What Do Rights Have To Do With It?

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What is the point of talking about human rights in relation to cuts to social programmes?

This is a moment in Canadian political history when government commitment to social programs is at a low ebb. Frequently, governments defend their decision-making in the area of social programs on the basis of cost saving. Among progessives, one common mode of social policy critique is to demonstrate that the economic goals that government says it is interested in will not, in fact, be served by its legislative agenda. It can be and has been shown that some cuts to social programmes do not result in cost saving at all, while others amount to cost shifting to individuals. It can be very powerful. Being able to effectively engage one's opposition on its own terms can be important in a debate.

However, sometimes it is also necessary to adjust the terms of a debate to get outside the box of economics, to talk about values. The trouble with social policy debates that centre exclusively on economic means and ends is that they do not necessarily engage questions of values.

In a recent Vancouver Sun interview B.C. MLA Jenny Kwan criticized severe welfare cuts in the province and talked about poor and desperate parents foregoing meals, risking their health so that their children would have enough to eat. And she characterized the cuts as an attack on the poorest of the poor and the most vulnerable. This is the language of values.

When politically marginalized groups say they want to talk about poverty as a human rights issue often what they mean is that they want to inject some values and overlooked perspectives into debate about social policy. Using the language of human rights is also a way of saying not only are these

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values that are important to us, they are values that have been agreed to domestically and internationally as non-negotiable, and social policy must fall within their parameters. Rights are a way of saying: what about us? What about the inherent dignity and worth of every human being, the rule of law, social justice, and the commitments we have made to each other?

In Canada, human rights to equality and security of the person are entrenched in the Constitution. A Constitution is an expression of a society's agreed-upon fundamental values. Rights to equality and security of the person are also enunciated in international human rights treaties that Canada has ratified, and in human rights legislation. This means that rights can also be a way of saying to governments, if you persist in cutting social programs that people are reliant on in order to meet basic needs for food, clothing, shelter, health, and education, we will meet you in court.

But rights are not only about taking governments to court. Our Charter and human rights legislation, and endeavours to use them, are part of a movement—international in scope—that aims not only to secure human rights laws, effective jurisprudence, and enforcement machinery, but to create a culture in which there is a strong commitment to the values of human rights all over the world. Antonio Lamer the former Chief Justice of the Supreme Court of Canada has acknowledged, for human rights law to be effective it must be supported by a human rights culture.

Rights work is not intended to replace government in its role as initiator and designer of social programmes. On the contrary, it is intended to remind governments that this is their work. It is intended to be a prod to government action that is consistent with human rights values. The message of rights work in this area is that social policy must not be placed in a watertight compartment where it is isolated from questions of social values.

How recent is it that the concept of human rights has been applied to social programmes?

The idea that access to protections such as social assistance for persons in need is a right, and not a matter of mere charity has been evolving since the depression of the 1930's. From then through the 1990's the Canadian social safety net developed. Social assistance schemes which exist in every province and territory, are emblematic of an understanding that there is a

social obligation to provide assistance to people in need so that everyone has access to food, clothing, and shelter, as an incident of personhood. The post WWII period was also characterized by increased global consciousness about human rights. In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights. In 1976 Canada ratified the International Covenant on Civil and Political Rights and the International Covenant on Social Cultural and Economic Rights.

Historically, in liberal democracies such as Canada the emphasis in rights thinking has been on civil and political rights, such as fair trial processes, freedom of expression, and the right to vote in elections. Among rights activists in Canada, the consciousness that social programmes represent a fulfillment of rights commitments is relatively recent. As long as social programmes were being developed and maintained by governments in Canada there was not much imperative to characterize such measures as the particularization of social and economic rights. A kind of bifurcated approach to thinking about rights, wherein civil and political rights were taken seriously and social and economic rights were not much thought about, was rarely challenged. However, this is changing. As social programmes are eliminated and diminished people recognize that they are losing benefits and protections that they had regarded, perhaps unconsciously, as established rights.

As the impacts of more than a decade of cuts in social spending in Canada play out, it has become increasingly apparent, even to organizations that have concentrated strongly on traditional civil and political rights issues, that lack of access to food, clothing shelter is integrally connected to other human rights violations. Within Canadian organizations that are involved in efforts to address entrenched discrimination, there is a growing consensus that group based inequality and poverty are profoundly connected, and must be addressed as such, in understandings of rights, and through activism.

In recent years NGO's in various parts of the world have undertaken initiatives before courts, tribunals, and UN committees advancing a vision of human rights that encompasses the idea that poverty is a human rights violation.

What makes poverty a rights issue?

The proposition that poverty is a human rights violation is multi-layered.

In the lived experience of people who are poor, civil and political rights can be meaningless. Poor people have much less access to justice, and are criminalized because of their poverty. They are less able to defend themselves against abuse, and less able to participate in or to influence political decision-making. For women, poverty and lack of access to social assistance and related services exacerbates every form of inequality that is associated with their subordinate social status. In practice, governments cannot effectively implement one set of rights without implementing the other.

Without protections from the deprivations associated with poverty people do not have meaningful rights to life, liberty, security of the person.

Poverty is also an equality rights issue. Cuts to social programs exacerbate the inequality of vulnerable and marginalized groups. People who are reliant on state assistance to meet their basic needs are an unpopular group, subject to negative stereotyping, and they lack political power. Further, people living in poverty are also predominantly comprised of individuals who are members of groups that are vulnerable to discrimination and marginalizing in the political process: women, Aboriginal people, people, and people with disabilities. Also for each of these groups lack of economic security has particular effects that magnify their inferior social status. Cost cutting agendas that exacerbate pre-existing group disadvantage, and vulnerability to stereotyping and prejudice, by depriving people of access to food, clothing and shelter, run afoul of the norm of substantive equality.

The insight that the enjoyment of social and economic rights is a necessary condition for the enjoyment of civil and political rights is not new in the arena of international human rights. From the outset, the interdependence and indivisibility of all human rights has been a foundational principle of international human rights. Article 25 of the Universal Declaration of Human Rights, adopted in 1948 by the Member states of the UN, recognizes the right of everyone to an adequate standard of living. Subsequently, in 1968, the indivisibility and interdependence of human rights was reaffirmed in the Proclamation of Tehran which recognizes the impossibility of

protecting civil and political rights without realizing social and economic rights. Similarly, the 1993 Vienna Declaration states:

> All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equitable manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities...must be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote, and protect all human rights and fundamental freedoms.

Turning to the human rights treaties, the ICCPR and the ICESCR, adopted by Canada in 1976, both explicitly draw on the Universal Declaration, and recognize that civil and political freedom and freedom from fear and want can only be enjoyed if conditions are created whereby everyone can enjoy civil and political rights as well as economic and social rights.

And in the most recent human rights treaties, such as the Convention on The Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, which Canada adopted in 1982 and 1989 respectively, there is no distinction made between civil and political rights issues and social and economic rights issues.

Recognition of the importance of social and economic protections in the human rights schema is beginning to percolate in international and domestic jurisprudence on human rights. In a recent South African case recognizing the human right of indigent people to housing, the Constitutional Court of South Africa, put it this way, "There can be no doubt that human dignity, freedom, and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people enables them to enjoy the other rights enshrined in...[the Constitution]. The realization of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential." These ideas are no less applicable in the Canadian context.

In *Gosselin*, a welfare rights case out of Québec, Robert J.A. of the Court of Appeal referred to the indivisibility and interdependence of all human rights as "among the fundamental principles of the international law relating to

human rights." In the course of interpreting a provision of Québec's human rights legislation, he said,

> [t]he traditional dichotomy between civil and political rights (called "abstention-rights" or "negative rights") on one hand, and on the other, economic and social rights (called "rights-of-claim" or "positive rights") is criticized and, to a certain extent, this criticism appears to me to be well-founded. Formal separation of these rights--which, on an international level, is manifested by their recognition in distinct legal instruments--should not be allowed to obscure their converging points and their interdependency. Consequently, it would be erroneous to conceive of social, economic and cultural rights as "second-class" rights, devoid of any enforceability and incapable of being the object of legal recourse.
> This is particularly the case when the violation of a right, such as the right to an adequate standard of living, also compromises the right to fulfillment of other protected rights, such as the right to dignity inherent to every person and the right to the full and equal exercise of human rights and freedoms.

The growing recognition that poverty is a rights issue has been paralleled by a shift in thinking about the meaning of equality rights. At one time the right to equality was thought of as a purely individual right consisting of an entitlement to be treated the same by government without regard to presumptively irrelevant characteristics such as sex and race. Although this conception of equality rights continues to enjoy some currency in Canadian law and equality rights activism. it has been superceded by the recognition that inequality has group-based dimensions that are not always effectively addressed or even perceived under a policy of such "blindness." There is a growing understanding that the idea of substantive equality is resistant to characterization as either civil and political or social and economic. It is a hybrid.

In Canada what are the primary human rights provisions that are relevant to social programme cuts?

In the Canadian legal system the primary human rights provisions that are relevant to contesting social program cuts are: ss. 7, 15, and 36 of the Constitution. These rights are most effective when read together, as mutually reinforcing.

Section 7 provides that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The s. 7 right to security of the person has been interpreted as applying to a person's physical and psychological integrity, and has been applied by the Supreme Court of Canada to mandate the provision of state funded legal counsel to an indigent person. Section 15 is the equality guarantee. The Supreme Court of Canada has held that s. 15 is not a guarantee of mere formal equality in the state treatment of individuals, rather it is guarantee of substantive equality that requires that pre-existing group-based inequalities be taken into account.

Section 36 commits governments in Canada to providing essential public services of reasonable quality to all Canadians. Jurisprudence on s. 36 is limited, however, the legislative record indicates a legislative commitment to adequate social assistance programmes. As well, in human rights statutes there are provisions that are potentially helpful to challenge cuts to social programs, particularly on the basis of their discriminatory impact on disadvantaged groups.

Does the Charter include rights to social programs?

The language of rights guarantees such as those contained in the Charter is quite open textured. One of the things that people worry about is ambiguity and potential disagreement concerning the meaning of a right such as the right to equality or security of the person. A question that people sometimes ask is whether Canadian courts have a mandate to address social and economic rights issues absent an amendment to the Charter that explicitly declares that people have rights to food, clothing, and shelter.

It is true that the challenges facing Canadian society have changed significantly since the pre-foodbank era of the early 1980's when the Charter was being debated. However, the virtue of open textured language is that understandings of implications and requirements can evolve to address the injustices of the times. The values of respect for human dignity and the promotion of social justice are the values that have animated the Charter from the beginning. Giving effect to those values now means that the Charter must be understood to be capable of responding to the contemporary reality of widespread homelessness and use of foodbanks.

There is an ample basis in international law, and in principles of constitutional interpretation, for courts in Canada to find that the Charter encompasses positive obligations on governments to maintain social programs at levels necessary to ensure that everyone has access to an adequate standard of living, including food, clothing and shelter, and to make legal aid available where necessary to ensure that people in need have access to rights-enforcing mechanisms.

The interpretation of legal human rights provisions is an ongoing process. With respect to the judicial interpretation of Charter rights there is some water on the wheel. The Supreme Court of Canada has applied international human rights law as a relevant and persuasive source for the interpretation of Charter guarantees, on the theory that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents that Canada has ratified. The Court has also treated other sources of international human rights law including UN resolutions, government positions in support of resolutions, customary norms, and decisions of international tribunals as relevant and persuasive authorities for the interpretation of the Charter.

It is well established that the international human rights treaties were an important source of inspiration for the Charter. Particularly relevant to the claim that drastic cuts to Canada's social programmes constitute a violation of human rights is Article 11 of the ICESCR which obligates Canada to progressively realize the right of everyone to an adequate standard of living including adequate food, clothing, and shelter. As well, the equality rights of women, Aboriginal people, people of colour, and people with disabilities are affirmed in international human rights treaties.

The Supreme Court has not yet decided a case involving the interaction between Article 11 of the ICESCR and Charter rights to equality and security, however it would be anomalous for the Court to interpret ss. 7 and 15 of the Charter as according less protection than that which Canada has agreed to in Article 11 of the ICESCR.

Questions about the interaction between the ICESCR and the Charter have arisen before the UN Committee to which Canada is required to report periodically, under the ICESCR. The jurisprudence of that Committee as well as submissions that have been made to it by official representatives of

the Government of Canada should be regarded as relevant and persuasive authority for the interpretation of ss. 7 and 15 of the Charter, by courts in Canada. Before the ICESCR Committee, Canada has repeatedly claimed that the Charter guarantees that Canadians will not be deprived of the basic necessities of life. In addition in its 1982 mandatory report on its progress in complying with the requirements of the ICESCR, Canada cited both the Canada Assistance Plan and s. 36 of the Constitution as means of implementing the right to an adequate standard of living.

In turn, the ICESCR Committee has criticized governments in Canada for arguing in Canadian courts that social and economic rights should be regarded as mere policy objectives, rather than as enforceable rights. The ICESCR Committee has also made it abundantly clear, in its jurisprudence, that it fully expects Canadian courts and tribunals to adopt broad and purposive interpretations of the Charter so as to provide legal remedies against violations of social and economic rights in Canada.

Governments in Canada have also come under criticism for failing to take steps to ameliorate poverty, not only from the ICESCR Committee but also from the UN committees that oversee compliance with the ICCPR, and the CEDAW. Negative impacts of cuts to social programmes on women, and Aboriginal people have been particularly noted.

An important question now is whether Canadian governments will heed the criticisms of UN bodies, and if they do not, will courts in Canada provide a forum for accountability.

Who is responsible for fulfilling treaty obligations?

Another question that people sometimes ask is whether Canada's human rights treaty obligations are binding on provincial governments and the federal government. This is an important issue because legal responsibility for developing and delivering social programs in the areas of social assistance, health, and education rests with the provincial governments. On the other hand, the federal government has the primary power to raise funds through taxation, and the ability to place conditions on funds that are transferred to the provinces. In the international treaty-making process the power to enter into treaties rests with the federal government. Under international law, the federal government as a signatory to a human rights

treaty such as the ICESCR cannot wash its hands of responsibility for non-compliance by a provincial government. The federal government has a continuing responsibility for ensuring nation-wide compliance.

This might sound like a significant curtailment of provincial government powers, were it not for the fact that, in practice, the federal government does not enter into human rights treaties without the consent of the provinces. In the case of the ICESCR and the ICCPR provincial and territorial governments were consulted by the federal government prior to Canada signing on, and made a pledge to adopt the necessary measures to implement both treaties in the areas of their legislative competence.

Therefore, the provinces do not have a basis for objecting to the application of treaty obligations to them. Both levels of government are responsible.

Conclusion

The task of calling governments to account should not be left only to the slow and expensive processes of courts and litigation. In addition to the litigation avenue provided by courts, there is a need for governments to establish political-legal mechanisms for enforcing treaty commitments. A lack of such credible alternatives, in itself, presents a challenge for the realization of rights, and it narrows the range of possibilities for the promotion of a rights respecting culture.

Currently, there is a very practical problem of there being no federal-provincial machinery to prevent a province from flouting Canada's treaty obligations. Within Canada, there are no mechanisms to hold provincial governments responsible for treaty compliance, except for the courts and the ballot box. Ironically, in 1998, soon after the federal government repealed the Canada Assistance Plan—which had been a federal-provincial mechanism to hold provinces accountable for implementing ICESCR rights—federal government representatives assured the ICESCR Committee that if a provincial government ignored Canada's human rights treaty obligations, "national political-legal machinery would be brought to bear."

On the occasion of Canada's 1998 report under the ICESCR federal government representatives also offered assurances to the ICESCR Committee that the SUFA would be a vehicle that would ensure respect for Canada's international commitments. However, to date the federal

government has taken no steps to ensure that ICESCR obligations are respected by provinces, and has stood idly by, watching and even offering encouragement while provinces have derogated from ICESCR obligations that would have been legally enforceable under the Canada Assistance Plan.

It is in this political climate, of blatant government non-compliance, and failure to establish alternative democratic spaces, that the courts in Canada have a crucial role to play in giving life to Canada's human rights treaty obligations, and ensuring that the poorest and most disadvantaged people in Canada are not excluded from the protections that the Charter is intended to provide.