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"Bread and Roses": Economic Justice and Constitutional Rights

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Abstract

Socioeconomic inequality and poverty constitute critical human rights challenges in an increasingly globalized world. Not only do they result in material inequities that affect everyday life; they also undermine psychological and social wellbeing. In this article, issues of economic injustice and social exclusion are examined through the lens of constitutional rights. Three different dimensions of the nexus between economic justice and constitutionalism are explored, including: (i) the role of law in creating socioeconomic inequality and poverty; (ii) the extent to which economic justice is addressed at the interstices of civil and political rights and freedoms; and (iii) the potential for the concept of social inclusion to assist in the reimagining of constitutional law and economic justice.

Key words

Socioeconomic inequality; poverty; constitutional rights; social and economic rights; social inclusion

Resumen

La desigualdad socioeconómica y la pobreza constituyen desafíos críticos a los derechos humanos en un mundo cada vez más globalizado. No sólo dan lugar a desigualdades materiales que afectan a la vida cotidiana, sino que también socavan el bienestar psicológico y social. En este artículo se analizan los problemas de la injusticia económica y la exclusión social a través del prisma de los derechos constitucionales. Se exploran tres dimensiones diferentes del nexo entre justicia económica y constitucionalismo, incluyendo: (i) el papel del derecho en la creación de desigualdad socioeconómica y pobreza; (ii) el grado en que la justicia económica se aborda en los intersticios de los derechos y libertades civiles y políticos; y (iii) el

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potencial del concepto de inclusión social para ayudar en la reinvención de la ley constitucional y la justicia económica.

Palabras clave

Desigualdad socioeconomica; pobreza; derechos constitucionales; derechos sociales y económicos; inclusión social

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Yes it is bread we fight for, but we fight for roses too.[1]

1. Introduction

Socio-economic inequality and poverty constitute critical human rights challenges in an increasingly globalized world. Not only do they result in material inequities that affect everyday life; they also undermine psychological and social wellbeing. Indeed, it has been observed (White 1990 p. 48) that for "subordinated communities, physical necessities do not meet the minimum requirements for a human life." Individuals and groups marginalized by economic inequality and social exclusion seek greater economic justice (Macpherson 1985, Fraser 2003) as well as social inclusion (Collins 2003). Both are essential to respect of human dignity: their denial constitutes a tangible source of indignation.[2]

In this article, I examine issues of economic injustice and social exclusion through the lens of constitutional rights. There is an extensive body of constitutional scholarship on questions such as whether socio-economic rights should be constitutionally entrenched, the wisdom of imposing positive obligations on governments, the limits of state action and the institutional capacity of judges. I focus on three different dimensions of the nexus between economic justice and constitutionalism. First, I underscore the role of law in creating socio-economic inequality and poverty. From this perspective, economic injustice is in significant part legally constructed (Williams 2011). It is constituted and accentuated by laws and regulations – a conclusion that fundamentally undermines the negative versus positive rights dilemma in constitutional law, and recasts state action concerns. Rather than seeking to justify new positive rights and entitlements, our starting point becomes the reframing of existing (national and international) regulatory regimes to reduce their inequitable effects. While acknowledging the importance of affirming positive state obligations to remedy inequalities aggravated by private actors, I highlight the need to examine what governments have already done in particular domains of social life, and the importance of assessing the ways in which current government programs, laws, regulations and policies interfere with, undermine or erode fundamental economic and social rights.

Secondly, I explore the extent to which economic justice is addressed at the interstices of civil and political rights and freedoms – a development that is particularly important in jurisdictions where economic and social rights are not explicitly constitutionally entrenched or not justiciable. It has been observed that poverty implicates the full panoply of civil, political, social, economic and cultural human rights (Arbour 2005). Endeavouring to use constitutional law to address the harm of poverty and socio-economic inequality requires attentiveness to the connections between civil, political, social and economic rights. Indeed, there is a growing number of cases where efforts to redress poverty and socio-economic vulnerability have been integrated into claims based on recognized civil and political rights, such as anti-discrimination rights, fundamental freedoms and protections for life, liberty and security of the person.

Despite the conceptual logic of an integrated approach, there continues to be significant judicial resistance to constitutional claims based either on reading positive economic and social rights into existing civil and political rights or on recognizing poverty as a ground of discrimination. One reason for the recurrent denial of economic justice claims is widely held concerns about the institutional incapacity of courts to decide complex social and economic policy issues.

[1] From the poem by James Oppenheim (2011); it has since been used as a slogan in struggles for workers rights and dignity (Eisenstein 1983).

[2] These concerns resonate with the central theme of Indignation of the Oñati workshop for which this paper was prepared. See also, Stéphane Hessel's, *Indignez-Vous!* (2010, p. 8), critiquing the unacceptable and growing gap between the rich and the poor and the denial of the basic necessities of life to a large portion of humanity, both in the developing and developed world.

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Additionally, there appears to be a conceptual barrier; judges cannot figure out how to enlarge constitutional rights and freedoms to address the injustices faced by economically and socially vulnerable and marginalized communities, while also limiting the scope of economic and social rights in some coherent and principled way. Thus, there is fear of a "slippery slope." To illustrate this judicial resistance, I draw on examples from Canadian jurisprudence.

In the face of limited progress in advancing economic justice through constitutional rights, the final section of this article proposes some new ways of thinking about the underlying legal, institutional and justice principles in this domain. In particular, I focus on the concept of social inclusion (and exclusion), and explore its potential to assist us in reimagining constitutional law and economic justice. Social inclusion provides a principled justification for judicial intervention to redress the most extreme circumstances of socio-economic disadvantage, but only where particular communities or groups are also excluded from political decision-making and governance.

2. Law and the problem of economic injustice

Classical legal thought was deeply committed to an understanding of the world as divided into public and private spheres, with the former regulated by the state and the latter regulated by the free market (Olsen 1983). The emergence of legal realist thought fundamentally challenged this assumption. As Joseph Singer (1988, p. 482) explains, legal realists argued that, "a free market system could not be distinguished in a significant sense from a regulatory system. All market systems distribute power, and thus constitute regulatory systems." Thus, there is a significant scholarly tradition that recognizes the ways in which law contributes to shaping the distribution of wealth in society. Legal realist scholars, such as Morris Cohen (1927, 1933) and Robert Hale (1923, 1943) provided compelling accounts of the public choices implicit in property and contract law, thereby fundamentally challenging the coherence of the public/private distinction.

More recently, scholars have continued to emphasize the ways in which background legal rules (both formal and informal) have a direct effect on the distribution of wealth and income – and on poverty. Paralleling the legal realist critiques, Lucy Williams (2011, p. 468) contests the neutrality of the background legal rules that constitute our systems of private law (e.g. family, tort, property, contract, inheritance regimes). She argues (Williams 2011, pp. 468-469) that "[f]ar from being natural or neutral, legal rules, norms, and practices play a central role in maintaining poverty by perpetuating and by according cultural legitimacy to severe wealth inequality, privileging certain interests and disadvantaging others." Thus, she concludes (Williams 2011, p. 469):

> Contrary to the dominant political imagery, which effaces the power of the state in structuring social life, the state has always intervened in social life through the design and enforcement of non-neutral, value-laden entitlements established by market-structuring background rules. The question is not when or whether government should step in; the question is rather whose interests, and what distribution of power, are protected by these entitlements.

Judge-made law and statute-based legal regimes governing the everyday contexts of individual and family life also have an important impact on socio-economic equality. For example, statutes governing the distribution of property upon marriage breakdown, family support obligations, minimum wages and labour standards, health insurance, public transportation, education, social welfare programs (Sarat 1990), public infrastructures and facilities – have huge effects on the quality of life in communities and set the regulatory baseline for statute-based social and economic rights entitlements (Williams 2011). These background legal regimes, therefore, have significant immediate effects on individual lives and opportunities; they also have broader intergenerational, community and systemic

effects. Moreover, beyond national legal regimes, the importance of transnational regulatory regimes (i.e. international finance, production and trade) in shaping the face of poverty globally is increasingly being recognized and analysed (Williams 2006, Blackett 2011).

These insights raise the question of what role law and public policy play in causing socio-economic inequality. Implicit in this question is recognition of how law is implicated in the problem of poverty rather than its solution. Focusing on how law contributes to the problem of poverty critically recasts the starting point for constitutional analyses of social and economic rights. Rather than framing the analysis in terms of positive rights to food, shelter, health, education, it asks how existing regulatory frameworks or laws undermine socio-economic equality, interfere with the effective and equitable enjoyment of fundamental freedoms and perpetuate the reproduction of poverty. The problem is not the absence of law in a world of private power and economic inequality; the problem is how public power is currently structured to privilege and perpetuate inequitable distributions of wealth and property.

Resituating the problem in this way challenges one of the key constitutional objections to social and economic rights – the positive versus negative rights dichotomy and related concerns about state action. As United States Supreme Court Justice Brennan taught us in an important dissenting judgment in *DeShaney v. Winnebago Cty. DSS,* 489 US 189 (1989) (p. 208), "a State's prior actions may be decisive in analyzing the constitutional significance of its inaction." Although the case concerned child protection and the role of the state, Justice Brennan provides important insights on positive versus negative constitutional rights, and develops a more nuanced understanding of the public-private dichotomy. The case arose when Joshua, a young boy, was severely physically abused and injured by his father. The state child protection authorities had not removed the child from his father despite a longstanding awareness of past abuse and ongoing risks to Joshua. In the majority decision, Chief Justice Rehnquist concluded that the source of the harm was the father – a private actor – who was not constrained by the liberty and due process protections in the Constitution. In contrast, Justice Brennan did not insist that the Constitution should be reinterpreted to extend its applicability directly to private actors (i.e. the father); rather, he found state action in the long history of involvement of the state social workers with regard to the family in question. The state was aware of the risks of abuse in the family, had a lengthy file on the father's past misconduct and had been warned by teachers of the risk of abuse. As Justice Brennan (pp. 210 & 212) put it:

> It simply belies reality, therefore, to contend that the State "stood by and did nothing" with respect to Joshua. … Through its child protection program, the State actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger…My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it.

This case demonstrates the importance of taking into account the ways in which governments are actively involved, in multiple and diverse ways, in the lives of individuals and families. The background regulatory contexts are critical for understanding constitutional rights and government responsibilities for social and economic wellbeing.

Arguments that resonate with Justice Brennan's dissenting opinion were accepted by the Canadian Supreme Court in an important decision on the constitutional freedom of association and the rights of agricultural workers to unionize, *Dunmore v. Ontario (Attorney General),* [2001] 3 SCR 1016.[3] Agricultural workers were

[3] Although arguments were also advanced that the exclusion was discriminatory, the courts held that no enumerated or analogous protected ground of discrimination was implicated in the exclusion of a diverse

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seeking inclusion in a statutory regime protective of workers seeking to unionize and engage in collective bargaining. The government contended that agricultural workers were free to organize collectively, despite their exclusion from the legislative collective bargaining regime – advancing a classical negative rights conception of constitutional freedoms. The Canadian Supreme Court held otherwise, demonstrating a more nuanced understanding of the complex interplay between rights violations by private non-state actors, and the complicity of the state in such violations depending on scope and nature of existing regulatory regimes. As Justice Bastarache (para. 26) noted:

> [I]t is not a quantum leap to suggest that a failure to include someone in a *protective* regime may affirmatively permit restraints on the activity the regime is designed to protect. The rationale behind this is that underinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it *substantially orchestrates, encourages or sustains the violation of fundamental freedoms* [emphasis added].[4]

Thus, the Court took into account how the failure of the state to regulate could contribute to a violation of fundamental freedoms by a non-state actor (i.e. an employer). In so doing, it demonstrated an understanding of the integral links between private and public power. The remedy for the constitutional violation was an order for the government to include agricultural workers in protective collective bargaining legislation. Such an outcome appears remarkably similar to what one might expect had the case been framed in terms of a positive social right to fair labour standards.

The remedy did leave open considerable legislative discretion in the choice of how to comply with the Court's order. And, the government concerned passed legislation that minimally complied with the remedial order. Instead of simply removing the exemption of agricultural workers from the standard collective bargaining legislation, the government passed a special collective bargaining statute for agricultural workers that (on its face) appeared less protective of the rights of agricultural workers. In ensuing litigation, (*Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3), the Court was again tasked with adjudicating the constitutionality of the remedial legislation and upheld its constitutionality by reading in employer duties to bargain in good faith – duties that were not explicitly included in the legislation. Again, we witnessed the Court indirectly imposing positive duties, in this case, by interpreting the statute broadly.

Another critical example in the Canadian context concerns the socio-economic disadvantages of Indigenous peoples. In an important class action suit, *Grant v. Canada (Attorney General)*, (2010) 77 OR (3d) 481 (ON SC), it is alleged that the federal government is responsible for the siting and construction of substandard housing on an Aboriginal reserve. As noted by Justice Cullity (para. 3) in his decision to certify the class action:

> The plaintiff claims that this resulted from a failure of the Crown [government] to properly assess the suitability of the location for residential housing – the plaintiff described it as "swampy" - and the Crown's selection of building materials, techniques and designs that, among other things, permitted moisture to penetrate the houses. It is alleged that, as a consequence of these decisions, the plaintiff and other members of the First Nation were exposed to unsafe levels of toxic mould, and associated toxins, and developed a variety of symptoms and illnesses that included skin rashes, respiratory infections, eye irritation, nose bleeds, headaches, fatigue and nausea. The Crown's failure to construct housing that will remain free of toxic mould is said to be continuing.

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occupational group, such as agricultural workers. No evidence of racial disparities, for example, had been adduced.

[4] The concept of underinclusiveness describes a government policy that does not include all those affected by the problem the government is seeking to remedy. For a classic discussion of underinclusiveness in the equal protection context, see Tussman and TenBroek (1949, pp. 348-351).

The allegations involve issues at the heart of social and economic rights, including the right to health and housing. They allege violations linked to actions by the state rather than inaction. Government decisions are alleged to have resulted in the substandard and toxic housing. While the Court certified the class action and was prepared to allow the case to go forward on various legal grounds, including negligence and breach of fiduciary duty, it struck out the Charter-based constitutional pleadings. It did so in part due to its concern that the Charter rights claims were framed in positive socio-economic rights terms (i.e. a positive right to housing). Justice Cullity (paragraph 55) was concerned that the claim "imposes a duty on the Crown to provide housing, to protect the health of on-reserve individuals, and to respond adequately to situations where this is threatened", which he characterized as "obviously far-reaching." Yet, there was no need to accept the framing of the constitutional issues in terms of positive rights in this case. The constitutional questions could simply probe whether the actions the state had taken in relation to reserve-based housing violated the security of the person rights of the Aboriginal community, resulting in increased risks to health, bodily integrity and state-imposed psychological stress.[5]

Attentiveness to socio-economic inequality, therefore, in many cases, requires a careful and detailed analysis of the effects of existing regulatory frameworks rather than the formulation of positive social and economic rights-based entitlements. The latter may well be important to articulate as part of a normative endorsement of human rights and dignity. But the primary challenge is not how to layer positive social and economic rights onto an inequitable foundation of public and private power. Rather, our starting point should be to make the effects of existing government decisions, choices and policies visible and to engage in the reframing of regulatory regimes to reduce their inequitable effects and promote more equitable outcomes. From this vantage point, to advance the constitutional protection of social and economic rights, we need to delve into complex regulatory regimes in diverse domains of law (Riles 2005).

3. Intersecting constitutional rights and freedoms

Louise Arbour, former United Nations High Commissioner for Human Rights and former Justice of the Canadian Supreme Court wrote: "Poverty is the greatest human rights scourge of our time." (Arbour 2006, p. 5) Yet the concepts and frameworks we currently use in the human rights and constitutional law domains do not adequately address poverty. Instead, poverty tends to be treated as beyond the scope of legal and/or judicial intervention – ironically too disruptive and pervasive to be within the realm of constitutional law. In many jurisdictions, entire constitutional law treatises are written without any significant attention to poverty (Loffredo 2007).[6] Erasure occurs through a range of conceptual and discursive techniques, including the purported centrality of the positive versus negative rights dichotomy, the division between civil and political versus social and economic rights and arguments about judicial incapacity to adjudicate social and economic rights.

Contesting this tradition of erasure requires us to make visible what has been rendered invisible and to make connections across disparate and conventional categories. In this regard, although human rights documents have historically dichotomized civil and political versus social and economic rights, there is a growing consensus that there are integral connections between the two. More recent human

[5] The Canadian Supreme Court has recognized that state-imposed interference with physical bodily integrity, health or psychological wellbeing may violate constitutional guarantees of security of the person in the Charter: see, e.g., *R. v. Morgentaler*, [1993] 3 SCR 463; *Chaouilli v. Quebec (Attorney General),* [2005] 1 SCR 791; *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101.

[6] My arguments in this paper relate predominantly to Canadian constitutional law, where no express social rights are included in the *Canadian Charter of Rights and Freedoms*. Nevertheless, as Jeff King observes, there is a "worldwide constitutional profusion of social rights," raising important questions about interpretation and justiciability: see Jeff King (2012, p. 3).

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rights declarations and conventions merge protection of civil and political, economic, social and cultural rights (e.g. *UN Convention on the Rights of Persons with Disabilities; UN Convention on the Rights of the Child, UN Declaration on the Rights of Indigenous Peoples*). Indeed, numerous human rights scholars continue to insist on the need for an integrated, holistic and comprehensive approach (Scott 1999).

There have also been attempts to integrate concerns with socio-economic inequality and poverty into traditional civil rights cases (particularly in jurisdictions without explicit constitutional recognition of social and economic rights). In some cases, advocates have sought an expanded interpretation of existing civil rights such as liberty or security of the person to include basic social and economic rights (e.g. right to adequate social assistance, healthcare, housing, education). Additionally, there has been reliance on constitutional equality rights to secure the non-discriminatory provision of government services (e.g. health, education, social assistance), including failed attempts at extending anti-discrimination protections to the poor. In still other cases, socio-economic inequality and poverty are raised as key contextual factors that increase the likelihood of state violations of fundamental civil rights, or as important effects of the violation of fundamental rights. Moreover, the remedies sought in these cases open up the possibility of judges mandating positive social rights entitlement. Thus, constitutional protections for those who are vulnerable in terms of their socio-economic status may potentially emerge at the interstices of more conventional civil and political rights. Despite the conceptual potential of this integrated approach to human rights, a review of Canadian jurisprudence reveals significant judicial resistance in the absence of explicit constitutional guarantees for social and economic rights.[7]

3.1. Life, liberty and security of the person

The protection afforded in the *Canadian Charter of Rights and Freedoms* to "security of the person" consistent with "the principles of fundamental justice," has been the focus of repeated efforts to read recognition of social and economic rights into a provision initially conceived as a more classic civil and legal right. The starting point in this regard is the case of *Gosselin v. Quebec (Attorney General),* [2002] 4 SCR 429*,* which involved a challenge to Quebec's social assistance program provisions that significantly reduced welfare payments for individuals under age 30 unless they participated in employment training, community work, or remedial education. Louise Gosselin alleged discrimination and a violation of her right to life, liberty and security of the person. While denying her allegations, the Court (para. 83) left open "the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory 'workfare' provisions and the evidence of actual hardship is wanting." In an influential dissenting opinion, however, Justice Arbour (who subsequently was appointed as the UN High Commissioner for Human Rights), concluded (para 358) that "a minimum level of welfare is so closely connected to issues relating to one's basic health (or security of the person), and potentially even to one's survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it." Despite the significance of her dissenting judgment, Canadian constitutional law has not yet followed her bold lead.

Courts continue to be very cautious and reluctant to interpret the right to life, liberty and security of the person to include basic social and economic rights, such

[7] Even in the province of Quebec, where the *Quebec Charter of Human Rights and Freedoms*, CQLR c C-12, includes express protection for social, economic and cultural rights, courts have interpreted these protections as non-justiciable programmatic rights (e.g. *Gosselin v. Quebec (Attorney General),* [2002] 4 SCR 429).

as shelter, social assistance, and health care. For example, in a recent case, *Tanudjaja v. Attorney General (Canada),* (2013) 116 O.R. (3d) 574 (SCJ), an Ontario Court granted a preliminary motion to dismiss a case brought by four individuals who were either at risk of homelessness or actually homeless, on the grounds that there was no basis for the claims being advanced.[8] Justice Lederer described three of the claimants, not currently homeless, as follows (para. 13):

(1) a single mother in receipt of social assistance living in precarious housing with her two sons. Despite extensive efforts, she has been unable to secure housing within the social assistance shelter allowance. Her rent is almost double the shelter allowance allotted and is more than her total social assistance benefit. She has been on the waiting list for subsidized housing for over two years;

(2) a man who was severely disabled in an industrial accident. Two of his children are also severely disabled, including one son who is [in] … a wheelchair. The applicant lives with his wife and four children in a two-bedroom apartment that is neither accessible nor safe for persons with disabilities. The family survives on a fixed income and has been on the waiting list for subsidized accessible housing for four years;

(3) a woman and her two sons who became homeless after her spouse died suddenly. For several years, she lived in shelters and on the streets and was forced to place her children in her parents' care. Now housed, she currently spends 64% of her small monthly income on rent, placing her in grave danger of becoming homeless again.

The fourth applicant, homeless, was described (at para. 14) as "having been diagnosed with cancer, after which he was unable to work and unable to pay his rent, as a result of which he lost his apartment. He has been living on the streets and in shelters and has been on a waiting list for subsidized housing for four years."

The applicants were seeking a positive right to housing based on the security of the person guarantees in the Canadian Charter. In rejecting their claim at the outset, without even allowing the case to proceed to trial, Justice Lederer wrote (para. 82), "There is no positive obligation on Canada or Ontario to act to reduce homelessness and there are no special circumstances that suggest that such an obligation could be imposed in this case." Justice Lederer indicated (para. 4) that he was sympathetic to the housing needs of "the poor, disadvantaged and vulnerable members of our society." He did not believe, however, that the courtroom was the "proper place to resolve the issues of involved." The dismissal of the case is currently on appeal and numerous community-based groups have intervened to support the constitutional right to safe, secure and affordable housing.

In another unsuccessful case, *Toussaint v. Canada (Attorney General),* 2010 FC 810*,* (Fed. CA), Nell Toussaint, an undocumented migrant became ill and required hospital treatment. She was not covered under the public health insurance scheme. Though she wished to apply to regularize her immigration status on humanitarian grounds, she could not afford the $500 application fee. Her request for a fee waiver and constitutional challenge to the application fee were denied.[9] In dismissing her claim for an entitlement to basic health care, the Court stated (para. 76):

> At the root of the appellant's submission are assertions that the principles of fundamental justice under section 7 of the Charter require our governments to provide access to health care to everyone inside our borders, and that access

[8] For a review of this case and weblinks to all of the documents and court decisions, see the Social Rights Project, Community University Research Alliance (Charter Challenge to Homelessness and Violations of the Right to Adequate Housing in Canada).

[9] For a review of all of the various court actions and decisions in this case, see the Social Rights Advocacy Centre (2011).

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> cannot be denied, even to those defying our immigration laws, even if we wish to discourage defiance of our immigration laws. I reject these assertions. They are no part of our law or practice, and they never have been.

The Court's reasoning sounds persuasive at one level; surely we cannot provide everyone on Canadian soil with full health care services. And yet, when we probe deeper into the factual circumstances of this case, the issues become much more complex. We witness a claimant who has lived and worked in Canada for nine years, who has made significant efforts to regularize her immigration status and who has paid for health services whenever possible in the past. We witness a claimant being denied necessary medical treatment for financial reasons, with a concomitant risk of death or serious illness.[10]

In the few cases where plaintiffs have been successful, the alleged violations have been framed and conceptualized as negative rights (Jackman 2010). For example, in *Victoria (City) v. Adams (2009)*, 100 BCLR (4th) 28 (BCCA), the issue was whether a City bylaw, which prohibited the building of "any temporary structure (such as a tent or tarp roof) in a public park," violated their right to life, liberty and security of the person. The evidence revealed that there was not enough space in homeless shelters in Victoria to provide beds for all of the homeless; accordingly, some people would be forced to sleep in public spaces, and to deny them the right to erect some temporary shelter violated their right to security of the person. As Martha Jackman has so persuasively argued, however, the City of Victoria case did not afford the homeless any positive right to housing; it simply affirmed "a Charter right to sleep outside at night under a box." (Jackman 2010)

3.2. Equality and non-discrimination

> Groups that are discriminated against, such as Afro-descendants, minorities, indigenous peoples, migrants and refugees, are disproportionately affected by poverty in all regions of the world.
>
> Mutuma Ruteere (2013, p. 7)

In terms of constitutional equality rights, there have been numerous reports and studies documenting gender, race, family situation, youth, disability, immigrant status and aboriginal status as significant risk factors for poverty and socio-economic marginalization (Galabuzi 2005, Collin and Jensen 2009, World Health Organization and World Bank 2011, p. 39-40). These risk factors intersect and align with many of the specific grounds of discrimination enumerated in national and international human rights instruments. By redressing discrimination facing groups already protected in human rights laws and conventions, socio-economic disadvantage is often indirectly redressed.

Indeed, in a small number of Canadian equality rights cases, there have been redistributive remedial effects due to the nature of the claims. For example, in *Eldridge* v. *British Columbia (Attorney General),* [1997] 2 SCR 624, the government was ordered to fund sign language interpretation for deaf patients. As noted by the Court, persons with disabilities have experienced disproportionate economic marginalization (para. 52):

> It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; … Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face

[10] See Nell Toussaint's affidavit outlining her personal circumstances and need for health care assistance. Available from: http://www.socialrightscura.ca/documents/legal/tousaint%20IFBH/Affidavit%20of%20Nell%20Toussaint.pdf (Accessed 29 March 2014). Note also that an appeal of the decision to the Federal Court of Appeal was dismissed: see *Toussaint v. Canada (Attorney General),* 2011 FCA 213.

> much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed. [*References omitted*].

Similarly, in a couple of important decisions about special affirmative action initiatives to promote equality in Indigenous communities, the Court acknowledged that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health, and housing" (*R. v. Kapp*, [2008] 2 SCR 483). The Court therefore upheld positive government initiatives to redress the socio-economic disadvantage facing Aboriginal communities as consistent with Charter equality guarantees.

These cases involved grounds-based claims, and economic disadvantage was recognized as a contextual reality and critical effect of exclusion and discrimination. Socio-economic disadvantage, therefore, is recognized at the interstices of existing categories of anti-discrimination law. Rather than arguing for equality rights for economically marginalized individuals, the right is channeled through race, gender, disability, age, immigration status, etc. Given the significance of economic disadvantage as one of the most pernicious effects of many forms of group-based discrimination, however, this pathway to redressing socio-economic inequality is important.

Despite the above examples of judicial recognition of the socio-economic dimensions of discrimination against specific historically disadvantaged communities and groups, courts have been reluctant to recognize discrimination, when the claim is broadly linked to incidents of poverty, such as homelessness. In the *Tanudjaja* case on homelessness, for example, the Court (para. 134) wrote:

> It is said that the persons affected by homelessness and the lack of adequate housing are disproportionately members of these groups which are protected from discrimination [including, women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance] … The Application is not based on discrimination against any of these groups, but on all of them as part of the homeless or those without adequate housing. The problem should be evident. Taken together, these groups include virtually everybody in our society. Taking into account only "women", "youth" and "seniors", the only groups in society not included are young and middle-aged men. What discrimination can there be when all of the groups identified as being subject to this discrimination, taken together, include virtually all of us? … Poverty or economic status, which is seemingly the only common characteristic, is not an analogous ground.

Subsequently, the Court noted (para. 135) that, "the issues raised … are not breaches of the *Charter,* but a general concern for those who live in poverty and without appropriate housing. This is an issue that should disturb us all. This does not mean that it as an issue that belongs in court."

In another case involving municipal restrictions on panhandling, *R. v. Banks* (2007), 84 OR (3d) 1 (Ont. CA), Justice Jurianz, of the Ontario Court of Appeal, (para. 104) wrote:

> It is worth noting that the appellants took care not to argue that "poverty" in and of itself is a ground of discrimination. While the "poor" undoubtedly suffer from disadvantage, without further categorization, the term signifies an amorphous group, which is not analogous to the grounds enumerated in s. 15. The "poor" are not a discrete and insular group defined by a common personal characteristic. While it is common to speak of the "poor" collectively, the group is, in actuality, the statistical aggregation of all individuals who are economically disadvantaged at the time for any reason. Within this unstructured collection, there may well be groups of persons defined by a shared personal characteristic that constitute an analogous ground of discrimination under s. 15.

Similarly, in *Boulter v. Nova Scotia Power Incorporated*, (2009) 307 DLR (4th) 293, the Nova Scotia Court of Appeal acknowledged (para. 41) that the claimants' situation, in which they were unable to afford essential public utility services,

"poignantly depicts the burden of poverty." Nevertheless, the Court went on to point out (para. 43):

> … that the burden and the sympathy it evokes are not the defining criteria for an analogous ground under s. 15(1).… That poverty's plight appeals for relief does not mean the redress is constitutional. Pure wealth redistribution, that is legally directed but unconnected to Charter criteria, in my view occupies … "the daily fare of politics, and is best [done] not by judges but by elected and accountable legislative bodies" [references omitted].

Again, we witness judicial reluctance to enter into the domain of socio-economic rights and remedies, even though existing legal categories (such as anti-discrimination protections) could be applied creatively. The Canadian experience, moreover, appears to align with the experience in the United States. As Martha Fineman (2008, p. 17) notes, "discrimination-based arguments have accomplished too little with respect to dismantling broad systems of disadvantage that transcend racial and gender lines, such as poverty." She advocates (Fineman 2008, p. 17) shifting away from a discrimination approach towards what she calls a "shared vulnerabilities" model that would involve "a political movement around unequal institutional arrangements attendant to those vulnerabilities." Such an approach resonates in important ways with the social inclusion principle elaborated below.[11]

3.3. Additional obstacles: access to justice and the experiential divide

Beyond the reluctance on the part of courts to reimagine the substantive content of traditional constitutional rights to encompass basic social and economic entitlements, there has been an array of procedural obstacles to advancing these kinds of claims. In most of the unsuccessful examples highlighted above, the social and economic rights based claims were challenged at the outset by the government, on the basis of pre-trial proceedings in which the government contended that there was no justiciable cause of action or reasonable basis for the claim. Given governmental concerns that judicial recognition of economic and social rights could be very costly, there has been a willingness to use whatever resources are necessary to contest these claims in court, and to use the full arsenal of procedural motions to block cases from moving forward on the merits. It has been difficult for claimants to prevail and obtain their day in court on socio-economic rights issues.

It is also important to reflect upon why the courts have been so reluctant to embrace the challenge of socio-economic disadvantage in their elaboration of constitutional law. One recurrent question concerns the impact of the vast experiential divide between the lives of judges and the multiply disadvantaged and socially marginalized individuals at the heart of these cases, including, for example: illegal immigrants experiencing health problems, homeless individuals engaged in begging or sleeping in public spaces, recipients of social assistance experiencing mental illness, unemployed persons with disabilities, Aboriginal persons living in toxic, mould-infested housing, impoverished parents living with children with disabilities. While many judges have expressed their sympathy with the complex and multiple disadvantages at the heart of social and economic rights issues, there has been a resistance to interpreting traditional constitutional rights so as to provide creative and systemic remedies that respond to socio-economic injustices.

In cases implicating serious risks of physical violence and harm, there appears to have been greater judicial willingness to use constitutional guarantees to protect socially marginalized individuals and vulnerable communities. The Supreme Court of Canada has unanimously held that state action increasing the risks to health,

[11] As Fineman (2008, p. 8) explains: "Vulnerability" is typically associated with victimhood, deprivation, dependency, or pathology. … In contrast, I want to claim the term "vulnerable" for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility."

bodily integrity or life violate security of person protections and violate principles of fundamental justice if they are arbitrary, grossly disproportionate or overbroad (*Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134; *Canada (Attorney General) v. Bedfor*d, 2013 SCC 72). One can sense the empathy and concern of the judges in the face of the risks to health and actual threats to the lives of those involved, including street prostitutes and drug addicts living in impoverished and difficult circumstances.[12] If the legal issues involve only economic disadvantage, however, the Courts have not been moved to intervene. And the analytical tools of liberal legalism and concerns about institutional incapacity provide a protective shield and ready justification for not pushing the power of constitutional law to redress economic injustice.

How should we respond to the unwillingness of courts to embrace social and economic human rights violations as constitutional wrongs in Canada? One possible response would be to try to enhance judicial empathy towards individuals and communities in situations of socio-economic disadvantage to the point where judges feel compelled to act, as they have in some physical harm cases. Yet, despite the detailed accounts of multiple and overlapping socio-economic injustices in the individual claimants' lives in the cases highlighted above, judges were still not moved to act. In jurisdictions with explicit constitutional recognition of social and economic rights, powerful, compelling and emotional narratives – documenting the effects of poverty and the multiple ways it undermines human dignity -- may prompt a judicial response (Sachs 2009). As Mayo Moran has argued, albeit in the context of hate speech, a strategy that seeks to enhance judicial empathy to the private plight of individuals (through emotional claims by victims) may be less persuasive than an approach premised on public values and principles. (Moran 1994, p. 1500) The willingness of the Canadian courts to uphold legislative restrictions on hate speech was not generated predominantly by heightened empathy for the targeted victims of the speech, but was based instead on the principles of citizenship and equal entitlement of all to participate in democratic life without discrimination or racism. Thus, in addition to telling the stories of claimants in powerful and dignified ways (White 1990), it is important to elaborate constitutional principles that will justify more robust and principle-based judicial intervention in extreme cases of economic injustice, social exclusion and structural inequality.

4. Social inclusion as a constitutional principle

Over the course of the 20th century, we witnessed the gradual emergence of the regulatory and social welfare state, as governments became involved in regulating the economy, healthcare, education and social welfare. Legislatures rather than the courts were the primary actors in advancing social and economic rights. Beginning in the mid-1970s, faith in big government began to unravel, as public debt and neoliberal ideology combined to usher in a significant retreat in the social welfare state (Cossman and Fudge 2002). Communities are continuing to experience the effects of neoliberalism, with its acceptance of the accentuating inequalities borne of global capitalism, its erosion of regulatory institutions and declining support for civil society organizations and citizen engagement. In some countries, however, the neoliberal critique of the social welfare state has been met with new ideas about how to retain the positive aspects of the social welfare state, while revamping it in response to the neoliberal critique. Anthony Giddens' compelling work on the need for an inclusive, egalitarian, social investment state illustrates conceptual rethinking that goes beyond the dichotomy of the social welfare/neoliberal state (Giddens

[12] As Chief Justice McLachlin recently noted in *Canada (Attorney General) v. Bedfor*d, 2013 SCC 72 at para. 152, a case in which the Court struck down criminal law restrictions related to street prostitution: "If screening could have prevented one woman from jumping into Robert Pickton's car [a serial murderer who targeted street prostitutes in British Columbia], the severity of the harmful effects is established." (152)

1998). Though complex and contested, new approaches to governance have also emerged, including a shift from an instrumentalist (command and control approach to governance) to a facilitative state and the emergence of public-private partnerships (Sheppard 2010). A key question, therefore, for those concerned with addressing systemic and growing socio-economic inequalities is how these macro-regulatory changes align with human rights and constitutional law. Rather than advocating for legal rights without attentiveness to shifting regulatory realities, it is critical to link our advocacy strategies for economic and social rights to diverse approaches to governance, to acknowledge the difficulty of constitutionalizing a social welfare state in the face of neoliberal public policy and ideology, and to consider the potential implications of new approaches to social regulation and governance.

In many countries, constitutional rights and freedoms continue to be limited to civil and political rights, and are informed predominantly by classical liberal conceptions of the minimalist state. Social and economic rights resonate more directly with a social welfare state and have traditionally been associated with legislative provisions and programmatic international human rights guarantees rather than constitutional rights. More recent constitutions and constitutional reform projects have included explicit social and economic rights protection (King 2012); still, their justiciability, interpretation and enforcement have raised complex and contested questions. It is clearly a conceptual challenge (regardless of the explicit or implicit inclusion of social and economic rights) to advocate for a robust constitution-based protection of the social welfare state during a period of its decline. Yet, it is also at this historical moment that constitutional claims about economic justice are more urgent and compelling – as the tangible effects of socio-economic inequality and poverty take their toll. Indeed, it is in response to the persistent refusal of governments (even in the face of political mobilization, growing indignation and popular engagement with economic justice issues) to provide the resources and funding needed to respond to socio-economic needs that individuals and groups have turned to the courts (Blackstock 2011).

In developing litigation strategies, advocates seeking to advance constitutional recognition of social and economic rights have been cognizant of the need to provide the judiciary with some way to contain their radical and redistributive remedial implications. Different approaches have emerged to mediate recognition of economic and social rights with some justiciable limits, including, for example: (i) the minimum core approach (Young 2008); (ii) the reasonableness criterion (Sachs 2009); and (iii) judicial deference to legislative policy choices (King 2012). An additional principle that provides a basis for both recognizing and containing social and economic constitutional rights is that of "social inclusion".

Hugh Collins (2003, p. 23) describes "social inclusion" as a principle of justice that "concentrates its attention not on relative disadvantage between groups, but rather on the absolute disadvantage of particular groups in society." Its underlying objective is to secure "a minimum level of welfare for every citizen." He further explains that, "[i]ts typical targets are 'child poverty', 'unemployed youth', or 'racial minorities in deprived neighborhoods', not a more general equalization of welfare". It focuses on groups that have been "disproportionately socially excluded compared to the population as a whole" (Collins 2003, p. 27) and concentrates on assisting those groups rather than insisting on more general redistributive or egalitarian objectives. Unlike the minimum core approach to economic and social rights, however, social inclusion also assesses patterns and processes of exclusion from sites of economic, social and political governance. Thus, it integrates concerns with substantive disadvantage with process-based exclusions from social, institutional and political decision-making (Young 2000, Sheppard 2010, 2013). Collins (2003) explains that pursuant to a social inclusion approach, the "essential elements of 'well-being' include material goods such as food and shelter, but also include opportunities to participate in meaningful ways in social life." To engage in

meaningful social and democratic participation, he maintains that key non-material goods also require protection, including "a fulfilling level of education, participation in politics, cultural activities, and work" (Collins 2003, p. 23). It reminds us of the human need for both "bread and roses" (Eisenstein 1983).

Collins relies on the principle of social inclusion to elaborate the scope and limits of equality rights rather than economic and social rights. Yet, his insights have relevance beyond the equality domain. The social inclusion principle provides a mediating concept for limiting the reach of judicial remedies in relation to social and economic rights claims. It endorses judicial intervention to redress the most extreme circumstances of socio-economic disadvantage in instances where particular communities or groups are *also* excluded from political decision-making and governance. Accordingly, the social inclusion principle limits the involvement of judges in the vast array of socio-economic policy determinations that may well be best left to other institutional actors, while empowering judges to act in extreme cases of economic injustice where individuals and communities also experience social and political exclusion. Such a reorientation resonates with representation-reinforcing justifications for judicial review (Ely 1980), particularly for "discrete and insular minorities" (*United States v. Carolene Products Co.*, 304 US 144 (1938) footnote 4). It is also consistent with Fineman's vulnerability approach in which "the state is required to ensure that institutions and structures within its control do not inappropriately benefit or disadvantage certain members of society. The operation and impact of those institutions and structures become the focus of legislative and executive action." (Fineman 2008, p. 20) Finally, by linking economic injustice to exclusion from the processes of social and political governance, the principle of social inclusion also reinforces and aligns with emerging approaches to regulation, governance and democratic experimentalism (Young 2010, Sheppard 2010) based on community well-being, local control and innovative partnerships with the state. One recurrent theme is the need to focus not only on the substantive provision of goods and services, but as well on a reshaping of the governance processes of a reimagined social welfare state (Giddens 1998). It is by crafting a principled approach to social and economic rights that integrates substance and process issues that we may provide a pathway forward both for judges and policy-makers. [13]

5. Conclusion

New insights emerge when we explore the interface between socio-economic inequality, poverty and constitutionalism. An important starting point is an assessment of current legal and regulatory regimes to reveal the ways in which they undermine social and economic wellbeing, and contribute to economic marginalization and social exclusion. Doing so reveals the extent to which laws and state action are currently implicated in inequitable social and economic outcomes. For constitutional scholars, these actions by the state can be examined and judged in relation to normative conceptions of social and economic rights, without any need to delve into debates about negative versus positive rights. Securing the effective enjoyment of civil and political rights and freedoms is another important avenue of legal advocacy that finesses the quagmire of positive and negative rights and the legitimacy of social and economic rights, though continued judicial reluctance has made this litigation strategy difficult. As a result, there is a need for new concepts, principles and approaches that will prompt judicial, legislative and institutional engagement with these issues.

The concept of social inclusion provides one such conceptual tool. It emphasizes the needs of the most vulnerable, marginalized and socially disadvantaged

[13] It is important to be attentive to the risks of a social inclusion approach. For a compelling critique of social inclusion policies as technocratic, legitimating strategies for neoliberalism, see Porter & Craig (2004).

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communities, and seeks not only improved economic wellbeing, but also political and social empowerment. The latter is integrally linked to new approaches to governance and social regulation. Though the principle of social inclusion is important for legislators and policy-makers, courts also have an important role to play. Judges can contribute effectively and responsibly to advancing socio-economic justice by illuminating deficiencies in political processes and assessing the impact of legislative and public policy choices on socially disadvantaged communities. Still, much practical, conceptual and humanistic work remains to be done if we are to secure an enhanced remedial role for constitutional law in the pursuit of economic justice.

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