**Lifetime Ban: *The End of the Capitalist Welfare State and
The Return of Laissez-Faire***

By

Omar Hilowle, B.A. (Hons.)

A thesis submitted to the
Faculty of Graduate Studies and Research
in partial fulfillment of the requirements
for the degree of

Master of Arts

Department of Law
Carleton University
Ottawa, Ontario
May 27th 2004

©2004, Omar Hilowle

Library and
Archives Canada

Bibliothèque et
Archives Canada

Published Heritage
Branch

Direction du
Patrimoine de l'édition

395 Wellington Street
Ottawa ON K1A 0N4
Canada

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

ISBN: 0-612-98971-2

Our file Notre référence

ISBN: 0-612-98971-2

NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protègent cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.

Canada

Abstract

The Canadian welfare state was conceived in the spirit of collective responsibility, shared risk, and the recognition that individuals are subject to damaging forces which are beyond their control, such as unemployment, poverty and illness. This spirit appears to have vanished. Why? It is argued that it has disappeared because of economic instability, changes in the political climate, and the Canadian welfare state's inability to maintain those social welfare programs which were put in place following World War II. I contend that, although there is some truth in this argument, the downsizing of the Canadian welfare state and the introduction of social policies such as the lifetime ban, which will subject individuals to those very same forces from which they should have been protected, are the results of the unwillingness, not the inability, of the capitalist Canadian welfare state to continue its commitment to social welfare.

Acknowledgements

All thanks and all praises due to Allah the Lord of the Worlds, the Most Gracious, the Most Merciful Whom without His assistance and grace this work would not have been successful, and peace and blessings of Allah be upon the Holly Messenger of Islam.

I wish to thank my Thesis Supervisor, Professor Peter Swan for his guidance, patience and inspiration both throughout my undergraduate and graduate degrees, particularly the graduate level. My long-standing endeavor to contribute to the Canadian Legal Scholarship would never have materialized without Professor Swan's guidance. His contribution to my work has made me forever indebted to him.

I want also to thank Professor Martha Jackman of the University Of Ottawa Faculty Of Law who first introduced me the intriguing and tragic story of the late Kimberly Rogers. Her encouragement prompted me to write about the broader legal, political and socio-economic issues surrounding the Kimberly Rogers's case.

I want also to thank Andrew Squire the Graduate Administrator of Department of Law for his constant assistance. He played an important role in the achievement of my dream.

I am grateful to my family, without their blessings and wonderful kindheartedness my life would have been insignificant. For this I am forever grateful and humble to my father Abdullahi Hilowle and mother Habiba Ga'al. Finally, I am also grateful to my love Hanife Singor for her love, patience and encouragement.

I want to dedicate this thesis to the millions who perished in the Middle Passage, to the millions who died in the hands of the oppressors, to the millions who are in the dungeons of the oppressors unjustly, to those who stand up for justice and especially to the late Kimberly Rogers.

Table of Contents

Abstract	
Acknowledgements	
Introduction	1
Kimberly Rogers Case	2
The Problem	4
Outline	6
Theoretical issue	9
Methodology	12
Chapter One	
Lifetime Ban as a Welfare State Issue	13
Chapter Two	
Lifetime Ban as a Welfare State Retrenchment	32
Chapter Three	
Lifetime Ban as Social Rights Issue	53
Chapter Four	
Lifetime Ban as <i>Charter</i> Issue	74
Chapter Five	
Lifetime Ban as Social Justice Issue	104
Conclusion	112
Bibliography	114

*And let not the enmity and hatred
of others make you avoid
justice. Be just: that is nearer
to piety; and fear of Allah.*

Qur'an 5:8

Introduction

And let not those among you who are blessed with graces and wealth swear not to give (any sort of help) to their kinsmen, the poor, and those who left their homes for Allah's cause. Qur'an 24:22¹

The above Qur'anic verse was revealed in response to a decision made by Abubakar, the first Caliph of the Islamic state, a wealthy man who often fed the needy. One day Abubakar swore that he would cease to support his cousin Mistah, because Mistah was one of the people who spread slander about Aisha², the daughter of Abubakar, and the wife of the Messenger of Allah, may the peace and blessings of Allah be upon him. Allah revealed this verse to instruct Abubakar and the rest of humanity that it is not fitting to withhold sustenance from those in need because of personal motives. This extends even to serious delinquencies as long as wrongdoers feel remorse for their wrongdoing. It is worthwhile to note that this verse was revealed not when Abubakar was the leader of the Muslim *Ummah* but when he was just a member of the community. It is also important to note that Abubakar was supporting his cousin not out of duty but out of goodwill. I contend, drawing upon this example, that, if a private member of the

¹ Qur'anic verses are from the Qur'anic translation of Dr. Muhammad Taqi-ud-Din Al-Hilali and Dr. Muhammad Muhsin Khan.

² In the 6th year of Hijra Immigration—the time Muslims immigrated from Mecca to Medinah, which also coincides with the start of the Muslim calendar—Muslims were returning from an expedition. When they started their journey back to Medinah, Aisha somehow was not with them. She was out searching for a necklace that she lost. It was not until the next stop that the Muslims realized that Aisha was not with them. When she came back she found that the caravan had left, so she decided to stay in the hope that somebody would come back to fetch her. It was night and she fell asleep. A male Muslim who was left behind to retrieve anything which was left behind found Aisha next morning. He allowed her to ride on his camel while he was leading the camel on foot. Some interpreted this incident as though Aisha and her rescuer had done something scandalous.

community is thus dissuaded from withdrawing his support of the needy, the state should not have the power to employ lifetime suspension of benefits as a form of punishment. Fifteen centuries later, the Ontario Conservative government (1995-2003) thought that it was justified in imposing a lifetime ban upon social welfare benefits as a form of punishment for those who are perceived to have defrauded the welfare system, even someone in the situation of the late Kimberly Rogers.

Kimberly Rogers Case³

Kimberly Rogers was 40 years old and, at the time of her death, was approximately 22 weeks pregnant. Ms Rogers had received social assistance for several years, most recently in April 2001, when she received \$520.00, which is the maximum allowance for a single person under Ontario Works⁴, \$325.00 shelter allowance, and \$195.00 basic allowance for all other needs. She also received a drug card, which paid for prescribed medications. Her allowance and drug card were automatically cancelled on April 25, 2001, after it was discovered that she had also received Ontario and Canada student loans totalling approximately \$48,000.00 from 1996-1999.⁵

After this discovery, Ms Rogers was criminally convicted of fraud and handed a six-month conditional sentence that prohibited her from leaving her house more than once a week without a letter of permission. Also imposed upon her were: 18 months of probation; restitution of the \$13,373 she collected in welfare as a student; and a three-

³ *Rogers v. Sudbury (Administrator of Ontario Works)* 57 O.R. (3d) 460. *Rogers v. Sudbury (Administrator of Ontario Works)* May 15, 2001.

⁴ Ontario Works replaced *General Welfare Assistance Act*, R.S.O. 1990, c.G.6.

⁵ Under *Ontario Works Act*, that part of student loan which is not provided for tuition, compulsory fees, book, instructional supplies and prescribed transportation costs is deemed income and is deducted from social assistance allowances. Since Ms Rogers did not disclose the student loans that she was collecting, Ontario Works declared an overpayment of approximately \$14,500.00 and started recovery of this overpayment by making deductions from Ms Rogers's monthly benefits.

month welfare ban. As of April 1, 2000, the three-month ban was replaced by permanent ineligibility for social assistance.

Ms Rogers owed \$32,641.58 Canada Student Loan with an annual interest rate of 9.25% and a monthly payment of \$445.00. She also owed \$16,005.65 Ontario Student Loan with an interest rate of 7.75% with a monthly payment of \$207.00. Her combined monthly payment of both loans was \$652.00.

Ms Rogers found herself unable to pay for her medication or rent. Her rent was \$450 per month; in fact, she was in arrears for both amounts. She had been undergoing treatment for panic disorder, anxiety, long-term undiagnosed depression and migraine headaches. Her landlord agreed not to seek eviction and temporarily reduced her rent on condition that she would pay the difference in future; she sought a court injunction to restore her benefits.

On May 31, 2001, Ms Rogers' benefits were temporarily reinstated, pending a case under the *Charter*, in which she challenged the constitutional validity of section 36(3) of the *Ontario Works Act*, which suspended her benefits after her conviction of welfare fraud. During this period, \$52 was taken away from her benefits towards repayment of her fraud. After rent, she had only \$18 to support herself. In August 2001, Ms Rogers took both her own life and that of her foetus with an overdose of a prescription antidepressant before the court had rendered any decision about her case.

The Problem

After nine weeks of investigation of the reasons surrounding the death of Kimberly Rogers, the coroner's jury, in December 2002, urged the Ontario Conservative government to end its lifetime ban on welfare to recipients convicted of welfare fraud because this policy has a "devastating and detrimental effect on our society" and the removal of this policy is the only way to "prevent the death of impoverished individuals."⁶ But Brenda Elliot, the Ontario Minister of Social and Community Services, said, responding to jury recommendations, that her government did not plan to end the lifetime ban on welfare because, "We think welfare reform is working."⁷

The lifetime ban was one of many new so-called welfare reform policies that the Conservatives introduced right after they won in 1995 Ontario election. The rationale for these new policies, according to the Conservatives, was to end "the cycle of dependency and to crack down on welfare cheats."⁸ But one has to ask: what is the connection between welfare reform and starving people to death?

In a civilized society, there must not only be a rational connection between objectives and the means to achieve them⁹, but also the objectives must be acceptable to the values and conscience of a civilized society. Suspending anyone, let alone a sick and pregnant woman, from his/ her major source of livelihood, is unacceptable by any standard of civilized behaviour. In this thesis, Kimberly Rogers's case will not be retried, although it will be referred to every now and then. Instead, this thesis will examine the

⁶ Robert Benzie, "Give Welfare Fraudsters a Break: Jury," *National Post* (20 December 2002), Canada ed.: A5.

⁷ *ibid*

⁸ *Ibid*

⁹ *R. v. Oakes*, [1986] 1 S.C.R.103 at 135-42.

lifetime ban policy in the context of the capitalist welfare state, and raise some relevant issues.

1. I will examine the lifetime ban under the rubric of T. H. Marshall's concept of right to a modicum of economic welfare, also known as "social citizenship rights." Here I will address the question of whether or not social assistance is a charity or a right. The answer will help us to determine whether a lifetime ban is justified under the rule of law or whether it is in violation of the concept of social citizenship rights and the values of a free and liberal society.
2. I want also to investigate the constitutionality of Section 36 (3) of the *Ontario Works Act*¹⁰ lifetime ban. I intend to address particularly whether or not it is in breach of sections 1, 7 and 12 of the *Canadian Charter of Rights and Freedoms*. My concern here is not only to ascertain a possible breach but also to see if Section 7 could impose a positive state obligation to provide for those in need.
3. I also want to discuss the lifetime ban in connection with the concept of social justice. I will expand upon and combine the issues raised in 1&2, in exploring whether or not the state has a positive obligation to eliminate social injustices and their causes.
4. In conclusion, I will contend that the reason the Canadian welfare state has introduced such social policies, as the lifetime ban is the state's unwillingness, not its inability, to continue its commitment to social welfare. Traditionally, the Canadian welfare state was intended to save individuals from forces beyond their control such as

¹⁰ *Ontario Works Act*, 1997, c.25, schedule B.

section 36(3) in the event of conviction of offence in relation to the receipt of assistance, a person is permanently ineligible for social assistance.

As of January 2004, the Ontario Liberal government has repealed both lifetime welfare ban policy and the provisions requiring three and six-month suspensions from social assistance for those who are committed welfare fraud prior to April 1, 2000. Though I welcome these changes, I vehemently dissent the Liberal government's continuation of the Conservatives' policy of allowing welfare fraud cases to be dealt under the criminal justice system. The criminal justice system, as I will discuss later, is not capable or well suited to deal with welfare issues.

poverty, unemployment and sickness.¹¹ The lifetime ban and similar erosions of social policies subject individuals to those very same forces from which they should have been protected, and also violate the principles of social citizenship rights, social justice, rule of law and the *Charter*, contrary to government's argument that these new policies will help end the 'cycle of dependence' while bringing services (such as Social Assistance, Employment Insurance and Health Care) closer to those who need them the most.¹²

Outline

My goal in this thesis is neither to demonize nor to glorify the capitalist welfare state. Nor is it to rehearse victimization or to lay blame. When I occasionally target specific policies and identify some groups as victims, it is only to show the outcome of some social policies or to respond to some critics. My task is to comprehend how the Canadian welfare state, which was built on the spirit of "collective responsibility, shared risk, and the assumption that the individual needs to be sheltered from forces beyond his/her control"¹³ has become so eroded and distorted that, less than half a century after its expansion period, it exposes individuals to the very misfortunes it was designed to protect them from, through such innovations as the lifetime ban.

The federal government insists that it can no longer afford to sustain or maintain those social policies which were implemented during the welfare state expansion period. It claims that the new policies will not expose the individual to potential disaster but rather will make the services more accessible to those in need. The elimination of Canada Assistance Plan (CAP) in 1995 and the introduction of Canada Health and Social Transfer (CHST) are clear examples of the federal government's changing attitude

¹¹ Armstrong, Pat "The Welfare State As History," in Raymond B. Blake et al., *The Welfare State in Canada: Past, Present and Future*. Concord, Ont.: Irwin publishing, 1997, pp52-73.

toward social welfare programs. CAP signified the commitment of both levels of government to social welfare. But, under CHST, the federal government unilaterally withdrew its share of social responsibility, leaving matters to the provinces, which (in contrast to the CAP system) are not even required to spend on social programs.

At the provincial level, in April 2000, the Ontario government introduced lifetime ban legislation for welfare recipients convicted of welfare fraud. This legislation resorts to a permanent suspension of benefits as a form of punishment without taking into consideration the situations or conditions which forced the recipient to commit fraud. The Ontario government justified this legislation as a way of preventing welfare dependency and welfare cheating. I will argue, however, that this legislation does not prevent welfare dependency or welfare cheating, but merely contributes to destitution.

To demonstrate this, I will review in Chapter 1 the history of the western welfare state to see if there is any correlation between today's social policies and those of the past. My aim here is not to dwell upon this history, but to focus on the uniqueness of the Canadian welfare state, and the role of social welfare programs to Canadians.

Commitment to social welfare was the key feature of the new Canadian welfare state but this commitment did not last long, and, in Chapter 2, I will discuss what has made governments renege on their commitments. I will also explore the effect that this "retrenchment" has had upon Canadians. I will draw a different picture from that which both federal and provincial governments and some scholars have presented.

Retrenchment is often proffered¹⁴ as an inevitable outcome of political ideology or

¹² Ibid p 53.

¹³ Supra note 11 p 53.

¹⁴ Moscovitch, Allan. The Welfare State since 1975. Regina, Sask., U. of Regina, Social Administration Research Unit, 1985. Pierson, Paul, (a) "The New Politics of the Welfare State" (January 1996) 48 World Politics 143. Pierson, Paul. (b) Dismantling the welfare state? : Reagan, Thatcher, and The politics of retrenchment. New York: Cambridge University Press, 1994. Diana S. Ralph, André

market instability or the combination. I will argue that, although there is some validity in this argument, these factors alone do not sufficiently explain retrenchment.

Retrenchment is epiphenomenal in that it seems to strike certain programs, not all. For instance, social assistance programs are more vulnerable to cutbacks or elimination than any other social welfare program.¹⁵ Clearly, changes in the political and economic realm alone do not provide a definitive comprehension of the politics of retrenchment. Race, class, gender and status, as I will demonstrate, also play a major role in it.

In Chapter 3, I will discuss why social assistance programs are particularly vulnerable to retrenchment policies. To answer this question, I must revisit an old issue: whether social assistance constitutes charity or a right. Some people argue that social assistance is charity, and, as such, the government has no duty to provide it, and violates no law when it temporarily or permanently suspends it. I will demonstrate here, through the concept of social citizenship rights, that social assistance is not a charity but a right. But the question remains: what kind of right is it? And more specifically, as Joao Carlos Espada asks: are there social rights that can be simultaneously *in rem*, positive claim-rights, and is their enforcement compatible with traditional civil and political rights?

In Chapter 3, I will demonstrate that the right to welfare or right to basic social rights can be simultaneously *in rem*, positive claim-rights and its enforcement is compatible with traditional civil and political rights. I will argue, that this right to welfare is a positive right, which means that it does impose a positive duty to provide to those in need. In Chapter 4, I will not only establish that there is a positive state obligation to provide to those in need, but also substantiate through evidence that a lifetime ban from

Régimbald and Nérée St-Armand. Open for business: closed to people: Mike Harris's Ontario. Halifax, N.S.: Fernwood Publishing, 1997.

¹⁵ Korpi, W. "Social Policy and Distributional Conflict in Capitalist Democracies" (1980) 3 *West European Politics* 296 at 305.

receiving welfare is in breach of this right, the right to security of person and fundamental justice in the section 7 and section 12 because the lifetime ban is cruel and unusual treatment. In Chapter 5, I will further establish that social rights are *in rem*, positive claim-rights and their enforcement is compatible with traditional civil and political rights not solely because they have the same weight as the traditional civil and political rights, and protected under the *Charter*, but in addition it (the concept of social right) is linked to the concept of social justice. I then conclude that based upon the *Charter* and the concept of social justice, the duty to provide to those in need which was established in the concept of social citizenship right also imposes a positive pattern of distribution. The lifetime ban is, therefore, in violation of all these principles.

Theoretical Issues

Walter Korpi's class coalition theory will be employed in order to analyze the role that class plays in the politics of suspension or preservation of the social welfare programs.¹⁶ Korpi hypothesizes that social programs which are considered as universal (such as health care) are less likely to face retrenchment because they enjoy huge support from both middle and working classes. In contrast, selective or social programs that target specific groups, such as social assistance, tend to divide the working class, in that one group sees itself supporting a program from which it does not benefit. As a result, this group will side with the middle class, forming a coalition against the beneficiaries of the target programs. This is why social assistance programs draw negative attention or 'backlash' and are more vulnerable to erosion. Social assistance programs are eroded on the grounds that they increase government deficits (although, as will be shown later, the evidence is overwhelmingly to the contrary.) On the other hand, the evidence shows that

¹⁶ Ibid p 305.

universal programs such as health care, which is considered as part of the “Canadian Identity,”¹⁷ cause government deficit increases while continuing to enjoy popular support. So retrenchment will be analyzed as an issue of class rather than as an issue of deficit reduction.

I will also employ Glenn Drover and Patrick Kerans’s emancipatory or empowerment theory.¹⁸ I contend that social welfare programs in general and social assistance programs in particular are structured in a way that does not empower the recipients to become liberated from relying upon dehumanizing and stigmatizing benefits. Social welfare programs must provide beneficiaries with opportunities to better themselves, or empower them to emancipate themselves from the situations or conditions which made them in need of welfare benefits. Lifetime ban legislation, I maintain, does not give recipients any opportunity to better or emancipate themselves. It only worsens their conditions.

“Give a man a fish and you feed him for a day. Teach a man to fish and you feed him for a lifetime.” This saying means: it is commendable to help someone in need but it is more useful and long lasting to teach that person to provide for him/herself. Instead of demanding that people participate in workfare programs in order to be eligible to receive assistance, it is more worthwhile to assist recipients to participate in programs such as higher education which will prepare them to compete in the job market. Someone who has merely a community participation experience, which is what workfare offers, cannot compete in the job market with someone who has a degree.

¹⁷ Blake, Raymond B, Penny E. Bryden & J. Frank Strain. The Welfare State in Canada: Past, Present and Future (Concord: Irwin, 1997. Preface)

¹⁸ Drover, Glenn and Patrick Kerans. New Approaches to Welfare Theory. (Brookfield, Vermont: Edward Elgar Publishing Company, 1993) pp 3-30.

The empowerment theory also challenges the welfare state's approach to social assistance program. The current approach is that there are some people who need to be assisted and others who are expected to assist. This approach creates division and animosity, and portrays social assistance recipients as weak and helpless people living on the crumbs of society. No wonder, then, that both the social assistance program and its beneficiaries are always under attack. The empowerment theory proposes universality rather than a selective or targeted approach. It refers to an "agreed upon community standard", with help, as a matter of right, not as a matter of compensation, "in order to develop" those who have fallen below this standard.¹⁹ I will explore the topic of universality and selectivity later, and also intend to introduce it and use it interchangeably with Gosta Esping-Anderson's de-commodification theory. In this theory, which I will explain in detail later, Esping-Anderson compares the status of the individual before and after the introduction of the modern idea of social rights. He notes that, before this concept became established, the individual was treated as a commodity in that he had to sell his services to the market in order to survive because there was no societal institution that would provide welfare assistance in the case of market failure, unemployment, sickness or any other situation beyond his control. But after the introduction of social rights, Esping-Anderson observes, the individual was no longer a commodity. He was de-commodified—no longer obliged to sell his services to the market in order to survive, as there was a societal institution, the state, that would provide assistance. Esping-Anderson insists, however, that just because welfare benefits are provided does not mean that the individual is de-commodified; the benefits provided must enable the recipient to survive without resorting to the market. These two theories are useful in challenging and even

¹⁹ Ibid p 6.

refuting some of the claims that the Harris-Eves Ontario government made to the effect that welfare creates dependency and that social assistance benefits offered in their province were “Cadillac welfare rates.”

Methodology

This thesis will employ two main sources: case laws and literature. I will use case laws and statutes as a primary source. It is not my intention to retry Kimberly Rogers’s case, but I will use her story as a discussion tool. Similarly, I will not discuss the entire *Ontario Works Act*, but will limit my discussion to that part of Section 36(3) which deals with the currently repealed lifetime ban policy. I will use the literature about the topic as a secondary source. It is not my intention to place emphasis on one source over the other, but I may focus upon the *Charter* cases in general and the *Gosselin* case in particular. Overall, I will use analytical and descriptive methods to examine the compatibility of the lifetime ban policy with the principles of fundamental justice and the rule of law in a free and liberal society.

Injustice anywhere is a threat to justice everywhere.
Martin Luther King

Chapter One

Lifetime Ban as a Welfare State Issue

Introduction

The basic argument that I will make in this chapter is that the radical, so-called “welfare reform,”²⁰ as introduced by the Conservative government of Ontario (1995-2003), is contradictory to the theoretical understanding of social welfare,²¹ the characteristics and goal of the capitalist welfare state and the spirit of the Canadian welfare state.

The reason for these changes, according to the Conservatives, was to end “the cycle of dependency that the welfare created and to crack down on welfare cheats.”²² The welfare rates, however, never have been ‘Cadillac rates’, and the Tories’ choice of terminology not only misrepresented the facts but also perpetuated blame-the-victim ideology. I will also demonstrate that the methodology that the Tories used—the lifetime ban— is irrational and unconstitutional. The constitutionality issue will be covered in a

²⁰ Particularly the reduction of welfare benefits by 21.6% and the introduction of the lifetime ban legislation. Much of the discussion in this thesis will deal with the now repealed lifetime ban legislation but the reason I mention the reduction of the benefits here in this chapter and some other places is to challenge the Conservatives’ description of the welfare benefits as “Cadillac welfare benefits.”

²¹ I am not claiming here there is a particular theory or specific way that social welfare should be understood or analyzed. I just want to propose that the reduction of the benefits and permanently suspending them is on contradiction with Glenn Drover and Patrick Kerans’ Empowerment Theory. In other words, social welfare should give the recipients the opportunity to be better than the situation that made them in need of welfare. The reduction of benefits and permanent suspension will neither empower nor emancipate the recipients. Furthermore, the focus should not be the rate, which was what the Conservatives focused upon, but instead, (in Gosta Esping-Anderson’s terms) whether or not the service would de-commodify the recipients.

²² *Supra* note 6.

later chapter. I will limit myself in this chapter to a discussion of the irrationality of such legislation.

Welfare benefits are provided in order that people can maintain a commonly accepted standard of living; any legislation which denies to or deprives an individual of such a standard of life is contrary to the goal of the welfare state. The welfare state was mainly created to safeguard the individual from destitution and to enable him or her not to fall below a certain “floor”. The lifetime ban presented by the Ontario Conservatives not only deprives an individual of the means of sustaining life, but also makes that individual fall below the accepted standard of living in the community.

Theoretical Understanding of Social Welfare

Social welfare programs are under immense criticism and suspension, not because there is no need for them anymore, but because the capitalist welfare state is unwilling to maintain its commitment to them and because the beneficiaries of these programs have no political power. For the Left, these programs failed to serve the purposes for which they were intended—social equality and the eradication of poverty. For the Right, these programs have encouraged and created dependency and deficit and the state is no longer financially capable of maintaining them.²³ Because of the atmosphere of negativity and discouragement, and the capitalist welfare state’s withdrawal of its commitment to social welfare, it is my contention that, while some remnants of social welfare programs will remain for some years to come, the majority of them will be phased out. I do not know if the presence of some symbolic welfare programs will qualify a state to be considered as a welfare state. I do know, however, that the so-called welfare reform policies that the Ontario Conservative government introduced, particularly the reduction of the welfare

²³ *Supra* note 11 pp 52-3.

benefits by 21.6% and the lifetime ban legislation, infringe upon the theoretical understanding of social welfare, the characteristics and goals of the capitalist welfare state and the spirit of the Canadian welfare state.

The western welfare state in general and the Canadian welfare state in particular were conceived with the intent to safeguard people, especially those facing destitution, by providing benefits to enable them to sustain a decent standard of living. Lifetime suspension of social assistance benefits sanctions destitution because it denies people the only source of income, or the main one, that was keeping them from falling below the basic floor.

The debate about the role of the state in a free market society is not new. What is new, however, is the current intensification of the attack upon social programs. These attacks have occurred ever since the economic crisis of the 1970s, but they intensified in the 1990s. In the 1995 Ontario provincial election, welfare reform was a key plank of the Progressive Conservatives' *Common Sense Revolution*. They stipulated their goals: "to slash 'Cadillac' welfare rates, make all 'able-bodied' recipients including single mothers work for their welfare and root out 'fraud and abuse.'"²⁴ According to James Struthers, this was the first provincial election in Ontario since the Great Depression in which welfare was the only issue.²⁵

The Conservatives exploited the public backlash against welfare in the 1990s which began when Ontario experienced its highest welfare caseload increase since the Depression. The percentage of people on welfare in Ontario jumped from 4.5% in 1985 to 12.2% in 1994. About 1.3 million people or 1 in 9 Ontarians were on social assistance.

²⁴ Ian Morrison, "Ontario Works: Preliminary Assessment"(1998) 13 *Journal of Law and Social Policy*. 1 at 4.

²⁵ James Struthers. *Can Workfare Work? Reflections from History*. Ottawa: The Caledon Institute of Social Policy, 1996 cited in Ian Morrison. "Ontario Works: Preliminary Assessment"(1998) 13

In 1990/91, social assistance expenditure rose by 37.2%, in 1991/2, by 42.5%, and by 1995, was more than \$6 billion annually.²⁶ With this background, and with the federal government's unilateral withdrawal of social assistance transfer payments to the provinces under the CAP cost-sharing agreement, welfare and welfare recipients became easy targets. The Conservatives and others who were attacking the welfare system neglected to consider the impact of the recession in the 1990s.²⁷ High unemployment caused the increase in social assistance recipients and social expenditure. Statistics show the direct correlation between unemployment and welfare. The higher the unemployment rates, the higher the percentage of social assistance recipients and vice versa. Some of the unemployed who were receiving Employment Insurance had also to resort to welfare because of the reduction of the level of employment benefits, and the cutting of the length of benefit periods due to the cuts to EI in the 1990s.²⁸

When the Tories came to power in June 1995, they tightened welfare eligibility rules and reduced benefits by 21.6%. Sixteen and seventeen year olds who did not live with their parents were no longer eligible for assistance unless they were under adult supervision and attended school; single parents who attended university were no longer eligible for student loans; social workers were encouraged to visit the homes of the recipients without notice; workfare was introduced, and, last but not least, recipients guilty of welfare fraud were banned for life from receiving benefits. According to provincial government figures, 100,000 people subsequently left the welfare rolls between June and November 1995.²⁹ There is no conclusive evidence as to why so many people left the system only 5 months after the new government came to power, or of what

Journal of Law and Social Policy. 1 at 4.

²⁶ All the statistical numbers are from *supra* note 24, p3.

²⁷ *Ibid* pp 3-4.

²⁸ National Council on Welfare. Another Look at Welfare Reform. Ottawa: autumn 1997, pp 1-2.

happened to them. There is also no conclusive evidence either why the number of recipients has gone down ever since the Conservatives came to power. In 1995, the year they came to power, there were 1,334,600 recipients; in 1999, 910,100 and in 2001, 709,200 recipients.³⁰ There are many conflicting accounts of what has happened to them. According to the National Council of Welfare, less than 30% of the people of working age found jobs. The rest either moved out of the province, moved onto the provincial Family Benefits program if they were disabled, or moved back to live with their families. The Ministry of Community and Social Services did its own survey and found that 62% of the people who had left welfare in the month of May 1996 either found jobs or improved their job opportunities.³¹ Despite these conflicting explanations, there is no doubt that these new welfare rules had a largely negative impact on both the recipients and their dependants, as shown by the increase in use of food banks and the inability of some recipients, especially families with children, to pay their rent or satisfy their daily needs. I plan to discuss later, in detail, these new rules in general and the lifetime ban in particular.³²

Social assistance rates have never been “Cadillac rates” even during the postwar period when the federal government was more committed to investment in social

²⁹ Ibid p 62.

³⁰ “Welfare Reform: Is It Working?” *Studio2*, TV Ontario, 19Dec2002.

³¹ *Supra* note, 28, pp 62-65.

³² I recognize that the issue of welfare in general and welfare fraud in particular cannot be separated from gender. Since the majority of those accused of welfare fraud and a significant number of welfare recipients are women a gender/feminist perspective is a reasonable method to analyze this topic. (See Errlee Carruthers, “Prosecuting Women for Welfare Fraud in Ontario: Implications for Equality” 1995, 11 *Journal of Law and Social Policy* at 241. Dianne L. Martin, “Passing the Buck: Prosecution of Welfare Fraud; Preservation of Stereotypes” 1992, 12 *Windsor Yearbook of Access to Justice* at 52. Ruth Morris, Harry Glasbeek and Dianne Martin, “We’re Being Cheated! Corporate and Welfare Fraud: The Hidden Story,” Canadian Scholars Press, Toronto: 1997.) In this thesis however I selected to analyze welfare and welfare fraud as an issue of class, race, gender and status concerning the strong interconnection between these subjects. (See pp 20-24, 37-55, 102-105 and 111-113.)

programs than in the 1990s, and the eligibility rules were less strict than now. Even then, recipients had to show that they were in need of assistance. There was a stigma attached to the benefits. Recipients were called names and stereotyped as lazy freeloaders. Eligibility rules were always attached to the benefits because it was believed that if these rules were removed, the recipients would not look for work. Recipients were always discouraged from depending on assistance and benefits, which were, and still are, less than what the working poor earn.³³

But the issue is not about the rates, or whether or not services or benefits are provided. The issue is whether the programs emancipate the recipients from the factors that caused them to be in need and provide them better opportunities or conditions. The empowerment or emancipatory aspect of the social assistance program are crucial to the welfare state and will be discussed using April Adderley's case as an example³⁴. Esping-Anderson holds that the services or benefits must "de-commodify" the recipient.³⁵ Prior to the modern welfare state, he notes, there was no societal institution outside the market which provided financially for the individual. So the individual became a commodity and the only way he could survive was to sell his services to the market. The establishment of the modern concept of social rights meant, Esping-Anderson asserts, that the individual was no longer a commodity and his survival was not dependent on selling his services because there was a societal institution, the state, which would provide welfare benefits in case the individual failed to earn a living in the market.³⁶ But Esping-Anderson emphasizes that the mere presence of benefits does not mean that the individual is no

³³ Rice, James J. and Michael J. Prince, Changing Politics of Canadian Social Policy. Toronto: University Press, 1999, pp 35-6.

³⁴ *Supra* note 30.

³⁵ Esping-Anderson, Gosta, The Three Worlds of Welfare Capitalism Princeton, NJ: Princeton University Press, 1990, pp 21-22.

longer a commodity unless the provided benefits de-commodify the individual by maintaining him at a recognized standard of life without depending on the market.³⁷

Welfare rates provided by the capitalist welfare state cannot de-commodify because the benefits are always low and come with a stigma. Most importantly, capital investment is emphasized above welfare investment.

Referring to the welfare rates as “Cadillac rates” is not only a misrepresentation of the facts, but it is a perpetuation of the stigmatization of recipients. According to the Organization for Economic Co-operation and Development (OECD), the social assistance rates in most provinces in Canada is below the poverty line, particularly the benefits given to the single able-bodied unemployed who are referred as employable.³⁸ But whether one considers only the rates or benefit payments or both, the evidence shows that both the federal and provincial governments are no longer committed to welfare programs, as the assistance given barely covers such basics as rent. This is indeed contrary to the original aim of social assistance, which was to provide recipients with adequate assistance. ‘Adequate’ here only means that benefit which allows the individual not fall below that agreed-upon standard of living. In October 1995, for a single parent with one child on welfare, the maximum shelter allowance was \$511, and the average Toronto rent for a one-bedroom apartment was \$661. The increase of food bank services in Ontario is another example that the benefits are not “Cadillac rates.” In 1996, about 71,000 Toronto children needed food bank assistance, an increase of 65% over 1995.³⁹

³⁶ Ibid p 21.

³⁷ Ibid p 22.

³⁸ Organization for Economic Co-operation and Development. Social Assistance in OECD Countries Volume1: Synthesis Report. London: 1996,p105. The federal government claims, however, that rates alone do not give a comprehensive picture of social assistance because there are other benefit payments from provinces and municipalities.

³⁹ *Supra* note 28, pp 66-67.

The Tories chose the term “Cadillac rates” not only to misrepresent facts, but also, as Korpi hypothesized, to create a class coalition against the poor and set the stage to legitimize the introduction of legislation such as the lifetime ban, punitive programs such as workfare, or the suspension and/or elimination of programs which benefit the most vulnerable and least politically powerful group.

The tax structure is another way to legitimize the attack on the poor. Ontario has one of the lowest provincial tax structures in the country. Low taxes are popular amongst workers, and also enable Ontario businesses to compete with neighbouring US states.⁴⁰ This causes government to cut or decrease social spending and increase capital investment. A similar approach has been taken at the federal level. During an economic slump, the federal government, due to pressure from capital, redirects expenditure to aid capital or reduce taxation, which will result in the decrease of social expenditure and increasing deficit financing.⁴¹ Of course, business and labour are seldom on the same side, nor do they have equal political power, but in certain situations they unite against the poor. Whenever the government lowers taxes, it is most certainly responding to demands and pressure from business rather than pressure from labour.

The popularity of the attack on welfare and the political acceptability of social spending cutbacks sometimes come under the guise of a “crisis in capital accumulation where everyone has to make some sacrifices to assure economic growth and productivity gains in the future.”⁴² Even though the poor will suffer the brunt of cutbacks, many people, including those who are supposed to advocate for the poor, will support the

⁴⁰ Jeffrey Patterson, “Winding Down Social Spending: Social Spending Restraint in Ontario in the 1970s” In Allan Moscovitch and Jim Albert, *The “Benevolent” State: the Growth of Welfare in Canada*. Toronto: Garamond Press, 1987, pp242-254.

⁴¹ Moscovitch, Allan and Glenn Grover, “Social Expenditure and the Welfare State: The Canadian Experience in Historical Perspective” in Allan Moscovitch and Jim Albert *The “Benevolent” State: the Growth of Welfare in Canada*. Toronto: Garamond Press, 1987, pp13-43.

government's move in the belief that it must do whatever is necessary to overcome the current crisis of economic growth. Often these attacks are masked by ranting such as: "Welfare has become the dumping ground for failed social policies...welfare has become responsible for the failed educational system, failed marriages, failed contraceptives, failed family relationships, failed personal financial planning, and a failed economy."⁴³

What is the connection between welfare spending and social problems? Welfare is certainly not the reason that almost half of marriages fail today, nor has it caused high unemployment. There is no evidence, as John Ralston Saul says, "either spending on social programs caused the debt or that slashing can solve the debt problem. Indeed, there is considerable evidence to the contrary."⁴⁴ Even so, one can easily gain political advantage by attacking welfare or promising to slash welfare programs, as Conservatives can testify. Such attacks may reveal thoughtlessness about the theoretical understanding of social welfare and a lack of insight about the characteristics and goals of capitalist welfare state, and the spirit of the Canadian welfare state. Or they may indicate a willful ignorance or a deliberate repudiation.

The CAPITALIST WELFARE STATE

The welfare state was born to alleviate economic hardships that people suffered during the *laissez-faire* period of capitalism. The permanent suspension of welfare benefits from anyone, especially those who need them to survive, is contrary to the goals and characteristics of the capitalist welfare state.

⁴² *Supra* note 40, p 252.

⁴³ Sabatini, E. (Rico) Welfare-No Fair: A Critical Analysis of Ontario's Welfare System (1985-1994). Vancouver: The Fraser Institute, 1996 p 255.

⁴⁴ Saul, John Ralston, "McQuaig Throws Doubt on Economic Policies," *The Globe and Mail* (22 April, 1995) C25 cited in Pat Armstrong, "The Welfare State As History" in Raymond B. Blake et al., *the Welfare State in Canada: Past, Present and Future*. Concord, Ont.: Irwin, 1997 pp 52-73.

The western welfare state came about as a result of the changing attitude of the role of governments in a free market society. During the *laissez-faire* period, the role of the state was seen primarily as that of defending the community from external forces, maintaining internal law and order, and guaranteeing contracts.⁴⁵ The state could interfere only in extreme cases where the market failed, such as providing relief to the destitute. Other than that, the state was seen as ineffective and inefficient and the market as capable of self-regulation. The increase of poverty during the *laissez-faire* period demonstrated that the free market could not be relied upon to provide wages and benefits adequate for social needs, nor fill the gaps in social provision (e.g. in housing and in medical services). The state was thought to be the only agent that could solve these problems and promote social welfare, as J. F. Sleeman notes. The role of the welfare state was not only “to provide social services, such as social security, medical treatment, education, welfare facilities and subsidized houses, but these should go beyond the provision of a bare minimum towards insuring that all have equal opportunity, so far as the country’s resources allowed.”⁴⁶ The welfare state did not undertake to displace private enterprise in its primary role of producing and selling goods and services for profit. Its objective was to exert public will through government to administer the economy by making central decisions on economic matters of collective interest.⁴⁷

The capitalist welfare state is a mixture of capitalism and socialism, in that it allows the capitalist market economy to flourish but restricts it, because it is the duty of the state to guarantee that no one falls below an agreed-upon standard of life, and to

⁴⁵ Sleeman, J.F. The Welfare State Its Aims, Benefits and Costs. London: George Allen and Unwin Ltd, 1973, pp 1-19.

⁴⁶ Ibid p 5.

⁴⁷ Ulmer, Melville J. The Welfare State: USA Exploration In and Beyond the New Economics. Boston: Houghton Mifflin, 1969, pp 1-12.

promote and protect the community from individual aggression and market pitfalls.⁴⁸

This mixture of capitalism and social welfare is the key characteristic of the welfare state.

The ideas underlying the welfare state are derived from many different sources and the term “welfare state” does not designate a definite system of government. This is why capitalism can flourish in a social democratic welfare state like Sweden.⁴⁹

A state does not have to be democratic or claim to be democratic in order to be a welfare state, but it must have some essential ingredients such as social welfare, social justice and social equality. The only way that the mixture of capitalism and socialism could last is through continuous state intervention in the market and a promotion of individual and community interests. It appears that this combination works to a certain extent when the economy is booming and the state keeps intervening as it did in 1960s, but can this marriage work when the economy is under stress as it was in the 1990s? The challenge to the capitalist welfare state is to make this merger of capitalism and social welfare work even during economic crises when it is under attack from business, labour and the community, as it is today.

The goal of a capitalist welfare state such as Canada is to balance the dynamic conflict between “accumulation” and “legitimation.”⁵⁰ In other words, it has to develop a mechanism through which it can legitimize its tripartite structure: capitalist market economy, democratic mass polity, and welfare state. In order to do this, Peter Flora suggests that a capitalist welfare state must develop some essential social welfare

⁴⁸ Marshall, T.H. Sociology at the crossroads, and other essays. London: Heinemann, 1963, pp 284-288.

⁴⁹ Robson, William. A. Welfare State and Welfare Society Illusion and Reality London: George Allen and Unwin Ltd, 1976, pp 11-19.

⁵⁰ Flora, Peter “On the History and Current Problems of the Welfare State” in S.N. Eisenstadt and Ora Ahimeir, *The Welfare State and its Aftermath*. London: Croom Helm, in association with the Jerusalem Institute for Israel Studies, 1985, pp 12-16.

programs on the basis of individual rights without altering the market mechanisms. At the same time, however, he says that the structure of capitalist welfare state must reflect the basic nature of political consensus produced in the democratic mass polity. According to Flora, the western welfare state is inherently expansive because the objectives of its social welfare programs are not just to eradicate poverty or integrate the industrial working class, but also to influence the distribution and stability of individuals.

This expansive nature also created a dilemma; consequently, the western welfare state has drawn widespread criticism. Flora believes that it tries to institutionalize legal, political, and social rights, and strives to remove inequalities and improve the quality of life of its members, yet still promotes inequality. Institutionalization of social rights, removal of certain inequalities and extension of benefits will certainly contribute to the stability of democratic mass polity. At the same time, Flora predicts, the extension of benefits to solve conflicts may create fiscal instability and undermine the political consensus on which it is based, thereby making the welfare state lose its liberal character, because the upper and middle classes perceive that they do not need many of the services that the welfare state provides.

The result will be the withdrawal of the upper and middle classes from their support of the welfare state⁵¹ and more erosion and suspension of social welfare programs which benefit the poor. But a true welfare state cannot abandon, suspend or ban social welfare because such action contradicts its goal of minimizing economic hardships and inequalities.

The biggest dilemma is that only through expansion could the capitalist welfare state guarantee social equality and the Bismarckian vision of using social services to

⁵¹ Offe, Claus, "Democracy Against the Welfare State?" (1987) 15:4 *Political Theory* at 532.

peacefully include the working classes and the poor within the state.⁵² This peaceful inclusion has never materialized, so the creation of social equality became one of the major goals of capitalist welfare state. According to S.N. Eisenstadt, it was believed that social equality would be achieved by granting universal services with guaranteed standards and, under governmental control, advancing underprivileged groups and narrowing gaps in income, education and employment. This aim was, he holds, an expression of justice, to lower the social conflicts and, more importantly, to increase public participation in the political and economic process.⁵³ The more this was achieved, the more the welfare state would become legitimized.

This expansive nature, the failure of *laissez-faire* policy, the belief that capitalist welfare state could protect the community from market pitfalls, and the receptive attitude toward the state promoting social welfare were the main reasons that the capitalist welfare state was established. The Canadian welfare state was created with similar assumptions.

The Canadian Welfare State

During Canada's colonial period, poverty was considered, as in many parts of the western world, as a personal failure from lack of hard work, or as a disease to be dealt with at the family level with little help from the community. The poor were seen as lazy, unwilling to make sacrifices, even as criminals who deserved jail as punishment.⁵⁴ The social policies adopted during that period in the colonies which later became Canada also reflected this attitude. Social assistance, according to James J. Rice and Michael J. Prince, was supposed to be under private administration. The colonial administration assigned or

⁵² Eisenstadt, S.N. and Ora Ahimeir, The Welfare State and its Aftermath. London: Croom Helm in Association with the Jerusalem Institute for Israel Studies, 1985, p1.

⁵³ Ibid p 2.

⁵⁴ *Supra* note 33, pp 34-43.

handed over the responsibility of caring for the poor and destitute to private philanthropies, good neighbours, voluntary organizations and the churches. The poor could expect government assistance only after they had exhausted such private assistance.⁵⁵ Rice and Prince assert that public assistance was tendered only to those judged to be deserving of aid, such as the old, orphans, the mentally ill, and the disabled.⁵⁶ The able-bodied unemployed, who are now referred as ‘employable,’ had to perform certain duties or pass what was called the ‘workhouse test’ in order to qualify for assistance. Benefits were always less than the income of the lowest paid worker, to encourage the recipients to choose work over assistance. This is called the “less eligibility principle.” In other words, the recipients were expected to perform certain kind of duties or activities in order to remain eligible for assistance. Even though these policies were implemented during the colonial era, they are still with us in one way or another⁵⁷.

After Confederation, with people moving from rural communities to urban communities and with waves of immigration from overseas, there were many new social problems. The family, Rice and Prince state, could no longer be expected to deal with these problems because people no longer lived with their families and did not know where or whom to ask for assistance. Municipalities and provincial governments had to take the place of the family and private institutions; therefore the provinces became increasingly involved in social welfare.⁵⁸

The involvement of provinces was significant because it engendered the development of four major social policies that “reflected this changing pattern of welfare provision with respect to income support between 1914 and 1939, changes that

⁵⁵ Ibid p 35.

⁵⁶ Ibid p 35.

⁵⁷ Ibid p 36

⁵⁸ ibid p 38.

represented a modernization of income security policy in Canada.”⁵⁹ As recounted by Rice and Prince, workers’ compensation, which became a right for workers, was passed in Ontario in 1914. Mothers’ allowances, based on a means-test, were introduced in Ontario in 1920. The minimum-wage laws were passed in the 1920s, and, finally, the Old Age Pension was passed in 1927. The introduction of these four new social provisions indicated the shift of social welfare from private philanthropies, churches and municipalities to provincial and federal governments. The programs were financed in whole or in part by government, with some costs shared with employers (as in the case of workers’ compensation) or with the municipalities (as in the case of Old Age Pensions).⁶⁰

This shift was not, however, an indication of federal government’s immediate involvement in social welfare programs because, according to the *British North America Act* of 1867,⁶¹ the social programs were outside the federal government’s legislative power. This meant that the welfare state could not expand under the *BNA Act*. However, since the military and its veterans were under federal jurisdiction, the federal government had the power to involve itself in social programs that targeted the veterans. So the first significant entry of federal government into social welfare was the introduction of financial benefits for war veterans when Parliament introduced the *Annuities Act* of 1908.⁶² During the Great Depression, the federal government had to engage in social programs by extending grants to the provinces, which did not have the financial capacity to cover social welfare expenditures.⁶³

⁵⁹ Ibid p 40

⁶⁰ Ibid p 41

⁶¹ *British North American Act*, 1867 (U.K.), 30 & 31 Vict., c.3.

⁶² Guest, Dennis. *The Emergence of Social Security in Canada* 2ed. Vancouver: University of British Columbia Press, 1985, pp34-36 cited in James J. Rice and Michael J. Prince. *Changing Politics of Canadian Social Policy*. Toronto: University Press, 1999, pp34-43.

⁶³ *Supra* note 41, pp 23-24.

The involvement of the federal government in social welfare programs, however, was neither as acceptable nor as successful as these examples suggest. In 1935, at the end of its term, R. B. Bennett's Conservative government passed an *Employment and Social Insurance Act*. Bennett called this legislation the "New Deal" which was in imitation of U.S. President Roosevelt's "New Deal." The legislation gave the federal government sweeping powers of intervention over provincial, local and private sector spheres. Bennett lost the 1935 election, and the "New Deal," which was not accepted by the provinces, was taken to the Judicial Committee of the Privy Council for a decision as to its constitutionality. In 1937, the council ruled the *Employment and Social Insurance Act* to be *ultra vires* of the federal jurisdiction.⁶⁴ This ruling, however, did not stop the involvement of federal government in social welfare. Nevertheless, during the Depression and subsequent economic crises and social upheavals, the provincial governments would ask for federal assistance. The question was not 'should the federal government be involved the social welfare programs?' but 'how could the federal government lend its support to social programs without violating provincial legislative powers?'

In 1937, Prime Minister MacKenzie King appointed *The Royal Commission on Dominion-Provincial Relations*, otherwise known as the Rowell-Sirois Commission. It concluded that the social welfare programs were under the provincial legislature, but, in the event that the provinces were unable to meet their financial responsibilities to the social welfare programs without federal government assistance, then the government should provide "unconditional adjustment grants"⁶⁵ to the provinces in order that they meet their social welfare responsibilities. The Rowell-Sirois Report demonstrated the flexibility of Canadian federalism, giving the federal government a key role in social

⁶⁴ *Supra* note 33, pp 50-51.

welfare through constitutional amendment and use of the spending power clause. This was well received (especially outside Quebec) and was incorporated within the *Constitution Act* of 1982.⁶⁶ The involvement of the federal government in social welfare meant the birth of a “universalist” welfare state. Under the universalist welfare state, benefits are extended not only those to who are poor, but to all socio-economic groups.⁶⁷

So there was a critical need for the federal government to be involved in social welfare programs, and the federal government got involved with these programs as part of nation building and alleviating social upheavals. Karl Polanyi insists that state intervention is necessary because no society can survive without protection “against this [unregulated market] satanic mill.”⁶⁸ Social welfare programs were introduced as a form of protection and balance between free market and welfare. But were they successful in achieving this balance?

The universal social programs of the Canadian welfare state, which were mainly put in place in the period between Second World War and the late 1960s, were based on the spirit of “collective responsibility and shared risk, as well as a recognition that many forces were beyond individual control.”⁶⁹ There was a deep sense of sharing and caring and, as Richard Titmuss suggests, there was a recognition that the society’s will to survive as a whole is somehow interdependent with its will to assist the survival of those members who cannot survive without help.⁷⁰ Leonard Marsh’s 1943 *Report on Social Security for Canada*, which was regarded as the most important document for the

⁶⁵ Ibid p 59

⁶⁶ *Supra* note 17, pp1-2. *Constitution Act*, 1982, being schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

⁶⁷ Ibid p 2

⁶⁸ Polanyi, Karl, *The Great Transformation: the Political and Economic Origins of Our Time* Boston: Beacon Press, 1944, p73.

⁶⁹ *Supra* note 11, pp 52-3.

⁷⁰ Titmuss, Richard M. *Essays on the Welfare State*. London: George Allen and Unwin Ltd, 1958,p39.

development of the Canadian welfare state,⁷¹ also put emphasis on the collective responsibility initiative. Marsh argued that it is necessary to establish a social safety net, which recognizes our vulnerability to forces beyond our individual control.⁷² Some of the programs were based on rights for the citizen, such as health care, Old Age Security and Family Allowance; some on the rights for the worker, such as Unemployment Insurance and the Canada/Quebec Pension Plan; and some on as individual rights, such as social assistance.⁷³

The goal of social assistance programs, which is my focus, was “the prevention and removal of causes of poverty and dependence on public assistance and the provision of adequate assistance to persons in need.”⁷⁴ The program was needs-tested and funded under the Canada Assistance Plan (CAP). CAP was a cost-sharing program in that the federal government had to match every dollar that the provinces spent in social assistance programs. But in order for the provinces to qualify for federal assistance, they had to meet three conditions. Showing need was the first requirement for eligibility. The provinces were prohibited from excluding particular recipients such as ‘employables’ or imposing conditions such as workfare. Secondly, residence requirements could not be attached as an eligibility requirement. Finally, the provinces had to provide the recipients with the right to appeal.⁷⁵

⁷¹ Bliss, Michael, “Preface” in *Report on Social Security Canada for Canada*, ed. Leonard Marsh. Toronto: University of Toronto Press, 1975, p. ix, cited in James J Rice and Michael J. Prince. *Changing Politics of Canadian Social Policy*. Toronto: University Press, 1999, p 60.

⁷² Marsh, Leonard, *Report on Social Security for Canada 1943*. Toronto: 1975, pp 9-10, cited in Pat Armstrong, “The Welfare State As History” in Raymond B. Blake et al., *The Welfare State in Canada: Past, Present and Future*. Concord, Ont.: Irwin, 1997, p 54.

⁷³ *Supra* note 11, pp 52-73.

⁷⁴ Ontario, Social Assistance Review Committee, *Transitions* Toronto: 1988, p 9 cited in Pat Armstrong, “The Welfare State As History” in Raymond B. Blake et al., *The Welfare State in Canada: Past, Present and Future*. Concord, Ont.: Irwin, 1997, p 60.

⁷⁵ Evans, Patricia M., “Downloading The Welfare State, Canadian Style” in Gertrude Schaffner Goldberg And Marguerite G. Rosenthal *Diminishing Welfare: a cross-national study of social provision*. Westport, Conn.: Auburn House, 2002, p 82.

Despite this history, the principles of universality, collective responsibility and shared risk have come under attack ever since the welfare state experienced economic crisis in the 1970s. It was argued then that the welfare state was no longer able to support the social programs, which it had only put in place in the 1960s, because social spending caused an increase in the deficit. The principle of collectivity was replaced, as Pat Armstrong points out, by selectivity; collective risk was replaced by individual risk; rights were replaced by deservedness; all this was done in the name of cutting costs and improving services in order to make them more accessible. Every social program was affected, though some more than others. The welfare state is no longer caring and sharing; it became, as Armstrong says, “mean and greedy.”⁷⁶ This new policy, which is referred to as welfare state “retrenchment,” had enormous negative effects on both the beneficiaries and social welfare programs, as I will show in the next chapter.

⁷⁶*Supra* note 11, p 53.

*We will sell to no man, we will not deny or
defer to any man either justice or right.*

Magna Carta

Chapter Two

Lifetime Ban as Welfare State Retrenchment

Introduction

In this chapter, at the outset, I will submit that the policy of retrenchment is not the reverse of the policy of the welfare state expansion, because the reasons, objectives, goals and forces behind extending benefits to any recipient in need cannot be the same as the forces, goals and politics of elimination, suspension or lifetime banning of recipients from receiving benefits.

It is widely accepted that the retrenchment policy is the outcome of economic instability, a political shift to the Right, the political powerlessness of those who supported the welfare state expansion or a combination of these factors. Though there is some truth in all of the above explanations, I assert that social policy in the capitalist welfare state in general and the retrenchment policy in particular cannot be divorced from race, class, status and gender. For this reason, retrenchment is not applied to all social welfare programs equally. I assert that the social assistance program faces retrenchment more than any other social welfare program because of the class, gender, race and status of the beneficiaries.

Under the Canada Assistance Plan (CAP), the federal government had to match every dollar that provinces spent in social assistance program. The provinces were required to commit to social assistance in order to qualify federal assistance. But this changed in 1995 when Jean Chretien's Liberal government introduced the Canada Health and Social Transfer (CHST). Under CHST, the provinces receive a single transfer of a fixed amount of financial support through cash payment and tax points.

According to Patricia Evans, under CHST, the goal of social assistance is no longer the prevention and removal of causes of poverty nor is there any recognition of collective responsibility for forces beyond the individual's control which may cause him or her to seek outside help. Indeed, the provinces are no longer required to spend on social assistance because, as Evans notes, the amount of the federal transfer payment remains the same regardless of whether they spend too much or too little. In fact, the provinces are expected and even encouraged to spend less on social welfare programs.

The lifetime ban on social assistance is a byproduct of retrenchment policy, since, under CHST, the provinces are not required to spend on social assistance and can do to social assistance programs and their beneficiaries whatever they want. Thus, the Ontario Conservative government thought that it had the power to suspend permanently the welfare benefits from those whom it perceived as undeserving.

The Retrenchment Policy

Esping-Anderson's hypothesis that "a theory that seeks to explain welfare state growth should also be able to understand its retrenchment or decline,"⁷⁷ suggests that retrenchment is the reverse of expansion. But retrenchment is not the flip side of expansion; the reasons and objectives are different. Welfare state expansion, as Paul

⁷⁷ *Supra* note 35, p 32.

Pierson suggests, “involved the enactment of *popular* policies in a relatively underdeveloped interest-group environment. By contrast, welfare state retrenchment generally requires elected officials to pursue *unpopular* policies that must withstand the scrutiny of both voters and well-entrenched networks of interest groups.”⁷⁸ The forces, goals and politics behind expansion are not the same as those behind retrenchment.

Social welfare programs were extended, according to Pat Armstrong, as public responsibility for the individual’s economic security and welfare.⁷⁹ There was recognition of shared vulnerability to forces beyond individual control. The Canadian welfare state expanded through the approval of business, labour, community, local and provincial governments, all of whom recognized the economic hardships and social upheavals that was mentioned above and acknowledged that such problems could not be solved without the federal government involvement. This was particularly important during the periods after the wars, during social upheavals, and when the provincial governments could not meet the financial responsibility of social welfare programs, as in the 1930s.⁸⁰ So the expansion of the Canadian welfare state was undertaken in part to rescue individuals from destitution and in part for nation building.

On the other hand, retrenchment is based on the ‘sacrificial lamb’ ideology. The politicians eliminate some services under the guise of fiscal responsibility or making the social welfare programs more accessible to those who need the most. But before any suspension, the politicians must first make sure that they have the support of the business and middle class or those whose vote matters the most. They try to make the cuts less visible “either by making the effects of the policies more difficult to detect or by making

⁷⁸ *Supra* note 14a, pp 143-44.

⁷⁹ *Supra* note 11, pp 52-3.

⁸⁰ *Supra* note 41, pp 23-4.

it hard for voters to trace the responsibility for these effects back to particular policy makers. They do this either to avoid blame or spread blame.”⁸¹

Canadian governments employed two major approaches for the elimination and restructuring of social welfare programs: programmatic and systemic retrenchment. Programmatic retrenchment is a quick-fix policy, which refers to the increase of means-tested programs; tightening the eligibility rules, decrease of social expenditure, lack of commitment to social welfare programs and a shift from universality to selectivity or targeted programs.⁸² Both federal and provincial governments used this strategy to eliminate some social programs. In 1993, Brian Mulroney’s (Conservative) government suspended the universal Family Allowance and replaced it with the income-tested Child Tax Credit. This shift from universal to selective programs was justified on the grounds that there should be no extension of Family Allowance benefits to families who are not financially in need of the benefit.⁸³ At the provincial level, Ontario Conservatives slashed welfare benefits by 21.6% after they won the election in June 1995. They also changed the legislative framework of social assistance programs. In November 1997, they introduced Bill 142 the *Social Assistance Reform Act* (SARA).⁸⁴ This *Act* replaced the *General Welfare Assistance Act* (GWA) and the *Family Benefits Act* (FBA)⁸⁵ with the *Ontario Works Act* (OWA) and the *Ontario Disability Support Plan Act* (ODSPA). The aforementioned legislation introduced strict eligibility rules and required welfare recipients, especially the ‘employables,’ to work for their welfare.

⁸¹ *Supra* note 14a, p 147.

⁸² *Supra* note 33, p111. In the section, I will heavily rely on James J. Rice and Michael J Prince. Changing Politics of Canadian Social Policy, and Paul Pierson, Dismantling the Welfare State? : Reagan, Thatcher, and the politics of retrenchment. New York: Cambridge University Press, 1994.

“Programmatic and Systemic retrenchments” are from Pierson.

⁸³ *Ibid* p 112.

⁸⁴ *Supra* note 24 p 1.

⁸⁵ R.S.O 1990 c. G6 and R.S.O 1990 c. F2 respectively.

Systemic retrenchment refers to policy decisions that will lead to more erosion or reduction of social welfare programs in the future. The state can do this by creating a political climate that will make future erosion of social welfare programs more acceptable.⁸⁶ The capping of “CAP” under Mulroney’s government and the introduction of CHST by the Chretien government are examples of systemic retrenchment. The capping of “CAP” signaled the federal government’s withdrawal from cost-sharing of social welfare programs with provinces especially Alberta, British Columbia and Ontario.⁸⁷ CHST was not only an indication of the total withdrawal of federal government from the social welfare programs, but also an indication that provinces need not commit to or extend social welfare in order to receive federal transfer money. At the provincial level, the changing of the political framework is illustrated by the way the Ontario government got away with the changes they made in the social assistance programs. The *Social Assistance Reform Act* enabled the cabinet to slash benefits, tighten the eligibility rules and introduce the lifetime ban without going through legislative review, public input, or appeal. The *Act* also enabled the Ontario government to rule through regulation rather than legislation.⁸⁸

Paul Pierson suggests that retrenchment is *unpopular*. Jeffrey Patterson, as quoted above, holds that retrenchment is done under disguise. I do not think that popularity or unpopularity is very important when it comes to social assistance programs. They were never regarded as equal in importance to the pension or health programs even during the expansion period because of the status of the recipients and the historical background of social assistance. This is why health care is considered as part of “Canadian identity,” while social assistance is a target or selective program. Popular or

⁸⁶ *Supra* note 14b, pp 15-7.

unpopular, it comes down to who the beneficiaries are of the program and how politically powerful they or their advocates are. It has nothing to do with whether or not the policy is popular or not. The increase of food banks in Ontario due to social assistance cuts, the slashing of welfare rates, and the lifetime banning of welfare recipients who commit welfare fraud were obviously unpopular, but since welfare recipients or the social assistance program are “sacrificial lambs,” politicians do not care about their views. The politicians also do not care the views of the social assistance beneficiaries because they are getting the backing of the majority—the middle class and some members of the working class—as Walter Korpi hypothesized. So the slashing of welfare rates and lifetime ban policy were not unpopular with those whose vote counts the most.

For this reason, I contend that Pierson’s categorization of retrenchment into programmatic and systemic does not give the whole picture, because, as explained above, retrenchment is epiphenomenal. Pierson describes programmatic retrenchment as the increase of spending cuts, the reduction of benefit rates, the significant increase of means-tested benefits and tightening of eligibility rules. On the other hand, he defines systemic retrenchment as the changing of the political landscape so as to make the welfare state vulnerable to more cuts in the future. This certainly tells us something about the current retrenchment of the Canadian welfare state but it does not tell why social assistance programs are more vulnerable to cuts and suspension than programs such as health care which benefit the majority, and why the legal, civil, political, human and social rights of welfare recipients are more likely to be infringed upon than those of other program recipients. In Ontario, social workers can visit randomly, with or without notice,

⁸⁷ *Supra* note 75, p 82.

the social assistance recipients' houses, and in certain situations can search without the recipients' permission. The recipients cannot object to the visitation because it is part of the eligibility rules.⁸⁹ The police cannot even enter the house of a criminal without a warrant except in an emergency. What is it that makes a social assistance recipient more dangerous than a criminal?

Certainly, it is not a crime to receive welfare, but this visitation is allowed because the current politics of social assistance are to intimidate and humiliate the recipients, who are seen as less worthy and as less human. So we cannot analyze retrenchment solely as the act of politicians and the political influence of the recipients and their advocates. I agree with Pierson that the power of influence is very critical in the retrenchment process. In other words, social welfare programs will only survive on the basis of the political power of the beneficiaries, but we cannot divorce this power from race, class, status and gender because these are embedded in the politics of the retrenchment.

To quote Fiona Williams, "It is women and Black people who are disproportionately represented amongst the poor, the low-paid and the unemployed."⁹⁰ Retrenchment is not only detrimental to the needs of these groups, but also further marginalizes them. Race and gender cannot be dissociated from class because the programs that promote the interests of women and racial minorities must also, in certain cases, promote the interests of the working class.⁹¹

⁸⁸ *Supra* note 33, pp110-129.

⁸⁹ *Supra* note 43, p 272.

⁹⁰ Williams, Fiona, Social Policy: A Critical Introduction: Issues of Race, Gender and Class. Cambridge, UK: Polity Press, 1989, p xvi.

⁹¹ *Ibid*.

The interconnection of these factors and the politics of welfare state retrenchment force us to analyze critically and try to understand the politics of retrenchment. We must realize that retrenchment is not uniformly exercised and does not evenly affect all social welfare programs. So we need to analyze and understand the history and the politics of each social welfare program separately. We must recognize that the politics of dismantling social assistance programs is completely different from the politics of dismantling employment insurance programs and so on. We must also recognize that social welfare programs hardly thrive in capitalist welfare states unless they benefit the rich and powerful; social programs such as pensions which benefit politically powerful beneficiaries are the least vulnerable to suspension or erosion. If we grasp this, then we will be able to understand why social assistance programs are always under attack and why politicians can win votes by making the elimination of social assistance programs a platform. Social policy is not and has never been value-neutral and retrenchment is no exception. Social policy always reflects the social, political and legal values of the state. Race, gender, class and status are ingrained in the politics of social assistance programs. The public backlash about welfare in Ontario in the 1990s was not only a backlash against the increase of welfare caseloads, but was also an expression of anger towards racial minorities, immigrants, teens and single mothers because of the perception that these groups were abusing and draining the welfare program.⁹²

The interconnection between race, class, gender, status and the politics of welfare state also leads us to question Esping-Anderson's division of the western welfare state into liberal, social democratic and conservative welfare regimes.⁹³ He classifies the Canadian and the American welfare states as liberal welfare states. Esping-Anderson's

⁹²*Supra* note 24, p 4.

typology is helpful to some extent, but any classification based only upon ideology gives a partial presentation of western welfare state history. Women, ethnic/racial groups and immigrants are not only the victims of retrenchment policy, but were also the victims of welfare state expansion because they were excluded especially from Canadian and American welfare states as the historical predicament of the Aboriginal peoples and African Americans which I mention shortly indicate. Minorities and immigrants are often denied access to social welfare programs deliberately and, if not excluded, are mistreated, or receive a “secondary stream of inadequate, more highly stigmatized, and closely administered and monitored forms of welfare provision.”⁹⁴ The treatment that illegal immigrants receive is completely different from the treatment that women, minorities and legal immigrants receive. Illegal immigrants are absolutely denied any access to welfare provisions such as social assistance.⁹⁵ Legal immigrants, though retaining some kind of access, have been perceived as lazy or as having come to this country just ‘to live off the hard work of others’ as was said in Ontario during the 1995 election period.⁹⁶

Esping-Anderson’s classification is also problematic because it neglects to take into account how the western welfare state is built on the misuse, abuse and exploitation of the cheap labour of women, minorities and immigrants. In the United States, when the New Deal was introduced in the 1930s, many social programs which were introduced were designed in a way that made it easier to exclude black agricultural and domestic labourers. Local governments were given complete autonomy for the administration of Old Age Assistance (OAS)⁹⁷ and often either denied the benefits to African-Americans or

⁹³ *Supra* note 35, pp 9-34.

⁹⁴ Olson, Gregg M. The Politics of the Welfare State: Canada, Sweden, and the United States. Don Mills, Ont.: Oxford University Press, 2002, p 83.

⁹⁵ *Ibid.*

⁹⁶ *Supra* note 24, p 4.

⁹⁷ *Supra* note 94, p 85.

provided them with low benefits. African-Americans were denied access to many social programs due to racism. Aboriginal peoples here in Canada also experienced similar racist practices. Aboriginal peoples were often denied access to Canadian social welfare programs.⁹⁸ The universal Family Allowance blocked Aboriginal peoples from receiving income transfers, for which every other Canadian was eligible. Instead, they were receiving “in-kind benefits.” In other words, because of their race they were denied the universal Family Allowance benefits for which every Canadian was eligible. Even though the conditions of Aboriginal peoples have improved somewhat they still remain “at the bottom of the system of stratification in Canada.” They still have higher rates of poverty, ill health, and unemployment and the lowest life expectancy rate in Canada.⁹⁹

My aim here is not to talk about the mistreatment that these groups suffered, but to suggest that since the exploitation and colonization of these minorities was part of the history of western welfare state expansion, the classification of the welfare state must take into consideration this history. Any typology of the welfare state must not only reflect the social history of the state but also reflect the quality and effectiveness of social welfare programs and must scrutinize each program individually. Such scrutiny will help us to determine if a state is qualified to be considered as welfare state. Second, such scrutiny requires us to re-examine the typology of the welfare state. Third and most importantly, it helps us to notice that the higher the class of the beneficiaries of social welfare programs, in terms of politics and economics, the less likely that the programs that benefit them will face a retrenchment. The reverse is also true.

The social assistance program is more concerned about humiliating recipients than liberating them or finding them a way out. One of the eligibility requirements for

⁹⁸ Ibid p 86.

assistance is that the recipient must show that s/he does not have any assets or income.¹⁰⁰ How can a recipient get off welfare if all his or her resources are gone and the benefits he or she receives are not covering his/her needs? Impoverishing people and putting them in a state of hopelessness and misery will not help them to get off welfare.

In Ontario, the 'employables' are required to participate in workfare as part of their eligibility requirement. Workfare programs offer the recipients training programs which are thought to give the recipients experience so that in due course they will find permanent, well-paying jobs. How can training programs lead to permanent jobs when college and university graduates can barely find jobs? Secondly, employers are unlikely to hire someone who has graduated from training when they could find someone more educated and experienced. I am not suggesting that people have to be left to live on welfare, but that there should be a better approach; better than impoverishment or leaving them in despair. Social assistance programs must liberate and give alternatives to the recipients. Harassing them or forcing them to 'get a job' when there are no jobs or when they do not have enough qualifications or means is not the way to make people get off welfare. The majority of social welfare recipients are not pleased to live on crumbs.

Spreading the blame, especially under federalism, is much more important than the unpopularity or blame avoidance tactics.¹⁰¹ The Ontario Conservative government's massive cuts to social assistance, the introduction of workfare and the lifetime ban obviously were not popular, and the politicians were aware that they might eventually face a massive electoral backlash, but they were successful in shifting the blame to the federal government because of its unilateral withdrawal from contributions to social welfare programs. They also exploited the public backlash against the welfare system and

⁹⁹ Ibid.

presented these new policies not as cuts, but as reform and restructuring of services in order to make them more accessible and target those who need them the most.

The policy of 'divide and conquer' is also used here because the politicians could not have implemented these enormous cutbacks, had they not known that they could evade political repercussions from both the business community and middle class. For this reason, Pierson's resilience theory is less persuasive.¹⁰² The theory claims that politicians always avoid introducing major cutbacks because they are afraid of electoral backlash, and that consequently, the welfare state enjoys legitimacy. The idea that the resilience of the welfare state, especially the American or Canadian welfare states, depends on the fears of the politicians is not borne out by recent experience.

Selectivity, which is a major factor of the retrenchment to take place, was justified, as is the only way to reduce the increasing deficit and to continue with some remnant of the social programs dating from the 1960s. This policy has many shortcomings. First, it undermines social solidarity in that it pits recipients against non-recipients. This means that both the programs and recipients will be easy targets of both the politicians and the public. Services will be targeted because they are not benefiting the majority, and, since the majority is against the service and the recipients do not have the political power to defend their programs, it will make very easy to either suspend entire programs¹⁰³ or for the government to introduce irrational regulations such as the lifetime ban and the reduction of benefits. Secondly, it attaches a stigma to benefits so the recipients will be singled out and stereotyped as a burden. Thirdly, it assumes that no

¹⁰⁰ *Supra* note 33, pp106-107.

¹⁰¹ *Supra* note 14a, pp 145-155.

¹⁰² Clayton, Richard and Jonas Pontusson, "Welfare State Retrenchment Revisited" (October 1998) 51 *World Politics* 67 at 69.

¹⁰³ Ecumenical Council for Economic Justice, Reweaving Canada's Social Programs. Toronto: Ecumenical Coalition for Economic Justice, 1993, pp 12-13.

social welfare program is protected from cutbacks even though some will be affected more than others due to the political power of the recipients. Finally, it opens the door to the overhaul, erosion, privatization, or implementation of user fees in the name of reducing debt while making social welfare programs less accessible to those who need them the most.

Universality is the only way the capitalist welfare state can reduce class conflict, remove inequalities and improve the quality of life of its members. The goal of the welfare state is not to produce equality, but to minimize or remove factors that make inequality flourish. There will always be inequality, but legalized inequality, which is created by selectivity, must be eliminated. Universality is the opposite of providing selective services to a specific group because the latter will stigmatize the group, alienate the majority, and in the long run, lead to erosion of the services. The American 'War on Poverty' failed because it targeted a specific group without the approval of the majority. But this 'war' failed, not just because the majority did not support it, but also because selectivity is ineffective.¹⁰⁴ It is ineffective in the sense that it reduces neither inequality nor poverty. The evidence shows that universality is more likely to promote equality, and reduce poverty and stigmatization. The poverty rate of single-parent families in Sweden, a country with a universal social welfare system, is 5.5%, compared to 53.3% in the United States and, 48.4% in Canada. In contrast, the United States, which employs a highly selective social welfare system, has the highest degree of poverty and inequality among the industrialized nations.¹⁰⁵

Universality, in the sense of extending welfare benefits as a right so as to reduce inequality and poverty, remove stigmatization and empower the recipients, is the only

¹⁰⁴Titmuss, Richard M. Commitment to Welfare. London: George Allen and Unwin Ltd, 1968, pp 113-4.

way that the welfare state can maintain legitimacy and it is the only way for it to “provide a framework of values and opportunity bases within and around which can be developed acceptable selective services provided, as social rights, on the criteria of the *needs* of specific categories, groups and territorial areas and not dependent on *individual tests of means*?”¹⁰⁶ But, as Titmuss suggests, this does not mean that universality alone would remove social problems. It is an essential ingredient in the mitigation of social and economic inequalities, but there must be a combination of both selectivity and universality. Universality acknowledges that there must be some selective services because not all members of society have the same needs. Some may need assistance while some do not. But selective services are extended on the basis of social rights, not on the basis on means-testing or income testing. Social rights, which will be discussed in detail in the next chapter, mean, in this context, the state’s obligation to provide the basic minimum to those in need. This is the only way to eliminate stigma, achieve inclusion, and obtain the support of the majority.¹⁰⁷

The mixture of universality and selectivity serves the best interests of both the minority and the majority, but especially the majority because selectivity alone always leads to the gradual dismantling of universal social programs. The cuts and the gradual introduction of privatization in universal health care is the best indication of this. Health care is no longer immune from cutbacks. In 1984, the federal share of health care costs was 33%; by 1995, it went down to 21%, and kept going down under CHST. Patients are now expected to pay for some services “such as medical examinations for insurance purposes.” Prescription drug coverage for social assistance recipients has been replaced

¹⁰⁵ *Supra* note 103, p 12.

¹⁰⁶ *Supra* note 104, p 122. Italics are Titmuss’s.

¹⁰⁷ *Ibid* pp 196-197.

by co-payments and deductibles methods.¹⁰⁸ Health care is becoming selective, as one can see from the language of the politicians. According to Chretien, health care “was never meant to cover anything but major surgery.”¹⁰⁹ Such perceptions set the stage for the shift to selectivity.

Obviously, the impact of a reduction of social assistance benefits upon a recipient will be different than the impact of the suspension of Family Allowance benefits upon a rich person because often the social assistance benefit is the only source for survival. Yet the protection of one depends on the survival of the other.

Retrenchment policy is often blamed on economic crisis, a political shift to the Right, increases in social expenditure, and the lack of political power on the part of labour.¹¹⁰ I cannot accept this hypothesis because it assumes that, since these factors were behind the welfare state expansion, their failure must cause retrenchment. I argued earlier that retrenchment is not the reverse of expansion. If retrenchment occurred because of economic crisis, some of the programs which were cut should have been reinstated after the crisis. Second, if the social welfare programs were slashed because of a political shift to the Right, the programs would have been restored after the Right lost power. In fact, sometimes social welfare programs are eroded more when the Right is out of office. Social welfare programs have been cut more drastically under Jean Chretien’s government than under that of Brian Mulroney. The same was true under Bill Clinton’s government compared to that of George Bush the Elder.

Retrenchment is not considered too much of a problem unless it affects the social programs which benefit the middle class. Paul Pierson says that, in the 1980s, the American welfare state did not experience much retrenchment even though it was the

¹⁰⁸ *Supra* note 75, pp 84-85.

best candidate for such measures because all the aforementioned factors of retrenchment existed. He observes that when Ronald Reagan, a right-wing president, came to power, there was an economic crisis and no Left worth mentioning. The American welfare state was also the best candidate for cuts because it was not well entrenched to begin with. It did not have public support. There was no strong political opposition because the Republicans were in control of both the White House and the Senate. All these factors would have made possible a major dismantling of the American welfare state, but it was left intact because of the resilience of the welfare state and the unpopularity of retrenchment.

The American welfare state did not experience any major dismantling, Pierson argues, because “popular support for retrenchment dissipated rapidly. The Reagan assault petered out in 1982, when further budget cuts were overwhelmingly rejected [...] middle class programs also weathered out the storm.”¹¹¹ He assumes that retrenchment became unpopular because it lacked any bi-partisan support. But he fails to consider a major dismantling when the Reagan administration in its first year in office passed, with bi-partisan support, huge cuts in social programs, especially those affecting the poor: Aid to Families with Dependent Children (AFDC), unemployment insurance and low-income housing. Pierson contends that some programs for the poor such as food stamps, Medicaid, and the earned income tax credit for poor working families saw some improvement in Reagan’s second term.

The incremental improvement of the programs for the poor in Reagan’s second term is questionable according to Jens Alber.¹¹² He asserts that the maximum food stamp

¹⁰⁹ *Supra* note 11, p 64.

¹¹⁰ *Supra* note 14.

¹¹¹ *Supra* note 14a, pp 164-165.

¹¹² Cited in Richard Clayton and Jonas Pontusson’s article, note 102, p 86.

benefit did not increase and even fell in relation to earnings during the Reagan and Bush years. Alber also argues that the percentage of poor households receiving AFDC benefits fell steeply in the early 1980s, and “never regained its previous levels, while the maximum benefit for such a family of three fell from 67% to 36% of the poverty level.” The Clinton era was not much different. The Welfare Reform Bill which Clinton signed in 1996 cut food stamp benefits by \$24 billion, denied immigrants eligibility for food stamps, restricted social security eligibility for disabled immigrants and children, and cut federal funding for social services and child nutrition programs. The bill replaced AFDC “with block grants to the states, with no minimum requirements pertaining to either eligibility or benefit levels, but mandating a five-year lifetime limit on receipt of benefits and requiring 50 percent of each state’s caseload to be working for benefits by 2002.” Despite economic growth during Clinton period this bill had an enormous negative impact on the recipients. The Urban Institute estimated that the bill would “result in some income loss for 11 millions families, and move 2.6 million people, including 1.1 million children, into poverty.”¹¹³ Retrenchment ceased to be unpopular when it came to programs for the poor.

The fact that the means-tested programs are subjected to a higher rate of cuts than those social programs which benefit the middle class must suggest that the American welfare state experienced a major retrenchment. But this is not anything new because, throughout the history of welfare, means-tested programs have never enjoyed the same protection as programs which benefit the middle class. This fact obliges us to change the way we think about retrenchment. The yardstick for measuring the retrenchment should be the magnitude of the dismantling, not the affected beneficiaries or the role of the

¹¹³ Edelman, Peter, “The Worst Thing Bill Clinton Has Done,” *Atlantic Monthly* (March 1997), P 46, cited

politicians. The conclusion that retrenchment is unpopular because it did not affect the programs which benefit the majority is inadequate, because retrenchment must be assessed by its magnitude and effects, not whether it affected the majority.

The slashing of social welfare programs was done in the name of deficit reduction, but there is no evidence that such cuts help the deficit. Deficit increase in Canada was caused by decreases in government revenue, the effects of high interest rates, and tight monetary policy that slowed down economic growth and led to higher levels of unemployment.¹¹⁴ This lack of evidence that social welfare spending causes deficit increase did not diminish the federal government's obsession with withdrawing social welfare programs. The programs witnessed the first major cuts in the 1990s when the Mulroney government for the first time put some restrictions on CAP. These restrictions, which limited the federal government's contribution to the social welfare programs, had a serious impact upon such programs in Alberta, British Columbia and Ontario. These three provinces would no longer receive any major assistance from the federal government because they were responsible for the five percent increase in welfare expenditure over the previous year.¹¹⁵ Evans found that Ontario, which was experiencing high social assistance expenditures due to the recession in the 1990s, was hit the hardest. In 1992-1993, Ontario received only 28 cents of every dollar spent on social assistance and needs-based programs instead of receiving 50% of the cost as it did formerly.

Chretien's Liberal government continued the practice of slashing social welfare programs when it introduced the Canada Health and Social Transfer (CHST) in 1995.

in Richard Clayton and Jonas Pontusson's article note 102, p 87.

¹¹⁴ Maslove, A. and K. Moore "From red books to blue books: Repairing Ottawa's fiscal house." In G. Swimmer, ed., *How Ottawa Spends 1997-1998: Seeing Red: A Liberal Report Card*. Ottawa: Carleton University Press, pp23-49 cited in Patricia M. Evans, "Downloading The Welfare State, Canadian Style" in Gertrude Schaffner Goldberg and Marguerite G. Rosenthal *Diminishing Welfare: a Cross-national study of social Provision*. Westport, Conn.: Auburn House, 2002, p 75-102.

This does not mean that the social welfare programs experienced no cuts before CHST.

Social spending was decreasing during the last years of CAP, but it was further diminished by the introduction of the CHST. “In 1995, the federal government’s contribution to the social spending decreased by 1 percent from the previous year, but the social spending decreased 23% in the first year of CHST alone” and continued to decline. By considering “the effects of population growth and inflation, the overall per capita federal transfer for social programs decreased by 40% between 1993-1997, with the deepest cuts occurring under the CHST. Even with the increases announced in the 1999 budget, the value of the cash transfers remained below pre-1995 levels.”¹¹⁶

Under the CHST, the provinces receive a single transfer of a fixed amount of financial support through cash payment and tax points. This fixed transfer is supposed to cover expenditures on health care, post-secondary education and welfare. Under CAP, post-secondary education was funded under Established Programs Financing (EPF). It is now up to the discretion of the provinces to decide which programs mentioned above to spend it on because the transfer payment will always remain fixed regardless of the changing requirements of social welfare programs.¹¹⁷ Social assistance is no longer a right of “the provision of adequate assistance to persons in need”¹¹⁸ but as a discretionary expenditure. Since the provinces lack the financial capability to sustain these programs without federal involvement, and since the federal government no longer has to maintain its contribution to the social welfare programs, the implication is that provinces can reduce benefits, tighten the eligibility conditions, or permanently suspend welfare. Neither level of government considers social assistance programs to be human and

¹¹⁵ *Supra* note 75, p 82.

¹¹⁶ *Ibid* p 83.

¹¹⁷ Rice, James J. “Redesigning Welfare: The Abandonment of a National Commitment” in Susan D. Philips, ed., *How Ottawa Spends 1995-96: Mid-Life Crises*. Ottawa: Carleton University Press, p186.

constitutional rights. This is why the Ontario government could place under house-arrest and withhold benefits from Kimberly Rogers, who did not have any income to pay for her medication, rent or daily expenses. It was also known that she was not expecting any financial assistance from the father of her unborn child or her family. The discretionary factor also means that there is no requirement for the provinces to extend the benefits at all; nor are there any standards for the benefits. Each province will provide whatever rate it deems reasonable. The only thing the provinces are required to do in order to receive the fixed transfer payment is provide social assistance without a residence requirement.

Social assistance programs bore the brunt of this mean-spirited obsession with deficit reduction at any price. Under CHST, according to Evans, the goal of social assistance is no longer the prevention and removal of causes of poverty, nor is there any recognition of collective responsibility for forces beyond the individual's control which may cause them to seek help. Indeed, the provinces are no longer required to spend on social assistance because, as Evans suggests, the amount of the federal transfer payment remains the same regardless of whether they spend too much or too little. In fact, the provinces are expected and even encouraged to spend less on social welfare programs, which they regard as less popular, and spend more on the programs, which are presumed to be more popular with voters, such as health care. Therefore, conditions under CAP are no longer upheld. Benefits are not provided on the basis of need, but by meeting certain eligibility requirements such as participating in workfare. It is up to the provinces to decide not only who is eligible, but also whose benefits are being continued or suspended. If benefits are suspended, it is very difficult for a recipient to appeal the

¹¹⁸ *Supra* note 74, p 9.

decision. CHST does not deny the recipient the right to appeal, but the provinces exercise every possible mechanism to make the appeal process less available or inaccessible to the recipient.¹¹⁹

The CHST and lifetime ban are both the result of retrenchment policy. It is obvious how CHST is the outcome of retrenchment, but it may not be clear how lifetime ban is also an outcome of retrenchment. I pointed out that, under CHST, the goal of social assistance is no longer the prevention or removal of causes of poverty, and provinces are not even required spend on social assistance because of the amount of the federal transfer payment remains the same regardless of whether they spend too much or too little.

The lifetime ban is the byproduct of retrenchment policy because under CHST the provinces can do to social assistance programs and their beneficiaries whatever they want. Although the CHST and lifetime ban do not signify the collapse of social welfare in Canada, they do raise questions about the future of the welfare state. But, before discussing the future of the welfare state, I must first examine the significance and role of benefits in the welfare state. So far in the discussion, I have depicted the welfare state as providing benefits whenever the economic climate is favourable, and taking them away when the situation worsens. In the next chapter, the significance of the benefits will be examined. In order to do this, I want to analyze whether the benefits are provided as a privilege or claimed as a right. Can they be suspended permanently?

¹¹⁹ *Supra* note 75, p 88.

As justice dependeth on antecedent covenant; so does GRATITUDE depend on antecedent grace; that is to say, antecedent free gift... the breach of this law, is called ingratitude; and hath the same relation to grace, that injustice hath to obligation by covenant.

THOMAS HOBBES (Leviathan 1947 p 99)

Chapter Three

Lifetime Ban as Social Rights Issue

Introduction

Social welfare benefits are a right because they are the extension of citizenship rights, which T. H. Marshall identified more than half a century ago.¹²⁰ Today, the most important rights that a citizen has in a capitalist welfare state are social rights because they enable one to enjoy or exercise, to some extent, civil or political rights. Not all citizens can exercise their political and civil rights; only those of a certain status are able to do so.

According to the civil element of citizenship, all citizens have the right to equal treatment before the law. These include the right to fair representation and the right to due process. These rights are meaningless unless the social element of the citizenship is being guaranteed. The provision of the basic minimum, which is what social rights guarantee, may not be sufficient to ensure that the individual receives equal treatment before the law or can exercise civil and political rights as an equal to someone with more

¹²⁰ Marshall, T. H., "Citizenship and Social Class," in T. H. Marshall, *Class, Citizenship, and Social Development: Essays by T. H. Marshall*, with an introduction by Seymour Martin Lipset. Garden City, NY: Doubleday, 1964, pp 71-134.

than basic minimum. Nevertheless, the guarantee of social rights will at least enable the individual to take a step in the direction of exercising civil and political rights. Finally, and most importantly, the guarantee of social rights is the only way that citizens can be protected from the pitfalls of the market, as Marshall says.

But what kind of right are social rights? Or put another way, can there be social rights which, as Joao Carlos Espada asks, are simultaneously *in rem*, positive claim-rights, and enforceable in a way compatible with traditional civil and political rights? The answers to these questions will be discussed in this chapter. I will also argue in this chapter that the lifetime ban legislation infringes the right to welfare and thus, basic social rights.

Right to welfare

One of the greatest challenges that the capitalist welfare state faces particularly in this period of retrenchment is to implement social policies that legitimize its tripartite structure of capitalism, democracy and welfare¹²¹. Social policies, according to Flora, must advance democratic mass mobility, interfere with the market as little as possible, and create social welfare programs on the basis of social rights. For such a tripartite structure to survive, the capitalist welfare state must adopt social policies which guarantee the individual or community not to fall below that commonly accepted floor, and promote and protect the individual or community from individual or market aggression.¹²² The lifetime ban legislation delegitimizes the capitalist welfare state by violating the social rights of the citizen in that it neither protects nor promotes the welfare of the individual or community. A capitalist welfare state cannot adopt any social policy

¹²¹ *Supra* note 50, pp 12-16.

¹²² *Supra* note 48, pp 284-88.

which delegitimizes its tripartite structure and deprives the individual or community the right to maintain the standard of life.

Social welfare benefits are a right because they are the extension of citizenship rights, which T. H. Marshall identified long ago.¹²³ I argue that, today, the most important rights that a citizen could have in a capitalist welfare state are social rights, because they enable the citizen to enjoy or exercise to some extent other rights, be they civil or political rights. According to the civil element of citizenship, the citizen has the right to equal treatment before the law. This includes the right to fair representation and right to due process. I submit that these rights will be meaningless unless the social element of the citizenship is being guaranteed. Of course, the basic minimum will not be enough to enable the individual to receive equal treatment before the law or take advantage of the civil and political rights equally as those who have more than basic minimum, but I am only proposing that the guarantee of social rights will at least enable the individual to somewhat exercise civil and political rights. Finally, and most importantly, the guarantee of social rights is the only way that citizens could be protected from the pitfalls of the market.

The assurance of social rights is needed in this period of retrenchment more than ever before because of the increased number of victims of social welfare dismantling and the expansion of the gap between the haves and have-nots in the society. Social rights are required not only to minimize this gap but also, as Marshall suggests, to enable these members of the society to live according to "the standards prevailing in the society."¹²⁴

It is noteworthy that when Marshall was talking about the right to a guaranteed standard of living, it was during the early days of the welfare state, where expansion was

¹²³ *Supra* note 120, pp 71-134.

thought to be the only way to eliminate social problems. If expansion and extension—the practice of providing benefits with less strict eligibility rules—were the only feasible ways to combat social problems in that period, then these methods are still needed today rather than policies which create more deprivation, such as the lifetime ban. The *Ontario Works Act* in general and the lifetime ban in particular will not only create more social problems, but will also deny thousands a tenable standard of living. A decent standard of living means a lifestyle that does not go below the imaginative standard which the society or community considers untenable. Social welfare extension, not a lifetime ban, is needed in order to fulfill citizenship rights, and for the capitalist welfare state to maintain the legitimacy of its tripartite structure. This legitimacy cannot be upheld when social policies victimize certain groups of society such as women, the disabled, and economic and racial minorities.

Critics of the welfare state argue that extending or sustaining social welfare programs is impossible because these programs increase the financial deficit of the government.¹²⁵ There is no evidence to show that these programs cause any deficit increase. But one thing needs to be mentioned here: not all social welfare programs cost the same. Social assistance programs certainly cost less than health care or pensions. I base my assertion on the number of beneficiaries and the different reception these programs receive. The number of social assistance recipients is much lower than the number of beneficiaries of health care and pension. Also, as mentioned above, health care is considered as part of the “Canadian Identity” while social assistance is considered as a burden. The new social welfare policies also support my assertion. Under CHST, it is clear that both levels of government are no longer committed on social assistance. The

¹²⁴ Ibid p 78.

same is not true on both health care and pensions. So the question becomes: “Why do social assistance programs and the recipients get such negative attention?”

I will return to this question, though I mentioned some of the reasons above. For now, I want to deal with another question. If social assistance benefits are severely reduced or even suspended permanently, as they are now, does this still satisfy the social element in the citizenship? I argue that the current benefits in general and the permanent suspension of the benefits in particular infringe upon the social element in the citizenship because they fail to cover the individual’s basic needs. Marshall has suggested that the benefits must allow the recipient to maintain a standard of living. Furthermore, according to Esping-Anderson, the benefits must enable recipients to survive without reliance on the market. Insufficient benefits and permanent suspension of them certainly do threaten social citizenship rights.

Before I make this assertion however, I need to discuss another old question, which will either support or oppose my assertion that insufficient or permanent suspension of benefits violates the social citizenship rights. The question is: are welfare benefits claimed as a matter of right or provided by society as a matter of charity? The answer is critical to this discussion. It may well be that social assistance is under erosion or suspension because it is not perceived as a right. From that point of view, permanent suspension is merely withdrawing charity from someone deemed undeserving. Charity is not a right, and charity does not impose obligation.

Lawrence M. Mead suggests that the recipients cannot claim assistance as a matter of right because the benefits being provided are charity.¹²⁵ I maintain that the

¹²⁵ *Supra* note 11, pp 61-2.

¹²⁶ Mead, Lawrence M. “Citizenship and Social Policy: T.H. Marshall and Poverty” in Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul, *The Welfare State*. New York: Cambridge University Press, 1997, p 203.

social welfare benefits are a right. But what kind of right? To answer this question, I will first discuss rights. I will not go into depth because this area is huge and beyond the scope of this discussion. I then move to the issues surrounding the right to welfare. For this discussion, I will present two different perspectives on the case of right to welfare. These two perspectives will address whether the right to welfare or the concept of social citizenship rights can have the same weight as traditional civil and political rights. In other words, does the right to welfare impose an obligation on the state to provide it, in the same way as the traditional rights impose obligations upon the state?

The right to welfare is certainly different from the right to charity because a right is not synonymous with a gift. Charity is discretionary, but a right is not. Rights not only guarantee that one can do something, but also may require that one refrain from doing something, so as not to infringe upon the rights of others. Rights require enforcement. On the other hand, discretion does not assert that anybody has a right to anything; nor does it prevent anyone from doing anything. Discretion is left up to personal judgement and choice. If someone is bleeding to death in public, nobody is required to help this person. If people do not help, they are not in violation of the law. They maybe in violation of their moral duty, but that does not constitute an infringement of a rule, because helping a bleeding person is a matter of discretion. On the hand, the individual has the right not to be violated; that is, his or her right to be free from trespass. So where does the right to welfare fit, if it exists at all?

The right to welfare is a claim-right. According to Joao Carlos Espada, claim rights are always divided according to the duties that they impose. There are divisions between *in personam* and *in rem* rights; between *positive* and *negative* rights; and

between *active* and *passive* negative rights.¹²⁷ *In personam* and *in rem* differ as to upon whom they impose corresponding duties. *In personam* refers the specific duties of certain individuals, such as the obligations of the landlord to the tenant. On the other hand, *in rem* demands restraint of others from the right-holder, such as a property owner. *Passive* and *negative* rights differ in relation to the duties they impose, which can be either negative or positive. Negative rights require refraining from doing something, while positive rights give permission to do something. The landlord has the right to expect that the tenant has a positive duty to pay rent. *In rem*, requires others to refrain from doing something, such as not trespassing upon someone else's property. Such a right is a negative right. Espada, quoting Joel Feinberg, suggests that there are certain situations where *in personam* rights could become negative rights, and *in rem* could become positive rights. This is very important to this discussion because I argue that the right to welfare or the right to basic minimum can be *in rem*, positive right. Espada, as I will discuss shortly, would disagree with my assertion, not on the *rem* side of this right, but with regard to the positive duty that it entails. He would argue that the right to basic minimum or social rights does not entail a positive dimension.

Finally, negative rights can be divided into *passive* or *active* rights. This division according to Espada refers "only to the action of the right-holder, not the duty that the right may impose." In both cases, however, this right imposes negative duty. Feinberg, quoted by Espada, asserts that "active rights are rights to act or not act as one chooses; passive rights are rights not to be done to others in certain ways."¹²⁸ Active rights are part

¹²⁷ Espada, Joao Carlos. Social Citizenship Rights: A Critique of F.A. Hayek and Raymond Plant. Houndmills, Basingstoke: Macmillan; New York, N.Y.: St. Martin's Press in association with St. Anthony College, Oxford, 1996, pp 8-9. Italics are Espada's.

¹²⁸ Ibid p 8.

of the ‘right to liberty,’ such as the right to free assembly, freedom of the press and so on. Passive rights are part of ‘the right to security,’ such as one’s right against interference.

From this classification, we can suggest that social rights belong to “*in rem*; positive claim rights.”¹²⁹ Social rights are not discretionary because, according to Espada, they impose upon others the duty to provide goods to which the right-holder is perceived as being entitled. This duty is not “a negative but positive, because it requires others to do something in this situation to provide goods and services, or access to goods and services; therefore social rights are positive rights. Social rights are also *in rem* because they do not impose upon specific individuals the duty to provide, but demand that others make contributions to the right-holder.”¹³⁰ So, as Espada points out, the right to welfare and social rights in general have the features of *in rem* positive claim-rights.

An important question arises, though, (a question to which the rest of this thesis is devoted): “Whether or not there can be social rights that can be simultaneously *in rem*, positive claim-rights, and whether or not their enforcement is compatible with traditional civil and political rights.”¹³¹

Espada argues that social rights cannot be simultaneously *in rem*, positive claim-rights and that their enforcement is incompatible with the traditional rights because positive claim-rights or social rights will engender a common or positive pattern of distribution and this is incompatible with the traditional rights. Social rights which are compatible with the traditional rights must be, according to Espada, *in rem*, negative claim-rights.

¹²⁹ Ibid p 9

¹³⁰ Ibid p 9

¹³¹ Ibid p 9.

I will argue that social rights, just like the traditional rights, can be simultaneously *in rem*, positive rights and that their enforcement is compatible with traditional rights. A right not only contains the concept of the freedom to do something or refrain from doing something, but it also entails the freedom to have the means or resources necessary to enjoy this right, and, further, involves the idea of enforcement; otherwise the right is meaningless. The right to vote, a traditional political right, is a negative right, but it also has a positive element. Raymond Plant and others concur with my assertion, as I will demonstrate. The state has not only the duty to refrain from preventing the individual from exercising this right, but it also must provide the individual the means to enable him/her to enjoy the right, such as security. So, if the traditional rights can be both negative and positive and still enforceable, I do not see how and why Espada can reject the positive dimension of social rights, but not the positive element of traditional rights. But before I present my case for social rights, let me first present Espada's case as to why social rights cannot be simultaneously *in rem*, positive rights and why their enforcement is supposedly incompatible with traditional rights.

Espada contends that the only distribution that the concept of social right entails is the minimum that nobody should be deprived of, because this minimum is indispensable for the exercise of other rights. Society must, therefore, provide this minimum to anyone who is in need. Based on this sound interpretation, he contends, the concept of social right refers to "only a residual or negative criterion about those situations that cannot be accepted, or that common floor below which nobody should fear to fall, it cannot and should not be perceived as a common or positive pattern of distribution or social justice."¹³²

¹³² Ibid p 180.

Espada asserts that social rights do not impose any common pattern of distribution. Actually, the concept of social right and common pattern of distribution are two contradictory issues. A social right, he claims, is a negative basic pattern of distribution, while a common pattern of distribution is a positive pattern distribution where an individual or organization will decide what everybody ought to have.¹³³ Under the negative pattern of distribution, society is required only to provide to those who are in need or denied access to the minimum. This demands that society correct market outcomes, even if these outcomes were not intended or foreseen. Correcting the unjust outcomes, however, he submits, does not entail a positive pattern of distribution according to need. It only entails a negative pattern of distribution based on the minimum.¹³⁴

Society has a duty to provide the minimum, but this duty ceases, Espada argues, whenever the basic need is satisfied. How much would satisfy? How to provide the minimum? He claims that it is not the job of social rights theory to decide.¹³⁵ These questions should be left up to the specific society because only the economic power of a given society can determine the amount it can provide in order to satisfy the minimum. But the amount provided must satisfy the basic need. Espada summarizes his position about the social rights in the following passage in which he quotes from Ralf Dahrendorf:

Citizenship rights are entry tickets, opportunities of access, demolishers of barriers, guarantees of inclusion in a world of liberty and, thus, of unequal conditions. The goal of citizenship rights is not to promote equality, but to promote opportunity, not to avoid inequality but to avoid exclusion from the world of opportunities. Because people are free and equal as citizens, they can be free and unequal as individuals.¹³⁶

¹³³ Ibid pp 122-139.

¹³⁴ Ibid p 137.

¹³⁵ Ibid pp 186-7.

¹³⁶ Ibid p 195.

I contend that social rights, like the traditional rights, have a positive dimension. Espada himself admits this, but he claims that the social rights can only have a positive dimension or entail a common pattern of distribution in limited situations. He asserts, “We do not care about how basic goods are generally distributed, unless in those particular cases in which some people do not have what we consider to be a minimum of basic goods that we believe no one should be deprived of. In these cases, and in these cases only, we will provide for those people’s basic needs.”¹³⁷ I agree that it is not our concern of how the basic minimum should be distributed. But I do not think, extrapolating from this passage, that he can deny the positive dimension of the basic minimum. He admits that the only time that there is a positive pattern of distribution is where there is need, so why is this different from the provision of the basic minimum? In other words, doesn’t this show that the basic minimum has a positive dimension?

Those who need the basic minimum also experience special circumstances yet only request the satisfaction of the minimum. Espada says that even though the implication is there, we should not conclude that the basic minimum imposes a positive pattern of distribution because we are concerned only with particular cases. So he claims the provision of basic minimum except “in these cases” is a negative pattern and the confusion is a “game of words.”¹³⁸ I do not think this is a “game of words,” but rather a manipulation of words revealing his difficulty in accepting the existence of the positive dimension of the basic minimum.

Since we acknowledge the existence of the right to welfare or the right to the provision of basic minimum, and Espada does acknowledge it, we must also acknowledge that this right imposes a positive pattern of distribution in all cases, not in

¹³⁷ Ibid p 127.

limited cases. It is also enforceable because we are asking somebody or some organization—the government, in this case—to provide to those in need. This is exactly what Espada asserts, though he rejects the positive dimension of social rights except in limited cases, in this passage where he quotes from Friedrich A. Hayek:

There is no reason why in a free society government should not assure to all *protection against severe deprivation* in the form of an assured minimum income, or floor below which nobody need descend. To enter into such an *insurance against extreme misfortune* may well be in the interest of all; or it may be felt to be a clear moral duty of all *to assist*, within the organized community, *those who cannot help themselves*.¹³⁹

Espada supposes that neither the theory of social rights nor the constitution is equipped to answer or define what constitutes level of the basic minimum which satisfies the basic need. He argues that the answer should be left to political debate because the amount provided depends on the economic situation of a given society, and because those in politics, rather than the theorists of social rights or the constitution, are better equipped to determine the amount of basic minimum at a specific suitable for the society's circumstances. I agree this is good logic, but does the determination of this issue fall to the politicians as a matter of duty or as one of goodwill? I argue that the government will resolve this issue as a matter of duty, and since it is the elected officials' duty to decide what constitutes the basic minimum, it is also their duty to provide it. (Espada acknowledges that it is the duty of the government to provide to those in need.) Since there is a duty to provide, this must entail a positive pattern of distribution; consequently, I do not see how Espada can conclude that there is no positive dimension to social justice.

In another instance, Espada contends that the aim of the provision of basic minimum is not to replace the market by a common pattern of distribution but only to

¹³⁸ Ibid p 127.

¹³⁹ Ibid p 125 Italics are Espada's

provide an entry ticket to the market. It must be obvious from this, then, that someone or some organization—the government in this case—has the duty to provide the individual with this entry ticket or opportunity. This cannot be a negative pattern of distribution because, in a negative pattern of distribution, nobody has a duty to decide what others have to have. In this scenario, it is the government who will decide what others will have so this must be a positive pattern of distribution. Secondly, if the government has this duty to intervene, this must show that it is intervening as a response to social injustices that some individuals have experienced by way of exclusion or denial of opportunity. Once again, this kind of intervention entails a positive pattern of distribution or social justice, which contravenes Espada's conclusion.

Espada argues that “market results should not be ordered according to any common pattern of distribution.”¹⁴⁰ In other words, correcting market results does not entail a positive pattern of distribution. His assertion shows his lack of comprehension of the relationship between market results and social rights, and the market results and positive pattern of distribution. I will discuss the relationship between market results and social rights in detail in Chapter 5. Market results must be replaced so long as they are producing or contributing to social injustices or depriving people of basic social rights or if there is a fear that the individual or community may fall below the common floor below which nobody should fall. Espada himself admits that there are instances where the market can be the source of injustices and the government has a duty not only to provide opportunities to those who are denied the opportunities to enter the market due to lack of opportunities, injustices or inequalities, but also to protect the individuals from such ordeals. I proclaim, as Marshall pointed out above, that the protection of the individual or

¹⁴⁰ Ibid p 186.

community from market pitfalls or social injustices, the removal of inequalities and the provision of opportunities to the individual or community to maintain livelihood outside the market, as Esping-Anderson suggested above,¹⁴¹ entail a positive pattern of distribution.

Espada's main argument as to why social rights cannot be simultaneously *in rem*, positive claim-rights, and why their enforcement is incompatible with traditional civil and political rights is that social rights involve resources and a decision of somebody to determine what others are to have. I do not see "why this argument does not apply equally to civil and political rights."¹⁴² Enforcement of the traditional rights not only entails costs and resources, but also involves a decision by somebody as to how much resources should be allocated for their enforcement. "If it is that rights, unlike other claims, have to be *enforceable* then there has to be an enforcement mechanism and therefore, the costs of enforceability are intrinsic to all sorts of rights, not just social ones."¹⁴³ The chief of the police determines how many police officers should be allocated or deployed to any specific incident.¹⁴⁴ Similarly, in the justice system, somebody will decide how many judges should be allotted to any specific jurisdiction.

I acknowledge that resources are not intrinsic to all rights in the same way because the scarcity of resources has more effect upon social rights than upon civil and political rights. It is more likely that many people will starve if there are few social benefits than it is that many people will commit crimes because there are not enough judges. But still, this is not a sound reason to deny the positive dimension of social rights because one cannot reject the positive dimension of civil and political rights on the

¹⁴¹ *Supra* note 35, pp 21-2.

¹⁴² Plant, Raymond, "Citizenship, Rights and Welfare" in Anna Coote, *The Welfare of Citizens Developing New Social Rights*. London: Oram Press, 1992, p 21.

¹⁴³ *Ibid* p 21. *Italic* is Plant's.

grounds that there are not enough resources for their enforcement. The individual will maintain his/her positive right of protection of his/her property from an unlawful intruder whether or not there is enough police force to enforce this right or not. Raymond Plant puts this point more succinctly:

If one believes that there is a right to the protection and enforceability of rights (and how would they be rights otherwise?) then one cannot draw a sharp distinction between one set of rights and another by arguing that one set intrinsically involves costs and thus the commitment of scarce resources, while the other does not. If we have a right to enforceable civil and political rights then this is a positive right to resources.¹⁴⁵

One reason why social rights are simultaneously *in rem*, positive claim-rights and enforceable rights is that they are similar to and as important as traditional citizenship rights—civil and political. Another reason is that they entail a positive pattern of distribution: “the idea of rights to welfare has also become linked with the idea of social justice. According to this view, market outcomes should not be just accepted with all the resulting inequalities; rather, citizenship confers a right to a central set of resources... and this right exists irrespective of a person’s standing in the market.”¹⁴⁶ Espada’s statement that “citizenship rights are entry tickets, opportunities of access, demolishers of barriers, guarantees of inclusion in a world of liberty and, thus, of unequal conditions”¹⁴⁷ agrees with my assertion, though he thinks otherwise. If the government has the duty to give opportunity of access and to demolish barriers and unequal conditions, it must be acknowledged that the major way to remove these barriers and conditions is through social rights or a common or positive pattern of distribution or social justice. I will discuss further, in Chapter 5, the link between social rights and social justice.

¹⁴⁴ Ibid p 22

¹⁴⁵ Ibid p 21

¹⁴⁶ Ibid p 16

¹⁴⁷ *Supra* note 127, p 195.

When discussing social rights, Espada prefers to use “social citizenship rights” instead of social rights because he suggests that social rights have been introduced as part of the Universal Declaration of Human Rights, which was adopted by the United Nations Organization in 1948. The implication here is that human rights are moral rights, and apply to all human beings as human beings, unconditional and irrevocably. In other words, he claims (as critics of social rights such as Hayek assert) that social rights are “vague and abstract, and not enforceable as the traditional rights.”¹⁴⁸ Espada also suggests that these moral rights are “rights that are held to exist, prior to, or independently of, any legal or institutional rules.”¹⁴⁹ Social rights, in terms of human rights, he supposes, lack the issues of justification, content and enforcement. Social citizenship rights, on the hand, he argues, are “understood as applying to individuals who are citizens of states (as a rule, nation-states) that in turn have already accepted and enforced civil and political rights.”¹⁵⁰

I do not think there are irreconcilable differences between the two concepts. Social rights try to address the moral duty of liberal states to provide basic goods to those in need. I submit, as Espada does, that there is a moral duty to provide individuals with the basic goods they need. I also submit that this moral duty gives rise to a right which is enforceable just like traditional civil and political rights. Espada himself even acknowledges that, in a free society, government has the duty to provide for those in need. So the argument that the social rights or international human rights are “vague” or non-enforceable, or not addressed to specific individuals, is not persuasive.

¹⁴⁸ Ibid p 13.

¹⁴⁹ Ibid p 9.

¹⁵⁰ Ibid p 9.

Social rights or the right to welfare need not be claimed against an individual. Plant asserts¹⁵¹ that the moral duty to help is not the duty of one individual, but the duty of the society as a whole; or more specifically, the government. Secondly, the duty to provide for those in need does not imply giving directly to the individual; instead it imposes the duty to support the institutions which provide to those in need. One way to fulfill this duty is to pay taxes to fund the institutions that serve as an intermediary between the taxpayers and those in need of help. Therefore, people in a society have a demonstrable duty to support these institutions

International human rights laws may be vague or unenforceable, but our subject here is not vague. The protection against deprivation and destitution does not depend upon whether the individual is a citizen, a refugee, an immigrant, or stateless. The citizenship rights are not all-or-for-nothing rights. The individual may not fulfill the requirement for the right to vote, but this does not entail that s/he should be deprived the minimum that s/he needs to survive. Citizens who are incarcerated lose some rights, but protection from deprivation is not one of the rights they lose.

The concept of social citizenship rights does not deny basic goods to someone in need who was deprived of these basic goods in the place from whence s/he immigrated. Refugees and immigrants are subject to the law of the land. They are taxpayers, employers; some are even beneficiaries of social welfare programs such as employment insurance or child benefits. If refugees and immigrants are eligible for these programs I do not see how they could be denied the minimum of social assistance. It is worthwhile here to note that citizenship rights are not excluded from human rights. Human rights laws strive to protect human beings from deprivation and destitution: so are citizenship

¹⁵¹ Raymond Plant, Harry Lesser, and Peter Taylor-Gooby. Political philosophy and social welfare: essays

rights. Second, the admission or hosting of these individuals in the country by the government entails some expectations and duties, including the duty to provide that minimum that people must not be deprived of, regardless of whether they are citizens or would-be citizens.

The acceptance of social rights, which are simultaneously *in rem*, positive claim-rights and enforceable as traditional citizenship rights, stipulates the rejection and removal of any rule or regulation, such as the lifetime ban on welfare, which produces or contributes to social injustice and deprives human beings of access to the minimum that they ought to have. The lifetime ban is a legalized form of destitution and, in a free society, any legislation which drives people into destitution is inhuman, illegal and immoral. It is immoral in the sense that, in a free society, as Espada indicates, the government has the moral duty to provide the basic social rights to keep everyone above a certain floor or standard. The government does not have the legal and moral power to legislate destitution. Even if the destitution was not intended or foreseen, that is not a justification to propagate or continue unjust laws or practices. The same duty that requires the government to enforce social rights also requires that it should end the lifetime ban because the lifetime ban denies the right to have basic needs met. The lifetime ban is a punishment which violates social rights. I will discuss the issue of punishment in the next chapter, but limit myself to remarking here that punishment is required to be proportional to the wrong being done. The Harris-Eves administration in Ontario claimed that a lifetime ban was needed in order to protect the integrity of the social welfare programs. Protection of this integrity does not require driving individuals

into extreme destitution. The lifetime ban not only violates the principle of social justice, but also violates the principles of the welfare state.

The validation of the positive dimension of social rights entails the recognition that the market without interference is the source of social injustice, and it is the duty of the capitalist state to remove these injustices. The welfare state in a capitalist society can remove injustices only by extending universal social welfare programs. Universality here does not mean spreading the benefits widely or the complete eradication of poverty, but it means enrichment of life and collectivity. The positive dimension also entails that the state must perform the interference, and extend the services through a democratic process. Democratic process means that “welfare principles cannot be driven from the principle of the majority rule; its duty is to provide not what the majority want, but what minorities need.”¹⁵² This is not to cheapen the value of the democratic process or to suggest that totalitarianism is the best way to manage social welfare, but the principle of the majority rule in social welfare has, in certain situations, led to the introduction of irrational rules which are detrimental to the welfare of minorities (such as the lifetime ban) because the majority either supports the irrational rule or does not care, or it creates class conflict, which means that the social welfare programs which target the minority are more vulnerable to erosion, as discussed above.

The lifetime ban fails to maintain the balance between the free market and social welfare because it violates procedural fairness, which is an essential ingredient for the legitimacy of social welfare programs in the capitalist welfare state. As discussed above, in order for the mixture of free market and welfare to survive, the capitalist welfare state must adopt social policies which guarantee the individual or community not to fall below

¹⁵² Marshall, T.H., The Right To Welfare and Other Essays. New York: Free Press, 1981, p 126.

a commonly accepted line. Procedural fairness means that decisions made in social welfare programs must lead to just outcomes; secondly, decisions should treat those affected with dignity and respect; thirdly, the decisions should be reached by just process,¹⁵³ and finally, the decisions must not contradict the principles of the welfare state. In my example, the lifetime ban led to an unjust outcome in that it denied Kimberly Rogers the right to economic welfare both for herself and her unborn child. The evidence showed that, because of this ban, Kimberly Rogers did not have the income to buy her medication, pay her rent, and buy food. She needed special care, not only because she was pregnant, but also because she was ailing. She was suffering from panic disorder, anxiety and migraine headaches. She was also suffering from a long-term undiagnosed depression. She needed to stay on medication because she had attempted suicide in 1996. So the lifetime ban is a policy that conceivably leads to unjust results.

According to the concept of procedural fairness, the decisions about social welfare programs must treat the beneficiaries with dignity and respect.¹⁵⁴ The lifetime ban legislation infringes upon these values, though the Harris-Eves Ontario government claimed that the lifetime ban is needed to protect the integrity of the social welfare programs. The integrity of the programs must indeed be respected, but those who violate this integrity need not be punished in a cruel and inhumane manner. Denying benefits to an expectant mother neither contributes to the integrity of the social programs, nor is a respectful way to treat any member of the community, especially the weak and needy.¹⁵⁵ Also, decisions should also not be made through concealment and avoidance of

¹⁵³ Galligan, Denis, "Procedural Rights in Social Welfare" in Anna Coote *The Welfare of Citizens Developing New Social Rights*. London: Oram Press, 1992, pp 55-68.

¹⁵⁴ *Ibid* p 58

¹⁵⁵ *Rogers's v. Sudbury* at 5.

accountability.¹⁵⁶ The Ontario government introduced the lifetime ban through regulation rather than legislation in order to avoid legislative review, public input, or any appeal. The *Social Assistance Reform Act*, which came into effect in 1998, gave the provincial cabinet the power to make changes in the welfare programs. One of the most important features of the capitalist welfare state is the democratic process, which requires decisions to be made fairly, through elected representatives. The lifetime ban was not reached through a just process which is prerequisite for the procedural fairness because it denied both the elected and electors the right to be heard. The ban not only denied the electors the right to be heard, but also denied to the weak and needy the right to basic welfare, which is another important feature in the tripartite structure of the capitalist welfare state.

I showed in this chapter that welfare is not a charity but a right and this right can be simultaneously *in rem*, a positive claim-right and enforceable, like the traditional civil and political rights. I contend that the lifetime ban violates the procedural fairness in social welfare; the principles of social justice; rule of law; human rights laws, and the concept of social rights because it denies the basic minimum that nobody should be deprived of. It also denies access to opportunities, entrenches inequalities and drives people into destitution. I conclude, therefore, that the lifetime ban is incompatible with the rule of law in a liberal society. But before I make this conclusion, there is one more legal document that it is necessary to examine. The next chapter explores whether or not the lifetime ban is compatible with the *Charter of Rights and Freedoms*.

¹⁵⁶ *Supra* note 33, p 116-7.

I am for justice no matter who it is for or against.

Malcolm X

Chapter Four

Lifetime Ban as a *Charter* Issue

A few questions which are critical for our discussion were unanswered in the last chapter. First, what is the remedy for the denial or deprivation of basic goods? Second, are there reasonable circumstances under which basic goods can be permanently withheld? Third, and most important, who will determine the amount of the basic goods which will enable the individual to enter the market or to not be excluded from the market? In order to answer these questions, we need to revisit the discussion of social rights, this time to analyze it through the *Canadian Charter of Rights and Freedoms*¹⁵⁷ because social rights are a constitutional issue, not simply an issue which can be left to the discretion of politicians or public administrators. Espada suggests that what constitutes basic goods should be left to political controversy,¹⁵⁸ not to the theory of social rights or constitutional definitions, because the floor or basic level of one society differs from that of another society, due to differences in economic power. I argue, however, paraphrasing Charles A. Reich, that decisions concerning social welfare or social rights are too important to be left to the market or public welfare workers or public administration officials without the aid of the *Charter*. The *Charter* is needed to guide, to clarify the issues and to strengthen such decisions. In a constructive alliance of the *Charter* and social welfare there lies hope for a fundamental change in the status of the

¹⁵⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c.11 [hereinafter *Charter*].

¹⁵⁸ Political controversy means, according to Espada, that the decision and definition of what is, or what satisfies, the basic minimum should not be decided by social rights theory but should be left to the politicians because they are well equipped to make this determination.

disadvantaged of our society.¹⁵⁹ So I will analyze the lifetime ban and the right to welfare, or social rights, through Section 7 of *Charter*. I will first discuss the right to basic goods under Section 7, and then examine the issue of the lifetime ban under Sections 7 and 12 of the *Charter*.

Section 7 reads: 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.

There is a perception that the *Charter* does not recognize social rights. In reality, it does but only if the economic claims that the social rights entail, the interconnection between the traditional rights and social rights, and the concept of social rights are properly understood. The *Charter* may not protect or recognize property rights, but it certainly recognizes some form of economic rights, as the Supreme Court stated in the *Irwin Toy Ltd. v. Quebec (A.G.)* case.¹⁶⁰ The Court ruled:

The intentional exclusion of property from s. 7, and the substitution therefore of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the parameters of s.7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person." Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of the *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.¹⁶¹

Do social rights include those economic rights fundamental to human life which,

¹⁵⁹ Reich, Charles A., "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965) 74, *Yale Law Journal* at 1257.

¹⁶⁰ *Irwin Toy Ltd. v. Quebec (A.G.)* [1989] 1 S.C.R. 927.

¹⁶¹ *Irwin Toy Ltd. v. Quebec (A.G.)* at 1003-4.

The Court implies, must be protected? Does the lifetime ban violate those economic rights fundamental to human life?

One of the reasons why the recognition of *Charter*-based social rights is rejected is that, as Espada suggests, they impose a particular criterion of distribution in that someone or some organization—in this case, the courts—will decide what everyone ought to have. Such distribution, it is argued, is incompatible with the traditional civil and political rights. The second reason is referred as the “institutional competence of courts.”¹⁶² This ‘competence theory’ claims that the questions of what satisfies the basic need; how to determine, and how distribution will be handled, all depend upon the economic condition of the country. These questions, which involve distribution, are policy questions and can only be determined by policy makers because the politicians, not the judiciary, are well-equipped to decide policy related issues. But Justice Bertha Wilson thinks the opposite. Wilson asserted in *Operation Dismantle Inc. v. The Queen* that government decisions are subject to Court scrutiny under section 32(1)(a) of the *Charter*. Government decisions are not saved from Court scrutiny because they are political. She stated that the Court has a constitutional obligation under section 24 of the *Charter* to decide whether any act of the political branch of the government violates or threatens any right of the citizens.¹⁶³ This ‘competence theory’ fails to recognize that the *Charter* was not intended to deal only with political issues. One of the most prominent decisions that the Supreme Court rendered in the 20th century was abortion. Abortion incorporates legal, social, political, economic and scientific issues and, despite this, the Court has dealt with it.

¹⁶² Johnstone, Ian, “Section 7 of the Charter and Constitutionally Protected Welfare”

Another aspect of this competence argument is the objection to the judiciary, who are unelected officials, rendering judgement or opinion about decisions made by an elected official. Such an act, it is argued, is in contradiction of democratic principles.¹⁶⁴ This argument fails to understand that democratic processes compel the judiciary to examine whether or not the decisions made by elected officials infringe the *Charter*, and, if they do, the Court must decide whether the infringement is reasonable in a free and democratic society. Section 33 of the *Charter* grants the legislature supremacy over the judiciary and the final say in any legislating, but this does not connote the acceptance of unscrutinized decisions made by the elected officials. In *Motor Vehicles Reference*, the Court held that it is authorized, even required, to examine any legislation enacted either before or after the *Charter*, if it violates the guarantees of the constitution.¹⁶⁵ The role of the judiciary, as the Court affirmed in *Osborne v. Canada (Treasury Board)*¹⁶⁶ is to review the decisions made by the government and to determine whether the decisions are in accordance with the *Charter*.

Under section 52 of the *Charter*, any legislation contrary to Charter values is ineffective. The role of the judiciary is not to dictate or direct the government about what to do and how to do it. We should not accept the lifetime ban or any legislation which violates human life even though it is made law by elected officials. It is important to note here that 'democratic principles' have special meanings in the welfare state. I mentioned earlier T.H. Marshall's position about democratic process in social welfare programs. I also mentioned Peter Flora's assertion¹⁶⁷ that, in order for the capitalist welfare state to

(1988) 46:1 University of Toronto Faculty of Law Review at 11.

¹⁶³ *Operation Dismantle Inc. v. The Queen* [1985] 1 S.C.R. 441 at 443.

¹⁶⁴ *Supra* note 162, pp 42-3.

¹⁶⁵ *Reference re s.94 (2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 496.

¹⁶⁶ *Osborne v. Canada (Treasury Board)* [1991] 2 S.C.R. 69 at 104.

¹⁶⁷ *Supra* note 50, pp 12-16.

maintain the legitimacy of its tripartite structure, it must not only nurture the democratic mass mobility, but must also develop essential welfare programs on the basis of individual rights without altering market mechanisms. Democratic principles in a capitalist welfare state demand more scrutiny of social welfare policies, and, if the judiciary performs most of the scrutiny of the elected officials' actions, this is still compatible with welfare state principles.

The claim that the *Charter* in general and section 7 in particular does not guarantee or recognize social rights is based upon unconvincing and narrow interpretations of the *Charter*. Courts must interpret the *Charter* or the law in general not only through traditional doctrinal reasoning, but also, as Chief Justice Dickson said in *R. v. Big M Drug Mart Ltd.*, courts must venture into “the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be [...] a generous rather than a legalistic one.”¹⁶⁸ It is not through literal meaning that we can decide whether section 7 guarantees social rights or not, but through contextual understanding of the purpose and interconnection between the rights guaranteed in the section.¹⁶⁹

The right to liberty not only means the right to have liberty but also the right not to be deprived of liberty; the right to be protected as an individual from anything that may hinder, prevent or interfere with our enjoyment of such a right. The right to enjoy or exercise a right entails the right of the provision of the basic social rights because, as Marshall suggested, social rights enable the individual to enjoy or exercise to some extent

¹⁶⁸ *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R.295 at 344, 18 D.L.R. (4th) 321 at 360.

other rights, be they civil or political rights. Not all citizens can exercise their political and civil rights because the citizen must have a certain status in order to exercise these rights.

Social rights impose a duty on the government to provide the means to those who are deprived without just cause of their right to liberty. It becomes the duty of the state to free those who are taken hostage and denied their liberty. If we adopt such an interpretation then we will be able to conclude that there is an interconnection between the concept of social rights and the ‘right to life, liberty and security of the person and right not to be deprived.’ I can also conclude that the first part of section 7’s ‘right to life, liberty and security of the person’ will be meaningless unless the second part of the section ‘right not to be deprived’ is fulfilled. This is exactly what Raymond Plant asserts when he says that the traditional rights will be meaningless unless they are accompanied by the means to exercise them. He contends that the “right to life and liberty may require certain things, among them health and education, to make their exercise a reality, not just negative forbearance on the part of government.”¹⁷⁰ So it is misleading to suggest that social rights cannot be implied within the section 7.

Historical, contextual and generous interpretation obliges the interpretation and analysis of section 7 in conjunction with section 36 of the Constitution because this combination will provide the courts with evidence of the existence of social rights in the *Charter*. Section 36 is, of course, outside the *Charter*, but this does not prevent the analysis of section 7 or any other law or right which is thought to be associated either in context or historically.¹⁷¹ As I noted earlier, under the *British North America Act*, the Canadian welfare state could not expand because the federal government did not have the

¹⁶⁹ R v. *Morgentaler*, [1988] 1 S.C.R. 30 at 52.

legislative power to get involved in social welfare programs, even though there was a need for its involvement. Social welfare programs were under provincial jurisdiction and it was the responsibility of the provinces to finance and manage these programs. But the provinces did not have the resources to expand or even maintain these programs. So the federal and provincial governments agreed to make a constitutional amendment, which would give the federal government a spending power clause, and require it to transfer payments to the provinces in order to maintain social welfare programs. This amendment, which signified a strong federal involvement in social welfare programs, was included in the *Constitution Act* of 1982. But what has this clause, now section 36, got to do with the section 7 of the *Charter*? Before I answer this question let me first cite section 36:

36(1) without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

I said that the concept of social rights is derived from the moral duty of helping to those who cannot help themselves. This moral duty gives rise to a right which could be enforced under the rule of law in liberal society. I also said that the first part of section 7 will be meaningless unless the second part of the section is fulfilled and I used Plant to prove this point. I have shown through the quote from Hayek that there is a moral duty in a free society for government to protect the individual. I also mentioned Espada's position that there is a duty to provide basic goods and access to opportunities to those

¹⁷⁰ *Supra* note 151, p 79.

who are in need or being excluded. I stated Dickson's assertion of contextual and generous interpretation of rights and freedoms in association with other rights and freedoms within the text of the *Charter*. I argue that all these statements are consistent with the section 36(1)(a)(b)(c). I also argue that the lifetime ban is inconsistent with sections 7 and 36 which will be further proven later in this chapter. The word 'committed' is used in section 36. I contend that this word neither shows nor implies discretion or acts of charity from the government. This word only shows the duty of the government to both the provincial governments and to Canadians. The word 'Canadians' does not signify that social welfare is only for 'Canadian citizens.' As I mentioned in my discussion about the difference between social rights and social citizenship rights, citizenship is not a necessary prerequisite for the right to social right.

So far, I have articulated the grounds for *Charter* protection of social rights or economic rights. In *Irwin Toy*, the Supreme Court acknowledged that the *Charter* will not treat economic rights fundamental to human life as the same as commercial economic rights. But still I have not shown the link between section 7 and the concept of social rights or how section 7 protects social rights. So I will now try to establish the link. The Supreme Court expressed in *R. v. Morgentaler*¹⁷² that it preferred not to explore the broadest analysis or implication of section 7 because it felt, due to immaturity of the history of *Charter* interpretation, that it was impossible to embark upon such analysis. Second, the Supreme Court said it could not undertake such explorations because it was not presented with a wide variety of claims and factual situations which would allow it to tackle the full range of section 7 analysis. So the Court limited itself to only two important aspects of the section; namely, the right to "security of person" and "the

¹⁷¹ *R v. Big M Drug Mart Ltd.*, at 360.

principles of fundamental justice.” I also intend to limit my discussion to these two areas. But it is important to note that these two aspects, and even all the rights guaranteed in the section, are distinct from each other, and each one needs to be analyzed separately—as the Court recommended in *Singh v. Minister of Employment and Immigration*¹⁷³—before determining whether any of these rights is infringed contrary to the principles of fundamental justice. This, however, does not suggest that rights are isolated from each other. Rights guaranteed in the *Charter* are interconnected and interrelated, but the impairment of any of them must be analyzed separately and it must be likewise determined if such impairment is safe under the principles of fundamental justice.

The analysis of these two aspects will be, as already suggested, generous, contextual and “purposive.” In the early history of *Charter* interpretation, the Court adopted the practice of interpreting “security of person” within a criminal context. In *Mills v. The Queen*, Justice Lamer held that security of person is not limited to physical integrity but encompass impairment resulting from criminal accusations such as “stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction.”¹⁷⁴ The Court also relied on the same interpretation of “security of person” in *Morgentaler*, where it held that psychological stress caused by state action or legislation such as abortion legislation can be constituted as a violation of the security of person, at least in criminal contexts. Even though this stress did not result from an offense, the Court analyzed it within a criminal context. This stress arose from denying or delaying an abortion operation. In any event, this is

¹⁷² *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 51.

completely the opposite of the Court's interpretation of "security of person" in *Singh*.

This case was about whether the treatment of a refugee claimant was contrary to the principles of fundamental justice. Even though it was not a criminal case, the Court still held that "security of the person" must encompass freedom from the threat of physical punishment or suffering, as well as freedom from such punishment itself."¹⁷⁵

It is critical to note that, in *Morgentaler*, the Court hinted that when the *Charter* interpretation became more mature and more facts became available, the Court would likely accept and welcome the broadest analysis of section 7, or any other section for that matter. So, even though it limited the interpretation of "security of person" only in criminal cases, the doors were left open for the broadest interpretation for the scope of security of person when *Charter* interpretation advances or more facts were presented. Does the lifetime ban legislation fulfill these criteria? The ban causes all the impairments that Justice Lamer listed in *Mills*. The lifetime ban contributed to the deterioration of Kimberly Rogers' psychological and physical integrity, as was shown above, and will be further demonstrated very shortly. I do not think it is sensible to limit the impairment of physical or psychological integrity only to criminal cases because government actions breach the security of the person beyond the criminal context, as in the *Singh* or Kimberly Rogers cases. So, has the time come to broaden the interpretation of "security of person"?

In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, the Supreme Court expanded the scope of security of person beyond *Mills*, where Chief Justice Lamer, who first wrote the list of what constitutes impairment said, "I hastened to add, however, that s.7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of administration of justice, can

¹⁷³ *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 204-5.

deprive a person of their s.7 rights to liberty and security of person.”¹⁷⁶ The court warned that “security of person” should not be understood or interpreted as the protection of the individual from ordinary stresses or anxieties that a reasonable person might suffer as a result of state action. Government military involvement in one’s original country or the imprisonment of a loved one will certainly cause stress, but this should not be deemed as a violation of the “security of person.” How we measure what qualifies as ordinary or extraordinary stress or anxiety? The Court held that the impact of state action upon the psychological integrity of a person does not need to “rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.”¹⁷⁷ So I can now certainly proclaim that the lifetime ban violated the “security of person” because it impaired both the physical and psychological integrity of the person as shown in Kimberly Rogers’s case. Could it, however, be safe under the principles of fundamental justice?

I must say here that the lifetime ban did not cause Kimberly Rogers’s psychological impairment. The evidence showed that she attempted suicide in 1996, long before her benefits were permanently suspended. According to the evidence,¹⁷⁸ in 1996 she was going to college and was receiving a student loan at the same time as she was collecting social benefits. This was allowed under the previous government. I am not going to dwell upon the timing of her suicide attempt because I do not think that is relevant. I merely want to mention that she suffered from mental illness before the suspension of the benefits. But I must submit that the lifetime ban and the sentence of house-arrest were the reasons for the deterioration of her physical and psychological

¹⁷⁴ *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 920.

¹⁷⁵ *Singh v. Minister of Employment and Immigration*, at 207.

¹⁷⁶ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 65

¹⁷⁷ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, at para.60.

integrity because these social benefits were her only sources of income. The evidence¹⁷⁹ showed that she was receiving or expecting no income from anyone other than the welfare benefits. The father of her unborn child and her family indicated that they were not going to support her financially. The father contributed once but indicated that he would no longer be involved in either her life or the pregnancy. The evidence also showed that she could not even afford to pay her rent or food. Her landlord kindly agreed not to seek eviction and accepted reduced rent temporarily on the condition that she would pay the difference in the future. If she lost her apartment, it was certain that she would be homeless because there was no shelter for someone in her situation in her city. The only shelter in Sudbury was for abused women. The shelter could not accept her, and even if could have taken her in, she could not have stayed there longer than three months. In addition to all this, she could not feed herself. It is known that pregnant women need special care and food not only for themselves but also for the unborn.

Even if the lifetime ban legislation had not impaired “the security of person” of Kimberly Rogers, it violated “the principles of fundamental justice,” even though the principles of fundamental justice are not a protected right, unlike other rights in section 7. The Supreme Court held, in *Motor Vehicle Reference*,¹⁸⁰ that these principles must be interpreted purposively and contextually. Traditionally, rights protected in section 7 were never seen having the same weight or deserving the same protection as the rights and freedoms protected in sections 8-14 because these sections were dealing with criminal cases and the deprivation of rights and freedoms in criminal cases was considered much more important than the deprivation of what was considered as symbolic rights. This is exactly where Espada was coming from when he argued that the social rights do not have

¹⁷⁸ *Rogers's v. Sudbury* at para. 7.

the same weight or are not enforceable as the traditional civil and political rights. In *Morgentaler*, the majority, except for J. Wilson, analyzed rights within a criminal context, even though this was not a criminal case. J. Wilson reached her decision through substantive interpretation.¹⁸¹ In *Motor Vehicles Reference*, the Court suggested that it would no longer subscribe to this narrow interpretation of rights because it held that the impairment of rights and freedoms in section 7 has the same consequences as the rights in sections 8-14. Despite this assertion, and its call for generous and purposive interpretation, it seems that this did not lead to the birth of a broader interpretation of rights in *Morgentaler* and *Mills*. The Court tried to move away from the narrow interpretation of rights in *Singh*, but this still did not become judicial practice. This narrow interpretation, or the interpretation of rights within a criminal context, is referred as “procedural interpretation.” Procedural interpretation focuses only upon the procedural fairness of the criminal process, and whether the accused suffered any physical or psychological impairments listed in *Mills*.

A major shift from narrow to broader interpretation was observed in *G. (J.)*. Rights are no longer interpreted exclusively within a criminal context. This kind of broad interpretation is referred as “substantive interpretation.” It is much broader than procedural interpretation in that it encompasses both procedural and substantive interpretations.¹⁸² It gives the courts the power to be the arbitrators and protectors of rights and freedoms. It also gives the courts the power to review and determine whether government action violates rights and freedoms protected in the *Charter*, and if so, to determine if such violation is justified in a free and democratic society. It is only through

¹⁷⁹ *Rogers v. Sudbury*, at para. 18-22.

¹⁸⁰ *Reference re s.94 (2) of the Motor Vehicle Act*, at 499-501.

¹⁸¹ *R. v. Morgentaler*, at 161-185.

¹⁸² Colvin, Eric, “Section Seven of the Canadian Charter of Rights and Freedoms” (1989) 68

substantive interpretation, the Court held, in *Motor Vehicle Reference*, that the deprivation of rights protected in section 7 could be understood as having the same weight and important as the rights protected in sections 8-14. Even though sections 8-14 concentrate on the protection of rights in criminal cases, this should not be interpreted that they are different from section 7. Section 7 could be seen as protecting general rights, and sections 8-14 as protecting specific rights among these general rights. They are still linked together. The rights in sections 7-14 are many rights “fused into one section.”¹⁸³

A substantive examination of the lifetime ban legislation, I contend, will lead to the conclusion that it is in violation of the principles of fundamental justice. The principles of fundamental justice are “founded on the belief in the dignity and worth of the human person and the rule of law.”¹⁸⁴ Permanent suspension of benefits, which are the only source of income of a woman who is in her last trimester of pregnancy in grave health; unable to pay her medications which she must keep taking in order to survive; a woman who is about to lose her apartment, debases the human person and the rule of law. I must caution, however, that in order for the lifetime ban to be in breach of the principles of fundamental justice, it must not necessarily cause all these grave effects. The effects of the lifetime ban do not have to be this serious. In *G. (J.)*, the Supreme Court held that the level of impairment of “security of person” does not need to “rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.”¹⁸⁵ The infringement of government action upon the physical and psychological integrity of the

The Canadian Bar Review 560 at 564.

¹⁸³ *Reference re s.94 (2) of the Motor Vehicle Act*, at 502.

¹⁸⁴ *Reference re s.94 (2) of the Motor Vehicle Act*, at 512.

¹⁸⁵ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, at para.60.

person need only satisfy the situations listed in *Mills* or whatever a reasonable person considers impairment.

I have argued that the lifetime ban is in breach of section 7 of *Charter* and need now to see if it is saved by section 1 of the *Charter*. Even though it is not up to us to prove that the lifetime ban is or is not saved, I will still analyze it under section 1. It is the duty of the Ontario government to show that it is saved by section 1.

Section 1 reads: *The Canadian Charter of Rights and Freedoms* guarantee the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In *R. v. Oakes* and also *Egan v. Canada*,¹⁸⁶ the Supreme Court ruled that government action has to satisfy two conditions in order to be justified in a free society. First, state interference must be very substantial and pressing in order to override rights and freedoms guaranteed. Second, actions taken to achieve legislative goals must be reasonably and demonstrably justified in a free and democratic society. The court held that three more additional conditions are needed in order to satisfy the second conditions. These additional conditions are commonly known as the “proportionality test.” First, there must be a rational connection between the impairment of rights and the goal of the legislation. Second, actions taken in order to achieve legislative goals must impair the protected rights and freedoms as minimally as possible. Third, there must be proportionality between the effects of the impairment of the protected rights and freedoms, and the attainment of the legislative goals. In other words, actions taken to achieve legislative goals must not outweigh the level of impairment of protected rights and freedoms. Let us now see if the lifetime ban satisfies these conditions.

¹⁸⁶ *R. v. Oakes*, at 135-42, *Egan v. Canada*, [1995] 2 S.C.R. at 559-72.

As for “substantial and pressing,” was it so pressing to suspend benefits permanently from a pregnant woman in the last trimester of her pregnancy? I submit that any legislation which deprives the individual his/her life and security of person, let alone a woman in the last trimester of pregnancy, is absolutely neither substantial nor pressing; in fact, such legislation brings the principles of a free society into disrepute. The most important principle in a free society or any society is preserving, protecting and dignifying human life. Such a society even dignifies the lives of their worst criminals. I do not see anything substantial and pressing in starving people to death. This is a barbaric law and I wonder how members of a civilized society in the 21st century could stand by and allow such barbarism to be practiced in their midst and, even worse, done in their name?

I presented in detail the effect the lifetime ban had on Kimberly Rogers, contending that its effects outweigh what the legislation was nominally designed to achieve. I maintain that the lifetime ban results in the very same situations listed in *Mills*. I also maintain that a lifetime ban could not be reasonably and demonstrably justified in a free and democratic society because it drives people into deprivation and destitution.

Before I proceed, I need to review what has been covered so far. So far, I have made the case for the concept of social rights. I showed that there is a right to provide the minimum to those who are in need. I demonstrated grounds for *Charter* protection for this right. I proved through case laws that the deprivation of this basic good is in breach of the “security of person” and “the principles of fundamental justice” under section 7, and this deprivation is unjustified in a free and democratic society under section 1 of the *Charter*. But there is a very important question, which is the core of my disagreement

with Espada's position about the concept of social rights, and which has not yet been addressed. We are now at the right stage to address the question.

Recall that Espada supported the concept of social rights, but claimed that it is only a negative right. I, on the other hand, held that it could be both a negative and positive right. The implication is that there is a positive right on the state to provide to those in need, and Espada is claiming that there is no such positive duty on the state. So the question I need to ask is: is there a positive duty on the part of the state to provide basic goods to those in need? I hinted at the answer in *Irwin Toy Ltd. v. Quebec (A.G.)*, where the Court held that the economic rights essential for human survival should not be treated as economic rights for corporations. I also hinted in our discussion at the idea of "fused" rights in *Motor Vehicle Reference*. I could also have answered this question by using *G. (J.)* case, which I mentioned above, but I felt that it was too early to bring the question into the discussion. In any event, I will use the *Gosselin v. Quebec (Attorney General)*¹⁸⁷ case in order to answer this question because it deals with the very same question. I will particularly use Justice Arbour's dissenting opinion of the case.

Before I examine her opinion about whether there is a positive state obligation to provide to those in need, let me first state the issues and the opinion of the majority. In 1984, the Quebec government introduced legislation which required welfare recipients under 30 years of age to receive lesser benefits than the recipients who were 30 and above. Ms. Louise Gosselin, 43, contended that the legislation, which has since been repealed, violated sections 7 and 15(1) of the *Charter*, and section 45 of the *Quebec Charter of Human Rights and Freedoms*. I will limit my discussion to s.7 because it deals directly to our question. Ms. Gosselin claimed that the right to security of person entails

¹⁸⁷ *Gosselin v. Quebec (Attorney General)* 2002 SCC 84. File No.: 27418. This is a neutral citation.

the right to be provided with benefits which satisfy the basic needs. She argued that the state deprived her of this right by providing insufficient welfare benefits, and that this was a breach of the principles of fundamental justice. She argued 1) “ that the legislation affects an interest protected by the right to life, liberty and security of person within the meaning of s.7; 2) that providing inadequate benefits constitutes a “deprivation” by the state; and 3) that, if deprivation of a right protected by s.7 is established, this was not in accordance with the principles of fundamental justice.”¹⁸⁸

Chief Justice McLachlin, who was speaking for the majority, elected first to discuss the scope of section 7 before responding to these claims. She unequivocally rejected Justice Bastarache’s dissenting opinion that section 7 only applies to the deprivation of life, liberty and security of person “that occur as a result of an individual’s interaction with the justice system or its administration.”¹⁸⁹ I mentioned in *G. (J.)* that security of person is not limited to criminal cases because government action in the course of administration of justice can violate the security of person. In *G. (J.)* case, an indigent parent of three children was denied legal aid in order to hire a counsel to represent her in a custody hearing. She contended that the New Brunswick government deprived her of her right to security of person by not providing her with funds to hire a counsel. The Supreme Court ruled that the New Brunswick government was under constitutional obligation to provide state-funded counsel. This case was not obviously a criminal case, but the government became involved with the administration of justice. But what happens if the government action causes deprivation outside the administration of justice as in the *Gosselin* case? Does section 7 still apply?

¹⁸⁸ *Gosselin v. Quebec (Attorney General)* at para.75.

¹⁸⁹ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, at para. 65.

According to Chief Justice McLachlin, the Supreme Court has not yet answered this question even though, in *Morgentaler*, it contemplated the possibility of extending the scope of right to security of person in order “to protect either interests central to personal autonomy, such as a right to privacy.”¹⁹⁰ It also contemplated in *Irwin Toy* including the economic needs essential to human survival under the security of the person. Even if economic rights are included in the rights protected under section 7, Chief Justice McLachlin contends “nothing in the jurisprudence *thus far* suggests that s.7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of person. Rather, s. 7 has been interpreted as restricting the state’s ability to deprive people of these.”¹⁹¹ However, as I said in *Morgentaler*, the door is still open for the extension or inclusion of economic rights in the rights protected in section 7. The Chief Justice argued only that there is ‘nothing in the jurisprudence thus far’ which means, as she acknowledged in her judgement, that there is the possibility that, if the right case is presented, the Court has no option but to accept that section 7 entails a positive state obligation because, she stressed, “it will be a mistake to regard s.7 as frozen, or its contents as having been exhaustively defined in previous cases.”¹⁹² She held that the case presented was not strong enough to suggest that section 7 requires a positive state obligation to guarantee an adequate living standard, but she warns that this should not be understood that “s.7 has ever been—or will ever be—recognized as creating positive rights.”¹⁹³

Chief Justice McLachlin maintains that the *Gosselin* case does not offer enough evidence to rule that section 7 places a positive obligation on the state to provide

¹⁹⁰ *Morgentaler*, at 56.

¹⁹¹ *Gosselin* at para.81. The underline is from the judgement. Italics are mine.

¹⁹² *Gosselin* at para.82.

¹⁹³ *Gosselin* at para.82.

sufficient basic goods. But was this case really trying to establish the existence of a positive obligation either in the *Charter* or on the state? Put in a different way, since there is no need for a solid case to prove that there is a positive obligation on the state to provide a fair trial, why is there a need for a solid case at all to prove that there is a positive obligation on the state to provide? With all due respect to the Chief Justice, I think her interpretation of section 7 is both evasive and narrow, and thus is in contradiction of the theory of *Charter* interpretation. The Supreme Court instructed in many cases that the *Charter* rights and freedoms must be interpreted generously, contextually and ‘purposively’. McLachlin is evasive when she suggests that there is a possibility that section 7 may one day protect the economic rights, but the case at bar does not warrant reaching that conclusion. The case at bar has nothing to do with whether or not there is a positive state obligation to provide. The only significance of the case is for the Court to determine whether Ms. Gosselin presented enough evidence to show that the state deprived her of her right to security of person in a manner contrary to the principles of fundamental justice. Whether section 7 imposes a positive obligation on the state to provide adequate basic goods is absolutely irrelevant, whether or not she establishes a deprivation of her security of person in a manner contrary to the principles of fundamental justice.

It seems that the majority evaded answering the question of whether section 7 placed a positive obligation on the state to provide adequate goods. The Chief Justice contends that there is nothing in the *Charter* to show that section 7 has this capability. The only capability, according to the Chief Justice is that section 7 can only restrict state action which may cause physical and psychological impairment. The mere fact that there is a right not to be deprived of life, liberty and security of person, except in accordance

with the principles of fundamental justice, is enough indication of the existence of a positive obligation on the state not only not to deprive people of rights, but that inaction to stop deprivation entails a positive obligation. I contend that state action does not necessarily need to involve itself with the administration of justice in order to be considered as impairment of “the security of person.” The Supreme Court held in *Winnipeg Child and Family Services v. K.L.W.*¹⁹⁴ that apprehension of a child in non-emergency by a state agent with a legislative power situation, but with no prior judicial authorization, impaired the “security of the person” of the parent. The significance of this case is that, even though the Court found the apprehension to be in accordance with the principles of fundamental justice, “security of person” was applied to a proceeding which was taking place outside the administration of justice. The state agent had a legislative power to apprehend children from parents whom they found unfit, but despite this, security of person was still applicable to such proceedings. So, deprivation of any kind, whether it takes place inside or outside of the administration of justice, is a breach of the security of person unless it is justified under the principles of fundamental justice.

The effects of cruel and unfair punishment that took place in the administration of justice are not necessarily less harmful than the cruel and an unfair punishment to which one is subjected when deprived of basic goods. The psychological impairment that the parent suffered when she was denied funds to hire a counsel to represent her in custody hearing is not necessarily less detrimental than the psychological impairment that a pregnant woman suffered when her benefits were permanently suspended. Yet, clearly, the permanent suspension of benefits was worse because it ultimately had more serious consequences for the dignity and survival of the pregnant woman, as shown. If the

¹⁹⁴ *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R.519, 2000 SCC 48.

government had a positive obligation to provide funds to the parent to hire a counsel, I think it is utterly illogical and beyond comprehension to suggest that the state does not have a positive obligation to provide adequate basic goods to those in need. In *Irwin Toy*, the Court declared that economic necessities essential to human survival should be deemed different from the economic interests for business. So there is evidence in the jurisprudence that section 7 not only restricts state action, but also protects the economic interests without which the right to life, liberty and security of person cannot be enjoyed.

The majority's argument that "nothing in the jurisprudence thus far suggests that s.7 places a positive obligation on the state" implies that somehow section 7, unlike sections 8-14, does not have the capability to impose a positive obligation on the state because it is only capable of preventing a negative state action. In other words, as Espada argued, the obligation to provide basic goods could not entail a positive obligation; it can only impose a negative right. But what both the majority and Espada fail to explain is why section 7 can only impose a negative right, while other sections, to which it is linked, can impose a positive duty. The state cannot keep an accused in detention because there are no judges to preside over the trial, or decriminalize a crime because there are not enough law enforcement agents. There is a positive obligation on the state to provide law enforcement agents in order to uphold the principles of fundamental justice. There is nothing in the jurisprudence thus far restricting section 7 to capacity for imposing negative rights. As Justice Arbour points out in her dissenting opinion, "Any claim that only negative rights are constitutionally recognized is of course patently defective [...]" constitutional rights are not simply a shield against state interference with liberty; they place a positive obligation on the state to arbitrate competing demands arising from the

liberty and rights of others.”¹⁹⁵ Rights and freedoms listed in both *Charter* and the constitution imply positive rights. Section 36(1) (a)(b)(c) of the constitution obliges the government not to refrain but to perform some positive obligations. Also in *Dunmore v. Ontario (Attorney General)*¹⁹⁶, the Supreme Court held that, even though the *Charter* does not often oblige the government to provide or facilitate the means to enjoy or exercise rights and freedoms, there are certain situations which require positive governmental action, as long as it can be shown that government inaction causes impairment of the exercise and enjoyment of the rights and freedoms guaranteed in the *Charter*. The impairment of “security of person,” such as the lifetime ban, obliges positive state action because the state inaction to provide hinders the individual’s right to life, liberty and security of person.

This idea of ‘fused rights’¹⁹⁷, in other words, the idea of substantive interpretation of interconnected rights protected in sections 7-14 of the *Charter*, is a strong indication that section 7 does have the same capability of imposing a positive right as sections 8-14. Chief Justice Lamer’s opinion in *Schachter* seems to support this assertion. He held that “the right to life, liberty and security of person is in one sense a negative right, but the requirement that the government respect the ‘fundamental principles of justice’ may provide a basis for characterizing s.7 as a positive right in some circumstances.”¹⁹⁸ He once again reiterated his contention in *G. (J.)* where he held “the omission of a positive right to state-funded counsel in s.10 [...] does not preclude an interpretation of s.7 that imposes a positive a constitutional obligation on government to

¹⁹⁵ *Gosselin* at para.320 and 355.

¹⁹⁶ *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para.19-23

¹⁹⁷ *Reference re s.94 (2) of the Motor Vehicle Act*, at 502.

¹⁹⁸ *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 721.

provide counsel in those cases when it is necessary to ensure a fair hearing.”¹⁹⁹ It might be argued that these cases involve the administration of justice, but in *G. (J.)*, Chief Justice Lamer pointed out that the reason he held that there is a positive dimension in section 7 is not because the government initiated the custody proceedings, but because of the inaction of the government to provide funds to hire a counsel after the proceedings had begun. Also, *K. L.W.* demonstrates unequivocally that section 7 is applicable to proceedings which have no connection whatsoever with the administration of justice.

The theory of *Charter* interpretation and the concept of ‘fused rights’ oblige an interpretation of *Charter* rights and freedoms contextually, and ‘purposively’ together with other rights and freedoms with which they are associated. Consequently, I am going to examine whether or not the lifetime ban violates section 12 of the *Charter* concerning cruel and unusual punishment, and if does, whether such violation is justified under section 1. I do not, however, think that one must show that the lifetime ban breaches section 12 because it is already proven or, at least, established grounds for the lifetime impairment of psychological and physical integrity of security of person in a manner contrary to the principles of fundamental justice, and not saved by section 1. Nonetheless, examining the lifetime ban under section 12 will only strengthen this argument because this section is associated or linked with section 7.

Section 12 reads: everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

In *R. v. Smith*²⁰⁰, the Supreme Court established a test that determines the quality of the punishment or the treatment and its impact on the person who is subjected to it. It

¹⁹⁹ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, at para. 107.

²⁰⁰ *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1046-1050.

held that a punishment or treatment will be cruel and unusual and violate section 12 if it has any one or more of the following characteristics:

1. The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
2. The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or
3. The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.

Even though there is no need to prove that the lifetime ban fulfills all these requirements, I am still confident that I can prove that it does. Let us analyze the first test. Is the punishment of such character or duration as to outrage the public conscience or be degrading to human dignity? In a civil society, it is sometimes possible to deny someone sustenance for a short period of time or to reduce the amount of sustenance they are provided with as punishment, but there is no punishment or treatment in a free and democratic society which can entail a lifetime deprivation of basic goods. Punishment, of course, is an integral part of the makeup of civil society but punishment should not be “excessive and disproportionate to the offence committed that it would amount to cruel and unusual punishment.”²⁰¹ Banning benefits permanently from someone in the situation of Kimberly Rogers, or any person for that matter, is both outrageous and degrading. There is nothing that would outrage the public conscience and degrade human dignity more than, as the media reports showed, the permanent suspension of benefits from an eight-month-pregnant woman who was in a grave condition physically, psychologically,

²⁰¹R. v. *Smith*, at 1098

and financially, and who was also about to lose her apartment. The permanent suspension was excessive and disproportionate both to the offence and to the stated objectives of welfare reform. It also breaches the principles of fundamental justice and the civil society's commitment to the protection and promotion of human dignity. Deprivation of liberty and freedom in a manner compatible with rule of law is tolerable in a civil society, but a lifetime ban is intolerable because, as has been demonstrated, it is incompatible with the rule of law, and the *Charter* rights and freedoms.

The second test concerns whether or not the punishment goes beyond what is necessary for the achievement of a valid social claim having regard for legitimate purposes of punishment and the adequacy of possible alternatives? As mentioned in my discussion of section 1, the Ontario government claimed that the lifetime ban was introduced to maintain the integrity of the welfare programs. But the lifetime suspension of benefits from those who are convicted of welfare fraud goes beyond the goal of maintenance of this integrity. The highest and most honourable social claim in a civil society is the protection and promotion of human dignity, and any legislation, activity or behaviour which debases human dignity is unacceptable unless it is justified under the rule of law and human rights laws. There is no moral or reasonable justification for depriving a pregnant woman or any other human being of security of person. Both recipients and non-recipients of social assistance are committed to the preservation of the integrity of the welfare program, but this does not entail the subjugation of the weak, the needy, the sick, and the pregnant to the criminal justice system. The criminal justice system cannot play a role in the achievement of the commendable goal of the maintenance of the integrity of social assistance programs. Nor it is the framework within which to handle welfare fraud cases because it is not capable of handling such problems.

A witness at the inquest into Kimberly Rogers' death testified that, in the year 2000, the Employment Insurance Commission in Ontario investigated almost 970,000 overpayments and issued 80,000 penalties without a single criminal prosecution. Employment Insurance (EI) fraud cases, he stated, are handled by investigators who deal administratively with the cases, and rarely impose punishments other than fines and repayments. The EI system, he indicated, permits the administrators to take into consideration the potential effects of punishment on the accused and their dependents and the circumstances surrounding why the accused provided false information.

Contrary to the Ontario government's claim, there is no evidence of the prevalence of welfare fraud. In December 2002, only 106 welfare recipients had their benefits permanently suspended, due to so-called welfare fraud charges, out of 70,000 welfare recipients in Ontario.²⁰² Despite this, welfare fraud cases are handled under criminal law, and convicts are punished as criminals. If the Ontario government opted to handle EI fraud cases administratively and had the patience to wait for the repayments, then there should be no justification for the subjugation and harsh treatment of those resorting welfare frauds. But this discriminatory and unlawful treatment of welfare recipients is a sign of the continuing faulty perception and ill will to which the poor have been consistently subjected.

Even though welfare fraud is rare, the notion that it happens often is perpetuated because of the notion that the poor need to be humiliated, subjugated and stigmatized; otherwise they will remain dependent upon the welfare system. There is no evidence that the welfare system creates dependency because the benefits provided do not even cover

²⁰² *Supra* note 6.

the individual's expenses. Secondly, why is welfare the only program that is designated as creating dependency?

Welfare administration lacks creativity and insight. EI and student loans do not create stigmatization and dependency because the programs are set up to enable the recipients to depend on these programs for a short duration, and enter academic programs that will advance their opportunity to secure better jobs. Welfare, in contrast, offers only workfare, which merely provides training and volunteer placement.

The third test from *R. v. Smith* asks whether or not punishment is arbitrarily imposed in the sense that it is applied on a rational basis in accordance with ascertained or ascertainable standards like the proportionality test of section 1. This test is also concerned with whether there is a rational connection between the punishment and the legislative objectives, and also whether or not the punishment itself is imposed in an arbitrary manner. The Court held that the following factors could assist in determining whether punishment is imposed arbitrarily or not: "[T]he legislative decision to enact the law which provides for punishment could be arbitrary; the legislation on its face could impose punishment in an arbitrary manner; and finally, a body empowered to impose punishment could, in practice, impose the punishment arbitrarily."²⁰³

I mentioned in Chapter Two that politicians in the capitalist welfare state employ the policy of "blame avoidance" (avoiding political repercussion) to conceal their retrenchment and elimination of social welfare programs. I also mentioned that, in 1998, the Ontario Conservative government enacted the *Social Assistance Reform Act*, which gave it the power to rule through regulation rather than legislation, making radical changes in the welfare programs without going through legislation reviews, public input,

²⁰³ *R. v. Smith*, at 1104.

and appeal.²⁰⁴ I contend that both the rationale and the process by which the lifetime ban legislation was enacted were arbitrary because the legislation was not deliberated through democratic processes and the whole rationale behind it is only to punish, humiliate, stigmatize and dehumanize specific members of society. Such legislation breaches the rights and freedoms guaranteed in the *Charter*, and the values of a free and liberal society that aims to promote and protect human rights and human dignity.

The lifetime ban is also arbitrary because it imposes punishment in an arbitrary manner. The Court held in *Smith* that legislation imposes arbitrary punishment if there is no rational connection between the punishment and the objectives of the legislation, and if the punishment treats those who commit the same offence differently, even if the punishment imposed is proportionate to the offence. I have already discussed the concept of a rational connection in section 1. Here I will confine the discussion to differential treatment, although I have already touched upon this concept in my discussion of EI and welfare fraud and its relevance to the second test. In any event, I acknowledge that the differential treatment or punishment that convicts receive, even those who repeat an offence, does not necessarily demonstrate unjust and unequal treatment because there are many factors which play a major role in the imposition of punishment. Some offenders may get tougher treatment because of their history or the nature of the offence they committed. The reverse is also possible. An offender may get a lenient punishment due history or the nature of the offence. This fact does not violate the principles of the rule of law. I assert, however, that the different treatments or punishments that welfare and EI defrauders receive breach the principles of the rule of law, and are not justified in a free and democratic society. I am not going to discuss the last test of arbitrary punishment

²⁰⁴ *Supra* note 33, p 116-7.

because the Court held in *Smith* that such arbitrariness usually arises from sentencing, and since I am not discussing sentencing we need not be overly concerned about it.

Having established the legality and compatibility of social rights with the rule of law and human rights, and also the grounds for *Charter* protection, I can now proclaim that social rights have a positive dimension. But this seems to contradict Espada's position that social rights do not entail a common pattern of distribution because social right is a negative basic pattern of distribution. A common pattern of distribution is a positive distribution which requires dictating what others ought to have. Social rights are *in rem*, positive claim-rights and their enforcement is compatible with traditional civil and political rights not solely because they have the same weight as the traditional civil and political rights, and are protected under the *Charter*, but also because they are linked to the concept of social justice as I mentioned above. So in the next chapter, I will discuss and explore the link between the concepts of social rights and social justice and the importance of this link.

*If you see evil change it with
your hand if not able with your
tongue if not able then with your
heart and that is the weakest of
faith.*

The Prophet of Islam may peace and
blessings of Allah be upon him.

Chapter Five

Lifetime Ban as Social Justice Issue

I will emphasize in this chapter that social rights are *in rem*, positive claim-rights and that their enforcement is compatible with traditional civil and political rights, not solely because they have the same weight as the traditional civil and political rights, and are protected under the *Charter*, but in addition, because social rights are linked to the concept of social justice.

Contrary to Joao Carlos Espada's contention that replacing or correcting market outcomes does not in anyway entail any common or positive pattern of distribution,²⁰⁵ I am convinced that the concept of social rights imposes a positive pattern of distribution because it is only through social justice that the individual can be protected from market pitfalls as Marshall pointed out. Secondly, it is only through social justice that the individual can be de-commodified or maintain a livelihood outside the market as Esping-Anderson indicated.²⁰⁶ Thirdly and most important, the concept of social justice cannot be separated from the concept of demolishing the inequalities or barriers or providing opportunities to enter the market or social rights because "the idea of rights to welfare has also become linked with the idea of social justice. According to this view, market

²⁰⁵ *Supra* note 127, pp 180-6.

²⁰⁶ *Supra* note 35 pp 21-2.

outcomes should not just be accepted with all the resulting inequalities; rather, “citizenship confers a right to a central set of resources...and this right exists irrespective of a person’s standing in the market.”²⁰⁷

The critics of social justice, such as Friedrich A. Hayek, would disagree with my characterization of market outcomes as ‘unjust outcomes.’ He argues that, although we do not rejoice in the unfortunate situations that people experience in life, we still cannot refer to them as unjust because nobody intended or caused them. By the same token, he contends, market outcomes are not unjust because they are not the results of deliberate or intended actions by someone nor were they foreseen. Thus, social justice is not applicable to the market outcomes, but is meaningless to such outcomes, because justice is only applicable to deliberate acts.²⁰⁸

I agree that market outcomes are unintended and those involved should not be held responsible for unintended consequences, but I argue that this should not mean that outcomes are not subject to our judgement. In other words, just because an incident was unexpected, that does not negate our duty to respond to the outcome. Raymond Plant succinctly states:

If we say that as a matter of routine my intended actions produce a foreseeable but unintended outcome for another person, then it is going to be disingenuous to claim that I am not responsible for the foreseeable but unintended consequences of my action. Indeed, if this were not so, there would constantly be a strong incentive continually to narrow down the characterization of intention so that it does not include the foreseeable consequences of action.²⁰⁹

In other words, we do not need to foresee or predict the outcome but we can certainly see the effects of the outcome. Therefore we do not need to assess the outcome on an individual basis, but as a group, because, as Plant says, “those who enter the market

²⁰⁷ *Supra* note 142, p 16.

²⁰⁸ Hayek, Friedrich A. *Law Legislation and Liberty*, vol. 2. *The mirage of social justice*. Chicago: University of Chicago Press, 1976, pp 64-70.

with the least will end up with least.”²¹⁰ Since we know the feasible consequences, even though they may be unintended, and we also know the only way to correct this outcome is to undertake some sort of redistribution in the interest of social justice, “then we can argue that those who support the market do bear responsibility for the least well off even if they do not intend that these people should be in this position, and, in this context, the outcome of the market should not be accepted as in principle unprincipled.”²¹¹

Hayek is mistaken and seems to miss the point when he argues that justice is not applicable to the impersonal process of the market results. “Justice and injustice is not *only* a matter of how a particular outcome came about or arose but is rather a matter of our response to that outcome.”²¹² Justice or injustice is not applicable as to how and why Ms. Kimberly Rogers or anybody else became in need of basic social rights, but justice or injustice is applicable to our action such as the introduction of the lifetime ban legislation, or the reduction of welfare benefits, or inaction toward the individual or the situation.

Another reason that Hayek rejects social justice is that in a free society, it is not known what does or does not qualify as social justice. He claims that “we might not know what is ‘socially just’ yet we know quite well what is ‘socially unjust’; and by persistently eliminating ‘social injustice’ whenever we encounter it, gradually approach ‘social justice’.”²¹³ In other words, there is no other process other than through the impersonal workings of the market through which the individual can enjoy justice because this process guarantees maximum freedom of exchange, and if a socially unjust

²⁰⁹ Plant, Raymond. *Modern Political Thought*. Oxford, UK: Basil Blackwell Ltd, 1991, p 92.

²¹⁰ Ibid p 92.

²¹¹ Ibid pp 92-3.

²¹² Ibid p 93. Plant’s italics.

outcome is experienced, those involved in the market can correct it. So there is no process other than the market itself which can produce justice. What is the significance of knowing the standard of what is 'socially just'? Or, simply put, why do we need to define what is 'socially just', in this context, when we know that there are situations which need to be changed. This is sufficient and we do not need to waste our time by ascertaining what is 'socially just.' 'Socially unjust' or 'just' is, as mentioned, is not about how the outcome resulted but our action or lack thereof towards the outcome. 'Socially just' is the elimination of misfortune, deprivation and its causes such as the lifetime ban, the lack of basic minimum, and the lack of opportunities.

Certain situations need to be eliminated as a matter of interest or principle of social justice because they cause that which is 'socially unjust'. Hayek even acknowledges that "there is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody need to descend, to enter into such an insurance against extreme misfortune."²¹⁴ Ironically, these outcomes—severe deprivation and extreme misfortune—that Hayek is asking the government to replace are neither intended nor foreseen, yet he is still asking somebody to respond. Does not this show confusion? In one instance he is arguing "there are no rules of individual conduct the observance of which in the market order would secure to the individuals and groups the position which as such (as distinguished from the procedure by which it is determined) would appear as just to us."²¹⁵ In another instance, he is asking another system to replace the injustices produced by the very system—the market process—that he claimed only produces justice.

²¹³ *Supra* note 208, p 78.

Kenneth Minogue, another critic of social justice, claims that social justice is unreal because it fails to comprehend human nature. He supposes that part of being human is to strive to be better and not to be satisfied with the situation in which one finds oneself. This encourages a process of failure and success, with the expectation that the individual will remain competitive and not rely upon others to satisfy his/her needs. Social justice, on the other hand, he argues, creates a culture of passivity and dependence. People are not expected to strive hard and take charge of their destinies because they are told that the state guarantees food and shelter.²¹⁶

Welfare is an institution in which people are humiliated and stigmatized and this is why, as the evidence shows, so many recipients get out of the system whenever jobs become available. I mentioned in Chapter Two how the right to privacy of the recipients is violated. Social workers may randomly visit the recipient's home. Citizens are encouraged to call the so-called "welfare fraud hotline" and inform upon their neighbours. If the recipient wants to find out who has given such personal information without his or her permission, the administrators will reply that they cannot give an answer because they have to uphold the informer's right to privacy. People do not want to depend on welfare, but the welfare system requires people to depend on it because it does not offer them the means to get out of the system.

April Adderley tried to emancipate herself from the welfare system but the current policy prevented her from doing so.²¹⁷ A single mother of two, she went to teachers' college between 1994 and 2000. While she was in college, she was receiving both welfare and student loans. This was permissible under the previous Ontario NDP

²¹⁴ Ibid p 87.

²¹⁵ Ibid p 78.

²¹⁶ Minogue, Kenneth, "Social Justice in Theory and Practice" in David Boucher and Paul Kelly *Social Justice From Hume to Walzer*. London: Routledge, 1998, pp 255-60.

government. During the period that she was at college, she was living off a partial student loan of \$9000 per year, (of which \$3000 was forgivable) and a \$9,500 welfare allowance. Under the previous system, she had to pay back \$42,000 of student loan, but in 1995, the Conservative government revoked this policy and changed the rules. This meant April Adderley had to pay back \$29,000 extra plus \$42,000: in total, \$ 71,000, because under the new policy, student loans are considered as income.

In April 1996, then Ontario Minister of Education and Training John Snobelen was asked if he could reassure single parents not to quit postsecondary education because of their fear that by pursuing it, they would incur more debt because of the changes in welfare policies. The Minister responded that “he could indeed assure all single parents who were attending postsecondary education in Ontario that support programs would be available to all students in Ontario who were attending postsecondary education.”²¹⁸ A review was promised. Unfortunately, this promise never materialized.

April Adderley became a teacher and had to start paying back the loan. Under the new welfare policy, repayments are scheduled according to one’s income. She maintains, however, that she cannot afford to pay the loan and support her family at the same time because if she does this, 42% of her net income will go to student loans and 57% will go to rent. This left her with only 1%, which amounted to \$187 per month, to raise her family of three.²¹⁹ She was advised to see credit counsellors to give her some options. The credit counsellors told her that she had two choices: a) either to quit her teaching job and find a low-paying job such as working at McDonalds to lower her gross monthly income in order to qualify for interest relief, or (b) leave the country and teach somewhere else. The question is, does such credit policy create passivity and dependency

²¹⁷ *Supra* note 30.

or does it help people to better themselves? The other question is: why would someone try to better herself at the risk of ending up much worse off than in the beginning? April Adderley remarked that the worst decision she made financially was going to college.²²⁰ Ms. Adderley's and Ms. Rogers's cases must validate the contention that the welfare system is more concerned with stigmatizing and humiliating the recipients than giving them alternatives.

Another reason Minogue rejects the concept of social justice is that (he claims) this concept requires everyone to give his/her belongings to the state, with state deciding what, to whom, and how to redistribute. But, paradoxically, he calls for state intervention in some areas. He states, "Surely, it may be said, however, governments must intervene to bring social justice in some *areas*—race relations, for example."²²¹ Does this not seem that he is contradicting himself? More importantly, how can he reconcile his assertion that social justice produces a state of dependence with his call for government intervention? I do not think he can argue that the interference will be brief, or suspended whenever the state fears the creation of dependence. He did not suggest any timeline or condition for state intervention. The only condition was "to bring social justice." This could take years, as there are many potential areas for intervention. In any event, government has the positive obligation to intervene as long as there is a need for social justice, and its failure to do so is in violation of the principles of fundamental justice in a free and democratic society. By the same token, the government's inaction on social justice issues or its introduction of action or legislation, such as the lifetime ban that

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ *Supra* note 216, p 262. My italics.

downgrades social justice, is incompatible with the concepts of social justice, social right and the *Charter*.

Conclusion

The main reason that we have to dismiss the Ontario Conservative government's so-called "welfare reform," particularly the reduction of welfare benefits by 21.6% and the introduction of the lifetime ban policy, is not only because the coroner's jury investigating Kimberly Rogers' death urged the Ontario Conservative government to end its lifetime ban on welfare to recipients convicted of welfare fraud because of the policy's "devastating and detrimental effect on our society," but also because these policies contradict the theoretical understanding of social welfare, the characteristics and goals of the capitalist welfare state, the spirit of the Canadian welfare state, the concept of social rights, the concept of social justice, the *Charter* and the principles of fundamental justice and security of person in a free and democratic society.

In a civilized society, as stated in *Oakes*, there must not only be a rational connection between objectives and the means to achieve them but also the objectives must be acceptable to the values and conscience of a civilized society. Suspending anyone, let alone a sick and pregnant woman, from his/ her major source of livelihood, is unacceptable by any standard of civilized behaviour.

Welfare benefits are provided in order that people can maintain a commonly accepted standard of living, and any legislation which denies to or deprives an individual of such a standard of life is contrary to the goal of the welfare state. The welfare state was mainly created to safeguard the individual from destitution and to enable him or her not to fall below a certain "floor". The lifetime ban presented by the Ontario Conservatives not only deprived an individual of the means of sustaining life, but also made that individual fall below the accepted standard of living in the community.

Contrary to the Ontario Conservative government's contention that it introduced laws such as the lifetime ban to protect the integrity of the social assistance programs and end the cycle of welfare dependency, the welfare system cannot be reformed through illogical and unjust laws, such as the lifetime ban legislation. Empowerment (through education, provision of opportunities and removal of barriers and injustices) is the best way to reform welfare. Injustice has never and will never produce a just reform

I have established in this thesis that, in a civilized society, destitution and its causes, such as the permanent suspension of benefits, is a cruel and unusual form of punishment, and is in breach of social rights, social justice, security of person and the principles of fundamental justice. But I am afraid that the Canadian welfare state currently lacks the will to end this form of punishment because of the economic and political status of the beneficiaries. It is ironic that, today, the capitalist welfare state yearns to go back to *laissez-faire*, despite the fact that its implications and effects are well-documented, and that the welfare state came into being in response to the large scale human tragedies brought about by unfettered capitalism.

Bibliography

- Armstrong, Pat, "The Welfare State As History," in Raymond B. Blake et al., *The Welfare State in Canada: Past, Present and Future*. Concord, Ont.: Irwin publishing, 1997, pp52-73.
- Benzie, Robert "Give Welfare Fraudsters a Break: Jury," *National Post* (20 December2002), Canada ed.: A5.
- Blake, Raymond B, Penny E. Bryden & J. Frank Strain. The Welfare State in Canada: Past, Present and Future (Concord: Irwin, 1997. Preface).
- Bliss, Michael, "Preface" in *Report on Social Security Canada for Canada*, ed. Leonard Marsh. Toronto: University of Toronto Press, 1975, p. ix, cited in James J Rice and Michael J. Prince. Changing Politics of Canadian Social Policy. Toronto: University Press, 1999, p 60.
- Clayton, Richard and Jonas Pontusson, "Welfare State Retrenchment Revisited" (October 1998) 51 *World Politics* 67 at 69.
- Colvin, Eric, "Section Seven of the Canadian Charter of Rights and Freedoms" (1989) 68 *The Canadian Bar Review* 560 at 564.
- Diana S. Ralph, André Régimbald and Nérée St-Armand. Open for business: closed to people: Mike Harris's Ontario. Halifax, N.S.: Fernwood Publishing, 1997.
- Drover, Glenn and Patrick Kerans. New Approaches to Welfare Theory. (Brookfield, Vermont: Edward Elgar Publishing Company, 1993) pp 3-30.
- Ecumenical Council for Economic Justice, Reweaving Canada's Social Programs. Toronto: Ecumenical Coalition for Economic Justice, 1993, pp 12-13.
- Edelman, Peter, "The Worst Thing Bill Clinton Has Done," *Atlantic Monthly* (March1997), P 46, cited in Richard Clayton and Jonas Pontusson's article note 101, p 87.
- Eisenstadt, S.N. and Ora Ahimeir, The Welfare State and its Aftermath. London: Croom Helm in Association with the Jerusalem Institute for Israel Studies, 1985.
- Espada, Joao Carlos. Social Citizenship Rights: A Critique of F.A. Hayek and Raymond Plant. Hound mills, Basingstoke: Macmillan; New York, N.Y.: St. Martin's Press in association with St. Anthony College, Oxford, 1996.
- Esping-Anderson, Gosta, The Three Worlds of Welfare Capitalism Princeton, NJ: Princeton University Press, 1990, pp 9-34.

- Evans, Patricia M., "Downloading The Welfare State, Canadian Style" in Gertrude Schaffner Goldberg and Marguerite G. Rosenthal *Diminishing Welfare: a cross-national study of social provision*. Westport, Conn.: Auburn House, 2002.
- Flora, Peter "On the History and Current Problems of the Welfare State" in S.N. Eisenstadt and Ora Ahimeir, *The Welfare State and its Aftermath*. London: Croom Helm, in association with the Jerusalem Institute for Israel Studies, 1985, pp 12-16.
- Galligan, Denis, "Procedural Rights in Social Welfare" in Anna Coote *The Welfare of Citizens Developing New Social Rights*. London: Oram Press, 1992, pp 55-68.
- Guest, Dennis. The Emergence of Social Security in Canada 2ed. Vancouver: University of British Columbia Press, 1985, pp34-36 cited in James J. Rice and Michael J. Prince. Changing Politics of Canadian Social Policy. Toronto: University Press, 1999, pp34-43.
- Hayek, Friedrich A. Law Legislation and Liberty, vol. 2. The mirage of social justice. Chicago: University of Chicago Press, 1976, pp 64-70.
- Korpi, W. "Social Policy and Distributional Conflict in Capitalist Democracies" (1980) 3 *West European Politics* 296 at 305.
- Johnstone, Ian, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 46:1 *University of Toronto Faculty of Law Review* at 11.
- Marsh, Leonard, Report on Social Security for Canada 1943. Toronto: 1975, pp 9-10, cited in Pat Armstrong, "The Welfare State As History" in Raymond B. Blake et al., *The Welfare State in Canada: Past, Present and Future*. Concord, Ont.: Irwin, 1997, p 54.
- Marshall, T.H. Sociology at the crossroads, and other essays. London: Heinemann, 1963, pp 284-288.
- _____, "Citizenship and Social Class," in T. H. Marshall, *Class, Citizenship, and Social Development: Essays by T. H. Marshall*, with an introduction by Seymour Martin Lipset. Garden City, NY: Doubleday, 1964, pp 71-134.
- _____. The Right To Welfare and Other Essays. New York: Free Press, 1981, p 126.
- Maslove, A. and K. Moore "From red books to blue books: Repairing Ottawa's fiscal house." In G. Swimmer, ed., *How Ottawa Spends 1997-1998: Seeing Red: A Liberal Report Card*. Ottawa: Carleton University Press, pp23-49 cited in Patricia M. Evans, "Downloading The Welfare State, Canadian Style" in Gertrude Schaffner Goldberg and Marguerite G. Rosenthal *Diminishing Welfare: a Cross-national study of social Provision*. Westport, Conn.: Auburn House, 2002, pp 75-102.
- Mead, Lawrence M. "Citizenship and Social Policy: T.H. Marshall and Poverty" in Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul, *The Welfare State*. New York: Cambridge University Press, 1997, p 203.
- Minogue, Kenneth, "Social Justice in Theory and Practice" in David Boucher and Paul Kelly *Social Justice From Hume to Walzer*. London: Routledge, 1998, pp 255-60.

- Morrison, Ian "Ontario Works: Preliminary Assessment"(1998) 13 *Journal of Law and Social Policy*. 1 at 4.
- Moscovitch, Allan. The Welfare State since 1975. Regina, Sask., U. of Regina, Social Administration Research Unit, 1985.
- Moscovitch, Allan and Glenn Grover, "Social Expenditure and the Welfare State: The Canadian Experience in Historical Perspective" in Allan Moscovitch and Jim Albert *The "Benevolent" State: the Growth of Welfare in Canada*. Toronto: Garamond Press, 1987, pp13-43.
- National Council on Welfare. Another Look at Welfare Reform. Ottawa: autumn 1997.
- Offe, Claus, "Democracy Against the Welfare State?" (1987) 15:4 *Political Theory* at 532.
- Olson, Gregg M. The Politics of the Welfare State: Canada, Sweden, and the United States. Don Mills, Ont.: Oxford University Press, 2002, pp 86-6.
- Ontario, Social Assistance Review Committee, *Transitions*. Toronto: 1988, p 9 cited in Pat Armstrong, "The Welfare State As History" in Raymond B. Blake et al., *The Welfare State in Canada: Past, Present and Future*. Concord, Ont.: Irwin, 1997, p 60.
- Organization for Economic Co-operation and Development. Social Assistance in OECD Countries Volume1: Synthesis Report. London: 1996, p105.
- Patterson, Jeffrey "Winding Down Social Spending: Social Spending Restraint in Ontario in the 1970s" In Allan Moscovitch and Jim Albert, *The "Benevolent" State: the Growth of Welfare in Canada*. Toronto: Garamond Press, 1987, pp 242-254.
- Pierson, Paul, "The New Politics of the Welfare State"(January 1996) 48 *World Politics* 143.
_____. Dismantling the welfare state? : Reagan, Thatcher, and The Politics of Retrenchment. New York: Cambridge University Press, 1994.
- Plant, Raymond, "Citizenship, Rights and Welfare" in Anna Coote, *The Welfare of Citizens Developing New Social Rights*. London: Oram Press, 1992, pp 21-9.
_____. Modern Political Thought. Oxford, UK: Basil Blackwell Ltd, 1991, pp 92-3.
_____, Harry Lesser, and Peter Taylor-Gooby. Political philosophy and social welfare: essays on the normative basis of welfare provision. London: Routledge & Kegan Paul, 1980, pp 92-3.
- Polanyi, Karl. The Great Transformation: the Political and Economic Origins of Our Time Boston: Beacon Press, 1944, p73.
- Reich, Charles A., "Individual Rights and Social Welfare: The Emerging Legal Issue (1965) 74, *Yale Law Journal* at 1257.
- Rice, James J. "Redesigning Welfare: The Abandonment of a National Commitment" in Susan D. Philips, ed., *How Ottawa Spends 1995-96: Mid-Life Crises*. Ottawa: Carleton University Press, p 186.

- Rice, James J. and Michael J. Prince. Changing Politics of Canadian Social Policy. Toronto: University Press, 1999.
- Robson, William. A. Welfare State and Welfare Society Illusion and Reality London: George Allen and Unwin Ltd, 1976, pp 11-19.
- Sabatini, E. (Rico) Welfare-No Fair: A Critical Analysis of Ontario's Welfare System (1985-1994). Vancouver: The Fraser Institute, 1996.
- Saul, John Ralston, "McQuaig Throws Doubt on Economic Policies," *The Globe and Mail* (22 April, 1995) C25 cited in Pat Armstrong, "The Welfare State As History" in Raymond B. Blake et al., *the Welfare State in Canada: Past, Present and Future*. Concord, Ont.: Irwin, 1997 pp 52-73.
- Sleeman, J.F. The Welfare State Its Aims, Benefits and Costs. London: George Allen and Unwin Ltd, 1973, pp 1-19.
- Struthers, James. Can Workfare Work? Reflections from History. Ottawa: The Caledon Institute of Social Policy, 1996 cited in Ian Morrison. "Ontario Works: Preliminary Assessment" (1998) 13 *Journal of Law and Social Policy* 1.
- Titmuss, Richard M. Essays on the Welfare State. London: George Allen and Unwin Ltd, 1958.
_____. Commitment to Welfare. London: George Allen and Unwin Ltd, 1968.
- Ulmer, Melville J., The Welfare State: USA Exploration In and Beyond the New Economics. Boston: Houghton Mifflin, 1969, pp 1-12.
- "Welfare Reform: Is It Working?" Studio2, TV Ontario, 19 Dec 2002.
- Williams, Fiona. Social Policy: A Critical Introduction: Issues of Race, Gender and Class. Cambridge, UK: Polity Press, 1989, p xvi.

Cases

Rogers v. Sudbury (Administrator of Ontario Works) 57 O.R. (3d) 460. Rogers v. Sudbury (Administrator of Ontario Works) May 15, 2001.
Irwin Toy Ltd. v. Quebec (A.G.) [1989] 1 S.C.R. 927.
Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441
Reference re s.94 (2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486
Osborne v. Canada (Treasury Board) [1991] 2 S.C.R.69 at 104.
R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R.295 at 344, 18 D.L.R. (4th) 321
R. v. Morgentaler, [1988] 1 S.C.R 30.
Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177
Mills v. The Queen, [1986] 1 S.C.R. 863
New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46
R. v. Oakes, [1986] 1 S.C.R.103
Gosselin v. Quebec (Attorney General) 2002 SCC 84. File No.: 27418.
Winnipeg Child and Family Services v. K.L.W., [2000] 2 S.C.R.519, 2000 SCC 48.
Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016
Egan v. Canada, [1995] 2 S.C.R. at 559-72.
Schachter v. Canada, [1992] 2 S.C.R. 679.
R. v. Smith, [1987] 1 S.C.R. 1045.

Statutes

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c.11.
British North American Act, 1867 (U.K.), 30 &31 Vict., c.3.
Social Assistance Reform Act, S.O. 197, C.25, s. 4(2).
General Welfare Assistance Act (GWA) R.S.O 1990 c. G6
Family Benefits Act (FBA) R.S.O 1990 c. F2
Ontario Works Act, S.O. 1997, c. 25, Schedule B, as amended (“OWA”)
Ontario Disability Support Plan Act, S.O. 1997, c.25, Schedule B., s. 14(3).