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‘Freedom from want’ – from charity to entitlement

Libérer du besoin: de la charité à la justice

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1. Introduction

In the fall of 1999, I was greatly honoured to receive the Eleanor and Franklin Roosevelt “Freedom from Fear” Award, in connection with my work as prosecutor for the International Criminal Tribunal for the Former Yugoslavia and for Rwanda.

On that momentous occasion, I found myself envious of one of my co-honourees, who was being granted the “Freedom from Want” prize for that year. I had an intuition that hers would be harder to get.

I want to explore with you today why I think this is so. And I must state at the outset that although my reflection has been greatly enriched by my few months in office as the United Nations High Commissioner for Human Rights, I don’t speak today in that capacity. I speak as a Canadian, as a Quebecker, but as one who always had a foot somewhere else.

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Few ideas have been more powerful and influential as Franklin Delano Roosevelt’s ‘four freedoms.’ With tyranny unfolding across Europe, Roosevelt in his State of the Union address in January 1941 articulated a vision of four inter-connected freedoms indispensable for a just and secure world: freedom from fear, freedom from want, freedom of speech and expression, and the freedom of religious worship. These freedoms captured the global imagination and came to be enshrined in the human rights compact among nations: the United Nations Charter (1945), the Universal Declaration of Human Rights (1948), and the legally binding human rights treaties that have followed.

Roosevelt predicted – optimistically, as events have transpired – that the fulfilment of the four freedoms would be achievable within one generation. While such goals have proven elusive in the 20th Century, it has not been for a lack of resources. Despite our growing global base of financial and human capital, increasingly sophisticated technology, and the experience of decades in international cooperation, poverty, inequality and repression continue to fuel security threats both within societies and across borders. Globalisation, although making good on certain of its promises to generate higher rates of economic growth, confers the vast majority of its benefits on a chosen few.

According to data published by the World Bank (2004), the average level of real income in the richest countries is 50 times that of the poorest. Where there is social and economic inequality, people experience profound differences in access to political power, access to justice, and access to the goods and social conditions that support well-being more broadly: food, shelter, healthy environments and health care. Democratic institutions can seem frail against the growing power and influence of multinational corporations, international organisations and other external actors. Such fundamental security challenges are not just for individual nation states to face alone. They require international cooperation, and they are the subject of continuing debate and dialogue in international fora. That being said, they require action, first and foremost, at home.

For its own part, Canada has consistently portrayed itself as an active promoter and defender of international human rights, and has – no doubt – displayed a strong commitment to multilateral approaches to global problems. It is a commitment which has, moreover, come to be a matter of national identity. Canadians have long identified with the blue beret of a UN peacekeeper, for example, in large part owing to the involvement of former Prime Minister Lester B. Pearson,
Canada's sole Nobel Peace Prize Laureate, in the creation of a UN peacekeeping force during the 1956 Suez Crisis.

What about the case of human rights at home? The values of freedom, equality and tolerance reflect a very large consensus in Canada. They are values which have been entrenched in the Constitution through the 1982 Charter of Rights and Freedoms, and embodied in our international commitments under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women, amongst others. I want to ask you today, however – perhaps somewhat provocatively – if we have done everything within our power to give those values, and those legal commitments, effect in our day-to-day life as a nation.

During the 1990s, as a nation we were quick to celebrate our No. 1 ranking on the ‘Human Development Index’. The index is the UN Development Programme’s annual comparative assessment of human well-being world-wide, assessed on indicators including life expectancy at birth, literacy and gross domestic product. It gives a snapshot of well-being at an aggregate level, but it is a long way from reflecting the experiences of a country’s most vulnerable citizens.

Despite our international standing, however, it was evident that poverty and gross inequalities persisted in our own backyard. And so, the ‘Human Poverty Index’ tells a different story, where last year Canada could manage only a 12th place ranking out of the 17 OECD countries listed, a distressingly consistent pattern since the UNDP’s rankings began. Other reports, studies and indicators, from home and abroad, reveal that First Peoples, single parent families headed by women, persons with disabilities and many other groups continue to face conditions in this country that threaten their fundamental economic, social, civil, political and cultural human rights, the birthrights of all human beings under international law.

How can such glaring disparities prevail in a country such as this, a wealthy, culturally diverse, cosmopolitan democracy? What is it in Canadian society that prevents the poor and marginalised from claiming equal enjoyment to the full range of their rights recognised under law, including economic, social and cultural rights? Can such entrenched marginalisation really be dismissed as the fault of the marginalised, as some would tacitly suggest? To what extent can we point to shortcomings in our democratic processes or legal system? Or do such anomalies compel us towards a deeper examination of the basic values for which Canadians purport to stand?
It is impossible, I believe, to gain a full appreciation of the Canadian human rights experience, or to understand well our values and our history, de-linked from the international legal and political context of which the Canadian experience forms an inextricable part. I would like, therefore, to take one step back, looking at the core ideas and values underpinning the international human rights system, highlighting Canada’s role in the process. This should help us to better understand the evolution of Canadian political history and legal culture – and ultimately, our very partial and hesitant embrace of economic, social and cultural rights.

2. Canada and the international origins of economic, social and cultural rights

As important as it is to international human rights law as we know it today, our collective interest in human dignity and well-being did not originate with the Universal Declaration of Human Rights. ‘Welfare rights’ in general can be traced to two major political and socio-economic phenomena: the rise of nation states and their evolution into mass democracies after the French revolution, on the one hand, and the emergence of capitalism as the dominant mode of production following the Industrial Revolution, on the other. Within these two sets of transformations, welfare rights and institutions could be seen as responding to nascent demands for social security and income equality, with the perceived legitimacy of the State itself coming to depend at least in part upon its ability and willingness to meet these demands. In this sense, the welfare state can be understood as an accommodation and compromise between economic imperatives and socio-political demands.

No doubt, the priority that we choose to attach to different rights reveals much about the rich array of political and cultural traditions the world over. The western bias today towards a particularly narrow strand of ‘civil liberties’ likely has more to do with their instrumentality for neoliberal, market-driven policy imperatives than anything else. Such policy preferences, however, do not warrant subjugating – or obfuscating – rights labelled ‘socio-economic’ for their supposed incompatibility with liberalism or the so-called rules of the market. To do so would require turning a blind eye to not only the shared historical origins of many of these rights, but also the close conceptual and functional connectedness between them. I wish to underscore that my own use of ‘categories’ when talking about particular rights from here onwards is only to address the distinction drawn by others.
Roosevelt’s four interlinked freedoms captured the global imagination. The story of the Universal Declaration, and the place of socio-economic rights within it, reflected an integrated vision of the human being, embodying the interests and entitlements necessary for a life with dignity. This story is in great part a Canadian one. The task of drafting the Declaration was officially that of the newly constituted Commission on Human Rights, meeting for the first time in New York in 1947. The Commission was chaired by Eleanor Roosevelt, a strong advocate for economic, social and cultural rights. René Cassin, representing France, was later to receive the Nobel Peace Prize for his contributions to the Universal Declaration and Covenant drafting processes. However, it fell to the Director of the Human Rights Division of the Commission’s Secretariat, Canadian John P. Humphrey, to produce a first draft of the Universal Declaration, taking into account drafts and submissions from member States and expert bodies.

Humphrey, having taught law at McGill University for almost ten years, entered the United Nations Secretariat on 1 August 1946 and retired more than twenty years later. He later described his own role as a ‘behind the scenes one’, although no doubt his personal contribution was an important one. Humphrey attached great personal importance to socio-economic rights, drawing inspiration from the work of legislators the world over.

While Cold War rivalry was later to frustrate efforts to negotiate a single legally binding Covenant covering all human rights, this was no barrier during the period 1947-48. Spurred by the power of the ‘four freedoms’ idea, the inclusion of a wide spectrum of human rights within the Declaration was achieved with tacit advance agreement. Naturally, the spectre of World War II was in clear view too, influencing the elaboration of all rights including those of a ‘socio-economic’ character.

The Canadian relationship with genesis of the Declaration is not defined by Humphrey’s role alone. Considered by many to be one of our greatest political figures, Lester B. Pearson was an equally noted protagonist in the story of the Declaration. This may hardly seem surprising in view of the social policy developments that took place during the 1950s and 1960s under Pearson’s watch. It included the introduction of the Canada Pension Plan and family assistance plan, and – despite fierce opposition from insurance companies and some of the provinces – a national system of universal Medicare. He was also later to establish the Royal Commission on Bilingualism and Biculturalism, and the Royal Commission on Women that led to sweeping changes in the place and role of women in Canadian society. Pearson also introduced other
landmark progressive policy initiatives in the field of education, including a system of student
loans to provide greater opportunity for young Canadians to go to university, labour and
immigration policy, and in academic life following his retirement he led a major study advocating
increased aid for the developing world. During a distinguished political career, he achieved the
most sweeping and progressive package of legislation ever put before Canadians, and he did it
without incurring a deficit.

Lesser known, Pearson’s imprint as a newly appointed Secretary of State for External Affairs was
not the one that a casual observer of history, with knowledge of his subsequent work, might
expect. Indeed, Canada’s entire role in the genesis of the Universal Declaration came to be mired
in political intrigue and controversy. Canada’s position on socio-economic rights, in particular,
varied from ambivalence to outright hostility.

The low-water mark in Canada’s international stance on social and economic rights occurred
towards the final stages of the negotiation process on the Draft Declaration, when Canada – led
by Prime Minister Louis St. Laurent and Pearson – elected to abstain from a critical vote on the
Declaration in the Committee of the U.N. General Assembly charged with human rights issues,
one of only a small handful of countries to do so. While ultimately Canada did vote in favour of
the Declaration in the full General Assembly, the initial abstention decision embarrassed Canada
internationally, and in the words of Professor William Shabas, ‘left a blemish that fifty years have
not erased.’ This is hardly the story we might imagine given our national self-perception.

The reasons for the abstention related very directly to misgivings which prevailed then in official
circles in Canada at the inclusion of socio-economic rights in the Declaration. In Pearson’s
statement to the General Assembly on 10 December 1948, however, the true nature of these
misgivings were not apparent on the face of his words. Rather, Pearson challenged the vague and
“imprecise” nature of the language used in the draft Declaration, and noted that Canada had
abstained on certain articles – notably, the right to education and the right to cultural life – on the
basis that these matters were within provincial rather than Federal jurisdiction. While true that
there were provincial administrations that were concerned about Federal interference, the stated
justifications for the Canadian abstention simply do not hold up to critical scrutiny. It was very
clear that St. Laurent was under pressure from conservative elites, including members of the
Canadian Bar Association, who wanted to see an abstention. His intervention was crafted
accordingly.
In his diaries, Humphrey described Pearson’s statement to the General Assembly on 10 December 1948 as ‘one of the worst contributions,’ and a ‘niggardly acceptance of the Declaration because it appeared [that] the Canadian government did not relish the thought of remaining in the company of those who, by abstaining in the vote, rejected it.’ More pointedly, Professor Shabas asserts that the provincial jurisdiction concerns were mere pretext for avoiding human rights commitments: ‘The Canadian Government, and the Department of Foreign Affairs in particular, misled both domestic and international public opinion by concealing its substantive opposition to the Declaration behind procedural arguments.’

In the ensuing years Canada joined other Western States in thwarting aspirations for a single international treaty embracing all rights in the Universal Declaration. The result was the development of two separate Covenants and the consequent construction of an artificial boundary between the rights concerned – civil and political on one side, economic, social and cultural on the other. While we’ve seen some notable advances in the recognition of social and economic rights in Canada in recent years, the ambivalent echoes of Pearson’s words on ‘Human Rights Day,’ 10 December 1948, still reverberate within our political and legal cultures today, part of an enduring reluctance to give effect to economic, social and cultural rights. For such a generous people, such reluctance strikes me as puzzling, to say the least.

3. Economic, social and cultural rights in Canadian political and legal culture

Thinking in terms of Canada’s social history, it is well worth remembering that the early to mid 20th Century is not a bygone era of cooperation and solidarity. Social transformations demand political commitment, often generated by the work of Canadians – individually and together – who work for their ideals, who hold politicians to account, and who defend principles wherever they are, from the kitchen table to the international stage.

From where I am today, I am particularly interested both in the local roots and the outside influences that have shaped some of our approach to social and economic rights. Allow me to turn briefly and selectively to a few events and personalities from the 20th Century that help put the contemporary pursuit of “freedom from want” in context.
I want to start in the Maritimes with Dr Rev Moses Coady and the Antigonish Movement that has become synonymous with his name. While historical shorthand tells us that the 30s were dirty and the 20s were roaring – a time of the boom preceding the stock market crash of 1929 – the situation in rural Nova Scotia did not know such a distinction. Before and after the crash, the situation for Maritimers was dire. The plight of fishing communities was brought to the attention of the federal government following a public meeting held in Canso on Dominion Day in 1927, the diamond jubilee of Confederation. The call for action prompted the government to appoint a Royal Commission to investigate the fishing industry. Amongst its recommendations, the Commission stated that Maritime fisherfolk should be organised. Dr Coady was appointed to take on this job.

Dr Coady’s plan centred on adult education and economic cooperation for the purposes of conquering poverty and creating the “good and abundant life”. The key to freedom from want rests in collective action. Together with his colleagues from the Extension Department at St. FX University, Coady took this message from town to town, touching the lives of more than fisherfolk and their families. Coal miners and farmers, having no shortage of their own difficulties in sheltering, feeding and clothing their families, came to the same study clubs that Coady helped set in motion. Coady’s message was not a palliative taste of hope but rather a call to action.

Where did Coady’s ideas come from? While the Antigonish Movement has later received international attention as a model for community economic development, it is worth remembering that there were outside influences. The idea of the “study club” and cooperators was something that Coady imported from Sweden. Even in the early 1900s, people were taking notice of the ideas that might have local application – such global perspective is not merely a product of our globalised contemporary world.

Leonard Marsh was another figure in the history of Canadian social policy development that kept an eye on developments abroad. Working under the direction of former McGill University Principal F. Cyril James, Marsh served as research director of the Committee on Post-War Reconstruction. He was largely responsible for the Report on Social Security for Canada in 1943. It set out a blueprint for a welfare state that would insure that there were collective benefits available to meet the needs of Canadians at every point in the lifecycle. It advocated a social minimum and called for the eradication of poverty. While many Canadians are acutely aware of
the divergent paths of Americans and Canadians on any number of contemporary social issues, it is worth remembering that it was not so long ago that the expansion of social programmes was a cue taken from the United States. Commentators have noted that in addition to being a student of William Beveridge, the designer of Great Britain’s post-war welfare state, Marsh was also inspired by the ability of the Roosevelt administration to respond to the dire consequences of the Great Depression of the 1930s. In essence, the Four Freedoms, far from being only a part of the American story or even the Universal Declaration’s story, were also part of the Canadian story.

It probably is not surprising that the same people who were skeptical about economic, social and cultural rights in the context of an international declaration on human rights were also less than enthusiastic about Marsh’s recommendations. Political scientist and welfare state scholar Antonia Maioni points out that “the content and provenance of Marsh’s report were enough to generate a great deal of hostility, not to mention embarrassment, on the part of Mackenzie King and his Liberal cabinet.” The Prime Minister worried about the extent of fiscal pressures that would be placed on the state. Maioni notes that the Marsh report received considerable media comment and business protest prior to being “hastily buried away”.

Even if the Marsh report did not receive immediate action, it was clear that its ideas resonated with Canadians. In many respects they could be seen in the campaign of Tommy Douglas and the Cooperative Commonwealth Federation in Saskatchewan. Douglas was elected in 1944 after leading a campaign which ran under the banner “Humanity First”. His platform was true to the principles and vision espoused at the founding convention of the CCF, held in Regina 11 years prior to that victory. Delegates at the convention expressed their commitment to the retention and extension of social legislation, the socialisation of health services, and federal responsibility for the unemployed. It was clear to Douglas that social services were special types of goods, not commodities which could be made contingent on ability to pay. This was a social, political and moral commitment. And it was also a personal commitment, of someone who knew that it was only the charity of a doctor that saved his leg from amputation during his youth. Charity is a wonderful thing, but we also know – as Douglas knew then – that it is better to give than to receive.

Under Douglas’ leadership, the province moved quickly to establish a provincial hospital care programme, the first of its kind in the country. There were no limits on length of stay, only the need for the assurances of a medical doctor that the hospital stay was medically required. Mental
health care was included. Seniors were insured not only for hospital care, but also for dental care and eye glasses. Politically, healthcare was widely considered as having the status of an entitlement. Increasingly the same could be said elsewhere in the country.

Today we might take it for granted that it is a cherished national institution, something we see as a cornerstone of Canadian values, a way of honouring our fundamental commitment to each other. In discussing progress, we should not lose sight of the fact that the establishment of systems of public, universal health insurance and health care was a controversial and contested development in its time. The adoption of the Saskatchewan Medical Care Act on Canada Day, 1962, prompted a 23 day doctors’ strike in the province. Thousands came out to the steps of the legislature in Regina. Media reported that there was talk of possible violence. Doctors, some of medicare’s most ardent defenders today, were less likely to back the government’s pursuit of a single-payer, publicly-provided healthcare system. In an interview with the CBC, the Vice President of the Saskatchewan College of Physicians and Surgeons at the time stated that “There’s no doubt that you can not order charity, you can not order mercy, you can not order good motives and good feeling towards your fellow man.” While perhaps his comments are accurate in their narrowest sense, I would argue that society can build institutions which embody and reinforce all those values, and moreover, it is a matter of obligation at law owing to a duty which goes to the core of the protection and promotion of human dignity.

Subsequent events tell us that Canadians saw that potential, too. Building on support for Saskatchewan's policies and programmes, the federal government looked to create a plan that would extend protection to all Canadian citizens. In 1964, a report from the Royal Commission on Health Services was tabled by Supreme Court Justice Emmett Hall. He recommended a joint federal/provincial system that would cover the costs of preventative health care services and hospital care for all Canadians. In 1967, a national mechanism for the financing of health care was created, and the last provinces signed on in 1972. In all that transpired, it would seem that the federal government had finally overcome the sensitivities about intrusion into fields of provincial jurisdiction that it expressed so forcefully as a basis for its resistance to social, economic and cultural rights in the Universal Declaration in 1948.

The most dramatic example of social transformation can likely be found in the Quebec experience of the 1960s: the Quiet Revolution saw the rapid expansion of the état-providence, when health, education and social services left the hands of the church and became public,
secular institutions administered by the Government of Quebec. The Quiet Revolution was about more than the secularisation of social institutions, however. It was a social project that aspired to challenge old elites and create new relationships of justice. While it drew on the energies of young intellectuals and journalists, commentators have observed that one could still see roots that drew on the philosophy of social Catholicism, as well as Keynesian liberalism. It is also worth noting that the movement was cautious to preserve aspects of the province’s culture and reflected the linguistic and religious protections found in the British North America Act of 1867. The establishment of the Commission Parent on education lead to the adoption of a secular education system that retained its historical Catholic or Protestant character.

In a few short decades, Canadians and their political leaders seemed to grow to embrace collective responses to meeting each other’s needs, in raising a family, in unemployment and disability, in sickness, in old age. What was the essential nature of the choices being made and the goods being dealt with? Public policy decisions were reflected in law, regulations and institutions, but ultimately, the decisions remained political choices, and as political choices go, they remained subject to reversal. The adoption of the Canadian Charter of Rights and Freedoms in 1982 held the potential to change in a fundamental way the relationship between executive, legislature and judiciary as we knew it, opening up the possibility for an articulation of the rights-based component of public policy decisions. Section 7, guaranteeing the right of everyone to life, liberty and security of the person, is particularly relevant in the context of “freedom from want”. Political scientists and legal scholars watched the court with great interest to see what would be the impact of judicial review on public policy decisions.

The first two decades of Charter litigation testify to a certain timidity – both on the part of litigants and the courts – to tackle head on the claims emerging from the right to be free from want. This may have been caused, in part, by the three-year moratorium on equality rights, which therefore received constitutional protection only after the judiciary had had an opportunity to flex its intellectual muscles on the more familiar and less challenging claims related essentially to fairness in the criminal justice system. Equality rights were perceived, like social and economic rights, to invite broader social engineering, and to generate more conflict between legal demands and political accommodation.

Looking back at the discussion on the place of economic and social rights in the Universal Declaration, some might then observe that not much as changed with regards to the conversation
on these rights in Canada today. Given the dramatic transformation of our social protection infrastructure during this same period, such a stagnation seems odd, to say the least. In their social affairs, Canadians will affirm values strongly and publicly – in fact, even the recent Royal Commission on the Future of Healthcare in Canada called its final report "Building on Values" – but strangely, there is a reticence to give those values the force of law and full-fledged constitutional protection. Canadian courts have championed civil and political rights and have articulated for themselves an appropriately far-reaching sphere of judicial review when the state invokes the use of repressive criminal law powers. But considerably more reticence has been expressed in relation to social, economic and cultural rights and the protection of vulnerable segments of the population on grounds other than discrimination.

The approach of Canada’s courts has not escaped the notice of the United Nations Committee on Economic, Social and Cultural Rights. In 1998, when reviewing Canada’s compliance with its international obligations, the Committee stated that it had received information about a number of cases in which claims were brought by people living in poverty, alleging that government policies denied the claimants and their children adequate food, clothing and housing. The Committee noted that provincial governments “have urged upon their courts… an interpretation of the Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy.” It is important to stress that the Committee is not stating that governments have an obligation to directly provide all things to all peoples. What it has pointed out, however, is that courts in Canada have “routinely opted for an interpretation of the Charter which excludes protection of the right to an adequate standard of living and other Covenant rights”.

Very public, worldwide criticism of this nature is, of course, very hard to take. One might argue that it is even harder to take in the context of public – bordering on enthusiastic – commitments Canada has made under the banners of solidarity and social justice. It is the sign of a mature democracy, however, for a country to respond with professionalism and continued commitment to participating in those international mechanisms of accountability. There is, after all, limited benefit from isolated self-congratulations.

Ultimately, the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law. It honours the commitments made by Canadian legislatures when
they have ratified international human rights instruments. Of course, courts and human rights instruments do not purport to have all the answers on all of the most important social and political questions of the day, and it is simply beyond the capacity of the courts to adjudicate on every single matter with a human rights implication. But, just because the questions contain a substantial political dimension does not mean that they are beyond the reach of the judiciary, as I’ll shortly relate.

4. International perspectives

Whatever cause there may have been to question the equal status and justiciability of economic, social and cultural rights 60 years ago, one thing is clear: there is no basis for categorical disclaimers today. The equal status, indivisibility and inter-dependence of all human rights have been affirmed unanimously and repeatedly by the international community of States, most notably at the Vienna World Conference on Human Rights (1993) and in 2000 at the Millennium Summit. Socio-economic rights have the status of binding law under a multitude of international human rights treaties, some enjoying near universal ratification, as well as in the Inter-American, African and European regional human rights systems, where procedures are in place to ensure that violations of these rights are redressed.

Roosevelt’s ‘freedom from want’, borne through the Universal Declaration of Human Rights, now breathe life into dozens of constitutions from all regions of the world, from South Africa, to France, to Finland, India, Syria, Romania, Argentina, Nigeria, the Philippines, Sri Lanka, Papua New Guinea and Bangladesh.

As is the case for civil and political rights, economic and social rights may – and in many circumstances must – be backed by legal remedies. Courts the world over have been playing an increasingly vital role in enforcing socio-economic rights, within the bounds of their justiciability, bringing them from the realms of charity to the reach of justice.

In 2001 in India, the Supreme Court made a legal claim to the right to food as an integral element of the right to life. South Africa provides another notable example in the context of the right to health. While political avenues failed, the ‘Treatment Action Campaign’ brought a successful
action in the South African Constitutional Court, obtaining an order that required the government to make anti-retroviral medication available to pregnant women living with HIV and AIDS so as to more effectively prevent mother-to-child transmission of HIV. In Argentina, there is a similar story to be told, with the courts ordering the government to take reasonable and affordable measures to address a haemorrhagic fever endemic to the country.

These examples show how social mobilisation, judicial review and political action can together vindicate rights, with potentially life-saving impacts. In this sense, I believe there are important lessons for Canada in here. The realisation of economic and social rights is inherently a political undertaking, involving negotiation, disagreement, trade-offs and compromise. But political processes do not serve all equally. Equality requires, among other things, that the most disadvantaged be empowered to participate meaningfully both in political and legal processes, unshackling them from the benevolence and whim of the powerful, and enabling them to control their own destinies.

Securing implementation of court orders in human rights cases has often proved a challenge, but such challenges only underscore the importance of seeing litigation strategies as part of broad, participatory movement for social change. In this, we see how all human rights are indivisible and interrelated. Economic, social and cultural rights claims cannot be vindicated in the absence of minimum civil and political rights guarantees: freedom to organise, access to information on the entitlements in question, access to the judicial system. And the same applies vice versa.

The experiences in India, South Africa, Argentina and elsewhere help to dispel categorical assertions as to the non-justiciability of socio-economic rights. In principle and in practice, there are justiciable elements in most if not all human rights reflected in the Universal Declaration. From comparative experience, the prospects for effective judicial enforcement depend more upon the authority of the courts hearing the claim, than in anything inherent in the nature of the right in question.

International and national level jurisprudence also helps us to better understand the substantive content of economic, social and cultural rights, and the limits of entitlements and obligations arising thereunder. With the international standards and experience in view, it is impossible to regard socioeconomic rights obligations as fanciful or far-fetched. Human rights of all kinds involve ‘freedoms’, as well as ‘entitlements.’ Each kind of obligation may have cost implications
to varying degrees, be it for the infrastructure necessary for the administration of justice, human and technical resources necessary to regulate financial or social sectors, or direct provision of water, sanitation, housing or other services as needed. Human rights law insists on principle, rationality and equity in the process of resource allocation, and on moving steadily forward within the prevailing resource constraints. While the standard of achievement for all countries is the same, the national benchmarks will differ greatly. However, whatever the resource constraints, there is a core minimum international legal obligation to secure a floor of rights and services beneath which people should never be allowed to fall.

Both in principle and practice, the realisation of social and economic rights is not predicated upon any particular political or economic system, although the extremes at either end of the ideological spectrum are unlikely to be favourable. The fact that social and economic rights have been litigated successfully in many different legal systems helps to bear this out. Allegations as to the uniformly and uniquely ‘costly’ nature of socio-economic rights obligations seem at best strange or misinformed, or at worst, disingenuous, set against these realities. The barriers to rational debate on these matters are probably better explained by underlying ideological preferences, especially those associated with the libertarian ideal of a minimalist State. Liberty and political freedoms, as much as basic socio-economic entitlements, depend on taxes. In most instances, expenditures on human rights enforcement is money well spent. Girls’ education has been proven to be the best long-term investment that there is. Security of tenure, women’s rights, and participation rights all have demonstrably major development dividends. Conversely, recent World Bank research casts doubt on whether sustained increases in economic growth are achievable with declining distributional equity.

The real issue is not regulation or State action in and of itself: but rather, what is being regulated, and in the interests of whom: the market, national elites, the aggregate interest of the majority, or the disadvantaged and the vulnerable. Poverty and exclusion is too readily accepted by majorities as regrettably accidental, or natural or inevitable, rather than the outcome of conscious policy choices. All underlying agendas and preferences must be brought to the surface if these debates are to lead to policy decisions that produce just outcomes.

Of course there will always be those objecting to an active judicial role in regulating public and private life, especially where the effect of court action runs counter to current majoritarian will. But in truth, in addressing human rights claims, judges generally display a very clear regard for
the proper preserve of elected legislatures. The substantive tasks involved in reviewing social
and economic rights claims are no quantum leap from those associated with ordinary judicial
review functions, such as examining the ‘reasonableness’ or otherwise of official conduct in
accordance with objective criteria. In many cases it has been sufficient for courts to find that
particular groups of people are being unfairly discriminated against under social benefits
schemes, or that governments have failed to implement existing (reasonable) laws and policies.

The legality of judicial review of all human rights is not open to question under the Canadian
constitutional system. The legitimacy of a constitutional interpretation that reflects the
universality and indivisibility of all human rights expressed in international instruments ratified
by Canada should also not be open to question. Early in the history of the Charter, there was
scepticism towards judicial remedies for denial of fundamental rights both from those who feared
an overly timid judiciary and from those who dreaded overly ambitious courts. Would
constitutional supremacy lead to politics being superseded by legalism, politicians by lawyers,
parliamentarians by judges, the reality of power by the rhetoric of rights?

Both extreme forms of scepticism proved in my view ill founded. Courts are well-equipped to
reflect the entrenched expectation of Canadians that equitable access to the riches generated by
our collective harvesting of this generous land is no longer a matter of charitable disposition.

Work is advancing at the international level to promote the justiciability of economic, social and
cultural rights, and there are key opportunities to take leadership on this issue. In recent years
United Nations Member States have been examining options for the elaboration of an Optional
Protocol to the International Covenant on Economic, Social and Cultural Rights. Depending on
the shape it is given, an Optional Protocol could give rise to a legal mechanism that would allow
individuals to bring their claims to an international forum, in cases where national recourse has
been found wanting. This is an important development in international law, one that promises to
help parties to the Covenant honour the commitments they have made at law, complementing and
expanding remedial avenues under the European, Inter-American and African regional human
rights systems, and affirming our deeper social commitment to the realization to a life of dignity
for all people. Concluding such an instrument is an expression, not an abrogation, of State
sovereignty. The decisions that need to be taken clearly belong to States. As a Canadian,
however, it is my personal hope that Canada will play a leadership role in future discussions,
projecting a moral voice that mobilizes and galvanizes international support for such a protocol and all that it represents.

5. Conclusion

Human rights embody an international consensus on the minimum conditions for a life of dignity. But human rights are not a utopian ideal. At any given point in time they must be understood as the product of a struggle – whether made explicit or otherwise – between and within States, over ideas, ideologies, politics and resources. It is the interplay of these forces and the outcomes of these struggles that influence the textual formulations and formal interpretations of human rights, as well as the prospects for their vindication through legislative, political and judicial processes. The reason that ‘rights talk’ is resisted by the powerful is precisely because it threatens (or promises) to rectify distributions of political, economic or social power that, under internationally agreed standards and values, are unjust.

These truths are laid bare in Canada’s very hesitant recognition and selective implementation of some of its international human rights obligations. But sixty years of disclaiming or belittling the equal status of socio-economic rights as enforceable human rights, fundamental to the equal worth and dignity of all Canadians, rings hollow and disingenuous in the light of international and comparative experience. There is nothing to fear from the idea of socio-economic rights as real, enforceable, human rights on equal footing with all other human rights, and no cause for simplistic or categorical distinctions between these rights, and rights described as ‘civil and political.’ Human rights obligations require no more or less than reasonable efforts within the maximum extent that resource constraints permit, with priorities determined through inclusive democratic processes, and with an abiding concern for the situation of the most disadvantaged.

The possibility for people themselves to claim their human rights entitlements through legal processes is essential so that human rights have meaning for those most at the margins, a vindication of their equal worth and human agency. There will always be a place for charity, but charitable responses are not an effective, principled or sustainable substitute for enforceable human rights guarantees. The debate in Canada on these issues can be certain to continue. However those fearing or objecting to the vision of human rights that I’ve outlined would do well
to bring the true nature of their misgivings into the open, out from the shadows of straw men and calculated obfuscation. With good faith engagement on the substantive issues, I believe that there will be every prospect of a more just, inclusive and rights-respecting democracy in Canada in years to come, and that we shall be able to project abroad an unambiguous Canadian vision of the world.