

Research Paper

Liberalism, Law and Social Rights: The Charter of Rights and Freedoms in the Era of Welfare State Restructuring

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Abstract: Despite expanding the boundary of formal equality, the Charter of Rights and Freedoms is conducive to rationalizing liberalism's conception of the role of the state. Contrary to the hasty expectation of social rights advocates who hoped that they can utilize the Charter to advance social rights in Canada, the Charter has in fact been interpreted by the courts in a manner that justifies the subordination of the social rights to the vicissitudes in the economic sphere, which has historically been ingrained as an overriding tenet of liberalism. In line with a long-held liberal principle that the real threat to individual liberty emanates from the state, not private property relations which are indeed the basis for socio-economic inequalities, the Charter interpretations by the courts have, in fact, reinforced a legal rationalization for the neoliberal-motivated forces of welfare state retrenchment which are reflected in the courts' refusal from imposing any positive obligation on the state to provide the basic means of subsistence for citizens as a matter of right. Thus, judicial interpretation of the Charter reflects and reinforces the nineteenth-century liberal tenet that the judiciary can restrain but cannot compel the state to take positive actions.

Keywords: Canadian Social Policy, Liberalism, Neoliberalism, Social Rights, Supreme Court.



1. Introduction

Since its entrenchment in the Constitution Act of 1982, the Charter of Rights and Freedoms hence the Charter has established itself as a major game-changing legal force in Canadian politics. Due to the Charter's pervasive ascendancy in Canadian political discourse, rarely has any dimension of Canadian political life escaped the impact of the Charter. The Charter has not only galvanized the civic consciousness of Canadians on their rights and attitudes towards governments, but it has also reshaped the relations between Canadians and their governments. The Charter has in fact fostered a form of patriotism as the foundation for civic and secular nationalism in Canada. Furthermore, the Charter has altered Canadian political culture which is reflected in empowering citizens vis-a-vis their government. Consequently, the Charter has undermined elite accommodation which had historically been a dominant political practice in Canadian politics [1].

Since its inception in 1982, the Charter has been subject to an ongoing debate among political commentators, policy analysts, human rights activists, and legal practitioners. The fiercest attacks on the Charter have emanated from both sides of the ideological spectrum [2]. Despite their ideological differences, both left- and right-wing intellectuals depict the Charter as an undemocratic document that has allegedly triggered a significant transfer of policymaking power to the courts and has, therefore, undermined the sovereignty of the national parliament and provincial legislatures as the ultimate centers of law-making bodies. On one hand, the right-wing intellectuals have lamented the alleged potential of the Charter to advance equality at the expense of liberty and hence compromising the capitalist norms and values which in their views are indispensable to economic growth and prosperity. On the other hand, the leftist scholars have described the Charter as an undemocratic document and have criticized it for its inherent propensity to legalize politics.

Even though the Charter has extended the political frontiers of formal equality in Canada, it has not changed the underlying nineteenth-century liberal principles of the separation of the economic sphere from a political sphere that has taken deep roots in liberal democratic societies. Operating as part of the state ideological state apparatuses to reinforce and rationalize the nineteenth-century liberalism's conception of the role of the state, the Charter has in fact been utilized by the courts to justify the subordination of social rights component of the citizenship to the vicissitudes in the economic sphere which has historically been an ingrained tenet of liberalism. In line with a long-held liberal principle that the threat to the individual liberty emanates from the state, not private property relations which are indeed the basis for socio-economic inequalities, the Charter interpretations by the courts have provided a legal rationalization for the neoliberal driven welfare state retrenchment which are reflected in courts' refusal from imposing any legal obligation on the state to provide the basic means of subsistence for citizens as a matter of rights.

This paper is divided into five parts. The second part deals with the literature review of the main arguments by the left- and right-wing scholars. Part three discusses the rise of neoliberalism and ensuing welfare state restructuring that unmasked the dependence of social rights on the gale of market forces. Part four demonstrates the fragility of social rights under liberal democracy. Part five deals with the interplay of the Charter and the welfare state. It discusses how the judicial interpretation of the Charter reinforces nineteenth-century liberalism's conception of the role of the state. Finally, in conclusion, the main themes and findings will be recapitulated.

2. Left and Right Debate on the Charter

Prior to discussing the interplay of Charter and social welfare program retrenchment, it is imperative to briefly outline the main points of argumentation deployed by right- and left-wing scholars. The principal lines of right-wing criticisms of the Charter revolve around three points [3]. First, Right-wing intellectuals are under a strong impression that the Charter has expanded equality at the expense of liberty. According to this line of reasoning, accomplishing equality requires more state expenditures which are to be procured from increasing taxes. Consequently, increasing taxes is bound to limit individual liberty which in right-wing parlance is construed as the ability to appropriate without facing legal restraints. This attack by right-wing intellectuals on the Charter is predicated on an assertion that the Charter has the potential to distort the natural operation of market forces and therefore undermine economic growth which is the sine qua non for socio-economic prosperity. Second, right-wing intellectuals argue that the expansion of judicial review has allowed judges to become "politicians in robes". According to this line of argumentation, the politicization of the judiciary by the Charter is reflected in the empowerment of judges to challenge and strike down laws that are made by elected officials. In other words, the Charter has shifted the balance of power away

from the legislative branch to unelected judges who have emerged as policymakers. Third, it is argued that the Charter has fostered the emergence of a “court party” whose members have found a golden opportunity to circumvent the parliament and use the judicial avenue to translate their demands into concrete political goods. According to this last line of argumentation, the charter has undermined the supremacy of parliament since it has allowed interest groups to harness the court as a tool to bypass the parliament, which as the ultimate source of authority is responsible for lawmaking.

Leftist scholars' criticisms of the Charter revolve around four points [4]. First, left-wing intellectuals have attacked the Charter on the ground that the Charter is vocal on negative freedoms from state interferences and is silent on positive the rights to employment, adequate income, education, and housing. Second, leftist intellectuals argue that the Charter has facilitated the legalization of politics. According to this line of argumentation, the legalization of politics is manifested in the fact that crucial social, economic, and political questions that should be discussed in the parliament, have now been translated into an esoteric and technical language that can only be comprehended by judges and lawyers. In other words, leftist intellectuals insist that socio-economic issues and problems must be tackled and resolved in parliament, not in the court. Third, it is the assertion of left-wing scholars that it is an ineffective strategy to employ the Charter litigation process to bring about progressive social changes. According to these leftists' critics of the Charter, due to their socio-economic backgrounds, judges will interpret the Charter in a manner that rationalizes the values and norms of upper and upper-middle classes which is conducive to maintaining the status quo. Fourth, because of heavy costs associated with Charter litigation, only business interests can utilize the Charter to defend and advance their own interests. In other words, working-class and marginalized layers of society do not have the financial means to advance their interests through judicial proceedings.

While both left- and right-wing intellectuals have raised significant questions about the nature of the Charter and the enhanced role of the judiciary, their main concerns can hardly be justified. Social rights are not entrenched in the Charter as leftist scholars expect to be protected by the Charter. On the other hand, the Charter has not undermined the foundation of the market economy as the right-wing scholars have lamented. Even though private property rights are not protected in the Charter, private property rights are already respected and protected by common law. Furthermore, business organizations have successfully used different sections of the Charter to protect themselves against state regulations [5]. Contrary to the right wing's lamentation for the undermining of values and norms of market economy, the Charter has, in fact, reinforced the dependence of social rights on the gale of market forces which has, in turn, provided a legal justification for the neoliberal motivated push for social welfare program retrenchment. Comprehending the impact of the Charter on social welfare policy and its interpretation by the courts to justify neoliberal motivating force of social welfare retrenchment requires exploring the genesis of the concept of social right as a component of citizenship and how it came to be attenuated by the neoliberal forces of welfare restructuring.

3. Neoliberalism, Welfare State Restructuring, and Social Rights

The expansion and the proliferation of social welfare programs after the Second World War convinced certain intellectuals such as T.H. Marshall to proclaim the rise and ascendancy of socialism without the eradication of capitalism [6]. Marshall interpreted the development of social welfare programs as a reflection of social citizenship rights that encompassed "the whole range from right to a medium economic welfare and security, to right to share to the full in the social heritage and to live the life of a civilized being according to the standards of prevailing in society" [6]. In parallel to Marshall's optimistic view of the institutionalization of social rights manifested in the adoption of universal social programs, Anthony Crosland also boastfully declared the arrival of social democrats in the vicinity of the socialist land. Crosland forcefully proclaimed that the triumph of socialism might not be a complete reality, but it is no longer a myth [7]. Indeed, during the postwar era of Keynesian ascendancy, the prevailing assumption was that a welfare state would address the shortcomings of the market economy and it would provide the complex social infrastructure essential to the maintenance of a cohesive social order [8]. According to this social democratic interpretation of the postwar economic development, Keynesianism was conducive to generating a widely held assumption that the provision of generous social services and programs, the institutionalization of collective bargaining, and worker participation in the decision-making process would have the potential to drive liberal democratic societies towards industrial democracy [9].

Indeed, during the postwar era, the concept of citizenship expanded both in scope and eligibility. The postwar Keynesian welfare state came to rest on a consensus that the national community was responsible for the provision of basic means needed for the well-being of individuals [10]. In the pre-Keynesian era, no one envisaged the existence of the right to universal social services such as healthcare and old-age pension. In the postwar era, public perception of the welfare state began to change, and welfare assistance came to be conceived as a societal obligation rather than charity [11]. During the postwar Keynesian ascendancy, despite the absence of legal protection, social rights became so deeply entrenched in the expectations and self-definition of westerners including Canadians that it would be considered unconscionable for anyone in the country to be denied the needed Medicare because of inability to pay [12]. In Canada, the stipulations attached to federal contribution to Canada Assistance Plan (CAP), which as a shared cost program came into existence in 1966, precluded a workfare scheme and required provincial governments to provide social assistance benefits based on financial needs [13]. Resting the eligibility to receive social services and social benefits on social citizenship rights was intended to not only remove the stigma associated with charity but also to eliminate the distinction between deserving and undeserving poor that had been a striking feature of the Poor Law in the nineteenth century [14]. However, this ingrained perception of social rights which had never been constitutionalized, came to be shattered by the unraveling of the postwar consensus in the 1970s.

The persisting neoliberal assaults on the welfare state are aimed at breaking the linkage between social rights and redistributive policy. According to this neoliberal line of explanation, since inequalities are created by impersonal forces of the market, they cannot be envisaged as injustice because they are not the outcomes of deliberately contrived schemes [15]. Welfarist policies have been criticized by neoliberals on the grounds that they are conducive to sowing the seeds for dependency, a cultural mentality of indolence, and family disintegration [16]. It is the assertion of neoliberals that under the welfare state, the poor have been held in enthrallment to rely on the state and therefore are prone to lose their sense of initiative and obligation to their community. It is the assumption of pro-market forces that welfare allowances encourage deviant behaviours and a single household pattern of living that are pernicious to the moral integrity of society [17]. Compelling poor and unemployed people to take jobs through tightening eligibility criteria for receiving social benefits is thus interpreted as an appropriate strategy to restore the principles of self-reliance and individual responsibility that had allegedly been weakened by the generosity of the postwar social welfare expansion. The concealed aim of neoliberals is to transfer these paternalistic roles of the state to church and private charity organizations, which is reminiscent of the reign of laissez-faire social arrangements in the eighteenth and nineteenth centuries [18]. The contradictory and evasive emancipatory formula of neoliberalism to conquer the conundrum of socio-economic inequalities has been elucidated by Hoover and Plant:

“There is ... the problem of hypocrisy. While the poor are to be regulated to induce moral behaviour by the terms of dependency theory, the rich are given licence to be indulgent by the terms of free enterprise and laissez-faire” [19].

Within the emerging neoliberal political discourse on social citizenship, there has been an attempt to glorify radical individualism and shift the blame for individuals' market failures to individuals themselves [20]. Since the emerging neoliberal discourse associates the inherent perversity of market forces to individuals and their lack of understanding of how markets operate, it is conducive to depoliticizing economic policy. Under the neoliberal discourse on citizenship, an ideal citizen is described as one who is cognizant of the limitations and liabilities associated with the ability of the state to provide social protection. According to this neoliberal conception of citizenship, a responsible citizen is one who discerns the significance of principles such as hard work, self-reliance, and independence [10]. As Luca Mavelli has pointed out, neoliberalism tends to disseminate market values and principles to all spheres of social life and turn states and individuals into entrepreneurs who are bound to maximize their utilities.

Since the economic downturn in the 1970s which led to the identification of the Keynesian welfare state as one of the main contributing culprits behind the economic crisis, the centrality and attractiveness of social rights in both public life and political discourse even within social democratic parties have lost its momentum. The imperatives of competitiveness which have exerted enormous pressures on governments with different ideological orientations to adopt austerity policy measures in

order to promote economic growth have been conducive to overshadowing social citizenship rights. Since the ascendancy of neoliberalism in the 1990s, social rights are subordinated to rhythms of the market forces which is reflected in the shift to the workfare state that is geared to discipline and subject social assistance recipients to harsh regimentation.

The attractiveness of the workfare scheme in industrialized countries particularly, Anglo-Saxon countries was due to two main criticisms of the linkage between social rights and postwar social welfare assistance benefits. First, rights without responsibility were found to be problematic. In other words, those who receive social assistance benefits should also assume the responsibility to give back to the community. Second, there emerged a strong argument that adopting cash transfer as the mechanism to distributive social assistance has been ineffective in addressing poverty among social assistance recipients. These two neoliberal-motivated criticisms of the post-war connection between social rights and social welfare assistance benefits came to reshape and subordinate social welfare policy to the imperatives and demands of market forces. Under the workfare scheme, social assistance recipients are not only subjected to tightening eligibility criteria to receive social benefits but are also required to attend workshops and undergo training programs or any other compulsory work-related activities.

In liberal democratic societies including Canada, market-oriented neoliberal endeavours to break the umbilical cord between social rights and universal provision of social services and benefits have led to the recommodification of labour as manifested in tightening eligibility criteria, shift from universality to the mechanism of targeting as the mode of distributing social benefits, and privatization of social protection as reflected in the utilization of taxation to encourage individuals to save for their retirement. These major alterations and curtailment in social welfare programs are rationalized as painful but necessary medicine to surmount fiscal crisis and hence re-energizing the wheels of the economy.

Due to this neoliberal interpretation of citizenship, social rights are watered down to merchantable commodities, and the expansion of labour market opportunity for individuals is hailed as an enrichment of citizenship. Thus, the central thrust of neoliberal-oriented welfare state restructuring and retrenchment has been to enervate social citizenship rights and turn them into a fragile and variable component of citizenship. The roots of the fragility of social rights and their subordination to the fate of market forces can be traced back to the classical liberal justification of the separation of economy from politics which has established itself as a cornerstone of liberal democracy.

4. Liberal Democracy and the Fragility of Social Rights

Prior to elucidating the reason behind the fragility of social rights under liberal democracy, it is essential to explain how the interplay of democracy and liberalism has led to the separation of the economic sphere from the political sphere. As C. B. Macpherson has pointed out, John Locke who was the intellectual spearhead of liberalism in the seventeenth century, theorized the justification for the separation of civil society from the state. Through his interpretation of the law of nature and natural rights which were nothing more than what he had abstracted from the socio-economic conditions of the seventeenth century and had projected back into the state of nature, Locke theorized the separation of civil society from the state, naturalized class inequalities, and identified the preservation of property as the fundamental function of the state. Locke's seminal works gave birth to the gradual emergence of liberalism and formed the basis for eighteenth and nineteenth-century classical liberal theorists such as Adam Smith and John Stuart Mill to consolidate the liberal vision of the state. In line with this emerging liberal conception of the state, the role and function of the latter were confined to defending the nation against external threat, maintaining internal security preservation of private property, and providing certain public goods that could not have been provided by the market. Thus, under the classical liberal view of the state, there was a limited role for the state to interfere in social and economic spheres in society since it was believed that the economy has its own self-correcting mechanisms which make state involvement in economic activities unproductive and inefficient.

By the time democracy arrived in England, the liberal state had already entrenched itself as a legitimate mode of governance. After its fusion with liberalism in the late eighteenth and early decades of the nineteenth century, democracy which was envisaged by the ruling classes as a threat to the liberal state was gradually transformed into a fulfillment of the liberal state since it came to be exclusively associated with political and civil rights dissociated from the economic sphere. Instead of democratizing liberalism, democracy was actually liberalized and was in turn stripped from its

inspiring normative impetus and has since been invoked as a yardstick to gauge and assess rules and procedures that govern political institutions.

The amalgamation of liberalism and democracy which has come to be known as liberal democracy has been exalted for its simultaneous commitment to shelter both liberty and equality. However, within prevailing capitalist social relations, equality and liberty have the potential to come into a collision. Under the umbrella of liberal democracy, liberty is interpreted as a relatively unconstrained opportunity to appropriate the wealth, which tends to contradict promoting equality understood as equal freedom for individuals to operate as developers of their own capabilities. It is due to this inherent contradiction within the liberal democracy that the tension between equality and liberty has become structural in capitalist societies. The economic implications of liberty, which signify the transfer of power from many to few, are geared to restrict the scope of equality in liberal democratic societies.

Thus, historically ingrained separation of the political sphere from the economic sphere which had become a defining tenet of liberalism came to shape the fragility of social rights that entered political discourse during the development of the postwar Keynesian welfare state in liberal democratic societies. In other words, the liberal conception of the role of the state limited the ability of the state to act as a social engineering force by interfering in the operation of economic activities in order to promote positive rights.

It is in fact due to the separation of the economic sphere from politics that access to social welfare programs and social benefits was not entrenched in law as political and civil rights have been protected under the law though they are not absolute. In other words, the provisions of social welfare programs that have been intended to stimulate demand and hence economic growth came to be associated with the health of the economy. More specifically, in liberal democratic societies, both political and civil liberties which are referred to as negative rights absence of legal coercion are relatively stable since they have no significant impact on the economy and hence the public purse. However, since social rights manifested in the provisions of social welfare programs have a direct impact on the economy, any changes in the health of the economy will bring about changes in the levels of social services and social benefits. The fragility of social rights in capitalist societies is due to the fact that the market economy cannot tolerate the excessive expansion of social welfare programs beyond a certain threshold since an excessively generous welfare state will squeeze the rate of capital accumulation. The fragility of social rights has become conspicuous during the ongoing neoliberal-led attacks on social welfare programs which have to a great extent been sustained by the courts' judicial interpretation of the Charter.

5. The Charter and Social Policy

There is no dispute that the Charter has in fact advanced the interests of many Canadians who have historically been subject to discrimination and systemic marginalization. Through protecting civil liberties and expanding the boundary of equality within Canadian society, the Charter has indeed become an inspirational tool for historically marginalized groups such as women, GLBTQ, visible minorities, indigenous peoples, and people with disabilities. However, despite its positive impacts on the lives of these marginalized groups, the Charter has been silent on socio-economic inequalities.

In the absence of any legislative protection, socially and economically marginalized individuals who have faced debilitating impacts of social welfare retrenchment envisioned the Charter as a mechanism of salvation. As Margot Young has pointed out, in times of rising levels of socio-economic inequalities, social justice advocates would have to rely on the Charter as an effective legal mechanism to expand the boundaries of social rights. However, social welfare advocacy groups and organizations encountered a wall of resistance against forcing federal and provincial governments to provide basic means of substance as a matter of right. The expansion of frontiers of equality through judicial interpretation of the Charter has emboldened certain groups such as welfare rights advocates to invoke the Charter as a mechanism to challenge and halt governmental retrenchment of social welfare programs. The underlying assumption of these groups is predicated on an assertion that since poverty is due to social and economic factors beyond the control of individuals, it is, therefore, incumbent on the state to provide and guarantee the basic means of subsistence [11].

Social welfare advocates' arguments for social welfare services as rights that should be provided by the state, rest on three interrelated lines of argumentation. First, the social welfare advocates generally invoke the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights as the basis for securing the Canadian state's obligation to

uphold the right to adequate food, clothing, shelter, education, and health care in Canada. In line with these international conventions, it is argued that civil liberties have no meaning if they are not accompanied by social and economic rights. Furthermore, this argument is also based on Canada's ratification of these two covenants. Indeed, in *Baker v. Canada Minister of Citizenship and Immigration*, the Supreme Court highlighted the significance of international human rights instruments in shaping Charter interpretation:

International treaties and conventions are not part of Canadian Law unless they have been implemented by statute...

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.

Contrary to these expectations, the Supreme Court of Canada has ruled that those international laws and conventions can only become a direct source of Canadian law if they are implemented by domestic legislation. In other words, international laws, conventions, and treaties "are of no legal effects unless they are implemented by legislation." The Supreme Court of Canada has been consistent in its stance that international treaties and conventions are of no legal force unless they are integrated into Canadian statutes. It is, therefore, clear that international instruments are not part of domestic law in Canada unless implemented by statute. Moreover, Canada's treaty obligations can bind domestic courts if international law is specifically incorporated in domestic law or is integrated by necessary implication where such legislation is itself adopted by a legislative body that has constitutionally specified jurisdiction over the subject matter of the treaty. Furthermore, International Covenant on Economic, Social, and Cultural Rights does not impose a strict obligation on states to incorporate Covenant's principles into domestic law.

Second, it is also suggested that section 36 of the 1982 Constitution Act provides a legal basis for social rights protection. In section 36 of the Canadian Constitution Act of 1982, both levels of government are encouraged to strive to promote equality of opportunity, economic growth, and providing essential services for Canadians. As it can be extrapolated from the words of section 36, there is a built-in qualification in the text. In other words, the requirements in this section would not change the legislative authority of federal and provincial governments and their respective rights in conducting their own course of action. While section 36 gives the impression that governments are required to provide social services as a matter of rights, it nonetheless is not clear on such interpretation. As Lorne Sossin has pointed out, the term committed might imply that section 36 was intended to highlight justifiable obligations on the federal and provincial governments, it nonetheless "falls short of creating any mandatory obligation to provide a particular level of funding or type of benefit".

Third, in their struggle for advancing social rights, welfare rights advocates base their argument on section of the Charter which states, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, culture, religion, sex, age or mental or physical disability". While the judicial interpretation of the Charter has been crucial in expanding the boundaries of equality, it is by no means should be regarded as the entrenchment of social rights reflected in the imposition of legal obligation on governments to provide the basic means of living for citizens. On the application of section of the Charter, the Supreme Court's ruling in *Eldridge v. British Columbia* which asked B.C. provincial government to provide sign language services for deaf people has been interpreted by several analysts as an indication of the Charter's ability to protect positive rights. While the *Eldridge* ruling implies a positive obligation on governments to provide a service for patients, the ruling "does not open the floodgates to constitutional challenges about the scope of insured medical services". What is crucial about this ruling is that once the government decides to fund a service, it should be provided to all irrespective of their personal and socio-economic circumstances. Even in a situation where the government is committed to providing services for its citizens, retrenchment of services can still be justified on the ground that the fiscal integrity of the state is at stake. The Supreme Court's judicial interpretation, in this case, provides an opportunity for the state to challenge any equality rights claim on the ground of the severity of financial burden. This pattern of judicial subordination to the fiscal integrity of the state can be found in *Newfoundland v. NAPE* (*Newfoundland and Labrador Association of Public and Private Employees*), where the Supreme Court considered the constitutionality of the provincial government's decision to reject retroactive pay equity award owed to female public service employees. In this case, the Supreme

Court's ruling provided a compelling justification for the provincial government's decision to eschew paying retroactive pay equity award on the ground of fiscal imperatives of the state:

At some point, a financial crisis can attain a dimension that elected governments must be accorded significant scope to take remedial measures, even if the measures taken have an adverse effect on the Charter right. In this case, the fiscal crisis was severe and the cost of putting into effect pay equity according to the original timetable was a large expenditure (\$24 million) relative even to the size of the fiscal crisis.

What is clear from these judicial rulings is that section does indeed require the government to accommodate any individual or group who has been excluded from receiving the same benefit that is available to others. Thus, the government is provided with different options to respond to any section 15 challenges. Government can extend the benefits to the excluded individuals or groups. Government can also extend the benefits to all but reduce or even eliminate the benefits for everyone. This is what happened in *Schachter v. Canada*. In its ruling, in this case, the Supreme Court stated that it was unconstitutional to withhold from natural parents the benefits that were available to adoptive parents under Unemployment Insurance Act. Even before responding to the Supreme Court's ruling, Canadian parliament extended coverage to natural parents as well but reduced benefits for both natural and adopted parents.

The Supreme Court of Canada has conspicuously made it clear that the Charter does not require the government to provide social programs, services, and benefits. However, Supreme Court has made it crystal clear that once the government decides to provide such social services and benefits, it must make sure that the benefits are not provided in a discriminatory fashion. In *Auton v. B.C.*, where parents of children with autism brought a court challenge against the B.C provincial government for refusing to fund the costs of applied behavioral analysis, Chief justice Mc Lachlin stated that "the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminator manner". Furthermore, in *Chauoli v. Quebec*, the Chief Justice clearly stated that. "The Charter does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the Charter".

Third, as the legal basis for protecting social rights, social welfare advocates have on several occasions invoked section 7 of the Charter which states that " Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The principal line of argumentation deployed by social rights advocates hinges on an assertion that section 7 guarantees the right to basic means of subsistence which should be accordingly provided by the state. However, in several court rulings related to social welfare programs, the Supreme Court of Canada has dashed the hope of social welfare advocates to utilize the Charter as legal leverage to force the state to provide social services and benefits as a matter of social rights.

A distinction must be made between relying on section 7 to secure the basic means of subsistence and relying on section 7 to protect procedural fairness. As Ian Johnstone has pointed out, section 7 of the Charter guarantees procedural fairness, but it would hardly constitute a radical development. More specifically, section 7 guarantees the right of social service recipients to challenge the termination or suspension of social assistance on procedural grounds. However, such a right does not impose a general obligation on the state to provide social assistance. In other words, section 7 only requires the state to adhere to certain procedural requirements before it attempts to terminate or suspend the social assistance benefit.

The economic crisis of the 1970s and ensuing neoliberal led fierce assaults on the welfare state provided an opportunity for social welfare advocates to turn to the Charter in order to halt governmental curtailment of social welfare assistance benefits. The most draconian cuts to social welfare assistance benefits took place in Ontario under the Mike Harris administration in 1997 which reduced the rate of social assistance benefits by 22% [11]. A court challenge to social welfare assistance cuts in Ontario came in *Masse v. Ontario (Minister of Community and Social Services)* where the Ontario Superior court had to consider whether curtailing social assistance benefits infringed rights protected in section 7 of the Charter. The court was cognizant of the adverse implications of the benefit reduction for social assistance recipients and admitted that recipients of social welfare assistance will suffer from the cut to their welfare cheque and many of the recipients might end up becoming homeless. However, in its ruling, the Ontario Superior Court concluded that

section 7 does not provide social assistance recipients any legal right to minimal social assistance, nor does it guarantee an affirmative right to governmental aid. Furthermore, the court unambiguously stated that section 7 of the Charter does not protect economic rights and that social policy is a political matter and is not an appropriate jurisdictional domain for the application of the Charter [11]. In a court challenge to two city bylaws in B.C. that prohibited erecting abode in public space, the B.C. Court of Appeal ruled the bylaws to be in violation of section 7 in the Charter since it was interference on the part of the state to limit the ability of the homeless to shelter themselves from the harshness of weather. However, in line with relevant court cases that had already been decided by the Supreme Court of Canada, the B. C. Appeal court refused to rule on the constitutional responsibility of the government to address and end homelessness. In line with the ruling by B.C Appeal Court, the Ontario Appeal Court in *Tanudjaja v. Canada and Ontario* also dismissed the claim that the right to housing was justiciable under the Charter. According to Justice Pardu from the Ontario Appeal Court, subjects of broad economic policy and priorities are not appropriate for judicial review.

The Supreme Court of Canada has consistently refrained from making a judicial inroad into the domain of resource allocation which in the court's view is a proper jurisdiction of the government. The Supreme Court of Canada has clearly stated that "any imposition of legal obligation on the state to secure and guarantee positive rights " would almost certainly interfere with governments' allocation of limited resources. Thus, courts' Charter interpretation of positive rights reinforces nineteenth-century classical liberal tenets that the role of the courts is to operate as a neutral arbitrator whose mandate is not extended to the public policy-making process over the allocation of financial resources, which is the proper domain of politicians [5].

However, it should be acknowledged that the Supreme Court of Canada has on occasion imposed a legal obligation on the government to secure certain positive rights. In *Dunmore vs. Ontario*, the Supreme Court required Ontario provincial government to facilitate and guarantee association rights for agricultural workers that had been omitted from Ontario's statutory regime governing collective bargaining. As it can be extrapolated from this ruling, the Supreme Court is inclined to impose a positive obligation on the government if those rulings have no resource implications and do not put a strain on the public purse.

The most significant and decisive ruling by the Supreme Court that dashed the aspiration of social rights advocates came in *Gosselin v. Quebec*. In her class action on behalf of social welfare recipients under the age of 30 who had been subject to differential treatment by the Quebec government, Gosselin initiated a court challenge that claimed the Quebec government's differential treatment of social welfare recipients had violated both section 15 and section 7 in the Charter.

On the constitutionality of Quebec social assistance law that threatened to reduce social welfare benefits for social assistance recipients under the age of 30 by 1/3 if they failed to actively participate in workshops and other employers seeking programs, the Supreme Court ruled that there was no discrimination based on age since the programs had been designed to enhance the employability of younger social welfare recipients and it did not impair social assistance recipients' human dignity. In the court's view, younger recipients were in a better position than older recipients to get benefits from such employment-enhancing programs. As for the alleged violation of section 7, Chief Justice Beverley McLachlin asserted that section 7 is only designed to protect against state actions that have the potential to deprive individuals of the enjoyment of life, liberty, and security of a person. In other words, the Supreme Court made it clear that section 7 does not impose a legal obligation on the state to provide and secure the basic means of subsistence. Though the majority acknowledged the existence of several sources of international law that regarded basic social welfare provisions as a human right, they nevertheless eschewed recognizing such positive right to social assistance under section 7 of the Charter.

6. Conclusion

Though the Charter has in fact acquired an educational and symbolic role in fostering a sense of national identity and patriotism at least among English speaking Canadians as Pierre Trudeau has envisaged, it has at the same time been utilized by the courts as the basis for judicial interpretation to justify neoliberal motivated social welfare retrenchment that has been underway since the 1980s. Furthermore, the Charter has psychologically fostered a sense of empowerment and political efficacy among Canadians. While the Charter has enhanced equality provisions, it has not provided the basis for the materialization of historical aspiration of social rights advocates who have hoped that the Charter can be harnessed as a constitutional tool for advancing social citizenship rights in Canada.

The Charter's requirement that no one should be excluded from receiving a service or benefit which the state has already committed itself to its provision, is not tantamount to the legal imposition of a positive obligation on the state to secure the basic means of subsistence for Canadian citizens.

As the constitutional embodiment of liberal principles, the Charter reflects the classical liberal vision of state and society relations where effective mechanisms must be put in place in order to control the abusive power of the state. It is due to this liberal principle that the Charter is founded on a belief that the interests of individuals and state are at odds and that the state, not private property relations, is the main impending menace on individual liberty. The entrenched Charter rights reflect the zone of immunity that protects individuals from state encroachment though these rights are subject to reasonable limits.

Since Charter's entrenchment in the Constitution Act of 1982, the Supreme Court has generally refrained from involving itself in re-writing social and economic rights. The Supreme Court has justified its non-involvement stance on the allocation of economic resources on the ground that such an involvement would run counter to the doctrine of the separation of power between the judicial, executive, and legislative branches of government. Judicial rulings have made it clear that social and economic policies are beyond the institutional competence of the courts. The Charter-based judicial interpretation of social rights is thus in line with the historically ingrained political philosophy of liberalism that social relations of production and economic civil liberties should be shielded against undue social engineering activities of the state in the economic sphere. Thus, the Charter has reinforced the nineteenth-century classical liberal assumption that the role of the courts is to constrain governmental actions, not to compel or authorize the state to undertake a positive obligation in order to provide the basic means of subsistence for Canadian citizens.

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