GOSSELIN v QUÉBEC (ATTORNEY-GENERAL)*

IS STARVATION ILLEGAL? THE ENFORCEABILITY OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

CONTENTS

I INTRODUCTION

From 1984–89 Québec provided those citizens on welfare and under the age of 30 with payments amounting to only one-third of a subsistence level of income if they did not work or attend school. If they did work but could not earn subsistence levels, or if they were being schooled, welfare brought them up to subsistence levels.[1] The idea was to encourage young people to work or go to school. If they did neither, they starved. This scenario set the backdrop for the dispute in *Gosselin v Québec (Attorney-General)*.[2]

Louise Gosselin was living in Québec, was under 30 years of age before 1989, and was unable to find work or go to school. She was therefore in the unfortunate position of having inadequate financial resources for subsistence even after a welfare payment. She went to court asking for an order that the government pay her subsistence welfare, despite the Québec legislation. The

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* (2003) 221 DLR (4th) 257.

1 *Social Aid Act*, RSQ 1983, c A-16.

2 (2003) 221 DLR (4th) 257 ('*Gosselin*').

ensuing appeal process gave Canadian courts the opportunity to address the question of whether economic, social and cultural rights are legal rights enforceable in court.

In her submission, Louise Gosselin relied on both Québec's *Charter of Human Rights and Freedoms*[3] and the *Canadian Charter of Rights and Freedoms*.[4] The *Canadian Charter* guarantees the right to life and security of the person.[5] The *Québec Charter* legislates with respect to the right at issue in the case — the right to an adequate standard of living.[6] It replicates the wording found in the *International Covenant on Economic, Social and Cultural Rights*,[7] a covenant which Canada has signed and ratified. It would seem therefore that the terrain of legal battle would have been this legislated Québec right — but it was not.

The *Québec Charter* took away with one hand what it gave with the other. Although it guarantees the right to an adequate standard of living, this right is limited to those measures provided for by law that are susceptible to an interpretation allowing for the exercise of the right.[8] Since there were no relevant measures provided for in Québec law that ensured an adequate standard of living for Louise Gosselin, the right in the *Québec Charter*, by its very terms, did not apply to her. The terrain of debate became instead the *Canadian Charter* and its guarantees, in s 7, of the right to life and security of the person.

The *Canadian Charter* is the supreme law of Canada.[9] It prevails over all contrary law, provincial as well as federal. However, it is possible to opt out of some *Canadian Charter* rights, including the right to life and the right to security of the person. The *Canadian Charter* provides that

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*.[10]

In order to avoid lapsing, a 'notwithstanding declaration' must be renewed every five years.[11] Québec had legislated that all Québec laws were immune from the *Canadian Charter* regime for five years from their inception.[12] The law under challenge in *Gosselin* was on the books for five years and four months, meaning that there was a four month lapse in the 'notwithstanding declaration'. So the legal battle over the application of s 7 of the *Canadian Charter* was joined.

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3 *Charter of Human Rights and Freedoms*, RSQ 1975, c C-12 ('*Québec Charter*').

4 Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11 ('*Canadian Charter*' and '*Constitution Act 1982*').

5 *Canadian Charter* s 7.

6 *Québec Charter*, RSQ 1975, c C-12, s 45.

7 Opened for signature 16 December 1966, 993 UNTS 3, art 11(1) (entered into force 3 January 1976) ('*ICESCR*').

8 *Québec Charter*, RSQ 1975, c C-12, s 52.

9 *Canadian Charter* s 52.

10 *Canadian Charter* s 33(1).

11 *Canadian Charter* s 33(3).

12 *Acts Respecting the Constitution Act*, RSQ, chap L-4.2, div III, s 5.

Canadian courts have consistently ruled that international human rights law is to be used as an aid in interpreting the scope of rights in the *Canadian Charter*.[13] The *Canadian Charter* is presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[14] Given this rule of *Charter* interpretation, the right to security of the person in the *Canadian Charter* could be presumed to provide protection at least as great as the right to an adequate standard of living in *ICESCR*. In the *Gosselin* litigation, the question then became: how great was that protection?

II AN OVERVIEW OF *GOSSELIN* IN THE LOWER COURTS

The courts answered this question in a variety of ways. The case was heard by three courts: the Superior Court of Québec, the Québec Court of Appeal and the Supreme Court of Canada.

Louise Gosselin lost at all three levels, but was supported by one dissenting judge at the Court of Appeal and four dissentients in the Supreme Court. The dissent in the Court of Appeal, delivered by Robert JA, and two dissenting opinions in the Supreme Court of Canada, delivered by Bastarache and LeBel JJ, were based solely on the discrimination inflicted on Louise Gosselin because of her age.[15] Only the dissenting judgments of L'Heureux-Dubé and Arbour JJ in the Supreme Court of Canada relied on the right to an adequate standard of living.[16]

According to the lower courts in *Gosselin*, the legal protection offered by economic, social and cultural rights is not extensive at all. Reeves J of the Superior Court of Québec made four related distinctions between, on the one hand, economic, social and cultural rights, and on the other hand political and civil rights.[17] The first was that economic, social and cultural rights require active state intervention, whereas political and civil rights do not. Rather, they require only state forbearance.[18] The second was that respect for economic, social and cultural rights requires the expenditure of significant state resources. Political and civil rights do not; rather, they require only the efficient organisation of existing expenditures.[19] The third was that political and civil rights potentially can be implemented immediately, whereas economic, social

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13 See *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313, 349–5 (Dickson CJ); *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038; *R v Keegstra* [1990] 3 SCR 697; *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 860 (L'Heureux-Dubé J).

14 *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313, 349–50; 38 DLR (4th) 161, 185 (Dickson CJ, in dissent but not on this point); *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038; *R v Keegstra* [1990] 3 SCR 697.

15 *Gosselin* (2003) 221 DLR (4th) 257, [300]–[302] (Bastarache J), [419]–[423] (LeBel J). Bastarache J does consider that there is a positive right to a minimum standard of living (under s 45 of the *Québec Charter*, RSQ 1975, c C-12) but that it cannot be applied here: at [301].

16 Ibid [146]–[148] (L'Heureux-Dubé J), [358] (Arbour J).

17 *Gosselin v A-G (Québec)* [1992] RJQ 1647, 64–7. All page references to the Superior Court of Québec's judgment in this case are to the electronic form of the judgment available at <http://www.juris.uqam.ca/dossiers/gosselin_1992.pdf> at 1 May 2003.

18 Ibid 66–7.

19 Ibid 67.

and cultural rights need time for their implementation.[20] The fourth was that the ability to implement political and civil rights does not depend on the level of development of a particular country's economy, whereas the ability to implement economic, social and cultural rights does.[21]

In addition, the trial judge singled out art 11(1) of *ICESCR*, which recognises the right to an adequate standard of living.[22] According to Reeves J, this article does not apply immediately. Rather, the words 'take appropriate steps' indicate, at most, an intention on the part of states parties to implement the right.[23]

Baudouin JA, a member of the Court of Appeal majority, suggested that an analysis of economic, social and cultural rights should start by accepting the resource allocation by the state as a given. Thus, the rights analysis can apply only to the distributive allocation of resources, and not to the quantitative amount of resources allocated to ensure these rights.[24] This view stressed the division of responsibility between the government and the legislature, and the courts — that it is for the government and the legislature, not the courts, to decide on the resources to be allocated to ensure respect for rights. Courts can determine whether money is spent in the right way, but not whether the correct amount has been spent.[25]

In dissent, Robert JA partially agreed with criticisms of the traditional division between economic, social and cultural rights and political and civil rights. However, he nonetheless accepted Reeve J's characterisation of political and civil rights as negative rights, or rights which require the state to abstain from acting, and economic, social and cultural rights as positive rights which create an obligation on the state to act.[26] All the same, Robert JA concluded that the difference he saw between the two sets of rights did not deprive economic social and cultural rights of their legal force and justiciability.

III ARGUMENTS PRESENTED TO THE SUPREME COURT

The position of the Government of Québec in the Supreme Court of Canada was that whether or not the contested law was in full, immediate compliance with the standards set out in *ICESCR*, it could be characterised as a step towards the progressive realisation of *ICESCR*'s provisions which can be regarded as an

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20 Ibid.

21 Ibid.

22 Article 11(1) reads:

> The States Parties to the present *Covenant* recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

23 '*Cet article n'est pas d'application immédiate. Les termes "prendront des measures appropriées" indiquent une intention, tout au plus*': *Gosselin v A-G (Québec)* [1992] RJQ 1647, 66 (Reeves J) (trans: This section does not apply immediately. The words 'take appropriate measures' indicate at most an intention).

24 *Gosselin v Québec (A-G)* [1999] RJQ 1033, [40] (Baudouin JA).

25 Ibid [41] (Baudouin JA).

26 Ibid [150] (Robert JA).

ideal standard. In other words, compliance with *ICESCR* was satisfied because the contested law was a step in the right direction.

A *The Equality of Rights*

The reasoning of the lower courts and the arguments of the Government of Québec at the Supreme Court level made a number of distinctions between economic, social and cultural rights, and political and civil rights. The counter-argument presented in the Supreme Court of Canada was that these two sets of rights are juridically indistinguishable at international law. The appellant argued that all human rights must be read together as a coherent whole. Each contributes to the overall goal of enhancing the worth and dignity of the individual and needs to be nurtured, protected and developed. No one human right has a higher status than other human rights. The obligations imposed by each set of rights on a state such as Canada are of exactly the same nature. The argument followed the belief that all of the distinctions made by the respondent were incorrect at law.[27]

At international law there is no hierarchical ranking of economic, social and cultural rights, and political and civil rights. Each is viewed as equally important. The *Universal Declaration of Human Rights* contains both sets of rights and does not differentiate between them.[28] Pursuit of civil and political rights does not justify violation of economic, social and cultural rights — the two sets of rights are interdependent and indivisible. The United Nations Committee on Economic, Social and Cultural Rights ('CESCR') has said:

> The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent.[29]

There is nothing inherent in economic, social and cultural rights preventing them from having the same legal force as political and civil rights. On the contrary, because of the indivisibility and interdependence of the two sets of rights, putting economic, social and cultural rights beyond the reach of the courts would have the effect of frustrating the realisation of political and civil rights. For a person who is starving to death, freedom of expression or association or religion is practically meaningless. Furthermore, both sets of rights are subject to international covenants. In form there is nothing indicating that the *International Covenant on Civil and Political Rights*[30] deals with legal rights, while *ICESCR*

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27 See G J H van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in Philip Alston and Katarina Tomasevski (eds), *The Right to Food* (1984) 97; David Matas, *No More: The Battle against Human Rights Violations* (1994) 148–60; *contra* E W Vierdag, 'The Legal Nature of the Rights Granted by the *International Covenant on Economic, Social and Cultural Rights*' (1978) 9 *Netherlands Yearbook of International Law* 69.

28 GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948) ('*UDHR*').

29 CESCR, *General Comment 9: The Domestic Implementation of the* Covenant, UN Doc E/C.12/1998/26 [10] (3 December 1998).

30 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). The *ICCPR* and *ICESCR* are subsequently referred to collectively as the *Covenants*.

does not. Both *Covenants* are treaties, and treaties are considered a source of international law regardless of their content.

The preambles to the two *Covenants* are virtually identical. Both recognise that all rights derive from the inherent dignity of the human person. The only difference is that the *ICCPR* recognises that

> in accordance with the *Universal Declaration of Human Rights*, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.[31]

ICESCR, in the comparable preamble, omits the phrase 'civil and political freedoms' and reverses the order. This preamble recognises that

> in accordance with the *Universal Declaration of Human Rights*, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.[32]

Historically, however, there was a difference between the mechanisms established for implementing civil and political rights and economic, social and cultural rights. This difference has diminished over time, and the remedies for breaches of the two sets of rights have now converged.

The *ICCPR* established a Human Rights Committee ('HRC') of independent experts.[33] States parties are required to file periodic reports with the HRC on their compliance with the *ICCPR*.[34] The HRC studies these reports and makes general comments on them.[35] Additionally, there are optional provisions for inter-state complaints[36] and individual complaints to be made to the HRC.[37] In contrast, *ICESCR* establishes no such committee. Compliance reports are to be furnished through the Secretary-General of the UN to its Economic and Social Council ('ECOSOC') — a state representative body, not an expert independent body.[38] There is neither an inter-state complaints option nor an individual complaints option.

Even from the inception of the *Covenants*, the difference between the implementation structures of the two sets of rights was more apparent than real. The main reason there was no expert committee for economic, social and cultural rights was that there were a number of technical agencies reporting to ECOSOC, such as the World Health Organisation or the Food and Agriculture Organisation, which already dealt with these rights. There was a concern that

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31 Ibid preamble.

32 *ICESCR*, above n 7, preamble.

33 *ICCPR*, above n 30, art 28.

34 Ibid art 40(1).

35 Ibid art 40(4).

36 Ibid art 41.

37 *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, arts 2, 5 (entered into force 23 March 1976).

38 *ICESCR*, above n 7, art 16.

establishing a committee to deal specifically with economic, social and cultural committee would be a duplication of resources.[39]

Over time, as the compliance reports started to be generated, it became apparent that an expert committee was needed. The Sessional Working Group of ECOSOC was consequently established to consider states parties' compliance reports. It went about its work in a manner that was, in the words of the International Commission of Jurists, 'cursory, superficial, and politicized.'[40] It neither established standards for examining reports, nor reached any conclusion on these reports.

Specialised agencies of ECOSOC were impeded from participation in the Working Group. The Working Group sat infrequently. Its membership changed often. Members of the Working Group attended irregularly. The lack of expertise of Working Group members meant that they showed little understanding of the issues or of the reports themselves.[41] As a consequence, direct reporting to ECOSOC was abandoned and replaced by reporting to an Expert Committee, established by a 1985 ECOSOC resolution.[42] It held its first session in March 1987 and now functions very much like the HRC established under the *ICCPR*.[43]

Therefore, using different mechanisms at the domestic level to implement political and civil rights, as compared to economic, social and cultural rights, would repeat the errors made internationally. It was argued by the appellant that Canada should learn from international experience and not repeat these mistakes. The lesson to be gleaned from the international experience is that economic, social and cultural rights, if they are to be treated seriously, must be handled in much the same way as civil and political rights.

B *The Positive–Negative Distinction*

Two issues were raised by the lower courts' equation of the distinction between economic, social and cultural rights, and political and civil rights, with the distinction between positive obligations and negative forbearance. Firstly, the question arises as to whether the equation is exact; and secondly, whether there is value in drawing the distinction at all.

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39 Philip Alston and Bruno Simma, 'First Session of the UN Committee on Economic, Social and Cultural Rights' (1987) 81 *American Journal of International Law* 747, 748.

40 'Implementation of the *International Covenant on Economic, Social and Cultural Rights*: ECOSOC Working Group' (1981) 27 *International Commission of Jurists Review* 26, 28.

41 *Implementation of the* International Covenant on Economic, Social and Cultural Rights, UN ESCOR, 1st sess, 18th mtg, Agenda Item 3, [1], UN Doc E/1985/17 (1985); *Implementation of the* International Covenant on Economic, Social and Cultural Rights, UN ESCOR, 1st sess, 22nd mtg, Agenda Item 3, [46], UN Doc E/1985/18 (1985).

42 *Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the* International Covenant on Economic, Social and Cultural Rights, ESC Res 1985/17, UN ESCOR, 1st sess, 22nd mtg, Agenda Item 3, UN Doc E/RES/1985/17 (1985).

43 See generally Philip Alston and Bruno Simma, 'Second Session of the UN Committee on Economic, Social and Cultural Rights' (1988) 82 *American Journal of International Law* 603.

1 *The Accuracy of the Equation*

The assertion that political and civil rights require state forbearance whereas economic, social and cultural rights require state action is untenable. Not all political and civil rights can be realised through state forbearance. There are some rights that can be respected only through positive state action, such as through legislation.

The right of Louise Gosselin, in the determination of her claim, to a fair and public hearing by a competent, independent and impartial tribunal established by law[44] could not be realised without the active involvement of the state. The administration of justice is a state activity. The state can administer justice fairly, or unfairly. It cannot administer justice by doing nothing at all.

Indeed, there is an air of unreality to this equation in the context of a court dispute. The Superior Court of Québec, the Québec Court of Appeal and the Supreme Court of Canada themselves all require positive state action in order to operate. By their existence and operation, they realise and implement respect for fundamental civil rights, including the rights of the parties in *Gosselin*.

Conversely, there are economic, social and cultural rights that impose only negative obligations. Respecting the right to form trade unions[45] does not require the state to do anything aside from recognising the right. The same can be said for freedom of scientific research and creative activity,[46] and the right of parents to send their children to private schools.[47]

In the context of *Gosselin*, there were two related economic rights at issue: the right to an adequate standard of living,[48] and the right to enjoy this right without discrimination of any kind.[49] Respect for the right to freedom from the sort of discrimination at issue in *Gosselin* required only state forbearance, not state action. Québec imposed a discrimination on the basis of age and family status which would not have existed without positive action on the part of the Québec National Assembly. Therefore, it was not respect for *ICESCR* that required positive state action; rather, such action was necessary for its violation.

2 *The Value of the Distinction Based on Positive Obligations–Negative Forbearance*

Implicit in the distinction between economic, social and cultural rights and political and civil rights, on the basis of a positive obligations–negative forbearance dichotomy, is the assumption that negative prohibitions have a higher legal status than positive obligations. If positive obligations had the same legal status as negative prohibitions, then there would be little point in making the distinction. Denying the equation between the two distinctions does not completely answer the concerns of the lower courts. Even if the equation is not exact, there nevertheless remains an implied position that negative prohibitions have a higher legal status at international law than positive obligations.

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44 *ICCPR*, above n 30, art 14(1).
45 *ICESCR*, above n 7, art 8(1)(a).
46 Ibid art 15(3).
47 Ibid art 13(3).
48 Ibid art 11(1).
49 Ibid art 2(2).

If negative prohibitions are given a higher legal status than positive obligations, then negative prohibitions 'sit in judgment' on the positive obligations. Only if positive obligations satisfy the exigencies of negative prohibitions can the positive obligations survive. Yet, negative prohibitions and positive obligations are meant to co-exist and be read together as part of the same human rights package. By giving one set of rights a higher status than another, negative prohibitions are given an artificial importance relative to positive obligations, creating a distortion. Ranking rights, instead of according them equal status, may well end up defeating the ones ranked lower in the hierarchy.[50]

In the context of *Gosselin*, if we were to say that the negative obligation not to discriminate ranked higher than the positive obligation to ensure an adequate standard of living, and that only the first obligation had juridical status, then international law would be satisfied by a Québec law which gave everyone eligible for welfare their one-third subsistence, instead of just those under 30 who were able-bodied and alone. The duty not to discriminate could be used as an argument to drive the welfare rights of all below subsistence, and thus deny to *everyone* an adequate standard of living. This reasoning would frustrate rights, rather than encourage respect for them.

C *Expenditure of Resources*

The lower courts equated the distinction between the two kinds of rights with the distinction between the need to spend resources to respect a right on the one hand, and the ability to respect rights within existing expenditure levels on the other.[51] This equation in the lower courts raised similar issues to those raised above. Is the equation exact? Does the distinction between the need to spend resources to respect a right and the ability to respect rights within existing expenditure levels make a legal difference?

1 *The Accuracy of the Equation*

There may be a temptation to assert that doing something always costs something and that doing nothing always costs nothing; therefore, the expenditure–no expenditure distinction is the same as the action–forbearance or positive–negative distinction. However, these distinctions are not the same. Doing nothing can be quite costly at times, and it may occur that doing something costs almost nothing. Economic, social and cultural rights cannot be distinguished from political and civil rights on the basis that the first involve expenditure and the second do not.

For example, *ICESCR* recognises the right to safe working conditions.[52] It would cost the state little to require private employers to provide safe working conditions. Yet, the state has to do something to impose the obligation on private employers. It would cost the state a good deal if it imposed no such requirement and was liable for the medical costs accrued by victims of unsafe work

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50 David Matas, 'The *Charter* and Racism' (1991) 2 *Constitutional Forum* 82.

51 *Gosselin v A-G (Québec)* [1992] RJQ 1647, 67.

52 *ICESCR*, above n 7, art 7(b).

conditions. A further comparative example could be the costs involved in running elections (costs which are not only incurred by political parties but also by the state itself), and the costs involved in running Parliament. Yet the right to vote[53] and the right to either direct or representative democracy[54] are guaranteed under the *ICCPR*.[55]

Conversely, although it would involve a positive act on behalf of the state, it would cost the state little to ensure the right to strike.[56] Prohibiting child labour[57] also requires positive state action but has no direct cost to the state other than enforcing the law. Recognising equal opportunity for promotion, subject to no consideration other than seniority or competence,[58] does not involve substantial commitment of state expenditures. Indeed, if promotion on the basis of competence was furthered, then an economic efficiency analysis would argue that the result would be a saving of funds, rather than expenditure.

On the facts of *Gosselin*, respect for the right to an adequate standard of living would require the expenditure of resources. However, it is going too far to claim that it is because of the nature of the right as economic or social that this need for expenditure arises.

2 *The Value of the Distinction Based on Expenditure–No Expenditure*

Again, implicit in the attempt to distinguish between the two kinds of rights on the basis of an expenditure–no expenditure dichotomy is the view that cost-free rights have a higher legal status than costly rights. The appellant asserted before the Supreme Court of Canada that rights with a cost attached have the same juridical status at international law as rights that are cost-free.

In relation to the right not to be deprived of life, liberty and security of the person, except in accord with fundamental justice, the Supreme Court of Canada has said that cost is a matter to be considered under the 'reasonable limits' clause[59] of the *Canadian Charter*, not under the 'substantive rights' clause (ie the right contained in s 7). Costs can be used to determine whether violation of a right is demonstrably justified, not whether violation of the right has occurred. Furthermore, costs can justify violation of a right only if they are prohibitive.[60]

There would seem to be a great irony if courts were to rule that rights with a cost have a lesser legal status than rights without cost. The administration of courts themselves requires state expenditure. The *Gosselin* litigation cost money, some of it state money. There is nothing at international law to suggest that cost-

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53 *ICCPR*, above n 30, art 25(b).

54 Ibid art 25(a).

55 Marc Bossuyt, 'La Distinction Juridique Entre les Droites Civils et Politiques et les Droits Economics, Sociaux et Culturels' (1975) 13 *Human Rights Journal* 783. Bossuyt argues that civil and political rights differ from economic, social and culture rights in both nature and character. He argues that the difference lies in the question of inaction or action by the state. He does not deny that economic, social and cultural rights are legally binding, but argues that their difference from civil and political rights is so great that they are second class human rights: see the summary in van Hoof, above n 27, 103.

56 *ICESCR*, above n 7, art 8(1)(d).

57 Ibid art 10(3).

58 Ibid art 7(c).

59 *Canadian Charter* s 1.

60 See *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177.

free rights have a higher legal status than rights which require expenditure of money to facilitate their respect.

3 *The Nature of the Obligations*

In general, the obligations in the *Covenants* are to ensure respect for rights. For the right to an adequate standard of living, the duty on states parties under art 11(1) is to 'take appropriate steps to ensure the realization of this right.' The obligation is not to provide an adequate standard of living from state coffers. There is no necessary obligation to spend taxpayers' money so long as the right itself is respected.

There is an ongoing political and ideological debate about the extent to which the government should be involved in the economy. On this debate, the *Covenants* are silent, specifying only the ideals to be achieved but not the means of doing so. As long as an adequate standard of living is provided through the private sector, art 11 of *ICESCR* is respected without any expenditure of government funds. CESCR has said:

> in terms of economic systems the *Covenant* is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laisser-faire* economy, or upon any other particular approach.[61]

There are some obligations under the *Covenants* which necessarily involve the spending of taxpayers' money. *ICESCR*, for instance, recognises the right to free primary education.[62] However, the *Covenants* are mostly silent on the issue of whether any expenditure involved in respecting the right must by born by the state.

The Québec law at issue — that able-bodied single people under 30 years of age who were not enrolled in a training program should receive only one-third subsistence welfare — was underpinned by three assumptions. The first of these was that people in this group could have supported themselves through work and did not need welfare in order to survive. Alternatively, given their relatively young age, they could have been supported by their parents. Finally, if they had not been able to find work or receive parental support, then at the very least they could have enrolled into a training program to become more employable. These attitudes ignore the economic reality that full employment does not exist at all times — there is often not enough work available for every person seeking it. Furthermore, while some parents are in a position to support financially their adult children, this is not true of all parents. Finally, not everyone has the temperament and aptitude to engage in retraining.

If indeed there had been enough work available for everyone seeking employment, or if all parents had been able to support their adult children up to the age of 30, then the law at issue might not have violated the *ICESCR* obligation to ensure an adequate standard of living for everyone. Even in this case, the law would not ensure such an adequate standard but the economy

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61 CESCR, *General Comment 3: The Nature of State Parties' Obligations*, UN Doc E/1991/23 [8] (14 December 1990).

62 *ICESCR*, above n 7, art 13(2)(a).

(through the availability of work) and society (through parental support) would, and that is sufficient. However, the Government of Québec did not argue that the economy of Québec was, at the time, experiencing full employment and in a position to provide an adequate standard of living for those for whom welfare did not. Nor did the Government of Québec argue that all parents were financially in a position to support their adult children up to 30 years of age.

Ensuring respect for a right can be done either through the private sector or the public sector. However, it must be done by one or the other. The government cannot wash its hands of the matter because the private sector (for example, employers) has failed to ensure respect for the right. The government need not be the first resort to ensure respect for the right to an adequate standard of living. However, because it is the government that is ultimately accountable to the international community for implementation of the *Covenants*, it must provide a feasible last resort.

4 *Progressive Realisation of* ICESCR *Rights*

The position of the Government of Québec was that economic, social and cultural rights are merely aims or goals which should be achieved progressively, rather than obligations that must be met immediately. However, not all the rights in *ICESCR* may be realised progressively. Some must be respected immediately. The duty not to discriminate is among these immediate obligations.[63] Louise Gosselin's counter-submission pointed to the text of art 2(1) of *ICESCR*, which obligates states parties

> to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognised in the present *Covenant* by all appropriate means, including particularly the adoption of legislative measures.[64]

This provision might excuse a poor country from failing to realise the obligations immediately. It does not excuse a country like Canada, one of the wealthiest nations in the world. Canada should be able to realise economic, social and cultural rights if it devotes its maximum available resources to the realisation of those rights. CESCR reported that 'considering Canada's enviable situation with regard to such [available] resources, the Committee expresses concern about the persistence of poverty in Canada.'[65]

ICESCR's reference to international assistance and cooperation is an indication that the obligation of progressive rather than immediate realisation was intended to target poorer countries. Furthermore, art 11(1) of *ICESCR* puts forward a similar proposition when it provides that '[t]he States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.'

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63 CESCR, *General Comment 3*, above n 61, [1].

64 *ICESCR*, above n 7, art 2(1) (emphasis added).

65 CESCR, *Consideration of Reports Submitted by State Parties' under Articles 16 and 17 of the* Covenant*: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C.12/1993/5 [12] (10 June 1993) ('*1993 Concluding Observations*').

ICESCR sets out that if states parties cannot meet *ICESCR* obligations on their own, then they should and are expected to take advantage of international assistance to do so.

As stated previously, Canada is not a state that needs assistance from other states to meet its general *ICESCR* obligations, in particular the obligation to respect the right to an adequate standard of living. On the contrary, Canada is in a position to assist poorer states to meet their obligations under the *Covenants* and does, in fact, give such assistance.[66] The position of the Government of Québec would suggest that Canada is a potential aid recipient state rather than a donor state.

The reference to legislative measures in art 2(1) does not mean that there must be legislation in order to comply. The drafters of *ICESCR* rejected attempts to include a specific provision which would have rendered it non-self-executing. Interpretation of existing legislative and constitutional guarantees to realise the right is an appropriate means to give effect to *Covenant* rights. Indeed, CESCR has said that 'when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their *Covenant* obligations.'[67] In *Gosselin*, it was the appellant who was promoting interpretations of domestic laws which would give effect to Canada's *ICESCR* obligations. It was argued that the interpretations put forward by her counsel and interveners in support should, accordingly, be preferred to those of the Government of Québec.

In any case, what was at issue was not a failure to legislate, but rather the existence of legislation in conflict with a treaty standard. The legislation in question was passed in 1984 — eight years after Canada had signed and ratified *ICESCR*. The obligation to implement *ICESCR* in progressive steps, including in particular the adoption of legislative measures, might have justified a failure to implement between 1976 and 1984, when the new law was in operation. It did not justify new legislation which brought Canada into express conflict with *ICESCR* eight years after ratification.

The obligation to dedicate the maximum available resources to promote respect for *ICESCR* rights is not an obligation to be implemented progressively by dedicating less than the maximum initially and the maximum eventually. It is an obligation to dedicate the maximum immediately.

The *ICESCR* drafters recognised that there are some states which, even when immediately dedicating their maximum available resources, will not be in a position to ensure respect for *Covenant* rights. These states are to turn to international assistance and cooperation. In addition, as available resources increase, they are to devote their new resources to compliance. However, the Government of Québec did not argue that it did not have the resources to implement the obligation at the time.

The duty to take steps towards fulfilling treaty obligations is another immediate duty under *ICESCR*.[68] The substantive realisation of rights is to be

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66 See Canadian International Development Agency, *Statistical Report on Official Development Assistance: Fiscal Year 2001–2002* (2003).

67 CESCR, *General Comment 9*, above n 29, [11].

68 *ICESCR*, above n 7, arts 6, 11–15. These articles explicitly include a duty to take steps to promote the realisation of the rights to which they refer.

progressive, but the duty to take steps towards this realisation is not. Furthermore, when *ICESCR* states that the realisation must be through progressive steps, it implies that the steps cannot be retrogressive.[69] It is not clear how, if at all, the contested legislation was a step towards the realisation of the *Covenant* right to an adequate standard of living, as the 1984 legislation did not bring Québec any closer to respect for this right than the previous legislation.

The Québec social assistance law changed again in 1989,[70] and now does not include the contested provisions. However, the 1984 law could not be considered a step towards the 1989 law. The notion of progressive achievement does not mean that prior violations are excusable providing they are now gone. For the 1984 law to represent a progressive achievement it would have had to manifest some form of progress — and this was lacking.

5 *Economic Development*

One distinction between economic, social and cultural rights, and political and civil rights made by Reeves J in the Trial Division of the Québec Superior Court is partially correct. Reeves J noted that the implementation of economic and social rights depends on the level of development of the state. The implementation of political and civil rights does not.[71]

Article 2(3) of *ICESCR* provides that '[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present *Covenant* to non-nationals.' There is no comparable provision in the *ICCPR*. As one can see, the lesser obligation on developing countries is not in relation to rights guaranteed to all, but only in relation to rights guaranteed to non-nationals. From the express provision dealing with non-nationals it can be assumed that the drafters intended that the obligations of developing countries' governments towards their citizens be no lesser than for developed countries. On top of this, Canada is not a developing country. Even if the obligations on developing countries were less stringent, this excuse would be irrelevant in relation to Canada and Québec.

Reeves J referred to the obligations on developing countries in order to make the more general point that the two sets of rights are different. In developing countries, this underlying difference is visibly manifest, as respect for economic, social and cultural rights requires the spending of funds which developing countries may not have, whereas respect for political and civil rights does not require such expenditure. The argument can be made the other way: that the obligations under *ICESCR* are more binding than the obligations under the *ICCPR*, as the *ICCPR* allows for derogation, whilst *ICESCR* does not.

Some rights in the *ICCPR*, such as the right to life, are non-derogable.[72] Other rights, such as the right to liberty and security of the person, are derogable 'in time of public emergency which threatens the life of the nation and the existence

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69 CESCR, *General Comment 3*, above n 61, [2], [9].

70 *The Social Aid Act*, RSQ 1984, was replaced by *Act Respecting Income Security*, RSQ 1989, c S.3.1.1 on 1 August 1989.

71 *Gosselin v A-G (Québec)* [1992] RJQ 1647, 66–7.

72 *ICCPR*, above n 30, art 4(2). Article 4(2) states that '[n]o derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.'

of which is officially proclaimed'.[73] In comparison, none of the economic, social and cultural rights are derogable, even in times of emergency. Also, it should be remembered that despite the unqualified appearance of the rights in the *ICCPR*, states parties can sign the *Covenant* with reservations, as they can with any treaty. Canada has not attached any reservations to its signature, although many other countries have.[74]

Furthermore, while the *ICCPR* has no 'umbrella' provision allowing developing countries to limit the granting of its rights to non-nationals, it does have a number of specific provisions that grant rights to citizens only. Only citizens are guaranteed the right to take part in public affairs, to vote and be elected, and to have access to public services.[75] The right of entry into a country is granted only to nationals.[76] An alien lawfully in the territory of a state party may be expelled from the territory provided due process is respected.[77]

The developing country exception for non-nationals in *ICESCR* is allowed only after due regard to human rights and the national economy.[78] What this exception tells us is not so much that economic, social and cultural rights cost money, but rather that many economic, social and cultural rights granted to non-nationals can be respected without the right being explicitly guaranteed by the country in which the non-nationals are present. For instance, if the right to an adequate standard of living is respected in the country of nationality, the fact that it is not also respected in a developing country where an individual may currently reside is not an assault on the fundamental human dignity of the person.

It is going too far to develop a theory of the difference in the character of the two sets of rights based on *ICESCR*'s provision under art 2(3) for developing countries to restrict the granting of economic, social and cultural rights to non-nationals. To use this provision to argue about the nature of the obligations Canada owes under *ICESCR*, when Canada is not a developing country, goes against the spirit of the provision.

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73 Ibid art 4.

74 A comparative example is the UK which, by way of reservation, excepted the armed forces, prisoners and foreigners from its commitments under the *ICCPR*: *Ratification by the United Kingdom of Great Britain and Northern Ireland*, deposited 20 May 1976, 1007 UNTS 394, 394–5.

75 Ibid art 25.

76 Ibid art 12(4).

77 Ibid art 13, which states that:

> An alien lawfully in the territory of a State Party to the present *Covenant* may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

78 *ICESCR*, above n 7, art 2(3) states that '[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present *Covenant* to non-nationals.'

6 *The Intention–Law Distinction*

Reeves J relied on the phrase 'take appropriate steps' in art 11(1) of *ICESCR* to reason that the article merely indicated an intention by the state to implement the rights, and that therefore the rights did not apply immediately. On the face of it, his reliance on this phrase to reject the claim of Louise Gosselin is startling. Surely reliance on the *Canadian Charter* and the *Québec Charter* constitutes an 'appropriate' means, according to an *ICESCR* interpretation, to realise the right to an adequate standard of living. It is hard to imagine that the trial judge meant to indicate that reliance on the *Canadian Charter* or *Québec Charter* would be an 'inappropriate' means and a violation of *ICESCR*. Therefore, when the judge interpreted the phrase 'appropriate steps' to indicate mere intention as opposed to actual commitment, his Honour caused the perverse result of frustrating reliance on such 'appropriate means'.

The *ICCPR* uses the phrase 'appropriate steps' in art 23(4): 'States Parties to the present *Covenant* shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.' Using the reasoning of Reeves J, there is no immediate obligation on states to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution, because the article is merely a statement of intention on the part of states — again, a startling result.

The notion that a provision of any treaty has no legal force is antithetical to the nature of treaties. Treaties are international legal instruments. The *Vienna Convention on the Law of Treaties* defines a 'contracting State' as 'a State which has consented to be bound by the treaty, whether or not the treaty has entered into force'.[79] If a treaty was merely a statement of intention, there would be nothing to which a contracting state would be bound. The reasoning of Reeves J that art 11(1) states a mere intention rather than an immediate legal obligation is tantamount to saying that the states parties did not really consent to be bound by treaty obligations. Such an interpretation violates the requirement that treaties be interpreted in good faith.[80]

The notion that states parties to a treaty must take appropriate steps to implement their obligations is implicit in every treaty. For instance, the HRC stated that 'article 2 of the *Covenant* generally leaves it to the States Parties concerned to choose their method of implementation in their territories within the framework set out in that article.'[81] Therefore, the question posed by art 11(1) of *ICESCR* is not 'to what extent does the phrase "appropriate steps" lessen the legal obligation of immediate compliance?' Rather, it is 'why did the drafters find it necessary to insert the phrase "appropriate steps" since the obligation to take appropriate steps is nonetheless implicit?' There are two answers to this question.

The first answer can be found if the phrase 'appropriate steps' is read in the context of the sentence as a whole. It is evident that the purpose of inserting the

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79 Opened for signature 23 May 1969, 1155 UNTS 331, art 2(1)(f) (entered into force 27 January 1980).

80 Ibid art 31(1).

81 *Report of the Human Rights Committee*, UN GAOR, 36th sess, 311th mtg, Annex VII, Supp No 40, [1], UN Doc A/36/40 (1981).

phrase 'appropriate steps' is to remind the international community of one step that is considered appropriate in a nation's pursuit to realise the right to an adequate standard of living — that being international cooperation based on free consent. This reminder reinforces the statement in art 2(1) of *ICESCR* regarding the obligation 'to take steps, individually and through international assistance and co-operation, especially economic and technical'.

The second answer is that the phrase 'appropriate steps' was inserted to signal to signatory states that the obligation is positive, requiring active intervention by states to ensure respect for the right. One can see this signalling in relation to a number of rights in *ICESCR*. For example, the right to work in art 6(1) is followed by art 6(2) which states, '[t]he steps to be taken by a State Party to the present *Covenant* to achieve the full realization of this right shall include …'. There is a similar structure for the right to the enjoyment of the highest attainable standard of physical and mental health,[82] the right to education[83] and the right to take part in cultural life.[84]

There is, of course, an intention or policy that permeates *ICESCR*. Immediate and full respect for human rights is not a reality even amongst the signatory states to the international *Covenants*. The *Covenants* set out an ideal which states must attempt to realise. However, the fact that the *Covenants* represent an ideal does not change the immediate legal obligation that they impose on states.

Indeed, one can say that almost every law, both domestic and international, is imbued with an ideal that is not fully realised, and hence that it imposes an obligation on those to whom it is directed to take steps towards realisation of that ideal. The criminal law, for instance, is motivated by the ideal of a crime-free society. The intention of the Canadian Parliament in enacting the *Criminal Code*[85] is to impose an obligation on governments, the courts and Canadian society in general to take appropriate steps to realise that ideal. No one would argue contrary to this implicit ideal that the *Criminal Code* is a mere statement of political intent by Parliament which does not impose immediate legal obligations.

Since the creation of CESCR, Canada has submitted two reports on its compliance with *ICESCR*. CESCR examined the first report in 1993 and the second in 1998. In its *1993 Concluding Observations* on the report submitted by Canada, CESCR stated:

> The Committee is concerned that in some court decisions and in recent constitutional discussions, social and economic rights have been described as mere 'policy objectives' of governments rather than as fundamental human rights.[86]

In its 1998 *Concluding Observations* on Canada's subsequent report, issued after *Gosselin* was decided at trial, CESCR stated:

> The Committee, as in its review of the previous report of Canada, reiterates that economic and social rights should not be downgraded to 'principles and

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82 *ICESCR*, above n 7, art 12.
83 Ibid art 13.
84 Ibid art 15.
85 *Criminal Code*, RSC 1985, c C-46.
86 CESCR, *1993 Concluding Observations*, above n 65, [21].

> objectives' in the ongoing discussions between the Federal Government and the provinces and territories regarding social programmes.[87]

The views of the Committee, as an expert body, are persuasive. These views make clear that to use the phrase 'take appropriate steps' as Reeves J did, to turn a legal obligation into a policy objective, violates the meaning and intent of *ICESCR*.

7 *The Role of the Courts*

The lower courts betrayed a view that it is inappropriate to give economic, social and cultural rights legal force because their realisation involves the expenditure of money, and that these decisions are better left to governments. However, the appellant argued before the Supreme Court that this judicial reluctance is equally applicable to political and civil rights.

It is important that the concept of economic, social and cultural rights is distinguished from the fields of economics, social services or culture. Elaboration of the content of these rights is essentially a legal task, properly the domain of human rights institutions and the courts. The lower courts seemed to believe that enforcing economic, social and cultural rights would usurp the role of legislators. Yet, courts and legislatures, even when dealing with the same subject matter, do two very different things. Legislatures enact policies, reflecting the will of the majority or the powerful. Courts, when interpreting human rights instruments, elaborate on the meaning of rights to protect the position of the minority or the powerless.

Economic, social and cultural rights cannot be left to legislatures any more than political and civil rights. If economic, social and cultural rights are left to legislatures, then the majority or the powerful will effectively determine the extent to which the minority or the powerless enjoy these rights, and their realisation becomes a matter of convenience. The notion that rights are inherent in the individual is denied. CESCR has said that putting economic, social and cultural rights beyond the reach of the courts 'would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.'[88]

Giving courts the power to interpret economic, social and cultural rights does not give them unlimited agency. They are limited to enforcing respect for entrenched rights. However, it does mean that legislatures have limitations on what they do, or neglect to do — and that is what the entrenchment of rights sets out to ultimately achieve.

The *UDHR* provides that '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'[89] Law, in this context, is international in character as well as domestic, and includes the rights granted by *ICESCR*. CESCR has said that neglect by the courts of the responsibility to take into

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87 CESCR, *Considerations of the Reports Submitted by State Parties under Articles 16 and 17 of the* Covenant*: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C.12/1/Add.31 [52] (10 December 1998).

88 CESCR, *General Comment 9*, above n 29, [10].

89 *UDHR*, above n 28, art 8.

account *ICESCR* obligations 'is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.'[90]

Article 2(1) of *ICESCR* requires states parties to use 'all appropriate means' to achieve progressively the full realisation of the rights recognised in the *Covenant*. CESCR has stated that it would be difficult to show that legal remedies are either not an 'appropriate means' or are unnecessary for rights realisation. Further, it has noted that in many cases other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.[91]

IV THE SUPREME COURT OF CANADA DECISION

Surprisingly, at the level of the Supreme Court of Canada, the facts were still disputed by both the appellant and respondent. Louise Gosselin contended that she did not have access to a program of work or school that would have allowed her to reach a subsistence level of income because there were not enough places in the programs to meet the needs of all welfare recipients under 30 years of age. The Government of Québec took the opposite position, arguing that there were enough places available and that everyone who was willing to work or go to school could reach a subsistence level of income.

At trial, Reeves J found that there were enough places, but this finding was contrary to the expert evidence. Robert JA in the Court of Appeal and Bastarache J in the Supreme Court of Canada relied on that expert evidence to reason that the finding of the trial judge should not be followed on this point.

Although Louise Gosselin did not participate in the work and school programs consistently, she was able to access the programs and, during her periods of participation, received a subsistence level of income. She withdrew for personal reasons that included psychological distress and substance abuse. The Supreme Court majority — McLachlin CJ, Gonthier, Iacobucci, Major and Binnie JJ — held that her failure to participate in the programs continuously was the result of her personal problems and not the result of flaws in the programs.

Given the majority's acceptance of the trial judge's findings that there were enough openings in the programs to ensure an adequate standard of living for everyone, evidence of actual hardship was wanting. McLachlin CJ stated that 'the frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.'[92] This acceptance of the trial judge's findings meant the majority in the Supreme Court failed to make a determination on the justiciability of economic, social and cultural rights. The majority left open the possibility that a positive obligation to sustain life, liberty, or security of person may be made out in special circumstances, but was not made out in the circumstances of this case. LeBel J, in a separate judgment, agreed with this reasoning.

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90 CESCR, *General Comment 9*, above n 29, [14].

91 Ibid [3].

92 *Gosselin* (2002) 221 DLR (4th) 257, [83] (McLachlin CJ).

A *The Judgment of Justice Arbour*

1 *Justiciability of Economic, Social and Cultural Rights*

The most significant judgment in the case on this issue was that of Arbour J. Her Honour addressed the issue in the context of the *Canadian Charter*, rather than in an international law context, but her analysis can still claim general application. L'Heureux-Dubé J concurred with her analysis.

Arbour J preferred not to apply the label of 'economic right' to the right to an adequate standard of living. Her Honour equated economic rights with the right to property. Since the right to an adequate standard of living was not a right to property, it was, in Arbour J's view, not a true economic right.

While this sort of terminological definition might make sense in a Canadian context, it is confusing in an international context. Article 11 of *ICESCR*, while establishing the right to an adequate standard of living, does not define which of the rights it contains are economic, which are social and which are cultural. As has been noted, however, *ICESCR* does provide that '[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present *Covenant* to non-nationals.'[93] It is the author's view that the logic behind this provision is that non-nationals can seek the realisation of economic rights in their country of nationality. Developing countries should not be expected to shoulder the burden of providing for citizens of other nationalities. Presumably, given this provision in *ICESCR*, the right to an adequate standard of living would be considered an economic right at international law. Even though Arbour J found it not to be an economic right in Canadian law, that finding does not bring into question its status as an economic right at international law.

Arbour J rejected the distinction between negative rights and positive rights as a ground for enforceability. She observed that

> [a]s a theory of the *Charter* as a whole, any claim that only negative rights are constitutionally recognized is of course patently defective. The rights to vote (s 3), to trial within a reasonable time (s 11(b)), to be presumed innocent (s 11(d)), to trial by jury in certain cases (s 11(f)), to an interpreter in penal proceedings (s 14), and minority language education rights (s 23) to name but some, all impose positive obligations of performance on the state and are therefore best viewed as positive rights (at least in part). [94]

It was the view of Arbour J that one can distinguish between the assertion of a right and the expenditure of funds. Whether a right exists is justiciable, whereas how much money is required to realise the right is not.[95] In the context of this case, this meant that Louise Gosselin's assertion that she had a right to an adequate standard of living was justiciable. In contrast, how much money was required to realise an adequate standard of living was not. According to Arbour J, this distinction may deprive many litigants of an effective remedy because, unless it is evident how much money is needed to safeguard the right, it is

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93 *ICESCR*, above n 7, art 2(3).

94 *Gosselin* (2002) 221 DLR (4th) 257, [320] (Arbour J).

95 Ibid [386]–[387].

difficult to know whether the right has been violated.[96] However, that problem was not raised in this case because the Québec regulations had explicitly defined what constitutes a subsistence income.[97] The only issue in this case was whether Louise Gosselin was entitled to the decreed amount, and that was an issue within the court's jurisdiction.

In the opinion of Arbour J, the notion of the indivisibility of rights supported Louise Gosselin's assertion of the right to an adequate standard of living. Even though the right to an adequate standard of living is not found in the *Canadian Charter*, Arbour J found a basis for that right in both the right to life and the right to security of the person.[98]

Her Honour reasoned that any interpretation of the right to life that limited it to negative rights threatened to impugn the coherence of human rights as a whole. If the right to life was interpreted as protecting merely negative rights, it would be reduced to the function of guarding against capital punishment — arguably a redundant function in light of the prohibition against cruel and unusual treatment or punishment.[99] Arbour J then concluded that a minimum level of welfare is so closely connected to issues relating to the basic health or security of the person, and potentially even to one's survival or life interest, that a positive right to life, liberty and security of the person must necessarily provide for a minimum level of welfare.[100]

Therefore, Arbour J recognised the basic economic right to an adequate standard of living and related it to a Canadian context. This analysis advanced Canadian law, but simply reiterated international law concepts.

2 *Evidentiary Issues*

Arbour J's analysis of evidentiary issues deserves international attention because it advances our understanding of international human rights. The issue at hand was the evidentiary basis that a claimant must provide in order to establish that the state has violated a positive economic right. Must the claimant show that she has exhausted all private means, including the open market and the assistance of other private actors such as family members or charitable groups, before she can claim that her right to an adequate standard of living has been violated?

According to Arbour J, all that is required is that the claimant demonstrates that the failure of the state to act substantially impeded her enjoyment of the right. The claimant need only show that government action was necessary to render the right meaningful.[101] In this case, Arbour J found that Louise Gosselin had shown what was necessary to justify a finding that her right to an adequate standard of living had been violated by the state.

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96 Ibid [398]–[399].
97 *Social Aid Act*, RSQ 1983, c A-16, c 5, s 29, as amended by SQ 1984, c 5.
98 *Gosselin* (2002) 221 DLR (4th) 257, [356]–[358], [396] (Arbour J).
99 Ibid [348].
100 Ibid [358].
101 Ibid [370].

3 *Outcomes of Justice Arbour's Reasoning*

Nevertheless, her Honour left a troubling limitation to her reasoning. Aside from ruling that courts should not decide what specific levels of expenditure are required to realise a right, she also suggested that a minimum level of state action may be necessary to trigger respect for a right. That is to say, if the state completely refrains from action, it may be blameless. It can only run afoul of the law if it acts to respect a right and these efforts are inadequate. She stated:

> Legislative intervention aimed at providing for essential needs touching on the personal security and survival of indigent members of society is sufficient to satisfy whatever 'minimum state action' requirement might be necessary in order to engage s 32 of the *Charter*.[102]

Despite a lack of reference to international law, to a large extent the judgment of Arbour J reiterates it. *ICESCR* requires that the rights in the *Covenant* be respected by each state 'to the maximum of its available resources'.[103] Under the *Canadian Charter*, once any right is found to be violated, the government can justify the violation if it establishes that the violation was 'within the reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[104] Arbour J observed that cost considerations alone could not constitute a justification for the violation of the right to an adequate standard of living unless the costs were prohibitive.[105]

B *The Judgment of Justice Bastarache*

The only judge who disagreed squarely with Arbour J on economic rights was Bastarache J. Given that he was alone in his opinion, and Arbour J was supported by L'Heureux-Dubé J, the opinion of Arbour J can be considered the 'majority' opinion on the issue of economic rights. Furthermore, the opinion of Bastarache J does not translate as clearly into international law terms as the opinion of Arbour J. Bastarache J based his reasoning more on a textual analysis of the *Canadian Charter* than on the legal meaning of economic rights in general.[106]

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102 Ibid [385]. *Canadian Charter* s 32(1) is a seemingly innocuous provision, stating only that the instrument applies to the Parliament, provincial legislatures, and federal and provincial governments in respect of all matters within their authority.

103 *ICESCR*, above n 7, art 2(1).

104 *Canadian Charter* s 1.

105 *Gosselin* (2002) 221 DLR (4th) 257, [391] (Arbour J).

106 *Canadian Charter* s 7 specifically provides that '[e]veryone 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.' Arbour J read that guarantee as asserting two sets of rights. One set is the right to life, liberty and security of the person. The other set is the right not to be deprived of the right to life, liberty and security of the person except in accordance with the principles of fundamental justice: *Gosselin* (2002) 221 DLR (4th) 257, [338], [344]–[348]. Bastarache J read that guarantee as asserting only one set of rights: ibid [209] (Bastarache J). Based on that reading, he reasoned that the state must cause the deprivation of the right in a manner not in accordance with fundamental justice before the s 7 guarantee is violated. Whether Bastarache J or Arbour J is correct in their reading of this provision is not pertinent to our understanding of economic rights at international law.

In any case, although Bastarache J addressed the general issue of economic rights only briefly, he accepted the argument that these rights were conceptually and juridically indistinguishable from political and civil rights. He stated:

> The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government in order for it to be realised. This is true.[107]

His Honour then quickly returned to his textual position that this truth did not mean that s 7 of the *Canadian Charter* was engaged.

V CONCLUSION

Although Louise Gosselin lost her appeal in the Supreme Court, economic, social and cultural rights won. No judgment denied their justiciability. Six judges left the issue open. One judge accepted the justiciability of economic rights in theory, but concluded that this did not apply in Canada because of the specific wording of the *Canadian Charter*. Two judges affirmed the justiciability of economic rights both in theory and in Canadian law.

Economic, social and cultural rights have been beleaguered by criticisms that these rights are not really rights — but rather are juridically different from political and civil rights. These criticisms were voiced in the reasoning of the judges in the lower courts in *Gosselin*. The judgment in the Supreme Court of Canada should help put these criticisms to rest.

DAVID MATAS[†]

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107 *Gosselin* (2002) 221 DLR (4th) 257, [218] (Bastarache J).

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