

**Claiming Rights and Eliminating Poverty and Homelessness:
Making the Connection at Home and Abroad**

Canadian Council on International Law

November 5, 2011

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For the last 15 years or so, widespread homelessness, hunger and poverty amidst affluence in Canada, has been identified by both civil society actors and UN human rights treaty monitoring bodies as the most critical human rights violations in Canada. The UN CESCR has grown increasingly alarmed by the failure of governments, courts, and human rights institutions in Canada to address these violations of the right to an adequate standard of living. The UN Human Rights Committee has also take up these issues, noting that homelessness in Canada's climate violates the right to life and demands positive measures from governments to address it as such. And the other treaty monitoring bodies have expressed alarm at the disproportionate impact of poverty and homelessness on women, children, Aboriginal people, racialized groups and others. Yet we have not had a single hearing or inquiry by any of Canada's provincial/territorial or our national human rights institutions into poverty or homelessness as human rights issues in Canada.

Two days ago the Supreme Court of Canada again refused leave to appeal on a poverty case, this time from a decision from the Federal Court of Appeal. In a challenge to a refusal to waive a \$550 fee which barred a woman living in poverty from access to humanitarian and compassionate consideration under the IRRPA, the Federal Court of Appeal had found that poor people are not protected from discrimination under the Canadian Charter. We have tried, for more than 20 years, to get a case to the Supreme Court of Canada to establish that discrimination on the ground of poverty is constitutionally prohibited, but have never been granted a hearing. It is, of course, a struggle to get cases launched, to get cases to higher levels of court. Funding for this recent case was granted by the Federal Court Challenges Program, a critical source of

resources for strategic litigation on poverty issues back in 2006, just before the Federal Government eliminated funding for the program. Without the Court Challenges Program, we don't know how many years it may be before we get another chance to ask the Supreme Court to consider whether poor people are constitutionally protected from discrimination.

Poor people and homeless people in Canada, as in developing countries, understand the problems of poverty and homelessness as issues of human rights, injustice and disempowerment. So at the same time as advocating politically for improved programs and policies, they have gone to court to address causes of poverty and homelessness as human rights violations. We have challenged income restrictions imposed by landlords to bar poor people from private market housing; inadequate social assistance rates denying access to food and housing; failures by utilities boards to ensure affordable electricity rates for the poor; eligibility restrictions for unemployment insurance, among other things. While we have had some successes, I think the experience of Thursday at the Supreme Court of Canada can be taken as typical. By and large, poor people have been denied hearings in Canada into poverty and homelessness as human rights violations, both through barriers to accessing justice and to the predominance of a judicial prejudice that poverty issues belong to legislatures and not to courts.

What I want to suggest to you today is that the systemic denial of hearings to poor people and the failure of human rights institutions, courts, governments and other key actors to engage poverty and homelessness as human rights violations are at least partially responsible for the persistence and depth of poverty and homelessness in both affluent countries like Canada and in developing countries. I want to suggest that a new paradigm of social rights as rights which must

be subject to hearings and effective remedies at all levels of domestic and international law offers us a way forward in better understanding the relationship that ought to be constructed between human rights and development.

With widespread denial of hearings and remedies domestically, poor people in Canada have increasingly turned to international human rights bodies – not just to get recommendations made to governments but also as an adjudicative space in which their rights claims could be heard. It was Canadian anti-poverty groups who first pressured the CESCR, under the chairpersonship of Philip Alston, to adopt a new procedure during periodic reviews of states parties through which oral submissions of NGOs could be heard. This became institutionalized as what Mathew Craven called an “informal petition procedure.”

Despite these advances the entrenched divide between civil and political rights and social and economic rights within the UN System has continued. It was most clearly evidenced by the adoption of an optional complaints procedure for civil and political rights in 1976 and the absence of a similar procedure for ESC rights. As Philip Alston wrote 25 years ago, there was “no right to complain about being poor.” This asymmetry has distorted our understanding of the relationship between rights claiming and development in the past. While development aid has been linked to access to justice for civil and political rights, it has rarely been linked to any requirement that social and economic rights violations be subject to effective remedies. The progressive elimination of poverty and homelessness, subject to available resources, as guaranteed under the ICESCR, has been considered primarily as a goal and aspiration of

government rather than as a right which must be subject to effective remedies and meaningful engagement by courts, human rights institutions.

The adoption of an Optional Protocol to the ICESCR in 2008, establishing a parallel complaints procedure to the one that has existed for 35 years under the ICCPR, represents an historic transformation and a new vision of the relationship between human rights and development. As Louise Arbour as the UN High Commissioner on Human Rights wrote at the time, it represented “human rights made whole.” I suspect that her appreciation of the historic significance of that event, and her major contribution to making it happen during her tenure as High Commissioner may have owed a lot to her domestic experience here in Canada as a Supreme Court Justice. She wrote an eloquent dissent in the *Gosselin* case, the single case in which the Supreme Court of Canada has considered whether the right to life and security of the person in s. 7 of the Canadian Charter requires positive government measures to address poverty and homelessness and provide for basic necessities, affirming that the right to security of the person places positive obligations on governments in the Canadian context to ensure an adequate level of social assistance for those with no alternative source of income.

But what exactly does this new paradigm of “human rights made whole”, recognizing economic and social rights as justiciable, mean for the relationship between human rights and development? Are we proposing to transfer responsibility for key decisions about poverty and housing programs to courts? And if not, what is the value added the new paradigm of social rights?

It was Amartya Sen who, early in his career, alerted us to the connection between poverty in developing and affluent nations and the connection to rights. Prior to his research, we thought of hunger and famine as problems of scarcity of food. What Sen discovered was that even in developing countries, the essential problem was not the amount of food available or produced but what he called “entitlement system failures – failures generated by the existing system of contracts, laws, regulatory systems, distribution and protection of property, program entitlements and international aid that could have ensured that particular households would be able to purchase or secure enough food. Entitlement systems fail when the rights of certain groups are devalued or ignored. That is, it is when the rights of certain groups to food or adequate housing are devalued in comparison to the asserted entitlements of other, usually more advantaged groups, that an existing systems of entitlements fails to ensure basic social rights. So we do not get at the root causes of hunger or homelessness or poverty in either Canada or in developing countries if we conceptualize these problems solely as unmet needs or scarcity of commodities. We have to address the structural failures of entitlement systems and decision-making apparatuses to recognize and be informed by fundamental human rights values – and most importantly, failures to ensure social rights such as the right to freedom from poverty or homelessness as universal rights that should inform all decision-making and decisions about how entitlements will be designed and administered.

It is in this context that in seeking to address poverty and homelessness in Canada we have drawn heavily on what was called the “common understanding” of the relationship between human rights and development adopted in 2003 by UN development agencies. The “common

understanding” identified four key features in a rights-based approach, which I would paraphrase as:

1) Building the capacity of rights-holders to claim and enforce rights and duty-bearers to fulfill their obligations;

2) Identifying the central human rights claims of rights-holders and identifying the structural causes of the non-realization of rights;

3) Developing effective strategies to realize rights, including monitoring and evaluating both outcomes and processes, guided by human rights standards and principles; and

4) Ensuring that programming is informed by human rights norms - ,meaning that they must be informed by recommendations of international human rights bodies and mechanisms and by outcomes of the adjudication of rights claims at the international, regional and domestic levels.

When we combine these key features of the rights based approach with the new social rights paradigm of “human rights made whole”, we begin to understand that the right to housing and an adequate standard living under international human rights law provide much more than a moral imperative on governments to set goals for themselves of eliminating poverty or homelessness over a particular timeframe. It is only when rights are made meaningful for rights-holders, creating new capacities for them to be claimed and enforced, that a rights-based approach is able to challenge the underlying structural causes of poverty and homelessness and draw on the transformative potential of human rights. Social rights are not simply goals or aspirations of governments, they are for claiming in some manner. The project of eliminating poverty and homelessness, of re-valuing the rights of those who have been unnecessarily

deprived of a decent living, housing or food, is not simply a project that demands better programs and benefits. It demands hearings for rights claimants and effective remedies to be available every time their rights are ignored or devalued.

This is not to say that addressing poverty and homelessness will not require programs to address unmet needs. But at the same time as developing improved programs to meet existing needs,, rights-based approaches must challenge the social construction of certain groups as **being** in need. Consider the example of people with disabilities. 40% of working-age people with disabilities in Canada have no paid work. Most are living in poverty and it is clear that they need improved disability benefit programs to meet their needs. But people with disabilities also need and demand action to address the structural causes of their unemployment, a redefinition of work so that it values the rights of people with disabilities to work - as guaranteed under the recently ratified *Convention on the Rights of Persons with Disabilities*. This approach is consistent with revaluing the rights of persons with disabilities to dignity, security, equality and inclusions but it is also more fiscally sound. Removing barriers to meaningful economic participation of people with rather than simply administering to needs created by social and economic exclusion involves significant cost savings for governments.

Similarly in the case of homelessness, Canadian governments spend far more on policing, court and prison costs associated with the criminalization of homelessness, and more on healthcare costs associated with homelessness, than would be required to implement programs and policies ensuring access to adequate housing as a human right. Social rights claims are not just about benefit programs or about whether governments can afford them. Poverty and

homelessness in Canada are not just matters of inadequate programs or limited government resources. They are equally human rights problems, demanding a new and improved integration of human rights and social policy.

The value added of the human rights approach relies on rights-holders having the capacity to claim their rights, but it doesn't need to rely primarily on courts. The emerging model for human rights and development will be one in which rights-based decision-making will be disseminated more widely through various programs and institutions. Rights-holders must have a place to go for a hearing, and there must be institutions with effective mandates and resources to ensure effective remedies. But the CESCR has been quite clear that courts are not the only way to ensure meaningful hearings and effective remedies. Recourse to judicial review is important as a last resort, but the emphasis must be on ensuring that all decision-making conforms with human rights norms.

Emerging social rights jurisprudence has adopted the standard of 'reasonableness' to assess the structural, transformative obligations of governments and other actors to eliminate violations such as homelessness and poverty within the limits of available resources. The notion of 'progressive realization' which used to be thought of as a good reason not to accept that social and economic rights are justiciable is now seen as central to ensuring that social rights adjudication addresses the important temporal dimension of rights fulfillment – that it addresses systemic causes of poverty and homelessness and does not simply determine immediate or minimal entitlements. Social rights claims are thus understood as transformative of systems and not simply as claims to particular statutory benefits or program entitlements. "Human rights

made whole” means that entitlements systems which now ignore social rights, such as trade and investment agreements, intellectual property rights, landlord and tenant law, or utilities pricing regulation, must be redesigned so as to be informed by and consistent with social rights. It is in this sense that rights-based approaches to development demand a re-valuing of the rights of those who have become increasingly disenfranchised by a system of neoliberal entitlements that ignores and actively subverts their rights. Programs and policies must be designed to ensure rights-based participation, with multiple places for rights holders to go for hearings, ranging from local human rights committees through municipal and city human rights charters, to human rights tribunals and domestic courts, as well, of course, as the new optional protocol to the ICESCR in circumstances where domestic remedies have failed.

Civil society groups from affluent countries are finding themselves in common cause with those from developing countries in promoting this new paradigm of human rights and development. We worked together to fight for the new Optional Protocol to the ICESCR and now we are working collaboratively on strategic litigation in both developing and developed countries to promote better enforcement of social rights.

The Canadian Government, of course, continues to argue in courts that claims brought by poor people challenging systemic causes of poverty or homelessness should not be adjudicated by courts. When confronted by such claims, counsel for federal and provincial governments in Canada have consistently argued that these are not human rights issues but are matters of social policy for legislatures and governments to determine. Canada first opposed, then sought to weaken and limit scope of Optional Protocol the ICESCR when a Working Group

proceeded to draft it, and now refuses to sign or ratify it. Urgent and repeated recommendations from UN human rights bodies to adopt and implement rights-based strategies to address the crisis of poverty, homelessness and hunger amidst affluence in Canada are ignored. A bill that would have implemented a national housing strategy in Canada based on the right to adequate housing in accordance with the recommendations from UN bodies was introduced into the last parliament and had the support of the majority of parliamentarians but the minority Government refused to support it.

Meanwhile governments and courts in southern countries are making significant advances in providing access to justice for social and economic rights claimants. Munar has described the important role that has been played by the Indian Supreme Court and human rights commission in ensuring the right to food as a component of the right to life. The South African Constitutional Court has led the way in developing and applying the standard of reasonableness in review of policy and program design and allocation of resources that has now been incorporated into the Optional Protocol to the ICESCR. Courts in Latin America, most notably the Columbian Supreme Court, have developed innovative approaches to remedies incorporating judicial oversight and stakeholder participatory rights in the monitoring and implementation of structural remedies over time.

We have a lot to learn in Canada from emerging notions of rights-based development and social rights adjudication that has been advanced in developing countries. I hope that as our Supreme Court justices travel the world to speak to judges elsewhere about human rights and the rule of law, they may also learn a thing or two in their travels and consider granting a fair hearing to those suffering the ravages of poverty, homelessness and hunger here at home.