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Poverty Law and Equality Rights - Preliminary Reflections

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POVERTY LAW AND EQUALITY RIGHTS
Preliminary Reflections

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The traditional governmental response to the phenomenon of poverty has been the enactment of legislation to permit or effect the transfer of some measure of economic resources to the poor. From feudal times to the present, governments of our political tradition have consistently embraced an economic definition of poverty: the poor are identified by financial criteria and are assisted by financial means.[1] The legislative evolution in regard to poverty, based on this underlying economic premise, has achieved only superficial advances. First, twentieth century legislation incorporates a more humane standard of minimum acceptable resource allotments. Second, the modern social welfare system represents a somewhat more comprehensive and less stigmatizing legislative bandage than were such earlier legal vehicles as the regulation of begging, institutionalized almsgiving and workhouses.

The legislative developments to date have not, however, challenged the economic conceptualization of poverty in our laws. Welfare, unemployment insurance, workers' compensation and minimum wages, while certainly progressive in comparison with the regulation of mendicity, are premised on the notion that poverty can be alleviated by a redirection of funds toward those in need. Even the more progressive reactions to poverty which have been advocated assume an economic definition of poverty. Programs that would implement a significant redistribution of resources from the rich to the poor by way of the establishment of a guaranteed income and/or sharply progressive taxation system are really only sophisticated versions of the Poor Laws in that they perpetuate the economic focus of poverty legislation.

It is argued here that the legislative characterization of poverty as an economic condition is a pernicious effort to disguise the structural causes of poverty. It is further suggested that the most effective role for poverty lawyers is the articulation of this divergence between the real and professed objectives of poverty

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1. See, e.g. Podoluk, "Poverty and Income Adequacy", in Reflections on Canadian Incomes (1979), at 275.

BILLET DE LA RÉDACTION=

Il y a quelque temps déjà, le Bureau de direction de l'Association des cliniques juridiques de l'Ontario (A.C.J.O.) avait reconnu le besoin de plus de recherche dans les domaines juridiques dans lesquels oeuvrent les cliniques juridiques. Ce besoin a pris une urgence toute nouvelle avec la proclamation de la Charte canadienne des droits et des libertés dont la portée apparaît tout à fait extraordinaire en ce qui concerne les clients des cliniques. La circulaire ("Newsletter") de l'Association des cliniques juridiques de l'Ontario permet déjà un échange régulier d'informations juridiques mais ne constitue pas un véhicule adéquat pour des articles de fond.

Venant peu après l'entrée en vigueur de l'article 15 de la Charte, le premier numéro de la Revue des lois et des politiques sociales devient réalité. Il apparaît tout à fait approprié que ce premier numéro soit présenté sous forme de cahier spécial portant sur la Charte et, en particulier, sur l'article 15.

En plus de susciter davantage de recherche au sein du réseau des cliniques, la Revue servira d'outil à l'A.C.J.O. pour réaliser son engagement de renforcer les liens entre les cliniques, le barreau privé, le milieu universitaire et les autres organismes engagés dans la réforme des lois.

La Revue recherchera des articles traitant de sujets juridiques et de questions relatives aux politiques sociales qui sous-tendent les problèmes juridiques de toutes les régions du Canada et d'ailleurs. Un préjugé favorable existera favorisant tout article ayant un intérêt pratique immédiat pour le personnel des cliniques. En plus des articles qui paraissent dans ce premier numéro, nous accueillerons des rapports de cas et des résumés de livres. On prévoit que la Revue paraîtra annuellement. Si vous désirez présenter des articles, veuillez communiquer avec Jack Fleming à l'adresse suivante:

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Nous espérons recevoir bientôt des nouvelles de futurs correspondants et les commentaires de lecteurs sur le contenu et la présentation de cette publication.

Enfin, nous voulons remercier les auteurs des articles qui paraissent dans ce premier numéro pour des articles de qualité malgré le peu de temps qui leur a été accordé. Nous voulons exprimer toute notre gratitude aux membres du comité consultatif pour leur inestimable appui dans cette nouvelle entreprise.

Jack Fleming
David Shanks

octobre 1985

What mix of goods and services is required for survival or to meet generally accepted norms? How much of an income differential between the rich and the poor is socially permissible? At what point can it be said that steps need to be taken to remedy a social imbalance of revenue? All of these definitional approaches necessarily involve value judgments made by predominantly non-poor legislators and program administrators about the extent to which it is legitimate to condone economic deprivation. Because of the inherently amorphous character of economic definitions, those in policy-making posts can readily expand or constrict the range of persons classified as poor on the basis of arbitrary or self-serving considerations. What is more, the statistical language which clothes economic formulations of poverty gives them an appearance of absoluteness and value neutrality, thus discouraging public scrutiny of the underlying policy concerns.

Second, prevailing economic definitions of poverty ignore differences in resources which arise from the existence of past accumulations of wealth. By asking whether the poor have sufficient funds to meet their needs, or indeed whether there is in some sense a maldistribution of income, one avoids consideration of the true extent of the economic imbalance between the poor and the non-poor. Because all of the major economic definitions of poverty look only at actual and/or future revenue,[8] they tacitly sanction the preservation of historically acquired economic advantages. While such an approach may be rationalized on the basis of administrative practicality, the hegemony of the non-poor is nonetheless reinforced by the limited purview of current economic measures of poverty.

Third, and most important, economic definitions of poverty are of limited utility because they are descriptive rather than explanatory in nature. Merely knowing that a group of persons cannot meet its needs, or is in some sense economically disadvantaged, provides no insight on the meaning of poverty. A definition should express the essential nature of poverty, and thereby offer an indication of the common thread that unites those who are poor. Rather than fulfilling this function, economic definitions emphasize the symptoms of poverty and divert attention from the reasons that the poor lack financial resources. The resultant legislative

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8. See e.g. Special Senate Committee on Poverty, supra note 2, at 199-218.

initiatives tend to be largely superficial, with an emphasis on the transfer of funds rather than on the elimination of the conditions which give rise to income deficiency.

Poverty as a Structural Phenomenon

The persistent adherence to a definition of poverty that is arbitrary, of unduly limited scope and non-explanatory may seem irrational. Adherents of the structural theory of poverty might however argue that the use of the economic definition is an effective means of binding the interests of the poor to those of the non-poor without any risk of significant encroachment on the latter's vested interests.

The structural or situational theory posits that poverty may be most appropriately defined in terms of the structural imperatives of a capitalist economic system.[9] Our model of economic activity requires inequities in the distribution of wealth: there must be persons with sufficient accumulations of capital to enable them to create the means of production and there must be others who are prepared to sell their labor to the capitalists. As such, there must always be persons who are, at least in comparative terms, rich and poor. While it is not argued here that there is no socio-economic mobility, it is clear that those who begin life with the advantages of wealth are favored in the quest to remain economically advantaged; similarly, those who start in a comparatively disadvantaged position are, even assuming equivalent personal dynamism, less likely to achieve comparable financial success. More important, even where particular individuals are able to better their situations, there must be others who assume the role of labor to these new capitalists. The very nature of the economic system therefore perpetuates structural inequalities and gives rise to a class of persons who, because of their position of comparative economic disadvantage, may be classified as poor.

From this perspective, the economic definition of poverty and the programs which have evolved in reliance on same are unquestionably inadequate to alleviate poverty: transfers of dollars do not in any sense effect changes to the structure of the economic system. Moreover, by providing for the basic needs of

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9. "[Poverty] is both an adaptation and a reaction of the poor to their marginal position in a class-stratified, highly individuated, capitalistic society": Lewis, "The Culture of Poverty" in Structured Inequality in Canada (1960), 140. See also Merton, "Social Structure and Anomie" (1938), III Am. Socio. R. 672.

those most harshly oppressed, economically based social welfare programs may effectively blunt demands for systemic reform as the poor come to see their well-being as dependent in some sense on the continued munificence of the non-poor. The result is therefore ideal from the perspective of the capitalist class: the potential for social upheaval is significantly lessened and the most disquieting manifestations of systemic inequality are alleviated, yet the advantaged position of the non-poor is only minimally diminished and, in the long term, is effectively safeguarded.

If a structural definition of poverty were to be adopted, on the other hand, the focus of our concern would shift to the eradication of institutionalized barriers to equality of economic opportunity. Individualized concerns and immediate needs would necessarily cede priority to collective endeavors designed to secure fundamental long-term gains.

The Response of Poverty Lawyers

Poverty lawyering is premised on the notion that the marginalized position of the poor in the socio-economic system gives rise to legal needs of an essentially different character than those of the non-poor.[10] Because most of the legal problems of the poor flow from their position of structural disadvantage, an intrinsic part of the poverty lawyer's professional conceptualization is the handling of legal issues on a systemic level, rather than expending resources to resolve the individualized manifestations of deep-seated inequities. Emphasis is continually placed on the discernment of root causes as the basis for strategic intervention on behalf of the poor.

The distinct philosophy of practice notwithstanding, poverty lawyers have for the most part failed to mount an effective challenge to social programing modelled on economic definitions of poverty. While, for example, there has been an acknowledgment that collective action designed to force the amendment of welfare law is a more effective tool in the poverty lawyer's arsenal than is individualized casework, the rationale for the very existence of a social welfare system has but rarely been the object of criticism. Poverty lawyers have struggled to improve the security of tenure afforded tenants, rationalize the rules governing unemployment

10. Wexler, "Practising Law for Poor People" (1970), 79 Yale L.J. 1049.

insurance and improve the compensation structure for injured workers. Poverty lawyers have not, however, worked to change the socio-economic structures which ensure that some people will always be poor. By tacitly accepting the appropriateness of an economic formulation of poverty, lawyers who work with the poor have been drawn into the game of responding to symptoms rather than seeking out causes. The gains secured by poverty lawyers through current modes of intervention may have attenuated the suffering experienced by poor people, but they have not and will not end poverty.

It might be suggested that the eradication of poverty is a role that is fundamentally inconsistent with the professional and economic status of lawyers.[11] Lawyers are trained in the workings of the existent social system and are valued because their specialized knowledge of the system's functioning permits them to secure advantages for their clients. In a radically transformed social structure, current types of legal expertise might be rendered largely irrelevant and the professional and economic security of lawyers correspondingly jeopardized. Lawyers may therefore be said to have a stake in the continuation of the socio-economic status quo.

More charitably, it might be argued that even for lawyers prepared to risk vested interests, the legal system has not traditionally provided avenues of fundamental redress for systemically disenfranchised classes. The entry into force of the equality rights provisions of the Canadian Charter of Rights and Freedoms[12] may establish the requisite judicial vehicle for poverty lawyers to effectively raise issues of equality of economic opportunity.

The equality rights provisions of the Constitution which entered into force in April of this year[13] provide that

> "15. (1) 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, colour, religion, sex, age or mental or physical disability.

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11. Heinkenbrankt, L'ambivalence du droit social.

12. Part I (ss. 1 to 34) of the Constitution Act, 1982, c.11 (U.K.), Schedule B.

13. In accordance with s.32(2) of the Canadian Charter of Rights and Freedoms, ss.15(1) and 15(2) entered into force on April 17, 1985.

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

To what extent, if at all, might litigation based on section 15 be effective in fighting poverty as a systemic denial of economic opportunity? While the rights of "the poor" to equality are not explicitly safeguarded by the Charter, are their interests such as to fall within the ambit of the general language of section 15? Are there compelling policy reasons to argue that those who are denied substantive equality by reason of the operation of our economic system should be protected in a manner comparable to other disadvantaged groups?

The American Experience

In attempting to grapple with the potential of constitutionally entrenched equality rights to serve as a vehicle to attack poverty defined as a systemic denial of economic opportunity, it may be instructive to examine the judicial interpretations of the Fourteenth Amendment to the Constitution of the United States, the relevant portion of which provides that:[14]

> "No State shall... deny to any person within its jurisdiction the equal protection of the laws."

While there are important distinctions to be drawn between the statutory language and historical contexts of the Canadian and U.S. equality provisions, the American equal protection cases do provide effective illustrations of the conceptual issues that arise in constitutional challenges to institutionalized poverty.

In scrutinizing legislation to ensure compliance with the equal protection clause, American courts apply a sliding scale of standards of judicial scrutiny.[15] At one extreme of the scale are

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14. U.S. Constitution, amend. XIV, s.1 (1868).

15. Blattner, "The Supreme Court's 'Intermediate' Equal Protection Decisions: Five Imperfect Models of Constitutional Equality" (1981), 8 Hastings Const. L. Q. 777.

those cases which allege discrimination that adversely affects a discrete, identifiable minority group or involve a fundamental interest. If the case alleges a rights violation against a suspect classification of persons (particularly if defined by race) or involves intrusion on a fundamental right (such as the right to vote or to litigate), a standard of very strict scrutiny applies.[16] In such cases the government must demonstrate that there is a compelling state interest which legitimizes the denial of equal protection of the law, and that the means employed to meet that state interest were, in fact, necessary. Because of the difficulty of discharging this burden of proof, legislation that has an adverse impact on an identifiable minority group or results in the infringement of a fundamental interest is likely to be struck down.[17]

At the opposite end of the spectrum of judicial scrutiny are those cases that allege a denial of a non-fundamental right to other than a suspect classification. In such cases, the impugned law need only be rationally related to a legitimate governmental goal in order to stand.[18] Furthermore, the person or group challenging the constitutionality of the law has the obligation to establish the lack of compliance with this standard. As a result, few laws affecting the non-fundamental interests of persons who do not belong to a specific minority group are successfully challenged.[19]

The attraction of close judicial scrutiny is therefore of major importance in American equal protection cases. This, in turn, is a function of whether the discrimination alleged affects a suspect classification of persons or, if not, whether the right involved is characterized as fundamental.

In regard to the first ground for close scrutiny, "the poor" have been held not to constitute an identifiable minority in the same sense as members of a racial minority. Justice Black, speaking for the majority in James v. Valtierra,[20] endorsed the constitutionality of a special referendum requirement to sanction the construction of housing for "low income persons". The court adopted a restrictive interpretation of the suspect classification test, holding

16. Tribe, American Constitutional Law (1978) at 994 ff.

17. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Sup. Ct. L. R. 131, at 140.

18. Tribe, supra note 16.

19. Gold, supra note 17.

20. 402 U.S. 137 (1971).

that same would be met in the context of legislation affecting the rights of poor people only if there were an allegation of racial bias.[21]

Furthermore, legislative distinctions on the basis of poverty have been held not to raise questions of fundamental rights. There has been a consistent reluctance on the part of the judiciary to expand the scope of fundamental interests analysis to issues of economic inequality. In the landmark case of Dandridge v. Williams,[22] the Supreme Court was called upon to adjudicate the constitutionality of a Maryland law which established a ceiling on welfare payments, family size notwithstanding. The majority opinion of Justice Stewart rejected the "right to subsistence theory" and held that reasonable, though imperfect, economic classifications did not violate the equal protection clause because there was no fundamental constitutional right to even a minimal standard of economic security.[23]

This view has been reinforced in two other kinds of cases. First, a line of decisions dealing with the right to shelter in the context of challenges to landlord-tenant and zoning laws has taken the position that there is no denial of equal protection where the poor have been effectively excluded from housing.[24] Second, it has

21. The restrictive interpretation of the Fourteenth Amendment as directed at racial discrimination is based on its historical rationale, namely the need to counteract the adoption by numerous southern states after the abolition of slavery of statutes designed to institutionalize discrimination against blacks: Frank and Munro, "The Original Understanding of 'Equal Protection of the Laws,' " [1972] Wash. U. L. Q. 421, 445-446.

22. 397 U.S. 471 (1970).

23. "[The] intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients": Justice Stewart's majority opinion, supra note 22.

24. Lindsey v. Normet 405 U.S. 56 (1972); Warth v. Seldin 422 U.S. 490 (1975); Eastlake v. Forest City Enterprises 426 U.S. 668 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corporation 429 U.S. 252 (1977).

been held that even where exclusionary laws lead necessarily to a reduction of educational opportunities for the poor, there is no absence of equal protection.[25] It has been observed that "... governmental actions designed to isolate the poorer classes and prevent their acquisition and use of real property are themselves presumed to be legitimate governmental objectives."[26]

In sum, the American position is that systemic economic inequalities do not abridge the right to equal protection, as the poor are neither members of a recognizable minority nor seeking to assert rights which may properly be deemed fundamental.

Prospects for a Canadian Interpretation of Equality Rights Favorable to the Redress of Systemic Inequality of Economic Opportunity

On the basis of the American approach to scrutiny of equal protection cases, one might expect little to be gained by seeking to establish the right to equality of economic opportunity via constitutional litigation. To what extent, then, is the Canadian equality rights clause likely to be interpreted in a manner consistent with the U.S. caselaw?

The first issue to be considered is whether the rationale for establishing variant levels of judicial scrutiny of equal protection cases is applicable to Canada, and, if not, whether differential scrutiny is nonetheless warranted on other grounds. The suspect classification arm of the American test is rooted in the dynamics of United States history, in particular the need to scrupulously examine all laws which in form or application create distinctions based on race.[27] In view of the record of institutionalized racism

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25. San Antonio Independent School District v. Rodriquez 411 U.S. 1 (1973).

26. Binion, "The Disadvantaged Before the Burger Court" (1982), 4 Law & Policy Q. 37, at 50-51.

27. The Fourteenth Amendment was adopted during the period immediately following the Civil War, and was designed to counteract the rash of state legislation which sought to negate the impact of the Emancipation Proclamation by applying unequal penalties to blacks convicted of crimes and imposing a host of restraints on their business and employment activities: see Bickel, "The Original Understanding and the Segregation Decision" (1955), 69 Harv. L.R. 1.

in American legislation, and the resultant history of significant social conflict, such special vigilance is no doubt warranted. In Canada, however, there is not a parallel tradition of legalized racial discrimination leading to social upheaval, as a result of which the argument for this form of special scrutiny is absent.

The fundamental interest test as a basis for strict judicial scrutiny in regard to equality rights is also largely inappropriate to the Canadian context. The American Fourteenth Amendment does not provide any explicit guidance in regard to the kinds of inequality it was designed to proscribe;[28] as a result, it was both logical and necessary that the judiciary develop rules which permit systematic judgments to be made in regard to the kinds of issues that should be examined as potential violations of the equal protection clause. In Canada, there is no need for such judicial categorizations as the Charter makes express reference to a variety of classifications that must attract judicial scrutiny[29] and furthermore explicitly directs the courts to hear claims in regard to other, non-enumerated forms of discrimination.[30]

On the assumption that the bases for requiring different levels of judicial scrutiny of equal protection cases in the United States are not applicable to the Canadian situation, might we nonetheless feel compelled to make a distinction in the degree of scrutiny to be applied on the basis of whether or not the claim rests on an enumerated or a non-enumerated ground of discrimination? On the one hand, it might be argued that no such distinction should be made as the equality rights provision of the Canadian Constitution evinces a clear legislative intention to eliminate discrimination however motivated, as a result of which relatively strict judicial scrutiny should be the norm in regard to all claims under section 15. Alternatively, it might be suggested that although the general

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28. Rather, it merely precludes the denial of equal protection of the laws in general terms: U.S. Constitution, Amendment XIV, s.1 (1868).

29. The specified classifications are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability: Canadian Charter of Rights and Freedoms, s.15(1), supra note 12.

30. The enumerated classifications " . . . do not exhaust the bar against legal discrimination. Section 15 requires that there be no discrimination in the protection or benefits provided by law:" Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982), 25 Can. Pub. Admin. 1, at 25.

wording of the provision certainly contemplates the extension of equality rights protection to other than the specified groups, the express reference to certain prohibited grounds for discrimination may be seen to impose a more strict burden of proof on those alleging discrimination on a non-enumerated ground. While the Constitution implies that discrimination for a listed reason is presumptively wrong, such harm must be affirmatively established in the case of other forms of discrimination. The greater precision of language in the Canadian Constitution may be argued to make the logic of a dichotomous approach to judicial scrutiny of equal protection claims even stronger here than in the United States. Had the drafters of the Constitution viewed inequality based on economic status as inherently wrong, an express prohibition of such discrimination would presumably have been included in section 15(1). Because there is no such reference, litigants asserting this kind of claim may well be faced with a relaxed standard of judicial scrutiny.[31]

Whichever of the above interpretations of the differential judicial scrutiny argument is ultimately adopted, broadly based claims to equality of economic opportunity should not be dismissed as readily in Canada as under the American precedents. At worst, the Canadian poor should face the necessity of establishing harm resulting from differential treatment as proof of discrimination. This obligation, while not insignificant, is nonetheless clearly preferable to the historically straitjacketed American threshold test.

Insofar as we may succeed in attracting judicial scrutiny to a claim for equality of economic opportunity, does the scope of the equality rights provision provide for an effective head of redress? The American Fourteenth Amendment, which guarantees only "equal protection of the laws", has been construed to establish political rather than economic rights. Equal protection of the law is, however, but one of four heads of equality established by section 15 of the Charter. In addition to equal protection, the Canadian enactment guarantees equality before the law, equality under the law and, most important, equal benefit of the law. In light of the intention of the legislative drafters to move beyond

31. This analysis assumes that the named groups were included in section 15 for principled reasons. One commentator suggests, however, that this was not the case: "Section 15 was developed primarily on public relations grounds as a means of co-opting highly visible and vocal interest groups into supporting the Trudeau government's unilateral constitutional restructuring": Russell, supra note 30, at 26.

narrow interpretations of equality,[32] it seems open to assert that the statutory language supports an interpretation that bars the inequitable assignment of societal benefits by legislation.[33] While the government might assert a compelling state interest that justifies some form of preferential benefit, section 15 may now provide a basis in law to argue that legislation which effects or regulates the distribution of social goods must be prima facie non-discriminatory in its application. This principle is potentially a basis for asserting a remedy on behalf of those denied equality of economic opportunity by virtue of a statutorily sanctioned scheme. If accepted, such an interpretation could render unconstitutional the kind of laws held to be valid in the United States which effectively established distinct legal requirements for poor people.[34]

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32. Gold, supra note 17, at 135.

33. It has been argued that such an interpretation is inconsistent with the legislative history of the phrase which was created to "ensure that the provision of governmental benefits (like unemployment insurance) was not insulated from judicial review merely because such benefits are creations of the legislature": Gold, supra note 17, at 136. The broad language of the phrase "equal benefit of the law" seems entirely too expansive to accomplish such a narrow, technical objective. In any event, it is suggested that the interpretation offered could render the phrase "equal benefit of the law" redundant as the desired result of ensuring judicial review of decisions affecting the payment of government benefits might be secured by the application of the guarantee of "equality under the law." Another commentator has objected to the interpretation of "equal benefit of the law" in accordance with the ordinary meaning of those words on the ground that "[this] requirement if taken literally would condemn most of the contents of federal and provincial statute books to the shredder, as one of the prime purposes of law is to redistribute wealth and opportunity in ways that favour some and penalize others": Russell, supra note 30, at 25. This analysis seems to be at odds with the principle established in Grey v. Pearson which holds that "the ordinary meaning may be modified where that meaning results in some objective repugnance, inconsistency, or absurdity, [but] not where it leads to consequences considered to be absurd or unjust": Driedger, Construction of Statutes (1983), at 2.

34. See text supra at notes 24, 25.

This kind of progressive interpretation of the equality rights provision would be in line with the international tendency to define the principle of non-discrimination in both political and economic terms. Rather than merely enunciating a philosophy of egalitarianism, modern international human rights law holds that "... regardless of their many differences, [all persons] are entitled to protection from those man-made and avoidable impositions of oppressive power which would restrict the development of their individual potentials."[35] As such, the European Court of Human Rights has held that states are obligated to effectuate access to political rights by the elimination of economic obstacles.[36]

A potential pitfall in advancing such a systemically focused application of section 15 is that the interpretation of the Canadian equality rights clause is explicitly restrained by section 1 of the Constitution pursuant to which the guarantees of rights and freedoms are made subject to

> "... such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

It might logically be argued that a right to equality of economic opportunity is fundamentally inconsistent with the basic values of our "free and democratic" capitalist society. That is, insofar as the nature of our economic system is seen as a fundamental aspect of the Canadian way of life, a constitutional challenge to laws which reinforce the systemic inequities necessary to sustain that system may well fail in light of the limitation imposed by section 1. In the American context, for example, equality of economic opportunity has been criticized as an unacceptable principle in a

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35. Sieghart, The International Law of Human Rights (1983), at 18.

36. The leading case of the European Court of Human Rights on this point is Airey v. Ireland (1978), 2 E.H.R.R. 305 in which it was held that the right of access to a court cannot be viewed as a mere political right which can be rendered inoperative by economic or other obstacles. Having found that the plaintiff did not have the financial resources to secure the assistance of counsel in an action for judicial separation, and that she had not been provided with access to counsel, the Court held that her right to have her civil rights and obligations determined by a fair and public hearing had been effectively breached.

society generally committed to a market pricing system.[37] While there is at least some tentative indication that our courts may not be inclined to take such a a conservative position,[38] the express language of section 1 could make the adoption of a non-interventionist approach by our judiciary in the context of an equality rights challenge fatal to constitutional efforts to end endemic poverty.

In what way should poverty lawyers seek to make use of the equality rights clause of the Constitution? On the one hand, there appears to be at least a conceptual possibility that equality rights litigation might serve as an effective vehicle to promote the alleviation of poverty defined in structural terms. The Canadian enactment is much broader in scope and more explicit in intent than the American Fourteenth Amendment, and is not a product of the same historical tradition of entrenched discrimination. Furthermore, an interpretation of section 15 which recognizes both political and economic rights would be consonant with general

37. Michelman, "Foreward: On Protecting the Poor Through the Fourteenth Amendment" (1969), 83 Harv. L.R. 7.

38. There may be at least some room for optimism in light of obiter in two recent judgments which interpreted the Charter. In the first case, it was held that Canada was properly viewed as a "free and democratic society" because it had permitted the rise to power of the Parti Quebecois "on the basis of a programme the aim of which is the dismemberment of this federation": Quebec Association of Protestant School Boards et al v. Attorney-General of Quebec et al (No. 2) (1982), 140 DLR (3d) 33, (Que. Sup. Ct., appeals dismissed in Que. C.A. and S.C.C.) at 66-67. This remark implies that fundamental social reform is consistent with, rather than in any sense antithetical to, the notion of Canada as a free and democratic nation. In a second case which addressed the scope of the constitutional guarantee of free speech, the Ontario Divisional Court noted that "... the 'free market' is itself only an idea, one particular idea, about how goods should be distributed in a society. It being only an idea about how goods should be allocated among citizens, there is nothing to prevent society from deciding that some other method of allocation is better": Klein and Dvorak v. Law Society of Upper Canada, unreported case 49/84 (February 4, 1985). While in both of these cases the courts elected to take a non-interventionist stance, the extent of judicial openness to discussion of systemic change may be viewed as encouraging.

principles of international human rights law and the jurisprudence under the European Convention.

A somewhat less ambitious strategy would focus on the potential for equality rights litigation to serve as an important means of refocusing the discussion of poverty issues on fundamental questions of socio-economic structure. While the potential for success in legal argument may well be foreclosed by the political intervention of those with vested interests in the maintenance of the status quo, poverty lawyers might play a useful role by facilitating a direct confrontation between opposing economic interests. For far too long, there has been relative silence on the part of advocates for the poor in regard to the hard issues of structurally imposed economic discrimination. While poverty lawyers should not expect that their energies can end poverty, they can and should employ their skills to sensitize their clients and their clients' oppressors to the underlying inequalities inherent in our socio-economic system. The opportunities created by the constitutional enactment of equality rights may usefully contribute to this goal.