2001

Social Welfare Entitlements and the Role of Law: Guaranteeing Equality in Denmark and Canada

Jennifer Khurana

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/jlsp

Citation Information
https://digitalcommons.osgoode.yorku.ca/jlsp/vol16/iss1/2

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.
SOCIAL WELFARE ENTITLEMENTS AND THE ROLE OF LAW: GUARANTEEING EQUALITY IN DENMARK AND CANADA

JENNIFER KHURANA*

RéSUMÉ
La notion d’égalité suppose une absence de discrimination injuste et un traitement égal devant la justice et dans les lois, mais elle implique aussi la dignité, la participation sociale et la capacité d’exercer ses droits individuels et collectifs. Lorsqu’on ne peut s’alimenter, se loger, s’habiller et s’instruire de façon acceptable, il est impossible de jouir sérieusement de sa liberté. L’aide sociale peut donc grandement contribuer à créer cette égalité et remédier aux lacunes des garanties officielles prévues par la loi. Alors que la constitution canadienne garantit l’égalité, la pauvreté infantile, les disparités socioéconomiques grandissantes et le nombre des sans-abri s’observent parallèlement à des discussions d’ordre général sur le bien-fondé de l’assistance sociale et sur la part qui revient à l’État. Au Danemark, les garanties sont importantes et s’inscrivent dans un contexte de solidarité sociale et une volonté bien ancrée au chapitre de l’égalité, de l’intérêt commun et de l’engagement communautaire.

L’article suivant évalue les rôles respectifs des programmes d’aide sociale, des mécanismes législatifs, des influences politiques et du soutien communautaire au Canada et au Danemark en vue de comprendre comment ces facteurs se mêlent aux lois pour assurer une dignité humaine fondamentale et favoriser l’égalité. Cette étude de l’interaction entre les garanties sur le plan social et autres influences relevant des institutions et la législation permet de constater que l’égalité ne peut qu’exister dans un environnement où règnent la justice sociale et une véritable démocratie et où on reconnaît la nécessité d’en arriver à concevoir l’égalité au-delà des garanties officielles.

To feel poverty is, among other things, to feel oneself an unwilling outsider—a virtual nonparticipant in the society in which one lives.
—Economic Council of Canada

When few have too much and fewer too little, then we have truly become wealthy.
—N.F.S. Grundtvig

* Jennifer Khurana completed her LL.B. at the University of Toronto, spending her final semester in an exchange program at the University of Amsterdam. She will be clerking with the Superior Court of Justice in Toronto in 2001-02. The author gratefully acknowledges the Canadian-Scandinavian Foundation for its research grant support and Professor Trudo Lemmens for his comments and input.
The concept of equality includes freedom from unfair discrimination and equal treatment before and under the law, though it also includes dignity, participation in society, and the ability of all to actively enjoy their rights individually and collectively. Without access to at least minimum standards of nutrition, housing, clothing, and education, individuals cannot exercise their liberties and freedoms in a meaningful way. Thus social welfare has a significant role to play in fostering equality and in filling in the gaps left by formal guarantees of equality in constitutional documents or in law. Access to basic entitlements assures individuals at least minimum standards of well-being, enabling people to actively enjoy and exercise their rights, and bringing content and meaning to notions of autonomy, participation, self-determination and substantive equality. An examination of equality cannot be considered only from the perspective of the law, for the law doesn't tell the whole story, and the achievement of real equality necessitates the interplay of the law with other institutional actors and forces that together give meaning to what could otherwise remain an abstract notion of equality.

In Canada, equality is constitutionally guaranteed, and yet rising rates of child poverty, growing socio-economic disparity, and the prevalence of homelessness occur against the backdrop of broader discussions about the legitimacy of social welfare and the appropriate role of the state. In Denmark, social welfare guarantees are extensive and form part of a larger network of social solidarity and a heritage of commitment to equality, collective interest, and civic involvement. A comparative assessment of the relative roles of social welfare entitlements, legislative mechanisms, political influences, and civic support in these countries will thus be undertaken with a view to understanding how these forces interact with the law in guaranteeing fundamental human dignity and fostering equality. An examination of the interplay of the law with social welfare guarantees and other institutional actors acknowledges that equality necessarily occurs in a contextualized model of community involvement committed to social justice, inclusive democracy, and human dignity, recognizing as well the need to move beyond formal guarantees and toward a “real” or substantive conception of equality.

DEFINITIONS, ASSUMPTIONS, AND LIMITATIONS

Given the inherently complex, value-laden, and political nature of terms such as social welfare, social policy, and the welfare state, and the fact that they have been defined in a multitude of ways for a variety of reasons, it is not the aim of this project to discuss the merits, value judgments, or biases underlying these terms, many of which overlap and are often used interchangeably. The terms can mean different things in different contexts, given the diversity of environments in which systems involving human, social, or collective needs have developed. Even the nuances of the languages involved can change meanings, and there is no consensus on the terminology used. For the purposes of this paper, social welfare will be defined as broadly as possible and will

---

be used generally to refer to the provision of *income security* (cash assistance such as income support and income-maintenance programs) as well as *social services* (any kind of personal or community services other than income support, such as legal aid or day care), and will include reference to policies such as health care or education that relate to a person's well-being and quality of life. The *welfare state* will be used to refer to a system in which the state involves itself in the protection of the well-being and welfare of its citizens by providing services and income transfers to fulfill basic needs and social entitlements. Generally speaking, *social welfare* and *social system* will be used interchangeably, though it is acknowledged that these terms are distinguishable in other contexts and can have several meanings. Somewhat illustrative of the problem, Hess presents nine different definitions of social policy. For our purposes, *social policy* is to be considered a subset of public policy, a deliberate intervention by various sectors of society (mostly government, though not exclusively) to address human needs not adequately provided for by the private sector, "which shape the quality of life or level of well-being of members of society and determine the nature of all intrasocietal relationships among individuals, social sub-systems and society as a whole."

The comparative analysis presented below neither attempts to comprehensively analyze all aspects of the complex network of stakeholders involved in the social welfare systems in the two countries, nor does it purport to discuss the historical, ethical, or philosophical rationales of the welfare states. What it will do is sketch the key forces and values that have informed the development of social welfare entitlements in the two countries, in order to examine the interplay of the welfare state with the law. In that regard, the importance of social entitlements will be considered in relation to legally based guarantees, while the relative roles of the various institutional actors in fostering the requisite conditions for equality will be examined.

There are weaknesses and limitations inherent in any analytical attempt to compare aspects of what are value-laden social systems involving economic, political, and cultural factors as diverse as political and ideological heritage, the nature of the population, the size and geography of the country, and the country's role in a regional or multilateral system. Despite these limitations, and by analyzing the two systems in

---

2. These definitions are largely based on those set out by the author in A. Djao, *Inequality and Social Policy: The Sociology of Welfare* (Toronto, New York, Chichester, Brisbane & Singapore: John Wiley & Sons, 1983) at 6-7. Also note that while the term *social services* was first used in the United States to refer to public pension plans, here it will be used to refer to both income security and social services, and is thus used interchangeably with social welfare. For a Scandinavian perspective, see L. Nygren et al., in J. Sipilä, *Social Care Services: The Key to the Scandinavian Welfare Model* (Brookfield: Avebury, 1997) at 10-14.

a comparative way, it is hoped the results can inform discussions about the processes and mechanisms required to address the broad social and equity-based concerns that affect society at all levels—ethical, economic, cultural, social, political and (increasingly) global.4

Rather than simply describing each country’s system and legal context for social welfare and comparing them, the examination of key institutional stakeholders and relevant aspects of the countries’ social welfare systems will be conducted simultaneously and will be compared.

The Concept Of Equality

The concept of “equality” is one that engages notions of formal equality, distributive justice, democracy, and respect for an individual’s self-worth and humanity. While equality is at the very least defined by freedom from discrimination and equal treatment before and under the law, according to the formal wording of section 15 of the Charter of Rights and Freedoms,5 our focus here will be upon the role that distributive justice and dignity play in the achievement of equality, strongly connected to the recognition of the need to participate and feel included in society.6 This interpretation views equality as an enlarged notion of “substantive” or “real” equality, one that goes beyond the formal guarantees of equality to embrace a focus on human dignity that gives other human rights meaning and content. This approach, acknowledging the importance and role of human dignity in guaranteeing basic rights and in attaining equality, finds support in Canadian equality jurisprudence, first emphasized by the Supreme Court of Canada in Andrews v. Law Society of British Columbia, and again in Egan v. Canada, where the issue of dignity emerged expressly yet again:

This court has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society; Big M Drug Mart Ltd [(1985) 13 CRR 94] at p.97 (per Dickson J. as he then was). More than any other right in the Charter, s.15 gives effect to this notion. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that deem them as less capable for no good reason, or that otherwise offends fundamental human dignity.7

---


While there are many causes of poverty, the result of an impoverished standard of living relative to others in a society is exclusion—from community, social interaction, activities, responsibility, choice, and often respect. Poverty excludes and isolates people from their communities, and as the Economic Council reported over 30 years ago, "[t]o feel poverty is, among other things, to feel oneself an unwilling outsider—a virtual nonparticipant in the society in which one lives." Similarly, the Council of the European Communities defined poverty as the situation of "individuals or families whose resources are so small as to exclude them from the minimum acceptable way of life of the Member State in which they live." Without access to the necessities and fundamentals of life, participation in society eludes those living in poverty, as does the notion of dignity, which is focused upon by the Supreme Court of Canada in Andrews: "Poverty is a deprivation... an insufficiency of income and opportunity to provide for the necessities of life—not just food and shelter but the very real needs that go beyond these" [emphasis added].

This interpretation of equality is likewise in keeping with the concept of the indivisibility of rights, which suggests that while rights have been characterized as falling within three generations, from civil and political, to social and economic, to environmental and cultural, they are indivisible. Without second-generation or social and economic rights, first-generation rights remain abstract freedoms. Thus, without the basic essentials of life, civil and political rights lose their sense of content, as does the exercise of autonomy.

Given this enlarged conception of equality, a commitment to minimal social support for every citizen is central to assuring the fundamental dignity of all. It is on this basis that the following analysis of the effect of social welfare entitlements and the role of the law in fostering the conditions for equality will be conducted.

**UNDERLYING OBJECTIVES, PRINCIPLES, AND VALUES**

Social policy does not exist in a vacuum. Rather, it is informed by the events, ideologies, and values that shape countries as nations and influence their respective social systems. A comparison of the underlying objectives, principles, and values of

---


10. As quoted in Ringen, supra note 8 at 123.


13. See also A. Sachs, "Towards a Bill of Rights for South Africa" (1991) 35:1&2 Journal of African Law 21 for a discussion on the importance of social and economic, and cultural and environmental rights to the struggle for democracy in South Africa.
the Canadian and Danish social welfare systems will thus be undertaken, as many of these values have shaped the development of their respective systems and will continue to influence the way social policy is formulated and reformed in the future, and the way it is related to fostering real equality.

### Objectives

The objectives of the Canadian social security system have been described as follows:

> The central, though by no means the sole, objective of social security in Canada is an acceptable basic income for all Canadians [emphasis added]. There are of course, complementary objectives of the social security system: to provide universal access to such essential services as housing, hospital and medical care, legal aid and the rest; and to provide to individuals and to families the assistance they require to meet and to weather the emergencies of life—emergencies which are particularly difficult and intractable for people with limited resources. There is the broader social objective, too, of a decent quality of life for all, and most important, individual self-fulfillment for each. But the starting point for all of this must certainly be an acceptable basic income. Without this, any person, any family, is seriously handicapped from the beginning.15

Banting suggests that redistributive goals were critical to the development of the modern welfare state in Canada and that their focus was on horizontal equity rather than vertical equity.16 That is, programs were intended to ensure greater equity at each level of income, an idea in line with the universal conception of the welfare state. However, as he points out, goals have changed somewhat as a move toward greater selectivity has taken place, and as the focus has shifted toward vertical equity and income-tested transfer systems.

There is some disagreement among commentators about the goal of the Danish welfare state. Hansen suggests that the welfare state in Scandinavia more generally has not only set out to eliminate poverty, but to decrease inequality as well, an aim that necessitates more than simply a redistribution policy. Rather, as he suggests, the notion of equality requires greater state intervention in the organization of work and earnings from work, and also requires that it oppose tendencies toward much higher earnings for people at one end of the labour market scale.17

### Principles and Values

Of the principles that inform social security and social policy in Canada, Hess cites the principles of less eligibility, universality, and shared responsibility.18 The principle of less eligibility, based on the Elizabethan Poor Laws of seventeenth-century

---

15. Ibid. at 9.
Guaranteeing Equality in Denmark and Canada

England, holds that in order to discourage program abuse and long-term dependency, the standard of living provided to the poor must be less than that provided to the lowest paying job, a principle that has arguably endured until today, as reflected in the inadequacy and sub-poverty levels of unemployment benefits and assistance provided by certain social programs.\textsuperscript{19} In contrast, rather than merely allowing individuals receiving state assistance to “subsist” at this minimal level espoused by the principle of less eligibility, the “[j]ustice of equality is an ideal fundamental to the logic of Nordic welfare systems and impacts on their organization.”\textsuperscript{20} Andersen suggests that to understand the logic of Nordic welfare, it is first necessary to “recognize the extremely high ranking that the concept of equality holds in the Nordic value system—which, of course, grows out of our conception of the relations between the individual and society.”\textsuperscript{21} This idea of inequality as being fundamentally unjust is said to explain Danes’ support for comprehensive systems with broad coverage, for state intervention in areas such as industrial training and higher education, and to account for their preference for progressive income taxes and for flat-rate or even means-tested benefits rather than income-dependent benefits.\textsuperscript{22}

The principle of universality refers generally to the provision of social benefits to all people within a specified category, regardless of income, as contrasted with selective programs that provide benefits only to people with incomes within a certain range.\textsuperscript{23} Banting notes that universality lies at the heart of the origins of the Canadian welfare state, and that the original conception of the welfare state in Canada following the Depression of the 1930s was of “a vision of a set of universal social programs that would protect all citizens from the insecurities inherent in an industrial economy and, more generally, assist them in participating in modern society.”\textsuperscript{24} Universality is the subject of great debate today, and what is often viewed as the sanctity of certain universal programs such as health care is defended by proponents of universality who cite the destigmatizing, unifying effect that the principle promotes.\textsuperscript{25} Opponents argue that greater selectivity is more efficient, more cost-effective, and may in fact better serve those low-income Canadians who most need the support of social programs. Hess suggests that it may in fact be the principle that is sacred to Canadians, rather than the programs themselves, evidenced by the move to selectivity in the areas of Old Age Security and the elimination of Family Allowances, with the result that the

\begin{itemize}
  \item This principle is affirmed in the Working Paper on Social Security in Canada 1973 (also known as “the Orange Paper”), which stated that program recipients should have “adequate, but not overly generous, benefits,” as discussed in Hess, supra note 3 at 10.
  \item Ibid. at 122.
  \item Ibid.
  \item Hess, supra note 3 at 10-11.
  \item Banting, supra note 16 at 148.
  \item See A. Westell, “Did the G-G2 Say What I Think He Said?” The Globe & Mail (28 March 2000) A13, about the recent La Fontaine-Baldwin lecture delivered by John Ralston Saul, which referred to the decline of universal social-security programs in favour of selective programs.
\end{itemize}
only remaining universal social programs in Canada are medicare, Veterans’ and Civilians’ Disability Pensions, social insurance programs such as Employment Insurance, the Canada and Quebec Pension Plans, and Workers’ Compensation.26

The principle of universality is likewise at the heart of the Danish social welfare system. One underlying rationale of the Danish system suggests that if the mesh of the safety net is fine, few will fall through the holes. The critical idea behind the comprehensive character of the Danish approach is that no one is to be denied assistance when it is needed because of occupational status, sex, age, or low income. Ideologically this notion informs services in public health, education, and social services, because the provision of these critical services is considered much too important to a person’s well-being to be selective or to be dependent on anything other than the need for help.27

Finally, the principle of shared responsibility represents the “social contract” between government and its citizens, emphasizing that while government has a responsibility to ensure that citizens can maintain a basic standard of living, individuals have a responsibility to be or become self-sufficient as quickly as possible.28 Similarly, while the Danish social system can be characterized by a wide-ranging network of social rights, and includes provisions that impose a duty on the state to provide access to basic human needs,29 it is important to note that Danish social law nonetheless rests on a principle of self-support.30

Hess refers to commonly held values that inform the Canadian social security system and attempt to “counteract” the pernicious effects of a free market economy: equity, equality, concern for the person, sharing, security, social integration, social cohesion, work as a form of individual self-expression, and opportunity.31 In the Danish context, reference has been made to values compatible with, if not integral to, traditions of social democracy and a passion for equity: practical moderation, public-spiritedness, equity, and the work ethic.32

SOCIAL WELFARE ORIGINS AND DEVELOPMENT
The birth of the concept of welfare took root in Denmark at the end of the eighteenth century, coinciding with the breakdown of feudalism. Democratizing and decentralizing reforms were undertaken to ensure a wider distribution of wealth through sharing

27. Andersen, supra note 20 at 124-25.
28. As Hess points out, supra note 3 at 11, this principle is reflected in the Canadian Employment Insurance regime (formerly the Canadian Unemployment Insurance regime), which provides a minimum income for unemployed people, but expects recipients to actively seek work.
29. See discussion below on legal recognition of social welfare and the role of the law.
of land, with education playing a significant role as the country introduced one of the world's first education acts in 1814.\textsuperscript{33} The middle of the nineteenth century to the 1930s was characterized by a marked rise in the standard of living throughout the country, facilitated by increases in the real wages of workers, educational reforms, and the creation of strong organizations by farmers and workers. Rather than extend welfare through the state, this period was more reflective of a popular, collective approach to welfare was undertaken, which emphasized social responsibility in welfare,\textsuperscript{34} and the principle that state aid was to "help [citizens] to help themselves."\textsuperscript{35} The first old-age pension and insurance schemes against unemployment and accidents were likewise created during this period, associated with the view at the time that poverty is a collective rather than an individual risk.\textsuperscript{36}

As was the case in Denmark, social welfare was primarily a private responsibility in nineteenth-century Canada. Both countries shared the features of a predominantly agrarian society, with individuals largely dependent on the goodwill and sense of community of their neighbours and churches.\textsuperscript{37} While social welfare legislation began to appear with increasing frequency in Canada between 1867 and 1900, and although it was focused primarily on the protection of children, welfare was not seen as an urgent matter and social expenditures remained relatively insignificant until the 1930s.\textsuperscript{38} During this period, recommendations for a range of state social welfare programs kept appearing, particularly in the post-war period well into the 1920s, and most often in support of the creation of an old age pension scheme.\textsuperscript{39}

In both Canada and Denmark, the Great Depression and World War II had a significant effect on people's attitudes toward poverty, and on the role adopted by the state in alleviating the effects of social and economic uncertainties in people's lives.\textsuperscript{40} Following the economic devastation of the 1930s, the state's role in providing social assistance was significantly expanded in both countries. In Denmark, the state assumed responsibility for the funding, management, and development of welfare services that had previously been provided by voluntary organizations and popular movements, a shift propelled in part by movement toward centralization and toward


\textsuperscript{34} Ibid., and Milner, \textit{supra} note 32.

\textsuperscript{35} Hastrup, \textit{supra} note 33 at 43.

\textsuperscript{36} Ploug and Kvist, \textit{supra} note 4 at 11.

\textsuperscript{37} Hess, \textit{supra} note 3 at 21.


\textsuperscript{39} Hess, \textit{supra} note 3 at 24.

\textsuperscript{40} C. Clark, \textit{Canada's Income Security Programs} (Ottawa: Canadian Council on Social Development, 1998) at 23, and Hastrup, \textit{supra} note 33 at 43.
public administration and control of hospitals and educational institutions. The reach of the welfare concept was expanded as well, moving beyond the traditional areas of distribution, education, decentralization, and democratization, toward culture, the environment, Third-World development, and international security through the UN and NATO.41

In Canada, a country that had been strongly influenced by a traditional approach to social welfare and by a laissez-faire philosophy that classified disadvantaged peoples as “unworthy” or “worthy” poor, this period represented a dramatic change in thinking, as acceptance of the need for social security legislation grew, as did agreement that the greatest need was for adequate provisions for unemployment.42 Social welfare also shifted from the pre-1940s “residual” approach, which advocated self-sufficiency and self-reliance, to an “institutional” approach, which increasingly supported social security measures to protect individuals against unforeseen economic and social risks that were related to a modern industrial society.43 This period saw the birth of Unemployment Insurance as well as a joint unemployment assistance program established jointly by the federal and provincial governments during the mid-1950s. Rather than being coordinated through a comprehensive welfare program, welfare services were simply added piecemeal, and it was not until the 1960s that significant consolidation took place.44

The Canada Assistance Plan (CAP) of 1966 consolidated cost-sharing programs and other services, and determined that costs were to be shared 50:50 with the provinces. The Plan likewise introduced three important national standards to guide spending on provincial programs: (1) a “needs test,” (2) “guaranteed mobility rights,” which gave access to assistance to all Canadians, irrespective of province of origin, and (3) the right of appeal on applications for assistance.45 The 1960s also coincided with significant growth in participatory citizenship. Demands from labour, women’s, and social organizations, combined with a minority federal reform government provided the impetus for significant social welfare reform, with the result that social expenditures were significantly expanded through the programs put in place between 1965 and 1974.46

By the middle of the 1970s, however, problems began in both countries. In Denmark, the welfare system encountered financing problems as the high income-tax rates necessary to support this level of welfare were questioned.47 In Canada, the growth

41. Hastrup, supra note 33 at 44.
42. Turner, supra note 38 at 81.
44. Turner, supra note 38 at 82, and Hess, supra note 3 at 22.
45. Turner, ibid. at 82, and C. Clark, supra note 40 at 24.
of the welfare state and public support for an active state role was tempered by the more precarious economic climate of the 1970s, which saw government deficits and increases in social spending challenging the growth of the social security system.\(^4\) During the 1960s the state borrowed in order to offset the costs of social programs, but this strategy became more costly in the economic climate of the 1970s, and governments faced corporate pressures that advocated a shift to investment and toward tax cuts and deficit reductions.\(^4\)

A shift to neo-conservatism and policies of fiscal restraint in Canada during the mid-1980s led to significant legislative changes in social welfare. Full federal-provincial cost sharing of social assistance under the CAP was effected through Bill C-69, introduced in 1991. Bill C-69, known as the “cap on CAP,” put a ceiling on federal transfer payments for the three wealthiest provinces (Ontario, Alberta, and British Columbia) and reduced federal funding for post-secondary education and health care.\(^5\) In 1996, the federal government created the Canada Health and Social Transfer (CHST) by combining the CAP with the federal transfer for health and post-secondary education (Established Programs Financing or EFP). The CHST eliminated all but one of the three national standards for social assistance that had been part of the original CAP, maintaining only mobility rights, and adopting a new block-funding arrangement, while the cash portion of the transfers was substantially reduced.\(^5\)

Hastrup suggests that in trying out new forms of organization and models for welfare, the Danish welfare state is en route to what he suggests is its “experimental phase,”\(^5\) the form of which is still uncertain and developing. In Canada, a rethinking of the role of social policy and a questioning of the very nature and purpose of Canada’s welfare state have coincided with significant changes in political forces as discussed below, and social programs are being questioned and restrained in this age of reformulation.\(^5\)

**Approaches to Entitlement and Basic Features**

Depending on how social security or social welfare is defined, countless programs and benefits could be analyzed and compared—a very difficult task, given the value-laden nature of social policy, political and policy-making differences between the countries, and differing taxation and employee contribution-based schemes used to finance these programs. While the scope of this paper does not allow detailed comparison of the social welfare systems in both countries, their approaches to entitlement will be considered with a view to considering how these approaches affect equal access to services and substantive equality.\(^5\) In addition, the effect of recent

---

47. Hastrup, *supra* note 33 at 44.
52. Hess, *supra* note 3 at 44.
reforms on guarantees of equality in Canada will be addressed. While in Denmark there have been no substantive changes to the social welfare system of the same order, discussions about the need to reformulate and redefine the role of the welfare state and of social services more generally have taken place in both countries, though this aspect will be reserved to a discussion below about future challenges to social welfare and the quest for equality more generally.

A recent comparative study conducted for the Danish National Institute of Social Research suggests that, in general terms, the Danish system can be characterized as being "open," offering general access for all relevant groups. The other extreme provides very limited or "closed" access, and the study finds the Canadian system to fall somewhere in the middle, primarily entitling people who are working, although there is a residence-based basic pension that is independent of former work history, in the Canadian system, as in Denmark. In Denmark, nearly all benefits are characterized as "income related, low cap," setting a low minimal level of income in order to qualify, or else benefits are simply "flat rate," assuring a fixed amount to all recipients, irrespective of income. In Canada, by contrast, "income related" schemes are primarily applied.

The Danish system thus differs from the Canadian model in the degree to which rights to a normal living standard are divorced from market criteria. As Esping-Andersen and Korpi explain, the Danish model has emancipated individuals by replacing "help to self-help" dogmas with "a powerful commitment to collective social responsibility for the optimal welfare of citizens." Andersen suggests that two specific characteristics are common to the Nordic countries' social security systems: a willingness to

54. H. Hansen, Elements of Social Security: A Comparison Covering Denmark, Sweden, Finland, Austria, Germany, the Netherlands, Great Britain and Canada (Copenhagen: The Danish National Institute of Social Research, 1999), does undertake an in-depth analysis. See also Clark, supra note 40, for a detailed description of Canada's income security programs. Also see Hastrup, supra note 33 at 41-116, for an in-depth examination of the Danish welfare model.

55. Hansen, ibid. For the purposes of their study, the following events were considered in considering "social security" in the different countries: illness, unemployment, injuries from work, disability pension, retirement, having children, and maternity leave. The discussion on this section, comparing main features of the Danish and Canadian systems, will focus on these specific aspects of social welfare.

56. The only exceptions are the additional pensions scheme for employees, dependent on former contributions and the benefit for compensation for injuries from work.

57. Hansen, supra note 54 at 13. See also Hess, supra note 3 at 28-30.


59. Note that while the expression the Nordic countries or Scandinavia can be said to mean different things, here it refers to Norway, Sweden, Finland, Denmark, and Iceland. It is also noted that while there is a body of literature on whether there is a distinctive "Scandinavian" model of welfare (see, for example, The Scandinavian Model, supra note 8, and B. Greve, "Welfare States Research Core: Overview and Synthesis" in B. Greve, ed., Comparative Welfare Systems: The Scandinavian Model in Period of Change (London and New York: MacMillan Press and St. Martin's Press, Inc., 1996)), whenever reference is made to "Scandinavian" systems, it is not intended to endorse one opinion or
Guaranteeing Equality in Denmark and Canada

involve the state directly in administration and delivery of services to citizens, and delivery of these social services either free of charge or at little expense. Universalism is the cornerstone of the Danish system, as the state has set out to develop a welfare state that includes the entire population, thereby removing the stigma of needing the assistance of the state. Also of great importance to the Danish system are the comprehensiveness of social welfare entitlements and the “holistic” nature of the approach. Broad participation of the public sector in economic and social life is the norm in Denmark and exists in order to promote economic efficiency and to equalize and enrich the living conditions of individuals and families. The institutionalization of social entitlements invests citizens with a basic right to a very broad range of benefits and services, which constitute a democratic right to a socially adequate level of living. The way in which welfare expenditures are financed also respects the underlying values of social solidarity that underpin the Danish model, and the evolution of social welfare in Denmark more generally. Rather than tying benefits to individual contributions, general government revenues and taxation play a significant role in social welfare spending.

In general terms, the Danish welfare state establishes public health systems that provide free medical treatment and care to every citizen, financed through general taxation. Likewise, public schools and higher education are provided by public bodies free of charge, and daycare nurseries and other institutions for children are offered at nominal rates. Social services are provided for those who are suffering from illness, for persons with disabilities and for the elderly, and include day centres, meals-on-wheels programs, home-care services, and nursing homes. In Canada, “cash transfer” or financial assistance programs are provided, as are “income in kind” or social service programs. Cash transfer programs such as employment insurance, old age pensions, and Goods and Services Tax Credits are intended to support, supplement, or stabilize income, whereas “in kind” services such as counselling, family planning, legal aid, social housing, and employment and personal services are available either free of charge or for a user fee. Note that the “in kind” social services available in Canada involve the private and non-profit sector to a much greater degree than in Denmark. The voluntary sector, while often subsidized by the state, plays a substantial role in providing private services and helping individuals and families in Canadian society, a role that has expanded in recent years as the state has continued to withdraw its support from social services.

---

60. Anderson, supra note 20 at 120.
61. See generally Esping-Andersen & Korpi, supra note 58 at 39-43.
62. Ibid. at 42.
63. Ibid. at 54.
64. Anderson, supra note 20 at 120.
66. Ibid.
Despite its open accessibility and comprehensiveness, the Danish system has been criticized for having developed piecemeal, sharing many of the criticisms common to the Canadian system. Andersen explains the rationale of the welfare state in the Nordic countries as being "practical, pragmatic, and fragmentary," and, as a result, legislation has been introduced in small pieces, and only measures with a direct, clear effect on the abolition of poverty and the promotion of equality were passed.6 As a result, the ultimate impact of policy initiatives on the general social milieu has not been assessed, nor have effects that might cause inequality been considered.

The problem of a "piecemeal" system has developed in Canada both in the original creation of social programs, and more recently, in their reformulation and review.6 While the overlap and piecemeal manner in which programs were implemented has made their administration cumbersome, trying to comprehend the effect of reforms and service cuts proves even more daunting for recipients who require assistance and support. Since the mid-1990s in Ontario alone, employment insurance, the Canada Pension Plan, old-age security payments to seniors, workers’ compensation, social assistance, and medicare have been reviewed and reformed.68 Meanwhile, the federal transfer payment system to the provinces and from the provinces to the municipalities for social services and social assistance has been significantly modified.69 These changes have often occurred independently from one another, with political decision makers and policy analysts ignoring the interdependence of the network of services, resorting instead to haphazard reforms undertaken with little attention to the actual effect on people who rely on the individual programs. Of particular significance for the direct effect on Canadians’ ability to subsist and survive are the drastic reforms undertaken in Ontario, which reduced social assistance benefits by 22%.71 A “work-for-welfare” program, known as Ontario Works, was likewise instituted at that time, which imposed community participation through unpaid community service on recipients of social assistance.72 These changes also reflect a neo-conservative approach to social programs, and decision makers’ growing disdain for those who need assistance from the welfare state. Even on the surface, the reforms of the late 1980s and 1990s were substantial: the downloading of services had a deep impact on many Canadians, and the increasingly pervasive attitude that underlay these changes toward what were referred to as “fraudulent” and “wasteful” uses of public monies by the welfare state

67. Andersen, supra note 20 at 126.
69. Ellsworth, ibid. at 260 and at 280-84.
70. Ibid.
71. O. Reg. 385/95, effective October 1, 1994, implemented the social assistance cut. See Ontario, Legislative Assembly, Debates, (10 October 1995) at 172.4. Note that as a result of these cuts, the maximum benefit rate for a single employable person became $520/month, and for a mother with a child under 12 became $957.
Guaranteeing Equality in Denmark and Canada

had a significant effect on the quest for substantive equality. As we will soon see, the difficulties faced by a growing number of Canadians to simply “survive” has become a feature of the Canadian system to an extent unknown in the Danish state.

The Size of the Public Sector

The Danish system is financed through redistributive programs, including high valued-added taxes, with very little revenue drawn from employer and employee social security contributions. The country has thus a very high level of tax (skattertryk) that has risen dramatically since the 1950s, with the growth of the welfare state. Today the Danish tax level as a proportion of GDP ranks among the highest in the world, while the average worker in Denmark can expect to pay 32% of his income in tax, as will an employee in middle management. In 1994 the highest marginal tax rate in Denmark was reduced to 64% and the lowest to 45%, though there are plans to reduce these levels to 58% and 38% respectively. To provide a sense of the importance of social services in the Danish national budget, the Ministry of Social Affairs was accorded 98 billion kroner in 1994, almost triple the amount of the next-largest ministry budget.

A study conducted in 1990 by the Organization for Economic Cooperation and Development (OECD) compared government social spending as a percentage of GDP among OECD countries, and found that while Canada spends 12.8% of GDP on social spending, Denmark spends 20.5%. Spending roughly two-thirds of what Denmark does on social spending may be one of the reasons that levels of economic and social inequity in Canada are so much higher, though regardless of the amount of dollar-for-dollar spending, it is clear there are issues to be addressed around the effectiveness of current programs and services in Canada, leading some to conclude that the existing system “is unsustainable economically and untenable morally.”

THE ROLE OF WOMEN

The role of women in the development of the welfare state is important to examine for several reasons. First, the importance of social services to the poor often divides along gender lines. Given the number of women affected by poverty, they had the most to gain from a growing availability of social services. Women also had a profound

73. See Danish Economy Web site online: <http://www.oem.dk>
74. Hastrup, supra note 33 at 61.
75. After social services, the next-largest ministry budget was set at 34 billion kroner for a block grant to local councils, themselves a significant player in the delivery and administration of social services in Denmark. In fact, the top five ministry budgets were all in social services or social welfare-related issues (in billions of kroner): Social Affairs (98.5), Block grant, local councils (34.1), Unemployment (32), Employment (23.1), and Education (24.2). See Hastrup, supra note 33 at 55.
effect on the way services developed, given their interest in them for personal reasons, and due to their pivotal role in what has traditionally been the sphere of women—the family. Women dominate both sides of the social welfare “encounter,” however, as users of services, but also as workers. Constituting a larger part of the service and state sectors as workers, women do more of the work related to social services—as nurses, social workers, teachers, home helpers, and other state professionals, and indirectly, as mothers and family members.78

In attempting to understand why the Scandinavian countries79 developed a multitude of universal public services, Sipilä et al. suggest that we should focus less on political parties and more on women specifically.80 They point to the fact that as women were gaining power and influence in Scandinavian parliaments, so too did social services and state involvement in providing universal services become a priority.81 By increasing the availability of services to women, universal access made it easier for women to work outside the home, created new jobs in the service sector, and affected women’s autonomy as mothers, professionals, and elderly clients, in turn leading to improvements in education, the professional competence of workplaces, and the quality of institutions.82

In Canada, social services still challenge women on several fronts. The importance of accessible and low-cost daycare to the participation rate of Danish women in the workplace is pivotal, and Canadian women require such services to redress their economic disadvantage, to "defeminize" poverty, and to gain recognition for the value of the work they have traditionally done in the home. In addition, support for the elderly, pay equity, women’s shelters, and family counselling accompanied by the development of workplace policies would all go a long way to improve the situation of Canadian women. As we will soon discover, child poverty in Canada is at an all-time high, and given the prevalence of poverty among single-parent, female-headed families, this child poverty suggests the parallel poverty of the parent involved, most often the mother. Women have also been traditionally disadvantaged in certain social


79. Here the authors refer to Denmark, Norway, Sweden, and Finland when referring to the “Scandinavian” countries.

80. It is noteworthy that despite the fact that the Nordic countries are often referred to as “a paradise for women,” given their social benefits, and the level of political influence and paid employment held by women, Skard and Haavio-Mannila suggest that “equality” is a long way off, noting that women do not have equal access to trade unions, their at-home work is still devalued, and power is still concentrated in a male elite. See T.G. Skard & E. Haavio-Mannila, “Equality Between the Sexes: Myth or Reality in Norden?” in S. Graubard, supra note 20 at 176.


programs, as the pension system disfavoured women, given their disadvantaged position in the labour market and the tying of benefits to years in the workforce. So gendered economic inequalities threaten women's livelihood in Canada in ways that undermine principles of fairness and equality.

**The Impact of Political Forces**

Social welfare consists of a broad network of social programs and services, and as we have seen, this involves a complex array of policies that in both countries have often been implemented and overlapped in a piecemeal way. While this complex system involves many policy stakeholders—including the bureaucracy, interests such as business, labour, the professions, and advocacy groups—political ideology operating through electoral and party politics that attempts to form policy in the image of its own values is likewise a powerful force shaping—or dismantling—social welfare.  

While it is beyond the scope of this project to explore the chronology of political developments and their corresponding effects on the development of social welfare policies in the two countries, certain political forces or key political events that shaped the countries' respective development of social welfare and a political commitment to equality will be discussed.

Milner suggests that in Denmark, "equality is more than income distributions; it is also . . . a matter of expectations, of political culture." His observation captures the reality of the consensus on social welfare and social solidarity, in the name of collective interest and a longer-term view of public welfare and the public good. This support is reflected in the political culture of the country, and in fact "the idea of inequality as being fundamentally unjust . . . has been strong enough to make it politically potent; politicians who want broad electoral support base their arguments on the demand for equality." It is interesting to note that while the welfare state has often been the subject of debate among political parties, almost all parties have contributed to the growth and development of the welfare state. Although social welfare in Denmark well predates the advent of the social democratic parties, their role in the development of the model is still to be noted, as is the role of the labour movement and grass-roots organizations.

In Canada, while Mishra suggests that the political ideologies of liberalism, conservatism, and social democracy have shaped Canadian social welfare policy and that these ideologies correspond more or less to the Liberal, Progressive Conservative, and

---

83. See R. Mishra, "The Political Bases of Canadian Social Welfare" in Turner, supra note 38 at 60, and Hess, supra note 3 at 50, for a discussion of social policy-making in Canada.

84. See generally Esping-Andersen & Korpi, supra note 58 at 46-55; Milner supra note 32 at 189 for a discussion of political developments viz, the welfare state in Denmark.

85. Milner, supra note 32 at 150, and see Greve, supra note 59 at 1.

86. Andersen, supra note 20 at 122.

87. Ploug & Kvist, supra note 4 at 19-20.

88. Sipilä, supra note 2 at 41.
New Democratic (NDP) parties, this simple correspondence of nomenclature is dubious. While many fundamental renegotiations of the Canadian social welfare state were initiated by the newly elected federal Progressive Conservative government in the mid-1980s, these changes were not altered by the subsequent Liberal government, and arguably further cutbacks and changes to transfer payments have been implemented under the current government. Despite these ideological ambiguities and the plethora of political factors that play into these policy decisions, certainly the Canadian Commonwealth Federation (later the NDP) played a significant role in the development of social welfare in Canada, given the Saskatchewan government's pioneering role in implementing the first medicare program in North America. In addition, while the precarious economic climate of the 1970s began to challenge social spending in Canada, as did the recessionary forces of the early 1990s, the election of a Conservative government in the mid-1980s marked a pivotal shift in values toward neo-conservatism. As these value changes influenced social welfare policies and the willingness of government to intervene in society, the focus became more one of reducing government spending on social welfare, fuelled by a faith in market forces. This shift also marked a move away from universality toward selectivity in social policy development and had substantive consequences for employment, education, health care, child poverty, and federal-provincial relations. Arguably this neo-conservatism is alive and well, and while the federal government's recent budget promised a reinvestment in health care, certain provincial governments are bringing about significant substantive and ideological changes to the Canadian welfare state as we know it. 

Danes exhibit a very high percentage of organization, particularly at the grassroots level, accompanied by strong popular interest in politics in comparison with other countries, and participation rates are quite high. The effects of this level of political

89. Mishra, supra note 83 at 61.
90. Ibid. at 62-63. It is also interesting to note that the growing role of the Canadian state in economic and social life coincided with broader public acceptance of state intervention and widening support for the CCF as it became the official opposition party in Ontario in 1943 and was elected government of Saskatchewan in 1944. One consequence of increased support for the CCF and labour movements was renewed interest by then prime minister King and the Liberal government in social welfare. See Moscovitch & Drover, supra note 38 at 27.
91. Turner, supra note 38 at 84.
92. For more information about these changes, see section on origins and development re: changes to programs and Bill C-69.
94. Eurobarometer conducted a survey of politically interested groups in the 12 EU countries in 1990 and found that political participation, political involvement, and political interest are noticeably higher in Denmark than in other EU countries, with a political interest rate of 67%. Denmark had also increased its lead over other countries with relatively high levels of participation, such as the U.K., (57%), Germany (55%), Greece (54%), and Holland (53%). In addition, even turnout at local elections is very high in Denmark, reflecting a commitment to local administration and governance.
interest and grassroots organization are clear, as environmental, conservation, and social issues, and a strong, although sometimes latent, popular commitment to the principle of equality figure prominently on the public agenda, a reality all political parties must accept and contend with in Denmark.\textsuperscript{95}

While political parties in Denmark have not gone so far as to propose a drastic elimination of key programs, let alone cuts or reductions of the order with which Canadians have become familiar,\textsuperscript{96} arguments about the legitimacy of the welfare state have been heard within political discourse in Denmark. Beyond questioning the financing and costliness of a public sector the size of the Danish system, another line of argument claims that the welfare state destroys incentives for self-sufficiency and encourages dependency, transforming active citizens into passive clients of a monolithic state and stripping them of the level of family or private assistance that is the norm in countries with weaker or less comprehensive welfare states. Another claim argues that the welfare state does not actually change very much in society and that despite its longstanding objectives and goals, the welfare state is still going strong and cannot really hope to ever "solve" anything, given its coexistence with the capitalist system, which will also continue its exploitative and regressive influences on the labour force.\textsuperscript{97}

While there are few explicit provisions for the scope and content of social welfare entitlements in Denmark, the level of actual protection is quite high, and political support forms a large part of this workable level of protection, reflecting a public consensus on social welfare entitlements. In Canada, however, the lack of political support for acceptable levels of social welfare entitlements has constituted a significant challenge to the assurance of decent standard of living for all, as the neo-conservative forces that were set loose in the mid-1980s precipitated this chain of events and a gradual dismantling of social welfare entitlements.\textsuperscript{98} Political forces in this country have not stopped at simply withdrawing funding and support for social welfare, but have adopted a more aggressive stance, targeting low-income Canadians who are clients of social welfare programs. As Ellsworth observes, these changes also reflect the neo-conservative rhetoric of social policy reform, and an often mean-spirited attitude that justifies reductions and limitations to benefits.\textsuperscript{99} While there is evidence

\textsuperscript{95} Dahl, \textit{supra} note 30 at 75.
\textsuperscript{96} Ploug & Kvist \textit{supra} note 4 at 31, and see generally B. Kitchen, "Declining Living Standards in a Changing Economy" in Turner, \textit{supra} note 38 at 275.
\textsuperscript{97} Ploug & Kvist, \textit{supra} note 4 at 30.
\textsuperscript{98} See generally Kitchen, \textit{supra} note 96 at 275.
\textsuperscript{99} See Ellsworth, \textit{supra} note 68 at 284-85. In 1994, Prime Minister Chretien referred to the $500 billion debt at the time, warning that it was no longer acceptable for people to work for a few months and then spend the rest of the year on welfare "sitting at home and drinking beer." See "Break That Mentality, PM Says" \textit{The Globe and Mail} (21 April 1994) A4.
that the degree of “fraud” and “abuse” referred to by governments is vastly overstated, governments seem to disregard or ignore this information, continuing to adopt the language of disdain for those receiving support.100

The fact that governments ignore the reality of need is compounded by a “democratic deficit” related to support for social programs. Despite the fact that public support for social programs is still strong, governments across Canada, particularly at the provincial level, have disregarded the will of the electorate, choosing to pursue their own strategies of cost-cutting in social services.101

Public Opinion and Grassroots Support
Denmark distinguishes itself from other welfare states, and even from the other Scandinavian systems, through its emphasis on local administration and financing of most of its social security schemes, in keeping with its strong democratic traditions and heritage.102 Andersen suggests that “social welfare” in the Scandinavian countries comprises much more than social security and social services alone.

Certainly, the folk high-school movement, the unusual extension of farmers’ and consumers’ cooperative, the high rate at which wage-earners organize, the unity of the trade unions, and other factors, may have done more than social legislation to eliminate poverty and promote equality.103

As we have already seen, a commitment to equality forms a powerful part of people’s expectations and sensibilities in Denmark. A feature common to Scandinavian welfare systems is the fact that people rely on a network of good quality, universally accessible, and inclusionary public services.104 This long-standing ability to count on this level of assistance has created deep-seated public expectations and a shared expectation that Selle has summed up as

100. Ellsworth, supra note 68 at 285.
101. Recently Premier Ralph Klein introduced Bill 11, a provision that would use public money to pay for private, for-profit clinics in Alberta, a move that many fear is toward two-tiered health care in what has been a publicly funded and administered universal health-care system. Klein has pursued this, despite the fact that only 39% of Albertans back his bill, the lowest level of support among six provinces, and significantly lower than the 50% support level across Canada; see A. Mitchell, “Just 39% in Alberta Back Klein’s Health Bill” The Globe and Mail (21 April 2000) A1. The International Labour Organization recently decided that Ontario legislation to end a legal teachers’ strike in 1998 as a violation of the convention on Freedom of Association and Protection of the Right to Organize. The Ontario government dismissed the UN report, recommending that the UN focus its energies on “real” problem areas in the world such as Zambia or Ethiopia. See Canadian Press, “Back-to-Work Law Violated International Convention, UN Labour Body Rules” The Globe and Mail (18 April 2000) A19.
102. Ploug & Kvist, supra note 4 at 15, and Dahl, supra note 30 at 74.
103. Andersen, supra note 20 at 117. Note also that the “folk high-school movement” referred to in this quote is a reference to the popular education movement founded by Grundtvig in 1844. The folk high-school movement was critical to the country’s understanding of democracy, especially after 1864, and became an important vehicle for understanding and strengthening of Danish culture. For more information, see Hastrup, supra note 33 at 256.
104. Milner, supra note 32 at 150.
a universal demand for fairness. We must all have the same right to institutional care. If someone breaks a leg, the leg is to be set quickly no matter who the patient is. We consider it natural that such care should not be linked to production, status or ability to pay, . . . preferential treatment not be given to different categories of patient.105

Of importance to the Danish attitude toward social welfare and the perceived commitment to equality is a greater willingness than exists in Canada or indeed in most other countries to use all levels of government as a tool—to serve certain political targets such as the elimination of poverty, equality in income and power, and security106. Rather than having heated debates about the roles of private organizations, businesses, self-governing institutions, or funds in delivering social services, Andersen suggests that “[the] extremely relaxed attitude of the people toward their central government and public authorities is at the very heart of the Nordic welfare state.”107

A 1994 study conducted by the Directions for Social Welfare Project at the University of British Columbia examined the public’s views of directions for social welfare provision.108 The study is limited because it is regionally based and focused on British Columbia, but the authors made some general observations about myths surrounding public attitudes toward social welfare that are perpetrated in the Canadian media and in political rhetoric. For example, they found that while it is suggested that there is a widespread anti-welfare backlash in the population, only 6% of respondents said they were actually opposed to welfare programs in general. They likewise found that public support for comprehensive social programs has not seriously declined since World War II and that strong majorities favoured a list of 29 social programs, including services to help immigrants, unemployment insurance, universal retirement pensions, pharmacare, family allowances, income assistance (welfare), ESL classes, workers’ compensation, home nursing services, and child tax deductions for low-income families.109 The study also revealed that majorities of those surveyed were willing to pay more taxes to enable a number of major programs to continue, and that support for programs did not extend only to those services that respondents used themselves. In fact, support cut across all categories, and “self-interest” was defined in a very broad way, so that universal health care was justified as “an essential part of being Canadian,” rather than as a program useful for personal benefit alone.110 There is thus some evidence that policy-makers should remain skeptical in the face of claims by the media, political forces, and certain powerful stakeholder interests suggesting that


106. Andersen, supra note 20 at 121.

107. Ibid.


109. Ibid. at 133-62.

110. Ibid. at 201.
Canadians have lost their support for social welfare. As already discussed, there is a trend among provincial governments on issues such as tax cuts, health care reform, and education to perpetuate the myth that public opinion and support favours these drastic reductions and limitations, despite the evidence.

The commitment to equality and to equity has been pivotal in the development of the Danish system. A study conducted by Erik Allardt in 1975 examining values common to the Nordic countries concluded that people's concern about equality is serious, and that most favour a far-reaching levelling of incomes and properties. While the respondents in the survey enjoy the most equal distribution in all of Western Europe, Dahl suggests that they still seem to be dissatisfied and want even more equality. While the survey is now 25 years old, these values are still likely held dear to the Danes; however, Andersen argues that while there may still be a broad commitment to the values underlying social welfare in Denmark, there is concern among Danes about those who undermine the system by evading taxes and exploiting social services. There are likewise concerns, common to Canadians as well, about a sense of the declining legitimacy of the welfare state in terms of its financial functioning and internal dynamics that may ultimately threaten its long-term stability.

A more recent study conducted in 1990 measured Danes' attitudes towards public expenditures. The study revealed that a relatively small percentage of people (between 1 and 7%) believe the government spends too much money on services such as old-age pensions, health, unemployment benefits, education, or day-care homes. There seems to be more concern among respondents about unemployment benefits and social security, with 13% and 25% respectively believing that the government spends too much in these areas. On the basis of this survey, which also tracked attitudes from 1979 to 1990 and considered whether they had fluctuated, the author concluded that "the basic legitimacy of and the basic support of the welfare state seem to rest upon strong foundations which appear very 'robust' against interest-related challenges."

Turner reviews sets of public attitudes that inform Canadians' perspectives on social welfare and shaped social policy more generally. For some Canadians, a commitment to social welfare derives from philosophical grounds, and from the belief that

111. Allardt's 1975 survey revealed that when asked, "Is the income level of some groups too high?" 56% of Danes replied yes, and when asked, "Have some groups too much power?" 38% replied yes. See H. Dahl, "Those Equal Folk" in Graubard, supra note 20 at 98.
112. Ibid. at 99.
113. Andersen, supra note 20 at 116. See also J. Andersen, "Sources of Welfare State Support in Denmark: Self-Interest or Way of Life" in Hansen, supra note 82 at 25.
114. It is interesting that areas of greater concern about excess government spending were foreign aid (35%), defence (43%), and culture in general (31%). Only 6% of respondents believed the government spends too much on the environment. See J. Andersen, "'Responsible' Welfare State Support in Denmark" in T. Knudsen, ed., Welfare Administration in Denmark (Copenhagen: Ministry of Finance, 1991) at 159-60. Also see the section for statistics on how attitudes have changed from 1979 to 1990.
115. Ibid. at 170.
we have a social responsibility to one another to ensure that all individuals have access to basic needs required for the development of human potential. Others see a citizen's right to society's assistance as deriving from their very status as "citizen," related in part to the concept of individual worth and social justice. Another approach suggests it simply makes good economic sense to provide a more equitable distribution of resources, while a less frequently expressed view holds that without social welfare of some kind, the state would lack the degree of social control required to prevent violent, even revolutionary behaviour in the face of abject poverty, unemployment, and a lack of essentials. Finally, there is often an undercurrent of "deservedness" pervading people's attitudes toward social welfare in Canada, as some poor are classified as "deserving" while others are regarded as "undeserving" and thus solely responsible for the circumstances of their lives. This view ascribes a degree of fault to individuals, and then passes judgment on their decisions, affecting their perceived entitlement to the necessities of life, an attitude arguably reflected in the policy approaches of governments today. This view stands in stark contrast to the Danish value system: "[I]nequalities are a necessary evil, motivated by economic necessity and not by justice; people are neither rich nor poor because they deserve to be, but because the economic system demands it."\textsuperscript{117} As we have already seen, there is a sense in Canada that people "deserve what they get," an attitude that threatens to undermine the values that underpin our society and that are inherent in our Charter.

**THE ROLE OF THE LAW**

**Rights-Based Recognition and Constitutional Guarantees**

Denmark has been said to have the most rights-based standard of social assistance among the Scandinavian countries.\textsuperscript{118} In that regard, the role of the law in guaranteeing social welfare entitlements in Denmark will be compared to the degree of commitment to social rights found within Canada. In particular, efforts in Canada to ground social welfare entitlements as a right, through specific provisions of the Charter of Rights and Freedoms, will be examined, with a view to gauging the relative importance of the law in both countries in giving content and meaning to the notion of equality, a concept that is likewise legally and constitutionally guaranteed in Canada.\textsuperscript{119}

Despite the far-reaching and well-established norms and commitment to social welfare and social solidarity in Denmark, it is interesting to note that only one article of the Danish constitution reflects this commitment, and that the Danish constitution itself is very limited in formally guaranteeing fundamental or human rights.\textsuperscript{120} In fact, as Dahl et al. suggest, "the fundamental rights provisions in the Constitution reflect the liberal ideology of the previous century and have not taken account of the state's new

\textsuperscript{117.} Andersen, supra note 20 at 122.  
\textsuperscript{118.} This is grounded in the Social Assistance Act of 1974, as the level for the basic allowance is fixed by law. See T. Fridberg, ed., On Social Assistance in the Nordic Capitals (Copenhagen: The Danish National Institute of Social Research, 1993) at 36.  
\textsuperscript{119.} Charter, supra note 5.  
\textsuperscript{120.} Dahl, supra note 30 at 74.
role as a provider of services and minimum guarantees in the socio-economic area.”

The constitution is primarily limited to negative rights, or freedoms from intrusive legislative or executive action, and primarily cover what are known as “civil and political rights.” In addition, Danish constitutional theory has held that the substantive components of provisions are to be interpreted narrowly by courts, if at all, and in practice courts have avoided references to fundamental rights, resorting rather to subsidiary legislation. Nor is there a separate constitutional court in Denmark that could maintain and renew the face of constitutional guarantees and principles, such that “there is no lively debate about fundamental rights in Denmark.”

There are no general provisions in the Danish Constitution comparable to section 15 of the Canadian Charter that protect equality rights, prohibiting discrimination on the grounds of sex, race, colour, language, ethnic origins, disability, or age, among others.

Article 75, paragraph 2 of the Danish constitution holds that “any person unable to support himself or his dependents shall, where no other person is responsible for his or their maintenance, be entitled to receive public assistance.” Paragraph 1 of this article provides the backdrop for the Danish approach to social welfare: “In order to advance the public interest, efforts shall be made to guarantee work for every able-bodied citizen on terms that will secure his existence.” The only other social welfare-related provision is found in article 76, which relates to education, and mandates that “all children of school age shall be entitled to free instruction in primary schools.”

These constitutional guarantees are long-standing, however, perhaps reflecting the centuries-old commitment to a spirit of public assistance and education as the constitutional right to public assistance, and free schooling guarantees as first found in the Constitution of 1849.

While article 75, paragraph 2 is somewhat vague, it does entrench a right to obtain assistance from the state for an individual without means or other private support for the maintenance of his or her life. The provision has been implemented through several acts of parliament that deal with social security, unemployment benefits, pensions, and health care.

While some of these legislative provisions relating to social welfare have guaranteed these services as a right, others have simply imposed a duty on public authorities to assess the needs of the individual and provide an appropriate remedy.

121. Ibid.
123. Dahl, supra note 30 at 82.
124. Ibid.
125. The Constitutional Act of Denmark of June 5, 1953, Part VIII, article 75 at 29, online: <http://www.folketinget.dk> Danish parliament site.
126. Ibid.
127. Ibid. at 30.
129. Dahl, supra note 30 at 80.
However, despite the absence of more specific or expressly defined social rights protections, the real level of protection in this area, as well as in the educational domain (covered by article 76), is very high and comprehensive.\textsuperscript{130} suggesting that there are forces at work other than the law ensuring that real commitments to substantive social welfare guarantees exist. There have been suggestions, however, that as questions about the reformulation of the welfare state are being asked in Denmark, further constitutional codification of socio-economic rights might thus become increasingly important. Dahl \textit{et al.} suggest including a right to equal access to health care and social services, as well as a right to what is known as “the citizen’s pay,” a guarantee of the possibility to uphold a decent minimum level of existence.\textsuperscript{131}

Article 63 of the Danish constitution guarantees to all persons or legal entities affected by administrative decisions a right to judicial review of administrative decisions. In the application of this principle to social welfare services, it means that since the decision to grant social-assistance allowance in Denmark is made by the local social welfare offices, decisions can be appealed to the Country Social Appeal Court.\textsuperscript{132} However, in jurisdiction over social welfare rights, the Danish court system does not include a constitutional court, and constitutional questions are decided by the court that is otherwise dealing with the case, with the Supreme Court deciding questions in final instance.

It is important to note that Danish courts have been extremely reluctant to have recourse to the constitution.\textsuperscript{133} It is very difficult to change the constitution, and any proposed amendment to it must first be passed by the Folketing (parliament). This approval must be repeated after a general election, and a referendum must be held on the proposal in which a majority of votes cast must be in favour of the proposal, with the majority constituting at least 40% of all those entitled to vote.\textsuperscript{134} These particularly rigorous conditions suggest that while the existing constitutional guarantees on social rights are well-entrenched, reforms to expand them may prove challenging.

Despite Hess’s optimism about the \textit{Charter} as a key institution in social policy-making in Canada, highlighting its potential to shape legislation on social welfare entitlements, Canadian courts have been extremely reluctant to extend positive obligations to governments in relation to social welfare, and have until now exempted relations between disadvantaged Canadians and the state from the scrutiny of the \textit{Charter}.\textsuperscript{135}

While no provisions of the \textit{Charter} deal with social rights explicitly, some academics and social welfare activists have suggested that given the context of the country’s collectivist traditions, its history of social programs, and the advent of the \textit{Andrews

\textsuperscript{130} Ibid. at 80-81.
\textsuperscript{131} Ibid.
\textsuperscript{132} Fridberg, supra note 118 at 40.
\textsuperscript{133} Ibid. at 7-8.
\textsuperscript{134} Ibid. at 8.
\textsuperscript{135} Hess, supra note 3 at 44-45.
decision, the judiciary in Canada could indeed have read the *Charter* to encompass affirmative rights that assure positive conferrals of equal and sufficient access to social welfare entitlements.\(^{136}\) Specifically, Jackman has noted that poverty is a condition shared by several of the enumerated groups under section 15 of the *Charter*: the lives of women, persons with disabilities, persons of colour, and Aboriginal people intersect disproportionately with poverty and exclusion.\(^ {137}\) Although poverty itself does not figure as a distinct category under section 15, Jackman argues that it must be recognized as a prohibited and analogous ground, given the magnitude of poverty in Canada and the prevailing negative and intolerant attitudes towards the disadvantaged. These attitudes are often reflected in discriminatory practices, some of which will be described. In addition, she argues that poverty affects the ability of the poor to organize politically and to participate in society, with the result that they can constitute a “discrete and insular minority” deserving *Charter* protection.

Despite the Supreme Court’s emphasis on the need to broadly interpret constitutional documents,\(^ {138}\) the courts have heard few welfare-related claims, and most have been unsuccessful. The cases heard involve attempts to ground rights to health care,\(^ {139}\) to housing,\(^ {140}\) to social assistance,\(^ {141}\) and rights in relation to employment\(^ {142}\) in provisions of the *Charter*. These cases have failed for the most part, yet they represent the key areas of basic entitlement described above as critical and indivisible from substantive equality.


\(^{137}\) Jackman, supra note 136.


\(^{141}\) *Reference Re Family Benefits Act, Section 5 (N.S.)*, (1979) 75 N.S.R. (2d) 338, *Silano v. British Columbia* (1987) 42 D.L.R. (4th) 407, actually succeeded as section 15 claims, though as a result of the decisions, the provinces altered the relevant legislation to either strike down the entire program or reduce benefits for all claimants so that all recipients would be “equally” receiving low levels of benefits; in *Federated Anti-Poverty Groups v. British Columbia (A.G.)*, (1991) 70 B.C.L.R. (2d) 325 (B.C.S.C.), the claimants succeeded on section 7 and section 15 claims.

Jackman notes that the failure of *Charter*-based challenges to remedy inequities that result from gaps in social welfare programs and legislation is not due to any inherent limits in the language of sections 7 and 15 of the *Charter*, nor is it due to problems of interpretive context. Rather, she suggests that courts reject these claims because they have reservations about the role of the judiciary in reviewing social welfare legislation under the *Charter*. Aggravating this judiciary reluctance is the fact that courts have recently come under fire, particularly by groups converging on the right of the political and ideological spectrums. Those who criticize the courts for "judicial activism" argue, often as a result of their dislike for the progressive nature of particular rights-based decisions, that the judiciary is usurping the power of democratically elected politicians. In the face of these criticisms about judicial activism, courts are even more reticent about the suggestion that the *Charter* creates positive rights that can compel governments to increase levels of social welfare spending, a theme emerging from the 1996 Ontario Court of Appeal decision of *Masse v. Ontario (Ministry of Community and Services)*. In *Masse*, the applicants were social assistance recipients who claimed that a 21.6% reduction in benefits was unlawful and contrary to their section 7 right to "life" and "security" of the person, having been left with living standards below irreducible minimum. They likewise claimed the reductions were contrary to their section 15 equality rights, forcing them as welfare recipients to bear an inordinate share of government budgetary cuts without consideration of their basic requirements to live. The Court dismissed the application, holding that neither the provincial legislation at issue nor section 7 of the *Charter* provides a right to minimal social assistance, and that there was no legal obligation by the province to provide a social system at all. Their reasoning was based on the idea that the *Charter* is to be applied only to governmental action and not to inaction, and without explicit language to the contrary, the *Charter* would not be read to impose positive obligations but could only constrain government action. As for the section 15 claims, the Court held that the applicants were not a named protected group under section 15 and that it was not the Court's jurisdiction to second-guess policy decisions of the provincial government.

By characterizing all social welfare claims as economic, courts put them out of the reach of section 7. Misapplying the substantive conception of equality as defined in *Andrews*, courts focus on the form, rather than the substance of the legislation or its effect on a person's dignity. Judges have always created and continued to create economic and social policy when interpreting the strict "civil and political" rights guarantees under the *Charter*, and thus the court's rejection of social-welfare claims.

suggests that the judiciary is not the right forum for seeking legitimate social and political reform.\footnote{148}{Jackman does acknowledge that there is an extensive body of scholarship emanating from the left that critiques the courts as an effective forum to exercise real social and political change.}

The challenges inherent in using the \textit{Charter} to make these types of claims are also related more broadly to the limitations of the language of liberalism and traditional rights that focus on the individual, ignoring the web of social relations and collective interest that often give content and meaning to these guarantees, and to the concept of equality more broadly.\footnote{149}{See J. Nedelsky, “Reconceiving Rights as Relationships” (1993) 1:1 \textit{Review of Constitutional Studies} 7, for more information about the limitations of liberal democracy traditionally viewing the individual as autonomous and self-made, removed from the context of relationship and the larger social context.}

It is also interesting to note that the original discussion paper released on the possibility of a social charter during constitutional reform talks in the early 1990s recommended the creation of justiciable social rights, expanded constitutional commitments to equalization and the reduction of interregional disparities. Instead, the government opted for an expanded version of the non-justiciable principles set out in section 36 of the \textit{Constitution Act, 1982}, abandoning any mention of individual rights to specific programs or services. The Beaudoin Committee likewise recommended against the idea of a justiciable social charter, preferring the notion of a merely declaratory one, expanding slightly on section 36.\footnote{150}{M. Jackman, “Constitutional Rhetoric and Social Justice: Reflections on the Justiciability Debate” in J.Bakan and D. Scheiderman, eds., \textit{Social Justice and the Constitution: Perspectives on a Social Union for Canada} (Ottawa: Carleton University Press, 1992) at 18.}

\textbf{Private Obligations: The Surrogate Welfare State}

While courts have refused to impose positive, financial obligations on the state in relation to social welfare provisions, they have not hesitated to do so in adjudicating disputes between private parties. In family law, for example, courts have embraced income-security models of spousal support, perhaps as a response to declining public support for social welfare and assistance. In \textit{Bracklow} the Supreme Court of Canada radically expanded support obligations, so that parties can now be required to maintain lifelong support obligations to former spouses who have economic needs.\footnote{151}{\textit{Bracklow v. Bracklow}, [1999] 1 S.C.R. 420.} Whereas in a supportive social welfare environment, economic needs resulting from unemployment, illness, or disability would be met by social welfare provisions, in the current political and economic climate, the courts have stepped in where they established that without court-ordered private support obligations one of the parties would be destitute, given the failure of the state to provide adequate income security. So the courts have tried to make up for the shortfall in public sector support for income security by imposing these obligations on private parties. Parties who do not have the means to claim this support or know of no other individuals from whom to claim would thus be barred from seeking even this form of income security. This unfairness and inequity
Guaranteeing Equality in Denmark and Canada has now been built into the way courts adjudicate family law claims and is a direct consequence of the failure of the courts and of governments to provide adequate support for social welfare guarantees.

Social Welfare in Danish Law
As alluded to above, while the Danish constitution is limited in its coverage of fundamental rights and of express socio-economic rights, the level of real protection in Danish society is in fact very high, leading Dahl et al. to suggest that “the real level of protection of human rights in Denmark is considerably higher and more elaborate than what can be gleaned from a reading of the Constitution.”¹⁵² For example, social benefit levels are based in law in Denmark through the Social Assistance Act of 1974, and examples of legislative measures on equality include provisions for equality of the sexes in relation to the labour market, prohibitions against racial discrimination, and discrimination on the basis of sexual orientation.¹⁵³ Unlike our Charter provisions, however, these legislative measures are typically not framed in absolute terms, but consist rather of very detailed regulations, including specific exceptions and qualifications, so do not incorporate the same force and symbolic application known in other constitutional traditions and in Canadian constitutional jurisprudence.¹⁵⁴

The fact that these fundamental issues are found only in acts of Parliament has been criticized due to the fact that legislation can be changed much more easily than can constitutional provisions, and is subject to the prerogative of Parliament. In addition, much of the legislation dealing with socio-economic entitlements is not framed in terms of legally enforceable rights to these services, but are rather couched in the language of “goals” or “targets” to be reached by administrative authorities, leaving much room for discretion. Finally, as we have alluded, these values or rights lack the tradition of constitutional jurisprudence familiar to Canadians, a body of law that has reflected fundamental substantive values, particularly in relation to the Charter of Rights and Freedoms and key constitutional decisions.

Finally, since Denmark has incorporated the European Convention on Human Rights and Fundamental Freedoms into domestic law, provisions of the Convention can be invoked directly before national courts and administrative authorities. It has been suggested that perhaps this Convention can function as a surrogate Bill of Rights or Charter protecting human rights and civil liberties, and Danish courts even seem more willing to apply the Convention than their own constitution.¹⁵⁵

¹⁵² Dahl, supra note 30 at 82.
¹⁵³ Fridberg, supra note 118 at 36 and 50, and Dahl, ibid.
¹⁵⁴ Dahl, ibid.
¹⁵⁵ Dahl, supra note 30 at 83.
EVALUATING RESULTS: THREATS TO EQUALITY AND FORCES OF CHANGE

Undermining Equality in Canada: Poverty and an Assault on Fundamental Dignity

The welfare state and comprehensive state mechanisms can have a profound effect on the quality of individuals' lives and on the achievement of equality, given the connection between the necessities of life and fundamental human dignity, particularly in light of the pernicious and deep-seated exclusionary effects of poverty. Yet measuring the effects of social programs on a society or on a more equitable distribution of resources and opportunity is a complex and difficult task, given the number of variables and personal factors involved. Nonetheless, it is clear that conditions of poverty, great disparities in income, and unequal access to the satisfaction of basic human needs can undermine the fostering of equality and can deeply affect human dignity.

As Andersen comments, the pragmatism and piecemeal strategy adopted in the Danish welfare state appears to have worked for decades:

There can be no question that in terms of the abolition of extreme poverty, the promotion of equality, the creation of self-respect among ordinary and working-class people, the creation of security as the normal mental state and the consequent weakening of resistance to social and technological change, the welfare state is a success.

While what we have learned about the Danish welfare state suggests that the concept of "low-income families" in Denmark should be virtually non-existent, a survey conducted by the Danish Ministry of Economic Affairs found that 7% of all families fall into that category, as based on a definition of low income that is 86,700 kroner or half the average annual income of the Danish population as a whole in 1993.

A very interesting and relatively new area of relevant research deals with studies measuring the quality of life. In particular, the Quality-of-Life Research Center in Copenhagen released a report in 1995 measuring the quality of life in Denmark, based on an "integrative theory of the quality of life," which incorporates subjective factors (well-being, satisfaction with life, happiness, meaning in life) and objective factors (fulfillment of needs, realization of life potential, biological order). The attainment of quality within each of these factors incorporates aspects of social welfare and, at the very least, access to the basic human needs of life. Studies of the sort may hold great interest in measuring the effects and successes of social-welfare entitlements in facilitating a greater quality of life for individuals, information that is highly relevant to considerations of the degree of equality present in a society. See S. Ventegodt, *Measuring the Quality of Life: From Theory to Practice* (Copenhagen: Forskingscentrets Forlag, 1995).

For an interesting approach to this issue, see E. Hansen, *The First Generation in the Welfare State: A Cohort Analysis* (Copenhagen: The Danish National Institute of Social Research 96:4). The article reviews the results of a study of a generational cohort that grew up in the 1960s, the first generation to have experienced the welfare state in its most fully developed form, and the survey considers the impact of the welfare state on this group. Interestingly, the survey finds that the welfare state has not, as had been expected, affected the life courses of this generation.

Andersen, *supra* note 20 at 138.

See Statistics Denmark, "Data on Denmark" (1999), online: Statistics Denmark <http://www.dst.dk>, for

156. A very interesting and relatively new area of relevant research deals with studies measuring the quality of life. In particular, the Quality-of-Life Research Center in Copenhagen released a report in 1995 measuring the quality of life in Denmark, based on an "integrative theory of the quality of life," which incorporates subjective factors (well-being, satisfaction with life, happiness, meaning in life) and objective factors (fulfillment of needs, realization of life potential, biological order). The attainment of quality within each of these factors incorporates aspects of social welfare and, at the very least, access to the basic human needs of life. Studies of the sort may hold great interest in measuring the effects and successes of social-welfare entitlements in facilitating a greater quality of life for individuals, information that is highly relevant to considerations of the degree of equality present in a society. See S. Ventegodt, *Measuring the Quality of Life: From Theory to Practice* (Copenhagen: Forskingscentrets Forlag, 1995).

157. For an interesting approach to this issue, see E. Hansen, *The First Generation in the Welfare State: A Cohort Analysis* (Copenhagen: The Danish National Institute of Social Research 96:4). The article reviews the results of a study of a generational cohort that grew up in the 1960s, the first generation to have experienced the welfare state in its most fully developed form, and the survey considers the impact of the welfare state on this group. Interestingly, the survey finds that the welfare state has not, as had been expected, affected the life courses of this generation.


159. See Statistics Denmark, "Data on Denmark" (1999), online: Statistics Denmark <http://www.dst.dk>, for
However, when comparisons are drawn internationally, it appears that these levels are much lower than in Canada, and using the same definition of income in relation to the size of the country's population, Canada has twice as many families on a low income (and the United States three times). While at first glance this 7% figure seems surprising, given what we have learned about the comprehensiveness of Danish social welfare, it should be noted that the majority of these "low-income" families in Denmark are only temporarily low-income, because they are students or are self-employed, and if these latter groups are excluded, only 2% of families are considered permanently low-income. Also of note is the fact that if income-replacement payments were not a part of people's lives, the 7% figure would jump to 31%, indicating the importance of the Danish system of welfare payments to the distribution of wealth.

This relatively low level of income disparity has led Graubard to comment on the success of the Nordic welfare states more generally:

The Nordic states, in one way or other, demonstrating a high regard for efficiency and equality, perhaps also, in Tocqueville's words, showing a "true passion for equality," have managed to institutionalize state procedures that guarantee the basic physical needs of their citizens, young and old . . . [W]hat gives them distinction is their unquestioned commitment to certain minimal social support for every citizen. These many entitlements cannot be denied; the fundamental dignity of the individual is thought to be involved [emphasis added].

Unlike Denmark, where there is a very high level of real socio-economic protection, despite the absence of express provisions for constitutional equality, low-income Canadians face political barriers to social welfare support and to the reduction of inequities as a result of the influence of neo-conservative forces and the limitations of justiciability in positive rights. The absence of social welfare assurances for Canadians has resulted in the erection of barriers of exclusion, undermining Charter guarantees of substantive equality for those whose dignity and full participation in society has been infringed upon.

In Canada, poverty levels and disparity of wealth afflict many families, and child poverty rates are at their worst ever. A recent study revealed that 5.5 million Canadians—the equivalent of 20% of the population in 1995—lived substantially below average standards. Of these, 1.3 million were children aged 14 or younger, a group significantly affected by the problem of the "working poor." The average income of poor working families was $14,500, representing a quarter of the average earnings for other Canadian families. These problems are particularly acute in the metropolitan

160. Hastrup, supra note 33 at 77-78.
161. Ibid. at 78.
162. S. Graubard, in Graubard, supra note 20 at 8.
areas (41.2% of people in Montreal are classified as poor), and among Aboriginal peoples, single mothers, recent immigrants, the disabled, and elderly women. The study revealed that the poverty rate among single mothers is a staggering 59%, among Aboriginal peoples living in urban areas it is 56%, for recent immigrants it is 52%, and for elderly women over the age of 75 (the fastest-growing demographic group), it is 36%. The study likewise revealed that 85% of families in Canada receive some form of government transfer, whether through Employment Insurance, Canadian Pension Plan, Old Age Security, or social assistance, suggesting that while the welfare state still plays a predominant role in the lives of Canadians, it is perhaps not doing enough, and not well enough, given these staggering poverty rates. Along the same lines, while the average income for poor families was $14,500, of that total, $6,900 came from government transfers, and $7,600 from job earnings or other private sources, suggesting that income security has not assured security to individuals and has failed miserably in supplementing what individuals attempt to do for themselves. These disparities all raise questions about equality, and the potential of section 15 Charter challenges, given that certain groups consistently suffer as a result of these policy choices: changes to social welfare and decreases in social service support have a disparate impact on women, Aboriginal peoples, immigrants, the elderly, children, and persons with disabilities.

To compound the problem, governments have directly offended the dignity of low-income Canadians, treating as second-class citizens those who invariably fall within the “discrete and insular” minority of the disadvantaged and poor. To date 11 Canadian municipalities have enacted anti-panhandling bylaws, while the Ontario government has introduced a bill making panhandling illegal in the whole province, fostering intolerance and divisiveness, and perhaps infringing upon formal guarantees of equality as well as enlarged notions of dignity and respect for all individuals, regardless of class or income. The Harris government’s legislation known as the Safe Streets Act prohibits “squeegee kids”—many of whom are homeless and living on the streets—from washing car windshields for spare change, prompting commentators to note that this “law and order” approach masks what is essentially a social program better addressed by providing affordable housing and measures that target the roots of poverty and inequity in society. Other recent provincial government “initiatives” include legislation that permits the fingerprinting of those who receive unemployment insurance benefits, prohibits vagrancy and sleeping in public parks, and plans to relocate the homeless and unemployed to other provinces to reduce unemployment and poverty rosters in home jurisdictions and “clean up” the streets in the process. Most recently, as part of its “work for welfare” plan, the Ontario government has required that recipients of social assistance sign over part ownership of their homes


or be cut off benefits, imposing an ultimatum on recipients so that each dollar benefit they receive becomes a claim against their home when it is sold. The province is also claiming any benefits accompanying welfare payments such as dental and medical services that will be added up against any home equity.\textsuperscript{167}

The effects of these types of measures on the dignity of low-income Canadians are devastating and undermine any hope of achieving the requisite conditions for equality in Canada. As one welfare recipient commented, “The worst part is that [he’s] making me feel like a criminal, and I’m just trying to survive.”\textsuperscript{168} Not only does this treat low-income Canadians as second-class citizens, it completely undermines the spirit of social welfare in Canada, given the underlying values, principles and objectives discussed above. All of these “initiatives” have repercussions upon equality, and can likely be challenged constitutionally on these grounds as well as related section 7 claims.\textsuperscript{169}

**Equality vs. Uniformity: The Tensions of the Danish Welfare State**

As Dahl notes, “[T]he welfare state, with all its equity, obviously has its price.”\textsuperscript{170} Andersen comments, “Insisting on equality, we perhaps tend to ‘cut off the head of the tall person.’ We regret this—but only moderately; it seems a necessary price to pay to for what we want almost passionately.”\textsuperscript{171} Much has been said about the values that are sacrificed in Denmark (and in Scandinavia more generally) by the passion for equality that informs their sense of national community:

> Visitors—or Scandinavians who chose to leave—maintain that egalitarianism has gone beyond economics to become uniformism, and that it now permeates both education and cultural and political life. The standard is set by the rear party, it is said, and superiority takes second place to mediocrity.\textsuperscript{172}

Dahl cautions that at the heart of the Nordic dilemma more generally is the tension between equity and liberty. That is, while the passion for equity inherited from the nineteenth century in Denmark has its strengths and merits, contributing to the shape of the country’s political system, it must not be at the expense of the emergence of new ideas, new institutions, and novel interests.\textsuperscript{173} Andersen seems more optimistic however, and suggests that equality in the Nordic sense breeds neither conformity nor uniformity, and that a striking sense of openness, liberal values, and permissiveness is also characteristic of Nordic societies. He refers as well to Grundtvig, who preached


\textsuperscript{168} Ibid. at A7.

\textsuperscript{169} Note that a group of lawyers is mounting a constitutional challenge to the Safe Streets Act. See Freeze, supra note 166.

\textsuperscript{170} Dahl in Graubard, supra note 20 at 107.

\textsuperscript{171} Andersen, supra note 20 at 113.

\textsuperscript{172} Andersen, supra note 20 at 112.

\textsuperscript{173} Ibid. at 111.
the wealth of equality, and yet founded the folk high-school movement that is
extremely pluralistic and liberal in its approach.\textsuperscript{174} Andersen likewise comments on
criticisms that may come from abroad about "Scandinavian mediocrity," suggesting
that such critiques count for little in societies in which egalitarian standards are
measures of success. In fact he adds,

\begin{quote}
[\textit{W}hat really matters is whether we have succeeded in abolishing poverty and
illiteracy, in reducing the tensions between social classes, in promoting social
mobility, and in dignifying the common man so that he feels on an equal footing
with the rich and famous.\textsuperscript{175}
\end{quote}

While he concedes that this may have reduced incentives to achieve and to be
"outstanding," the weakening of incentives has not corresponded to hampered eco-
nomic growth, conflict between citizens, or the collapse of liberal capitalism.\textsuperscript{176} In
addition, to counter claims that a passion for equity and equality stifles individualism
and pluralism, it has been suggested that the open nature of the country's school
system, allowing parents and groups to establish their own schools, as well as the
plurality of the political party system, displaying an amazing diversity of choices with
13 parties contesting for seats in parliament,\textsuperscript{177} are evidence of an enduring commit-
ment to local democracy and to a pluralistic, openly communicable flow of ideas in
Denmark.\textsuperscript{178} Finally, as Graubard comments,

\begin{quote}
The Nordic equality is very real; the passion for justice and liberty is no less real;
the fears that Tocqueville entertained that equality might one day drive out liberty
have not been realized. The Nordic world appears somehow to have managed to
combine both.\textsuperscript{179}
\end{quote}

\textbf{Undermining Equality: The Danish Paradox}
The ability of the Danish state to adapt to the pressures of a modern society and to
forces of globalization and pluralism is at the forefront of political debate and policy
discourse, and critiques of the Nordic countries have focused on their inability to
tolerate alternatives or to allow different groups or opinions to blossom.\textsuperscript{180} It has been
suggested that while foreign workers or refugees arriving in the country may find a
set of well-defined rights and social benefits at their disposal, they will not find a
"feeling of being welcomed for their contribution to the richness of culture or diversity
of ethnicity."\textsuperscript{181}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{174} Ibid. at 114.
\item\textsuperscript{175} Ibid.
\item\textsuperscript{176} Ibid. at 114-15.
\item\textsuperscript{177} See Hastrup, \textit{supra} note 33 at 126-31, for detailed descriptions of political parties.
\item\textsuperscript{178} Ibid. at 109-10.
\item\textsuperscript{179} Graubard, \textit{supra} note 20 at 14.
\item\textsuperscript{180} Ibid. at 108.
\item\textsuperscript{181} Graubard, \textit{supra} note 20 at 118.
\end{enumerate}
\end{footnotesize}
Despite what may seem at a superficial level to be the "utopian" social state of the Kingdom of Denmark, the country faces very real challenges in racism, xenophobia, ethnocentrism, and an undercurrent of popular disdain for "foreigners." The presence and even rise in popularity of right-wing parties with a xenophobic bent in several European countries has surfaced, to the dismay of Europeans and the worldwide community alike. In Denmark this trend is expressed through the Danish People's Party, a far-right, nationalist party with an intolerance for immigrants and refugees.

While the rise of such movements is alarming, an even more disturbing trend may be found in the fact that it is not only proponents from the far right in Denmark who hold such views. Increasingly even Social Democrats and other traditionally left-wing parties have argued in favour of restrictions on immigration and freedom of religion, as exhibited by a recent proposal supported by the far-right Danish People's Party that was proposed by the governing Social Democrats and eventually enacted into law in May 2000.

Despite what may seem at a superficial level to be the "utopian" social state of the Kingdom of Denmark, the country faces very real challenges in racism, xenophobia, ethnocentrism, and an undercurrent of popular disdain for "foreigners." The presence and even rise in popularity of right-wing parties with a xenophobic bent in several European countries has surfaced, to the dismay of Europeans and the worldwide community alike. In Denmark this trend is expressed through the Danish People's Party, a far-right, nationalist party with an intolerance for immigrants and refugees.


183. See Danish People's Party online for a description of the party platform at <http://www.danskfolkeparti.dk/prineng.htm>. The party demonstrates the ironic and seemingly contradictory mix of "equality and inequality" that characterizes present-day Denmark. The party's program includes the following statement about rights to social welfare: "Any person with a real need for social help to maintain a healthy and secure life shall have the opportunity to receive help via a good and simple, well-functioning social system with quick and easy expedition of each individual case." At the same time, however, the party is very nationalistic and believes that "Denmark is not, and has never been a country intended for immigration and The Danish People's Party disagrees with the statement that Denmark will develop into a multiethnic society." The party wants to prohibit any religious groups from building any kind of religious building or monument such as a mosque, and likewise wants to restrict services and resources available to newcomers, and recently has suggested that the families and relatives of all newcomers to Denmark be deported, should any relative commit a criminal act. In addition, the party views immigration as a severe threat to the future welfare of Denmark, thereby justifying its restrictive views on immigration and even the acceptance of asylum refugees.

184. See J. Langergaard, "TV-angreb paa dansk udlaendingepolitik" Berlingske Tidende (4 April 2000), for an article discussing a report conducted by Piet de Blauw, from NCRV, one of Holland's largest TV stations, on Danish immigration policy. Online: http://www.berlingske.dk/inlands

185. The law prohibits Danish residents from marrying foreigners, even residents with Danish citizenship, until the age of 25—a right that had previously existed for all 18 years of age or older. The onus is on the couple to prove that the marriage was not arranged. See "Ris fra Venner, Ros Fra Fjender" (2000) online: Berlingske Tidende, <http://www.berlingske.dk> (date accessed: 19 June 2001), and Berlingske Tidende, "Regeringens Udlaendingepakke gik glat igennem" (2000) online: <http://www.berlingske.dk> (date accessed: 19 June 2001).
While the rise of such movements is alarming, an even more disturbing trend may be found in the fact that it is not only proponents from the far right in Denmark who hold such views. Increasingly even Social Democrats and other traditionally left-wing parties have spoken in favour of restrictions on immigration and freedom of religion, as exhibited by a recent proposal submitted by the far-right Danish People’s Party that was supported by one of the typically governing parties, considered quite close in political ideology to the governing Social Democrats.

As an illustration of the nature of the problem, this year’s annual New Year’s address to the nation delivered by the queen and the prime minister focused on the issue of “New Danes.” Both referred to the fact that Denmark has failed to welcome newcomers and has not been open enough to other nationalities, cultures, and religions. This same statement was repeated by the queen very recently, as she added thoughts about how the nation has much to learn in this regard. While the content of the prime minister’s speech was to be expected, the queen’s address to the nation was viewed as evidence of the degree of the problem, as commentators suggest that generally a problem would have to be quite serious for the monarch to intervene and publicly comment on multiple occasions in such a manner.186

As discussed above, the Danish constitution contains only a limited catalogue of fundamental human rights, and has no explicit provisions dealing with formal equality rights or prohibitions against discrimination, and specific legislative provisions that do deal with equality can be amended at the whim of parliament. In addition, while there is little formal constitutional protection for fundamental rights in Denmark, and citizens are not able to invoke many key international human rights conventions directly, there is little political support or a sense of a pressing need to change the situation. It has been suggested that this is largely due to the traditional “Danish covert feeling of superiority towards foreign countries,” which suggests that other countries may need human rights but Danes are able to cope without.187

While in Canada racism and discrimination certainly exist, and while socio-economic inequities threaten to undermine guarantees of equality, formal constitutional guarantees of equality and rights to freedom from discrimination have been integral to the fostering of greater tolerance and respect for the self-worth and dignity of all individuals. In addition, there is more recognition in Canada that multiculturalism and diversity form a necessary part of our economic and social survival and progress, constituting a source of our nation’s richness. The lack of protection against unfair discrimination and formal equality threatens the reputation of the Danish welfare state, as well as the legitimacy of its pride in what it claims is a progressive, liberal, equity-based society with a high regard for equality. Denmark is thus paradoxical in its approach to equality: progressive in its distribution of wealth, and perhaps regressive in its lack of fundamental protection for formal equality and freedoms from discrimination.

186. See <http://www.berlingske.dk>
187. Dahl, supra note 30 at 84.
Toward Substantive Equality for All: Dynamics of Change and the Interplay of the Law

The emergence of the knowledge economy and the advent of globalization have changed the parameters of what used to be exclusively national social policy, as flows of capital and labour increasingly transcend borders through the rise of information commerce and entities based in cyberspace. While the Danish welfare state still finds it possible to tax and redistribute income within its own borders, even limiting the ability of high-income earners to significantly “out-earn” other members of society, this capacity will be difficult to maintain in an age where millionaires can be made in virtual domains, and where the nationality and origin of Internet entrepreneurs are irrelevant. As is often the case in Canada, there have been discussions in the Nordic states about a “brain drain” to more entrepreneurial cultures where individuals can earn significantly more money and avoid the conformity and redistribution of wealth prevalent in Danish society. Managing these forces of change will be a challenge to the Danish and Canadian welfare states alike.

While the Danish system appears to have worked well for decades, vulnerabilities of the model have emerged. Some fear that a “mentality of dependency” has developed, and at the heart of current debates about the reformulation of the welfare state are concerns about the financing of the welfare state and the ability of a limited base of young people to support the long-term viability of the system and the tax base required for a growing elderly population.\(^{188}\)

While there is a strong sense among Danes who have come to expect—even demand—access to high-quality services, nonetheless there are concerns about tax evasion and the impact of “free riders,” particularly if those in high-income brackets can evade taxes and thereby undermine the precious equality that Danes have fought hard to achieve.\(^{189}\) Andersen wonders whether the challenges of the welfare state go beyond the few who attempt to cheat the system to a larger question about the motivation of self-interest:

[O]ne cannot escape wondering whether we have not built our Nordic welfare state on an unrealistic notion of man as an altruistic creature, who of his own accord, and without external pressure, is willing to sacrifice a fair amount of his own wealth for the benefit of anonymous fellow human beings . . . perhaps we have overrated their capacity for altruism. We may in fact have passed the critical threshold.\(^{190}\)

In order to deal with the challenge of this disconnection between individuals and the larger social network that they support and benefit from, it is perhaps necessary to recreate the link between rights and duties in Denmark. While there is already a strong sense of local democracy and administration of social welfare, perhaps there is a need to “democratize” even more, and to further localize. Engaging more private involve-

\(^{188}\) Andersen, supra note 20 at 130.

\(^{189}\) Ibid. at 130-31.

\(^{190}\) Andersen supra note 20 at 141.
ment in collective welfare, without resorting to American-style philanthropy or a private foundation model may help to eliminate the perceived facelessness of social welfare services for the Danes, reconnecting them to a system they ultimately value that risks being undermined by evasiveness and fraudulent self-interest.

Despite its progressive redistribution policies and its recognition of the need for all citizens to obtain access to the fundamentals of life, Denmark must deal with the claim that it is somewhat backward in its attitudes toward embracing diversity, given the reality of the new global economy and the declining importance of nation states. Whether acknowledged or not, the reality of today—and indeed of tomorrow—is one of increased cross-border movement in employment, immigration, capital, ideas, knowledge, and culture, and Denmark’s failure to this point to acknowledge diversity through equality guarantees is perhaps its biggest threat to substantive equality. While there has not yet been significant political interest in introducing formal equality or non-discrimination measures, this issue will likely be one that politicians will have to face in the coming years, though change is certainly required in public attitudes, given what we have seen about the importance of engaging support at all levels for a commitment to equality.

In Canada, there are similar debates on the legitimacy of the welfare state, and critiques of the current social welfare system are launched on the grounds that social welfare delivery is too expensive, ineffective, and inequitable, that it creates disincentives for self-sufficiency, and that it fails to help the working poor. Government hostility toward universalism in social welfare, trends of privatization and “restructuring,” and the withdrawal of government from key services have seriously affected the ability of Canadians to gain access to the necessities of life and to assure them a decent standard of living. One of the big challenges for social welfare advocates and for Canadian social policy makers will be to dispel myths perpetuated by neo-conservative politicians about the lack of public support for social welfare or the values it promotes. To frame the issue in terms that the influential voices of private-sector and corporate advocates can understand, it makes good economic sense to have a productive society in which poverty and exclusion are minimized. In that regard, there is likewise a need for greater coordination between economic policy and social policy makers in Canada, given the current lack of systemic analysis undertaken when the government haphazardly reforms social welfare. Ellsworth suggests that given the gradual decline of government deficits and the growing recognition that social programs have borne a disproportionate share of the burden of cuts to the public sector, the time is ripe for a comprehensive anti-poverty strategy. Such a comprehensive approach would avoid the pitfalls of independent policy implementation and would instead focus on an integrationist approach, examining the causes of inequity and recognizing that a broader network of support is required to address these problems.

---

192. Ellsworth, supra note 68 at 290.
It is clear from this analysis of both the Danish and Canadian systems and their relative successes in fostering the conditions for equality, that the law has a limited—although critical—role to play. Building toward substantive equality for all must engage the involvement and cooperation of institutional forces involved in social welfare that can together shape and foster conditions for equality. And the law is but one part of this interrelationship. In both countries, however, the law could play a greater role in addressing the exclusion that exists, and in so doing, could take a bolder step toward achieving real equality.

In Canada, the law could better address the exclusion perpetrated by poverty by recognizing the existence of social rights, and by no longer exempting the relations between disadvantaged Canadians and the state from the scrutiny of the Charter. In that way, one is at least "clearly more apt to secure 'the full benefit of the Charter's protection' for all Canadians, instead of merely some." However, there are still limits to justiciability, for access to justice and to the legal system may prevent individuals from having these rights enforced. As Porter explains, "[I]f a new paradigm of substantive rights is to prevail, it will require changes in many areas, not just in equality jurisprudence, and not just in the Court." Ironically, crafting a holistic, comprehensive solution most requires the participation of those who are excluded and whose inclusion we are fighting to achieve through our solutions.

As for the role of the law in Denmark, while it seems to take a relative back seat to legislative measures and to popular, policy, and political support for social-welfare guarantees, it does have a gap to fill and exclusions to address. Constitutionally entrenched prohibitions against discrimination and protecting equal treatment are required to address the growing concerns in Denmark about systemic racism and exclusion on the grounds of race, ethnic origin, and religion. Although a constitutional change would not fully address the undercurrents of xenophobia at work in Denmark, it would certainly be a step toward equality, and an endorsement of a respect for the dignity of all individuals, whether of Danish ancestry or not.

As seen in Denmark, in order to foster substantive equality, it is critical that public support be found for a role for the state, as well as political recognition and respect for the will of the people in the matter of their social rights. It is this support that strengthens the Danish experience with substantive equality, moving inclusive democracy and a decent quality of life for all citizens into the realm of possibility—even reality—rather than merely retaining it as an ideal set high above people's expectations. Given the current state of poverty and disparity in Canada, this level of real equality has arguably become a far-off dream, and to this point the law has done little to fill in the gaps left by formal guarantees. This failing is perhaps related to traditional conceptions of individual rights and to a model of liberal democracy that views the individual as autonomous and self-made, abstracted from the context of personal relationships. It is perhaps by moving to a reconception of rights as relational that we

193. Jackman, supra note 136 at 94.
194. Porter, supra note 136 at 82.
can move beyond this emphasis on individualism and personal responsibility, toward a recognition that what actually make autonomy—and true equality—possible are relationships rather than independence.\textsuperscript{195} What is required to move toward substantive equality is recognition of the inherent self-worth of all individuals and of their capacity for autonomy, but also an acknowledgement of the role that a broader collective interest can play in fostering the conditions for inclusive democracy.

Frankenberg perhaps best captures both strands of this conception of equality—the formal definition that is lacking in Denmark, and the substantive approach that must be acknowledged and supported in Canada.

Why should “we,” the members of a political community, feel obliged to care for others—at least to the extent of expressing this solidarity in our political support for an empowering public assistance and in the recognition of social rights geared toward that objective . . . To enjoy their autonomy in society citizens must realize, in whatever simple or sophisticated way, that they depend on others who they, consequently have to accept—at least tolerate—as different but equal. This requirement can be satisfied by tolerance or by treating every person as politically and legally equal. This duty intensifies for members of a political community. Their membership, which is expressed by their voice option and generally by their legal status as citizens, includes the further obligation to provide for the conditions of autonomy. Protection of people’s autonomy means attending to their needs and making sure that goods are distributed in proportion to need.\textsuperscript{196}

\textsuperscript{195} See Nedelsky, \textit{supra} note 149, for her reconception of rights as relationships, and autonomy as relational.