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**INVESTIGATING ALTERNATIVES TO RIGHTS:  
THE HUNGARIAN CONSTITUTIONAL COURT AND  
THE PROTECTION OF A MINIMUM LEVEL OF  
ASSISTANCE**

GRAHAM REYNOLDS<sup>†</sup>

**ABSTRACT**

*In recent years, in the attempt to achieve “fiscal responsibility”, governments have decreased social assistance rates, reduced program eligibility, and terminated social services. As a result, more and more individuals have slipped into poverty. In order to prevent governments from cutting these services to below subsistence levels, this paper proposes that Canada take steps to achieve constitutional protection of a minimum level of assistance. The concept of a constitutionally protected minimum level of assistance has been considered. Most recently, advocates focused their efforts on achieving constitutional protection through the language of rights. However, both through the legislature and the judiciary, these efforts have failed. This paper will attempt to achieve protection without resorting to the language of rights. It will do so by examining the law of Hungary, a country whose Constitutional Court used the principles of legal certainty, legitimate expectations, and property protection to find legislation terminating a system of social welfare benefits unconstitutional.*

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*The most sacred of all laws, the welfare of the people,  
The most irrefragable of all titles, necessity*

— Robespierre<sup>1</sup>

In “On Revolution”, Hannah Arendt discusses the “social question”, what she “better and more simply [calls] the existence of poverty”.<sup>2</sup> Arendt describes poverty as:

a state of constant want and acute misery whose ignominy consists in its dehumanizing force; poverty is abject because it puts men under the absolute dictate of their bodies, that is, under the absolute dictate of necessity as all men know it from their most intimate experience and outside all speculations. It was under the rule of this necessity that the multitude rushed to the assistance of the French Revolution, inspired it, drove it onward, and eventually sent it to its doom, for this was the multitude of the poor.<sup>3</sup>

The actual content of freedom, according to Arendt, is “participation in public affairs”.<sup>4</sup> However, as individuals cannot participate in public affairs when they are under the “absolute dictate of their bodies”, freedom cannot be achieved while the social question remains unanswered.<sup>5</sup> Thus, satisfaction of the dictate of necessity is not a distraction from freedom, as Arendt states.<sup>6</sup> It is a pre-condition of freedom. Consequently, it was in the effort to create the conditions for freedom, and not in its abdication, that Robespierre turned his attention to the “rights of the Sans-Culottes...dress, food and the reproduction of their species”.<sup>7</sup>

In Canada, many individuals, shackled to the “absolute dictate of necessity”, have not achieved freedom. In order to create the conditions for their freedom, Canada must implement a plan to satisfy the basic

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<sup>1</sup> Maximilian Robespierre, *Oeuvres*, vol. 3 (Paris: Laponneraye, 1840) at 514, cited in Hannah Arendt, *On Revolution* (New York: The Viking Press, 1963) at 54 [Arendt].

<sup>2</sup> Arendt, *ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* at 25.

<sup>5</sup> *Ibid.* at 54.

<sup>6</sup> *Ibid.* at 55.

<sup>7</sup> *Ibid.* at 54-55.

needs of its citizens. This paper proposes that Canada do so through the constitutional protection of a minimum level of assistance.<sup>8</sup>

A minimum level of assistance may be defined simply as the level of assistance that is adequate to satisfy the basic needs of the individual in matters such as food, clothing, housing, medical care, and necessary social services.<sup>9</sup> Though Canadian governments would retain the ability to restructure the social welfare system, constitutional protection of a minimum level of assistance would compel the government to keep certain social assistance benefits, rates, and programs (those deemed necessary for one's basic needs) at set levels (the adequate level of assistance).

Achieving constitutional protection of a minimum level of assistance will achieve positive gains for individuals, a vulnerable group, and society. Individuals, free from the dictate of necessity, will be able to exercise their rights through full participation in democratic discourse.<sup>10</sup> The poverty collective, a vulnerable group, will begin to see its interests protected and its rights assured. Through these gains, Canadian society will draw closer to the deliberative democratic ideal of "authorship by everyone...of the fundamental laws".<sup>11</sup> Given the importance of achieving protection for individuals, the poverty collective, and Canadian democracy, it is essential that this protection occur through a constitutional mechanism. Without constitutional protection, the level of assistance would remain subject to the "potentially destructive reach of governments".<sup>12</sup>

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<sup>8</sup> It is the position of this paper that although individuals in poverty theoretically possess the same civil and political rights as all other Canadians, these rights cannot be fully exercised until the protection of social and economic rights, specifically the right to a minimum standard of assistance, is achieved. Thus, this paper takes the position that social and economic rights are necessary pre-conditions to the full enjoyment of civil and political rights.

<sup>9</sup> This definition is based on, but is not identical to that contained in article 25(1) of the *Universal Declaration of Human Rights*. See the *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [UDHR].

<sup>10</sup> It should be noted that the poor do have some form of political voice, as evidenced by anti-poverty civil disobedience, constitutional litigation, etc. However, in many instances, those speaking for the poor are not the poor themselves.

<sup>11</sup> Frank Michelman, "How Can the People Ever Make Laws? A Critique of Deliberative Democracy", in James Bohman & William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997) at 151 [Michelman].

<sup>12</sup> Joel Bakan & David Schneiderman, eds., *Social Justice and the Constitution* (Ottawa: Carleton University Press, 1992) at 5 [*Social Justice*].

It is realistic to expect that without a constitutional bulwark, governments will continue to cut social services. In recent years, in the attempt to achieve “fiscal responsibility”, governments have decreased social assistance rates, reduced program eligibility, and terminated social services. As a result, more and more individuals are slipping through the cracks into a state of “constant want and acute misery”.<sup>13</sup> Constitutional protection of a minimum level of assistance must be secured as soon as possible.

The concept of a constitutionally protected minimum level of assistance has been considered. Most recently, advocates have focused their efforts on achieving constitutional protection through the language of rights. However, both through the legislature and the judiciary, these efforts have failed. Given the failure of rights to achieve constitutional protection of a minimum level of assistance, continuing to force discussions through the language of rights risks exhausting debate on the issue. If the same arguments continue to be raised and rejected, debate will slowly grind to a halt. Given the importance of protecting a minimum level of assistance, this is unacceptable.

In the interest of continuing debate, and with the ultimate goal of securing constitutional protection for a minimum level of assistance, it is necessary to subvert the contemporary reliance on rights, allowing the concept of a minimum level of assistance to be presented through other institutional instruments. As noted by Wiktor Osiatynski in “On Social and Economic Rights: A Needs-Based Approach”:

One way of overcoming many difficulties is to limit the application of the language of rights in social and economic spheres. A more fruitful approach would be to acknowledge the existence of legitimate social, economic, and cultural needs of individuals and groups of individuals...[t]hese needs can be fulfilled by a broad spectrum of means and instruments. Rights and the mechanisms for enforcement of rights will cover only one section of this spectrum.<sup>14</sup>

In seeking to provide constitutional protection for a minimum level of social assistance without resorting to the language of rights, it is helpful

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<sup>13</sup> Arendt, *supra* note 1 at 54.

<sup>14</sup> Wiktor Osiatynski, “On Social and Economic Rights: A Needs-Based Approach” online: <<http://www.newschool.edu/tcds/on%20social%20and%20econ.pdf>>.

to look outside Canada to nations who have managed to accomplish a similar task. One such country is Hungary.

In 1995, the Hungarian government wished to pass legislation terminating a system of social welfare benefits. In evaluating the constitutionality of the legislation, the Hungarian Constitutional Court, due to particular features of the Hungarian Constitution, could not rely on the language of rights. Instead, the Court applied the principles of legal certainty, legitimate expectations, and property protection to find the legislation unconstitutional. This paper, in seeking to achieve Canadian constitutional protection for a minimum level of assistance without resorting to the language of rights, will attempt to apply these principles, as defined by the Hungarian Constitutional Court, to Canadian jurisprudence.

Through the course of this paper, it will be found that these principles, so successfully used by the Hungarian Constitutional Court, will not, in all probability, achieve the same results in the Canadian context. However, though a solution to the social question may not be found in the following pages, the act of analysis itself is necessary. In Canada, the attempts to achieve constitutional protection for a minimum level of assistance through rights have failed. Given the importance of achieving such protection, it is necessary to examine alternatives until a solution is found. Proceeding through rights discourse alone risks exhausting debate. As long as solutions and alternatives continue to be proposed, examined, and evaluated, the social question will not remain unanswered.

## **I. THE IMPORTANCE OF A CONSTITUTIONALLY PROTECTED MINIMUM LEVEL OF ASSISTANCE**

### **1. Individual**

As a nation committed to the ideal of democracy and the rule of law, it is crucial for Canada to institute constitutional protection for a minimum level of assistance. By achieving such protection, benefits will flow to individuals, a vulnerable group, and Canadian society.

On the individual level, constitutional protection of a minimum level of assistance gives Canadians the opportunity to escape from the “dehumanizing force” of poverty, achieving a direct and substantial improvement in their health and welfare. In addition to helping improve an individual’s physical conditions, protection of a minimum level of assistance achieves beneficial results for an individual’s rights. When an individual is under the absolute dictate of necessity, struggling to find a hot meal, a bed to sleep in, or a jacket to wear, all of their rights become “thin and impoverished”.<sup>15</sup> The satisfaction of one’s basic needs is a pre-condition to the full enjoyment of every right. As such, constitutional protection of a minimum level of assistance gives content to the rights of an individual.

Individuals cannot participate in public affairs while they are under the “absolute dictate of their bodies”.<sup>16</sup> Escape from the dictate of necessity gives individuals the opportunity to participate in public discourse. Habermas notes that “citizens can make appropriate use of their public autonomy only if...they are sufficiently independent”.<sup>17</sup> The constitutional protection of a minimum level of assistance allows individuals to achieve independence from necessity. Having achieved private autonomy, individuals can make appropriate use of their public autonomy.<sup>18</sup>

## 2. Group

On a group level, constitutional protection of a minimum level of assistance is necessary to secure protection for the poverty collective. The poverty collective, loosely defined as those individuals and families who exist in poverty, exists as a vulnerable group. Without constitutional protection, it is likely that their interests will continue to be “overlooked and their rights to equal concern and respect violated”.<sup>19</sup>

By definition, the poverty collective lacks resources. As well, they lack political power. The poverty collective is among those groups in

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<sup>15</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 73 [Eldridge].

<sup>16</sup> Arendt, *supra* note 1 at 54.

<sup>17</sup> Jürgen Habermas, “Remarks on Legitimation through Human Rights” (1998) 42 *Philosophy and Soc. Crit.* 157 at 161 [Habermas].

<sup>18</sup> *Ibid.*

<sup>19</sup> *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 5 [Andrews].

society, noted in *Andrews*, “whose needs and wishes elected officials have no apparent interest in attending”.<sup>20</sup> Furthermore, the poverty collective is made more vulnerable because it lacks an affirmative identity. Whether poverty is seen as temporary condition brought on by economic hardship or the inevitable consequence of immutable personal characteristics,<sup>21</sup> very few individuals, if any, seek to identify positively with the condition of poverty. As a result, the collective is dispersed, made even more vulnerable by the desire of its members to disassociate from it.

### 3. Canadian society

On a societal level, constitutional protection of a minimum level of assistance gives Canada’s laws legitimacy. As well, it brings Canada closer towards the deliberative democratic ideal of full participation. Habermas notes that “a law may claim legitimacy only if all those possibly affected could consent to it after participating in rational discourses”.<sup>22</sup> As noted above, those individuals living under the dictate of necessity cannot participate in public affairs. Thus, they are affected by laws to which they cannot possibly consent. Until the poverty collective defeats the dictate of necessity through the institution of a minimum level of assistance, Canada’s laws may not claim legitimacy.

As well as legitimating the legal-political structure, the constitutional protection of a minimum level of assistance brings Canada closer to the deliberative democratic procedural ideal of political rightness, defined by the “ongoing process of authorship...of the laws by everyone who stands to be governed by or under them”.<sup>23</sup> With their basic needs satisfied, individuals can contribute to the process of authorship.

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<sup>20</sup> *Ibid.*

<sup>21</sup> B. Singh Bolaria & Terry Wotherspoon, “Income Inequality, Poverty, and Hunger”, in B Singh Bolaria ed., *Social Issues and Contradictions in Canadian Society*, 3<sup>rd</sup> ed. (Toronto: Harcourt Canada, 2000) at 85 [Bolaria].

<sup>22</sup> Habermas, *supra* note 17 at 160.

<sup>23</sup> Michelman, *supra* note 11 at 148-150.

## II. THE DECLINE OF THE CANADIAN SOCIAL WELFARE STATE

Over the past twenty-five years, Canadian governments have slowly retreated from the provision of social welfare.<sup>24</sup> In the face of international economic pressure, and in the desire to pay down debt and draft balanced budgets, both federal and provincial governments have made significant cuts to social services. Through the 1980's, provincial governments, "in harmony with Ottawa[,],...focus[ed] on deficit reduction at the expense of social spending".<sup>25</sup> In 1990, the Federal Government, "through its policy of budgetary restraint", capped "contributions to social welfare programs [previously]...agreed to in cost-sharing arrangements with the provinces".<sup>26</sup> In 1995, the Federal Government repealed the protections in the Canada Assistance Plan. Accompanying that announcement was "\$7 billion in cuts from the Federal Government to...provinces for their social programs".<sup>27</sup> In 2002, the government of British Columbia cut rates for social assistance recipients and narrowed the rules governing eligibility for social assistance recipients, resulting in "many people who [were] eligible for social assistance being disentitled".<sup>28</sup>

As a result of these cuts, a greater number of Canadians will experience "first-hand the realities of living with too little money, too little food, clothing, and shelter, and too little hope".<sup>29</sup> Still burdened by debt and deficit, it is likely that Canadian governments will continue to withdraw funds from social services until they are prohibited from doing so by a constitutional safeguard.

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<sup>24</sup> *Social Justice*, *supra* note 12 at 5.

<sup>25</sup> *Social Justice*, *supra* note 12 at 5.

<sup>26</sup> *Social Justice*, *supra* note 12 at 5.

<sup>27</sup> Charter Committee on Poverty Issues (CCPI), Submissions to the Committee on Economic, Social and Cultural Rights by the Charter Committee on Poverty Issues (CCPI), (16 November 1998), online: <<http://www.equalityrights.org/ngoun98/ccpi.htm#part5>> [CCPI].

<sup>28</sup> BC Coalition of Women's Centres, Media Advisory--Submission to United Nations Committee on Economic, Social and Cultural Rights (11 February 2002), online: <[http://www3.telus.net/bcwomen/archives/ICESCR\\_Feb\\_02.html](http://www3.telus.net/bcwomen/archives/ICESCR_Feb_02.html)>.

<sup>29</sup> Ann Duffy and Nancy Mandell, "The Growth in Poverty and Social Inequality: Losing Faith in Social Justice", in Dan Glenday and Ann Duffy, eds. *Canadian Society* (Toronto: Oxford University Press, 2001) at 77 [Duffy].

### III. ACHIEVING PROTECTION THROUGH RIGHTS

In recent years, advocates have attempted to achieve constitutional protection for a minimum level of social assistance primarily through the vehicle of rights, both through the wholesale adoption of a charter of social and economic rights and the judicial interpretation of charter rights. Neither attempt has succeeded.

#### 1. Social and Economic Rights

Representing “claims by individuals for an equitable share of economic and social resources”, social and economic rights were promoted mainly by “East Bloc and developing countries... as elements needed to stem the excesses of free-market economies and capitalism and to ensure equality of all participants”.<sup>30</sup> Included in the Universal Declaration of Human Rights (1948),<sup>31</sup> social and economic rights are specifically protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966).<sup>32</sup> The right to a minimum level of assistance is codified in Articles 9 and 11(1) of the ICESCR.<sup>33</sup>

In 1992, Canadians were asked to endorse the Charlottetown Accord, a set of proposals for constitutional amendment. One provision in the Accord dealt with the inclusion of a charter of social rights in the Canadian constitution.<sup>34</sup> However, along with the rest of the Charlottetown Accord, the social union provision was discarded.<sup>35</sup>

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<sup>30</sup> Hugh M. Kindred, ed., *International Law*, 6<sup>th</sup> ed. (Toronto, Emond Montgomery, 2000) at 781.

<sup>31</sup> UDHR, *supra* note 9.

<sup>32</sup> United Nations, International Covenant on Economic, Social, and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3, (registered *ex officio* on 3 January 1976) [ICESCR].

<sup>33</sup> *Ibid.* Article 9 of the ICESCR provides that: The States Parties to the present Covenant recognize the right of every one to social security, including social insurance; Article 11(1) of the ICESCR provides that: The States Parties to the present Covenant recognize the right of everyone to a minimum standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

<sup>34</sup> Joel Bakan, *Just Words* (Toronto: University of Toronto Press, 1997) at 135.

<sup>35</sup> *Ibid.*

## 2. Judicial Interpretation of the Charter

As well as through the amendment process, individuals have tried to secure constitutional status for a minimum level of assistance through judicial interpretation of Charter rights. It has been argued that certain provisions of the *Canadian Charter of Rights and Freedoms* (Charter) and the *Quebec Charter of Human Rights and Freedoms* should be interpreted to include protection for a minimum level of assistance. Arguments for inclusion have centered upon three provisions, namely sections 7 and 15 of the Charter,<sup>36</sup> and section 45 of the *Quebec Charter*.

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As noted by the Charter Committee on Poverty Issues (CCPI), “s. 7 is the lynch pin for constitutional protection of basic social and economic rights”.<sup>38</sup> Consequently, “people in poverty...have been vigorously seeking to have section 7 interpreted consistently with the Covenant”.<sup>39</sup> For instance, in *Gosselin v. Quebec (Attorney General)*, it was argued that “the section 7 right to security of the person includes the right to receive a particular level of social assistance from the state adequate to meet basic needs”.<sup>40</sup> Louise Gosselin argued that the state deprived her of this right “by providing inadequate welfare benefits...in a way that violated the principles of fundamental justice”.<sup>41</sup>

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<sup>36</sup> Section 7 of the *Canadian Charter of Rights and Freedoms* states that “Everyone: everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice; while s. 15 states that: (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” See the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

<sup>37</sup> Section 45 of the *Quebec Charter of Human Rights and Freedoms* provides that: every person in need has a right to “measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living”. See *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s. 45, cited in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at 85 [*Gosselin*].

<sup>38</sup> CCPI, *supra* note 27.

<sup>39</sup> CCPI, *supra* note 27.

<sup>40</sup> *Gosselin*, *supra* note 37 at para. 75.

<sup>41</sup> *Gosselin*, *supra* note 37 at para. 75.

The Court, through a narrow interpretation of section 7, rejected Gosselin's claim. Firstly, McLachlin C.J. noted that "s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice".<sup>42</sup> As interpreted by the Court, the harm to Gosselin did not occur as a result of her "interaction with the justice system and its administration".<sup>43</sup> Secondly, though acknowledging that section 7 can be interpreted, in certain situations, to protect "economic rights fundamental to human...survival", the Court held that this was not one of those situations. Thirdly, even if section 7 could be read to encompass economic rights, McLachlin C.J. noted that "nothing in the jurisprudence thus far suggests that section 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person".<sup>44</sup> Instead, section 7 has been consistently seen as a negative right, restricting the state's ability to deprive individuals of life, liberty, or security of the person. Though McLachlin C.J. leaves open the possibility that "a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances", she maintains that the "frail [factual] platform" of this case does not meet those special circumstances.<sup>45</sup> Though it has not definitively stated that it would not interpret section 7 as protecting a minimum level of assistance, the Supreme Court of Canada has stopped short of providing any actual protection.<sup>46</sup>

In certain situations, section 15, the equality rights provision of the Charter, has imposed positive obligations on governments to allocate resources to "alleviate disadvantages that exist independently of state action".<sup>47</sup> Such was the case in *Eldridge v. British Columbia (Attorney General)*, where the Supreme Court of Canada held that the "failure to provide sign language interpretation services under the provincial *Medical and Health Care Services Act* and *Hospital Insurance Act* violated

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<sup>42</sup> *Gosselin*, *supra* note 37 at para. 77.

<sup>43</sup> *Gosselin*, *supra* note 37 at para. 77.

<sup>44</sup> *Gosselin*, *supra* note 37 at para. 81.

<sup>45</sup> *Gosselin*, *supra* note 37 at para. 83.

<sup>46</sup> *Gosselin*, *supra* note 37 at para. 80.

<sup>47</sup> *Eldridge*, *supra* note 15 at para. 73.

the appellants' *Charter* right to equality without discrimination based on physical disability".<sup>48</sup>

As a result of *Eldridge*, it has been argued that the *Charter* "imposes positive obligations on governments to allocate resources and to implement programmes to address social and economic disadvantage".<sup>49</sup> However, this argument has not been successful in securing protection for a minimum level of assistance. As noted by the CCPI, it appears as if "the same narrow and restrictive interpretation which governments are arguing with respect to section 7 is happening in cases involving the equality guarantee in section 15 of the *Charter*".<sup>50</sup>

Section 45 of the *Quebec Charter* provides that every person in need has a right to "measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living".<sup>51</sup> In its construction, it is very similar to Article 11 of the ICESCR, which provides that every state has an "adequate core obligation to ensure the satisfaction of, at the very least, adequate essential levels of subsistence needs and the provision of basic services".<sup>52</sup>

In *Gosselin*, the court struggled between two competing interpretations of section 45. However, instead of holding that section 45 gives courts the ability to review the adequacy of social assistance measures, the Supreme Court of Canada held that the phrase "susceptible of ensuring...an acceptable standard of living" allows the court only to specify "the kind of measures the state is obliged to provide...and cannot ground a review of their adequacy".<sup>53</sup>

In 1998, the CCPI stated that "the *Charter* is the tool which the poor and other equality seekers are looking to in order to guarantee the legal protections contemplated by the Covenant".<sup>54</sup> However, the *Charter*, and rights discourse more generally, has not been effective. Canadian courts have "routinely opt[ed] for an interpretation which excludes protection

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<sup>48</sup> CCPI, *supra* note 27.

<sup>49</sup> CCPI, *supra* note 27.

<sup>50</sup> CCPI, *supra* note 27.

<sup>51</sup> *Gosselin*, *supra* note 37 at para. 85.

<sup>52</sup> ICESCR, *supra* note 32.

<sup>53</sup> *Gosselin*, *supra* note 37 at paras. 87, 88.

<sup>54</sup> CCPI, *supra* note 27.

to a minimum standard of living and other Covenant rights”.<sup>55</sup> True progress towards a minimum level of assistance has yet to be achieved through rights.

#### IV. SEEKING AN ALTERNATIVE TO RIGHTS

It is possible that the failure of rights discourse to achieve constitutional protection for a minimum level of assistance stems from a reluctance to guarantee the normative content of the right. That is to say, perhaps Canadians simply don’t believe that governments should take steps to satisfy the basic needs of their citizens. In this case, as citizens and the courts object to the fact of protection itself, the search for a new tool with which to guarantee protection would be futile.

However, this position is inconsistent with Canada’s history as a social welfare state. Throughout the 20<sup>th</sup> century, Canadian governments have instituted social programs that extol, as their goal, the satisfaction of the basic needs of the individual. To many, the programs created in support of this goal “are considered part of the panoply of rights and privileges attaching to Canadian citizenship”.<sup>56</sup>

Thus, it appears as if the issue could be institutional, and not normative. Canadians don’t necessarily disagree with the concept of protecting a minimum level of assistance. Instead, their resistance may be centered on the institutional expression of this concept through rights. Such an issue is uncommon in constitutional law. Generally, when protection is sought for an interest, debate focuses upon whether the interest merits protection, and not whether the institutional form in which the interest is presented is acceptable.<sup>57</sup>

Recognizing the importance of achieving constitutional protection, and in the effort to continue debate, an alternative approach to that of rights must be found. In attempting to reach a solution, it is helpful

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<sup>55</sup> United Nations, Committee on Economic, Social, and Cultural Rights, “*Concluding Observations of the Committee on Economic, Social and Cultural Rights--Canada*” in *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant*, (4 December 1998) at para. 15. online: <<http://www.web.net/~ngoun98/conclud98.htm>>.

<sup>56</sup> *Social Justice*, *supra* note 12 at 4.

<sup>57</sup> One example is the debate surrounding the inclusion of pornography within the right to freedom of speech.

to turn to countries who have managed to solve a similar problem, in order to determine whether their reasoning can apply in the Canadian context.

## V. THE HUNGARIAN BENEFITS CASE

### 1. Background

In the fall of 1989, Hungary<sup>58</sup> entered its final transition into both a parliamentary democracy<sup>59</sup> and a free market economy.<sup>60</sup> Struggling under the weight of an enormous internal and foreign debt, Hungary was vulnerable to pressure from foreign lending institutions and organizations like the International Monetary Fund (IMF) and the European Union (EU).<sup>61</sup>

For a period of time, the Hungarian government resisted the urge to curb state socialist spending practices.<sup>62</sup> However, as the deficit increased, the welfare system began to be seen less as “an important remedy helping the government...smooth the social and political transition”, and more as a “major source of budgetary problems, incorporating costly and wasteful subsystems that impose a heavy burden on the economy and constrain its growth potential”.<sup>63</sup>

In 1995, faced with the reality that “servicing the debt risked plunging the country into bankruptcy”, the socialist government introduced a comprehensive economic emergency plan (the Economic Stabilization Act).<sup>64</sup> The major thrust of this plan was:

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<sup>58</sup> It should be noted that Hungary has a civil law system.

<sup>59</sup> Rudolf L. Tőkés, *Hungary's Negotiated Revolution* (Cambridge: Cambridge University Press, 1996) at 361 [Tokes].

<sup>60</sup> United States of America, Central Intelligence Agency, *Hungary*, online: The World Factbook <<http://www.cia.gov/cia/publications/factbook/geos/hu.html>>.

<sup>61</sup> Andras Sajo, “How the Rule of Law Killed Hungarian Welfare Reform” (1996) 5:1 *East European Constitutional Review*, reprinted in Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 1999) 1465 at 1469 [Sajo].

<sup>62</sup> *Ibid.*

<sup>63</sup> László Halpern and Charles Wyplosz, eds., *Hungary: Towards a Market Economy* (New York: Cambridge University Press, 1998) at 335 [Halpern].

<sup>64</sup> Sajo, *supra* note 61 at 1469.

a substantial cut in the government's expenditures on welfare benefits, pension allowances, education and health care in order to reduce Hungary's enormous budget deficit and foreign debt. This austerity package curbed social spending by explicitly tightening eligibility rules and the quality of welfare programmes.<sup>65</sup>

While the Act was being debated, concerned Hungarian citizens submitted petitions to the Constitutional Court,<sup>66</sup> protesting the fact that the plan annulled or altered significant benefits granted by the government, including the family allowance, child care benefit, child care fee, pregnancy allowance, maternity benefit, and the child care allowance.<sup>67</sup> The Constitutional Court reviewed the case (dubbed the *Hungarian Benefits Case*) with "exceptional urgency", determining that some welfare changes could not enter into force because they lacked an adequate adjustment period, and that other restrictions were "unconstitutional and void per se, irrespective of their date of entry into force".<sup>68</sup>

## 2. Logic of the Hungarian Constitutional Court

Article 70/E of the Hungarian Constitution gives Hungarian citizens the right to social assistance.<sup>69</sup> In earlier cases, the Constitutional Court interpreted this right as guaranteeing only subsistence-level care.<sup>70</sup> The Economic Stabilization Act annulled or altered programs above the level of subsistence protection. It did not challenge subsistence-level protection itself.<sup>71</sup> Thus, in analyzing the constitutionality of the proposed cuts

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<sup>65</sup> Halpern, *supra* note 63 at 301.

<sup>66</sup> Created in January 1, 1990 as the first institution created by Hungary's new constitution to assume its responsibilities

<sup>67</sup> *Hungarian Benefits Case*, 43/1995 (VL30) AB Decision, [1997] 4 E. Eur. Case Rep. Const. L. 64 (Hungarian Constitutional Court), reprinted in Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 1999) 1452 [*Hungarian Benefits Case*].

<sup>68</sup> Sajo, *supra* note 61 at 1470.

<sup>69</sup> Article 70/E of the Hungarian Constitution provides that: (1) Citizens of the Republic of Hungary have the right to social security; they are entitled to the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own. (2) The Republic of Hungary shall implement the right to social support through the social security system and the system of social institutions. See Hungary, *Constitution*, online: <[http://www.oefre.unibe.ch/law/icl/hu00000\\_.html](http://www.oefre.unibe.ch/law/icl/hu00000_.html)>.

<sup>70</sup> Sajo, *supra* note 61 at 1472.

<sup>71</sup> Sajo, *supra* note 61 at 1472.

to social services, the Constitutional Court could not rely on the concept of social rights as codified in Article 70/E. Instead, the Hungarian Constitutional Court based its decision on the principles of legal certainty, legitimate expectations, and property protection. In so doing, the court managed to protect programs threatened by the Economic Stabilization Act without turning to the language of rights.

According to the Hungarian Constitutional Court, the government, by passing social welfare legislation granting benefits to families, generated legitimate expectations of welfare support.<sup>72</sup> As a result of these benefits and their related expectations, families made significant life choices. For instance, a family may have decided that they could afford to have a second child based on the allowances and fees generated from family, child care, pregnancy, and maternity benefits. This system of benefits thus “played a substantial role in the livelihood of families”.<sup>73</sup> With the passage of the Economic Stabilization Act, many social welfare benefits upon which families had based significant life choices would disappear. As a result, the legitimate expectations of thousands of Hungarian families would be violated.

The Court states that the violation of these legitimate expectations defeats the principle of legal certainty, “the most substantial conceptual element of a constitutional state and the theoretical basis for acquired rights”.<sup>74</sup> As a result, it is of “exceptional significance from the viewpoint of the stability of the welfare benefit systems”.<sup>75</sup> In the interest of legal certainty, it was held that the benefits and their related expectations could not be “altered constitutionally without sufficient reason or overnight”.<sup>76</sup> The Constitutional Court noted that:

it is a requirement adequate to the constitutional state...that the behaviour of the State be calculable, so that both natural and legal persons be able to plan with good grounds in making their economic- or family- or livelihood-related decisions and that they be able to infer the will of the State incorporated into legal relations.<sup>77</sup>

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<sup>72</sup> Sajo, *supra* note 61 at 1472.

<sup>73</sup> *Hungarian Benefits Case*, *supra* note 67 at 1453.

<sup>74</sup> *Hungarian Benefits Case*, *supra* note 67 at 1456.

<sup>75</sup> *Hungarian Benefits Case*, *supra* note 67 at 1456.

<sup>76</sup> *Hungarian Benefits Case*, *supra* note 67 at 1456.

<sup>77</sup> *Hungarian Benefits Case*, *supra* note 67 at 1461.

In order to allow families to adjust their lives to the new benefit system, the Court ordered the institution of a transition period before certain social welfare benefits can be withdrawn. As noted by Sajo, “it is not clear from the Court’s decision how long expectations are to be respected”.<sup>78</sup> It could potentially be years before the Hungarian government is permitted to adjust its benefit programs.

Furthermore, in its decision, the Hungarian Constitutional Court addresses the reduction or withdrawal of social welfare benefits featuring a mandatory insurance component. Through mandatory insurance, the state draws assets from the individual which the individual could have otherwise used to protect his/her family, and places these assets in the service of social security based on the principle of solidarity.<sup>79</sup> The Constitutional Court states that the constitutionality of the “reduction or termination” of these benefits shall be determined according to the criteria of “protection of property”.<sup>80</sup> Sajo notes that in the Hungarian constitutional context:

property protection means a flat prohibition on takings...today’s legislation cannot change in a fundamental way social benefits promised by earlier legislation, unless the legislature can prove to the Court that the taking serves the public interest and only if there is full and immediate compensation.<sup>81</sup>

As a result, in the case of social security benefits with an insurance component, the legislature may not remove promised benefits unless full compensation is provided. As Sajo states, “such compensation is highly unlikely”.<sup>82</sup>

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<sup>78</sup> Sajo, *supra* note 61 at 1473.

<sup>79</sup> *Hungarian Benefits Case*, *supra* note 67 at 1461.

<sup>80</sup> *Hungarian Benefits Case*, *supra* note 67 at 1461.

<sup>81</sup> Sajo, *supra* note 61 at 1471.

<sup>82</sup> Sajo, *supra* note 61 at 1471.

## VI. APPLYING THE PRINCIPLES OF THE *HUNGARIAN BENEFITS CASE* TO CANADIAN JURISPRUDENCE

The Hungarian Constitutional Court, in determining the constitutionality of the Economic Stabilization Act, circumvented social rights by basing its decision on the principles of legal certainty, legitimate expectations, and property protection. Perhaps the application of these principles will help Canadian courts shake their reliance on rights, allowing the constitutional protection of a minimum level of assistance to be achieved through other institutional means.

In Canada, there has been the growth of a “public expectation that the state meet [the] basic needs of its citizens as a matter of legal obligation”.<sup>83</sup> While recognizing that governments maintain the ability to adjust social programs, Canadians expect that social services will remain, at the very least, at the minimum level of assistance. Applying the principles from the *Hungarian Benefits Case*, it can be argued that if government withdrawal of social services and benefits causes assistance to fall below this level, the legitimate expectations of Canadians will be violated, thus defeating the principle of legal certainty. Social services with an element of mandatory insurance could potentially be buttressed with a greater degree of protection due to their contributory element. In analyzing whether the principles utilized in Hungary can apply in Canada, this paper will begin first by addressing legal certainty.

### 1. Legal certainty

As noted above, in the *Hungarian Benefits Case*, the Hungarian Constitutional Court declared that “legal certainty...is the most substantial conceptual element of a constitutional state”.<sup>84</sup> The Hungarian Constitutional Court invalidated the Economic Stabilization Act largely because by passing the Act, the government would defeat the principle of legal certainty.

In Canadian jurisprudence, “legal certainty”, far from being the most substantial conceptual element of the Canadian constitutional state, is a

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<sup>83</sup> *Social Justice*, *supra* note 12 at 4.

<sup>84</sup> *Hungarian Benefits Case*, *supra* note 67 at 1456.

minor concept. Legal certainty is referred to only twice by the Supreme Court of Canada, both references occurring in the context of preferring written over unwritten constitutions. In the *Quebec Secession Reference*, the Court notes that “a written constitution promotes legal certainty and predictability”.<sup>85</sup> In the *Reference re: Remuneration of the Judges of the Provincial Court*, the Court states that there are “many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review”.<sup>86</sup>

Using this limited Canadian jurisprudence, it could be argued that legislation granting benefits to individuals and families promotes legal certainty and predictability. Just as a written constitution helps individuals predict their rights and obligations, benefit-granting legislation helps individuals predict government behaviour, thus allowing individuals to plan important life decisions. As a result, it could be argued that in order to promote legal certainty, an adjustment period must be instituted before benefit-granting legislation is amended. This argument was successful in Hungary. However, in Canada, such an argument would run counter to the principle of parliamentary sovereignty “reflected in section 42(1) of the federal Interpretation Act, which states that ‘every Act shall be construed as to reserve to Parliament the power of repealing or amending it’”.<sup>87</sup> As a result, this argument, as was the case in *Reference Re: Canada Assistance Plan*, would likely be dismissed.

Nevertheless, in *Vriend v. Alberta*, the Supreme Court of Canada cited with approval a passage by William Black in “Vriend, Rights, and Democracy”, which stated that “democracy requires that all citizens be allowed to participate in the democratic process, either directly or through equal consideration by their representatives. Parliamentary sovereignty is a means to this end, not an end in itself”.<sup>88</sup>

Individuals cannot participate in public affairs if they are living under the dictate of necessity. Thus, while parliamentary sovereignty is a means through which individuals may participate in the democratic process, the satisfaction of necessity is a pre-condition to this participa-

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<sup>85</sup> *Reference Re: Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 53.

<sup>86</sup> *Reference Re: Remuneration of Judges of the Provincial Court*, [1997] 3 S.C.R. 3 at para. 93.

<sup>87</sup> *Reference Re: Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at headnote [CAP].

<sup>88</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 174 [*Vriend*].

tion. Before the principle of parliamentary sovereignty can be applied, the dictate of necessity must be satisfied.

Consequently, notwithstanding the principle of parliamentary sovereignty, the court could use the principle of legal certainty to invalidate legislation cutting social services below the adequate level of assistance. In this situation, “where the interests of a minority [the poverty collective] have been denied consideration...judicial intervention is warranted to correct a democratic process that has acted improperly”.<sup>89</sup> If this argument is accepted by the court, an exception could be carved out of section 42(1) stating that Acts granting benefits to vulnerable groups shall not be repealed or amended if doing so would cause social assistance to fall below the minimum level.

## 2. Legitimate expectations

In the *Hungarian Benefits Case*, the Hungarian Constitutional Court held that the legislature, by passing benefit-granting legislation, created legitimate expectations of social support for its citizens. As a result of these legitimate expectations, the government could not withdraw certain benefits until an adequate transition period had expired.

In seeking to provide Canadian constitutional protection for a minimum level of assistance, it could be argued that the Canadian government, by virtue of the fact that it is an advanced modern welfare state with a history of instituting social programs and a web of benefit-granting legislation, created legitimate expectations that it would provide for the basic needs of its citizens. As a result of these legitimate expectations, the government would not be permitted to set social services at rates below the minimum level of assistance.

However, such an argument would be problematic given the current state of the Canadian doctrine of legitimate expectations. In Canada, the “process of establishing a legitimate expectation claim is a difficult one, and claims are not often successful”.<sup>90</sup> Originally a British concept designed for administrative law, legitimate expectations was used

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<sup>89</sup> *Ibid.* at para. 176.

<sup>90</sup> David Wright, “Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law” (1997) 35 *Osgoode Hall L.J.* 140 at 185 [Wright].

to extend the situations in which the duty of fairness is owed.<sup>91</sup> Though the Supreme Court of Canada integrated the British concept into Canadian law, “its judgments have...considerably restricted the situations in which it applies”.<sup>92</sup>

The Canadian doctrine was severely limited with the Court’s decision in *Reference Re: Canada Assistance Plan*. Under the Canada Assistance Plan (CAP), the federal government concluded agreements with the provinces to pay half of the provinces’ eligible expenditures for social assistance. The agreement was open to amendment or termination by mutual consent, or could be terminated on one year’s notice from either party. In 1990, the federal government, seeking to reduce the federal budget deficit, unilaterally cut expenditures and limited the growth of payments made to British Columbia, Alberta, and Ontario under the Canada Assistance Plan. It did not give one year’s notice before amending the agreement.<sup>93</sup>

The Government of British Columbia argued that “the agreement gave the province a legitimate expectation that it would be consulted and its consent would be obtained before changes were made to the agreement, unless the one year’s notice was given”.<sup>94</sup> This argument, though accepted by the Court of Appeal, was rejected by the Supreme Court of Canada on the basis that the doctrine of legitimate expectations does not apply to legislative decisions and that it cannot be used to create substantive rights.

Given the *CAP* decision, the use of the Canadian doctrine of legitimate expectations to achieve constitutional protection for a minimum level of assistance is problematic. Firstly, many cuts to social services occur through acts of the legislature. For instance, in *CAP*, withdrawals to the CAP plan were embodied in the *Government Expenditures Restraint Act*.<sup>95</sup> As a result, these cuts are presumptively out of reach of the doctrine. David Wright, in “Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law”, discusses the justification for restricting the doctrine to administrative functions, noting that “the introduction of legislation [is] a fundamental part of the legislative proc-

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<sup>91</sup> *Ibid.* at 141.

<sup>92</sup> *Ibid.* at 140-141.

<sup>93</sup> *CAP*, *supra* note 87 at headnote.

<sup>94</sup> Wright, *supra* note 90 at 168.

<sup>95</sup> *CAP*, *supra* note 87 at headnote.

ess, and using the doctrine of legitimate expectations to restrict would interfere with Parliamentary sovereignty”.<sup>96</sup>

However, as discussed in the context of legal certainty, there are certain situations when it is legitimate to restrict Parliamentary sovereignty. As noted above, the protection of a minimum level of assistance is one such situation. Though unlikely, it may be possible to create an exception to the principle that the doctrine of legitimate expectations applies only to legislative acts in order to protect a minimum level of assistance.

The requirement that legitimate expectations cannot be used to create substantive rights poses a more difficult challenge. In Hungary, citizens had a legitimate expectation of a substantive right: the public expected that benefits would not be terminated without an adequate transition period. In Canada, as confirmed in *CAP*, the termination of government benefits would fall outside of the scope of the doctrine of legitimate expectations. Due to the fact that, in Canada, the doctrine of legitimate expectations cannot be used to create substantive rights, advocates of a minimum level of assistance would not be able to use the doctrine to prevent the government from setting social assistance rates at a below-subsistence level.

Nevertheless, Wright notes that the “focus on the fact that substantive legitimate expectations are not protected in [Canada] has obscured the possibility that the promise of a substantive result could give rise to procedural protections”.<sup>97</sup> Such an argument, though it has been raised by “few plaintiffs in Canadian legitimate expectation cases”, could achieve beneficial results for proponents of the protection of a minimum level of assistance.<sup>98</sup> Though ineffective in stopping governments from withdrawing social services, it could be held that the implied promise by Canadian governments to satisfy the basic needs of its citizens gives rise to enhanced procedural protections when governments contemplate setting social assistance rates below the level of subsistence. Such a result would mandate the participation of and consultation with the poverty collective in specific situations, “in order to ensure that a democratic decision is made which also takes into account the interests of those with

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<sup>96</sup> Wright, *supra* note 90.

<sup>97</sup> Wright, *supra* note 90 at 181.

<sup>98</sup> Wright, *supra* note 90 at 181.

a greater interest in its outcome than the average citizen".<sup>99</sup> The ability of the doctrine of legitimate expectations to create a right to "make representations or to be consulted" is confirmed in *CAP*.<sup>100</sup>

In addition to the possibility of securing enhanced procedural protections through the doctrine of legitimate expectations, Wright also suggests that courts extend the review for fairness in the case of delegated legislation in order to ensure that "those whose lives or activities are affected by a decision have the opportunity to be consulted".<sup>101</sup> As noted earlier, the poverty collective has no resources or political power. Thus, unable to influence decision makers, their views can be easily disregarded. It is submitted that in Canada, the review for fairness should be extended to the poverty collective in situations where the legislature is contemplating decreasing assistance to below-subsistence rates. As Wright notes:

While large benefit cuts may be considered to be in the broad "public interest", certain people bear the brunt of these decisions, and it is crucial to require some consultation with them when the decisions are being made. At the very least, this is because people have planned their lives based on the existing state of affairs. Welfare recipients, for example, have signed leases and made budgeting decisions on the basis of the amount of assistance being provided. Without consultation, these special needs may be ignored by the delegated decisionmaker. Although there may have been no clear representations to these groups that their benefits would remain at a certain level for a certain time, the special needs of people in these situations are at least as important as those to whom representations have been made.<sup>102</sup>

Though the Canadian doctrine of legitimate expectations would not allow courts to invalidate legislation simply on the basis that it breached an implied promise that assistance would not be cut below the level of subsistence, courts may read in a duty to consult. This duty would not prevent the legislature from cutting social services. However, it would, at the very least, ensure the presence of the poverty collective during

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<sup>99</sup> Wright, *supra* note 90 at 189.

<sup>100</sup> *CAP*, *supra* note 87 at para. 59.

<sup>101</sup> Wright, *supra* note 90 at 191.

<sup>102</sup> Wright, *supra* note 90 at 192.

negotiations. For a vulnerable group who has been overlooked and disregarded, the opportunity to have one's voice heard is an important step forward.

### 3. Property protection

In addition to the principles of legal certainty and legitimate expectations, the Hungarian Constitutional Court applied the concepts of mandatory insurance and property protection in order to invalidate legislation terminating social benefits. As noted above, in Hungary, social security benefits with a mandatory insurance component can be removed only if “the legislature can prove to the Court that the taking serves the public interest and only if there is full and immediate compensation”.<sup>103</sup>

Due to historical differences between the two nations, the principle of property protection would not likely advance the cause of Canadian constitutional protection of a minimum level of assistance. In Hungary, private property is seen as “an important guarantee of personal autonomy”.<sup>104</sup> In response to the eradication of private property by former Communist governments, the Hungarian Constitution “protects the right to property as the traditional material base of individual autonomy in action”.<sup>105</sup>

A strong connection has been forged in Hungary between property and social services. Laszlo Solyom, former Chief Justice of the Hungarian Constitutional Court, stated in a 1993 concurring opinion that “in order to assure the autonomy-granting function of property, the functional equivalent of property, namely, welfare entitlement, should also receive property-like protection”.<sup>106</sup>

In Canada, early charter critics were concerned that property protection could be used to “thwart governments from redistributing property rights or economic entitlements, as had occurred in the United States in the early years of the twentieth century”.<sup>107</sup> Thus, while in Hungary, constitutional property protection is seen as a necessary tool in the pres-

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<sup>103</sup> Sajo, *supra* note 61 at 1471.

<sup>104</sup> Sajo, *supra* note 61 at 1471.

<sup>105</sup> *Hungarian Benefits Case*, *supra* note 67 at 1458.

<sup>106</sup> Sajo, *supra* note 61 at 1471.

<sup>107</sup> Patrick Monahan, *Constitutional Law*, 2<sup>nd</sup> ed. (2002) (QL).

ervation of social services, in Canada, constitutional property protection is seen as a possible threat to social services, programs, and vulnerable minorities. As a result, it was intentionally omitted from the Charter. Furthermore, it has limited application in attempting to secure constitutional protection for a minimal level of assistance.

However, an argument can be made for a Canadian application of the Hungarian principle of property protection. In both Canada and Hungary, the majority of citizens are not “self-pensioners...it is not their own material goods that constitute social and economic security in their inactive age; they live in a way that they invest a part of the result of their work in social security”.<sup>108</sup> In Hungary, due to the close connection between property and social services, it was held that since the benefits “perform the function of guaranteeing security of property taken *stricto sensu*, law must provide for a security comparable to that of property”.<sup>109</sup>

It is possible that for certain services, the same result could be found in Canada. Canadians must submit a portion of their income to the Canada Pension Plan (CPP) and Unemployment Insurance (UI). These contributions could be interpreted by a court as “mandatory insurance”. Thus, any substantial cuts to CPP or UI benefit programs could be invalidated due to the Hungarian principle of property protection. However, given the historical interaction between property and social services in Canada, it is unlikely that this result would be found.

## VII. CONCLUSION

It is crucial for Canada to achieve constitutional protection for a minimum level of social assistance. Without such protection, a substantial portion of Canadian society will continue to live in abject poverty, without rights, and without the ability to participate in democratic discourse. If protection is not achieved, a vulnerable group, the poverty collective, will continue to have its interests overlooked and its needs neglected. Without protection, the deliberative democratic ideal of full authorship

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<sup>108</sup> *Hungarian Benefits Case*, *supra* note 67 at 1458.

<sup>109</sup> *Hungarian Benefits Case*, *supra* note 67 at 1458-9.

will continue to be overwhelmed by the concept of authorship by those who can afford to participate.<sup>110</sup>

Attempts have been made to achieve constitutional protection for this minimum standard through the language of rights. These attempts have failed. Given the importance of achieving protection for a minimum level of assistance, it is necessary to take another path, to explore each and every alternative until a solution is found. Proceeding solely through the language of rights risks exhausting debate. Over time, if the same arguments continue to be circulated and rejected, conversation will cease. This cannot be the case. Too much depends on finding an answer to the social question, on protecting a minimum level of assistance.

This paper attempted to take another path, to seek the constitutional protection of a minimum level of assistance through means other than rights. It did so by analyzing a jurisdiction that managed to protect social needs without resorting to the language of rights. However, the non-rights based concepts used in Hungary to protect social programs are not directly applicable to the Canadian context.

Though arguments have been made, in each case, for the applicability of the principles of legal certainty, legitimate expectations, and property protection, a Canadian court would likely find them legally unpersuasive. In all probability, the solution to achieving a constitutionally protected minimum level of assistance will not be found in the pages of this paper. However, the analysis itself still has value.

The act of searching outside of the language of rights for a solution to the problem of necessity helps subvert contemporary reliance on the rights-based approach. It does so through the creation of an “autocritical” moment.<sup>111</sup> By demonstrating that there is potentially more than one path through which to provide constitutional protection for a minimum level of assistance, this autocritical moment allows for the proliferation of alternative sites of participation. Perhaps a South American court has taken a different path towards a minimum level of assistance. Maybe an alternative route can be found in municipal records in Geneva. Perhaps the answer will be found in future decisions by the Hungarian Constitutional Court. With this proliferation of alternatives, discourse expands,

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<sup>110</sup> Michelman, *supra* note 11 at 148.

<sup>111</sup> Michelman, *supra* note 11 at 166.

conversation increases, and Canadian society draws closer to the ideal of deliberative democracy.

Conversation is not enough. However, through conversation, attention is brought to the issue of a minimum level of assistance. As long as conversation continues, the issue will not slip away. As long as solutions are proposed, the legislature and the courts will not be able to disregard the poverty collective.