



# **Rethinking Progressive Realization: How Should it be Implemented in Canada?**

**Background Paper for a Presentation to the Continuing Committee  
of Officials on Human Rights**

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## A. Introduction: Progressive Realization within a Unified Framework of Rights

When the unified set of rights in the *Universal Declaration of Human Rights* was divided into two covenants, a provision was included in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) that was not included in the *International Covenant on Civil and Political Rights* (ICCPR). Article 2(1) of the ICESCR articulated what is generally referred to as the obligation of “progressive realization,” clarifying that “Each State Party to the present Covenant undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Up until the mid-1990s or so, the unique provision for progressive realization of ESC rights was seen by many as proof that ESC rights should be understood as aspirational goals of social and economic policy in contrast to obligations of immediate application, subject to judicial remedy, as civil and political rights were characterized. Under this earlier paradigm, progressive realization of ESC rights was associated with collective indicators of economic development rather than with individual human rights claims linked to the inherent dignity and worth of the human person. This differentiation between the two sets of rights was reinforced by the adoption of an optional individual complaints procedure for the ICCPR when no similar optional protocol was adopted for the ICESCR.

It became clear as the years went by, however, that this “aspirational” view of progressive realization deprived ESC rights of meaningful content for rights holders. Leaving socio-economic rights entirely to governments to define and implement according to their own priorities simply reinforced patterns of exclusion of the most powerless and marginalized groups which human rights was supposed to remedy. Civil society and human rights experts began to call for return to a unified conception of human rights, recognizing that all human rights, including the components of ESC rights that are subject to progressive realization, require access to effective remedies. The *Vienna Declaration of Human Rights* in 1993 reaffirmed the indivisibility of all human rights and encouraged States and the CESCR to “continue the examination of optional protocols” to the ICESCR.<sup>1</sup> An expert group meeting convened to consider violations of ESC rights in 1997 in Maastricht affirmed that “The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States ...” and affirmed that “Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.”<sup>2</sup> In the meantime, an increasing number of states were choosing to include ESC rights as justiciable rights in new constitutions. Over the course of the following decade courts and international bodies confronted directly the question of how the principle of progressive realization should be reconciled with the new understanding of ESC rights as firm legal obligations subject to effective adjudication and remedy.<sup>3</sup>

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<sup>1</sup> See *Vienna Declaration and Programme of Action*, A/CONF.157/23, at para 75.

<sup>2</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997.

<sup>3</sup> M Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209.

On December 10, 2008, the UN General Assembly eradicated the final vestiges of the historic distinction between the two sets of rights by adopting the *Optional Protocol to the ICESCR*.<sup>4</sup> This historic acknowledgement of the equal status of economic, social and cultural rights and the need for access to justice for all rights claimants was heralded by Louise Arbour, then UN High Commissioner on Human Rights, as “human rights made whole.”<sup>5</sup> In the same year, the *Convention on the Rights of Persons with Disabilities* (CRPD) was adopted, along with its optional complaints procedure, which combined civil and political and economic, social and cultural rights of persons with disabilities within a single convention.

Within the new holistic framework of human rights, obligations linked to progressive realization of ESC rights are no longer seen as entirely distinctive to ESC rights. It is now recognized that both civil and political and ESC rights create some obligations of immediate application and others that require time and budgetary allocations to implement. Obligations under various human rights treaties significantly are now understood as overlapping and converging. The UN Human Rights Committee has affirmed, for example, that positive measures are required to address homelessness in Canada in order to respect the right to life under article 6 of the ICCPR<sup>6</sup> and has found that poverty disproportionately affects women and other disadvantaged groups in Canada, thus engaging rights to non-discrimination and equality.<sup>7</sup> Many other obligations of a programmatic nature and requiring time and resources to implement, including accommodation of disability or measures to ensure women’s access to reproductive health or maternity benefits are recognized under multiple treaties and provisions. As domestic courts and international human rights bodies consider increasing numbers of cases engaging ESC rights through more inclusive interpretations and substantive understandings of civil and political rights, standards applied to obligations with respect to the two sets of rights are tending to converge.

It remains important, however, to distinguish obligations of immediate effect from those which are tied to progressive realization. The obligations to respect and protect rights are generally of immediate effect in relation to both civil and political and ESC rights, and to the extent that civil and political rights focus on obligations to respect and protect rights, they are considered to create obligations of immediate effect. Governments have an immediate and ongoing obligation to respect and protect the right of non-discrimination, for example, by refraining from discriminating in any programs or decisions and by maintaining legislative protection from discrimination by private actors. Many of the remedial and systemic measures required to realize equality and non-discrimination, however, which may themselves emanate from legislative or constitutional protection of equality, may require time and resources to implement. Thus, when it is asserted that the obligation to implement the right to equality and non-discrimination is an obligation of immediate effect, it should be understood that the right must be implemented in domestic law and practice immediately, while the obligations to fulfil the right to equality and non-discrimination through programmatic measures and positive action may be subject to available resources and engage progressive realization.

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<sup>4</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117, (2008) [OP-ICESCR].

<sup>5</sup> Louise Arbour, “Human Rights Made Whole” *Project Syndicate* (26 June 2008), online: Project Syndicate <<http://www.project-syndicate.org/commentary/arbour1/English>>.

<sup>6</sup> United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee: Canada*, UNHRCOR, 65th Sess, UN Doc CCPR/C/79/Add.105, (1999) at para 12.

<sup>7</sup> *Ibid* at para 20.

A similar distinction applies to ESC rights. The obligation to respect ESC rights and to adopt legislative and other measures is immediate, even if the full realization of the rights can only occur over time. The obligation to provide legal recognition of the right to adequate housing and to adopt an effective strategy for its progressive realization, for example, is an immediate obligation, even if the full realization of the right to housing, like the right to equality, will take time and resources to achieve. The CESCR has therefore identified as the central immediate obligation with respect to ESC rights the obligation to adopt and implement strategies for the realization of these rights, and to demonstrate that progress has been achieved commensurate with available resources and other factors. Progressive realization has thus become a standard that is amenable to ongoing assessment and adjudication in the here and now even though it still references commitments to the full realization of rights in the future.

## **B. The Obligation to Implement Strategies**

The CESCR has properly emphasized that progressive realization should be understood as a standard for compliance with ESC rights rather than a defense for non-compliance. The “maximum of available resources standard” does not suggest that limited resources justify a violation of ESC rights but rather that the obligations with respect to ESC rights are assessed relative to available resources, based on a rigorous standard commensurate with the priority to be accorded fundamental human rights. As early as its first General Comment in 1989, the CESCR emphasized that even if the full implementation of *Covenant* rights cannot be achieved immediately because of resource or related constraints, this does not relieve governments of immediate obligations.<sup>8</sup> States have an immediate obligation “to work out and adopt a detailed plan of action for the progressive implementation” of each of the rights contained in the *Covenant*. This is clearly implied, according to the CESCR, by the obligation in Article 2(1) “to take steps ... by all appropriate means.”<sup>9</sup>

The immediate obligation to develop clear strategies and plans and to demonstrate progress toward identified goals, was further clarified in *General Comment No. 3, on the nature of States parties obligations (art. 2, para. 1 of the Covenant)*.<sup>10</sup> The CESCR noted that while *Covenant* rights are subject to progressive realization, there are two over-riding obligations which are of immediate effect: the obligation to ensure non-discrimination and the obligation “to take steps.” The steps taken, according to *General Comment No. 3*, “should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the *Covenant*.”<sup>11</sup> “Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programs for their promotion, are not in any way eliminated as a result of resource constraints.”<sup>12</sup> Legislative measures are almost always desirable and in some cases indispensable. The CESCR notes that it will be particularly interested in whether legislative measures “create any right of action on behalf of individuals or groups who feel that their rights are not being fully

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<sup>8</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 1: Report by States Parties*, UNCESCROR, 3d Sess, UN Doc E/1989/22, (1989).

<sup>9</sup> *Ibid* at para 4.

<sup>10</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant)*, UNCESCROR, 5th Sess, UN Doc E/1991/23, (1990).

<sup>11</sup> *Ibid* at para 2.

<sup>12</sup> *Ibid* at para 11

realized.”<sup>13</sup> The Committee also introduced at this time the concept of “deliberately retrogressive measures” which set back the progressive realization of rights, noting that these would be subject to stricter a test. They “would need to be fully justified by reference to the totality of the rights provided for in the Covenant.”<sup>14</sup>

*General Comment No. 4*, adopted by the CESCR in 1991, elaborated on State parties’ obligation to achieve the full realization of the right to adequate housing (Article 11 of the *ICESCR*).<sup>15</sup> The Committee clarified that this “will almost invariably require the adoption of a national housing strategy.”<sup>16</sup> In their development of such a strategy, States are required to consult extensively with, and to encourage the participation of, groups who are affected by inadequate housing.<sup>17</sup> Legal remedies must be available to groups facing evictions, inadequate housing conditions, or discrimination in access to housing.<sup>18</sup> Subsequent General Comments relating to the right to adequate food,<sup>19</sup> the right to social security,<sup>20</sup> the right to work,<sup>21</sup> the right to health<sup>22</sup> and the right to water<sup>23</sup> have each called on States to create targeted strategies based on human rights principles and to ensure access to effective remedies and participation of rights-holders through appropriate legislation.

Key to the obligation to adopt strategies for the progressive realization of ESC rights is the requirement that the strategies be framed around the realization of the right rather than merely the provision for needs. A strategy for the realization of the right to adequate housing, for example, is not equivalent to a housing plan. A strategy for the progressive realization of housing must recognize housing as a right, provide for participatory rights and engage with the wide range of decisions and policies which may deny rights-holders their right to adequate housing.

While the earlier paradigm of ESC rights as policy objectives would assess progressive realization on the basis of statistical indicators alone, the new understanding of progressive realization through rights-based strategies brings rights-holders and human rights values more directly into any assessment of compliance with rights. Progressive realization now affirms a transformative framework through which rights-holders are able to claim rights and challenge structural disadvantage and social exclusion. Socio-economic policy choices are not simply assessed against statistical indicators, more directly, against the experiences of rights holders and human rights values of the inherent dignity and worth of every human being. Indicators, benchmarks and timelines remain important to assessing progress, but these must

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<sup>13</sup> *Ibid* at para 6.

<sup>14</sup> *Ibid* at para. 9.

<sup>15</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (art 11(1) of the Covenant)*, UNCESCROR, 6th Sess, UN Doc E/1992/23, (1991) [*General Comment 4*].

<sup>16</sup> *Ibid* at para 12.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* at para 17.

<sup>19</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food (art 11)*, UNCESCROR, 20th Sess, UN Doc E/C.12/1999/5, (1999).

<sup>20</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art 9)*, UNCESCROR, 39th Sess, UN Doc E/C.12/GC/19, (2007)

<sup>21</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 18: The Right to Work (art 6)*, UNCESCROR, 35th Sess, UN Doc E/C.12/GC/18, (2006).

<sup>22</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (art 12)*, UNCESCROR, 22d Sess, UN Doc E/C.12/2000/4, (2000).

<sup>23</sup> *General Comment 15: The Right to Water (art 11 & 12)*, UNCESCROR, 29th Sess, UN Doc E/C.12/2002/1, (2002).

be constantly referenced to informed by engagement with rights-holders. Abstract economic indicators cannot, on their own, measure the progressive realization of human rights.

### C. The Reasonableness Standard

The standard to be applied in assessing compliance with Article 2(1) of the *ICESCR* was the object of intense debate during the drafting of the optional complaints procedure to the *ICESCR*. Skeptical states argued that the *Optional Protocol* should prescribe a very deferential standard of review, encouraging the CESCR to apply a “broad margin of discretion” or to require a finding of “unreasonableness” before a finding of a violation could be made.<sup>24</sup> Other States argued that such a deferential standard would defeat the very purpose of the *Optional Protocol*, by undermining any meaningful accountability of States in relation to the *ICESCR*'s key substantive obligations.<sup>25</sup> In the end, proposals for a deferential standard of review were not accepted and references to a margin of discretion were omitted. The final text of the *Optional Protocol* emphasizes that steps taken to achieve progressive realization of *ICESCR* rights must be in accordance with the substantive guarantees in Part II of the *ICESCR* and prescribes a standard of ‘reasonableness’ in assessing steps taken. The text recognizes that in many instances there may be a variety of ways for governments to achieve the results necessary for compliance:

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights.<sup>26</sup>

The specific wording used in the *Optional Protocol* was taken from a paragraph of the now famous *Grootboom*<sup>27</sup> decision, in which the South African Constitutional Court first developed its reasonableness standard for review of compliance with the justiciable economic and social rights in the South African Constitution.<sup>28</sup> The Open Ended Working Group mandated to draft the *Optional Protocol* was also guided by a statement prepared for it by the CESCR in which the Committee suggested for the first time that, in evaluating compliance with article 2(1) of the *ICESCR*, it would assess the “reasonableness” of steps taken.<sup>29</sup> In its statement, the CESCR identified a number of possible factors to

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<sup>24</sup> United Nations Committee on Economic, Social and Cultural Rights, *Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Third Session*, UN Commission on Human Rights, 62d Sess, UN Doc E/CN.4/2006/47, (2006) at para 92.

<sup>25</sup> For descriptions of the debates on the reasonableness standard see Bruce Porter, “The Reasonableness Of Article 8(4) – Adjudicating Claims From The Margins” (2009) 27:1 Nordic Journal of Human Rights 39 [Porter, “Reasonableness”]; and Brian Griffey, “The ‘Reasonableness’ Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2011) 11 HRL Rev 275 at 290.

<sup>26</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, GA res. 63/117, (entered into force 5 May 2013).

<sup>27</sup> *Government of the Republic of South Africa v Grootboom*, [2000] ZACC 19, 11 BCLR 1169 (available on SAFLII), (S Afr Const Ct).

<sup>28</sup> Porter, “Reasonableness”, *supra* note 25

<sup>29</sup> United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007) [CESCR, “Maximum Available Resources”]; Malcolm Langford, “Closing The Gap? – An

be considered in determining whether steps taken by a State party meet the reasonableness standard for compliance with the obligation of progressive realization. These included:

- The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights.
- Whether discretion was exercised in a non-discriminatory and non-arbitrary manner.
- Whether resource allocation is in accordance with international human rights standards.
- Whether the State party adopts the option that least restricts *Covenant* rights.
- Whether the steps were taken within a reasonable timeframe.
- Whether the precarious situation of disadvantaged and marginalized individuals or groups has been addressed.
- Whether policies have prioritized grave situations or situations of risk.
- Whether decision-making is transparent and participatory.<sup>30</sup>

Meaningful participation of affected constituencies was also identified by the CESCR as a critical procedural component of the reasonableness standard.<sup>31</sup> The CESCR has suggested that both long- and short-term timelines should be adopted, with particular attention paid to interim steps such as “temporary special measures [which] may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others.”<sup>32</sup>

Elsewhere, the CESCR has insisted that reasonable policies should include “efforts to overcome negative stereotyped images.”<sup>33</sup> Additionally, reasonable strategies should rely on effective “coordination between the national ministries, regional and local authorities.”<sup>34</sup> Human rights institutions may scrutinize existing laws, identify appropriate goals and benchmarks, provide research, monitor compliance, examine complaints of alleged infringements and disseminate educational materials.<sup>35</sup>

Monitoring and redress should also include assessment of budgetary measures and ensure transparent allocation and expenditure of resources.<sup>36</sup> The reasonableness of budgetary allotment can be assessed based on information about the percentage of the budget allocated to specific rights under the *Covenant* in comparison to areas of spending that are not related to fulfilling human rights. The

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Introduction To The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights” (2009) 27:1 Nordic Journal of Human Rights 2.

<sup>30</sup> CESCR, “Maximum Available Resources”, *ibid.*

<sup>31</sup> *Ibid.*, at para 11.

<sup>32</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 16: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (art 3)*, UNCESCROR, 34th Sess, UN Doc E/C.12/2005/4, (2005) at para 15.

<sup>33</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 6: The Economic, Social and Cultural Rights of Older Persons*, UNCESCROR, 13th Sess, UN Doc E/1996/22, (1995) at para 41.

<sup>34</sup> *General Comment 15*, *supra* note 120.

<sup>35</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, UNCESCROR, 19th Sess, UN Doc E/C.12/1998/25, (1998) at para 3.

<sup>36</sup> *General Comment 3*, *supra* note 10 at para 11.



State party's resource allocation may also be compared to that of other states with similar levels of development.<sup>37</sup>

Other UN treaty bodies have also pointed the way toward a common reasonableness standard. The UN Human Rights Committee has affirmed that reasonableness analysis must be both purposive and contextual, and that a policy must be consistent with the purpose of the *Covenant* read as a whole.<sup>38</sup> The Committee on the Rights of the Child has affirmed that a strategy to implement children's rights must go beyond a list of good intentions or vague commitments: it must set specific, attainable goals with implementation measures, timelines and provisions for necessary resource allocation.<sup>39</sup>

In summary, the reasonableness standard imposes obligations on all actors to make decisions that are consistent with a firm commitment to the progressive realization of ESC rights, with access to justice and effective remedies and meaningful participation by rights-holders - what Sandra Liebenberg and Geo Quinot have described in relation to the reasonableness standard in South African jurisprudence as "a rights-conscious social policy, planning and budgeting process."<sup>40</sup>

#### **D. Recommendations of UN Human Rights Bodies with Respect to Progressive Realization of ESC Rights in Canada**

The centerpiece of the CESCR's recommendations with respect to poverty and homelessness in Canada has been a "strategy for the reduction of homelessness and poverty" that integrates economic, social and cultural rights.<sup>41</sup> The CESCR has emphasized that the strategy should include "measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms, in keeping with Covenant standards."<sup>42</sup> The CESCR has also referred Canada to its statement, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, which is aimed at "encouraging the integration of human rights into poverty eradication policies by outlining how human rights generally, and the *ICESCR* in particular, can empower the poor and enhance anti-poverty strategies."<sup>43</sup> The CESCR has emphasized that "anti-poverty policies are more

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<sup>37</sup> Manisuli Ssenyonjo, "Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law" (2011) 15:6 Int'l JHR 969 at 980-81. See e.g. United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of Congo*, UNCESCROR, 43d Sess, UN Doc E/C.12/COD/CO/4, (2009) at para 16, where the Committee found that the State's decreased allocation of resources to social sector development combined with increased levels of military spending resulted in a violation of its Covenant obligations.; Griffey, *supra* note 25 at 290.

<sup>38</sup> United Nations Human Rights Committee, *Sandra Lovelace v Canada*, Communication No R.6/24, UNHRCOR, 1981, Supp No 40, UN Doc A/36/40, (1981).

<sup>39</sup> United Nations Committee on the Rights of the Child, *General Comment 5: General Measures of Implementation of the Convention on the Rights of the Child*, UNCRCOR, 34th Sess, UN Doc CRC/GC/2003/5, (2003) at paras 32-33.

<sup>40</sup> Geo Quinot & Sandra Liebenberg, "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa", in *Stellenbosch Law Review*, Vol. 22, No. 3, pp. 639-663 at 641.

<sup>41</sup> United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 19th Sess, UN Doc E/C.12/1/Add.31, (1998) at para 60.

<sup>42</sup> *Ibid* at para 62.

<sup>43</sup> United Nations Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the*



likely to be effective, sustainable, inclusive, equitable and meaningful to those living in poverty if they are based upon international human rights.”<sup>44</sup>

Rights based strategies have also been a central component of recommendations from UN special rapporteurs after conducting missions to Canada. The UN Special Rapporteur on adequate housing, Miloon Kothari called on federal and provincial governments to work in close collaboration, and “commit stable and long-term funding to a comprehensive national housing strategy.”<sup>45</sup> Reiterating the recommendations of the CESCR, Kothari stated that the strategy should include “measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms.”<sup>46</sup> He urged that the “right to adequate housing be recognized in federal and provincial legislation as an inherent part of the Canadian legal system.”

Similarly, the UN Special Rapporteur on the Right to Food, Olivier De Schutter, in the Report on his 2012 Mission to Canada urged Canadian governments to “formulate a comprehensive rights-based national food strategy clearly delineating the responsibilities of public officials at the federal, provincial/territorial, and municipal/local levels, identifying the measures to be adopted and the associated time frames...”<sup>47</sup> The UN Special Rapporteur on the rights of indigenous peoples, James Anaya emphasized in his Mission Report on Canada that “it is necessary for Canada to arrive at a common understanding with aboriginal peoples of objectives and goals that are based on full respect for their constitutional, treaty and internationally-recognized rights.”<sup>48</sup> The UN Human Rights Council’s 2009 and 2013 *Universal Periodic Reviews (UPR)* of Canada also highlighted the need for anti-poverty, housing and food security strategies based on human rights.<sup>49</sup> In its responses, Canada has emphasized its support for provincial strategies but has declined to accept recommendations for national strategies”<sup>50</sup>

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*International Covenant on Economic, Social and Cultural Rights*, UNCESCOR, 25th Sess, UN Doc E/C.12/2001/1, (2001) at para 3 [*Poverty and the ICESCR*].

<sup>44</sup> *Ibid* at para 13.

<sup>45</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada (9 to 22 October 2007)*, UN Human Rights Council OR, 10th Sess, UN Doc A/HRC/10/7/Add.3, (2009) at para 90 [*SR Mission to Canada*].

<sup>46</sup> *Ibid* at para 90.

<sup>47</sup> Report of the Special Rapporteur on the right to food, Olivier De Schutter, Human Rights Council Twenty-second session A/HRC/22/50/Add.1 Addendum 1, Mission to Canada\*

<sup>48</sup> Special Rapporteur on the rights of indigenous peoples, James Anaya, Human Rights Council, Twenty-seventh session A/HRC/27/52/Add.2. at para 81.

<sup>49</sup> United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, UN Human Rights Council OR, 11th Sess, UN Doc A/HRC/11/17, (2009) [*UPR Canada*]; *UPR Canada (2012)* United Nations Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review: Canada*, UNHRCOR, 16th Sess, UN Doc A/HRC/WG.6/16/L.9 (2013) at paras 45, 70, 72, 45.

<sup>50</sup> United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada, Addendum, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UNHRCOR, 11th Sess, UN Doc A/HRC/11/17/Add.1, (2009) at para 27; United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada, Addendum, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UNHRCOR, 24th Sess, UN Doc A/HRC/24/11/Add.1 (2013) at paras 30-31.

## E. The Obligations of Progressive Realization under Domestic Law in Canada

It is beyond the scope of this brief paper to consider in detail the extent to which the *Canadian Charter* as the preeminent guarantee of human rights in Canada can be interpreted consistently with the obligation to ensure effective remedies with respect to the obligation of progressive realization of ESC rights.<sup>51</sup> In general, however, the news is good. There is a solid basis in evolving jurisprudence from the Supreme Court of Canada for applying the *Canadian Charter* consistently with international human rights standards of reasonableness linked to progressive realization.

The interdependence and overlap between socio-economic rights recognized in international human rights law ratified by Canada and the rights that are explicitly included in the *Charter*, particularly the right to life, the right to security of the person and the right to equality, are widely acknowledged.<sup>52</sup> As noted above, an enhanced understanding of the indivisibility of these rights was a key factor in overcoming the historic divide between civil and political and economic and social rights at the international level. The Supreme Court of Canada has affirmed a similar holistic and inclusive approach to the interpretation of constitutional and human rights in Canada.<sup>53</sup>

As well as interpreting the rights to life, security of the person and equality in the *Charter* consistently with the obligation to implement effective strategies to address poverty, homelessness and hunger under international human rights law, it is also important that courts interpret the section 1 standard of reasonable limits consistently with emerging international standards of reasonableness and progressive realization.

While section 1 provides a means by which governments can justify infringements of *Charter* rights, serves more fundamentally as a guarantee of governmental decision-making that balances competing societal interests in a “reasonable” manner.<sup>54</sup> As Justice Arbour observed in *Gosselin*, “[w]e sometimes lose sight of the primary function of s. 1 – to constitutionally guarantee rights – focussed as we are on the section’s limiting function.”<sup>55</sup> Chief Justice Dickson identified the underlying *Charter* values that must guide the section 1 analysis as including social justice and equality, enhanced participation of individuals and groups in society, and Canada’s international human rights obligations.<sup>56</sup> The Supreme Court has also underscored governments’ obligations to protect the rights of vulnerable groups in its approach to reasonableness under section 1.<sup>57</sup> Thus, there are direct lines of correspondence between

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<sup>51</sup> *Baker, supra* note **Error! Bookmark not defined.** at para 70; *R v Ewanchuk*, [1999] 1 SCR 330 at para 73 [*Ewanchuk*]; Martha Jackman & Bruce Porter, Martha Jackman & Bruce Porter, “Socio-Economic Rights Under the Canadian Charter” in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 214-15 [Jackman & Porter, “Socio-Economic Rights”].

<sup>52</sup> Martha Jackman & Bruce Porter, *Rights Based Strategies to Address Homelessness and Poverty in Canada: The Charter Framework*, in Martha Jackman & Bruce Porter, eds., *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014).

<sup>53</sup> *Ibid.*

<sup>54</sup> *R v Oakes*, [1986] 1 SCR 103 at 135 [*Oakes*].

<sup>55</sup> *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 352.

<sup>56</sup> *R v Oakes*, [1986] 1 SCR 103 at para 135; *Slaight Communications Inc v Davidson*, [1989] SCR 1038 at 1056-1057.

<sup>57</sup> *Ibid* at 999. But see *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at para 136, where the Supreme Court granted a tobacco manufacturer’s section 2(b) challenge to federal tobacco advertising and marketing

the standards domestic courts should apply under section 1 and the standard of reasonableness to be applied to progressive realization under international human rights law.

The standard of reasonable accommodation of disability or other characteristics of disadvantaged groups has also been situated by the Supreme Court within the section 1 guarantee of reasonable limits such that, in cases such as *Eldridge*, an assessment of budgetary allocations is conducted under section 1 that would apply an “undue hardship” test under human rights legislation.<sup>58</sup> In *Newfoundland (Treasury Board) v NAPE*, having found that revoking a pay equity award for women as an austerity measure violated women’s the right to equality under section 15 of the *Charter*, the Supreme Court engaged in an assessment of budgetary measures that would generally seem to accord with international standards of reasonableness review and retrogressive measures. The Court noted that “courts must remain sceptical of attempts by governments to justify such rights infringements, noting that “there are *always* budgetary constraints and there are *always* other pressing government priorities.”<sup>59</sup> It found in that case that the provincial government’s decision was reasonable under section 1 in this case, however, on the basis of a difficult balancing of a range of competing rights.<sup>60</sup>

It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, a government is engaged in an exercise “whose sole purpose is financial”. The weighing exercise has as much to do with social values as it has to do with dollars. In the present case, the “potential impact” is \$24 million, amounting to more than 10 percent of the projected budgetary deficit for 1991-92. The delayed implementation of pay equity is an extremely serious matter, but so too (for example) is the layoff of 1,300 permanent, 350 part-time and 350 seasonal employees, and the deprivation to the public of the services they provided.<sup>61</sup>

The Court recognized that, in these kinds of “weighing” exercises, a certain degree of judicial deference is mandated, since “there may be no obviously correct or obviously wrong solution but, rather, a range of options each with its advantages and disadvantages. Governments act as they think proper within a range of reasonable alternatives.”<sup>62</sup> However, the Court recognized that the assessment of reasonableness in relation to budgetary decisions consistent with Charter rights is entirely distinct from the legislature’s determination of reasonable budgetary allocations and rejected proposals for any broad deference to legislatures with respect to the question of the constitutionality of budgetary measures. As Binnie J cautioned:

No doubt Parliament and the legislatures, generally speaking, *do* enact measures that they, representing the majority view, consider to be reasonable limits that have been demonstrated to *their* satisfaction as justifiable. Deference to the legislative choice to the degree proposed by Marshall J.A. would largely circumscribe and render

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restrictions, notwithstanding evidence of tobacco related harm to health, and the particular vulnerability of children and youth to tobacco advertising.

<sup>58</sup> *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at paras 65, 79.

<sup>59</sup> *Ibid* at para 72.

<sup>60</sup> [2004] 3 SCR 381 [*NAPE*].

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid* at para 83.

superfluous the independent second look imposed on the courts by s.1 of the *Charter*.<sup>63</sup>

The Supreme Court's approach to 'deference' under section 1 is therefore consistent with the standard set out under the *OP-ICESCR*, which directs the Committee on Economic, Social and Cultural Rights adjudicating complaints to "consider the reasonableness of the steps taken by the State Party" and to "bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant" but at the same time recognizing that it is the Committee's and not the State's role to decide whether the steps taken are "in accordance with Part II of the Covenant."<sup>64</sup>

The positive components of the section 1 guarantee of reasonableness are more squarely engaged in the case of *Tanudjaja v. Canada*, currently the subject of an application for leave to appeal a decision by the Ontario Court of Appeal dismissing the claim as non-justiciable.<sup>65</sup> In that case, the rights to life, security of the person or equality have been allegedly infringed by the effects of homelessness which, on the evidence, is caused by failures to implement the strategies recommended by UN human rights bodies. If this case proceeds, it will provide an opportunity for Canadian courts to apply section 1 of the Charter consistently with international standards of reasonableness and to ensure a constructive dialogue between domestic and international human rights standards with respect to reasonableness and progressive realization.

## F. Reasonableness and Administrative Decision-Makers

Rights-based strategies proposed internationally seek to ensure that social rights are claimable and adjudicated in multiple *fora*: from local community mechanisms and city charters to provincial and national mechanisms of oversight and monitoring. It is important in the Canadian context as well that rights claiming and adjudication commitments to the progressive realization of ESC rights not be restricted to a few *Charter* challenges. Rights claiming and accountability mechanisms in Canada must also infuse all levels of government and all spheres of decision-making. A decentralized or 'disseminated' model for the adjudication of rights is consistent with the Supreme Court's more recent *Charter* jurisprudence in which an increasing number of administrative bodies and decision-makers are charged with the mandate and responsibility to consider and adjudicate *Charter* and human rights claims. As Chief Justice McLachlin noted in *Cooper v Canada (Human Rights Commission)*,<sup>66</sup> administrative decision-makers, tribunals and commissions, play a critical role in adjudicating fundamental rights of many citizens, including many *Charter* rights. In keeping with this view, the Supreme Court has confirmed the authority of a wide range of administrative bodies to consider and apply the *Charter*.<sup>67</sup>

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<sup>63</sup> *NAPE*, *supra* note 60 at para 103.

<sup>64</sup> *OP-ICESCR*, *supra* note 4 at art 8(4).

<sup>65</sup> *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852.

<sup>66</sup> *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854.

<sup>67</sup> *R v Conway*, [2010] 1 SCR 765.

In the recent decision of *Doré v Barreau du Québec*<sup>68</sup> Justice Abella states that the modern view of administrative tribunals has also given rise to a more robust form of administrative law reasonableness, nurtured by the *Charter*, which can provide essentially the same level of protection of *Charter* rights as does a section 1 analysis.<sup>69</sup> She suggests that this approach is better suited to reviewing whether administrative decisions have properly ensured *Charter* “guarantees and values” in particular factual contexts. “A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under section 1: minimal impairment and balancing.”<sup>70</sup>

This recent jurisprudence provides strong grounds for insisting that administrative decision-makers consider both explicit *Charter* rights and the foundational “*Charter* values” that tied to Canada’s international human rights obligations, including socio-economic rights. As Lorne Sossin and Andrea Hill note:

If the principle that discretion should be exercised in a manner consistent with *Charter* values is incorporated into the guidelines, directives and practices of tribunals, this could have a profound effect on the opportunity for these adjudicative spaces to advance social rights. By contrast, if such values turn out not to be relevant in the everyday decision-making of such bodies, then the Court’s rhetoric in *Doré* will suggest a rights orientated framework that is illusory.<sup>71</sup>

The fast array of provincial administrators are unlikely, on the basis of Supreme Court of Canada decision alone, to incorporate the obligation to progressively realized ESCR rights into their understanding of their obligations to make reasonable decisions -- at least not without prompting. What is needed is for all levels of government to seize upon this recent jurisprudence as an important opening through which to enlist administrative decision-makers as key actors within more strategies to address poverty, homelessness and hunger and, more generally, for the realization of ESC rights. The constitutional and international human rights obligations on administrative decision-makers with respect to ESCR are real – but they need to be promoted and clarified through legislation and the adoption of explicitly rights based strategies.

## **G. Provincial and Federal Implementation of the Obligation of Progressive Realization**

Strategies that implement commitments to improve programs and create at least some modest accountability to indicators of success have become relatively common in many provinces. No provincial or municipal strategy to date, however, has included a clear human rights framework linked to progressive realization as a legal obligation. The question many governments and civil society actors may ask, of course, is why it is necessary to incorporate legally binding international human rights and constitutional norms into these strategies? Many would be concerned that this is simply an invitation to courts and lawyers to intrude into spheres of social policy better left to the experts.

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<sup>68</sup> *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

<sup>69</sup> *Doré*, *supra* note 68 at para 29.

<sup>70</sup> *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para 40.

<sup>71</sup> Sossin, Lorne and Hill, Andrea (2014), ‘Social Rights & Administrative Justice’ in Martha Jackman and Bruce Porter (Eds.) *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) pp. 343-364 at p.357.

The answer to this question is, in part, related to the nature of the problem that is being addressed by housing, anti-poverty and food security strategies. Homelessness, hunger, and poverty in Canada are not caused by a scarcity of food or affordable housing. Even in the developing world, Amartya Sen discovered that famines are not, primarily, caused by simple failures to provide enough food to those in need but rather by what he called systemic “entitlement system failures”, tied to a broad range of policy choices, legislation, and program administration decisions in which access to adequate housing, food, or other requirements were not properly considered as fundamental human rights. While famine in developing countries and homelessness or hunger in Canada demand as a first response, urgent measures to provide basic necessities, it is equally important that the structural and systemic causes of ESC rights violations in Canada be addressed through a stronger commitment to the realization of human rights. The obligation of progressive realization addresses more than the obligation to provide for those in need. Effective strategies must also address systemic causes of poverty, hunger and homelessness amidst affluence in Canada.<sup>72</sup>

Entrenching social rights and the obligations of progressive realization in national, provincial and municipal strategies would affect decision-making and program design in all spheres which impact on the enjoyment of social rights – not, in most cases, through recourse to courts but rather by simply changing the status of ESC rights so that they are accorded the same status as statutory and civil and political rights in the consciousness of decision-makers. Like rights to freedom from discrimination on the prohibited grounds of race or sex, social rights would begin to inform all aspects of everyday program design, implementation and administration – precisely as they should, if we take international human rights and Supreme Court of Canada jurisprudence seriously. Rarely do civil and political rights such as these rely on recourse to the courts. They simply become embedded in the concept of reasonable decision-making. Administering a program or exercising statutory discretion in a manner that results in a family being rendered homeless or without access to adequate food or water should equally be seen as incompatible with a more rights-based standard of reasonableness.

While provincial governments have taken important steps in engaging with civil society and stakeholders in the design and implementation of housing and anti-poverty strategies, the strategies to date have remained largely within the older paradigm of social rights as aspirational. Initiatives such as housing first have resulted in significant steps forward in the realization of the right to housing, but the provision for basic needs is only the first step in the obligation of progressive realization.

The rights-based approach to the progressive realization of rights to housing, food and an adequate standard of living that has been affirmed internationally is highly relevant to the ongoing crisis of poverty and homelessness in Canada and to the design of effective policies, programs and strategies to address it. Economic deprivation amidst affluence in Canada must be understood as a socially constructed systemic failure of law, policy and decision-making, deriving from the fundamental devaluing of the rights claims of those who have been stigmatized and pushed to the margins of society. It is not simply a problem of unmet needs. It is also a devaluing of the rights and equal dignity and citizenship of those living in poverty, hunger and homelessness amidst affluence.

What would rights-based strategies incorporating the obligation of progressive realization look like in Canada? They will affirm social rights as claimable rights. Goals and timelines will not simply be targets for governments but will also be articulated as entitlements to reasonable decision-making

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<sup>72</sup>*Ibid.*



consistent with the obligation of progressive realization as well as with the standard of rights-informed reasonableness that has been affirmed by the Supreme Court of Canada. Human rights norms will be written into legislation and regulations so as to inform the mandate and guide the decisions of statutory bodies and decision-makers which have previously operated outside of any human rights framework. Governments will encourage courts to engage more constructively with obligations of progressive realization as a means of ensuring improved accountability of its decision-makers to binding human rights obligations. The institutional mandate of human rights commissions, landlord and tenant, social benefits, labour and many other administrative bodies will be reconceived in light human rights norms and values. All of these changes will begin to ensure that the myriad of entitlement system failures that lie behind poverty and homelessness amidst affluence are brought within a human rights lens and made subject to effective remedies.

Creating a more robust human rights framework for the progressive realization of social rights in Canada will not 'judicialize' social policy or make policy and programming more litigious. In fact, current practices of criminalizing and stigmatizing those who are homeless or living in poverty constitutes a far more aggressive and expensive judicialization of homelessness and poverty than would rights-based approaches to solving these problems. A rights-based approach creates a more constructive and mutually reinforcing relationship between justice and socio-economic policy which challenges systemic discrimination rather than reinforcing it.

Ensuring access to justice for claims linked to the progressive realization of social rights leads to enhanced community understanding of human rights values which in turn creates new opportunities for rights-holders to be heard outside of courts. Provincial and municipal housing, anti-poverty, food security and other social rights strategies present an ideal opportunity to develop new forms of human rights accountability outside of courts. Institutions such as provincial human rights commissions and tribunals, Law Reform Commissions and ombuds officers could play important roles in making international human rights norms meaningful and relevant at all levels of governance. Bringing progressive realization into governance and social policies offers the opportunity to implement, through local initiatives and strategies, the fundamental rights that have been affirmed and clarified at the international level, drawing from a movement that has become global in scope, but which is based on empowering rights holders to affirm and claim rights locally.

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