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THE RIGHT TO FOOD IN CANADA

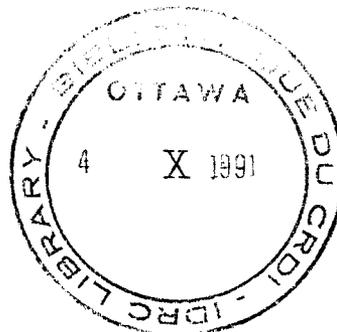
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A Monument to Human Rights was unveiled recently in downtown Ottawa. The ideals of "dignity" and "equality" carved in perfect marble are held aloft by imperfect human shapes made of rough concrete slabs. These rights have not been fully achieved and cannot be fully achieved by flawed humanity, but at least they are held up as ideals. But such ideals as the right to food or shelter are not held aloft in any monument, and they are not held aloft by the people of this country.

The attitude of Canadians to economic and social rights is ambivalent. Canadians are highly supportive of universal access to education and health care, but they offer no guarantees to the hungry or the homeless. A genuine sense of charity towards the needy co-exists with a feeling that poverty may be self-inflicted and that public attempts to end poverty may simply perpetuate it. Although Canada has subscribed internationally to the existence of a right to food, it has not implemented it domestically, either in fact or in law. Because we have not discussed the issue of food availability in the human rights context,

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it has not been accorded a place of fundamental importance in the society. A person threatened with hunger cannot find in the law a friend, unlike those threatened with an abuse of their civil or political rights. I believe it is an urgent part of the work of human rights advocates to achieve equal prominence for economic and social rights, for they are of equal value to civil and political rights. Neither set of rights can be fully enjoyed without the presence of the other set.

Before looking at the relevance of the Charter to the hunger question in Canada I would like to set out in some detail what the right to food is. It is a surprisingly well developed concept, and one with echoes from other ages. The idea of food entitlement is an ancient one. Confucius stated that feeding the people was a primary obligation of the state.¹ The Old Testament prescribed detailed laws which Jews were bound to follow, which provided for the poor and hungry to have access to productive land or the food growing on the lands of others.² Revolutionary France gave birth to numerous declarations emphasizing the rights of the poor to basic sustenance.³ And of course aboriginal societies have long followed norms which require sharing the bounty of the hunt.⁴

The twentieth century has seen the development of the international human rights system and with it the internationalization of such ideas as the right to food. By one

compilation, there are now over one hundred instruments which are relevant to the establishment and definition of the right to food.⁵ These include treaties which require the provision of food to prisoners and refugees, those dealing with international food aid and food security, and treaties relevant to the control and preservation of agricultural resources.

The most frequently cited expression of the right to food is contained in the International Covenant on Economic, Social and Cultural Rights, which entered into force in 1976. Article 11 says in part, "the states parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food..." This echoes article 25 of the Universal Declaration of Human Rights, proclaimed by the U.N. General Assembly in 1948.

In his 1987 report, the Special Rapporteur to the Economic and Social Council of the U.N. on the right to food, gave the following formulation: "Everyone requires food which is (a) sufficient, balanced and safe to satisfy nutritional requirements, (b) culturally acceptable, and (c) accessible in a manner which does not destroy one's dignity as a human being."⁶ As well, food which is adequate qualitatively, quantitatively and culturally, should be accessible in a sustained way. For the Special Rapporteur, this implies that,

"The physical and institutional environment in which food is procured must be optimally utilized (and) protected from erosion or distortion..."⁷

This expansive definition of the content of the right to food widens its relevance to a variety of circumstances. For example, it is clearly an argument for those in developing countries who advocate land reform, giving peasant farmers the chance to provide themselves with adequate food in a dignified and sustained manner.⁸ The right to food has also been invoked for the same reasons on behalf of African pastoral communities who see their grazing lands being encroached upon by expanding populations and the conversion of grazing land to agriculture.⁹ In a developed and urbanized country, the right to food is more readily applicable to issues touching the inadequate resources available to purchase food, as opposed to an individual's self-sufficiency in producing it.

What duty does the state have to establish the right to food? The scope and nature of state duties is largely lacking in the international instruments which establish the right to food. Article 2(1) of the Covenant provides some guidance on how state obligations with respect to all of the rights in the Covenant are to be fulfilled. In essence, it obliges a state to participate in the universal implementation of the rights. Internationally, there is a duty to participate in co-operation and assistance to implement them. Domestically,

legislative measures are an important, but not the sole method through which the rights are to be implemented. The ultimate obligation is to achieve "full realization". However, this result is not necessarily to be achieved immediately. Circumstances may dictate a process of implementation which will be carried out progressively. This process must bring to bear a state's maximum available resources.

Although provisions of such brevity could hardly provide a formula for solving the complex question of world hunger, their intention is clear in one respect. States must devote their resources to the fullest extent possible to implementing the right to food. In some cases its implementation may not be immediate, but rather progressive. However, only the absence of resources justifies not fully implementing it.

Taking the above imperatives as a starting point, there have been various scholarly formulations of the types of duties which a state is required to undertake. For present purposes, the three levels of state responsibility set out by the Special Rapporteur are adopted. They are: (i) the obligation to respect the right to food, (ii) the obligation to protect the right to food, and (iii) the obligation to fulfil the right to food.

The first obligation, to respect the right to food, "calls for non-interference by the state in all cases where the individuals or groups can take care of their own needs without weakening the possibility for others to do the same."¹⁰ This obligation is cited as being of particular importance to groups, such as aboriginal peoples, who wish to retain collective rights to the use of their food-yielding resources. Governments are not to encroach upon these. Another example of the obligation to respect would be that states are not to interfere with the right of individuals to obtain work so that they can feed themselves.

The second obligation, to protect the right to food, "implies the responsibility of states to counteract or prevent activities and processes which negatively affect food security, particularly for the most vulnerable in society."¹¹ This obligation can be seen as the activist side of the obligation to respect. For example, the state is obliged to take actions to prevent the environmental destruction of food-yielding lands or waters by industrial polluters. As well, it could oblige the state to construct an appropriate legislative framework to control the marketing of food products which are inherently harmful or the use of which may lead to harm, such as breastmilk substitutes.

The third obligation, to fulfil the right to food, requires the state to give "assistance or direct provision."¹² Examples of this are giving food to prisoners, or the establishment

of an effective social security and social assistance system.

These three types of duty---respect, protect and fulfil---each seem applicable to all states, although the emphasis on each in a given state will vary with factors such as the fiscal resources available to the state, the extent of urbanization, and the food-related practices of the various cultural groups constituting the population of the state. This fluidity of obligation has led to great difficulty in measuring state compliance. However, that does not make less real the fundamental nature of the right to food, or a state's obligation to fully implement it, if it has the resources to do so.

The monitoring of state compliance with the right to food is done by the U.N. Committee on Economic, Social and Cultural Rights, a committee of experts which meets once a year in Geneva. Its principal function is to consider periodic national reports on state implementation of the Covenant. It also makes what it calls "general comments" with the intention of building up jurisprudence in a given area. As well, it also has general discussions on the nature of various rights contained in the Covenant. The future of the development of the right to food internationally appears to rest largely on this committee, which has now had five sessions. But the committee membership is of uneven experience and knowledge, there is very little NGO input into its deliberations, and the public is

largely unaware of its existence, thanks in part to poor press coverage. It may be that the real fight to establish the right to food will be fought at the national level, as groups working for the poor begin to inject the concept into their political rhetoric, and into court actions. A solid base in national legal systems would fuel discussion of the right internationally, and encourage states to construct dynamic international mechanisms to promote its universal implementation. As we consider whether The Charter does or should protect people from hunger, it is important to keep this international dimension in mind. Human rights tend to expand beyond national borders. We know the historic international significance of the seminal human rights documents produced in individual nation states, such as Magna Carta and the American Bill of Rights. Although the Charter may not be in that league, the legal recognition of economic rights in this country would give weight and definition to the struggle which many are waging on behalf of populations in even greater need than our own.

There have certainly been attempts in the past to embody economic rights in Canadian law. In 1960 an amendment to put the right to an adequate standard of living in the Bill of Rights was defeated.¹³ In the 1968 proposal for a Canadian Charter of Human Rights, the Liberal government said the guarantee of economic rights was desirable and should be an ultimate objective of Canada, but said they would have to be left for a later day

because of the time it would take to get agreement with the provinces and the difficulty in implementing them.¹⁴ Again in 1982, in considering our present Charter, the NDP put forward an amendment which would have obliged the government to fully implement the International Covenant on Economic, Social and Cultural Rights. The Minister of Justice, Mr. Chretien rejected the idea, saying the next thing people would want in the Charter was his aunt's recipe for apple pie. He said "It is the constitution, so I reject the amendment."¹⁵ And so, we are left without explicit inclusion of the right to food in our Charter. We are also left with a burgeoning number of people who need it. Every month, nearly half a million Canadians use food banks. In one year, that number has grown by over thirty percent. Opinion surveys indicate that fifty-eight percent of Canadians say that government is not doing enough for the hungry. Twenty-nine percent think that government is ignoring the problem completely.¹⁶ And yet, in the current climate of economic restraint, who could believe that improved funding of social welfare programs is the way in which economic rights will be fulfilled in this country. Without putting economic rights on the same plane as civil and political rights, there is no chance that Canada will live up to its covenant to provide its citizens with an adequate standard of living.

Is there any hope that the hungry could find solace in the law as it now exists? It may be that there is, both with respect to Charter rights and other rights under international law which form part of Canadian law. The most frequently cited sections of the Charter which could be of assistance are section 7--security of the person, and section 15--equality rights. In the Singh case, Madame Justice Wilson noted the possible relevance of Article 25 of the Universal Declaration of Human Rights, which contains the right to food, and cited the Law Reform Commission of Canada's statement that "security of the person" refers not only to the protection of one's physical security but also the provision of necessities for its support.¹⁷ In the Irwin Toy case, the Supreme Court of Canada said that corporations could not be protected by the section 7 security of the person provision, however it did recognize that the term "economic rights" also included rights to the basic necessities of life, and said at that stage in Charter interpretation, they did not want to pass judgement on whether those rights were of the same ilk as corporate-commercial economic rights which they said were not in the Charter.¹⁸

Of what value is section 7 to the needy even if it is found to include the right to food? It is interesting to look at the Morgentaler case. Mr. Justice Beetz said in that case "Security of the person within the meaning of section 7 of the Charter, must include a right of access to medical treatment for a condition representing a danger to life or health

without fear of criminal sanction."¹⁹ Access to medical treatment exists because the State provides for health care. However the State does not necessarily provide access to adequate food, even though hunger and malnutrition are dangers to life and health. If a person lacking adequate food steals money to buy it, or if a needy parent commits welfare fraud to feed her children, is there immunity from criminal process? Why should the weight of the criminal law descend upon a person in one circumstance where their life or health is threatened, but not in another? We await an answer on that question from the courts. However, it must be recognized that even if a right to food is achieved in those narrow circumstances, it could hardly be considered as progress for the needy to say they can resort to otherwise criminal and degrading behaviour to answer their needs. Protection from a sanction does not, for most people, achieve the ultimate goal of the right to food, which is to have the right fulfilled.

Does the ambit of "security of the person" extend beyond the criminal justice system? In the Morgentaler case, Chief Justice Dickson left that as an open question. If it does, then clearly there are circumstances where one's security of the person can be protected against authorities not administering social welfare programs according to the principles of fundamental justice in determining entitlements. Of course, that is only of value in achieving the right to food if the entitlements are themselves adequate.

The second section of the Charter which is of relevance to the right to food is Section 15, the equality rights provision. The two step analysis for determining if section 15 applies is first to attempt to identify the group in question as enumerated or analogous to an enumerated group, and second to determine if the impugned legislation is discriminatory against that group. In the Turpin case, the Supreme Court of Canada said that you must look at the group in question within the context of "the entire social, political and legal fabric of our society"²⁰ and view the purpose of section 15 as being to remedy those disadvantaged within that context. I find it hard to believe that the needy could not be thought of as being one of those groups. In the Andrews case which dealt with whether non-citizens could be considered an analogous group, various judgements cited such characteristics as "vulnerable to having their interests overlooked", "lacking in political power" and "(having) a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs."²¹ Certainly the needy must think of themselves as thoroughly vulnerable and, apart from having a vote, sadly deficient in political influence. Want is doubtless such an ever-present factor in their lives that their self-perception in an affluent society must be governed by their economic status more than by even those characteristics enumerated in section 15 (1). Their need is profoundly personal, shaping almost every aspect of their lives, and it is not easily alterable by conscious effort, especially if one is unemployable or a child.

How could section 15 be used to promote the right to food? Let us consider a hypothetical situation, which not too long ago threatened to become a reality---a tax on food. Large numbers of the poor do not have sufficient resources to adequately feed themselves. They receive at best borderline nourishment. A food tax by itself would push them into a position of even greater want. It's effect would range from trivial for the wealthy to health-threatening for the poor. In Andrews the Supreme Court made it clear that discrimination is a distinction which has the effect of imposing burdens, obligations or disadvantages on a group which are not imposed upon others. While the court will be slow to second guess economic and social policy making, in such a case it could be argued that the value at stake, that is that no one should be without the necessitates of life, is so fundamental that the tax should be held to violate section 15. However, like section 7, section 15 appears to potentially offer only a slice of the broad and vigorous definition of the right to food which exists in international law, because its essential purpose is to stop government action, not to compel it.

Where else in the law of Canada might you locate the right to food? I would like to look briefly at two possible areas---the transformation of the international law into domestic law, and the law as it is evolving concerning the rights of aboriginal peoples. First with respect to international law, because treaties to which Canada is a party are not self-executing, the International Covenant on Economic, Social and Cultural Rights which includes the right

to food, is not part of our domestic law. However, in contrast to treaty law, customary international law requires no legislative act to transform it into domestic law. It has been argued forcefully that the Universal Declaration of Human Rights, which also contains the right to food, forms part of customary international law.²² Therefore the Universal Declaration which was not intended to be binding on states may now be part of our law, whereas the derivative covenant which was intended to be binding is not part of our law. Be that as it may, the right to food would not in any event achieve a fundamental status in Canadian law as a result of the Universal Declaration. Any federal statute could restrict or negate it. Nevertheless, there is some precedent for a private action against the Crown where it has violated a principle of international law.²³ I would hope at some point that we might be treated to a suit where such an argument is raised against a governmental action which adversely effects the food-growing potential of land, or which challenges social assistance rates as being inadequate for the stated purpose.

Second, with respect to aboriginal peoples, we have a perfect illustration of a component of the right to food, that is the right to culturally appropriate food. By this we don't mean simply a matter of taste preference. Rather, it is also a question of respecting food prohibitions based on religious belief, and the recognition that cultural identity is established and sustained by distinctive food preferences and use. For Canada's aboriginal peoples, hunting fishing and gathering practices form an integral part of their culture. Not only is there a high dependence on food thus acquired to maintain their traditional and

preferred diet, but also for many aboriginal peoples the food procurement and distribution process is the way through which societal values, such as sharing, are transmitted. It would be most interesting if the lawyers for the Innu of Labrador who are fighting low-altitude NATO flights over traditional Innu land were to advance right to food arguments. The Innu of course claim that the flights disrupt caribou migration patterns and harm their reproductive processes, and also effect other game. It is a clear case where an argument could be made that the government is not respecting the right to culturally appropriate food. It is also a case where the Innu could attempt to use security of the person arguments to defend themselves against criminal charges arising from their efforts to stop the flights. Also with respect to aboriginal peoples, it is interesting to contemplate whether the Supreme Court of Canada is also in effect fashioning a right to food-like rule without labelling it as such, although the rule springs from section 35 of the Constitution Act. Certainly in a case like Sparrow the result achieved is a standard not unlike one that would be achieved using international human rights law analysis.²⁴ The government must meet a high standard in justifying any regulation which would impinge upon traditional fishing practices which could limit the aboriginal right to fish for food or ceremonial purposes.

Where do we go from here? Canada's legislative reaction to its own international acceptance of the right to food has clearly been inadequate. If the right now exists in

domestic law it has gotten there with no help from government. Rather it is due to judicial expansiveness or the haphazard operation of customary international law. That is not desirable for at least two reasons. First, it lacks coherence. At best, it is a piecemeal implementation of a right of fundamental importance. Second, it does not represent the will of the people. Civil and political rights exist because they represent a national will to honour them, as expressed through the political processes which led to their enshrinement. I know that constitutions usually end up standing for some things not in the minds of their authors, but it does seem highly undemocratic to wish that a whole category of rights should be brought into existence through a document not originally designed to accommodate them.

And so, the time has come for Canadians to decide if they want to continue to be two-faced about economic human rights, supporting them internationally, ignoring them domestically. And if we cannot stomach the financial and social consequences of their domestic implementation, let us renounce those we've already subscribed to internationally and stop participating in the creation of more of them. But, if we do believe in them, let us begin to treat them as rights rather than as policy goals. How can we do that? It's not an easy question. Although numerous national constitutions proclaim economic and social rights, many of those nations are developing countries where clearly the resources

to implement them are insufficient to the purpose, or are communist states which offer little guidance to our quest for acceptable legal mechanisms to implement such rights.²⁵ Several European countries such as Holland, Italy, Greece and Spain do have economic rights in their constitutions, but I confess to not having been able to learn very much about their impact. There is a rather interesting approach to the issue in the Irish constitution which I would like to come back to in a moment, for it may serve as a model, all be it an inadequate one, which would could consider.

What would be the consequences of simply stating in a revised Charter that "everyone shall have the right to food." If we return to the three duties of states, the consequences would be that the state is obliged to respect, protect, and fulfil the right. "Respecting" would be the most manageable of the three because it fits into the present Charter scheme. A plaintiff would simply be asking for a governmental action to cease, such as not flying planes over Caribou herds. "Protecting" would be a greater stretch. It would involve the government being compelled to take an action to prevent a private infringement of the right to food, for example it might involve a challenge to the adequacy of environmental legislation designed to stop the industrial pollution of rivers upon which aboriginal peoples depend for fish. That clearly implies much greater judicial activism; in effect, the mandated re-writing of legislated standards which are proved to be inadequate to the task. And then, most problematic of all, "fulfilling" the right to food. Here the key

issue would surely be the absence of national standards of social assistance. The typical assertion of a plaintiff trying to require the government to fulfil the right to food would be that the amounts received from provincially administered welfare schemes do not respond to the real needs of the plaintiff and fall below any recognized poverty line, which clearly many of them now do. Thus, the enshrinement of the right to food and other economic rights implies a radical re-ordering of the allocation of fiscal resources in this country. But that's what human rights are about. It is a society deciding on what is of fundamental importance, and saying that the national life will be governed and if necessary altered to accommodate those priorities, because such priorities reflect the country's basic values.

Now, if such a formula proves too heady a brew for all of us, there is at least one part-way measure which could be taken, and of course there may be more than one. I referred earlier to the Irish constitution. It has a section called "Directive Principles of Social Policy" and is specifically for the guidance of Parliament and "not cognizable by any court". However the courts have used them as a guide to interpreting the meaning of other parts of the constitution.²⁶ Thus, the Canadian constitution could have a section which sets out basic economic rights as goals of policy. The courts could then have reference to this section in interpreting the ambit of the term "security of the person" or in determining what groups are covered by the equality rights section. In this way, the

manner in which the Charter is used could remain the same, but the situations in which it could be used would be broadened.

No one writing about economic and social rights has ever claimed they were easy to implement, especially in the context of a federal system and especially at a time of economic restraint. But in spite of these problems, we have worse problems which can only be solved if we take the rights seriously. Canada has a history of hunger, from pre-Confederation times to the Great Depression to the current age of food banks. Clearly, the problem will not be going away without something changing, and what has to initiate that change is human rights law. Until activists and lawyers start holding up the words "right to food", just as those imperfect figures in the monument to human rights hold up other ideals, we will be living in a country with generations of children growing up scarred by hunger, and also a country which is flouting its obligations under international human rights law.

1. For a discussion of various approaches to food issues in ancient China see P. Spitz, "Right to Food for Peoples and for the People: a Historical Perspective", in "The Right to Food" P. Alston and K. Tomasevski (eds.), (Utrecht: Martinus Nijhoff Publishers, 1984) at pp. 171-173.
2. Exodus 23, Deuteronomy 14 and Leviticus 19, 23 and 25.
3. Supra note 1 at pp. 174-175.
4. For example see Michael Asch, "Home and Native Land---Aboriginal Rights and the Canadian Constitution" (Toronto: Methuen, 1984) at p. 21, for a description of the practices of the Shuswaps of British Columbia.
5. "The Right to Food: Guide Through Applicable International Law" K. Tomasevski (ed.) (Dordrecht: Martinus Nijhoff Publishers).
6. "Report on the Right to Adequate Food as a Human Right" submitted by Asbjorn Eide, Special Rapporteur, E/CN.4/Sub.2/1987/23 para. 52.
7. Ibid., at para. 135.
8. For numerous specific cases where the right is asserted, see the Newsletter of the Foodfirst International Action Network, of Heidelberg Germany. For example, there was alleged repression of sugar workers on the Philippine Island of Negros, where the collapse of the sugar market led to widespread hunger among workers. The Philippine government was criticized for not acting to implement a land reform program which would allow the workers to provide for themselves. (Newsletter No. 24 Dec. 87/Jan. 88).
9. Kaj Arhem, "Cultural Identity and the Right to Food: The Case of the Maasai" in "Food as a Human Right", Asbjorn Eide et. al. (eds.) (New York: The United Nations University, 1984), 89.
10. Supra. note 6 para. 170.
11. Ibid. para. 175.
12. Ibid., para. 180.
13. Journals of the House of Commons of Canada, 3 August, 1960, at page 878.

14. P.E. Trudeau, "A Canadian Charter of Human Rights", a document of the Government of Canada, at page 27. (Available in the library of the Supreme Court of Canada.)
15. Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Issue No. 49, January 30, 1981, pages 65-71.
16. Findings of a Gallup Poll released in June, 1991.
17. (1985) 1 S.C.R. 177
18. (1989) 1 S.C.R. 927, at 1003
19. (1988) 1 S.C.R. 30, at page 81
20. (1989) 1 S.C.R. 1296, at page 1332.
21. (1989) 1 S.C.R. 143
22. See John P. Humphrey, "Human Rights and the United Nations: A Great Adventure", (Dobbs Ferry, New York: Transnational Publishers, 1984) at pages 75-96.
23. See Commercial and Estates Company of Egypt v. The Board of Trade (1925) 1 K.B. 271 (C.A.)
24. (1990) 1 S.C.R. 1075
25. For a more detailed description of other national constitutions, see Robert E. Robertson, "The Right to Food---Canada's Broken Covenant", (1989-1990) 6 Canadian Human Rights Yearbook 186 at page 196.
26. For a general discussion of this provision, Article 45, see J.M. Kelly, "The Irish Constitution (Dublin: Jurist Publishing Co. Ltd., 1980), at page 542 and James Casey, "Constitutional Law in Ireland (London: Sweet and Maxwell, 1987) at page 307.