Special Section
The *Hartz IV Case* and the German *Sozialstaat*

Welfare Rights in Canadian and German Constitutional Law

By Chava Schwebel[*]

A. Introduction

According to liberal political theorists, such as John Locke and Adam Smith, liberty and equality are competing values. In Canadian constitutional law, the commitment to liberal individualism has pushed questions of socio-economic rights from the constitutional sphere into the political one.

This is not the case in Germany, where the Federal Constitutional Court has ruled that, under the Basic Law,[1] citizens are guaranteed social welfare assistance at a level consistent with their human dignity, and that the state has a positive obligation to provide such assistance.[2] In the German conception, the right to human dignity—which comprehends the priority of individual freedom—generates positive social rights. Rather than occupying separate dimensions, as they do in Canada, the rights to liberty, equality, and socio-economic well-being are integrated values in Germany, where they are linked by the inherent dignity of persons.

Canada's Supreme Court has also examined the ideas of human dignity and social welfare assistance in the context of equality rights under the Charter. The Court's decision in *Gosselin v. Quebec (Attorney General)*[3] and its retreat from the human dignity paradigm in *R. v. Kapp*[4] stand in contrast to the German approach. The question is: which idea of equality is inherent in being a person and how are differences in this idea reflected in the German Basic Law and the Canadian Charter? Does our understanding of equality and human dignity have any implications for property rights in Canada, as it does in Germany?

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[1] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], 23 May 1949, BGBl. I (Ger.).

[2] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 9 Feb. 2010 (*Hartz IV*), 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 175 (__), 1 BvL 1/09 of 9 Feb. 2010, para. 134, 2010 (Ger.), *available at http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html* (last visited 7 Nov. 2011).

[3] Gosselin v. Quebec (Att'y Gen.), [2002] 4 S.C.R. 429 (Can.).

[4] R. v. Kapp, [2008] 2 S.C.R. 483 (Can.).

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In Part B of this Essay, I discuss the *Gosselin* case, focusing in particular on the Section 15 Charter analysis and the different ways in which our judges framed the concept of human dignity in applying the test for equality outlined in *Law v. Canada*.[5] In Part C, I address the Section 7 arguments raised in the *Gosselin* judgment in order to bring to light the Court's objections to welfare rights as justiciable or within the realm of legitimate judicial scrutiny. Part D returns to the idea of human dignity and the question of its place in the Canadian constitution after the Court ruled it out of the Section 15 analysis in *Kapp*. The Court's treatment of these issues—human dignity, welfare rights, and their legal, philosophical, or political status—is relevant because it discloses a view of constitutionalism that is challenged both empirically by the German constitutional model and theoretically by rival conceptions of constitutional theory and political morality. For this reason, Part E introduces the structure of German constitutional law, including the history of the Basic Law and the Constitutional Court's distinctive approach to human dignity, judicial authority, and social rights. Part F concludes with a discussion of Hermann Heller and John Rawls, whose work on the relationship between law and politics, and on social welfare principles in constitutional theory, respectively, pertains directly to the arguments I advance.

I argue that the concept of human dignity is of vital importance to constitutional analysis and that a retreat from this value in the context of equality claims may render the recognition of social rights even more difficult in the future. This is particularly the case where, as in *Gosselin*, the Supreme Court frames social welfare legislation as "beneficial,"[6] and not as a matter of political, much less legal, right.

The intuition that human dignity is not contingent on political recognition but has a separate and prior existence is upheld by the German constitutional model as well as by modern liberal theorists such as John Rawls. In this conception, personality precedes the social institution by which it is recognized or ought to be recognized. This approach does not deny that human beings depend on governments and other community institutions as a matter of social reality, but it does assert that any political arrangement—*or constitutional structure*—that denies this priority permits the conceptual and legal conditions which make human rights violations acceptable. It is this recognition which underlies the German Basic Law and which *Gosselin* and *Kapp* deny.

Accordingly, we can understand much of the debate surrounding social rights as stemming from what academics perceive to be an improper conflation of law and political morality—or the application of the wrong *kind* of political morality, according to their own prejudices. On this basis, the distinction between legal and political rights in constitutional analysis is

[5] Law v. Canada, [1999] 1 S.C.R. 497 (Can.).

[6] *Gosselin*, 4 S.C.R 429, para. 112 (Can.).

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simply inapt. Secondary arguments, which maintain that a constitution is merely a negative instrument, and that therefore a court's role is constrained and objections such as justiciability and institutional legitimacy are upheld, come to the same conclusion.

The *Gosselin* decision has been heavily criticized by the left because it is believed to disclose a traditional liberal political bias against equalizing property. Following Heller, I agree that law can be influenced by its history and social context and ultimately understood as a reflection of this history and of national political values. Germany offers a prime example, first in the legal recognition of human dignity and social rights after the Holocaust, and secondly, in the court's rejection of the liberal distinction between private rights and the public good in constitutional analysis. Rawls's work in *Political Liberalism*[7] furthers our understanding of the difficulty inherent in relating concepts of freedom and equality in a modern constitutional democracy. Germany offers a source of optimism in this regard. Thus, the impact of history and political ideology on our understanding of constitutionalism in Canada, and the formalism of the Supreme Court in Section 15 Charter adjudication and social rights, can be made clearer by a comparison with German constitutional law and an understanding of constitutional theory and political morality as advanced by Heller and Rawls.

B. *Gosselin*: Overview and the Right to Equality

Gosselin is a leading example of the failure of the Supreme Court of Canada to find a violation of Section 15 equality in socio-economic rights claims. The decision involved a class action lawsuit based on the equality and "security of the person" grounds in Sections 15 and 7 of the Canadian Charter, in addition to Sections 45 and 49 of the Quebec Charter. In the decision, Quebec legislation denying full welfare entitlements to individuals under thirty years old was held not to be a violation of Section 15. The Supreme Court, in accordance with the framework enunciated in *Law* for equality cases, found that the legislation in question did not violate the dignity of those whose welfare benefits it had rescinded. Further, the Court did not find a breach of Section 7, on the grounds that constitutional claims, including those to economic rights and social support, are delimited by the Charter's inherently negative nature. The following analysis will focus primarily on the Section 15 arguments and, in particular, the different ways in which the Court understood the concept of human dignity in the *Law* test. The Section 7 arguments will be addressed in Part C, below.

Section 15(1) of the Charter provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without

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[7] John Rawls, Political Liberalism (1993).

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discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[8]

In 1984, the Quebec government amended its social welfare program to require that individuals under thirty participate in one of three "workfare" training courses before they would be eligible for full welfare benefits. Section 29(a) of the *Regulation Respecting Social Aid*[9] set the welfare rate for persons between eighteen and thirty at approximately one-third of what was provided for adults over the age of thirty. In practice, individuals like Gosselin received $170 per month, compared to $466 per month allocated to older welfare recipients, unless they attended state-run employability programs as mandated by the challenged legislation. There were only 30,000 places available in these programs and roughly 75,000 young adults who needed to participate in them in order to claim additional support. Even then, not all participants received the full amount.[10] Additional restrictions were imposed, such as time delays between enrollment in each of the three programs and limiting criterion for education or literacy levels of participants.[11] The effect of the legislation was to force a large number of Quebec youth to subsist on a below-minimum income—below even the Quebec government's own calculations of what was required for bare subsistence living.[12] The legislation was eventually repealed in 1989.

Louise Gosselin challenged the constitutionality of the Quebec legislation on behalf of those affected by it during the period of 1984–89. Under Section 15, she alleged that the legislative scheme unfairly discriminated against persons eighteen to thirty years old, causing severe hardship and disadvantage. The Court split 5-4 on this issue.[13] Justice McLachlin, writing for the majority, found no basis for the claimant's Section 15 allegations. Despite drawing a formal age-based distinction between targeted groups, the law in question was not held to be discriminatory in a substantive sense. The essence of the majority's position was that the disentitlement of individuals under thirty from full welfare benefits did not reflect the idea that members of this class are less deserving of respect nor perpetuate the view that they are less valuable as human beings. Thus, the

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[8] Canadian Charter of Rights and Freedoms, s. 15(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

[9] Regulation Respecting Social Aid, R.R.Q., 1981, c. A-16, r. 1, §. 29, *amended by* 113 O.G. II 4118 (Can.).

[10] Gwen Brodsky & Shelagh Day, *Women's Poverty Is an Equality Violation*, *in* MAKING EQUALITY RIGHTS REAL: SECURING SUBSTANTIVE EQUALITY UNDER THE CHARTER 323 (Fay Faraday, Margaret Denike & M. Kate Stephenson eds. 2006).

[11] *Id.*

[12] *Id.*; *see also* Gosselin v. Quebec (Att'y Gen.), [2002] 4 S.C.R. 429, para. 130 (Can.) (L'Heureux-Dubé, J. dissenting).

[13] *See Gosselin*, 4 S.C.R. 429 (Can.) (explaining that the Court split 5-4 on the decision with L'Heureux-Dubé, Bastarache, Arbour, & LeBel, JJ., dissenting).

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age-based distinction was found not to violate the claimant's human dignity and therefore not to constitute a breach of her equality rights.

Justices L'Heureux-Dubé, Bastarache, Arbour, and LeBel dissented, finding that the effect of the scheme was to deny the claimant full participation in a vital benefit to which other Canadians were entitled. The legislation therefore constituted a breach of Section 15 and was not saved by Section 1. Justice L'Heureux-Dubé's separate opinion on this issue can be usefully compared to the majority's position. Their rival conception of human dignity, involved at the third stage of the *Law* test then in use for Section 15 allegations, reveals the degree to which judicial interpretation can affect the scope of legal rights and determine the outcome of constitutional litigation. The precise mechanics of this test will be discussed in greater detail in Part D. For the moment, suffice it to say that a finding of Section 15 infringement at the time required the establishment of a distinction, drawn on the basis of an enumerated or analogous ground of Section 15, and the application of four contextual factors which sought to establish whether substantive discrimination had occurred. *Law* specified that the question posed by an investigation of substantive discrimination is "whether a reasonable person in the claimant's position would experience the legislation as a harm to her dignity."[14]

According to the majority, personal dignity is not demeaned by laws which purport to improve a person's welfare or employ distinctions actually corresponding to the situation of the claimant.[15] The majority accepted the idea that younger persons are more capable of retraining and employment and would benefit from government-imposed employment training programs. *A fortiori*, a law singling out youth for denial of benefits so as to induce them to enroll in remedial education courses functions not by stereotype or prejudice, but by distinctions sufficiently correspondent to the reality of the individuals concerned.[16] They need not actually do so. As the Court noted in *Law*: "Legislation need not always correspond perfectly with social reality in order to comply with Section 15(1) of the Charter."[17] Justice McLachlin echoed this sentiment in *Gosselin*, arguing that "[p]erfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required" by Section 15.[18]

By not being able to participate in the available programs, Gosselin attracted the Court's "sympathy." However the inability of the Quebec welfare program to accommodate "each

[14] Law v. Canada (Minister of Emp't & Immigration), [1999] 1 S.C.R. 497, para. 7 (Can.).

[15] *Gosselin*, 4 S.C.R. 429, paras. 42–44 (Can.).

[16] *Id.*

[17] *Law*, 1 S.C.R. 497, para. 105 (Can.).

[18] *Gosselin*, 4 S.C.R. 429, para. 55 (Can.).

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and every individual" did not permit the conclusion that it failed to correspond with the needs of all affected or that the distinctions contained in the law constituted discrimination in the substantive sense.[19] Instead, this situation merely reflected that "[s]ome people may fall through [the] cracks."[20]

In the face of less than 30% participation in the workfare programs, the majority found it difficult to infer that the program failed to meet the needs of those under thirty.[21] The Court also found it difficult to infer that the law adversely affected younger welfare recipients in a concrete way. The fact that $170 per month is clearly inadequate for basic subsistence was not dispositive nor could the majority fathom the fact that, in many cases, this amount represented an individual's only monthly income.[22]

The majority's task was to adopt the perspective of a reasonable person *in the claimant's position*, in assessing whether a violation of human dignity had occurred.[23] Who was the reasonable person, in the majority's view? Per Chief Justice McLachlin: "[t]he regime constituted an affirmation of young people's potential rather than a denial of their dignity."[24]

Apparently, the reasonable claimant would recognize that "simply handing over a bigger welfare cheque" would have impaired her long-term ability to enter the labour market.[25] This is because reliance on welfare in one's formative years can disrupt an individual's capacity for "economic self-sufficiency and autonomy, not to mention self-esteem."[26] Any reasonable person would have "taken this into account."[27]

From the perspective of the reasonable claimant, the requirement of participation in government training programs in order to receive more than $170 per month was

[19] *Id.*

[20] *Id.*

[21] *Id.* at para. 8.

[22] *See id.* at para. 64 (noting that "the availability of other resources, like family assistance" likely mitigated any adverse impacts of the law).

[23] *Id.* at para. 44.

[24] *Id*.

[25] *Id.* at para. 27.

[26] *Id.* at paras. 43–44.

[27] *Id.*

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therefore not a burden but a reasonable "incentive . . . supported by logic and common sense."[28]

I make one further comment. The majority repeatedly emphasized the value of self-sufficiency and productive participation in the labour force.[29] The implication of their analysis is that a person's long-term ability to work is more important to dignity than the ability to meet daily subsistence needs. It is possible that both are required for a full conception of human flourishing. I am bothered, however, by the majority's allusion to the allocation of taxpayer dollars in their dismissal of the case at paragraph 47:

> It is, in my respectful opinion, utterly implausible to ask this Court to find the Quebec government guilty of discrimination under the Canadian Charter and order it to pay hundreds of millions of taxpayer dollars to tens of thousands of unidentified people, based on the testimony of a single affected individual.[30]

Rhetoric about self-sufficiency and rationality notwithstanding, this appears to be the most honest moment of the majority judgment and the most revealing of their perceptions of the plaintiff's case. Compare, instead, Justice L'Heureux–Dubé's construal of the plaintiff's circumstances and the nature of the law's effect on her dignity interest. Given the clarity with which Justice L'Heureux–Dubé describes her position, I reproduce her comments in detail:

> The sole remaining question is whether a reasonable person in Ms. Gosselin's position, apprised of all the circumstances, would perceive that her dignity had been threatened. The reasonable claimant would have been informed of the legislature's intention to help young people enter the marketplace. . . . She would have been told that the long-term goal of the legislative scheme was to affirm her dignity. The reasonable claimant would also likely have been a member of the 88.8 percent who were eligible for the programs and whose income did not rise to the levels available to all adults 30 years of age and over. Even if she wished to participate in training programs, she would have found

[28] *Id.*

[29] *Id.*; *see, e.g.*, *id.* at para. 65.

[30] *Id.* at para. 47.

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> that there were intervals between the completion of one program and the starting of another, during which the amount of her social assistance benefit would have plunged. The reasonable claimant would have made daily life choices in the face of an imminent and severe threat of poverty. The reasonable claimant would likely have suffered malnourishment. She might have turned to prostitution and crime to make ends meet. The reasonable claimant would have perceived that as a result of her deep poverty, she had been excluded from full participation in Canadian society.[31]

In short, according to Justice L'Heureux–Dubé, the reasonable claimant would have perceived that her dignity was infringed in addition to being reduced to circumstances of even more severe poverty by the Quebec welfare scheme.

The Section 15 analysis in *Gosselin* revealed deep divisions in the Court's construal of the *Law* test. By an act of conservative judicial interpretation, the majority read the content of the right to equality as involving an interest in freedom from negative stereotyping and the concept of human dignity as based on traditional values of economic productivity and self-sufficiency. In contrast, Justice L'Heureux–Dubé read the equality right broadly, emphasizing the marginalizing effects of the challenged welfare scheme and the importance of meeting daily subsistence needs in maintaining a dignified life. As a result of *Kapp*, the question of how to interpret human dignity under Section 15 is no longer open to the Court. Despite problems with the human dignity analysis in *Gosselin*, I question whether the retreat from the *Law* framework is actually helpful in social rights cases. I turn first to a discussion of the Section 7 claim in *Gosselin.*

C. The Right to Welfare in *Gosselin*

The claimant in *Gosselin* also argued that the Quebec legislation, by denying full welfare benefits to those under 30, violated the Section 7 guarantee of "security of the person."

Section 7 of the Charter provides: "Every person has the right to life, liberty and security of the person, and the right not to be deprived thereof, except in accordance the principles of fundamental justice."[32]

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[31] *Id.* at paras. 131–32.

[32] Canadian Charter of Rights and Freedoms, s. 7, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

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The majority upheld the challenged provision, finding that the factual record was insufficient to support the claimant's position.[33] The Court thereby avoided ruling on the main question raised by the case—the justiciability of social rights under the Charter. In her brief comments on the issue, Chief Justice McLachlin, writing on behalf of Justices Gonthier, Iacobucci, Major, Bastarache, Binnie, and LeBel, voiced two preliminary objections: the interpretation of the Charter as an inherently negative instrument, and the Court's authority, in light of the historical separation of powers, to review matters of "political" or "public" policy. A third objection, concerning judicial competence and the ability of judges to inquire into the substance and adequacy of social welfare allocations, was discussed by Justice Arbour in her dissenting reasons.[34] These arguments question the capacity of courts to impose positive obligations on governments and allege that social rights are improper subjects for adjudication. Below, I sketch out the reasoning of the Court, particularly Justice Arbour's dissent.

The substance of the plaintiff's allegations was that the right to security of the person under Section 7 includes the right to minimum welfare provision by the state.[35] Moreover, the denial of this basic entitlement in the circumstances did not accord with the principles fundamental justice.[36] The Quebec legislation was, therefore, unconstitutional.

The majority found it unnecessary to rule directly on whether Section 7 included a right to social assistance. At the first instance, they noted that the application of Section 7 in the jurisprudence was traditionally confined to the criminal justice context. This presented the first "hurdle": Whether or not to allow Section 7 protection of interests outside of the "administration of justice," specifically to those interests involving "economic rights fundamental to human . . . survival."[37] This question was asked, but not answered, by Chief Justice Dickson in *Irwin Toy Ltd. v. Quebec (Attorney General)*.[38] The majority in *Gosselin* also declined to rule on this issue.

A second obstacle, in the Court's view, was the question of whether Section 7 imposed positive obligations on the state to ensure the "security" or welfare of its citizens. Chief Justice McLachlin ruled that "one day [Section] 7 may be interpreted to include positive obligations," but found that the case at bar did not "warrant a novel application of [Section] 7" to support the recognition of a constitutional guarantee of social support in

[33] *Gosselin*, 4 S.C.R. 429, para. 75 (Can.).

[34] *Id.* (L'Heureux-Dubé, J., concurring in the dissent).

[35] *Id.* at para. 75.

[36] *Id.*

[37] *Id.* at para. 80 (McLachlin, C.J.) (quoting Irwin Toy Ltd. v. Quebec (Att'y Gen.), [1989] 1 S.C.R. 927, 1003 (Can.)).

[38] *Id*.

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the circumstances.[39] Evidence of "actual hardship" was lacking, making *Gosselin* an inappropriate basis on which to ground positive state obligations of this nature: the "frail platform provided by the facts" of *Gosselin* could "not support the weight of a positive state obligation of citizen support."[40]

The Court's refusal in *Gosselin* to recognize social rights under Section 7 appears to only formally rest on concerns about the evidentiary record. Given the same facts, Justice Arbour found ample evidence for a Section 7 violation. The real issue seems to be about perceptions of institutional legitimacy. Justice Arbour raised this point in her dissent. She found that the case disclosed a sufficient material basis to recognize a positive right to welfare under Section 7, that the legislation in question violated this right, and that fears about the legitimate scope of judicial review were largely misplaced.

According to Justice Arbour, the barriers raised by the majority to preclude a finding that positive social rights were implicated in the circumstances were "unconvincing."[41] In the first place, she found that the question of allowing "economic rights" protection in the nature of social welfare assistance is separate from the issue of constitutionalizing "property" rights. The constitutional recognition of social rights does not support the latter question.[42]

Justice Arbour also challenged the view that the Charter only protects negative rights. Citing *Dunmore v. Ontario (Attorney General)*, [43] she argued that recent jurisprudence had recognized that state inaction possibly interferes with individual rights. Thus, in certain circumstances, it may be necessary to compel the state to extend positive legislative protections to its citizens: "In certain cases, Section 7 can impose on the state a duty to act

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[39] *Id.* at para. 81:

> Section 7 speaks of the right *not to be deprived* of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to *deprive* people of these. Such a deprivation does not exist in the case at bar.

[40] *Id.* at para. 83.

[41] *Id.* (Arbour, J., dissenting).

[42] *See id.* ("The right to a minimum level of social assistance . . . can be readily accommodated under the s. 7 rights to 'life, liberty and security of the person' without the need to constitutionalize 'property' rights or interests.").

[43] In *Dunmore v. Ontario (Att'y Gen.)*, [2001] 3 S.C.R. 1016 (Can.), the Supreme Court recognized that constitutional violations are not limited to instances of government misfeasance, but that legislative nonfeasance can also invite *Charter* scrutiny.

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where it has not done so."[44] The *Gosselin* case, in her view, presented one such occasion where the recognition of positive rights would be warranted.[45] In conclusion, Justice Arbour noted her concern with the position that social rights claims are not justiciable, given their origin as a matter of political responsibility. This was a weak objection when the right to basic subsistence was at stake. While acknowledging that courts are "ill-equipped to decide policy matters concerning resource allocation," she specified that "the role of the courts as interpreters of the Charter and guardians of its fundamental freedoms requires them to adjudicate" rights-based claims.[46] In her view, the traditional separation of powers meant that the question of how much the state should allocate to social programming was perhaps injusticiable, but whether or not they provided basic support was, without question, within the scope of judicial authority.[47]

The majority's emphasis on the negative nature of *Charter* rights must be questioned in light of Justice Arbour's arguments against this theory. Is the Court truly unfit to adjudicate questions of social rights, or is it simply unwilling to do so? Its refusal to even question the social welfare allocation of the challenged legislation or to decide on whether Section 7 can operate to compel political action in this case suggests that such limits may be largely self-imposed. The Court seems to acknowledge this by leaving open the question of positive rights for some future case, yet remains more concerned about institutional legitimacy than its remarks concerning Section 7 directly suggest. The entire judgment, including the Court's narrow reading of Section 15, is infused with judicial conservatism. It discloses a view of judicial authority as presumptively limited vis-à-vis the government in constitutional challenges to matters of "social policy." Despite being directly implicated by the *Gosselin* case, the Court preferred to leave the constitutional status of social rights unresolved.

In Germany, the Federal Constitutional Court has answered the question of social rights through interpretation of the human dignity clause in Article 1(1) of the Basic Law. This provision has provided legal support for the judiciary to compel the state to provide for the minimum basic needs of its citizens. The Canadian Supreme Court has also recognized the concept of human dignity as supportive of constitutional rights, notably in the context of Section 15 adjudication. *Gosselin* is significant because it represented a moment of intersection between the question of social rights recognition and the application of human dignity as part of the legal test for equality rights infringement. Despite the potential for human dignity to provide substantive legal support for social rights, as is the case in Germany, the Court in *Gosselin* chose to read this concept narrowly,

[44] *Gosselin*, 4 S.C.R. 429

[45] *Id.* (Arbour, J., dissenting).

[46] *Id.*

[47] *Id*.

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notwithstanding its insistence in *Law* that the protection of human dignity is the primary purpose of Section 15 and the substantive principle underlying the equal rights guarantee. In *Kapp*, the Supreme Court declared, *in obiter*, that human dignity was a philosophical concept only and not a stable test for whether substantive discrimination had occurred. In my view, the question of whether human dignity is a legal or merely "moral" right is crucially related to whether or not social rights may one day be constitutionally recognized. My argument is supported not only by the example of the German Court, but also by the model of South African Constitutional Law and the *Universal Declaration of Human Rights*, both of which affirm human dignity and a right to social support thereby.[48] Although the latter two legal regimes are outside of the scope of this Essay, a review of the status of human dignity in Canadian equality jurisprudence is required in order to clarify my position. A comparison with German constitutional law, discussed in Part E below, will reinforce my argument.

D. Human Dignity as a Constitutional Value in Canada

The Canadian Constitution does not contain an explicit right to human dignity: While it is acknowledged to be an underlying moral principle, the Supreme Court has resisted legal recognition of human dignity as a right. The *Law* decision was a benchmark in Canadian equality jurisprudence. It represented the first enunciation of human dignity as a legal principle underlying the equality guarantee[49] and a moment of doctrinal consensus amidst severe disagreement within the Court regarding the precise values protected by Section 15 and the proper approach to its analysis.

I. Law v. Canada (Minister of Employment and Immigration)

Law concerned a Section 15 Charter challenge to age-based distinctions in the Canada Pension Plan (CPP). The claimant, a thirty-year-old woman in good health and having no dependent children, was denied survivor's benefits according to a formula which discounted the pension for able-bodied surviving spouses without dependent children on the basis of the recipient's age. The effect of the discount was such that the claimant's benefits would be withheld until she reached retirement age. The claimant brought suit

[48] *See* S. AFR. CONST., 1996; *see also* Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III), (10 Dec. 1948), *available at* http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng (last visited 7 Nov. 2011); Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137 (2003).

[49] Human dignity has a long-standing history, however, as a conceptual value and the "lodestar" of *Charter* rights interpretation. *See* R. v. Kapp, [2008] 2 S.C.R. 483, para. 21 (Can.). In *R v. Oakes*, [1986] 1 S.C.R. 103, 136 (Can.), Justice Dickson stated: "The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality . . . and faith in social and political institutions which enhance the participation of individuals and groups in society."

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alleging that the denial of benefits under the CPP constituted an infringement of her Section 15 equality rights and that it was not justified under Section 1. The Court answered these allegations in the negative. In so doing, the judges unanimously agreed on the legal test to be followed in Section 15 equality cases.

The Court declared that the purpose of Section 15 is the protection of human dignity: "To prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society . . . ."[50]

Because individuals are to be treated equally "as human beings or as members of Canadian society,"[51] laws based in stereotype and prejudice are unacceptable because they fail to fulfill the government's duty to respect the dignity of its citizens. Thus, the test for Section 15 should ask, first, whether the impugned law (a) draws a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fails to account for pre-existing disadvantage, which results in substantively differential treatment between the claimant and others on the basis of the distinction drawn.[52]

At the second stage, the question is whether or not the claimant was subject to differential treatment on the basis of an enumerated or analogous ground in Section 15(1).[53] If this was so, the analysis would shift to focus on whether the differential treatment caused discrimination in a substantive sense, defined according to the law or program's impact on the claimant's human dignity.[54] A finding of substantive discrimination at the third stage involved the assessment of four contextual factors:

(1) pre-existing disadvantage;

(2) correspondence between the impugned law and the claimant's actual characteristics or circumstances;

(3) any ameliorative purpose or effect of the impugned law; and

[50] Law v. Canada, [1999] 1 S.C.R. 497, para. 51 (Can.).

[51] *Id*.

[52] *Id.* at para. 39.

[53] *Id.*

[54] *Id.*

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(4) the nature and scope of the interest affected.[55]

Law recognized, therefore, that the real interest underlying a finding of substantive discrimination under Section 15 is the universal claim to dignity, a right to which all individuals have a claim simply by virtue of their humanity. The Court found that the distinction drawn by the CPP legislation was permissible and did not violate Section 15. Procedurally, the case remains important because it established human dignity *as a legal test* against which government conduct would be evaluated. Not a decade later, the Supreme Court rejected the concept of human dignity as a workable framework for Section 15 analysis under the Charter.

II. R. v. Kapp

In *R. v. Kapp*, the Supreme Court of Canada revisited the legal test for Section 15 violations. Although unnecessary to decide the case (which concerned the Charter protection, under Section 15(2), of communal fishing licenses issued to aboriginal bands), the Court saw occasion to restate the *Law* test, and to remove the dignity principle from the equality analysis.

Kapp raised the question of whether the British Columbian government could discriminate between aboriginal and non-aboriginal fishers in the issuance of communal fishing licenses. The province had introduced a pilot sales program allowing members of three aboriginal bands the exclusive right to fish for salmon for twenty-four hours. The non-aboriginal and commercial fishers excluded from the program brought a Charter challenge alleging race-based discrimination, in breach of their Section 15 equality rights. The case directly implicated the scope and operation of Section 15(2), which was designed to insulate government "affirmative action" measures such as the program in question. In ruling that the communal fishing license fell within the ambit of Section 15(2) and was therefore constitutional, the Court clarified the relationship between Section 15(1) and Section 15(2), and chose to "re-focus" the test for breaches of Section 15(1).[56]

Law had established human dignity as the touchstone of the equality analysis. Accordingly, the Court focused on whether or not that case involved a violation of the plaintiff's dignity. In *Kapp*, the Court declared that *Law* had not, in fact, introduced a new test for showing discrimination under Section 15(1).[57] It had simply affirmed the two-step test set out in *Andrews v. Law Society of British Columbia* [1989], [58] which the Court restated as follows:

[55] *Id.* at paras. 62–74.

[56] R. v. Kapp, [2008] 2 S.C.R. 483, para. 23 (Can.).

[57] *Id.* at para. 15.

[58] Andrews v. Law Soc'y of British Columbia, [1989] 1 S.C.R. 143, para. 17 (Can.); *see also Kapp*, 2 S.C.R. 483 at

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(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[59]

Any reference to human dignity as the substantive basis for a finding of discrimination was recast in terms of *Andrews*, where the perpetuation of disadvantage and stereotyping had been, and were again, the primary indicators of discrimination.[60]

Tout court, the justices argued that, although the *Law* decision "made an important contribution to our understanding of the conceptual underpinnings of substantive equality," "human dignity" was simply too weighty a concept for plaintiffs to prove.[61] Because human dignity is an "abstract and subjective notion," "several difficulties" had emerged from the attempt to employ it "*as a legal test.*"[62] It had proven to be a barrier to Section 15 claimants, "rather than the philosophical enhancement it was intended to be."[63] Moreover, the four factors enunciated in *Law* for assessing discrimination were "confusing and difficult to apply" and they should not be employed as a "formalistic," i.e., legal, test for determining substantive inequality[64]: "The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focusing on the central concern of [Section] 15 . . . combating discrimination, defined in terms of perpetuating disadvantage and stereotyping."[65]

In other words, the Court's "focus" is now not on human dignity, but on preventing legislative discrimination which creates a disadvantage in two possible ways: by perpetuating prejudice or by applying a stereotype.[66] Viewed in this way, "remedial" or

para. 23 (Can.).

[59] *Andrews*, 1 S.C.R. 143, para. 17 (Can.).

[60] Notably, in the Supreme Court's more recent decision in *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222 (Can.), the Court did not refer to *Law*, "human dignity", or the four contextual factors for a finding of discrimination employed in *Law*. The removal of human dignity as a legal principle from s. 15 *Charter* analysis would appear complete.

[61] *Kapp*, 2 S.C.R. 483, para. 20 (Can.).

[62] *Id.* (emphasis added).

[63] *Id.* at para. 22.

[64] *Id.* at para. 23.

[65] *Id.* at para. 24.

[66] *Id.* at para. 23.

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"beneficial" legislation, such as that at issue in *Gosselin* and in *Law*, would rarely be found to *create* a disadvantage—social welfare is, after all, a matter of government largesse and not an "entitlement" or the source of legal rights. This possibility is compounded by the Court's approach in *Gosselin*, which seemed to accept government good faith and a beneficent purpose as dispositive of whether or not a rights violation had occurred. In her dissenting opinion, Justice L'Heureux–Dubé expresses this concern:

> At the [Section] 15 stage, courts should not be concerned with whether the legislature was well-intentioned. By necessary implication, the fact that a legislature intends to assist the group or individual adversely affected by the impugned distinction also does not preclude a court from finding discrimination . . . . Of course, benign legislative intent may aid in saving a discriminatory distinction at [Section] 1, but that is a separate inquiry.[67]

The SCC has been clear that "the differential treatment of younger people" in government social programs does not perpetuate prejudice or stereotyping in a formal sense, so long as the distinction employed corresponds to the general circumstances of the individuals involved.[68] Moreover, the government is entitled to "a margin of appreciation"[69] in deciding the terms on which a welfare-benefits scheme is enacted:

> The fact that the legislation is premised upon informed statistical generalizations which may not correspond perfectly with the long-term financial need of all . . . does not affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant. Parliament is entitled, *under these limited circumstances at least*, to premise remedial legislation upon informed generalizations without running afoul of [Section] 15(1) . . . .[70]

In *Law*, the Court emphasized, however, that "a more precise correspondence" will be required when the individual or group excluded by the legislation "*is already disadvantaged*

[67] Gosselin v. Quebec (Att'y Gen.), [2002] 4 S.C.R. 429, para. 112 (Can.).

[68] Law v. Canada, [1999] 1 S.C.R. 497, para. 10 (Can.).

[69] *Gosselin*, 4 S.C.R. 429, para. 55 (Can.).

[70] *Law*, 1 S.C.R. 497, para. 10 (Can.).

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or vulnerable within Canadian society."[71] Thus, in asking whether a distinction perpetuating disadvantage implicates the right to equal treatment—*in a substantive sense*—a greater, rather than less, "nuanced inquiry" is required.[72]

As discussed, *Gosselin* was decided on the basis of the *Law* test, at a time when an assessment of human dignity still pertained. Rather than considering whether the claimant's dignity was infringed, i.e., by the denial of social support which was necessary for a dignified existence, let alone a basic subsistence according to the government's own formula, the Court looked only to the narrow legalities of the *Law* framework. In denying Gosselin a remedy, the majority of the SCC completely ignored her actual experiences of discrimination.

We know that the Court may be reluctant to enforce what it considers to be strictly political obligations. We may also prefer the political process as the primary means of establishing national social policies. But this does not place existing welfare legislation beyond Charter scrutiny. The government should not be allowed to impose arbitrary or discriminatory standards in enacting legislation or conducting any programme. This goes to the heart of the Section 15 equality guarantee. Section 15(2) is an exception; it allows that legislation conferring a benefit on an already disadvantaged group be insulated from allegations of discrimination, from those *more advantaged* in society. There is no legislative exception to the effect that, so long as the law in question presents some group with a "benefit" (notwithstanding the idea that welfare support is a civic right and a matter of collective responsibility), it need not do so indiscriminately. For this reason, the third factor enunciated in *Law*—whether the challenged distinction was intended to improve the welfare of a more disadvantaged group—can be misleading. Justice L'Heureux–Dubé made this point explicitly in *Gosselin*:

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[71] *Id.* (emphasis added).

[72] *Ontario (Disability Support Program) v. Tranchemontagne* (2010), O.A.C. 593, paras. 90–91 (Can. Ont. C.A.), may be a source of optimism. Although directly concerned with a challenge to the equality guarantees of the *Human Rights Code*, the court noted that:

> [I]n the human rights context, in most instances, it will be evident that a *prima facie* case of discrimination has been established based solely on the claimant's evidence showing a distinction based on a prohibited ground that creates a disadvantage (in the sense of withholding a benefit available to others or imposing a burden not imposed on others) . . . . However, in other instances a more nuanced inquiry may be necessary to properly assess whether a distinction based on an enumerated ground that creates a disadvantage actually engages the right to equal treatment under the Code in a substantive sense.

Id.

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> I would like to address an apparent confusion. *Law* states at para. 72: "An ameliorative purpose or effect which accords with the purpose of [Section] 15(1) of the Charter will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation."
>
> This passage makes clear that the ameliorative purpose must be for the benefit of a group less advantaged than the one targeted by the impugned distinction. The relevant ameliorative purpose . . . is not defined with reference to the group that suffers the disadvantage imposed by the impugned distinction.[73]

There is no principled reason why social policy legislation, if it discriminates among members of Canadian society and does not fall under Section 15(2), should be afforded any deference at the initial stage of the Section 15(1) analysis. As with other Charter remedies, the scope of the guarantee should be read in light of the values it was meant to protect. Deference to government decisions is a question that properly belongs under Section 1, where the government is given a chance to justify the legislative measures it adopted.[74] This is to ensure that government standards are not arbitrary and that they correspond to and represent the public interest, rather than some ancillary or colourable purpose.

The effect of *Gosselin* was to push questions of government justification, where remedial legislation is concerned, back onto to the plaintiff. Under the four factors presented by *Law*, Louise Gosselin was asked to adduce evidence not only that the impugned law was discriminatory, but also that there existed a correspondence between the impugned law and her actual characteristics or circumstances. This placed an unrealistic burden of proof on the claimant, and shifted an important aspect of government justification from the basic limitations structure, thus elevating what was earlier only *de facto* deference where remedial social policy legislation is concerned into a posture of deference as a matter of law.

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[73] *Gosselin*, 4 S.C.R. 429, para. 136 (Can.) (L'Heureux-Dubé, J., dissenting).

[74] *Id.* at para. 113. Under *R v. Oakes*, [1986] 1 S.C.R. 103, 136 (Can.), "the analysis of the right at issue should be kept separate from the inquiry into an impugned distinction's justification." *See also* Andrews v. Law Soc'y of British Columbia, [1989] 1 S.C.R. 143, para. 182 (Can.).

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The Court's intent in *Kapp*, it seems, was to remedy these concerns. The removal of human dignity from the equality analysis and the confinement of Section 15 allegations to questions of "stereotyping" or "prejudice" is not the correct approach, however. It goes too far. While these concepts may provide some insight into what constitutes discrimination in particular circumstances, a categorical approach to equality is problematic because equality claims are, by nature, fact-specific.

In my view, a more tailored approach to the interpretation of Section 15 is one that retains the *Law* framework, but does not compel litigants to prove each and every aspect of the four factors enunciated in the third stage, as the majority in *Gosselin* seemed to require.[75] As developed in *Andrews*, the first question should be whether the conduct complained of makes a distinction, on some prohibited ground, creating or perpetuating a disadvantage to the claimant. If a breach of a prohibited ground is established, and causation and injury shown, then the principles underlying equality, and in particular the concept of human dignity, should be examined in order to determine whether substantive discrimination has occurred.

Courts considering claims under Section 15 should therefore examine contextual realities. Conduct that is discriminatory may vary widely according to the actual circumstances of the plaintiff, and what is objectionable in one situation may not be in another. Nor should discrimination be evaluated entirely from the claimant's perspective; this would turn the question of Section 15 infringement into a largely subjective one and place an impossible burden on the government. Rather, the approach to Section 15 interpretation should be objective and also contextual, having regard to the actual circumstances of the claimant and to the broader principles underlying the equality guarantee and the Charter generally.[76]

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[75] In *Law*, 1 S.C.R. 497, para. 10 (Can.), the Court emphasized that "There is [sic] a variety of factors which may be referred to by a s. 15(1) claimant in order to demonstrate that legislation demeans his or her dignity. The list of factors is not closed . . . ."

[76] *See id.* at para. 7 (Iacobucci, J.) ("The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant. The focus of the inquiry is both subjective and objective. The relevant point of view is that of the reasonable person . . . ."). This was echoed by Justice L'Heureux-Dubé in her dissent in *Gosselin*:

> In *Egan* . . . I held (at para. 56) that the examination of whether a distinction is discriminatory should be undertaken from a subjective-objective perspective: i.e. from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member.

Gosselin 4 S.C.R. 429, para. 123 (Can.).

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What constitutes discrimination should not be narrowly defined or limited to the categories of "prejudice" and "stereotyping." These categories may often be involved in a finding of discrimination, but it is possible for discrimination to occur outside of them. This is particularly the case when the government denies or restricts the provision of an important benefit to which others in the community have access. The concept of human dignity provides vital grounds for the court to intervene in these circumstances, such as if the government rolls back social welfare programmes or denies its citizens some "dignity constituting" benefit.[77] It also presents an important guide to plaintiffs alleging discriminatory conduct which may lie beyond conventional legal territory, such as in *Gosselin* and in the latter situation, generally, where an important benefit is denied.

As a matter of litigation strategy, violations of "human dignity" may have proven a difficult thing for claimants to demonstrate, but without it, the *Kapp* approach offers an incomplete picture of conduct that is discriminatory and inequitable. The answer may lie in affirming human dignity as a legal ground by which discrimination may be shown, but only if a claimant's case falls outside of the categories recognized by *Kapp.* In other words, the contextual factors outlined in *Law* are not mandatory for every Section 15 claimant, but offer additional arguments to which a plaintiff may resort. This formula remains faithful to the *Law* approach:

> Although the [Section] 15(1) claimant bears the onus of establishing an infringement of his or her equality rights in a purposive sense through reference to one or more contextual factors, *it is not necessarily the case that the claimant must adduce evidence in order to show a violation of human dignity or freedom*.[78]

Viewed in this way, the human dignity concept indicates the type of wrong or conduct at which the Section 15 remedy is aimed. It also remains the basis for the equality analysis. The particular types of discrimination described in the *Kapp* test (prejudice or stereotyping) may be seen as illustrations or examples of how dignity may be infringed, rather than representing a closed list of categories by which discrimination may be shown.

This approach focuses on the fact that Section 15 provides a rights-based remedy. It seeks to ensure substantively equal treatment of all Canadians and is premised on the view that

[77] For a useful analysis, see Denise Réaume, *Discrimination and Dignity*, 63 LA. L. REV. 1 (2004), which describes protection against the denial of dignity constituting benefits as a key feature of the Section 15 equality guarantee. *See also* Chris Essert, *Dignity and Membership, Equality and Egalitarianism: Economic Rights and Section 15*, 19 CAN. J. L. & JURIS. 407 (2006).

[78] *Law*, 1 S.C.R. 497, para. 10 (Can.) (emphasis added).

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membership in the community entitles one to certain rights.[79] The Court seemed to allude to this approach in *Law* when it asserted that all Canadians are to be treated equally "as human beings or as members of Canadian society."[80]

The alternative, in which human dignity is read down to a nebulous "philosophical" concept, considerably narrows the scope of the equality guarantee.[81] It also does not provide sufficient guidance for the court to determine whether a violation of Section 15 has occurred in social rights claims which may or may not involve "prejudice" or "stereotyping." Claimants whose cases do not fit so neatly within these juridical categories, but who have a real claim to government discrimination, are likely out of luck.

The combined effect of *Gosselin* and *Kapp* is to dramatically restrict social rights recognition in Canada. This may be, in part, the Court's objective, but it runs against the Charter mandate to approach constitutional rights claims purposively.[82] Judicial review of social welfare legislation has the potential to encourage government policies that are more effective, rather than less. It does not represent an unwarranted intrusion by judges into political territory, but falls precisely within the mandate of judicial authority afforded by the Charter equality guarantee.

Frustration grows when the status of social rights in Canada is contrasted with that in Germany, where the Federal Constitutional Court is committed to both social welfare principles and the substantive interpretation of individual rights. This comparison of the Canadian and German high courts is valuable for two reasons. First, it offers a perspective on human dignity as an objective constitutional value that is relevant to Canadian public law, and, second, the social rights jurisprudence of the German Constitutional Court allows us to rethink the conservative approach that the Supreme Court of Canada has taken in this area.

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[79] *See generally* Essert, *supra* note 77.

[80] *Law*, 1 S.C.R. 497, para. 51 (Can.).

[81] R. v. Kapp, [2008] 2 S.C.R. 483, para. 23 (Can.).

[82] *See* Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145, 156 (Can.) (Laskin, C.J., taking no part in the decision) ("The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms.").

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E. The German Example

I. The Basic Law—A "Remedial" Constitution

The German Constitution (called the *Grundgesetz,* or Basic Law) came into being in May 1949, as the temporary constitution of Western Germany. Upon the German Reunion in October 1990, the Basic Law became the national constitution of the united Federal Republic.

The failures of the Weimar Republic and the atrocities committed by Hitler's government during World War II provided the incentive for the enactment of the new constitution. As Hannes Rösler argues, the Basic Law for Western Germany was an exercise of "moral cleansing through law" and an attempt to supersede and correct the structural weaknesses of the Weimar Constitution of August 1919.[83] The latter document's most glaring infirmities included the possibility of the prolonged suspension of civil rights during declared national emergencies, the infamous Article 48,[84] and no minimum vote requirement for parties to join the *Reichstag*.[85] The emergency decree was invoked in 1933 and provided the legal basis for the arrest and persecution of Hitler's political opponents.[86]

The Basic Law was also informed by the liberal and intellectual background of its framers. Inga Markovitz writes: "[T]he authors of the *Grundgesetz* were no men of the people."[87] Nearly half of the sixty-five people who drafted the Basic Law at the Parliamentary Council of 1949 were lawyers, and the others were civil servants. The two main parties, the Social Democrats and Christian Democrats, held the majority of seats; minor "bourgeois-liberal" parties and two Communist delegates held the remaining seats.[88] It was agreed that the new charter would not be ratified by a popular referendum but instead would be voted on by the representatives of the West German *Lander*.[89]

[83] Hannes Rösler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution—The Lüth Revolution 50 Years Ago in Comparative Perspective*, 23 TUL. EUR. & CIV. L.F. 4 (2008).

[84] Article 48 is well-known for giving the President extensive powers in times of emergency, including the authority to rule the Republic without the Reichstag.

[85] *Id.*

[86] *Id*.

[87] Inga Markovitz, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1309 (2008).

[88] *Id.*

[89] *Id.*

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The drafters' goal was modest: to entrench a bill of basic rights, while leaving political and legislative space for a future united Germany.[90] Despite the provisional nature of the Basic Law, Article 79(3) (*Ewigkeitsklausel*, or the "eternity" clause) places these fundamental rights beyond amendment, even by the people and the Federal Constitutional Court (FCC).

The core principle of German fascism was that the state was paramount over the freedoms of individual citizens. The Basic Law turned this philosophy on its head by placing human dignity at the top of the new constitutional order. Article 1(1) affirms that human dignity is "inviolable" and antecedent to political or legal authority: "to respect and protect it is the duty of all state authority."[91] The human dignity clause is also a major legal concept under the Basic law.[92] Although often read in conjunction with other constitutional rights, such as the right to free development of personality in Article 2(1), German Constitutional judges have a clear mandate to strike down any state or private action[93] which contravenes it. The strength of the human dignity clause, and indeed the Basic Law as a rights-protecting instrument, is a direct product of German political history.[94]

The Holocaust was clearly a negative reference point for the framers of the Basic Law. Their anguish is reflected in an original draft of the Preamble, which read: "The national-socialist tyranny has robbed the nation of its freedom. War and violence have plunged humanity into misery and destitution."[95] The final version took a more optimistic and forward-looking tone: "Conscious of its responsibility before God and Men, animated by the resolve to preserve its national political unity and to serve the Peace of the World as an equal partner in a united Europe, the German people . . . has enacted, by virtue of its constituent power, this Basic Law . . . ."[96]

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[90] *Id.* at 1310.

[91] GG, 23 May 1949, BGBl. I, art. 1(1) (Ger.).

[92] Kommers notes that the FCC has characterized human dignity as both "an objective and a subjective right:" Objective, because it imposes a positive obligation on the state to establish the prerequisite conditions of its realization, and subjective because it restrains the state from interfering with personal dignity and autonomy. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 312 (2d ed. 1997).

[93] *See* BVerfG 15 Jan. 1958 (*Lüth*), 7 BVERFGE 198, (__), 1 BvR 400/51 of 15 Jan. 1958 (Ger.).

[94] THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 12 (Ulrich Karpen ed., Nomos Verlagsgesellschaft Baden-Baden 1988).

[95] L. Weinrib, Constitutional Courts and Constitutional Rights (Fall 2010) (unpublished handout) (on file with author).

[96] L. Weinrib, Original Preamble to the German Basic Law, 1949 (Fall 2010) (unpublished handout) (on file with author).

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The spirit of the new constitution was therefore prospective, but wholly remedial in its aspirations for a new order of political, legal, and social life in post-World War II Germany.

II. Powers of the Court

Given the severe corruption of the Third Reich courts, the drafters of the Basic Law faced the challenge of defining judicial authority under the new constitution.[97] Article 93 of the Basic Law established a special judicial body, the German Federal Constitutional Court (*Bundesverfassungsgericht*, FCC), as the trustee and authoritative interpreter of the constitution.[98] According to this provision, the Federal Constitutional Court has the power to review legislation for compliance with the Basic Law and to invalidate laws that violate it. Under Article 93(1)[4a], the Court can review the decisions of administrative bodies and lower courts for constitutional compliance, although the Court has shown some reluctance to exercise this power of review of lower court decisions.[99] Individuals also have the right to bring "constitutional complaints" before the FCC and to seek a remedy, albeit only after they have exhausted other legal avenues.[100] Nonetheless, the procedure has proven very popular in Germany and constitutional complaints brought by individual plaintiffs comprise the bulk of the FCC's work.[101]

III. Judicial Interpretation of the Basic Law

The German Federal Constitutional Court has adopted a contextual and purposive approach to the interpretation of constitutional rights. The *Lüth* case (1958)[102] exemplifies this approach. In *Lüth*, the FCC held that the fundamental rights provisions of the Basic Law apply equally to relations between the state and individuals and relations between private individuals. The decision changed the "rules of the game"[103] in Germany and ultimately illuminates the core differences between German and Canadian constitutional interpretation.

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[97] *See* Rösler, *supra* note 83, at 10; *see also* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider trans., Harvard Univ. Press 1991); MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY (Thomas Dunlap trans., Univ. of Chicago Press 1998); Markus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COL. L. R. 1807 (1993) (reviewing MÜLLER, *surpa*).

[98] GG, 23 May 1949, BGBl. I, art. 93(1) (Ger.).

[99] Rösler, *supra* note 83, at 14.

[100] *Id.* at 13.

[101] Over 96% of the cases filed with the FCC since its establishment have been complaints of this nature. *Id.* at 14.

[102] BVerfG 15 Jan. 1958 (*Lüth*), 7 BVERFGE 198 (__), 1 BVR 400/51 of 15 Jan. 1958 (Ger.).

[103] Dennis-Jonathan Mann, *Legalization and Juridification: Judicial Review as a Catalyst of Institutional Change* 4 (European University Institute Draft), *available at* http://www.eui.eu/Personal/Researchers/mann/pdf/Mann,-Dennis-Jonathan_Judicial-Review_Catalyst_Institutional-Change.pdf (last visited 9 Nov. 2011).

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Lüth involved the boycott of a German filmmaker, Veit Harlan, who produced anti-Semitic material during the Nazi regime and re-emerged as a director in post-war Germany. Erich Lüth wanted to prevent the publication of Harlan's newest film and urged the public and film-distributors not to show it. Harlan secured a court order against Lüth, who, after appealing the order to no avail, filed a constitutional complaint with the FCC. Specifically, he alleged that the court-ordered injunction violated his right to free speech as guaranteed under Article 5(1) of the Basic Law.

In its judgment, the Court set forth a careful exposition of the content of the right to free speech as guaranteed by Article 5(1).[104] It ruled that the right embodies an individual and a social character, and has both positive and negative dimensions.[105] The Court then considered whether constitutional rights could apply beyond public law to restrain "general laws" in the private law realm.[106] The relevant question was whether the district court had to take into account the plaintiff's constitutional interest in free speech in upholding Harlan's private law right to commercial distribution of his films. The FCC found that the decision of the court below was based on "an incorrect application of the standards applying to basic rights" and violated the claimant's constitutional right to free expression.[107] The decision of the lower court was therefore set aside.

The case is significant for a number of reasons. First, *Lüth* affirms that the analysis of constitutional rights is purposive and applies in any instance of judicial review, whether concerning public or private law disputes. Second, the decision reveals the positive steps that the Court has taken to institutionalize and entrench its own authority.

In *Lüth,* the Court declared that the Basic Law is not "value-neutral" but establishes an objective order of values, the focal point of which is the protection of human dignity.[108] The constitution must therefore be regarded as applying to all "spheres of law [public and private]."[109] Private law relations must be "compatible" with constitutional values, and

[104] "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship." GG, 23 May 1949, BGBl. I, art. 5(1) (Ger.).

[105] *See* KOMMERS, *supra* note 92, at 363.

[106] *Lüth*, 7 BVERFGE 198 (__), 1 BVR 400/51 of 15 Jan. 1958, para. 1 (Ger.) (translated by Tony Weir).

[107] *Id.* at para. 4.

[108] *Id.* at para. 1.

[109] *Id.* at para. 3.

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"every such provision must be interpreted in [this] spirit."[110] On this basis, the Court developed the doctrine of third-party effect (*Drittwirkung*) whereby constitutional considerations may apply in private law disputes. Under this doctrine, there are several ways in which the Basic Law may affect legal relations. First, it can apply directly and "vertically" to state action, as is traditional in the legal systems of other Western constitutional democracies, such as Canada. Second, the Basic Law can apply "horizontally," either directly to private legal relations between individuals *inter se*, or indirectly, whereby public law norms are given interpretive effect in settling private law disputes.[111] In these circumstances, courts "apply and interpret private law, but the interpretation must conform to the Constitution."[112] Accordingly, the protection of fundamental rights is given priority in the domain of public and private law.

Because basic rights can also be infringed by a judicial decision, the FCC declared that its powers include the ability to review the decisions of ordinary courts where a constitutional complaint is alleged:

> The [Court] must have the legal right to control the decisions of the courts where, in applying a general law, they enter the sphere shaped by basic rights . . . . The [Court] must have the right to enforce a specific value found in the basic rights. [This authority] extends to all organs of public authority, including the courts.[113]

Therefore *Lüth* provided decisive support for the authority of the Basic Law and also the review power of the Constitutional Court, as the ultimate interpreter and trustee of the German Constitution.[114]

The judgment had a worldwide impact, informing even the judgments of the Supreme Court of Canada.[115] For our purposes, the *Lüth* case illustrates the substantive scope of constitutional law and the legitimacy of judicial authority in the area of basic rights protection.

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[110] *Id.*

[111] Eric Allen Engle, *Third Party Effect of Fundamental Rights* (Drittwirkung), 5 HANSE L. R. 165 (2009).

[112] *Lüth*, 7 BVERFGE 198 (__), 1 BVR 400/51 of 15 Jan. 1958 (Ger.), *translated in* Kommers, *supra* note 92, at 363; *see also* Engle, *supra* note 111, at 165–66.

[113] Weir, *supra* note 106, at 5.

[114] Rösler, *supra* note 83, at 31.

[115] *See id.* at 32; *see also* RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 (Can.).

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We have noted that the Canadian Charter and Supreme Court do not concede legal recognition of human dignity as a justiciable principle, and conversely, that this value is explicitly recognized in the German Basic Law and zealously protected by the Federal Constitutional Court. To understand why Canada should afford concrete constitutional status to human dignity, we need to see why such recognition is valuable. Unlike the differences that may be attributed to the existence of an explicit constitutional affirmation of human dignity, the significance of *Lüth* is, in practice, functional. As Dennis-Jonathan Mann points out, judicial review can, "without altering the actual text" of formal legislation, e.g., the constitution, change its meaning fundamentally.[116] In expanding the scope of legal relations subject to constitutional scrutiny, the judgment affirmed that constitutional interpretation is an important lever by which a court can assert itself and uphold human rights in the face of private or economic interests which may threaten to encroach upon them. Through an act of interpretation, a court can, thereby, shift the weight of national public policy.[117]

The *Lüth* decision has further significance. It affirmed that the freedom of an individual to develop himself or herself in society is not a formal end in itself. Rather, it is a substantive value implicating multiple interests as well as other constitutional values. By this, the Court declared that the right to free speech is "the most immediate expression of human personality in society."[118] It is not a stand-alone value, but must be read in light of the other fundamental freedoms and constitutional values expressed in the Basic Law. Not only must all law be interpreted in light of these basic rights, but the rights themselves are not mutually exclusive. Such an approach means that constitutional values are, at one and the same time, paramount *and* part of an integrated whole. They include individual and social dimensions. Thus, a right to development of one's personality in society can be found to support freedom of expression,[119] and human dignity can provide the foundation for economic and social rights—indeed, all other constitutional values. Because social support is understood in Germany to be a crucial means of individual self-realization, this holding, along with the Court's enhanced powers of judicial review, laid the groundwork for successful future social rights claims.

[116] Mann, *supra* note 103, at 4.

[117] See *id.* for further development of this argument.

[118] Weir, *supra* note 106, at 4.

[119] *Id.*

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IV. Economic and Social Rights

Unlike the Canadian Charter, which does not recognize economic rights (that is, rights to property or social assistance), these rights receive active protection under the German Basic Law.[120] "Property and inheritance are guaranteed" under Article 14(1).[121] The FCC has held that this provision guarantees private property as a legal institution and private ownership as "an elementary basic right."[122]

The vision of property rights in the Basic Law is not one of unqualified and unimpeded individualism, however. Article 14(2) provides that: "Property entails obligations. Its use shall also serve the public good."[123] Subsection (3) of this provision allows for government interference in private property rights, so long as such interference is pursuant to the public interest and accompanied by fair compensation.[124]

Both the principle of the *Sozialstaat*, grounded in Article 20(1), which asserts that Germany is defined as a "social federal state," and Article 28(1), which states that the constitution is based on the "principles of . . . *social government,*" infuse the meaning of all economic rights in Germany with a social purpose.[125] As Donald P. Kommers points out, the German Basic Law represents the union of *Rechtsstaat* and *Socialzstaat* values. The first asserts the individual's negative freedom from state interference, while the second, the principle of the social welfare state, obliges the state to establish a "just social order."[126] Economic rights are anchored in both constitutional principles. The German Court thus distinguishes between private property interests, whose purpose is merely profit, from those interests implicating the right to personal dignity and individual self-fulfillment. The latter is

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[120] "Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws." GG, 23 May 1949, BGBl. I, art. 14(1) (Ger.). "The Federal Republic of Germany is a democratic and social federal state" Art. 20(1) GG; "The constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law . . . " *Id.* art. 28(1).

[121] *Id.* art. 14(1).

[122] *See, e.g.*, *Codetermination* case, 50 BVERFGE 290 (339) (1979); *Hamburg Flood Control* case, 24 BVERFGE 367 (389) (1968); *see also* Gregory S. Alexander, *Property As a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 5 (2003).

[123] GG, 23 May 1949, BGBl. I, art. 14(2) (Ger.).

[124] "Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected." *Id.* art. 14(3).

[125] KOMMERS, *supra* note 92, at 241.

[126] *Id.* at 242.

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protected as a vital constitutional right whereas exclusively economic interests are less strongly upheld.[127]

Property is therefore conceived of as an instrumental or derivative right. Under German constitutionalism, it is placed in the service of other constitutional values including human dignity and personality. This approach allows for the free promulgation of social welfare legislation, unfettered by complaints that redistributive measures would interfere with classical individual liberties.[128] As we shall see, it also allows for judicial intervention when and if such measures fall short of providing citizens the minimum material basis for realizing their moral and political autonomy.

V. Human Dignity and the Right to Welfare

The *Standard Benefit* case highlights the important role of human dignity in social welfare litigation. There, the FCC asserted its explicit authority to not only strike down federal legislation revoking some dignity-constituting benefit, but to also compel the state, if necessary, to provide for the basic needs of German citizens.

The *Standard Benefit* case concerned the constitutionality of social assistance benefits paid under federal legislation (the "Hartz IV legislation" in the newly created Second Book of the Code of Social Law).[129] Although not directly protected in the Basic Law, the Court declared it to be a constitutional requirement that the state guarantee individuals "a subsistence minimum that is in line with human dignity."[130] According to the Court, this requirement follows logically from Article 1(1), the human dignity clause, and Article 20(1), the principle of the social state, of the Basic Law.

In finding a constitutional guarantee of social support, the Court made the following observations. First, Article 1(1) the right "to respect the dignity of every individual" has "absolute effect" on its own, but an "autonomous significance as a guarantee right" when read in conjunction with the social state principle of Article 20(1).[131] According to the Court, this separate right "ensures every needy person the material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural, and political life."[132] Second, this right to social assistance is not subject to

[127] Alexander, *supra* note 122, at 5.

[128] KOMMERS, *supra* note 92, at 242.

[129] BVerfG 9 Feb. 2010 (*Hartz IV*), 125 BVERFGE 175 (__), 1 BVL 1/09 of 9 Feb. 2010, para. 118, 2010 (Ger.), *available at* http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html (last visited 7 Nov. 2011).

[130] *Id.* at para. 120.

[131] *Id.*

[132] *Id.*

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legislative discretion: it "must be honoured."[133] Third, the Court specified that the legislature is responsible to ensure social welfare allocations correspond to human dignity, but that the precise content of social benefits beyond a certain minimum is up to the government to determine and "it has latitude for doing so."[134]

The Court elaborated that statutory assistance benefits may be subject to constitutional review on the following terms:

(1) The FCC may examine whether the legislature has accounted for the constitutional mandate to ensure "an existence that is in line with human dignity in a manner that does justice" to Articles 1(1) and 20(1) GG;

(2) The FCC may examine whether the legislature has adopted a "fundamentally suitable method of calculation" in deciding the "subsistence minimum";

(3) The Court may determine whether, "*in essence*," the legislature has "completely and correctly ascertained the necessary facts"; and finally

(4) The Court may ask whether the legislature has stayed within the boundaries of its permissible discretion at all "stages of calculation employed in the legislative procedure."[135]

The Court emphasized the importance of due process in the government's assessment of social benefit amounts. It noted, "if the legislature does not sufficiently meet this obligation, the ascertainment of the subsistence minimum is no longer in harmony with Article 1(1) GG *already due to these shortcomings.*"[136] In other words, the government is obliged to disclose its calculation figures and statistical methods employed determining benefit amounts and this data is reviewable by the Court.

Despite being described as an instance of "cautious review" by the Federal Constitutional Court, the standard of review here endorsed is far more probing than that adopted by the Supreme Court of Canada in *Gosselin*. At the threshold, the FCC found that the standard benefit amount of €345 fixed by the legislature for single adults was unacceptable; it had "not been ascertained in a constitutional manner" because "the structural principles of the statistical model [had] been abandoned without a factual justification."[137] The legislature

[133] *Id.*

[134] *Id.*

[135] *Id.* at para. 121.

[136] *Id.*

[137] *Id.* at para. 122.

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was therefore obliged to conduct a new procedure for determining social benefits as "necessary for securing a subsistence minimum that is in line with human dignity," and was "realistic" by taking into account the "actual need" of those reliant on state support.[138] The government was given until 31 December 2010 to comply.[139]

The Court was prepared to assume, in other words, that the government bore the burden of justifying the amount of welfare it provided in relation to the circumstances of the individuals it affected. This can be contrasted with the *Gosselin* judgment, in which the Court placed the burden of proof upon the claimant to show that the legislative distinction did not correspond to her actual circumstances and caused her to suffer adverse material effects.

The *Standard Benefit* case did not concern the constitutionality of age or group-based distinctions in social welfare calculations, as did *Gosselin.* The FCC accepted that the legislature could draw distinctions between recipient groups as necessary, but maintained that any allocation must be sufficient for individuals to meet basic subsistence needs. For example, the Court found that the legislature was justified in setting a lower welfare amount of €311 for adults living in a joint household because of financial savings realized from their cohabitation.[140] The Court ruled that in all cases, however, the standard benefit amounts must be established in a statistically informed and factually consistent manner, lest they be found unconstitutional.[141]

On a wider scale, the *Standard Benefit* case illustrates political value differences between Canadian and German constitutional law. The recognition of a constitutional right to welfare in Germany reveals the *Socialzstaat* origin of post-World War II German constitutionalism—the view that individual welfare is a matter of state and social responsibility. Because of the importance of constitutional values of human dignity and the principle of the social state in Germany, the burden of subsistence does not fall singularly on the shoulders of individuals, as it seems to in the Supreme Court of Canada's understanding of social rights.

The *Standard Benefit* case is also a clear example of a potential breach to dignity from the denial of a benefit. Apart from its origin as an instance of abstract review,[142] the

[138] *Id*.

[139] *Id.* at para. 124.

[140] *Id.* at para. 121.

[141] *Id.* at para. 122.

[142] "Abstract review" is a procedural practice, similar to the Canadian reference jurisdiction, which allows the FCC to review the constitutional compliance of a specific law without the requirement of an individual litigant bringing a positive complaint to the court.

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constitutional violation at issue in *Standard Benefits* would likely not find a remedy here in Canada. The SCC's current approach to the Section 15 equality analysis, i.e., the *Kapp* test of "prejudice" or "stereotyping," would be inadequate in these or similar circumstances where the sufficiency of social benefit allocations is challenged. For this reason, we should question the adequacy of human dignity's new status in Canada as an abstract, unstable, "moral" right, to be invoked at the discretion of the Supreme Court.

F. A "Political Conception of Justice"[143]

The German approach further suggests that the constitutional recognition of social rights is not, as the *Gosselin* decision implies, inherently a question of institutional legitimacy or judicial competence. The question is: Can we assess the merits of these rival views of social rights apart from the historical contingencies and ideological particularities of broader legal framework which supports them? And, is there something essential about personhood which normatively requires a minimum level of resources, such that judicial recognition of the former grounds a positive constitutional claim to the latter? The Federal Constitutional Court found that welfare rights were protected as a logical extension of the human dignity clause in Article 1(1) and the social foundation of the German Federal Republic, described in Article 20(1) GG. These findings receive conceptual support from the work of theorists such as Hermann Heller and John Rawls.

I. Heller and the Political Basis of Law

In contrast to other Weimar-era legal theorists, such as Carl Schmitt and Hans Kelsen, Heller did not try to explain the nature of power in purely political or legal terms. In his view, law can be understood as an expression of the dialectical relationship between political ideology, ethical considerations, and social and historical conditions.[144] He argued, much like Schmitt and Kelsen, that there is no necessary connection between liberalism and rational legality.[145] In other words, there is nothing inherent about law which requires liberal political principles (or any other set of values for that matter) to uphold a rational, i.e., "legitimate," legal order. This does not mean that law is completely divorced from moral or political principles. To the contrary, law is inherently rooted in ethical concerns. Heller's claim is that the content of law is not necessarily prescribed by any specific conception of political morality, but that law creates the conditions whereby

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[143] RAWLS, *supra* note 7, at 156.

[144] *See* Hermann Heller, *The Nature and Structure of the State*, 18 CARDOZO L. REV. 1139, 1185–86, 1191 (David Dyzenhaus trans., 1996); *see also* David Schneiderman, *Social Rights and "Common Sense":* Gosselin *Through a Media Lens*, *in* POVERTY: RIGHTS, SOCIAL CITIZENSHIP, LEGAL ACTIVISM 58 (Margot Young et al. eds., UBC Press 2007) (discussing Heller's social theory of law as it relates to the *Gosselin* case).

[145] David Dyzenhaus, *Hermann Heller and the Legality of Legitimacy*, 16 OXFORD J. LEGAL STUD. 645 (1996) [hereinafter *Legality of Legitimacy*].

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ethical rules may be established, and these rules are themselves relative to the society that produced them.

Heller argues that the "state is justified in so far as it exhibits, at a particular level of development, the organization necessary to secure the law."[146] This would seem to support a view of political legitimacy as functionally related to the stability of the legal order. But what about the content of this legal order? Heller's position cannot be easily seen as adhering to either a positivist or natural law understanding of legal authority. Although law is required to be formed by an act of "authoritarian power," he maintains that "the individual law receives all its obligatory force only from the superior, ethical, fundamental principle of law."[147] A secondary distinction may be derived from this observation. According to Professor Dyzenhaus, Heller conceived of political authority only superficially in terms of its "co-ordinative" or organizational function—as merely ensuring compliance with positive legal requirements.[148] More aptly, the state's role should be seen as securing the conditions under which social cooperation can be maintained. The state, in order to be legitimate, must therefore confront "the fact of pluralism" in contemporary society.[149] This means that the cooperative function of the state, in holding some common conception of the good, should also account for possible differences in the value systems of the state's various members. Despite the inevitably controversial nature of political decisions, these decisions must take legal form, and not simply be the technical result of majority or authoritarian political power. Dyzenhaus explains: "The insight for Heller is that state power can never be a mere projection of will from the powerful to those subject to them, from ruler to ruled. On Heller's view, political power is a relational resource which cannot be monopolized by any one group."[150]

Accordingly, any exercise of political power is constrained in the first instance by law, which is itself shaped by ethical considerations. Power is therefore shared between the executive, legislative, and judicial branches of government. Fundamentally, the mandate of institutional legitimacy, whether political, legal or judicial, belongs to the people and must be seen as accommodating the interests of both the most and the least powerful in society. In this regard, Heller can be seen to oppose a philosophy of blind adherence by judges to positive statutory enactments. Heller also objects to the view (associated with classical liberalism) that only a certain class of society—those with property and

[146] Heller, *supra* note 144, at 1157.

[147] Dyzenhaus, *Legality of Legitimacy*, *supra* note 145, at 653.

[148] *Id.* at 652.

[149] *Id.* at 653; *see also* RAWLS *supra*, note 7 (explaining how Rawls dealt at length with the potential problems pluralism posed for modern political regimes).

[150] Dyzenhaus, *Legality of Legitimacy*, *supra* note 145, at 654.

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education—have a voice in assessing the "reasonableness" of the legal order.[151] This is why Heller argued that the formal recognition of liberal rights must be accompanied by an understanding of their dialogic social conditions.[152] The content of legislation, and any act of judicial interpretation, must also aim at a substantive understanding of rights understood according to both individual *and* social principles.[153] This conception is strikingly similar to the dual nature of the Basic Law as embracing *Rechsstaat* and *Sozialstaat* criteria.

On the question of basic rights, Heller argued in favour of social equality as a condition of individual liberty and political stability. Without a level of "social homogeneity," the integrity of the legal and political order is undermined.[154] Social division results when "groups of individuals find the law's formal promise of equality and liberty for all to be merely formal" and not productive of substantively just civic arrangements.[155]

It is evident why Heller's legal theory is valuable to an analysis of German and Canadian constitutional practice in the context of social rights claims. He contributes, first, to the view that the recognition of basic rights requires corresponding recognition of their social and historical character. Second, Heller bases political legitimacy on the satisfaction of civilian interests. These are not intended to appease majority demands or defined according to classical liberal rationality but are broadly construed according to a pluralistic constellation of values. He writes that the "content and validity of a norm are never determined merely by its text, and never solely by the standpoints and characteristics of its legislators, but above all by the characteristics of the norm addressees who observe them."[156] Thus, legal rules are seen to be the products of a multiplicity of factors, never far from the cultural and historical conditions which produce them, and always subject to the values endorsed by the community—with its multiple and conflicting values—as the basis of their ultimate justification.

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[151] *Id.* at 656.

[152] Heller, *supra* note 144, at 1185–86; *see also* Schneiderman, *supra* note 144, at 58.

[153] David Dyzenhaus, *Hermann Heller: An Introduction*, 18 CARDOZO L. REV. 1129, 1131 (1996).

[154] *Id.*

[155] *Id*.

[156] Heller, *supra* note 144, at 1191; *see also* Schneiderman, *supra* note 144, at 59.

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II. Ideological "Capture"[157]

If we accept the idea of the German Basic Law as a remedial constitution, and apply Heller's legal philosophy, the potential for constitutions to reflect historical particularities and to embody specific national values becomes clear. But, as Craig Scott and Patrick Macklem point out, judicial review is also susceptible to ideological "capture."[158] The majority's judgment in *Gosselin* upheld one particular political conception of justice, at the expense of another conception which it violated.

As discussed in Part E, the German Basic Law was conceived as a fundamentally liberal instrument, entrenching a catalogue of basic rights according to a largely Kantian view of individual autonomy.[159] The constitutional order it describes places the individual firmly within political and civil society, and personal liberty is informed by the public interest and communitarian values. German constitutionalism strictly rejects a neo-liberal understanding of human beings as isolated economic agents, in contrast to the uncritical egoism of recent Canadian constitutional adjudication.

Professor Schneiderman suggests that Canadian constitutional culture has "followed the lead of governments" in responding to the pressures of neo-liberalism and globalization.[160] Accordingly, he argues that the Supreme Court's rejection of social rights in *Gosselin* is best understood in light of Canada's political retreat from social solidarity.[161] In its place, the Court now seems to value economic self-sufficiency and uphold a brand of liberalism more closely resembling a neo-classical and Lockean, rather than Kantian, concept of political morality.

As Heller emphasized, liberalism is not the author of the rational legal order nor is it a value necessarily inherent in any particular conception of political morality. According to Professor Dyzenhaus, "this is especially true of the age in which we live, one characterized not by a universe of shared values but by a pluriverse of conflicting and irreconcilable ideologies."[162] This is premised on the claim that there is no such thing as a universal

[157] Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 6 (1992).

[158] *Id*.

[159] In Kant's original conception, individual autonomy is limited by the categorical imperative to treat persons as ends in and of themselves. Indeed, Kant, more than any other natural law thinker, was concerned with human dignity in his defense of private reason.

[160] Schneiderman, *supra* note 144, at 57.

[161] *Id.* at 58.

[162] Dyzenhaus, *Legality of Legitimacy*, *supra* note 145, at 645.

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political morality; there are merely "various political ideologies which contend for dominance."[163]

Liberalism is also not self-evident in the way the majority understands it in *Gosselin*. Significant here is the majority's repeated recourse to the notion of "common sense" and reasonability in considering whether the claimant would perceive her dignity to have been infringed. Per Chief Justice McLachlin: "As a matter of common sense, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity."[164]

The majority employed a reference to common sense, which did not accommodate the perspective of the claimant.[165] It seemed to reflect the values shared by judges and professional elites, rather than truly "common" reasoning, which would necessarily include the values and experiences of the uneducated or lesser well-off. To Professor Dyzenhaus, such a restriction makes a "social and historical claim about what legitimacy has come to mean for most people."[166]

The point is not to dispute the value of constitutional adjudication, but simply to suggest that a specific political ideology should not be the starting point of Charter analysis, lest we limit ourselves *ex ante* to a rather narrow range of permissible interpretations of law. This contention applies with equal force to liberal and socialist conceptions of justice. The question is: Must social rights always attach to a particular political agenda? John Rawls offers an important perspective on this question as it relates to the nature of public law and the possibility of social rights recognition in a pluralistic constitutional democracy.

III. Rawls

The majority's reluctance to acknowledge a rights infringement in *Gosselin* can be understood according to distinctions between different conceptions of liberty, equality, and human dignity. We have already discussed how the majority and dissent in *Gosselin* rendered differing interpretations of the Section 15 and Section 7 guarantees, and also how the German Court has understood the human dignity principle as generative of positive social rights. Rawls's connection between basic needs and basic justice offers another reason why the right to welfare may be understood as a positive constitutional requirement. This challenges directly the view of the Supreme Court of Canada, which has

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[163] *Id.*

[164] Gosselin v. Quebec (Att'y Gen.), [2002] 4 S.C.R. 429, para. 27 (Can.).

[165] *See* Schneiderman, *supra* note 144, at 61–63 (expanding on this point).

[166] Dyzenhaus, *Legality of Legitimacy*, *supra* note 145, at 645; *see also* Schneiderman, *supra* note 144, at 61–63.

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generally interpreted Charter guarantees as entrenching only negative freedoms and refused to impose obligations on the government to provide adequate social support, as it did when confronted with this issue in *Gosselin*.

Rawls argues that a social minimum providing for the basic needs of all citizens is a matter of basic justice and, therefore, a constitutional "essential."[167] He writes:

> The idea is not that of satisfying needs as opposed to mere desires and wants; nor is it that of redistribution in favour of greater equality. The constitutional essential here is rather that, below a certain level of material and social well-being, and of training and education, people simply cannot take part in society as citizens, much less equal citizens.[168]

Recognition of the need for individuals to participate freely and fully in society has implications for rights in terms of how they are institutionalized. The recognition of human dignity in the German Basic Law has a similar conceptual basis. Rawls does not, however, address the possibility that the gross availability of social resources may pose a limit to the practical realization of this basic right. He is concerned with the constitutional conditions necessary to realize "justice as fairness" as a political ideal.[169] He is also not concerned that social rights allocations often involve a type of egalitarian "redistribution," which he expressly dismissed. These objections to Rawls are valid as they speak to the viability of distributive justice measures which may be constitutionally required, but whose substantive reach may be limited in practical terms. One would expect that, if this limit were to actually be reached, the principle of "justice as fairness" would operate to require the government to provide social support only insofar as was possible.

But government action is arbitrary unless the needs of individuals are duly considered. The legislative mandate afforded to Parliament by voting does not give the government license to ignore the needs of minority populations. Rawls makes the point that democracy itself requires the recognition of a plurality of interests, including those, like the poor, who may not have political influence. Undoubtedly there are many differences of opinion as to how the government should weigh the interests of various constituencies. In liberal constitutional democracies, such as in Canada and Germany, the entrenchment of basic rights in a constitution affords judges the power to review political decisions when the fundamental freedoms of individuals are at stake. As a matter of justice, our primary

[167] RAWLS, *supra* note 7, at 166.

[168] *Id.*

[169] *Id.*

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concern is the correction of the wrong. How do we decide between different views of the matter? And how do we ensure that judges act to ensure an appropriate correction of the wrong? It is for this reason that judges are asked to adjudicate impartially.

In the context of whether it would be just to grant a remedy, judges must look beyond formal conceptions of individual rights. This does not deny that there may be conflicting claims about what constitutes a breach of these rights. As we have seen, the Canadian Court has had difficulty agreeing on the content of Section 15, and, for the moment, abandoned the concept of human dignity as justiciable under this heading. Nonetheless, we must always presuppose a capacity for rights. In the liberal philosophical tradition, going back to Hegel and Kant, the recognition of universal moral equality is *the* conceptual basis of human rights. But what good is mere capacity if it cannot be exercised?

For this reason, theorists such as Rawls have upheld that positive liberty best describes the nature of political and legal rights. The development of this distinction is generally attributed to Sir Isaiah Berlin, who recognized that liberty could involve positive or negative dimensions.[170] Conditions of negative liberty would require only that the state be restrained from interfering with individual freedoms. Conditions of positive liberty, by contrast, would affirm the state's obligation to act positively to ensure that individual freedoms may actually be exercised.[171]

In constitutional terms, Rawls regards positive liberty as generative of a political duty to provide social assistance to the poor. He writes: "The constitutional essential itself is . . . what is required to give due weight to the idea of society as a fair system of cooperation between free and equal citizens, and not to regard it, in practice if not in speech, as so much rhetoric."[172]

In Rawls's view, formal rights recognition is the beginning, but it is inadequate on its own. In practice, constitutional rights may implicate positive legislative obligations. These are necessary to establish substantively just social and political conditions.

This belief is similarly upheld in German Constitutional law, as described above in Part E. The dissent in *Gosselin* also argued that Charter rights, in certain circumstances, involve a positive dimension. Hence, it would appear to be valid to contest the interpretation of Charter rights as always negative. Serious pundits point out that social rights deserve to be

[170] *See* Isaiah Berlin, *Two Concepts of Liberty*, *in* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (Oxford Univ. Press 1969).

[171] Berlin saw in positive liberty the potential for political totalitarianism, and seemed to prefer the negative conception of this value—although he recognized that both forms of liberty were necessary to secure the conditions of free political society. *Id.*

[172] RAWLS, *supra* note 7, at 166.

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considered for this type of positive constitutional recognition.[173] At a minimum, judicial review of social policy of the nature described in *Gosselin* and the *Standard Benefit* case should not be presumptively avoided as a matter of exclusively political authority. In light of the preceding authorities, judicial review of social rights claims can be understood as being well within the realm of substantive constitutional law and the interpretive authority of judges.

G. Conclusion

German constitutional law is exemplary in its regard for human dignity, a value with global currency as a moral right, but which commands little legal traction in Canada. Since *Kapp*, the Supreme Court will cede only moral or "philosophical" status to the right of human dignity. This designation means that the legal application of the right of human dignity, and the civil and political rights individuals may claim under it, is a matter of political discretion. It is for this reason that the entrenchment of human dignity in the Basic Law is so powerful: It places the recognition of personhood and the concomitant necessity of humane treatment beyond the reach of majoritarian politics. Without a doubt, the Holocaust was the source of this constitutional commitment and the reason for the absolute, inviolable nature of the human dignity clause in the Basic Law.

For our purposes, a significant aspect of the value of human dignity in the German Basic Law is the way in which it is translated into a social rights claim, exercisable by German nationals against the state, for basic welfare provision. The logic is identical to Rawls's understanding of public law, according to which individuals require a minimum level of property in order to realize their capacity as citizens and to have the possibility of a full and dignified life. The moral intuition grounds a legal right. Thus, what may be seen as an abstract and formal philosophical concept by the Canadian Supreme Court is, in Germany, a practical adjudicative standard and a specific prescription within the constitution. These are its essential juridical features for German society.

In political theory, Heller and Rawls remind us of the constituting effect of history and ideology on positive law and interpretations of it. Rawls, especially, offers an understanding of liberal democracy that comprehends, as a "constitutional essential," the recognition of a legal right to welfare. An important dimension of the debate about social rights can therefore be understood in terms of which political values one believes should be upheld. Human dignity should not be subject to political debate, however.

The problem of the relativity of ideas about justice can be clearly seen. To critics, *Gosselin* represents the legal disenfranchisement of the poor in Canada: It illustrates judicial

[173] Examples include Rawls, Schneiderman, Réaume, Brodsky and Day, as well as Justices L'Heureux-Dubé and Arbour in *Gosselin.*

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support for a government programme that weighs only the interests of the politically vocal classes at the expense of the interests of those who are silent. The effect was to foreclose a substantive reading of human dignity and equality in the context of social rights and to maintain or deepen social stratification. One may understand *Kapp*, similarly, as an attempt by the Court to pave the way for a further shift of social welfare claims out of Section 15 and the Charter and into the political domain. The comparison with Germany, ultimately, should warn us against casual treatment of human dignity and prompt us to not underestimate the importance of institutional safeguards for political and civil liberties.

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