Lessons from India's Constitutional Culture: What Canada Can Learn

Isabelle Gilles
Faculty of Law
McGill University, Montreal

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Abstract

This thesis aims at initiating dialogue between Canadian and Indian constitutional cultures. Canadian constitutional law is arguably characterized by ideologies of liberalism and legal positivism. Because human rights norms are expected to incorporate a vision of social justice into the law, ideologies and legal philosophies are crucial to assess the potential and the limitations of human rights protections. The legal cultures in Canada and India have similar roots, and yet the systems have evolved differently. Among other factors, judicial activism and the quest for social justice of judges at the Supreme Court of India were significant in the evolution of Indian constitutional culture. From a Canadian perspective, it is interesting to study this culture as it offers new avenues in the human rights field and therefore challenges the universal value of human rights norms as interpreted and applied in Canada. This thesis argues that, on the intersection of human rights and social issues like poverty and social classes, important lessons can be drawn from the way the Supreme Court of India has based its human rights interpretation on contextual analyses of Indian social reality. The judges engaged in judicial activism sought to move beyond the traditional ideologies found in the common law, and their jurisprudence is helpful in grasping the limitations these ideologies can put on human rights interpretation.

Ce mémoire vise à créer un dialogue entre les cultures constitutionnelles canadiennes et indiennes. Certaines caractéristiques de la culture constitutionnelle canadienne sont empreintes de libéralisme idéologique ainsi que de positivisme juridique. Les normes des droits de la personne représentant pour beaucoup une manière de permettre à une vision de justice sociale de pénétrer le domaine du droit, les idéologies ainsi que les philosophies juridiques sont des considérations cruciales lors de l'évaluation du potentiel ainsi que limites des droits de la personne. Les cultures juridiques de l'Inde et du Canada ont de communes racines, mais les systèmes ont évolué de façon très différente. L'activisme judiciaire ainsi que la quête pour une justice sociale dont ont fait preuve les juges de la Cour Suprême de l'Inde ont participé significativement à l'évolution de la culture constitutionnelle indienne. D'un point de vue canadien, il est intéressant d'étudier cette culture en ce qu'elle offre de nouvelles pistes dans le domaine des droits humains, et ce faisant elle remet en question la valeur universelle des droits de la personnes tels qu'interprétés et appliqués au Canada. Ce mémoire vise à démontrer qu'en

ce qui a trait à l'intersection de l'interprétation des droits de la personne et de problèmes sociaux tels que la pauvreté et les classes sociales, d'importantes leçons peuvent être retenues de l'étude de la jurisprudence indienne, et plus particulièrement de l'interprétation des droits basée sur une analyse contextuelle de la réalité sociale en Inde. Les juges faisant preuve d'activisme judiciaire ont cherché à dépasser les idéologies traditionnelles encastrées dans la *common law*, et leurs jugements sont utiles pour saisir les limites que ces idéologies imposent à l'interprétation des droits de la personne.

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> "[U]nless the multiplicity of Third World distinctiveness and difference is valued on its own terms and nor merely as Europe's Other, the goals of economic justice and solidaristic democracy will be shaped accordingly. [...] Therefore, what must be understood more fully is how to directly engage in the struggle with European hegemony, how to locate its inconsistencies and frailties, and how to mark Europe with its 'Other' in ways that disrupt its founding dichotomies."[1]

Introduction

The purpose of this thesis is to invite Canadians to rethink some characteristics of Canadian law and legal interpretation by comparing them to a system that imagines them differently: India's constitutional law. My visit to India has triggered a deep interest in understanding such a rich and unique cultural reality. The nearly overwhelming colors and smells, the diversity of foods, cultural identities, languages, mentalities and backgrounds ensure the never-ending mystery of India. Intensity is a word that describes well the experience of travellers in India. It can appear intimidating to engage in a different culture and claim to understand it. Nevertheless, a failure to try would be a shame. As a part of the Indian culture, human rights law as applied by the Supreme Court of India (SCI) is unique and deserves more recognition than it is currently given. Faithful to its commitment to independence, India did not simply apply human rights as thought out in other legal cultures. It appropriated the concepts and made them evolve to constitute today a rich body of law. This legal experience is as unique as Indian culture is, and perhaps even more stimulating from a jurist's point of view.

This thesis explores an encounter between two constitutional cultures: Canada's and India's. Legal education in Canada, let alone legal institutions, rarely discuss legal cultures developed in the "Third World".[2] This thesis aims to offer an account of Indian constitutional culture that challenges the existing hierarchies between different judicial systems. This thesis starts from the premise that human rights are meant to represent a vision of social justice, and it argues that the Indian system should be studied so that other judicial systems can benefit from its

[1] Dianne Otto, "Postcolonialism and Law ?" (1998-1999) 1998-1999 Third World Legal Stud vii., at xvii.
[2] At the risk of using essentialist concepts, the term "Third World" has apparently been attributed a variety of meanings, of which some bear positive emancipatory connotations. It is in this sense that it is used here, and in absence of any other term that would better communicate the reality. Ibid. at xi.

progressive components. The role of human rights in society is closely linked to the role of the judiciary in interpreting and applying human rights standards.

This thesis seeks to challenge characteristics of a given legal culture that we, as Canadians, may perceive as inevitable. Interestingly, in many ways choosing India defeats the "cultural relativity debate" that is so present in the human rights field.[3] Can human rights be called a western project if non-western nations are in fact taking the lead? The western tendency to hegemony could be left aside by human rights academics – this tendency has found and will most likely keep finding ways to express itself in any conjuncture, therefore it cannot be considered an attribute of human rights in particular - and human rights should be considered on their own: they are but broad concepts that require local legal interpretations.[4] As dialogues between legal cultures are becoming more frequent, local applications of human rights are an incredibly rich field in which to understand the dynamics of law in human crises. In this sense, we can ask nothing more than for legal cultures to develop in their unique social context so that alternative systems can be studied and analysed. Everyone has to gain from the achievements accomplished elsewhere. The SCI has achieved the wonderful task of developing and enforcing its local interpretation of human rights, in a context where extreme poverty is most present and the court has chosen not to ignore it. And us, in the west, should recognize this Indian constitutional expertise and learn from the different version of human rights India has to offer us.[5]

[3] For an interesting account on the issue of cultural relativism and human rights, see Benhabib. The author addresses how human rights can be used as part of western hegemony, or how human rights can find local expressions through democratic means of social consensus. Seyla Benhabib, "The Legitimacy of Human Rights" (2008) 137:3 Daedalus 94. See also Kennedy, for a list of the problems found in human rigths discourses: David Kennedy, "The International Human Rights Movement: Part of the Problem?" (2002) 15 Harv Hum Rts J 101.

[4] Benhabib., ibid. Human rights are in fact used by numerous social movements as tools for their struggles, and this is an importance role of human rights that should not be underestimated: Sally Engle Merry, "Global Human Rights and Local Social Movements in a Legally Plural World" (1997) 12 Can J L & Soc 247.

[5] As J. L'Heureux-Dubé points out, there are compelling arguments not to import foreign legal reasoning without questioning the applicability in one's social and political context. However, this hardly appears like a real risk in Canadian courts. On the other hand, there appears to be greater risk that this argument may lead courts to quickly dismiss Indian jurisprudence as non-applicable in Canadian context. The rationale of the human rights law applied in India can be relevant for further reflection in Canadian judgments without simply importing definitions that are not applicable to Canadian situations. It is hoped that Canadian judges would know better than applying law in such an indiscriminate manner even

Observing the Indian system allows us to have a glimpse of what a constitutional system might look like when culturally-entrenched classical liberalism is not hiding behind the corner of legal creations. Another reason for choosing India to discuss the constitutionalization of human rights is that it puts human rights back in their place: they are but constituents of a political project among others. Viewed from a purely Canadian perspective, human rights are often perceived as "intrinsic",[6] natural rights, which everyone must enjoy. This intrinsic statute prevents a pragmatic measure of human rights' positive and negative impacts,[7] as nothing can be done or argued against such "intrinsic" characteristics. Articulated as abstract universal norms, human rights have yet to become the doorstep for a political project to penetrate the law through domestic interpretation. Exploring a different human rights culture might allow us to understand that the human rights norms we perceive as intrinsic may not be so. It is necessary to understand that we, as a society, are in fact choosing them and the way they are applied. It is important to understand this to ensure that our power to improve and change them is not underestimated. This thesis suggests that the unique human rights culture fostered in India may be much more holistic and complete than what is found in Canada. In fact, it may be a lot more consistent with the theoretical, ideal and international concepts of human rights.[8]

A. What is the relevance of a Comparison between India and Canada?

This thesis explores the judicial culture developed by the SCI for the protection of human rights[9] from the standpoint of a Canadian lawyer. There appears to be a perception that western legal cultures are somehow more developed and deserve more recognition than non-western ones.[10]

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without such a warning. Claire L'Heureux-Dubé, "Human Rights: A Worldwide Dialogue" in B.N. Kirpal *et al.*, eds., *Supreme But Not Infallible* (New Delhi: Oxford University Press, 2000).

[6] *Charter of Human Rights and Freedoms*, RSQ c C-12. [Quebec Charter], preamble.

[7] For further reading of the importance of a pragmatic analysis and an extensive list of critiques of human rights, see Kennedy., *supra* note 3.

[8] It should be noted that what is studied here is the jurisprudence of the SCI on constitutionally guaranteed human rights and how law can be used as a tool for social justice. The factors that would have to be studied to seize how human rights protections are in fact translated in the lives of Indians are multiple and complex and it is not the purpose here to assess them. There are undoubtedly several practices in India that are not consistent with human rights norms.

[9] This term is used to refer to the theoretical concepts of human rights, as these are both found in international instruments and domestic legislations. The Indian constitutional human rights are called *fundamental rights*.

[10] Ghai suggests states that India is a "victim of western and white hegemony", and that it is for that reason that Indian achievements are not recognized as they deserve to. Yash P. Ghai, "Foreword" in C. Raj Kumar, ed., *Human Rights, Justice and Constitutional Empowerment* (New Delhi: Oxford University Press, 2007) 520. at xiv.

This perception is strongly condemned by postcolonial theorists.[11] It may be true that in some developing countries endemic corruption or other socio-economic realities may prevent the installation of an independent judiciary able to provide stable and coherent jurisprudence. However, this is not the case of the Indian judiciary,[12] and its constitutional system is no less worthy of consideration than any other western system.[13] On the contrary, its unique ancient and recent evolution[14] may make it more appealing to one who is interested in understanding the law through legal culture. Indian society's development has been similar to no other civilization during the twentieth century. It has gone through social, economic, political and industrial revolutions in a period of less than one hundred years. The struggle against colonialism was neither fought nor won in India as in other colonies: it was not a story of violent revolution against oppression, but was rather the intellectual and political project of building the Indian collective identity. It gave birth to a well-thought out constitution that was meant to establish the underlying project of society.[15] The constitution embeds protection for several human rights as fundamental principles. This thesis attempts to explain the human rights culture as it was developed in India since the revolution, as a social and political project, a collective building effort.

India is the world's largest democracy. [16] Low literacy rates and poor socio-economic conditions make the exercise of civil and political rights difficult in some portions of the population, and the widespread corruption in government is alarming.[17] Nevertheless, it is a strong democracy in terms of the legitimacy of elections,[18] and most notably the independence of the judiciary.[19] The

[11] Alpana Roy, "Postcolonial Theory and Law: A Critical Introduction" (2008) 29 Adel LR 315.
[12] See Oliver Mendelsohn, "The Supreme Court as the Most Trusted Public Institution in India" (2000) 23 South Asia: Journal of South Asian Studies 103.
[13] Ghai., *supra* note 10.
[14] On the evolution of India, see Satish Saberwal, "Introduction" in Zoya Hasan, E. Sridharan & R. Sudarshan, eds., *India's Living Constitution - Ideas, Practices and Controversies* (London: Anthem Press, 2005).
[15] Sarbani Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations* (New Delhi: Oxford University Press, 2007).
[16] Strictly as a demographic comparison, the only country that could be compared to India in order to understand the political and economic challenges the country faced, and is still facing in the current global conjuncture, is China. However, the history of communism and the authoritarian government in China makes both countries very difficult to compare efficiently. Edward Luce, *In Spite of the Gods: The Strange Rise of Modern India* (New York: Anchor Books, 2007).
[17] Mendelsohn., *supra* note 12.
[18] This is true in the sense that elections are generally not the cause of violence against political opponents nor are the elections' results manipulated. This does not however mean that questionable campaign strategies do not happen or that localized populations cannot feel pressured into voting for one

challenges India has had to overcome since independence are deep and the country has at times proven creative and motivated in getting the population out of poverty.[20] However, governmental institutions have failed to maintain the legitimacy they once had, as corruption practices are coming into the spotlight. Indeed, the SCI, followed by the High Courts, have played a major role in intervening in situations where the government appeared to have interests led by other motivations than assisting the population. Where the courts' interventions would be considered as interfering in the affairs of the other branches of government in other Westminster-style constitutional systems, it has proven useful and even necessary in India.[21] This brings some to conclude that the SCI is the "most trusted institution in India".[22] In other words, the contrast between the failure of the other branches and the engagement and proactivity of the SCI has led to a situation where the SCI is the "only true fount of justice in India".[23] It has to be noted that the role played by the SCI was nothing more than the role envisaged for it by the drafters of the constitution, who had placed just as much hope in the judiciary as an arm of social revolution as they had on fundamental rights.[24] As the constitution was the expression of the will of the Indians, courts were the institution that held the power to implement this Indian social revolution; after all these years of colonial rule, Indian courts would apply the Indian constitution.[25]

India's system is particularly well suited to a comparison with the Canadian systems; some even call India and Canada "long lost siblings" because their constitutional dynamics are similar.[26] Both systems were strongly influenced by the British, as former colonies, and later on by the American system. The American Bill of Rights was the first one to recognize fundamental rights, in 1791. Almost two centuries passed before the Indian (1950) and Canadian (1982) constitutions also recognised fundamental rights. Both jurisdictions borrowed from American

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representative rather than the others. The low literacy rates also make it difficult to ensure the whole population is politically aware of national politics. See Luce., *supra* note 16.

[19] Austin Granville, *Working a Democratic Constitution* (New Delhi: Oxford University Press, 1999)., at 123 and following.

[20] Luce., *supra* note 16.

[21] Mendelsohn., *supra* note 12 at 105.

[22] Ibid.

[23] Ibid. at 103.

[24] Austin Granville, *The Indian Constitution: Cornerstone of a Nation* (London: Oxford University Press, 1966). at 164.

[25] Ibid.

[26] Vivek Krishnamurthy, "Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles" (2009) 34 Yale J Int'l L 207. at 207.

interpretations and procedures in their application of fundamental rights.[27] The Canadian and Indian constitutional systems function in a similar way notably because in both cases the judiciary has interpreted unwritten norms from the written constitutions: the rule of law, democracy, federalism, and judicial independence. In both cases, these principles were used to strike down legislation.[28] This led to a similar type of dialogue between the legislative and the courts, although the dialogue was not used in the same manner at all in the two countries.[29] The SCI has rather adopted a judicial activism approach that has truly allowed it to actively participate in "social engineering".[30] This judicial activism has been criticized as interfering with the other branches of government, but it did not prevent the SCI from assuming a strong role in governance.[31] The SCI is the gatekeeper of the constitution; an important part of that role is to ensure the two other branches of government are fulfilling their duties as they are meant to.[32] Considering that the constitution aimed at creating an equal society economically, socially and politically;[33] and that large portions of the Indian population lived in extreme poverty, the SCI judges have taken the suffering of the people as the measure of fundamental rights. More importantly perhaps, "constitutional empowerment became the vehicle of human rights development".[34] This judicial mentality led to a completely different interpretation of rights and freedoms: the theoretical concepts of rights no longer hold the spotlight, what matters is the human situation. It is argued here that providing relief to human crises is the end, and human rights are merely a means to provide that relief. [35]

Interestingly, the comparison can be made on two levels on the Canadian side, both federal and provincial. There are perhaps even more similarities that can be drawn between the Indian Constitution and the *Charte des droits et libertés de la personne* (Quebec Charter), which bears a "semi-constitutional" status in Quebec.[36] First of all, the preambles of both of these documents refer to notions of equality, dignity and wellbeing; thus going a lot further than the Canadian

[27] L'Heureux-Dubé., *supra* note 5.
[28] Krishnamurthy., *supra* note 26 at 208.
[29] Ibid. at 235 and following.
[30] C. Raj Kumar, "Introduction" in C. Raj Kumar, ed., *Human Rights, Justice and Constitutional Empowerment* (New Delhi: Oxford University Press, 2007) 520. at xxxi.
[31] Ibid.
[32] Ibid.
[33] *Constitution of India*, 1950 [CONST], preamble.
[34] Kumar., *supra* note 30 at xxxi.
[35] This was also the position of some activist judges from the SCI, as well as their reason for interpreting human rights norms broadly. See below Chapter 2 section B.2.
[36] See Quebec Charter, art 52.

Charter of human rights and freedoms' preamble (Canadian Charter)[37]. Second, human rights are separated in two sections: the "fundamental rights" at first, which includes mostly civil and political rights, followed by another section protecting social and economic rights.[38] This second section of the Quebec Charter is not given the semi-constitutional status granted to the fundamental rights; interestingly, the same was true of the social and economic rights in the Indian Constitution in the first years of its interpretation.[39] The SCI has circumvented this difficulty by interpreting the social and economic rights in the right to life, thus applying the constitution as sought by the constitution makers. The third is that both the text of the Indian constitution and that of the Quebec Charter allow for some horizontal application of human rights norms, breaking with the traditional approach of individual protection from state intervention.[40] A fourth comparison (which would deserve a lengthier analysis than is possible to provide here) may be that both societies, the Indians and the Quebecois, have experienced at some level deep social changes and emancipation from the domination of a stronger cultural group during the twentieth century – the Indian independence from British rule, and the Quebecois' *révolution tranquille*. These two documents are expressions of these social revolutions, and were an integral part of the collective effort of society building, even though they did not play the same role in each case.

The SCI endeavored to develop an efficient human rights law fostering constitutional empowerment, and this thesis aims at presenting some of its achievements that could greatly benefit our understanding of Canadian jurisprudence. As Justice L'Heureux-Dubé, judge at the Supreme Court of Canada (SCC), writes in a book celebrating the fifty years of the Indian Constitution, "[j]udgments in different countries increasingly build on each other, and mutual respect and dialogue between appellate courts is fostered. No longer are some jurisdictions giversˈ of law while others, ˈreceiversˈ. Reception is turning to dialogue."[41] However, it appears

[37] *Charter of human rights and freedoms*, RSC 1982, part 1 of Constitution Act. [Canadian Charter]
[38] Fundamental rights are protected by articles 1 to 38, and social and economic rights are protected by articles 39 to 48, see art 52 of the Quebec Charter.
[39] A case that transformed most radically the substantive definitions of rights is *Francis Coralie Mullin v Administrator (Union Territory of Delhi),* (1981) AIR 746 SC. [Francis Coralie Mullin], see below Chapter 3.
[40] In the case of India, the practice is not yet completely entrenched, but the courts have recognized several situations where fundamental rights should be applied horizontally. See Sudhir Krishnaswamy, "Horizontal Application of Fundamental Rights and State Action in India" in C. Raj Kumar, ed., *Human Rights, Justice and Constitutional Empowerment* (New Delhi: Oxford University Press, 2007) 520. at 70-73
[41] L'Heureux-Dubé. , *supra* note 5 at 215.

that even though the dialogue might exist at some level, it is still asymmetrical.[42] Even L'Heureux-Dubé J. herself, while dissenting in the *Gosselin* case,[43] missed a golden opportunity to cite Indian jurisprudence. Nevertheless, she recognizes the leadership of the SCI, most notably in the field of human rights and environmental law.[44] The lack of reference to Indian constitutional law in Canadian jurisprudence and scholarship does not appear justified, and this thesis aims at presenting the uniqueness of some elements of human rights jurisprudence in India.

B. Methodology

Postcolonial theory is the first theory that will be presented. It is used here almost as a background theory and it serves two purposes. The first purpose is that postcolonial thinking has guided the initial choice of studying India, as the author sought to learn more about Indian constitutional distinctiveness and hopefully engage other Canadian jurists to do so as well. The objective is that dialogues between legal cultures become more symmetrical. The second purpose is to locate Indian constitutionalism in its local and global contexts.[45]

Theories and criticisms on constitutionalism will also be used throughout this thesis. More than any other law, a constitution represents a nation's soul, its fundamental values and aspirations.[46] It is meant to be an expression of the people's will.[47] Constitutionally guaranteed human rights are now used extensively[48] as a way to entrench values of human dignity and

[42] For an example of reference to Canadian jurisprudence in an Indian judgement, see: *State Bank of Patiala & others vs S.K.Sharma,* (1996) AIR 1669. L'Heureux-Dubé J. cites a few cases where the Canadian Supreme Court has quoted Indian judges. However, these remain marginal examples.
[43] See below, section 1.A.I. *Gosselin v. Québec (Attorney General),* 2002 SCC 84 [Gosselin].
[44] L'Heureux-Dubé. , *supra* note 5.
[45] For an excellent overview of postcolonial theory, as well as accounts of neocolonialism and imperialism, see Roy. , *supra* note 11.
[46] The author chose to adopt here a pragmatic position on constitutionalism. There is no challenge in this thesis of the role of constitutions, or if this role may in fact be fulfilled. In the view of the author, the simple observation that many countries are today choosing to adopt constitutions as emancipatory tools is enough to render their analyses useful. The critical views of some authors on constitutionalism will however be presented.
[47] About constitutionalism and democracy, see: Sen; Larry D. Kramer, *The People Themselves: Popular Constitutionalism And Judicial Review* (New York: Oxford University Press, 2005); Charles Howard McIlwain, *Constitutionalism: Ancient And Modern* (New York: Lawbook Exchange, 2005).
[48] Numerous countries have recently adopted constitutions recognizing human rights in an attempt to establish fundamental transformative principles for their newly born democratic states. For an account of the new constitution in Ecuador, see Marc Becker, "Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador" (2011) 38:1 Latin American Perspectives 47. For an account of the effects of the constitution in Brazil, see Keith S. Rosenn, "Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society" (1990) 38:4 Am J Comp L 773. And finally, for the hopes

equality in constitutions as the most fundamental principles and aspirations of nations.[49] These human rights norms are of primary importance: the choice of rights granted constitutional protection, the role given to judges, and until the very wording of these norms shape the constitutional system of a given country. Human rights represent contemporary political projects, but they are also deeply rooted in philosophical conceptions. Indian constitutional law has shaped Indian distinctiveness in its legal and political spheres, and it should be recognized for its unicity.

The theoretical approach to constitutional law discussed in the North American context will draw on the capabilities approach developed by Martha Nussbaum,[50] as well as critical race theory. All three theories, the capabilities approach, critical race theory and postcolonial theory converge in that they ask from judges to engage in a contextual analysis of cases and reject liberal positivism. The capabilities approach is based on criticisms of American constitutional law's lofty formalism and methods of judging, and it is deeply linked to Nussbaum as well as Amartya Sen's work on social justice and human rights. Critical race theorists criticize American constitutional law for failing to consider the particular circumstances of the case, notably the race, and for maintaining hierarchy of race through legal positivism. Regarding this objective, postcolonial theory holds precisely the same arguments as critical race theory, on a worldwide scale.[51] These theories are relevant to study the Indian context because the Indians who created the constitution, and afterwards who interpreted and applied it at the SCI, were engaged in a postcolonial revolution and eventually also rejected liberal positivism and Anglo-Saxon legal interpretation principles. The fact that the SCI has adopted a radically different interpretation of norms of which the text is similar to the North Americans ones confirms Nussbaum and critical race theorists in their critiques of the North American liberal positivistic judicial interpretations

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behind the 1991 constitution of Colombia, see Donald T Fox & Ann Stetson, "The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia" (1992) 24 Case W Res J Int'l L 139.

[49] Martha C. Nussbaum, "Foreword - Constitutions and Capabilities: "Perception" Against Lofty Formalism" (2007-2008) 121 Harv L Rev 4.

[50] Martha Nussbaum, as well as other authors on the topic of constitutional law, writes about American constitutional law rather than Canadian. Numerous critiques against American constitutional law are also applicable to Canadian constitutional law, notably the Capabilities Approach and Critical Race Theory, as the legal cultures are not so different.

[51] Roy; Chantal Thomas, "Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development Symposium: The E-book on International Finance & Development" (1999) 9 Transnat'l L & Contemp Probs 1; Chantal Thomas, "Critical Race Theory and Postcolonial Development Theory: Observations on Methodology Symposium - Critical Race Theory and International Law" (2000) 45 Vill L Rev 1195.

seeking to find *the* rule to fit all situations,[52] and contradicts the perception that mere application of positive law is the best way to grow a healthy "living tree".[53]

The view taken throughout this thesis is a pragmatic one. Regarding India's institutions, criticising them for being components of the colonial heritage is certainly possible, but it is of little relevance as the questions raised relate to the achievements and the distinctiveness of the Indian constitutional culture. This culture comes from a complex combination of factors, including the institutions but also the judicial culture, the relationship between the judiciary and the two other branches, and changing characteristics of the Indian society the judiciary had to adapt to. Therefore it appears more relevant to ask pragmatically what achievements should be acknowledged and how the Indian judicial system chose to use these institutions, rather than ask if these institutions were truly authentic at the dawn of the social revolution. The same is true of the value of human rights as notions of international law or legal theory: there certainly are numerous important and useful critiques about human rights, but it is not the purpose here to challenge their theoretical nature in any way.[54] Since human rights are used as an emancipatory discourse,[55] they will be addressed as such.

This thesis is divided in three chapters. The first chapter describes the theoretical frameworks underlying this thesis, postcolonial theory, constitutionalism, capabilities and critical race theory, as well as an overview of the literature addressing human rights, social justice and the role of the judiciary in constitutional social and economic claims. The second chapter aims at explaining how human rights constitutional culture was shaped in India through the years of independence, the importance of the Constitution and the involvement of an active SCI. It first presents the historical conditions in which the social revolution that triggered independence was carefully institutionalized in the constitution, which was meant to preserve democracy from self-interested politicians, and then addresses how the constitution enabled, and even required, judges of the SCI to engage in judicial activism in order to safeguard values of the social

[52] See below, Chapter 1, section A.
[53] The "living tree" is a well-known expression to describe the Canadian constitution. It is meant to convey that the Canadian constitution is always growing and adapting to changing social realities.
[54] For an interesting review of critiques on human rights as seen in international law, see Kennedy., *supra* note 3.
[55] See also Upendra Baxi, "Politics of Reading Human Rights: Inclusion and Exclusion Within the Production of Human Rights" in Saladin Meckled-Garcia & Basak Çali, eds., *The Legalization of Human Rights* (New York: Routledge, 2006); Ratna Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side" (2006) 28 Syd L Rev 665.

revolution in everyday politics. The third chapter compares a landmark Canadian case in the area of social and economic rights, *Gosselin*,[56] and *Francis Coralie Mullin,* an Indian case addressing similar issues.[57]

Chapter 1 – Literature Review

This chapter presents the theoretical framework of this thesis, reviewing the works of leading scholars. The first section addresses constitutionalism and particular approaches to constitutional law and critiques that are relevant to understanding the importance of the achievements of the SCI. The second section addresses literature on human rights law, from both international and domestic – Indian and Canadian - perspectives.

A. Theoretical Approaches to Constitutionalism

All the authors presented here have in common a quest for social justice through law, from various viewpoints. The first section presents a brief overview of postcolonial theory and its connections with law. The second section presents Martha Nussbaum and her work on the capabilities approach. Critical race theorists are presented in the third section. Authors from the three theories find common ground in criticizing aspects of liberalism, legal positivism and rejection of the law as a neutral institution. They consequently argue for a contextual analysis of the law.

1. Postcolonial Theory

Postcolonial theory seeks to provide a new way of looking at world phenomena, past or present. It notably challenges the social constructs of the "European" and the "Other", and aims at deconstructing the stereotypes that survive regarding the inferiority of the Other.[58] The construction of this concept happened during the Enlightenment, at the same time as the concept of race was constructed. Both concepts were created to justify the attitude of Europe towards the world, for example in its practices of slavery and colonialism; and for this reason both concepts were embedded in a "natural" hierarchy,[59] confirming the European superiority to all others and hence its right to impose its culture.[60]

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[56] *Gosselin*, *supra* note 43.
[57] *Francis Coralie Mullin*, *supra* note 39.
[58] The concept of Other is central in postcolonial theory. Roy., *supra* note 11 at 321.
[59] The Other does not have to be oriental. The Other can also be anyone who the White man does not recognize to be like him. This can be so because of some feminine characteristics: irrationality of thought

Postcolonialism is concerned with the reality of the colonised since the very beginnings of colonialism (15th Century). Theorists are highly critical of history as "what happened"; the story told is always that of the victors. In this sense the history of the Other was never told. When one seeks to tell the Other's story, it is perceived as the story of "special interests". But neutral history does not exist; a story is always told by someone.[61] Postcolonial theorists address the effects of colonialism both on the colonisers and the colonised, and how colonialism never really ends for a society as its effects become entrenched in both cultures.[62] Moreover, colonialism has never really ended as the former colonial powers retained economic power over their former colonies, rendering political independence illusory, and new imperialist states (notably the US) are trying to gain indirect control over numerous Third World countries. [63] Famous postcolonial theorists have assessed how colonialism has annihilated the sense of self in colonised peoples, convincing them of the "truth" imposed on them. In other words, Europe has managed to convince the Other that to get privileges he needed to at least act as if he was White – although complete whiteness can never be attained. Nevertheless the colonised was not the only one to be influenced, the European identity was also shaped by its encounter with the Other – some theorists call it *cross-fertilization*.[64]

The relationship between postcolonial theory and law aims at assessing the role of law during colonialism, as well as its lasting effects on colonised societies. It is here that postcolonial theory shares a common ground with critical race theory[65] and other movements of critical legal studies: they are deeply engaged in criticism of liberal positivism, which has dominated legal discourse since the 20th century, and is identified as the "western legal project".[66] Liberal

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and behaviour, irresolution, surfeit of sentimentality, affection, selflessness: Ian Duncanson & Nan Seuffert, "Mapping Connections: Postcolonial, Feminist and Legal Theory - Special Issue: Mapping Law at the Margins: Through the Lens of Postcolonial Theory" (2005) 22 Austl Fem LJ 1. at 4-5. The Other can also be identified because the White man sees "barbaric or savage" traits, or different skin color, language – the Other has to be *different*. In the construction of the Other, often is underlying the idea – and usually justification for violent subordination – that the Other is less than human: ibid. at 13.

[60] Roy., *supra* note 11 at 323-324.

[61] Duncanson & Seuffert. at 9.

[62] Roy. at 315-318.

[63] For an extensive review of the key concepts in postcolonial theory, notably imperialism, colonialism, decolonisation, neocolonialism, see ibid. at 330-337.

[64] Ibid. at 338-340.

[65] See below, section 3.

[66] Roy., *supra* note 11 at 319.

positivism is characterised by claimed "legal neutrality, formal equality and legal objectivity".[67] In attempting to sustain these claims, liberal positivism excludes any other legal discourse than its own as inferior, while postcolonial theorists suggest that the dominance of the discourse may be due to nothing more than imposition through force.[68] Underlying the claims to neutrality are the contested concepts of reason and objectivity; which are challenged by postcolonial theorists.[69] Postcolonial as well as critical race theorists, in challenging liberal positivism, advocate for a contextual analysis of the law. However, postcolonial theorists have no doubt that this belief that the western legal system is superior to others is still deeply entrenched today. There is a perception from authors that Indian law is not as valued as it should outside of India for that reason.[70]

Law is a powerful vehicle for transmitting cultural values; and western laws are carriers of liberalism. Laws in colonialism have played a strong role in shaping the subjects of both colonisers and colonised. Through the imposition of their laws, Europeans have imposed their rule and values.[71] We see it in the governmental institutions in India and in the British legal education received by important members of the intellectual elite, which most likely planted seeds in the process of imagining the social revolution.[72] However, Upendra Baxi explains that if postcolonial constitutionalism does carry its load of colonial heritage, postcolonial constitutions also represent a break with colonialism and do offer emancipatory opportunities to populations. Baxi specifically notes the Public Interest Litigation (PIL)/Social Action Litigation (SAL) system and the SCI's judicial activism as important achievements of Indian postcolonial constitutionalism.[73]

The work of postcolonial theorists will not be explored more in depth in this section as the objective is to offer a brief overview of the theory, but it should be noted that several authors referenced throughout this thesis are engaged in work on postcolonial theory. Notably Upendra Baxi and Ratna Kapur, whose work will be presented in the second section, are strong advocates of postcolonial theory.

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[67] Ibid. at 319.
[68] Ibid. at 320.
[69] Duncanson & Seuffert*., supra* note 59 at 7.
[70] Ghai., *supra* note 10 at xiv.
[71] Roy*., supra* note 11 at 329-330.
[72] Nehru as well as Ghandi studied British law. See below, Chapter 2 section A.
[73] Upendra Baxi, "Postcolonial Legality" in Henry Schwarz & Sangeeta Ray, eds., *A Companion to Postcolonial Studies* (MA: Blackwell Publishing, 2005).

2. Capabilities

This section is based on the work of Martha Nussbaum and Amartya Sen, who are development as freedom theorists and offer interesting insights on the place of social justice in constitutionalism. The first section presents Nussbaum's argument for a constitutional interpretation method based on human capabilities. The second section defines capabilities, and how precisely capabilities are linked with but are not the same as rights.

a. Capabilities Approach to Constitutional Law

In discussing American constitutional law, Nussbaum addresses the capabilities approach to constitutional law as one of the approaches used – to a limited extent - by the Supreme Court of the United States (SCUS). She raises questions about the role of constitutional principles in governance and how they should be used if real equality is to be achieved. She sets out to answer the following question: "How have the basic constitutional principles of a nation, and their interpretation, promoted or impeded people's abilities to function in central areas of human life?"[74] The purpose of a constitution as well as its interpretation and application must be to secure all of the citizens with a life worthy of human dignity.[75] In other words, the capabilities approach requires that we ask the question of "what basic minimum justice requires".[76] The task of judges is then to interpret the list of basic entitlements chosen by the nation.[77] The choice of entitlements here is not merely a choice of the majority, as values of protection of minorities should be included as well as principles of tolerance, equality and multiculturalism.[78] Basic entitlements are often found in constitutions in the form of fundamental rights.[79] Therefore, the rights protected in a constitution are meant to be a written recognition of the choice of a society as to the basic guarantees a government should provide its

[74] Nussbaum., *supra* note 49 at 6.

[75] Ibid. at 7. The government must bear this role because if human beings are all born with internal abilities to live their life in dignity, these abilities are not enough; certain external elements are also required to ensure a person's capacity to live that life. The government's mission is thus to provide people with "combined capabilities", which Nussbaum describes as "internal capabilities combined with suitable external circumstances to select the function in question", at 11-12.

[76] Education, resources to feed themselves and live in an adequate home, possibility to speak and participate in politics are all capabilities that need to be fostered by the government so that everyone can enjoy them equally. Ibid. at 12.

[77] Ibid. at 16.

[78] For the importance of these principles in constitutionalism, see also Robert L. Hayman, "The Colour of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism " (1995) 30 Harvard Civil Rights-Civil Liberties Law Review 57.

[79] Nussbaum., *supra* note 49 at 57-58.

citizens with. In other words, fundamental rights are meant to represent a society's version of social justice.

Nussbaum traces the primary source of the capabilities approach to Aristotle[80] and especially his work on human vulnerabilities.[81] Nussbaum presents Aristotle's writings about judging: he advocated for "perception" and "contextual understanding". He argued that to be a good judge was not to merely follow abstract general rules, but rather to understand the individual circumstances of the person standing before him – in other words, to take into consideration the personal vulnerabilities of each.[82] Nussbaum opposes the capabilities approach to other constitutional approaches found in American law, and especially to "lofty formalism". She defines lofty formalism as "the view that good judgment requires standing at a considerable distance from the facts of the case and the history of struggle that they frequently reveal."[83] The proponents of this view believe that this distance allows them to make decisions that are not biased, or even better, decisions that are "neutral". In the same way, judicial formalism allows to draw decisions merely from established rules rather than individual cases.[84] Lofty formalism comes from the ideas that law must be in the form of a "one-size-fits-all" rule, and that lawyers and judges should not make law but merely apply it. To apply law without providing their personal input, jurists must not have the possibility of interpreting and adapting rules to individual circumstances, and even less to their *perception* of individual cases. Nussbaum calls this search for *the* rule "judicial search for fixity" and notes that it frequently expresses itself in two ways: textualism and a refusal to consider some characteristics of a given case.[85]

[80] Aristotle sought to provide politicians with guidelines, as he believed their mission was to provide their population with the resources necessary to allow them to lead a flourishing life. Aristotle based his writings on two pillars: capability to choose freely and human vulnerabilities. His recognition of vulnerabilities implied that any governmental decisions required the vulnerabilities at stake to be considered and remedied or at least alleviated by the government. This means providing persons with capabilities and opportunities to make their choices for themselves. Ibid. at 33.

[81] Aristotle writes of physical as well as emotional and intellectual vulnerabilities, p. 35-36. However, Aristotle did not write about any real equality, as he accepted the concept of citizens and thus excluded females, immigrants, slaves and others from his writings about human vulnerabilities. In this sense, his writings need to be adapted to a context of multicultural society. Ibid. at 37.

[82] Ibid. at 25.

[83] Ibid. at 26.

[84] Ibid. at 26.

[85] Ibid. at 27.

Nussbaum also makes the connection between lofty formalism and libertarian minimalism, and demonstrates how they can prove to be strong allies.[86] Acting together, both approaches legally confirm the legitimacy of the established power interests.[87] The liberal view ideologically bases its rights approach on the liberal subject: the white, educated, powerful and propertied male.[88] Lofty formalism, which offers no critique whatsoever of existing hierarchy, rather confirms the status of the powerful in granting it the standing of "neutrality". In other words, according to lofty formalism proponents, political bias is found in all views but the one of the established power holders.

Nussbaum's argument places the judge at the center of the interpretation of fundamental rights. Not only does the interpretation of a right depend on the personal experience of the judges on the bench, but it also depends on what they see as their mandate. The capabilities approach requires a good judge to place himself or herself in the story of the cases, and analyse whether the entitlements guaranteed to the persons involved were in fact available, or if in those circumstances they merely amounted to words on paper.[89] The application of the capabilities approach requires a strong judiciary,[90] and the role advocated is a proactive one of engaging in judicial review. An overly cautious judiciary cannot implement this approach.[91] The

[86] Ibid. at 21-24, 30.
[87] Ibid. at 30.
[88] For a critique of the liberal foundations of human rights as a well as a similar and yet postcolonial description of the liberal subject, see Kapur*., supra* note 55.
[89] Nussbaum argues that three things are needed in order to do that. The first suggestion is that judges should look more closely at impediments that stand in the way of people in enjoying their fundamental rights. This requires reflection on the social and historical context, and the judge has to think in terms of perceptions of the persons involved in the case, rather than relying on mere abstract rules. Secondly, Nussbaum argues that equality of access to a right must be considered by judges as an intrinsic part of the right itself, and that in that regard the social and historical context have to be considered as frequent causes of impediment in access to rights. An impediment does not have to be imposed by the state to be effective, thus the state should endeavour to provide people with capabilities to ensure they can enjoy their rights. The third element is that judges should be aware that some rights may require some material support from the state to make these rights accessible, even though they do not appear to be "affirmative rights". Nussbaum*., supra* note 49 at 31-32; 58-59.
[90] Ibid. at 61. Governments have the responsibility to intervene when the circumstances of some groups do not provide them with equal chances. If the government fails to provide facilitating measures, then courts should use their power of judicial review to intervene, at 58-59.
[91] Diane Woods, an American judge, attempted to answer to Nussbaum. She stated that it was difficult to argue against the fact that a child, who is disabled, does not have a home or is hungry does not have the same access to free public education as others. She also agreed that there was no structural impediment to judges immersing themselves in the fact of a case as much as they wanted to. Nevertheless, she said the problem was rather what judges would do after considering the facts. She then gave a lengthy lecture about the limitations judges met in the rules they applied – international human rights law the US has

role of the judiciary as described by Nussbaum is interestingly similar to the role taken up by the Indian judiciary. In choosing judicial activism and the defence of the powerless, the SCI has left Anglo-Saxon legal mentalities to move towards a contextual analysis of the reality of the disadvantaged, taking into account their social, historical and political circumstances. The SCI has consciously rejected lofty formalism and liberalism as rules of legal interpretation, and opted for a strong mission of judicial review in accordance with the Indian social revolution.[92]

b. Capabilities and Social Justice

The work of Amartya Sen has greatly influenced the field of law and especially human rights, most notably legal scholars such as Upendra Baxi.[93] Sen's contribution to social economics and his work on social inequalities and poverty are invaluable, to India and to the international community.[94] His definition of poverty as "capability deprivation" offers an insightful representation of the reality of the poor and an alternative to the traditional definitions of poverty.[95] His work is of critical importance in understanding social inequalities and human development and the role of law and human rights in these respects.

Giving example of deprivation of basic capabilities, Sen enumerates "premature mortality, significant undernourishment (especially of children), persistent morbidity, widespread illiteracy and other failures".[96] While the terms chosen are not part of human rights vocabulary, each capability is easily linked to at least one human right: right to health, right to life and rights of children – especially right to non-discrimination for girl children[97] (premature mortality); right to food, right to a decent standard of living, right to clean water and rights of children (significant undernourishment); right to health and right to life (persistent morbidity); right to education (widespread illiteracy). This example is a great illustration of the deep links between situations

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ratified, constitutional guarantees. It is however interesting to note that the US, unlike Canada, has never ratified the International Covenant on Social, Economic and Cultural Rights. Nussbaum answered that where it is true that changing the constitution might be the ideal answer, there is still much to be done with the current constitution. See Bryan Hart, *Chicago's Best Ideas: Martha Nussbaum and Judge Diane Wood, "Constitutions and Capabilities: A Dialogue about Political Philosophy and the Judge's Role"* (Chicago: University of Chicago Law School, 2009).

[92] See below, Chapter 2 section B.

[93] William Twining *Human Rights, Southern Voices* (New York: Cambridge Press University, 2009). at 159.

[94] See also C. Raj Kumar, "International Human Rights Perspectives on the Fundamental Right to Education-Integration of Human Rights and Human Development in the Indian Constitution" (2004) 12 Tul J Int'l & Comp L 237.

[95] Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999).

[96] Ibid. at 20.

[97] Ibid. at 104.

of human suffering because of capability deprivations and human rights norms. The rights associated with the capabilities are coherent with the theoretical version of human rights, but they are not coherent with the strictly liberal version of human rights. Sen addresses different types of freedoms, or capabilities, as "building blocks" to allow persons to live the life they want to live.[98] It could be argued that the concepts developed as capabilities by Sen would find equivalents in the human rights language. However, the distinction between civil and political rights on one side, and economic and social rights on the other appears completely unjustified in light of Sen's definition of poverty. His building blocks remind us that all the freedoms are in fact interdependent.

It is interesting to note the importance Sen gives to the concept of freedom, and the links he makes between freedom and poverty. Where freedom in liberal thinking merely means restriction from intervention on the state's part, Sen brings a perception of freedom that includes not only individual freedoms but the opportunity to use social arrangements. For Sen, freedom is not an individual good but a social one.[99] In other words, a person living in poverty cannot be *free* from wants and needs, if the social arrangements are not there to allow him or her to enjoy capabilities.

Martha Nussbaum uses Sen's capabilities approach as a basis to articulate a theory of social justice.[100] She also notes the similarities between the approach and the human rights regime, observing that the approach covers both first-generation and second-generation rights.[101] However, she argues that capabilities are more precise and complete, as they convey the idea of equal opportunities that human rights do not clearly state.[102] She argues that the best way to interpret and fulfill human rights is to think of them in terms of human capabilities. Nussbaum notes that the Indian Constitution affirmatively states the rights, and thus addresses human rights in the manner of capabilities. In other words, the Indian Constitution does not state rights

[98] Ibid. at 18.
[99] Ibid. at 31.
[100] Martha C. Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice" (2003) 9:2-3 Feminists Economics 33.
[101] Ibid. at 36.
[102] Ibid. at 37.

in negative terms, as required by liberal ideology and found in the American or Canadian constitutional interpretations.[103]

Nussbaum establishes a list of ten capabilities that every person must be offered to be able to enjoy in a minimum capacity. This list represents her idea of social justice: a society that fails to guarantee its citizens with the minimum threshold for every capability cannot be a just society.[104] Several observations can be drawn from the list. First, capabilities demonstrate a collective aspect: Nussbaum's list acknowledges the fact that human beings always live in interrelation, and that a human being's life revolves around other human beings. The opportunity to care for other human beings or other living species is found in several capabilities' descriptions.[105] Second, found in the previous "collective" aspect but also in other descriptions of capabilities, is the aspect of protecting human emotions.[106] Emotions are not often acknowledged in legal discourse; in fact, legal discourse claims to be "rational" and thus beyond emotions.[107] It is relevant to note here the link between acknowledgment of emotions

[103] Ibid. at 39.

[104] Ibid. at 40-42. The list includes: Life; Bodily Health; Bodily Integrity; Senses, Imagination, and Thoughts; Emotions; Practical Reason; Affiliation; Other Species; Play; Control Over One's Environment. She is open to the idea that there might be diverging views about the capabilities included in the list, but the existence of divergent views does not question the principle that a minimum social justice requires the recognition of basic capabilities.

[105] For example in the description of "*Emotions*", she writes "Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)"; in the description of "*Affiliation*", she writes "Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another" and "Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others."; and finally in "*Other Species*" she writes "Being able to live with concern for and in relation to animals, plants, and the world of nature."

[106] Of course the category "*Emotions*" aims at protecting emotions, however the language used in the category "*Senses, Imagination, and Thought*" also recalls emotions: "Being able to use the senses, to imagine, think, and reason – and to do these things in a ''truly human'' way, a way informed and cultivated by an adequate education […] Being able to have pleasurable experiences and to avoid non-beneficial pain"; a language or empathy is used in "*Affiliation*": "Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another"; the capability "*Other Species*" includes "Being able to live with concern for and in relation to animals, plants, and the world of nature"; and finally the capability to "*Play*" reads "Being able to laugh, to play, to enjoy recreational activities" which refers to the emotion of enjoying oneself.

[107] For an exploration of the dynamics between reason, emotions, mercy and interpersonal relationship in law, see Linda Ross Meyer, *The Justice of Mercy* (University of Michigan: University of Michigan Press, 2010).

in the capabilities' definitions, and Aristotle's list of vulnerabilities which were often emotional. Aristotle argued that these emotional vulnerabilities had to be taken into consideration in good judgement. Law's claim to be rational is contradictory with this endeavour, and the list of capabilities aims at presenting an alternative. The last observation is that the list's language is oriented toward *building* rather *protecting*. This is probably what Sen and Nussbaum mean when they discuss "opportunities" rather than "rights." The objective is to empower individuals rather than limit wrongful interference, and at the same time it recognizes that governments are not necessarily the ones to impose impediments to citizens. This must not mean that nothing should be done to reduce or eliminate these impediments.

Arguably, the failure to acknowledge human emotions and the importance of personal interrelations is a blind spot of the law, one that is particularly poignant in the case of human rights law. As stated earlier, Nussbaum argues for her list to be used as social justice principles,[108] they are not meant to be legal principles. Sen and Nussbaum, in arguing for theories of social justice instead of mere human rights, might be using a different language to transmit the same message that will be discussed further with the scholar Upendra Baxi.[109] Baxi argues that the principles of human rights on their own risked being abused or discriminated but that if the interpretation is led by the reduction of *human suffering,* then they become useful tools of protection. Both interpretive tools are useful to provide a truly holistic protection – or hopefully positive empowerment – of individuals. Both demonstrate the greatly needed human face of human rights. All of the elements that are found in Nussbaum's list but not in human rights norms are the reason for a contextual analysis of cases, because only such an analysis can extract the relevant emotions and other relevant information to one's reality.

Nussbaum writes that the contents of social justice must be explicitly embedded in the fundamental entitlements of the citizens.[110] Fundamental entitlements are crucial to an efficient judicial review in human rights claims, since failing to establish what it is a society seeks as a social ideal means that the "critical" role of social justice cannot be fulfilled. As Nussbaum phrases it,

[108] She actually refers to them as "political principles": Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice"., *supra* note 100 at 43.
[109] See section B.3.
[110] Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice"., *supra* note 100 at 46.

> Social justice has always been a profoundly normative concept, and its role is typically critical: we work out an account of what is just, and we then use it to find reality deficient in various ways. Sen's whole career has been devoted to developing norms of justice in exactly this way, and holding them up against reality to produce valuable criticisms.[111]

In constitutional law, this means that judicial review on the basis of human rights norms would be meant to fulfill precisely this critical purpose. Where a constitution guarantees human rights, these norms are meant to represent a list that includes the basic entitlements citizens are supposed to be guaranteed by the state. Laws adopted by Parliament are thus meant to be compared to these ideals in order to find out if they respect the criteria of social justice embedded in the constitution. The power of judicial review, when used in human rights claims, has a different purpose than it does any other type of claims. Human rights norms represent a certain vision of social justice, and as such these norms cannot reach their full potential through liberal positivistic interpretations. Legal analyses of the expectations and perceptions of the citizens on their access to basic entitlements are fundamental to assess government laws and policies.

3. Critical Race theory

The capabilities approach developed by Nussbaum and Sen is well complemented by critical race theory. Both are advocating for affirmative actions, in the sense that the state needs to provide privileges to communities that were historically and socially discriminated against.[112] This assertion is based on the fact that these communities do not benefit, if evolution is left to follow its natural track, from equal opportunities with members from privileged communities. This is so because these groups still suffer from discrimination, which can present itself in the most insidious ways. From a legal point of view, Nussbaum argued that the personal circumstances of one have to be taken into account in order to assess if the person was in fact able to enjoy the rights guaranteed. On the other hand, critical race theorists place themselves from the perspective of non-whites who suffer their whole lives from various types of discrimination, and stress that this historical and social context must always be considered when the situation of a non-white is at stake, whether in law of in other fields of social sciences.[113] In a

[111] Ibid. at 47.
[112] Nussbaum, "Foreword - Constitutions and Capabilities: "Perception" Against Lofty Formalism"; Hayman.
[113] Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001).

way, critical race theorists advance that there is a presumption that racism is present in every situation and colors every step of non-whites' lives.

Theorists from the critical race theory challenge expressions of racism in North-American institutions, constitutionalism among others.[114] Critical race theory is not only focused on race, but rather explores the reality of all marginalized groups. The critical race theory movement has roots in radical feminism and critical legal studies[115] and is linked to queer-crit interest groups.[116] Critical race theorists also write on the deep effects of poverty on portions of the populations, and the link between race, poverty and socio-economic issues.[117] A critical race theory scholar has therefore stressed that every new law should be assessed to ensure that it is meant to relieve the distress of the poorest sections of the population, and where it is found that it does not or even worst that it enhances it, the law should be rejected. All of the critical race theory movements share common ground in challenging the existing hierarchy in public institutions, hierarchy from which members of marginalized groups suffer.

Both the capabilities approach and critical race theory are concerned with the historical and social context that has led certain groups to be disadvantaged, and therefore not able to enjoy their rights as dominant groups do. Critical race theory criticizes the standard of formal equality. Rules that are made to be applied to everyone in the same way do not affect everyone in the same way. Furthermore, racism is lived on a daily basis by persons of color and discrimination is found in the smallest of actions. Providing that laws must be subject to verification according to norms of non-discrimination, even a constitutional one, can change but the most blatant discriminations; it can do little against mentalities.[118] Some critical race theorists advocate for affirmative actions to improve the status of non-whites in society, while others will rather seek a change in mentalities that they believe will eventually lead to more equality.[119] Critical race theory aims to shed light on the reality of people of color, and how public institutions interact

[114] Arguments from critical race theory were also used by authors from postcolonial theory, on a global scale. See Thomas, "Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development Symposium: The E-book on International Finance & Development"; Thomas, "Critical Race Theory and Postcolonial Development Theory: Observations on Methodology Symposium - Critical Race Theory and International Law"*., supra* note 51.
[115] Delgado & Stefancic., *supra* note 113 at 4-5.
[116] Ibid. at 6.
[117] Ibid. at 10-11.
[118] Ibid. at 7.
[119] Ibid. at 17.

with them, law being an important one of those public institutions. In the same way, the capabilities approach rejects the concept of formal equality as it is not enough to bring any real equality; empowerment has to be provided to citizens who need it to enjoy their rights equally.

The consequences of marginalization on the lives of people are precisely what Nussbaum wants to see explored in judicial decisions. Arguably, critical race theory could be perceived as a specific application of the contextual analysis of legal norms advocated by Nussbaum. From the point of view of judicial interpretation, Nussbaum argued that the personal circumstances of one have to be taken into account in order to assess if the person was in fact able to enjoy the rights guaranteed, and she insisted on the importance of the judiciary's role. Critical race theorists place themselves from the perspective of non-whites who suffer their whole lives from various types of discrimination, and stress that this historical and social context must always be considered when the situation of a non-white is at stake, whether in law or in other fields.[120] Critical race theory goes deeper in its assessment of the reality of marginalized people as well as in its critique of the existing order, whereas Nussbaum merely mentions these elements as important realities or issues to address. Critical race theory scholars criticize liberalism, especially the supposedly "color-blindness" and "neutrality" of constitutional principles. They also criticize rights for serving the interests of the wealthy rather than the poor.[121]

Hayman discusses the importance CRT grants to the lived experience of people in constitutional cases, and how CRT scholars insist that justice should be rendered on the basis of lived experience rather than mere theory.[122] He opposes this position to "conventional traditionalism", which he states being "blissfully ignorant of its own construction".[123] Conventional traditionalism refers to the traditions of the dominant group, and courts' efforts to apply it have systematically meant exclusion of cultural minorities' traditions:[124]

> Conventional traditionalism, in short, excludes too many truths. In its indifference to context, it distorts; in its indifference to perspective, it is biased. In its pretense that the dominant tradition is the one

[120] Ibid.
[121] Ibid. at 21-24.
[122] Hayman., *supra* note 78 at 70.
[123] Ibid. at 71.
[124] Ibid. at 74.

> tradition, it oppresses; and in its blindness to its own role in the construction of differences, it enlarges the spaces that separate us.[125]

The author also notes that this conventional traditionalism impoverishes the constitutional culture, and that inclusion of other traditions, of "racially" different traditions,[126] would hold the promise of enrichment. He also writes that "the forcible homogenization of the unitary tradition exacts its own spiritual costs: it steals from us the excitement of discovery; it cheats us of the joys of sharing; it robs us of wonder."[127] American constitutional evolution at the moment behaves as if there was one single, white, truth; and it leads it to miss differing traditions that are as important as interesting.

Hayman bases his argument on critical race theory and thus concentrates on racial issues, but similar reasoning can be used for poverty issues: the needs and wants of poorer sections of the population are rarely understood by elites, no matter the color of their skin. Conventional traditionalism demands uniformity, conformity to the dominant group; in doing so it oppresses minorities to force them into assimilation. Conventional traditionalism moreover justifies its demands for assimilation by its so-called neutrality. Hayman's definition of "traditions" appears to be broad, and it most likely includes libertarian minimalism and lofty formalism as described by Nussbaum, and he does mention that it includes the "color-blindness" of the constitution. In mentioning "indifference to context" and to "perspective", Hayman offers the same argument as Nussbaum regarding the personal circumstances of every case, in opposition to a lofty rule of law and libertarian traditions. And in discussing "blindness to its own role in the construction of differences", he refers to and challenges the alleged "neutrality" of dominant legal traditions, as Nussbaum does.

The author writes that "law is what we do" and highlights that understanding law really is the same process as creating it. The possibility for judges to completely refrain from adding personal input to their interpretation of cases is simply non-existent: understanding law involves a

[125] Ibid. at 77.
[126] The term "racially" is used here because CRT holds that race is a social construct. See Delgado & Stefancic., *supra* note 113. As such, it includes a large share of cultural background rather than any concrete biological or genetic characteristic, and thus the racial group is really a cultural group. The group is identified as bearing one identity, whether this identity is imposed on it or whether it chooses it itself and this identity has cultural traits and perhaps traditions in common. It is these traditions that Hayman wants considered and valued in American constitutional law.
[127] Hayman., *supra* note 78 at 106.

personal exercise that requires at least some creation of law.[128] Law cannot merely be found, because law as a lofty truth does not exist. Hayman asks from judges that they challenge the view that they should decide on cases while escaping personal traditions and be nothing more than a judge. Judges are human beings and they cannot escape it. Hayman therefore rather advocates for recognition of these traditions and an attempt at understanding the impact it can have on their judgment.[129]

In Diane Woods' answer to Nussbaum,[130] the judge stated that she indeed agreed that a child who was disabled, homeless or going to school hungry, or if a child only had access to an education of poor quality because of the coloured neighborhood where the child lived, that child was in fact not enjoying access to free public education on an equal footing with other children. Nevertheless, instead of having the reflection that law should somehow acknowledge this different reality, she pursued by stating that rules did not allow her to do anything about it. She clearly stated that she considers that instead of focusing on the personal situation of the child to interpret his or her actual access to the right, she must look merely at precedent and written rules. This is precisely what Nussbaum and critical race theorists are arguing against. Perhaps if Diane Woods and other judges gave a little more importance to contextualizing, this type of reasoning would not be so widespread among judges. On the other end of the spectrum, Indian judges have not only considered the human situations of their cases, but they have wilfully engaged in social transformation and have gone far in adapting the law in order to achieve these transformations.

B. Human Rights

This section reviews the literature on salient aspects of the debate about human rights law and the role of courts in adjudicating human rights norms. The first part describes the human rights culture, namely the importance human rights occupy in the universal perception of social goals and ideals. The second part discusses the liberal version of human rights, and the reactions of Canadian authors to the role of judges in social justice and human rights claims presented to

[128] It is interesting to contrast this view with Aristotle's. Rather than seeing this personal input as a sign of weakness, Aristotle rather thought this personal input was precisely the pre-requirement for good judgement. Personal input indeed comes from personal experience, which enables one to build judgment capacities.
[129] Hayman., *supra* note 78 at 76-78.
[130] Hart*., supra* note 87.

Canadian courts. The third part addresses the Indian judiciary, and how human rights have evolved to play a completely different role through the SCI's judicial activism.

1. The Human Rights Culture

Western countries at first, now joined by many non-western ones, have adopted what can be called a human rights culture.[131] Human rights have become the ideal, our way of reaching out for the "right" society.[132] The notion that human rights are the current social ideal is well described by Samuel Moyn,[133] a leading scholar on the history of human rights. In a recent book on human rights, the author demonstrates how human rights are in fact the "last one standing" in terms of ideology.[134] In other words, human rights truly gained importance as ideals in "an age of ideological betrayal and political collapse".[135] This consideration is crucial, as it allows criticizing human rights like any other choice of political and legal discourse, and prevents the conclusion that human rights are inevitable as natural attributes of the human person. Moyn writes that human rights are not only thought of as the "highest moral precepts and political ideals", but that they also imply "an agenda for improving the world". [136] In this sense, human rights are often perceived as important tools to fight for human dignity and emancipation, and numerous NGOs and social movements use human rights in their campaigns regarding various social and political struggles.[137]

Ratna Kapur, a leading author on feminist studies as well as a professor, has achieved important work on human rights and cultural relativism. She presents the history of human rights in a way similar to Moyn.[138] She challenges three claims about the human rights discourse. The first two claims she deconstructs are that human rights are neither necessarily progressive nor universal. She then argues that their philosophical foundation is the liberal subject, the "white, Christian,

[131] See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010). and Richard Rorty, "Human Rights, Rationality, and Sentimentality" in Stephen Shute & Susan Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures* (New York: Basic Books, 1993).
[132] This is also true of numerous non-western countries, where human rights are largely used by social groups as a tool to advocate for various claims: Engle Merry. *, supra* note 4.
[133] Samuel Moyn is a history professor at Cambridge University. His insights are situated in the fields of sociology and history rather than law, nevertheless they are very useful to understand the connections between the expectations of society regarding human rights, and the legal interpretation of these norms.
[134] He mentions some examples of bankrupt ideologies: Moyn., *supra* note 131 at 2-3.
[135] Ibid., at 8.
[136] Ibid., at 1.
[137] For an account on the use of human rights in local political struggles, see Engle Merry. *, supra* note 4.
[138] Kapur*., supra* note 55.

propertied male".[139] The first claim addresses the general perception that human rights are necessarily a progress, that in recognizing human rights, "civilised" nations have achieved a "righteous" objective.[140] Kapur notes that critiques of human rights are as numerous as they are diversified: postcolonial, feminist and new scholars are of the group, as are members of extreme religious right movements and more nuanced conservative reactionaries. She therefore reminds us that human rights form a political project among others, and going even further that they have become a moderate project, when they are imagined by many as a revolutionary one.[141] Human rights projects vary both in nature and substance, but even more they vary in the expectations one entertains regarding the projects. These variations in reality and perception leave the door open to a wide range of potential political uses and manipulations. Kapur notes that the discourse has been permeated by imperial ambition and moral superiority, and that human rights vocabulary has replaced "muscle flexing and macho talk" of military conquests to provide the same violent interventions with legitimacy.[142]

In deconstructing the second claim that human rights are universal, she reminds us that postcolonial theory is crucial to understand the ways in which human rights were built on politics of exclusion of difference:[143] colonialism, slavery, and gender and racial discrimination characterised the time when human rights were born.[144] Some excluded groups were integrated after social movements fought for it, but these inclusions remain the result of social pressure rather than intrinsic to human rights politics. The author's title, the "dark side of human rights", represents the colonial encounter: contemporary human rights cannot be understood without embracing the importance the colonial encounter still has in the world today. The mentality underlying colonialism has not necessarily disappeared yet, and its effects are still present. While writing about the liberal subject, her third critique of international human rights, Kapur notes that he is "free, unencumbered, self-sufficient and rational, existing prior to history and social context".[145] Human rights having grown in the soil of liberalism, they do not intrinsically

[139] Ibid. at 673.
[140] Ibid. at 668.
[141] Kapur asks an interesting question: "How has a project that held out the promise of a grand spicy fete mutated into an insipid appetiser?" Ibid. at 666.
[142] Ibid. at 671.
[143] Baxi uses the same language in similar arguments: Baxi, "Politics of Reading Human Rights: Inclusion and Exclusion Within the Production of Human Rights"., *supra* note 55.
[144] Kapur., *supra* note 55 at 673.
[145] Ibid. at 675.

recognize the richness of cultural diversity but rather attempt at finding mechanisms to address difference from *the* subject, in other words, to address "civilizational backwardness".[146]

Kapur does not advocate for abandoning human rights, but rather aims at enabling critiques to reformulate them in a way that ensures their conformity with their purpose.[147] The "dark side" she refers to is the underlying liberal tradition in the human rights discourse that threatens to impose a political project rather than provide emancipatory strategies to disadvantaged groups.[148] This risk is all the more present that it does so in claiming to be "neutral", objective and, even worse, "civilised". She acknowledges the power of human rights vocabulary and the emancipatory potential it can have but asks from human rights advocates to "interrogate the colonial trappings and the "First World" hegemonic underpinnings of this project".[149] Countries that are going through the process of independence from a colonial power, like India, are doing so with laws – including human rights – that were often enacted by colonisers and created with a backdrop of hegemony. Kapur asks us to look more closely at how countries are engaging with postcolonialism, to see how the politics of human rights may still foster exclusions rather than inclusions.[150] Looking at a human rights project in a postcolonial situation is precisely what this thesis does, and from the perception of an outsider, India appears to have at least partially met the challenge.[151]

2. The Human Rights Constitutional Culture in Canada

The Canadian legal system recognizes the importance of human rights by constitutionalizing them. The rights recognized by the Canadian Charter are generally described in human rights literature as first generation rights or freedoms from state intervention, and they form a specimen of the liberal version of human rights described by Kapur. The rights granted protection are far from being a representative sample of the whole body of human rights

[146] Ibid. at 675-676.
[147] Ibid. 668.
[148] Ibid. at 681.
[149] Ibid. at 683-684.
[150] Ibid. at 685.
[151] The interpretation of human rights in India is progressive in many ways. However, some severe lacks are still found, notably regarding the rights of women. For critiques on gender justice in India, see Vrinda Narain, "Muslim Women's Equality in India: Applying a Human Rights Framework" (Forthcoming: 2013) February 2013 Hum Rts Q; Jaising Indira, "Gender Justice and the Supreme Court" in B.N. Kirpal *et al.*, eds., *Supreme But Not Infallible* (New Delhi: Oxford University Press, 2000); Zoya Hasan, "Gender, Religion and Democratic Politics in India" (2010) 31:6 Third World Quarterly 939.

instruments recognized in international law.[152] In fact, the Canadian Charter does not include all, or even most, of Canada's obligations in human rights treaties. The lack of recognition of social and economic rights in Canadian legislation persists in spite of Canada's ratification of the International Covenant on Social, Economic and Cultural Rights in 1976, and despite numerous UN criticisms of Canada in this area.[153] An important difference between India and Canada needs to be pointed out here: whereas Indian courts are receptive to applying international law in domestic cases, and are encouraged to do so by the constitution,[154] the same cannot be said of Canadian courts. Canadian courts cannot directly apply international law in domestic cases. Indeed, Canada has a dualist system, which means that international law only becomes binding once it is enacted by Canadian legislative institutions. In other words, human rights treaties are not self-executive in Canada, and this has led to serious discrepancies between Canada's international obligations and the domestic protection for human rights. This possibility to avoid international legal obligations has led to poor legislative protection for many human rights in Canada.[155]

The main focus of this thesis is on social, economic and cultural rights not because they are more important than civil and political rights, but because they represent the failure of the liberal version of human rights to represent a coherent version of social justice. Even though the two Covenants were meant to be equal and represent equivalent obligations for all the states, the reality is quite different. The recognition of civil and political rights in the Canadian constitution, in contrast with a complete absence of social, economic and cultural rights, is a good illustration of this. This liberal account of human rights, which came to dominate some

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[152] See Frédéric Mégret, "International Human Rights Law Theory", online: (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539591 >. and Eric Engle, "Universal Human Rights: A Generational History" (2006) 12 Ann Surv Int'l & Comp L 219.

[153] Canada has in fact been consistently criticized by the UN Economic and Social Council for its failure to enforce in its law the international obligations it committed to in the International Covenant on Economic, Social and Cultural Rights. In its 2006 concluding observations on Canada, the Economic and Social Council reiterated its concerns that Canada had not implemented its obligations under the Covenant, concerns that had already been raised in the 1993 and 1998 concluding observations. Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights on Canada*, UN ESC, 36th Sess, E/C.12/CAN/CO/4 and E/C.12/CAN/CO/5, (2006).

[154] Article 51 c) reads: "51. Promotion of international peace and security.—The State shall endeavour to— […] (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another;… " CONST.

[155] *Promises to Keep: Implementing Canada's Human Rights Obligations*, Report of the Standing Senate Committee on Human Rights, December 2001, online: Parliament of Canada http://www.parl.gc.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm

branches of the discourse, is said to represent “bourgeois individualism” and having excluded “non-white peoples, women, sexual minorities, developing countries, and non-western cultures more generally” from the common humanity supposedly found in the human rights discourse.[156] It should be noted that the legal recognition of social and economic rights is not expected to be sufficient to provide effective social and economic justice, as human rights have not exactly been proven to bring actual results,[157] but a complete failure to recognize them is most certainly not providing tools for civil society to put pressure on governments to adopt policies to improve social equality.

Several leading Canadian scholars are concerned about the limited account of human rights which is protected in the interpretation of the Canadian Charter. Martha Jackman describes well the way Canadian courts address cases where social and economic rights are at stake, and how they have almost systematically rejected them. She writes in reaction to a recommendation of the UN Committee on Social, Economic and Cultural Rights that Canadian courts should enforce social and economic rights as they already do for civil and political rights. Canada has ratified both Covenants and thus has equivalent obligations regarding both types of rights, even if Canada refuses to comply with the Covenant on Social, Economic and Cultural Rights. Jackman writes that lower courts routinely reject social and economic rights cases, but that the SCC has not completely closed the door to a wider protection of the right to security. She also mentions some cases where the right to equality (s.15 of the Charter) was used to grant such social and economic claims. However, the state of the law currently does not recognize such claims, and Jackman criticizes this lack of judicial recognition for not respecting Canada’s international obligations. She argues that the SCC could be more inclined to accept social and economic claims, as it should feel more compelled than lower courts to interpret Canadian law in consistency with its international obligations.[158] While one can hope this statement to be true, the SCC has not yet shown any enthusiasm for integrating social and economic rights in its Charter interpretation.

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[156] Anthony Woodiwiss, "The Law Cannot Be Enough: Human Rights and the Limits of Legalism" in Saladin Meckled-Garcia & Basak Çali, eds., *The Legalization of Human Rights* (New York: Routledge, 2006). at 33.
[157] Ratna Kapur, "Revisioning the Role of Law in Women's Human Rights Struggles " in Saladin Meckled-Garcia & Basak Çali, eds., *The Legalization of Human Rights* (New York: Routledge, 2006).
[158] Martha. Jackman, "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees Through Charter of Rights Review" (1999) 14 Journal of Law and Social Policy 69.

Bruce Porter criticizes the Canadian courts' limited interpretation of the Charter. He advocates for a stronger recognition by courts of the hardship of poverty and homelessness, insisting that it is more than time for the poor to be heard by courts. He argues that an integration of Canada's international obligations in the courts' application of human rights norms is greatly needed. Porter argues that for courts to hear claims on social and economic rights would not amount to interference with the other branches of government, and insists that the substantive content of rights requires such hearings. He goes as far as stating that social and economic rights should be considered as the cornerstone for Charter interpretation.[159]

The version of "fundamental" human rights found in the current interpretation of the Charter[160] represents primarily freedoms from state intervention, oppression and cruelty. As discussed in the previous paragraphs and sections, this thin version of rights is also criticized by certain authors for including only liberal rights confirming property rights and the existing order of power imposed by the dominant class on lower classes.[161] The purpose of "negative" human rights is to create modern individuals, protecting every person from interventions preventing them from becoming individuals and be free to do what they will.[162] For that reason, collective rights and claims are threatening to the individual, as it limits their complete freedom.[163]

Wendy Brown argues that this "justice project" is only counterproductive in terms of political empowerment: although the human rights project claims to be beyond politics, it is no more or less political than other political projects; to the contrary it "carries implicitly antipolitical aspirations for its subjects".[164] In other words, the Charter protects rights that are claimed to be outside of politics and enable the individual to live in dignity and equality. The effect that Brown sees is that the individualization of the political subject leads not to more protection of human dignity, but to a political disempowerment of the individual. The individual may have more individual "rights", but in response to this he/she stops seeking collective goals. Individuals do

[159] Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 JL & Soc Pol'y 117.
[160] For an overview of the importance of these "basic" human rights, see M. Ignatieff, A. Gutmann & K.A. Appiah, *Human Rights As Politics and Idolatry* Princeton University Press, 2003).
[161] See Andrew Petter, "Canada's Charter Flight: Soaring Backwards into the Future" (1989) 16:2 J L & Soc 151.
[162] Wendy Brown, ""The Most We Can Hope For...": Human Rights and the Politics of Fatalism" (2004) 103:2/3 South Atlantic Quaterly 451. at 455-456.
[163] Ibid. at 457.
[164] Ibid. at 456.

not need to fight for a common goal as they are only involved at the level of individual negative protection from state intervention; they are therefore not involved in society building. Or, as Brown puts it, they are not involved in any "collective determinations of ends".[165]

3. Indian Judicial Activism in Human Rights Claims

Numerous critiques can be presented against the argument for a more active judiciary, and an important one is the "slippery slope" or the "opening of the flood gates".[166] It is undeniably difficult to predict what the effects of a controversial and political decision will be, even if the courts do have to decide on these matters; and it is even more difficult to predict the consequences of a different judicial approach. It is only natural that the choice of a new approach raises concerns. For the past forty years or so, the SCI has been making unique choices that shaped its relationship with the executive and the legislative. A more active judiciary does not necessarily mean opening the floodgates; it can in fact be more productive in terms of human rights protection and government accountability. The role of a constitution is precisely to control the actions of the government through judicial review. Constitutionally guaranteed human rights are meant to provide citizens with a tool to hold the government accountable for the way it treats them.[167] Consequently, these norms are meant to ensure citizens have access to remedies when their treatment is not conform to constitutional requirements. However, human rights in the Canadian constitution are not consistent with the body of internationally recognised human rights, or with Canada's international obligations. India's interpretation of rights is not only consistent with its obligations, but it has also developed particular legal notions and procedures to ensure respect of human rights in a manner a lot broader than mere freedoms from state interventions, a lot more "human". India may not have the resources to ensure a decent standard of living to all of its citizens, but its constitutional history is unique and it can teach a lot to others, notably in the human rights field. This section raises questions about judicial activism and human rights and how authors address the role of courts in "social" issues, which would typically be categorised as beyond the jurisdiction of Canadian courts.

[165] Ibid. at 456.

[166] For various critiques on the Canadian Charter and the risks perceived or foreseen in judicial activism by different authors , see James B. Kelly & Christopher P. Manfredi, eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009).

[167] This has been more extensively explored in section 1.

A leading legal scholar and lawyer in human rights issues in India is Upendra Baxi.[168] His position on human rights joins Moyn's: human rights do not represent higher and intrinsic moral principles, but they became the ideal and gained power in international relations, while other projects like distributive justice or solidarity were being rejected. Their high moral grounds provide human rights[169] with a powerful language that can be used to reduce suffering and empower social movements.[170] Suffering and pain are the daily reality of the oppressed and human rights must always represent this reality in their discourse and application. Therefore, reduction of suffering, all kinds of suffering without discrimination, must be the focus of human rights.[171] On behalf of the disadvantaged portions of the population, he has been using the legal tools he had access to in order to achieve changes. Baxi has warned against the hierarchy of suffering: capital punishment, suspension of human rights in situations of "emergency", the claimed supremacy of civil and political rights over economic and social rights, or the justification of massive human rights violations in the name of the protection of human rights. Baxi has written extensively on Indian constitutional law and judicial activism, and his work is used as reference in several sections of this thesis.

Yash Ghai, writes about the involvement of courts in social and economic claims worldwide. William Twining writes that Ghai is considered "cautious" in his perception of the limited role courts should play in social and economic claims, as he has at times criticized Indian courts for their judicial activism.[172] However, to him there is no doubt that courts do have an important role to play in social and economic claims. The line has to be drawn between indicating to the state a failure to guarantee certain rights and getting involved in policy-making, as policy-making is not the role of the judiciary nor is it in its institutional capacity. The line might be thin, but this is precisely where the task of one branch ends and the other one's begins.[173] This role changes in time and must be adapted to the circumstances of the case and the dynamics between the judiciary and the government.

[168] Twining , *supra* note 93 at 158.
[169] Ibid. at 160.
[170] Ibid. at 163-164.
[171] Ibid. at 168-169.
[172] Yash P. Ghai, "Yash Ghai" in William Twining ed., *Human Rights, Southern Voices* (New York: Cambridge University Press, 2009). at 152-153 (footnotes).
[173] Ibid. at 153.

Therefore, Ghai believes that Indian courts may have been too creative with the remedies they provided and refers to the landmark South African constitutional court case *Grootboom*[174] as an example of the proper way for courts to deal with social and economic claims.[175] The court in South Africa has in fact chosen an approach that has been referred to as "polycentrism": the Constitutional Court enters an evolving dialogue with the government, trying to limit judicial intervention as much as possible while intervening every time the government is failing its human rights obligations, and leaving a lot of room for civil society players.[176]Although it may not have gone as far as the Indian courts have, the South African Constitutional Court is considered very proactive and willing to intervene in social claims, and is frequently cited as a progressive example in social and economic claims. Ghai agreed with dissenting Justice Arbour in the *Gosselin* case of the SCC[177] when she wrote that there was no reason for courts not to be able to intervene in social and economic claims to state that the government had failed its obligation to ensure that its citizens had means of subsistence, without having to create policy in place of the government.[178] Ghai writes that courts have a crucial role to play in "(a) elaborating the contents of rights; (b) indicating the responsibilities of the state; (c) identifying ways in which the rights have been violated by the state; (d) suggesting the frameworks within which policy has to be made".[179]

Moreover, Ghai puts emphasis on the importance of the role of courts not only in the development of rights themselves, but also on the accountability of the government to its people.[180] A careful approach, in other words a refusal to intervene, too often means refusing to hold the state accountable for its violations of human rights. In this sense, intervening in social and economic rights claims is more a characteristic of the dynamic between the judiciary and the other branches rather than of the substantive rights themselves. As Ghai puts it, "[h]uman rights have, or should have, a major role to play in strengthening the accountability of government to the people".[181] Therefore, it is not individual justiciability that is sought as much

[174] *Government of South Africa v. Grootboom*, 2000 11 BCLR 1169 CC.
[175] Ghai, "Yash Ghai"., *supra* note 172 at 153.
[176] Brian Ray, "Policentrism, Political Mobilization and the Promise of Socioeconomic Rights" (2008) 45 Stanford J Int'l L 151.
[177] *Gosselin*, *supra* note 43.
[178] Ghai, "Yash Ghai"., *supra* note 172 at 154.
[179] Ibid. at 152-153.
[180] Ibid. at 154.
[181] Ibid. at 154.

as mere exercise of checks on the executive and legislative; it is this mission that is often failed by Canadian tribunals.

Ghai also writes about poverty, offering a definition that is much closer to Sen's[182] than to "traditional" definitions of poverty:

> Poverty is not, as some imagine, an original state, nor are the poor the victims of their own faults and weaknesses. Nor is it due to shortcomings in personality or morality, or failures in family or upbringing. Poverty is created by society and governments… Poverty is about exclusion, physical and economic insecurity, fear of the future, a constant sense of vulnerability… This definition of poverty is sustained by the concept of human rights, which, with its overriding theme of human dignity, alerts us to the multiple dimensions of the human person. Indeed to secure an insight into the nature of poverty we should examine the ways in which poverty negates the realisation or enjoyment of human rights. The essential purpose of human rights, a life in dignity, is rendered impossible by poverty. The daily struggles of the poor humiliate them and register for them their helplessness in the face of state and economy.

This holistic understanding of poverty in relation to other social factors and its adverse effects on individuals' perception of dignity is crucial for legal institutions having to cope with poverty issues. A judiciary refusing to engage in such an analysis cannot have all the elements to decide on cases in a just manner, even less in human rights claims. For this reason, human rights law may require an assessment of cases that is more contextual and subjective than other types of law, because of the expectations of social justice that human rights carry.

To conclude on this literature review, authors have been presented on the topics of constitutional law and human rights law. Constitutionalism and human rights are now often linked one to the other, and constitutionally guaranteed human rights are thought of as principles representing the idea of social justice of a society; in other words, they form a political project. This political project is sensitive to the judicial philosophy of judges, as interpretation of rights may be dependent on the adjudication style of judges. The Indian judiciary is known for its judicial activism in human rights claims and its engagement with social inequalities. India's human rights project has been built with a specific vision of social justice in mind, which will be explored in the next chapter.

[182] See above, section A.1.b.

Chapter 2 –The Constitution, the SCI and Human Rights Law

This chapter presents in chronological order the evolution of Indian constitutional law since independence. It is important to study how the constitution was used to achieve the purposes of postcolonial independence as well as the social goals sought by the revolution leaders to understand how critical the role of constitutionalism was meant to be in postcolonial India. Thus, the context is crucial to grasp the difference between the Canadian and the Indian systems. Every social context participates in shaping the mentality of the citizens of a given society. Consequently, it also shapes the jurists of the said society. If these assertions may appear to be truisms, they perhaps represent the crucial point to deconstruct in the liberal positivist ideology: neutrality cannot exist, as one is always a result of his or her social class as well as political context. As some phrase it, liberal positivism is "blissfully ignorant of its own construction".[183] Judges are not "finding" law, they are creating it; "lofty" legal rules simply do not exist; and a judge always has to include a part of personal perception in legal interpretation. Studying Indian law and finding interpretations that are radically different from those found in Canadian law, where the norms are very similar, leaves no room for belief in neutrality of the law. Written law may be the starting point, but the direction taken is often determined through judicial interpretation. Studying Indian constitutional law also proves that judicial activism should not be demonized but rather considered as offering a potentially interesting dialogue between the judicial, the legislative and the executive. Democracy is found in all three of the branches, as a constitution is also a crucial democratic expression and courts are its guardians.[184] There is therefore no reason for courts not to bear a stronger role in governance. While fulfilling this role judges should keep in mind values of equality and empowerment of all citizens, and promote principles of inclusion and recognition of difference.[185]

This chapter briefly presents the Indian Constitution, the evolution of the SCI and of its human rights jurisprudence. It first presents the Constitution as it was intended by the drafters, seeking to explain the important role that judges were expected to play in building the new Indian society. The second part shows how the judiciary managed the challenges of its task in a newly independent state and the legal evolution of constitutional law of human rights.

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[183] Hayman., *supra* note 78 at 71.
[184] Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*., *supra* note 15.
[185] This was argued by Nussbaum, "Foreword - Constitutions and Capabilities: "Perception" Against Lofty Formalism"., *supra* note 49.

A. The Indian Constitution

The human rights constitutional culture developed by the SCI is hardly a coincidence or an unintended consequence. A brief explanation of the Indian Constitution is required to fully grasp the task that stood before the SCI. The Indian constitution is celebrated until today by many. It is perceived as progressive, and innovative in comparison with the liberal model of traditional constitutions.[186] There is faith that it can bring emancipatory tools to the Indian population, and has done so to a certain extent.[187] The first section will thus attempt to present the intention of the drafters in adopting this constitution, while the second section discusses some critiques of the constitution.

1. The Indian Social Revolution and the Constitution

The Indian Constitution is no mere legal text. It was the culminating point of deep and engaged popular resistance, and all the hopes for a free India were placed in the text. The Constitution became a "political symbol of national identity".[188] The constitutional principles adopted at the culmination of a popular movement of such strength cannot be changed every five years, as an elected government is, for the mere reason that this kind of popular uprising is extremely rare. The importance of constitutional principles, especially the fundamental rights and the role of judicial review, must hence be acknowledged as superior to a regular statute. The Fundamental rights as well as the Directive principles on state policy were adopted following a fierce struggle for freedom, and the hope for real liberty of the Indian nation were invested in a revolutionary constitution.[189]

Two internationally known players were particularly important to the freedom struggle and the process towards constitutionalism: Gandhi and Nehru. Both Gandhi and Nehru encouraged civil disobedience and resistance against British rule, in the colonial institutions and in the streets.[190] Nehru, who was the main leader at the time of independence and also led the government until

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[186] Upendra Baxi, "The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism " in Zoya Hasan, E. Sridharan & R. Sudarshan, eds., *India's Living Constitution* (London: Anthem Press, 2005). at 42-43.

[187] Baxi, "Postcolonial Legality"., *supra* note 73.

[188] Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*., *supra* note 15 at 4. The author argues that a constitution deserves a higher participation of the population because it is a transformative episode, and that the resulting constitutional achievement must be preserved until the next transformative episode, at 25.

[189] Kumar, "Introduction"., *supra* note 30 at xxix.

[190] Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*., *supra* note 15 at 73-76.

his death in 1966, was a firm believer in constitutionalism.[191] The political, social and economic revolution of the population against foreign domination would be placed in this revolutionary document, the constitution, to ensure that this collective effort would never be lost.[192] The importance Nehru gave to popular sovereignty in the political organization he imagined brought the Indian constitution outside of the box shaped by English ideology.[193] In Nehru's hands, constitutionalism took on another shape, one that was consistent with the principles of the revolution which aimed at giving the power to the people.[194] Popular sovereignty was not only the basis of legitimation for government representatives through elections, but the Constitution was further meant to be a purer expression of that sovereignty than elections. Because it would be debated in a way that ensured the free expression of a social consensus, the constitution was the representation of popular sovereignty, whereas the representatives who would be elected would not be. In order to prevent abuses, the power of the representatives had to be limited by the will expressed by the people, thus the Constitution.[195]

The drafters of the Constitution were important players of the social revolution: they had fought in the freedom struggle and wanted to ensure that rights and freedoms would not be blindly entrusted to the government.[196] Thus, the founders gave great powers to courts to ensure the government would fulfill its social mission correctly, through judicial review.[197] This has led to a judiciary that had wider powers than any other high court in the Commonwealth, even more than the SCUS, as stated by the first Attorney General of India in 1950. He also made the precision that the task standing in front of the judiciary was progressive interpretation of the constitution, and that narrow interpretation would be out of place with such a constitution. He hoped that the courts would play a strong role, especially in their interpretation of fundamental

[191] Nehru believed constitutionalism would protect the population against political abuse in the law-making process and violations of civil liberties, and that it would provide with a system of checks on the executive and possibilities for the population to intervene in the state system to bring about economic and political changes. Ibid. at 77.
[192] Granville, *The Indian Constitution: Cornerstone of a Nation*., *supra* note 24.
[193] Upendra Baxi, "The Recovery of Fire: Nehru and Legitimation of Power in India" (1990) 25:2 Economic and Political Weekly 107. at 108.
[194] Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*., *supra* note 15 at 82.
[195] Ibid. at 82.
[196] Kumar, "Introduction"., *supra* note 30 at xxix.
[197] Ibid. at xxix.

rights. The Chief Justice of the SCI of the time answered that the SCI would have no use for formal legalism in its interpretation of the constitution.[198]

The global context is also crucial to understand the importance of the rights embedded in the Indian Constitution. The Indian Constitution provides social and economic rights in its Part IV, in the Directive principles of state policy (Directive principles), whereas civil and political rights are protected by Part III on fundamental rights.[199] At the moment of drafting, international human rights were far from what they are today. In fact, India was only the second state to constitutionalize human rights, after the US.[200] It is important to recall that the two major Covenants[201] would not be adopted until 1966, sixteen years after the adoption of the Indian Constitution. The divide between civil and political rights on one side, and economic and social rights on the other, had not yet been so firmly established. The Universal Declaration on Human Rights had been adopted in 1948,[202] and it was perceived as a very important step for humanity on the international scene, but it had not yet led to any real human rights movement and even less momentum.[203] It can be said that in 1950, the movement of human rights had not gained its full strength.[204] And yet, the Indian Constitution is based on fundamental rights, which include mostly civil and political rights, but also recognizes social and economic rights as directive principles of state policy.[205] The idea of the drafters was a welfare state which combined democracy with socialism.[206] The separation between the two groups of rights embedded in the Indian Constitution came from this tension between ideologies inside the Indian society, as the drafters sought to seek everyone's approval and managed to get consensus on "freedom,

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[198] A.S. Anand, "Introduction" in O. Chinnappa Reddy, ed., *The Court and the Constitution of India - Summits and Shallows* (New Delhi: Oxford University Press, 2008). at xxxi-xxxii.
[199] CONST.
[200] The first to do so was the US, and for this reason the Indian Constitution's drafting is said to have been influenced by the US Constitution. L'Heureux-Dubé., *supra* note 5 at 216.
[201] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23rd March 1976, accession by Canada 19th May 1976); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3rd January 1976, accession by Canada 19th May 1976).
[202] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
[203] Moyn., *supra* note 131.
[204] Ibid.
[205] See below for an analysis of how the sections interact, section 3.
[206] Arun Ray, *Public Interest Litigation and Human Rights in India* (New Delhi: Radha Publications, 2003). at 47, see also Austin Granville, "A Historian's Reflections on the Indian Constitution" in C. Raj Kumar, ed., *Human Rights, Justice and Constitutional Empowerment* (New Delhi: Oxford University Press, 2007) 520. at xxxii-xxiii.

equality and social justice".[207] The whole Constitution served one radical purpose: social revolution.[208]

2. Critiques of the Indian Constitution

It should however be noted that the Indian constitution is also criticized by various scholars. Baxi is skeptical of the "justness" of constitutions in general, of the possibility of drafting a constitution that could provide justice to a society.[209] Baxi first notes that the Indian constitution did not necessarily bring justice to the people in terms of democracy, as democratic expressions have been repressed through legal, and even constitutional means. Several aspects of Indian sovereignty are outside of the scope of participative constitutional justice, notably internal security and national defence policies, which prevents any involvement of the population in these matters. Furthermore security concerns have been more important than justice for all Indians, and the "Indian integrity" has been a justification for oppression.[210] Baxi also criticizes the fact that the Indian constitution, in the directive principles of state policy, treats development as justice for the population. Granting the state the power to produce resources and own public enterprises[211] has allowed the growth of hegemonic practices of planned development, which has served the interest of the powerful and has not helped in providing equality to the poorest.[212] Baxi furthermore mentions the threat that globalization poses for the

[207] A. Vaidyanathan, "The Pursuit of Social Justice" in Zoya Hasan, E. Sridharan & R. Sudarshan, eds., *India's Living Constitution - Ideas, Practices and Controversies* (London: Anthem Pess, 2005). at 284-285.
[208] Granville, "A Historian's Reflections on the Indian Constitution"., *supra* note 206.
[209] Baxi, "The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism "., *supra* note 186 at 31.
[210] Ibid. at 36-37.
[211] Article 39 is often invoked to justify publicly owned enterprises and production of goods. CONST. Art 39 reads: "Certain principles of policy to be followed by the State.
—The State shall, in particular, direct its policy towards securing—
(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."
[212] Baxi, "The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism "., *supra* note 186 at 38-40.

emancipatory possibilities offered by national constitutions, especially in countries from the South. Constitutional normative orders are often in conflict with the international legal order, which seeks to impose norms to ensure an easy flow of capitals. These norms, adopted for the international economic market to thrive, are not necessarily compatible with local justice projects.[213]

Baxi also provides an interesting review of various perspectives of groups from Indian society that criticize the Indian constitution. He mentions the Left critique, a heterogeneous movement claiming that the constitution as well as the judiciary is perpetuating the dominance of the propertied over the proletariat. They qualify the constitutional culture of "neo-colonial", and further argue that if it guarantees civil and political rights for all, the discourses effectively denies democratic rights to citizens.[214] The Gandhian critique perceives the whole parliamentary system, including the constitution, as a "Westoxification".[215] In Gandhian thought, state governance through political parties is not democracy but rather mere management of power distribution. Gandhi sought government through direct participation of the citizens.[216] Politics in smaller communities, where all individuals can use of their political freedoms, is the only way to achieve democracy in Gandhian thought.[217] A similar critique is found in the Neo-Gandhian movement, which seeks to adapt Gandhian thought to current context of parliamentary democracy. Several individuals or groups have therefore initiated social or political projects in order to challenge liberal legal definitions, notably the right to private property, and shape the law and politics in India, attempting to install mass politics rather than bourgeois politics.[218]

There is also the Hindutva critique, which claims that the constitution explicitly bans certain characteristics of the Hindu religion, while protecting the rights of religious minorities.[219] A

[213] Ibid. at 40-41.
[214] Ibid. at 44.
[215] Ibid. at 46.
[216] See Chapter 1, section A. 1.
[217] Baxi, "The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism "., *supra* note 186 at 46.
[218] Ibid. at 47-48.
[219] Notably, the constitution bans practices of "untouchability". CONST. art. 17: "Abolition of Untouchability.—"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law." On the other hand, Muslim law is protected under "personal laws", ibid. at 49.
Hindutva advocates for a new secularism: one that would recognize the supremacy of the majority religion. In other words, it seeks a de facto Hindu state. This movement is also deeply linked to violent political actions and hate speech, at 50.

strong indigenous critique also exists, as the constitutional discourse has completely delegitimized all claims for exercise of self-determination and secession for indigenous groups. This has led to civil war in some parts of the country.[220] The last critique Baxi refers to is the Subaltern critique, which includes constitutionally disempowered groups of Indians; he mentions feminist and ecologist authors. To these authors, the constitution serves the state of India in that it is a unifying document and it proves the "modernity" of the state of India, but this unification comes at the cost of justice in India. The state gets involved in various types of acts of violence to assimilate and become a "strong" state, and its actions are often in violation of human rights norms.[221]

Baxi concludes that for all the reasons expressed by the various authors, any realist ambition for constitutional justice is difficult to sustain. He however applauds, comparatively speaking, the Indian constitution for some innovations it brought to postcolonial constitutions,[222] and he writes that it "marks a clear break with modern constitutionalism".[223] He also notes that fifty years later, the constitution still holds.[224]

B. The Supreme Court of India

This section describes the role of the judiciary, and most precisely the SCI, in Indian society since the revolution. The Constituent Assembly thought about how to limit the power of the government, to ensure that self-interested politics would not take over the ideals of the social revolution.[225] The Constitution and the judiciary had an important role to play in this control. The Indian legal community has achieved the remarkable task of advancing and transforming the SCI's European features to allow the judicial system to play an important role in the social and political revolution that Indian society was undergoing.[226] Judges were not meant to merely apply law; they were an important part of the democratic process and they were a tool that

[220] Ibid. at 52.
[221] Ibid. at 54.
[222] Baxi, "Postcolonial Legality"., *supra* note 73.
[223] Baxi, "The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism "., *supra* note 186 at 55.
[224] Ibid. at 55.
[225] Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*., *supra* note 15.
[226] Gobind Das, "The Supreme Court: An Overview" in B.N. Kirpal *et al.*, eds., *Supreme But Not Infallible* (New Delhi: Oxford University Press, 2000). at 16.

ought to be available for the population to ensure that the welfare state is providing its citizens with wellbeing.[227]

Some describe the task of the Indian judiciary as "economizing virtue": because individuals cannot always do virtuous politics, the virtuous political achievements have to be institutionalized in a constitution to ensure that when popular virtue goes down the gains are not lost.[228] The judiciary, protected from the vested interests present in politics, will hence remain virtuous and apply the principles that were decided upon following the transformative effort.[229] It is not a matter of what institution has legitimate authority over the constitution; it is merely that the judiciary's task is to review governmental actions to ensure continuity in the application of the Constitution as it was drafted.[230] It is an attribute of the separation of powers. The SCI is thus a "preservationist institution", and bears the responsibility of synthetizing the evolving social reality while preserving the virtuous transformative principles.[231]

It should however be noted that the judicial system suffers from numerous material impediments: the courts are too few, the resources too limited, and the delays too long. The large numbers of population that need access to courts make it difficult for courts to handle all of them.[232] However, in spite of all the hurdles the SCI had to go through, it has accomplished a lot.

This section presents the historical evolution of the SCI. It is separated in three chronological sections, as the judicial activism of the SCI judges caused radical jurisprudential changes during the rebirth. It thus appears logical to go through the history in three phases, as it allows understanding that the rebirth was a break with previous jurisprudence, and then set the ground for subsequent jurisprudence. The first part addresses the judiciary during the first thirty years of independence. The second part illustrates the peak of human rights interpretation at the SCI, during a period referred to as the rebirth of the SCI, the end of the

[227] Ray, *Public Interest Litigation and Human Rights in India*., *supra* note 206 at 49
[228] Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*., *supra* note 15 at 29.
[229] Ibid. at 29.
[230] This power is embedded in the power of judicial review, article 13 of the Indian Constitution.
[231] Sen, *The Constitution of India: Popular Sovereignty and Democratic Transformations*., *supra* note 15 at 30.
[232] Marc Galanter, "Fifty Years On" in B.N. Kirpal *et al.*, eds., *Supreme But Not Infallible* (New Delhi: Oxford University Press, 2000). at 59.

1970s and the beginning of the 1980s. It is during this period that judicial activism was engaged and that law was adapted and enriched through broad interpretations of positive norms. The third part discusses the heritage left by the activist judges and how following judges have in turn adapted norms to changing realities.

1. The Judiciary in the First Years of the Social Revolution

The judiciary from 1950 to 1960 really set the approach of the SCI. The new optimism of independence was accompanied by economic progress and political stability. The SCI combined traditional judicial approaches to policy making, enabling enriching debates both among SCI judges and between the SCI and the government. The SCI created jurisprudence on numerous legal principles such as due process of law, freedom of press, police power, delegated legislation, and land reforms. The court was particularly sympathetic to rural land owners who were deprived of their land without adequate compensation.[233] Deciding on crucial cases,[234] the SCI has placed strong limitations on the political power of the government and thus triggered war between the government and the judiciary. Most notably, in 1967 the SCI decided in the *Golak Nath* case that fundamental rights could not be amended by the government, thus ending the battle between the two institutions on fundamental rights.[235]

However, the beginnings of independence also saw narrow interpretations of fundamental rights. Reddy J.,[236] a proponent of judicial activism, notably criticizes the *Gopalan* case[237] for the approach the SCI had taken. He states that the judges of the time apparently had not realized that colonial rule was over, and that their task was to build a progressive nation. The judicial interpretation was notably based on the language of the constitution. The judgment was said to include a "doctrine of exclusion", as the narrow interpretation led the court to decide that the right to life included no other fundamental rights. However, this judgement and the SCI's approach towards fundamental rights were radically reversed afterwards.[238] It is interesting to note that former Chief Justice Anand compares the *Gopalan* case to the American judicial

[233] Das., *supra* note 226 at 18-19.
[234] The author refers to the Golak Nath case, *I.C. Golak Nath v. The State of Punjab* (1967) 2 SCR 762 [Golak Nath]; the Bank Nationalization case, *Rustom Cowasjee Cooper v. Union of India* (1970) 3 SCR 530; and the Privy Purse case, *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao v. Union of India* (1971) 3 SCR 9.
[235] Golak Nath, ibid.
[236] See below, section 2.a.
[237] *A.K. Gopalan vs The State Of Madras* (1950) SCR 88.
[238] O. Chinnappa Reddy, *The Court and the Constitution of India - Summits and Shallows* (New Delhi: Oxford University Press, 2008). at 28 and following.

confirmation of the legitimacy of slavery, as both cases are to him violent assaults on human dignity. In his eyes and in that of Reddy J., the right to life must be as wide as possible to encompass the right to live in dignity.[239]The first years of the SCI in fact saw judgements based on the language of the constitution, seeking to find the intention of the drafters. The judges of the SCI adopted a positivist approach to interpretation in several cases, even until the 1960s.[240]

Where Nehru had invested in the principle of judicial independence as a safeguard against abuse from representatives,[241] Indira Gandhi sacrificed it as it limited her power to achieve social revolution. She gained a lot of control over the SCI in 1973.[242] Right before she managed to hold control over the SCI, the court rendered its historical judgement in the *Kesavananda Bharati* case, which still today draws the limits on the governmental power to amend the constitution: the parliament could amend the Constitution, but it could not alter its basic structure, thus creating the *basic structure doctrine*.[243] The judgement shaped not only the future of constitutional amendment, but also the role of the political order and how it could exercise it. It defined fundamental rights and directive principles, as well as the future of democracy.[244] This was the decisive case over the custody of the Constitution:[245] the parliament had a power to amend it, but to the extent that was allowed by the SCI.

Indira Gandhi proclaimed a state of emergency in 1975,[246] suspending numerous civil and political rights and sending many to detention. The SCI was relatively quiet during the whole period of emergency, which lasted until 1977, and even confirmed in some judgements the right of the government to violate people's freedoms as it did. In the most infamous *Shukla* case, the majority stated that civil liberties were a gift from the state and thus that the state could legally

[239] Anand., *supra* note 198 at xxxiv.
[240] Ibid. at xxxvii.
[241] Nehru believed in a strong judiciary and first-rate judges, he rejected the idea of a malleable judiciary that would decide like the government. Granville, *Working a Democratic Constitution*., *supra* note 19 at 124.
[242] Granville, "A Historian's Reflections on the Indian Constitution"., *supra* note 206 at xxiv.
[243] *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala*, (1973) Supp SCR 1. [Kesavananda Bharati]
[244] The case was heard over sixty-nine days on a period of over five months. Thirteen judges – the largest Bench - sat, and six judges decided in favor of each side. The last judge, Justice Khanna, agreed with no other judge; he rather took position on the middle ground and stated that constitutional amendments could not alter the basic structure of the constitution. The result was a judgement of 700 printed pages, but nothing was decided in this case except for the establishment of the basic structure doctrine. Das., *supra* note 226 at 21-22.
[245] Granville, "A Historian's Reflections on the Indian Constitution"., *supra* note 206 at xxv.
[246] Das., *supra* note 226 at 22.

withdraw it. Where numerous *habeas corpus* cases had been accepted by the High Courts, the SCI stated that in view of the 1975 Presidential Order, individuals could not seize the court to challenge the legality of their detention anymore.[247] In deciding so, the SCI contradicted not only the High Courts, but also its own carefully built jurisprudence on *habeas corpus*.

These judgements of the SCI have inflicted a serious blow to the protection of fundamental rights and, until today, Indians remember the failure of the SCI.[248] Some judges of the SCI, like many members of the legal community at the time, engaged in judicial populism as a response to this deterioration of the rule of law. They created an informal network against injustice, and the creation of PIL and legal aid were initiated; the courts became perceived as the last resort against oppression.[249] These years could be called the dark ages of the new Indian nation, but fortunately they triggered a swing back in the opposite direction when the government changed in 1977, restoring the Constitution. Indeed, the SCI seized the opportunity to expand legal notions and allow greater protection for fundamental rights through public interest litigation and other legal concepts.[250] The SCI needed to restore its credibility and its moral authority as protector against state oppression, which it had lost during the emergency.[251] The next section presents the achievements of the SCI during the rebirth.

2. The Rebirth of the SCI and Judicial Activism

It can be argued that until 1978, the SCI's human rights interpretation was "restrictive and literal", except for the right to property.[252] The post-Emergency period brought the "great transformation in the judicial attitude".[253] The critical case for human rights interpretation, the very first case after the Emergency period, is *Maneka Gandhi*.[254] This case overturned *Gopalan*,[255] which has been previously described as establishing a positivistic interpretation of the right to life and personal liberty (section 21 of the Indian constitution), in 1950. *Maneka Gandhi* on the contrary interpreted section 21 to be as wide as possible, in order to allow people

[247] *A.D.M. Jabalpur v. S.S. Shukla* (1976) Supp SCR 172. [Shukla case]
[248] Anand., *supra* note 198 at xxxv.
[249] Ray, *Public Interest Litigation and Human Rights in India*., *supra* note 206 at 23.
[250] Granville, "A Historian's Reflections on the Indian Constitution"., *supra* note 206.
[251] Ray, *Public Interest Litigation and Human Rights in India*. , *supra* note 206 at 22.
[252] M.P. Jain, "The Supreme Court and Fundamental Rights" in S.K. Verma & Kusum Kumar, eds., *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (New Delhi: Oxford University Press, 2000)., at 97.
[253] Ibid., at 97.
[254] *Maneka Gandhi vs Union Of India* (1978) AIR 597. [Maneka Gandhi]
[255] *Supra* note 221.

to enjoy their personal liberty.[256] For some, *Maneka Gandhi* has corrected the "heresies" of *Gopalan* in Indian constitutional jurisprudence.[257] It has also allowed the subsequent creation of a generous jurisprudence on due process of law, as was now required by article 21.[258] The SCI itself stated, in a later case, that article 21 had gotten "unshackled by the restrictive meaning placed upon it in *Gopalan*", in *Maneka Gandhi*.[259]

Indira Gandhi won the elections in January 1980, bringing back authoritarianism and fears for individual liberties.[260] It also challenged the independence of the judiciary as well as its strong role in governance.[261] Indira Gandhi's return to power therefore placed the SCI in a difficult position towards the government. Nevertheless, in the *Minerva Mills* case,[262] the SCI confirmed its power of judicial review through a renewal of the basic structure doctrine. This judgment was perceived, and pictured in the media, as establishing firm limits on the power of the government in order to avoid a repetition of the Emergency regime.[263]

The strategy chosen by the SCI in the beginning of the 1980s was to focus their judgements on "the poor, the helpless, the oppressed in the name of socialism, constitutional conscience, and the rule of law."[264] This led the SCI to its central achievement in the human rights' field, as it explored the "dialectics between human rights and poverty".[265] Unlike any other judiciary, the SCI has been addressing the underlying causes of social inequality for decades. In order to achieve this, the SCI did not hesitate to be creative with human rights norms and even court procedures, to ensure that it fulfilled the mandate dictated by the constitutional social revolution.[266] Following the path of *Maneka Gandhi*, the SCI broadened the scope of the right to life in two decisions: *Francis Corallie Mullin*,[267] and *Bandhua Mukti Morcha* .[268] In *Francis Corallie*

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[256] Jain., *supra* note 252 at 24.
[257] Ibid., at 23.
[258] Ibid., at 24, 26-30. This new standard of due process of law has been very useful to improve the criminal justice system, especially the life conditions in Indian prisons, where prisoners would stay for months without even a scheduled trial, and the lawless activities of the police whose methods remained unchecked and violent. Legal aid was also pushed forward by the new jurisprudence.
[259] *Abdul Rehman Antulay v. R.S. Nayak AIR* (1992) SC 1701.
[260] Granville, *Working a Democratic Constitution*., *supra* note 19 at 492-493, 498.
[261] Ibid., at 485, 493.
[262] *Minerva Mills Ltd and Others v. Union of India and Others* (1981) 1 SCR 206ff.
[263] Granville, *Working a Democratic Constitution*., *supra* note 19 at 502-503.
[264] Das., *supra* note 226 at 24.
[265] Ghai, "Foreword"., *supra* note 10 at xi.
[266] Ibid. at xii.
[267] This case will be further discussed in Chapter 3.

Mullin, which will be further discussed in Chapter 3, the right to life and liberty was significantly broadened to include the right to live in dignity and everything that dignity involves. The SCI interpreted that dignity required a decent standard of living and all the social and economic resources to access it, as well as emotional and intellectual components.[269] In *Bandhua Mukti Morcha*, the SCI confirmed that the right to life included the right to live in dignity and that it was required by the Directive principles of the constitution, and interpreted this right in the following manner:

> [A]t the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. [270]

Following these decisions, the right to life was interpreted as the right to livelihood in further cases, notably *Olga Tellis,*[271] where it was decided that the municipality could not evict pavement dwellers without providing them with the right to be heard on the matter, as their right to life would be jeopardized by the eviction. Later on, after the end of the golden era, the right to life would also be interpreted to include the right to education in *Mohini Jain*,[272] which was afterwards confirmed in *Unni Krishnan*.[273] Over the years, even after the end of the golden era, article 21 has been interpreted to encompass: "right to livelihood; right to shelter; right of an accused against custodial violence; right to health; right to doctor's assistance; right to legal aid and speedy trial; right to dignity and privacy; right to education; right to compensation; right to pollution-free environment".[274]

In adapting legal interpretation of human rights to the reality of the population, the SCI harmonized civil and political rights with economic and social rights. Perhaps most importantly, the court showed that it was possible for courts to decide on social and economic claims, and to conduct legal hearings on poverty-related issues and social crises.[275] The view the SCI has

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[268] *Bandhua Mukti Morcha* (1984) AIR 802. [Bandhua Mukti Morcha]
[269] See Chapter 3, section B.
[270] *Bandhua Mukti Morcha*, *supra* note 268 para 2.
[271] *Olga tellis v. Bombay Municipal Corporation* (1985) Suppl 2 SCR 51.
[272] *Mohini Jain v. State of Karnataka*, (1992) 3 SCC 666. [Mohini Jain]
[273] See section 3. *Unni Krishnan, J.P., v. State Of Andhra Pradesh*, (1993) SCR (1) 594.[Unni Krishnan]
[274] Jain., *supra* note 252 at 52.
[275] Ghai, "Foreword"., *supra* note 10 at xiii.

adopted on human rights is efficiently, and not merely theoretically, holistic: the focus is on the underlying human problem, this problem being at the heart of the court's jurisdiction. The interpretation of human rights is adapted to the human realities at stake, which have gained legal relevance. This principle of interpretation stands in opposition to strict consideration of legal texts. The difference is demonstrated in the case of article 21: the article received a restrictive interpretation for more than twenty-five years, during which the SCI chose to interpret it in a positivistic manner, and when the SCI decided to engage in the context of cases and in human suffering, article 21 was the basis for an explosion of the jurisprudence on human rights. Leaving the positivistic interpretation behind has allowed an enrichment of the constitutional culture and a democratization of the judicial system.

The beginning of the 1980s can therefore be said to be the golden era of the SCI and its judicial activism as it is the period that witnessed the awakening of human rights jurisprudence. It witnessed the work of the group of activist judges, whose judicial philosophies will be exposed in the first section.[276] Their activism has also led to the creation of PIL, which will be discussed in the second section.

a. Judicial Activism and the Golden Era

The concept of judicial activism needs to be further explored in order to gain insight on the particularities of Indian constitutionalism. Judicial activism is a notion that is not easily defined. Activism has to be relativized, as a judiciary being referred to as activist can only be so in comparison with less active judiciaries. Baxi defines activist judges in opposition to active judges:

> An *active* judge regards herself, as it were, as a trustee of state regime power and authority. Accordingly, she usually defers to the executive and legislature; shuns any appearance of policy-making; supports patriarchy and other form of violent social exclusion; and overall promotes "stability" over "change". In contrast, an *activist* judge regards herself as holding judicial power in fiduciary capacity for civil and democratic rights of all peoples, especially the disadvantaged, dispossessed, and the deprived. She does not regard the adjudicatory power as repository of the reason of the state; she constantly re-works the distinction between the *legal* and the *political* sovereign, in ways that legitimate judicial action as an articulator of the *popular*

[276] See Upendra Baxi, "The Promise and Peril of Transcendental Jurisprudence - Justice Krishna Iyer's Combat with the Production of Rightlessness in India" in C. Raj Kumar, ed., *Human Rights, Justice, and Constitutional Empowerment* (New Delhi Oxford University Press, 2007).

> sovereign. This opposition implies at least one irreducible characteristic of activist adjudication: namely, that a judge remains possessed of *inherent* powers to mould the greater good of the society as a whole.[277]

Baxi's definition appears to be connected to the Indian judiciary, which has seen itself invested of the mission to protect "civil and democratic rights of all peoples, especially the disadvantaged, dispossessed, and the deprived" and of powers to "mould the greater good of the society as a whole". He continues to state that he knows these notions to be in opposition with the "global prescriptive theory about judicial role and function".[278] He explains that this global theory is based on the assumption that "ethics of judgment can be defined at a high level of abstraction and generality; that the truths of theory remain cross-culturally valid."[279] These quotes bring us back to the lofty formalist principles mentioned above, to the "neutrality" of some western legal principles claiming to be universal truths. Baxi also mentions Northern judges and academics who tend to consider the South as unable to develop interesting constitutional practices; as well as members of legal community in the South who accept these dominant Northern legal traditions and thus perceive these Southern practices of judicial activism as "deviant".[280] These Northern and Southern attitudes are part of the postcolonial consequences described above by postcolonial theorists.[281] It should be noted that India's judicial activism as well as social action litigation is of great importance and has influenced numerous other Southern countries in their judicial culture, even South Africa[282] which is known for its progressive jurisprudence in social and economic human rights claims.[283]

Baxi describes Indian judicial activism not as one single trend, but as a convergence of individual biographies.[284] However, he notes that the political process of appointing judges makes it almost impossible for candidates presenting activist characteristics to be appointed, as it would not be

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[277] Upendra Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice" in S.K. Verma & Kusum Kumar, eds., *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (New Delhi: Oxford University Press, 2000). at 166.
[278] Ibid. at 166.
[279] Ibid. at 166.
[280] Ibid. at 168.
[281] See Chapter 1, section A.1.
[282] Upendra Baxi, "Foreword" in S.P. Sathe, ed., *Judicial Activism in India* (New Delhi: Oxford University Press, 2002)., footnote 3.
[283] See above, Chapter 1 section B.
[284] Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice"., *supra* note 277 at 182.

in the advantage of politicians to have activist judges.[285] But the following question has to be raised: how have so many SCI judges become activists? Baxi answers this question in presenting the *institutional* culture of judicial activism at the SCI. The path has been traced, the role models are there. Judges have individual choices to make,[286] but the possibilities are wide and judicial activism is among them.

It has been argued that judicial activism has been present at the SCI from the adoption of the constitution, and that the variations in judicial philosophies were found in the individual styles of the judges.[287] Baxi argues that two kinds of activism were found in the history of the Indian constitution: reactionary and progressive, categories that he admits to be value-laden. He places in the first category the Nehruvian period judicial activism, during which the SCI endeavoured to protect the right to property, and the *Shukla* case where state violations of individual liberties were condoned by the SCI;[288] and states that progressive activism started with *Golak Nath* and *Kesavananda,* which prevented the government to make constitutional amendments on human rights provisions, and culminated with the birth of social action litigation.[289] For Baxi, judicial activism culminated with social action litigation because this was the only way to provide judicial answer to the needs of the rightless in India. This leads him to quote a case where it was affirmed that judicial activism was the "last resort for the bewildered and the oppressed".[290] It has to be noted that, as was previously stated, the SCI's engagement in the defence of the rightless is nothing more than what is expected from it by the constitution, as the constitution enacts principles of social justice for all in the Directive principles.[291] The most significant period of judicial activism until today is the post-emergency period, as it set the ground for the following decades. It created the PIL/SAL system and broadened the legal interpretation given to human rights constitutional protections sufficiently to provide the constitutional culture with a strong humanist basis. For this reason, the judges who engaged in judicial activism during the golden era and their judicial philosophies will be presented in this section.

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[285] Ibid. at 187.
[286] Ibid. at 187.
[287] Baxi believes that this is the view presented by Professor Sathe in his book on Indian judicial activism, Baxi, "Foreword"., *supra* note 282 at x-xi.
[288] See above, section 1, *Shukla*, *supra* note 247.
[289] See above, section 1. *Golak Nath, supra* note 234, and *Kesavananda Bharati*, *supra* note 243.On social action litigation/public interest litigation, see below section 2.b.
[290] Baxi, "Foreword"., *supra* note 282 at xvi-xviii. *State of Rajasthan v. Union of India* (1977) 3 SCC 592.
[291] This was noted in the beginning of section 2, in discussing the case *Bandhua Mukti Morcha*, *supra* note 268.

A group of SCI judges saw themselves invested with this role of social transformation, and they applied the law as a tool for such social transformation. They questioned the principle of deference to the executive and legislature, which appeared to them as a hurdle to the application of human rights and social justice in general. It deserves to be noted that human rights are not merely a part of the Indian constitution, but they are rather the central part of constitutional law as interpreted and applied by these judges of the SCI. Furthermore, these judges interpreted human rights not as abstract legal principles, but rather as concrete ways to alleviate the suffering of the Indian population. This allowed them to adapt law to the greater signification of justice, and not blindly apply existing positive law. It could be said that constitutional law, for the judges who took charge of the rebirth, was not even about human rights so much as *human suffering*. This is the focus that Baxi also advocates, insisting that judges should use the power of human rights to reduce suffering.[292] Iyer J., crafted the notion of "Destination Justice", reminding us that law was merely a means to achieve higher justice,[293] and similarly human rights are a means to achieve the reduction of human suffering.

Three judges of the SCI are well known for their input in the rebirth of the SCI: Justices P.N. Bhagwati, Krishna Iyer and Chinnappa Reddy.[294] The beginning of the 1980s is characterised by a renewed progressivism in judicial activism[295] which had already been started by both Justices Bhagwati and Iyer during the emergency but was now more than ever required by the poor state of national public institutions. Since independence, public values had seen a sharp decline and institutions were being poisoned by growing corruption;[296] the government was lawless;[297]

[292] Baxi, "Politics of Reading Human Rights: Inclusion and Exclusion Within the Production of Human Rights"., *supra* note 55. Baxi discusses the concept of suffering as well as its intersection with human rights law in a lot of his work, for example Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" (1985) 1985 Third World Legal Stud 107. and Baxi, "The Promise and Peril of Transcendental Jurisprudence - Justice Krishna Iyer's Combat with the Production of Rightlessness in India". *supra* note 276.

[293] Baxi, "The Promise and Peril of Transcendental Jurisprudence - Justice Krishna Iyer's Combat with the Production of Rightlessness in India"., ibid at 14.

[294] Justice Desai is also a member of the group of activist judges, however he is not as well-known as others, and writings about his work at the SCI are not as numerous. He furthermore does not appear to have been as public as his colleagues about his beliefs and battles. Baxi nevertheless always mentions him when discussing the rebirth of the SCI. See Upendra Baxi, "Foreword" in O. Chinnappa Reddy, ed., *The Court and the Constitution of India - Summits and Shallows* (New Delhi: Oxford University Press, 2008); Baxi, "The Promise and Peril of Transcendental Jurisprudence - Justice Krishna Iyer's Combat with the Production of Rightlessness in India"., *supra* note 276. For Gobind Das, there were rather five activist judges, the fifth one, Justice Thakar, coming later than the four already mentioned. Das., *supra* note 226.

[295] Vocabulary chosen by Baxi in Baxi, "Foreword". *supra* note 282.

[296] Ray, *Public Interest Litigation and Human Rights in India*., *supra* note 206.

politics accommodated tax evaders and the bureaucrats were not concerned with the issues of the masses.[298] The judiciary appeared like the last solution, and judges like Bhagwati and Iyer JJ. were strong advocates of representation of the disadvantaged masses.[299] Some even write that "[i]in contrast to other judges, with these judges compassion had the aggressive flavour of crusaders."[300] The activist judges were active both inside and outside of the courtroom, engaging in public discourse, media and militancy.[301] If the activist judges were in fact very creative with the law and were criticized for it, they did not interfere with the major political and economic decisions of the government.[302] The imprint they left was so deep that still today they remain present in the academic legal community in India, whether through their own work or because writings are produced in their memory.

Baxi has analysed at length and in numerous writings the styles and ideologies of each judge, and his work is invaluable to understand the judicial philosophy behind the SCI judgments of the golden era, as will be seen in the next sections. Baxi writes that judicial activism has allowed the SCI to become the Supreme Court *for* India, rather than the Supreme Court *of* India.[303] He also affirms that "judicial activism emerges as a platform of resistance to the neo-colonial practices of power that seek to convert citizens into *subjects*."[304] It is important to note however that while Baxi is a strong advocate of judicial activism, he often refers to the golden era as a period also characterized by judicial populism,[305] which he condemns and describes as "spurious

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[297] Baxi explains how the SCI combats the lawlessness of the government: "[u]ndertrial as well as convicted prisoners, women in protective custody, children in juvenile institutions, bonded and migrant labourers, unorganized labourers, untouchables and scheduled tribes, landless agricultural labourers who fall prey to faulty mechanization, women who are bought and sold, slum-dwellers and pavement dwellers, kins of victims of extra-judicial executions – these and many more groups now flock to the Supreme Court seeking justice."Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"., *supra* note 292 at 108.

[298] Ray, *Public Interest Litigation and Human Rights in India*., *supra* note 206.

[299] Ibid.

[300] Das., *supra* note 226 at 25.

[301] Baxi, "The Promise and Peril of Transcendental Jurisprudence - Justice Krishna Iyer's Combat with the Production of Rightlessness in India"., *supra* note 276.

[302] Das., *supra* note 226 at 25.

[303] Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice"., *supra* note 277 at 157.

[304] Ibid. at 157.

[305] Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"., *supra* note 292 at 107, Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow: Eastern Book Co, 1980).

appeals to people as justifying certain post-Emergency decisions".[306] He therefore draws a line between judicial *activism* and *populism*. He draws another line in stating that judicial activism must remain *judicial*, that judges must be activists within the limits of their duty.[307] This means that they must remain perceived as judges, they cannot be seen as politicians or social activists wearing a robe. If judges trespass these limits, their legitimacy may be compromised.[308] While the scholar writes that Indian judicial activism is "unsurpassed in world judicial annals",[309] he also enumerates numerous important inconsistencies that are found in the SCI's jurisprudence.[310] Lastly, it has to be noted that the SCI's judicial activism, while unique, necessary and very useful, still promised more than it could ever deliver, as courts can participate in but can never be the sole institution to achieve social revolution.[311]

Each judge's ideology was deeply anchored in postcolonial theory; Baxi notes that the activist judges had in common a will to fight legal liberalism on every occasion they had.[312] It is important to note that the individual judicial ideologies of each activist judge shaped the decisions of the SCI and led the way for future judges. Understanding this shows the human face of justice: judges are human beings, and the personal ideologies of these justices have led them to render certain decisions – as personal ideologies of judges always do, whether acknowledged or not. The legal interpretations of the golden era are very different from the positivistic legal interpretations found in many common law jurisdictions, notably Canada. Studying where this difference comes from is useful to fully grasp the limitations of legal positivism, especially in human rights field. These justices demonstrate that it is possible to interpret human rights norms according to a contextualized case, and that focusing on and trying to understanding human suffering is necessary to give their full meaning to human rights norms. The jurisprudential concepts developed during the golden era have generally not been overturned

[306] Baxi, "Foreword"., *supra* note 282 at footnote 12. He however appears to have changed his definition over time, as in other writings he seems to associate judicial populism with judicial activism aiming at protecting the poor, and even at times with social justice advocacy: Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"., *supra* note 292 at 111 and following.
[307] Baxi, "Foreword"., *supra* note 282 at xviii.
[308] Ibid., at xviii.
[309] Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice"., *supra* note 277 at 162.
[310] Ibid. at 163.
[311] Ibid. at 164.
[312] Baxi, "The Promise and Peril of Transcendental Jurisprudence - Justice Krishna Iyer's Combat with the Production of Rightlessness in India". *supra* note 276 at 4-5, footnote 6. Baxi writes that Bhagwati J. was known for his pragmatism, which made his judgements more prudent and enduring in time than Iyer J.

by subsequent jurisprudence, even if the SCI's composition changed and that the new justices did not necessarily have the same personal convictions or priorities.[313] On the contrary, subsequent jurisprudence confirmed over and over decisions rendered during the golden era.[314] This confidence in these legal concepts demonstrates that judicial activism was useful to the evolution of Indian constitutional culture, and it is further argued that it has enriched it and strongly participated in the development of its distinctiveness.

Justice Iyer Krishna

Iyer J. left a particularly strong imprint on the Indian judiciary and legal community, and he was perhaps the most radical of the activist judges.[315] In discussing Iyer J.'s position on judicial activism, Baxi recalls that Iyer J. had differentiated between judges who were "populist activists", and those that merely were "shopkeepers of legal justice".[316] The scholar compares the work of the judge with a revolution, an "elemental seismic force"; he writes that the judge's decisions "remain acts of serial insurgency from the High Bench".[317]Baxi calls Iyer J.'s judicial philosophy "transcendental jurisprudence" and describes:

> [T]he passage from where we are to where we all ought to be poses the question beloved of philosophers: to transcend is to go beyond "appearance" to "reality," the phenomenal to the noumenal, the particular to the universal, error to truth, expedient to the essential, contingent to the necessary.[318]

Baxi refers to the common law tradition as an "uncritical deference to the executive and the legislature", and criticizes the acceptance of the Indian legal community of colonialist and imperialist legal heritage.[319] Similarly, Iyer J. had held that judges had to "transcend their own latent class bias, and further persuade the bar to do likewise"; a class bias that had been inherited from the British legal culture according to the judge.[320] Baxi argues that constitutional law requires not common law, but rather an *uncommon* law "firmly disciplined by the inherent

[313] See below, section 3.
[314] See next sections. Notably, the scope of article 21kept broadening, coming to include the right to education. Public interest litigation took on a life of its own, as it evolved to new realities. It was never questioned by new judges, it has become an important part of Indian constitutional culture.
[315] Baxi, "The Promise and Peril of Transcendental Jurisprudence - Justice Krishna Iyer's Combat with the Production of Rightlessness in India"., *supra* note 276.
[316] Ibid. at 6.
[317] Ibid. at 3.
[318] Ibid. at 7.
[319] Ibid. at 8.
[320] Ibid. at 15.

logics of fundamental rights and human freedoms",[321] and therefore rejecting deference to other branches of government that supports human rights violations, and describes Iyer J. as combatting "imperial legal culture." This legal culture and class bias are British heritages because British law involves the recognition of the supremacy of the dominant class, to which belong the law makers, interpreters and enforcers; the very domination that the Indian Constitution sought to evacuate. Iyer J. militated for all the judges and members of the legal community to understand that their role was one of social transformation. The Constitution, instead of "being the routine of unchanged repetition […] instead and forever seeks to redefine the political". Iyer J. treated human rights as "languages, logics and paralogics of justice." Baxi quotes Iyer J., saying that "To defy or deny social justice to the humblest Indian, even for the highest court, is to act not only *extra-constitutionally* but *contra-constitutionally*".[322] To the eyes of the judge, the constitution, the law and the legal community are meant to serve the population in a mere fiduciary capacity. For this reason, Iyer J. has spoken on behalf of the oppressed, "the tongueless, tattered, battered, police-hunted, poverty-bitten, raped adivasi belles and dowry-burnt brides, the tortured prisoners, degraded slum dwellers, homeless pavement-dwellers, bonded labourers, sweated labourers, and discriminated gender". Baxi writes that no judge "has so poignantly articulated the principal task of constitutional development in terms of the amelioration of the 'weight of suffering'". Iyer J. insisted that any postcolonial constitutionalism that claimed to decide on human rights issues had to take human suffering into serious consideration.[323]

In a judgement about a man's pension that had been drastically reduced, Iyer J. exposed the ties between law, justice and social justice:

> Social justice is the conscience of our Constitution, the State is the promoter of economic justice, the founding faith which sustains the Constitution and the country is Indian humanity. […] Law and justice must be on talking terms and what matters under our constitutional scheme is not merciless law but humane legality. The true strength and stability of our polity is society's credibility in social justice, not perfect legalise; and this case does disclose indifference to this fundamental value. […] We do appreciate the successful exercises of the Management in reaching just settlements with its employees but

[321] Ibid. at 9.
[322] Ibid. at 12.
[323] Ibid. at 15.

> wonder whether the highest principle of our constitutional culture is not empathy with every little individual.[324]

Iyer J. was notably concerned with the rights of prisoners. In the landmark case about prisoners' rights, the question of the hands-off doctrine was laid: did the SCI have jurisdiction over events happening inside prisons, or if once inside a prison, inmates had forfeited all their rights. The court decided that not only did the court have jurisdiction, but furthermore that prisoners should have access to legal aid so that they do not remain at the mercy of their wardens. Iyer J. wrote:

> So, it follows that activist legal aid as a pipeline to carry to the court the breaches of prisoners' basic rights is a radical humanist concomitant of the rule of prison law. And in our constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legally unfree, and, as sentinels on the qui vive, courts will guard Freedom behind bars, tampered, of course, by environmental realism but intolerant of torture by executive echelons. The policy of the law and the paramountcy of the constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons. If judicial realism is not to be jettisoned, judicial activism must censor the argument of unaccountable prison autonomy.[325]

Iyer J. also noted the importance for social justice that the rights of these tortured "martyrs" be respected,[326] and that prisons must be therapeutic, as every human being is born good and that criminality is curable.[327] His vocabulary is interesting in the following passage:

> If you treat a man like an animal, then you must expect him to act like one. For every action, there is a reaction. This is only human nature. And in order for an inmate to act like a human being you must trust him as such. Treating him like an animal will only get negative results from him. You can't spit in his face and expect him to smile and thank you. I have seen this happen also. There is a large gap between the inmate and prison officials. And it will continue to grow until the prison officials learn that an inmate is no different than them, only in the sense that he has broken a law. He still has feelings, and he's still a human being.[328]

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[324] *Som Prakash Rekhi vs Union Of India* (1981) AIR 212, para 153.
[325] *Sunil Batra and Others vs Delhi Administration* (1978) AIR 1675, at paras 412-413. [Sunil Batra(I)]
[326] Ibid, para 414.
[327] Ibid, para 417.
[328] Ibid, para 418.

In the case of a prisoner who was being tortured in prison because a guard asked from him that he gets money from his visitors, a petition of habeas corpus was created on the basis of a letter from another inmate. Confirming his previous judgement in *Sunil Batra (I)*, Iyer J. asserted that when "injustice, verging on inhumanity, emerges from hacking human rights guaranteed" that the court would intervene to protect the public from such human rights violations.[329] He concluded:

> Thus it is now clear law that a prisoner wears the armour of basic freedom even behind bars and that on breach thereof by lawless officials the law will respond to his distress signals through 'writ' aid. The Indian human has a constant companion - the court armed with the Constitution. The weapon is 'habeas', the power is Part III and the projectile is Batra.[330]

Iyer Krishna J. is known for his deep compassion, and deep respect for every human being, even the criminal. He sees no justice in breaking a person's dignity because of the commission of a crime. The law was the means to accomplish social justice, and he always sought to confront injustice.[331]

Justice Bhagwati

Bhagwati J. was also an important member of this group. He was a judge at the SCI from 1973 to 1986, and was appointed Chief of Justice in 1985.[332] Bhagwati J., Baxi tells us, was the most strategic of the four judges engaging in judicial activism. Where Iyer J. had been more radical, Bhagwati J. was seeking long-lasting effects to his judgements.[333] The mentality behind the achievements of the SCI in the post-emergency period can be well understood through some of his judgements and writings. In his famous judgement on the *S.P. Gupta* case in the beginnings of PIL he wrote the following:

> Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to

[329] *Sunil Batra vs Delhi Administration* (1980) AIR 1579, at para 575 (judgement of Iyer J.). [Sunil Batra (II)]
[330] Ibid, para 578 (judgement of Iyer J.).
[331] Soli J. Sorabjee, "Justice V. R. Krishna Iyer : a Man for All Seasons" in C. Raj Kumar, ed., *Human Rights, Justice & Constitutional Empowerment* (New Delhi: Oxford University Press, 2007).
[332] Supreme Court of India, online: SCI http://www.supremecourtofindia.nic.in/judges/bio/pnbhagwati.htm
[333] Baxi, "The Promise and Peril of Transcendental Jurisprudence - Justice Krishna Iyer's Combat with the Production of Rightlessness in India"., *supra* note 276 at 4-5, footnote 6.

> large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief.[334]

He further continues:

> The task of national reconstruction upon which we are engaged has brought about enormous increase in developmental activities and law is being utilised for the purpose of development, social and economic. It is creating more and more a new category of rights in favour of large sections of people and imposing a new category of duties on the State and the public officials with a view to reaching social justice to the common man. Individual rights and duties are giving place to meta-individual, collective, social rights and duties of classes or groups of persons. This is not to say that individual rights have ceased to have a vital place in our society but it is recognised that these rights are practicably meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all.[335]

It should be noted that Bhagwati J. was writing this in 1982, more than thirty years after the adoption of the Constitution. The SCI judges' mission of social and economic revolution had not been diminished over time, at least in the eyes of Bhagwati J. He is still quoted today when judges are deciding on SAL issues, notably where they need to determine if a claimant deserves the status of SAL or not.[336] If the type of SAL cases has changed over time, the purpose and ideology have not.[337] The deep link between a holistic view of human rights, poverty and equal access to justice are well spelled out by Bhagwati J. in the above quotes. Social justice is the end; law is the means. If law does not provide relief to those who need it the most, law has to evolve according to its goals. The judge's objective is precisely what was advocated by a critical race

[334] *S.P. Gupta v. President of India AIR* 1982 SC 149 at para 17. [S.P. Gupta]
[335] Ibid at para 19.
[336] *State Of Uttaranchal v. Balwant Singh Chaufal* (2010) SC 086. [State Of Uttaranchal v. Balwant Singh Chaufal]
[337] This case provides a very interesting review of the evolution of PIL cases since its beginnings, ibid.

theorist: that every law should be thought out to improve the condition of the disadvantaged, no less.[338]

Bhagwati J., like Iyer J. has strong positions about the necessity of judicial activism. He is very critical of what he describes as a "myth strongly nurtured by the Anglo-Saxon tradition and propagated by many jurists that judges do not make law, that they merely interpret it. Law is there, existing and immanent, and judges merely find it."[339] He explains the origins of such a blind approach this way:

> This stance suits equally the lawyers and the scholars who find it more convenient to deal with immediate issues of technique and substance rather than look back to more fundamental questions of the role of the judge in a traumatically changing society. This explains the persistent attempt on the part of some lawyers and judges to convince the people about the truth of the fallacy that judges do not make law.[340]

As Nussbaum, Bhagwati J. writes that it is important that judges have a strong role in governance, as the judiciary is a branch of the government with a specific mission in a democracy and they have to fulfill that mission. The SCI rejected being bound by precedents, or being restricted in its jurisdiction. Furthermore, it has invented the procedures required to achieve the court's social purposes.[341] Bhagwati J. was very engaged in the challenge of liberalism and lofty formalism. He reminds us that "neutral law" hardly exists: "Even where the judge adheres to formal notions of justice and claims not to be concerned with the social consequences of what he decides, it is often a thin disguise, for in many such cases his instrumental objective is to preserve the status quo."[342] Formal justice, or neutral justice, does not exist.

Baxi developed a similar concept in explaining "false consciousness", in which individuals act to protect the interests of the ruling class without knowing they are doing so.[343] He writes that "[i]n accepting politics as fate the affected peoples see no possibility of things being otherwise"; in

[338] See above, Chapter 1 section A.2.
[339] P.N. Bhagwati, "Judicial Activism and Public Interest Litigation" (1984-1985) 23 Colum J Transnat'l L 561. at 562.
[340] Ibid. at 563.
[341] Ibid. at 564-565.
[342] Ibid. at 566.
[343] Baxi, "Politics of Reading Human Rights: Inclusion and Exclusion Within the Production of Human Rights"., *supra* note 55 at 194 and following.

other words, social phenomena are seen as natural rather than human.[344] This is precisely what happens when one accepts law as being neutral; or when a judge reads words instead of understanding human realities. This widespread approach to law is exactly what Bhagwati J. successfully sought to avoid at the SCI. He is straightforward about the role of the SCI in social and distributive justice. The SCI does not merely apply law; it creates law to let social justice into the law. If the SCI had not adopted social justice as a fundamental principle, then it could not claim to be a court for Indians.

It should however be noted that Bhagwati J. must also be remembered for participating in questionable judgments. In the previously described *Shukla* case,[345] Bhagwati J. was indeed one of the majority judges, rendering a decision in blatant violation of individual liberties. There are indeed some gray areas in Bhagwati J.'s long career, even though most of it was brilliant and progressive.[346]

Justice Reddy

Justice Chinnappa Reddy was as oriented towards the relief of the worst-off as Iyer and Bhagwati JJ. He believed that every judge came to the Bench with his or her own ideologies, and that it was more honest to be upfront about what these ideologies were. He thus described – and still does – himself as seeking *constitutional socialism*, and seized numerous occasions to publicly speak about his ideologies. If Reddy J. was the father of this vision, he was greatly assisted by his colleagues. Baxi writes that judges who follow legalism and eclectism "delude themselves" in thinking that their use of such approaches are not ideological.[347] Reddy J. was highly critical of the *bourgeois* notion of justice, and he did not hesitate to expose the classism that was often found in constitutional jurisprudence. According to Baxi, Reddy J. did not make use of judicial populism, as did Iyer and Bhagwati JJ., and he occupied a rather median position in comparison to the two other judges. Perhaps he was more inclined to seek consensus than his colleagues.[348] He has written a lot, and has still recently published a book about the "summits and shallows" of the Indian constitution and the SCI, criticizing their evolution since the

[344] Ibid. at 195.
[345] See above, section 1.
[346] Das., *supra* note 226 at 28.
[347] Baxi, "Foreword". *supra* note 282 at xii-xiii.
[348] Ibid. at xix-xxi.

beginnings.[349] In his foreword, Baxi notes that Reddy J., in this book, asks if the rebirth was not perhaps the summit of the Indian judiciary, and if currently we are not witnessing its shallows.[350]

Reddy J. states that socialism amounts to a welfare state, which is precisely what is sought by the Indian constitution – whether the term socialism is used or not. The founders were aware that political freedoms were not enough; the people had to be ensured social and economic freedoms as well. The socialism sought by Reddy J. is *Indian* socialism, which has characteristics of its own. Notably, the former Justice writes that it is constitutional socialism in the sense that it is not meant to be achieved through revolution, but through orderly process. To Reddy J., socialism means humanism, and Indian Constitutional Socialism requires that all public institutions aim at protecting the welfare of the people through the promotion of social, economic and political justice.[351] He therefore criticizes the current trend in public policy of liberalization, globalization and privatization, and notes that no case has – at the time of writing - made its way to the SCI to contest these public policies.[352]

In a landmark judgment on the Directive principles, addressing a conflict between a law adopted to enforce the Directive principles and the right to equality, a Fundamental right, Reddy J. wrote:

> The broad egalitarian principle of social and economic justice for all was implicit in every Directive Principle, and, therefore, a law designed to promote a directive principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would most certainly advance the broader egalitarian principle and the desirable constitutional goal of social and economic justice to all.[353]

In the same judgment, Reddy J. explores the dynamics between formal equality (article 14 of the constitution)[354] and substantive equality, which has to be promoted according to article 39.b).[355] Article 39.b) mentions the common good, which Reddy J. assimilates with "the broader

[349] Ibid. at xxvi-xxvii.
[350] Ibid. at xxx.
[351] Reddy., *supra* note 238 at 137-139.
[352] Ibid. at 146-147.
[353] *Sanjeev Coke Manufacturing v. Bharat Coking Coal Ltd* (1983) AIR 239 at para 1004. [Sanjeev Coke Manufacturing]
[354] Article 14 CONST reads "14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."
[355] Article 39(b) CONST reads "39. Certain principles of policy to be followed by the State.—The State shall, in particular, direct its policy towards securing— […] b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;[…]"

egalitarian principle", as "there are bound to be innumerable cases where the narrower concept of equality before the law may frustrate the broader egalitarianism contemplated by Art. 39(b)."[356] Reddy J.'s interpretation of article 39.b) is consistent with his belief in socialism, and he explains such belief very well in the same judgement:

> The words must be understood in the context of the Constitutional goal of establishing a sovereign, socialist, secular, democratic republic. Though the word 'socialist' was introduced into the Preamble by a late amendment of the Constitution, that socialism has always been the goal is evident from the Directive Principles of State Policy. […]Ownership, control and distribution of national productive wealth for the benefit and use of the community and the rejection of a system of misuse of its resources for selfish ends is what socialism is about and the words and thought of Art. 39 (b) but echo the familiar language and philosophy of socialism as expounded generally by all socialist writers. To quote a recent writer, "Socialism is, first of all, a protest against the material and cultural poverty inflicted by capitalism on the mass of the people. It expresses a concern for the social welfare of the oppressed, the unfortunate and the disadvantaged. It affirms the values of equality, a classless society, freedom and democracy. It rejects the capitalist system and its competitive ethos as being inefficient in its use of resources.[357]

Regarding judicial activism, the former judge believes it is necessary and reminds us that it has in fact given birth to all the great common law principles. Judges are always called on to use their discretion to in cases, and judicial activism is an essential part of a judge's duties. Providing the Indian population with remedies that the legislature fails to provide is nothing more than a constitutional obligation in the eyes of Reddy J. A number of great constitutional inventions of the SCI were the fruit of judicial activism: the basic structure doctrine, public interest litigation.[358] In the same way, Reddy J. considers that public interest litigation was just as much a constitutional obligation of the SCI to open the doors of the court to disadvantaged portions of the population.[359]

To Anand J., in his assessment of the SCI's summits and shallows Reddy J. found that the SCI was "a pathfinder seeking discovery of ways and means to translate constitutional ideals into workday realism, the constitutional philosophy of transforming the society into a just, free, and

[356] *Sanjeev Coke Manufacturing*, *supra* note 353 para 1021.
[357] Ibid para 1023.
[358] Reddy., *supra* note 238 at 256-260.
[359] Ibid. at 267-268.

equal society." In other words, the SCI would have kept the promises it held to the newly independent State of India in 1950.[360]

Conclusion

It is fascinating to observe the similarities in the judicial philosophies of these three judges and the critiques that were discussed above, namely the capabilities approach and critical race theory. These critiques were born in a North American context; not in a postcolonial context, not in such a culturally unique postcolonial background, not in a "developing" country. However, the battles are fought against remarkably similar enemies: liberalism, classism, legalism and textualism, "neutrality" of the law and existing order in general, blind confirmation of existing orders, the almighty division of powers, failure to engage in human compassion and understanding of suffering, failure to recognize the ever-present impact of individual circumstances on one's life until one's interactions with law – whether as a jurist or a member of a disadvantaged group - and the necessary encounter with law when engaging in social justice issues, etc.

But this may not be so surprising. After all, the activist judges perceived these evils as their heritage from Anglo-Saxon legal traditions; precisely the same traditions that are found in North America. If these traditions have not necessarily evolved the same way in England, Canada and the US, they nevertheless have strong common roots. For India, the independence meant emancipation from the Anglo-Saxon rule; the Indians were the oppressed population during colonisation. For the coloured people in the US, emancipation is not to be hoped for as long as they are on American soil. In a way, Indians gaining control over their law and their institutions could be comparable to granting power over American institutions to persons of color. As Hayman writes, other "traditions" would take hold of American law and different postcolonial mentalities would emerge.[361] Surely the result would be fascinating as well.

b. Public Interest Litigation (or Social Action Litigation)

One of the most important aspects of the SCI jurisprudence that requires to be emphasized is the birth of Public Interest Litigation (PIL), or Social Action Litigation (SAL), as Baxi prefers to call it.[362] Justices Bhagwati and Iyer were the founding fathers of the PIL.[363] PIL was one of the major

[360] Anand., *supra* note 198 at I.
[361] Hayman. *supra* note 78.
[362] The term public interest litigation, or PIL, is more widely used, but Baxi thought that this related the procedure too closely to the American public interest litigation. The scholar did not want the two

contributions of the activist judges in the rebirth of the SCI. If it could be perceived as a mere procedural novelty, the reality lies elsewhere: PIL became the new judicial philosophy. The traditional British or common law rules were relaxed to let new groups of people and new types of claims into the courtroom. Access to justice was simplified, and jurisprudence adapted to the reality of the poor and illiterate. This was done in the spirit of socialism, as Reddy J. sought, and it is even said that "[e]mpathy with lowly individuals became constitutional culture."[364] The new constitutional culture appears to have been successful in opening the doors of the court, as there was at that time an explosion of litigation.[365]

Judicial Activism and the New Legal Standard: PIL

PIL was not born during the 1980s; it began as one of the movements attempting to counter the Indira Ghandi government in place and the Emergency in the 1970s. PIL was often thought of as an arm of legal aid, and both were advocated for by the same people. Justices Bhagwati and Iyer both worked really hard to allow law to reach out to people through legal aid and then PIL, rather than the opposite. Bhagwati J. was writing in 1971, in a report on legal aid, that the judge ought to be given a role of greater participation in court proceedings so as to allow the poor to have equal chances against the rich in court proceedings. In 1973, in another report on legal aid, Iyer J. reiterated the need for a more active and widespread legal aid system, and mentioned PIL as a way to allow the poor to be reached by the law. In 1977, the two judges jointly rendered a last report emphasizing the need to adapt the current judicial proceedings to the socio-economic reality of the country, as adversarial litigation was not adequate to suit the needs of the poor, and stressing that these changes required a new philosophy of legal services.[366] By 1979, the SCI was therefore looking for a new kind of constitutional litigation.[367]

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procedures to be called the same for two reasons. The first is because he thought that borrowing the word had been too easy for the Indian society for the reason that it still readily accepted white hegemony. The second is that he did not want Indian social action litigation to suffer from the same shortcomings American PIL has. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India". *supra* note 292.

[363] Ray, *Public Interest Litigation and Human Rights in India*., *supra* note 206 at 66-67 and following.

[364] Das., *supra* note 226 at 25-26.

[365] Ibid. at 26.

[366] Ashok H. Desai & Muralidhar S., "Public Interest Litigation: Potential and Problems" in B.N. Kirpal *et al.*, eds., *Supreme But Not Infallible* (New Delhi: Oxford University Press, 2000). at 161.

[367] Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"., *supra* note 292 at 166.

PIL is strongly linked to judicial activism, as it was created through the activist judges' *juristic activism*.[368] Baxi defines juristic activism as the "enunciation of new ideas and techniques […] which are in no way necessary to the instant decision but relevant, and in some cases decisively so, for the future growth of the law".[369] This process is the same that was used to expand the scope of article 21, as well as the creation of the basic structure doctrine. In fact, some creation of law is always required in common law jurisdictions, as rules are meant to be adapted to changing social realities. Perhaps because the SCI has engaged in judicial activism which is not compliant with the "global prescriptive theory about judicial role and function",[370] its juristic activism might be perceived to go further than other jurisdictions. In any case, the engagement of the SCI in juristic activism is just another way of presenting the endeavour of the SCI to shape Indian law to the specifics of Indian reality, and in doing so it is developing its distinctive law. The creation of PIL is a crucial aspect of the Indian constitutional jurisprudence and, as such, is tied to the future of Indian law. Some call PIL an "establishment revolution".[371]

In traditional common law rules, *locus standi* is granted only to one who can prove to be personally affected by a given violation. This excludes any other person of good faith who wants to represent the aggrieved person,[372] or anyone who wants to challenge a situation where it is difficult to find one of many aggrieved person because the effects are too widespread and general to affect only a few. PIL can be described as procedures where the *locus standi* and the evidence rules have been relaxed almost to the point of non-existence where at least one of the following elements exists:

- Collective concerns raised by the petition – not individualistic
- Claimants (or those on whose behalf claim is filed) belong to underprivileged sections of society
- Judicial intervention is necessary for the protection of democracy (independence of judiciary, possibility of a remedy)

[368] Ibid. at 115.
[369] Ibid. at footnote 42.
[370] See above, section 2.a.
[371] Baxi quoting Rajeev Dhavan : Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"., *supra* note 292 at 132.
[372] Desai & S. *supra* note 366.

- Administrative decisions relating to development are harmful to the environment and jeopardise people's rights to natural resources[373]

Iyer J. was the one to set the ground for PIL in the case of *Municipal Council, Ratlam v. Shri Vardhichand*.[374] Iyer J. begins his written judgment with "It is procedural rules, as this appeal proves, which infuse life into substantive rights, which activate them to make them effective."[375] He further continues, giving life to the philosophy of PIL:

> The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of `standing' of British Indian vintage. If the centre of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered.[376]

The concept was confirmed and expanded by Bhagwati J. in the *Asiad* case,[377] in which he explained the concept that PIL was not meant to enforce individual rights against other individuals, but rather to allow claims promoting the public interest. It sought to ensure that where large numbers of the population are poor, illiterate or disadvantaged in some way, their rights do not go unnoticed. He also stated that PIL was required by the rule of law, which demands that everyone be equally protected by laws, and not solely the fortunate. Bhagwati J. further explored the purpose of PIL and its deep links to social justice and socio-economic transformations in *S.P. Gupta*.[378] To Bhagwati J. as well, judicial activism was deeply linked to PIL.[379] The PIL procedures were necessary to ensure social justice in the application of

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[373] Ray, *Public Interest Litigation and Human Rights in India*., *supra* note 206 at 24-25.
[374] *Municipal Council, Ratlam v. Shri Vardhichand* (1980) AIR 1980 SC 1622.
[375] Ibid., first parapragh of Iyer J.'s judgment.
[376] Ibid.
[377] *Peoples Union for Democratic Rights v. Union of India* AIR (1982) SC 1473 [Asiad].
[378] See above, section 2.a., in discussing Bhagwati J.'s judicial philosophy.
[379] The origin of the SCI power to develop SAL is s.32 of the Constitution: "32. Remedies for enforcement of rights conferred by this Part
1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part (…)"
A similar power is granted to High Courts by article 226. CONST.

constitutional law, otherwise it could not be brought to "the common man."[380] PIL was partly introduced to restore the SCI's legitimacy after the dark period of emergency, and partly to reinstall the judiciary as guardians of social revolution.[381]Bhagwati J. also acknowledges the fundamental links between PIL and the access of citizens to their social and economic claims, and believes that PIL procedures have allowed the population to grant new credibility to the SCI.[382]

Bhagwati J., like Baxi, differentiates PIL/SAL in India from PIL in the US: the US PIL procedures require large amount of resources, which in India is completely unrealistic as poverty and illiteracy are widespread.[383] Moreover, where PIL in the US is merely headed towards the conservation of civil liberties, in India the aim is rather large-scale social and economic changes and accountability for governance. PIL's main objective was to allow everyone to present claims to the SCI and to counter the particular challenges to the presentation of evidence in poverty claims,[384] but it also aimed at bringing a collective aspect that was lacking in individualistic Anglo-Saxon traditions into Indian law.[385] Nevertheless, both types of PIL have a similar objective, which is to promote the role of law and provide the possibility for new groups to be involved in constitutional adjudication[386] and therefore modifying the range of actors and claims.

The SCI has been very creative in its adaptation of the law and has significantly relaxed the *locus standi* and the evidence rules to allow everyone to present fundamental rights claims. PIL is an intrinsically public procedure, litigants are not litigants anymore: they are not presenting a private claim but a public one. One who presents a PIL case thus does not have the power to

[380] Bhagwati.*, supra* note 339 at 567.
[381] Ray, *Public Interest Litigation and Human Rights in India*., *supra* note 206 at 64.
[382] Bhagwati.*, supra* note 339 at 568.
[383] It could however be argued that if a lot of resources are required in the US, it probably is not an equal opportunity for all in the US either.
[384] The judge describes this reality the following way: "[t]he problem of proof therefore presents obvious difficulties in public interest litigation brought to vindicate the rights of the poor. This problem becomes acute in many cases because, often enough, the opposing respondents deny on affidavit the allegations of exploitation, repression and denial of rights made against them. Sometimes the respondents contest the bona fides or the degree of the relevancy of the information on which the litigation is based and sometimes they attribute wild ulterior motives to the social activists bringing the litigation." Bhagwati., *supra* note 339 at 573-574.
[385] Ibid. at 570.
[386] Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"*., supra* note 292 at 109. Baxi, "Foreword"., *supra* note 282 at x.

withdraw it; the case is not in his hands.[387] PIL is not meant to be an adversarial process: the parties and the court are rather engaged in problem solving, in collaboration with one another.[388] Bhagwati J. discusses the character of the proceedings in PIL cases in *Bandhua Mukti Morcha*:

> There is nothing sacrosanct about the adversarial procedure with evidence led by either party and tested by cross-examination by the other party and the judge playing a positive role has become a part of our legal system because it is embodied in the Code of Civil procedure and the Indian Evidence Act. […] The strict adherence to the adversarial procedure can sometimes lead to injustice, particularly when the parties are not evenly balanced in social or economic strength. Where one of the parties to a litigation belongs to a poor and deprived section of the community and does not possess adequate social and material resources, he is bound to be at a disadvantage as against a strong and powerful opponent under the adversary system of justice, because of his difficulty in getting competent legal representation and more than anything else, his inability to produce relevant evidence before the court. Therefore, when the poor come before the court, particularly for enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure which will make it possible for the poor and the weak to bring the necessary material before the court for the purpose of securing enforcement of their fundamental rights. If the adversarial procedure is truly followed in their case, they would never be able to enforce their fundamental rights and the result would be nothing but a mockery of the Constitution.[389]

The SCI can be seized by a mere letter, since requiring more from firms representing the poor would be asking too much from pro bono lawyers.[390] Bhagwati J. calls this the "epistolary jurisdiction", where the court is properly moved by a letter and can thus hold an investigation. This acceptance of letters begun informally: judges accepted letters and treated them as petitions, and eventually the practice was formally recognized[391] and even widespread, especially in the beginnings.[392] The court has chosen not to ignore the reality of the poor nor to require extremely lengthy briefs from the claimants, and to conduct its own investigation. In

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[387] Desai & S., *supra* note 366 at 166.
[388] Ibid. at 167.
[389] *Bandhua Mukti Morcha*, *supra* note 268 at 8-9.
[390] The case where Baxi sent a letter to the SCI to seize the court is well known: *Dr. Upendra Baxi v. State of Uttar Pradesh* (1983) 2 SCC 308. [Dr. Upendra Baxi v. State of Uttar Pradesh]
[391] Notably, in the *Asiad* case, in which Bhagwati J. confirmed and expanded the concept of PIL, the court had been seized by a letter: Asiad, *supra* note 377; Bhagwati., *supra* note 339 at 572-573.
[392] Desai & S., *supra* note 366 at 165.

1998, the SCI has issued a notification to specify which matters would be heard on reception of a letter and which would not, basically drawing the line between public interest matters and private matters.[393] In fact, in the beginnings of PIL, the majority of cases were not presented by lawyers but by social activists.[394] The case where Baxi and other law professors sent a letter to the SCI about the inhumane conditions at the Agra Protective Home for Women is a well-known case, in which the court accepted the letter as a petition and provided important directions to the Home which significantly improved the living conditions of the women.[395] Another significant PIL case is the *Sunil Batra (II)* case,[396] which has been mentioned above. In this case, another prisoner had sent a letter to the court to put an end to a situation of torture of another inmate, which the court accepted as a petition and granted it.

As another major difficulty of the poor to have access to courts is the necessity to present evidence, the SCI has begun to appoint commissioners and set socio-legal fact-finding commissions.[397] Commissioners can be persons from all backgrounds, legal or non-legal, journalistic, professionals, bureaucrats or expert bodies. The SCI is also very open to rely on social sciences evidence or empirical data, notably expert opinions on various questions. It has, for example, based its decision on expert opinion when deciding if the right to life of people were endangered if they were evicted.[398] The SCI also frequently demands from some lawyers to act as *amicus curiae* and give their opinion on the case or even verify certain facts alleged by one of the parties.[399]

The issues the courts dealt with when engaging in mass poverty or endemic corruption cases did not call for mere compensation or writ. As a consequence of judicial activism, massive response to the creation of PIL, and the changes in the traditional role of courts, the conventional remedies did not suffice anymore. Remedies had to be adapted to the new legal reality. The courts thus issued directions to the government to enact affirmative action policies or imposed continuous monitoring to the government.[400] Bhagwati J. makes the precision that these

[393] Ibid. at 165.
[394] Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"*., supra* note 292 at 118.
[395] *Dr. Upendra Baxi v. State of Uttar Pradesh*, *supra* note 390.
[396] *Sunil Batra (II), supra* note 329; see above section 2.a.
[397] Bhagwati*., supra* note 339 at 574.
[398] Desai & S*., supra* note 366 at 165.
[399] Ibid. at 167.
[400] Ray, *Public Interest Litigation and Human Rights in India*., *supra* note 206 at 73.

creative remedies were not infringing on the other branches of government: they are merely ensuring that the citizens' rights are duly respected.[401] In order to ensure enforcement, predicting that the government may not act in all good faith to enforce orders against it, the SC even started appointing its own monitoring agencies.[402] These agencies are composed of appointed commissioners, as are the fact-finding missions. Their task is not only to monitor but also to propose remedies.[403]

PIL's Role in Indian Society

The PIL procedures are of prime importance because they have given a new face to judicial review. Where court procedures are long and complicated and lawyers are expensive, justice belongs to the rich; hence it cannot be just. In a place like Canada, where a constitutional case takes forever and guarantees heavy loans to an average Canadian, judicial review cannot be a tool for the disadvantaged, or even for middle class.[404] However, if a society's perception of social justice is meant to be legalized in human rights norms, then this might mean that only the riches' perception of social justice is presented to courts in human rights claims. Or perhaps no perception of social justice is presented at all, when the people suffer from Baxi's "false consciousness" syndrome and cannot realise that they are perpetuating the "neutral" rule of a class. Either way, when judges, lawyers, claimants and defendants belong to the same social class, it can hardly be said that disadvantaged portions of population will see their interests represented in any type of proceedings. The utility of principle of judicial review should then be challenged, as it is not in fact being used by those who need it the most. The judicial system thus allows a rise in inequality of representation in public institutions rather than the opposite. A likely result is that the judicial system and judicial review lead to further disempowerment of historically and socially disadvantaged communities.

PIL procedures have changed the role of courts in governance, as anyone can present any claim and the court welcomes claims about social inequalities. It has furthermore changed the

[401] Bhagwati., *supra* note 339 at 576.
[402] Ibid. at 577.
[403] Desai & S., *supra* note 366 at 165.
[404] Petter writes that "A newspaper report in 1985 estimated that the cost of taking a criminal case to the Supreme Court of Canada 'can be more than $34,500', while those bringing non-criminal cases under the Charter 'should be prepared to spend at least $200,000'. The operative words are 'at least'. A woman from Ontario recently reported spending $200,000 on a Charter case that had not yet reached the Ontario Court of Appeal. A challenge brought by college instructor Merv Lavigne against the use of union dues for political causes cost the National Citizens Coalition, the right-wing lobby funding the case, $400,000 before the trial judge ever rendered a decision." Petter., *supra* note 161 at 155-156.

relationship of individuals and collectivity towards law: groups can seize the court as groups, and citizens can have resort to courts to ensure government accountability. These are not mere procedural changes; they represent a new role for law and the judiciary in governance. This has considerably broadened the role of judicial review, which is no longer limited to typical cases of judicial review. All PIL cases are writ proceedings alleging violations of fundamental rights.[405] However, the incompatibility of a law with fundamental rights is not the focus in PIL litigation, as PIL rather aims at combating government lawlessness, repression and gross human rights violations for which the government is responsible, whether through commission or omission.[406] An important role of PIL is to expose such governmental practices.[407] A very recent judgement is interesting as it answers questions that relate to state practices that are typically conceived as outside the scope of judicial review, notably regarding allocation of resources:

> (1) Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?[408]

Even though this case is rather representative of the more recent trends of PIL jurisprudence,[409] it demonstrates well how far judicial review can go in PIL cases. A right to formal equality would hardly invite such a review on the allocation of resources on the part of the executive. In answering question 1, the SCI has stated the following:

> The State is empowered to distribute natural resources. However, as they constitute public property/national asset, while distributing natural resources, the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material

[405] Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"*., supra* note 292 at 119.
[406] Ibid. at 121.
[407] Ibid. at 119.
[408] This recent case is very well known in India and is commonly called the "2G scam". Centre for Public Interest Litigation v. Union of India, Writ Petition (Civil) No 423 OF 2010; Dr. Subramanian Swamy v. Union of India, Writ Petition (Civil) No 10 OF 2011 [2G Scam Judgment] online: INDIAN KANOON http://indiankanoon.org/doc/116116642/
[409] See section 3.b.

> resources of the community should be so distributed so as to best sub-serve the common good[410]

The person who seizes the court is a *public citizen*.[411] Every person in India is entitled to question state practices and to challenge them when they are not transparent or may have adverse effects on the population. PIL thus enables the citizens to hold the government directly accountable for some administrative and executive decisions, as the widespread corruption makes such a resort necessary. Whereas in many common law countries the judiciary has strict limitations on the scope of its judicial review power,[412] the SCI's role is to review all government actions to ensure they are done correctly.[413] The growth of PIL has diversified the problems presented to the court and therefore enabled the judiciary to get involved in such cases that go further than what is imagined in most constitutionalist systems.[414]

Perhaps the most interesting and democratizing aspect of PIL is the joint action of several actors of Indian public life: the media, the social movements, and the courts. In the post-Emergency period, members of the press also appeared to realize how fragile their freedom of expression was, and they actively began to find and reveal dubious state practices.[415] Investigative journalism allowed social movements to engage in the battle against endemic problems of government lawlessness, that were otherwise perceived as petty injustices, and to attract attention from all over India.[416] PIL has been built on this synergy between the press and the social groups: the media provides public access to information that social movements can use in PIL proceedings.[417] Moreover, the press grants heavy coverage to PIL cases.[418] This collaboration means that the population is not only well aware of PIL cases and their individual power to seize the courts, but it provides social movements with several tools to pressure the government, before and after PIL judgements are rendered. It is often more efficient to have the government

[410] 2G Scam Judgment, *supra* note 408 para 63.
[411] Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"., *supra* note 292 at 121.
[412] Kelly & Manfredi, eds., *supra* note 166.
[413] 2G Scam Judgment, *supra* note 408.
[414] Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"., *supra* note 292 at 108.
[415] Ibid. at 114.
[416] Ibid. at 114.
[417] Ibid. at 114.
[418] Bhagwati., *supra* note 339 at 573.

adopting adequate policies than to have courts intervening to force the government to provide remedies for its failures.

The PIL procedures in India have allowed the creation of numerous non-profit organizations that engage in a large number of PIL cases and have the opportunity to bring into evidence large-scale issues, like corruption, bad governance, environmental pollution, massive violations of social and economic claims, etc.[419] The relaxation of the *locus standi* rule added to the open-mindedness of the SCI to accept social claims and play a role in social justice allows for a high amount of victories to the NGOs, and this has led to a rapidly evolving human rights law and PIL jurisprudence. Although they are not the only social groups playing a role in or benefitting from PIL, these organizations are now playing a unique role in Indian society. One can observe a social problem, gather some evidence, and come up directly to the SCI to present the issue. There is no established limit to the actions of the government the courts have the power to review, and the SCI has been proactive in adapting law to the changing social reality. The creation of PIL is a good example of the SCI using law as a means and not as an end.[420] Human rights have become legal standards to ensure courts are gatekeepers of social justice and not merely of the law enacted by members of high classes and for members of high classes.

PIL has given law a new democratic role: the judicial institutions have become an area for citizens to express their opinions and make demands from the state. Not only are their demands heard, but a significant amount of power is also afforded to claimants, since courts have been open to criticize the government for its failures and to order creative remedies. PIL was in fact created to ensure participation of the population in the judicial institutions, as elections allow public participation in politics. It is a strategy seeking to ensure "participative justice".[421] The case of *Akhil Bharatiya Soshit Karamchari Sangh*, a case about affirmative action in the Railway Administration, is a good example. Iyer and Reddy JJ. accepted the PIL claim made by a large number of persons, even though they were not a recognized union. The claimants sought to contest the law allowing affirmative actions in the enterprise, and their capacity to seize the court, as an unrecognized union, was challenged. Iyer J. wrote the following:

[419] The NGO Human Rights Law Network is a good example of this. Every morning several lawyers head for the SCI and plead numerous SAL cases, while tens of others are helping legal aid lawyers at the Juvenile Justice Boards or doing human rights research and writing briefs to file in court. Human Rights Law Network online: HRLN http://www.hrln.org/hrln/.
[420] See above, section B.2.a., Iyer J.
[421] Reddy., *supra* note 238 at 262.

> Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through 'class actions', 'public interest litigation', and 'representative proceedings'. Indeed, Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions.[422]

Baxi writes that PIL has allowed constitutional adjudication to become a *social conversation*,[423] between the activist judicial and the human rights and social activist groups. Constitutional adjudication no longer belongs to professionals, it belongs to everyone in society - even the oppressed.[424] The philosophy behind it is that constitutional governance, as a tool for verification on government actions, has to belong to everyone in order to be democratic. The dynamics of governance and constitutional rights have been given a new face, and Baxi goes as far as stating that this represents a new constitutionalism.[425] This result is confirmed as faith in constitutionalism is highly present among social actors in India, who believe that judicial process is the best tool for redemocratization of Indian society. Social actors believe that the judiciary can promote and protect human rights and that adjudication en fact represents a *democratic space*.[426]

The creation of SAL therefore has allowing new kinds of lawyering and judging, which has led, in Baxi's words, to "juridical democracy", as judicial power is being used in a way that it has never been used.[427] It has provided the courts with a socio-political sphere where it could engage in activism.[428] In other words, PIL has allowed courts to become a forum for public expression of grievances and grant claimants a certain amount of power. Courts can engage in *justice* in the more absolute sense of the term, as their administration of "justice" in the institutional sense of the term is not strictly limited to applying laws enacted by the government. The procedural

[422] *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India* (1981) AIR 298 at 224.
[423] Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice"., *supra* note 277 at 158.
[424] Ibid. at 158.
[425] Ibid. at 158.
[426] Ibid. at 158.
[427] Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"., *supra* note 292 at 108.
[428] Ibid. at 129.

opening of PIL allows courts to hear diversified cases, claims by various actors, to assess unseen means of evidence, and create novel remedies. The rules have been adapted so that capacities to understand proceedings and to pay for a lawyer are not limitations on citizens' claims. And even more importantly, they are not the factor determining which claim makes it to court and which gets discarded at some moment in the proceedings, for technical reasons. Hearing cases regarding deeper causes of social inequalities changes the focus of the jurisprudence and enables judges to gain an understanding of the reality of the poor. Such an understanding is crucial to avoid blindness to the perpetuation of domination of certain classes over others.

Indian PIL, more than a procedural change, is a different vision of a justice system. It could be said that the SCI runs two judicial systems in parallel, as the philosophy behind PIL cases and adversarial litigation in "regular" cases have little in common. It also offers a new role for the law in society, which raises many questions. What is law for? Can law claim to be democratic if it is used by the legal community, for the legal community? Once a law is enacted by a government, should it be considered the will of the people, simply because the representatives were elected? Should there not be further checks on the use of this power, which is meant to fundamentally belong to the people? How could average citizens of a democracy not be provided with a process to hold the government accountable for its actions, other than less-than-perfect elections? This is precisely how PIL is democratic: democracy through elections perhaps is not enough to truly represent the will of the people. Perhaps when the people are unhappy with the government, a forum to express such discontent – and be listened to - is not only welcome but necessary.

Critiques of PIL

There are also some challenges to the PIL system. First and foremost, PIL and the jurisprudence it has triggered have narrowed the traditional line in common law between the judiciary and the two other branches. The SCI did assert that it was not its task to engage in policy-making,[429] but through the remedies ordered in some PIL cases, the distinction between jurisprudence and policy-making has at times almost disappeared. This is especially true in the case of monitoring and appointments of commissions deciding on detailed remedies. The SCI often accepts to engage in policy making where the executive fails to take action on particular problems. For

[429] For example, this was asserted by the SCI in *Fertilizer Corporation Kamgar Union v. Union of India* (1981) 1 SCC 568.

example, in a case filed by M.C. Mehta, the Supreme Court decided to issue directions to the government regarding traffic regulations in New Delhi, because the government failed to enforce the law in place. The petition had been filed years before, but the SCI decided to activate it after an accident had caused the death of a large number of school children.[430] The SCI has in fact been inconsistent with its decisions, at times refusing claims and others times engaging in detailed policy-making.[431] PIL has therefore been criticized by politicians, who stated that PIL may have started from a good idea but was being misused.[432]

The critique that the SCI may at times be overstepping its judicial role in PIL cases is important because it affects the SCI's credibility, and also because it raises questions of competency. Policy-making is highly technical and judges do not have the expertise to achieve this task. A further issue is that the judiciary is not a "democratic" body because it is not elected, which is a cause of concern to some when judicial decisions border on policy-making. Judges are however quite aware of these difficulties and try to be cautious in deciding on PIL cases.[433] The SCI has rejected some PIL claims because it infringed on the legislative's role.[434] Indeed the SCI has refused to decide on matters regarding the sale of liquor,[435] the recognition of a language as national language,[436] or whether specific protections had to be granted to religious buildings.[437] The court has also recognized that its capacities had limitations, especially in cases where expertise other than legal is required. In *Tehri Bandh Virodhi Sangarsh Samiti*, the SCI thus decided in a case regarding the construction of a dam that it did not possess the expertise required to decide on the technical issues at stake, and found that the court's duty was to assess the appropriateness of the government's conduct rather than the correctness of the decision.[438]

The general trend does however point to adopting policies where the executive fails to act. It often takes the form of temporary guidelines, remaining in force until the government takes

[430] *M.C. Mehta v. Union of India* (1997) 8 SCC 770.
[431] Desai & S., *supra* note 366 at 176-178.
[432] Ibid. at 180.
[433] Ibid. at 180-182.
[434] For a more radical view on the limitations of the court's jurisdiction, see *State of HP vs. Parent of a Student of Medical College* (1985) 3 SCC 169.
[435] *Krishna Bhat v. Union of India* (1990) 3 SCC 65.
[436] *Kanhya Lal Sethia v. Union of India* (1997) 6 SCC 573.
[437] *Mohd. Aslum v. Union of India* (1994) 2 SCC 48.
[438] *Tehri Bandh Virodhi Sangarsh Samiti v. State of UP* (1992) Supp 1 SCC 44.

action on the issue.[439] Nevertheless, in general the relationship between the SCI and the executive did not suffer from the growth of PIL. It has rather given the judiciary a new intensity in its dialogue with the executive,[440] perhaps because the judiciary now beneficiated from a renewed credibility in the Indian population. Furthermore, the executive has been compliant with the judgements rendered in PIL cases, even if resentful.[441]

It has also been difficult to adapt the PIL procedures to the rules of evidence and procedure applied by the court in the regular adversarial proceedings, arousing criticism from lawyers. The lack of petitions makes it difficult for other parties to know what to respond to; the court has remedied this by asking *amicus curiae* to draft petitions on the basis of letters received. The reports presented by appointed commissions are also problematic, as it is difficult to accept it in the evidence without granting the opposing party possibility to cross-interrogate and verify its credibility. The SCI has been adapting the procedures to these issues, but a coherent body of rules managing PIL cases is necessary to ensure the certainty of the law and to avoid inconsistencies between judgements.[442]

A last important criticism is that this conversation between sections of society still remains unequal as everyone does not have the same means or is not as empowered to get involved in constitutional adjudication.[443] This is a problem that might be more difficult to completely eradicate, as it requires fundamental social changes. Nevertheless, despite these criticisms, the perception of PIL by the population has been very positive and PIL is crucial for the enforcement of the constitution among all classes of population. These criticisms must be used by the SCI to strengthen the PIL process and to include safeguards to ensure certainty, both regarding procedures and substantive law.[444]

3. The SCI Since the Rebirth

Analysing Indian constitutional jurisprudence is of particular interest because the Constitution was adopted in 1950, which has left sufficient time for constitutional procedures to develop,

[439] Desai & S., *supra* note 366 at 179.
[440] Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India"., *supra* note 292 at 127.
[441] Ibid. at 132.
[442] Desai & S., *supra* note 366 at 179-180.
[443] Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice"., *supra* note 277 at 158.
[444] Desai & S., *supra* note 366 at 183-184.

prove viable and adapt when needed. The rebirth of the post-emergency period was starting even before the Canadian Charter was adopted. This leaves us with more than three decades of jurisprudence to observe how the strategy of judicial activism has developed on the long term, and assess if it has had adverse consequences. This section addresses the evolution of the judicial culture since the post-emergency period. In the first part, the role taken up by judges of SCI since the retirement of the activist judges will be described. The evolution of PIL will be addressed in the second part.

a. Judicial Approaches after the Rebirth

From 1980 to 1987, during the rebirth, the Indian economy was going well and the Indian nation appeared to be blooming.[445] In 1987, the country entered a period rather characterized by political and judicial instability, and economic regression. The fall of the Soviet Union, bringing down with it the dreams of socialism, seemed to leave open no other public policy than capitalism. Corruption appeared to be endemic, and public institutions were mismanaged. All the activist judges had also retired by 1987.

The end of the 1980s and the beginning of the 1990s saw numerous corruption scandals as well as natural disasters. The SCI became interested in issues of corruption and environmental problems, as the government appeared to fail miserably in managing both types of issues.[446] The court did not have a leader nor particular approach or strategy, but the judges worked collectively and met the challenges of the time. It took a vigorous lead in cases about corruption and protection of the environment. [447] There was no probity in Indian public institutions, and corruption was everywhere. This had created a deep crisis in the Indian society: the gap between the population and the government was only growing, and the population's confidence in public institutions was rapidly fading. The SCI chose to attempt to fix this gap, to provide the population with a tool to fight corruption and other social wrongs. The SCI took on a role of "enforcement", a role that was more focused on patching the failures due to the indifference and negligence of the two other branches of government and less with taking a leading role towards a precise objective, as socialism and empowerment of the deprived had been for the activist judges. SCI judges have shown courage developing this new judicial activity, and judicial review took on a new life. Lack of probity in government was the new challenge for the SCI.

[445] Das., *supra* note 226 at 24-26.
[446] Ibid. at 28.
[447] Ibid. at 28-29.

Reddy J. noted that the SCI had generally been faithful to the socialist agenda of the constitution, especially compared with the executive and the Parliament, except in its first years.[448] Reddy J. concluded that the SCI was on the right track "all along" regarding the goals of socialism, but is nevertheless worried about some recent judgments. The SCI has indeed found strikes to be illegal in 2003.[449] This judgment represents a huge step back in terms of socialism, and is not legally justified as numerous other countries recognize in their labour laws the importance of strikes in the power balance between employees and employers. This decision, added to liberalizing public policies, is very disquieting for the judge.[450] Others have expressed that the judicial mission undertaken by the activist judges to bring socialism to Indian society and to open the courts to the poor was abandoned when these judges left the Bench, when the mission was only half-fulfilled.[451] Baxi expresses similar concerns while discussing the recent role of judicial activism. He writes that recent practices have been too quick to rejects claims regarding important social justice achievements in the field of labour rights, only to give more adjudicatory space to new social movements, which he describes as "excessively human rights market driven".[452]

However, this does not mean that the SCI has left social causes and only worked against corruption. In some cases social justice and human rights were at stake and the SCI did not fail its duty to enforce them. The *Unni Krishnan* PIL case is a good example of the dynamics between the court, the media, social movements, and the government. In the *Unni Krishnan* case, the SCI has reiterated that the right to education was a right of every person, and that it was included in the right to life and liberty (article 21). The SCI had already determined that education was a right included in the right to life of art.21 in *Mohini Jain v State of Karnataka*,[453] but in *Unni Krishnan* it went further in deciding how that right was enforceable. It forced the state to provide education to every child under fourteen years old and to everyone over fourteen in the limit of the state's economic capacity. It stated that "Education means knowledge and knowledge itself is power. The preservation of means of knowledge among the lowest ranks is

[448] Reddy*., supra* note 238 at 149.
[449] *T.K. Rangarajan v. State of Tamil Nadu* (2003) 6 SCC 581.
[450] Reddy*., supra* note 238 at 147-148.
[451] Das*., supra* note 226 at 38.
[452] Baxi, "The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice"*., supra* note 277.
[453] *Mohini Jain, supra* note 272.

of more importance to the public than all the property of all the rich men in the country."[454] This case was a PIL, and it is particularly interesting because it underlines the importance the SCI has continued to grant to the concept called by some "human development".[455] The SCI expressed discontent with the government because the Directive principle on education put a time limit of ten years for the state to provide with educational institutions for all the children of up to fourteen years old.[456]

After the SCI decision in *Unni Krishnan*, the government adopted the 93rd amendment to include the right to education in the Constitution as a fundamental right.[457] However, the dialogue was not merely between the SCI and the government; the civil society had a strong role to play. Following the judgment, members of civil society and NGOs began to seize the court for children under the age of fourteen who did not have access to a school, and put pressure on the government to adopt stronger policies in education. The judgement provided them with a powerful weapon. The movement became a rallying point for organizations working on different topics, and the National Alliance for the Fundamental Right to Education (NAFRE) was created. NAFRE at one point represented about 2400 Indian NGOs.[458]

It should not be concluded that the government enacted the amendment out of good will or recognition of the SCI judgement. It rather had to answer to the pressure from civil society.[459] This might be the most crucial aspect of the continuing role of the SCI and PIL cases: in its role as a democratic institution representing the population, it has enabled civil participation not only in judicial proceedings, but in political power struggles as well. It gives weight to social movements, provides them with remedies and legal arguments. Rather than interfering with the other branches, another vocabulary should be used to describe the dynamic as seen in the *Unni Krishnan* case: it is empowering civil society to play a role in public decision-making, which is difficult in India because of endemic corruption.

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[454] *Unni Krishnan, supra* note 273.
[455] Kumar, "International Human Rights Perspectives on the Fundamental Right to Education-Integration of Human Rights and Human Development in the Indian Constitution"*., supra* note 94.
[456] CONST s.45 (abrogated in 2002), *Unni Krishnan*, *supra* note 273.
[457] The new article 21.A reads "Right to education.—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine." CONST.
[458] Vijayashri Sripati & Arun K. Thiruvengadam, "India - Constitutional Amendment Making the Right to Education a Fundamental Right Constitutional Development" (2004) 2 Int'l J Const L 148. at 153.
[459] Ibid.

Other recent decisions have also confirmed the trend in earlier decisions of the SCI to uphold laws that aimed at enforcing directive principles, and thus promoted social and economic rights, even when they were conflicting with fundamental rights.[460] This trend aims at respecting the social revolution objectives, which sought equality between all Indians and social justice. Article 21 has been receiving the same broad interpretation since the golden era. The right to shelter was thus stated to be included in article 21 in 1990,[461] the right to health confirmed in 1996,[462] the right to a doctor's assistance stated in 1989,[463] the right to legal aid and a speedy trial confirmed in 1992,[464] etc.[465]

b. Evolution of PIL

While the pathway to socialism was virtually abandoned, the same is not true of PIL, which has on the contrary gained vigour.[466] However, without the prior judicial approach towards socialism and protection of the disadvantaged, PIL has turned a corner. The middle-class was the new group to benefit from PIL and it used it to correct all sorts of social wrongs, in which the state was not taking up its responsibilities, notably pollution and corruption. The media made public large amounts of information that made PIL very useful to hold the state accountable for its numerous failures.[467]

As PIL cases evolved, it has at times been abused, as private actors have sought to benefit from the relaxed rules of procedure according to dubious and very broad definitions of "public interest". A recent PIL case clarifies the criteria applicable to PIL in order to make sure it is not used for private and *mala fide* purposes. In 2010, the SC wrote:

> The Court held that the scope of entertaining a petition styled as a public interest litigation and locus standi of the petitioner […] has been examined by this Court in various cases. The Court observed that before entertaining the petition, the Court must be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and

[460] Atul M. Setalvad, "The Supreme Court on Human Right and Social Justice: Changing Perspectives" in B.N. Kirpal *et al.*, eds., *Supreme But Not Infallible* (New Delhi: Oxford University Press, 2000). at 251.
[461] *Shantistar Builder v. N.K. Totane* (1990) AIR 1990 SC 630.
[462] *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal* (1996) AIR 1996 SC 2426.
[463] *Paramanand Kataria v. Union of India* (1989) AIR 1989 SC 2039.
[464] *A.R. Antulay v. R.S. Nayak* (1992) AIR 1992 SCW 1872.
[465] For a more extensive review of cases, see Jain*., supra* note 252.
[466] Das*., supra* note 226 at 38.
[467] Ibid. at 38.

> seriousness involved. The court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions.
>
> The aforementioned cases clearly give us the picture how the judicial process has been abused from time to time and after the controversy was finally settled by a Constitution Bench of this Court, repeatedly the petitions were filed in the various courts.[468]

The Court reiterates that PIL was "the product of realization of the constitutional obligation of the court".[469] The SC confirms the importance of PIL in India, how they have brought about positive change in the society, helped in protecting the environment and facilitated probity and transparency in governance. It also appraises the improvement in accessibility to justice it provided.[470] PIL has hence been used for more than thirty years and the courts still recognize its necessity and cite Bhagwati J. in their judgments.[471]

The SCI states that PIL procedures have had three different periods.[472] The first period was described in the previous section, aimed principally at improving access to justice to disadvantaged masses to allow them to bring social claims to court. The SC refers to this period as the golden era. The second phase started in the 1980s and addressed issues of environmental protection.[473] The courts issued directives to the government to protect ecology and environment. The broad right to a quality of life (s.21) that was seen in the previous section opened the door to the recognition of a right to a healthy environment.[474] This right has in turn allowed the development of a rich jurisprudence on the protection of environment and ecology, clean air and water, etc. The courts have really engaged in protection of the environment, and the SC believes this has had serious impacts in India.[475] The third phase started in the 1990s and extended the scope of PIL: courts have started to engage in review to ensure probity and transparency in governance, addressing the central issue of corruption.[476] The SC and High

[468] *State Of Uttaranchal v. Balwant Singh Chaufal*, *supra* note 336, paras 18-19.
[469] Ibid, at para 31.
[470] Ibid, at paras 33-34.
[471] Ibid.
[472] Ibid, at para 35.
[473] Ibid, at paras 81 and following.
[474] *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P.*, AIR 1990 SC 2060.
[475] *State Of Uttaranchal v. Balwant Singh Chaufal*, *supra* note 336 at paras 81-105.
[476] Ibid, at paras 106 and following.

Courts have thus issued orders where the government was not adequately fulfilling its task. For instance, it has ordered the Central Bureau of Investigation to conduct investigations when a ministerial project appeared dubious. The SC then pursued further investigations itself, and stalled the initial project because the role of various branches of government was questioned.[477] This last trend is perhaps more of a clear intervention in government management than the first two.

PIL has thus changed its route, but it could hardly be said that judicial activism has really stopped if compared to some other jurisdictions. The SCI has actively adapted its jurisprudence to the mentality and problems of the day, or at least to the judges' perception of it. The socio-economic reality of the poor in India today has not really improved,[478] and it would be hard to sustain the argument that the activist judges' beliefs about the deep needs to improve the conditions of the poor in the country would be superfluous thirty years later.

The next chapter aims at providing a concrete comparison between the judicial interpretation of human rights by the SCI and the SCC. Both Supreme Courts have rendered landmark judgments establishing the contents of the right to life and liberty of the person, which provides us with interesting benchmarks, in the two countries, to assess the limitations each court sees on their scope of judicial review on the ground of human rights claims.

Chapter 3 – Social Justice and Human Rights: Comparing India and Canada

Throughout the thesis, legal theories relating both to the Canadian and the Indian context have been discussed. The contribution of Indian activist judges was to provide Indian jurisprudence with legal principles adapted to the needs of the poor, to realities of human suffering. They questioned common law principles and rethought them to adapt them to widespread conditions of extreme poverty found in India. While this adaptation was certainly required in the Indian context, the judicial philosophies applied in India are applicable everywhere, with local adaptations. The judicial philosophies presented by Iyer, Bhagwati and Reddy JJ. are located in the critical race theory and postcolonial theory currents of thought, in their challenge of liberalism, objectivity and classism.

[477] *M. C. Mehta v. Union of India*, (2007) 1 SCC 110.
[478] Vaidyanathan*., supra* note 207.

This chapter seeks to illustrate the concrete results of such diverging judicial philosophies as the Canadian and the Indian one. Two landmark cases will thus be compared: *Francis Coralie Mullin* and *Gosselin*. This comparison is interesting to understand how legal philosophies may lead to very different results. Judicial philosophies are not merely a matter of theory for academics; on the contrary for the human beings involved, they may prove crucial. In these cases, the respective SCs addressed similar questions in their local contexts, and the resulting interpretation is radically different.

It is interesting to first compare the constitutional human rights norms the judges had to decide on in the two cases. In the Indian case, article 21 of the Indian constitution reads:

> 21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.

In the case of Canada, s. 7 of the Canadian Charter reads:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

These norms do not, at their face, appear as very different. If could be noted that the Indian provision the right is framed in negative terms, "not to be deprived of" whereas the Canadian provision starts by granting the "right to life, liberty and security", to provide protection from deprivation afterwards. Moreover, the Canadian provision adds the right to security. One aspect that should be noted in the case of Canada is that s. 7 is included in the category framed as "Legal rights", which has most likely played an important role in its restrictive interpretation. It appears fair to say that both norms are not significantly different in their wording, and that it can be expected that both norms were created to protect similar rights, in a context where human rights are meant to be universal.

A. Francis Corallie Mullin

The post-emergency era also saw the expansion of the definition of the right to life.[479] The Indian Constitution provides social and economic rights in its Part IV, in the Directive principles of state policy (Directive principles), whereas civil and political rights are protected by Part III on fundamental rights. There was, since the first years of independence, confusion on the status of

[479] CONST art. 21. For a description of the evolution of the right to life, see above, Chapter 2 section B.2.b.

the Directive principles in relation with Fundamental rights.[480] In the case *Francis Coralie Mullin*, a SAL case, Bhagwati J. established once and for all a broad definition of the right to life including social and economic rights. The case was about the rights of an inmate, who was in preventive detention, to have interviews with members of her family and friends as well as her lawyer in order to prepare her defence. The inmate only had access to one visit per month, in accordance with the Conditions of Detention Order. Bhagwati J. held that the limitation imposed by the Order was unreasonable and violated the right to life, stating that:

> The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival. Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiori, this would include the faculties of thinking and feeling. […]Therefore any act which damages or injures or interferes with the use of any limb or faculty of a person either permanently or even temporarily, would be within the inhibition of Article 21.[481]

With regards to the circumstances of the case, Bhagwati J. adds that the right to life includes the "right to socialize",[482] as this is of prime importance for human rights. This was particularly important since the inmate had a young daughter, whom she could not see more than once a month. However, Bhagwati J. also seized the opportunity to expand the definition of the right to life, which had already been considerably broadened in *Maneka Gandhi* in order to ensure the possibility not just to live but to enjoy liberties and dignity as well.[483] Bhagwati J. describes:

> The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.[484]

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[480] Ray, *Public Interest Litigation and Human Rights in India., supra* note 206. See above, Chapter 2 section A.
[481] *Francis Coralie Mullin*, *supra* note 39 para 5.
[482] Ibid para 7.
[483] See above, Chapter 2 section B.2.
[484] *Francis Coralie Mullin*, *supra* note 39 para 6.

The right to life, under the pen of Bhagwati J. includes therefore not only the right to dignity, as previously stated in *Maneka Gandhi*, but also the right to *live*.[485] This means that in order to assess whether the right to life was respected, the simple analysis of whether the person has lost his/her life or if it was attempted upon does not suffice; a whole more complex analysis has to be undertaken. In this definition, bringing one's death or attempting to is not the sole circumstance where the right to life is violated. A whole range of potential violations exist, including violations of personal liberties, social and economic rights, or violations of human dignity. This entails a reflection on the *quality* of life rather than mere abstention from taking somebody's life. It avoids the creation of an abstract rule that can easily be applied to everyone, namely the prohibition of attempting to someone's life, to favor a rule that allows the consideration of the specific circumstances of each case and assess how that person does in fact live his/her situation. In no way does this rule affect the prohibition to attempt to one's life, it merely broadens the legal perception of the word "life" to allow courts to engage in the human situations rather than hide behind abstract rules.

Several aspects of these definitions remind us of Sen and Nussbaum's capabilities. The focus on reduction of injustice is important for Sen, as he argues that any universal rule of justice simply does not exist, but that human beings have, generally speaking, a feeling of how to reduce injustice in every given situation.[486] There is no "one-rule-fits-all" to accomplish justice, but on the other hand injustice is a tangible fact, and heading towards more justice can only be done through understanding and compassion for others. Another interesting aspect is the importance the court gave to the "mixing and comingling with fellow human beings". This acknowledgement of human beings as social creatures was highlighted by Nussbaum in her list of capabilities, but is rarely a component of human rights. Perhaps the most revolutionary aspect is the apparently limitless formulation of "[e]very limb or faculty through which life is enjoyed is thus protected by Article 21". "Enjoyment" is not a word normally read in the definition of the right to life, as it invites a subjective assessment of the person's emotions. The right to life as described by Bhagwati J. encompasses a notion of compassion, invites the judge to walk in the shoes of the

[485] "This right to live which is comprehended within the broad connotation of the right to life can concededly be abridged according to procedure established by law and therefore, when a person is lawfully imprisoned, this right to live is bound to suffer attenuation to the extent to which it is incapable of enjoyment by reason of incarceration." Ibid para 7.

[486] Amartya Sen, *The Idea of Justice* (United States of America: Belknap Press from Harvard University Press, 2009).

person involved. The judge's compassion, where it is not perceived as a political bias,[487] might allow human rights claims to reduce injustice rather than merely applying positive law. Here again, reducing injustice on an individual basis requires a deeper analysis of every case, and prevents the establishment of a lofty rule.

If this broad opening of the right to life may seem like a different issue from the creation of PIL, it could be said to be the other half of the system put in place by the activist judges in their quest for social justice. Judicial proceedings had been changed to ensure courts were able to decide on social claims; now substantive law was being opened up to allow courts to adapt human rights to their objectives of social justice. In *Francis Coralie Mullin*, Bhagwati J. also explains the reason why such a broad definition of the right to life was required by constitutionalism:

> [Constitutions] are not ephemeral enactments designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it" The future is their care, and provisions for events of good and bad tendencies of which no prophecy can be made. […]The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. Now obviously, the right to life enshrined in Article 21 cannot be restricted to mere animal existence.[488]

This vision of the right to life appears fundamentally humanist, focusing on improving the individual circumstances of each and the guarantee of dignity. This definition will now be compared to definition of the right to life, security and liberty of the person as interpreted by the SCC.

B. Gosselin

The case that currently represents the position of the SCC on issues of social and economic rights is *Gosselin*. In this case, a young woman on welfare contested a law that had been in force between 1985 and 1989 in Quebec. The law stated that welfare beneficiaries under thirty years old would be given approximately one third of what the beneficiaries over thirty received. The

[487] See Martha Nussbaum about lofty formalism, Chapter 1 section A.2.
[488] *Francis Coralie Mullin*, *supra* note 39 at 528.

beneficiaries under thirty had the chance to participate in training in order to raise the amount they would receive from welfare, to a maximum amount equal or under the amount received by beneficiaries over thirty years old. To speak in numbers, the basic welfare amount was 466 $, and recipients under thirty would receive 170$. The court noted that the poverty level in a large metropolitan area was 914$.[489] There was also an issue with the availability of this training, as Ms. Gosselin claimed there were not unlimited spaces and therefore applicants could go wait months for a space, all this time with the third of the basic welfare amount. The majority in the judgment however rejected this issue as it believed that the evidence was not sufficient to be conclusive.[490]

Ms. Gosselin claimed that the law violated her right to life, security and liberty (s. 7 of the Charter), as well as her right to equality (s. 15 of the Charter) and her right to an acceptable standard of living (s. 45 of the Quebec Charter).[491] For the sake of comparison, only the claim on s. 7 will be considered but it has to be noted that all three claims were equally rejected by the majority. With regards to her right to life, security and liberty, Ms. Gosselin argued that "the s. 7 right to security of the person includes the right to receive a particular level of social assistance from the state adequate to meet basic needs" and that "the state deprived her of this right by providing inadequate welfare benefits, in a way that violated the principles of fundamental justice."[492]

1. The Majority Decision

The following question arose: can the right not to be deprived of life, liberty and security of the person (s. 7 of the Charter) encompass the protection of a minimum standard of living to persons living in Canada? And if so, does it confer a positive obligation on the state? The majority of the court decided in the negative for both questions. Without giving extensive explanations, the court decided that there was no reason to expand the current notion of security or life in the present circumstances. The current notion included merely “legal rights”, in other words mostly - but not exclusively - the rights of the accused in criminal trials. The majority opinion wrote that:

[489] *Gosselin*, *supra* note 43 para 7.
[490] Ibid para 8.
[491] Ibid para 9.
[492] Ibid para 75.

> [T]he dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those that occur as a result of an individual's interaction with the justice system and its administration.[…]Under this narrow interpretation, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice.[493]

The court therefore had to reflect on the scope of the right to life, security and liberty of the person, and if it could encompass more than mere legal rights, more particularly economic rights.[494] Regarding this question, the court answered that s. 7 guaranteed the right "not to be deprived", and therefore that even if the article could include economic rights, nothing in the jurisprudence suggested that the article could confer a positive obligation on the state.[495]

The court did not close the door on eventual circumstances where the definition of the right to life, liberty and security of the person could be extended to situations other than that of legal rights, or that it could encompass a positive obligation for the state.[496] The majority wrote that s. 7 should be interpreted as a living tree, and therefore that a day might come where s. 7 would be interpreted differently. The court held that the question to answer was rather "whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards." The conclusion of the court regarding this question is, in its entirety:

> I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory workfare provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support. [497]

However, the court did not provide reasoning as to how exactly the security of a person could not be endangered when the person is not capable of meeting her basic needs, or how the

[493] Ibid, para 77.
[494] Ibid para 80.
[495] Ibid para 81.
[496] Ibid para 82.
[497] Ibid para 83.

health of a person would not be affected by such conditions of poverty. The majority of the court merely chose not to interfere without getting into any real interpretation of the human rights involved in the circumstances of the case.[498] Ms. Gosselin was living with 170$ per month, when the poverty line was set at 914 $ per month. It could be argued that this was reasonable evidence of hardship. The amount received by Ms. Gosselin can only be a fraction of the lowest available rent. Did the majority of judges ask how Ms. Gosselin could live a life free of hardship on 170$ a month? If evidence was indeed lacking, is there a judge, at any point of the proceedings, who requested the lawyers representing her to bring the evidence they were looking for? Did the judges question her about it when she was testifying?

2. The Dissent

Two of the nine judges dissented on the violation of s. 7, L'Heureux-Dubé and Arbour JJ. L'Heureux-Dubé J. dissented on s.7, and unlike the majority she contended that severe poverty was a serious threat to Ms. Gosselin's psychological and physical integrity, and further stated that "[t]here is little question that living with the constant threat of poverty is psychologically harmful." [499] She also confirmed the fact that Ms. Gosselin was living well under the poverty level, and that the monthly cost of adequate nourishment was 152 $.[500] In her own words, the judge wrote "I cannot imagine how it can be maintained that Ms. Gosselin's physical integrity was not breached."[501] L'Heureux-Dubé J., in addressing the context of Ms. Gosselin for the analysis of s. 15, wrote:

> 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. She would have perceived that her right to dignity was infringed as a sole consequence of being under 30 years of age, a factor over which, at any given moment, she had no control.[502]

Regarding s. 7, L'Heureux-Dubé J. concurred with Arbour J., whose position is presented below. She however made the precision that while it is true that courts are not in the best position to

[498] Ibid paras 80-83.
[499] Ibid para 130.
[500] Ibid para 130.
[501] Ibid para 130.
[502] Ibid,para 132.

make policy choices, it does not mean that they cannot have a role to play in setting an appropriate framework in which to build policy making. She indeed wrote that:

> [A]lthough governments should in general make policy implementation choices, other actors may aid in determining whether social programs are necessary. In the present case, the government stated what it considered to be a minimal level of assistance but a claimant can also establish with adequate evidence what a minimal level of assistance would be.

Justice Arbour, in her dissenting opinion, went more in-depth in her interpretation of the rights at stake. In her analysis, she concluded that the risks of such low income had strong impacts on one's health, and therefore that the right to security as well as the right to life were both relevant.[503] Arbour J. concluded that in a welfare state such as Canada, the right to security and life represented a positive obligation on the state to guarantee its citizens a certain standard of living. Interestingly, she notes that:

> Few would dispute that an advanced modern welfare state like Canada has a positive moral obligation to protect the life, liberty and security of its citizens. There is considerably less agreement, however, as to whether this positive moral obligation translates into a legal one.[504]

Arbour J. therefore believes the moral obligation is clear, but the legal one is not. In other words, to the judge, the notion of social justice in Canadian society would include a positive obligation on the government to ensure a minimum standard of living to its citizens. In fact the judge afterwards concludes that not only does the language of s. 7 allow the interpretation of positive obligation, but it *compels* it.[505] She then pursues to state the reasons for her assertions, deconstructing the barriers "precluding this Court from reaching in this case what I believe to be an inevitable and just outcome."[506]

She writes that the perception that s.7 encompassed only negative obligations on the state – obligation not to interfere - "is a view that is commonly expressed but rarely examined".[507] She concludes her analysis in stating that the case law is consistent with the inclusion of positive

[503] Ibid para 311.
[504] Ibid para 308.
[505] Ibid para 309.
[506] Ibid para 309.
[507] Ibid para 319.

obligations in s.7,[508] and that the opposing view was "unfounded under a correct interpretation of the Charter".[509] She also describes in details the scope of judicial review and the limitations on the role of judges, and draws the line between the judicial decisions on human rights claims drawing on social and economic equality on the one hand, and resource allocation and policy-making on the other:

> It does not follow, however, that courts are precluded from entertaining a claim such as the present one. While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation — questions of how much the state should spend, and in what manner — this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case. As indicated above, this case raises altogether a different question: namely, whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. In contrast to the sorts of policy matters expressed in the justiciability concern, this is a question about what kinds of claims individuals can assert against the state. The role of courts as interpreters of the Charter and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims. One can in principle answer the question of whether a Charter right exists — in this case, to a level of welfare sufficient to meet one's basic needs — without addressing how much expenditure by the state is necessary in order to secure that right. It is only the latter question that is, properly speaking, non-justiciable.[510]

She pursues with a thorough analysis of the presence of other positive obligations in the Canadian Charter, an interpretation of the language of s.7 and a purposive analysis of s.7.[511] On the purpose of the right to life, Arbour J. wrote that leaving such a restrictive role to the right to life was an anomaly in legal interpretation, as

> [A]ny interpretation of the *Charter* that leaves the right to life such a small role to play is one that threatens to impugn the coherence of the whole *Charter*. Far from being a poor relation of other *Charter* rights — one which deserves protection merely as a negative right, while certain other *Charter* rights are granted recognition as full-blown

[508] Ibid paras 319-324.
[509] Ibid para 330.
[510] Ibid para 332.
[511] Ibid paras 336-343.

> positive rights — the right to life is, in a very real sense, their essential progenitor. [512]

In her assessment of the evidence required for the violation of s.7, Arbour J. wrote that the requirement was merely to prove that the lack of government intervention had "substantially impede[d] the enjoyment of their s.7 rights", in other words to ensure that this right was meaningful to the person involved.[513] Arbour J. concluded that there was "ample evidence" of such a substantial impeachment.[514]

Arbour J. continued, stating that an alarming 88.8 % of recipients under 30 were not able to raise their benefits up to the level received by recipients over 30, which was a violation of young adults' physical and psychological security.[515] The judge even wrote that this was "compellingly illustrated" by Ms. Gosselin and her four witnesses.[516] Arbour J. described the evidence on the living conditions imposed on young adults,[517] and concluded that such conditions amounted to a substantial violation of the young adults' right to security, and even "drove them to resort to other demeaning and often dangerous means to ensure their survival."[518]

Arbour J. did not hesitate to describe the concrete effect of poverty on the health, engaging in the social science evidence presented by Ms. Gosselin. As an example of the problems she describes because of the poverty that was imposed on the young adults, she mentions:

> Malnourished young adults suffer from lethargy and from various chronic problems such as obesity, anxiety, hypertension, infections, ulcers, fatigue and an increased sensitivity to pain. Malnourished women are prone to gynecological disorders, high rates of miscarriage

[512] Ibid paras 346-347.
[513] Ibid para 370.
[514] Ibid para 371.
[515] Ibid para 371.
[516] Ibid para 371.
[517] "On $170/month, paying rent is impossible. Indeed, in 1987, the rent for a bachelor apartment in the Montreal Metropolitan Area was approximately $237 to $412/month, depending on the location. Two-bedroom apartments went for about $368 to $463/month. As a result, while some welfare recipients were able to live with parents, many became homeless. During the period at issue, it is estimated that over 5 000 young adults lived on the streets of the Montreal Metropolitan Area. Arthur Sandborn, a social worker, testified that young welfare recipients would often combine their funds and share a small apartment. After paying rent however, very little money was left to pay for the other basic necessities of life, including hot water, electricity and food. No telephone meant further marginalization and made job hunting very difficult, as did the inability to afford suitable clothes and transportation." Ibid para 372. The consequences on the physical and psychological health of poverty on young adults is addressed in details in paras 373-377.
[518] Ibid para 371.

> and abnormal pregnancies. Children born to malnourished mothers tend to be smaller and are often afflicted by congenital deficiencies such as poor vision and learning disorders.[519]

She also mentions the consequences of not being able to pay for shelter, warm water, adequate clothing and electricity[520], and that undernourished young adults had to turn to criminal activities or search for pieces of food in the garbage to feed themselves.[521] She turned to the psychological security of the person, writing that:

> [H]ardships and marginalization of poverty propel the individual into a spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction. According to a 1987 enquiry by Santé Québec, one out of five indigent young adults attempted suicide or had suicidal thoughts. The situation was even more alarming among homeless youths in Montreal, 50 percent of whom reportedly attempted to take their own lives.

Arbour J. therefore concludes that the "evidence overwhelmingly demonstrates" the violation of the right to security and potentially of the right to life as well.[522] She notes that "freedom from state interference with bodily or psychological integrity is of little consolation to those who, like the claimants in this case, are faced with a daily struggle to meet their most basic bodily and psychological needs."[523] She adds that the claimants' world "is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances."[524] For these reasons, in these circumstances purely negative rights have no meaning or purpose, when s.7 is meant to be one of the most important rights of the Canadian Charter.

3. Analysis

Arbour J.'s dissenting opinion is not representative of the law in Canada. It can however be argued that it is representative of the fact that, as Arbour J. had phrased it, the courts at times fail in their task as "interpreters of the Charter and guardians of its fundamental freedoms" in refusing to enter a dialogue with the government regarding human rights interpretation when cases may fall within the ambit of economic equality. The majority decision relied on the division

[519] Ibid para 374.
[520] Ibid para 373.
[521] Ibid para 375.
[522] Ibid para 377.
[523] Ibid para 377.
[524] Ibid para 377.

between "positive" and "negative" rights, a division that has been carefully deconstructed by Arbour J. in her dissent.[525] This division is also linked to the claim that deciding on positive rights would take the court outside of its jurisdictions and into the political realm.[526] As Wendy Brown and Andrew Petter remind us, negative claims are no less political than positive or collective claims; they merely come from a particular political agenda.[527] In all types of human rights claims, judicial discretion cannot be avoided: human rights are meant to be broad norms to be adapted to changing social realities. Therefore the judge's task is precisely to adapt them in accordance with the social reality. Interpretation of human rights is thus always required from the judiciary, and refusing to consider the social reality, the social impacts of a decision and the personal circumstances of individual cases - for lack of expertise or any other reason - to reach that interpretation often fails to protect the human beings involved. As asserted by the Indian activist judges, Canadian judges also bear a role in governance. Therefore, social impacts will be felt no matter *how* they decide on the claim, and refusing to decide on "social" or "positive" claims in fact confirms the right of the state to make a particular decision or policy, and often confirms the legitimacy of social classes.[528] A complete abstention from deciding on social and economic claims is not truly possible. Judges do have the power to make more of human rights claims than the restrictive view found in the majority decision, and the spirit of human rights requires it.

In her dissent, Arbour J. has highlighted a contradiction between a positive moral obligation of the state to ensure the security, life and liberty of its citizens, and whether this moral obligation could in fact be translated into a legal obligation.[529] This contradiction illustrates well the tension between social justice standards and their potential protection through human rights norms, as was explored by Nussbaum above.[530] Arbour J.'s assertion therefore begs the question: is the right to life, security and liberty as interpreted by the majority in *Gosselin* sufficient to represent the perception of members of Canadian society in terms of social justice standards? Would it be fair to conclude that the Canadian population's conception of social justice includes no entitlement to social and economic equality? Even if the answers to these

[525] Ibid para 319.
[526] Ibid para 329. Arbour J. also deconstructs this claim in para 330 and following.
[527] Petter; Brown., *supra* notes 161; 162.
[528] See Jackman; Petter., *supra* notes 158; 161.
[529] See above, section 2. *Gosselin*, *supra* note 43 para 308.
[530] The author addressed fundamental rights in constitutions as basic entitlements of justice. See above, Chapter 1 section A.2.

questions are hardly clear, the perception that constitutionally guaranteed human rights can, if enforced properly, guarantee a just society is widely shared.[531] It appears from the majority opinion in *Gosselin* that on their own, human rights standards cannot build a healthy and equal society. As Brown puts it, "Americans have never had so many rights […] and so little power to shape collective justice and national aims".[532] The failure of human rights to represent positive goals and to allow proactive engagement from courts and civil society may mean that human rights are failing their purpose of bringing a vision of social justice to the Canadian society.

It would not be fair to say that visions of social justice are absent from Canadian constitutional law.[533] On the contrary, in deciding on constitutional human rights claims judges are required to assess what is a "free and democratic society",[534] and what is included in "principles of fundamental justice",[535] etc. However, judges appear very reluctant to engage in matters drawing on economic equality, as seen in *Gosselin*. It has to be noted that the Canadian Charter includes no reference to economic equality, which perhaps justifies the uneasiness of judges to engage in the matter. However, studying Indian constitutional law has taught us that claims presented by the poor require more active judges, judges that are willing to understand the context of the cases presented to them. Constitutional adjudication, if adaptive measures are not taken by courts, is designed in a way that makes it difficult for the disadvantaged to seize the court to ensure respect for constitutional rights.[536] Being able to afford a lawyer, presenting sufficient evidence to support constitutional claims, taking part of procedures that last for years are all aspects that make it extremely demanding for the poor. For these reasons, in a landmark judgment about PIL, Bhagwati J. was writing that a failure of courts to adapt procedures to the means of the deprived in human rights cases made a "mockery" of the constitution and

[531] See Moyn., *supra* note 131.
[532] Brown., *supra* note 162 at 459.
[533] See Errol P. Mendes, "In Search of a Theory of Social Justice; the Supreme Court Reconceives the Oakes Test" (1990) 24 RJT ns 1. Jurisprudence has evolved since then, however many judgements the author refers to are still important judgements in Canadian constitutional law, and the analyses are generally still relevant.
[534] Canadian Charter, s.1: "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[535] Canadian Charter, s.7.
[536] This is the very reason that PIL/SAL was created, see above Chapter 2 section B.2.b. See also, for the costs of constitutional adjudication in Canada, Petter., *supra* note 161 at 155-156.

fundamental rights,[537] as presenting relevant and sufficient evidence in adversarial cases required a lot more resources than available to most people.

Indeed, in *Gosselin* the majority merely stated that the evidence was not sufficient to change the legal interpretation of s.7, while the dissenting judges both stated that evidence of hardship was indisputable. The judgement of the majority offered no discussion of the circumstances of the case or the broader social and economic context. Nothing in the majority judgement opens the door to the consideration of a social and economic context that might cause the security or life of Ms. Gosselin to be endangered.

The assessment of the ties between poverty and human rights is surprisingly absent in constitutional cases in Canada, the majority opinion in *Gosselin* being an outstanding example of this lack of consideration. It should not be assumed, as it sometimes is, that poverty in the western world is not as important an issue as it is in the developing world. A view is sometimes expressed by authors from non-western countries that western ones have reached a certain level of equality in the societies that allow for poverty not to be a priority.[538] While it is true that the income of persons living in poverty in western countries may be higher than the poor in developing countries, growing social inequalities as well as the social exclusion they involve need to be granted more consideration in this analysis.[539] In a society where most people are well-off, the ones that aren't are further marginalized, as poverty is easily identified. Furthermore, links between poverty and lower levels of education, criminality, abuse of drugs or alcohol, violence in the family or in the neighborhood and health problems, to name just a few, must also be acknowledged.[540]

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[537] See above, Chapter 2 section B.2.b. *Bandhua Mukti Morcha*, *supra* note 268 at 8-9.

[538] This view is held in Mahendra P. Singh, "Constitutionalization and Realization of Human Rights in India" in C. Raj Kumar, ed., *Human Rights, Justice, and Constitutional Empowerment* (New Delhi: Oxford University Press, 2007).

[539] For various perspectives on the problems created by the growth in social inequality and how best to address them, see Growing Gap, ed., *Why Inequality Matters in 1,000 Words or Less* (Toronto: Canadian Center for Policy Alternatives, 2007).

[540] For the intersection of poverty with criminality, see Morgan Kelly, "Inequality and Crime" (2000) 82:4 Review of Economics and Statistics 530; William C. Heffernan, "Social Justice/Criminal Justice", *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* Oxford University Press, 2000); Jeremy Waldron, "Why Indigence is Not a Justification" in William C. Heffernan & John Kleinig, eds., *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* Oxford University Press, 2000).

Furthermore, the court experience is particularly representative of the division between classes that often results in the exclusion of the poor.[541] Judges and lawyers often belong to higher classes, thus are not always readily aware of the reality of the poor. When one testifies in court, judges, lawyers and jurors are assessing his or her *credibility*.[542] Credibility is based on an assessment of all apparent features of the witness or defendant: clothes, hygiene, vocabulary, self-confidence, tone of voice, body language, etc. These features are representative of one's social class,[543] and the poor is almost instantly disadvantaged as it is more difficult for one to convince a judge of a position when one appears to lack credibility.[544] All these challenges require from judges that they engage in the reality of the poor in order to understand the legally relevant characteristics of their cases, which may be different and differently expressed from that of other cases.

For all these reasons, there appears to be no rational reasoning to explain the failure of some judges from the SCC to engage more in issues of poverty and hardship. Iyer J. asked to move from "appearances to reality",[545] in other words from positive law to human suffering. Iyer J. seemed to believe this philosophy was required in a setting of postcolonial constitutionalism when deciding on human rights claims. However, it does not appear fair to say that all Canadian citizens are exempted from suffering even if Canada is not exactly a postcolonial setting, the case of Ms. Gosselin being a good example of this. On the contrary, statistics about rising inequalities would tend to prove the opposite.[546] Iyer J. tells us that the highest constitutional principle may be that of empathy towards every individual, and that humanity is the founding faith of the Indian constitution. In the same way, in *Francis Coralie Mullin*, Bhagwati J. stressed the importance of prioritizing the worth and dignity of every human being in constitutionalism.

An important question might be asked: what if the majority had made factual findings similar to that of Arbour and L'Heureux-Dubé JJ., if they had concluded that hardship for young adults living with 170$ per month is indisputable? Let one imagine a situation where the majority had

[541] For an excellent assessment of the experience in court of members of marginalised groups, see Lucie E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G" (1990) 38 Buff L Rev 1.
[542] Ibid.
[543] The author in fact uses the word "caste" rather than class. Ibid.
[544] This assertion is based on my personal experience in Youth Tribunal with social services for youth protection, with daily testimonies of parents, children and extended family.
[545] See above, Chapter 2 section B.2.a.
[546] Gap, ed., *supra* note 539.

concluded that the evidence had in fact proved that such low income involved risks for the young adults' physical and mental health, that it might lead them to commit dangerous and criminal actions, and that in any circumstances poverty remains humiliating. Would the majority have made the same decision, namely that s.7 requires no positive obligation from the state? Would the judges have rejected the claim as easily, or would they have felt a glimpse of compassion, leading them to question the soundness of the positive/negative rights divide? It is of course impossible to answer these questions, but arguably a contextual analysis could have taken judges somewhere else. At the very least, the judges would have considered all the facts relevant to the case. Refusing the evidence and qualifying it as a "frail platform", where other judges have found it to "overwhelmingly demonstrate" the violations[547] makes it seem like the judges merely chose not to engage with the context.

C. Comparison

It should first be noted that the facts of the cases are very different. In *Francis Coralie Mullin*, the claimant was a prisoner who had access to very few visits. This is in fact very different from *Gosselin*, whose claim was aiming at the very heart of social and economic rights: the right to a decent standard of living. It can be argued that the SCC would likely have decided on the facts of *Francis Coralie Mullin* the same way the SCI has, based on a different legal reasoning, as the SCC is more open to allowing claims on detainees' rights than on social and economic claims.[548] However, the purpose here is not as much to compare the facts of these cases as much as the jurisprudential principles involved and the judicial reasoning that led the judges to their conclusions. Both judgments have set the standard in their respective country about the scope of the right to life and liberty and, in deciding as they did, they knew their judgment would have that important effect. This thesis is therefore concerned with both the facts considered as relevant by the judges in their reasoning, as well as the jurisprudential principles they have chosen to set.

Several aspects of Bhagwati J.'s interpretation of the right to life are absent in the *Gosselin* judgment, both in the opinion of the majority and in the dissents. The SCI focused on a subjective criterion, one that involved the assessment of one's emotions, enjoyment,

[547] *Gosselin*, *supra* note 43 para 377.

[548] The Charter devotes a whole section to legal rights, which includes section 7. Sections 8 to 14 provide specific rights to protect persons from unlawful intervention on the part of the state. It is therefore likely that *Francis Coralie Mullin* would have been decided on the basis of these articles, and that the SCC would not have considered such a case as being outside of its jurisdiction.

interpersonal relationship, etc. In other words, the SCI has interpreted the right to life as the right to a quality of life and included components that are found in Canadian law as components of the right to security. The SCI has gone further in its definition of the right to life than the dissenting judges in *Gosselin,* for whom a violation of the right to life involved a risk of death. The dissenting judges of the SCC did not go as far in their interpretation of the right to security either, as the evidence they decided on was objective rather than subjective: statistics, expert opinions, social science evidence. Nevertheless, the dissent and the SCI based their decision on similar reasoning, as they assessed the situation of the claimant in her context and were willing to interpret the right according to the human crisis. They furthermore perceived that their role, as judges, was to allow claimants to present evidence on economic deprivation, and that this reality was in fact justiciable as a human rights violation. The SCI and the dissent in *Gosselin* both stated that a constitutional right to life must have a strong role in constitutionalism, if not the prime role.

However, none of the parallels mentioned in the previous paragraphs apply to the majority decision in *Gosselin*. The judgement of the majority, representing the state of the law in Canada at the moment, is in fact similar to the judgement on the right to life that had been rendered by the SCI in *Gopalan* in 1950.[549] As discussed above, this judgment had rendered a restrictive and positivistic interpretation of the right to life, based on an analysis of the language of the constitution. The right to life, interpreted as such, excluded any other fundamental right, as well as the right to live in dignity. This interpretation was in force until it was overturned, in the 1970s.[550] This restrictive definition was criticized by many, including Reddy and Anand JJ.[551] Some authors therefore state that the right to life had been "denuded of much of its substance by *Gopalan*".[552] It is argued that a comprehensive vision of human realities, especially in situations marked by poverty, remains to be found in Canadian human rights interpretation so that constitutional law may become more inclusive of those who bear the most hardship.

D. The SCC's Relationship with Social and Economic Rights

One can only speculate in attempting to explain the SCC's reluctance to engage in the protection of social and economic rights, and it is likely the result of multiple factors. Jurisprudence on the

[549] *Gopalan*, *supra* note 237, see above Chapter 2 section B.1.
[550] See above, Chapter 2 section B.2.
[551] See above Chapter 2 section B.1.
[552] Jain., *supra* note 252 at 98.

topic of socio-economic rights cannot in itself provide an answer to this question. In my view, the answer is to be found in the underlying mindset of judges as individuals and courts as institutions. A crucial differentiation is to be made between individual judgments and the systemic analysis of Canadian constitutional jurisprudence. The objective here is not to engage in such an analysis, which could be the topic of a future thesis, but merely to attempt to open some paths for discussion.

The comparison between India and Canada may be relevant to understand at least part of the reluctance of the SCC to engage in socio-economic issues. The vast majority of Indian human rights cases that were cited in this thesis were PIL cases. Significant changes were made to Indian procedural law to allow such litigation and to ensure that fundamental rights were a reality to every Indian. This widening of the scope of legal standing has greatly extended the protection of the law to a large number of people, allowing virtually all citizens the possibility of instituting constitutional claims. This has opened the door to a wide variety of claims and the body of human rights law has developed through PIL litigation, one step at a time. The right to life gradually reached one level and then another one, to become what it is today. The evolution of Indian human rights law since 1950 is rich and fascinating, for the very reason that the wide variety of claims was itself rich and diversified. Rights and freedoms have taken a meaning in India that reaches until the poorest section of society. The same could hardly be said of Canada. Fundamental changes might have to be made in Canadian constitutional law to allow average and disadvantaged Canadians to have access to courts and consequently have the possibility to participate in the evolution of constitutional law. Some of the hurdles to popular participation in constitutional adjudication will be discussed in the next paragraphs.

The first factor raised here lies in the procedural hurdles to access to constitutional justice. As has been stated earlier, the biggest hurdle to the Canadian constitutional litigation is the budget required by such procedures. Constitutional rights in Canada are not available to a normal Canadian because they are simply not affordable. This necessarily creates an imbalance of representation in the justice system. Judges could seek to rebalance the representation in the justice system, but this has yet to happen. If this underrepresentation of average and disadvantaged Canadians in the justice system is a problematic imbalance, it is not an issue of mere procedure. The types of claims that are brought by economic elites are not necessarily representative of the concerns of the rest of the population. It is therefore a logical

consequence that the law which is created through such claims, in other words the legal evolution of constitutional rights, can only develop towards the confirmation of the rights of the economically privileged classes. This cannot lead to an accurate conception of Canadian societal values in constitutional law. It is unavoidable that the views of some classes are over-represented in constitutional principles.

For this reason it is argued here that a change in procedures is required to direct constitutional cases toward a democratization of such law. Constitutional law is not meant to be for economic elites; it is meant to be for everyone. If average Canadians cannot present constitutional claims, constitutional law cannot belong to Canadians. If groups that constitute the economic elite, including enterprises, were to possess 80% of the votes in elections, would we consider Canada a democratic country? The answer to this question is clearly no: one person one vote. It is troubling to observe that it is considered normal that average Canadians do not have access to constitutional litigation. The judiciary is a branch of all democratic states and it is a necessary institution in a democracy. But in order to fulfill its role, it has to be used *democratically*.[553]

A second factor to be considered is the institutional culture of the SCC. As Kent Roach writes, the SCC does not assume its role as a positive legislator in the branch of socioeconomic rights - even though it does in other areas. Roach explains that the SCC has been very proactive in cases drawing on criminal justice, national security, gay rights, and even on political, Aboriginal, and minority-language policies.[554] On the other hand, the author establishes that the court has proven very reluctant to assume its role as a positive legislator in socio-economic claims. Roach mentions the *Reference re Canadian Assistance Plan*[555] judgment of the SCC, where the court decided that there was no constitutional limitation on the decision of the government to drastically reduce transfers to provinces regarding social assistance. The author also refers to *Gosselin* in support of his argument.[556] The author discusses *Finlay*,[557] where the court rejected a claim where a province had violated its statutory objectives regarding minimum levels of social

[553] Allan R. Brewer-Carias, *Constitutional Courts as Positive Legislators – A Comparative Law Study* (New York: Cambridge University Press, 2011)
[554] Kent Roach, "The Canadian Constitutional Courts as Positive Legislators" in Allan R. Brewer-Carias, *Constitutional Courts as Positive Legislators – A Comparative Law Study* (New York: Cambridge University Press, 2011) at 328-336.
[555] *Reference re Canadian Assistance Plan* [1991] 2 SCR 525.
[556] See section B.
[557] *Finlay v Canada* [1993] 1 SCR 1080.

assistance for citizens. Roach also mentions the *Law*[558] judgment, where a widow's pension plan was reduced because of her age and the SCC confirmed the reduction. The author concludes that so far the court has refused to interfere with welfare policies.[559]

This reluctance was evident in the *Gosselin* majority decision.[560] The majority's poor engagement with the facts as well as the legal principles at stake, especially in contrast to Arbour and L'Heureux-Dubé JJ.'s dissents, demonstrates that this reluctance is not based on concrete legal principles. In *Gosselin*, the SCC majority has shown an indisputable refusal to consider economic equalities as well as personal context and human suffering in it legal reasoning.

Numerous authors explain this particular reluctance in engaging in socio-economic policies by the fact that the SCC has been responsive to a neo-liberal set of values which prevented them from engaging with socioeconomic policies.[561] In other words, the SCC has fostered the evolution of market-driven freedoms over socioeconomic rights that are sometimes perceived as intruding on distributive policy. Andrew Petter has been writing on the Charter since even before its arrival in Canadian constitutional law.[562] His arguments will be summarily presented here.

Petter considers courts to be the most conservative institution in Canadian governance, and therefore does not believe in directing social activism towards judicial activism. To him, courts require extensive resources and specific knowledge and skill. Progressive policies should be dealt with by the executive branch, where all Canadians can interact.[563] Petter also challenges the view that Charter rights are a "legal" concern, and that a "correct" legal definition can be made determined for Charter rights. He claims that they are political elements that each can agree or disagree with in accordance with their political beliefs, and that these critiques are not legal but political. In other words, the Charter is not a legal but a political instrument.[564] In his

[558] *Law v Canada* [1999] 1 SCR 497.
[559] Roach, *supra* note 554 at 337.
[560] See section B.
[561] Roach, *supra* note 554 at 337. See also Petter, *supra* note 161; Paul O'Connell, "The Death of Socio-Economic Rights" (2011) 74:4 Mod L Rev 532; Andrew Petter, *The Politics of the Charter: the Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).
[562] Petter, *The Politics of the Charter: the Illusive Promise of Constitutional Rights*, ibid.
[563] Ibid. at 6.
[564] Ibid. at 7.

recent book where he gathered his writings on the Charter since the 1980s, he has compiled analyses of SCC jurisprudence.

Petter discusses the *Dolphin Delivery* case,[565] where the SCC has granted priority to property rights over picketing rights.[566] Another important case addressed by Petter is *Chaoulli v. Québec*,[567] where the SCC stated that prohibitions on private health insurance in Québec violated the rights to life and security of citizens. For Petter, this "decision disregards years of democratic struggle".[568] Canadian provincial health systems are core elements of Canadian social justice systems, and striking down some of the dispositions forming its bases is a blow to the very system.[569] Petter also cites *RJR-MacDonald*[570]*,* where the SCC decided that legislative prohibitions on tobacco advertising were a violation of freedom of expression.[571]

In judging as the SCC does regarding socioeconomic issues, the court does not merely "apply" legal principles, but rather imposes a specific set of values on Canadian legislation. It is important to remind ourselves that the SCC's mission is not to create policies but to safeguard the primacy of the constitution and consequently of Charter rights. Rights and freedoms, including the right to equality, are meant to hold priority status. In choosing "deference" in socio-economic cases, the SCC may therefore be failing its duty to safeguard the Charter and the right to equality.

The third factor to be considered is the impact of the judges' backgrounds on the decision of cases. A case that brings an interesting perspective in that regard is *Symes v. Canada*.[572] In this case, a woman who was an associate in a law firm was told by the SCC majority that her child care expenses could not be deducted as business expenses, stating that it lacked an income-earning purpose. Perhaps the most interesting element in the analysis of this judgment is the fact that out of the nine judges sitting on the bench, there were only two women. And that

[565] *Dolphin Delivery Ltd. V. Retail, Wholesale and Department Store Union, Local 580* [1986] 2 SCR 573.
[566] Petter, *The Politics of the Charter: the Illusive Promise of Constitutional Rights*., *supra* note 561 at 77-98.
[567] *Chaoulli v. Québec (A.G.)* [2005] 1 SCR 791.
[568] Petter, *The Politics of the Charter: the Illusive Promise of Constitutional Rights*., *supra* note 561 at 12.
[569] Ibid. at 167-189.
[570] *RJR-MacDonald Inc. v Canada (A.G.)* [1995] 3 SCR 199.
[571] Petter, *The Politics of the Charter: the Illusive Promise of Constitutional Rights*., *supra* note 561 at 235.
[572] *Symes c. Canada* [1993] 4 RCS 695. [Symes].

these two women were the only judges to dissent from the majority decision, which was unanimously rendered by the masculine portion of the bench.

In *Symes*, the majority decision regarding discrimination based on the sex is clearly put in the following words:

> While it is clear that women disproportionately bear the burden of child care in society, it has not been shown that women disproportionately incur child care expenses. Although the appellant has overwhelmingly demonstrated how the issue of child care negatively affects women in employment terms, proof that women incur social costs is not sufficient proof that they incur child care expenses.[573]

One could think that, unless a family member can provide support in taking care of the children, a parent has two options : to stay home to take care of the children, or to go to work and pay someone to take care of them. How the seven males who wrote the majority judgment failed to seize this reality is both troubling and eye-opening.

L'Heureux-Dubé J., whose reasoning was agreed with by McLachlin J., wrote in her dissent that:

> The traditional interpretation of "business expense" was shaped to reflect the experience of businessmen and the ways in which they engaged in business. The present world of business is increasingly populated by both men and women, however, and the meaning of "business expense" must account for the experiences of all participants in the field. Child care is vital to women's ability to earn an income. […] While for most men the responsibility of children does not impact on the number of hours they work or affect their ability to work, a woman's ability even to participate in the work force may be completely contingent on her ability to acquire child care.[574]

It can be argued that these different judgments are not as legal as they are social or political, deeply based on the judges' visions of a just society. Then again, this is difficult to avoid when discussing constitutional principles. The fact that reasonable legal reasoning may be rendered in both directions by SCC judges, by seven males in one direction and two women in the other, makes it difficult to ignore how the characteristics of individual judges have the power to shape the future of constitutional law. It appears that the seven males were not sufficiently inclined to put themselves in the shoes of women trying to start businesses to understand their reality. This

[573] Ibid at 5.
[574] Ibid at 6.

observation can lead one to wonder if the economic background of judges may prevent them from engaging in claims where economic inequality is at stake. Coming from generally privileged backgrounds, if judges do not make the effort to understand the reality of persons living on welfare, such an understanding will not necessarily come readily. *Symes* perfectly illustrates why it is crucial for judges to truthfully engage in the context and the personal circumstances of each case.

It is argued here that the failure of the SCC to engage in socio-economic claims is a result of these factors, and probably of others as well. These factors and the judgements mentioned were not analysed here in any depth, to our regrets, but can hopefully raise interesting points to stimulate reflection on the SCC and social and economic equality.

Conclusion

Postcolonial theory was discussed in order to expose the background objective of this thesis: to show a face of India that remains to be discovered for many. It is argued that Indian jurisprudence on human rights has proven more adaptable to human realities and contexts, most likely because of judicial engagement towards social justice, than North American constitutional law has. In a globalizing world, it would be a shame not to consider Indian jurisprudence and its achievements. This thesis therefore aims at presenting them to Canadian jurists in order to allow Indian distinctiveness to be provided a spotlight.

Sen and Nussbaum, as well as critical race theorists were presented to provide a sample of critiques of North American constitutionalism. These critiques highlighted the underrepresentation of marginal groups in constitutional adjudication and especially in jurisprudential principles. A partial consequence of this underrepresentation, and perhaps a partial consequence of local judicial mentalities, makes it difficult for claims relating to social and economic justice to penetrate the law, even through human rights norms. The connections between human rights norms and social justice standards were further explored with writings from Nussbaum and Sen. These various critiques advocated for a contextualized application of the law, as broader inequalities as well as personal hardship are facts that should be perceived as legally relevant, especially in human rights claims. Constitutionally guaranteed human rights are the intersection of two different fields: constitutionalism and human rights. The second section of the literature review therefore presented scholars addressing the human rights

discourse, to show that human rights may be perceived by some as an emancipatory discourse but are nevertheless criticized for serious limitations on their emancipatory potential. It is important to grasp these limitations to understand the crucial role of court interpretations of human rights norms in the actual fulfillment of their emancipatory potential; a restrictive application may enact the limitations that are feared. Scholars writing on both the Canadian and Indian judicial attitudes towards human rights norms were presented: it is interesting to note that many authors in the Canadian context criticized the SCC for failure to decide on social and economic claims, whereas in the Indian context the judges were rather criticized for their judicial activism. Indian judges have notoriously led their judicial activism towards adapting the law to the reality of the disadvantaged.

Most of the authors presented in the literature review are engaged in a challenge of liberal ideology and liberal positivism, as were the SCI judges engaging in judicial activism. The second chapter provided explanations as to the social origins as well as the evolution of the social revolution in India. The Constitution was used as a powerful tool for social revolution; it was thought out as such by the founders and it was applied as such by many judges since then. Social justice was the cornerstone of the revolution of a nation that had been dominated for decades. The Constitution was meant to include all the elements of social revolution in order to ensure the government would not get lost in self-interested politics. Human rights were thought as elements of a broader idea of social justice and equality for all. The role of the judiciary was then exposed in relation to the origin of the constitution. The Constitution created the judiciary as its gatekeeper, providing it with the keys of the social revolution. This function has proven crucial, as the government became poisoned with corruption and bureaucracy. The SCI has taken the lead in the quest for social justice and has created the PIL mechanism to allow accessible procedures of judicial review for governmental actions in fundamental rights cases. The SCI also expanded definitions of human rights, keeping in mind the goals of social justice and reduction of human suffering. PIL claims have allowed an evolution of substantive law, which has led to strong standards in environment protection and probity and transparency in governance. The possibility for dialogue between the judiciary and the other branches, added to civil society participation in governance were presented as salient aspects of Indian judicial activism. The balance between the judiciary and the other branches of government may be different than what is commonly seen in Canadian jurisprudence but it does exist, and it is

effective in achieving social changes, as well as promoting government accountability and democratic civil participation.

Whether the term used is freedom, capability, social justice, unequal chances, hardship, suffering, poverty, the idea remains the same. What these terms confer is the complete picture of the human reality behind the law; more precisely behind positive law. Judges cannot be compelled by any universal "content" of human rights, since such content does not exist. Apparently, judges cannot be compelled to interpret international norms in domestic jurisdictions either. Human rights need to represent a social justice idea adapted to a particular context. The perfect rule to achieve justice for all may not exist, but judges hold in their hands the power to reduce injustice, which may be the best that one can do.[575] The same idea is expressed by Baxi, who advocates for a reduction of suffering.[576] Dignity cannot have any real meaning if not considered from the standpoint of one particular person, with particular circumstances. Dignity is in the eyes of the right-holder, and of no one else. If judges strongly believe that considering the individual and broader context amounts to "political bias", how could human rights achieve social changes? The failure to focus on human crises to rely solely on positive law is a symptom of a false representation of the law as neutral, of the law as existing on its own. Law always exists in a context and must be understood and interpreted in such context. Neutral law, "above" such context, is blind law. A positivistic interpretation in human rights claims has the effect of applying human rights law as an end in itself, when it cannot be more than a means to provide relief - Iyer J. reminded us of this reality. If violations of human rights norms are not seen as human crises but merely as legal violations, then they are self-defeating. And if this is the case, social movements may be wrong to invest so much in human rights because courts will never be able to do them justice.

To illustrate the comments of the previous paragraph, the example of Ms. Gosselin is very demonstrative. She was a women forced to live on 170$ a month, suffering from malnourishment, physical and mental health problems, as well as humiliation, and forced to have resort to demeaning methods to obtain money in order to survive. The majority of judges merely abstained from assessing the evidence on Ms. Gosselin's situation. The majority of judges appeared to believe that all the evidence referred to by L'Heureux-Dubé and Arbour was

[575] This is argued by Sen, in Sen, *The Idea of Justice*., *supra* note 486.
[576] Baxi, "Politics of Reading Human Rights: Inclusion and Exclusion Within the Production of Human Rights"., *supra* note 55.

not legally relevant. Could Ms. Gosselin's living conditions be considered just? Would it be possible to contend that she was living a safe lifestyle? Could it be argued that she was free to change that lifestyle and live a healthy life? Had a similar situation come before the SCI, the questions would have been: did she have the opportunity to live in dignity? Did Ms. Gosselin experience a quality of life? A painful human problem was experienced by members of the Quebec society, and that problem was created by a law enacted by Parliament. But the majority failed to consider any of these issues, only to apply a positivistic interpretation of the right to life and security. As Arbour J. wrote, the right to life and security therefore has no meaning for Ms. Gosselin and the court failed to grant any importance to her dignity.

An analysis of *Gosselin* based on Nussbaum's perception of human rights might raise interesting questions. Nussbaum argued that human rights were principles of basic justice, chosen by a society, meant to be used as critical mechanisms on state actions.[577] It can be argued that the Indian constitution shaped the project to build a more just society, which was and arguably still is the goal of the social revolution.[578] If we engage in the reflection in the case of the majority opinion in *Gosselin*, the following questions might arise: what is the Canadian conception of basic justice? What are the fundamental entitlements that our citizens should be guaranteed? Are they well reflected in the human rights norms as interpreted in the Canadian Charter and in *Gosselin*? If the Canadian Charter and the interpretation in *Gosselin* of the right to life, security and liberty are in fact representative of the Canadian vision of social justice, does this mean that Canadians see no room for distributive justice in their conception of basic justice? Or on the other hand, if the Canadian Charter and the *Gosselin* interpretation are not representative of the Canadian idea of basic justice, is it merely a matter of overly restrictive application by the courts? And if it is so, why and what can be done to change this?

As a postcolonial author writes, it can be shocking to reach the conclusion that there is no such thing as a universal principle that can prevent all types of discriminations and atrocities.[579] However, if *Justice* does not exist in any essentialist way, there is always, in any given situation, a perception or instinct of what could be done to reduce injustice. This is the argument presented by Sen in *The Idea of Justice*.[580] This quest for universalism and essentialism is not

[577] See above, Chapter 1 section A.2.
[578] See below, Chapter 2 section A.
[579] Duncanson & Seuffert*., supra* note 59.
[580] Sen, *The Idea of Justice., supra* note 486.

required. Being just and compassionate in every context may be sufficient, and perhaps better, pragmatically speaking. This is what Baxi argued for, what the activist judges sought to achieve: concentrate on and assess individual suffering.

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