

# Progressive Interpretation of the Constitution: Ideology, Application and Efficacy

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## Introduction

Progressive interpretation of the Constitution (PIC) lays central focus on expanding the rights<sup>1</sup> under the Constitution in order to meet the requirements of justice, social progress and welfare. Progressivism is a dynamic concept of bringing comprehensive development of the society elevating its position from a situation of poverty, illiteracy, backwardness, exploitation, discriminations and deprivations to a higher level of people's access to all the good things of life, overcoming the exploitative social hierarchy and creating enduring happiness and harmony. It is an instrument of multifaceted justice. PIC is a logically convincing and the most appropriate approach to a constitution that promises Justice, Liberty, Equality, Dignity and Fraternity to all the citizens. In a country impoverished by two centuries of exploitative colonial rule and suffered by deprivation of freedom and opportunity of democracy, progress is a mantra, a clarion call for a nation's awakening

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<sup>1</sup>According to W. Hohfeld, these include right in strict sense, liberty, power and immunity which are connected by their respective correlatives: duty, no-right, subjection and disability. Wesley Newcomb Hohfeld, 'Fundamental legal Conceptions as applied in Judicial Reasoning' 26 (8) *Yale Law Journal* (1917) 710-770. RWM Dias considers that in understanding the law, juridical developments, mechanism of enforcement and legal values this provides valuable insight. RWM Dias, *Jurisprudence* (Fifth ed. Butterworth's, 1985, Aditya Books, New Delhi, 1994) 42.

for independence and all round development. When we look at the constitutional philosophy and aspirations of the constitution makers, the drive for all round progress is at the heart of the constitutional jurisprudence. Justice H. R. Khanna regards constitution as a vehicle of national progress.<sup>2</sup> The post-*Kesavananda* activist judicial stance has both gathered inspiration and support from progressivism and persuaded to implement its objectives.<sup>3</sup> The Governments at both the levels have responded to the requirements of progressivism in their own way either with enthusiasm or reluctance. When the Parliament thought it expedient to meet the needs of changing times and imperatives of progress, it brought amendments, and introduced new principles and mechanisms suitable for a progressive society. Integration of these new accretions to the old constitutional structure required redefining the path of progress. Thus, the ideological terrain of progressivism is to be located in the general constitutional philosophy, march of the society, its cultural outlook and political choices. PIC, as a dominant approach, had to gather support from other dynamic rules of interpretation such as purposive, textual and holistic interpretation. Internal aids and external aids also provide valuable insights for judicial reasoning in the path of progressivism. Hence, PIC does not operate in isolation. PIC has considerable application in other jurisdictions like Canada with distinct lessons. This paper attempts a comparative study of the background, features, philosophy, working, importance, constraints and efficacy of PIC in India and Canada. It also examines the relations of PIC with other rules of constitutional interpretation in order to understand how it gathers support from those rules or whether it suffers constraints from them.

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<sup>2</sup> H R Khanna, *Making of India's Constitution* (Eastern Book Co., Lucknow, 1961) 2-3.

<sup>3</sup> *Kesavananda v. State of Kerala*, AIR 1973 SC 1461; the basic structure theory was primarily developed on the basis of State's duty to implement the Directive Principles of State Policy, which no doubt, stands for all round progress of the society.

## Conceptual Contours

Progressive society's march has always been from status, which is formulated by society, to contract inspired by freedom, if we believe in what Sir Henry Maine says.<sup>4</sup> History has given ample illustrations to demonstrate progressive unfolding of consciousness of freedom, as per Hegel.<sup>5</sup> Progress is a change towards the better, a material and spiritual uplift, and advancement from the imperfect to the more perfect. Gandhiji considered that it is a progressive step for any society to ethically internalise the tendency against harming others by violence.<sup>6</sup> Non-violence presupposes sacrifice to make the lives of all happy by a just distribution of the fruits of development. He said, "A cause has the best chance of success when it is examined and followed on its own merit. Measures must always in a progressive society be held superior to men, who are after all imperfect instruments, working for their fulfilment."<sup>7</sup> Thus, choosing the best set of values and institutional framework to execute the talisman of well-being of the last person in the street and implementing its objectives with all serious commitment on the part of all becomes a key to the success of that noble vision. By relying on self-knowledge and aiming at self-perfection, the *Hind Swaraj* notion of progressivism thrives on strong ethical foundation. Without development there could hardly be an access to an atmosphere to enjoy the equal freedom of all. Amartya Sen considers the lack of development as a situation of un-freedom.<sup>8</sup> Since progress is prerequisite to freedom, any obstruction to attain the former means slipping away from the gallops of

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<sup>4</sup> Henry S. Maine, *Ancient Law* (10<sup>th</sup> ed, Henry Holt & Co, New York, 1901) 165.

<sup>5</sup> Georg Wilhelm Friedrich Hegel, *Lectures on the Philosophy of History* (1822-30 at Berlin) Tr. J Sibree (George Bell & Sons, London, 1902) Chapter IV 'World History is the Progress of Consciousness of Freedom'

<sup>6</sup> M K Gandhi in *Harijan*, 25-3-1939, p 64-65. R K Prabhu and U R Rao, *The Mind of Mahatma Gandhi* (Navajivan Publishing House, 1967) 136

<sup>7</sup> Young India, 13-7-1921, p.224, R K Prabhu and U R Rao p 12.

<sup>8</sup> Amartya Sen, *Development as Freedom* (Oxford University Press, New York, 1999) 3

the latter. He writes, “Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over-activity of repressive states.”<sup>9</sup> Between development and freedom the relation is one of mutual support.<sup>10</sup>

The seed of progress that a community germinates needs to be planted and nourished with great care and enthusiasm by the institutions and authorities composed within the Constitution. Here we come across the role of the legislature, executive and judiciary in filling the interstices and help robust functioning of the supreme law. When the Constitution needs to be interpreted according to its spirit along with its letters, the judiciary cannot afford to be oblivious to its principal goal of heralding progress. Making PIC a major rule of constitutional interpretation has a necessary consequence of using other principles of interpretation to serve the cause of progress and have enormous impact towards the growth of rights and policies of welfare. Its great strength consists in working for social justice, an approach quite distinct from either excluding the social science discourse from judicial reasoning or confining the judicial task only to control abuse of power.

The concept of progressivism was a popular issue in policy debates, political processes and electoral choices in the twentieth century America. It had a chequered history and its influence in the rights revolution and racial desegregation of mid twentieth century was enormous. Its focus on rights of women and vulnerable sections gained the attention of academicians and became the bandwagon of the amelioration strategy. Robin West views that in a hierarchical society with skewed relations within the socio-political structure, whether related to race, gender and poverty, progressive approach has to contest and

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<sup>9</sup> *Id*

<sup>10</sup>*Id* at 10

confront the hegemonic social authority or power.<sup>11</sup> It cannot embrace the discriminatory social structure. It has to side with the disempowered, rely upon their experiences and aspirations and protect them from continuing agony. He distinguishes from conservative constitutionalism and progressive constitutionalism in the post-War period and argues for higher democratic participation to make progressive constitutionalism to succeed. In the analysis of Mark Tushnet, progressivism is relating to public policies for mitigating the deprivations of material conditions rather than dealing per se with racial inequality, denial of expressional freedom or violation of due process protection unless the former is result of the latter ones.<sup>12</sup> The solutions consist in political action, legal remedy or both. Progressive politics facilitates and even compels progressive law and fills the gaps in human development. Deviating from a conservative approach, progressive constitutionalism had the implication of using rule of law, federalism and basic human freedoms in overcoming deprivation of material conditions and wrestling against imbalances in social structure.

Dawn Johnsen recognises that meaningful progressive constitutionalism requires coherent, compelling and accessible substantive ideas including principles of constitutional interpretation.<sup>13</sup> He gives five ideas for developing progressive constitutionalism: (i) judges to have constitutional vision of progress; (ii) the executive and other organs to have a progressive perception; (iii) emphasis on fidelity to the text and structure of the Constitution; (iv) gathering support from both originalist and non-originalist theories; and (v) diligent work over time and a long foresight. These ideas are primarily about the way in

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<sup>11</sup>Robin West, 'Progressive and Conservative Constitutionalism' 88 *Michigan Law Review* (1989-1990) 641-721 at 679

<sup>12</sup> Mark Tushnet, 'Progressive Constitutionalism: What is "it"?' 72 (6) *Ohio State Law Journal* 1073-1062 at 1073-75.

<sup>13</sup> Dawn Johnsen, 'Lessons from the Right: Progressive Constitutionalism for Twenty-first Century' 1 *Harvard Law and Policy Review* (2007) 239 - 258

which the 21<sup>st</sup> century preparation for progressivism should take place both for competence of institutions and theoretical insights. Fidelity to the text and integration of existing theories of interpretations with eclectic choices is a key point made out by Johnsen. Erwin Chemerinsky views that the task for progressives consists in giving contextual content to the values declared in the preamble.<sup>14</sup> He states, “Only a progressive vision of constitutional law can address serious flaws in American democracy, such as racial discrimination that undermines equality of voting in many states. Such a vision is needed to truly champion criminal justice reform, including finally ending the death penalty, and to fiercely defend women’s reproductive right.”<sup>15</sup>

Some scholars have used the word ‘developmentalism’ to denote progressivism.<sup>16</sup> They consider that judges should reject static understanding of constitutional meaning, gather support from political culture and broader historical events, decipher the general consensus, and build up incremental addition of values in judge-made doctrines. Bruce Ackerman refers to Roosevelt’s campaign for building public consensus against *laissez faire* interpretation under the *Lochner* approach.<sup>17</sup> Keith Whittington points out the social and political factors outside the court persuading the governmental officials departing from existing constitutional assumption triggering the judiciary to venture constitutional construction in the new light.<sup>18</sup> While interpreting the right against cruel and unusual punishments, Justice Earl Warren ruled that along with precedents, “the evolving standards of decency that mark the

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<sup>14</sup> Erwin Chemerinsky, ‘A Progressive View of the Constitution’ *American Constitutional Law Society Blog Expert Forum*, September 17, 2019.

<sup>15</sup> *Id*

<sup>16</sup> Walter Murphy, James E Fleming, Sotirios A Barber and Stephen Macedo, *American Constitutional Interpretation* (3<sup>rd</sup> Ed. Foundation Press, New York, 2003) 410-413.

<sup>17</sup> Bruce Ackerman, *We the People: Foundations* (Belknap Press, 1991) 36-37, 43.

<sup>18</sup> Keith A Whittington, *Constitutional Constructions: Divided Powers and Constitutional Meaning* (Harvard University Press, Cambridge, 1999)

progress of a maturing society” shall be taken into consideration.<sup>19</sup> In contrast, a Justice Hugo Black protests against any proposition of change introduced by judges for that task are for constitutional amendments.<sup>20</sup>

Progressivism has gathered support from sociological jurisprudence. Justice Oliver Wendell Holmes wrote that when dealing with public policies, judges consider what is expedient to the community, and from this secret root they draw all the juices of life and integrate them with law.<sup>21</sup> This requires due attention on what Joseph Raz calls moral merit of the Constitution and improve the provisions of the Constitution along with its continuity.<sup>22</sup> Justice Benjamin Cardozo wrote that constitutional adjudication shall assess comparative importance of social interests that will be thereby promoted or impaired.<sup>23</sup> Denying that the Constitution is a glorified police manual, Roscoe Pound observed, “Constitutional provisions lay down great principles to be applied as starting points for legal and political reasoning in the progress of society.... Interpretation of constitutional principles is a matter of reasoned application of rational precepts to conditions of time and place.”<sup>24</sup> Instead of subjective and personal views of individual judges, what Justice Frankfurter refers, “the consensus of society’s opinion”<sup>25</sup> shall guide the interpretive process. Balancing of interests in the context

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<sup>19</sup> *Trop v. Dulles* 356 US 86 (1958)

<sup>20</sup> *Griswold v. Connecticut* 381 US 479 (1965)

<sup>21</sup> Oliver Wendell Holmes, *The Common Law* (University Press, 1881, MPP House, 2021) 35-36.

<sup>22</sup> Joseph Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in Larry Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge University Press, Cambridge, 1998) 152 at 183-184.

<sup>23</sup> Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921, MPP House, 2021) 112.

<sup>24</sup> Roscoe Pound, *Law Finding Through Experience and Reason* (University of Georgia Pressy, 1960) 63.

<sup>25</sup> *Louisiana ex rel. Francis v. Resweber* (1947) 329 US 459, 470-1. Concurring.

of changed social circumstances is an issue addressed by recourse to progressive interpretation.<sup>26</sup>

PIC has the backing of natural law thinking also. Under the ancient Indian philosophy, progress (*uddharet*) of the self (*atman*) through one's own efforts and subordinating of one's desires and economic acts to the higher goal of just law constitute the path of happiness.<sup>27</sup> Performance of such duties by all excludes hierarchic exploitations and improves the social position. The purposive character of state as articulated in the ancient Indian law has a continuous responsibility upholding dharma in both public and private actions. Dharma is expected to match *yugadharmā* when the society undergoes structural changes, and adjustments become imperative.<sup>28</sup> In India, dignity-based discourse on right to life could carve out a number of positive rights as a part of progressive constitutionalism.<sup>29</sup>

Peter Hogg considers PIC as the method of continuously adapting the language of the Constitution to new conditions and new ideas and one of the means of adapting to the changes in the Canadian society.<sup>30</sup> The judicial perception of progressivism in Canada resulted in invention of the 'living tree' doctrine, a metaphoric principle that reflects PIC. The Judicial Committee of the Privy Council in the epoch-making *Edwards*

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<sup>26</sup> *NLRB v. Babcock & Wilcox Co.* (1956) 351 US 105, 112; also see Chester James Antieau, *Constitutional Construction* (Oceana Publications inc., New York, 1982) 207.

<sup>27</sup> *Uddharet atmanatmanam* "One must deliver himself with the help of his mind and action, and not degrade himself" Bhagavadhita VI. 5. Trivarga principle denotes subordination of kama and artha to dharma. Manu II. 224; Yajnavalkya I. 115.

<sup>28</sup> P. Ishwara Bhat, *Law and Social Transformation in India* (2<sup>nd</sup> Ed. Eastern Book Co., Lucknow, 2021) Ch 3.

<sup>29</sup> See discussion *infra*.

<sup>30</sup> Expansion of territory and population, change from agrarian to industrialised economy with mining, financial service, telecommunication create new conditions to which the unamended constitution needs to be adjusted through interpretation. See Peter W Hogg, *Canadian Constitutional Law* Vol. I (Fifth Ed. Thomson Reuters, Canada, 2016, 2017 South Asian ed) 15-48.



case observed, “The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.” It called for avoiding narrow and technical construction and give a liberal interpretation in order that the Dominion may cherish autonomy and the Constitution may develop robustly through usages and convention. Use of the words ‘within its natural limits’ places outer margin for the expansion process. This approach made the Canadian Courts to give a low-key treatment of constitutional history in the course of interpretation. But ‘tree’ implies roots in history,<sup>31</sup> and nourishment from soil, fertility and water, suggestive of social, economic and political factors and people’s support. Thus, gradual open mindedness to look into these factors contributed to the holistic approach of text-context-object. In the United States of America, original intention theory attained dominant place, which came in the way of expansion of fundamental human freedoms. But the progressivism-driven approach in *Brown*, *Roe* and *Griswold* avoided textualist approach and initiated the ideas of progress or development.<sup>32</sup> As a result, unnamed rights entered into the domain of named rights either as emanations or part of the penumbra.

In India, the post-*Maneka Gandhi* judicial activism accommodated many positive rights of life and aspects of personal liberty within Article 21 as essential for human dignity. The process involved judicious examination of the relation between the named and unnamed rights with an inquiry whether the unnamed right is inevitable for enjoying named right. For example, right to food is indispensable for a person facing the situation of starvation due to want of access to food. The policy of protective discrimination favouring backward classes and judicial approach in rationalising the same, resetting the relation between

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<sup>31</sup> Stephane Beaulac, ‘Constitutional Interpretation: On Issues of Ontology and Interlegality’ in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers, *The Oxford Handbook on the Canadian Constitution* (Oxford University Press, New York, 2017) 867-890 at 869.

<sup>32</sup> Developmentalism is also word alternatively used for progressive outlook.

fundamental rights and the directive principles of state policy in order to enable progressive implementation of the directives and the evolution of right to education as a fundamental right and expansion of grass root democracy have also exhibited the tendency of progressivism. Empowerment of women in a multifaceted manner, protection of children and safeguarding the interests of minorities has also features of progressivism. This approach is synonymous with what is called now as transformative constitutionalism in the developing countries, since it has the aim of bringing structural changes. But unlike transformative constitutionalism, which is more a philosophy as of now, PIC is a rule of interpretation. “Progressive realization of rights” is a judicially evolved approach towards expansion of rights which spearheaded the rights revolution centre-staging the goal of social justice.<sup>33</sup> Justice P N Bhagwati and Justice V R Krishna Iyer gave a philosophical justification for going beyond mere control of abuse of power and for traversing a new path of visualising progress with justice.<sup>34</sup> Thus, theoretical basis for progressivism has been sound and the tool of progressive interpretation of the Constitution is a product of that vision.

There are criticisms on PIC. The question of legitimacy on the part of unelected judges to ‘amend’ the Constitution without recourse to the procedure prescribed for the amendment but by a stroke of interpretation has been raised.<sup>35</sup> Moving a step ahead, it is called undemocratic for the same reason. Peter Hogg replies to this criticism by stating that it is not the job of judges to research on the attitudes of people long dead and gone and adhere to the same in spite of irrelevance

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<sup>33</sup> Justice Puttaswamy (Retd) v. Union of India AIR 2017 SC 4161: (2017) 10 SCC 1

<sup>34</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597

<sup>35</sup> Peter Hogg refers to the arguments of originalists. See Peter W Hogg, *Canadian Constitutional Law* Vol. II (Fifth Ed. Thomson Reuters, Canada, 2016, 2017 South Asian ed.) 36-26.

of it in the changes social circumstances and even operating as impediment to the socio-economic progress of the country.<sup>36</sup>

With the above background, the specific experiences of three constitutional jurisdictions can be comparatively evaluated. The theoretical, historical and socio-political basis of progressivism, the specific juridical experience, strategies employed and the consequences in terms of transformative competence will be the factors for comparing.

### **The Canadian Experience**

The Preamble's reference to the goal of federally uniting provinces to form a Constitution similar in Principle to that of the United Kingdom imports progressive measures for protecting the rights of people. The idea of "Implied Bill of Rights" emerged as a product of progressive interpretation in *Alberta Press* and *Switzman* cases.<sup>37</sup>

The difficulties of bringing constitutional amendments, fast-changing economic and political conditions and the common law approach of innovation made the Canadian judiciary to give scope for adequate flexibility to the scope of words used in the Constitution to meet the changing needs. A bold and clear approach of progressivism initiating a landmark development in the interpretation strategy took place in the *Edwards* case.<sup>38</sup> In this case the question whether women could be regarded as persons eligible for nomination by the Prime Minister to the Senate, was answered positively by the Judicial Committee of the Privy Council by overruling the Supreme Court decision that at the time of enactment of the British North America Act, 1867, the meaning of person did not extend to women. Using the

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<sup>36</sup> *Id.*

<sup>37</sup> In *Re Alberta Statutes* [1938] SCR 100 right of reply to criticisms cannot be insisted by the province upon the press; *Switzman v. Elbling* [1957] SCR 285 a province could not prohibit use of a house to propagate Communism.

<sup>38</sup> *Edwards v. A G Canada* [1930] AC, 124

metaphor of living tree, capable of growth, the Privy Council held, “The Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words.”<sup>39</sup> The metaphor of living tree is highly imaginative as it connotes gathering support from the soil and water beneath, oxygen and sunlight from the above, and hence, need for continuous nourishing and care; natural growth with all potentialities of providing shade, shelter, flower and fruit; abandonment of dry and old branches; and exposure to calamities.<sup>40</sup> A balance between rigidity and flexibility is implicit in the notion of living tree.<sup>41</sup> Application of progressive interpretation meant upholding of federal criminal law which introduced the element of victim compensation although in the 1867 standards it is a civil matter.<sup>42</sup> Similarly, federal power on banking also meant regulation of assets and properties in course of banking transaction, although ‘property and civil right within the province’ comes under the Provincial list.<sup>43</sup> But a purely textualist approach of looking at the compartmentalisation of powers in the *Labour Convention* case<sup>44</sup> did

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<sup>39</sup> *Id* at p. 136

<sup>40</sup> Pouring water to the roots of the tree thinking that it is its mouth results in shooting new leaves and branches at the top. Basaveshwara Vachana; See P. Ishwara Bhat, *Law and Social Transformation in India* (Eastern Book Co, Lucknow, 2009)

<sup>41</sup> “A tree is a fairly rigid biological structure that regulates its own growth in a way that sustains its identity as the same tree from season to season. A theory of living tree constitutional interpretation allocates power to judges to change the Constitution, and the use of the power must be regulated.” Timothy Endicott and Peter Oliver, ‘The Role of Theory in Constitutional interpretation’ in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers, *The Oxford Handbook on the Canadian Constitution* (Oxford University Press, New York, 2017) 937-964, at 951

<sup>42</sup> *P. A. T. A v. AG Canada* [1931] AC 310, 324; also see *Canadian Federation of Agriculture v. AG Quebec* [1951] AC 179

<sup>43</sup> *Canadian Pioneer management v. Labour Relations Board of Saskatchewan* [1980] 1 SCR 433

<sup>44</sup> *AG Canada v. AG Ontario (Labour Conventions)* [1937] AC 355.

not traverse the progressive path. In the *Patriation Reference* case<sup>45</sup> the unilateral proposal made by the Trudeau Government to UK Parliament without obtaining the consent of provinces to amend the Canadian Constitution to incorporate provisions conferring power of amending the constitution was held by the Supreme Court as not in violation of the Canadian constitutional law, but nevertheless unconstitutional as not in accordance with constitutional convention. The Court applied the living tree approach and paved the way for participation of all stakeholders in initiating the constitutional amendment. In evolving and adapting constitutional convention to the changing circumstances the rule of progressive interpretation played a crucial role.

PIC has helped the Canadian judiciary in interpreting the issue of legislative competence and of exercise of legislative power. In *Zelensky*, the Supreme Court progressive view of the federal criminal law power to recognise new approaches of victim compensation while the traditional criminal law had not provided for the same. In interpreting the scope of dominion's power to make law for peace, order and good governance in *McNeil* case, the Court resorted to PIC and held that it was confined to emergency and residuary powers and that Nova Scotia film censorship law was valid.<sup>46</sup>

Application of the PIC to understand the implication of the Charter rights took place in a series of cases, and the phenomenon is continuing. In *Skapinker*, while holding that exclusion of a South African citizen who was a permanent resident of Canada from practicing in Ontario bar violated the right under section 6 (2) (b) of the Charter, the Supreme Court applied this rule and observed, "The Charter is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the

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<sup>45</sup> Re: Resolution to amend the Constitution [1981] 1 SCR 753

<sup>46</sup> Nova Scotia (Board of Censors) v. McNeil [1978] 2 SCR 662; also see Reference Re Anti-Inflation [1976] 2 SCR 373.

unknown of the future, can stunt the growth of the law and hence the community it serves.”<sup>47</sup> The Supreme Court in *Big M Drug Mart* took the PIC rule to a more stable footing by using it along with other rules of interpretation such as textualism, historical inquiry, purposive interpretation and interrelationship with other rights.<sup>48</sup> The Court held that the Sunday Closure law is unconstitutionally discriminating against the non-Christian communities. W J Waluchow comments, “Viewing constitutions as living trees is not equivalent to granting judges wholesale licence to make of the Constitution what they will. As with a tree capable of sustaining itself over time, secure against the hostile environmental forces it often faces, the Constitution, as the fundamental framework within which ordinary law and politics are to take place, must also be rooted in something that provides a healthy measure of stability.”<sup>49</sup> PIC was applied in *B C Motor Vehicle Act* case<sup>50</sup> to determine the constitutional validity of a legal provision creating absolute liability driving offence in the light of principles of fundamental justice in accordance with which alone any person’s life, liberty and security could be deprived. The Court categorically said that the meaning of key constitutional provision could not be confined to the framers’ intention at the time of adoption. Peter Hogg considers PIC as the dominant tool of interpretation and has best served the Canadian constitutional development.<sup>51</sup> However, PIC has not accommodated economic liberty, social security and property interest within the scope of ‘liberty’ under

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<sup>47</sup> *Law Society of Upper Canada v. Skapinker* [1984] 1 SCR 357

<sup>48</sup> *R v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295.

<sup>49</sup> W J Waluchow, ‘The Living Tree’ in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers, *The Oxford Handbook on the Canadian Constitution* (Oxford University Press, New York, 2017) 891-909 at 901.

<sup>50</sup> Reference Section 94 (2) of the Motor Vehicles Act, [1985] 2 SCR 486.

<sup>51</sup> Peter W Hogg, ‘Canada: From Privy Council to Supreme Court’ in Jeffrey Goldsworthy (Ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press, New Delhi, 2006) 55-105 at 87.

section 7 of the Charter.<sup>52</sup> This speaks about the pragmatic considerations operating on the basis of multiple factors mentioned in the *Skapinker* case. It avoids economic due process approach and judicial intervention in policy matters. These constitute the ‘natural limits’ within which the ‘living tree’ grows. Since welfare policy is not a major value of the Canadian constitution unlike India where the Directive Principles of State policy operate, it is in accordance with the scheme and spirit of the Canadian Constitution, although it is a setback for socio-economic rights essential for life and liberty. However, the Canadian Bill of Rights comes to the help of persons aggrieved from deprivation of economic rights.

The superiority of PIC over originalism is explicit in some cases. In the *Same-Sex Marriage Reference* case<sup>53</sup> the Supreme Court rejected the argument that the Parliament’s power to legislate on marriage as conferred under the Constitution Act 1867 was limited to marital union for procreation and did not contemplate marriage without an intention of procreation. The Court ruled that such view was “frozen concept” and observed that the Canadian Constitution “is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.” Similarly, in *Re Employment Insurance Act*<sup>54</sup> the Court interpreted the words “unemployment insurance” under section 91 (2A) to include withdrawal from workforce due to maternity, in order that new social realities can be addressed by progressive approach.

Although PIC donned the dominant role by recourse to purpose, history and structure of the Constitution, gradually a concerted or eclectic application of diverse rules of interpretation emerged as a notable development in Canada.

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<sup>52</sup> *Singh v. Minister of Employment and Irrigation* [1985] 1 SCR 177.

<sup>53</sup> *Re Same-Sex Marriage* [2004] 3 SCR 698

<sup>54</sup> [2005] 2 SCR 669

## The Indian Experience

Progress is the clarion call of the Indian Constitution. In the background of varieties of inequalities and socio-economic inequities and exploitations, the Constitution makers moulded the Constitution to be an engine of progress. Dr. S. Radhakrishnan said in the Constituent Assembly in the context of discussion on Resolution of Aims and Objects, “We are here working for the establishment of Swaraj for all the Indian people. It will be our endeavour to abolish every vestige of despotism, every heirloom of inorganic tradition. We are here to bring about real satisfaction of the fundamental needs of the common man of this country, irrespective of race, religion or community.”<sup>55</sup> Mr. N V Gadgil considered the vision of harmony, equality and service to all as the means of progress.<sup>56</sup> “A free India becomes a power for the forces of progress”, stated Mrs. Vijayalakshmi Pandit. Prof N G Ranga spoke of props and ladders for the economically oppressed and socially suppressed and illiterate people so that rights become valuable and meaningful to them.<sup>57</sup> Dr. B R Ambedkar emphasised that contradictions arising from socio- economic inequality and political equality must be removed by working hard to attain overall progress through people’s participation with a sense of fraternity and solidarity to social life.<sup>58</sup> Social and economic progress was the central theme when Articles 15 (3), 17, 23, 24 and the Directive Principles of State Policy were discussed. Characterising the Indian Constitution as a social document, Granville Austin wrote that Part III and IV “were included in the Constitution in the hope and expectation that one day the tree of true liberty would

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<sup>55</sup> CAD, 20-1-1947 Book I, pp 269-270

<sup>56</sup> *Id* at 277.

<sup>57</sup> *Id* at 280. Similar opinions were expressed by Dr P K Sen (283), Shri S. Nagappa (284), Mr C M Poonacha (310), Shri Vishwabhar Dayal Tripathi (312)

<sup>58</sup> CAD 25-11-1949 Book No. 5 p 979



bloom in India.”<sup>59</sup> The metaphor is similar to the concept of living tree in Canada. The expression “true liberty” connotes ordered liberty or liberty without abuse and with full-fledged support of equality, dignity and fraternity. In essence, it has progressive outlook.

In *Virendra Singh*, Justice Vivian Bose referred to emergence of the sovereign will of people setting a new order without any discrimination on account of class, caste, race or creed wiping out all the allegiance to the earlier political rule.<sup>60</sup> The learned judge had reasoned in *Anwar Ali Sarkar* that the words in the constitution are not dull and lifeless as if mummified in the distant past “but living flames intended to give life to a great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present.”<sup>61</sup> Judicial review in *Anwar Ali* gave an opportunity to scrutinise whether the prescription of special criminal procedure was based on reasonable classification. Similar judicial review in *A K Gopalan*<sup>62</sup> could open up the opportunity to make representation against preventive detention although the Court did not superimpose the requirement of reasonableness under Article 19 (4) upon the legal procedure prescribed for deprivation of right to life and personal liberty. The approach of interrelationship doctrine, which is a facet of structuralism, had been rejected in *Gopalan* but got accepted in course of time after its acceptance in the field of property right and ultimately in the field of life and personal liberty in the famous *Maneka*

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<sup>59</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, New Delhi, 1966) 63. At p. 50, he said, "The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution by establishing the conditions necessary for its achievement yet despite the permeation of the entire Constitution by the aim of national renaissance the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and the Directive Principles of State Policy. These are the conscience of the Constitution."

<sup>60</sup> *Virendra Singh v. State of Uttar Pradesh*, (1955) 1 SCR 415; AIR 1954 SC 447.

<sup>61</sup> *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 para 85.

<sup>62</sup> *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

*Gandhi*<sup>63</sup> case. The post-*Maneka* strides through PIC have been enormous and highly enriching.

The word ‘progress’ is not explicitly occurring in Part III, IV and Part IV-A of the Constitution; but its equivalents, ‘development’<sup>64</sup>, ‘promote’<sup>65</sup>, ‘improve’<sup>66</sup>, ‘alleviation’<sup>67</sup>, ‘rise to higher level’<sup>68</sup> are traceable. However, it can be found in the context of President’s power relating to ‘peace, progress and good governance’ of the Union Territories,<sup>69</sup> duties of the National Commissions for Scheduled Castes and Scheduled Tribes,<sup>70</sup> use of Hindi,<sup>71</sup> and development of Tuensang district of Nagaland.<sup>72</sup> These show adequate textual basis for progressivism. Further, the main thrust of progress implicit in the Constitution is generously responded by the judiciary. Justice J.M. Shalet and Justice K.N. Grover observed in *Kesavananda*, “Every Constitution is expected to endure for a long time. Therefore, it must necessarily be elastic. It is not possible to place the society in a straightjacket. The society grows, its requirements change. The Constitution and the laws

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<sup>63</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>64</sup> The word ‘development’ occurs in 54 places: Articles 41, 243 G (a) and (b); 243 W (a) (i), 243 ZD (1) (2) (3 a) (4); 243 ZE (1), (2) (3 a [ii]), 4; 275 (1) Proviso, (1A); 338 (c) (e) (f); 338A (5) (c) (e) (f); 351; 371 (2)(a) (b); 371J (1) (a) (b); Sixth Schedule paragraph 3B (xii); Seventh Schedule List I Entry 53, 54, 56, List 2 Entry 23, 50; names of Ninth Scheduled Legislations; Eleventh Schedule Entry 3, 25; Twelfth Schedule Entry 3

<sup>65</sup> Preamble, Article 38, 39A, 43, 43B, 46, 51 (a), 51A (e), 351, Sixth Schedule 3B

<sup>66</sup> Article 47, 48-A, 51-A (g), 243-I (1) (b), 243 Y (1) (b), 340, Sixth Schedule 3B, Seventh Schedule, list 2 entry 15, 18; Eleventh schedule Entry 2; Twelfth Schedule Entry 10

<sup>67</sup> Eleventh Schedule Entry 16; Twelfth Schedule Entry 11

<sup>68</sup> Article 51-A (j)

<sup>69</sup> Articles 240 (1) and Provisos

<sup>70</sup> Articles 338 (5)(c) and 338-A (5) (c)

<sup>71</sup> Article 344 (2) (a)

<sup>72</sup> Article 371-A (2) (d)

may have to be changed to suit those needs. No single generation can bind the course of the generation to come. Hence every Constitution, wisely drawn up, provides for its own amendment.”<sup>73</sup>

Following is a brief narration of application of PIC in the field of fundamental rights, directive principles of state policy, fundamental duties, amendments, democracy and federalism to point out its reach and effect. In order to escape from the risk of being unwieldy, the focus will be on highlights of expansion of rights through PIC.

The central approach of PIC with regard to fundamental rights is: “The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction.”<sup>74</sup> This task involves (a) inclusion of various facets each right; (b) recognition of unenumerated or unnamed rights which are essential for or concomitant of the named right; (c) ensuring that the restrictions are reasonable; and (d) making the procedural safeguards effective and meaningful. The method involves using the text, context, structure and object of the rights and balancing between rights and restrictions and between competing rights. This requires application of textualism, structuralism, originalism, purposive interpretation and also the ethos of the provision. In this sense, progressivism is not an independent principle of constitutional interpretation. It is more a goal or philosophy. It shows the direction towards which the constitutional jurisprudence shall march.

About the principled way of evolving unnamed rights in named rights, some cautious path was taken in the early 1960s. Declining to recognise right to strike within the freedom of association, the Court in *All India Bank Employees' Association* case warned against grotesque result arising from recognising a series of ever-expanding concentric

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<sup>73</sup> Kesavananda v. State of Kerala, AIR 1973 SC 1461 at para 650.

<sup>74</sup> Justice P N Bhagwati in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 at 622 Para 54.

circles in the shape of rights concomitant to concomitant rights and so on.<sup>75</sup> The Court was not ready to give “unnatural and artificial meaning” to the expressions used in the Constitution by resort to ideological considerations. This approach of looking at the inevitability of a particular component for a named right, similarity of its purpose and impact of non-inclusion within its ambit continued in subsequent cases. While refusing to recognise right to go abroad within the ambit of freedom of speech and expression in *Maneka Gandhi* case, P.N. Bhagwati J declined to “accept the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right.”<sup>76</sup> In the matter of positive rights of life an expansionist approach was adopted in *Francis Coralie Mullin*. The case was relating to prisoner’s right to have interviews with family members. Instead of confining the query to procedural justice, the Court identified certain components of right to life under Article 21 by connecting it to dignity enshrined in the Preamble and also the Directive Principles. Justice P N Bhagwati observed, “We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”<sup>77</sup>

The approach is typical of structuralism and continued in numerous cases resulting in recognition of right to food, health,

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<sup>75</sup> All India Bank Employees' Association v. National industrial Tribunal (Bank Disputes) Bombay AIR 1962 SC *Id* at 171 para 20

<sup>76</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 para 81.

<sup>77</sup> *Francis Coralie Mullin v. The Administrator Union Territory of Delhi*, 1981 Cr L J 306 SC. Para 7. The Court referred to the directive principles of state policy in support of its reasoning.

environment, education, means of living, right to passive euthanasia, etc.,. A high water mark of progressivism can be found in these cases. The question whether a particular component right is an inevitable prerequisite to named right was asked at several layers in the process of tracing an unnamed right within a named right. At least in one case, *M P Vashi*,<sup>78</sup> several links formed the chain of reasoning: A fair and reasonable procedure requires legal aid; legal aid needs availability of legal professionals; this is possible only with adequate number of law colleges; when the government or university law colleges are not sufficient for meeting the requirements of people and profession, private law colleges shall be allowed to provide the service; law colleges shall have adequate infrastructural facilities in order to be effective; and this requirement can be satisfied only with state aid to meet the salary of law teachers. Hence, grants in aid to law colleges is part of the fair legal procedure. The case borders on what Justice Rajagopal Ayyenger called “grotesque”, and if similar reasoning is extended to other innumerable situations it would become problematic.

The above developments in the sphere of Article 21 did not occur in isolation. They were associated with other rights, especially Article 14, 19, 20 and 22, Preamble’s objectives, directive principles and fundamental duties. In fact, the trio of Articles 14, 19 and 21 constitute the golden triangle and gave a strong structural foundation for progressivism.<sup>79</sup> Principles of procedural fairness became strong with innovative application of interrelationship doctrine. Progressive interpretation of equality charter evolved new dimensions of equality:

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<sup>78</sup> *State of Maharashtra v. M.P. Vashi*, AIR 1996 SC 1 Para 7. The case was decided by invoking right to equality among private law colleges in the matter of access to grants.

<sup>79</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

non-arbitrariness,<sup>80</sup> proportionality,<sup>81</sup> objective scrutiny of reservation policies and their implementation,<sup>82</sup> empowerment of women,<sup>83</sup> and protection of children and victims of caste related atrocities. The interface between various facets of equality has also reinforced them or struck fair balance. This is a revolutionary development in a constitutional democracy. Insofar as freedoms under Article 19 are concerned, the development has witnessed recognition of all the facets and content of specific freedoms, under the category of both positive and negative freedoms, primary and supportive rights and building safeguards against abuse of both freedoms and regulatory power over them. The doctrine of reasonableness of restriction, procedural and substantive reasonableness and application of administrative law principles have strengthened these freedoms. An example of PIC can be found in understanding the phrase ‘forced labour’ to include those who are under economic pressure to sell their labour at unfair price. The words ‘trafficking in human being’ and ‘hazardous works’ are also understood to favour the victims. In recognising new individual and group or denominational rights in the sphere of religious freedom, protecting places of worship and allowing social welfare laws PIC has made contributions. In the field of cultural and educational rights and rights of religious and linguistic minorities PIC has allowed wide ambit of rights. By not confining the minority educational right to the purpose of

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<sup>80</sup> E P Royappa v. State of Tamil Nadu Air 1974 SC 555

<sup>81</sup> According to Justice D Y Chandrachud, “Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other.” K S Puttaswamy v. Union of India AIR 2017 SC 4161

<sup>82</sup> M. Nagaraj v. Union of India AIR 2007 SC 71 , Jarnail Singh v. Lacchmi Narain Gupta SLP (Civil) No. 30621, B K Pavitra & Ors. V. Union of India AIR 2019 SC 2723 , Jaishri Laxmanrao v. C.M. State of Maharashtra MANU/SC/0340/2021

<sup>83</sup> Vishaka v. State of Rajasthan (1997)6 SCC 241

protection of their identity, but by allowing them to support their community to get education “of their choice”, especially professional and higher education, PIC could attain tremendous progress at the community level. Exponential growth of public interest litigation with innovative procedural refinements; evolution of new substantive principles; and expansion of availability of remedies and content of reliefs including new remedies have been the testimony of creative role of PIC.

The maturity with which the constitutional jurisprudence grew in India in the area of fundamental rights during the last quarter of the 20<sup>th</sup> century can be related to the positive contribution of PIC. The two decades of 21<sup>st</sup> century not only show continuity of this spirit and enthusiasm but also exhibit foresight about the preparation for the new millennium. The valiant efforts of facing the challenges of globalization and prolonged pandemic of great hazard stand witness to the acumen of progressive interpretation to shape the national life on lines of constitutional ideology. The great stride that has taken place in the domain of right to privacy in its vivid dimension has been enabled by PIC. A doctrinal shape was given to map its expanding sphere by conceiving “progressive realization of rights”. In *M. Nagaraj*,<sup>84</sup> *Naz Foundation*<sup>85</sup>, *NALSA*<sup>86</sup>, *K.S.Puttaswamy I*<sup>87</sup>, *Common Cause*<sup>88</sup>, *NCT Delhi*<sup>89</sup>, *Joseph Shine*<sup>90</sup> and other cases, elaborate doctrinal and philosophical discussions have narrated the phenomenon of expansion of liberties. The idea of transformative constitution discussed in some of

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<sup>84</sup> *M. Nagaraj v. Union of India* AIR 2007 SC 71

<sup>85</sup> *Naz Foundation Trust v. Union of India* (2018) 11 SCC 547

<sup>86</sup> *NALSA v. Union of India* AIR 2014 SC 1863

<sup>87</sup> *Justice .S. Puttuswamy (retd.) v. Union of India* (2017) 10 SCC 1

<sup>88</sup> *Common Cause (A Regd. Society) v. Union of India* MANU/SC/0232/2018

<sup>89</sup> *Government of NCT Delhi v. Union of India* Civil Appeal No. 2357 of 2017, 4-7-2018.

<sup>90</sup> *Joseph Shine v. Union of India* 2018 SC 1676

these cases connects the growth of the Constitution to progress. Relying on dignity as the basis of right to privacy, Justice D. Y. Chandrachud observed in *K. S. Puttaswamy I*, “Dignity is core which unites fundamental rights because fundamental rights seek to achieve for each individual dignity of existence. Privacy with its attendant values assures dignity to individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures fulfilment of dignity and is core value which protection of life and liberty is intended to achieve.”<sup>91</sup> In *K.S.Puttaswamy II* the Court made references to the idea of progressive realisation of welfare, social and economic rights in international conventions.<sup>92</sup> In *Navtej Singh Johar*, consolidating the major thrust of these cases, the Court stated that the Constitution is “dynamic and ever-growing” and evolves with the evolution of society and hence the economic and cultural rights. In order to conserve these rights it relies on the doctrine of doctrine of progressive realization of rights is the most suitable one.<sup>93</sup> Dipak Misra CJI observed, “The constitutional courts have to recognize that the constitutional rights would become a dead letter without their dynamic, vibrant and pragmatic interpretation. Therefore, it is necessary for the constitutional courts to inculcate in their judicial interpretation and decision making a sense of engagement and a sense of constitutional morality so that they, with the aid of judicial creativity, are able to fulfil their foremost constitutional obligation, that is, to protect the rights bestowed upon the citizens of our country by the Constitution.”<sup>94</sup> The Court said that it is the responsibility of all the organs of state to assist in realization of social, non-regression

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<sup>91</sup> K S Puttaswamy v. Union of India AIR 2017 SC 4161 Para 107

<sup>92</sup> K S Puttaswamy v. Union of India (Aadhar case) AIROnline 2018 SC 237

<sup>93</sup> Navtej Singh Johar v. Union of India, AIR 2018 SC 4321

<sup>94</sup>*Id* para 184



of rights and says, “In a progressive and an ever-improving society, there is no place for retreat. The society has to march ahead.”<sup>95</sup>

Progress, equity and socio-economic justice constitute the central philosophy of DPSPs. Logically, PIC has great role in this sphere, and its achievement is creditworthy. In fact, it is PIC that converted the otherwise barren and unenforceable DPSPs into a fertile field and enabled highly enlivening crop of socio-economic justice. Compared to the early approach of relegating DPSPs into dry set of ideals without means of enforcement,<sup>96</sup> the post-*Chandra Bhavan*<sup>97</sup> and post-*Kesavananda*<sup>98</sup> approaches have made DPSPs veritable tools of national progress. The benefit of synergy from an integrated reading of Part III and Part IV became a golden minefield to unearth great values of the Constitution. For understanding the facets of right to life to include equitable access to food, health, environment, education, means of living, gender justice, etc., Courts gathered source of reasoning from DPSPs. Mixing the principles with policies provided adequate scope for filling the interstices.<sup>99</sup> Today nobody can raise a little finger that “nothing different would have occurred in the absence of DPSPs.”<sup>100</sup> With the gradual descending of property jurisprudence and serious focus on Part IV goals by the executive and legislature PIC also got great fillip, and people’s welfare became one of the basic structures of the Constitution.

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<sup>95</sup> *Id* para 188

<sup>96</sup> *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.

<sup>97</sup> *Chandra Bhavan v. State of Mysore*, 1970 SCC (1) 43.

<sup>98</sup> *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461; *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534: (AIR 2006 SC 212).

<sup>99</sup> See Ronald Dworkin for distinction between principles (binding norms which recognise rights and obligations) and policies (community aspirations). See Ronald Dworkin, *A Matter of Principle* (Princeton University Press, 2014); Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, 1977)

<sup>100</sup> See for the observation H M SEERVAI, *CONSTITUTIONAL LAW OF INDIA* Vol 2 (Universal Law Publishing, New Delhi, 1993, 2010) 1921.

In the matter of interpreting constitutional amendments, PIC's role is to keep the transformative and progressive spirit of the Constitution alive and vibrant. Supporting and using the innovative discourse of basic structure jurisprudence has been the role of PIC.<sup>101</sup> Basic structure doctrine cannot be labelled as *status quoist*, as it combines change with continuity.<sup>102</sup> Hence, there is no incompatibility between PIC and basic structure doctrine. In nullifying constitutional amendments or their parts which provided for autocratic measure, deviation from rule of law or exclusion of judicial review both the doctrines went ahead together. A brief period of conflict between the Parliament and Judiciary in the matter of property right and a series of amendments on the subject witnessed court decisions standing for justice to the property owners. Restrictive interpretations of economic reform laws or constitutional amendments created an image of anti-progress on the part of judiciary. In the long run, it is the progressivism coupled with justice that prevailed.<sup>103</sup> Similar criticisms are levelled against the Judiciary when judicial decisions reduced the rigour of reservation policies by qualitative and quantitative restrictions.<sup>104</sup> But again, Courts did it in order to balance between competing interests, maintain security of social interests in efficiency and confine the affirmative action benefits to the most deserving classes which are the targets of social exploitation.<sup>105</sup> Regarding the representation-reinforcing amendments,<sup>106</sup>

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<sup>101</sup> Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461

<sup>102</sup> Minerva Mills v. Union of India AIR 1980 SC 1789

<sup>103</sup> I R Coelho v. State of Tamil Nadu & Ors. AIR 2007 SC 861

<sup>104</sup> Indra Sawhney v. Union of India, AIR 1993 SC 477; Chebrolu Leela Prasad Rao v. State of Andhra Pradesh, C A No. 3609 of 2002 judgment dated 22.4.2020.

<sup>105</sup> M Nagaraj v. Union of India, AIR 2007 SC 71; Jaishri Laxmanrao Patil v. State of Maharashtra CA No. 3123 of 2020 judgment dated 5, May, 2021. *See also* P. ISHWARA BHAT, LAW AND SOCIAL TRANSFORMATION IN INDIA 2<sup>nd</sup> ed. (Eastern Book Co, Lucknow. 2021) chapter 5.

<sup>106</sup> The 52<sup>nd</sup>, 73<sup>rd</sup>, 74<sup>th</sup> and 97<sup>th</sup> Constitutional Amendments

which brought new players of the constitutional game into the field of democracy, such as political parties, panchayats, municipalities and cooperative societies, the concern of the judiciary as expressed in *Kihoto Hollohan*, *Bhanumati*, *Village Panchayat of Calangute*, *Vipulbhai Chaudhury*, *Thalappalam* cases and their progeny is progressive application of the principle of political justice and strengthen grass root democracy.<sup>107</sup> When the constitutional amendments are progressive pieces, PIC becomes a suitable rule for taking the reformative move ahead.

Democracy and federalism are the two cardinal concepts and institutions helping in progressive realization of objectives underlying the Preamble. Both are interconnected and both have responsibilities towards fundamental rights and DPSPs. Democracy has inbuilt force for self-correction, which is manifested in revival of democratic values after some disturbance during internal emergency. Insistence on free, fair and pure election,<sup>108</sup> application of rules of disqualification of legislators,<sup>109</sup> control over reappointment of non-legislator minister<sup>110</sup> and avoidance of abuse of special procedure for money bills<sup>111</sup> are some of the progressive steps which have added capacity to the democratic institutions and expanded the rights of people. In each of the matters, PIC has significantly helped. Insofar as federalism is concerned, PIC posits to

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<sup>107</sup> *Kihoto Hollohan v. Zachillu* 1992 Supp (2) SCC 651; (1992 AIR SCW 3497); *Bhanumati v. State of Uttar Pradesh*, (2010) 12 SCC 1; (AIR 2010 SC 3796); *Village Panchayat, Calangute v. The Additional Director of Panchyat-II* 2012 AIR SCW 3811; *Vipulbhai M Chaudhury v. Gujarat Cooperative Milk Marketing Federation Ltd* (2015) 8 SCC 1; *Thalappalam Service Cooperative Bank Ltd. V. State of Kerala*, (2013) 16 SCC 82

<sup>108</sup> *Indira Nehru Gandhi v. Rajnarain*, AIR 1975 SC 2299

<sup>109</sup> *Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly*, AIR 2019 SC (Supp)2380

<sup>110</sup> *S R Chaudhuri v. State of Punjab*, AIR 2001 SC 2707; (2001) 7 SCC 126. *B R Kapur v. State of Tamil Nadu*, 2001 AIR SCW 3720

<sup>111</sup> *Roger Mathew v. South Indian Bank Ltd.* AIR 2019 SC (Supp) 2419

shape the vertical and horizontal relations for building cooperative or collaborative federalism.<sup>112</sup> Application of PIC can be found in the interpretation of special provisions aiming at overcoming regional imbalance, implementation of centrally sponsored schemes on education, health and employment and resolution of inter-state water disputes.<sup>113</sup> It is by using PIC that cooperative federalism has been applied by the judiciary to overcome the problem of scarcity of medical goods such as vaccine, oxygen and other life-saving drugs during pandemic COVID-19.

## Conclusion

As an ideology and a rule of constitutional construction, progressivism has great significance for individual, collective and national life. Its roots in constitutional philosophy and socio-economic development of the nation are indicative of pragmatic dimensions. In India and Canada, PIC is a major tool of interpretation whose application has enriched the constitutional jurisprudence by expansion of rights and empowering the vulnerable. The progressive outlook of judges, readiness to gather from developing social philosophy and ardent respect for human rights and welfare and fidelity to the text made PIC a viable tool. PIC is neither a rival to nor independent of other tools of interpretation. History, text, structure and purpose have given input for judicial reasoning while traversing the progressive path in constitutional adjudication. The “living tree” doctrine beckons for overall supporting atmosphere and continuous nourishment by people’s participation and avoidance of any damage to any part of the tree. Percolation of

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<sup>112</sup> Government of NCT Delhi v. Union of India Civil Appeal No. 2357 of 2017, 4-7-2018. S.R.Bommai v. Union of India, AIR 1994 SC 1918

<sup>113</sup>People’s Union for Civil Liberties v. Union of India, AIR 2008 SC 495; P Ishwara Bhat, ‘Why and how federalism matters in elimination of disparities and promotion of equal access to positive rights and welfare?’ 54 (3) *Journal of the Indian Law Institute* 2012; State of Karnataka by its Chief Secretary v. State of Tamil Nadu, AIR 208 SC (Supp) 2621; Dr. Pradeep Jain v. Union of India, (1984) 3 SCC 654: (AIR 1984 SC 1420).

progressivism to all walks of life and all layers of people's participation strengthens each and every constitutional structure. This has a great implication for transformative constitutionalism. The doctrine of progressive realization of rights and non-retrogression is a culmination of systematic development of structuralism and has great potentials. Looked from the perspective of consequences of PIC, especially the rights revolution that occurred in various jurisdictions, nobody can deny its crucial role. It has guided integration of constitutional amendments to the mainstream of constitutional philosophy.