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THE  
SUPREME COURT  
AND THE  
CONSTITUTION  
AN INDIAN DISCOURSE

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## Chapter 3 The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada

Shruti Bedi & Sébastien Lafrance

Constitutional borders have become more permeable<sup>1</sup> than ever before. Additionally, democratic contemporariness is characterised by the increasing role of courts in politics, with numerous social activists attempting to use the judiciary as the source of securing solutions to societal issues. People with limited access to majoritarian-led legislatures find sometimes the courts a more reasonable forum to challenge government policies. Law has acquired, for some, the status of effectuating progressive change.<sup>3</sup> Resultantly, judicial activism has become a concern that some constitutional lawyers and academicians are agitating across the globe today. In societies facing struggles on account of threat from the executive and lawmakers to their rights and freedoms, the courts are seen as the primary forums to negate the attacks on these rights and freedoms. This chapter seeks to analyse these goals of harbouring change and resolving conflicts through the medium of the courts, on the fundamental rights and freedoms in the context of India and Canada. It looks at the recent interpretative strategies and constitutional histories of the two democracies as well as the interconnections on the rights and freedoms.

### 1. Why Compare Judicial Activism in India and Canada?

What is the purpose of comparing judicial activism in India and Canada, two countries geographically located at two different ends of the world? To start with, "Canada and India share a great deal more in common with each other than with the European countries".<sup>4</sup> This is illustrated, for example, by "[t]he structural similarities that the Canadian and Indian constitutions share".<sup>5</sup> As pointed out by Daniel Mockle, "the

<sup>1</sup> Editorial, 1 *Indian J. Const. L.*, iii (2007).

<sup>2</sup> The world has moved towards a new constitutionalism which is reflected in the activist judicial interpretation. See Heniz Klug, *Constituting Democracy*, 9-10, 65-67 (2000); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (2000); Neal C. Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power* (1995).

<sup>3</sup> Orifit Liviatan, *Judicial Activism and Religious Based Tensions in India and Israel*, 26(3) *Ariz. J. Int'l & Comp. L.* 583, 583 (2009).

<sup>4</sup> Vivek Krishnamurthy, *Colonial Cousins: Explaining India and Canada's Unwritten Constitutional Principles*, 34 *Yale J. Int'l L.* 207, 211 (2009).

<sup>5</sup> *Ibid.* at 235. See also 208.