LAW, POVERTY AND TIME: THE DYNAMICS OF POVERTY IN CONSTITUTIONAL HUMAN RIGHTS ADJUDICATION

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ABSTRACT

Poverty is an event in time. Only dynamic thinking can fully capture its reality. This thesis contends that human rights case law is based on a static perception of poverty inconsistent with the dynamic perception of poverty in economics. Failing to notice its temporal aspects, the examined courts consequently produce judgments that overlook essential aspects of this socio-economic phenomenon. This is puzzling, since in other contexts of constitutional human rights adjudication the passage of time bears a significant role. This means that for courts to switch from a static perspective to a dynamic perspective of poverty does not require new legal tools. The duration of poverty and change in poverty can be incorporated into judicial thinking using familiar norms and doctrines.

The extent of poverty, whether it is transitory or a long-term situation, the chances of escaping it in the near future, the fluctuations in depth of poverty over the years, the probability that upon emerging from poverty one will be caught up in it again, the inheritance of poverty from parents to children: these are all time-related concerns that bear profound significance on the lives of poor people. A static examination not only overlooks these issues, but also neglects the essence of long-term poverty. Viewing poverty through the lens of time would reveal a broader and more complex human rights picture, producing a richer legal analysis, and, finally, leading to a more suitable remedy.

This study examines cases that consider claims relating to the economic situation of poor people, concentrating on examples from France, Canada and Israel. The analysis reveals the temporal approach of each judgment and suggests an alternative, dynamic reading of poverty.

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Law, Poverty and Time:

The Dynamics of Poverty in Constitutional Human Rights Adjudication

To my mother, father, and sister

In memory of Yisrael Twito, 1965-2006

I have seen the burden God has laid on the human race.
He has made everything beautiful in its time.
He has also set eternity in the human heart.

Ecclesiastes 3, 10-11

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Each of the following good friends dedicated hours to speaking with me about poverty and time. I gained clever insights and warm attention from (listed chronologically in the order that we met!) Noa Mishor, Yos Baruch, Ziv Itzhaki, Uri Basson, Achiad Gabriel Levi, Dr. Markus Wagner, Dr. Itay Nissan-Rozen, Shmulik Metkuma, Dr. Giovanni Cogliandro, Rachel Shaw, Ahmad Nazzal, Dr. Meghan Campbel, Dr. Shivi Greenfield, Elise Maes, Gabrielle Dyson, Neta Gruber, Sam Bookman, Noa Aviv, Dr. Atif Ansar, and soon-to-be-Dr. Maya Hauser. May you all be happy and healthy.

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The late Yisrael Twito was a fighter for the poor. His protest encampments were evicted twice; first by the Tel Aviv municipality (2003) and then by Jerusalem's (2004). His actions in those years inspired the subject of this thesis.[1] I wish Twito had tread these paths with Marie, Shako and Garima, for his struggle for justice would have benefitted a great deal.

This work is dedicated to my parents, Dov and Eilat, and my sister Noa, who taught me what justice is, and who always make things possible.

[1] AA 3829/04 *Twito v Municipality of Jerusalem* PD 59(4) 769 is discussed in ch 3 Section D5.

Abbreviations

1789 Declaration……..	The Declaration of the Rights of Man of 1789
1946 Preamble…..……	Preamble to the Constitution of the Fourth Republic of 1946
1958 Constitution…..….	Constitution of the Fifth Republic
C. Cass..…….……	*Cour de cassation*
Charter or Canadian Charter……...	The Canadian Charter of Rights and Freedoms
CC…….……...…..……	Conseil constitutionnel
CE…….…….....	Conseil d'Etat
CRC……..	Canada Criminal Code R.S.C. 1985
ECHR……	European Court of Human Rights
ICESCR…..…….……	International Convention of Economic, Social and Cultural Rights
IMF…..…….……	International Monetary Fund
INSEE…..……..……	French national institute for statistics
NII…….……...……	Israel National Insurance Institute 'Bithuach Leumi'
SC…..…….…….….	Supreme Court
SCC……....	Supreme Court of Canada
UDHR…….…..….	Universal Declaration of Human Rights

Reference in French cases are to considérant (designated paragraph in the judgment).

All translations in this paper are by the author, unless otherwise noted.

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Introduction

A. THESIS

Bilhah Rubinova, a single mother from the Israeli desert city of Beersheba, had been poor all her life. She started working as a cleaner at fourteen years old, and had drifted in and out of part-time jobs ever since. In December 2002, at the age of thirty-eight, Rubinova found herself unemployed, and totally reliant on public support for her monthly income of 3,034 NIS (£494). In the same month, Israel introduced the most radical welfare cutback reform in its history: *The Economic Shield Plan.* The Israeli Civil Rights Movement, representing Rubinova and other petitioners, challenged the reform in the High Court of Justice, claiming that the 30% immediate cut in income guarantee payments violated their constitutional rights. The Court submitted the ruling three years later, acknowledging a right to a minimum dignified existence, derived from Israeli Basic Law.[2] Nevertheless, it dismissed Rubinova's appeal on the grounds that she had not proven her economic condition to have fallen

[2] HCJ 888/03 *Rubinova v Minister of Treasury* PD 60(3) 464. This case is analysed in ch 4D(2).

below the line of minimum existence. The detailed judgment analysed Rubinova's economic condition at length. It calculated her total disposable income, and meticulously considered her necessary expenses. But it did so only with respect to a frozen picture of her present-day situation. The judges did not consider the length of time Rubinova had been poor, nor did they examine the impact of *The Economic Shield Plan* on her ability to escape poverty in the future. In fact, the 51-page case of *Rubinova v Minister of Treasury* did not once mention the duration of any of the petitioners' deprivation. Seeing neither the past nor the future, but only the present, the High Court of Justice pulled Rubinova out of time. Would the Court have reached the same conclusion had it considered the duration of her poverty?

Roughly 180 million people throughout OECD countries live below the line of *relative* poverty.[3] It is estimated that half of them escape this situation within one to five years, experiencing what is often called short-term or *transitory* poverty.[4] Yet the other half stay poor year in, year out. Many, like Bilhah Rubinova, experience *chronic* poverty, suffering limited economic conditions sometimes throughout their entire lifetime. For these people the problem is not merely being poorer than others; rather it is being poorer than others *forever*.

In using *chronic* and *transitory relative* poverty, I employ economic terms. *Relative* poverty is defined with respect to the standard of welfare of the rest of society.[5] Unlike absolute poverty, it does not necessarily imply a deprivation of

[3] Own calculation based on OECD data for 2010-2011. OECD Stats, *Income Distribution and Poverty* <https://stats.oecd.org/Index.aspx?DataSetCode=IDD#> accessed 1 September 2016.
[4] Numbers differ substantially from one country to another. Eurostat report presenting aggregated data from fifteen European countries found that 38% of those who were under the poverty line at least once between 1994-1997 were persistent poor, defined as being poor in at least three out of the four examined years. European Communities, *European Social Statistics: Income, Poverty and Social Exclusion* (2nd report 2002) 91. Subsequent chapters provide further data on France, Israel and Canada.
[5] The term 'standard of welfare' summons further elaboration. Ch 2(C) discusses various definitions of poverty.

physical human necessities such as nutrition, health and shelter: instead, it suggests a lack of access to goods and services that are available to the non-poor segment of the surrounding society. *Chronic* poverty is a long-lasting condition. Unlike *transitory* poverty, those in a state of chronic poverty face no prospect of relief in the near or intermediate future. Chronic poverty is sometimes described as a state of low mobility, in that there is little chance of improving one's welfare in a given period of time. It is evident that these terms imply a dynamic approach: they involve measurement of the duration of poverty and the distinction between short-term and long-term circumstances. They require, in other words, viewing poverty in the context of time.

Such a dynamic conception of poverty is a dominant approach in economic thinking, increasingly employed in empirical studies; it is almost a convention in theories of income distribution and inequality. Yet however widespread in economics, this thesis contends that a temporal conception of poverty is absent from judicial discourse of constitutional human rights. It is my suggestion, then, that the case of *Rubinova v. Minister of Treasury* reflects not an exception but rather a common perspective.

Moreover, where courts apply a static rather than dynamic approach to poverty, it becomes harder to advocate for the poor. Time is such a fundamental element of poverty that neglecting it is akin to neglecting the experience of being poor. The extent of poverty, whether it is transitory or long-term, the chances of escaping it in the near future, the fluctuations in depth of poverty over the years, the probability that upon emerging from poverty one will be caught up in it again, the inheritance of poverty from parents to children: these are all time-related concerns that bear profound significance on poor people's lives. Without accounting for these

concerns, the judicial examination may even fail to recognise an individual's poverty all together. Viewing poverty through the lens of time reveals a broader and more complex picture of human rights, allowing for a richer legal analysis and potentially leading to a more suitable remedy.

Thesis

- **that constitutional human rights case law is based on a *static* perception of poverty inconsistent with the conventional *dynamic* perception of poverty in economics.**
- **that failing to notice the duration of poverty, the examined judgments overlook essential aspects of this socio-economic phenomenon.**
- **that switching from a *static* perspective to a *dynamic* perspective of poverty does not require new legal tools. The duration of poverty can be incorporated into judicial thinking using familiar norms and doctrines.**

A dynamic approach is not foreign in human rights law. Indeed, this thesis will argue that the passage of time bears a significant – sometimes crucial – role in a variety of human rights cases. It is puzzling, then, that human rights law fails to account for time in consideration of poverty.

B. SITUATING THE THESIS IN CURRENT LITERATURE

Consider the following matrix (*figure* 1).

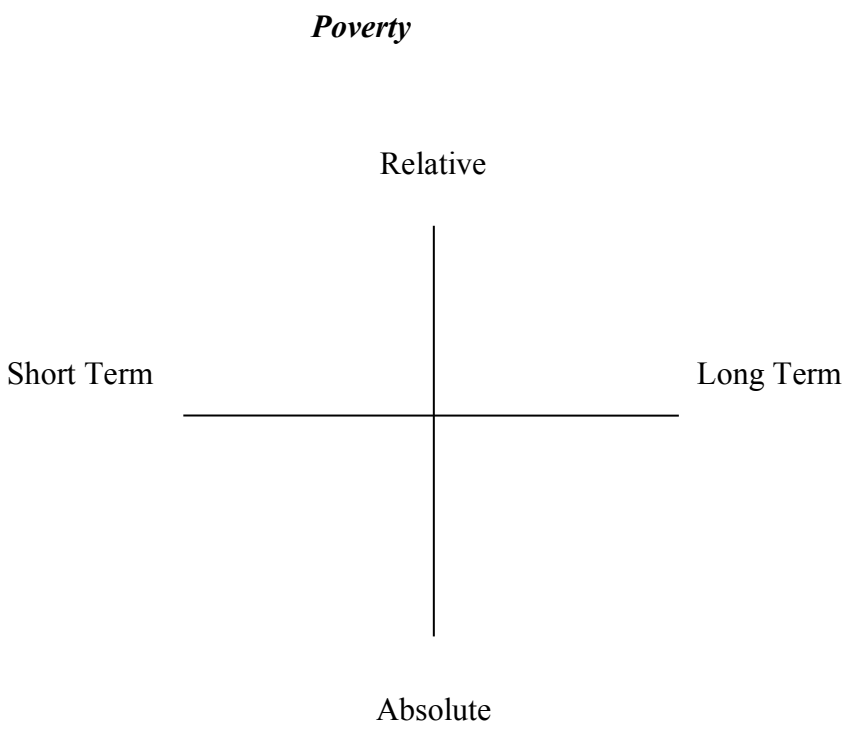

Figure 1. Four definitions of poverty

The bottom half of this matrix is absolute poverty, whether short-term or long-term. The North West quarter describes short-term – or transitory – relative poverty. An unemployed banker with no savings, and a student who has just graduated and not yet found a job, may both find themselves in states of relative poverty. Bilhah Rubinova, along with others who are caught in relative poverty for an extended period of time, would be placed in the North East quarter of the matrix. This study argues that human rights adjudication is oblivious to the distinction between these cases, and that courts

do not locate the poverty cases before them within these four quarters.

Several bodies of expertise orbit our subject. The extensive human rights scholarship on poverty is an obvious place to start. To this end, studies consider cases located in both the upper and lower halves of the matrix. Much of this research has focused on hunger and extreme conditions of absolute poverty in developing countries, in the context of international human rights; an increasing volume of legal literature on poverty in developed economies is, according to nature of these economies, occupied with relative poverty. But these writings are virtually entirely static, that is, they fail to engage with the dynamic questions of the horizontal axis in the matrix.

Looking for temporal inspiration in other disciplines, we find the no less extensive contemporary economic literature on poverty dynamics. It is worth mentioning in particular the writing on poverty definition which can be found both in economics and in human rights literature (a field which considers the tension between the Northern and the Southern parts of the aforementioned matrix, but in the case of human rights scholarship, with no regard to the temporal tension represented in the East-West axis).[6] Lastly, as previously mentioned, the thesis turns to the more general issue of time in human rights. These three domains – human rights and poverty, economics and poverty, and the legal account for the passage of time – are all relevant, yet none of them provides a self-standing approach for our inquiry. A comprehensive human rights approach to the duration of poverty could be engendered by the fruitful integration of these fields.

The last three decades have seen a growing influence of economics on various

[6] The relation between the definition of poverty and the duration of poverty is discussed in ch 2 text to n 119.

fields of law. Scholars as well as judges have infused economic theories, concepts and definitions into many legal areas, most notably into the laws of torts, contract law, corporate and security law, and competition law.[7] However, with regard to human rights, and especially with regard to rights of the poor, the flow of economic ideas has been conspicuously thin. While dynamic approaches to poverty date back to the writings of Seebohm Rowntree at the beginning of the 20th century,[8] if not to the works of T. R. Malthus in the early 19th century,[9] the judicial human rights discussion on poverty seems ignorant of these ideas. In many cases it still speaks an archaic language of the 'static'.

C. METHODOLOGY AND SCOPE

This research combines two time-related methods. The first is a *time-based approach* to law: it observes different meanings that are given to the passage of time in human rights adjudication, and applies these findings in cases of poverty. It thus enables an interrogation of what role, if any, the duration of poverty plays in the judicial understanding of poverty. This approach does not create new legal mechanisms: rather, it draws on existing jurisprudence, marking how time is treated with standard analytical instruments.

[7] For a general overview of the impact of Law and Economics see Steven Shavell, *Foundations of Economic Analysis of Law* (Harvard UP 2004) with a view on welfare at 595-612; Richard A Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) with a discussion on poverty in Ch 17.
[8] BS Rowntree, *Poverty: A Study of Town Life* (first published 1901, Longmans, Green & Co. 1922) 117.
[9] TR Malthus, *An Essay on the Principle of Population* (first published 1798, OUP 2008).

The second method evaluates the material background of poverty cases using dynamic economic theory. Time-related concepts and models are applied to the facts described in each judgment with the aim of offering a different perspective on the case.

Here the analysis returns to the *time-based approach* to law, identifying whether this new reading of the factual basis allows for a different legal conclusion to be drawn. Again, the legal evaluation applies accepted analytical tools that are available in constitutional law of the relevant jurisdiction. It does not create new rights nor does it require new legal doctrines. An alternative result to the case, sensitive to the duration of poverty, is thus expressed by conventional legal terms.

To conclude, this study injects dynamic thinking into the facts and figures of poverty cases and then examines the outcome with a *time-based approach* to human rights law.

The role of poverty in constitutional analysis

Poverty is not a legal term. It is a human and a social experience[10] that can potentially affect rules and decisions. Rather than a legal position in itself, poverty is accordingly a fact or a collection of facts, which may influence the legal analysis of a case. How is poverty analysed in the context of human rights case law? The countries discussed here do not recognise *freedom from poverty* as a constitutional right: instead, their courts examine many different rights in light of poverty. Poverty was considered in France with respect to the right to equality,[11] the right to privacy,[12] the right to

[10] Compare Neta Ziv 'Poverty, Gap Bridging, and Equality: The Case of the Right to Water' (2005) 7 Law and Government 945, 949 [Hebrew].
[11] Eg, CC décision 2006-535 DC du 30 Mars 2006, *Loi pour l'égalité des chances*.

equality in the burden of taxation,[13] the right to housing,[14] the right to decent means of existence and the principle of social solidarity,[15] the right to 'conditions to development',[16] the right to health,[17] the right to determine collective agreements and liberty of labour unions,[18] and, to some extent, with respect to the right to vote.[19] In Israel it was considered with respect to the right to equality,[20] the right to social security and the right to property,[21] the right to protest,[22] the right to education,[23] the right to a minimum dignified subsistence,[24] and with respect to the right to housing.[25] It was also discussed briefly with relation to the right to access justice.[26] In Canada poverty was considered in several cases with respect to the right to equality before the law,[27] the right to retain and instruct counsel,[28] the right to vote,[29] and in *Gosselin v Québec* it was discussed with respect to the right to security of the person.[30] In another Canadian case an argument about poverty was made with respect to the right of free expression and association[31] (all above-mentioned cases are discussed in subsequent chapters). It is evident, then, that some cases concern poverty with respect to (what are commonly regarded as) social rights, and other cases concern poverty

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[12] CC décision 2011-625 DC du 10 mars 2011, *Loi d'orientation et de programmation pour la performance de la sécurité intérieure*.
[13] CC décision 2000-437 DC du 19 décembre 2000, *Loi de financement de la sécurité sociale pour 2001*.
[14] Eg, CC décision 94-359 DC du 19 janvier 1995, *Loi relative à la diversité de l'habitat*.
[15] Eg, CC décision 2011-123 QPC du 29 avril 2011, *M. Mohamed T.*
[16] Eg, CC décision 97-393 DC du 18 décembre 1997, *Loi de financement de la sécurité sociale pour 1998*.
[17] CC décision 99-416 DC, 23 juillet 1999, *Loi portant création d'une couverture maladie universelle.*
[18] CC décision 2011-122 QPC du 29 avril 2011, *Syndicat CGT et autre.*
[19] CC décision 98-403 DC du 29 juillet 1998, *Loi d'orientation relative à la lutte contre les exclusions*.
[20] Eg, HCJ 6298/07 *Resler v. The Knesset* (not published) (2012).
[21] HCJ 5578/02 *Manor v Minister of Finance* PD 59(1) 729.
[22] AA 3829/04 *Twito v Municipality of Jerusalem* PD 59(4) 769.
[23] HCJ 10030/05 *Al-Amur v. Minister of Education* (not published) (2006).
[24] Eg, the above mentioned *Rubinova* n 1.
[25] Eg, PCA 4905/98 *Gamzo v Yesha'ayahu* PD 55(3) 360.
[26] RMA 6857/00 *Rota v. Natzbatayeb* PD 54(4) 707.
[27] Eg, *R. v. Kapp* [2008] 2 SCR 483.
[28] Eg, *R. v. Prosper* [1994] 3 SCR 236.
[29] *Sauvé v. Canada* [2002] 3 SCR 519.
[30] [2002] 4 SCR 429.
[31] *Canada v. Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 SCR 524.

with respect to (what are commonly regarded as) political and classic rights.

Poverty may fulfil several roles in the constitutional evaluation. Most familiarly, poverty cases concern its impact on the violation of a right. The distinction between *a human right and its related violation* on the one hand, and *the social and economic circumstances which put an individual at risk of exposure to this violation* on the other hand, locates poverty in the latter, and thus allows a broad perspective on the interaction between poverty and human rights law. As the examples above demonstrate, there is no right not to be poor, but there are many possible rights which may be affected by poverty: this is the legal framework of the above-mentioned judgment in *Rubinova*. Secondly, poverty could serve in the constitutional analysis as a justification for the violation of a protected right. For instance, *Loi de financement de la sécurité sociale,* a French case analysed in Chapter Three, examined a law that imposed a levy for the purpose of economic redistribution.[32] In this example, the relief of poverty was a desired social interest, and therefore justified an impingement of the right to property. Lastly, poverty may play a role in the background of a constitutional analysis. Such was the case, for example, when poverty was recognised as grounds for discrimination, as was suggested in the Canadian case of *Dartmouth/Halifax County Regional Housing Authority v. Sparks*.[33]

The boundaries of this research

The above goes to show that poverty could relate to many possible rights and perform different constitutional tasks. With this in mind, I will now turn to define which cases will be examined in this thesis. The research goal is to assess the perception of

[32] See n 12.
[33] [1993] 119 NSR (2d) 91. Discussed in ch 6(F).

poverty in constitutional human rights case law. The relevant cases for establishing this hypothesis are all those in which the socio-economic condition of poor people is considered as part of a human rights claim. By 'considered' I mean that the Court recognises poverty as a factor in the final constitutional examination, or reviews such a poverty-related claim but ultimately does not take it into account.

This study examines all those roles of poverty mentioned above. It does not relate to a specific human right, but rather to all possible rights; it does not relate to a specific constitutional function which poverty may fulfil, but rather to all possible functions; and it does not exclusively relate to arguments that were accepted by the court, but also to arguments that were noticed and eventually dismissed.

Finally, this research does not follow every case that shapes and affects the constitutional human rights of the poor. It only examines cases that involve a direct analysis of poverty. In other words, it is limited to those human rights cases *explicitly* employing the term 'poverty' (or any synonyms thereof). This is a study on judicial reasoning and hence the focus on text: if the written judgement does not refer to 'poverty', it cannot reflect a standpoint on the duration of poverty. A judicial perspective on poverty dynamics exists only within a judicial perspective on poverty.

Three countries examined: France, Israel and Canada

This work studies cases in France, Israel and Canada, all classified as high income economies by the World Bank.[34,35] In these rich industrialised free markets there is

[34] World Bank, *Country and Lending Groups*, 2014 (2013 data in USD). <http://data.worldbank.org/about/country-and-lending-groups#High_income> accessed 1 September 2016.

[35] These countries correspond with Esping-Andersen's three types of welfare regimes. This will be briefly discussed in ch 3 (text to n 49) and ch 6 (text to n 92). See Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990) 23-34.

little, if any, absolute poverty. Nonetheless, there are substantial levels of relative poverty. Each of these countries operates judicial review over the executive and the legislator. In each of their legal systems, claims regarding poverty have been considered in the context of constitutional human rights.

Defining the court level

The thesis examines the constitutional approach of the highest judicial tribunal in each jurisdiction.

Summary

To sum up, this thesis examines –

1. judgments of the **highest judicial level**
2. in **France, Israel and Canada**,
3. in which **poverty** is explicitly mentioned and reviewed
4. in the context of a constitutional **human rights argument.**

D. STRUCTURE

This paper is divided into three parts. **Part I** lays the foundations of a time-based methodology for this research. It introduces dynamic theories in the economics of

poverty and a temporal approach to human rights adjudication. **Part II** analyses cases from France, Canada and Israel, demonstrating the courts' static approach to poverty and proposing an alternative dynamic analysis to each case. **Part III** concludes the findings, considers possible critiques of the dynamic approach to poverty, and signals aspects for further inquiry that should hopefully be touched on in future work.

Part I, **Dynamics: Legal and Economic Time Based Approaches**[36] establishes the time-related economic and legal infrastructure. **Chapter One** discusses the question of time in the broader context of constitutional human rights. It sets a conceptual background on the role of the passage of time in human rights adjudication against which the duration of poverty will later be examined. The chapter first explores the vast literature on time and law, proposing a framework that distinguishes four concepts of time. The passage of time (which I denote *exogenous time as quantity*) is identified as a category that has not been discussed thoroughly in legal scholarship. Chapter One then turns to develop this subject in the context of constitutional human rights. It identifies the possible legal outcomes of the passage of time that may be applied by a court, and classifies them in four constitutional functions: *magnitude, nature, essence, and agent*. The four functions are illustrated and examined in various human rights cases. Finally, the chapter discusses the background role of the passage of time enabling the concept of *fluctuation*. The result is a toolkit for analysing judicial temporal approaches.

Chapter Two is oriented to economics, presenting the notion of dynamic

[36] *Dynamics*, *statics* and *kinetics* describe three branches of classical mechanics. Approaches as to their inter-connection vary. In his 1887 book titled *An Elementary Treatise on Kinematics and Dynamics* (new edn, Myers Press 2010) James MacGregor suggested to combine *statics* (the study of forces in a system in which positions do not vary over time) and *kinetics* (the study of the motion of bodies and its causes) under *dynamics*, which became the branch dealing with 'the determination of the motion of bodies resulting from the action of specified forces'. See Bodgan Wilamowski and David Irwin, *Control and Mechatronics* (CRC Press 2016) 34-5; see also Roberto Torretti, *The Philosophy of Physics* (CUP 1999) 84-94.

thinking in this discipline. It then moves to describe the fundamental debates concerning the definition and measurement of poverty in economic literature, and to explain how time is incorporated into these issues. This review defines the economic terms used in the following chapters. Subsequently the chapter presents key theories on poverty dynamics and mobility, useful for the dynamic analysis proposed in later chapters.

Having discussed *law* and *time* in Chapter One; and *poverty* and *time* in Chapter Two, we proceed to Part II, **Statics: Human Rights Adjudication and the Duration of Poverty** where the three elements – *law, poverty, time* – are combined. The goal in this section is to identify the temporal perspective of poverty underlying the examined cases, and to demonstrate the implications of this approach. The judges' view, argued to be a static one, is confronted with an alternative dynamic analysis. For each case, the difference between these two approaches is highlighted.

France is discussed in **Chapter Three**, Israel in **Chapter Four** and Canada in **Chapter Five**. Following a brief presentation of data on poverty in each country, with a special focus on chronic poverty, each of these chapters presents a constitutional and legal background, introducing the judicial human rights treatment of poverty, before moving to evaluate the perception of the duration of poverty in the relevant cases. Each case study aims to address the following questions: (1) what is the function of poverty in the constitutional analysis? (2) what does a dynamic perspective tell us about the material facts of the case, and what are the possible legal results of this understanding? (3) does the court employ a dynamic, or static approach to poverty? (4) had the court changed its temporal perspective, could the outcome of the judgment have differed?

This study has required a complete survey of all constitutional human rights

poverty cases. However, limitations of space allow for a detailed analysis of only a handful among them. Therefore, for each court I have selected between three and five cases to examine in depth; other cases are described only in a sufficient level of detail in order to verify that they do not contradict the conclusions of this research.

Part III, **Kinetics: Towards a Time Based Approach to Poverty in Human Rights Adjudication** closes the research. **Chapter Six** gathers and discusses the findings. It presents the *disciplinary gap*, *temporal gap*, and *institutional dilemmas* as potential causes for the discrepancy between the static judicial and the dynamic economic approaches to poverty. These three challenges also amount to three possible means of attack on my proposed dynamic approach to poverty, an attack to which I will attempt to respond, based on the findings of this study. The *temporal gap* concerns the location of the examined poverty spell - past, present or future - and the different role this temporal location (especially, the future) plays in law and in economics. By *disciplinary gap*, I infer that the theoretical premises of economics, on one hand, and jurisprudence, on the other, may be irreconcilable, thereby muddling efforts to translate poverty studies from the former to the latter. The following section offers points for future work on *institutional dilemmas* of both justiciability and political impact. To illustrate the approach promoted in this paper, Chapter Six then presents a judgment of the Supreme Court of Nova Scotia where, to my opinion, a dynamic approach to poverty was well applied. Closing this discussion, it reviews the different temporal functions used in my proposed dynamic analysis of poverty and marks how these were linked to the legal analysis. **Chapter Seven** concludes this essay.

PART I

DYNAMICS: LEGAL AND ECONOMIC TIME BASED APPROACHES

1 Law and Time: Human Rights and the Passage of Time

A. INTRODUCTION

A performance art video clip entitled *Time Freeze*, filmed on a rush hour in central Munich, shows a group of five people standing still for three minutes in the middle of a busy city square.[1] A young man is frozen while disembarking his bicycle. Another woman, her hands resting motionless in her coat pockets, gazes at some point in the distance. Around them the city is alive. Occasional bystanders point at the odd group. A dove flies across the frozen scene. At some stage a passing tourist, probably perplexed by what he sees, takes out a camera and starts shooting photos of the five people surrounded by the crowd. Another minute passes, and the actors abruptly resume motion. The young man dismounts his bicycle. The woman takes her hands out of her pockets, looking for something inside her bag. Here the clip ends.

[1] Csmunich, *Time Freeze, Munich Germany*, (2009) <www.metacafe.com/watch/2399129/time_freeze_munich_germany/> accessed 1 September 2016.

What kind of souvenir will the tourist have from this amusing incident? Not a very exciting one: in the snapshots taken by his camera, there will be no difference between a bystander and a frozen performer. For, contrarily to the title given to the performance, time was not frozen in this Munich square. It was the five people that were frozen inside an ever-beating time. But the tourist's camera cannot capture such a vision. It does not record the passage of time.

It is the presumption of this research that constitutional human rights law does not capture the passage of time in cases of poverty. The aim of this chapter is to establish those legal instruments that *do* record time. Illustrating the possible functions of the passage of time in the wider scope of human rights cases, the chapter identifies the different perceptions of time applied by courts, and the various legal outcomes which result. This is the conceptual background against which the duration of poverty will be later examined. This chapter therefore presents a toolkit for analysing judicial temporal approaches to poverty.

The first step is to define the subject and locate it with respect to what has already been written about time and law. To this end, Section B offers principle terminology, and classifies the vast discourse on time and law into four different concepts of time. It identifies the passage of time (which is named *exogenous time as quantity*) as a category that has not been thoroughly discussed in legal scholarship. Section C then develops this subject in the context of constitutional human rights, classifying four different functions of the passage of time – namely, *magnitude, nature, essence,* and *agent*. These functions are illustrated and analysed in relation to various human rights cases in sections D to G. Finally, Section H discusses the idea of *fluctuation*, dealing with legislation that internalises the passage of time – a point to which I return in later chapters. Section I concludes the chapter.

Time in legal writing

The literature on law and time is voluminous and diverse. Published in 2002, Todd Rakoff's *A Time for Every Purpose* provoked a debate on the question of how law structures time, and how it uses time in the construction of other aspects of individual and social life.[2] The discussion includes several aspects of time. One focus is on the *legal establishment* of time - that is, the way the law creates a unified concept of time, to be used by individuals in their interactions ('telling the time', in Rakoff's words). Another focus is on the *allocation and coordination* of time. Here we find, for example, laws that limit the amount of labour per week or per day, or laws that define specific hours in the day and specific weeks in the year as school time. A third aspect of the discourse is the *rhythms and textures* that the law creates using time. Legal rules can create special social meanings for time, such as laws forbidding labour and commerce on holidays, or laws reserving a religious meaning for a holy day of the week.

Nonetheless, the most extensive writing on time and law concerns the aspect of *temporal validity*. A dilemma of inter-temporal law arises when an element that is relevant for the outcome of a norm is dated either earlier or later than the period of validity of that norm.[3] Several theories of jurisprudence mention the limitation on retroactive law-making as a requirement of legitimacy.[4] Such restrictions, dating back to Jewish Talmud[5] and Roman law,[6] appear in the US constitution,[7] the Canadian

[2] Todd Rakoff, *A Time for Every Purpose: Law and the Balance of Life* (Harvard UP 2002); see also (preceding Rakoff's book) David Engel, 'Law, Time and Community' (1987) 21 Law & Society Rev 605; Rebecca French, 'Time in the Law' (2001) 72 Univ of Colorado L Rev 663.
[3] Aharon Barak, *Interpretation in Law: Volume Two – Interpretation of Legislation* (Nevo 1993) 609 [Hebrew]; Shneor Feler, 'On the Retroactivity of Extradition Laws and the Impact of Pardon' (1973) 4 Mishpatim 403 [Hebrew].
[4] Lon L Fuller, *The Morality of Law* (rev edn, Yale UP 1969) ch. 2. See also a discussion in Joseph Raz, *The Concept of a Legal System* (Clarendon Press 1980) 170; Friedrich Savigny, *A Treatise On The Conflict of Laws and the Limits of their Operation in Respect of Place and Time* (Guthrie 1880).
[5] In the context of private law, see for example: *Babylonian Talmud, Baba Bathra*, 2b.

Charter of Rights and Freedoms (with respect to criminal penal legislation)[8] and the French Declaration of the Rights of Man and of the Citizen of 1789.[9] The French *Code civil* provides restriction on retroactivity as a general rule.[10] A prohibition on *ex post facto* law is provided in Israel in primary legislation,[11] and has been repeatedly referred to as a constitutional principle in Supreme Court decisions.[12] Inter-temporal law is discussed at length in legal literature.[13]

Both Rakoff's book and inter-temporal law scholarship are interested in time as a primary focus. However, various time related aspects are discussed (if incidentally) in many other legal contexts. Procedural rules of prescription, length of imprisonment, and the land law principle of adverse possession, are merely notable examples amongst numerous subjects that involve temporal aspects of the law.

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[6] Indicated in the maxim *nulla poena sine lege* ('no punishment without law') see Adolf Berger *Encyclopedic Dictionary of Roman Law* (American Philosophical Society 1953, reprinted 1991) 457.
[7] Article I ss 9-10, first discussed in the opinion of Justice Chase in *Calder v Bull* 3 US 386 [1798]. Recently considered in *Smith v. Doe* 538 US 84 [2003].
[8] Section 11 (g),(i).
[9] Article 8. Recently discussed in the *Conseil Constitutionnel*: CC décision 2008-562 DC du 21 février 2008, *Loi relative à la rétention de sûreté*. The case is reviewed below, text to n 32.
[10] Article 2 provides: 'Legislation provides only for the future; it has no retrospective operation'.
[11] Criminal Law, 5737-1977 s 3. The Law of Interpretation, 5741–1981 provides a general rule that a new law does not affect rights, obligations, offences and penalties that were created by a previous law (s 21).
[12] Recently discussed in CA 10723/04 *A v The State of Israel* (not published).
[13] In 1997, Rosalyn Higgins published an article which gathered what she called 'matters temporal' of international law in four groups. *Now and Then* refers to a time gap between the acceptance of jurisdiction and preceding material facts. A special sub-group which belongs here is of continuing events, i.e. situations and actions that first took place before the date of acceptance, but are repeated subsequent to this date. *Then and Now* refers to the retrospective application of a legal precedence. *Long Enough Time* refers to time limitations. *Too Long Ago* refers to inter-temporal interpretation. See Rosalyn Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46(3) ICLQ 501-520. See also Alan Rodger, 'A Time For Every Thing Under The Law: Some Reflections on Retrospectivity,' (2005) 121 LQR 57; Richard Tur, 'Time and Law' (2002) 22 OJLS 463; Elmer Driedger *On The Construction of Statutes* (3rd edn, Butterworths Law 1994).

B. PRELIMINARY TYPOLOGY: MAPPING THE DISCOURSE ON LAW AND TIME

The wide-ranging literature on law and time may be arranged according to two questions: what is the conception of time? and what is the relation between time and law? Time can be conceived either as *location* or *quantity*, and it could be either *endogenous* or *exogenous* to law.

Locations and quantities

> 'The Gran Bretagna is 32.2 miles South-East of the Port of Halifax.'
>
> 'The Gran Bretagna is 32.2 meters wide.'

As it is with spatial dimensions, so it is with time, that it could express either *a location* in the infinity or *a quantity* of continuous segment in the infinity. The former is telling the time. The latter is telling how much time. Thus:

Time as location

'They met on the eighteenth of October 2008.'

'Her train leaves today at twenty past five in the afternoon.'

Time as quantity

'He was thirty years old.'

'The train ride takes two hours and fifteen minutes.'

Time as location is synchronic – or, rather, unichronic: it refers to a single temporal place. This place could be a particular minute, a particular year or any other unit of time, as long as it is a specific one. *Time as quantity* is diachronic: it refers to a temporal interval, over which there might be a development or a change. This duration is determined by its length, and not by its position.[14] The literature on time and law is occupied with both locations and quantities.

Time endogenous to law and time exogenous to law

Another question concerns the relation between time and law. Here, again, we can identify two bodies of literature. The first is interested with the way the law constructs time, as is demonstrated in Rakoff's study. When Rakoff says 'law and time' he means to describe how the law controls time and how it structures the social experience of time. Here time is *endogenous* to the law. It is a category which is classified and defined by legal rules. The second body of literature is concerned with the reverse relationship. Instead of law shaping time, here it is time that shapes the law: the focus is on possible temporal impacts on jurisprudence. In this case time is *exogenous* to the law. It is an element that is taken into account in legal argumentation or in a legal rule. Simply put, *endogenous time* is a social concept which is formed

[14] Consider this example taken from the US constitution. *Time as location*: Art II(1): 'The Congress may determine the time of choosing the electors'. *Time as quantity*: Art I(7) 'The congress shall have power... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries'.

and regulated by human-made rules. *Exogenous time*, on the other hand, is an independent factor, an attribute of physical reality, which plays a role in legal thinking.

We can now draw ***table 1*** in which we locate four bodies of time and law scholarship.

Endogenous time as location	Endogenous time as quantity
Exogenous time as location	Exogenous time as quantity

Table 1: four groups of time and law literature

Time as location

Scholarship that is concerned with *endogenous time as location* focuses on laws that regulate time and the social experience of time, by referring to specific points in time. Canadian Supreme Court cases dealing with 'Blue Laws' that prohibit commerce on Sundays;[15] cases dealing with work on the employee's holy day of the week;[16] Israeli legislation that limits labour on Shabbat;[17] French legislation specifying May to

[15] *R. v. Big M Drug Mart Ltd.* [1985] 1 SCR 295; *R. v. Edwards Books and Art Ltd.* [1986] 2 SCR 713. A general background of the Canadian constitutional system is provided in ch 5(B)-(C).
[16] *Central Okanagan School District No. 23 v. Renaud* [1992] 2 SCR 970.
[17] Hours of Work and Rest Law, 5711-1951.

October as required period for annual leave for certain employees;[18] these are all examples of the legal construction of time, by reference to specific days of the week or specific weeks of the year. Another focus of research in this group is on laws that regulate the establishment of time itself, in the sense of *time as location*, such as laws governing time zones in the US and in Canada.[19] Another example is The British Calendar Act, 1751 which provided that 2 September 1752 would be followed by 14 September, omitting eleven days in order to bring British dates into line with the Gregorian calendar.[20]

The second category is *exogenous time as location*. In its *exogenous* relation to the law, *time as location* is a factual element. The law deals with events (being actions, factual circumstances, or legal statuses[21]) that are usually located at a certain point in time. By determining the temporal position of two events, the law determines their temporal order. Any one event is always earlier than, simultaneous with, or later than, another event. This relative organization of facts enables the determination of causality (as casual interaction between events requires that one event precedes the other). Temporal order can refer not only to facts, but also to norms. A legal rule applies in space, over a defined group of people, and also in time.[22] Every norm '...begins its life in a certain point in time, and ends its life in another'.[23] Several fields of jurisprudence deal with law and time in this respect. I mentioned earlier the extensive discussion on *temporal validity*. Another subject closely related to constitutional human rights, which is at the centre of constitutional debate in the US,

[18] Code du travail Art L3141-13.
[19] Rakoff (n 2) 15-20.
[20] Robert Poole, '"Give Us Our Eleven Days!": Calendar Reform in Eighteenth-Century England' (1995) 149(1) Past & Present 95.
[21] Elisa Holmes similarly speaks of discrimination law as dealing with either 'situations' or 'actions'. Elisa Holmes, 'Anti-Discrimination Rights Without Equality' (2005) 68 MLR 175.
[22] Kelsen named it the spatial, personal and temporal spheres of validity respectively. See Hans Kelsen, *General Theory of Law and State* (Russell & Russell 1945) 45.
[23] Barak, *Interpretation of Legislation* (n 3) 609-610.

concerns the effect of time on interpretation. Different hermeneutic approaches suggest different ways of bridging the temporal gap between legal texts that are dated in the past on one hand and their contemporary interpretation on the other hand.[24]

Time as quantity

Rakoff's book, which deals with different expressions of *endogenous* time, mostly concerns *time as location*. However, parts of it discuss *endogenous time as quantity*, which is the third category in our matrix. In Rakoff's view, protection laws that limit the amount of labour per day or per week shape the social experience of time. Therefore, he considers the relation of time to law with respect to these laws as an endogenous one. These are examples of perceiving the amount of time, or its duration, regardless of position.

The last category is *exogenous time as quantity*. Events that are of interest to the law could either be *instantaneous* or *continuous*. The existence of instantaneous events may be disputed in metaphysics,[25] however in the legal sphere there are indeed events that 'do not take time'. Signing a contract or voting in an election is an *instantaneous*, timeless action in the eyes of the law.[26] Such events are not described as sequences of time, but rather as points in time. In contrast, *continuous* events are actions, statuses, or factual circumstances that occur over a period of time: serving a

[24] Jack Rakove, *Interpreting the Constitution: The Debate Over Original Intent* (Northeastern 1990); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton UP 1998); Aharon Barak, 'On Time in Legal Interpretation' in Aharon Barak and Haim Berenzon (eds), *Berenzon Book* (vol 3, Nevo 2007) 57 [Hebrew]; In Canada: Bradley Miller, 'Beguiled by Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada' (2009) 22 Canadian Journal of Law and Jurisprudence 331. In Israel: Aharon Barak, *Interpretation in Law: Volume Three – Constitutional Interpretation* (Nevo 1993) 149-159 [Hebrew].

[25] Gottfried W Leibniz and Samuel Clarke, *Leibniz and Clarke: Correspondence* (Roger Ariew ed, Hackett 2000); Sydney Shoemaker 'Time Without Change' in Robin Le Poidevin and Murray MacBeath (eds), *The Philosophy of Time* (OUP 1993) 63.

[26] 'Event' is also a philosophical term. Here I use it in a legal sense. Compare Robin Le Poidevin, *Travels in Four Dimensions: the Enigmas of Space and Time* (OUP 2003) 154-155, 161-162.

sentence of imprisonment, the ownership of a copyright, or being pregnant. *Exogenous time as quantity* relates to the temporal sequence over which *continuous* events spread, or to the distance between any two events, whether they be *instantaneous* or *continuous*.

It is clear that time in the sense of *quantity* appears in scores of possible contexts, and is consequently present in every aspect of the law, be it the length of criminal punishment, the rule of limitations, or the implications of the duration of land ownership.[27] It is therefore surprising that there is little research which takes time – in the sense of quantity – as its major focus, as a subject that cuts across a certain legal field.[28] In what follows I discuss *exogenous time as quantity* in the context of constitutional human rights law. But first, let us more closely define the subject matter.

[27] E Magen presents an interesting analysis of time as quantity in the context of judicial precedence in 'Binding Precedence – the Difficulties of Implementation in the Vertical Surface' 43(3) Hapraklit 324, 340-342 [Hebrew].

[28] The issue of the passage of time has been covered, though, by several non-legal authors. See: Jeremy Rifkin, *Time Wars: the Primary Conflict in Human History* (H. Holt 1987) 48; Eviatar Zerubavel, *Hidden Rhythms: Schedules and Calendars in Social Life* (University of California Press 1985).

C. THE PASSAGE OF TIME

'Events' were defined in the previous section as actions, legal statuses, or circumstantial facts, which can be either continuous or instantaneous. As mentioned already, *time as quantity* can relate either to a continuous event, or to the distance between any two events. Let us call both the measured length of one event and the measured distance between two events a *legal sequence*. The *passage of time* would be the extent of *time as quantity* in a certain *legal sequence.* Dynamic thinking in law is interested with the impact of *the passage of time* on legal factors.

Here we are therefore looking into the effect of the length of *legal sequences* on constitutional human rights law. But is it really time that is in the centre of attention here? Perhaps it is not the passage of time that makes the difference over a *legal sequence,* but rather the things that happen during that time? Consider, for example, a three-year limitation period to civil claims. Arguably the potential disappearance of evidential material and the evolution of new interests have a greater capacity to affect the case than the passage of time itself. Similarly, a six-month prolongation of criminal proceedings does not just entail a six-month delay, but involves repeated investigations and court hearings, the continuous discomfort of being defined as a suspect, and the potential limitation on one's liberty. Could it be that it is not the passing of time itself, but rather the events which occur within that time, that create the notion of 'the passage of time'? Is there a meaning to the passage of time without change? This dilemma reflects a philosophical query into the essence of time: whether it is defined by the events which it consists, or rather is an independent category in its own right, is a central question in the philosophy of

time.[29] In the legal sphere, we may reformulate the problem in the following way: could there be legal implications of the passage of time with no events at all?

Leaving metaphysical reflection aside, an answer to the legal question is crucial because there is a need to clearly define the focus of the following analyses. *The passage of time* is the time that passes with respect to a certain event – an imprisonment, being under investigation, or the time that passes since the signing of a contract. This is the event that *defines the legal sequence*. The defining event should be constant throughout the legal sequence. The sequence begins at point A, ends at point B, and the defining event continuously exists all along. We are interested in the impact of the quantity of time between point A and point B. We do not require that nothing would change during the *legal sequence*. We only require that the event which defines the *legal sequence* would be constant.[30]

I will now turn to examine the meaning of the *passage of time* in the specific context of constitutional human rights adjudication, arguing for a fourfold function of *time as quantity* in the characterization of human rights violations. Time could define the *magnitude* of the infringement of a right or the magnitude of a competing interest; time could define the *nature* of the rights involved in a case; time could define the *essence* of a right; and time could define the *agents* involved in the situation. Following this discussion, in section H, I will introduce the relevant issue of *fluctuation* over a determined time interval.

[29] Le Poidevin, *Travels in Four Dimensions* (n 26) 127, 148-162; Arthur Prior, 'Changes in Events and Changes in Things' in Le Poidevin and MacBeath (n 25) 35.
[30] The subject of change over a defined period will be further discussed in Section H below.

D. MAGNITUDE

A is detained by the police with no trial and no just cause at 5 o'clock on a Monday afternoon. Exactly six minutes later, she is released from custody. B, also unjustly detained, is jailed for six days before being released. C is illegally detained for six months. No physical harm is done to any of the women. What is the difference between the three cases? What legal results might the time behind bars have?

First, and most clearly, the duration of the detention characterizes the *magnitude* of the breach of liberty. Six months of imprisonment is roughly thirty times longer than six days of imprisonment. The passage of time functions in this sense as a quantitative physical measurement. Typically, it is considered to indicate the extent of the infringement with respect to a certain constitutional right. In some cases, it plays a different role, indicating the magnitude of the opposing interest.

The passage of time defining the extent of infringement

In 2007-2008 the newly elected French government promoted several controversial legislative measures reforming French criminal procedure law. One of the bills, referred to as 'the Act pertaining to post-sentence preventive detention and diminished criminal responsibility due to mental deficiency',[31] introduced the *rétention de sûreté* (safety retention). The Act established that, in the case of severe offences, upon a prisoner's completion of their initial sentence, they would be brought before a committee which would decide whether further detention was necessary for any 'socio or medical reasons'. If applied, the *rétention de sûreté* would be served in a

[31] Loi no. 2008-174 du 25 fevrier 2008 relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental.

special medical-social closed institution. The decision of the committee was to be given for a predefined period and could be repeatedly prolonged.

The *Conseil Constitutionnel* examined this bill and found it unconstitutional.[32] The rationale for this decision, embedded in art 8 of the 1789 Declaration, was twofold. The first reason concerned retroactive punishment – a subject considered briefly earlier. The second reason is of interest to us here, for it regarded the passage of time as an expression of the magnitude of the human right violation. It concerned the 'principle of proportionality of sanctions' which reflects the first part of art 8:

> The law shall provide for such [criminal] punishments only as are strictly and obviously necessary...

The *Conseil constitutionnel* found that '[i]n view of its custodial nature, the time it may last, [and] the fact that it is indefinitely renewable',[33] the new provision is in breach of the principle of proportionality of sanctions. According to this line of thought, the total duration of imprisonment and retention all together exceeded the amount of time that Article 8 permits as 'strictly and obviously necessary'.

It is interesting to note that the *Conseil constitutionnel*, which was dealing here with a case of a new detention with no trial, chose to see the *rétention de sûreté* not only as a *chronological* continuation of the lawful imprisonment, but also as its *legal* continuation. When it stated that the safety retention was too long, it conceived it as another phase of the same interference with rights that consisted in the imprisonment, and not, say, as the creation of a completely new infringement of

[32] Décision 2008-562 (n 9). A general background of the French constitutional system is provided in ch 3(B)-(C).
[33] ibid [10].

liberty. For the *Conseil constitutionnel*, *rétention de sûreté* was just a prolongation of the original sentence.

When it defines *magnitude*, the function of time is nominal. It creates a direct proportion between duration and contravention. It is as if over time there is a steady, linear accumulation of the intrusion to a certain right. The longer a suspect is prevented from meeting her lawyer, the more severe is the infringement of her right to an attorney.[34] The longer a detention at the police station before the detainee is brought before a judge, the heavier is the violation of liberty.[35] The shorter a blackout period prohibiting the publication of opinion surveys prior to election, the less severe the restriction of freedom of expression.[36]

The passage of time and judicial discretion: reasonableness and proportionality

We now turn to a case with a commercial character, *Arutzey Zahav and Co. v Minister of Communication*,[37] given by the Supreme Court of Israel. For most of the 1990s, the cable television market in Israel was dominated by three companies which supplied a certain package deal of television channels. The Public Council for Cable and Satellite Broadcasting (hereinafter 'the Council') permitted a fourth company to enter the market, enabling it to sell a potentially more attractive package deal. For a period of 18-27 months, or until the number of subscribers for the new company exceeded

[34] In France: CC décision 93-334 DC du 20 janvier 1994, *Loi instituant une peine incompressible et relative au nouveau code pénal*; CC décision 93-326 DC du 11 août 1993, *Loi modifiant la loi no. 93-2 du 4 janvier 1993*; and CC décision 2004-492 DC du 2 mars 2004, *Loi portant adaptation de la justice aux évolutions de la criminalité*, which analyses the prevention of a lawyer by the principle of equality.
[35] In Israel: CA 6055/95 *Tzemach v Minister of Defence* PD 53(5) 241, quashing a new law governing the period of time in which a soldier may be detained by a military police officer before being brought before a military judge, for violating the right to liberty.
[36] An argument examined in Canada in *Thomson Newspapers Co. v. Canada* [1998] 1 SCR 877; see Gonthier J's dissenting opinion: '[w]hether a ban over a three-day period can properly be described as a "complete ban" is a subtle point.' [120].
[37] HCJ 7852/98 PD 53(5) 423. Review of the Israeli constitutional system is provided in ch 4(B)-(C).

250,000, the other three companies were not allowed to supply this new product. The regulator justified this unequal treatment by the need to open the market for competition, and to guarantee the chances for the penetration of a fourth company. The three older companies appealed to the High Court of Justice claiming that, by preventing them from supplying the new package for a period of two years, the Council violated their freedom of occupation guaranteed in s. 3 of Basic Law: Freedom of Occupation. They demanded to abolish this arrangement altogether or limit to the period of prohibition. For this claim, they relied on a declaration by the General Director of the Antitrust Authority according to which a shorter prohibition of six months would suffice. Rejecting the challenge, the Court held that the prohibition complied with the requirements of the Basic Law's limitation clause[38] and, therefore, that the measure taken by the Committee was constitutional. The Court chose to examine the length of the prohibition according to standards of administrative law. It concluded that the 18-27 months period was reasonable:

> The decision of the Council, even if limiting the claimants to a greater extent than the one recommended by the General Director [of the Antitrust Authority], does not deviate from the area of reasonableness, and we should therefore not intervene[39]

The difference between the shorter period which was recommended by the Antitrust Authority, and the longer period ordered by the Council was viewed by the Court merely as a matter of scale. A more extended prohibition period results in a heavier limitation on the appellants' freedom of occupation. Here, again, time was understood as an indicator of *magnitude*.

[38] Basic Law: Freedom of Occupation s 4.
[39] *Arutzey Zahav* (n 37) 431-432.

The legality of this temporal magnitude was determined in this case through a test of reasonableness. And indeed, the application of time as a parameter in abstract legal tests, such as proportionality or reasonableness, is widespread.[40] Twentieth century physics may have altered classical assumptions on time, but the earthly experience of the passage of time still resembles Aristotle's observations – first that time is constant (it does not speed up or slow down) and second that, when we talk about time as quantity, it is universal (that is, while clocks show different hours from one place to another, time itself passes identically in all places).[41] That time is both constant and universal – that the passage of time is always and everywhere equal – is what makes it a useful element in judicial balancing and weighting. Time is objective, steady, consistent, accurate, absolute. Judicial instruments of discretion such as reasonableness and proportionality are in constant search for such attributes. Balancing and weighting 'are not scientific in nature'.[42] They are rather normative in nature. In the process of producing a definite judicial conclusion out of the indefinite whirlpool of conflicting interests, the certainty of temporal measurement is a source of stability, perhaps even a source of legitimacy. It is no surprise, then, that courts often consider the passage of time in determining reasonableness or proportionality.[43]

We shall return to the temporal aspects of reasonableness in the discussion on time as *nature*, examining the right to be tried within a reasonable time. Note that in the cases described so far, it was only the intensity of the violation that became

[40] A similar approach to time was applied by the US Court of Appeals (7th cir) in a case concerning the same subject of guaranteeing the chances of a new competitor. The Court found a five-year prohibition on making commercial contracts with certain customers to be 'reasonable'. *L. G. Balfour Co. v Federal Trade Commission* 442 F 2d 1, 23.
[41] Aristotle *Physics* Book IV Parts 10-13.
[42] Aharon Barak, *The Judge in a Democracy* (Princeton UP 2006) 165.
[43] Consider these further examples, in cases examining the constitutionality of imprisonment and detention. In all of the following cases the proportionality of the infringement on liberty was examined through the concept of the passage of time. In Israel: FCH 7048/97 *A vs. Minister of Defense* PD 54(1) 721. In France: Décision 2004-492 (n 34); CC décision 2010-31 QPC du 22 septembre 2010, M. Bulent A. et autres [Garde à vue terrorisme].

greater as time passed. We move now to the other side of the constitutional balance: those cases in which the passage of time indicates the magnitude of a conflicting interest.

The passage of time defining the magnitude of a competing interest

A year prior to the decision regarding *rétention de sûreté*, another part of the French reform of criminal procedure reached the *Conseil Constitutionnel*. In March 2007, the French legislator decided to modify art 5(2) of the Order of 2 February 1945, which originally provided for a special, longer criminal procedure for minors. The new legislation prescribed a stricter demand for 'immediate appearance in front of the juvenile tribunal'.[44] The claimants contended that the reform equalized the length of proceedings for minors with that for adults, thus preventing a special attention to minors, whilst including a necessary investigation of personal and social situation.

The *Conseil Constitutionnel* held that the modification of terminology did not affect any constitutional principle in itself.[45] Rejecting the challenge, the judgment first noted the tension between the special consideration of minors, which required a longer time to process justice, and the purpose of the new legislation, which was to guarantee that criminal proceedings were quick and efficient. However, examining the technical arrangements of the criminal procedure, it demonstrated that the reform did not prevent the operation of special proceedings necessary for under age suspects.

Crucially, in this case, a shortened duration of proceedings was the desired legislative goal, possibly justifying an infringement of individual rights. The passage

[44] Loi no 2007-297 du 5 mars 2007.
[45] CC décision 2007-553 DC du 3 mars 2007 *Loi relative à la prévention de la délinquance*. The decision was given in light of Articles 8 and 9 of the 1789 Declaration and of Article 56 of the Constitution.

of time is therefore central in the determination of the magnitude of the competing interests in this constitutional analysis. In this case, the passage of time did not directly affect the infringement of a right, but rather shaped the rationale which could justify such infringement. Time was a measurement for the advantage, which lies at the heart of the legislative purpose.

Time affects both the infringement and the competing interest

Investment Managers Chamber (1997)[46] was the first case in which the Israeli Supreme Court quashed Knesset legislation following the 'Constitutional Revolution' of 1992.[47] The Court examined the constitutionality of a new legislation that introduced compulsory licensing for investment management, and set the requirements for obtaining the licence, such as passing a professional qualification exam, and obligations of insurance and minimum equity.[48] The judgment focused on the transition orders established by the new Act. Section 48 provided that investment managers who had been in the profession before the enactment of the law for more than seven years were exempt from several requirements, including the qualifying exam. No such exemption was granted to those who practiced for less than seven years.

A group of investment managers who had been practising for less than seven years (and were consequently required to meet the same licensing demands as new practitioners) challenged this legislation. They argued that the new legislation, and

[46] HCJ 1715/97 *Investment Managers Chamber v Minister of Treasury* PD 51(4) 367.
[47] Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, both limiting the Knesset legislative powers, were enacted in 1992. The Israeli Supreme Court accordingly outlined the judicial power of review over legislation in its seminal 1995 case 6821/93 *United Mizrahi Bank* v *Migdal* PD 49(4) 221.
[48] Law for the Regulation of Occupation in Investment Consulting and Management of Investment Portfolio, 5755 – 1995.

especially the transition rules regarding examinations, disproportionally violated their freedom of occupation, and should therefore be abolished. The Supreme Court found that the general part of the Act complied with constitutional requirements. While the new law indeed infringed the right to freedom of occupation, it did so for a proper purpose: protection of investors and guaranteeing a high professional standard in the operation of the financial market. It held that the general part of the new law appropriately balanced these goals on the one hand, and the individual rights of those who wished to work as investment managers for the first time on the other.

Individuals who were already in the profession before the law was enacted were recognised as a special case: '[I]ndeed, a normative arrangement may be proportional for new dealers and non-proportional for senior dealers...'.[49] Therefore, the judgment continued, there should be a separate examination of proportionality for new managers and for senior managers. In the case of the latter, the requirements set by the transition rules were found more harmful than is required, or, in other words, not proportional.[50] As long as these rules were not amended, the entire arrangement for licensing for senior managers was abolished due to unconstitutionality.

One obvious role that time played in this case was in the question of temporal validity, concerning the timing in which this legislation came into effect. However, our interest is in the passage of time and not in *time as location*. There were three types of managers mentioned in this case:[51]

[49] *Investment Managers* (n 46) 407.
[50] ibid 410.
[51] Barak CJ provides a similar classification. ibid 410.

New Managers: those who had never worked as investment managers. Not exempted from examinations.

Experienced Managers: those involved in investment management for a period of one day up to seven years. Not exempted from examinations.

Senior Experienced Managers: those who had experience of more than seven years. Exempted from examinations.

The judgment did not affect Senior Experienced Managers who were released from any licence requirements. It was the situation of Experienced Managers that the case considered. To this end, the Court concluded that treating an Experienced Manager and a New Manager the same way was unconstitutional. The transition orders should have reflected a different balance between the benefit to the public and the damage to Experienced Managers, a balance which would have adequately considered their record in the business.

But how is the balancing of rights and benefits different for an Experienced Manager and a New Manager? What is it that becomes greater after four or five or six years? Is it one's freedom of occupation? Is it just the violation of this freedom? Or is there a different kind of intrusion that the appellants suffer from?

> In the case of a longer duration of previous occupation several different tools may be considered for the achievement of the same purpose. Experienced managers have a record which may substitute the qualifying examination; experienced managers may be authorised to deal with investments while studying for the exams; the content of the exams for experienced managers may be different than the one for new managers. All of these tools cast a lighter damage to the experienced managers, while remaining relevant to the rationale of the laws[52]

[52] ibid 407-408.

According to the judgment, the greater experience acquired by investment managers with the passage of time entailed that the suggested professional limitations caused both greater damage to the appellant, as well as lesser benefit to the public. Time hence affected the proportionality test in two ways: (1) compared to a New Manager, an Experienced Manager was more severely damaged by the law because of special reliance; (2) the experience that an Experienced Manager had acquired resulted in a lesser benefit for the public from the limitation of her freedom of occupation. Note how in statement (1) time increases the infringement, while in statement (2) time erodes the rationale of the legislation. In this double temporal analysis, the passage of time defined *magnitude* on both sides of the balance of interests.

The *legal sequence* examined in both arguments was the extent of experience of the appellants. Different lengths of this temporal interval define different degrees in the constitutional balance. The combined impact of argument (1) and (2) is that the longer the *legal sequence*, the stronger the constitutional case against the legislation. There is a quantity of time beyond which the violation is of a magnitude that is too great so it can no longer be justified by the rationale of the law. This is the temporal point of unconstitutionality. The question in *Investment Managers Chamber* was, then: does the seven-year limit fall before or after this point?

Magnitude – a summary

The extent of an infringement of liberty and the trade-off between liberties can be measured in terms of time. Such is the impact of time as *magnitude* on the constitutional evaluation. The operation of the passage of time may be described as linear and constant. For each unit of time, there is a steady rate of change in the

examined legal parameter, whether it is the strength of the interference with the right or the strength of the competing social interest.

In the cases we have examined so far, time has been operating with respect to damage, benefit, and the balance between them, while along the timeline it has always been similar rights, similar right holders, and similar duty bearers involved in the legal analysis. We now continue beyond the issue of scale, to examine other, perhaps less obvious, functions of the passage of time.

E. NATURE

Consider D, unlawfully detained with no trial for sixty years. It may be argued that her case is different from the case of C (who was detained for six months) not only in quantity but also in quality. We might suggest, for instance, that these decades of imprisonment did not only harm D's right to liberty and D's right to a fair trial, but also her very right to life, because the denial of freedom and autonomy for almost an entire lifetime eliminates a fundamental meaning of life itself.[53] Here, the duration of time reaches a level that determines the *nature* of a right. In cases such as this, time affects not only severity with respect to a fixed set of rights, as it is for *magnitude*, but it also shapes the catalogue of the rights involved.

[53] In the 'life sentence case' 45 BVerfGE 187 (1977) the Constitutional Court of Germany found a compulsory life sentence with no chance of release violating the principle of human dignity. The judgement focused on the negation of all hope for freedom.

If human rights are 'universal'[54] and 'inalienable';[55] if they are based on 'the sanctity of human life';[56] if these 'natural'[57] and 'fundamental'[58] interests are anchored in a declaration which should be kept 'constantly in mind',[59] then one might expect for them to be indefeasible also in a temporal sense.[60] We understand human rights to be unchanging, persistent, and immortal. They are untouched by time. The writers of the 1789 Declaration captured this notion in the opening of the preamble:

> …[T]his declaration, constantly presented before all members of the social body, shall remind them continually of their rights and duties;

However, when discussing a concrete situation, time does affect the assignment of rights. The pertinence and fulfilment of human rights depends both on material circumstances, which may change over time, as well as on the passage of time itself. And so, with time, rights that were not initially relevant may become applicable, and rights that were relevant may cease to be so.

The passage of time triggering a constitutional protection

The simplest and most direct illustration comes from statutes that either provide or deny rights with the passage of time. The Supreme Court in Canada reviewed several laws of this type: Canada Elections Act which prohibited inmates serving more than

[54] UDHR, Preamble.
[55] 1789 Declaration, Preamble; and UDHR, Preamble.
[56] Basic Law: Human Dignity and Liberty s. 1.
[57] 1789 Declaration, Preamble.
[58] Canadian *Charter*, s 2.
[59] UDHR, Preamble.
[60] It is interesting to note that, while Israeli legislation usually uses Hebrew language future or conditional tenses, the Israeli Basic Laws, including the Basic Laws which guarantee human rights, use present tense form, the *Beinoni Poel*, which conveys continuous occurrence. The French 1789 Declaration and the Canadian *Charter* both use present tense language.

two years in prison from voting;[61] the Canada Pension Plan which stipulated that survivor's benefit would be paid to a common law spouse only if the couple was cohabiting at the date of the death of the contributor spouse and for one year prior to that date;[62] and Ontario Human Rights Code which indirectly allowed setting a mandatory retirement age at 65,[63] to name a few examples.[64] In all these cases the examined legislation changes interests and duties depending on the length of time intervals – thus, justifying the involvement of certain *charter* rights at different points in time. The bottom line is that in the constitutional analysis relevant rights appear, disappear and reappear on account of different *legal sequences*.

Time as *nature* bears impact on the *prima facie* stage of the constitutional analysis. Unlike time as *magnitude*, it does not shape the balance of the right with another interest, but rather introduces the right itself. Consider the following example, in which the passage of time triggers a claim of discrimination.

Nova Scotia (Workers' Compensation Board) v. Martin[65] dealt with people suffering chronic pain who were denied permanent disability benefits. Workers' Compensation Act[66] excluded chronic pain from purview of regular workers' compensation system. Instead of the benefits that would normally be available to injured workers, the law provided a four-week functional restoration program beyond which no further benefits were available. The SCC ruled that this legislation infringed

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[61] Section 51(e) of the old Canada Elections Act. Examined in *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519.
[62] R.S.C. 1985, c. C-8, the definition of 'spouse' in s. 2(1), examined in *Hodge v. Canada (Minister of Human Resources Development)* [2004] 3 SCR 357.
[63] 1981, S.O. 1981, c. 53 s. 9(a) examined in *Mckinney v. University of Guelph* [1990] 3 SCR 229.
[64] Rights of way, a legal right to pass through property belonging to another, is a common law doctrine which includes a temporal condition: it may be established by usage over a period of time (as long as the path is used without the use of force, not in secrecy, and with no permission of the landowner – *nec vi, nec clam, nec precario*). This doctrine was adopted in Israel with a time requirement of 30 years: Law of Land 5729-1969 s 94; CA 700/88 *Istarchan v Ben-Horin* PD 45(3) 720.
[65] [2003] 2 SCR 504.
[66] S.N.S. 1994-95, c. 10, s. 10B.

s. 15(1) of the *Charter,* as it imposed differential treatment upon injured workers suffering from chronic pain on the basis of the nature of their physical disability:

> The scheme… ignores the needs of those workers who, despite treatment, remain permanently disabled by chronic pain… the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession... They ignore the very real needs of the many workers who are in fact impaired by chronic pain and whose condition is not appropriately remedied by the four-week Functional Restoration Program.[67]

In this case, *time as quantity* – both the duration of the illness and the duration of the compensation plan – was a defining element in the path to recognising the infringement of the right to equality. If the Court had not accepted these time related aspects, it could not have concluded that the impugned legislation violated s. 15.

Indeed, the judgment in *Martin* went to great lengths to apply a time-based perspective on the case. It highlighted the temporal aspects in the appellant's condition and even urged the development of an appropriate 'legislative response to the special issues raised by chronic pain claims'.[68] In that sense, this case well illustrates the main argument of this chapter: attention to the time dimension is not foreign to human rights adjudication, and the passage of time sometimes bears a crucial role in a human rights constitutional analysis.

[67] *Martin* (n 65) [5-6].
[68] ibid [6].

The passage of time and internal thresholds

Some rights have an internal threshold that, once crossed, triggers a constitutional protection. Such is, for example, the right to be tried within a reasonable time guaranteed by s. 11(b) to the *Charter*. In *R. v Conway*[69] the SCC reviewed a case where an accused was tried three times for the same murder charge (a second trial was ordered on the grounds that the trial judge incorrectly instructed the jury; in the second trial the jury failed to reach a verdict). Five years passed between the initial charge and the commencement of the third trial, partly on account of choices Conway made in the conduct of his defence. Rejecting his claim to the violation of the right to be tried within a reasonable time, and dismissing the appeal all together, the Court attempted to define the threshold of reasonableness in s. 11(b):

> [T]he cut-off point after which a delay becomes unreasonable must be determined by balancing a number of factors… among the most relevant ones… prejudice suffered by the accused, waiver of time periods, inherent time requirements and limitations on institutional resources… While some degree of impairment may necessarily result from the mere passage of time, in my view, greater weight in the overall assessment of reasonableness should attach to impairment resulting from delays not attributable to the person charged.[70]

The infringement on s. 11(b) is hence created only when a certain temporal threshold has been crossed. This is an example of the passage of time defining *nature* and not *magnitude*: time does not aggravate a pre-existing violation, but rather forms a new constitutional acknowledgment.

[69] [1989] 1 SCR 1659.
[70] Per L'Heureux-Dubé J., Dickson CJ and La Forest J concurring (paragraph numbers not indicated in the judgment).

However, the internal threshold does not have to mention time explicitly (as does s. 11(b)) in order to be sensitive to time. As long as a constitutional mechanism lets the passage of time trigger a human right, this allows the function of time as *nature.*[71] Consider the following examples, dealing with the right to be presumed innocent and the right to life, liberty and security of the person.

In *R. v Demers*[72] the SCC examined the constitutionality of the regime set in s. 672.54 of the Canadian Criminal Code (hereinafter 'CRC')[73] with respect to accused persons who are permanently unfit to stand trial.[74] The appellant suffered from Down Syndrome. He was put on a charge of sexual assault but was declared unfit to stand trial. Following three months in a psychiatric facility he was discharged under conditions by a Review Board acting under ss. 672.47 and 672.54 of CRC.

The key to understanding *Demers* is in the temporal distinction made in Canadian law between an accused who was found unfit to stand trial, and an accused who was found not criminally responsible.[75] The former status determines the person's mental state at the time of the trial. The latter relates to the time the offence was committed (and indeed, this temporal distinction is yet another example for the role of *time as location*).

A Review Board can order an absolute discharge for those found 'not criminally responsible'.[76] At the time *Demers* was heard, no absolute discharge was available for an accused who was found unfit to stand trial. As long as there was a

[71] Compare with the US Const. Eighth Amendment jurisprudence regarding the Death Row phenomenon, where 'cruel and unusual punishment' clause is triggered thanks to the passage of time. See *Knight v Florida* 120 S.Ct. 459, 461; Kate McMahon, 'Dead Man Waiting: Death Row Delays, the Eighth Amendment, and What Courts and Legislatures Can Do' (2006) *Bepress Legal Series,* Working Paper 1434; Margaret Radin, 'The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause', (1978) 126 U Pa L Rev 989.
[72] [2004] 2 SCR 489
[73] R.S.C. 1985, c. C-46.
[74] In combined effect with ss. 672.33 and 672.81(1) CRC.
[75] Compare with s. 16(1) CRC.
[76] s. 672.54(a) CRC.

prima facie case against the accused, the Review Board had to conduct a new hearing every year.[77]

As the Court mentioned, this arrangement was justified in the case of an unfit accused who suffered from a passing mental disorder: when found fit, he would be sent to trial under s. 672.48. But if the accused was permanently unfit to stand trial – as was the case with Demers – this would mean that he remained within the jurisdiction of the Review Board indefinitely.

The appellant presented a motion to obtain a stay of proceedings[78] or alternatively to declare s. 672.54 of no force and effect on the basis that it violated his *charter* rights. He argued, among other things, that his right to be presumed innocent under s. 11(d) was infringed because he had been subject to the criminal justice system for an indeterminable period, without ever being able to contest the charges against him.

The role of the passage of time in this argument was one of *nature*. The appellant did not argue that all criminal proceedings violated the presumption of innocence. Rather, it was because the process had no end that his right under s. 11(d) was injured. In other words, there is a certain temporal threshold beyond which the continuation of the criminal process amounts to a denial of the presumption of innocence. Demers's second argument was that his right to be tried within a reasonable time under s. 11(b) was infringed. Note how in his argument the application of both sub-sections similarly depends on time as quantity: both rights are actionable once a temporal threshold is crossed. According to Demers's position, with

[77] s. 672.81(1) CRC.
[78] Under s. 24(1) of the *Charter*.

the passage of time temporal quantity turns into quality, triggering both s. 11 (b) and s. 11(d).

The appeal was accepted, however, based on a different *charter* right. We shall continue this discussion, introducing the decision in *Demers* in section H which deals with time as *fluctuation*.

The Canadian case of *Chaoulli v Quebec*[79] is another sharp example for the impact of time on the nature of the right involved. The *Canada Health Act*, the *Health Insurance Act* and the *Hospital Insurance Act* limited access to private health services by banning private health care insurance from covering the same services covered by public insurance. Thus the State effectively limited access to private health care, except for the wealthy who could afford treatment without insurance. The result was a virtual monopoly for the public health scheme. The appellants in *Chaoulli* were concerned with long waiting time for health treatment in the public system. They argued that delays in the public system placed their health at risk, violating their right to life and security of the person under s. 7. They sought to strike down the prohibition on private insurance, thus allowing them to access private services. Allowing the appeal, the SCC held that outlawing private medical insurance was unconstitutional. In the words of McLachlin CJ:

> We are of the view that the prohibition on medical insurance… violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice… By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the *Charter*…[80]

[79] *Chaoulli v Quebec* 2005 SCC 35.
[80] ibid [104-105].

Here, again, the legal analysis focuses on a threshold of reasonableness which is expressed in temporal terms, and so the passage of time triggers a violation of s. 7. The Court found the long delays unreasonable, stating that they '...adversely affect the citizen's security of the person'.[81] The provision of 'timely health care'[82] was therefore considered a condition crucial to the appellants' rights.

Nature – a summary

This section has established that the passage of time can determine which rights are involved in a certain situation. As time passes, new rights may join the relevant constitutional catalogue and old rights may no longer be relevant. The passage of time sometimes affects the analysis, through a threshold that once crossed triggers the acknowledgment of a violation of a right. From this point onwards, time may bear the consequences of *magnitude*. This would mean that once the constitutional protection is relevant, a prolonged period of violation results with a greater violation.

F. ESSENCE

In the previous section it was suggested that the passage of time provides a threshold beyond which a new constitutional protection is applied. The *nature* aspect means that

[81] ibid [106].
[82] ibid [123].

for a certain situation, with time, the group of relevant human rights may change. Yet crucially, there is a difference between a right that becomes relevant with time, and a right that is *defined* by the passage of time. The impact of time in the case of the latter is integral, rather than accessory, to the right. It defines *essence*, not only scope and actuality. As in *nature*, the passage of time affects here the *prima facie* stage of the constitutional analysis, but this time is affects the very content of the right. To call back detainees A, B, C, and D, time as essence is relevant – in varying degrees of gravity – to all four of them, because in a sense, time is an essential component of any experience of arrest.

We find an interesting example in the Privy Council decision in *Riley v A-G of Jamaica*.[83] The case dealt with the death row phenomenon:

> It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading.[84]

Here the duration itself was identified with the suffering of the appellant. The passage of time not only activated the acknowledgement of a violation, but also, as a more substantive matter, determined its inherent value and a characterised the right involved.[85]

[83] *Riley v A-G of Jamaica* [1983] 1 AC 719.
[84] ibid 735 (per Lord Scarman and Lord Brightman, dissenting).
[85] Interestingly, this temporal approach in *Riley* is somewhat similar to the SCC understanding of time in cases dealing with assisted suicide to people suffering from a terminal disease. See *Rodriguez v British Columbia* (AG) [1993] 3 SCR 519, overturned in *Carter v Canada (AG)* [2015] 1 SCR 331.

Consider another example from the European Court of Human Rights, in the case of *Aristimuño Mendizabal v France*.[86] The claimant complained that following a long period of lawful residence in France the refusal to issue her with a long-term residence permit violated her right to respect for her private and family life under art. 8 of the ECHR. The Court discussed the implications of the fact that, for a decade, the French authorities granted her a series of one-year residence permits:

> [T]he alleged violation of art. 8 arises not out of measures to deport or expel but out of the precarious situation and uncertainty experienced by the applicant over a long period.[87]

The Court concluded that the failure to issue a residence permit for such a long period of time constituted an undeniable interference with the claimant's private and family life. The passage of time facing this uncertainty was the substance of the violation in this case.

Time and risk

For a slightly more complicated example of time as *essence*, we turn to *R. v. Morgentaler*,[88] the case that terminated the criminalisation of abortion in Canada. Section 251 of CRC defined abortion as a criminal offence and excluded cases where the therapeutic committee had by a majority of the members of the committee decided that '…the continuation of the pregnancy of such female person would or would be likely to endanger her life or health'.[89] The SCC stroke down this section, on the basis

[86] (2010) 50 EHRR 50.
[87] ibid [70].
[88] [1988] 1 SCR 30 (not to be confused with *R v Morgentaler* [1993] 3 SCR 463).
[89] Section 251(4)(c) CRC.

that it breached s. 7 of the *Charter*. The delay in obtaining therapeutic abortions due to mandatory procedures imposed by the state, the Court found, increased the risk of complications and mortality to a woman in a way which was sufficient to trigger the physical aspect of her right to security of the person:

> These periods of delay may not seem unduly long, but in the case of abortion, the implications of any delay, according to the evidence, are potentially devastating.[90]

And later in the judgment:

> [T]hese delays continue to result in an additional risk to the health of these women. The risk of post-operative complications increases with each passing week of delay.[91]

In *Mogentaler,* the passage of time entailed a higher exposure to possible danger. Note that health risk does not have to be an actual event – only a potential event depending on probability. Time is therefore used in the legal analysis as an index to predict the potential realization of a particular violation of a right. Moreover, by the logic of the judgment, it is not only that a woman faces danger during a certain period of time. Rather, it is that over this period of time she faces an accumulating, growing danger.

In *Morgentaler* the harm is by itself connected to time. This is another form by which time is inherent to the essence of a human right situation. It is interesting to

[90] *Morgentaler* (n 88) 58.
[91] ibid 105.

note that despite obvious similarities, the court in *Chaoulli*[92] did not apply the same probability-based analysis.

When time is in the role of *magnitude*, it bears a steady impact on the gravity of a human right violation. When the essence of the human suffering is in the prolongation itself, the passage of time may exacerbate even the increase of impingement. Mathematically speaking, while time in the role of *magnitude* brings linear increase in human rights violation, time in *Morgentaler* brought an exponentially increasing impingement. In this sense, we may say that the human rights violation in this case was faster than time.

G. AGENT

The duration of time might shape and change the individuals and institutions involved in a legal situation. As result of the passing of time, individuals whose rights were infringed may be no more affected. Others may become involved. With time, the law may also change those bearing legal responsibility with regard to a particular right. These are situations in which the passage of time modifies the group of agents involved in the human rights situation. We begin with the duty bearer and then turn to a shift in the person carrying the right.

What happened to A's son while his mother spent parts of her Monday afternoon in the police station? A's legal responsibilities as a parent did not change as

[92] Discussed above, see text to n 79.

a consequence of her six-minute detention, and neither did the various responsibilities of the State towards A's son. It is arguably different with respect to the son of C. During the six months of her detention, subject to conditions such as the availability of another parent, it could be that the State bore parental responsibilities towards C's child.[93] In this case the passage of time would have broadened the scope of responsibility of the State, and narrowed the duty of C.

To this end, Section 20 of the British Children Act, 1989, provides the following guidance:

> (1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of…
>
> ...
>
> (c) the person who has been caring for him being prevented (whether or not permanently and for whatever reason) from providing him with suitable accommodation or care.

In *R (P,Q and QB) v Secretary of State for the Home Department*[94] the court considered the appeals of two mother prisoners against the policy which only allowed babies to remain with their mothers in prison until they had reached the age of 18 months. The rights of both the mothers and their children were considered in the context of the right to privacy and family life under art. 8 of ECHR. Bearing in mind the 'potentially traumatic effect of separation'[95] the Court examined the above-

[93] In the UK alone some 18,000 children are affected by their mother's imprisonment each year. See Jean Corston,'The Corston Report' (Home Office 2007) 17-20. See also Janet Walker, 'Silent, Forgotten and Vulnerable: Examining the Risks for Children with a Parent in Prison' (2007) 69 Amicus Curiae 10; Richard Vogler, 'The Child, the Imprisoned Parent and the Law' in Roger Shaw (ed) *Prisoners' Children: What are the Issues?* (Routledge 1991) 101.
[94] *R (P,Q and QB) v Secretary of State for the Home Department* [2001] 1 WLR 2002.
[95] ibid 2020.

mentioned provisions of the 1989 Act as grounds for an alternative agent guaranteeing the child welfare. It dismissed P's appeal:

> The mother's position is indeed unenviable, but she has a long sentence left to serve. She was sentenced to eight year's imprisonment on 28 June 1999… She will be eligible for parole on 3 April 2003, when PB will be nearly four...[96]

As for the other child and her mother, the Court decided differently, based, among other factors, on a shorter imprisonment:

> The situation of QB is rather different. QB was born on 26 July 1999. She was nine months old when her mother was sentenced to five years imprisonment in April 2000. They were separated for only five days before admission to an MBU. The mother's parole eligibility date is 25 July 2002, when QB will be just three...[97]

In the case of P, a lengthier sentence created a shift in the parental duty, from the mother to the local authority. Human rights law recognizes various agents of legal duty correlating to protected human rights. The agent could be an individual (as in, for example, a negative responsibility not to cause physical harm to anyone), an individual in a special capacity (parent, employer, landlord), the State, or another public body. Duty is not static. It may pass from one public body to another, from one individual to another, from the State to an individual, or, as demonstrated above, from an individual to the State. In its role defining *agent* the passage of time is a significant factor in these shifts.

[96] ibid 2033-2034.
[97] ibid 2035.

Such temporal approach may cast a new light on the much-debated issue of positive rights and State obligations by correlating between the power of time on agency and the political conception of State duty. Instead of contemplating whether the State *should* have a positive duty with respect to a certain right, what if we could ask *when* should the state bear such a duty? The distinction between the duties to respect, protect, and fulfil;[98] concepts such as minimum core obligation;[99] and, naturally, the doctrine of progressive realization;[100] could therefore be represented in temporal terms,[101] raising questions such as: in which cases does the State have an immediate role? In which cases ought it to intervene only at a later stage? Is there a point in time beyond which the State must not only respect but also fulfil a certain right?

Time modifying the agent enjoying a particular right

Under English real estate and limitations laws, an adverse possession bars claims to recover prior rights if it remains unchallenged for long enough. The required period is usually 12 years.[102] A similar regime exists in Israel,[103] in France,[104] and in Canada

[98] Masstricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) [guideline 6].
[99] Sandra Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 84-87.
[100] See s. 26(2) of the Constitution of South Africa; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) [45]; Fredman, ibid 80-83.
[101] In the context of progressive realization, the SC of South Africa in *Grootboom* (ibid) [44] indeed speaks in temporal terms of 'those whose needs are the most urgent'.
[102] Limitation Act, 1980, s. 15(1) and Land Registration Act, 1925 (Land Registration Act, 2002 (schedule 6) changed the regime with respect to registered land); *Buckinghamshire CC v Moran* [1990] Ch 623, 644; *Mabo v Queensland* (No 2) (1992) 175 CLR 1, 211; Kevin Gray and Susan Gray, *Elements of Land Law* (5th edn, OUP 2009) 1158.
[103] Othman Land Law, s 78; Land Arrangement Order s 51; Sandy Kedar, 'Majority Time, Minority Time: Land, Nationality and Adverse Possession Laws in Israel' (1998) 21(3) Iyunei Mishpat 665 [Hebrew].
[104] In a 2008 reform, the period of prescription was changed in most cases from 30 years to 5 years: loi no 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile. Currently in Code civil arts 712, 2224, 2261.

with respect to unregistered land.[105] The passage of time results in a shift of title to land, when the intruder's obtaining of a property right is coupled with a loss of the same right by the titleholder. The right to property of the latter is curtailed by an arbitrary time limit.[106]

The European Court of Human Rights examined the British rule of 12-year limitation for adverse possession in *J.A. Pye (Oxford) Ltd v United Kingdom*.[107] The Court held that the rule was non-compliant with the first Protocol right to the 'peaceful enjoyment of possessions'.[108] The Grand Chamber reversed this decision two years later.[109] By ten votes to seven, it held that the law of adverse possession complied with the requirement of the ECHR for a fair balance between public interest and the rights of the titleholder. The majority controversially regarded the limitations principle as affecting only a control of use of the land, rather than deprivation of possessions.[110] The dissenting opinion of Loucaides and Kovler JJ strongly rejected this view.[111] However, the Court pointed out clearly that protection of possessions included either 'existing possessions' or assets such as claims to enjoy a property right. In any case, the applicant had lost the beneficial ownership with respect to the land and therefore Protocol 1 was applicable.[112] To this end, it is worth mentioning the opinion of the English Court of Appeal concerning this case. Among other things, the Court argued that the Limitations Act did not deprive a person of his possessions, but merely barred him of the right to bring an action to court which would recover his

[105] In Canada, rights in relation to land are regulated by the laws of the provinces and territories. For example the Ontario Land Titles Act, RSO 1990, provides that adverse possession of unregistered land is recognized after ten years; Alan Sinclair and Margaret McCallum, *An Introduction to Real Property Law* (Markham 2005) 45-46.
[106] Gray (n 102) 1158.
[107] (2006) 43 EHRR 3.
[108] ECHR Protocol No. 1, art 1.
[109] *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45.
[110] Gray (n 102) 1168.
[111] *Pye 2008* (n 109) [O-16].
[112] ibid [63].

property right.[113] Despite the differences, any one of these opinions leads to a similar temporal mechanism: the passage of time barred the application of a human right to one person, and opened way for another.

H. FLUCTUATION: CHANGE OVER TIME

At the outset of this chapter it was stated that the *passage of time* in law measures *time as quantity* over a certain *legal sequence*, and that a *legal sequence* relates to one continuous event (an action, a status, or circumstantial facts) or the distance between two events. All the cases discussed so far have included an event that was fixed over a period of time. The examined *legal sequence* in each case was anchored to this defining event, in the sense that the passage of time was measured as long as the event remained unchanged. The four temporal functions presented above – all different outcomes of *time as quantity* – resulted from sensitivity to the passage of time, and may therefore be summarised as enabling the impact of *duration*.

In the final section of this chapter, let us turn from *duration* to *fluctuation*: a different setting, in which the emphasis is not on the temporal extent of a stable element but rather on change of a certain element during a given interval. We therefore shift our focus now from *time as quantity* to *time as location*. Unlike the cases of *magnitude*, *nature*, *essence* and *agent,* here there is no fixed and predetermined event to define a legal sequence. Instead, the legal analysis examines

[113] *JA Pye (Oxford) Ltd v Graham* [2001] Ch. 804.

what happens to a material component (again, this would be an action, a status, or circumstantial facts) during a certain period. *Duration* and *fluctuation* are hence opposite terms: the former deals with invariability and continuation, whilst the latter deals with change.

The possibility of change

Recall *R. v Demers,* which was discussed above.[114] In this case, an appellant who was permanently unfit to stand trial attacked the constitutionality of an arrangement that made him subject to indefinite annual Review Board hearings. The judgment accepted the appeal, focusing on the impact of the impugned legislation (s. 672.54 CRC) on the right to liberty and security of the person (s. 7 of the *Charter*).

The Court distinguished between those who are permanently unfit to stand trial, and those whose mental capacities are expected to change over time. With respect to the latter group, the judges found the examined legislation appropriate because it advanced the goals of assessment of and treatment for the mentally disabled. Indeed, s. 672.54 CRC can result in rendering the accused fit and sending him to trial under s. 672.48. However, in the case of the permanently unfit, a trial is not a possibility:

> In enacting [this arrangement], Parliament has set up an assessment and treatment system so that the accused can become fit, thus creating a presumption of possibility of recovered capacity to stand trial. Consequently, the continued subjection of an unfit accused to the criminal process, where there is clear evidence that capacity will never be recovered… makes the law overbroad[115]

[114] Text to n 72.
[115] *Demers* (n 72) [42-43].

As the Court explains here, what the legislature had in mind – or should have had in mind – was change over time. Potential *fluctuation* in mental capacity was therefore the rationale behind the examined regime. For the permanently unfit, this was irrelevant because they expect no such change. 'Such individuals' the judgment concludes, 'will be subject to anxiety, concern and stigma because of the criminal proceedings that hang over them indefinitely.' In the absence of possible *fluctuation*, s. 672.54 does not stand the constitutional test.

Note that time is not the centre of attention here. The analysis does not require units of time, understandably, as it does not measure the passage of time. The judgment in *Demers* does not even mention time in expressive terms. Still it is strongly associated with temporal thinking, because the judicial analysis is interested with development and process. Indeed, *fluctuation* refers to time in the same sense that change refers to time in Aristotle's understanding.[116] To put simply, *fluctuation* requires the passage of time. It is a term that deals with diachronic time and not with unichronic time.[117,118]

Similar judicial analysis was employed by the Israeli Supreme Court in various contexts of human rights adjudication: anticipating change in place of residence in a divorce case,[119] anticipating the changing production rate in natural gas wells in a tax review case,[120] anticipating the number of religious students entitled for income support due to their studies in a discrimination action,[121] and anticipating

[116] *Physics* Book IV Part 11. Aristotle's concept of change and time is further discussed in ch 2(A).
[117] For the meaning of 'unichronic' see above text to n 14.
[118] It is therefore not rare for *fluctuation* to deal with anticipated change, as was the case in *Demers*. This raises a question as to how judges deal with the future, a subject which is discussed in ch 6(C).
[119] HCJ 7075/04 *A. v A.* (not published).
[120] HCJ 3734/11 *Dudian v The Knesset* (not published).
[121] HCJ 4124/00 *Yekutieli v Minister of Religious Affairs* PD 64(1) 142.

levels of government debt in future years in the context of a review of a social security reform,[122] to name a few examples.

Change over a specified interval

A typical context for the function of *fluctuation* would be cases involving legislation with a periodic nature. The cyclical impact of the regulation of the school year, annual leave, elections, annual or monthly tax reporting, and so on, all create legal situations in which the Court needs to examine change through time. Consider another example from Canada: s. 23(3) of the *Charter* states that the right to receive public funding for primary and secondary education in French or English requires that the number of children speaking a minority language is 'sufficient to warrant' spending on separate schooling or building of new schools. The numbers vary from year to year. The Supreme Court took this dynamism into account in *Mahe v Alberta*:[123]

> [T]he relevant figure for s. 23 purposes is the number of persons who will eventually take advantage of the contemplated programme or facility. It will normally be impossible to know this figure exactly, yet it can be roughly estimated by considering the parameters within which it must fall -- the known demand for the service and the total number of persons who potentially could take advantage of the service.[124]

[122] HCJ 5578/02 *Manor v Minister of Finance* PD 59(1) 729.
[123] [1990] 1 SCR 342.
[124] ibid [8].

The judgment went on to examine demographic forecasts and the anticipated rate of enrolment at the Francophone schools, in order to predict the applicability of s. 23 in different school districts.[125]

A temporal analysis of this sort governs cases dealing with legislation that sets cut-off points beyond which a legal arrangement changes. For example, the French *Revenu de solidarité active (RSA)*[126] and the Israeli Income Support Law[127] provide benefits that are based on periodical means testing. If a family's income goes above a certain threshold the benefits stop. When the entitlement is responsive to alterations in the economic condition of the household, it is obvious that over time some will move in and some will move out of eligibility. Such sensibility to *fluctuation* will be illustrated in several case analyses in subsequent chapters.[128]

Fluctuation – a summary

To conclude, *fluctuation* means that the legal analysis takes account of change over time. The period to which *fluctuation* relates could be either a clearly defined legal sequence or an unspecified open-ended period: while *Mahe v Alberta* focused on change during a particular school year, *Demers* examined the possibility of change in mental capacity anywhere in the future.

[125] See also *Arsenault-Cameron v Prince Edward Island* [2000] 1 SCR 3.
[126] Loi n° 2009-1673 du 30 décembre 2009 de finances pour 2010; See Philippe Mongin, (2008) 'Sur le Revenu de Solidarité Active' (2008) 118(3) Revue d'économie politique 433.
[127] Income Support Law, 5741-1980 ch 4.
[128] See ch 3(E2-E3), ch 4(D4) and ch 5(D2).

I. CONCLUSION

The goal of this chapter was, firstly, to demonstrate that time matters: that courts often pay attention to this dimension in the context of constitutional human rights. Secondly, it was to present a taxonomy of the constitutional implications to the *passage of time*. The cases reviewed here illustrate the leverage that time applies on different points in the legal analysis. Note that these functions of time do not exclude each other; the same legal setting may raise more than one function of *time as quantity*. These concepts allow us to identify and describe categories of legal thinking. They consequently depend on the legal argumentation. For example, in a case of adverse possession, the passage of time can be explained as introducing a new property right for the intruder and terminating a right for the titleholder (*nature*). The same setting could be also described as a shift of rights from one to another (*agent*).

Poverty is yet to be clearly defined and its dynamics adequately illustrated before we move to analyse the role of time in poverty cases.[129] Yet even at this early stage, we can recognise how poverty integrates into the time-based thinking presented in this chapter.

In the cases examined in the following chapters, the concept of poverty will embody what was regarded here as the defining event of a legal sequence. Being poor is a continuous event: a circumstantial fact spreading over a temporal interval. The length of this interval – the duration of poverty – is at the heart of the dynamic analysis. When we discuss the passage of time in the context of poverty, we deal with a time sequence along which the state of poverty remains unchanged. The duration of poverty may contribute to the constitutional analysis via any of the above-mentioned

[129] The definition of poverty and dynamic economics of poverty is the subject of ch 2.

functions of the passage of time. It can determine the *magnitude* of a claimed impingement, the *nature* or *essence* of the human right relevant to the case, or the *agents* affected by this right.

Furthermore, a time-based approach to poverty includes not only the notion of *duration* (the temporal quantity of poverty, captured by the question 'for how long will they be poor?') but also the notion of *fluctuation* (captured by the question 'will they be poor?'). The focus of the latter is on the change from poor to non-poor and vice versa. Over a certain temporal sequence, there may be a point in which an individual crosses the poverty line, either on her way up or down. When a legal analysis examines such mobility over time, it is dealing with time as *fluctuation*.[130] As mentioned above, *duration* and *fluctuation* are opposite terms: hence, the duration of poverty measures what happens in the absence of fluctuation in poverty.

We can now proceed to our main task: that is, to evaluate the human rights conception of poverty through the lens of time. This thesis contends that considering the duration of poverty has the potential to uncover a wider and more diverse picture of the human rights involved than a timeless, static conception would. However, before we move on, it is worth contemplating, in light of the different functions illustrated above, the potential results of ignoring the passage of time.

Overlooking the passage of time

The static vision of the tourist's camera could not tell a complete story of what was happening in the square in Munich. What would be the implications of perceiving a human rights violation cut off in time? What happens when the court elevates a

[130] This idea will be developed and illustrated in the context of income mobility in the following chapters: see n 128 above.

certain occurrence from the time continuum and perceives it out of temporal context? When the passage of time functions as a factor of *magnitude*, disregarding the time element will distort the calculation of damage and benefit. The constitutional balancing would misrepresent the actual scale of violation of the right involved. When the passage of time functions as a factor of *agent*, not giving account to time may cause a misleading conclusion on the subject enjoying the legal interest, or a problematic conclusion regarding the responsibilities correlating to the rights involved. Rights and duties may be cast on the wrong actor. When the passage of time functions as a factor of *nature*, disregarding time may lead to ignoring relevant rights or taking irrelevant rights into consideration. What happens when the court ignores the passage of time as a factor of *essence*? Consider the punishment of Sisyphus, King of Corinth.[131] A static account of his condition, describing Sisyphus frozen in time, would obviously miss the point. This hero of mythology was not condemned just to roll a bolder to the top of a mountain; he was condemned to do so *throughout eternity*. The essence of his punishment lay in the time dimension. When the days, months, or years are not measured out in cases where time affects *essence*, the court may fail to spot the very core of the situation before it. This would lead to a fundamental defect in the legal evaluation.

The perception of a situation is, then, dependent on the temporal perspective. But still when dealing with poverty, time is overlooked. Before we present these cases, let us first define what poverty is and examine its temporal treatment in economics. This is the subject of Chapter Two.

[131] Homer, *Odyssey* (Samuel Butler ed, Red and Black 2008) 593-600.

2 Poverty and Time: Economic Dynamic Perspectives on Poverty

Just as if the 'now' were not different but one and the same, there would not have been time, so too when its difference escapes our notice the interval does not seem to be time.

Aristotle[1]

A. INTRODUCTION

The Chinese word for dinosaur, *Kong-long* (恐龍), translates as 'dreadful dragon', a reminder of an ancient belief that fossils were bones of the mythical monster. Indeed, fossils were noticed much before Aristotle's time. Noticed, but not understood. In order to expose their true nature, these animal-shaped stones (and plant-shaped stones) had to be dug out not only from under the ground, but also from static

[1] *Physics* Book IV Part 11.

conceptions which took no account to time.[2] Perhaps it is no coincidence, then, that it took the mind of a philosopher who thought extensively about time, to realize that these remains of life were covered thanks to transformations in 'the relation of land to sea'.[3] These changes, Aristotle noted, occur over periods of time so long, that they could not be observed during a human lifetime.[4]

It was not before the awakening of two scientific doctrines, both tightly connected to time, that the interest in fossils developed into its modern form of palaeontology. Modern geology contributed the notion of 'deep time', the tremendous chronological scale applied in the studying of the material of the Earth.[5] Early transmutation theories,[6] later replaced by Darwin's Evolution Theory, contributed a dynamic account of the evolution of species. The combination of these dynamic approaches made it possible to identify the process of fossilisation, and to expose what the fossil record tells us about life in ancient eras.

Palaeontology, a historical science,[7] is a particularly good example for how thinking about time contributed to a developing body of knowledge. Such attention to the role of time has similarly enriched many other fields of research. Consider some examples from the social sciences: the focus on 'extensive form games' in game theory, provoking a new debate on repeating playing periods;[8] the introduction of

[2] See Christopher McGowan, *The Dragon Seekers: How an Extraordinary Circle of Fossilists Discovered the Dinosaurs and Paved the Way for Darwin* (Perseus Pub. 2001) 1.
[3] Aristotle *Metereology* Book I Part 14.
[4] Prior to Aristotle, Herodotus (5th century BC) learned from fossil shells that land was once under water. Brian Hall and Benedikt Hallgrimsson, *Strickberger's Evolution* (4th edn, Jones and Bartlett, 2008) 14.
[5] Jack Repcheck, *The Man Who Found Time: James Hutton and the Discovery of the Earth's Antiquity* (Perseus Pub. 2003) 145.
[6] Such as Jean Baptiste Lamark's *Philosophie Zoologique* (first published 1809, Flammarion 1999).
[7] Rachel Laudan, 'What's so Special about the Past?' in Matthew Nitecki and Doris Nitecki, *History and Evolution* (SUNY Press 1992) 55, 58.
[8] Reinhard Selten, 'The Chain Store Paradox' (1978) 9(2) Theory and Decision 127.

'dynamic inconsistency' theories in public policy studies,[9] relating to the gap between short term considerations and long term considerations in decision making of political agents; the theory of social constructionism, arguing that over time concepts and mental representations are shaped by the political and social context;[10] Freudian psychodynamics, suggesting that events in the past shape human mind.[11]

These studies were not interested in time *per se*. Rather, they made provision for time, focusing on process and change, thus raising new questions, suggesting new methods, drawing new models and, eventually, inspiring new explanatory theories. This is the essence of dynamic thinking. Such approaches often, though not always, placed themselves in opposition to earlier theories which had presumed an unchanging situation under fixed structures.

This chapter discusses how dynamic thinking enriches the economic study of poverty. The goal is to provide a terminology of poverty and poverty dynamics, which should allow, in the following chapters, to examine the temporal assumptions underlying the judicial treatment of the subject, and make a distinction between a static approach and a dynamic approach. It is done in three steps. Section B discusses the role of time in economics. It traces the origins of temporal approaches in the history of modern economic thought, and demonstrates the importance of dynamic approaches in contemporary research. This is where I suggest a definition for 'economic dynamic thinking'. We then turn to poverty in Section C. At first, the subject is discussed regardless of time, with the aim of providing a set of definitions for poverty, so that we can clearly locate what kind of poverty we are discussing, and

[9] Finn Kydland and Edward Prescott, 'Rules Rather than Discretion: The Inconsistency of Optimal Policy Plans' (1977) 85(3) Journal of Political Economy 473.
[10] Peter Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Doubleday 1966) 1.
[11] Calvin Hall, *A Primer of Freudian Psychology* (Plume 1999) 13-16.

identify different possible applications of the term in the examined cases. The remaining of the chapter considers the impact of time on poverty. Section D discusses temporal aspects in the definition and measurement of poverty. Section E introduces key concepts and economic theories on low welfare dynamics. Section F concludes.

B. DYNAMIC THINKING IN ECONOMICS

How do economists deal with time? Temporal thinking has played a role in modern economics right from its early stages in the 18th century. David Hume introduced gradual adjustments in trade surplus, as well as a dynamic version of monetary quantity theory, as long ago as 1752.[12] Italian economist Ferdinando Galiani introduced in 1768 a notion of adjustment towards economic equilibrium.[13] In 1776, Adam Smith's *The Wealth of Nations* laid the basis (developed a century later by Leon Warlas) for the idea that over time, market forces adjust supply and demand to reach equilibrium.[14] These early models did indeed suggest an understanding of the economy as a process, but bar a few exceptions (the most famous being Thomas Malthus' dark portrayal on the dynamics of population growth[15]) they did not talk

[12] Namely, the idea that an increase in the supply of money might affect the real economy for a certain time interval. David Hume, *Political Discourses* (first published 1752); and see Ernesto Screpanti and Stefano Zamagni, *An Outline of the History of Economic Thought* (2nd edn, OUP 2005) 63.
[13] Ferdinando Galiani, *Dialogues sur le commerce des bleds* (first published 1768); Screpanti and Zamagni (n 12) 62.
[14] Adam Smith, *An inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776); and see Richard Day, *Complex Economic Dynamics: Vol 2 - An Introduction to Macroeconomic Dynamics* (MIT Press 2000) 333.
[15] Steven Medema and Warren Samuels, *The History of Economic Thought: A Reader* (Routledge 2003) 193. I return to Malthus in the last section of this chapter.

about continuous change. They only described short-term variations in factors. Upon reaching equilibrium, the system in these models remained there. 18th century economists were offering, in other words, motion in one place.

A century later, early neoclassical analysis, most notably Alfred Marshall's *Principles of Economics*, was still static to some extent.[16] Change arrived with the recession of the 1920s and 1930s, where Western markets appeared to be straying away from equilibrium. This created a need to explain credit fluctuations and continuous decline in production. It was in these decades that dynamic macroeconomic theories arose,[17] initially in the field of monetary economics, later in other aspects of the economic system. We may trace several origins for what is today regarded as 'Keynesian theories' of economic dynamics. For my purposes here, it will be most useful to dwell upon the contributions of the Stockholm School, because their path of research and the problems they encountered are somewhat parallel to my arguments on the law. Erik Robert Lindahl, Karl Gunnar Myrdal and several other Swedish economists in this group dealt with problems of inter-temporal equilibria, or, in other words, 'equilibrium through time'.[18] Lindahl, who probably deserves to be credited as one of the fathers of modern economic dynamics, introduced the concept of 'temporary equilibrium'. An economic system, he suggested, travels through successive points of balance over successive periods of time.[19] The reason for exiting one equilibrium and moving on to the next, was, according to Lindahl, 'unpredictable disturbances'. But this left unanswered exactly the dynamic behaviour in question. Lindahl's model was indeed criticised for not explaining the change between points of

[16] Screpanti and Zamagni (n 12) 204-205 and 234.
[17] ibid 233.
[18] ibid 237-238.
[19] ibid 238.

equilibrium. He later admitted that by neglecting this element he had attempted to introduce 'dynamic problems into a static context'.[20]

In a 1939 article entitled 'The Dynamic Approach to Economic Theory'[21] Lindahl corrected this lacuna and made what economic historians Screpanti and Zamagni later called 'a decisive jump forward'.[22] He abandoned the classic Walrasian idea of equilibrium, and drew instead a model of ever-changing disequlibria, based on different future expectations. This time, Lindahl introduced *dynamic problems into a dynamic context*. This marked the birth of non-Walrasian models, and arguably the emergence of modern economic dynamics. It remains to be seen in the following chapters whether Lindahl's re-evaluation of his own temporal approach can be mirrored in the study of poverty and constitutional law.[23]

In his famous *General Theory of Employment Interest and Money* (1936), John Maynard Keynes adopted, consolidated and developed these ideas in order to study what he called 'the forces which determine changes in the scale of output and employment as a whole', using a method of 'analysing the economic behaviour of the present under the influence of changing ideas about the future'.[24] In 1946 Burns and Mitchell published a study of business cycles, identifying points in time in which economic indicators change trend.[25] Ten years later, Robert Solow published his

[20] ibid.
[21] Published in Erik Lindahl, *Studies in the Theory of Money and Capital* (first published 1939, new edn, Kelley 1970).
[22] Screpanti and Zamagni (n 12) 238.
[23] Chapter Seven will revisit Lindahl's work. See further discussion in ch 6(D)-(G).
[24] John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (first published 1936, Harcourt-Brace-Jovanovich 1964) vii.
[25] Arthur Burns and Wesley Mitchell, *Measuring Business Cycles* (National Bureau of Economic Research 1946); and see Stephen Beveridge and Charles Nelson, 'A New Approach to Decomposition of Economic Time Series into Permanent and Transitory Components with Particular Attention to Measurement of the Business Cycle" (1981) 7 J Monetary Economics 151.

exogenous growth theory, a key step in modelling long run increase in output.[26] Ever since these classic works, economic research deploys dynamic thinking as a prime viewpoint.[27] Contemporary economists forecast, interpret and test hypotheses regarding the behaviour of variables through time,[28] from fluctuations in aggregated economic activity[29] to economic shocks,[30] from unemployment[31] to wage levels,[32] from monetary dynamics such as exchange rate movements,[33] interest rate fluctuations,[34] and inflation dynamics[35] to changes in income inequality.[36] Econometrics, the branch of economics that deals with statistical method, also makes time explicit in its analysis. Traditionally, time-series econometrics was used to forecast the behaviour of a variable.[37] With the growing interest in economic dynamics, both time-series econometrics (analysing the dynamics of single variable data) and panel-data econometrics (analysing the dynamics of cross-section data)

[26] Robert M. Solow, 'A Contribution to the Theory of Economic Growth' (1956) 70(1) Quarterly J of Economics.
[27] Walter Enders, *Applied Econometric Time Series* (3rd edn, Wiley 2010) 1.
[28] Don Ethridge, *Research Methodology in Applied Economics: Organizing, Planning, and Conducting Economic Research* (2nd edn, Blackwell Publishing 2004) 148.
[29] Oliver Blanchard and Danny Quah, 'The Dynamic Effects of Aggregate Demand and Supply Disturbances' (1989) 79(4) American Economic Rev 655.
[30] Pierre Perron, 'The Great Crash, the Oil Price Shock, and the Unit Root Hypothesis' (1989) 57(6) Econometrica 1361.
[31] Philip Rothman, 'Forecasting Asymmetric Unemployment Rates' (1998) 80(1) Rev of Economics and Statistics 164.
[32] James Davidson and others, 'Econometric Modelling of the Aggregate Time-Series Relationship Between Consumers' Expenditure and Income in the United Kingdom' (1978) 88 Economic J 661.
[33] Rüdiger Dornbusch, 'Expectations and Exchange Rate Dynamics' (1976) 84(6) J of Political Economy 1161.
[34] Yamei Liu and Walter Enders, 'Out-of-Sample Forecasts and Nonlinear Model Selection with an Example of the Term Structure of Interest Rates' (2003) 69(3) Southern Economic J 520.
[35] Phillip Cagan, 'The Monetary Dynamics of Hyperinflation', in Milton Friedman (ed), *Studies in the Quantity Theory of Money* (University of Chicago Press 1956).
[36] Andrew Harvey and Jared Bernstein, 'Measurement and Testing of Inequality from Time Series of Deciles with an Application to U.S. Wages' (2003) 85(1) Rev of Economics and Statistics 141; and see Barry Chiswick and Jacob Mincer, 'Time-Series Changes in Personal Income Inequality in the United States from 1939, with Projections to 1985' (1972) 80(3) The J of Political Economy S34.
[37] Enders *Econometric Time Series* (n 27) 1-7.

provided richer mathematical tools for interpreting trends and fluctuations in multiple time periods.[38]

The legal and the economic understanding of 'dynamic'

How can we define dynamic thinking in the economic context? 'A system is dynamical if its behaviour over time is determined by functional equations in which variables at different points of time are involved in an essential way'.[39] The key in this definition, presented by the Italian economist Giancarlo Gandolfo,[40] is the temporal distance between different arguments (inputs) of a function. Compare this with the definition proposed in Chapter One: dealing with *time as quantity* in the legal context, I named both the length of one event, and the measured distance between two events, a *legal sequence*.[41] I regarded *the passage of time* as the duration of time (as quantity) with respect to a certain *legal sequence*. This understanding of time in law is not far from Gandolfo's interpretation of time in economics. Dynamic thinking is, therefore, concerned with the impact of *the passage of time* on material elements, to use a legal language, or its impact on essential variables, in Gandolfo's economic words.

We can now turn to poverty and time. The following section stipulates a definition for poverty, or, rather, maps and analyses the many different definitions proposed for the term. Based on this terminology, I then move to explore the role of time, presenting some insights on economic mobility, income fluctuations, and the

[38] Manuel Arellano, *Panel Data Econometrics* (OUP 2003) 1; and see George Box and others, *Time Series Analysis: Forecasting and Control* (Holden-Day 1970).
[39] Giancarlo Gandolfo, *Economic Dynamics* (3rd rev ed, Springer 1996) 1.
[40] With this definition Gandolfo follows Ragnar Frisch, 'On the Notion of Equilibrium and Disequilibrium' (1936) 3(2) *Review of Economic Studies* 100 and Paul Samuelson, *Foundations of Economic Analysis* (Harvard UP, 1947).
[41] See ch 1(C).

duration of poverty. The next section discusses, therefore, the semantics of poverty, and the section that follows incorporates temporal thinking.

C. DEFINING POVERTY

Mainstream economic literature offers very different definitions of poverty, but gives very few reasons for preferring one definition to the other. Many, probably most, of the studies and reports on the subject use one of the accepted poverty lines without defending their choice and occasionally without even specifying that this definition was favoured over others. Some other studies deal with a continuous axis of income, without designating where, on the scale of riches to rags, poverty starts.[42] However, the scarcity of reflection on semantics should not be surprising. Poverty may be a word commonly used, but there is no agreement on what it stands for, and a close examination of what one actually means by this expression reveals one's normative assumptions. It locates the speaker in a context of social ideas. Contemporary economists rarely take part in such adventures. But if a politically charged discussion on definition is escapable, definition itself is not, and adopting one particular meaning of poverty, even if done with the poker face of scientific objectivity, still frames the

[42] For example Samuel Bowles and others (eds), *Unequal Chances: Family Background and Economic Success* (Princeton UP 2008).

debate and inevitably affects its conclusions.[43] Exactly for these reasons, we turn now to the discussion on the definition of poverty.

This discussion is divided into three categories of questions: the *what*, the *how*, and the *who*.[44] The first set of questions, 'poverty in *what*', refers to the indicator of well-being. Should poverty be measured by income? By a combination of income and assets? Or perhaps by consumption? Some approaches define poverty as lacking in non-material interests or advantages, calling for a multidimensional understanding of the term.[45] The many different definitions of welfare consequently suggest different definitions for being short of it.

The second category of *who* deals with the subject of poverty. It raises questions such as: should we measure the total welfare of a family? Or focus on individuals? This category also refers to inquiries into the poverty of special groups, such as old people or children. The third category deals with *how* to measure poverty. Primary here is the conceptual tension between defining poverty with comparison to the society (relative poverty) or in fixed terms (absolute poverty). Further to that, this category includes technical debates on measurement and methods of calculation. I now move on to elaborate on the *what*, the *who,* and the *how* of the conventional definition of relative poverty. Subsequently I will describe two alternative

[43] Interestingly, Statistics Canada, the national statistical agency, refuses to publish formal data on poverty as long as the Government does not define who is poor: '[P]overty is intrinsically a question of social consensus... [i]t is through the political process that democratic societies achieve social consensus... [t]he exercise of such value judgements is certainly not the proper role of Canada's national statistical agency'. Statistics Canada does actually publish the 'Low Income Cut-offs' and the 'Low Income Measure', the former practically an absolute poverty line, the latter equivalent to the relative poverty definition accepted by the OECD, but the agency 'regularly and consistently emphasize[s] that these are quite different from measures of poverty'. See: Ivan Fellegi, *On Poverty and Low Income* (Statistics Canada, 1997).

[44] Here I follow Nicholas Barr's slightly different categorisation: Nicholas A Barr, *The Economics of the Welfare State* (4th edn, OUP 2004) 127.

[45] See further discussion below, text to n 101.

approaches, namely, Rowntree's primary poverty (known as the absolute approach) and Sen's poverty in capabilities.

Conventional definition of relative poverty

The relative approach considers as poor someone whose income is significantly lower than most others. This approach is therefore interested in the gap between one's income and the typical income of the time and the place. What I call *conventional* is a relative definition proposed in the 1960s by Victor Fuchs,[46] commonly used today by policy makers in Israel and France, adopted by the OECD, and widely applied in economic and social policy literature. It draws the poverty line at 50% (and sometimes at 60%) of the national median income. The income test refers to households, and it is standardised by the size of the family. I shall explain this method following the three categories.

Poverty in what. In a market economy, the conventional approach assumes, poverty should be portrayed not by the actual existence of certain goods and services, but rather by measuring the purchasing power to obtain them.[47] Hence the focus is on the flow of money, whether by earned income (salaries, wages, interests, rents, profits) or by unearned income (pensions, welfare payments and other compensations).[48] However, money income is not the sole source of purchasing power. First, assets and credit also determine the ability to obtain goods and services in the market.[49] Secondly, some people enjoy income in kind, such as growing their

[46] Victor Fuchs, 'Redefining Poverty and Redistributing Income' [1967] The Public Interest 88. The relative approach to poverty was advocated (in the UK) by Peter Townsend already in the 1950s. See Peter Townsend, 'Measuring Poverty' (1954) 5(2) The British Journal of Sociology 130.
[47] Bradley Schiller, *The Economics of Poverty and Discrimination* (6th edn, Prentice Hall 1995) 30-31.
[48] Alan Batchelder *The Economics of Poverty* (Wiley 1966) 3.
[49] Both assets and credit are resources of purchase power that are based on stock rather than on flow. This issue is discussed later, text to n 182.

own vegetables in the garden, or receiving non-financial benefits from the work place (e.g. a car) or from the government (e.g. free housing). Notional income for residency, which is the conceptual income from living in a self-owned home, is also equivalent to income in kind.[50] Still, due to the technical complications in measuring these elements, statistics of poverty usually does not include income in kind, nor assets and occasionally not even credit. This means that families with low income will be counted as poor even if they posses large property.[51] Financial income is therefore chosen not as a perfect but merely as the best available determinant for purchase power adequacy. Poverty line is, accordingly, a level of income, expressed in units of money, which represents the upper limit of purchasing power inadequacy.[52] Barr,[53] Schiller,[54] Batchelder,[55] Perlman[56] and Atkinson[57] all suggest an income-based assessment of poverty.

Progressive tax systems and transfer payments in the form of social security and income guarantee schemes make up for inequalities in income and consequently reduce the level of poverty in considerable proportions. Figures of poverty before government intervention (pre-tax or brut poverty) indicate the situation in the labour market and are also used in order to evaluate the burden on the welfare system. Figures of poverty after government intervention (post-tax or net poverty) reflect the practical welfare situation of individuals and families.

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[50] High levels of income in kind in rural areas compared to urban areas (due to, inter alia, higher levels of privately owned homes) may lead to an over estimation of poverty in the latter. Different levels of income in kind may lead to inaccurate comparisons between countries. See Batchelder (n 48) 7.
[51] Empirical studies of poverty in assets as well as studies which include income in kind reveal a richer picture but not a substantially different one. See Batchelder (n 48) ch 3.
[52] Richard Perlman, *The Economics of Poverty* (McGraw-Hill 1976) 8.
[53] Barr (n 44) 127-134.
[54] Schiller (n 47) 19-25.
[55] Batchelder (n 48) ch 1.
[56] Perlman (n 52) 3-18.
[57] Anhtony B Atkinson, *The Economics of Inequality* (2nd edn, Clarendon Press 1983) 224-230.

Who. Mindful of the fact that people living together in one house act in most cases as a single economic unit, income surveys usually calculate the total income and the joint expenses of the household. Poverty definition, accordingly, measures the welfare of households. A few questions arise regarding the subject of such surveys.

First, different families have different needs and therefore a general comparison of incomes will always suffer from simplification. Half of the median income may be not enough for persons with special medical needs;[58] people who live in different regions may face substantially different price levels. But a wide perspective demands universality and it is imperative if we want to reach general conclusions. The standard counting of poverty is therefore made usually in the national level, with no regards to special needs.[59]

Secondly, households differ in size. An income adequate for a couple with no children may be insufficient for a six-member family. Any poverty count that disregards household size will fail to notice large families for whom the national median income is simply not enough.[60] The conventional definition is therefore adjusted for size. Because of advantages to scale (a family of six, just like a family of two, needs only one kitchen) the household income is modified by an equivalence scale, which gives decreasing marginal weight per family member.

Thirdly, in a time when single parent families, cohabiting couples, single sex parents, and other non-traditional forms of family units are increasingly more prevalent, the measurement of welfare in most cases does not assume a traditional

[58] Morton Paglin, 'The Measurement and Trend of Inequality: A Basic Revision' (1975) 65(4) American Economic Review 598.
[59] Some studies focus on the welfare of specific groups. See for example, Constance Citro and Robert Michael (eds), *Measuring Poverty: A New Approach* (National Academies Press 1995); for a focus on women, children and old people see Gøsta Esping-Andersen, *Why We Need a New Welfare State* (OUP 2002).
[60] Batchelder (n 48) 7, 22-30.

family structure but rather focuses on all habitants of one house as a single economic unit. The conventional approach, which was originally tailored for the typical family is today focusing on the habitants of the household.

Lastly, a focus on the income of the entire household may neglect the division of resources between its members. Women, for example, do not necessarily share equally in the household financial resources.[61] How income is shared within the family has a dominant impact on our understanding of the frequency and the spreading of poverty.[62]

How. So now we have a measurement of the total income, both earned and non-earned, of the household, adjusted to size. How should we determine the income gap between this figure and the typical income of the time and the place? There is more than one way to do that. One technique is to regard as poor those who are simply at the bottom of the income distribution. This would mean that as long as inequality exists, a fixed portion of the society will always be regarded as poor. The elimination of poverty would require, following such a definition, an end to all income differences. Alternatively we could refer to the gap from the mean (average) income. However, the statistical mean is shifted upward by few very high incomes of those at the top of the scale and it is therefore an imprecise determinant for the typical welfare standard in the society.

Victor Fuchs suggested using the median income instead, defining as poor a households whose income is lower than half of the national median income. The advantage of representing the standard of living by reference to median income is that this figure is indifferent to the value of top incomes. As pointed by Schiller, the

[61] Shelley Phipps and Peter Burton, 'Sharing within Families: Implications for the Measurement of Poverty among Individuals in Canada' (1995) 28(1) The Canadian J of Economics 177.
[62] I return to this subject later discussing the work of Amartya Sen. See text to n 108.

elimination of poverty defined this way requires not the complete elimination of income differences, but merely the *reduction* of differences.[63] The Fuchs poverty line moves upward with the growth in the general standard of living, allowing, as Perlman points, for changing social standards on what constitutes poverty.[64]

The 50% line is obviously not an imperative level. Both EU and OECD sometimes refer to a higher level of 60% of the national median.[65] 33% of median income is occasionally used for defining extreme poverty.

The relative approach has been criticised on three main points. First, that the poverty line it provides is actually an index of income inequality and not of poverty. Handling this assertion invites a further discussion on the basic needs that are at the heart of the relative approach. This debate with its clear normative aspects exceeds the boundaries of the present study. The second criticism is that a simple headcount ratio misses the true severity of poverty because it does not measure the poverty gap, that is, how far households are from the poverty line.[66] A third, related, criticism is that the relative measurement does not provide information on the actual material state of the poor.[67] We now move to discuss the absolute poverty approach, which deals directly with this last point.

[63] Schiller (n 47) 22; and see Perlman (n 52) 14.
[64] Perlman (n52) 15.
[65] Esping-Andersen (n 59) 34.
[66] Several indices provide this information measuring, per each household, the percentage shortfall in income from the poverty line (which is typically measured in the same relative terms). Notable is the FGT index. See James Foster and others, 'A Class of Decomposable Poverty Measures' (1984) 52(3) Econometrica 761.
[67] Schiller (n 47) 23.

Rowntree's primary poverty: an absolute definition

In 1901 Benjamin Rowntree published a study of low-income families in York which was one of the first to consider the question of poverty definition in detail.[68] His main focus was what he called primary poverty, defined as having income 'insufficient to obtain the minimum necessaries for the maintenance of merely physical efficiency'.[69] He calculated this level by referring to specified diets that meet minimum nutritional requirements, with the addition of certain amounts for clothing and house necessities such as cooking and heating. The result was a yardstick of a life-sustaining minimum.

This was the foundation of the absolute approach to poverty. The point of reference in this method is not other people's income, but rather a fixed list of goods and services. A later definition, proposed by the US Council of Economic Advisers in 1963 and further developed by Mollie Orshonsky,[70] relied on a similar principle, with a list of nutritional essentials. This time, non-food items were calculated based on the average proportion between food expenses and the total expenses of families of different sizes. The budget required for buying the minimum nutritional needs was then multiplied by (the reciprocal of) this proportion.[71] This is the basis for calculating the poverty line in the US until today. The current poverty line, published by the US Bureau of the Census, is calculated as three times the amount required for a subsistence diet. This poverty threshold is updated annually only to adjust to price

[68] Rowntree followed the 1889 work of Charles Booth (with Clara Collet) in London: Charles Booth, *Life and Labour of the People - Vol 1* (Williams and Norgate 1889).
[69] Benjamin Seebohm Rowntree, *Poverty: A Study of Town Life* (first published 1901, Longmans, Green & Co. 1922) 117.
[70] Mollie Orshonsky 'Counting the Poor: Another Look at the Poverty Profile' (1965) 23 Soc. Secur. Bull. 3.
[71] Kenneth Hanson, 'Mollie Orshonsky's Strategy to Poverty Measurement as a Relationship Between Household Food Expenditures and Economy Food Plan' (2008) 30(3) Rev of Agricultural Economics 572; and see Atkinson (n 57) 225.

rise. Its real value remains fixed.[72] Similarly, Statistics Canada publishes the Low Income Cut-Off (LICO), with poverty defined as having a consumption proportion of food, clothing, and shelter at more than 20 percentage points greater than the Canadian average.[73]

For the completion of the picture, it is worth mentioning the leading approach taken by international organizations, even if this definition is not applicable to the countries examined here. 'Poverty is pronounced deprivation in well-being...', defines the World Bank, '[i]t includes low incomes and the inability to acquire the basic goods and services necessary for survival with dignity'.[74] This definition is coupled by the World Bank's extreme poverty benchmark of living on less than US $1.25 per day.[75]

The absolute approach ultimately examines the total income of the household, to see whether it is sufficient to meet minimum standards. The difference between the relative approach and the absolute approach is therefore only in the way the cut-off level is originally derived, that is, in the *how* and the *in what* questions. As for the

[72] Even though American households today spend one fifth, and not one third, of the total income on food. See Schiller (n 47) 46.
[73] The LICO is annually adjusted to price level. Until 1992, it was also rebased every few years to adjust to changes in expenditure in the general public. It has been debated whether it is a relative or an absolute measurement. However, having not been updated for 20 years, it is only fair to consider this index as absolute. See Cathy Cotton and others, 'Should the Low Income Cut-Offs Be Updated?' Discussion Paper 75FOO02MIE-99009 (Statistics Canada 1999); Andrew Mitchell and Richard Shillington, 'Are Statistics Canada's Low-Income Cutoffs an Absolute or Relative Poverty Measure??' (Canadian Social Research Net 2008) <www.canadiansocialresearch.net/licos.htm> Accessed 1 September 2016.
[74] World Bank 'Poverty and Inequality Analysis'. Available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:22569747~pagePK:148956~piPK:216618~theSitePK:336992,00.html> accessed 1 September 2016. Similar approaches were adopted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities of the economic and Social Council. See 'Final Report on Human Rights and Extreme Poverty' submitted by the Special Rapporteur, Mr. Leandro Despouy (paper E/CN.4/Sub.2/1996/13, UN High Commissioner for Human Rights 1996) Available at: <www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1996.13.en?Opendocument> accessed 1 September 2016.
[75] This benchmark was proposed in 2008. The amount is adjusted to purchasing power parity (PPP). Martin Ravallion and others, 'Dollar a Day Revisited' (2008) 23(2) World Bank Economic Rev 163.

who, the US official poverty surveys and the Canadian LICO are adjusted to family size. The former is additionally adjusted to the age of household members.[76]

Note that it is not mathematically necessary that an absolute threshold would be lower than a relative one.[77] Take for instance the absolute poverty assessment published by the Fraser Institute in Canada. This index is much higher compared to standard absolute measurements. It includes not only necessities such as food, health and shelter but also transportation, communication and insurance. However, the absolute poverty line commonly used by researchers and public institutions is substantially lower than the conventional relative line thanks to the general standard of living in wealthy countries. Half the median income in Canada, France and Israel is higher than the subsistence standards defined by Rowntree and his followers.

There are several difficulties in the absolute approach, as presented by Townsend,[78] Schiller,[79] Atkinson,[80] Perlman[81] and others. First, applying the minimal food budget requires well planned shopping and skilful cooking, which are not always feasible under conditions of poverty. The outcome is that poor families usually spend a larger share of their budget on food, leaving fewer resources than anticipated for all other necessities.[82] Secondly, it is not clear where to draw the line of goods absolutely necessary for sustaining life. Similar to his list of nutritional necessities, Rowntree calculated the non-food necessities by a fixed list. But Orshansky and the American

[76] US Census Bureau, *How the Census Bureau Measures Poverty* available at <www.census.gov/hhes/www/poverty/about/overview/measure.html> accessed 1 September 2016. The 2010 Poverty Thresholds are available at <www.census.gov/hhes/www/poverty/data/threshld/index.html> accessed 1 September 2016; and see: United States Department of Health and Human Services, *The HHS 2011 Poverty Guidelines* available at <http://aspe.hhs.gov/poverty/11poverty.shtml> accessed 1 September 2016.
[77] James Foster, 'Absolute versus Relative Poverty' (1998) 88(2) Americn Economic Rev 335, 337.
[78] Peter Townsend, *Poverty in the United Kingdom: A Survey of Household Resources and Standards of Living* (Penguin 1979) 31-49, 59-60; Peter Townsend, 'The Meaning of Poverty' (2010) 61 The British Journal of Sociology 85.
[79] Schiller (n 47) 20-21.
[80] Atkinson (n 57) 225-226.
[81] Perlman (n 52) 8-9, 12.
[82] ibid 9.

system refer to an average proportion between food and non-food expenses. This is like bringing the relative examination through the backdoor.[83] The question reopens, how many additional expenses should be added. Thirdly, it has been argued that absolute definitions – Rowntree's and Orshansky's alike – are both arbitrary and circular. An estimate of minimum requirements of non-food goods was based, in some cases, on a personal opinion, or, in other cases, on the actual spending on non-food items among poor households. By this, Rowntree and Orshansky have confused practice with need.[84] Fourthly, if the absolute basket does not update (except for adjustment to price level) this means that over time the poverty line drifts away from the general welfare level. The purchasing power represented by the absolute index may not change, but it increasingly becomes distant from the purchasing power of the rest of the population.[85] I shall return to this point in section D.

But the sharpest criticism touched the very essence of the subsistence approach. Absolute conceptions are inappropriate and misleading because they simply do not address the problem they claim to address. In the words of Peter Townsend, 'people's needs, even for food, are conditioned by the society in which they live and to which they belong'.[86] They are different from one society to another and in one society from one period of time to another. Townsend called for defining poverty in terms of 'a concept of relative deprivation'. Individuals are in poverty, he specified, when they lack the resources to participate in the activities and have the living conditions which are customary in the societies in which they belong.[87]

[83] The same is true for the Canadian LICO, with the addition of shelter and clothing.
[84] Townsend, *Poverty in the UK* (n 78) 34, 37.
[85] ibid 35.
[86] ibid 59.
[87] A similar line of argument was advanced by no other than Adam Smith: 'By necessaries I understand not only the commodities which are indispensably necessary... but whatever the custom of the country renders.' Adam Smith, *Wealth of Nations* (n 14) Book V, ch 2, para 148.

This criticism challenged what was by that time the accepted absolute notion of poverty, and led to the development of the conventional approach discussed earlier. It is common, then, to position the two approaches not only as competing concepts, but also as the two phases of a dialectic process.

Sen's capabilities approach and non-income dimensions of poverty

Nobel Prize winner Amartya Sen suggested an alternative understanding of poverty, which gathered momentum in the 1990s. It is founded exactly on what economic literature lacks: an ethical inquiry. Sen's larger project turned around a criticism of John Rawls' theory of justice (as well as other, non-socio-liberal, theories of justice). Account has to be taken, he argued, not only of primary goods, which are Rawls' 'embodiment of advantage', but also of the relation between persons and these goods. The focus should be on the ability of an individual to convert such goods in order to promote her ends.[88] The substantive freedom to lead the life one values is referred to by Sen as 'capabilities'.[89] Economic opportunity, social inclusion, health, and education, are examples for such elements which make an individual free to choose between 'alternative functioning combinations'.[90,91] Accordingly, low economic opportunity, social deprivation, insufficient health care and poor education, are examples for 'sources of unfreedom',[92] or, in other words, for limitations on

[88] Amartia Sen, *Development as Freedom* (OUP 2001) 74. See also Amartia Sen, 'Equality of What?' in Sterling McMurrin (ed) *Tanner Lectures on Human Values - Volume I* (CUP 1982) 195, 216.
[89] The idea of human capabilities appears in Sen's work since the late 1970s: Sen, 'Equality of What?' (n 88); Amartia Sen, *Commodities and Capabilities* (Professor Hennipman Lectures in Economics vol 7 1985); Amartia Sen, *Inequality Reexamined* (Clarendon Press 1992) ch 3.
[90] Sen, *Development as Freedom* (n 88) 75.
[91] Sen's theory was criticised for being an overtly individualistic conception of human society and for adopting an 'idealistic' vision of politics, unmindful of the constrains on people's ability to convert capabilities into freedoms. See Stuart Corbridge, 'Development as Freedom: The Space of Amartya Sen' (2002) 2(3) Progress in Development Studies, 28(2), 183; Craig Jeffrey and other, *Degrees Without Freedom?: Education, Masculinities and Unemployment in North India* (Stanford UP 2008).
[92] Sen, *Development as Freedom* (n 88) 3-4.

individual capabilities. According to this analysis, which Sen identified as relevant for rich and poor countries alike,[93] development must guarantee the expansion of substantive freedoms, that is, of the capabilities to choose a life one values.[94]

The focus on the value of freedoms rather than on utilities, incomes and wealth,[95] lead Sen to depart from the traditional income-centred approach to poverty and suggest a much broader perspective. Poverty, Sen submits, is a deprivation of basic capabilities.[96] It is therefore indicated by a variety of criteria, from mortality to freedom of speech, from undernourishment to access to work. As Satya et al. put it, poverty by Sen is a problem of a functioning failure.[97] So with regard to the question poor *in what*, the answer by Sen is multidimensional. When 'real freedom', and not growth in national product, is the principle end of development, the definition of poverty is no longer restricted to income.

This is not to say that low income is not a cause of poverty. Lack of sufficient income is by Sen a major cause of capability deprivation. But income is only important here as an instrument – one of many – to substantive freedom.[98] What is more, the relation between income and capabilities is contingent on place and communities and it varies between people. Persons with disabilities may need more money in order to enjoy the same capabilities. Age and illness therefore not only reduce the ability to earn an income, but also make the impact of income on capabilities smaller. 'This entails', Sen concludes, 'that "real poverty" (in terms of

[93] ibid 6.
[94] Martha Nussbaum has famously attempted to list Sen's capabilities by prescribing ten 'central human capabilities'. Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard UP 2011). Sen has however disagreed with such 'pre-determined canonical list': Amartia Sen, 'Human Rights and Capabilities' (2005) 6(2) J of Human Development 151, 158.
[95] Sen, *Development as Freedom* (n 88) 27.
[96] ibid 20.
[97] Satya Chakravarty and others, 'On The Watts Multidimensional Poverty Index and its Decomposition' (2008) 36 World Development 1067.
[98] Sen, *Inequality Reexamined* (n 89) 41-42; Sen, *Development as Freedom* (n 88) 87.

capability deprivation) may be... more intense than what appears in the income space'.[99] We can extract from this analysis a useful distinction between *real poverty* and *nominal poverty* to which I shall return in later chapters.[100]

Following on Sen's work, scholars have suggested various definitions for poverty, which are not restricted to income analysis. 'Poverty is now defined as a human condition that reflects failures in many dimensions of human life such as hunger, ill health, malnutrition, unemployment, inadequate shelter, lack of education, vulnerability, powerlessness, social exclusion and so on'.[101] Studies highlighted many dimensions of poverty such as nutrition,[102] decision-making capacity,[103] self-confidence,[104] managing time resources,[105] life expectancy, literacy, freedom and security and access to public goods,[106] to name a few examples.[107]

Sen clearly departs the conventional definition on the *in what* issue. He criticises the accepted concept of poverty also with regards to the *who* question. Focusing on income for the entire household may conceal the distribution of resources inside this unit. Expenses may be disproportionately allocated between family members, for example between boys and girls and between husbands and

[99] Sen, *Development as Freedom* (n 88) 88.
[100] See ch 4(D5) and ch 5(D1).
[101] Nanak Kakwani and Jacques Silber (eds), *The Many Dimensions of Poverty* (Palgrave MacMillan 2007) xi; and see Barr (n 44) 129.
[102] Michael Lipton and Martin Ravallion, 'Poverty and Policy' in Jere Behrman and TN Srinivasan (eds.), *Handbook of Development Economics* (vol 3, Elsevier 1995) 2551.
[103] Sendhil Mullainathan and Eldar Shafir, *Scarcity: Why Having too Little Means so Much* (Times Books 2013) ch 7.
[104] Robert Walker, *The Shame of Poverty* (OUP 2014)
[105] See elaborated discussion below, text to n 187.
[106] Erik Thorbecke, 'Multidimensional Poverty: Conceptual and Measurement Issues' in Kakwani and Silber (n 101) 3, 4.
[107] We return to the multidimensionality of poverty in the discussion on social capital below, text to n 165.

wives. Unequal intra-distribution of family resources results in women being under represented in poverty statistics.[108]

Lastly, let us examine the *how* aspect in Sen's approach to poverty. Can deprivation of capabilities be represented in technical terms? Is this concept measurable? It is complicated to construct an index that will manage to capture all poverty aspects suggested in Sen's theory. Moreover, as Sen himself points out, there is a problem of determining the relative importance of various capabilities.[109] But successful attempts have been made. L.A. Zadeh's fuzzy set approach was applied for multidimensional poverty analysis in the 1990s.[110] Chakravarty et al. developed the Watts index along the same lines.[111] Alkire and Foster have long worked on operationalising Sen's capabilities approach in quantitative terms.[112] Furthermore, multidimensional approaches to poverty were adopted by national and international institutions. The UNDP human poverty index examines three aspects: decent living standards, educational attainment rate and life expectancy in birth.[113] The Committee on Economic, Social and Cultural Rights has drawn upon Sen's theory in its statement

[108] Sen, *Development as Freedom* (n 88) 88-89, 104-107.
[109] Sen, 'Equality of what?' (n 88) 219.
[110] Unlike *crisp sets* in which elements either belong or do not belong to the set, *fuzzy set* mathematics examines membership as a matter of degree. This non-binary approach carries two advantages for the analysis of poverty. First, it allows for definitional vagueness. It replaces the clear cut between 'poor' and 'non-poor', with a continuum axis between the two categories. This is useful for incremental concepts such as income. Secondly, fuzzy sets are able to handle multiply relationships at the same time. It can thus deal with the various dimensions of poverty under a rigorous function. See Andrea Cerioli and Sergio Zani, 'A Fuzzy Approach to the Measurement of Poverty' in Camilo Dagum and Michele Zenga (eds.), *Income and Wealth Distribution, Inequality and Poverty* (Springer 1990) 272. For a review of the progress in fuzzy set measurement of poverty see Achille Lemmi and Gianni Betti (eds), *Fuzzy Set Approach to Multidimensional Poverty* (Springer 2006) 1-2.
[111] Satya Chakravarty and others, 'On the Watts Multidimensional Poverty Index and its Decomposition' (2008) 36(6) World Development 1067.
[112] Sabina Alkire and James Foster, 'Counting and Multidimensional Poverty Measurement' (2011) 95 J of Public Economics 476.
[113] UNDP, *Human Development Report 1997* (OUP 1997).

on poverty.[114] The European Commission adopted the fuzzy approach in its report on social exclusion.[115]

We shall return to the debate on the dimensions of poverty later in this chapter, examining social capital and its relation to the duration of poverty. But let us now leave this debate to introduce the temporal aspects of the economics of poverty.[116]

D. TEMPORAL ASPECTS IN THE DEFINITION AND MEASUREMENT OF POVERTY

> *Poor (adjective): when you have too much month at the end of your money*
>
> Fun and Run, a Facebook community

The first to have analysed poverty from a dynamic perspective was Robert Malthus (1766-1834). Starvation of the poor was an important factor in his concept of increase and decrease of the population over time. Aid to the poor should be completely

[114] See Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP 2007) 48.
[115] European Commission, 'Regional Indicators to Reflect Social Exclusion and Poverty' [2005] Employment and Social Affairs DG.
[116] There are other perceptions of poverty that suggest cultural, psychological, and anthropological notions to the term, separate from the social capital scholarship. Lewis suggested the existence of a 'culture of poverty' in low income communities (Oscar Lewis, *A Study of Slum Culture: Backgrounds for La Vida* (Random House 1968) 4-21); Jackson argued that poverty involves 'inadequate social functioning' (Dudley Jackson, *Poverty* (Macmillan 1972) 13); Simmel suggested defining poverty as a situation of dependency (Georg Simmel, 'The Poor' (1965) 13 Social Problems 118).

stopped, he therefore concluded, in order to give way to the dynamics of nature.[117] No wonder Malthus' grim take on economics was labelled, following Thomas Carlyle, as 'the dismal science'. But however dark, his model captured what is today a common understanding in welfare economics: that a dynamic observation reveals information on poverty which is not otherwise available, and that this information provides a strong explanatory power.[118] The following sections portray the impact of time on the definition of poverty, on the measurement of poverty, on how we explain the causes of poverty, and finally, on the nature of chronic poverty.

Time and the definition of poverty

In the course of long enough periods of time, the standard of living in the general population rises. The poverty cut off standard responds differently to this change, depending on the definition on which it is based. A relative measurement, which is by its nature dependent on the ups and downs of the general income, produces a shifting poverty line. An absolute approach, on the other hand, produces a poverty line that changes very little over time,[119] except for adjustment to the changing price level. Surely, as Orshonsky herself acknowledged, even nutritional standards are likely to be influenced by changing living standards (and therefore with time the cost-of-living estimate should be modified),[120] but as far as the absolute definition is concerned, this is the exception and not the rule.[121]

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[117] Thomas Robert Malthus, *An Essay on the Principle of Population* (first published 1798, OUP 2008)
[118] Tony Addison and others (eds), *Poverty Dynamics: Interdisciplinary Perspectives* (OUP 2009) 3.
[119] Schiller (n 47) 21.
[120] In her above mentioned article which proposed the conventional absolute measurement. Orshonsky (n 70) 5.
[121] According to several studies, not only the relative index but also the popular perception of who is poor changes over time. Ornatti noted that with the rise of general income, welfare expectations rise and consequently the social concept of who is poor rises. Each of his three thresholds of poverty, namely, minimum subsistence, minimum adequacy, and minimum comfort (the 'poverty band') grows

The result is that the tension between the conventional definition and the absolute definition carries a significant temporal aspect. The former is inherently dynamic; the latter is inherently static. This has two implications.

First, there is a clear desynchronisation between the two terms. On a given day, an absolute poverty line and a relative poverty line may have the same money value. But eventually the relative line will change, adapting to the general income, while the absolute line will remain constant.[122] This explains why it is harder to make gains against relative poverty over time, whereas a long term decrease in the rate of absolute poverty is more reachable, thanks to the increase in the general standard of living. In the words of Perlman, the poor advance, but no faster than anyone else.[123]

Secondly – and here we move, to use the terms defined in Chapter One, from *time as quantity* to *time as location* – in the relative approach deciding who is poor is strongly affected by time. In 2016, a household with no electricity supply is probably considered poor while in the 1920s it was not necessarily so.[124] The link between relative poverty and time may explain why a static perception of poverty is often coupled with an absolute definition.

The dependence of relative poverty on date and place brought Karelis to conclude that in the future, those below the future poverty line, 'with their reliable cars, their swimming pools, and their three-week vacations',[125] would not be really

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therefore over time. See Oscar Ornatti, 'The Poverty Band and the Count of the Poor' in Edward Budd (ed.), *Inequality and Poverty* (Norton 1967) 168. Schiller (n 47) 20-21 reports similar findings.

[122] Foster 'Absolute versus Relative' (n 77) 337.

[123] Both Perlaman (n 52 at 13-16) and Ornatti (n 121) provide empirical data from the US which supports this assertion.

[124] At the beginning of the 1920s, fewer than 10% of British households were wired to an electricity supply network. Anthony Byers, *Centenary of Service: a History of Electricity in the Home* (Electricity Council 1981).

[125] Charles Karelis, *The Persistence of Poverty: Why the Economics of the Well-Off Can't Help the Poor* (Yale UP 2009) 9. It is hard not to notice how this ideal description of future America resembles the standard of living in contemporary France.

poor and that we (today) should therefore be indifferent towards their economic situation.

I do not agree with this argument. It is true that the threshold of relative poverty is subject to a certain day. But the definition of this threshold, and the way it is constructed do not change over time. We can agree with the people of 2116 on what poverty means, and on how to draw a poverty line, without drawing the same line. In this sense the definition of relative poverty is stable. The basic need of social inclusion does not change, even if the bundle of goods and services required to attain this need does evolve with the change of society. It should therefore not surprise us that the poor of 2116 will have a more luxurious life than those of an average contemporary European. However, they will still be regarded as poor because in their future society, with their future material resources, it will be hard for them to meet the need of social inclusion and dignity.

From the temporal aspect, Sen's analysis of poverty is closer to the relative approach rather than to the absolute approach, in the sense that it suggests a steady definition whose practical expressions adjust to time and place. When the general standard of living rises, more income may be needed to achieve the same social functioning.[126] Therefore, over time, the same requirements of capabilities may necessitate different levels of consumption and different economic abilities.

Time and the measurement of poverty

Both the conventional and absolute definitions of poverty measure flows of income. The count must refer to income flow over a particular time interval: per month, per

[126] Lars Osberg 'Poverty in Canada and the United States: Measurement, Trends, and Implications' (2000) 33(4) Canadian Journal of Economics 847, 848.

year, or referring to an average income during two years, and so forth. Suppose a person with a steady annual income of 14,000 Euros suffers a drop in income to 8,000 Euro in a single year followed by recovery to 14,000 the next year. If the poverty line is measured by an annual income of 10,000 Euros for one person, this would mean that she will be counted as poor for one year. However if poverty is measured by periods of two years, the average income of 11,000 would not fall under the poverty line. Generally speaking, the longer the interval of reference is, the fewer temporary poor will be counted. Remembering that income poverty is interested in the ability to consume basic needs, it is clear that the time range that is used must respond to the impact of income fluctuation on consumption.[127] As Duncan points out, a family suffering an atypical year of low income is as needy for food and heating as a family in persistent destitution.[128] A short accounting period is hence useful for the purpose of identifying those with need for immediate assistance, while a longer accounting period could be applied for measuring poverty in the context of, for example, programmes for improving job skills. This subject will be further discussed below.[129]

The duration of poverty

OECD figures indicate that in each of the years 2011, 2012 and 2013 there were just over 1.4 million people living in poverty in Israel, 4.4 million poor in Canada and 5.2 million poor in France.[130] However, this data may be construed in different ways. It may be that there were different poor families every year so that each annual survey

[127] Kevin Lang, *Poverty and Discrimination* (Princeton UP 2007) 40-41.
[128] Greg J Duncan, *Years of Poverty, Years of Plenty: The Changing Economic Fortunes of American Workers and Families* (Institute for Social Research 1984) 37.
[129] See the discussion on Milton Friedman's permanent income theory, below, text to n 179.
[130] All figures are for post tax and social payments, using a 50% line. Figures for France are based on an average for 2012 and 2013. Sources: own calculation based on OECD data OECD (2016), Poverty Rate (indicator) doi: 10.1787/0fe1315d-en. <https://data.oecd.org/inequality/poverty-rate.htm> accessed 1 September 2016.

counted a different group of people. Alternatively, the same people may have been poor in each of the three years.

Charles Karelis distinguishes between the persistence of poverty at the collective level and the persistence of poverty at the individual level.[131] The data given above refers to the former: it shows that poverty was a steady social phenomenon in Canada, in France and in Israel in the mid 2010s.[132] But when we say 'the duration of poverty' we refer to the continuation of this condition for one specific household over a period of time.

The persistence of poverty at the collective level requires only a series of cross section data. It is taken in one-off interviews with household heads, and different households may be examined every year. Studying the persistence of poverty at the household level requires the same individuals to be re-interviewed over several years, so that it would be possible to follow the change in their degree of welfare. This is called time-series (for single variable) or panel (for several variables) data.[133,134]

[131] Karelis (n 125) ix-x.
[132] For trends in poverty in the last two centuries see Batchelder (n 48) 34-37.
[133] Arellano (n 38) 1.
[134] A good example for dynamic dataset on poverty can be found in the British Household Panel Survey (BHPS), carried out at the Institute for Social and Economic Research of the University of Essex: <www.iser.essex.ac.uk/bhps> accessed 1 September 2016. This data was first analysed in Sarah Jarvis and Stephen Jenkins, 'Do The Poor Stay Poor? - New Evidence About Income Dynamics From The British Household Panel Survey' (1995) available at <www.iser.essex.ac.uk/files/occasional_papers/pdf/op95-2_text.pdf> accessed 1 September 2016.

E. THE ECONOMICS OF POVERTY DYNAMICS

Retrospective (time-series and panel) data is crucial to the study of the dynamics of poverty. First, it enables us to distinguish between different lengths of spells of poverty, and examine the turnover around the poverty line. Secondly, it provides information on the social and economic determinants of persistent poverty, and thus illuminates our understanding of the patterns and causes of poverty traps. Thirdly, dynamic data can teach us about the passing of poverty from one generation to the next. The remaining of this section discusses these three aspects.

Economic literature defines two main types of poverty. The first is persistent (also defined as continuous, long-term or chronic[135]) poverty, with no escape in the near or intermediate future. A second type is temporary poverty (also defined as transitory or short-term). It is a passing situation, a state from which the household is able to recover within a short to medium period of time: a family may suffer from temporary setbacks caused by, say, an injury that hinders the ability to work (and increases necessary medical expenses). The difference between persistent and temporary poverty is not only a matter of duration: these are two different economic phenomena. Their causes are quite different and they may call for different policy tools.[136]

[135] 'Chronic' derives from the Greek word 'khronos' (time).
[136] Michael Carter and Christopher Barrett, 'The Economics of Poverty Traps and Persistent Poverty: An Asset-Based Approach' (2006) 42 J of Development Studies 178.

Short-term poverty

As the example above demonstrates, personal circumstances such as health condition, family structure and occupational position, can cause a temporary drop of household income. Poverty spells end due to the flip side of the same reasons, leading in most cases to an earning increase.[137] Short-lived low levels of income can also be the result of a person's location on the life earning cycle: students and young professionals typically experience a passing phase of low transitional income.

Fluctuations in the economy have an impact on people's income and expenses and so short-term poverty may also be a result of the general economic context. Evidence show, unsurprisingly, that absolute poverty increases in times of economic depression.[138] Austerity measures cutting public welfare expenses (which can be either temporary or permanent) inevitably lead to an increase in relative net-poverty.[139]

Panel data studies reveal that many poor in one particular year are no longer poor in the years that follow.[140] A high turnover around the poverty line is significant for several reasons. First it means that poverty is more widespread than what is perceived by static poverty reports. Secondly, the risk of falling into it is relevant to a greater share of the population. This particularly affects the lives of the near-poor.[141]

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[137] Mary Bane and David Ellwood, 'Slipping into and out of Poverty: The Dynamics of Spells' (1990) 21 J Human Resources 1; Richard Burkhauser and others, 'Economic Burdens of Marital Disruption: A Comparison of the U.S. and Germany' (1990) 36 Rev of Income and Wealth 319.
[138] Batchelder (n 48) 38-40 provides data on absolute poverty from US in the 1950s-1960s.
[139] The Israeli Government reduced social security and basic income spending by 14.5% in 2002-2005. The number of poor households soared over this period by 24.1%. Source: own calculation based on NII, *Dimensions of Poverty and Social Gaps – Annual Report 2002* (2003) [Hebrew] and NII, *Dimensions of Poverty and Social Gaps – Annual Report 2004/5* (2006) [Hebrew].
[140] Bruce Headey and others, 'Long and Short Term Poverty: Is Germany a Two-Thirds Society?' (1994) 31(1) Soc Indic Res 1.
[141] ibid 1; and see Steven Webb, 'Poverty Dynamics in Great Britain: Preliminary Analysis from the British Household Panel Survey' [1995] Commentary no. 48, Institute for Fiscal Studies.

Chronic poverty and its determinants

Chronic poverty means that this condition is long lasting, with no apparent relief in the near or intermediate future. Chronic poverty is sometimes described as a state of low social (or income) mobility, i.e., little chance of improving one's welfare in a given period of time.[142]

Many have discussed the vicious cycle of long-term poverty.[143] As Perlman put it economic disability creates conditions that 'seem[s] designed to perpetuate poverty'.[144] Three primary factors shape chronic poverty in industrialized countries: work, children and education.

The impact of employment has been extensively discussed in the literature.[145] In a research which aimed to analyse the determinants of poverty, Flug and Kasir reached unequivocal conclusions: 'it is possible to identify the non-employment (whether due to non-participation or unemployment) of the head of the household as the main determinant of poverty. The existence of more than one wage earner in a household is almost certain to guarantee that a family will not fall below the poverty line'.[146] The numbers are quite striking: in Israel, for example, families with two wage earners, one wage earner and none, have poverty rates of 2%, 16.9% and 38.9%

[142] For persistent poverty data see, for France and Canada: Greg J Duncan and others, 'Poverty Dynamics in Eight Countries' (1993) 6(3) J of Population Economics 215; for Israel: Moshe Shayo and Michael Waknin, 'Persistent Poverty in Israel – First Results from the Matched File of Population Censuses 1983 and 1995' (2000) 47(4) Economic Quarterly 597 [Hebrew]; European Communities, *European Social Statistics: Income, Poverty and Social Exclusion* (2nd report 2002) 91. Subsequent chapters provide further data on France, Israel and Canada.
[143] Barr (n 44) 225.
[144] Perlman (n 52) 5.
[145] UNICEF Innocenti Research Centre, *A League Table of Child Poverty in Rich Nations* (Innocenti Report Card No.1, UNICEF 2000); Dimitry Romanov and Noam Zussman, 'Labor Income Mobility and Employment Mobility in Israel, 1993–1996' [2003] (1) Israel Economic Rev 81; Vered Kraus and Yuval Yonay, 'The Power and Limits of Ethnonationalism: Palestinians and Eastern Jews in Israel, 1974-1991' (2000) (51) British J of Sociology 525*;* Momi Dahan, *The Ultra-Orthodox Population of Israel, Part 1: Income Distribution in Jerusalem* (Jerusalem Institute for Israel Studies 1998) [Hebrew].
[146] Karnit Flug and Nitza Kasir, 'Poverty and Employment, and the Gulf Between Them' [2003] 1(1) Israel Economic Rev 55.

respectively. Brender and Strawczynski examined the linkage between poverty and employment and found similar results.[147] Welfare schemes are therefore often criticised to be a cause of poverty traps, due to their negative impact on the incentive to work.[148] This subject is discussed in detail in Chapter Three.[149]

The second primary factor is number of children.[150] Here again figures show a sharp association with poverty. According to a 2001 Income Survey in Israel, the poverty rate in families with 1-3 children was 15.9%, 1.5 percentage point lower than the national average. Poverty rate for families with 4 children or more was three times higher, at 44%.[151] A correlation has been found between family size and academic achievement, occupational performance, delinquency and even alcoholism.[152]

Education is the third primary factor.[153] Early dropout from the educational process was found to be a strong determinant of poverty.[154] Findings were similar in Canada[155] and in Israel. One of the studies found that when the head of the household has at least 12 years of schooling, chances of persistent poverty are less than half compared with a household with a less educated head (10.8% and 22.9% respectively).[156]

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[147] Adi Brender and Michel Strawczynski, 'Earned Income Tax Credit in Israel: System to Reflect the Characteristics of Labor Supply and Poverty' (2006) 4(1) Israel Economic Rev 27.
[148] Samuel Bowles, 'Institutional Poverty Traps' in Samuel Bowles and others (eds), *Poverty Traps* (Princeton UP 2006) 116; Horst Siebert, 'Labor Market Rigidities: At the Root of Unemployment in Europe' (1997) 11(3) J Economic Perspectives 37.
[149] Sections (E1) and the discussion on the replacement ratio in Section (E2).
[150] Dahan (n 145); Charles Manski and Yoram Mayshar, 'Child Allowances and Fertility in Israel: Preliminary Findings' (2000) 4 Economic Quarterly 535 [Hebrew].
[151] Flug and Kasir (n 146).
[152] Mazie Wagner and others, 'Family Size Effects: A Review' (1985) 146(1) J of Genetic Psychology 65.
[153] Dahan (n 145); Yossi Muallem and Roni Frish, *The Rise in Return on Education in Israel in 1976–97* (Discussion Paper 99.06, Bank of Israel Research Department 1999) [Hebrew].
[154] Karelis (n 125) 17.
[155] Clarence Lochhead and Katherine Scott, *The Dynamics of Women's Poverty in Canada* (Canadian Council on Social Development 2000) 18.
[156] Flug and Kasir (n 146).

Economic literature mentioned other determinants of persistent poverty, including: single parenthood,[157] age,[158] welfare dependency,[159] type of occupation,[160] family instability,[161] frequent change of jobs, and disobeying the law.[162] Poverty in Canada, France and Israel is highly linked to ethnic and religious cleavage and to immigration.[163] Lastly, residential segregation is a phenomenon which aggravates poverty. The better off live among the better off, the poor live in the neighbourhoods of the poor. They hardly meet.[164] The isolation of the poor affects their chances in employment, education and overall inclusion, and hence, perpetuates their situation.

Social capital and the duration of poverty

In the 1990s Robert Putnam developed and popularised the concept of 'social capital', which includes all networks of social relations, forms of reciprocal trust, and social norms that are embedded in social structures.[165] Linking this notion to welfare economics, Coleman focused on differential access to social capital, emphasising that the ability to integrate in the community and reap economic benefits from it, reflects power inequality in our society.[166] Embedding this idea in the cultural matrix of society, Bourdieu similarly observed that social capital is variedly distributed,

[157] UNICEF (n 145); Lochhead (n 155) 21; Karnit Flug and Nitza Kasir, 'The Single Parent Law, Labor Supply and Poverty' (2006) 4(1) Israel Economic Rev 59.
[158] Lisa Kaida and Monica Boyd, 'Poverty Variations among the Elderly: The Roles of Income Security Policies and Family Co-Residence' (2011) 30 Canadian J on Aging 83.
[159] Robert Schoeni and Rebecca Blank, *What Has Welfare Reform Accomplished? Impacts on Welfare Participation, Employment, Income, Poverty, and Family Structure* (Working Paper 7627, NBER 2000).
[160] Nabil Khattab, 'Ethnic and Regional Determinants of Unemployment in the Israeli Labour Market: A Multilevel Model' (2006) 40 Regional Studies 93.
[161] Burkhauser (n 137).
[162] Karelis (n 125) 15-24.
[163] Khattab (n 160); Kaida and Boyd (n 158); Lochhead (n 155) 16.
[164] Batchelder (n48) 42-44.
[165] Robert Putnam and others, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton UP 1993).
[166] James Coleman, 'Social Capital in the Creation of Human Capital' (1988) 94 (Supplement) American J of Sociology 95; James Coleman, 'The Rational Reconstruction of Society' (1993) 58 American Sociological Rev 898.

highlighting how non-material aspects of social being bear significantly upon economic positions.[167] This understanding of a social dimension to poverty is of importance to this research because it touches on questions of participation, access and fulfilment of rights. The concept of social capital will be useful to highlighting such aspects in subsequent chapters.

Lack of social capital and income poverty are interconnected, arguably in a recursive causal framework. More money leads to increased social capital; possession of social capital entails higher chances of gaining money. The reverse is also true for those in need: lack of social capital is in many cases due to the fact that people have been financially poor through extensive periods of their lives.[168]

The convertibility of social and economic capital means that the continuation of poverty in the income space bears impact on social capital. The chronically poor are therefore more prone to narrow social networking, limited access to social positions, reduced political participation and so on.[169] Long spells of poverty thus increase social powerlessness which in turn intensifies the very factors that lead to poverty.[170] We thus return to Perlman's observation: chronic poverty is a self-perpetuating social phenomenon.[171]

Moreover, if the duration of poverty is strongly correlated with, and in many ways leads to, changes in social capital, what follows is that differences in the duration of poverty can explain variations in social capital among the poor. People who experience temporary poverty usually possess more social capital than the long-

[167] Pierre Bourdieu, *Outline of a Theory of Practice* (CUP 1977).
[168] Craig Calhoun, 'Habitus, Field and Capital: The Question of Historical Specificity' in Craig Calhoun and others (eds), *Bourdieu: Critical Perspectives* (Polity 1993) 61.
[169] Marie-Claire Laval-Reviglio, 'Pauvreté et citoyenneté politique' in Dominique Gros and Sophie Dion-Loye (eds), *La Pauvreté saisie par le droit* (Seuil 2002) 245.
[170] This links to Eldar Shafir's idea that 'scarcity creates scarcity': Shafir (n 103) part 2.
[171] See n 144.

term poor and may sometimes convert social abilities in order to meet material necessities.[172]

Intergenerational poverty

Poverty persists not only over a lifetime, but also across generations. Several studies have shown the strong correlation between the economic status of parents and the economic status of their children after they become adults.[173] Poverty, just like wealth, is transferred from one generation to the other.

This intergenerational effect was explained with reasons ranging from better schooling opportunities and parental education,[174] to better health,[175] and even to (though with a much lower impact) differences in personality and intelligence, resulting from 'environmental inheritance'.[176] Another relevant determinant is the belonging to a minority ethnic group, a subject briefly discussed earlier.

The essence of generational interdependence lies in the limited life chances that are predetermined in childhood. A 2000 panel data survey, which included six OECD countries, found that out of 10 children who were at the poorest quintile in one year, over 6 children were in the same quintile in the year that followed.[177] Circumstances of long-term poverty in childhood are the substrate on which

[172] Paul Gertler and others, 'Is Social Capital the Capital of the Poor? The Role of Family and Community in Helping Insure Living Standards against Health Shocks' (2006) 52 CESifo Economic Studies 455.
[173] Greg J Duncan and others, 'The Apple Does not Fall Far from the Tree' in Bowles, *Unequal Chances* (n 42) 23; Nicole Fortin and Sophie Lefebvre, 'Intergenerational Income Mobility In Canada' in Miles Corak (ed), *Labour Markets, Social Institutions, and the Future of Canada's Children* (Statistics Canada 1998) 51.
[174] David Harding and others, 'The Changing Effect of Family Background on the Incomes of American Adults' in Bowles, *Unequal Chances* (n 42) 100.
[175] Anne Case and others, 'Economic Status and Health in Childhood: The Origins of the Gradient' (2002) 92(5) American Economic Rev 1308.
[176] Bowles, *Unequal Chances* (n 42) 12.
[177] Bruce Bradbury and others (eds), *The Dynamics of Child Poverty in Industrialized Countries* (UNICEF 2001) 143.

intergenerational poverty develops. The longer a family stays poor, the harder it is to steadily provide goods, services and other home conditions that are required for a child's development and for his future economic success.[178] Thus, a parent who is economically disadvantaged raises a child with limited opportunities, who in turn may become a poor parent.

Permanent income theory and a temporal bridge from poverty to wealth

Milton Friedman's permanent income hypothesis had an important impact on the dynamic study of poverty.[179] Friedman argues that even though their income may increase and decrease over time, people maintain a fairly constant level of consumption. The reason is that individuals base their decision making on what they consider as their typical income. What is perceived by an individual as a temporary change in income would have little effect on spending and consequently on the household's standard of living.

Sarah earns a monthly income of 100 today but she expects to have a raise and start making 300 in two years. According to Friedman, her present economic decisions will take the expected future income into account. What Sarah would do is in fact a capitalization of reasonable income expectations. Even if the flow of income changes over time, one still tends to integrate his expectations for the future and thus see a more steady income, reflecting future fluctuations.

Friedman notes that stable changes in income (that is, change in permanent income) will lead to change in the household's routine consumption (current expense); while temporary changes in income lead to change in savings and purchase

[178] Bradbury (n 177) 18.
[179] Milton Friedman, *A Theory of the Consumption Function* (Princeton UP 1957) 20-37.

of consumer durables.[180] This observation affects the way we understand income fluctuation around the poverty line, and particularly relevant to tailoring welfare policies regarding poverty traps.[181]

Friedman's approach changes the way we measure and understand poverty, and was indeed taken further by scholars of welfare. Batchelder, for example, offered to smoothen the household's income by measuring income over an interval of several years. This depends on the availability of such panel data (which is scarce). Another problem is that Batchelder supposes that people are (equally) capable to smoothen their income by saving, taking loans, or changing consumption habits. This assumption is not at all obvious for low-income levels.

Sustaining fluctuation of income is more difficult those who are under or close to the poverty line for two main reasons. First, bank credit policy limits the availability of supporting financial instruments. Secondly, it is not possible to postpone consumption of basic needs such as food, water, and shelter.[182]

Assets and credit were mentioned earlier as resources of purchasing power. These resources are based on stock rather than on flow. A family that suffers a setback in the stream of income may sell their jewelleries or take a loan and thus smoothen their purchase power over different periods. Assets and credit act in this case as mediators between present and future economic ability. They can be regarded as an economic bridge between two points in time, thus providing escape from poverty.

[180] Friedman (n 179) 28-29.
[181] This will be discussed in Chapter Four text to n 76.
[182] Lang (n 127) 41.

The experience of time

In his book *Down and out in Paris and London* George Orwell recorded his life among the desperately poor at the end of the 1920s. Consider the following quote:

> For when you are approaching poverty, you make one discovery which outweighs some of the others. You discover... the great redeeming feature of poverty: the fact that it annihilates the future.[183]

When Orwell speaks of poverty annihilating the future, he means that with the decline in economic resources the ability to plan prospectively also decreases.[184] The deeper poverty gets, the less significant is time to the person experiencing it. The less money you have, the less you worry. 'When you have a hundred francs in the world you are liable to the most craven panics',[185] Orwell tells us. But when you have only three francs you become indifferent. '[T]hree francs will feed you till tomorrow, and you cannot think further than that'.[186]

The experience of time relates also to the effect of what has been coined as 'time poverty'.[187] Low-income families often have limited choices in the face of limited time.[188] Clearly, not only the poor suffer from not having enough hours in the day. However, time scarcity affects the motivation and the ability to move back into work, to give up social payments, and to take care of your children's education, and it therefore has a significant impact on the chances of escaping income poverty. As

[183] George Orwell, *Down and out in Paris and London* (Penguin 2003) 17.
[184] This statement is now backed up by research. See Shafir (n 103).
[185] Orwell (n183) 18.
[186] ibid.
[187] The allocation of time as a resource was developed by Gary Becker, 'A Theory of the Allocation of Time' (1965) 75 Economic J 493; 'Time poverty' was introduced by Claire Vickery in 1977: 'The Time-Poor: A New Look at Poverty' (1977) 12 J of Human Resources 27; See also Tania Burchardt, *Time and Income Poverty* (CASE report 57, Centre for Analysis of Social Exclusion, LSE 2008).
[188] Katherine Newman and Margaret Chin, 'High Stakes: Time Poverty, Testing, and the Children of the Working Poor' (2003) 26(1) Qualitative Sociology 3.

noted by Blackden and others, time poverty and income poverty may reinforce each other with negative consequences.[189]

Finally, the experience of poverty is made completely different when it is carried on for years, and, as it is for some, over one's entire lifetime. The passage of time, with its uncertainty and despair, brings a whole different quality to this condition. As Bradley Schiller observes:

> If the prospect of existing for a short time on a poverty budget or less is not disquieting enough, consider the prospect of subsisting at that level into the indefinite future. A poor family must not only adjust to a subsistence budget but must also be prepared to remain at that standard of living. That is why a more affluent person cannot adequately grasp the significance of poverty by adopting a subsistence budget for a brief time. The affluent person knows that such an experiment can and will be terminate shortly. The poor persons possesses no such luxury.[190]

Recalling the story of King Sisyphus illustrated in Chapter One, we see how time carries not only an impact on *magnitude* (that is, for how long a person is poor) and on *nature* (that is, that it creates conditions that intensify poverty) but also on *essence*: the passage of time itself is experienced differently by the chronic poor.

[189] Mark Blackden and Quentin Wodon (eds), *Gender, Time Use, and Poverty in sub-Saharan Africa* (Working Paper 73, World Bank 2006) 1-10.
[190] Schiller (n 47) 37-38.

F. CONCLUSION

This chapter defined the two key concepts of the research: dynamic thinking and poverty. It then described how time is incorporated into the economic understanding of poverty, by presenting the basic theories on poverty dynamics and mobility.

Poverty is a condition measured not only in Euros and Dollars, but also in months. As was demonstrated here, economists see time and change as fundamental to the understanding of poverty, and indeed dynamic thinking governs their study of this phenomenon. A temporal perspective allows the economist to evaluate various forms of poverty, to examine its different characteristics, and to identify its different causes.

Four conclusions can be drawn so far. First, many poor are not permanently in this situation, that is, poverty is to some extent a transitory phenomenon. Secondly, as a result, a much larger share of the general population suffers from poverty at one point in life or the other. Thirdly, the chronic poor experience a situation in which time plays a substantive role. Long-term poverty is not just a short-term poverty that lasts longer. The quantity of time creates a difference in quality. The continuation of poverty generates the factors that prolong poverty, not only because of burden of credit, but also by weakening social capital and by the pressing subjective experience of time in poverty. Thus, chronic poverty is in many senses a self-perpetuating phenomenon. Fourthly, chronic poverty tends to pass from parents to children, that is, it carries implications for future chances and opportunities that even go beyond one lifetime. It would be only fair to expect that these time-related concerns bear significance on the constitutional analysis of cases that involve poverty.

I thus conclude Part I – Dynamics: Legal and Economic Time Based Approaches. Having discussed *law* and *time* in Chapter One; and *poverty* and *time* in Chapter Two, let us move on now to combine *law, poverty* and *time*. The following Part II – Statics: Human Rights Adjudication and the Duration of Poverty examines how poverty is treated in constitutional human rights case law. The goal in this part is to identify the temporal perception of poverty by the high judiciary in France, Israel and Canada and to offer an alternative dynamic perception.

In his novel *Einstein's Dreams* Alan Lightman portrays a town that is cut off in time. It is not a frozen place, where time stands still. It is rather a timeless place, where time is simply absent. It is, in his words, 'a world in which there is no time, only images.'[191] To this world we now turn.

[191] Alan Lightman, *Einstein's Dreams* (Vintage Books 1993) 57.

PART II

STATICS: HUMAN RIGHTS ADJUDICATION AND THE DURATION OF POVERTY

3 Poverty, Time and Constitutional Human Rights Law in France

A. INTRODUCTION: POVERTY IN FRANCE

France is the 26th richest economy in the world, with a GDP per capita of US$ 39,800.[1] Yet amid these riches live over 4.9 million poor.[2]

Like in most OECD countries, the French national institute for statistics (INSEE) defines the poverty line as at 50 percent of the median income.[3] In 2013, this threshold was set at 838 Euro (£732) per month.[4,5] The poverty rate in France, at eight

[1] PPP figures for 2013. IMF, World Economic Outlook Database, October 2014. <www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx> accessed 1 September 2016.
[2] 2013 figures, for a threshold of 50%. Figures in this chapter refer to *France métropolitaine* only (i.e. data excluding the DOM territories). INSEE, *Taux de pauvreté et nombre de personnes pauvres selon le seuil en 2014* (March 2015). INSEE figures exclude households in which the main breadwinner is a student. <www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=nattef04415> accessed 1 September 2016.
[3] INSEE also publishes figures for a 40%, 60%, and 70% cut-off.
[4] INSEE, *Seuils de pauvreté mensuels en 2014* (March 2015). <www.insee.fr/fr/themes/tableau.asp?ref_id=natsos04401> accessed 1 September 2016.
[5] Conversions to British Pound are based on 2016 rates unless specified otherwise.

percent, (after taxes and transfers) is lower than in most OECD countries,[6] and infant mortality rates are among the lowest in the world.[7] The mean poverty gap (after taxes and transfers) is 24.2 percent, meaning that the average income of a poor household, at 635 Euro (£550), is roughly three quarters of the poverty line.[8]

Long-term poverty in France

France has comparatively low rates of long-term poverty. In 2008, OECD estimates showed that three percent of the general population, roughly 1.9 million individuals, suffer from poverty for a period of over three years. This figure is about half the OECD average.[9] Mobility rates in France – measured by the association between an individual's current income and their parents' income during their childhood – is average for OECD countries.[10]

Two important characteristics of long-term poverty in France are that it is highly associated with immigration, and that it is geographically concentrated. In 2013 the 3.9 million non-EU immigrants in France, mostly of North African origin, represented 6.1 percent of the total population.[11] An immigrant household is over three times more likely to be poor than its non-immigrant counterparts.[12] Immigrants

[6] In 2013 France had 7th lowest poverty rates out of 35 OECD member states. OECD Stats Extracts, Income Distribution and Poverty <https://stats.oecd.org/Index.aspx?DataSetCode=IDD#> accessed 1 September 2016.
[7] 2012 figures. OECD Stats Extracts, Infant Mortality Rates <https://data.oecd.org/healthstat/infant-mortality-rates.htm> accessed 2 September 2016.
[8] 2013 figures. OECD n 7.
[9] OECD, *Growing Unequal? - Income Distribution and Poverty in OECD Countries – Country Note: France* (2008)
[10] ibid.
[11] INSEE, *Étrangers - Immigrés en 2013* <www.insee.fr/fr/themes/donnees-locales.asp?ref_id=etr2013&typgeo=METRODOM&search=1> accessed 4 September 2016.
[12] 2007 figures. While the poverty rate (of 50% threshold) amongst immigrant households is 36.1%, among non-immigrant households it is 11.3%. Immigrant households are defined in this research as household whose head of household, and if exists, also his/her couple, were both born out of France. Philippe Lombardo and Jérôme Pujol, *Niveau de vie et pauvreté des immigrés en 2007* (INSEE 2010) 41 <http://www.insee.fr/fr/ffc/docs_ffc/ref/REVPMEN10d.PDF> accessed 2 September 2016.

and second generation immigrants are overrepresented in the outskirts of major cities. *Banlieue*, the common word used for French suburbs, has become a synonym for low-income housing projects. Often, suburbs of major cities feature blocks of low-income families living in high population density.[13] These neighbourhoods are heavily stigmatised: French media regularly refers to these '*zones urbaines sensibles*' as affected by violence, crime and economic distress. As observed by the OECD in its 2007 Economic Survey of France, 'people living in [these] overwhelmingly poor areas lack access to social networks that might help them to integrate into the economy'.[14]

The labour market and the welfare state

Poverty rates in France have remained stable at around eight percent since the 1980s, slightly declining in the 1990s and returning to previous levels in recent years.[15] Rates of poverty in retirement age have improved steadily.[16] These figures are striking considering the increase in poverty in most other OECD countries over the same period.[17] The decline is primarily attributed to the labour market: income inequality has decreased during the past three decades.[18] In the mid 1980s the average income of the top decile (ten percent) was 7.3 times higher than the average income of the bottom decile. This ratio dropped to 6.8 in 2008, placing French income inequality close to the level of the Nordic states. However unemployment continues to be a major economic problem in France. From a peak in the mid 2000s (10.1 percent in

[13] Symbolically, the same word, *banlieue*, means an affluent suburb in Quebec, Canada.
[14] OECD, *Economic Survey of France* (2007) 7.
[15] OECD Stats (n 6) and OECD *Growing Unequal* (n 9).
[16] OECD *Growing Unequal* (n 9).
[17] France is one of only five OECD countries in which poverty has declined since the 1980s. ibid.
[18] Gini for disposable income decreased from 0.30 in the mid 1980s to 0.23 in 2008. OECD, *Growing Unequal* (n 9).

2004) the unemployment rate declined toward the end of the last decade, but has increased again in recent years (reaching 9.9 percent in 2014).[19] Minimum wage in France is the highest in the OECD relative to the median income.[20] As we will discover later in this chapter (Section E), labour policy plays a relatively dominant role in some poverty cases in France.

The French welfare state, broader and richer than the OECD average, is another dominant element in this context. Relative to other OECD countries, France implements high economic redistribution. In 2013, the number of RMI and RSA recipients (*revenu minimum d'insertion* and *revenu de solidarité active,* two income support schemes) was just under 1.4 million.[21] Taxes and benefits reduce inequality by 32 percent, a figure well above the OECD average of 25 percent.[22] The result is that the average income of the poorest decile of the French population is about 25 percent higher than the average for OECD countries.[23] Finally, poverty reduction is produced not only through tax and social security, but also through a generous system of public services. An OECD report, noting strong redistribution from services in France, observes that 'expenditure on public services like health, education and care in France is 16% of GDP in 2007, above the OECD average (13%). The OECD estimates the value of these services as equivalent to 6,600 EUR [per person per year]... effectively reducing inequality by one fifth'.[24]

[19] INSEE, *Nombre de chômeurs et taux de chômage selon le sexe et l'âge en 2015* <www.insee.fr/fr/themes/tableau.asp?reg_id=0&ref_id=NATCCF03338> accessed 2 September 2016.
[20] OECD *France* (n 14) ch 2.
[21] INSEE, *Bénéficiaires du RMI et du RSA socle non majoré selon la situation familiale en 2013* <www.insee.fr/fr/themes/tableau.asp?reg_id=0&id=338> accessed 4 September 2016.
[22] Figures for late 2000s. Measured as decrease in the Gini coefficient of inequality between market income (gross) and disposable income (net). OECD, *Divided We Stand: Why Inequality Keeps Rising* (2011), data notes on France.
[23] The figure is adjusted to PPP. OECD *Growing Unequal* (n 9).
[24] OECD *Divided We Stand* (n 22).

The following sections

We can now turn to the French courts. The two following sections present the constitutional playground explored in this chapter. Section B describes the constitutional norms, written and unwritten, protecting human rights in France. Section C describes how the high judicial institutions operate, and the various modes of access to these tribunals. With the unique attributes of this civil-law system in mind, Section D considers our research methodology as a lens applied to the context of French adjudication. Poverty cases from both the *Conseil constitutionnel* and the *Conseil d'Etat* are examined in section E, and section F concludes the findings.

B. NORMS: CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN FRANCE

Rights and freedoms

The Constitution of the Fifth Republic (hereinafter '1958 Constitution') is mostly concerned with institutional arrangements. Bar a few political rights such as the right to vote[25] and freedom of political association,[26] it does not contain articles protecting human rights. However, in a landmark ruling from 1971, the *Conseil constitutionnel* recognised the constitutional validity of the Preamble to the Constitution of the Fourth

[25] 1958 Constitution, Art 3.
[26] 1958 Constitution, Art 4.

Republic of 1946 as drawn from the 1958 Constitution,[27] thus creating what was later called in academic writing 'the constitutional block' (*le bloc de constitutionalité*).[28] This bundle of constitutional texts and principles provides several sources for the protection of human rights in France. The 1946 Preamble guarantees social rights, often named *droits-créances*, such as the right to employment,[29] the right to health and to material security,[30] and the right to education.[31] The Declaration of the Rights of Man of 1789 (hereinafter '1789 Declaration'), similarly mentioned by the 1958 Constitution, contains civil and political rights,[32] referred to as *droits-libertés,*[33] among them equality,[34] liberty,[35] freedom of speech,[36] and the right to property.[37] The Charter for the Environment, adopted in 2005, adds rights relevant to the preservation of the environment, including, primarily, the right to live in a stable environment which enables health.[38] Lastly, the ECHR is another source of human rights protection in France. As an international treaty, this document is defined as 'superior' to law by the 1958 Constitution.[39]

[27] CC décision 71-44 DC du 16 juillet 1971, *Liberte d'association.* For a critical analysis see Keneth Holland, *Judicial Activism in Comparative Perspective* (MacMillan 1991) 4-5.
[28] John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (2nd edn OUP 2008) 157-159; John Bell, *French Constitutional Law* (OUP 1992) 57-77.
[29] 1946 Preamble, Paragraph 5.
[30] Both in 1946 Preamble, Paragraph 11.
[31] 1946 Preamble, Paragraph 13.
[32] The distinction between political and civil rights, on the one hand, and social rights on the other hand, has been challenged in French legal literature. See Jean Rivero, *Les libertés publiques*: vol. 1 – *Les droits de l'homme* (2 edn, P.U.F. 1978) 115.
[33] For the distinction between *droits-libertés* and *droits-créances* see Luc Ferry and Alain Renaut, 'Droits-libertés et droits-créances, Raymond Aron critique de Friedrich-A. Hayek' (1985) 2 Droits 75. This distinction is somewhat parallel to the distinction between positive and negative rights proposed by Isaiah Berlin in his 'Two Concepts of Liberty' in *Four Essays on Liberty* (OUP 1969).
[34] 1789 Declaration, Art 1. Equal taxation is provided in Art 13.
[35] ibid Art 1-5.
[36] ibid Art 11.
[37] ibid Art 17.
[38] The Charter for the Environment, Art 1.
[39] 1958 Constitution, Art 55.

Principles of law

The constitutional provisions mentioned above are complemented by constitutional principles. Some of these are provided by constitutional texts, such as Paragraph 12 of the Preamble to the 1946 Constitution which refers to the principle of social solidarity. The 1946 Preamble also contains labour-specific social principles such as the right to work.[40] Other principles are in the form of unwritten conventions. These 'general principles of law' are a creation of the courts. The *Conseil d'Etat* draws on these more than other courts.[41] Some of the principles are connected to the protection of basic rights, such as the principle of equality[42] or the principle of the right to hearing.[43] Similarly, by way of interpretation, the *Conseil constitutionnel* often refers to 'objectives of constitutional value' which are not expressed in the constitutional text, but are rather used as general guiding principles, reflecting the spirit of the French constitution.[44]

The French constitutional law also offers a hybrid of these instruments, that is, between operative rights and freedoms, and constitutional principles. The 1946 Preamble calls this hybrid the 'fundamental principles acknowledged by the laws of the Republic'.[45] These norms, born from ancient legislative text reinvented into a modern constitutional principle, were designed to refer to freedoms and liberties acknowledged by laws (*lois*) of the Third Republic, but have been used to recognize

[40] See Mark Freedland, 'Employment Law' in *Principles of French law* (n 28) 483, 490.
[41] See B Jeanneau, 'La théorie des principes généraux du droit à l'épreuve du temps', [1981-2] EDCE 33.
[42] CE 30 Novembre 1930, *Couitéas*, Leb. 789.
[43] *Le droit de la défense.* See CE 5 May 1944, *Trompier-Gravier*, Leb. 133.
[44] *Principles of French law* (n 28) 16-17.
[45] 1946 Preamble, Paragraph 1: '*Principes fondamentaux reconnus par les lois de la République*'. French lawyers refer to this type of constitutional norm as PFRLR.

norms from even earlier times.[46] Among them, for example, is the freedom of education, derived from a law legislated by the Third Republic in 1931.[47]

Several writers consider French welfare policy an expression of a social model, as opposed to the liberal model typical of the English speaking world.[48] The most influential is Esping-Andersen's analysis, which conceived of the social regime in France, as in other central European countries, as aiming to maintain employee income through social insurance systems funded by collective contribution. Esping-Andersen thereby associated France with the corporatist welfare tradition.[49] While this notion is clearly political, it had its impact on the legal discussion. Some lawyers argue for a social or (following the wording of the 1946 Preamble) a *solidariste* approach to law.[50] As we will see in the case analysis that follows, these ideas influence the constitutional debate in France.

[46] *Principles of French Law* (n 28) p. 158.
[47] Freedom of education is recognised by Art 91 of *loi de finances du 31 mars 1931*. See Bell, *French Constitutional Law* (n 28) 70-71.
[48] *Principles of French Law* (n 28) 8-9. Similar categorization was presented by many other writers. See, for example, Bruno Palier, 'French Welfare Reform in Comparative Perspective' (2004-5) 45 Revue française de sociologie 97, 99 (portraying France as a strong example of a 'Bismarckian welfare system') and Richard Titmuss, *The Social Division of Welfare* (Liverpool UP 1960) (indicating three systems which provide the 'social services' – the Social Welfare, the Fiscal Welfare and the Occupational Welfare).
[49] The two other welfare regime according to Esping-Andersen are the liberal regime typical of the English speaking countries, which aims to provide social coverage only for the needy and therefore operates targeted policies; and the social-democratic regime of Northern European countries, which aims at citizen equality and therefore provides universal coverage and free social services. Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990) 23-34.
[50] *Principles of French Law* (n 28) 9.

C. INSTITUTIONS: THE THREE HIGH COURTS IN FRANCE

In France, in contrast to Israel and Canada, there is no Supreme Court, but three supreme jurisdictions. The *Conseil constitutionnel* is responsible for reviewing legislation, the *Cour de cassation* is the top tribunal of criminal and private law, and the *Conseil d'Etat*, the council of the State, deals with administrative matters. This study focuses on the first and indirectly concerns the other two. To provide a complete picture of the French judicial system, this section describes all three institutions and then explains the choice to concentrate on the *Conseil constitutionnel*.[51]

Conseil constitutionnel

The *Conseil constitutionnel* is the only jurisdiction with authority to strike down a law, whether before or after its enactment. It can either strike it down as a whole or abolish only certain articles.

In the case of *a-priori* control, framed by Article 61(2) of the 1958 Constitution, either the President of the Republic, the Prime Minister, the President of the National Assembly, or the President of the Senate may refer acts of Parliament to the *Conseil constitutionnel* 'before their promulgation'. A 1974 reform extended this standing right to 60 senators or 60 members of the National Assembly. This amendment empowered the Parliamentary Opposition to refer new bills for judicial

[51] Further material on the subject discussed in this section can be found in John Bell, *Judiciaries Within Europe: A Comparative Review* (CUP 2006) ch. 2; *Principles of French Law* (n 28) ch. 2.

review, thus substantially increasing the number of cases discussed by the *Conseil constitutionnel*.[52]

A later constitutional reform dating to 2008 introduced *a posteriori* control over enacted legislation.[53] This mechanism of judicial review, called *question prioritaire de constitutionnalité* (*'le QPC'*), allows a party in proceedings before any court to claim that a statutory provision infringes 'rights and freedoms guaranteed by the Constitution'.[54] The claim is considered by the *Conseil d'Etat* or the *Cour de cassation*, which act as filters before referring a constitutional question for decision by the *Conseil constitutionnel*. If they permit the request, proceedings are frozen, and a question, phrased by the *Conseil d'Etat* or the *Cour de cassation* themselves, is delivered to the *Conseil constitutionnel*. The phrasing of the question is crucial because the *Conseil constitutionnel* is required to judge *non ultra petita*, that is, to deal only with the claims brought before it (even if this rule is not always respected).[55] Once conditions of admissibility have been complied with, the *Conseil constitutionnel* will give its ruling and, if need be, repeal the challenged statutory provision.

In order to initiate *a-priori* control, an individual that would anticipate herself to be harmed by a piece of proposed legislation would have to turn to a political representative. The *QPC* is, by contrast, a right given to 'any person who is involved in legal proceedings before a court'.[56] In reality, though, this ideal picture of a

[52] *Principles of French Law* (n 28) 158-159.
[53] 1958 Constitution Article 61-1. An Institutional Act (*loi organique*) was passed in 2009 specifying the details of the application Article 61-1 See: *loi organique n° 2009-1523 du 10 décembre 2009*.
[54] 1958 Constitution Article 61-1. The *QPC* procedure during criminal trial at the *Cour d'assises* is different.
[55] The sharpest example being the *Liberte d'association* case mentioned earlier (n 27).
[56] *Conseil constitutionnel* website : <www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/priority-preliminary-rulings-on-the-issue-of-constitutionality.48002.html> accessed 4 September 2016.

constitutional right entrusted to all individuals must be nuanced, as the *Cour de cassation*, often hostile to the increase of powers of the *Conseil constitutionnel*, has exercised its role as a filter relatively strictly in practice. This has served to limit access to *QPC* proceedings. The *Conseil d'Etat*, on the other hand, has shown more willingness to transmit questions to the *Conseil constitutionnel*.[57]

Nonetheless, the *QPC* remains a procedure in the abstract, similar to *a-priori* control. The claimant who triggers the *QPC* is not party to the proceedings before the *Conseil constitutionnel.* The mechanism functions as a general decision on the constitutionality of a statute, not a judgment between two parties. The *Conseil constitutionnel* does not examine facts but only the legislated text. Claims of unconstitutionality in both mechanisms are phrased in terms of the general effect on a group or on the entire population. In the context of poverty, claims before the *Conseil constitutionnel* often relate to the 'more vulnerable part of the population', or, to use a term frequently mentioned in these cases, the '*personnes défavorisées*', but never to a specific individual.

Conseil d'Etat

The *Conseil d'Etat* controls the constitutionality of administrative acts, but not the constitutionality of laws. The result, admitted in the *Arrighi* decision, is that the constitutionality of an administrative norm cannot be challenged before the administrative judge if it strictly applies a law,[58] a rule known in French

[57] Marie Gren et al., 'Le Conseil d'Etat, juge constitutionnel?', L'examen de la constitutionnalité de la loi par le *Conseil d'Etat*, dir. B. Mathieu, M. Verpeaux, Dalloz, 2011, 33.
[58] CE sect. 6 novembre 1936, *Arrighi* et *Dame veuve Coudert*, Leb. 966.

Administrative Law as the '*théorie de la loi-écran*' ('the screen law theory').[59] This rule legally encircles the primary Parliamentary legislation. When the administrative act lies within these limits, that is, when it is in full compliance with the law, then an attack on the administrative act is actually an attack on the law, hence not within the authority of the *Conseil d'Etat*. Only when the administrative act is outside the territory of legality, that is, it does not fully comply with the law, the *Conseil d'Etat* will have authority to examine a challenge to its legality.

The most common claim before the *Conseil d'Etat* is the *recours pour excès de pouvoir*, a claim based on the illegality of an administrative norm. The specificity of this legal action is that the legal interest in bringing proceedings is very widely interpreted. Virtually any citizen can bring such an action in front of the administrative judge. This claim is free of charge: there is no obligation of representation by a lawyer and there are no related fees.

However, the *recours* is not a personal claim. French administrative law depends on the fanciful notion that appellants bring an action in order to restore the legality of the system, not to obtain recognition of individual, or subjective, interests. This distinction between subjective and objective rights has been criticized several times by the *doctrine*[60] but it still leaves a clear impression on the decisions of the *Conseil d'Etat.* Indeed, the previous observation about the *Conseil constitutionnel* can also be made here: a possible argument of unconstitutionality of an administrative norm would be phrased in terms of the general effect on a group, or on the society as

[59] Nonetheless the *Conseil d'Etat* has reduced the scope of this rule in several cases. In addition, the French constitution provides for norms that enacted by the executive and are therefore considered as administrative acts, but are hierarchically at the normative level of laws. These norms therefore escape this restriction. See Article 37(2) to the 1958 Constitution.

[60] For example Joseph Barthélémy, *Essai d'une théorie des droits subjectifs des administrés dans le droit administratif français*, Th., Toulouse, 1899 ; Roger Bonnard, 'Les droits subjectifs des administrés' [1932] RDP 695.

a whole.[61] The *Conseil d'Etat*, like the *Conseil constitutionnel*, may discuss poverty but only in general, and not particular, terms.

The Conseil constitutionnel and the Conseil d'Etat – a council or a court?

Both the *Conseil constitutionnel* and the *Conseil d'Etat* are formally named 'councils'. Indeed, the *Conseil d'Etat*, along with its judicial functions, also performs administrative tasks to advise the government on secondary legislation.[62] As for the *Conseil constitutionnel*, before *QPC* was introduced, scholars had argued that an institution dealing only with *a priori* examination of legislation cannot be considered a court. Moreover, the procedure at the *Conseil d'Etat* and even more at the *Conseil constitutionnel*, are less party driven than in common law courts, as previously noted. The composition of the *Conseil constitutionnel* and the procedure for nominating its members also support the opinion that this is not a court.[63] This could also be said of the *Conseil d'Etat*.

Arguments to the contrary have also been proposed.[64] The *Conseil constitutionnel*'s interpretation of the constitution is authoritative. Its rulings on the legality of a law are binding. Its interpretation of laws is 'typically followed as

[61] This is not the case with another type of administrative claims, 'responsibility of the administration'. However those claims are very rarely examined in terms of constitutional law, making it irrelevant to the context of this research.
[62] This separation was created by the *loi du 24 Mai 1872 relative au Tribunal des conflits* which organized the CE.
[63] The members of the *Conseil constitutionnel* are not required to have legal qualification, even if in practice most of them do. All former Presidents of the Republic are *ex-officio* members of the *Conseil constitutionnel*. 1958 Constitution, Article 56.
[64] Marc Guillaume, 'L'autorité des décisions du Conseil constitutionnel: vers de nouveaux équilibres?', 2011 Nouveaux cahiers du Conseil constitutionnel 49. Guillaume, who was the General Secretary of the *Conseil constitutionnel* (2007-2015), contends that Art 62 of the Constitution provides for a judge 'specialized in constitutional matters'. He does not hold that the QPC reform changed anything in this respect. However, the *Conseil constitutionnel* is not a Supreme Court in the American sense, as there is still no possibility for this institution to act against 'non-respect' by the CE and the C.Cass.

authoritative statements'.[65] The same is true for the *Conseil d'Etat*. Following the creation of the *QPC*, this procedure of reference from the other courts brings the *Conseil constitutionnel* a step closer to the model of an appeal court. Given these institutional characters, and with the purpose of this research in mind, the *Conseil d'Etat* and the *Conseil constitutionnel* will be regarded here as courts.[66]

Cour de cassation

Following the *Paulin* case,[67] and in accordance with the tradition of the French Revolution,[68] the *Cour de cassation* does not examine the constitutionality of the law. Handling only private (and, to some extent, criminal) law, the *Cour de cassation* deals much less with constitutional claims. Still, following a tendency to 'constitutionalise' the law in France,[69] that is, to import constitutional concepts and rules into various fields of the law, the *Cour de cassation* (as well as the *Conseil d'Etat*) applies constitutional analysis in a growing number of cases.

The typical action before this jurisdiction is a claim for quashing a judgment of the court of appeal. In this respect, the *Cour de cassation* does not exercise 'completeness of jurisdiction' (*plénitude de juridiction*): it is only the judge of the law, not of the facts which are being decided by the lower instances. Therefore, this

[65] *Principles of French Law* (n 28) 43.
[66] For a similar approach, that the *Counseil constitutionnel* is a court 'to all intents and purposes', ibid 42.
[67] Cass. Crim. 11 mai 1833, S. 1833, 1, p. 357; and more recently: Cass, Civ, 2e, 20 décembre 1956, Bull civ. N° 714 p. 464.
[68] Expressed in the *loi des 16 et 24 août 1790 sur l'organisation judiciaire* (Law on the judiciary organization) according to which 'the tribunals taking part directly or indirectly in the exercise of the legislative power, or prevention or suspension of the decrees of the Legislative body, approved by the King, shall constitute a breach of duty'.
[69] For example Pascale Deumier, 'La constitutionnalisation de la responsabilité civile' [2011] Nouveaux cahiers du Conseil constitutionnel 21.

supreme tribunal does not discuss the peculiar situation of a litigant but focuses on the use of the law by lower jurisdictions.

Legal aid

Pleading before the judicial and administrative jurisdictions, a claimant may be entitled to partial or total legal assistance, the '*aide juridictionnelle*'.[70] In 2011, complete legal aid was provided if the applicant's monthly income in the previous year was below 929 Euros.[71] Individuals eligible for the basic income support scheme (RMI) are automatically entitled to legal aid. Under some conditions, individuals who do not fit in the above mentioned categories may benefit from this help when the claimant's situation is considered of high interest, whether with respect to the object of the litigation, or given the foreseeable fees of the trial.[72]

Focusing on the Conseil constitutionnel

Some of the cases examined in this chapter were referred to the *Conseil constitutionnel* by the other two courts, however, judgments delivered directly by the *Cour de Cassation* are not examined here, and cases of the *Conseil d'Etat* are only touched on briefly. The choice to focus on the case law of the *Conseil constitutionnel* has both theoretical and institutional logic.

From the theoretical perspective, legal scholars have posited that thanks to the *QPC*, the French judiciary is approximating the model of a supreme court, in which

[70] *Loi n°91-647 du 10 juillet 1991 relative à l'aide juridique*
[71] Conseil national des barreaux, *Accès au droit et à la justice* <http://cnb.avocat.fr/Acces-au-droit-et-a-la-justice_a135.html#tag_2> accessed 1 September 2016.
[72] ibid.

the *Conseil constitutionnel* fulfils the role of the head of the judiciary.[73] As mentioned previously, the *Conseil constitutionnel's* interpretation of the constitution is considered binding upon the other courts.[74] The *Conseil constitutionnel* has therefore become – for constitutional matters, even if not for other matters – the equivalent of the Supreme Courts of Canada and Israel.

There are also institutional reasons for this choice. As mentioned above, the *Conseil d'Etat* and the *Cour de Cassation* do not examine laws, and subject to the *théorie de la loi-écran*, the examination of bylaws and executive decrees is fairly limited. These courts perform a constitutional examination only when the secondary legislation under question does not strictly apply a law. There are two consequences to note here. First, most of the cases employing constitutional norms are delivered by the *Conseil constitutionnel*. The other two courts have a much thinner case law in the constitutional field. Secondly, given that the *Conseil d'Etat* and the *Cour de Cassation* lack the tradition of constitutional analysis, they are not accustomed to discuss such matters. When they do, the judgments are shorter and have poorer argumentation than judgements of the *Conseil constitutionnel*. On this point, it is worth mentioning that for French legal scholars, case law of the *Conseil d'Etat* and the *Cour de Cassation* is not considered constitutional law. Cases of the *Conseil d'Etat* which use constitutional analysis belong to the category of administrative law.

[73] Dominique Rousseau, 'Le Conseil constitutionnel, Cour suprême?' in *Conseil constitutionnel et QPC: une révolution?* (*Regards sur l'actualité,* N°368, *La documentation française* 2011) 36-44.
[74] Mathieu Disant, 'L'autorité de la chose interprétée par le Conseil constitutionnel − Permanence et actualité(s)' [2010] Cahiers du Conseil constitutionnel 28.

D. APPLICABILITY OF THE METHODOLOGY TO THE FRENCH LEGAL SYSTEM

The French judicial system is distinct from the common law courts of Israel and Canada. There are significant dissimilarities in terms of the concept of the law, role of the courts, and, consequently, legal procedure.

While the common law is articulated by analogies of cases and precedents, the French civil law is expressed by restatements of principles. Common law is based on custom. Civil law is based on concepts. The former reasons from rights, the latter reasons from facts and actions. The intellectual principles of traditionalism, incrementalism, and pragmatism are replaced in the civil system by rationalism.

This results in differences in the role of the court and in the authority of their judgments. Separation of the legislative and judicial powers was firmly established by the French Revolution, as expressed in the *Law of judicial organization of 16-24 of August 1790*. This law provides that judicial tribunals taking direct or indirect part in the exercise of the legislative power, or suspending the decrees of the legislative body, commit a breach of duty.[75] The separation was later reaffirmed in Article 5 of the *Code civil* which provides that 'judges are forbidden to decide cases submitted to them by way of general and regulatory provisions'. In other words, not only do the decisions of the *Conseil d'Etat* and the *Cour de Cassation* not have any obligatory value, these tribunals are actually forbidden to be influenced by previous decisions. This general restriction on judge-made rules leads to the theory of the 'relativity of the judged litigation' (*relativité de la chose jugée*), according to which judgments have only a relative authority, limited to the case at stake. A judicial judgment carries

[75] *Loi sur l'organisation judiciaire des 16-24 août 1790.*

no value of precedence, and the tribunal submitting it is entitled on the following day to render an exactly opposite decision. Article 62 of the Constitution provides that decisions of the *Conseil constitutionnel* have a binding power over other institutions.

Another difference, mentioned earlier, is that unlike common-law courts, the *Conseil constitutionnel* does not examine concrete cases but only abstract ones. It examines the compatibility of a norm with another norm, without bringing the facts of an actual event into the analysis.

French judges are not obliged to present reasoning for their decisions nor to develop any argumentation, and indeed there is no tradition of well-argued judgments. It follows that French human rights adjudication departs from its Canadian and Israeli counterparts also in technical terms. The judgments are significantly shorter (one page for most cases and from five to ten pages for very important decisions of the *Conseil d'Etat* and the *Conseil constitutionnel*), they usually provide very few factual details, and they hardly elaborate the parties' legal claims.

It appears as if the French courts, on the one hand, and the Canadian and Israeli courts, on the other hand, exist in separate judicial universes. Judgments produced in these legal systems seem to differ in abstract assumptions as much as in technical terms. This raises a dilemma for this research: are the jurisdictions comparable? Is the methodology of the research, clearly tailored to common law cases, suitable for the French adjudication? Can we apply common law analysis to civil law courts?

Systems may be closer than they appear

French constitutional adjudication is closer to the Israeli and Canadian models than it may seem, and the case analysis method is suited, in fact, to the judgments of the *Conseil constitutionnel*.

First, the case law in France does actually have normative power. It has been argued that the aforementioned Article 5 of the *Code civil* may be interpreted in a restrictive manner: creating rules outside of litigation is forbidden, while creating praetorian rules remains perfectly admissible. Such an understanding led to the recognition of central judgments that contain general principles applicable to other similar cases (*arrêt de principe*).[76]

Even by strict positivist standards, a decision of a French tribunal may have an impact on the normative reality. Otto Pferstmann argues that judicial decisions are at least a concretization of superior general norms.[77] Indeed, according to the Kelsenian approach, in *any* legal system that recognizes the power of the judge, judgments have a compulsory legal value just like any other norm in the pyramid. Judicial decisions in France are therefore a form of individual legal norms.

In this respect, the difference between a common-law system such as Israel and Canada and a civil law system such as France lies not in the very idea of a

[76] See for example François Terré, *Introduction générale au droit* (Dalloz 2003) 278-279. It is worth noting the constitutional sources often mentioned as grounds for creation of rules by the two leading courts. It may be considered that Title VIII of the Constitution on Judicial Authority, namely Article 66(2) that provides that this institution is 'guardian of the freedom of the individual[…] in the conditions laid down by statute', is constitutionally grounding this authority for the *Cour de cassation*. As far as the *Conseil d'Etat* is concerned, things are more complicated. In CC décision 86-224 DC du 23 janvier 1987, *Conseil de la concurrence,* the *Conseil constitutionnel* considered that 'the fundamental principles acknowledged in the laws of the Republic' mentioned by paragraph 1 of the 1948 Preamble authorise the administrative jurisdiction to annul or reform the decisions, taken in the frame of State authority, by the executive branch. In the earlier CC décision 80-119 DC du 22 juillet 1980, *validation d'actes administratifs*, the *Conseil constitutionnel* admitted that the *loi du 24 mai 1872* (n 62) was the basis for the independence of the administrative jurisdiction which constituted 'a fundamental principle acknowledged in the laws of the Republic'.

[77] Otto Pfersmann, 'La notion moderne de Constitution' in *Droit constitutionnel* (Louis Favoreu coordinateur, Précis Dalloz 2009) 76.

normative power attributed to judge-made rules, but merely in the hierarchical level attached to these rules. In all three systems, there are constitutional norms entitling the judges to produce new norms. The comparison between the systems is in the varying normative value given to the case law. With this common ground, the difference between Canadian, Israeli and French case law becomes a matter of scale, not of principle. This topic is in the heart of an ongoing debate in France, where various opinions have been expressed on whether or not judicial decisions have, and should have, a binding normative value.[78]

There should be no surprise, then, that most French lawyers, who may refuse the terminology of precedents, in fact consider case-law part of the legal system.[79] In other words, France is perceived by its lawyers as a common-law system, even if not described as such, in the sense that it has a concurring legislative and judicial creation of law.

It is all the more so when it comes to the work of the *Conseil constitutionnel*. Article 62(3) of the 1958 Constitution provides that the decisions of this institution 'shall be binding on public authorities and on all administrative authorities and all courts'. Indeed the *Conseil constitutionnel* is more active than the other two tribunals in creating judge-made rules. This is of course not an ironclad binding, as *stare decisis* is not strictly applied by the council. But in the final analysis, French constitutional adjudication creates binding precedence much like in the common-law model.

[78] For example Disant (n 74).
[79] Otto Pfersmann, 'Classifications organocentriques et classifications normocentriques de la justice constitutionnelle en droit comparé' in *Mélanges Francis Delpérée* (Editions Bruylant Bruxelles 2007) 1131.

Furthermore, France is similar to Israel and Canada in other aspects of judicial operation. In all three countries, the judiciary examines legislation and executive powers, and the legal systems internalize social values by way of constitutional norms. With the recently introduced mechanism of *QPC*, the *Conseil constitutionnel* has hewed even closer to the common-law design. From the Israeli and Canadian side, it bears remarking that even though it is incrementally developed by case law, constitutional law in these countries relies on fundamental texts providing not only rules but also principles.

To conclude, the difference between the three jurisdictions is not as sharp as it may appear at first glance, and in the constitutional context it is even less so. Decisions of the *Conseil constitutionnel* have a binding normative power, and overall this institution operates in a legal environment which is similar in some substantial elements to the common-law environment of the supreme courts of Israel and Canada.

Final remarks on methodology

Even if it were not close to the common law model, the case law of the *Conseil constitutionnel* would still be relevant to the methodology of this research, simply by virtue of the research goal. The intention of this work is to examine how poverty is perceived by courts. This can be done within any regime, within any system, within any context of rules of precedence. What is in focus here is not the normative impact of judicial decisions but rather the way judges understand poverty within these decisions. The power of the examined decision on subsequent cases is therefore insignificant. For the purposes of this study, as long as it is possible to trace a

perspective on poverty, the decision of the court is relevant and the time-based methodology of this research is applicable.

Considering the last two points, namely, the similarity of the French to a common law system, and the relevance of examining the perspective taken by the court regardless of the power of its decisions, we are only left to address the practical difficulties arising from the special character of the decisions of the *Conseil constitutionnel*. This is the object of the following sbusection.

Reading decisions of the Conseil constitutionnel

French judgments, as observed earlier, are short, provide few factual details, and seldom elaborate the parties' pleadings. The *Conseil constitutionnel* belies these observations, however. First, the cases tend to be longer than those of the other two courts, and to provide more reasoning. Secondly, the *action* of the appellants in the *a priori* control is often made public. In the *QPC*, details on the pending trial are mentioned. The *Cahiers constitutionnel,* an official publication of the *Conseil constitutionnel*, provides commentaries on some of the council's cases written by an internal legal team. These documents often shed light on the factual background and arguments of the parties. The availability of such accompanying documents made it possible to trace the reasoning of the *Conseil constitutionnel* in all of the cases examined below.

E. THE CONSEIL CONSTITUTIONNEL AND POVERTY

French jurisprudence is not used to consider poverty in terms of constitutional rights. Indeed, several scholars mention that the *doctrine* was reluctant to the idea of a legal analysis – especially in terms of human rights – of what was considered a social problem, a matter of solidarity between citizens, a workers' issue which would traditionally be solved through political tools.[80] Until today, French lawyers specialising in social law, that is, in employment law, social security law and social benefits law, present their field of expertise as aiming at protecting social justice[81] or as promoting solidarity.[82] With the same spirit, the authors of the various French constitutions hesitated to qualify social benefits or health protection as rights.[83] As mentioned earlier, it was only the constitution of the Fourth Republic that embedded social rights in its preamble, and it was as late as 1971 that the constitutional value of this text was 'rediscovered' by the Constitutional Council of the Fifth Republic.[84] It was therefore only recently that a constitutional understanding of poverty appeared in France, and even more recently that the idea of justiciability of the rights of the poor was acknowledged.

However, it is important to note that not all poverty cases deal with the rights of the poor. As we will show, in some French cases the social-economic phenomenon

[80] Diane Roman, 'La justiciabilité des droits sociaux ou les enjeux de l'édification d'un Etat de droit social' in *Droits des pauvres, pauvres droits? Recherches sur la justiciabilité des droits sociaux* (Centre de Recherches sur les droits fondamentaux, Université Paris Ouest Nanterre la Défense 2010) 1; Tatiana Gründler, 'La doctrine des libertés fondamentales à la recherche des droits sociaux' in *Droits des pauvres* (ibid) 90.
[81] Jean Rivero and Jean Savatier, *Droit du travail* (13th edn, Presses Universitaires de France 1993) pp. 33-34. The authors consider that labour law has an essential social and human aim of protecting the weak against the strong.
[82] Michel Borgetto and Robert Lafore, *Droit de l'aide et de l'action sociales* (7th edn, Montchrestien 2009) 28-30.
[83] Diane Roman, *Le droit public face à la pauvreté* (LGDJ 2002) 249.
[84] In the *Liberté d'association* (n 27).

of poverty is considered in association with an examination of rights of individuals who are not necessarily poor, and the rights examined are not necessarily social rights.

The following is an analysis of three cases, followed by eight other cases which are described more briefly. The first three represent the main fields of the French constitutional judicial treatment of poverty, considering taxation policy and social security schemes. They include two *a-priori* control cases and one *QPC* delivered from the *Cour de Cassation*. The *Conseil constitutionnel* examines a variety of constitutional claims in these cases, from the right to equality and the right to equal burden of taxation, to the right to health and the right to suitable means of existence.

E1. M. MOHAMED T.

(Conseil constitutionnel, 2011)

The right to decent means of existence, the principle of social solidarity, and the right to equality[85]

The *allocation aux adultes handicapés* is a social payment provided to disabled adults over 20 years of age. Individuals diagnosed as suffering from a high degree of disability (the threshold is fixed at 80 percent by a decree) are entitled to the benefit with no further requirements.[86] Following a chain of legislative amendments, cover for individuals with a lower degree of disability (set by a decree at 50 to 79 percent)

[85] CC décision 2011-123 QPC du 29 avril 2011, *M. Mohamed T.*
[86] *Code de la sécurité sociale* Art L821-1

was added, provided that two cumulative conditions, set forth by Article L.821-2 (2°) - (3°) of the Social Security Code, are met, namely:

> (2°) [the disabled person] was not employed for a period fixed by a decree.
>
> (3°) [A commission] ... recognises that given the disability, the person suffers from a substantial and durable restriction to access employment...[87]

Note that while sub-clause (2°) creates a backward-facing time requirement (that the person has not been employed for a year), sub-clause (3°) creates a forward-facing time requirement (that the person would be incapable of entering a job). The former requirement was originally added in a 2005 reform,[88] and later adopted by the law of finance for 2007, which is the law examined in this case.[89] A decree of June 2005 set the period of unemployment to one year.[90]

Previous proceedings

Prior to the proceedings in *Mohamed*, the decree was challenged before the *Conseil d'Etat*, on the basis of the principle of equality before the law, claiming that it created unequal treatment for disabled persons.[91] Loyal to the doctrine of *loi-écran*,[92] the *Conseil d'Etat* rejected the appeal. The decree, the judges found, merely specified

[87] *Code de la sécurité sociale* Art L821-2, version of December 2006.
This version is available here:
<www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=60C23487C55776AA07D9153119197F2C.tpdjo03v_1?idArticle=LEGIARTI000006744992&cidTexte=LEGITEXT000006073189&categorieLien=id&dateTexte=20081228> accessed 2 September 2016.
[88] *Loi n° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées,* Art 16(4).
[89] *Loi n° 2006-1666 du 21 décembre 2006 de finances pour 2007.*
[90] Décret n° 2005-725 du 29 juin 2005 *relatif à l'allocation aux adultes handicapés modifiant le code de la sécurité sociale*, which created Art D. 821-1 of *Code de la sécurité sociale.*
[91] CE 26 février 2010, n° 327664 (not published in recueil Lebon).
[92] See discussion above, text to n 59.

conditions set by the law. It did not create differences in treatment further to those created by the law.

Mohamed T. suffered from a lower degree disability. Under a special employment contract, the aim of which was to promote the labour inclusion of individuals who receive social benefits (such as *RMI*), he was employed in an NGO from April to October 2006. Immediately following the termination of his work he made a claim for the *allocation aux adultes handicapés*. The authorities refused the request in December 2006 on the grounds that he had been employed in the previous year. A challenge of this decision in front of the social security tribunal was rejected. Mohamed T. then appealed to the *Cour de Cassation*. Following his request for *QPC*, the *Cour de cassation* decided to hold proceedings and refer a question to the *Conseil constitutionnel* on the constitutionality of the aforementioned sub-clause (2°).[93]

The QPC

The appellant argued that allowing benefits for disabled individuals only if they were not employed in the previous year deprived them from suitable means of existence, a right guaranteed in Paragraph 11 of the 1946 Preamble. Mohamed, in other words, claimed to be caught in a legal trap: while waiting for the year to pass, he could not work, because he would then lose the option for benefits in the future.

The legal dilemma was phrased differently by the *Cour de Cassation*, which, similarly to the argument of the appellants in the proceedings before the *Conseil d'Etat*, questioned the constitutionality of sub-clause (2°) with regard to the principle of equality before the law (art 6 to the 1789 Declaration), as well as on the principle

[93] C.Cass, 2eme civ, 17 février 2011, n° 10-21634.

of national solidarity (enumerated in Paragraph 11 of the 1946 Preamble). A possible unconstitutionality arises, the *Cour de Cassation* submitted, because of an unequal treatment between disabled persons who have worked and those who have not worked. This difference in treatment does not appear to be linked to the object of the law.

Decision

Delivering a short judgement, the *Conseil constitutionnel* dismissed the claim for unconstitutionality, based on three arguments.

With regard to the appellant's assertion on the basis of the 1946 Preamble, the members held that indeed Paragraph 11 imposes a 'constitutional requirement'[94] on the legislator, to operate a national solidarity policy in favour of poor people.[95] Certainly, the legislator cannot avoid the obligation to guarantee this necessary social protection, however it is free to choose the way of fulfilling this requirement.[96] The judgement proceeds with two additional arguments:

> [S]ub-clause (2°) of article L.821-2 defines an objective criterion characterising the difficulty to access the labour market which results from the disability; by excluding from this benefit people that had occupied an employment for a duration set forth by a decree, the

[94] 'Constitutional requirement' – '*exigences de caractere constitutionnel*' in the words of the *Conseil constitutionnel* – is neither a principle nor a right, but rather an instructive demand turned at the legislator. *Mohamed* (n 85) considérant 5.
[95] In a chain of previous decisions, the *Conseil constitutionnel* recognised Paragraph 11 as grounds for policies of national solidarity, in favour of family, retired people and poor people. The case law was hence developed using a global interpretation of the entire Paragraph 11. Such understanding is demonstrated in *Mohamed*. In this case, the *Conseil constitutionnel* understands paragraph 11 as a whole, providing a general constitutional principle of social protection, rather than a collection of separate rights. Laurence Gay, 'Reconnaissance du droit constitutionnel à la protection sociale dans le cadre de la QPC' (88 *Revue française de droit constitutionnel* 2011) 833, 835.
[96] *Mohamed* (n 85) considérant 3.

> legislator fixed a criterion that is not manifestly inappropriate to the pursued goal.[97]

The use of the term 'objective' to define the chosen criterion may be read as a rejection of the claim for breach of equality: the *Conseil constitutionnel* finds that sub-clause (2°) applies an identical and neutral standard on all disabled adults. It treats similar cases similarly. Furthermore, and this is the core argument of the decision, even if sub-clause (2°) did infringe a constitutional norm of any sort, the condition it sets is not by itself unconstitutional, as it is linked and suitable to the rationale of the law.

A dynamic reading of 'Mohamed'

Mohamed is an excellent example of the hypothesis of this study, as it clearly demonstrates the possible impact of both time and poverty on the constitutional evaluation. A dynamic reading of the case offers three main insights.

The first point speaks to the length of the suspension period set by the decree. Consider an example. Two individuals, B and C, suffer from the same medical condition, possess an equal level of economic resources, and, at the present moment, are similarly unable to work. B has worked in the past month whereas C has not worked for a long time. B will have to wait, while abstaining from work, for a time period specified by the decree before receiving Government assistance. C, on the other hand, will be immediately entitled to the *allocation aux adultes handicapés*. From the perspective of equality, the longer this delay, the wider the difference in treatment between B and C. From the perspective of Paragraph 11, the longer the

[97] ibid considérant 4 [own translation].

suspension of benefits, the deeper the infringement of B's right to suitable means of existence. Evidently, then, time does matter, at least – to use the terms defined in Chapter One – in the sense of *magnitude*.

Not only is *magnitude* a pertinent factor in this example. An even stronger legal impact that could be argued for is considering time as *nature*. As mentioned above, the decree which sets the suspension period to one year had been challenged before the *Conseil d'Etat*, with the contention that it provided for unequal treatment.[98] The *Conseil d'Etat* found that it merely specified conditions already set by the law. This appeal was therefore rejected on grounds of jurisdiction. A time analysis could suggest a different path. Temporally speaking, the longer the period set by the decree, the further it goes beyond the purpose of the primary legislation. Indeed, as the *Conseil d'Etat* contended, the executive is free to define the requirement for inactivity, by the power provided in the law. But there must be a limit to this authorization: that is, there must exist a period long enough to make the decree *ultra vires*. A suspension period of ten years would no doubt have already been outside the scope of authority set by the law. There must be a threshold beyond which time has import in terms of legality. Does a one year period exceed this threshold? It might have been suggested, then, in the terminology of French administrative law, that striking down the decree can be done, notwithstanding *loi-écran*, on the ground of internal legality, and more specifically, for reasons of manifest error of appreciation.[99]

[98] CE 26 février 2010 (n 91).
[99] In French administrative law, the test of 'manifest error of appreciation', *erreur manifeste d'appréciation*, does not require a direct violation of the law. The judge is rather asked to determine that the decision maker did not properly fit the means chosen to the purpose of the law. In a case where freedoms or property rights are at stake, the judge will not hesitate to go into even more intensive control. The *erreur manifeste d'appréciation*, which applies to administrative action, could be applied in such a case to administrative legislation. CE., 15 février 1961, *Lagrange,* Rec. 121

The second point concerns the purpose of the law. The preparatory works for the law of finance of 2007 show that the intended purpose behind the reform examined in *Mohamed* was to increase the incentive to work.[100] Indeed, in the French economy, with relatively high welfare expenses and relatively broad unemployment, it makes sense to try and reduce the number of people who do not work and are dependent on public funds. This reform implements a public policy concept according to which the harder it is to receive public money, the stronger the motivation to be economically active. This appears to make sense. However, it may be that sub-clause (2°) has an opposite effect to this ostensive rationale. Considering the example of Mr. Mohamed, it is clear that potential recipients may rationally choose to avoid work, fearing that working would jeopardise their chances of receiving benefits in the future. Indeed, a simple analysis that locates both the decision-agent (the disabled individual who is about to claim benefits) and the context of the incentive (the potential to lose the benefits) on a time axis, reveals the examined legislation as lacking in good sense, even perverse, as it operates in contradiction to its own declared purpose: under subclause (2°), if you work, you lose money in the future.

The legal outcome of this temporal understanding is dramatic. It undermines what we earlier defined the core of the judgement. To use the words of the members of the *Conseil constitutionnel,* it questions whether the legislator had fixed a criterion that is manifestly inappropriate to the pursued goal.[101]

We might find, nonetheless, and still with the help of dynamic thinking, another possible rationale for this law. Perhaps the logical basis for sub-clause (2°) was not one of incentive, but rather of indication. According to this line of thought, its

[100] This purpose is mentioned in the *Commentaire aux Cahiers* of this decision, which is based on Parliamentarian papers created during the legislative process (the *amendement*, that is, a proposition to change the wordings of a bill, provided by a deputy or a senator).
[101] *Mohamed* (n 85) considérant 4.

purpose is to provide an objective criterion to reinforce the evaluation of the inability to work in the future. The standard chosen is that prior to submitting the application for benefits, the applicant had no labour activity. Using the language of Chapter One, it is useful to analyse the difference between indication and incentive from the perspective of *time as location*. An indication faces the future. Based on circumstances in the past or in the present (in the context of this law, employment in the previous year) it predicts an event that is still to come (likelihood to be able to work). An incentive, on the other hand, is focused on the present. Based on past, present or future events, it encourages a decision that is, by definition, located in the now.

It is not clear that such an argument (that the law has a purpose different from that declared by the legislator) could even be considered according to French constitutional law.[102] This view could, however, save the legislation, and indeed the judgement in *Mohamed*, from absurdity. In any case, even if the purpose of the demand of inactivity in the previous year was indeed to indicate the inability to work in the future, is this not the goal of the other part of Article L.821-2 – of sub-clause (3°)? If a professional committee determines that given a disability-degree of between 50% and 79%, a person suffers from a 'substantial and durable restriction to access employment'[103] why is it necessary to require, in addition, a previous inactivity? It seems this retrospective demand may reflects distrust with the committee more than anything else.

The last two points examined the time limit set by the decree. Let us turn to another time interval central to this study: the duration of poverty. A dynamic reading

[102] This would depend on the interpretational approach of the judge. In most cases, the *Conseil constitutionnel* is loyal to the intention of the legislator. See Olivier Schrameck, 'L'autorité des Décisions du Conseil constitutionnel' in *cahiers constitutionnels de Paris I* (Dalloz 2010) 134.
[103] The words of sub-clause L.821-2 (3°).

of the case raises the substantial difference in the way long-term poor experience time. Recall George Orwell's observation, cited in Chapter Two: 'For when you are approaching poverty, you make one discovery which outweighs some of the others. You discover... the great redeeming feature of poverty: the fact that it annihilates the future.'[104] As noted in the previous chapter, Orwell reports that with a decline in economic resources, the ability to make prospective plans decreases. This understanding is especially relevant to the impact of sub-clause (2°) on people with different economic abilities.

The reform examined deals with an interval of time. Sub-clause (2°) creates a spell during which an individual is restricted from benefits. At the end of this period, set to one year, she will be paid. Permanent income theory, discussed in Chapter Two,[105] suggests that rich and poor may experience this time spell very differently. Consider B1 and B2, both disabled, both worked in the previous month, and both have to wait for 11 months before being entitled for *allocation aux adultes handicaps*. For B1, with a relatively high permanent income, it would be easier to financially survive this one year. She has better access to credit, so she can take a loan from the bank. She can also 'eat' her savings. This is thanks to a higher average income spreading over years. B1 is more capable of maintaining a previous standard of living, or at least a minimal standard of living. For B2, a poorer individual, whose permanent income is substantially lower, it will not be as easy. Poor people usually have no savings to use, and they command a much lower access to credit. The implication is that through a period of no Government support, or with a substantially lower level of Government support, for B2 it would be difficult to maintain a decent standard of

[104] George Orwell, *Down and out in Paris and London* (Penguin 2003) 17. See discussion in ch 2 text to n 183.
[105] Ch 2 text to n 179.

living. For individuals who have been suffering from long-term poverty, this would be practically impossible. Note that this difference between poor and rich remains under any time period set by the decree.

It should be mentioned that permanent income theory usually refers to the future. However sub-clause (3°) requires that both B1 and B2 suffer from a 'substantial and durable restriction to access employment', so their prospective incomes are similar. They both face a zero labour income in the future. But in retrospect, the difference in income over a long period of time in the past creates a difference which cannot be overlooked in a constitutional examination of this legislation. In many relevant factors, such as medical condition and the ability to support oneself in the free labour market, B1 and B2 are similar. But their financial starting point is so different that surviving the one year period of inactivity, or any other period set by a decree, is possible for one and impossible for the other.

With such a diverging effect on individuals, does the conclusion of the judgement arguing for a similar treatment to similar cases still stand? And if B2's economic situation is so precarious, is it constitutional – from the perspective of Paragraph 11 of the 1946 Preamble – to withhold Government assistance?

Time and poverty: the temporal approach of CC and CE

The judgments in this case presented four legal arguments. The first observed that the examined sub-clause provided similar treatment for similar people and therefore did not breach the right to equality. The second reasoned that the legislator properly fulfilled the requirements of Paragraph 11. The third considered that the examined sub-clause was well-linked to the purpose of the law. Finally, the *Conseil d'Etat* held

that the decree was close enough to the primary law so that *loi-écran* denied jurisdiction to examine its legality.

A richer temporal observation provides a richer legal analysis. Adopting a dynamic perspective of the case not only reveals interesting insights into the facts, but also carries practical legal implications with regard to each of these four arguments. Permanent income analysis reveals significant differences in the impact of the law between poor and non-poor, and an especially problematic impact on Paragraph 11 rights of long-term poor. As for the suitability of the rationale, a temporal examination finds that the law contradicts its own declared purpose. Considering *time as magnitude* may influence the analysis of equality as well as of Mr. Mohamed's claim for breach of Paragraph 11. Finally, with regard to jurisdiction, a time-based analysis may provide the legal justification that the *Conseil d'Etat* was missing.

All these aspects are absent from the judgements of both the *Conseil d'Etat* and the *Conseil constitutionnel*, and it seems that for both tribunals it is due to lack of instruments of legal analysis: the *Conseil d'Etat* held that it had no power to handle the case; the commentator of the *Cahiers Conseil constitutionnel*, a formal organ of the *Conseil constitutionnel*, openly admitted that in *Mohamed* the members of the council had engaged in a restricted legal discussion.[106] This judgement indeed nearly ignores the argument on equality and is far from profoundly analysing the appellant's argument on a breach of Paragraph 11. The commentator contended that the reason for the indifference to these arguments was linked to the will of the *Conseil*

[106] Cahiers du Conseil constitutionnel, Commentaire pour décision n° 2011-123 QPC du 29 avril 2011 (*M. Mohamed T.)*

constitutionnel to create a 'coherence between its *a-priori* and *a-posteriori* control', by keeping its analysis to an examination in the abstract.[107]

In the abstract, in this context, also implies being blind to time. The lack of legal instruments actually results from a lack of dynamic perspective. The *Conseil constitutionnel* did not consider the fact of setting the inactivity period to one year, and therefore did not – and in fact could not – reach a conclusion as to unequal treatment or other constitutional claims that were brought by the appellant. It is only with the temporal concretization, which is provided by the executive decree, that the judgement could have fully evaluated the constitutional impact of sub-clause (2°).

Indeed, avoiding the analysis of the decree is a result of rules of jurisdiction, and it reflects a general attitude of the *Conseil constitutionnel* to *QPC*. *A-priori* or *a-posteriori*, this tribunal refuses to do concrete examination of cases. But this policy has been criticised by academics,[108] and indeed in the past the *Conseil constitutionnel* was willing to make exceptions and draw limits to the executive (one of these cases is discussed in this chapter[109]). In the final analysis, in this particular case the outcome is close to absurd, because *Mohamed* is an exact mirror decision of the one provided earlier by the *Conseil d'Etat*. One council saw a challenge directed at the law. The other saw a challenge directed at the decree. Both concluded that they were incompetent. A symmetrical denial of justice.

The *Conseil constitutionnel* avoided a temporal evaluation of the case whatsoever. It is worth remarking, though, that most of the dynamic insights discussed above, including the application of permanent income theory and the

[107] ibid.
[108] Anne-Laure Cassard-Valembois, 'Le refus par le Conseil constitutionnel de sanctionner, dans le cadre d'une QPC, les lois qui se sont révélés inopportunes' [2011] Constitutions 319
[109] CC décision 99-416 DC 23 juillet 1999, *Loi portant création d'une couverture maladie universelle.* See text to n 129 below.

evaluation of the rationale of the legislation, are valid for any time period and therefore could have been applied even without discussing the particular administrative decree. However, in the absence of time, it was impossible to thoroughly evaluate the constitutional arguments. The failure to properly reflect the dynamic nature of poverty resulted in incomplete legal analysis and consequently, a gap in the legal conclusion. Similarly, the *Conseil d'Etat*, by not taking time into consideration, failed to see that it can actually interfere even under *loi-écran*.

Bear in mind that *Mohamed* is a *QPC*, which means that it was generated by a real person under real circumstances. Time in this case is not a theoretical concept which may be examined in the abstract (as in the two other cases discussed later in this chapter). Instead, this is a case of an appellant who had to wait to receive benefits for a long period of time. Disregarding the passage of time in this judgement is therefore even more striking. *Mohamed* was the first *QPC* to have introduced claims based on Paragraph 11 of the 1946 Preamble.[110] It was, therefore, a missed opportunity to introduce a time-based analysis in this context.

In the months following *Mohamed*, the requirement for a period of unemployment was publically criticized exactly for these reasons. Several disability organizations contended that the reform not only reduced the incentive to work, but also led to disabled persons often finding themselves in poverty, turning towards income support benefits such as the *RMI*. Similar criticism was made by the *Médiateur de la République*, the national ombudsman. Finally, the requirement of Article L.821-2 (2°) was cancelled by the law for finance of 2009.[111]

[110] Gay (n 95).
[111] *Loi de financement de la sécurité sociale pour 2009.*

E2. LOI DE FINANCEMENT DE LA SÉCURITÉ SOCIALE

(Conseil constitutionnel, 2000)

The right to equal burden of taxation[112]

The Law of Funding for Social Security, voted annually by the Parliament, determines the resources of the social security system in France. It mandates a monthly requirement from all taxpayers, the *contribution sociale généralisée* (*CSG*), as a primary source of funding. Article 3 of the Law of Funding for Social Security of 2001 purported to substantially reduce *CSG* payments in that year for individuals whose 'income from economic activity' was below 140% of the minimum wage.[113] For those whose 'income from economic activity' was above that level, the *CSG* remained unchanged. The Social Security Code defines 'Income from economic activity' ('*revenus d'activité'*) as including compensation, emoluments, salaries, allowances, pensions and life annuities.[114] In other words, it includes all labour related income. Article 3 did not provide for any reduction for income from capital.

A group of Senators challenged the bill as violating Article 13 of the 1789 Declaration. Article 13, which according to a previous decision of the *Conseil constitutionnel* applies to social security payments,[115] provides:

> For the maintenance of the public force, and for administrative expenses, a general tax is indispensable; it must be equally distributed among all citizens, in proportion to their ability to pay.[116]

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[112] CC décision 2000-437 DC du 19 décembre 2000, *Loi de financement de la sécurité sociale pour 2001* (hereinafter : *financement de la sécurité sociale*)
[113] *Loi de financement de la sécurité sociale pour 2001,* Art 3 defined the ceiling as: 'equivalent to 169 times the national minimum wage rate per hours majored in 40%'.
[114] *Code de la sécurité sociale*, Art L. 136-2.
[115] In CC décision 90-285 DC du 28 décembre 1990, *Loi de finances pour 1991.*
[116] Translation: website of the *Conseil constitutionnel*.

The Senators argued that through the actions of the bill, many individuals would be exempt from fully participating in funding the social security from whose services they benefit. The bill would cancel most of the social security charges paid by employees earning the national minimum wage. Unlike the funding for the State budget, social security is not financed by any indirect taxation causing all to contribute, so those individuals benefiting from the bill would not be contributing to social security. Therefore, the Senators argued, the mechanism provided in Article 3 violated the principle of equality, or, more specifically, what has been previously considered by the *Conseil constitutionnel* as the principles of solidarity and universality in the social security system.[117] Though equality in taxation is not, generally, an obstacle for the legislator to create tax reliefs for reasons of general interest, the appellants continued, 'a permanent fiscal advantage of the [*CSG*] could not be considered as a tax relief as this contribution was not a tax in the classical meaning.'[118] To support this position, the Senators mentioned that the CSG is deductible for tax accounting purposes, which is never the case of a regular tax, and that the European Court of Justice qualified this payment as a 'social contribution' rather than as a tax.[119]

Observe that the Senators were in fact using an argument of equality in order to attack a bill which promoted economic redistribution – not an obvious task. For this to succeed, they had to distinguish between what seems to be two different conceptions of equality. The first is what they identify, and what had been previously

[117] In the case of *Loi de finances pour 1991* (n 115).
[118] Saisine de la décision 2000-437 DC, 19 décembre 2000 (hereinafter *Saisine de 2000-437*).
[119] Decision of ECJ from 15 February 2000: Case 169/98 Commission v France [2000] ECR I-01049.

acknowledged by the *Conseil constitutionnel*, as the principle of *solidarity*.[120] It is the idea that everyone contributes to the common funding of the social security system. The second is what the Senators called a reason of 'general interest' that lay at the heart of the bill. It is the idea of civil camaraderie, which justifies redistribution: following the wording of the Preamble to the French Constitution, we may name it the principle of *fraternity*. In their argument, the Senators created a tension between the two principles, and associated the constitutional principle of equality to the former. Progressive taxation, according to this observation, is an expression of *fraternity*. Social security contribution, on the other hand, should remain universal, as an expression of *solidarity*.[121]

I shall return to this tension later on. For now, it is important to note that the appellants attacked what seemed to them to be the main underlying motive of the bill: the notion that the collecting mechanism of social security can be used for distributive purposes. The Senators did not claim that no tax could be used for the reallocation of wealth. What they did argue is that there was certain uniqueness in social security distinguishing it from an ordinary tax, and which demanded a universal contribution.

The Senators briefly made two additional arguments, both focusing on the ability to pay. First, they contended that Article 3 did not take into account the size of the family. Indeed, the Senators argued, a household earning one salary equivalent to 1.4 of the minimum wage would not benefit from the tax relief whereas a household with two minimum wage salaries would receive a refund equivalent to a month's

[120] Solidarity is a constitutional principle in France, specified in Paragraph 11 of the 1946 Preamble. See the case of *Loi de finances pour 1991* (n 115) considérant 29.
[121] The principle of solidarity in social security system is widely accepted in OECD countries. Social security collection is not only rarely applied as a progressive tax system but would also considered conrary to the definition of social security. Social security contribution in Israel and in Canada, as well as in many other countries, is universal and proportionate, that is, akin to applying a similar rate on everyone. Ruth Ben-Israel, *Social Security* (Open University Press, 2006), chapter 3.

wage per year. This would create 'a situation of extreme iniquity'.[122] Secondly, the fact that the relief was provided only for income from labour (economic activity), but not for income from estate or investment, seemed discriminatory. It resulted in unequal treatment for households with the same chargeable income, and therefore it breached the principle of equality in the burden of taxation. Note that accepting these last two arguments requires abandoning the assertion of the uniqueness of social security which formed the heart of the appellants' first argument. Insisting that the *CSG* should consider the size of the household as well as income from capital, is the same as treating it like any tax, which contradicts the argument based on the special character of solidarity which social security enjoys.

Decision

The *Conseil constitutionnel* held that it may be justifiable to deviate from the constitutional principle of equal taxation in order to achieve a social goal, and that in this case it was constitutionally acceptable to favour those whose income was below the 140% threshold for reasons of redistribution. However, the burden on all the rest should be equal, considering all paying abilities, and the reduction for poor people should also be allocated on an equal basis. In this way, that the *Conseil* accepted the last two arguments made by the appellants, and thus indirectly rejected the assertion of uniqueness, by treating the *CSG* as a tax:

[122] Saisine de 2000-437 (n 118).

> ....[the bill at stake] does not take into consideration any income other than the one produced by direct economic activity. It does not consider neither incomes of other members of the households, nor income of dependent persons within the household. This choice of the legislator, not to take into consideration all economic means, created a clear disparity between the considered contributors, in contrast with article 13 of the Declaration of 1789.[123]

The bill failed to consider the entire tax-paying abilities and thus created an inequality between taxpayers such as to breach the right to an equal burden of taxation.

Poverty in 'Financement de la sécurité sociale'

What is the function of poverty in the constitutional analysis? The poor in this case are not the ones hurt by the legislation. Poverty is rather located as the reason for interfering with the rights of someone else, as a justification for an unequal treatment:

> …[i]f the legislator can reduce the burden that is placed on the most 'modest' [poor] taxpayers, it is on condition that it will not create an obvious breach of the principle of equality between taxpayers.[124]

The purpose of this law is thus seen by the *Conseil constitutionnel* as redistribution and assistance to the weak.

[123] *Financement de la sécurité sociale* (n 112) considérant 9 [own translation].
[124] ibid.

A dynamic reading of 'Financement de la sécurité sociale'

Adopting a temporal approach reveals a richer set of motivations underlying the bill, suggesting that the central premise of the examined legislation was not in fact redistributive, as the *Conseil constitutionnel* believed. Rather, the dynamics of poverty suggest that its purpose was closer to what the Government claimed it to be, namely, to serve as 'a business recovery plan by a tax relief mechanism.'[125] Let us take a closer look at the payment deduction mechanism outlined in Article 3(B.):

> For the incomes received during the year 2001, the reduction provided for in article 3(A) equals to, in the limits of the contribution owed, a third of the amount determined by the following formula:
>
> 19 %
>
> x
>
> (169 x minimum wage increased by 40 % – income)

The minimum wage in 2001 was 6.67 Euro per hour.[126] Based on this rate, ***table 1*** shows the reduction provided by the bill.

[125] Observations du gouvernement de la décision 2000-437 DC, 19 décembre 2000.
[126] Gross figures. Source: INSEE, Salaire minimum interprofessionnel de croissance (SMIC) <www.insee.fr/fr/themes/tableau.asp?ref_id=NATnon04145> accessed 6 September 2016.

Salary *% of min. wage*	**Salary** *€ per month*	**CSG relief** *€ per month*	**Size of benefit** *as % of salary*
75%	845 €	46 €	5.5%
90%	1,015 €	36 €	3.5%
100%	1,127 €	29 €	2.5%
110%	1,240 €	21 €	1.7%
120%	1,353 €	14 €	1.1%
130%	1,465 €	7 €	0.5%
140%	1,578 €	0 €	0.0%
150%	1,691 €	0 €	0.0%
160%	1,804 €	0 €	0.0%

Table 1: ***CSG reduction according to Article 3. Source: own calculation***

What could have been the rationale for this mixed mechanism, where 140% of the minimum wage is the limit for a progressive system and the beginning of a neutral charge? Is it 'perfectly arbitrary' as the Senators pleaded?

This legislation increased poor unemployed people's incentive to work, by lightening the burden of social security contributions on low wages. The tax relief for salaries close to the minimum wage raised the *replacement ratio*, that is, the ratio between a poor person's available income when employed and when unemployed.[127] Consider Julie as an example. Typical of many chronic poor, Julie has secondary or

[127] Nicholas Barr, *The Economics of the Welfare State* (4th edn, OUP 2004) 225-226.

partial secondary education and no professional training, and is presently unemployed, with her entire income provided by welfare schemes. For the sake of this example, we can assume Julie is single with no dependents, and that she is able to work a full-time job. Finally, we can assume that the total value of social payments and benefits that she receives today is 900€. This morning, she is offered a job paying minimum wage. Julie has the choice to either accept the job, with the associated salary, or to turn it down, retaining her 900€ income from welfare. Let us assume that the alternative net income offered to Julie is 1000€, which includes her salary, after paying the CSG contribution along with other applicable taxes, plus any other benefits which she may still be eligible for. Julie may find it not worthwhile to accept the job for a meagre increase in income. With a net improvement of merely 100€ (out of a gross salary of 1,127€) the effective marginal tax rate she would be facing is higher than 90%.[128] This description is clearly incomplete as it ignores the non-financial utilities of work, such as social recognition and self-fulfilment. Nonetheless, it presents an essential feature of the landscape of poverty traps: under certain welfare regimes and tax bracket systems, it may be a rational choice to stay unemployed. The larger the economic improvement from taking a job, the higher Julie's incentive to accept the offer. The *replacement ratio* precisely defines this dilemma, presenting the substitution between wage and benefits. This figure is positively correlated to the real minimum wage, and negatively correlated to taxes imposed and welfare benefits lost upon entering the labour market. In order to keep the *replacement ratio* high, tax buffers shielding the minimum wage – which is the expected salary for chronically unemployed poor – should be as wide as possible. This is exactly what the Law of Funding of Social Security for 2001 was trying to do.

[128] A high effective marginal tax rate – EMTR – is considered as a primary cause for the poverty trap phenomenon. See Horst Siebert 'Labor Market Rigidities: At the Root of Unemployment in Europe' (1997) 11(3) J. Economic Perspectives 37.

Time and poverty: the temporal approach of the Conseil constitutionnel

Returning to the legal discussion, how does it change the constitutional picture if we understand the rationale of Article 3 by this different dynamic approach? The *Conseil constitutionnel*'s logic was as follows: because the purpose of the law is redistribution, an unequal treatment for those who earn above the threshold and those who earn below the threshold is justified. It fits the rationale of the law. Unequal treatment of labour income and capital income is however not justified, because it is irrelevant to the goal that the legislator sought to achieve.

But if we perceive this bill as aiming to incentivise poor people to join the labour market, the constitutional analysis takes a different trajectory. The cardinal tension in the basis of this law is accordingly not between solidarity and redistribution, as the Senators observed, but rather between solidarity and the stimulation of employment. According to this line of thought, the *raison d'être* of the Law of Funding of Social Security for 2001 would be twofold: (a) the original purpose of social security, including the principle of universal contribution; (b) increasing the incentive to work. These two goals are rationally connected to Article 3. They may both justify the unequal treatment between those who earn above the threshold and those who earn below the threshold, and the unequal treatment for labour income and capital income. There is no justification for a tax reduction on income from financial and material assets, because it would not affect the incentive to work. With this new legislative purpose considered, it is not clear that the result of the judgment is sustainable.

Furthermore, the Law of Funding of Social Security is reenacted annually, meaning that it changes year on year, and in this sense it represents a dynamic legislative process. This illustrates what was defined in the previous chapter as sensitivity to *fluctuation*: the mechanism created by the bill intends to operate over a defined period of time. But the *Conseil constitutionnel* does not analyse it accordingly. Through this dynamic perspective, the suggested tension between the principle of solidarity on one hand, and the rationale of the law on the other hand, becomes blurred. Over time, when economic mobility is taken into consideration, a larger portion of the society is poor, was poor, or will become poor. This means that exempting the poor from payment of *CSG* is a mechanism that would eventually touch on a much wider part of the society. This bill is therefore similar to an expression of solidarity, far more than is evident at first examination.

The *Conseil constitutionnel,* on the other hand, demonstrates an entirely static approach to poverty in this case. Assessing the relief of the tax burden on poor households engages no temporal aspects, and the duration of the 'modest' financial capability is not examined by dynamic tools. A dynamic approach to poverty may have revealed, as demonstrated above, other rationales for the bill, with different conclusions to the judgment. As we see in this case, a different perspective on poverty results in a different constitutional analysis, which may indeed produce different conclusions.

E3. LOI PORTANT CRÉATION D'UNE COUVERTURE MALADIE UNIVERSELLE

(Conseil constitutionnel, 1999)

The right to equality, the right to health, and the right to conditions necessary for development[129]

In 1999 the French government introduced the *couverture maladie universelle*, a health insurance reform offering free cover for poor people whose income was below a certain threshold. The proposed legislation did not specify the income threshold, but rather authorised this to be established by an executive decree. The government expressed its intention to set the cutoff line at 3,500 FRF (£462) a month for a single person.[130] This threshold, which was 300 FRF (£40) lower than the poverty line published by INSEE, meant that not all those regarded as poor in France would benefit from the new plan. The poorest, whose income was below the 3,500 FRF limit, would be eligible for free medical cover. The better-off poor, with income higher than the threshold but still lower than the poverty line, would not be covered. The bill created strong opposition in the Parliament and was referred to the *Conseil constitutionnel* by Deputies of the *Assemblée nationale* in virtue of Article 61 of the 1958 Constitution.

The constitutional challenge focused on the better-off poor who were not eligible to this basic social health service. The attack on the bill was based on grounds of unequal treatment between the poor and the poorer. The Deputies argued that the suggested health cover system would create significant inequalities between poor

[129] CC décision 99-416 DC du 23 juillet 1999, *Loi portant création d'une couverture maladie universelle.*
[130] Conversions from French Franc to British Pound are based on 1999 rates.

people.[131] The dissimilarity of treatment would violate Article 1 of the 1958 Constitution (providing that the Republic 'shall ensure the equality of all citizens before the law') and Article 6 of the Declaration of 1789 (providing that the law 'must be the same for all, whether it protects or punishes'). The Deputies further submitted that the principle of equality is all the more important with relation to the right to health which is protected as a constitutional right in Paragraph 11 of the 1946 Preamble:

> [The Nation] …shall guarantee to all, notably to children, mothers and elderly workers, protection of their health…

The breach of equality in this case is therefore particularly unacceptable having not only financial but also health consequences for the concerned persons.[132] The principle of equality, they continued, requires the state to treat similar situations similarly and allows the state to treat different situations differently.[133] But when an elderly person who receives a minimum old-age pension of 3,540 FRF (£467) per month, or a disabled person who receives a similar level of disability living allowance, are both excluded from this medical coverage, '…it seems difficult to accept that the additional 40 Franc [£5] of income means that they are not

[131] Saisine de la Décision 99-416 DC, 23 juillet 1999
[132] The *Conseil constitutionel* has several times recognized a constitutional right to equality specifically with relation to the access to health. With respect to health cover, see CC décision 75-54 DC du 15 janvier 1975, *Loi relative à l'interruption volontaire de la grossesse.*
[133] Here the Deputies refer to CC décision 78-101 DC du 17 janvier 1978, *Loi portant modification des dispositions du titre 1er du livre V du code du travail*, Considérant 3: '[T]he principle of equality… does not prevent to establish different rules in respect of categories of persons who are in different situations".

disadvantaged and that they are in a different situation relative to those who get the help'.[134]

The Deputies admitted that 'the equality principle is not an obstacle for the legislator to depart from equality for reasons of general interest if the difference of treatment is related to the aim of the law',[135] or in other words, that equality before the law may be breached for desired social purposes. But if the motive of general interest was, as declared by the government, to guarantee equal access to health care to the poorest citizens, then it must be observed that this very interest is injured by the Bill, due to an arbitrary choice of a threshold and its perverse effects. '[I]n the name of a 'blind solidarity',' the Deputies contended, 'the universal cover scheme will put in question acquired social rights for more than a third of the poorest citizens'. It therefore seemed difficult to consider that the inequalities created by the threshold effect of universal cover scheme were justified by a social interest. The obvious inequalities between insured individuals created by this threshold, the Deputies concluded, were justified neither by a real difference between the poor and the poorer nor by a compelling reason of general interest.

Decision

The *Conseil constitutionnel* rejected the equality argument. Citing the reasoning of the Deputies at length, it referred both to the general legal scheme, in the form of the Parliamentary bill, as well as to the 3,500 FRF threshold which was expected to be defined by the government decree. It is interesting to note that the latter, being an administrative act, does not, on the face of it, belong to the jurisdiction of the *Conseil*

[134] Saisine de la Décision 99-416 DC, 23 juillet 1999, para I.
[135] Quoting CC décision 87-232 DC du 7 janvier 1988, *Loi relative à la mutualisation de la Caisse nationale de crédit agricole.*

constitutionnel. This is an important institutional factor to bear in mind in the analysis of the judgment, and to which we shall return.

The members of the *Conseil constitutionnel* indicated that the threshold effect had a different impact depending on whether it was related to the 'basic coverage' or the 'complementary coverage', the two different sections of the proposed legislation. In the part of the scheme entitled 'complementary coverage', individuals with an income higher than the eligibility line would pay only the proportional contribution according to the portion of their income which is above the threshold. The threshold effect of 'all or nothing' would not exist under this section. With respect to the other section, in which the poor above the threshold pay full health care contributions while those below the threshold enjoy complete exemption, the *Conseil constitutionnel* examined the public interest which was behind the programme:

> The legislator had the objective, according to the words of Article 380-1 of [the bill], to offer a basic coverage to persons that otherwise would not have, under any other status, the right to receive sickness benefit in kind.[136]

Would the objective of providing health coverage to the poorest justify the inequality between the poor who pay and the poor who do not pay? The *Conseil constitutionnel* believed as much. Following the same line of thought suggested by the Deputies, but reaching an opposite conclusion, it found that:

[136] *Couverture maladie universelle* (n 129) considérant 9 [own translation].

> [w]hen in the case at stake the legislator is trying to reduce the disparities of treatment in social protection, the equality principle cannot force it to find a solution to all the existing disparities.[137]

In other words, the reduction of disparities in access to health was a goal that may justify unequal treatment in access to health. It is interesting to note that in this analysis the 'inequalities' relate to the difference (in treatment) between the poorest and the better-off poor, while the 'disparities of treatment' relate to the difference (in access to health) between the poorest and *the rest of the society*. This is a distinction the Deputies avoided in their arguments. The *Conseil constitutionnel* continued further, explaining that as far as the complementary cover was based on the low income and the poverty situation which resulted, the choice of a threshold of incomes to define its beneficiaries was linked to the object of the law. In this case, because the benefit was in kind and not in money, i.e. that the health coverage was not compensated by any contribution, and because of the difficulties of equalizing the threshold effects, it did not seem that the legislator had breached the equality principle. The *couverture maladie universelle* passed the constitutional requirements with regard to the difference between the poor and the poorer.

Next, the *Conseil constitutionnel* adopted a different course of constitutional examination, concluding that the legislation would be constitutional only if the threshold-setting was made aiming to protect the rights of *all* the poor, and especially their right to health. Having previously rejected the arguments on inequality, the *Conseil constitutionnel* examined the rights of the better-off poor who would not benefit from the proposed programme, focusing exclusively on their particular conditions. They reached their conclusion based on the same constitutional norms that

[137] ibid considérant 9.

were used by the Deputies as legal grounds for their claim. These norms included the right to health and the right to equality before the law, along with Paragraph 10 of the 1946 Preamble, according to which 'The Nation shall provide the individual and the family with the conditions necessary for their development.'

The result was a 'declaration of constitutionality with a reserve', according to which, the *pouvoir réglementaire* (the executive power of administrative enactment) should be used to -

> … define the level of the threshold… as well as the details of its annual revision, in a way that respects the above-mentioned provisions of the Preamble to the Constitution of 1946, and under this reserve, the grievance of unconstitutionality should be rejected.[138]

The administrative acts can only be challenged at the *Conseil d'état*, and in the judicial chambers of the *Conseil d'état* it is only considered *a posteriori*. But in this case, the *Conseil constitutionnel*, which is limited by the Constitution to the examination of Parliamentary bills, sent a clear message of constitutionality regarding a future action of the Government. In practice, the impact of this resolution was not on the new law, but on the potential executive decree. This constitutional inconvenience found an indirect response in the last argument of the *Conseil constitutionnel*. The Legislature, according to the concluding remarks of the judgment, was 'responsible for the practical application' of the constitutional principles, and for this purpose it could create new provisions 'only insofar as it was respecting the constitutional limitations'. 'Respecting the constitutional limitations',

[138] ibid considérant 11.

according to this reasoning, is contingent on the administrative act which sets the threshold.

This issue of constitutional capacity may explain why the Deputies chose to focus their attack on arguments of equality and not on the separate rights of the uncovered poor. The argument on equality could be made with any choice of a threshold. The argument on the rights of the uncovered poor is dependent on the decision of the Government. When we turn now to examine the temporal perception of poverty in the case, we shall discuss the equality argument the same way it was treated by the *Conseil constitutionnel*: as if the threshold of 3,500 FRF has already been set.

A dynamic reading of 'Couverture maladie universelle'

This case is especially interesting for our study because it is a legal reflection of the issue of poverty measurement over time, a subject discussed in Chapter Two. The chances of escaping poverty in the short and medium term are of particular importance for those who are slightly above or slightly below a cut-off line such as the one created by the bill. A chronically poor person may have short spells in which she is just above the threshold, interspersed with longer spells in which she is below the threshold. She may find or lose a job, her health conditions may change for better or worse, and professional opportunities may come or go. Those who are not eligible for the free cover today may be eligible tomorrow. Empirical studies show that mobility around the poverty line is relatively high.[139] The percentage of poor households whose income go above the poverty line at least once in a certain period

[139] This was discussed in ch 2(D); and see B Jordan, 'The Place of "Place" in Theories of Poverty: Mobility, Social Capital and Well-Being' (2008) 1 Cambridge J Regions Economy & Society 115.

of time, which is an accepted index for measuring 'poverty mobility', is significant in France as in many other rich countries.[140] This may not have a major impact on the chances of escaping poverty completely (as many who rise above the line soon return below it), but it is very relevant to evaluating the equality argument in the *Couverture maladie universelle* case.

The *Conseil constitutionnel* did not challenge the claim that the bill treats those who are above the threshold differently from those who are below it; it merely found this unequal treatment to be justified by constitutional standards. But the picture of inequality is significantly amplified when the relevant households are seen as frozen in time. Because their income actually varies over time, many individuals consequently fluctuate between different modes of eligibility. Once this element of *fluctuation* is observed, thanks to a dynamic perspective, the *Conseil constitutionnel* may observe that the bill does not discriminate against as many households as the Deputies argued.

When the appellants claimed that 'the universal cover scheme will bring into question acquired social rights for more than a third of the poorest citizens', they apparently did not consider the likelihood that roughly one half of those citizens would be expected to fall below the threshold (and hence become eligible for free cover) within three years, and vice versa. From a legal point of view, unequal treatment still exists in the bill, but it is less acute. Over time, a poor person's chances to enjoy the free cover are higher than it appears from a static perspective. This is an argument that the *Conseil constitutionnel* missed.

[140] Madior Fall, *Poverty Measurements in France* (Institut National de la Statistique et des Etudes Economiques 1997).

On the other hand, a dynamic approach can be used to bolster the concurring argument against the bill. In the case of the uncovered poor who remain as such over time, it is evident that the more drawn out this situation, the more severely their access to health is infringed. As mentioned in Chapter One, lacking access to health care over an extended duration may have several constitutional implications. Moreover, given that even when neglecting a dynamic perspective, the judgment invoked the right to health, evoking the duration of poverty clearly plays a role of *magnitude* in this analysis.

My last remark pertains to poverty traps, as this scheme may present a serious risk for people to remain in such a situation of poverty. As mentioned above, the aspect of the scheme entitled 'basic coverage' created a threshold effect of 'all or nothing'. The better-off poor whose income was above the threshold paid full healthcare contributions, while those below the threshold enjoyed a complete exemption. Such binary arrangements decrease the incentive to find a job, and therefore present a major potential for poverty traps. There are two considerations serving to mitigate this risk in the context of the present bill. First, in the *couverture maladie universelle* the State provides benefits in kind, which do not affect agent decisions to the extent that financial benefits do.[141] This is even more the case for medical services and medications. Secondly, the mechanism created in the legislation examined here was not entirely an 'all or nothing' arrangement. Under the 'complementary cover' section, individuals with an income higher than the eligibility line would have paid a proportional contribution according to the portion of their

[141] See discussion in ch 2(E).

income above the threshold. This being the case, the scheme's design tempers the possible effect of a poverty trap.[142]

Time and poverty: the temporal approach of the Conseil constitutionnel

In this case, the *Conseil constitutionnel* engaged in a fairly elaborate discussion on poverty, but only from a static perspective, making it blind to certain relevant implications. The judgment did not refer to the duration of poverty, nor was it concerned with the chances of escaping it. Being detached from time, poverty was therefore posited as a situation that could never change. As a result, the dynamic findings of our own analysis (and their crucial legal implications) are ignored.

However, time still does play a role in *Couverture maladie universelle*, albeit under the radar. Under the regime examined, fluctuating in and out of deep poverty means fluctuating in eligibility. To this extent, the legislature did take time into consideration. However, as was the case in the previous *Financement de la sécurité sociale*, the *Conseil constitutionnel* was unaware of the aspect of *fluctuation* in the examined bill.

To conclude, a dynamic approach to poverty can enrich the discussion in this case with arguments going both ways. The *fluctuation* argument that emerged was contrary to the appeal: in time, people move between states of eligibility. Therefore, the alleged inequality in treatment it is less sharp than perceived in the judgment. The *magnitude* argument focused on the uncovered poor, and pushed in favour of the

[142] The *Conseil constitutionnel* has indeed referred to this issue, in its discussion on the difficulties of equalizing the threshold effects (presented above). However, as mentioned above, this discussion was handled with no attention to potential change over time.

appeal: the longer their situation lasts, the more severe is the infringement of their access to health.

E4. OTHER CASES

The other *Conseil constitutionnel* cases dealing with poverty make a similar point. Whether discussing it directly or incidentally, whether in the context of *droits-créances* or *droits-libertés*, none of the cases apply a dynamic approach. However, the scope of this study does not allow for a deep analysis of the cases. I shall therefore briefly present each case and outline its temporal perspective.

Loi d'orientation et de programmation pour la performance de la sécurité intérieure[143] *(2011)*

The law examined in this case allowed public authorities to order a property be evacuated if it has been unlawfully occupied within the preceding 48 hours. The law chiefly targeted poor people with no other solution for housing. The appellants claimed that the legislation violated several rights, among which the respect of private life and the presumption of innocence. Dismissing the appeal, the *Conseil constitutionnel* made no distinction between squatters who are long-term poor and those who are not.

[143] CC décision 2011-625 DC du 10 mars 2011, *Loi d'orientation et de programmation pour la performance de la sécurité intérieure.*

***Loi pour l'égalité des chances*[144] (2006)**

***Syndicat CGT et autre*[145] (2011)**

The laws examined in these two cases made rules of hiring and firing and several other labour protection laws more flexible in order to encourage the employment of young workers. The appeal in the former case was on the grounds of violating the constitutional right to employment, and in the latter on the grounds of equality, of the right to determine collective agreements and the liberty of labour unions. No one stays young forever, but the *Conseil constitutionnel* did not take account of long-term effects including the cycle of participation in the labour market. The analysis in both cases was entirely static.

***M. Zeljko S.*[146] (2011)**

In this *QPC,* the *Conseil constitutionnel* examined a reform to the *RMI* (income support) system aimed at encouraging individuals to return to work, as well as to combat poverty among working individuals. The appeal concerned a requirement of foreigners to have been legal residents in France for at least five years in order to be covered by the scheme, claiming that it was a breach of the equality principle as well as of Paragraph 11 of the 1946 Preamble. Notwithstanding the clear temporal context, embodied in the required length of residency, the judgement does not consider the duration of poverty.

[144] CC décision 2006-535 DC du 30 Mars 2006, *Loi pour l'égalité des chances*.
[145] CC décision 2011-122 QPC du 29 avril 2011, *Syndicat CGT et autre.*
[146] CC décision 2011-137 QPC du 17 juin 2011, *M. Zeljko S.*

Loi de financement de la sécurité sociale pour 1998[147] (1997)

This case examined legislation which aimed to transform child benefits to targeted allowances, that is, provided only to families whose income was below a certain threshold. The reform was challenged based on the principle of equality as well as under various rights enumerated in the 1946 Preamble. Income is measured annually, so the new law is inherently responsive to the dynamics of income change. However, this aspect of *fluctuation* is absent in the judgment which applies a completely static analysis.

Loi instituant une dotation de solidarité urbaine[148] (1991)

The law examined in this case created a redistributive mechanism of money transfers from richer to poorer municipalities in Ile-de-France (the region including Paris and its suburbs). A group of Deputies argued for breach of the principle of equality, because municipalities outside Ile-de-France were not included in the arrangement. The *Conseil constitutionnel* examined the socio-economic situation of the region and found a gap which justified a different treatment. The appeal was rejected. This case, which focused on the geography of poverty, did not take account of the temporal aspect of regional development.

Loi d'orientation relative à la lutte contre les exclusions[149] (1998)

This is an important judgment that laid down a constitutional conceptualization of distributive justice policy. A legislation providing for taxation on vacant houses in

[147] CC décision 97-393 DC du 18 décembre 1997, *Loi de financement de la sécurité sociale pour 1998*.
[148] CC décision 91-291 DC du 06 mai 1991, *Loi instituant une dotation de solidarité urbaine et un fonds de solidarité des communes de la région d'Ile-de-France.*
[149] CC décision 98-403 DC du 29 juillet 1998, *Loi d'orientation relative à la lutte contre les exclusions*.

municipalities with a strong demand for housing, and for temporary seizure of vacant residencies, was claimed to breach property rights and the principle of equal taxation. The *Conseil constitutionnel* found the law constitutional and rejected the appeal, mostly on plain technical reasoning. The legislator can impose a heavier tax burden on certain categories of people in order to improve other people's economic situation, the judgment held. As far as seizure is concerned, it was a temporary measure that did not constitute a serious breach of property rights. The court thus applied a temporal approach in parts of the judgement which did not deal with poverty. The analysis of poverty, as the general interest justifying the infringement of rights, was entirely static.

Diversité de l'habitat*[150] *(1995)

A 1995 bill provided various incentives and arrangements to ensure social diversity in city planning but indirectly weakened the incentive of local authorities to build and finance public housing. It was challenged by Deputies who claimed that the bill defeated the purpose of previous laws providing social housing, and violated several rights provided by the 1946 Preamble. The appeal was rejected on grounds of legislative margin of appreciation. The legislator, the judgment held, can modify previous laws insofar as it does not deprive the access to decent housing.

Temporally speaking, this bill combined a short-term solution (emergency housing for homeless) with a long-term solution (provision of public housing). Such an understanding, that different time prospects are involved in the bill, would have reinforced the judicial argument on the margin of appreciation preserved for the legislator. However, the *Conseil constitutionnel* did not apply this approach.

[150] CC décision 94-359 DC du 19 janvier 1995, *Loi relative à la diversité de l'habitat*.

F. CONCLUSION: THE TEMPORAL APPROACH TO POVERTY

The cases analyzed in this chapter reflect several current discussions on poverty dynamics in economics. *Mohamed* raised questions relating to permanent income theory; the analysis of *sécurité sociale* discussed poverty traps and the effective marginal tax rate; in the case of *maladie universelle,* the analysis concerned problems of dynamic measurement.

The constitutional role of poverty in the examined cases

Poverty played various constitutional roles in the cases examined in this chapter. In *maladie universelle*, poor people's right to health was at stake; and the comparatively better-off poor were discriminated against with respect to the poorer poor. In *sécurité sociale*, poverty appeared as the rationale of the law which justifies a deviation from equality. In this case poverty was merely the economic circumstances which exposed an individual to a human rights violation. Finally, in *Mohamed*, poverty was not only the rationale of the legislation, but also played a hidden part, as an unexamined element creating substantial inequality in the effect of the examined law.

A static perception of poverty

A clear finding is revealed from examining all *Conseil constitutionnel* cases dealing with poverty. All cases, including those only briefly discussed in the last section, manifest a judicial thinking pattern: the pattern of temporal oversight. Among the French cases examined in this chapter, some of which concern the passage of time in a most literal way, I did not find not even one example of a dynamic perspective on

poverty. The judgments provide a constitutional analysis of poverty which is always alien to the passage of time.

The possible reasons for these findings will be discussed in subsequent chapters. But first, we continue our journey between jurisdictions, embarking to Israel as the next destination.

4 Poverty, Time and Constitutional Human Rights Law in Israel

A. INTRODUCTION: POVERTY IN ISRAEL

In 2013, Israel[1] was the 33rd richest country in the world, with GDP per capita of US$ 32,700.[2] The country's social security agency, *Bituach Leumi* (Israel National Insurance Institute, NII) releases an annual report on 'Poverty and Inequality'. It provides data on household income below a relative poverty line which is defined, in line with OECD standards, as 50% of local median income.[3] In 2011 this threshold

[1] A clarification may be necessary here: this research does not cover the occupied territories of the West Bank nor the disputed Israeli settlements in these territories. It deals only with Israeli citizens, Jews and Palestinians alike, who live within the sovereign borders of the State of Israel. Under the Interim Agreement of 1995 (the Second Oslo agreement) the West Bank is partly governed by the Palestinian National Authority and partly by Israel. Since 2000, Israeli and Palestinian leaders have expressed support of establishing an independent Palestinian state in the West Bank and in Gaza Strip.
[2] PPP figures. IMF, World Economic Outlook Database, October 2014. <www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx> accessed 2 September 2016.
[3] There are minor differences between the methods of *Bituach Leumi* and the OECD, in the calculation of the median income as well as in the control for the size of the household. Figures cited here are in Israeli terms unless otherwise specified. See Israel National Insurance Institute, *Dimensions of Poverty and Social Gaps – Annual Report 2011* (2012) 36-37 (hereinafter *NII 2011 Report*).

was 6,401 NIS (£1,066) per month for a family of four.[4] The report for that year indicates that one out of five households, with just over 1.8 million individuals - making 24.8% of the Israeli population - were in a state of relative poverty (after taxes and transfers).[5] Among 35 members of the OECD, Israel is second in poverty levels only to Mexico.[6]

Long-term poverty in Israel

The NII releases estimations for long-term poverty in Israel based on household levels of consumption.[7] Relying on these assessments, roughly 16.4% of the Israelis (or 12.5% of the households) are long-term poor.[8] A 2000 study estimated that roughly one-third of the poor in Israel stay in this condition for ten years or more.[9] This phenomenon has been intensifying during the previous decade: among the poor, chronic poverty incidence has risen in 10 percentage points since 2002.[10]

Three factors are highly associated with long-term poverty in Israel: unemployment, high number of children and low education. These determinants are exceptionally widespread among two social groups.[11]

The *Haredim* – Ultra-Orthodox Jews, consisting roughly 8% of the total population – are the poorest social group in Israel. In 2011 58.8% of Ultra-Orthodox

[4] ibid 8.
[5] ibid 5 and 61. In OECD terms figures are somewhat lower, at 20.9%. See n 2.
[6] 2013 figures. OECD Stats Extracts, Income Distribution and Poverty. <https://stats.oecd.org/Index.aspx?DataSetCode=IDD#> accessed 2 September 2016.
[7] Based on Milton Friedman's Permanent Income Theory, a household will be regarded long-term poor if both its income and consumption expenditure are below the poverty line. For further explanation of this technique see ch 2 text to n 179.
[8] Own calculation based on NII data. See NII 2011 Report (n 3) 34 and 61.
[9] Moshe Shayo and Michael Waknin, 'Persistent Poverty in Israel – First Results from the Matched File of Population Censuses 1983 and 1995' (2000) 47(4) Economic Quarterly 597 [Hebrew].
[10] From 56% in 2002 to 66% in 2011. NII 2011 Report (n 3) 34-35.
[11] Bank of Israel, *Annual Report 2009* (2010) 305.

were poor, and 46.5% of Ultra-Orthodox were long-term poor.[12] Poverty amongst *Haredim* is a puzzle to economists because in many aspects it is poverty by choice.[13] Ultra-Orthodox children go to independent religious schools which provide no secular studies, and they therefore graduate with very poor abilities to fit in a modern economy.[14] Most men (up to the age of 40) do not work but instead concentrate on religious studies. Employment rate among men is 25.0% compared with the national average for men of 64.0%.[15] Employment among women is more widespread than men, but still significantly lower than the national average (47.5% compared to 55.3% among women in general).[16] As a result of poor education background the salaries of the men and women who do work are relatively low.

Israeli Palestinians – Arabs living within the State of Israel, consisting one fifth of the Israeli population[17] – are the second poorest group. In 2011, 58.0% of Israeli Palestinians were poor, and 36.5% of Israeli Palestinians were long-term poor.[18] Reasons for the impact of ethnicity on economic inequality were extensively discussed in the literature. Here again, the main reason lies in the labour market. In the more traditional Palestinian Muslim society, women marry younger and they are expected to carry the burden of raising the children.[19] Just like Ultra-Orthodox men they too have a significantly low participation rate. In 2008, less than one fifth of

[12] Own calculation based on NII data. See NII 2011 Report (n 3) 34 and 61.
[13] Eli Berman, *Sect, Subsidy and Sacrifice: An Economists' View of Ultra-Orthodox Jews* (National Bureau of Economic Research 1998) [Hebrew].
[14] Momi Dahan, *The Ultra-Orthodox Population of Israel, Part 1: Income Distribution in Jerusalem* (Jerusalem Institute for Israel Studies 1998) [Hebrew].
[15] Figures for 2008. Bank of Israel, *Annual Report 2009* (2010) 308.
[16] ibid.
[17] Out of 1.6 million Palestinians, 1.4 million (88%) are Muslim and the rest are mostly Christian. Israeli Central Bureau of Statistics, *Statistical Abstract of Israel 2012* (2012) 87-90 [Hebrew]. The Palestinian Christian community is similar to the Jewish majority in most socio-economic and demographic aspects. However due to availability of data, figures in this chapter are for Israeli Palestinians in general, unless otherwise specified.
[18] Own calculation based on NII data. See NII 2011 Report (n 3) 34 and 61.
[19] Yaser Awad, 'Poverty and Inequality among Jewish and Non-Jewish Families 1979-1994' in Haled Abu Isba (ed), *Arab Children and Teens in Israel: From Today to the Future* (Brookdale Institute 1998) 291 [Hebrew].

Arab women – 19.7% – were either working or seeking a job (compare with the figure cited above of 55.3% among women in general).[20] Another reason for the high level of poverty among Israeli Palestinians is historical – and contemporary – discrimination in the access to resources and opportunities, combined with (and indeed also leading to) crucial gaps in education.[21] The rate of working age men with less than secondary education is almost three times higher for Muslim Palestinians (58%) compared to Jews (22.5%), and the rate of working age men with tertiary education is less than half for Muslim Palestinians (15%) compared to Jews (38%).[22] This obviously results in serious income gaps.

Both poverty stricken groups have a large number of children. For the Ultra-Orthodox community figures are quite overwhelming, with 6.5 to 7.6 children per woman in 2003-2009.[23] Figures for Palestinian Muslim families are lower, and have been declining for the past three decades, but are still far from the national average of 2.96 children per woman: from 6 children per Muslim woman in the beginning of the 1980s to 3.6 in recent years.[24]

[20] Figures for 2008. Bank of Israel, *Annual Report 2009* (2010) 308. Figures for Muslim women are even lower. Eran Yashiv and Nitza Kasir, *Arab Israelis: Patterns of Labor Force Participation* (Bank of Israel Research Department 2009) 13 [Hebrew].
[21] It should be noted that government encouragement for employment policies from the recent years resulted with a 5.3% increase in the number of workers among Palestinian population (compared with 2.9% raise in the general population). Palestinian women's education is in a rise in recent years, and along with it fertility is in decline. NII 2011 Report (n 3) 18.
[22] Nabil Khattab, 'Ethnic and Regional Determinants of Unemployment in the Israeli Labour Market: A Multilevel Model' (2006) 40 Regional Studies 93.
[23] Ahmad Hleihel 'Fertility among Jewish and Muslim Women in Israel, by Level of Religiosity, 1979-2009' (Working Paper 60, Central Bureau of Statistics 2011) 32; Oz Almog and Sharon Horenstein, 'Fertility and Composition of Age and Sex in the Ultra-Orthodox Society in Israel' in *People Israel – A Guide for the Israeli Society* (Shmuel Neeman Institute 2008) <www.peopleil.org/details.aspx?itemID=7721> accessed 6 September 2016 [Hebrew].
[24] Hleihel, (n 23) 15. For national average and further data on the subject see Israeli Central Bureau of Statistics, *Characteristics of Israeli Society* (4th Report 2011) 207 [Hebrew].

The bottom line is that a vast majority of both Ultra-Orthodox and Palestinian families have either one earner or none,[25] their household income is highly dependent on welfare payments, and support a larger number of members per family. These combined factors inevitably result in widespread long-term poverty.

The labour market and long-term poverty

Long-term poverty affects not only these two groups. Widening income disparities over the last three decades[26] are a cardinal reason for chronic poverty in Israel. Global competition has had a negative impact on salaries in traditional industries. This, together with insufficient labour protection law enforcement, an ongoing erosion of the minimum wage, and the continuous inflow of foreign workforce from the East Asia and Eastern Europe, has pushed the wages at the bottom further down. OECD reported in 2011 that in Israel 'the real incomes of those at the bottom of the income ladder actually fell compared with the mid-1980s.'[27] This further enhances poverty: not only that many families stay away from the labour market, but those who do take a job may still remain poor.

When getting a job is no longer an escape from poverty, a new class of 'working long-term poor' is created. Figures are striking. Poverty among working families, that is, in households in which at least one adult is working, is on the rise. In 2011, 13.8% of working families in Israel were defined as poor, doubling the 7% figure of just a decade earlier.[28] Recent years have also seen a sharp incline in the rate

[25] Karnit Flug and Nitza Kasir, 'Poverty and Employment, and the Gulf Between Them' [2003] 1(1) Israel Economic Rev 55.
[26] OECD, *Divided We Stand: Why Inequality Keeps Rising* (2011) data notes on Israel.
[27] ibid.
[28] NII 2011 Report (n 3) 22. The number of working families below the poverty line has increased from 2010 to 2011 by 6.7%. Own calculation, based on data from NII 2011 Report 60.

of poverty among families with two earners.[29] In 2011 nearly two-thirds (64.8%) of the 442,000 poor households had at least one provider.[30] This developing phenomenon is bound to carry dramatic consequences in the future. However, it is a discussion which exceeds the boundaries of the present study.

Trends in the labour market and the welfare system

Despite the fact that Israel as a whole was a poor country in its early years, levels of inequality (and relative poverty) were relatively low from the 1950s until the 1970s. The last three decades have seen a steady rise in poverty.[31] This is due to two main reasons.

The first is the above mentioned widening gaps in income disparity. Massive privatization - and the impressive rise of the telecommunication industry in Israel – has pushed the top salaries further up, while salaries at the bottom stagnated. From one of the most equal labour markets in the Western world, with Nordic-state levels of income inequality, the Israeli economy has turned into one of the most unequal, with current inequality similar to the US. In the last decade alone, Gini coefficient (measuring disposable income) has risen by 5.6%.[32] As a result, the poverty line moved upwards in nominal as well real terms, and many families – many more than before – found themselves on the wrong side of the line.

The second reason for the recent rise in poverty is a drastic cutback in public civil expenditure, especially in welfare payments and health services, carried out by neo-conservative Governments in the early 2000s. This cutback, combined with the

[29] From 2% in 1999 to 4.6% in 2011. NII 2011 Report (n 3) 23.
[30] ibid 22.
[31] Except for a decrease in the middle of the 1990s, largely attributed to the Oslo peace process which allowed for significantly larger civil expenditure.
[32] Comparing 2011 rates to 1999 rates. NII 2011 Report (n 3) 42.

raising of indirect taxes and the decrease in salaries for the weaker workers described above, caused an unprecedented increase in poverty rates in Israel during the beginning of the 2000s.[33] The record high levels of poverty have remained almost unchanged until today.

The following sections

Similarly to the previous discussion on France, the two following sections provide an overview of the constitutional framework to be explored in this chapter. Section B describes the constitutional norms, both written and unwritten, which protect human rights in Israel. Section C describes the operation of the Israeli Supreme Court, the judicial institution examined in this chapter. Since a great part of constitutional cases in Israel – and the majority of the cases examined in this work – are heard by the Supreme Court sitting as the High Court of Justice, I shall focus on this unique form of the Court. This section also portrays the accessibility of low-income individuals to the judicial system. Section D analyses poverty cases from the Supreme Court in Israel. Section E concludes the findings.

[33] ibid 5.

B. NORMS: CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN ISRAEL

Israel is a constitutional democracy with no constitution. Its legal system includes Supreme norms; the powers of the legislative branch are limited; and laws are subject to judicial review on grounds of basic individual rights;[34] but instead of a formal written constitution it has eleven 'Basic Laws', eleven chapters of an unfinished book.

Due to political disagreements, the first Knesset – which acted as a constituent assembly and was empowered by the Declaration of Independence (1948) to ratify the Israeli constitution – did not reach an acceptable version of a constitution. Instead it decided to compose it chapter by chapter, each part constituting a Basic Law. Finally, the first Knesset transferred its constituent powers to the Second Knesset and to any subsequent Knesset.[35] The first Basic Law ('The Knesset') was passed in 1958 and it was followed by eight further Basic Laws, enacted every few years until 1986. Most of these laws deal with different State bodies.

Then, in 1992, came what Aharon Barak, Chief Justice (or President) of the Supreme Court in 1995-2006, later called 'The Constitutional Revolution'.[36] The Knesset passed two Basic Laws, one dealing with 'Freedom of Employment' and the other with 'Human Dignity and Liberty'. These Basic Laws guarantee various human rights and, similar to the Canadian model developed in *R. v Oakes*,[37] provide a protecting 'limitation clause': 'there shall be no violation of [the mentioned rights] except by a law befitting the values of the State of Israel, enacted for a proper

[34] Suzie Navot, *The Constitutional Law of Israel* (alphen aan den rijn 2007) 35.
[35] For a review of the historical circumstances and the legal significance thereof Navot (n 34) 35-38.
[36] Aharon Barak, 'The Constitutional Revolution: Protected Human Rights' (1992) 1 Law and Government 9 [Hebrew].
[37] [1986] 1 S.C.R. 103.

purpose, and to an extent no greater than is required.'[38] Israel 'underwent a constitutional metamorphosis: from a state based on the English model of Parliamentary sovereignty, it became a constitutional state'.[39]

Three years later, in the seminal case of *Bank Mizrahi v. Migdal*, the Supreme Court took up the gauntlet. It stated that '[t]he Knesset granted the State of Israel a constitutional Bill of Rights',[40] with the majority affirming the constituent power of the Knesset and the supremacy of Basic Laws, acknowledging the principle of a limited legislature, and ultimately recognizing the power to strike down a law, a power vested in the court by the Knesset itself.

The Israeli constitutional landscape is therefore 'partial and incomplete',[41] especially in terms of human rights. As recognised by Professor Suzie Navot, 'a significant portion of the work regarding constitutional recognition of human rights is therefore still at the Knesset's doorstep'.[42]

Rights enumerated in Basic Laws

As a result of the above mentioned historical circumstances and widespread social disagreement, the Israeli written bill of rights is not only incomplete but also unsystematic. Prominent rights, primarily the right to equality, are not expressly mentioned in the Basic Laws, while other less central rights are well developed.

Basic Law: The Knesset recognises the right to vote, the right to be elected and equality in elections. *Basic Law: Human Dignity and Liberty* recognises the right to

[38] Basic Law: Human Dignity and Liberty, s 8; Basic Law: Freedom of Employment, s 4.
[39] Navot (n 34) 42.
[40] Barak CJ in CA 6821/93 *United Mizrahi Bank* v *Migdal* PD 49(4) 221, 352.
[41] Yoav Dotan, 'The Supreme Court as the Protector of Social Rights' in Yuval Shani and others (eds), *Economic, Social and Cultural Rights in Israel* (Ramot 2004) 69, 75 [Hebrew].
[42] Navot (n 34) 37.

life, human dignity, property, personal liberty, freedom of movement and privacy. Finally, freedom of occupation is recognised in *Basic Law: Freedom of Occupation*. Evidently, a number of rights typically found in other bills of rights do not merit what is usually referred to by scholars and judges in Israel as 'constitutional anchorage',[43] or express mention.

The new Basic Laws do not directly mention any social right. As will be demonstrated below, socio-economic rights in Israel were developed from more general rights (such as the right to human dignity) by way of judicial interpretation. Drafts of a 'Basic Law: Social Rights' were prepared in several sessions of the Knesset by the Government as well as in private bills. However in the general political climate, which has not allowed the passage of any new Basic Law since 1994, these suggestions never materialized into legislation.

Judge made rights

Judge-made rights have special significance in a constitutional system which is based on a partial and incomplete constitutional text.[44] In Israel, rights not explicitly mentioned in the Basic Laws, but that the Court recognised as deriving from other enumerated rights, have in practice the same normative power as enumerated rights. Among these, first and foremost is the right to equality which the court recognised as contained in the enumerated right to human dignity.[45] Thus, even if not specified in a basic law, the right to equality is accepted today as a supra-legal norm:[46] a constitutional right with which the legislature is obliged to comply, subject to the

[43] Navot (n 34) 37.
[44] Dotan, 'Protector of Social Rights' (n 41) 75.
[45] HCJ 7052/03 *Adalah v Minister of the Interior* PD 61(2) 202.
[46] Aharon Barak, *Interpretation in Law: Volume Three – Constitutional Interpretation* (Nevo 1993) 423 [Hebrew].

provisions of the limitation clause.[47] Similarly, the court has recognised the unenumerated rights to representation, the right to shelter, freedom of religion, and other rights.[48]

These judge-made rights join the civil rights which were developed by the Supreme Court in the years before the 'Constitutional Revolution', similar to the English tradition of common law rights. These protected rights, often called the 'bill of rights which is not written in a book',[49] include freedom of speech, rights of due process, freedom of religion, and others. In the post-1992 era, the judicial treatment of these rights is increasingly integrated with the Basic Law normative formation.

C. INSTITUTION: THE SUPREME COURT

The Israeli Supreme Court operates not only as a final court of appeal on judgments of the lower courts, but also as the High Court of Justice (HCJ), a first instance court on several administrative and constitutional issues. The statutory source for the powers of the HCJ is broad and vague. *Basic Law: The Judiciary* provides that it shall hear 'matters in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court'.[50] With no clearer limitation

[47] Navot (n 34) 210.
[48] For a clear summary of derived rights in Israel see Navot (n 34) 210-217.
[49] Landoy J in HCJ 243/62 *Israel Filming Studios LTD. v. Commission for Review of Films and Plays* PD 16, 2407, 2415.
[50] Section 15(c).

provided by the legislature, it may be said that there is a constitutional convention in Israel that the HCJ determines the limits of its own authority.[51]

The outcome is that in most judicial review cases the Supreme Court operates as a trial court. This creates enormous volume of work for its fifteen judges. In order to reduce the pressure, a law from 2000 empowered District Courts (Israel's intermediate appellate court) to adjudicate some administrative matters which were previously under the jurisdiction of the HCJ and that do not involve violations of basic individual rights.[52]

But except for the particular issues which were transferred to the jurisdiction of the District Court, the address for judicial relief is still the Supreme Court. Any individual has the right to submit a claim directly to the HCJ in any matter regarding State and local authorities, officials and bodies thereof, and 'other persons fulfilling public functions under law'.[53] There is no possibility to appeal on the decisions of the HCJ, except for rare cases in which the HCJ itself decides to grant a second hearing in a larger panel.[54]

This peculiar arrangement is a result of historical circumstances. At the time of the British Mandate for Palestine, both Magistrate and the District courts were manned by local judges – Jews and Arabs – and Supreme Court judges were British (or close to the British administration). The British Mandate authorities preferred that while ordinary legal disputes, both civil and criminal, would be settled by local judges in the lower courts, matters concerning the Crown would be discussed exclusively, from beginning to end, by 'trustworthy' judges. Thus it was determined that

[51] Yoav Dotan, 'Judicial Activism in the High Court of Justice' in Ruth Gavison, Mordechai Kremnitzer and Yoav Dotan (eds), *Judicial Activism: For and Against* (Yediot 2000) 9 [Hebrew].
[52] Administrative Courts Law, 5760-2000.
[53] Basic Law: The Judiciary s 15(d).
[54] Court Law, 5744-1984 s 30.

administrative disputes would be handled directly by the Supreme Court. In 1948, following the foundation of the State of Israel, in accordance to a general policy to leave legal arrangements unchanged, this authority of the Supreme Court was kept, this time with Israeli judges. Soon the Supreme Court became a key player in the development of the democratic character of the new state, with its judges confronting the Executive authorities of the young state on matters of civil rights.[55] The Supreme Court steadily gathered reputation and influence,[56] and it plays – until today - 'a decisive role in Israel's public life'.[57]

Procedure

The procedure of the Supreme Court as an appellate court is fairly standard and therefore does not require extensive discussion. However the practice in the High Court of Justice is worth our attention because it carries consequences for substance.

The HCJ has a simple procedure. Hearings are held in an adversary fashion, but there are no oral testimonies and no cross examinations on submitted depositions.[58] The HCJ issues injunctions, mandamus and orders of habeas corpus to State or local authority officials. It may also grant declaratory judgments. Decisions of the HCJ are submitted relatively quickly and it is not uncommon for the court to provide an immediate temporary injunction upon first hearing. Ultimately, from the point of view of the appellant, the HCJ is an efficient tool for confronting illegal or unconstitutional acts of State authorities.

[55] Dotan, 'Judicial Activism' (n 51) 5-6.
[56] ibid 6.
[57] Navot (n 34) 137.
[58] Dotan, 'Judicial Activism' (n 51) 6.

Israeli law does not provide for a special procedure for raising question relating to the constitutionality of a legislation. In theory, any court can review the constitutional validity of primary legislation. In practice, however, in all eight times that a Knesset law has been declared unconstitutional since 1995 until 2012, it has been done by a final decision of the Supreme Court: seven times as the HCJ and once as an appellate court in a criminal case.[59]

Legal aid and accessibility

Court fees at the HCJ are low compared to the other courts.[60] For certain proceedings, such as appeal for habeas corpus, the law provides complete exemption.[61] In other matters (as well as in some matters within the jurisdiction of the Supreme Court as a court of appeal) the law provides a reduced fee.[62] In addition, Israeli legislation provides fee exemption for barehanded claimants. The release from fees is granted under the discretion of the court,[63] and in recent years the court has broaden the use of this authority.[64]

Appellants to the HCJ meet relatively few procedural, economic and structural obstacles on their way to court.[65] Procedural simplicity at the HCJ allows many appellants to appear with no legal representation. Petitions can be written by a layperson. Thanks to its high accessibility, combined with activist protection of

[59] In *Mizrahi Bank* (n 40), a civil appeal, the Supreme Court overturned the Tel-Aviv District Court decision to invalidate a Knesset legislation.
[60] Court Regulation (Fees), 5748–1987, First Supplement, s 2(b).
[61] Court Regulation (Fees), 5748–1987, s 20.
[62] Such as Prisoner's Appeals. See Court Regulation (Fees), 5748–1987, First Supplement, s 9.
[63] Court Regulation (Fees), 5748–1987, s 13.
[64] Yoram Rabin, 'Social Rights from the Procedural Sphere' in Yuval Shani (n 41) 765, 776.
[65] Dotan, 'Protector of Social Rights' (n 41) 104.

human rights and a relatively high public legitimacy, the HCJ enjoys the image of the court as 'protector of the little person'.[66]

It might however be worth mentioning that empirical studies show that representation by a lawyer is a deciding factor for success of an appeal to the HCJ.[67] Appellants to the Supreme Court (not necessarily to the HCJ) may be entitled to State-funded legal representation. The law provides entitlement for funded representation in criminal proceedings[68] and in civil proceedings[69] according to the economic ability of the appellant, and in accordance with the substance of the matter in question.

D. THE ISRAELI SUPREME COURT AND POVERTY

Since the enactment of the last Basic Laws in the middle of the 1990s there has been growing criticism – mostly from academics – that the Supreme Court was not doing enough to develop social rights in general, and the rights of the poor as a particular group. Some critics argued that the court adopted an individualistic worldview corresponding to an emerging neo-liberal economic order in Israel.[70] Others did not identify a clear wilful ideological line in the case law but still criticised an unbalanced

[66] Yoav Dotan, 'Do the "Haves" Still Come Out Ahead?' (1999) 33(4) Law & Society Rev 1059, 1062-1063.
[67] ibid 1071. However when represented, the 'have nots' were found to actually have a higher rate of success compared with wealthier appellants: ibid 1072.
[68] Law of Public Defence Counselling, 5756-1995
[69] Law of Legal Assistance, 5732-1972.
[70] Ran Hirschl, 'The "Constitutional Revolution" and the Emergence of a New Economic Order in Israel' (1997) 2.1 Israel Studies (1997) 136.

development of liberal and property rights – such as the freedom of contract and the right to property – while neglecting the social and distributive potential that the new Basic Laws could carry.[71] Others disagree, instead emphasising that the Supreme Court has actually validated and corroborated both legislation and administrative reforms even when these had dramatic redistributive effect.[72] It has been agreed by both sides that there is no correlation between the Supreme Court's theoretical recognition of rights and its actual decisions in numerous cases.

Two cases that were published in the middle of the last decade, towards the end of Justice Aharon Barak's term as Chief Justice of the Supreme Court, signal a watershed in the short history of judicial review of legislation in our context. *Rubinova v Minister of Finance*,[73] briefly described in the introduction to this work and analysed more extensively below, was released in 2005. This case, dealing with the constitutionality of a welfare cutback reform, marked an important step in a process of recognition by the Supreme Court of social rights as deriving from 'Basic Law: Human Dignity and Liberty'. The court not only recognised a core of non-enumerated social rights, but at the same time acknowledged a positive duty upon the State to guarantee these rights. Notwithstanding the theoretical progress achieved in this judgment and its undisputable precedential value, the actual decision in the case held that a severe cutback reform was constitutional. The case has therefore received wide criticism for failing to actualise rights into practice. The second case, from 2006, recognised the right to equality deriving from the same Basic Law, as grounds for judicial review of legislation.[74] It may be too soon to identify any change of trend, but

[71] Aeyal Gross 'Israeli Constitution: A Measure for Distributive Justice, or a Counter Measure?' in Menachem Mautner (ed), *Distributive Justice in Israel* (Ramot 2001) 79, 83-92 [Hebrew].
[72] Dotan, 'Protector of Social Rights' (n 41) 119.
[73] HCJ 888/03 PD 60(3) 464. See Section D2 below.
[74] See *Adalah* (n 45).

the cases that followed these judgments had a more activist attitude to poverty.[75] It is undisputable, however, that the volume of cases relating to poverty has increased over the last few years.

This section discusses the three leading Supreme Court cases on poverty given in the previous decade. *Gamzo* (2001), concerning a debt of alimony, marked the first steps taken by the Supreme Court in dealing with these matters.[76] It is followed by an extensive analysis of the seminal HCJ case of *Rubinova* (2005). A comparison between *Gamzo* and *Rubinova* will allow to stress the findings of the analysis. Next is the latest: *Hassan* (2012) which, as we shall see, overturned *Rubinova* on several crucial points. For the sake of comprehension, this chapter also examines an earlier case named *Twito* (2004), submitted by the Supreme Court as a court of appeal, which dealt with an illegal encampment of social activists and hence concerns important aspects of freedom of speech. Finally, I will briefly overview the temporal approach in the other Supreme Court poverty cases.

As will be demonstrated below, the Supreme Court deals with poverty within a context of diverse constitutional rights. The following analysis consequently touches a wide range of rights, from the right to minimum dignified subsistence to the right to protest; from the right to equality to the right to housing.

[75] This is clearly demonstrated in the case analysis below.
[76] *Gamzo* was preceded by two cases which developed the right to minimum dignified subsistence: HCJ 161/94 *Itri v The State of Israel* (not published) [1994]; CA 7038/93 *Solomon v Solomon* PDI 51(2) 577 (1995). Both are briefly discussed in Section D5 below.

D1. GAMZO V. YESHAYAHU

(Civil appeal at the Supreme Court, 2001)

The right to minimum dignified subsistence and the right to housing[77]

This appeal considered the interpretation of s 69(e) of the Israeli Execution of a Judgment Act, 5727-1967. Under 'special circumstances', this provision allows a court to order that the payment of a debt of unpaid alimony may be made by instalments. The question before the Supreme Court was, does the severe economic hardship of a debtor parent fall under 'special circumstances' and therefore justify rescheduling his debt? The appellant, Yossef Gamzo, a college lecturer, divorced his wife and moved to live abroad for over twenty years. During that time he had avoided paying his former wife and their daughter the alimony ordered by a court. His debt had accumulated to over 1.25 million NIS (£220,000), a sum which upon returning to Israel he claimed that he could not pay. The daughter and her mother sought for an execution order of an immediate payment of the entire debt. The Execution Court, followed by the Family Court, ruled in favour of the rescheduling of the debt due to the appellant's right to 'minimum welfare'. It was decided that the appellant must pay his entire monthly income minus the amount which the Law of Wage Protection[78] provides as exempt from confiscation, and that he must continue to do so every month until the full recovery of the debt. The District Court reversed this decision, determining that s. 69(e) allows rescheduling of alimony debt only in order to avoid the imprisonment of a debtor. In this case the plaintiffs undertook not to request imprisonment and therefore this section could not apply. Gamzo was ordered to pay the entire debt. On appeal to the Supreme Court, he claimed that the decision of the

[77] PCA 4905/98 PD 55(3) 360.
[78] Law of Wage Protection 5718-1958 s 8.

District Court left him in complete destitution, with no ability to provide for himself. On constitutional grounds, he claimed that failure to guarantee the minimum amount necessary for a 'reasonable livelihood' would violate his right to basic dignity provided by the Basic Law: Human Dignity and Liberty.

Decision

The Court (Barak CJ, Zamir and Englard JJ concurring) held that the Basic Law provides a constitutional protection to a minimum subsistence:

> The dignity of a person includes... protecting the minimum of human subsistence... a person who lives in the streets and has no housing is a person whose dignity as a human being is injured; a person who is hungry for bread, is a person whose dignity as a human being is injured... so it is with the dignity of any person; so it is with the dignity of a debtor who cannot pay a ruled debt on time; and so it is with the dignity of a debtor of a ruled debt from alimony[79]

The Court found that s. 69(e) should be interpreted in a way which properly balances the public interest of an efficient collection of debts alongside the protection of the right to property of the creditor, on the one hand, and the right to dignity of the debtor, on the other hand. The protection of the creditor is especially significant when the debt considered is one of alimony. However even an alimony debt must not infringe a person's core of dignity. The minimum human subsistence of the debtor must be guaranteed. In this case, the court concluded, the severe economic hardship of the appellant should fall under 'special circumstances' for the purposes of s. 69(e).

[79] *Gamzo* (n 77) 376. All translations in this paper are by the author, unless otherwise noted.

The case was referred back to the District Court in order to determine the arrangement of instalments.

A dynamic reading of Gamzo

A dynamic interpretation of this case reveals a complex situation. Gamzo was poor at the time of the proceedings, but his overall economic situation – considering change through time – was much better. He had enjoyed a steady income in the past and, thanks to his education and experience, a potentially steady income in the future. According to the judgment, Gamzo also enjoyed, and he would probably continue to enjoy, some other job related benefits, such as university accommodation. Compared to a typical chronic poor person, the highly educated Gamzo had better chances for a promotion and a higher capability to change his job or his career. The judgment does not mention his age – which is in itself an example of a static approach – but we may estimate that he had several years ahead of him before retirement. To conclude, it seems that Gamzo was much more stable economically in the long run than in the short run. In fact, there are several dynamic theories such as Milton Friedman's *permanent income hypothesis*[80] which would not regard Gamzo as poor at all.

This theoretical evaluation is realized in practical life by personal financial mechanisms that were probably available to the appellant. Credit is the financial instrument which allows one to spread a debt over time. It capitalizes a future flow of income, making it available for immediate use. Gamzo, who was required to pay a debt larger than his available present stock, could have simply borrowed the money. In financial terms this is called a roll-over: the transformation of a debt into a new loan.

[80] Discussed in ch 2, text to n 179.

In other words the appellant was temporarily poor with a high potential for escaping his present economic condition, and as such, he was in a good position to pay his debt at once and not by instalments. Returning to the constitutional analysis of the case, given his economic ability in the long run, it is not at all evident that it was necessary to call upon the constitutional instrument of minimum dignity. The constitutional minimum could have been preserved even if Gamzo had been forced to pay his debt immediately.

Time and poverty: the temporal approach of the court

The underlying assumption of the constitutional analysis in this case was that if forced to pay all at once, Gamzo would fall into such severe destitution that would violate his human dignity. The judgment gave relief to a poor appellant who did not have the enormous amount of money he was obliged to pay.

A dynamic reading of the case offers an alternative solution. With the possibility of credit that is based on future income, a different implementation of s. 69(e) is available. The constitutional core of *Gamzo* is the balancing between the appellant's right to dignity and the respondents' right to property. A dynamic observation of the facts has a clear potential of changing the assessment of these competing rights.

But this alternative evaluation is missing from the judgment, and the reason for that is that the appellant is perceived by the court as frozen in a fixed economic situation. Describing his current poverty, the court paid no regards to potential fluctuation in his income. His age – a crucial element for determining one's future economic ability – is not even mentioned in the judgment.

How ironic it is that the right to a minimum dignified subsistence – the flag-bearer of legal rights of the poor in Israel – was born in a case which discussed not the economic situation of a chronically unemployed single mother, nor the condition of an under-skilled and under-educated homeless person, but rather in a case which considered the difficulties of a college professor who classically fits the economic definition of 'transitory poor'.

We shall return to *Gamzo* for further discussion by way of comparison to *Rubinova*, a case submitted five years later, in which the Supreme Court recognised a positive aspect in the right to a minimum subsistence. But first it may be useful to examine *Rubinova* separately.

D2. RUBINOVA V. MINISTER OF FINANCE

(Appeal to the High Court of Justice, Supreme Court, 2005)

The right to minimum dignified subsistence[81]

The Economic Shield Plan was a government programme aimed at confronting the world recession of the early 2000s, with the declared purpose of reducing public debt and encouraging employment. The programme was passed in the Knesset in three separate statutes during 2002-2003. It included flat budget cuts in most government ministries, several tax increases, and the severest welfare payment reduction in Israeli

[81] HCJ 888/03 PD 60(3) 464. An English version is available here: <http://elyon1.court.gov.il/files_eng/03/660/003/a39/03003660.a39.pdf> accessed 19 September 2016 Quotes and citations refer to the English version.

history. *Rubinova v. Minister of Finance* dealt with the second statute of the three, the State Economy Arrangements Law (Legislative Amendments for Achieving Budget Goals and the Economic Policy for Fiscal Year 2003), 5763-2002 (hereafter — *Arrangements Law* or *the statue*), which was passed by the Knesset and published as law in December 2002.

The statute included a series of amendments to the Income Support Law,[82] decreasing the *Havtachat hachnasa* benefit (literally - income guarantee, a means tested social payment provided for individuals with a very low income) and reshaping the structure of these payments. The changes predominantly affected claimants under the age of 55 and single parent families. The decrease was differential, ranging from 8% for a couple with no children to 22% for a single parent with two children. Generally, higher levels of benefit suffered higher rates of reduction. This cutback programme was accompanied by a freeze to the adjustment mechanisms of the *Havachat hachnasa* benefits and a flat reduction of 4% to all social benefits (which had both passed six months earlier),[83] and in addition to a Government decision[84] to cancel several concessions and exemptions provided to recipients of *Havtachat hachnasa*, such as an exemption from television license fees and a reduction on public transport tickets.

Bilhah Rubinova - a thirty-eight years old single mother with two children - petitioned for the invalidation of the *Arrangements Law*. She was represented by the Association for Civil Rights in Israel and joined be several other petitioners. Rubinova's income history is not mentioned by the Court in its submitted judgment – and this is by itself a sign of a static approach – but it is available in her petition: she

[82] Income Support Law, 5741-1980.
[83] Section 2 and 10 of the Economic Emergency Programme Law (Legislative Amendments for Achieving Budget Goals and the Economic Policy for Fiscal Year 2002 and 2003), 5762-2002.
[84] Government Decision no. 2331 of 30 July 2002.

had been poor for all her life, working in part time jobs since the age of fourteen. The fact description in the case was restricted to the present: at the time of her appeal, Rubinova was unemployed and her total monthly income of 3,034 NIS (£494) was entirely from public support.

Rubinova's main assertion was that the statute reduced the *Havtachat hachnasa* benefits to a level that fell below a necessary minimum. The outcome, she maintained, was that her right to a dignified subsistence, a constitutional right recognized in previous Supreme Court cases[85] as deriving from Basic Law: Human Dignity and Liberty, was infringed. According to Rubinova, the reduced benefits prescribed by the new legislation fell short of the obligation to ensure this minimum. This was a bold line of argument: to claim for a commitment of the State not only to *respect* but also to *fulfil* a minimum of economic conditions.[86] Following this position, the *Arrangements Law* therefore violated the positive aspect of the right to live with dignity. This violation, Rubinova maintained, did not meet the constitutional requirements of the limitation clause.[87] For the same reason she also asked to repeal the aforementioned Government decision cancelling the exemption from television license fees and the reduction on public transport tickets.

Surprisingly, the State did not dispute the appellant's assertion of a positive aspect in the right to dignity: that is, that the Basic Law obliges State action. Its response instead dealt with the scope of this right and with justifying the overall constitutional balance reflected in the *Arrangements Law*.

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[85] Primarily, in *Gamzo* (n 77) which was discussed in the previous section; and see n 76.
[86] This refers to the terminology used in *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) [guideline 6], according to which rights give rise to three types of correlative obligations. The (negative) duty to *respect* requires the State to refrain from interfering directly or indirectly with the enjoyment of the right; the (positive) duty to *protect* requires the State to prevent third parties from interfering with the enjoyment of a right; the (also positive) duty to *fulfil* requires the State to provide what is necessary for enjoying the right. Compare s 11 of the ICESCR; see Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008), 69-70.
[87] Basic Law: Human Dignity and Liberty, s 8

The right to dignity, the respondent contended, covers only the material aspect of dignified subsistence. It protects against no more than physical deprivation.[88] This narrow right was not infringed by the legislation examined in this case. Even after the cutback, the State argued, the purchasing power of the benefits remained similar (in real value) to 1980 levels, when the Income Support Law was enacted.

Two further arguments of the State referred to the appropriate constitutional balance in the case. First, the respondent argued, *Havtachat hachnasa* is not the sole instrument used for guaranteeing an economic minimum. The duty of the State is discharged by a variety of measures provided 'in statute and in subordinate legislation, by direct grants, exemptions and subsidies, comprehensive arrangements and individual programmes'.[89] Among these means are, for example, child benefits, a national health insurance programme, Ministry of Housing assistance in financing private accommodation, provision of free education, and many others. *Havtachat hachnasa* is, therefore, a single element in a wide array of services and benefits. In order to determine whether the state complies with its duty, all provisions should be examined and not merely one scheme.

Secondly, the State maintained that the *Arrangements Law* was necessary 'in order to achieve a real cut in the State budget',[90] and that it was intended to encourage employment among those who are able to work. The statute is, in the final analysis, a proportional measure aimed at a justified cause.

[88] *Rubinova* (n 81) 116.
[89] ibid 127.
[90] ibid 116.

Decision

Several months into the process, the case was transferred to an extended panel of seven justices. The judgment was given in late 2005, three years after the law came to force. The Court dismissed the appeal in a 6 to 1 ruling. In a majority opinion delivered by Barak CJ the Court adopted the position of the appellant as to the positive nature of the right to dignity, and the position of the respondent as to its limited scope.

Based on s 4 to the Basic Law ('Every human being is entitled to protection of his life, his body and his dignity')[91] the judgment accepted Rubinova's theoretical constitutional argument that the right to dignity, and specifically the right to a dignified subsistence, casts duties upon the State. 'If, notwithstanding all of the support mechanisms that it operates, the State is found to violate this duty... [an appellant] may be entitled to an order of the court that will direct the State to comply with its duty and to provide him with the means that are required for living with dignity'.[92]

As for the scope of this right, the majority took a more limited approach. 'One should not 'read' into the right to dignity more than it can support', Barak CJ maintained, citing several previous cases.[93] The Basic Law's protection of 'human dignity' constitutes a cluster of rights, a collection of constitutional interests necessary for dignity to exist, but this cannot encompass the full meaning of all social and civil human rights. Human dignity covers a narrower range – only the core necessary for a person in order to 'subsist in the society within which he lives' and in order to

[91] Section 4 is entitled '*Protection of life, body and dignity*' and it prescribes the positive aspect of this right. Compare with s 2 of the same Basic Law, which deals with the negative aspect of this right, providing that 'There shall be no violation of the life, body or dignity of any person as such'.
[92] *Rubinova* (n 81) 129-130 (quote based on the English version with minor translation corrections which are my own, YM).
[93] *Rubinova* (n 81) 123.

'conduct one's ordinary life as a human being, without being overcome by economic distress and reduced to intolerable poverty'.[94]

This theoretical justification provides judicial recognition of the positive aspect of a core right to a dignified subsistence.[95] The State is obliged '...to maintain a system that will ensure for poor individuals a 'protective net'... so that their material situation position does not reduce them to a condition of subsistence deprivation.'[96]

However with regard to the specific case, the justices adopted most of the arguments of the State, consequently rejecting the appeal. The *Arrangements Law*, the Court accepted, was one instrument of many. The right to a dignified subsistence is not a right to a monthly benefit in a certain amount. The content of the right is merely that considering all support and aid systems, human dignity be upheld.[97] The examination is therefore consequential. A reduction – even a significant reduction — in the *Havtachat hachnasa* benefits does not in itself indicate a violation of dignity.

This lead the to the conclusion that the appellant had the burden to prove that notwithstanding all available services, material living conditions were insufficient, so

[94] ibid 124.
[95] A clarification may be in place here. The judicial discussion on the core of the right to dignity may seem to echo the ICESCR Committee terminology of a 'minimum core obligation' embedded in the human right (CESCR, General Comment 3, The Nature of States Parties Obligations (Fifth session 1990) UN Doc E/1991/23, Annex III, para 9). This concept was rejected by the South African Constitutional Court in *Khosa* on the basis that it is impossible to provide access to all core services immediately. (*Khosa and Mahlaule v Minister for Social Development* [2004] (6) BCLR 569 para. 34. The South African and the Israeli cases are, however, very different in this regard. Unlike in *Khosa*, the minimum core in *Rubinova* is drawn by the court not because the right to dignity bears a positive aspect, but rather because a narrow constitutional text in the Basic Law calls for a limited interpretation of the right. This approach is applied by the Israeli Supreme Court on both the positive and the negative aspect of the right. For this reason, the aspect of priorities and timing, discussed by Fredman (n 86) 85-89) with regard to the minimum core obligation, which is naturally relevant to the question of the passage of time, is not applicable with respect to the current Israeli case.
[96] *Rubinova* (n 81) 126-127.
[97] ibid 128.

that her dignity was violated.[98] All this could not be examined in the abstract. A full factual basis had to be provided. The court –

> ...will require details, based on appropriate documentation of the sources of income and the current and fixed expenditure of [the appellant]... It should examine the functioning of all the national and other support systems that assist [the appellant] and the steps he takes in approaching them in order to exhaust his rights. It will be necessary to clarify whether that person works, and what are the employment alternatives available to him.[99]

Rubinova, the majority opinion held, did not prove that as a result of the *Arrangements Law* her dignity and the dignity of others had been infringed. She did not discharge the aforementioned burden. Such being the case, the constitutional scrutiny ended in this preliminary stage with the finding that no constitutional violation had been demonstrated. It was unnecessary to proceed to examining the compatibility of the *Arrangements Law* with the limitation clause. Using similar argumentation, the majority dismissed the appeal also with regard to the public transport tickets and television license fees.

Towards a dynamic evaluation of Rubinova: preliminary remarks

It appears as if the bottom line of the case was that the appellant simply did not provide sufficient evidence to support her claim. The judgment indeed included

[98] ibid 128. Beinish J holds a different opinion in this matter. After successfully discharging a preliminary burden to prove that their economic situation (expenses against income) is dire, the burden ought to shift to the respondent, who would be required, already in the first stage of the constitutional scrutiny, to prove that 'other measures that exist are sufficient for ensuring a minimum human subsistence with dignity': Rubinova (n 81) 139.
[99] *Rubinova* (n 81) 130.

implications along these lines, even if in a somewhat hesitant language.[100] In fact, a closer look into the opinion of Barak CJ reveals a more complex picture.

Israeli constitutional law adopted a three stage structure in cases of judicial review of legislation. The first stage examines whether the legislation infringes, limits or changes a constitutionally protected human right. If the court finds that no such kind of violation has occurred, the constitutional scrutiny ends there. Otherwise, the judge will proceed to the second stage which examines whether this violation satisfies the requirements of the limitation clause.[101] If the result is that the legislation does not comply with these requirements, then in the third and final stage a fitting remedy is considered.[102] The first stage requires the Court to interpret the discussed constitutional right and define its scope. It revolves around the essence of the right and its borders. It is, in that sense, an internal examination. The second stage balances the right with competing rights or interests. It focuses, therefore, on external limitations.[103]

In the first step it is the appellant claiming for a violation of a human right who carries the burden of proof. In the second stage the burden of proof is carried by the other party (usually the State), which must prove the legality of the infringement. In the third and final stage the burden returns to the appellant.[104]

Now let us further inquire into the argumentation of the judgment. It is necessary, Barak CJ found, to create a special burden of proof because a variety of

[100] For example, Barak CJ at *Rubinova* (n 81) 130-131 ('[N]o factual basis has been established from which it can be seen that... the dignity of certain persons has been violated.') and Beinisch J at pp. 139-140 ('[The Court] did not have a proper basis of fact with regard to [the appellants'] claim').
[101] See n 38.
[102] *Rubinova* (n 81) 119; *Mizrahi Bank* (n 40) 428.
[103] For a theoretical discussion see Barak, *Constitutional Interpretation* (n 46) 395-399.
[104] ibid 399.

instruments provided by the State require consequential examination.[105] This is a questionable argument. First, a constitutional examination is always consequential.[106] Secondly, a consequential examination does not, by itself, necessitate reversing the burden of proof. Thirdly, legislation is said to 'infringe' on a basic right if its impact limits the fulfilment of this right.[107] In the case of the *Arrangements Law* there is no doubt that decreasing social payments diminishes the enjoyment of a minimum dignified subsistence. The law reduces the totality of services which are normally provided by the State in order to guarantee human dignity, and it is therefore evident that by reducing those services there is at least some level of reduction in the enjoyment of the right. This may be a minimal reduction, small enough to be constitutionally legitimate. But is that not a question which ordinarily belongs to the assessment of the alleged violation – that is, to the second stage of the constitutional analysis? The variety of alternative services and payments is a discussion which is relevant to impact and magnitude. Alternative instruments are usually not considered in the first stage but rather in the constitutional weighting of the following stage.

But in *Rubinova*, the Court still casted the burden of proof on the appellant. If it is not because of the consequential nature of its analysis, nor because of the existence of complementary State funded services, then what may be the reason for such an unordinary analysis? There is, rather, a far simpler reason. The judgment adopted the constitutional assertion of the respondent, that the right to dignity is narrow and that it has an inherent limitation. An internal threshold restricts its

[105] It is worth mentioning that this argument presented by the Court is in sharp contrast to a common viewing of positive rights as rights to an act rather than rights to an object. See Fredman (n 86) 89-90.
[106] This is a point made by Barak CJ in his academic writing. See Barak, *Constitutional Interpretation* (n 46) 466.
[107] ibid 466.

coverage, delimiting only a protected core.[108] It follows that the Court also accepted the analytical implications of this argument. Barak CJ examined whether the picture described by Rubinova had crossed this internal threshold: whether her appeal showed *prima facie* an infringement of dignity. This discussion belongs to the first stage of the constitutional assessment, which identifies whether there had been a penetration to the scope protected by the right.[109] As mentioned above, in this stage the burden of proof is normally carried by the appellant.

Be that as it may, the analytical road taken by the Court still raises a number of difficulties relevant to the following dynamic analysis. I shall discuss them in brief. First, it is an uncommon approach in Israeli constitutional jurisprudence to create an internal threshold within the right.[110] The Israeli constitution did not adopt a model of a separate limitation clause to each specific human right. It rather preferred the Canadian model, phrasing rights as absolute and placing a general limitation clause which applies to all (or most) of them.[111] Barak CJ makes this very point in his academic writing: 'Should we make a distinction between a substantial violation and violation which is not substantial? As a principle, it appears to me, that any infringement or limitation of a basic right should be considered, and that the

[108] In the later 2012 case of *Hassan* the State, responding to another appeal relating to the right to minimum dignified subsistence, provided an enlightening description of the same constitutional argument. In its submitted answer it claimed that the focus on the first stage of the constitutional examination 'does not replace the constitutional analysis but rather relocates the substantial tests which are usually at the second stage, into the first stage, in order to decide whether an infringement of a right had occurred'. HCJ 10662/04 *Hassan v National Insurance Institute* PD 65(1) 782 (discussed in Section D4 below).

[109] For a similar theoretical discussion, in the context of free speech, see Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge 1982) 89; For a similar analysis provided by the Supreme Court (in the context of the question – does freedom of speech cover racist speech?) see HCJ 399/85 *Kahanah v Managing Committee of the Broadcasting Authority* PD 41(3) 255, 270; Aharon Barak, 'Freedom of Speech and its Limitations' (1991) 40(1) Hapraklit 5, 10-12 [Hebrew].

[110] For example, Barak CJ in *Adalah* (n 45) para. 105: 'The consideration of public interest should be done through the examination of the limitation clause... and not in the context of determining the scope of the right itself'.

[111] Barak, *Constitutional Interpretation* (n 46) 394-395.

evaluation should be carried in the second stage of the constitutional scrutiny'.[112] This approach is far from the philosophy of *Rubinova*.

Secondly, if the right to a minimum dignified subsistence requires such a preliminary examination, then why was this requirement not applied in *Gamzo*, the 2001 case discussed above? *Gamzo*, after all, dealt with the same right to a minimum dignified subsistence (albeit with its negative dimension). The Court in *Rubinova* did not provide a justification for an inconsistent treatment of a similar constitutional right.[113]

Thirdly, the Court refused to examine arguments concerning proportionality and the extent of the alleged violation, reasoning that there was 'no need to continue to carry out the other stages of the constitutional scrutiny'.[114] However, at the same time it examined arguments on the availability of alternative instruments. This is inconsistent. In fact, the judgment turned into a partial examination of the second stage, while the burden of proof was shifted from the respondent to the appellant. As mentioned above, in the second stage it is normally the respondent that carries the burden of proof.

Fourthly, Levy J, dissenting, concluded not only that the appellant presented sufficient foundation for her claim, and that the right to human dignified subsistence had indeed been violated, but also that this infringement did not stand the standards of

[112] Barak, *Constitutional Interpretation* (n 46) 469.
[113] *Gamzo* deals with an individual case while *Rubinova* concerns a general rule. The Court may have been inclined to avoid a clash with the Government on matters of national economic policy. However, this explanation did not appear in the judgment.
[114] *Rubinova* (n 81) 131.

the limitation clause.[115] The gap between this position and the position of the majority, that no infringement has been proven whatsoever, is questionable.

Fifthly and finally, although the judgment did not mention this argument, it may be that the reason for a different judicial treatment of the right to dignity in *Rubinova* was that this case dealt with the positive aspect of this right. As mentioned above, while *Gamzo* dealt with the negative aspect of this right, *Rubinova* was the first case to discuss State positive duty with regard to dignified subsistence. However, there is no theoretical justification for why this positive right, or any other for that matter, should be analysed differently from negative constitutional rights, as much as it concerns the order of the constitutional scrutiny between the first and the second stage.[116] As we shall see henceforth, the analytical approach in *Rubinova* was rejected in the later Supreme Court case of *Hassan* which also dealt with the positive aspect of the right to a minimum dignified subsistence in the context of the Income Support Law.[117] The constitutional analysis presented in *Hassan* is standard in every way.

In any case, even without adopting the approach of *Gamzo* and *Hassan* but rather following the way paved in *Rubinova*, the judicial method is ultimately one of measurement. Even if the main focus is on the first constitutional stage rather than on the second, and even if the burden of proof has been transferred to the appellant, in its essence the analysis in *Rubinova* still examines the degree of an alleged violation. Therefore any argument which tells us something about the size of the infringement is relevant to the case. The following provides exactly that: it is a dynamic examination

[115] Parts of the *Arrangements Law,* Levy J holds, are not rationally associated to the declared goal of the legislator. In addition, the respondents did not provide the data necessary for examining the proportionality of the examined legislation. *Rubinova* (n 81) 158-162.
[116] The Supreme Court in *Hassan* specifically mentioned that the difference between positive and negative rights does not justify changing the model of the constitutional scrutiny: *Hassan* (n 108) 27-29.
[117] *Hassan* (n 108), discussed in Section D4 below.

of *Rubinova* which may cast light on its evaluation. This exploration is subject to the special analytical approach of the case.

A dynamic reading of Rubinova

Bilhah Rubinova had been under the poverty line throughout each of the four decades since she was born. Her life – her entire life – was shaped by destructive dynamics of chronic poverty. It is important to recognize that the *continuation* of this economic and social condition is in itself a crucial part of her story. Similarly, her poor chances of escaping these conditions are a crucial part of her future.

Time, therefore, plays a significant role in the economic reality experienced by Rubinova, and consequently time has a defining impact on the legal account of this reality. In a case so influenced by time, switching between a static and a dynamic view changes what we see. It inflates or deflates our perception of the alleged human right violation. A static view shrivels it. A dynamic view reveals elements which may have otherwise not been acknowledged. Here are five remarks of a dynamic reading of *Rubinova*.

First is the issue of intergenerational poverty. Chapter Two covered the central role the economics of poverty dedicates to the impact of parent poverty over the life chances of their children.[118] The appeal did not stress this point, but the *Arrangements Law* had a serious impact also on second generation. From an economic point of view, the *Havtachat hachnasa* cutback may determine their horizon for the next fifty years.[119] The legal outcome is close to the idea of time in the function of *agent*,

[118] See ch 2 text to n 173.
[119] The primary responsibility for the development and wellbeing of a child belongs obviously to his parent. This parental duty is coupled with the right to accomplish the same goal. See s 15 of the Legal Capacity and Guardianship Law, 5722-1962: 'Parental guardianship includes the duty and the right to

discussed in Chapter One: the introduction of a dynamic approach to a case may reveal a wider array of agents involved in the constitutional picture. In this case, Ms. Rubinova's children may join the picture, because their present – and indeed future – economic condition is highly influenced by the examined legislation.[120]

The second point regards the expected accumulation of economic damage. Economic dynamics can help us predict Rubinova's future income, based on her past and current economic and social condition. The odds are that Rubinova will be dependent on social welfare for the next 30 years, until her retirement, and probably even beyond that. This is, evidently, a very different situation from an individual who suffers from temporary poverty and is hence expected to be eligible for social payments only for a short period of time. The examined legislation was therefore not a one-off reduction made 'in one thrust' as the court, and indeed the appellant, phrased it.[121] It was rather a reform which affects every single monthly payment in the future.[122] A monthly reduction of 769 NIS (£128), which was determined by the *Arrangements Law* for a single parent with two children, piles up to 276,840 NIS (£46,140)[123] over 30 years. Legally speaking, this means that the alleged human right violation is expected to be broader than what was considered by the court. To use the terminology of Chapter One, Rubinova could argue for a greater *magnitude*. The different accumulation of economic damage may also raise an interesting question

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care for the needs of the minor, including education, studies, and the training for work and for a profession'.

[120] It is interesting to note the similarity to *Gamzo* in this respect, with the interest of the children appearing in both cases. In *Gamzo*, however, this interest was opposite to the parent-appellant. We shall return to similarities and dissimilarities between the two cases in the following section.

[121] *Rubinova* (n 81) 117-118.

[122] This point is relevant to the economic distinction between flow and stock. See text to n 154 below.

[123] Figures are not NPV i.e. not calculated for present value. This means the calculation does not include the time value of money. On the other hand, the calculation does not consider expected raise in real value over the calculated period. For illustrative purposes it can be considered as a reasonable rough estimation.

regarding equality between short term and long-term recipients of *Havtachat hachnasa*.

Third is the related issue of social risk. Public policy and social security theories define social risk as a deterioration in household economic conditions resulting from a social, medical or natural shock. This could be either a reduction in income (consequence of, for example, losing a job, or the death of a supporting family member) or an increase in expenses (consequence of, for example, the birth of a child or a new illness which requires special medical attention).[124] There is, on that account, a certain likelihood that Rubinova's family and any other poor household would face a severe deterioration of economic conditions. For a specific family the probability for the materialization of a risk is rather low. But in large numbers, considering the entire population of income support recipients, there is no doubt that some will experience a social risk.

It is true that in most cases when social risk is fulfilled the welfare state provides specific protections (such as child benefit or a publicly covered medical treatment). But in such a case the economic condition should be examined as a whole. Just as the judgment demanded the study of totality of Rubinova's resources, it should equally measure the totality of the risks that she faced. What is more, economic theory teaches us that the ability to confront an economic shock is significantly dependent on the household income prior to the change.[125] *Havtachat hachnasa* is not the only social protection but it is recognized (in a later Supreme Court case which

[124] Robert Holzmann and others, 'Social Risk Management: A New Conceptual Framework for Social Protection, and Beyond' (Social Protection Discussion Paper No. 6, World Bank 2000).
[125] ibid.

will be discussed henceforth) as the last protective net that the society stretches for its economically weakest members. It is 'the central instrument protecting the poor'.[126]

How is that relevant to the analysis in *Rubinova*? In terms of human rights law we would say that with a substantially lower income, and taking in consideration the passage of time, the risk for a shock which the poor household cannot confront raises. When the *Arrangements Law* impinges the chances of being able to deal with, for example, a prospective medical situation, that calls for other constitutional protections, such as the right to health or the right to life. To use the terminology of Chapter One, time thus affects the *nature* of the rights involved in the case.

The fourth remark regards what we defined in Chapter One as the *essence* of a right: the way the passage of time shapes the character of the right to a minimum dignified subsistence. The parties in *Rubinova* disagreed not only on the scope of the right to dignity, but also on its character. Both may have used the term 'dignified subsistence', but they diverged on the basic quality embedded in this phrase. The State (referring to 'protection against a lack of subsistence') contended that it should cover only what is necessary for physical existence. Rubinova, on the other hand, argued that the right to dignified subsistence includes aspects beyond the material. It is contingent, she maintained, not only on physiology but also on community. The right 'includes spiritual and social needs, and it should take into account needs that are accepted in society'.[127]

Barak CJ made a similar remark in his academic writing (but as we shall soon see, the words of Professor Barak did fully reflect in the judgment of Chief Justice Barak) –

[126] Beinisch CJ in *Hassan* (n 108) [66]. The case is analysed Section D4 below
[127] Submitted appeal quoted in *Rubinova* (n 81) 117.

> The Basic Law [Human Dignity and Liberty] manifests the basic rights of the human being as a social creature. The human dignity set by this Basic Law is the dignity of an individual who lives in an ordered society together with other humans[128]

This idea matches Peter Townsend's concept of relative deprivation which was discussed in Chapter Two ('people's needs, even for food, are conditioned by the society in which they live and to which they belong').[129] It also echoes Adam Smith's position on poverty and society.[130] The appellant's position expressed, in other words, the notion of relative poverty. The State adopted the opposite concept of absolute poverty.[131]

This debate over a relative or an absolute understanding of the minimum dignified subsistence has a strong relation to time, and this is where the impact of time on the '*essence*' of the right comes to light. If minimum dignity is not merely a physical but also a social concept, then it has crucial dynamic aspects. The physical minimum is more or less fixed over time.[132] But the social minimum changes with time, simply because society changes: the standard of living rises and with it what is necessary for a minimal integration.[133] A dynamic view will show that as years pass the ability of a household to live with (social) dignity, that is, to retain a minimal integration in the society, diminishes. It is this view that led to the appellant's assertion that the State should guarantee 'that the individual also has a tolerable

[128] Barak, *Constitutional Interpretation* (n 46) 433.
[129] Peter Townsend, *Poverty in the United Kingdom: A Survey of Household Resources and Standards of Living* (Penguin 1979) 59; and see ch 2 text to n 86.
[130] See ch 2 n 87.
[131] For a discussion on relative and absolute poverty see ch 2(C).
[132] In real terms, that is, holding prices constant.
[133] On the relation between time and the definition of absolute vs. relative poverty see ch 2(D).

standard of living, which is reasonably proportionate to the general standard of living *at a given time*' [emphasis added].[134]

The *Economic Shield Plan* included, aside from the *Arrangements Law*, a legislative freeze of the adjustment mechanisms of *Havachat hachnasa* benefits. This meant that from 2002 onwards, these benefits were no longer adjusted to the raise in standard of living (and not even to changes in price level).[135] Following this legislation, the relative value of *Havachat hachnasa* benefits had been constantly decreasing with time. Combined with the cutback of the *Arrangements Law*, and examined from a dynamic perspective, Rubinova and her family drift away from the general standard of living. Testing the judgment of *Rubinova* by a time-based approach, the notion of Barak's 'basic rights as a social creature' becomes increasingly unrealistic.

Finally, time affects also the reading of the rationale of the examined legislation.[136] The respondent submitted that by reducing social benefits the legislator expected the *Arrangements Law* to increase the motivation to work. It is thus hoped, the State maintained, to 'neutralize the 'poverty trap' by denying an inducement to continue entitlement to income supplement instead of applying for work'.[137] Levy J (dissenting) pointed several flaws in this argument. It does not make sense, he stated, that in the name of employment encouragement the law cuts social allowance of people who are unable to work.[138]

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[134] *Rubinova* (n 81) 117.
[135] See State Economy Arrangements Law (Legislative Amendments for Achieving Budget Goals and the Economic Policy for Fiscal Year 2002), 5763-2002 ss 36-37.
[136] Doubting the rationale of the law is relevant only if the constitutional scrutiny reaches the second stage. This is what Levy J offered in his dissenting opinion.
[137] *Rubinova* (n 81) 132-133.
[138] ibid 160-161.

This argument has an interesting temporal aspect. Reviewing the causes and determinants of chronic poverty, Chapter Two mentioned that long-term poor hardly accumulate human capital. This capital is useful, and sometimes necessary, for getting a job, such as social networking, professional experience and the intellectual capacity to work. For this reason, different people may have different chances of integrating in the labour market. Dynamically speaking, the duration of poverty determines the potential to be employed in the future. The outcome is that the desired impact of the *Arrangements Law* (that is, the rationale which justifies the cutback) works differently for long-term and for short term poor. Time, in this sense, allows for a richer understanding of the purpose of the examined legislation, and it suggests that we should evaluate the unequal impact it has on different individuals.

Time and poverty: the temporal approach of the court

The Court analysed Rubinova's economic condition with relative detail. But all references to her disposable income and to her necessary expenses related to the present. The judgment is all about today, never yesterday or tomorrow. The Court did not consider the duration of Rubinova's poverty, nor her chances of escaping it the future, nor the likelihood that her family would continue to depend on welfare benefits.

Even the dissenting opinion of Levy J, the judge who suggested to look for the 'daily reality… the permanent life experience of many individuals'[139] – neglected the straightforward temporal meaning of the phrase 'permanent life experience'. *Rubinova* is a case frozen in time.

[139] ibid opinion of Levy J [10].

The majority opinion, which dealt extensively with the factual framework, or lack thereof, protested that subsequent to the primary affidavits submitted in the beginning of 2003, no update was provided by the appellants:

> More than two years have passed since the affidavits were submitted, and despite this no updated affidavit has been filed with regard to their position. At the hearing which we held on the petitions (on 30 November 2004) we asked to be informed as to the current position of those petitioners; their counsel was unable to provide a satisfactory answer to our questions.[140]

This may appear to be dynamic thinking, a judicial recognition of time and constant change. In fact this remark demonstrates the static approach of *Rubinova*. When Barak CJ indicated the lack of an updated report he meant that the Court missed the current facts – for a present-day, static view. In a case of chronic poverty such as Rubinova's, evidence on her condition two years prior is as valuable as evidence on her condition at the time of hearing.

The Court also overlooked the contrast between the appellant's relative approach to minimum subsistence and the respondent's absolute approach, a dispute which, as mentioned above, has a strong link to time. Quoting the submitted arguments of the two parties, the judgment failed to grasp this crucial disagreement.

The Court reached a clear resolution with respect to the scope of the right to a minimum dignified subsistence, submitting that it should have a narrow coverage. But what is the content of this right? Is it merely physical subsistence? Or does the right relate also to the wider social needs? The judgment lacked a systematic consideration

[140] *Rubinova* (n 81) 131. Similar remarks were given by Beinisch J see p. 139-140.

of this subject, presenting inconsistent answers to these questions. At times Barak CJ adopted the absolute approach -

> [The State] must ensure that a person has enough food and drink in order to live; a place to live in which he can realize his privacy and his family life and be protected from the elements; tolerable sanitation and medical services, which will ensure him access to the facilities of modern medicine.[141]

And at times his opinion indicated a more comprehensive relative approach -

> [T]he access to accessible and cheap media and public transport is essential for conceiving the individual as a part of the public. Indeed, human rights are the rights of man as a social creature. Human dignity is the dignity of man as a part of society and not as someone who lives on a remote island.[142]

Conclusion

As we have seen, a time-based reading of *Rubinova* provides functional and meaningful elements to the constitutional analysis. It exposes additional agents who may be affected by the examined legislation; suggests a greater magnitude of the purported violation; raises questions of equality regarding the impact of the law between short term and long-term poor; may lead the judge to realize that basic rights other than dignity may be involved in the story; contributes to the discussion on the

[141] ibid 126-127.
[142] ibid 134. In several other places the judgment also mentions the relevance of the condition of 'the society in which the person lives'. See p 124 and p 129.

essence of the right to dignified subsistence; and finally, it exposes difficulties in the declared rationale of the legislation.

But these aspects were absent from the judgment, majority and dissenting opinion alike. The duration of poverty may have a significant role in the economics of Ms. Rubinova, but it was overlooked in the legal analysis of *Rubinova*. Neglecting the temporal aspect of her story inevitably lead to a partial, if not false, perception of the human rights picture.

If we return now to the bottom line of the case, things may seem unsettling. The majority in *Rubinova* maintained that the appellant did not even prove a *prima facie* infringement of her basic rights, and that consequently there was not even a point in measuring the proportionality of the alleged violation. But to say all that from a static perspective, missing the above mentioned elements – is simply unjust. 'It is impossible' – Barak CJ stated in his opinion – 'to examine assumptions on a theoretical basis with no concrete data'.[143] A frozen picture, one moment sliced out of time, cannot be treated as concrete data. Switching between a static and a dynamic view does indeed change what we see: a static observation unquestionably shows less. The decision in *Rubinova*, a decision of a static viewer, was the fruit of a partial perception of the life of Bilhah Rubinova.

[143] ibid.

D3. COMPARING *GAMZO* AND *RUBINOVA*

If *Gamzo* marked the birth of a constitutional right, *Rubinova* marked its maturation. Less than five years separate the former – in which the Supreme Court recognised the right to a minimum dignified subsistence as deriving from the Israeli Basic Law[144] – and the latter, in which it interpreted it as a positive right which may result in an obligation upon the State to act.

Aside from the obvious distinction between a positive and a negative aspect of the same right, in what sense are these cases similar and in what sense are they different? Ultimately, each case dealt with a different legal question. *Gamzo* concerned the rescheduling of alimony, the daughter and her mother being the parties whose rights were at stake. *Rubinova* examined the constitutionality of an act reducing income support, the State and the State's budget located in the other side of the legal equation. Still both cases formulated the same constitutional analysis, and both applied the same human right in the context of poverty. They both defined a core of material necessity which is guaranteed by way of constitutional protection, not to be injured. The legal evaluation in both cases is strikingly similar.

However a clear gap between the cases is revealed when we turn our attention to dynamic economics. Bilhah Rubinova and Yossef Gamzo may both have been poor at the time of their respective hearings, but economically speaking they represent two completely different stories. Rubinova was unemployed, and her entire income consisted of social benefits; Gamzo was a skilled individual with a steady income. Rubinova had virtually no potential for a higher income in the future; Gamzo had

[144] See n 76 above, for cases preceding *Gamzo* which developed the right to minimum dignified subsistence.

much greater prospects to escape poverty. Rubinova had been poor for a long time; Gamzo became poor just recently.

Consider the dynamic representation of their respective economic conditions provided in table (1). While Rubinova is chronically poor, Gamzo is most likely to be in a transitory state of short term poverty.

	Past	**>**	**Present**	**>**	**Future prospect**
Rubinova	poor	>	poor	>	poor
Gamzo	not poor	>	poor	>	not poor

Table 1. A dynamic comparison of economic conditions.

What we have here are two very different economic situations, which were analysed by the Supreme Court as if they were identical. The parallel legal analysis was possible only because of the static approach of the Court in both cases. Because only in the immediate moment the case of Rubinova is similar to the one of Gamzo. Only in the present do these cases justify a similar constitutional evaluation. The immediate or short-term impact of the right to a minimum dignified subsistence is hence similar in these judgments. But in the long run the stories diverge. A dynamic observation would have revealed to the judges a significant economic difference between the cases, such that would have required a different constitutional perspective.

Notice the temporal aspect of the remedy sought in the two cases. Based on a similar current situation, while Gamzo was seeking *to pay* in the future, Rubinova was asking *to be paid* in the future. Seeking a rescheduling of a debt, Gamzo was asking to turn an immediate difficulty into a solution spread over time. Rubinova, by contrast, was asking to abolish a cutback in a social allowance which was paid regularly every month. Had her appeal been granted, the income support payments would have been higher not only in one particular month but rather for months to come. It appears that both were seeking a long standing remedy, based on opposite anticipations of their respective future abilities.

Both *Gamzo* and *Rubinova* are indeed cases with immense importance as precedence which develops new rights in the Israeli constitutional law. But at the same time both cases have missed an opportunity to recognize the special impact of time on the practical implication of these rights, and the importance of a temporal evaluation of claims for their infringements.

D4. HASSAN V. NATIONAL INSURANCE INSTITUE

(Appeal to the High Court of Justice, Supreme Court, 2012)

The right to minimum dignified subsistence [145]

Seven year after *Rubinova* the Israeli Supreme Court had a chance to deal once again with the link between income support benefits – *Havtachat hachnasa* – and the

[145] HCJ 10662/04 PD 65(1) 782.

threshold of minimum subsistence. This time it was asked to repeal a 2007 amendment to the Income Support Law (adding s 9A(b)), according to which ownership of a private car or even the usage of a car by a claimant of *Havtachat hachnasa* or by her child automatically revoked her entitlement to benefits (henceforth – section *9A(b)*).[146]

Salah Hassan was a father of five children who had been eligible for *Havtachat hachnasa* since 2001. His entitlement was subsequently denied by the National Insurance Institute due to ownership of a car, which he had claimed he needed in order to drive his blind daughter.[147] Hassan and several other appellants attacked s 9A(b) on grounds of an unconstitutional violation of the right to dignity. They asserted that the categorical denial of benefits for users of private cars did not allow for the examination of their actual economic condition: a family may be destitute despite owning a car. A car may not be essential for guaranteeing subsistence, but it facilitates job-searching, medical care, and keeping social relations, especially in small towns and villages where public transportation is infrequent.

The State responded that the expenses associated with owning a car were higher than the income threshold which determined the eligibility for the benefits. If Hassan owned a car then this meant that he had more than the maximum income allowed for *Havtachat hachnasa* recipients. Alternatively, if a person received a car gratuitously from a relative or a friend, then this gift was equivalent to a financial assistance which is, again, greater than the threshold. In short, the usage of a car or its ownership was used, according to the respondent, as a proxy for the claimant's

[146] Income Support Law, 5741-1980 s 9A, enacted in Amendment 28 from January 2007. Prior to this amendment, a similar rule was provided by secondary legislation (the National Insurance Bylaw). Following *Hassan* the Knesset replaced s 9A (Amendment 40 from August 2012).
[147] At the time of appeal Income Support Law provided exceptions for claimants using a car for medical purposes (see s 9A (c)) but the NII found they did not apply in Hassan's case.

economic ability (either via income or aid). The examined amendment, the State concluded, was a rational and proportionate measure to assure that social payments were provided only to those in need.

Decision

An extended panel of the HCJ accepted the internal logic of the State's argumentation, but unanimously rejected its conclusions, eventually repealing the examined legislation.

The main opinion, delivered by Beinisch CJ, relied extensively on the 2006 case of *Rubinova* but maintained that the narrow nature of the right to a minimum dignified subsistence did not justify a different analytical approach: there is no need for a special treatment in the first stage of the constitutional examination. It is worth dwelling upon this point, because here the judgment indirectly – and rather quietly – reverses what was a pivotal idea in the judicial analysis of the previous case – the special burden of proof associated with the right to minimum dignified subsistence. They may have done so with little fanfare, but the extended panel of *Hassan* overturned the rule which was created only six years earlier by the extended panel of *Rubinova*.[148]

Beinisch CJ begins with a general remark on *Havtachat hachnasa*, which by itself seems to mark a different direction from *Rubinova*:

> Income Support Law may not be the only State instrument for fulfilling the right to a minimum dignified subsistence – but it is one of the central measures protecting it. The importance of *Havtachat*

[148] Except for Beinisch CJ, none of the members of the panel in *Hassan* sat in *Rubinova*.

> *hachnasa* in guaranteeing the minimum of dignified human subsistence is the basic reference point for our decision in this case.[149]

The judgment subsequently referred to the calculation of maintaining a car, provided in the respondent's deposition. It compared the figures to the income test fixed in the Income Support Law.[150] The Court found that the cost of a car maintenance is lower than the threshold of eligibility for any type of *Havtachat hachnasa* by a significant gap of 24% to 55%. But s 9A(b) denied 100% of the benefit. This raised questions as to its proportionality: the examined legislation did not apply the least infringing measure.[151]

Furthermore, the judgment continued, when the car is not owned but rather received gratuitously from a relative or a friend, in many cases there is no financial alternative. The car owner may be letting her car only when it is not in use, while she is not able to replace this offering with a different assistance. A gift such as this, the HCJ found, cannot be considered a benefit carrying a financial value.[152]

For these reasons it was essential to make an individual examination for each *Havtachat hachnasa* recipient, considering the usage of the car and its comparability to a financial assistance. But s 9A(b) provides a conclusive presumption, a categorical test which is irrebuttable. This is a rigid and excessive arrangement, the judgment concluded, and consequently it does not stand up to constitutional scrutiny.[153] The HCJ ordered that the Section be removed within six months.

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[149] *Hassan* (n 108) 34. This idea is further developed in p 38. Compare this to Barak CJ's words in *Rubinova* - 'Income Support Law is not the sole guarantor of human dignity. It is one instrument out of many. The right to a dignified subsistence is not a right to a monthly benefit in a certain amount.' *Rubinova* (n81) 128.
[150] National Insurance Law [Combined Version], 5755-1995, Chapter D
[151] *Hassan* (n 108) 45-47.
[152] ibid 36.
[153] ibid 35.

A dynamic reading of Hassan

Similar to other durable goods, a car implies three main types of financial flows. First, it involves *periodic costs* (fuel costs, maintenance costs such as insurance and repair, financing costs associated with the purchase of the car, and depreciation cost referring to the decline in the value of the vehicle over time).[154] Secondly, the car user enjoys an *imputed income*.[155] Market rents – in our case that would be car rental rates – are used to estimate the value of an asset to its user or owner (for the latter, this represents an implicit cost).[156] Thirdly, a car may *return yield*, such as in renting it to a third party. This last aspect is not relevant to the case of *Hassan* so we will only discuss the first two.

With regard to a recipient of *Havtachat hachnasa* who owns a car, the judgment in *Hassan* recognises the *periodic costs* (seeing it as an indication to the recipient's income) but mistakenly does not take into account the imputed income – the value of owning the car. With regard to cars lent gratuitously, the Court did not take into account the periodic costs, even though according to the logic of the judgment, costs which were covered by the lender should have been considered as a financial gift, and costs which were covered by the user should have been treated as an indication for income.[157] As for imputed income, the State asked to treat the lending of a car as a benefit, but the Court refused. Instead, it found that since it was an offering with no alternative, it could not be considered as valuable to the lender.

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[154] S. Naess-Schmidt and M. Winiarczyk 'Company car Taxation' Working Paper No.22 (Copenhagen Economics 2010) 3.
[155] The theory of imputation, first developed by the Austrian School (discussed in ch 2(C)) is highly linked to dynamic economics. See H Uzawa, 'A note on the Menger-Wieser Theory of Imputation' [Springer-Verlag] 18 Zeitschr. f. Nationalökonomie 318.
[156] The first and second elements intersect, and it is a matter of definition where to cross the line between them. The total 'worth' of a car, imputed income and costs combined, is similar to the price of car rental plus the cost of fuel.
[157] In this point the judgment confuses between costs indicating income, and imputed income. See *Hassan* (n 108) 35.

This, again, was a mistake because the focus is on the user and not on the lender. Table 2 summarises the analysis provided by the Court. Three out of four categories were either denied or overlooked in the judgment.

	Costs - indicating income	**Imputed income**
Owner	Counted	Not counted
User - car lent gratuitously	Not counted	Not counted

Table 2. Analysis of cost and imputed income in the judgment in Hassan

The right column tells the story of the point that the judgment in Hassan missed: the usage of a car is not only an indirect indication of another income (which supposedly pays for the costs), as the Court assumed. It is also a real benefit, an implicit income which must not be overlooked when assessing the economic condition of a person claiming for social support.

These costs and imputed benefits are not one off payments. They are not single events in time. They fall, rather, under the economic definition of 'flow'. They refer to an interval of time, and they are measured, accordingly, per unit of time. Examining the cost and imputed income of a car over time, the sums increase significantly. For instance, one of the appellant in the case declared in her deposition that she used the car of a relative three times a month. Constant over one year such flow will equal a total (imputed income and costs combined) of well over 5,000 NIS (£900). It is a matter of simple arithmetic. Over time, the value of a benefit which is provided regularly simply piles up. In time-based constitutional terms, this means that

the longer the person involved holds the car, the higher her implied economic ability and hence the *magnitude* of the examined infringement decreases.

The time dimension is especially significant because many households supported by *Havtachat hachnasa* live in continuous poverty. They therefore receive the social payments over a long time – for several months and, more than often, for several years. Under such circumstances, the accumulation of imputed income leads to the simple legal conclusion that many claimants of *Havtachat hachnasa* may not be in economic conditions as harsh as they declare. In constitutional terms this means that the infringement of the right to dignity is sometimes less pronounced. A more complex evaluation of the constitutional balance is in place.

But the legal consequences of a time-based analysis go even further than that. This case illustrates what we called earlier the idea of *fluctuation*: a temporal perspective is susceptible to reveal a dynamic mechanism inherent to the examined legislation. Income Support Law (including s 9A(b)) is a legal norm which is organized around intervals of time. It provides a monthly benefit which is conditioned on a monthly evaluation of several factors, among them the car test. The NII examines the claimant's income anew each month, determines eligibility, and pays the benefits, month in month out. This system deals with fixed stations along a financial current.

The car ownership test is operated in each of the stations. The result of the test is immediate, and it lasts for one month only. A person eligible for *Havtachat hachnasa* who used a car in January is denied benefits in January (or in the following month). If she stops using the car in March, the social payments will return. In that sense Income Support Law internalises time, because it creates a stream of periodic testing and it continuously applies periodic decisions.

The Supreme Court found s 9A(b) to be excessively rigid because it provided 'a conclusive presumption, a categorical test which is irrebuttable'.[158] But from a dynamic perspective this is simply not the case. Section 9A(b) denies eligibility for a specified, limited period of time. It is a conclusive presumption valid for one month only. After this period the situation is re-examined by the NII. This is not the character of a rigid and categorical order. It is a legal arrangement more sophisticated and less injurious than was perceived by the Supreme Court.

Time and poverty: the temporal approach of the court

The examined legislation may be internalising time, but the analysis in *Hassan* does not. There is no single place in the judgment which mentions the duration of poverty of the appellants nor the period in which they have been receiving the social benefits.

The Court did not take into consideration that the costs and the imputed income related to a car were continuous and periodic. What seemed *de minimis* from the static perspective of the Court (a car used only three times a month) accumulates to significant numbers from a dynamic perspective. Naor J mentioned in her concurring opinion that it was necessary to examine whether a claimant enjoyed a standard of living higher than she declared.[159] Following the static approach of the judgment in *Hassan*, it is difficult to grasp the accurate picture of each *Havtachat hachnasa* claimant because, as mentioned above, imputed benefits and costs indicating income are accumulating.

Even more critical is that the judgment failed to notice that the examined legislation itself included a continuous periodic element. It thus missed a point crucial

[158] ibid 35.
[159] ibid 54. Compare, in the context of bankruptcy: CA 404/87 *Vesing v Werker* PDI 44(2) 593.

for the constitutional evaluation of s 9A(b). This lead to a conclusion similar to our findings with regard to the French case of *Couverture maladie universelle*, discussed in Chapter Three.[160] In both cases, change in circumstances over time created, through a statutory mechanism, a change in eligibility. But in both cases the judgment was unaware of this dynamic aspect of the examined legislation.

Finally, *Hassan* dealt with a law which balanced out the right to minimum existence with the ability to move around. The judgment was therefore right to point out the problematic nature of such an arrangement: in places with poor public transportation, using a car may be useful, and sometimes crucial, in order to find a job in nearby cities where there are better employment opportunities. Legal prohibition on the use of a car is therefore a barrier for escaping poverty. The relevance of this understanding to economic dynamics is clear: *Hassan* is an excellent example of legislation that limits economic mobility. This notion, however, was absent from the judges' findings.

D5. TWITO V. MUNICIPALITY OF JERUSALEM

(Administrative appeal at the Supreme Court, 2004)

The right to protest[161]

In November 2003, Yisrael Twito, an unemployed social activist, together with several other homeless and poor people, built a tent encampment in front of the

[160] Ch 3 text to n 129.
[161] AA 3829/04 *Twito v Municipality of Jerusalem* PD 59(4) 769.

Ministry of Finance in central Jerusalem. The group protested against the fall in job offers and the erosion of the value of the minimum wage, and attempted to stimulate public opposition to recent welfare reform.[162] They named the place '*Kikar HaLechem*', The Bread Square. The tents blocked one pavement and one lane in the 'Ben-Gurion Campus', a road lined with government ministries leading to the Knesset (and, ironically, the Supreme Court). The municipality of Jerusalem issued an evacuation order according to a local bylaw which deals with street order and cleanliness.[163] Twito and several others sought protection from the Administrative Court in Jerusalem under freedom of expression and right to protest. The Court rejected their appeal on technicalities which are irrelevant to our discussion here.

On appeal before the Supreme Court they explained that being unable to support their families they had decided to create a group 'that would lead a social struggle of the weak and the needy'.[164] By residing in The Bread Square they wished, in the words of the Court, 'to express an outcry against their deprivation, and to push the government to pay attention to their case and find solutions that would change their condition'. They argued that there was no legal restriction against demonstrating in that area and that it was therefore not an issue for the police to handle. A municipal bylaw regulating cleanliness in the streets should not have been applied in a way that denied their right to protest. 'Social and economic rights gain ever growing importance in the Israeli legal system', the appellants added, 'and they should be given practical, and not only theoretical, effect'.[165] By 'practical effect' they aimed to be allowed to remain and demonstrate in *Kikar HaLechem*, as well as to find a

[162] The same *Economic Shield Plan* which was discussed in *Rubinova*.
[163] Jerusalem By-Law (Preservation of Order and Neatness) 5738-1978.
[164] *Twito* (n 161) 772.
[165] ibid 773.

solution for the members of the encampment 'according to their rights to decent living and housing, to food, to clothing and to dignity'.[166]

The Municipality of Jerusalem responded that it was under a duty to ensure order and cleanliness in public areas and in the streets, 'especially in an area of public institutions which is close to the State's House of Representatives'.[167] The right to protest was not unlimited. The encampment which was obstructing street traffic therefore had to be removed.

Decision

The Supreme Court unanimously dismissed the appeal, on the grounds that the municipality had 'the duty and the authority' to ensure order in the streets and that every demonstration is subject to the requirements of the law. But the judges reached this conclusion not before they delivered an elaborate discussion on the poverty conditions of the members in The Bread Square.

Procacia J opened the legal discussion with concerns for the lack of concrete data on the economic condition of the appellants, and then moved to describe the efforts of Court to shift the discussion to the evaluation of the material needs of each of them:

> We have learned from the questions we asked, that the people in this group did not turn... to the welfare authorities in order to present their problems and get assistance... unfortunately, our attempt to navigate this hearing to a practical direction which will open a path of

[166] ibid.
[167] ibid 774.

> communication between the people of this group and the welfare authorities did not succeed.[168]

The judgment subsequently mentioned that the Court suggested that the Attorney General be summoned in order to individually discuss 'the real needs' of each of the members of the group, to link them up to the relevant State authorities, and so to 'examine legal options of assistance'.[169] The appellants refused and asked that the hearing be based on their submitted legal arguments.

Only at this point Procacia J turned to analyse the legality of the evacuation. The relevant bylaw, she maintained, authorised the mayor to order the removal of any object which a person leaves in the street for period longer than reasonable. The encampment 'is a nuisance which substantially harms the appearance of the area'.[170] Citizens have no right to continuously occupy a street which is meant for the public 'however important the goal which they seek to promote may be'.[171] The appellants who called for the amendment of social wrong surely enjoyed a right of expression and protest, but this right is not absolute. It is subject, primarily, to the duty to obey the law and to acting in accordance with its directives.

> It is hard to accept that in the name of freedom of expression and demonstration... a group of citizens will take unlimited continuous hold in a public street of a city and will settle there with its tents and facilities while disrupting the traffic, creating health hazards, as well as continuous aesthetic damage to the appearance of the place. The damage from such an activity may grow even further when the location of the encampment is in the area of the Government Campus, which is

[168] ibid 774.
[169] ibid 775.
[170] ibid 776.
[171] ibid.

> exposed to heavy public traffic, being a central hub for public national activity.[172]

A conclusion was within reach now. The appellants must evacuate their tents within seven days. But here, again, Procacia J turned to the conditions of poverty.

> Indeed, the conception that the constitutional right to human dignity contains also a right to a minimum of human subsistence, including shelter, basic food, and elementary health treatment, and that the State has the duty to make sure that the standard of living of an individual shall not go below the level which is necessary for a dignified living, struck roots in the Israeli legal system... we may assume that this conception would lead the approach of the authorities if any of the appellants shall turn to them for support.[173]

What was the purpose of this last remark? Who was it addressing? Was it aimed at the welfare authorities - which the appellants refused to approach? Or was it the reflection of the appellants request to give practical meaning to their social rights? Or perhaps it was nothing but rhetoric, a friendly coda to conclude the discussion? How is the mentioning of the right to dignity relevant to the rest of the opinion?

The role of poverty in the judgment

Poverty was constantly mentioned in *Twito*. It appeared and reappeared in almost half the paragraphs of the judgment. But it is hard to define what role it actually played in the case. There are several options. The first of these is that the Court recognised that the encampment was an act of demonstration, and that by residing in those tents the appellants carried a political message. In this sense poverty was the political message

[172] ibid 778.
[173] ibid 779.

– it was written on the banners. But this was not the only function of poverty in this case. Poverty in *Twito* was not just the content of the protest, it was also a characteristic of the protestors. First, it appeared when the Court tried to navigate the hearings into a discussion on finding a solution to the welfare situation of each of the appellants. Secondly, it appeared in the argument of the appellants, who refused to make this shift, and asked the Court to consider their economic condition as a material element for the decision on the future of the encampment. Thirdly, poverty appeared in the last quote above, as well as in most of the concurring opinion delivered by Rubinstein J, with no apparent argument attached. The conclusion is that the Court indeed noticed poverty as a distinctive feature of the appellants and as a meaningful element in the case. But not more than that. While the economic condition of the appellants was thought over extensively in the judgment, in the final evaluation it was left out.

A dynamic reading of Twito

The appellants wanted more: they contended that legal significance should be attached to poverty. According to this line of thought, the Court should have considered their destitution as a factor in the constitutional analysis, as a substantial element which affects their right to protest. Can a dynamic perspective offer that?

At the end of his opinion, Rubinstein J made the following remark:

> Indeed, there are those who argue that legal rules are shaped without taking into consideration the life reality of people who live in poverty and their personal experiences...[174]

[174] ibid 783.

The argument that Rubinstein J mentioned – he neither accepted it nor rejected it – presented the following idea: that the appellants are poor is a crucial element which changes the constitutional picture. The economic constraints they face do not allow them to participate equally in the political and public debate. Examining their practice of freedom of demonstration similarly to the way it would be done with non-poor people disregards the barriers they bump into when they wish to make a voice in an era of mass media.[175] It is problematic to ask the members of Bread Square to protest and demonstrate like everyone else when the means for promoting an ordinary demonstration are not available to them. Publishing an advertisement in leading newspapers, printing thousands of flyers, getting an interview in a popular talk show a day before the rally: these indispensable actions require money and other resources that the appellants lack. Poverty, in short, is an obstacle to political expression.[176]

Even if eventually rejected, it is important to be aware of the role that the duration of poverty plays in such an argument. A fair examination of the appellant's position requires a dynamic evaluation of poverty. Unlike short-term poverty, chronic poverty is closely related to other aspects of social powerlessness. People who are poor for a long period of time would usually have significantly weaker social abilities, fewer opportunities for social networking, and consequently poorer ability to promote a political message. Presenting the notion of social capital, Chapter Two described the correlation between long-term poverty and lack of social power.[177] For this reason,

[175] It may be necessary to add: and yet before the appearance of Facebook and other social media.
[176] John Rawls expresses the idea that economic inequalities can distort the ability to exercise basic liberties. This requires to secure each citizen a fair access to the use of the political process. See John Rawls *Justice as Fairness* (Harvard UP 2001) 148-150. For more on the interaction between freedom of speech and other political rights and socio-economic conditions see Fredman (n 86) 67-68.
[177] See ch 2 text to n 168. For a specific discussion on the impact on political capacities see P. Baumann *Sustainable Livelihoods and Political Capital* (Overseas Development Institute 2000).

whether the appellants were chronic poor or transitory poor is especially relevant to the evaluation of the constitutional picture.[178]

Chronic poverty means not only a long-term disturbance to political expression. It is an economic condition which results in the absence, or the loss, of basic social skills. To use the terms of Chapter One, the duration of poverty creates not only a difference in the *magnitude* of the constraint on the right to protest, but also a gap in the *nature* of this constraint. Quantity turns into quality. If poverty blocks, or delays, or disturbs effective political participation and effective political expression, then long-term poverty cripples the social ability to create them in the first place.

According to this argument, limiting the right to protest has a far more restrictive effect when it concerns long-term poor, because it limits the speech of those who are already short of speech power. Indeed, freedom of expression should be tested by the ability to realise an action which carries meaning.[179] Evacuating Twito and his colleagues was a restriction on the only alternative left for them to be heard. Telling them they should clear their tents and instead turn to standard mechanisms of public campaigning is akin to forbidding a person on a wheelchair to enter an elevator, telling her she could use the stairs like everyone else.

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[178] A similar analysis regarding the link between poverty and political power was suggested in France, following a *Conseil constitutionnel* case, CC décision 98-403 DC du 29 juillet 1998*, Loi d'orientation relative à la lutte contre les exclusions*, which discussed a legislation that required homeless people to register with an address. The case has been criticized in commentaries as a violation of Art 3(3) of the Constitution which provides for universal and equal suffrage. See M. Laval-Reviglio *'Pauvreté et citoyenneté politique'* in D. Gros & S. Dion-Loye, *La Pauvreté saisie par le droit* (Seuil, 2002) 245. Catherine MacKinnon raised a similar argument, that freedom of speech is valuable to men who control the media, but not to women. Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard UP 1987).

[179] Compare to the Canadian case of *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, 968.

Time and poverty: the temporal approach of the court

How far did the judges go in examining the proposition of the appellants as for the role of poverty in the constitutional analysis? Again, *Twito* is not a case of a blind court. The economic conditions of the people standing before it were indeed present and visible in the judgment. But the Court did not examine the above mentioned aspects in the appellants' claim. There is no recognition in the judgment that the appellants were not just poor but chronically poor. The duration of poverty was overlooked. The Court thus lost a perspective which may have assisted in approaching the appellant's argumentation more sympathetically.

The result of the decision in *Twito* is a legal rule which makes it extremely difficult for poor people to practice their right to demonstrate and to effectively participate in the public debate. It appears, after all, that the Supreme Court gave a decision that was, in the above-cited words of Rubinstein J, 'shaped without taking into consideration the life reality of people who live in poverty'.

D6. OTHER CASES

Examining all other Supreme Court cases which deal with poverty, I found none that applies a dynamic approach. The scope of this study does not allow for a deep analysis of all cases. The following presents each case in brief and outlines its temporal perspective.

***Itri v The State of Israel*[180] (1994)**

Eliyahu Itri, an unemployed homeless person who could not pay his debts, asked to sell his kidney to a patient not related to him by blood. At the time of the appeal (1994), the trading of organs was not yet criminalized in Israel, but it was forbidden by a decree set by a commission in the Ministry of Health.[181] Itri, not represented by an attorney, asked the Court to order the Minister of Health to permit and regulate the trade of human organs. In a short decision a unanimous Court rejected the appeal on the grounds that relevant legislation was in the process of being legislated in the Knesset, and that until the subject was regulated by primary legislation, an executive decision to prohibit organ trade was both reasonable and compliant with World Health Organization policy. At the end of the judgment the Court added a comment which was touching as much as it was dry - 'we inquired information regarding the condition of the appellant, and whether he is in need for assistance from welfare authorities. The dignity of the appellant demands concern for minimal human subsistence. The appellant declared that... he is assisted and that there is no need for further treatment in this aspect.'[182] These few sentences were the first to articulate a legal phrase that would rule the treatment of poverty in constitutional law in the following two decades.

Given the nature of the appeal, a dynamic approach (or any other understanding of the economic condition of the appellant) would have probably not changed the decision. However, it is worth noting that when it comes to the temporal understanding of poverty, this case is no exception. The judgment refers only to Itri's condition at the time of the hearing.

[180] HCJ 161/94 (not published).
[181] For the legal situation today - Organ Transplantation Law, 5768-2008 s 3, s 36.
[182] *Itri* (n 180) 2.

Solomon v Solomon[183] **(1995)**

The case concerned divorce and alimony issues which are not relevant to this study. But similarly to *Itri*, the judgment in *Solomon* concluded with a constitutional remark on the relation between human dignity and poverty: 'abandoning a spouse to destitution and hunger is a violation of human dignity'.[184] Again, the duration of poverty played no role and the short (and abstract) discussion is entirely disconnected from time. Indeed, from an economic dynamic perspective both parties in *Solomon* were in a state very different than the one of Eliyahu Itri. But the constitutional remarks ending *Solomon* and *Itri* were identical.

Rota v. Natzbatayeb[185] **(2000)**

According to Israeli family law, a married couple which is not subject to any religious authority and wishes to divorce, is required to appeal directly to the Chief Justice of the Supreme Court (!) to decide which court or religious tribunal would have jurisdiction to hear their case.[186] Filing this request, the appellant asked to be exempt from court fees, on account of her poor economic conditions. The Court accepted her appeal, stressing her constitutional rights of access to court and the right to equal treatment of couples of different religious affiliations.

The case concerned a one-off payment, and it was not entirely up to the appellant to choose when the event that triggers this payment will occur. Such being the case, it is not clear that a dynamic perspective would make a difference. But it is

[183] CA 7038/93 PDI 51(2) 577.
[184] ibid 580.
[185] RMA 6857/00 PDI 54(4) 707.
[186] The term 'Marriage Annulment' is unrelated to the similar term used in the Catholic Church. See Adjudication in Matters of Marriage Annulment Law, 5729-1969 s 1.

still worth mentioning that *Rota* is no exception: this case as all others takes no notice of the duration of poverty.

Manor v. Minister of Finance[187] **(2004)**

The 2002-2003 *Economic Shield Plan*, discussed in Section D2 above, included – aside from the income support cutbacks – a series of reductions in the universal old age pension totalling 7%.[188] The appellants, some of them claiming that old age pension was their only source of income, reported that following the reduction they had to forego medications or basic food. They attacked the legislation on the ground of an unconstitutional violation of the right to minimum dignified subsistence, the right to social security, and the right to property. The Court (Barak CJ, Rivlin and Grunis JJ concurring) rejected the appeal, maintaining that the instrument which guarantees dignified subsistence is in fact the *Havtachat hachnasa*, the income support benefit for which the poorer among the elderly are eligible (an argument which conflicts with the main reasoning of the same court a year later, in *Rubinova*[189]).

From the perspective of dynamic economics, an income reduction in an old age is very different from the same reduction before retirement. But this aspect is absent from the judgment. The Court in *Manor* disregards the issue of age.

[187] HCJ 5578/02 PDI 59(1) 729.
[188] The law provided a flat 4% reduction and the freezing of adjustment mechanisms.
[189] n 81. *Havtachat hachnasa* is discussed extensively above, in Section D2 and D4.

***Al-Amur v. Minister of Education*[190] (2006)**

The appellants, 57 parents to children aged 3-4, who lived in Za'arura (an illegal Bedouin settlement in the South of Israel), asked the HCJ to order the Ministry of Education to provide transportation to the closest kindergarten. This was located several kilometres away, in a village recognised by the planning authorities. Alternatively they demanded the building of a kindergarten in their settlement. Their appeal rested on the right to education and claims of equality. The State responded that transportation for 3-4 years old was not provided anywhere in the country; that free education in this age was provided only in numerous places prescribed by law, and that Za'arura was not one of them; and that providing education within Za'arura would defeat the effort to remove this illegal settlement. Adopting these arguments, the Court rejected the appeal. The judgment acknowledged that the inhabitants of Za'arura suffered from a 'Socio-economic condition of poverty and need',[191] but took no notice of the fact that it is a condition of *chronic* poverty, and thus did not refer to the relevance of education as an escape from poverty.

***Movement for Quality Government v. The Knesset*[192] (2006)**

***Resler v. The Knesset*[193] (2012)**

Members of the Ultra Orthodox community are exempt from the mandatory three year military service in Israel. This exemption, which existed since the foundation of the State in 1948, grew in scale from a few hundred in the 1950s to tens of thousands

[190] HCJ 10030/05 (not published) (2006). For a previous case dealing with the same subject, and reaching similar conclusions see HCJ 5108/04 *Abu-Juda v. Minister of Education* (not published).
[191] Al-Amur (n 190) [3].
[192] HCJ 6427/02 (not published).
[193] HCJ 6298/07 (not published).

in the 2000s. It is a subject that has caused much political controversy and social tension in Israel.

The normative basis of the exemption was an executive decree, provided by the Minister of Defence. Following strong public protest and several court decisions, the Knesset was pushed to regulate this practice in primary legislation, commonly named '*Tal Law*',[194] in 2002. The two cases discussed here are appeals against the constitutionality of this law. The first case, delivered in 2006, declared the law unconstitutional, but postponed its cancellation, giving the Knesset five more years in order to examine its impact. The second case, discussing a similar appeal, was delivered in 2012, at the end of the trial period. This time the Supreme Court abolished the *Tal Law*.[195] The reasoning of the Court in both cases focused on the constitutional right to equality before the law, stemming from the right to dignity.

As mentioned in the beginning of this chapter, 46.5% of Ultra-Orthodox were long-term poor in 2011.[196] But neither of the judgments mentioned this figure. That poverty in this community is chronic was overlooked in both cases. But this may have been considered as an efficient argument which justifies the *Tal Law*. Confronting poverty and encouraging employment among the Ultra-Orthodox was, after all, one of the declared purposes of the law. The rationale of fighting poverty was indeed considered by the Supreme Court. But not its depth and duration: to use the terminology of Chapter One, not its *magnitude*. Poverty was considered in both cases with no relation to time.

[194] Law for Delay of Service for Students of Yeshivah, 5762-2002.
[195] Following the last Supreme Court decision, the Knesset passed an amendment to *Tal Law* in 2013: Law of Security Service (Amendment 19) 5774-2013.
[196] See n 12 above.

E. CONCLUSION: THE TEMPORAL APPROACH TO POVERTY

As we have noticed in the case analysis above, a constitutional evaluation which takes time into consideration would result in new legal tools. In *Rubinova*, a temporal perspective has the potential of affecting the nature of the right involved, the identity of those who are infringed by the new legislation, the magnitude of the examined violation and the evaluation of the rationale of this legislation. In *Twito*, a dynamic approach questions the foundations of the Court's ruling. In *Gamzo* it calls for revising the balance between the competing constitutional rights involved in the case. A time-based reading of the legislation examined in *Hassan* concluded that the legal arrangement examined in the case was less injurious than was perceived by the Court.

The dynamic analysis of both *Gamzo* and *Hassan* resulted in a conclusion that the Court could have adopted a more passive position, and refrain from interfering with the examined legislation (*Hassan*) or with the judicial decision of a lower court (*Gamzo*). The dynamic analysis in *Rubinova* and in *Twito* led to an opposite conclusion, that the Court should have taken a more active standing.

Gamzo, *Rubinova* and *Hassan* may represent a dramatic breakthrough in the sense of recognising new constitutional rights, but at the same time they mark a missed opportunity. These three, and all other cases discussed in this chapter, reveal a judicial approach which disregards the duration of poverty. The Court indeed discusses poverty in the context of many constitutional rights, from classic rights such as the right to equality and freedom of demonstration to social rights such as the right to minimum dignified subsistence and the right to housing. It demonstrates, in most of the cases, a somewhat activist approach and willingness to come up with innovative

constitutional solutions for different aspects of poverty. However in all cases poverty is regarded as a frozen phenomenon, isolated from the passage of time. In this sense the findings are similar to the conclusion reached with respect to the French *Conseil constitutionnel*. The Supreme Court of Israel applies a timeless approach to poverty. The journey between jurisdictions continues, and we head now to our third and last stop – to Canada.

5 Poverty, Time and Constitutional Human Rights Law in Canada

A. INTRODUCTION: POVERTY IN CANADA

Canada is the wealthiest country examined in this study. With a GDP per capita of US$ 43,300, the Canadian standard of living is 9% higher than that of France, and 32% higher than in Israel.[1] 12.6% of Canadians live below the relative poverty line, placing Canada at 21st out of 35 OECD member states. These figures are somewhere in the middle of the way between France (8.0%) and Israel (18.6%).[2]

Canadian welfare benefits (including, among others, child tax credit, unemployment benefits, working income tax benefits, and old age security) are lower

[1] PPP figures for 2013. IMF, World Economic Outlook Database, October 2014. <www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx> accessed 2 September 2016.
[2] 2013 figures, after tax and transfers. OECD Stats Extracts, Income Distribution and Poverty. <https://stats.oecd.org/Index.aspx?DataSetCode=IDD#> accessed 2 September 2016.
The poverty standard used here, and all through this study, is the relative measurement of (standardised) 50% of median income. Due to an on-going debate in Canada as to the appropriate definition of poverty, the Government's 'Statistic Canada' did not officially adopt any measurement method. See discussion in ch 2 n 43.

than in most OECD countries.[3] Transfer payments therefore do not alleviate poverty as much as in France and Israel. Employment status is, accordingly, highly associated with poverty, reflected in especially high poverty rates for households where no one works (66%). There are also significant poverty levels in households where only one person works (21%). Poverty among the elderly is relatively low (5.9%, half the OECD average),[4] and among children is at 15%, a figure slightly higher than OECD average.[5] However, thanks to an overall high standard of living, the material situation of Canadian poor is relatively better off: 'fewer households than in any other countries struggle to purchase basic goods and to have decent housing', an OECD report finds.[6]

Canada witnessed a steady decline in poverty rates from the mid-seventies until the mid-nineties. The trend subsequently changed: in the first decade of the 21-century poverty increased by two to three percentage points to a current rate of 12%.[7] This dramatic deterioration was similar for all age groups. It is partly explained by the expanding income gaps – the rise in inequality in Canada over this decade was of the highest among OECD countries – and partly explained by changes in population age composition and family structure, such as an increase in the share of single-parent households.[8]

[3] OECD, *Growing Unequal? - Income Distribution and Poverty in OECD Countries – Country Note: Canada* (2008).
[4] OECD, *Pensions at a Glance 2011: Retirement-Income Systems in OECD and G20 Countries* (2011) 149
[5] OECD 'Comparative child well-being across the OECD' in OECD, *Doing Better for Children* (2009) 35.
[6] OECD *Growing Unequal?* (n 3) 2. This finding deals, of course, with absolute, and not relative, poverty.
[7] ibid 1.
[8] ibid.

Long-term poverty in Canada

Statistics Canada operates several longitudinal studies, making data on poverty dynamics in Canada better than in most countries.[9] Roughly 8% of born Canadians experience low income in at least four out of five years examined, an accepted index of persistent poverty. Indeed, a 2008 OECD study finds that chronic poverty is more stubborn in Canada compared to other country members: 'If Canadians do fall into poverty, they are likely to remain poor for longer than in most countries'.[10] At the same time, this report uncovers surprising results about inter-generational poverty: children's chances of escaping their parents' economic condition appear to be higher compared to other OECD members. The report concludes that 'social mobility is higher in Canada than in other countries'. Low income is especially persistent among immigrants who entered Canada in the 1980s and 1990s (immigrants entering Canada prior to 2000 had relatively lower education and professional skills): one fifth experienced low income in four out of five years. However, for their children, poverty spells are usually short lived, and up to 40% of the second generation escape poverty after one year.[11] Finally, although Canadian-born 'visible minorities' are no more likely than other Canadians to experience low income, visible minorities who experience low income are more likely to experience it repeatedly.[12]

[9] For example, the Longitudinal Administrative Database (LAD) and the Longitudinal Immigration Database (IMDB). See Garnett Picot and others, 'Chronic Low Income and Low-income Dynamics Among Recent Immigrants' (Analytical Studies Branch Research Paper Series No. 294, Statistics Canada 2007)
[10] *Growing Unequal?* (n 3) 2.
[11] Picot (n 9).
[12] Boris Palameta 'Low Income Among Immigrants and Visible Minorities' (Perspectives on Labour and Income Vol. 5 no. 4, Statistics Canada 2004).

The following sections

Like the previous discussion on France and Israel, the following two sections provide an overview of the constitutional playground to be explored in this chapter. Section B describes the constitutional norms that protect human rights in Canada. Section C describes the operation of the Canadian Supreme Court, focusing on its relation to welfare and poverty issues. This section will also briefly portray the accessibility of low-income individuals to the judicial system. Section D analyses poverty cases from the Supreme Court in Canada. Section E concludes the findings.

B. NORMS: CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN CANADA

Canada is a federal parliamentary liberal democracy consisting of ten provinces and three territories. Legislative authority is split between the federal and provincial legislatures.[13] The federal constitution is composed of codified norms, including the Canada Act, 1982 (which includes the Constitution Act, 1982), the Constitution Act, 1867, and other orders and acts listed in the schedule to the Constitution Act, 1982,[14] as well as several pre-confederation acts and unwritten components.[15]

Protection of human rights exists both at federal and provincial levels. Within each province's distinctive body of statute law there is some form of safeguard for

[13] Constitution Act, 1867 ss. 91-92 stipulate the matters for federal and provincial responsibility.
[14] Constitution Act, 1982 s 52(2).
[15] See *New Brunswick Broadcasting Co. v Nova Scotia* [1993] 1 S.C.R. 319

individual rights. At times it is on a quasi-constitutional normative level (as is the case with the Quebec Charter of Human Rights and Freedoms): it thus cannot be repealed by future legislation. But for the most part, it takes the form of a standard primary legislation, primarily dealing with protection from discrimination (for instance, the Ontario Human Rights Code).[16] These provincial bills and codes are always subject to the supremacy of the federal constitution, which is the focus of the following review.

The main source for Canadian Supreme Court human rights reviews is the federal Charter of Rights and Freedoms, enacted as part of the Constitution Act in 1982.[17] All Canadian legislatures, executive branches and courts, in whatever levels of government - federal, territorial, provincial, and municipal - are subject to the *Charter*.

The Charter of Rights and Freedoms divides the individual rights it stipulates into a number of groups. 'Fundamental Rights' comprise freedom of expression and assembly, conscience and religion, and association (s 2); a bundle of 'Democratic Rights' includes, amongst others, the right to vote and be elected (ss. 3-5); 'Mobility Rights' designates the right of movement and the right to enter and leave the country (s. 6); and the category 'Legal Rights' includes a right not to be subjected to cruel and unusual treatment or punishment, the right to retain counsel on arrest, and other rights associated with criminal procedure, detention and imprisonment (ss. 7-14). The *Charter* also provides language and language education rights (ss. 16-23). Finally, s 15 provides a right to equality and regulates affirmative action policy.[18]

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[16] Jeffrey Brooke and Philip Rosen, 'The Protection of Human Rights in Canada' 2(3) Canadian Parliamentary Review 37.
[17] To be distinguished from the Human Rights Act of 1977, a federal primary legislation which deals only with prohibiting discrimination. Complaints of violation of this Act are generally dealt with through the Human Rights Commission.
[18] The right to equality is discussed with some detail in the following analysis of *Gosselin v Quebec* (Section D3).

Section 1 is the main instrument for assessing claims concerning violations of *Charter* rights: it is a limitation clause similar in structure to the Israeli arrangement described in the previous chapter.[19] The burden of proof lies first with the claimant who must show on the balance of probabilities that a charter right was violated. This shifts the onus to the respondent. Following the *Oakes* test the latter is then required to demonstrate under s 1 of the *Charter* that the purpose of the legislation serves 'a pressing and substantial objective' according to the values of a free and democratic society and that the means inscribed within the legislation are proportional.[20] Proportionality is examined through three sub-tests. First, that measures are rationally connected to the objective; secondly, that the impairment of rights is 'as little as is reasonably possible';[21] and thirdly, that there is an overall proportionality between the infringement and the purpose of the impugned norm.[22]

Occasional cases suggested that some rights should either be subject to a different interpretation of s 1 (notably in *Andrews*, where the Court divided on whether to apply a different s 1 examination on the right to equality),[23] or not be subject to s 1 at all.[24] Nonetheless, the test in *Oakes* was prescribed as a uniform standard applicable to all *Charter* rights, and remains as such today.[25]

The power of the *Charter* is curbed by the 'notwithstanding clause' of s 33, authorising both Federal and provincial legislators to 'expressly declare' a particular

[19] It is in fact the Israeli Basic Laws that were based in 1992 on the Canadian model.
[20] *R. v. Oakes* [1986] 1 SCR 103
[21] As was refined in a later case, *R. v. Edwards Books and Art* [1986] 2 SCR 713.
[22] Sujit Choudhry, 'So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 Supreme Court Law Rev 501.
[23] *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143. Later s 15 cases kept a universal standard of s 1. See Peter Hogg, *Constitutional Law of Canada* (5th ed. 2014) 38.13.
[24] See the dissenting opinion in *R. v. Smith* [1987] 1 SCR 1045 with respect to the right under s 12.
[25] A notable exception is *Mackin v. New Brunswick* [2002] 1 SCR 405, where the Court refused to apply the *Oakes* test in a case dealing with the right to an 'independent and impartial tribunal' under s 11(d). Abolishing a law that impaired the employment status of judges, the Court declared this case to be exceptional because it challenged an 'unwritten constitutional principle' of judicial independence.

act or provision thereof to override a *Charter* right (only those of ss. 2 and 7 to 15). This immunity from judicial review is limited to five years with an option of re-enactment. To date, the Federal Parliament has never used this power of override (nor have seven of the ten provinces).[26]

The list of rights provided in the *Charter* is not exhaustive.[27] Indeed there are several examples of embedding human rights in federal constitutional law outside the *Charter*. Thus, for instance, s 35 of the Constitution Act, 1982 affirms aboriginal and treaty rights. Additionally, Canada's roots in the English legal system mean that human rights were historically protected by the common law convention of institutional respect for 'civil liberties'. It is best described as a tendency to 'favour individual rights and freedoms… when they come into conflict with state interests',[28] joined by other unwritten constitutional principles, such as tolerance of minorities and securing of judicial independence. With the enactment of the *Charter* in 1982, these safeguards of 'a democratic approach to civil liberties'[29] received a textual supra-legal entrenchment, but even in the *Charter* era they continue to play a role in the constitutional law of Canada.

[26] Hogg (n 23) 39.2.
[27] *Charter*, s 26.
[28] Hogg (n 23) 34.2
[29] Peter Russell, 'A Democratic Approach to Civil Liberties' (1969) 19 U Toronto L.J. 109.

C. INSTITUTION: THE SUPREME COURT

The Supreme Court of Canada is the highest judicial instance in the country. Its decisions are final and they bind on all lower courts, provincial and federal.[30] Appeals are brought from appeal courts of both levels, and they may raise questions of constitutional, federal or provincial law.[31] In addition, the Supreme Court gives opinions on 'references', questions of law referred from the federal government, usually on the constitutionality of a statute, whether before or after it is enacted.[32]

The Supreme Court is comprised of a chief justice and eight puisne justices.[33] A quorum consists of five members, but it normally sits as a full bench, especially in constitutional cases.[34] The *Supreme Court Act* specifies that three members must be from Quebec (s. 6). By tradition, another three judges are appointed from Ontario and the rest are from the Maritimes and Western provinces.[35]

Any Canadian court has the power to strike down both federal and provincial primary legislation if it exceeds the legislative authority of the Federal Parliament or the respective legislature. Similarly, a court can strike down federal and provincial legislation if inconsistent with the *Charter*.

[30] *Canada v. Craig* [2012] 2 SCR 489. The recent *Canada v Bedford* [2013] 3 SCR 1101 suggested a more flexible model of vertical *stare decisis* in constitutional cases. See Hogg (n 23) 8.7.
[31] Hogg (n 23) 8.5(a).
[32] Supreme Court Act s 53; Hogg (n 23) 8.6.
[33] Supreme Court Act s 4(1).
[34] Supreme Court Act s 25; Hogg (n 23) 8.3.
[35] Hogg (n 23) 8.3.

Standing and justiciability

With the exception of an appeal on an opinion given in a procedure of provincial reference,[36] and a few other instances, most of them of criminal procedure,[37] an appeal to the Supreme Court usually requires grant of leave.[38] The Court will hear cases that raise a question of public or legal importance: on constitutional and human rights matters it is likely to grant leave.[39] The Supreme Court receives 500-600 applications of leave to appeal annually and hears 65-80 appeals.[40]

To balance the government's exclusive right to generate judicial review of legislation by way of a federal reference, the Court developed rather flexible rules of standing allowing individual appellants to bring a declaratory action before a trial court, challenging the constitutionality of a law, whether federal or provincial.[41] Not only a party directly affected by a law, but also public groups with a 'genuine interest' in the matter gain standing, if they demonstrate that the impugned law raises a 'serious issue of invalidity' and that there is no effective alternative to bring the issue before the Court.[42] This procedure is brought to a trial court (either federal or provincial) and standard rules of appeal to the Supreme Court apply.[43]

An appeal or reference must carry a 'legal component'. A political character, or consequence, to a case does not exclude it from judicial review,[44] but the Court will

[36] Supreme Court Act s 36.
[37] For example, a court of appeal conviction overturning a trial-court acquittal: Criminal Code R.S.C. 1985, s 691(2)(b). For other examples of appeal as of right see ss. 691-693, 784(3). For appeal as of right in civil cases, see Supreme Court Act, s 36, and Federal Court Act, s 32.
[38] Supreme Court Act, s 40(1) and Federal Court Act, s 31(2). Even if rarely used in practice, on some matters, the provincial (and federal) courts of appeal also have the authority to grant leave of appeal to the Supreme Court. See Supreme Court Act, s 37 and Federal Court Act, s 31(1).
[39] Hogg (n 23) 8.5(b).
[40] Website of the Supreme Court of Canada – The Role of the Court <www.scc-csc.gc.ca/court-cour/role-eng.aspx> accessed 2 September 2016.
[41] Hogg (n 23) 59.2.
[42] *Canadian Council of Churches v. Canada* [1992] 1 SCR 236, 253.
[43] Hogg (n 23) 8.6(a).
[44] *Re Objection by Quebec to Resolution to Amend the Constitution* [1982] 2 SCR 793, 805.

refuse to answer a 'purely political question' (this refers primarily to references).[45] It may also find indirect ways not to interfere if the case is politically charged.[46]

The arrangement of legal aid, its operation in practice, and the relevant constitutional foundations are dealt with in the analysis of *R. v Prosper* (section D1).

D. THE CANADIAN SUPREME COURT AND POVERTY

In considering the Supreme Court's treatment of poverty, it is necessary to situate poverty policy in the context of federal-provincial division of authority. Section 92(7) of the Constitution Act, 1867 assigns legislative power over 'Charities and Eleemosynary Institutions' to provincial governments, but a series of constitutional amendments in 1940 and 1951 delegated authority to the federal government to provide and fund various social security services.[47] Consequently, welfare services in Canada are provided by both levels of government, often in the form of federal funding for programmes operated by the provinces.[48]

The Constitution Act, 1982 provides at s 36(1) that both levels of government are committed to promote 'equal opportunities for the well-being of Canadians' and 'essential public services'. This was seen as a statement of aspiration rather than

[45] *Re Canada Assistance Plan* [1991] 2 SCR 525, 545.
[46] For example, refusing to answer one of the questions in *Re Same-Sex Marriage* [2004] 3 SCR 698 on the grounds that it was 'inappropriate'.
[47] See ss. 91(2A) and 94A to the Constitution Act, 1867. The former is further discussed in the analysis of *CSN v Canada*, Section D2 below. Other social benefits are provided by the federal and provincial governments based on their general spending powers. See Hogg (n 23) 33.1.
[48] Hogg (n 23) 33.5.

enforceable human right.[49] Aside from this article, and the *Charter* guarantee of language and education rights discussed above, federal constitutional documents outline no socio-economic rights (unlike the Quebec Charter which provides 'Economic and Social Rights' in Chapter Four). To the extent that it exists, the poverty policy of the Supreme Court is thus developed through indirect means, notably through ss. 7 (life, liberty and security of the person) and 15(1) (equality) of the *Charter*.

The Supreme Court invoked the right to equality to extend or increase social assistance in several cases in the 1990s. In *Eldridge* it allowed an appeal for access to healthcare by individuals with hearing disabilities on the basis of s 15(1).[50,51] Timely access to medical treatment appealed to the right to life and security of the person in two other cases.[52] In addition, in *New Brunswick v. G. (J.)*, the Supreme Court explicitly held that s 7 provided a positive right to state-funded counsel in the context of a child custody hearing.[53]

Barring these instances, the history of Supreme Court poverty cases is mostly a tale of what was decided not to decide: protections not adopted and rights unrecognised. Thus, a famous obiter in *Irwin Toy* noted that it was too early to exclude s 7 coverage of economic rights such as 'rights to social security… adequate food, clothing and shelter'.[54] In *Gosselin v Quebec*, virtually the only Supreme Court case on the right to an adequate standard of living, it was claimed that the right to

[49] Aymen Nader 'Providing Essential Services: Canada's Constitutional Commitment Under Section 36' (1996) 19 Dal. L.J. 306, 349.
[50] *Eldridge v British Columbia* [1997] 3 SCR 624. Section 15(1) lists physical disability as ground of discrimination.
[51] Martha Jackman and Bruce Porter, 'Socio-Economic Rights Under the Canadian Charter' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 209, 213.
[52] *Chaoulli v Quebec* [2005] 1 SCR 791 and *R. v Morgentaler* [1988] 1 SCR 30 (both discussed in ch 1 text to n 79 and n 88 respectively).
[53] [1999] 3 SCR 46 [107].
[54] *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927 [7].

'security of the person' requires a minimum of social support.[55] This approach was neither adopted nor wholly rejected by the majority, which also chose to leave open the question of whether s 7 includes a positive dimension. Similarly, the Court refused to recognise freedom of employment[56] as stemming from s 7.

As a result, the jurisprudence of poverty and the constitutional status of socio-economic rights in general 'remains, to a large extent, an open question'.[57] It is in this context that the following cases need to be read.

The remainder of the chapter considers three Supreme Court poverty cases. *R. v Prosper* addresses the question of poor people's access to legal aid on detention. The analysis of this judgment will examine how such access is affected by social capital. The previous chapter discussed social capital and poverty with respect to a positive dimension of the right to protest, in the Israeli case of *Twito*. *Prosper* offers a chance to further explore the issue, this time in the context of the more conventional right to retain counsel. The other two cases studied in this chapter call into question the constitutionality of welfare reforms and their impact on recipients of social assistance. *CSN v Canada* considers a challenge to the authority of the Federal Parliament pertaining to unemployment benefits, and the seminal *Gosselin v Quebec* examines a claim for breach of the rights to equality and to security of the person.

Following the methodology used in previous chapters, for each case I present a dynamic interpretation, which is then set against the Court's analysis, thus enabling an assessment of the judges' temporal approach. Before concluding, the chapter includes some brief remarks on additional Supreme Court poverty cases, highlighting the perception of the duration of poverty in each.

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[55] *Gosselin v Quebec* [2002] 4 SCR 429 [82].
[56] *Siemens v Manitoba* [2003] SCC 3 [47].
[57] Jackman and Porter (n 51) 209.

D1. R. V. PROSPER

(Appeal from the Court of Appeal for Nova Scotia, 1994)

The right to retain and instruct counsel[58]

This appeal considered the impact of economic conditions on the access to counsel upon arrest. It is of special interest to this study because the indirect effect of the decision in *Prosper* is by itself related to time: time spent in jail.

Provincial Legal Aid programmes in Canada provide counsel free of charge where an accused meets prescribed financial criteria ('legal aid'). They also provide, irrespective of financial status, access to immediate, although temporary legal advice upon arrest ('duty counsel').

The constitutional protection of access to a lawyer derives from s 10(b) of the *Charter*, which provides a right 'on arrest or detention… to retain and instruct counsel without delay and to be informed of that right'. In 1990 the Supreme Court held in *Brydges*[59] that s 10(b) imposed a duty upon the police '…in circumstances where an accused expresses a concern that the right to counsel depends upon the ability to afford a lawyer',[60] to provide her with information on the availability of Legal Aid and duty counsel and to allow reasonable access to these services.

The availability of duty counsel (who is, in most cases, a Legal Aid attorney on call for the day) during night hours and weekends differs between the provinces. But what happens when a public defender is not available at the time of arrest? Such was the case in *Prosper*.

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[58] [1994] 3 SCR 236.
[59] *R. v Brydges* [1990] 1 SCR 190.
[60] ibid (paragraphs not indicated in the judgment).

Cyril Prosper was chased and arrested by the police in Nova Scotia on a Saturday afternoon after driving his car 'in an erratic fashion'. In court, Constable Young who arrested Prosper reported that he showed 'indicia of impairment; a strong smell of alcohol on his breath, bloodshot eyes, intermittent and slurred speech and swaying from side to side'.[61] Following the reading of the mandatory caution (which, applying the above mentioned *Brydges*, included information on the availability of State-funded legal aid) Prosper indicated that he would take the breathalyser test, but that first he would like to speak to a lawyer.

At the Halifax police station the officers provided him a telephone and a list of Legal Aid lawyers. However, none of them was available, as this was outside regular business hours. Prosper made '15 fruitless attempts to contact a Legal Aid lawyer over a period of almost 40 minutes'.[62] Subsequently, when handed the Yellow Pages in order to contact a private lawyer, he expressed his inability to afford one, and then agreed to take the breathalyser test.

Prosper was charged with having care and control of a motor vehicle while his blood alcohol level was in excess of the minimum allowed,[63] and with several other related offences. The trial court acquitted him, based on the finding that his s 10(*b*) rights had been breached and that the breathalyser evidence should be excluded under s 24(2) of the *Charter*.[64] The Nova Scotia Court of Appeal reversed the decision and convicted him. Prosper, the judgement held, was indeed afforded a reasonable opportunity to consult a lawyer.

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[61] *Prosper* (n 58) 248.
[62] ibid 249.
[63] Contrary to s 253(*b*) of the Criminal Code, R.S.C., 1985, c. C-46
[64] This section provides that an evidence shall be excluded if a court concludes that it was obtained 'in a manner that infringed or denied' any rights or freedoms guaranteed by the *Charter*.

On appeal to the Supreme Court, Prosper contended that s 10(b) of the *Charter* creates a positive constitutional obligation on governments to ensure that free and immediate temporary legal advice is available to all detainees.[65] This duty was not fully met by Nova Scotia, as it did not provide legal aid on weekends. Given the appellant's economic difficulties, it resulted in denial of his right to retain counsel upon arrest.

Decision

The Supreme Court of Canada (per Lamer CJ, Sopinka, Cory, McLachlin and Iacobucci JJ concurring) held that s 10(b) does not impose obligation on governments to provide free legal advice upon arrest. This was based on two main arguments. First, that while the *Charter* guarantees the right to retain counsel without delay, it does not provide, in express terms, a right to a state-funded counsel, free of charge. In fact, a proposed amendment which would have added such a right was considered and rejected by the legislator. '[I]t would be imprudent for this Court not to attribute any significance to the fact that this clause was not adopted,'[66] Lamer CJ remarks. Secondly, if the court ordered the provision of free counsel, that would have had significant budgetary consequences. Interference with government allocation of resources of this magnitude should be avoided.[67]

But this was just an introduction for a far more energetic decision. Lamer CJ cites the jurisprudence prior to *Prosper* which held that if a detainee expresses an interest in instructing counsel, and is duly diligent in attempting to contact a lawyer, then, in order to comply with s 10(b), the police must 'hold off' from questioning her

[65] *Prosper* (n 58) 287
[66] ibid 267.
[67] ibid 268.

until she has had a reasonable opportunity to reach counsel.[68] What constitutes a reasonable opportunity, the judgement in *Prosper* holds, depends on the surrounding circumstances, which include the availability of duty counsel services in the jurisdiction. In the case of a detainee with economic difficulties, the police must therefore refrain from eliciting incriminatory evidence, until she had an opportunity to consult a duty counsel. The length of the 'holding off' period will therefore depend on whether free and immediate legal aid services are available or not. This arrangement, Lamer CJ concludes, may have administrative and evidentiary costs, but it is a trade-off the government, which refuses to implement a universal '*Brydges* duty counsel' system, should take into consideration.

With respect to Prosper, the outcome is that his s 10(b) rights were infringed in this case. He was not properly informed of the obligation to hold off until he had a reasonable opportunity to contact counsel, and even though he 'had clearly asserted his right to counsel', he was prevented from exercising it 'because of institutional conditions entirely beyond his control.'[69] The breathalyser evidence should be excluded under s 24(2). Prosper is acquitted.

A dynamic reading of Prosper: access to counsel despite poverty

In the free market, where legal service is provided by private businesses, access to counsel is determined by the client's availability of resources. In most cases these resources are measured in dollars, or any other currency, and they are weighted against the price of the desired legal service. But there are cases where it is not money that is exchanged for the service. One may attain legal counsel thanks to personal

[68] Among the cases cited, is the above mentioned *Brydges* (n 59) at pp. 203-204.
[69] *Prosper* (n 58) 281.

contacts, or the social status that one possesses. A lawyer may even agree to provide services based on the client's potential: a promise, or a hope, that one day she is going to have a higher financial or social position. Access, in short, is not exclusively a matter of cash and material capital. It can also be gained thanks to social capital.[70]

What is important for the purpose of this discussion is that because it is not dependent only on material, but also on social resources, access to counsel may sometimes exist despite financial poverty. With 'access despite poverty' in mind, the identification of the cases where the police must hold off investigation becomes more complex. There could be three types of detainees in a situation similar to Prosper's: first, the non-poor, who have full access to a lawyer through the private market; second, poor detainees that cannot afford the cost of legal services, but own enough social capital in order to obtain them without fully paying; and third, poor people with insufficient resources, both financial and social, who cannot access counsel without public assistance.

This classification is associated with a dynamic reading of poverty, because the duration of poverty is strongly correlated with, and in many ways leads to, changes in social capital, as discussed in Chapter Two.[71] Chronic poor typically have low social capital and consequently no access to counsel. People who experience temporary poverty usually possess more social capital than the long-term poor and they would therefore present more cases where social capital is used as currency to gain legal services. Differences in the duration of poverty can therefore explain variations in access to counsel among poor people; and the result, a crucial one for

[70] The notion of social capital was defined, and its implications on poverty discussed, in ch 2. See text to n 165.
[71] See elaborated discussion in ch 2 text to n 171.

this analysis, is that access despite poverty is expected to be more prevalent among the short-term poor.

The impact on Prosper

The judgment in *Prosper* instructs the police: if a detainee is not able to reach counsel, police must refrain from eliciting incriminatory evidence until public assistance is available. For implementing this rule, officers must engage in a process of administrative decision-making, determining whether a detainee is eligible for public counsel. Clearly, that means that the officer should be able to efficiently identify whether the detainee is poor or not. A difficult task? Perhaps, but not an impossible one, considering that many public services in the welfare state are dependent on public officials determining a person's economic status.

Prosper demands, however, an even more complicated exercise, because, as we have seen, poor people may indeed have access to an attorney thanks to social capital. It is therefore not sufficient to identify the detainee's economic condition, but rather, if the *Prosper* ruling is to be implemented with attention to the real ability to contact a lawyer, the officer should make an assessment considering social networking and financial status alike.

This is a decision that should be made promptly, and it carries immediate and practical consequences for the continuation of a criminal procedure. Later, in a court of law, it may be simpler to identify the defendant's social and financial abilities. But under the pressure and urgency of arrest and investigation, what the officer is expected to do per *Prosper* is rather complicated. Misidentification is likely to happen from time to time.

Let us now examine the possible errors that can transpire when a new detainee is brought to the police station. Consider ***table 1***.

Police investigation continues? \ Detainee with access to private counsel?	Y	N
Y	Y/Y	N/Y
N (police hold off)	Y/N	N/N

Table 1. Reality and perception in the *Prosper* ruling

The left column is for detainees who have private access to a lawyer (either through financial or social resources). The right column indicates those who do not. The rows represent what the police officer decided pertaining to this question. In the top row, the officer decided to continue the questioning. In the bottom row, investigation was deferred.

Thus we have four categories. Y/Y and N/N are cases where the officer made no miscalculation: the detainee either had access to a private lawyer or not, the officer rightly identified it and acted accordingly. The other categories represent errors. The first kind is N/Y: a detainee had no access to counsel, but the police officer continued with the investigation (either through an incorrect assumption or deliberately, as was

the case with Cyril Prosper[72]). The last category is Y/N, that is, a police officer decided to hold off, but in fact the detainee had good ability to speak to a private lawyer and for some reason did not exercise this.

Each mistake bears clear advantages and disadvantages in terms of law enforcement efficiency and human rights protection. Error Y/N, deferring investigation when it was unnecessary, may lead to loss of evidence; it also means that the detainee spends more time under arrest: under *Prosper*, the suspect will stay in custody until a public lawyer is available for counsel, even if that means waiting for normal work hours to resume following the weekend. Error N/Y, on the other hand, runs a different risk: that the court would later exclude evidence based on s 24(2).

Given the complexity of the task before the officer, it may be impossible to completely avoid misidentification. But with the likelihood of mistakes in mind, why not try to control which mistake is more frequently made? The *Prosper* regime can be shaped to favour committing one of the errors over the other. Setting a presumption that in case of a doubt, the detainee is either held to have, or not to have, access to a private lawyer, is an obvious example of such an arrangement. It should also be taken into account that like many other rules in the field of criminal evidence, the regime adopted here would affect the incentives of a detainee, who is likely to be aware that the police must hold off investigation under certain circumstances. Good adjudication should therefore consider the pros and cons of each mistake, and adopt a rule to prioritise one or the other.

It is worth noting at this point that of the negative outcomes mentioned above, those associated with a decision to hold off are certainties. If the officer decided to

[72] A similar error type was discussed in *R. v Matheson* [1994] 3 SCR 328.

wait for a public lawyer to become available, the investigation would be delayed and the detainee would spend more time in custody, whether or not he turned out to have real access to counsel (that is, whether the case turns out to be Y/N or N/N). However, the obverse decision, not to hold off, would carry negative results (the court quashing illegal evidence) only if it turned out to be inappropriate – an N/Y error. From the perspective of an uncertain police officer, then, a decision to hold off will carry definite cost, while the opposite decision will be costly only based on chance, in a certain proportion of cases. Thus statistics can be relevant: an empirical examination may reveal the probability of each of the two possible mistakes to happen. These are important considerations for shaping a guiding policy regarding the *Prosper* ruling.

All this is clear even when the duration of poverty is not part of the picture. But, to return to the temporal context, as we discussed, a dynamic understanding of poverty and its relation to social capital reveals the likelihood of an erroneous decision, particularly in the case of short-term poor. This is a group that would be harder to identify, as some have access to private counsel whilst others do not. It is therefore the group for which the officer is liable to make the most mistakes.

The passage of time in this analysis is thus a background factor, which contributes to determining the *nature* of the human right involved in the legal framework. The right to retain and instruct counsel depends, amongst other things, on availability of social resources. This is highly associated with the temporality of poverty. A dynamic reading of *Prosper* reveals the impact of this linkage: people who experience different durations of poverty are likely to have different degrees of need for public assistance.

Time and poverty: the temporal approach of the court

The judges recognise the appellant as a man with economic difficulties who could not afford a lawyer. The events in the police station may indeed support this observation. But the judgment lacks basic evidence about his economic condition, information crucial for determining his real ability to access a lawyer. Prosper's wealth, whether he has been poor for a long time or only recently entered poverty, and his social capital: the judgment lacks all these details. If the trial court asked these questions, then the Supreme Court did not find them relevant or important enough to be mentioned in the judgment. Thus, the court assumes a limited and static observation of the appellant's poverty.

On the more general level, the judgement fails to note the connection between access to counsel and fluctuations of poverty. The majority opinion takes for granted that financial difficulty necessarily entails that channels to private counsel are blocked. They envisage only two groups: the non-poor, who have access to a private lawyer, and the poor, who do not. But not all poor detainees share similar socio-economic conditions. Lamer CJ's analysis does not recognise the more complex cases of individuals who experience economic difficulties but at the same time could still access a private lawyer. To neglect these issues in a leading case results in bad policy, and could further the possibility of future mistakes at the police station (either Y/N or N/Y).

The social capital approach is overlooked, just like the related question of time. The judgment ignores the chance of a police officer misidentifying the detainee's real access to counsel, and the effect of the duration of poverty on the likelihood of such mistake. As has been shown, a different temporal assessment not only accounts for the possibility of miscalculation in the police station, but also

acknowledges that there is a certain socio-economic condition that is more predisposed to this error (short-term poverty). Finally, a judgment that internalises a dynamic approach, including the above notions that this entails, can shape policy to avoid less desirable mistakes (and thus favour the lesser faux pas).

D2. CONFEDERATION DES SYNDICATS NATIONAUX V. CANADA

(Appeal from the Court of Appeal for Quebec, 2008)[73]

The constitutional challenge in the case of *CSN v Canada* is not based on a *Charter* right, but rather on what the court referred to as a 'fundamental disagreement'[74] regarding the authority of the Federal Parliament and the division of power between the federal and the provincial level of government. With an institutional question in its focus, *CSN* does not fall within the scope of this study (which is expressly limited to human rights cases). However, as it provides an instructive illustration of a static judicial approach to poverty, it will be analysed nonetheless. The following should therefore be read bearing in mind that it is a case external to the defined space of the research. As such, *CSN* may suggest that the main argument of our study also applies beyond the human rights field.

In 1996 the Parliament of Canada passed the Employment Insurance Act, S.C. 1996, a reform in the unemployment insurance system, replacing the previous arrangement, which had focused merely on providing unemployment benefits, with

[73] [2008] 3 SCR 511 (hereinafter *CSN*).
[74] ibid 526.

the more ambitious aim of *preventing* unemployment. The reform renamed the main law, replacing the old title 'Unemployment Insurance' with the updated 'Employment Insurance'. This change held symbolic significance for the question before the Court: does the Employment Insurance Act fall under the constitutional *federal power of unemployment insurance*?

A decade earlier, in 1986, the Canadian Federal government incorporated the unemployment insurance account, known thereafter as the 'Employment Insurance Account' (hereinafter, *the Account*), into the Consolidated Revenue Fund. This account was not financially stable, and from 1990 the government stopped covering its deficits. In the mid-1990s several modifications were introduced attempting to solve the repeating insolvency crises. One of them was the legislation that is examined in *CSN*. With objectives to ensure stability in the fluctuating premium rates and to secure the Account by building up an adequate reserve, this Act tightened eligibility requirements for receiving the benefits (s 23). It also included what are referred to as '*active measures*' to combat unemployment and improve the employability of claimants, such as training and benefits associated with participation in training activities, wage subsidies paid to employers, earnings supplements for employees joining low-paid jobs, assistance to small businesses in order to foster self employment (ss 57 and 59), and work-sharing programmes (s 24). These measures were to be financed by the employment insurance system and not by State budget. Thus they were earmarked – as noted by the Supreme Court – to be 'paid for by contributors'.

At the same time, the *Employment Insurance Act* rearranged the financing of the federal employment insurance system. It structured a premium setting mechanism (ss 66 to 66.3 and 72) under which payments by employers and employees were to be

set high enough to ensure the accumulation of a reserve 'so that raises in premiums would be unnecessary during periods of economic slowdown and higher unemployment'.[75] The following years consequently saw a growing surplus in the Account, reaching the astronomical value of $40 billion (£26 billion).[76]

Section 60 of the Act instructed the Employment Insurance Commission (with the approval of the Governor General in Council, on the recommendation of the Minister of Finance) to fix premium rates based on two criteria: to build up an adequate reserve, while maintaining stable premium rates throughout a business cycle. Then from 2002 until 2005,[77] due to problems caused by the growth of the account surpluses, the system changed once again, when Parliament made the Governor General in Council responsible for setting the premium rate. This time the Act no longer included criteria to guide rate setting.

The appellants, two trade union organisations, challenged the constitutionality of several aspects of the reform. Their argument referred to the power over unemployment insurance, vested in the Parliament by s 91(2A) of the *Constitution Act*, 1867:

> …[t]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —
>
> 1A. The Public Debt and Property.
>
> 2. The Regulation of Trade and Commerce.
>
> 2A. Unemployment insurance.
>
> 3. The raising of Money by any Mode or System of Taxation.
>
> …

[75] *CSN* (n 73) 519.
[76] In this chapter, Canadian dollars are converted to GBP according to exchange value at the date the case was submitted.
[77] With the exception of 2004, when Parliament set the premium rate in the Act itself.

The first challenge was that the *active measures* arrangement abuses the federal unemployment insurance power. Section 91, the appellants argued, does not give the federal legislator authority to set actions to promote employment, but only to establish provision of compensation 'during periods of unemployment'.[78] The former are exclusively under provincial legislative jurisdiction, and therefore the examined law exceeds the limits of federal spending authority.[79]

The appellants further criticised the premium setting mechanism. The constitution, they contended, only authorises Parliament to collect the amount that is necessary for covering the unemployment insurance. The accumulation of large surplus in the Account exceeds the federal unemployment insurance power. Surely, they continued, payments collected under this purpose may not be used, as they had been, for external purposes such as general government expenditures or reduction of public debt. Moreover, the new premium setting mechanisms lacked the requisite connection to the regulatory scheme for employment insurance and therefore could not be considered an exercise of parliamentary authority according to s 91 of the *Constitution Act*.

The sections providing for the *active measures*, the premium setting mechanism, and the allocation of the surpluses by the government should therefore be quashed and the surpluses accumulated in the Account should be declared as belonging to the contributors.

The Attorney General of Canada responded that all aforementioned arrangements were well connected with the scheme for employment insurance. The

[78] *CSN* (n 73) 526.
[79] *CSN* (n 73) 519.

unemployment premium is a regulatory charge, that is, a levy connected with a government program. The legislation is therefore constitutionally valid. If not, the respondent argued in the alternative, then the Parliament legally used its other constitutional power of taxation and the premia could be considered a tax for the purposes of s 91(3) of the *Constitution Act*. In either case, they were imposed in accordance with the Constitution[80] and rights of insured contributors were not violated.

Decision

In a unanimous judgement delivered by LeBel, J the Supreme Court recognised a 'dual purpose' at the heart of the unemployment insurance power: '…*to remedy the poverty caused by unemployment* and maintain the ties between unemployed persons and the labour market'[81] (emphasis added). The latter was an element that was 'part of the system from the very beginning'.[82] It was an objective both 'relevant' and 'important'.[83] The Court examined these measures and found that they all related to the goal of maintaining – or creating – ties with the labour market. The *active measures* therefore did not require invoking the federal spending power. They stayed close enough to the objectives of the power provided by s 91(2A). The legislation is hence consistent with the constitutional norms governing the division of powers between the federal and the provincial.

As for the second challenge, concerning the financing system, the judgment found the technique of accumulating large surplus constitutional, save for the years

[80] ibid 542
[81] ibid 529.
[82] ibid 531.
[83] ibid 535. The judgment refers to similar findings in reference.

2002, 2003 and 2005. The premium setting method applied in these years was 'inconsistent with the constitutional principles' that govern the creation of charges and imposition of taxes.[84] The appeal was hence allowed with respect to the collection of premia in these three years. The declaration of invalidity of the relevant sections was suspended for 12 months from the date of the judgment.

A dynamic reading of CSN v Canada

Note that poverty was considered in this case as a justification underlying the examined legislation. It was a rationale, one of several, giving grounds for collecting money to fund the federal employment insurance system. With this in mind, a dynamic reading of *CSN* yields two points.

First, that the poverty at the heart of this case is of a transitory nature. Unemployment benefits in Canada (as well as in most other OECD countries) are only provided to those who have lost their job recently. The economic context of the benefits policy is therefore, by definition, one of change. Some recipients may have been economically secure before and become poor as a result of their newfound state of unemployment. Theirs would thus be short-term poverty (with the possibility that henceforth they would remain poor for an extended time). Some others may have suffered lengthy periods of employment instability and poverty in the past; for them the current loss of income is an aggravation in already deteriorated economic conditions. They may have just descended below the line once again, beginning yet another spell of poverty. Or, if they were already poor before losing their job, then it is a case of long-term poverty that has recently deepened. In all cases, the employment benefits cover a new deficit in income.

[84] ibid 517.

Similar to the point discussed in Chapter Three on the French case of *Couverture maladie universelle* (and partly similar to the Israeli case of *Hassan*), here, too, we have an instance where the legislation contains an internal dynamic element, so the passage of time plays what we previously called the role of *fluctuation*. A static reading of the *Employment Insurance Act* captures the group of eligible unemployed individuals in a given, frozen, moment. But a dynamic reading of the case actually reveals that many more Canadians enjoy the benefits (and other provisions) over time. The longer the temporal context we examine, the more individuals will fluctuate in and out of eligibility.

This point bears significant weight for the question of whether the premia regulated by the Act are by nature a tax, or rather constitute a contribution-based mutual mechanism. If many more people receive the benefits, then the unemployment arrangement is closer to the latter. This is powerful corroboration of the appellant's conception of the Account. The respondent made a similar argument with regard to the *active measures*, and a close dynamic reading of the *Employment Insurance Act* allows such a conceptualisation with respect to the financing method. The potential consequence could spell a different conclusion regarding the premium setting mechanism of the years 2002, 2003 and 2005.

The second, rather obvious, notion that arises from a time-based analysis of the case is that the *active measures* are oriented towards long-term effects. They reflect forward-looking thinking, focused on change in the Aristotelian sense.[85] The legislator seeks to place people in jobs by offering various incentives and investing in their professional skills. This therefore provides a clear example of how a dynamic view of poverty can shape the legal framework. The outcome is that the *Employment*

[85] See ch 1 text to n 116.

Insurance Act is a dual-temporal Act: it offers both short-term instruments (temporary income replacement benefits) and long-term instruments (the *active measures*).

Time and poverty: the temporal approach of the court

The Supreme Court identified both of these instruments, recognising that they derive from the same constitutional source and serve a common purpose. In that sense, indeed, the judgement internalised the dynamic nature of the examined legislation. But it did so without regard to time. That one instrument is targeted towards immediate relief, and the other to a change in the long run, is absent from the judicial reasoning. Instead, LeBel J reflected on the dual function of the Act by referring to 'passive' and 'active' measures:

> Regulating unemployment insurance does not mean simply taking passive responsibility for paying benefits to Canadian workers during periods when they are not working. It also means taking on a more active role designed to maintain or restore ties between persons who may become or are unemployed and the labour market.[86]

The apparent temporal context – that the passive measures concentrate on the present and the active on the future – went unnoticed.[87] It is no wonder, then, that the Court missed the significant contribution of the time-based argument on the sensitivity to *fluctuation* of the unemployment benefits system. As was demonstrated above, this neglected argument may have had an impact on the analysis regarding an alleged breach of authority by the federal Parliament.

[86] *CSN* (n 73) 534.
[87] Interestingly, the judgement of the lower court reflects a somewhat more temporal view on this issue, in rhetoric if not in substance: writing for the Quebec Court Robert CJQ admitted that 'employment benefits are not temporary income replacement benefits [rather, they] constitute a new type of employment incentive' ([2006] R.J.Q. 2672 [75]).

This static judicial approach to poverty is particularly evident in *CSN v Canada* because in many other aspects of the judgement – aspects that do not discuss the economic conditions of the unemployed – the Court clearly exercised a dynamic approach. Not only did the case assess events and developments from multiple points in time (for instance, the budgets for 2002, 2003 and 2005), but also, LeBel J presented forward- and backward-looking analyses. Such was, for instance, the discussion on the designing of premium rate levels to fit the change in business cycles[88] or the examination of the accumulation of surpluses in the Account.[89] To use terms defined in Chapter One, the temporal standpoint in these examples involved not only location but also quantity (applying time as *fluctuation* in the former and time as *magnitude* in the latter). However, this dynamic thinking did not feature in the analysis relating to poverty. The judgment did not refer to the temporary nature of the economic conditions of unemployment, nor to their cyclical character. *CSN* is a case in temporal denial: it is shaped by the passage of time without admitting it.

[88] *CSN* (n 73) 514.
[89] ibid 518.

D3. GOSSELIN V. QUEBEC (ATTORNEY GENERAL)

(Appeal from the Court of Appeal for Quebec, 2002)

The right to equal benefit of law

and the right to life, liberty and security of the person[90]

Gosselin is a well-known case needing no elaborate introduction in such a dissertation. Before I returned to read it for this study, I reflected that it could go either way for my argument. The judgment clearly deals with temporal issues, concentrating on the age of the appellant and examining the long-term approach embedded within the legislation she challenges. A document that so expressly addresses the passage of time could either prove a contradiction and cripple my thesis, as a rare example of dynamic judicial thinking about poverty, or a strong confirmation of it. It turned out to be a fairly good case.

The judges in *Gosselin* do apply a dynamic approach to the legal question before them, but not to poverty. The case is therefore a strong illustration of the hypothesis tested here: even within a clear time-related framework, *Gosselin* still considers poverty with a static state of mind.

As a result of an on going economic depression in North American economies in the early 1980s, Quebec witnessed an alarming increase in unemployment and welfare dependency, especially among youth. By 1983, young single people capable of working comprised a greater proportion of welfare recipients than ever before. Two-thirds of new welfare recipients were under 30, and half were under 23.[91] Lack

[90] [2002] 4 SCR 429.
[91] ibid McLachlin CJ [39].

of basic education and professional skills were among the chief causes:[92] the majority of unemployed under 30 were school drop-outs, roughly half of them having completed fewer than eight years of education.

In an attempt to confront these trends, in 1984 the Quebec government passed a reform to the *Social Aid Act* cutting welfare benefits for people younger than 30 years to a third of the base level (still payable to the 30-and-over group), $170 instead of $466.[93] Section 29(a) of the *Regulation respecting social aid* provided that people under 30 could regain the full amount if they participated in either job training or community work schemes. Participation in a third programme called 'Remedial Education' would bring welfare benefits up to around 80%, $100 short of the maximum monthly allowance.

Louise Gosselin, a welfare recipient younger than 30 during the five-year period in which this arrangement remained in effect (until 1989) filed a class action on behalf of all welfare recipients under 30 who were subject to the differential regime. She attacked s 29(a) with three arguments. First, that providing lower benefits to younger people constitutes discrimination on the basis of age contrary to s 15(1) to the *Charter of Rights and Freedoms*. Second, providing merely one third of the base level breaches the right to security of the person provided in s 7 of the *Charter*. Third, she argued, the social assistance scheme infringes s 45 of the Quebec *Charter of Human Rights and Freedoms*, which provides that 'every person in need has a right… to measures of financial assistance and to social measures provided for by law'. The Quebec Superior Court dismissed the case and the Court of Appeal upheld the decision. The Supreme Court of Canada heard an appeal in late 2001.

[92] ibid McLachlin CJ [40].
[93] Figures for 1987; ibid McLachlin CJ [7].

Decision

The judgment rejected all three arguments of the appellant. Due to limitation of scope the following will deal primarily with the majority opinion, delivered by McLachlin CJ. Four justices concurred with her findings on s 15(1), six concurred on s 7, and seven justices joined her judgment on s 45.

Applying the standard set in *Law v Canada*,[94] the Court held that the distinction made by the social assistance regime was not discriminatory under s 15(1). The impugned arrangement did not stereotype the under-30s. The youth do not suffer from any pre-existing disadvantage nor are they more susceptible than others to negative preconceptions. The premise on which s 29(a) was based, McLachlin CJ continued, corresponded to relevant needs of this age group during pressing economic times, with a long-term purpose of providing young people with incentives to gain work skills and experience, and thus integrate in the labour market. This did not infringe on their human dignity but rather recognized their potential. Finally, the harmful effect of the law in question did not undermine the appellant's recognition as a fully participating member of society. Gosselin and others receiving the lower welfare payments were not denied the right to join the programmes, they rather dropped off because of 'personal reasons'. Gosselin's case was therefore an exception which should not dictate the general judgment of s 29(a):

> The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s 15(1).[95]

[94] [1999] 1 SCR 497.
[95] Gosselin (n 90), McLachlin CJ [55].

As for Gosselin's second charge, s 7 was considered a limit on the State's capacity to violate the right to life, liberty and security. Whether it included economic rights, as claimed in the appeal, was so far left unanswered. The appellant did not discharge the burden of proof necessary for her claim, and the facts of the case did not warrant establishment of a new approach that s 7 generates a state positive obligation to provide minimum living standards.

Finally, s 45 of the *Quebec Charter* only required the government to *aim at* ensuring decent living standards, and to prove that appropriate social and financial measures were taken towards that goal. The government was not required to succeed (!) nor to defend the wisdom of its enactments.[96]

A dynamic reading of Gosselin

Gosselin may revolve around the question of age, but this theme is portrayed in high relief against the background of economic difficulty. The case must be examined bearing in mind that those implicated were poor enough to warrant state financial assistance. Louise Gosselin was chronically poor, occasionally homeless and habitually unemployed. She struggled with addiction and other social and psychological difficulties, and received social assistance 'for most of her adult life'.[97] Should that change the approach to the legal questions presented in her appeal? Does s 29(a) have a different effect on the long-term compared to the short-term poor? A close examination of the facts of the case through an economic lens may provide some insight.

[96] ibid McLachlin CJ [93].
[97] ibid McLachlin CJ [1].

The cost of not participating in the programmes, a loss of almost $300 monthly, was dramatic. In 1987 the base amount of social assistance was at 51% of the poverty line for a single adult. Under-30s not enrolled in any programmes lost two thirds of the benefits, declining to below 19% of the poverty line. Those who lost just $100 of the monthly benefit nonetheless reached only 40% of the poverty line.[98] In the economy of a poor household, this may spell the difference between living in a house or on the street. For the poor, $100 a month can mean the world.[99]

The judgment reveals that the programmes had a limited number of places available and there were 'temporal gaps in the availability of the programs offered'.[100] Despite McLachlin CJ's refusal to consider Gosselin's claim about the matter on procedural grounds,[101] evidently, there were never enough places to accommodate all young welfare recipients in the programmes.[102] In fact, only 30,000 places were available in all three programmes together, although 85,000 single under-30s were on social assistance at the time.[103] It is also noted that at any given time, less than 11% of eligible under-30s actually participated in either programme that conferred the full benefit amount,[104] and an astonishing 73% were not enrolled in any programmes, thereby obtaining $300 less.[105]

Of special relevance to this study is the matter of who were most affected by this regime. The clear answer is the persistent poor, who were more likely not to participate in programmes. Arbour J. made this point:

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[98] Calculation based on the figures provided by McLachlin CJ [7]. Note that the Court relies on Statistics Canada figures, which refer to an absolute measure of poverty line. In OECD conventional relative terms the rates are even lower.
[99] See the details provided in *Gosselin* (n 90) by Arbour J [372].
[100] ibid Arbour J [393].
[101] ibid McLachlin CJ [50].
[102] ibid Bastarache J [283].
[103] ibid Arbour J [393].
[104] ibid Arbour J [276].
[105] ibid Bastarache J [290].

> **…** [s]ome of the most needy welfare recipients, the illiterate and severely undereducated, could not participate in certain programs.[106]

There is a high negative association between the severity of poverty, including its duration, and chances of continuous participation in structured activities. Chapter Two discussed the effect of continuous poverty on social capabilities: the long-term poor are more likely to drop out of school and work. Arbour J recognised that it is the least educated who tend to be excluded from programmes altogether.[107] Lack of basic capabilities is hence both a source of chronic poverty, as well as its outcome. Consequently, many experience a vicious cycle linking long-term poverty with the inability to take part in challenging activities of training and work. This calls for special attention because many chronic poor were never afforded a chance to begin with: they were born into a poverty trap, their future determined by their entry position. They may be second or third generation in persistent poverty.

Louise Gosselin was such an individual. McLachlin CJ's judgment indicated she participated in all three programs and abandoned each one, 'apparently because of her own personal problems'.[108] Indeed, the respondent suggested that most, if not all, of those who received the decreased amount (over 75,000 individuals) did not partake in the 'full amount' programmes due to *personal reasons*.[109] These personal reasons are the unstated socio-economic reality underlying *Gosselin v Quebec*. They are the result, and the cause, of long-term poverty, and they exposed those individuals to losing 65% of their social assistance through s 29(a).

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[106] ibid Arbour J [393].
[107] See also Bastarache J [277].
[108] ibid McLachlin CJ [8].
[109] ibid Bastarache J [290].

The State authorities actually knew it would be impossible for many beneficiaries to participate in their programmes: hence, the government allocated places to accommodate only 35% of eligible under-30s.[110] They failed to provide capacity for them all. The reform embedded in s 29(a) thus implicitly assumed that many eligible individuals would not enrol and thereby lose their rights to full benefits.

The upshot is that the likelihood of joining a programme and subsequently receiving full benefits is improved for short-term poor, whilst the converse is true for chronic poor. Earlier in the process, at the trial court, Gosselin could easily have shown extensive evidence to support this argument, certainly with relation to her own circumstances as well as more generally concerning the wider group.

It is possible to channel this notion to bear on two legal foundations, either a s 15(1) or s 7 challenge. To abide by the scope of this study, I shall focus on the former, as equality was central to McLachlin CJ's reasoning.

Poverty dynamics and Gosselin's right to equality

The appellant's s 15(1) claim concerned discrimination against single individuals under 30 years of age, differentiated from older individuals. But, like a Russian matryoshka doll, the category of poor and single under-30s hides a further, more subtle division, an indirect outcome of s 29(a): the distinction between the long-term poor and the others. If the relevant s 15(1) group no longer comprises all under-30 poor, but is restricted to the under-30 chronic poor (who are more likely to lose 65% of the benefits), then the analysis appears to adopt a different trajectory than the one espoused by McLachlin CJ. Let us now put this through the *Law v Canada* test.

[110] ibid Arbour J [393] and Bastarache J [283].

The first element requires that the impugned law impose a differential treatment based on personal characteristics. No doubt, both poverty and age are personal characteristics. Section 29(a) provides a formal distinction on the basis of age, but no formal distinction between long-term poor and others. However, in *R v Kapp* the Supreme Court of Canada confirmed that earlier judgments, including the one in *Law*, guarantee not just formal but also substantive equality.[111] The chronic poor are thus subject to an unequal treatment due to their 'already disadvantaged position'.[112] The long-term poor are treated differently *in substance* by an arrangement under which they are more likely than others to lose two thirds of their social assistance. Indeed, the distinction based on the duration, or severity, of poverty is implicit (unlike the explicit distinction based on age), but even a 'facially neutral' distinction can trigger s 15(1).[113]

The second element poses the greatest challenge, as it requires that the differential treatment be based on one or more enumerated or analogous grounds. Poverty is not enumerated in s 15 and to date, the Canadian Supreme Court has not expressly recognised it as analogous grounds.[114] But it has not denied it either, and in *Lovelace v Ontario*[115] and the aforementioned *R. v Kapp*,[116] two cases dealing with affirmative action policies towards the Aboriginal community (both are further discussed below), the Court drew near – as close as it had ever gotten – to such recognition, however indirect. *Lovelace* and *Kapp* acknowledge the socio-economic

[111] *R. v Kapp* [2008] 2 SCR 483 [20]. In the context of social assistance, see *Schachter v Canada*, [1992] 2 SCR 679 [41]; Gwen Brodsky, 'Gosselin v. Quebec: Autonomy with a Vengeance', (2003) 15 Canadian J of Women and the Law 194; Bruce Porter, 'Expectations of Equality' (2006) 33 Supreme Court L Rev, 23, 36-38; Jackman and Porter (n 51) 212-213.
[112] *Law v Canada* (n 94) [88].
[113] *Gosselin* (n 90) McLachlin CJ [26].
[114] To date, two provincial courts stated that poverty is not grounds for s 15: in 2009, the Nova Scotia Court of Appeals in *Boulter v Nova Scotia Power Inc*. 2009 NSCA 17; and a recent case from 2013 by Ontario Superior Court, *Tanudjaja v Attorney General (Canada)* 2014 ONCA 852.
[115] [2000] 1 SCR 950.
[116] [2008] 2 SCR 483.

context of poverty, unemployment and limited access to health and housing, as sign for the vulnerability of the Aboriginal community.[117] Poverty in these cases may be only a background to an enumerated ground (ethnic origin) but it is one of several characteristics that justify the implementation of s 15. This approach could be useful for the assessment of the matryoshka doll in *Gosselin*. Even without recognizing it as analogous grounds, long-term poverty could play a role in the analysis of s 15 as a background characteristic that joins the enumerated ground of age.[118]

The final element, recognition of discrimination based on the principle of human dignity, was where majority and dissent differed in *Gosselin*. The Court in *Law* decomposed their analysis at this stage into four contextual factors. First, whether the group at issue experiences pre-existing vulnerability or stereotyping. McLachlin CJ held that youth do not experience such marginalisation: '[T]he appellant has not established that people aged 18 to 30 have suffered historical disadvantage on the basis of their age'.[119] It is evidently different when considering chronic poor, a group that on account of persistent economic inferiority has heightened susceptibility to social marginalisation. The under-30 chronic poor are, truly, at risk of experiencing adverse differential treatment.

The second contextual factor tests the correspondence between the grounds on which the claim is based and the actual circumstances of the claimant. Section 29(a) fails to take into account the duration, or severity, of poverty. It provides a generic

[117] *Lovelace* (n 115) [69]. The Court in *Kapp* (n 116) [59] quotes this remark in agreement.
[118] Several scholars have called upon the Supreme Court to recognise poverty as grounds under s 15. See Martha Jackman, 'Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law' (1994) 2(1) Rev. Constitutional Studies 76; J. Eisen, 'On Shaky Grounds: Poverty and Analogous Grounds under the Charter' (2013) 2(2) Canadian Journal of Poverty Law 1; Martha Jackman, 'Constitutional Castaways: Poverty and the McLachlin Court' (2010) 50(2d) SCLR 297; Judith Keene, 'The Supreme Court, the Law Decision, and Social Programs: The Substantive Equality Deficit' in Fay Faraday and others (eds.), *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto 2006), 345-370.
[119] *Gosselin* (n 90) McLachlin CJ [36].

arrangement, identical for both temporary poor and long-term poor: thereby discriminating against the latter.

The third factor clearly exemplifies how altering the temporal classification of poverty can alter the understanding of *Gosselin*. This contextual factor asks whether a group exists more disadvantaged than the claimant, who may warrant preferential treatment, which weakens the claim. The majority held this factor neutral in this case.[120] Clearly, Gosselin belongs to the weakest group even among welfare recipients.

The final contextual factor refers to the nature and scope of the interest affected by the impugned law. Here, again, a combination of age-based distinction with distinction based on the persistence of poverty leads to a substantially different conclusion. As noted earlier, the effect of the questioned arrangement on the long-term poor was no less than critical.

To conclude, s 29(a) may have aimed, as the majority held, to improve the situation of poor young people, by providing incentives to gain work skills and experience, and thus foster their human dignity rather than infringe upon it. But, per McLachlin CJ, 'a beneficent purpose will not shield an otherwise discriminatory distinction from judicial scrutiny under s 15(1).'[121] Louise Gosselin belonged to a smaller, more marginalised group that merited protection under Canadian equality law. Her appeal could have been argued with a focus on this group. This may have led to a conclusion that the impugned legislation violated essential human dignity, failing

[120] *Gosselin* (n 90) McLachlin CJ [60].
[121] ibid McLachlin CJ [27].

to protect the imposition of disadvantage on chronic poor, and perpetuating their position as 'less capable' members of Canadian society.[122]

What role is played by the duration of poverty in this proposed dynamic analysis? Put simply, in order to identify the linkage between the different stages presented above: the longer Gosselin's past poverty, the more vulnerable she is socially, and the higher are her chances of dropping out, or not initially enrolling in, any programme. Consequently the stronger is the effect of s 29(a), and hence the stronger is the finding of s 15(1) discrimination. To use terms presented in Chapter One, the passage of time is therefore a background element, which operates as the function of *nature*: there is a certain threshold, beyond which the concerned group is disadvantaged enough, vulnerable enough, to warrant the operation of s 15(1). The longer a person was poor in the past, the higher the chances of crossing this threshold.

Time and poverty: the temporal approach of the court

Gosselin addresses a policy that is sensitive to age and therefore has clear aspects of time.[123] What is more, just like the legislation in *CSN*, the case discussed earlier, so it is here, that the impugned law has a multi-temporal purpose, providing economic relief in the short-run and developing professional skills in the long-run. This was not unnoticed by the Court:

[122] Compare *Law v Canada* (n 94) [99].
[123] For example, McLachlin CJ develops an idea introduced earlier by Peter Hogg: 'The fact that each individual of any age has personally experienced all earlier ages and expects to experience the later ages' (*Gosselin* (n 90) McLachlin CJ [32]). Unlike ageism, discrimination against old people, in the case of different treatment for the young, there's always a remedy that works in the background - time. Old people will never be young. Young people will one day, hopefully, become old. See Hogg vol 2 (n 23) 52-54.

> [N]otwithstanding its possible short-term negative impact on the economic circumstances of some welfare recipients under 30 as compared to those 30 and over, the thrust of the program was to improve the situation of people in this group, and to enhance their dignity and capacity for long-term self-reliance.[124]

Indeed here lies a clear dynamic aspect of the judgement. Yet this time-based thinking disappears when it comes to assessing the socio-economic reality of the recipients, and their ability to attend the programmes. Note that dynamic data is available. Take, for instance, McLachlin CJ's observation:

> In addition to coming onto the welfare rolls in ever greater numbers, younger individuals did so for increasingly lengthy periods of time. In 1975, 60 percent of welfare recipients under 30 not incapable of working left the welfare rolls within six months. By 1983, only 30 percent did so.[125]

It looks wonderfully dynamic, but there is no legal evaluation following these facts. The court does nothing with this data, nor does it process the duration of poverty.

Even the dissenting opinions do not consider the crucial temporal aspects of poverty. Bastarache J's fierce defence of the young, and L'Heureux-Dubé J's attack on the exposure to severe poverty 'as a sole consequence of being under 30 years of age'[126] both fail to understand the appellant's situation, and fail to recognise the heterogeneity of the group at issue, just as much as the majority opinion. All judges see *Gosselin* as a case (only) about age.

The outcome is a monolithic view of those dependent on social assistance. A description of the appellant's economic conditions, as McLachlin CJ notes, is not

[124] *Gosselin* (n 90) McLachlin CJ [66] and see [42].
[125] ibid McLachlin CJ [39].
[126] ibid L'Heureux-Dubé J [130].

helpful, because the conditions are similar to the entire group of recipients, including the group which is the basis of comparison, the 30-and-over.[127] The Court sees no distinction between poor, no hierarchy of severity, which could be easily interpreted from a dynamic view. 'In effect it is stereotypes that drive a convoluted legal analysis, not bad law, that defeated Louise Gosselin's claim,' wrote Jennie Abell, concerned with judicial reliance on 'age-old stereotypes about poor people in preference to the realities of poverty'.[128] A temporal outlook may reveal one possible reason for this misconception. In a static view, the poor may appear to experience similar economic realities, resulting from similar causes, and inviting similar remedies – such as that provided by 29(a). When we turn our attention to the duration of poverty, the picture is more complex.

McLachlin CJ repeated the idea that Gosselin's story was no more than a misfortune, devoid of social context and legal implications: 'The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected'.[129] But Louise Gosselin and thousands of others from similar socio-economic backgrounds did not avoid the Government programmes just by coincidence. Their disenrollment was closely related to the *continuation* of their economic circumstances. If they had indeed fallen through the cracks, then it was perhaps through the cracks of time, for the Supreme Court of Canada perceived them in a frozen state, untouched by the passage of time. We conclude a 200-page case that speaks extensively on poverty and speaks extensively about time but does not consider even once the relation of the two.

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[127] ibid McLachlin [35].
[128] Jennie Abell, 'Poverty and Social Justice at the Supreme Court during the McLachlin Years: Slipsliding Away' 50 (2d) SCLR 257, 288
[129] *Gosselin* (n 90) McLachlin [55].

D4. OTHER CASES

There are additional 13 human rights cases of the Supreme Court of Canada in which poverty plays a role of some kind. Limitations of space will not allow for an extensive analysis of all these cases. The following presents each in brief and outlines its temporal perspective.

***Thibaudeau v Canada* (1995)**[130]

***Egan v Canada* (1995)**[131]

These two cases, which were released on the same day, deal with equality rights in the context of family household. In *Egan*, the appellant was refused a spousal allowance by the Department of National Health and Welfare on the grounds that his partner was of the same sex. He appealed to Court claiming that the definition of 'spouse' in the *Old Age Security Act* infringed the right to equality under s 15. Poverty is mentioned in the judgment (by both majority and dissenting opinion) in the context of the purpose of the examined legislation: the Act is meant to reduce poverty among elderly households. Poverty is therefore not a factual element of the case but rather describes the goal of the legislation in question. The Court did not refer to poverty in a dynamic way.

Similarly, in *Thibaudeau*, which incidentally dealt with the impact of divorce on the economic conditions of the separated spouses, poverty was discussed with no regard to temporal aspects. Both cases deal with the loss of steady monthly income

[130] [1995] 2 SCR 627.
[131] [1995] 2 SCR 513.

the affect of which is hence continuous. These obvious dynamic aspects are absent from the judgment.

***Winko v British Columbia* (1999)**[132]

***New Brunswick Minister of Health v G.* (1999)**[133]

Joseph Winko was charged with aggravated assault but was declared 'not criminally responsible' (NCR) by the court and subsequently hospitalised. Twelve years later the review board of his mental institution decided to grant him conditional discharge. He appealed with the hope of receiving rather an absolute discharge. The issue before the Court was whether s 672.54 of the Criminal Code, which authorises the review board to give discharge, was a violation of either ss 7 or 15 of the *Charter*. Poverty was mentioned briefly in *Winko* as a condition many NCRs suffer from, a constraint on their access to justice and ability to present a 'convincing case for absolute discharge'.[134]

New Bruswick Minister of Health also dealt with poverty in the context of access to justice. In this case the Court held that denial of legal aid from parents in child protection proceedings discussing suspension of custody over their child is a violation of s 7 to the *Charter*.

Both judgements use an entirely static approach. When poverty is a situation frozen in the present, it is easy to overlook the possible impact on social capabilities (an issue discussed above in the analysis of *Prosper*) and the relevant consequences to the legal question at hand.

[132] [1999] 2 SCR 625.
[133] [1999] 3 SCR 46.
[134] *Winko* (n 132) [45].

***Vancouver Society of Immigrant and Visible Minority Women v M.N.R.* (1999)**[135]

This case dealt with the meaning of 'charity' under the Income Tax Act, and whether a club dedicated to advancing employment of its members fall under this legal term. 'Relief of poverty' is mentioned in the case as one of several 'presumptively charitable categories'.[136] The judgment does not present dynamic approach to poverty.

***Sauvé v Canada* (2002)**[137]

This case, and the two that follow, dealt with the aboriginal community in Canada, which historically suffers from poverty and social marginalisation. *Sauvé* examined a rule disqualifying prisoners serving sentences of two years or more from voting in federal elections in the context of both the right to vote and the right to equality. Declaring the legislation unconstitutional, the Court mentioned, among other things, that it had 'a disproportionate impact on Canada's already disadvantaged Aboriginal population'.[138] An overrepresentation of this group in prisons, the judgment continued, reflected factors such as high poverty rates and social alienation. Silencing the voice of this community in Parliament could not be justified under s 1 to the *Charter*.

Poverty in this case is one of several socio-economic facts mentioned as cause to the overrepresentation of Aboriginal people in prisons (and hence, according to the majority in *Sauvé*, a factor contributing to a crisis in the criminal justice system). It is a permanent situation for most Aboriginals: clearly a continuous characteristic of this

[135] [1999] 1 SCR 10.
[136] ibid [42].
[137] [2002] 3 SCR 519.
[138] ibid [60].

group. This therefore could have been an ideal context for a dynamic approach recognising the special vulnerability caused by a persisting condition. But the Court did not refer to the temporal dimension of the socio-economic situation of the Aboriginal community.

***Lovelace v Ontario* (2000)**[139]

***R. v Kapp* (2008)**[140]

These cases examined the legality of affirmative action policies towards the Aboriginal community under s 15(2) to the *Charter*. In *Lovelace*, an exceptional permission to operate a casino was given exclusively to a select group of people of Aboriginal origins. A different group of Aboriginals, who did not receive such permission, claimed that they were discriminated against under s 15(1). In *Kapp*, a non-Aboriginal fisherman challenged a special fishing license that was given exclusively to Aboriginal bands.

Answering the question of possible interaction between ss 15(1) and 15(2), the Supreme Court decided in both cases that affirmative action policies under the latter are shielded from the equality requirement of the former. The priority of s 15(2) is prompted only if the conditions of this section are met, that is, the examined measure has an ameliorative purpose, and it targets a disadvantaged group identified by the enumerated or analogous grounds.

As was mentioned briefly earlier, the Court in *Lovelace* recognized the background of the Aboriginal community, which included poverty and

[139] [2000] 1 SCR 950.
[140] [2008] 2 SCR 483.

unemployment.[141] The Court in *Kapp* quotes this remark in agreement. Poverty is therefore an expression – one of several – for the vulnerability of the Aboriginal community. It is unmistakably a continuing situation, apparently as permanent as belonging to this ethnic group. The Court even mentions (in *Kapp*) that the examined measures were 'addressing long-term goals of self-sufficiency'.[142] Similarly to *Sauvé*, this could have been used as an aggravating factor in the human rights analysis. But nowhere in neither of the cases is poverty considered as a long-term, or chronic, condition.

Canada v Downtown Eastside Sex Workers United Against Violence Society (2012)[143]

In this case, a public interest group working on behalf of sex workers and an individual who worked as such initiated a challenge to prostitution provisions of the Criminal Code based on the right of free expression and association and other *Charter* rights. The question was whether to grant them public interest standing, and the judgment focused particularly on the question whether their challenge constituted reasonable and effective means to bring the case to court. Answering positively, the judges took notice that the group's members were 'women, the majority of whom are Aboriginal, living with addiction issues, health challenges, disabilities, and poverty'.[144] It would have been an excellent opportunity for a judicial temporal approach to chronic poverty, as the socio-economic background facts were fastened in this description to (other) permanent characteristics such as ethnicity and physical

[141] *Lovelace* (n 139) [69].
[142] *Kapp* (n 140) [59].
[143] [2012] 2 SCR 524.
[144] ibid [5].

incapacities. However the legal analysis in this case did not take account of these facts. The on-going economic situation of the appellant and other sex workers did not affect the judgement.

Three more cases mention poverty incidentally: ***Hodge v Canada***,[145] ***Nova Scotia v Walsh***,[146] ***United States v Burns***,[147] and ***M. v H***.[148] Poverty is discussed in these cases only shortly, and is not material to the facts of the case. It is not discussed in a dynamic way.

E. CONCLUSION

In the three cases investigated in this chapter, a constitutional assessment which takes time into consideration results with new available legal tools. In *Prosper*, the analysis emphasised that people who experience different durations of poverty are likely to have different degrees of need for public assistance. Poverty dynamics affects the availability of social resources and was hence a background factor, which contributed to determining the *nature* of infringement to the right to retain and instruct counsel. In *CSN* the legislation contained an internal dynamic element, allowing the passage of time to play what we previously called the role of *fluctuation*. A dynamic reading of

[145] [2004] 3 SCR 357.
[146] [2002] 4 SCR 325.
[147] [2001] 1 SCR 283.
[148] [1999] 2 SCR 3.

this case reveals that over time, many more Canadians experience unemployment than one may initially think. Finally, in *Gosselin* a temporal approach made it possible to distinguish a different and narrower group than the one referred to in the appeal. The duration of poverty served in the dynamic analysis as background element, operating in the function of *nature*, triggering, beyond a certain threshold, the protection of s 15(1).

A dynamic approach in *Gosselin* invites a more active decision, more favourable to the appeal. The dynamic analysis in *CSN* had the opposite effect, providing further strength to the standpoint of the respondent. The analysis of *Prosper* did not change the final outcome in the particular case, but it did suggest to shape the general rule set by this judgment in a way which takes into consideration possible mistakes in identification of poor detainees.

Both *CSN* and *Gosselin* afford a clear illustration of a judicial disregard of temporal aspects of poverty, especially because dynamic components play a fairly apparent role in the legal arrangement examined in each case. The disputed legislation in *Gosselin* (a job training programme associated with the social assistance scheme) and in *CSN* (‘*active measures*’ associated with the unemployment benefits) had a two-layer purpose: they aimed both at the short-term and the long-term. The judgment in the former recognised this temporal duality. The judgment in the latter accepted it, even if without using the time-related terms. But neither of the cases processed this dynamic terminology into understanding the social conditions of the individuals affected by the government programmes. In that sense, both *Gosselin* and *CSN* are cases where a legislator’s dynamic approach to poverty meets a judge’s static approach.

In this sense of judicial rhetoric, the last cases indeed manifest the trend we have shown in the analysis of all other cases from Canada, France, and Israel. But on the substantial level these cases are actually evidence – incomplete, indirect, and unprofessed, but still, a rare piece of evidence – that human rights law can adopt dynamic thinking about questions of welfare and poverty. The two are therefore fitting cases to conclude Part II of this study, as a tentative indication that a time-based legal understanding of poverty is possible.

It is now fair to ask: why? Is there something in human rights law to encourage static judicial thinking about poverty? Are judges less free to apply a dynamic approach under these constitutional frameworks? This question was partly addressed in Chapter One, which established that it is possible, and even commonplace, to combine constitutional human rights law with temporal thinking. But perhaps something in the mixture between poverty and human rights prevents judicial dynamic analysis? We now turn to Part III – Kinetics: Towards a Time Based Approach to Poverty in Human Rights Adjudication which aims to deal with these issues.

PART III

KINETICS: TOWARDS A TIME BASED APPROACH TO POVERTY IN HUMAN RIGHTS ADJUDICATION

6 Critique and Response

A. INTRODUCTION

The previous chapters showed a gap in the judicial understanding of poverty. While it is common in contemporary economic writing to emphasise the dimension of time and adopt a dynamic approach, constitutional human rights adjudication applies a more rigid, static approach to poverty. The task of this chapter is to conclude the findings while discussing possible reasons for this gap.

The chapter is organised in accord with ***table 6.1*** below, which concludes the findings in Part II and summarises the main characteristics of the dynamic analysis that accompanied each case. Section B gathers the dynamic elements overlooked by accessed 2 September 2016.the examined judgments, thus providing a last view on the *statics* described in previous chapters. These results are presented in the table in Column 2.

The titles for sections C, D and E suggest three separate discussions with a common line that connects them. Together they supposedly lay claim to the idea that

the court cannot evaluate poverty dynamics. This can therefore be read as a critique of my attempt to incorporate time into the adjudication of poverty. I will try to confront this attack: relying on the findings in ***table 6.1*** these sections respond to each line of criticism in turn.

Section C discusses the *temporal gap*, referring to the different role the concept of future plays in law and in economics. The response to this critical argument presents the temporal location of the poverty intervals discussed in the case analysis (see Column 3) and explores the possible integration between different concepts of time. Section D turns to a more general *disciplinary gap*, suggesting that different concepts regarding data may make it difficult to incorporate ideas coming from economics into the judicial process. Since this discussion touches on the question of evidence, the response examines the extent to which professional economic data is used in the proposed dynamic analysis (Column 4). Section E then follows with two brief remarks on justiciability and politics that reflect aspects of *institutional dilemmas*. The response here naturally examines whether the proposed dynamic analysis pushes for more active or more passive court decisions (Column 6). It also considers the constitutional rights reviewed in each case (Column 5) and investigate whether a dynamic approach pushes for decisions more favourable to the interests of poor individuals or the poor community as a whole (Column 7).

As a final illustration to the argument of this study, Section F presents a judgment of the Supreme Court of Nova Scotia where, to my opinion, a dynamic approach to poverty was well applied. Section G then concludes by taking us back to the terminology defined in Chapter One, reviewing the different temporal functions used in the proposed dynamic analysis of poverty (Column 8), and concluding how these were linked to the legal analysis (Column 9).

1	2	3	4	5	6	7	8	9
Case	**Poverty dynamics unrecognised by Court**	**Location of poverty interval**	**Sample data or special evidence used?**	**Constitutional rights discussed in the case**	**Outcome of dynamic analysis: A more active Court?**	**More favourable to the poor?**	**Function of time**	**Dynamic analysis: the legal outcome**
France: *Mohamed* Discussed in Ch. 3 Sec. E(1)	The effect of examined legislation on decision making of welfare recipients (locating events on a time axis).	Past Unspecific future	No: analysis is theoretical	The right to decent means of existence The principle of social solidarity The right to equality	More active	More favourable	Magnitude	Temporal location of decision-agent and incentive reveals the examined legislation as perverse. The longer the period set by the decree, the weaker is the declared social purpose.
	A period of unemployment with no income is more difficult to cope with for those who previously experienced long-term poverty (applying permanent income theory).						Magnitude	The longer the duration of poverty prior to application for the benefits, the more difficult for long-term poor to cope with a period with no income.
							Nature	The longer the period set by the decree, the wider the difference in treatment, and further it breaches purpose of the primary legislation.
France: *Loi de financeme-nt de la sécurité sociale* Discussed in Ch. 3 Sec. E(2)	The dynamics of decision-making and incentives to work.	Unspecific future	No: analysis is theoretical	The right to equal burden of taxation	More Passive	Neutral	Fluctuation	The rationale of the legislation: increasing incentive to work. The outcome is that unequal treatment between those above the threshold and those below it is justified, and so is the unequal treatment for labour and capital income.
	Fluctuation in poverty: over time, a larger portion of society is poor, was poor, or will be poor.							This law is recurrently re-enacted. Over time, its mechanism involves a wider segment of society.

1	2	3	4	5	6	7	8	9
France: *Couverture maladie univeselle* Discussed in Ch. 3 Sec. E(3)	Income of poor households may vary over time	Unspecific future	"Empirical studies show that mobility around the poverty line is relatively high" – general data on household income trends	The right to equality	More passive	Less favourable	Fluctuation	The longer the period examined, the more individuals will fluctuate in and out of eligibility and therefore the alleged inequality in treatment it is less sharp than perceived in the judgment.
	Continuation of poverty under and above the threshold		No	The right to health The right to conditions necessary for development	No change	More favourable	Magnitude	With respect to uncovered poor, the longer their situation lasts, the more severe is the infringement of their access to health
Israel: *Gamzo* Discussed in Ch. 4 Sec. D(1)	The appellant was temporarily poor with a high potential for escaping his present economic condition.	Future	Past economic conditions and present abilities signalling future income potential	The right to minimum dignified subsistence The right to housing	More passive	Less favourable	Magnitude	Revise the balance of rights; given Gamzo's economic ability in the long run, the constitutional minimum could have been preserved even if he had been forced to pay his debt immediately.
Israel: *Rubinova* Discussed in Ch. 4 Sec. D(2)	The impact of parent's economic condition on children's present and future conditions	Present Future	Predict children's future based on current conditions in the household	The right to minimum dignified subsistence	More active	More favourable	Agent	The legislation affects not only Rubinova but also her children, both today and in the future
	Considering both her poverty history and current situation, Rubinova's chances of escaping poverty are low. The anticipated future is of long-term poverty.	Future	Predict Rubinova's future income based on past and current socio-economic conditions.				Magnitude	Over future years, accumulation of economic damage caused by legislation: the alleged human right violation is hence expected to be broader

Israel: *Rubinova* (contn'd)	The ability to confront a social risk is dependent on the household income prior to the economic change. With a substantially lower income, and taking in consideration the passage of time, chances are higher for a shock that the poor household cannot confront.	Unspecific future	No: analysis is theoretical	The right to minimum dignified subsistence	More active	More favourable	Nature	Further human rights may be involved
	The examined legislation freezes the adjustment mechanisms of the benefits. Over time, the relative standard of living they provide would erode.	Unspecific future	No: analysis is theoretical				Essence	The passage of time wears down the benefits: an internal impact of time on the right to dignity.
	Duration of poverty determines employability. The longer the appellant had been poor, the thinner are her social and professional skills, and therefore chances of finding a job decrease.	Past	No: analysis is theoretical				Magnitude	Legislation's rationale of encouraging work weakens.
Israel: *Hassan* Discussed in Ch. 4 Sec. D(4)	The examined legislation internalises time – recurring periodic testing leading to recurring monthly payments.	Unspecific future	No: analysis is theoretical	The right to minimum dignified subsistence	More passive	Less favourable	Fluctuation	The examined legislation is less injurious than perceived.
	The costs and imputed benefits associated with a car are not one off payments but rather fall under the economic definition of "flow" and refer to an interval of time. The longer a recipient holds a car these factors increase.						Magnitude	Over time the justification to cut benefits (that is, the competing interest) becomes more significant.

1	2	3	4	5	6	7	8	9
Israel: *Twito* Discussed in Ch. 4 Sec. D(5)	Long-term poverty weakens social capital: the chronically poor usually have inadequate social skills and thin networking which substantially restricts their access to political mediums.	Past	No	The right to protest	More active	More favourable	Magnitude	Considering the appellants' crucially defective capabilities of political speech, the evacuation bears harsher consequences to freedom of speech.
Canada: *Prosper* Discussed in Ch. 5 Sec. D(1)	Differences in the duration of poverty are among the reasons for variation in social capital among poor people; this leads to differences in access to counsel among poor people; access despite poverty is hence expected to be more prevalent among the short-term poor.	Past	Yes: to determine the detainee's access to legal counsel, based on financial and social resources. Also, an empirical examination may reveal the probability of each of two possible mistakes and thus offer a regime likely to result with fewer errors.	The right to retain and instruct counsel	More passive: it is possible that Prosper's condition did not justify judicial interven-tion.	Possibly, less favourable	Nature	The passage of time in this analysis is a background factor, which contributes to determining the nature of the human right involved: the right to retain and instruct counsel depends on availability of social resources, of which people who experience different durations of poverty are likely to have different degrees.
Canada: *CSN* Discussed in Ch. 5 Sec. D(2)	A dynamic reading reveals that many more Canadians enjoy the benefits over time. The longer the temporal context we examine, the more individuals will fluctuate in and out of eligibility.	Unspecific future	No	The case does not discuss any Charter right	More passive	Neutral	Fluctuation	With more people receiving the benefits, the unemployment arrangement is closer to a contribution-based mutual mechanism. This may spell a different conclusion regarding the alleged breach of authority by the federal Parliament for the years 2002, 2003 and 2005.

1	2	3	4	5	6	7	8	9
Canada: *Gosselin* Discussed in Ch. 5 Sec. D(3)	The persistent poor are more likely to drop out of structured activities, and are hence more exposed to losing social assistance through the examined regime: the longer Gosselin's past poverty, the more vulnerable she is socially, and the higher are the chances of disenrollment in any programme.	Past	Yes, to demonstrate that the likelihood of joining a programme and subsequently receiving full benefits is lower for chronic poor.	The right to equal benefit of law The right to life, liberty and security of the person	More active	More favourable	Nature	The impugned legislation affects long-term poor more strongly than others. It violates essential human dignity, failing to protect the imposition of disadvantage on chronic poor, and thus constitutes a s. 15(1) discrimination.

B. SUMMARY OF FINDINGS: THE STATIC MIND OF POVERTY ADJUDICATION

Throughout this dissertation I have used the word 'static' to describe the judicial attitude to poverty, but this term may not fully encompass the utter lack of temporal sense found in France, Israel and Canada. The examined judgments are so unconcerned with time that we may label them as *achronistic*. The term anachronism (from Greek anakhronismos, ana- 'backwards' + khronos- 'time') means 'the attribution of something to a period to which it does not belong'.[1] *Achronism*, by contrast, (based on Greek, a- 'not' + khronos- 'time') is the state of having no time, of being timeless.[2] If anachronism means being out of date, then *achronism* means being out of time.[3]

Such a timeless approach generates a restricted perception of the legal reality. Expecting to understand a dynamic case through a static lens is of no more sense than hoping to grasp the plot of a movie from one single frame. As previous chapters demonstrated, the result is bad law. This section, deriving from Column 2 in the table above, aims to conclude the impact of judicial achronistic perspective on material facts: what did the judges miss in the reality of poverty? The answer can be sorted into the following five groups.

[1] Oxford English Dictionary 2012 (Oxford University Press 2012).
[2] Compare with the Oxford Dictionary definition of 'amoral': achronistic to anachronistic is like amoral to immoral.
[3] A similar term, *achronistisch*, is used (rarely) in German, even if not recognised in contemporary standard dictionaries. See, for example, Heinrich Graetz, *Geschichte der Juden von den ältesten Zeiten bis auf die Gegenwart* (Star Peiner Leipzig 1875) 436.

Failing to notice continuous events

When judges do not locate events on a timeline, the most evident outcome is that they overlook the plain notion of duration. In *Couverture maladie univeselle* the *Conseil constitutionnel* did not recognise that the longer people remained poor, the longer was the limitation on their access to medical treatment. This basic meaning to the duration of poverty is parallel to the concept of *magnitude* elaborated in Chapter One: a linear perspective on the passage of time, which simply recognises that an event continues throughout a certain period. Similarly, in *Hassan*, the Israeli Supreme Court missed the repetitive nature of periodic payments and the difference between flow and stock with respect to the cost of owning a car.

A static perspective can lead to disregarding developments in other material elements of a case. In *Rubinova*, the Israeli Court failed to notice how time shapes economic circumstances such as increase in the general price level. It consequently failed to recognise how the relative standard of living provided by State benefits would erode under a freeze on the adjustment mechanisms introduced by the new legislation.

What is in common to these examples is that payments, costs, price levels and income are all located in time. They may be repeated. They may change. A static perspective cannot capture repetition or change.

Failing to distinguish between short-term and long-term poverty

With no sense of the duration of poverty the Court can neither single out cases of short-term poverty nor identify how they differ from chronic poverty. As earlier chapters demonstrated, there are significant distinctions between these phenomena in

both causes and characteristics, to say nothing of the obvious difference in predicting the chances to escape poverty. Thus the Israeli Supreme Court underestimated the financial capabilities of *Gamzo*, a classic short-term poor. Recall the tension between this case and that of *Rubinova*, a chronic poor, discussed in Chapter Four. At the instant moment of the judicial hearings, the economic living conditions experienced by the appellants in these two cases were fairly similar. Frozen snapshots therefore invited identical legal analyses. Lifting the focus from the immediate moment to the long run, the stories diverge.

Failing to notice fluctuations in poverty

Yet another result of overlooking the duration of poverty lies in *fluctuation*, a concept presented in Chapter One and demonstrated in the French cases of *Financement de la sécurité sociale* and *Couverture maladie univeselle,* the Israeli case of *Hassan* and the Canadian *CSN*. What was unnoticed in these cases was not the chance to escape poverty of one particular individual, but rather the more general notion of income mobility in modern economy. Ignoring the dynamics in household incomes results in disregarding the idea that with time some households swing in and out of poverty. Thus, for example, some of these judgements did not take into account that over time a larger portion of the society is poor, was poor, or will become poor.

Failing to notice the multidimensional impact of chronic poverty

Chapter Two drew a distinction between *nominal poverty* (which describes insufficient financial income) and *real poverty* (which describes substantive deprivation in the things that money is suppose to buy). Aligned with Sen's ideas of

capability deprivation, real poverty is the concept through which the multi-dimensional reality of poverty is discovered. Putnam and other scholars (also referred to in Chapter Two) speak of such non-monetary resources in terms of social capital. As Sen notes, real poverty indeed 'may be... more intense than what appears in the income space'.[4]

Chronic poverty has an effect on this spectrum of social and economic capabilities. Real poverty intensifies under permanent income deprivation and so the gap between nominal and real poverty is sensitive to time. Blind to the gradual erosion of social capital and loss of capabilities caused by continuous poverty, a static approach is therefore less likely to recognise the gap between real and nominal poverty.

This has been illustrated in several cases examined in Part II. One aspect of the issue concerns differences in the ability to overcome a social shock (that is, an exogenous event causing either an increase in expenses or decrease in disposable income) such as unemployment or illness in the family. The power to cope with such changes naturally depends on the financial security and stability of the household, elements that deteriorate during periods of poverty, and that for chronic poor are therefore severely impaired. This notion was missing from the judgments in both *Mohamed* and *Rubinova*, in the former with regard to new phases of unemployment, and in the latter within a general context considering the difficulty chronic poor families face when they try to endure a social shock.

The impact of chronic poverty goes beyond the financial dimension, covering other social capabilities. Whether it was differences in the duration of poverty as

[4] Amartya Sen, *Development as Freedom* (OUP 2001) 88. See ch 2 text to n 99. For Putnam's concept of social capital see ch 2 text to n 165.

reasons for variation in access to counsel in the Canadian case of *Prosper*, or the impact of long-term poverty on access to political mediums and public discourse in the Israeli case of *Twito*, the judicial analysis neglected the consequences of the duration of poverty. Similarly, the judgment in *Gosselin* did not mention that the persistent poor are more likely to drop out of structured activities, and are hence more exposed to losing social assistance through the examined welfare regime. Finally, the judges in *Rubinova* missed the impact of the parent's extensive poverty not only on her children's present conditions but also on their future prospects. Another point overlooked by the Court in this case was that the duration of poverty determines employability: the longer the appellant had been poor, the thinner were her social and professional skills, and therefore her chances of finding a job decrease.

Failing to notice the impact of chronic poverty on individual decision-making

Finally, two French judgements overlooked the dynamics of individual decision-making and how they were affected by long-term poverty. Both *Financement de la sécurité sociale* and *Mohamed* concerned the choice of poor unemployed individuals to take a job. The judgement in the former overlooked the process by which financial incentives stimulate this decision. The judgement in the latter, even if proclaimed to be attentive to external impact on individual preferences, still neglected to locate the events relevant to decision-making on a time axis. It consequently failed to observe the perverse nature of the examined arrangement, which could not be rationally expected to incentivise welfare recipients.

Conclusion

To conclude this section, the judgments examined in Chapters Three, Four and Five detached facts from time, seeing the case at hand as a frozen scene. This achronistic perspective generated an incomplete legal analysis. Could this be avoided? In many other fields of law judges and scholars incorporate ideas coming from economics into the legal analysis.[5] Why is it not happening with the dynamics of poverty? Is human rights law capable of importing a temporal perspective on the subject? The subsequent sections propose various theoretical, normative and practical answers to these questions.

C. TEMPORAL GAP

The following sections present and evaluate possible criticism against the main argument of this study. Before turning to a general examination of disparities in the theoretical premises underlying law on one hand and economics on the other (the subject of Section D), the line of criticism discussed in this section is that law and economics have a different relation to time, specifically with respect to the future. Perhaps the temporal perception is so far apart that it is impossible for the judge to frame economic dynamic thinking about poverty within the limits of legal debate. I first present this argument, and then try to refute it.

[5] Law and Economics and its relevance to this study is briefly discussed in Section G. See text to n 119.

The 'temporal gap' argument is not about a judicial inability to process facts in a dynamic way - Chapter One illustrated the influential role the passage of time may have in constitutional human rights cases, so it is clear that this body of law is not limited to static categories - but rather about a difficulty that results from the location of these facts. It refers not to *time as quantity* but rather to *time as location*.

Future tense in economics

No other discipline has produced more sarcasm on the weakness of its own predictions than economics (notably Nobel laureate Paul Samuelson's observation that 'Wall Street indices predicted nine out of the last five recessions'),[6] but still a great deal of the intellectual effort of economists is dedicated to predicting the future. A strong advocate of this forward-looking attitude, Milton Friedman held the view that accurate prediction is a key feature in the establishment of economics as a science.[7] Friedman would have surely admitted that uncertainty is typically higher in a forward- compared to a backward-looking analysis (and forecasts vary greatly in their degree of predictability),[8] but this is just a change in degree: his approach to economics sees past, present and future as similar in essence.[9]

Others took the stance that the power of social sciences is not in prediction but rather in retrospective analysis.[10] Hicks went further to suggest that economics is located 'on the edge of science and on the edge of history'.[11] But even for these

[6] Paul A Samuelson, 'Science and Stocks', *Newsweek* (19 September 1966) 92.
[7] Milton Friedman, 'The Methodology of Positive Economics' In Milton Friedman, *Essays in Positive Economics* (University of Chicago Press 1953) 3, 7.
[8] Clive Granger, *Forecasting in Business and Economics* (Academic Press 1980) 3.
[9] Friedman's Permanent Income Theory, presented in ch 2(E), is a clear illustration of this temporal approach.
[10] Dan Soen, *Left, Right: From Dreams of Liberty and Justice to Nationalism* (Haifa 2015) [Hebrew].
[11] Quoted in Wenceslao González, 'On the Theoretical Basis of Prediction in Economics' (1996) 27 J. Social Philosophy 201, 202. See John Hicks, *Causality in Economics* (Basil Blackwell 1979).

thinkers, doubt and probability have a comparable role in all tenses. Whether economics is seen from Friedman's predictivist perspective or Hicks' quasi-scientific approach, studies of the future and the past are carried out subject to similar concepts of uncertainty.[12]

Law's presentism and poverty dynamics

The law has a different approach. Judicial exercise is inclined to the present; comfortable with the past; and highly suspicious of the future. Legal systems are under 'powerful pressure to make everything turn on events that lie in or close to the present'.[13] Courts thus apply a philosophical standpoint somewhat analogous to Le Poidevin's concept of *Presentism*. It is the notion that only what is present is real, and that present facts are held 'to be the truth makers of statements about past and future'.[14] In a clear deviation from Le Poidevin, fact-finding processes and determination of liability are naturally focused not only on present but also on past events (though past events are only relevant in court when they are necessary in order to determine rights and duties in the present). But while rules of evidence and procedure allow the judge to integrate data from the past into the comforting certainty of the present, the law usually keeps Le Poidevin's misgivings about the future.[15]

Several explanations can be put forward for this legal version of *presentism.* The most obvious is the pragmatic preference of proof and certainty. The law is gripped to the present and the past, and suspicious of the future, because meaning and

[12] A similar view with regard to science in general was (indirectly) proposed by Susan Haack, see Susan Haack, *Evidence Matters* (CUP 2014) 85.
[13] Richard Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 Wash. U.L.Q. 667, 674.
[14] Robin Le Poidevin, *Travels in Four Dimensions: the Enigmas of Space and Time* (OUP 2003) 161.
[15] The following section discusses the relevant topic of damages in tort cases.

validity cannot be easily given to things that did not happen, to what is not real.[16] Richard Epstein explains law's *presentism* with an an interesting position on the urgent need to restore justice and the rule of law.[17] Law's commitment to 'realness' can also be explained as a moral position: as a matter of normative conviction, modern legal systems see humans as subjects and not objects. Respect for individual autonomy demands that judicial decisions do not purport to predict future events that depend on human choice.[18]

With a clear distinction between past-ness and present-ness on one hand, and futurity on the other (terms corresponding to McTaggart's A-series account of time[19]), legal systems in Canada, France and Israel are not only stricter when dealing with the future but rather operate under a separate evidential policy.[20] The point should not be overstated, for judicial proceedings that take account of 'forecasted facts' do exist (such exceptional cases coming from the jurisdictions examined here will be discussed and illustrated in my response to this criticism, below). But even in these instances, courts show utter discomfort with future projections, and often make what can be described as an effort to turn future facts into something stable and real.

The critical argument on the 'temporal gap' proceeds as follows: the duration of poverty is a concept that locates events on a time continuum. Any period of poverty happens either in the past, in the future, or in both. In economics it is not

[16] Compare with Bickel's somewhat similar idea on the realness of constitutional dealings: 'Statutes, after all, deal typically with abstract or dimly foreseen problems. The courts are concerned with the flesh and blood of an actual case.' Alexander Bickel, *The Least Dangerous Branch* (Vail-Ballou Press 1962) 26.
[17] Epstein (n 13). See for example *Schnebly v Baker* 217 N.W.2d 708 (Iowa 1974), a leading US case dealing with prediction of inflation, where the Supreme Court of Iowa speaks of the future as speculative and uncertain.
[18] This approach can be traced back to Cartesian tradition. See Noam Chomsky, *Powers and Prospects* (Pluto Press 1996) 15-18.
[19] John McTaggart, *The Nature of Existence* (CUP 1921). See also Nathan Oaklander and Quentin Smith, *The New Theory of Time* (Yale UP 1994).
[20] See Discussion below, text to n 28.

conceptually problematic for this period to be located in the future, or for a conclusion deriving from poverty dynamics in the past to refer to the future. But for the judge the task is not as simple because it leads to breaching temporal conventions of the legal operation. A different attitude to the future, the critics would hence maintain, prevents the inclusion of the duration of poverty in a judicial analysis.

The objectors to the hypothesis of this study may further argue that the temporal difficulty is most evident with respect to predictions of poverty spells. Econometrics offers extrapolative forecasting procedures that - to put simply - allow anticipation of future observations based on current and past observations.[21] This evidence-based method was applied in my dynamic analysis of the Israeli case of *Rubinova*, predicting that the appellant who has been poor all her life has a high risk of remaining poor in years to come. In this dynamic analysis the concepts of *duration* and *fluctuation* (two terms defined and discussed in Chapter One) met: data on the length of poverty in the past were used to determine the chances for escaping poverty in the future. Critiques would argue that a Court that is limited to *presentism* cannot derive such conclusions. And so, to conclude this line of disapproval, the proposal to incorporate the dynamics of poverty into human rights law collapses because economic thinking about the future endangers the time axioms of the law.

Response

This criticism is not borne out by the analysis of the cases in the jurisdictions studied here. First let us examine whether the dynamics of poverty in this study is a matter of the past or the future, using Column 3 in ***table 6.1***, which locates the poverty intervals

[21] Andrew Harvey, 'A Unified View of Statistical Forecasting Procedures' (1984) 3 J. Forecast 245, 245. This method was discussed in the context of poverty in ch 2(E).

that were discussed in each case. In three cases – *Twito* (Israel), *Prosper* and *Gosselin* (both from Canada) - the analysis referred to a period of poverty that is exclusively in the past. The criticism of a temporal gap does not capture these cases, which prove that a dynamic analysis is by no means limited to the future. But the temporal mismatch argument is relevant to seven out of the ten cases analysed here, in all of which the dynamic analysis has some reference to the future. The analysis in *Mohamad* (France) had elements located in both past and future, and the dynamic analysis proposed for *Rubinova* (Israel) discussed poverty dynamics in the past, present and future. The remaining four cases provided dynamic analysis that examined the duration of poverty only in the future.

Abstract future

But what kind of a future? The *a-priori* constitutional control in France is forward-looking by nature. The appeal is carried out immediately after the enactment of a new statute, before it enters into force. The *Conseil constitutionnel* then examines the potential impact of this legislation in a theoretical discussion: the appellant is not directly related to the case, and claims are made in the abstract.[22] Prediction of concrete circumstances is hence avoided.

In the context of this immaterial examination, the above criticism of a temporal gap does not stand. Perhaps the law has difficulty in forecasting concrete factual circumstances (this will be discussed below), but there is certainly no disciplinary difficulty in analysing future situations when the discussion is not fixed

[22] John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (2nd edn OUP 2008) ch. 2; John Bell, *Judiciaries within Europe: A Comparative Review* (CUP 2006) ch. 2. The newer and less frequent *QPC* procedure is similar to the standard constitutional analysis in Israel and Canada, looking backward at a specific situation. See ch 3(C).

to a particular factual scenario. After all, what is a contract if not the establishment of forthcoming interests and duties?[23] Indeed, the *Conseil constitutionnel* does not seem to have a conceptual struggle when it regularly analyses the future implications of a law in the *a-priori* procedure.

Similar dealings with a fact-less abstract future can be found outside the French jurisdiction.[24] Take, for example, the rule against perpetuity in Canadian and Israeli law.[25] This is an area of law where the Court quite easily deals with future positions in a process that does not require prediction of material facts. Another classic example of such a temporal approach are the various rights of future generations in international law[26] and in French constitutional law.[27] And so, the Israeli Supreme court in *Hassan* and the Canadian Supreme Court in *CSN* delivered a theoretical forward-looking examination of a piece of legislation which is comparable in essence to the French *a-priori* control.

A closer look reveals, then, that in this study most forward-looking dynamic analyses relate not to a concrete but rather to an abstract future. In *Financement de la sécurité sociale*, *Couverture maladie univeselle, Hassan*, and *CSN*, and whatever reference there is to the future in *Mohamad*, the temporal location of the poverty interval is indeed in the future, but the proposed analysis is not framed with forecasted material reality (these cases are marked 'unspecific future' in column 3). Moreover, for all of these cases, the original analysis of the Court was itself abstract and

[23] The words of OW Holmes are in place here: 'The object of [the study of law], then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts'. Oliver W Holmes, 'The Path of the Law' (1897) 10 Harvard L Rev 457, 457.
[24] See Bickel's cited remark above n 15.
[25] Epstein (n 13) 703-707.
[26] Duties towards future generations were established in several international instruments, notably in the context of the protection of global climate. See Preamble to Declaration on the Responsibilities of the Present Generation Towards the Future Generation (1997); United Nations Framework Convention on Climate Change (1992); and the accompanying Kyoto Protocol (1997).
[27] Déclaration des droits adossée à la Constitution du 24 juin 1793, Art 28.

forward-looking, so the proposed dynamic analysis does not change the temporal picture. It is only in two cases, *Gamzo* and *Rubinova* (both by the Israeli Supreme Court) that the dynamic analysis this thesis proposes speaks of a concrete future, and so the problem of temporal gap may appear.

Concrete future

Judicial treatment of a concrete future is exceptional but not impossible. It has developed in legal domains where social economic reality has demanded such projections. Of particular relevance to our matter – that is, of particular resemblance to the temporal attitude discussed here – are tort lawsuits dealing with future earning loss and with cost of future care. In these cases the judge predicts future income and expenses based on current contingencies. Consider the words of the Canadian Supreme Court in *Krangle*:

> Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest.[28]

In the context of tort claims regarding future care, this method requires two kinds of expert evidence, both forecasting future events: medical professionals need to anticipate the future medical condition and specific treatment needs of the claimant; and actuarial expertise is necessary to calculate the present value of such future costs

[28] *Krangle (Guardian ad litem of) v Brisco*, 2002 SCC 9 [21].

based on prediction of economic conditions.[29] A similar method is used to examine tort claims that are based on loss of future income. In these lawsuits an estate of a deceased who died as a result of the respondent's negligence claims compensation for the loss of her earning capacity in her lost years. The judge is required to estimate what would have been the deceased's income and expenses, had the wrongful death not happened. The case law in Israel and Canada is similar: the judge systematically examines personal contingencies to forecast the earning loss, and then applies economic multipliers, which assume the future impact of macro-economic conditions on the value of money.[30]

Israeli and Canadian case law on loss of future income and cost of future care does not seem to be troubled by the aforementioned temporal gap difficulty.[31] Reading through leading judgments in both jurisdictions, I did not find the opinion (or even a scholarly view) that anticipating concrete future economic conditions in tort cases is impossible due to conceptual limitations. In fact, any explicit engagement with temporal aspects whatsoever, such as the above quote from *Krangle*, is rare.

We find similar treatment of concrete future circumstances in other legal fields: anticipation of financial stability in banking law in France;[32] Canadian finance

[29] Clark Havighurst et al., 'Evidence: Its Meanings in Health Care and in Law' (2001) 26.2 Journal of Health Politics, Policy and Law 195.
[30] In Israel see CA 140/00 *Estate of the late Michael Ettinger deceased v Company for the Reconstruction and Development of the Jewish Quarter*. In Canada the Court estimates the potential income and then applies a contingency discount for the factors that might have prevented the victim from attaining it in full: *Tucker v Asleson*, 1993 CanLII 2782 (BC CA) [173]; *The Queen v Jennings* [1966] SCR 532; and *Andrews v Grand & Toy Alberta Ltd*., [1978] 2 SCR 229.
[31] A close examination reveals an interesting temporal aspect in the judicial analysis in these cases. The judgments in both Israel and Canada distinguish between the ability to create income and actual income. Damages compensate for 'loss of earning capacity and not for loss of earnings' (*The Queen v Jennings* [1966] SCR 532 at 545). The former is lost in the present. The latter is lost in the future. And so this temporal exercise allows the court to locate the damage and its compensation in the present. However even under this theoretical distinction, from a material point of view the Court is still required to do the same investigation: to determine potential future income. See also *Andrews v Grand & Toy Alberta Ltd*., [1978] 2 SCR 229 at 251. This distinction between potential and actual value does not appear in cost of future care cases.
[32] Loi no 2010-1249 du 22 octobre 2010 de régulation bancaire et financière.

law cases which predict the level of inflation and wages[33] and specifically, cases calculating the present value of future economic losses through the concept of net discount rate (usually involving calculation of inflationary expectations);[34] prediction of agriculture production in the context of regulation of production quotas in Israel;[35] analyzing the aging of commodities in the context of products liability in Canada (and the US);[36] judicial account for the future condition of historic buildings in France following expected renovation;[37] the contract law principle of anticipatory breach in Israel;[38] to name a few examples.

Implication to the cases examined: Gamzo and Rubinova

Judicial decisions are often made in the absence of full knowledge of what happened or what is going to happen in the future.[39] Inter-temporal analysis appears in many cases of execution law and debts. In fact, the judgment in *Gamzo* is an excellent illustration of exactly that.[40] The proposed dynamic analysis for this case (which used past economic conditions and present abilities as signals for future income potential) did not exceed the standard routine of cases of its kind. By the nature of the legal question they deal with, it is not rare for this type of case to include a predictive

[33] A Dexter and others 'Inflation, Interest Rates and Indemnity: The Economic Realities of Compensation Awards', (1979) 13 U. Brit. Colum. L. Rev. 298, 301. In the US context see *Schnebly v Baker* 217 N.W.2d 708 (Iowa 1974).
[34] This was decided by the Supreme Court of Canada in three cases given together in 1978 : the above mentioned *Andrews* (n 30) together with *Arnold v Teno* [1978] 2 SCR 287 and *Thornton v Board of School Trustees of School District No. 57* [1978] 2 SCR 267. See William Landsea, 'How workable are net discount rates?' (1982) 28 McGill L. J. 102.
[35] CA 3553/00 *Aloni v Zand-Tal Animal Feed Institute LTD* (not published). This Israeli Supreme Court case also discusses income prediction in the context of execution of debt.
[36] Peter Letsou, 'A Time-Dependent Model of Products Liability' (1986) 53 University of Chicago L. Rev 209, 210.
[37] CE 29 juillet 2002, n° 222907, Caisse d'allocations familiales de Paris.
[38] For a review of cases see Gabriela Shalev and Yehuda Adar, *The Law of Contract – Remedies for Breach* (Din Publishers 2009) 129 [Hebrew].
[39] Richard Eggleston, *Evidence, Proof, and Probability* (2nd edn, Weidenfeld and Nicolson 1983) ch 1.
[40] See discussion in ch 4(D1).

analysis: it is what the court is required to do in order to determine the financial ability of a debtor to pay his creditors.[41] So here, again, the original judgment already includes a reference to the future, and the proposed dynamic analysis does not change the temporal approach in that respect.

Some cases fit into a middle category in between an abstract and a concrete future: the Court would examine future factual elements, but without invoking the usual cautious approach to future predictions, either because they are very general material statements or because they are recognised as scientific truisms. Such would be the case with general data on trends, on the potential impact of a certain present element, or any other general observation. Consider, for example, environmental case law, an area which clearly cannot avoid the anticipation of some very global events.[42] These are not concrete pieces of evidence that relate to a particular appellant or event, but rather general expert statements relevant to the legal analysis. Similarly, in a 2008 case dealing with the right to education the Israeli Court emphasised that there is a 'clear risk' that young students will drop out of school, and that 'a forward-looking view teaches us that investing in education at a young age can decrease the risk for a situation in which resources turned to treat these children in the future would be even greater'.[43] A forward-looking analysis of poverty such as the one described above for *Rubinova* is similar in every relevant aspect to this case.

To conclude, the location on the continuum between past and future is crucial to the law and the past is easier to handle in the judicial process. But it is by no means impossible to deal with the future in the Court. There may be conceptual difficulties resulting from uncertainty, but there is no structural incapability of the law to analyse

[41] Israeli Execution of a Judgment Act s 69(e).
[42] For example, Rajendra Pachauri and others (eds.), *Climate Change 2007: Synthesis Report* (Intergovernmental Panel on Climate Change 2007).
[43] Dantziger J in HCJ 5373/08 *Abu-Labda v Minister of Education* (not published) [14].

poverty in future tense. This is definitely true for theoretical examinations of an abstract future, but also in the more unique cases of a concrete future, the forward-looking dynamic examination in this study (proposed only for the Israeli cases of *Rubinova* and *Gamzo*) is similar in its temporal approach to the work of the Israeli Court in equivalent cases.

D. DISCIPLINARY GAP

It seems that Richard Posner's observation from 1979 that judicial opinions rarely use the explicit language of economics,[44] remains true today. Posner's main criticism was that economic reasoning is poorly executed in courts due to a lack of professionalism. In this section I would like to investigate a different argument which potentially could be directed against this dissertation, namely that theoretical and methodological differences between the disciplines make it difficult for judges to incorporate knowledge from economics into law. To be more specific, a possible attack on my thesis would contend that each of these fields has a distinct approach to gathering and evaluation of facts, and that this difference prevents the use of economic dynamics of poverty in law. I will first develop this argument and then offer a response.

[44] Richard Posner, 'Some Uses and Abuses of Economics in Law' 46(2) Univ. of Chicago L. R. 281, 300.

The attack traces the following steps. Economics is a science. Law is not a science. 'Dynamics of poverty' is a scientific term, but the work of the judge is not the work of a scientist. Focused on social process and change, the economist is interested with explanations of empirical findings,[45] so for her facts are only the beginning of the intellectual challenge, and their authenticity is rarely disputed. The Court, by contrast, is looking through contested factual views, and the picture it adopts is the material basis for a normative interpretation. For a judge, what is behind the facts is usually beside the point.

Judicial fact gathering is process-based: it follows strict rules of procedure and admission.[46] Social sciences are more flexible in that respect, and it is enough to stay loyal to any rational method of investigation.

The problem with sample data

In the case of dynamic theories on income and poverty, as in many other fields of economics, conclusions are wider than the concrete examples they are drawn from. Following inductive logic, statistical methods allow the economist to generalise from sample data to the whole.[47] Raw data is therefore incomplete and based on random selection. Law, by contrast, is foreign to such methods of induction. It deals with concrete data that has not gone through such a process of abstraction.[48]

These differences result in conflicting conceptions about uncertainty in law and in economics. In economics, uncertainty is a part of the game. The probability

[45] Posner (n 44) 301-305.
[46] See Philippe Nonet, 'In the Matter of Green v Recht', (1987) 75 Cal. L. Rev. 363.
[47] R. Clay Sprowls, 'The Admissibility of Sample Data Into a Court of Law: A Case History' 4 UCLA L. Rev. 222, 223-4.
[48] Posner (n 44) 301.

that a sample does not represent the population can be measured and analysed.[49] Judicial proceedings are instead based on an assumption that once accepted by the Court, facts are no longer challenged.

Critics of my hypothesis will conclude that the law cannot incorporate the foreign conception of data that the dynamic assessment of poverty requires. Economics introduces an unacceptable degree of uncertainty into the judicial process (to borrow Posner's words in his criticism of social values[50]). In technical terms, the problem here is one of admissibility. And even if conceptually and legally possible, evaluating the validity of the sampling procedure would require expertise that is not available in most courts.[51]

Lack of applicable poverty indicators

Another more specific problem that may be directed at this work is that human rights law is constructed around an individual perspective while most indicators and theories of poverty economics are collective in essence. Indeed, classic microeconomics produces models that deal with the individual, and are therefore easily adoptable by the legal discipline. But most economic studies on poverty apply a wide macro perspective.[52] This may be suitable for policymaking, but not for the legal discourse of individual rights.

Take, for example, the definition of poverty. Absolute poverty requires no macro perspective. It draws a clear red line, and thus offers an intuitive mechanism,

[49] Sprowls (n 47) 225.
[50] Posner (n 44) 292.
[51] Sprowls (n 47) 231.
[52] See ch 2(E). Recent scholarship in behavioral economics, notably the work of Eldar Shafir, has produced excellent examples to the contrary, with a micro-economic perspective on poverty. See AK Shah et al., 'Some Consequences of Having Too Little' *Science 2012* 682; Sendhil Mullainathan and Eldar Shafir, *Scarcity: Why Having Too Little Means So Much* (Times Books 2013).

easy to conceptualise in an independent legal discourse. The concept of relative poverty, by contrast, is the fruit of a broad perspective of society. Applying this concept in the discourse of individual rights requires a degree of economic proficiency and understanding of statistics which courts do not posses.

Response

Numerous thinkers have suggested that both law and economics are expressions of the same capitalistic-liberal social order (Kennedy,[53] Hansen,[54] Campbell and Picciotto,[55] to name a few, not to mention the vast Marxist and Neo-Marxist literature on the subject[56]). It is evident that these fields, both of which structured around individual interests and choice, are not just separated by disciplinary differences, but also united by common principles.

The aim of this study is not to require theories of poverty to shape norms and legal principles, but merely to contribute to the material picture before the judge.[57] When dealing with the factual background, we must not confuse methodological difficulties with a statement that such information is irrelevant.[58] It is in many senses a work of translation: rendering insights from the language of Economics to the one of Law. As in any effort of translation, success depends on how well the message is understood in the target language.

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[53] For example, Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89(8) Harvard L. Rev. 1685.
[54] Jon Hanson and David Yosifon, 'The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture' (2003-4) 152 Univ. Penn. L. Rev 129.
[55] David Campbell and Sol Picciotto, 'Exploring the Interaction Between Law and Economics: The Limits of Formalism' (1998) 18 Legal Studies 249.
[56] See Paul Hirst, *On Law and Ideology* (CUP 1979) and Andrew Halpin, 'Ideology and Law' (2006) 11 J. Political Ideologies.
[57] In this respect this work stands in contrast to traditional Law and Economics literature. See Section (G) below.
[58] Compare with Levi J's opinion in HCJ 888/03 *Rubinova v Minister of Finance* PD 60(3) 464 [25].

Approached from a technical legal perspective, the questions before us could be therefore phrased as follows: what kind of evidence does a dynamic analysis of poverty require? And is it admissible?

The data used in the dynamic analysis

Column 4 in ***table 1*** provides a summary of the data used in each proposed dynamic analysis. In five of the ten cases the inquiry was theoretical: it included no examination of facts. This demonstrates that a dynamic approach to poverty does not always require the consideration of economic data. Of the other five, two cases had mixed arguments – applying both theoretical and data-based ideas. The dynamic analysis of the remaining three cases was entirely dependant on economic sample data. Before we examine the compliance of this data with evidence law in the respective jurisdictions, it is important to identify its factual consequence in each of these five cases.

In *Couverture maladie universelle* knowledge based on sample data was used in order to determine broad income trends. Similarly, in *Ruinova* and *Gosselin* sample data was used to predict future economic conditions of the appellants, but in the context of a wider examination of the impact of the legislation. The conclusion of the dynamic analysis in these three cases was general rather than focused on a particular person.

Gamzo and *Prosper* are different, because in these cases the dynamic analysis uses sample data to determine something specific about the appellant: Gamzo's future income potential and Prosper's degree of access to counsel. However, a similar factual examination was part of the actual proceedings at the Court. This is not

surprising, because anticipating future ability to pay debts is the requirement of Israeli family and execution law,[59] and determining whether a detainee is eligible for public counsel it is an obvious outcome of the *Prosper* rule.[60] This means that the proposed dynamic analysis of both cases simply followed the original judgment, and changed neither the scope nor the nature of the evidence examined.

The following therefore focuses on economic facts that do not speak to an individual but rather in terms of group experience.[61] However, most of the arguments henceforth apply similarly to cases with a specific factual examination, such as *Gamzo* and *Prosper*.

Social facts in court – Israel, Canada and France

'Social facts' offer the Court 'context for deciding factual issues crucial to the resolution of a particular case'.[62] The Court accepts such evidence, which is often based on social science research,[63] not in order to gain information specific to the case but rather to understand the larger picture, 'the requisite background for the interpretation and the application of the law'.[64]

This doctrine, which developed a century ago in the US nicknamed 'Brandeis brief'[65], was adopted in Canada[66] and later in Israel.[67] Let us examine two examples,

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[59] See ch 4 text to n 77.
[60] See ch 5 text to n 58.
[61] Compare Dickson J. in *Andrews v Grand & Toy*, [1978] 2 SCR 236
[62] *R v Spence*, 2005 SCC 71 [57].
[63] Aharon Barak, *Interpretation in Law: Volume Three – Constitutional Interpretation* (Nevo 1993) 479 [Hebrew].
[64] *R v S(RD)*, [1997] 3 SCR 484 [43].
[65] After Louis Brandeis, who in the 1908 US Supreme Court case *Muller v Oregon* 208 U.S. 412 presented a compilation of sociological and economic information. See Jonathan Yovel and Elizabeth Mertz (2004) 'The Role of Social Science in Legal Decisions' in *The Blackwell Companion to Law and Society*. (Austin Sarat ed., Blackwell 2004) 410, 414.
[66] For example, examining the social context of response to police arrest in *R v Bartle*, [1994] 3 SCR 173; recognising the 'battered wife syndrome' in *R v Lavallee*, [1990] 1 SCR 852; the effect of the

both from cases analysed in this study. 'We are… unable to examine… assumptions on a theoretical and abstract basis', Barak CJ states in *Rubinova*,[68] as he examines figures and studies presented by the litigants to support their competing interpretations of 'minimum dignified existence'. The Israeli Court is divided in this case on whether sufficient evidence was provided, but not on its admissibility.[69] Similarly, in *Gosselin* The Supreme Court of Canada (McLachlin CJ) clearly looks into facts of socio-economic context, observing that –

> In 1975, 60 percent of welfare recipients under 30 not incapable of working left the welfare rolls within six months. By 1983, only 30 percent did so. Behind these statistics lay a complex picture. The 'new economy' emerging in the 1980s offered diminishing prospects for unskilled or under-educated workers. At the same time, a disturbing trend persisted of young Quebecers dropping out of school and trying to join the workforce. The majority of unemployed youths in the early 1980s were school drop-outs.[70]

Similar to Israel and Canada, in France all forms of expert testimony in civil procedure (called *expertise*) are advisory in nature. But the expert does not represent any of the parties: nomination is by the judge and upon the judge's discretion.[71]

This is just one of many significant distinctions between French law and common law, crucial to the issue of evidence. These legal traditions differ in their

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'feminization of poverty' in *Moge v Moge*, [1992] 3 SCR 813; the systemic factors that have contributed to the difficulties faced by aboriginal people in *R v Wells*, [2000] 1 SCR 207. See Claire L'Heureux-Dubé, 'Re-examining the Doctrine of Judicial Notice in the Family Law Context' (1994) 26 Ottawa L. Rev. 551.

[67] *United Mizrahi Bank* v *Migdal* PD 49(4) 221, 438-440; HCJ 7052/03 *Adalah v Minister of the Interior*, [67]; Levy J's dissenting opinion in *Rubinova* (n 57) [18-19]. For a critical evaluation see Guy Mundlak, 'Social Rights in the New Constitutional Discourse: From Social Rights to the Social Dimension of All Rights' *7 The Labor Yearbook*, 65, 100-101 (1999) [Hebrew].

[68] Barak CJ in *Rubinova* (n 57) [19].

[69] ibid. Compare Barak CJ at [23] with Levy J's dissenting opinion at [7].

[70] Note that this is dynamic data. *Gosselin v Quebec* [2002] 4 SCR 429, McLachlin CJ [39-40].

[71] Robert Taylor, 'A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure' (1996) 31 Tex. Int'l L. J. 181, 192.

conceptualisation of the relations between law and fact, in the role of litigants and the Court in gathering evidence, in the onus of proof, and more.[72] The scope of this work does not allow to dwell into the complex particularities of French procedure and evidence law.

However, the discussion in this section is less relevant to the *Conseil constitutionnel* for two reasons. First, because review of legislation at the CC is purely theoretical, with no reference to material facts in the judgment.[73] It is no surprise, then, that the proposed dynamic analysis presented no data arguments for all French cases.[74] Secondly, what the CC considers in a case is anyway unavailable: 'procedure before the French Conseil remains rudimentary and is based on the principle of secrecy: secrecy regarding the evidence in the case, secrecy regarding the name of the reporting judge, secrecy regarding the meaning of the report, secrecy regarding the deliberations'.[75] Still it is possible to see in CC decisions, including those analysed in this study, that CC does indeed refer to aspects of social context.

The remainder of this discussion is therefore less relevant to France and we shall focus on Israel and Canada.

Expert evidence and judicial notice

There are two main instruments that allow courts to accept and examine social facts where deemed suitable. The first is through expert witnesses, who can testify as to

[72] Bell (n 21) 85. For further discussion see ch 3(D).
[73] See ch 3(C)-(D).
[74] *Couverture maladie universelle* is the only case that included, in addition to a theoretical argument, another idea which required a highly accessible social fact regarding income mobility around the poverty line. This basic and general data on household income was considered in the abstract and with relation to what I earlier defined as unspecific future.
[75] Dominique Rousseau, 'The Conseil Constitutionnel confronted with comparative law and the theory of constitutional justice' *5(1) Int J Constitutional Law* (2007) 28, 34.

both the implications drawn from a research study and the validity of the research method.[76] The Court can gain an understanding of social context from experts in both Canada[77] and Israel.[78] The standard of proof under s 1 of the Charter (in Canada) and the limitation clause (in Israel) is the civil standard (in both countries, proof by a preponderance of probability).[79]

A second, simpler option is the acceptance of social facts without proof, based on judicial notice. This doctrine, which is accepted similarly in Canada[80] and Israel,[81] applies to 'facts which are so notorious as not be the subject of dispute among reasonable persons', and also to 'facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy'.[82] The Canadian Supreme Court has explicitly recognised that this also includes 'academic studies properly placed before the Court'.[83] The dynamic analysis proposed here demonstrates that in most cases there is no need for an expert because the required context is well-known and accessible.

In cases such as *Prosper*, where the examined economic facts are gathered by the respondent as an administrative body, the Court interferes with dynamic data

[76] R. Clay Sprowls, 'The Admissibility of Sample Data Into a Court of Law: A Case History' (1956-7) *4 UCLA L. Rev*. 222, 222.
[77] *R v Mohan*, [1994] 2 SCR 9. In the context of social facts see *R v S(RD)* (n 63); *R v Lavallee*, [1990] 1 SCR 852. See Graham Glancy and John Bradford, 'The Admissibility of Expert Evidence in Canada' 35 *J Am Acad Psychiatry Law* (2007) 350.
[78] Civil Procedure Regulations 5744-1984 s129 (non-medical expert witness on behalf of a litigant) and s 130 (nomination of an expert by the Court). See Uri Goren *Civil Procedure Issues* (10th edn, Nevo 2009) 252.
[79] Dickson CJ in *R v Oakes* [1986] 1 SCR 103 para 67. In Israel: Aharon Barak, *Constitutional Interpretation* 480-481.
[80] In the context of social facts: *Moge v Moge* (n 66) at p. 853; for judicial notice of child poverty see L'Heureux-Dubé J. in *Willick v Willick* [1994] 3 SCR 670 para 22.
[81] CA 219/63 *Kashpitzky v Grabelsky* PD 18(1) 413, 418. See Barak *Constitutional Interpretation* at p. 479.
[82] *R v Williams*, [1998] 1 SCR 1128 para 54
[83] *R v S(RD)* (n 63) [44].

through judicial control. Administrative law provides the court with the tools for evaluating the gathering and processing of data by the Executive.[84]

Canadian and Israeli courts repeatedly stress that a contextual and practical perspective is important in human rights cases. Interpretation and examination of legislation should not be done in the abstract.[85] 'The degree of infringement must be examined against the characteristics of those who are infringed'. Proportionality is examined 'by a concrete test… [which] focuses on the infringement upon a particular group. It depends on circumstances. The infringement by a certain act of government is different from one person to another, and it is different from one group of people to another'.[86]

Sample data

By the nature of social science, and science in general, knowledge is often produced based on sample data. Even obvious and simple information (which would clearly be accepted by judicial notice) such as the level of the relative poverty line is produced by a sample-based research. Indeed, as was mentioned earlier, such research is based on the idea of generalisation. Sample data 'speaks in terms of group experience. It cannot and does not purport to speak as to the individual'.[87] Voluminous scholarship,

[84] See further discussion in ch 5 text following n 71.
[85] In Canada: *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326, at p. 1356 (per Wilson J.); *Willick* (n 80) per L'Heureux-Dubé J. para 19, (dissenting in part). See Antonio Lamer, 'Canada's Legal Revolution: Judging in the Age of the Charter of Rights', *28 Isr. L. Rev.* 579, 581 (1994)].
In Israel: HCJ 1748/06 *Mayor of Daharya v Commander of the IDF in the West Bank* (not published). See Yoav Dotan 'The Supreme Court as the protector of social rights' in Yuval Shani et al. (eds), *Economic, Social and Cultural Rights in Israel* (Tel Aviv, 2004) 69, 113.
[86] *Mayor of Daharia* (n 85) [16].
[87] *Andrews v Grand & Toy*, [1978] 2 SCR 236

much of it in the 1950s, has been written on the admissibility of economic sample data in courts of law.[88]

To conclude, an examination of the legal arrangements in the jurisdictions studied here reveals that the criticism brought in this section does not stand. When the Court examines the dynamics of poverty it does not cross the boundaries of law, certainly not more than it does when considering medical expert testimony in a tort case. There are tools to guide the evaluation of medical assessments, and similarly, there are tools to guide the evaluation of economic assessments.[89] The assessment of poverty should not be exceptional.

E. INSTITUTIONAL DILEMMAS: TWO FURTHER REMARKS

There are two points of potential criticism against my hypothesis that touch on institutional dilemmas. The first deals with justiciability, and the second with the final impact of these judgments on the poor. Both are linked to the larger political question on the role of the Court in issues of class and distribution.

The scope of this work does not allow for an in-depth examination of these matters. However, as a starting point for later work, this section presents findings that

[88] Most of it in the 1950s in the US, but applies to both Israeli and Canadian evidence law. Sprowls (n 76) 222; R. E. Kecker, 'Admissibility in Courts of Law of Economic Data Based on Samples', 28 J. of Business Univ. of Chicago, 114 (1955), 115-116; Reginald Caughey, 'The Use of Public Polls, Surveys and Sampling as Evidence in Litigation, and Particularly Trademark and Unfair Competition Cases', 44 Calif. L.Rev. 539 (1956).
[89] See W Fisher and E Hartnett 'Admissibility of Economic Testimony on Future Inflation' *18 S. Tex. L.J.* 59 (1976-1977).

are relevant to the discussion. The following should therefore be seen as an invitation for further debate based on findings that are already available in this thesis.

Justiciability

Having discussed admissibility of evidence and economic expertise in Section D above, it is obvious that from a normative perspective,[90] the Court does have tools to apply a time-based approach to poverty. That leaves us with the institutional question: is it desirable for courts from a democratic perspective to apply dynamic approach to poverty? An examination of ***table 1*** above reveals interesting relevant findings.

First, the dynamic analysis proposed in this work does not invite the introduction of poverty into human rights adjudication. In all of the cases examined here, poverty was already discussed and mentioned explicitly in a human rights constitutional evaluation. Secondly, neither did this study introduce new constitutional concepts. As Column 5 shows, there was no creation of new human rights: the rights involved and analysed here are standard in Canada, Israel and France. As for analytical tools, Column 9 shows that the dynamic analysis does not go beyond what is accepted as conventional methods of constitutional scrutiny in each jurisdiction.

Thirdly, it is worth contemplating whether a dynamic approach pushes for a more active or more passive court. This information is provided in Column 6: 'more passive' signifies that compared to the outcome of the original case, the outcome of my proposed dynamic approach would result in a lighter judicial intervention in the

[90] The distinction between the normative and the institutional dimension of justiciability follows the framework suggested by Aharon Barak in his *A Judge in a Democracy* (Princeton UP 2006) ch 11. Similarly, In the Canadian context, David Weisman suggested to distinguish between availability and suitability of the legal claim. See David Wiseman, 'The Charter and poverty: beyond injusticiability' 51 Univ. of Toronto L. J. (2001) 425.

work of the Executive or the Legislature; 'more active' signifies that my analysis would result in a heavier intervention. Dynamic arguments that did not change the outcome are marked with 'no change'. The results are clear: a dynamic approach does not give more energy to the Court. Six out of ten cases resulted in a more passive outcome. The same conclusion stands when this is broken down to each country: two of three French cases and two of three Canadian cases are marked 'passive'. In Israel two cases are marked 'passive' and two are marked 'active'.

A final political remark

Griffith notes that it is 'inevitable that the judiciary will play a political role in the capitalist state'.[91] The Court is indeed both a production and a producer of social order. A static view of poverty reinforces certain political ideas about poverty (contextual vs. individual causes of poverty, and personal vs. collective responsibilities). From this political perspective, each temporal approach carries both assumptions and implications.

One aspect of this discussion is the question of how the bottom line of each case affects distribution in the society. How are poor appellants – and the poor community as a whole – affected by the final result of each case? If the outcome of a dynamic analysis would have always been more favourable or less favourable to them compared with the original judgment - this would have had clear political implications.

Column 7 shows that overall the result is balanced. In four cases (*Mohamed, Rubinova, Twito, Gosselin*) the result of a dynamic approach is more favourable to the

[91] John Griffith, *The Politics of the Judiciary* (Manchester University Press, 1977)

poor. In three cases (*Gamzo, Hassan* and *Prosper*) the result is less favourable. In *Financement de la sécurité sociale* and *CSN* the result is neutral and finally *Couverture maladie universelle* had a mixed result, with one argument pushing for and another against the interests of the poor.

The countries examined in this study correspond with Gosta Esping-Andersen's widely accepted categorisation of welfare regimes.[92] Canada represents the liberal model with a tendency for a social-democratic welfare regime, France represents the conservative central-European model, and Israel, which has shifted from a social-democratic model to a quasi-liberal model, represents a mixture of regimes. In light of this, it is interesting to note that not only that a static approach equally characterised these regimes, but also that the impact of a dynamic analysis – whether 'pro-poor' or 'anti-poor' – is evenly distributed between these countries.[93]

F. DARTMOUTH/HALIFAX COUNTY REGIONAL HOUSING AUTHORITY V. SPARKS

(Nova Scotia Supreme Court, Appeal Division, 1993)

The right to equality and the right to housing[94]

> The appellant has been a public housing tenant for over ten years. In accordance with the terms of her lease she was given one month's

[92] Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press 1990) 23-34. See further discussion in ch 3 text to n 49.
[93] It is also worth noting that the results are spread fairly equally between short-term poor (such as *Gamzo*) and long-term poor (such as *Hassan*).
[94] *Dartmouth/Halifax County Regional Housing Authority v Sparks* [1993] 119 N.S.R. (2d) 91.

> notice by the respondent to quit her residential premises. She is a single black mother with two children and is on social assistance.[95]

This is the opening of a 1993 case of the Appeal Division of the Nova Scotia Supreme Court, which recognised poverty as a characteristic analogous to the grounds of prohibited discrimination listed in the *Canadian Charter of Rights and Freedoms*.[96] Delivered by a court of a Canadian province, this case does not fall within this study, which is limited to decisions of the highest judicial level in each country.[97] However *Sparks* is the single case I have found so far that considers the dynamics of poverty. Clearly out of sync with the general approach which governs the poverty cases of the Supreme Court of Canada as described in Chapter Five, this case provides a valuable example of how courts could adopt an economic dynamic perception. I therefore bring *Sparks* as a contrast from a lower instance court, an illustration of the road not taken by the courts examined in this study.

Sparks examined the constitutionality of s 10(8)(*d*) and s 25(2) of *The Residential Tenancies Act* in Nova Scotia.[98] This Act limits the unilateral termination of a residential lease. Notwithstanding the agreement between the parties, the Act states that in a lease by a year to year agreement, notice to quit shall be given at least three months before the expiration of any such year,[99] and for a tenant with a possession of five years or more, a notice to quit can be given only by an order of court which would be granted under certain circumstances[100] (subject to a few exceptions which are irrelevant to this case). The application of these 'security of

[95] ibid para 1.
[96] For a discussion on poverty as analogous ground under s 15 see ch 5 text to n 114.
[97] At the time when this case was delivered, the Appellate Division of the Supreme Court of Nova Scotia was the highest court in the Province. Further grant to appeal may be given by the Supreme Court of Canada. Following the judgment in *Sparks* the parties did not appeal.
[98] R.S.N.S. 1989, Chapter 401.
[99] Section 10(1)(a).
[100] Section 10(8).

tenure' provisions is severely limited with respect to public housing residents. According to s 10(8)(d) the protection for tenants of five years or more is denied when -

> [T]he residential premises are operated or administered by or for the Government of Nova Scotia, the Government of Canada or a municipality;

In addition, s 25(2) provides a general exemption from the Act for public housing tenants, so that where any provision of the Act conflicts with the provision of a lease granted to a tenant of public housing, 'the provisions of the lease govern.'

Irma Sparks, a public housing tenant for over ten years, was given one-month's notice to quit her public housing residence. The notice was given with accordance to her lease. She turned to the court, seeking a declaration that ss (10)(8)(d) and 25(2) of the *Residential Tenancies Act* infringed her right to the equal benefit of the law without discrimination, guaranteed in s 15(1) of the *Charter*.

The distinction created by the Act imposes a burden based on personal characteristics, the appellant argued. Because women, blacks and social assistance recipients form a disproportionally large percentage of tenants in public housing – a fact which was not contested by the respondents – they are therefore indirectly affected by the exempting provisions. Sparks was hence exposed to discrimination on account of being a black poor single mother. The trial court dismissed the claim concluding that s 15(1) of the *Charter* was not breached. Sparks appealed to the Supreme Court of Nova Scotia.

The Housing Authority responded that the provisions in question distinguished between groups of tenants and do not fall under any prohibited ground of discrimination. The exempting provisions, it further argued, were necessary in order to guarantee flexibility in the administration of the public housing scheme.

Decision

The Nova Scotia Supreme Court upheld the appeal, delivering a judgement of four stages, following the line set in what was in 1993 the leading case of *Andrews v Law Society of British Columbia*.[101] At the first stage the Court identified the existence of a distinction in treatment. A private sector tenant in a similar situation to Sparks could be given a notice to quit only if a judge was satisfied that the tenant was in default of any of the tenant's obligations under the Act, the Regulations or the lease,[102] a protection denied to public housing tenants. The following stages require that the distinction in treatment is based on grounds that are related to a personal characteristic enumerated in s 15 or analogous to those enumerated, and that its effect impose a disadvantage on the individual or a group.[103] This would turn a different treatment into a prohibited discriminatory treatment. At this point the Court cited the following statement of the trial judge:

> The tenant in this case is treated differently because and solely arising from having applied and met the criteria for public housing. I agree with the submission by counsel for the landlord that the fact that public housing tenants are disproportionately black, females on social assistance tells us something about public housing but doesn't tell us anything about being black, about being female or upon being on

[101] [1989] 1 S.C.R 143. The judgment in Sparks was given six years before *Law v Canada* [1999] 1 SCR 497.
[102] Section 10(8)(*e*) of the Act.
[103] *Andrews* (n 29) [18].

> social assistance. I agree that it is not a characteristic of any of those three groups to reside in public housing.[104]

According to this line of thought, for the appeal to have succeeded, Sparks had to show that the legislation exempted recipients of social assistance from the protection of the statute, by singling out a characteristic of being a recipient of social assistance. The Supreme Court rejected this notion. In the words of Hallett JA, delivering for a unanimous Court:

> Low income, in most cases verging on or below poverty, is undeniably a characteristic shared by all residents of public housing; the principal criteria of eligibility for public housing are to have a low income and have a need for better housing. Poverty is, in addition, a condition more frequently experienced by members of the three groups identified by the appellant. The evidence before us supports this.
>
> Single mothers are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non-citizenship was in *Andrews*.[105]

And therefore -

> The content of the law and its impact on public housing tenants is not only that they are treated differently but the difference relates to the personal characteristics of the public housing tenant group. To come to any other conclusion is to close one's eyes to the makeup of the public housing tenancy group and the effect on them of the exempting sections.[106]

[104] The trial judgment reported at 112 N.S.R. (2d) 389. See p. 402.
[105] *Sparks* (n 94) [31].
[106] ibid [34].

The Court concluded that public housing tenants are a group analogous to those referred to by the characteristics provided in s 15(1).[107] Poverty is acknowledged as a ground for discrimination.[108] It is a sensible conclusion, the judgment notes, considering that public housing tenants are historically disadvantaged 'as a result of the combined effect of several personal characteristics listed in s 15(1)'.[109]

Having found that the sections in question infringe the right to equality, Hallett JA turned to examine whether they could be saved by s 1 of the *Charter*. Evaluating the objectives of the exempting sections, he partially accepted the position of the Housing Authority, acknowledging that the operation of a public housing scheme required a higher degree of flexibility. Contracts of public housing are therefore a special case:

> **Certainly changes in tenants' eligibility for public housing should affect the duration of the tenancy.** Therefore, there is legitimacy to the objective of not granting all the benefits of the Act to public housing tenants.[110] [emphasis added]

Exceptional administrative flexibility was needed because over time residents may improve their economic situation and lose their eligibility for public housing. This may indeed justify a distinction in treatment, the Court held. The argument actually reflects a dynamic approach to poverty, and so this remark of fifteen words did what no other case examined in this study has done: it introduced the future.

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[107] ibid [34].
[108] In 2009 the Nova Scotia Court of Appeals denied this approach in *Boulter v Nova Scotia Power Inc.* 2009 NSCA 17. The Ontario Superior Court reached similar conclusions in 2013 in *Tanudjaja v Attorney General (Canada)* 2014 ONCA 852. To date, the Supreme Court of Canada has neither adopted nor denied the notion of poverty as an analogues ground. See further discussion on this subject in Chapter Five, text to n 117-121. For a theoretical discussion on indirect discrimination and development of analogous ground see Tarunabh Khaitan, A Theory of Discrimination Law (OUP 2015) p. 74.
[109] *Sparks* (n 94) [33].
[110] ibid [36].

Hallett JA then examined whether the means chosen to achieve the legislature's legitimate objective were reasonable and 'demonstratively justified in a free and democratic society'. He found that they were 'overly broad'. The sections in question could not be said to be a proportional infringement justified so as to ensure that public housing is available only for those who qualify. The respondents failed to satisfy 'that there was a reasonable basis for a denying carte blanche, so to speak, the benefits of the Act to public housing tenants'.[111] The conclusion was that ss 10(8)(*d*) and 25(2) were in breach of the public housing tenants' right to equal benefit of the law without discrimination. They were declared to be of no force or effect.[112]

Sparks' dynamic approach to poverty

Poverty is evidently a significant factor in the constitutional thinking provided in *Sparks*. It is, along with single parenthood, the foundation for establishing discrimination. The notion of poverty appears in this capacity in the second stage of the analysis, where the Court examines the personal characteristics of the appellant. However the *dynamics of poverty* plays its role in a different and separate step of the process, upon examination of s 1. It is therefore important to clarify that the exceptional decision to recognise poverty as an analogous ground was not a component of the dynamic thinking that followed. For the purpose of this study, the recognition of poverty as a s 15 analogous ground is irrelevant, and serves only as a background for what is for us a far more interesting analysis that occupies the latter part of the judgment. One could be inspired by the dynamics of poverty in *Sparks*

[111] *Sparks* (n 94) [38].
[112] The practical implication of the ruling was that tenants of public housing enjoyed the same protection as private sector tenants, meaning that in case of a need to terminate a tenancy the Housing Authority could appeal to a court permission to give notice to quit, in accordance with section 10(8)(e).

without adopting the Court's extraordinary opinion on poverty as grounds for discrimination.

Let us take a closer look at the dynamics of poverty in the case. Prospective changes in the economic situation of a tenant, and how they might affect eligibility to public housing are, in the reasoning of Hallett JA, what lies at the heart of the legislative purpose. According to the judgment, these potential changes justify a different treatment for public housing tenants. Poverty mobility is thus presented as the reason why the objective behind ss 10(8)(*d*) and 25(2) is legitimate.

This is a clear illustration for the contribution of a temporal perspective to the judicial analysis in a poverty case. Understanding poverty as a changing scene rather than a single frozen frame allowed the Supreme Court of Nova Scotia to take account of anticipated variations in the income of public housing tenants and thus for the possibility of escaping poverty. Just as was suggested in Chapters Three, Four, and Five above, the Court then translated its dynamic observation of the economic reality into legal conclusions. Hallett JA's legal conclusion was that 'there is legitimacy to the objective of not granting all the benefits of the Act to public housing tenants',[113] because their economic situation is not fixed over time.

Indirectly acknowledging the notion of short-term vs. long-term poverty, the judgment utilised time in the role of *fluctuation*. An application of poverty dynamics similar to that of *Sparks*, applying time as *fluctuation* and reaching comparable results, was proposed in this study for the French cases of *Financement de la sécurité sociale* and *Couverture maladie univeselle,* the Israeli case of *Hassan* and the Canadian *CSN*. A temporal perspective on poverty would have allowed these cases, as

[113] *Sparks* (n 94) [36].

it did in *Sparks*, to apply better legal mechanisms for determining whether government justifications are legitimate.

To demonstrate the resemblance between *Sparks* and the dynamic analyses proposed in this study, we can easily characterise the judicial dynamic thinking in this case following the same questions discussed in previous chapters (and summarised in ***table 1*** at the beginning of this chapter). The location of the poverty interval in *Sparks* is the unspecific future; it appears, by the reasoning provided in the judgment, that this line of analysis did not require more data than what was before the court; the outcome of the temporal approach to poverty is less favourable to the poor appellant as it supports the constitutionality ss (10)(8)(d) and 25(2) of the *Residential Tenancies Act*; and as such it naturally plays a curbing role in terms of the relationship between government branches, pushing for a more passive outcome to the case at hand.

Sparks is also a good illustration for how problematic it may be to disregard the time dimension in poverty. If the Court had used a static rather than dynamic approach, the judges would have lost an essential component of the material reality before them. Missing the notion of *fluctuation* the Court would not have been able to comprehend economic based justifications from the respondent. Specifically, the judges would not have been able to recognise measures, which were tailored by the legislature for cases of short-term poverty and fluctuating income.

It is no surprise that *Sparks* involved a temporal perspective on poverty. It was almost dictated to the judges, since income fluctuation was at the core of the respondent's argumentation. It is interesting to note that it was the Government, and not the poor appellant, who brought the dynamics of poverty before the Court. To avoid the proposed time-based notion would have meant ignoring the respondent's main proposition. This position, combined with the clear facts of a case that called for

a simple and rather straightforward dynamic analysis, made it almost inevitable that the Court would adopt a temporal approach to the case.

Sparks is an exceptional judgment, not only because it recognised poverty as grounds for discrimination – a conclusion which was outstanding in the constitutional realm of Canada – but also, and perhaps primarily, because it offers a time-based understanding of poverty. The Nova Scotia Supreme Court demonstrated that a judicial dynamic analysis of poverty is not a legal Elysium.

G. CONCLUSION: THE DYNAMIC MIND OF POVERTY ADJUDICATION

As mentioned earlier, this study can be seen as a work of translation from economics to law. The disciplinary, temporal and institutional gaps discussed in this chapter can be understood accordingly as tensions between the languages, challenges faced by the translator. However, as the discussions above demonstrated, it is possible to communicate the dynamics of poverty at the Court despite these tensions.

For a technical formulation of this translation process let us return to the beginning of this work. Chapter One explained dynamics in human rights law. It defined events as actions, legal statuses, or circumstantial facts, and stated that events could be either continuous or instantaneous. *Time as quantity*, it was stated, could relate to either a continuous event, or to the distance between any two events. The measured length of one event and the measured distance between two events was named a *legal sequence*. Dynamic thinking in law is interested with the impact of *time*

as quantity over a certain *legal sequence*.[114] Chapter Two dealt with the parallel concept in economics, examining Gondolfo's idea that a dynamic system is determined by 'functional equations in which variables at different points of time are involved in an essential way'.[115] What is in common to both legal and economic dynamic thinking, it was emphasised, is the impact of the passage of time on material elements.[116]

This similarity is what allows the integration of the economics of poverty in human rights law. The result is a temporal perspective of the material picture, which then allows new normative accounts.[117] In this work of translation, the point beyond which Economics is no longer spoken and ideas are expressed solely by legal doctrinal terms is where the examination of material facts ends and normative assessment begins. The last step of legal evaluation is done exclusively within the legal discourse.

Table 1 in the beginning of this chapter demonstrates how this is done in practice. The table is organised, from left to right, to follow the steps of translation. The analysis begins with a dynamic material perspective (which, as described in Column 2, is absent in the static cases examined here), and leads to legal consequences. It is evident from Column 9 that the final result is in the form of standard legal instruments, fitting the operation of ordinary constitutional mechanisms: revealing the purpose of the legislation (*Financement de la sécurité sociale*), its rationality (*Mohamed*), and its magnitude in the constitutional balance (*Rubinova, Hassan*); defining the size of the group that is to be impacted by the examined legislation (*Financement de la sécurité sociale, Couverture maladie*

[114] See discussion in ch 1 Sections (B)-(C).
[115] Giancarlo Gandolfo, *Economic Dynamics* (3rd rev edn, Springer 1996) 1.
[116] See ch 2(B).
[117] Compare Robert Hockett, 'Justice in Time' (2009) *Cornell Law Faculty Publications* Paper 123.

universelle); discovering that the magnitude of infringement of various rights is higher (*Couverture maladie universelle*, *Rubinova, Twito*) or lower (*Gamzo, Hassan*); re-calculation of the balance of rights between parties to a case (*Gamzo*); noticing the legislation's impact on third parties (*Rubinova*); adding further human rights to the equation (*Rubinova* – various implied rights inferred from human dignity, *Prosper* - the right to retain and instruct counsel); concluding that there has been a breach of constitutional authority (*CSN*); and determining that an unequal impact of legislation constitutes an unlawful discrimination (*Gosselin*).

The dynamic mind of poverty adjudication therefore does not require judges to articulate reasoning in economic terms.[118] What is required is to follow the format of these proposed analyses: an economic dynamic insight on poverty contributes to the material picture, and the judicial examination continues then with plain legal terminology.

Column 8 categorises the various impacts the dynamic observation of poverty has on the constitutional process. These temporal functions (*magnitude, nature, essence*, *agent* and *fluctuation*, defined and illustrated in Chapter One) allow us to understand the dynamics of poverty using internal legal terminology, and compare it to the impact of temporal thinking on other, non-poverty human rights cases.

Finally, it is worth noting how this study is different from standard Law and Economics scholarship. Coase, Calabresi and their followers offer the explanatory power of economics to study the social phenomenon called law. They sometimes seek policy recommendations based on the economic evaluation of their consequences.[119] In this dissertation the legal system is not the target of scientific observation. I did not

[118] Compare Posner (n 44) 293.
[119] See David Friedman, 'Law and Economics: What and Why' (1989) 9 Economic Affairs 25

try to describe the law using economic tools, but rather the opposite: describe a socio-economic phenomenon using legal tools. What this thesis tries to achieve is not for economic discourse to shape legal norms, but only to take into account factual characteristics that dynamic economics can provide, and incorporate them into legal discussion. The inspiration comes from economics. The language is legal.

7 Conclusion

Time

A judgment without time is incomplete. Time is so fundamental to the human experience and so well embedded in our social institutions, including the law,[1] that it is curious, even paradoxical, to observe pockets of timelessness, pockets of *achronism*, within the law.[2] After all, a legal case requires telling a story, and a story that is frozen in time cannot be a full one.

Constitutional adjudication involves a great deal of giving meaning to facts. Indeed, in the cases examined here, the judges often mentioned the need to see 'the full picture', to consider 'the circumstances of time and place'[3] and so on. The temporal perspective is a crucial element in establishing this factual basis. It frames and defines the narrative of a case. By applying a static approach, the Court creates a realm that is unclear, unbalanced and unrealistic. Since 'it is by his choice of the

[1] Based on Richard Epstein's reference to Immanuel Kant. Richard Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 Wash. U.L.Q. 667, 722.
[2] The term *achronism* is defined and discussed in ch 6 text to n 2.
[3] See McLachlin CJ in *Gosselin v Québec* [2002] 4 SCR 429 [37]; Barak CJ in HCJ 888/03 *Rubinova v Minister of Treasury*, PD 60(3) 464 [13].

material facts that the judge creates law',[4] the outcome of this distorted normative reality is distorted legal conclusions.

Poverty

The long-term poor whose stories this study examines are men and women who experience great hardships. Some of them are single parents struggling daily to support their children; others are disabled or elderly individuals who depend on welfare schemes to subsist. Many hold occupations that are routinely disdained by society, and earn an income on the margin of sufficiency. Weak and sometimes invisible, they do not typically experience the law as an instrument of empowerment. When their stories are abstracted from time, there is a qualitative, and not only a quantitative, characteristic that is neglected, because long-term poverty is distinct from short-term poverty not only in *magnitude* but also in *essence*. A static perspective disregards the 'chronic' in chronic poverty. No judgment should be premised upon such an unfounded representation of people's lives.

A person's life is more than a single snapshot. It is an ongoing course comprising numerous moments, memories and experiences. Though a judge can never grasp all or even most of them, there is a specific value in recognizing and defining them as a process with an internal logic and the explanatory power of a narrative. A dynamic perspective allows that. It identifies the poor as people who have a past, a future and a human story; as subjects and not objects. It is, in short, a more human approach.

[4] Arthur L Goodhart, 'Determining the Ratio Decidendi of a Case' (1930) 40 Yale L.J. 161, 169

It is also more just. From a social perspective there is a tremendous difference between transitory poverty and life-long poverty, reflected in the chances to escape one's inferior economic situation. The moral implications of poverty are therefore contingent on time. Only a time-based perspective can recognize them. A static perspective makes the judge blind to these aspects, and therefore to the wide socio-economic context of poverty. It hides social patterns and traps, ignoring crucial consequences of present-day economic order. Poverty is a phenomenon too complex to be imprisoned in a frozen timeless conception.

Law

A time-based approach to poverty therefore makes better law. This work has been compiled in the hope of educating members of the bench and the bar in the principles of poverty dynamics. It seeks to equip practitioners with practical tools to employ these principles in the legal discourse.

There is no social revolution hiding behind these lines. The balanced bottom line results of the proposed dynamic analyses (discussed in Chapter Six) attest to that. Moreover, the integration of law with dynamic economics was achieved without developing new constitutional instruments or new rights. Instead, the previous chapters resulted in a taxonomy of legal responses to the duration of poverty, all of which are based on ordinary mechanisms of constitutional analysis. And furthermore, a temporal perspective on poverty is shown to be feasible within a multitude of legal contexts examined in this study. The temporal lens was applicable to different rights, to different constitutional proceedings with different types of parties, to different remedies, and, obviously, under different jurisdictions.

Economist Erik Lindahl of the Stockholm School (Chapter Two), confronted with his own demon of *achronism*, strove to replace prevailing theories, by accounting for and measuring the change of state between two points of equilibrium. He criticised the former views for introducing 'dynamic problems into a static context'.[5] These words are a fitting description of human rights adjudication in poverty cases today.

Let us call for a Lindahl moment in poverty adjudication. Replace an outdated static approach with a dynamic one, and thereby enable judges – paraphrasing Lindahl's own words – to encounter dynamic problems through a dynamic context. Bilha Rubinova, Louise Gosselin, Mohamed T., the late Yisrael Twito, and millions of others, deserve this sensitivity and acknowledgment. Every single person's journey through time warrants being recognised and considered for its merits in the court of law.

> It is not only stink that rises
> from the sewage, but also poor words
> that adopt the nothing
> as a motto for life. Nurturing impoverishment
> with daily devotion,
> as a holy ritual, as a prayer.
>
> Words that hardly make ends meet
> and words that don't make ends meet
> words that think about the now and maybe of tomorrow but no
> words that can think in the long-term.
>
> *Roy Hassan*

Oxford, 2016.

[5] See ch 2 text to n 20.

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