

**RIGHTS, CONSTITUTIONS AND COURTS: A
COMPARATIVE STUDY OF RIGHT TO LIVELIHOOD IN
INDIA AND SOUTH AFRICA**

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in partial fulfillment of the requirements
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MASTER OF PHILOSOPHY

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DECLARATION

I declare that the dissertation entitled *Rights, Constitutions and Courts: A Comparative Study of Right to Livelihood in India and South Africa* submitted by me in partial fulfillment of the requirements for the award of the degree of **Master of Philosophy** of Jawaharlal Nehru University is an original work and has not been previously submitted for any other degree of this university or any other university.

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PREFACE

When you learn to become comfortable with uncertainty, infinite possibilities open up. This quote aptly explains my experience in these two years into the M. Phil program in CPS, JNU. My entry into the university was an unexpected turn in my life. It was accompanied by a latent fear as I knew that I would have to confront with multiple difficulties for being a day scholar. But, it also ushered a spark of hope that I'd be able to harness my interest under the guidance of new teachers. A comparative study between India and South Africa remained my foremost interest, along with constitutionalism. My M.A. days in Delhi University are from where I drew the inspiration to work on this topic. My fondness for a song called, *Ordinary Love*, was another reason for which I chose to look at South Africa. Undeniably, this work would have been impossible without the help and support of all the teachers at JNU and DU, friends, and classmates.

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LIST OF ABBREVIATIONS

BMC- Bombay Municipal Corporation

CSP- Congress Socialist Party

CODESA- The Convention for a Democratic South Africa

DPSP- Directive Principles of State Policy

GNU- Government of National Unity

ICESCR- International Covenant on Economic, Social and Cultural Rights

INC- Indian National Congress

MCD- Municipal Corporation of Delhi

MISA- Maintenance of Internal Security Act

ML- Muslim League

OAU- Organisation of African Unity

PAJA- Promotion of Administrative Justice Act

PIE- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

UDHR- United Nations Declaration of Human Rights

INTRODUCTION

This dissertation is a comparative study of constitutions of India and South Africa: two post-colonial countries. Both these countries have been undergoing a political change for building liberal constitutional democracies.¹ Primary focus of this research is to understand role of the constitution as a text and its interpretation by the courts to ensure socio - economic rights in this process of democracy building. This study attempts to show that the prevailing compelling circumstances at the time of constitution making (e.g. partition in case of India, and global pressures on South Africa) drove the constitution makers in both the countries to adopt distinct texts. Yet, the common thread which binds the two is the transformative character of the constitutions reflected in the rights discourse enshrined in the constitution itself. While, the South African Constitution remained a transformative text in itself, India harnessed the transformative capacities through putting the constitution to its use.

The concept of rights is placed in the forefront in this study to signify the primary theme which runs across this work. The attempt is essentially to track the original intention of the framers, which is not merely derived through personal dispositions of the leading political actors. Rather, is also affected by various other external factors (e.g. increasing global acceptance of the Human Rights discourse). This explanation is assisted with a brief historical account of the circumstances under which the heightened phase of democratic consolidation was experienced in both India and South Africa and the backdrop under which this political project operated. The constitution as a text put into force, also highlighted a set of challenges.

The concept of constitutions referred here not only as the text as- it- is, but it also refers to working of the Supreme Law, especially in case of evolution of the rights discourse. Though undoubtedly the South African constitution bears a more elaborate and expansive section on rights, India has witnessed the strengthening of *rights in practice*, while upholding the sanctity of

¹Robert Dahl argues that the liberal democratic model primarily rests on the inculcation of rights.

the text. It needs to be highlighted that the process of carving out constitutional principles, or the enumeration of the foundational defining characteristics in both India and South Africa, allowed the re- definition of rights. It also asserted the normative character of the text to be fundamental.

Rationale of the study

The following work titled, “*Rights, Constitutions, and Courts*” is essentially a comparative study of two post- colonial nations. The selection of India and South Africa for this work stems from the following justifications: *firstly*, it emerges from the need to problematize the post- colonial and to examine the distinctive processes of constitution making, especially concerning the Bill of Rights. The examination of this process and the study history is essentially a *political* study, *secondly*, to examine distinctive outcomes of the phenomena of judicialisation of politics, marked by the excessive intervention of the courts on social and economic rights, and *finally*, to ascertain the influence of the configuration of rights in the two respective constitutions and the working of the text. The central focus of this study remains on the interpretative exercises adopted and the working of the apex court in both India and South Africa, towards changing and furthering the concerns of socio economic rights. However, a brief reference in the case studies dealt by the lower courts can also be cited, more notably in Chapter 3.

It must be noted that no comparative study would be possible without aspects of convergence. The same applies to this study. India and South Africa have stood with times to gain the stature of being two successfully consolidated democratic systems.² The process of democracy building however was observed in two distinct scenarios. The converging aspect of both the countries remained that there emerged a shift in the discourse of rights, more so in the case of India, inclining towards the Human Rights discourse, in the light of giving greater primacy to social and economic rights.

² Heller, Patrick, Democratic Deepening in Brazil, India and South Africa: Towards a Comparative Framework, Seminar Paper, 24th- 26th March.

Background

India and South Africa had witnessed two discrete variants of foreign rule, which culminated in two distinct democratic nations. Both the countries continue to grapple with similar complications and difficulties stemming from the multifaceted socio-cultural diversities. While in South Africa, the system of state led racial bifurcation during the apartheid regime emerged as the major task to handle, under the constitutional project underway, it also felt the need to reconcile with other social parameters which associate with individual identity.

The Constitution recognised eleven official languages, placing English at the eighth position to highlight the primacy of other main languages in New South Africa, and also sought to promote other indigenous languages which are integral to the nation.³ Hence, the nation was firm about achieving a sovereign and democratic state based on the value of non- racism through the recognition of languages.⁴

India as well grappled with major complicated challenges to attain reconciliation, with the aim of achieving unity, while upholding the diverse character. One of the foremost challenges which had emerged as a major obstacle during the constitution- making process was that of Hindu-Muslim disunity. Thus, the framers developed a cautionary attitude in responding to the immediate challenges, while delegating the other major contentious concerns (example: linguistic diversity and state re-organisation) in the following years to come.

³ Section 6 of the South African Constitution bears an elaborate section of Languages as one of ‘the Founding Provisions’. While Section 6(1) enumerates the eleven official languages, Section 6(5) highlights the need to respect and promote other languages, also including Hindi and Gujarati and tribal languages such as the Khoi, Nama and San languages.

⁴ The above statement implies that through the Constitution bears the term “non racism”, it refrains from elaborately listing out the pertinent races. This highlights that the culmination of New South Africa also meant the subversion of race as a recognizable identity. This essentially marks a break from the apartheid regime.

Another marked characteristic of democracy building process in India and South Africa has been the need to unleash a logical break from the past to head towards a more substantive and value laden model of democracy. Both the nations expressed the need to address to the social and economic problems. While in South Africa, the installation of the Constitutional Court as the apex juridical body and the simultaneous replacement of parliamentary democracy with ‘Constitutional democracy’ became one of the foremost ways to achieve this endeavour. This could be compared with American constitutionalism which was apparently marked by a complete distrust in representative institutions.

Furthermore, the South African constitution culminated as a *bridge* to signify a break from the past and the larger motive to unleash social and economic transformation. The elaborate section on Bill of Rights (Chapter 2) engraved *over ambitious* set of legally justiciable rights, in consonance with the *second generation rights* laden in the Universal Declaration of Human Rights, 1948. It includes environmental rights⁵, livelihood rights such as right to housing⁶, education⁷, healthcare⁸; and rights of children⁹.

India, on the contrary, had continually recognised the need to achieve social and economic development. This not only required the presence of economic requisites, but also need to unleash a change in social practices deeply rooted in Indian society. This enabled the insertion of Article 17 in the Constitution which recognised the illegality of caste based discriminative practices. But, the elaborate process of deliberative prioritization¹⁰ which went into the making of the Indian constitution carved out a separate part in the constitution consisting of non-justiciable social and economic rights, which were meant to guide future political action.

⁵ Section 24, Constitution of the Republic of South Africa, 1996

⁶ Section 26, Ibid

⁷ Section 29, Ibid

⁸ Section 27: Right to healthcare, food, water and social security.

⁹ Section 28, Ibid

¹⁰ The term deliberative prioritization is used to describe the process of constitution making in India. The founding fathers indulged in elaborate deliberations over the issue of rights, and thus placed social and economic rights under Directive Principles of State Policy under Part IV, thereby prioritizing the immediate concern, which was largely the unity and stability of the country.

Thus, the Directive Principles of State Policy (Part IV) were delegated as “goals”, or “objectives” guiding the future political representatives to achieve these motives, which were deemed to be integral in nature. The original intention of the framers was to enable the fulfilment of these goals in the future when the economic and social conditions would be favourable, and thus cannot be regarded as a blind emulation of the Irish model of bifurcating rights.

Therefore, the pressing challenge and need to further social and economic rights in both India and South Africa was greatly influenced by the process of constitution making and the role of the political representatives. A study of the process, in the backdrop of the historical conditions under which democracy building unleashed, assists in understanding the discourse on rights which dominated the concerns of the founders of the constitution, and thereby trace the changes it has undergone.

The rise of judicial sovereignty to fulfil the goal of achieving social and economic transformation through a discourse on rights has emerged as a powerful and yet controversial phenomena in both these democracies. This is also seen in the light of the emergence of a new period, referred to as the *post –democracy* (Mehta: 2007) , marked by the declining role of representative institutions and the excessive intervention of the judiciary in policy making with respect to the enhancement of social and economic rights.

The use of creative interpretative techniques has been one of the prominent tools used by the Court in India, allowing an expansive interpretation of rights enumerated in the Constitution. Additionally, the post- Emergency period also witnessed the use of this subtle technique accompanied by a more overtly activist role played by the Court in India (Public Interest Litigation), through *pro- bono lawyering* (Bhuwania: 2014) , enabling the poor and disadvantaged to gain greater accessibility of the Courts, while also allowing the furtherance of Article 39A¹¹.

¹¹ Part IV, Article 39A: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. This Article was inserted into the Constitution in the year 1977.

On the contrary, the inception of the South African Constitution in the year 1996 signalled a clear call in favour of Court- led rights based litigation allowing the complete protection of human dignity and life of the citizens under the category of *non- derogable* rights¹². However, Section 35(2) (c)¹³ stands as one of the prominent examples which highlight the fault lines of adopting an overtly elaborate section on Bill of Rights.

While in South Africa, the connotation of human rights emerged as one of the incontestable and sacrosanct constitutional principles; India witnessed the use of creative interpretative exercises in the aftermath of the display of executive excessiveness¹⁴ , while channelling its [executive] positive intentions to unleash socio economic transition while placing the need of upholding the sanctity and *basic structure* of the text.

In India, the focus remains on the emergence of the Basic Structure Doctrine and the rise of *due process*, while South Africa also witnesses the rise of re- defining and expanding the rights terrain while expanding the scope around social and economic rights configured in the Constitution, which are not objectively defined. The Courts has thus developed a culture of justification while simultaneously infusing indigenous concepts such as *Ubuntu*, in an original discourse of rights which was largely surmised upon the international human rights.

However, this change we believe is led by the leading role played by the *court* in unleashing the normative endeavour of attaining substantive justice and exerting continual pressure on the representative branch to enumerate policies in this direction. Therefore the court, we assume, is the *agent of change*, which has enabled expansion and the furtherance of an enriched connotation of rights in both the nations. Therefore, the title suggests that the Court has played a leading role in altering the discourse on rights which had dominated the constitution making process, without tampering with its [constitution's] sanctity and supremacy.

¹²See Table of Non Derogable Rights, the Constitution of the Republic of South Africa, 1996

¹³ Section 35: Arrested, detained and accused persons (2) (c): to have a legal practioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; Ibid.

¹⁴ The term refers to the period of Emergency in India (1975- 1977).

Research Questions

- 1) How does the constitution making process have an impact over the configuration of rights in the Constitutions of India and South Africa?
- 2) Has India and South Africa witnessed a change in the rights discourse?
- 3) What has been the role of the Courts in India and South Africa in the evolution of rights discourse?
- 4) To what extent have India and South Africa worked towards the achievement of livelihood rights¹⁵?

The study essentially stems from the observable distinctiveness in the textual configuration of Bill of Rights in India and South Africa. While India is an example of a New Democracy which emerged during the second phase of democratization, in the aftermath of the two devastating wars; South Africa represents an endeavour of post- conflict reconstruction. (Tushnet and Khosla: 2016) Undoubtedly, the scenario marked by the heightened phase of democratization and democracy building during both the phases must have been different, which together stemmed two different connotations of rights- based priorities. However, the attempt to unravel the constitution making process leads us to the next puzzle which is marked by a phase of convergence, notably referred to as, the period of post- democracy.

¹⁵ Livelihood Rights pertains to the congregation of rights required to fulfil a dignified life. It includes adequate food, shelter, education, health, safe and hygienic environment.

The excessive role played by the Court was rather an intentional feature of New South Africa, which placed the Constitutional Court as the supreme body, and the Constitution as the Supreme text towards achieving the preliminary objective; human dignity, through cherishing and upholding the expansive Bill of Rights. In India however, the rise of the Court emerged in the aftermath of Emergency as a way to assert its independence, and to uphold the sanctity of the Constitution. This also was coupled with the Court recognising the need to keep a check on the representative institutions, while furthering the larger objective of social and economic transformation. The court therefore, assumed the role of unleashing this change, while placing greater primacy on Rule of Law. Therefore, whether the rise of judiciary in India led to a change in the established discourse on rights remains an unresolved question. This study precisely attempts to track the change.

South Africa remains a largely divided society, and dwells within the category of developing nation confronted with major pressing challenges, essentially stemming from economic constraints and political unwillingness in unleashing social and economic change. This has driven the Court to influence policy making, and devise interpretative techniques in the mission to interpret and channel the enumerated justiciable Bill of Rights, which bear no inherent objective meaning. This helps us deduce the fact that despite an expansive section on rights, the Court's duty to utilise its interpretative skills becomes necessary. However, whether this has also led to a change in the dominating rights discourse remains a question to examine.

But, what and how different has been the role of the courts in both the nations while achieving the endeavour of attaining substantive justice remains another formidable concern to this study. In this light, both the constitutions have well recognised and cherished the value of upholding human dignity, which is closely tied with livelihood rights. While a constant effort to enhance the directives lay in Part IV of the text remains a persistent complication in India, South Africa grapples with the problems emerging from the justiciability of social and economic rights.

Methodology

While the attempt here is to trace the interpretative exercises adopted by the Courts in India and South Africa, the derivation of this is assisted through describing the political context which gave rise to it, and thus does not qualify under the category of a legal jurisprudential or linguistic study. The study relies upon a political narrative of history, while contextually placing the circumstances which had led to the emergence of the two constitutions. In addition, the evolutionary nature of constitutions and the discourse on rights is also tracked with the assistance of the activist and creative role of the court.

Additionally, the case studies exclusively focus on the right to livelihood in India and South Africa as deductive examples which converge with the central argument of this study, which claims that the intervention of the court is necessarily marked by the use of interpretative skills in order to expand the concerns of rights. However, this study majorly uses primary and secondary literature to construct these arguments.

Chapterization

This comparative work is bifurcated into three chapters which connect together in the light of unravelling the discourse of rights and the change it has undergone, while assuming Court as the *agent of change*.

Chapter 1 attempts to briefly highlight the political history of the colonial and later an independent India on one hand, and apartheid and post- apartheid South Africa on the other. The subsequent sections deal with the influence of political history and the context in which the process of drafting their respective constitutions took place. We argue further that in India, the understanding of rights was derived through a thoroughly deliberative process which drove the founding fathers and mothers to prioritise the provisions associated with the civil rights and socio economic rights, while the South African discourse on rights was largely influenced by the international climate and the dominant discourse of the United Nations Declaration of Human Rights.

Chapter 2 primarily seeks to trace this change in the established discourse of rights which had dominated the constitution- making process. To help locate this change, we focus on the developments which have taken place in the rights discourse in the aftermath of the post- Emergency period in India, and post- 1996 South Africa. We would specifically focus on the role of the Apex Courts in altering the discourse. In India, the central focus remains on the assertion of Court to preserve the sanctity of the text through carving out the Basic Structure Doctrine, and simultaneously the emergence of due process leading to the expansive interpretation of Article 21 Right to Life in order to further the original intention of the framers for enabling social and economic progress. In South Africa, the inculcation of indigenous concept of *Ubuntu*, bearing the idea of community rights and the use of history in deriving justifications for unleashing social and economic change has been one of the formidable ways the court has attempted to further the concerns of social and economic rights.

Chapter 3 takes up two case studies from each of the two nations focusing on Right to Livelihood. The relevance of this chapter derives from its relation with the arguments dealt in the previous two chapters. While the South African constitution bears an enriched section guaranteeing the justiciability of livelihood rights, India has been attempting to carve out a sphere within the text to inculcate and advance the Directives laid in Part IV. South Africa also experiences a tussle between state incapacity/unwillingness and the humungous burden exerted upon the Constitutional Court. In this light, the chapter takes up two recent cases concerned with Right to Housing jurisprudence which has led the court to carve out un-enumerated rights. The final section in chapter highlights an overview analysis of the right to livelihood jurisprudence in both the countries.

CHAPTER ONE

HISTORY, CONSTITUTION MAKING AND RIGHTS DISCOURSE

IN INDIA AND SOUTH AFRICA

INTRODUCTION

In the recent times, both India and South Africa have emerged as New Democracies¹⁶ and have witnessed the furtherance of an evolving discourse on rights, with great emphasis on a broad and holistic connotation of basic human dignity¹⁷. While this discourse is largely in consonance with the international discourse on Human Rights, it is necessary to examine the textual configuration of rights in their respective constitutions and recollect the process of drafting of it. This would enable us to compare the discourse on rights which existed during the inception of the Supreme law¹⁸, and then highlight the change/ evolution in the understanding of rights developed by the activist and creative role led by the Apex Courts.

¹⁶ Borrowing Mao Zedong's concept, we use it to signify the birth of democratic systems which emerged in distinct historical, social, economic and political contexts and were to experience unique obstacles and experiences in the process of consolidating democracy and devising a constitution for themselves.

¹⁷ The term 'dignity' appears in the Preambles of both, Indian as well as, South African Constitution. However, we imply to say that there has been an evolution of what constitutes Human Dignity, in tune with the Human Rights discourse.

¹⁸ The term "Supreme Law" has been used widely in the context of South Africa interchangeably with the term "Constitution", indicating Constitutional Supremacy.

The constitution- making process in India and South Africa we argue, were distinct in many respects. It was influenced by various factors, and led to the adoption of distinctive constitutional texts, especially the sections on Bill of Rights. Firstly, both the constitutions had emerged in different eras¹⁹, but found commonality in ending the discrimination and injustices inflicted upon the masses through the previous regimes. Secondly, the explicit inclusion of the civil as well as socio economic rights in the Bill of Rights of the South African Constitution can be contrasted with the separate provisions for Fundamental Rights and non- justiciable Directive Principles of State Policy in India. Thirdly, the perpetual process of democratic consolidation can be identified in their common commitment to achieve *social transformation* which is, as defined by Roberto Gargarella as, “...the altering of structured inequalities and power relations in society that reduce the weight of morally irrelevant circumstances such as socio- economic status, gender, race, religion or social orientation”.(Pg.2) But this common goal continues to be influenced by the variations in the approach and understanding of rights during the inception of the constitution, in both the countries.

Though, there exists a notable distinction in the process of democracy building which unleashed in India and South Africa. The process of constitution making has been classified into three significant waves. Notably, the birth of the American and French Constitution in the late 18th century, premised upon the values on representative and limited government comes under the category of the first wave. This phase is deemed to be revolutionary as it led to the birth of modern liberal democracy. The second wave; also called the post- colonial wave of constitution drafting, signifies the emergence of decolonised, independent nations, like India, in the aftermath of the two devastating world wars. One notable feature of this phase is the lack of sovereignty in the drafting process. While, post- conflict reconstruction is an alternative word that describes the emergence of written constitutions in the aftermath of 1960s till the formation of the South African Constitution in the year 1996, which constitute the third wave. (Tushnet and Khosla: 2016)

¹⁹ The chapter deals with the Constitution of India, 1950 and the final South African Constitution drafted in the year 1996. We classify the eras as post- II World War and post- Cold war/globalization; respectively.

A study of constitution- making in India and South Africa therefore would also enable us to examine the differences in the two markedly distinct phases and the culmination of distinct Constitutions.

To unravel the discourse on rights in India and South Africa, we examine the political history and the process which went into the making of the two constitutions. This would include an analysis of the role of political representatives in the drafting process, and the common national sentiment regarding rights in the initial years of the post- Colonial and post- apartheid India and South Africa; respectively, and also the influence of the international discourse on democracy and rights.

Additionally, study purports to examine the rights discourse while considering that democratization has remained a prominent and perpetual process in both the nations, and the presence of the pre- requisite entity, namely; the state, made the process much more efficient. It must however be understood that the humungous tasks of nation building and constitution-making took place simultaneously and remains to be an ongoing process. (Linz and Stepan 17: 1996) We would first look into the Indian case, and then highlight the South African political experience.

1.1 CONSTITUTIONAL HISTORY OF INDIA

The East India Company entered India to largely further its economic interests and to establish a monopolistic trading position. However, in order to facilitate its easy penetration into the Indian landmass, and reap benefits through exploitation, the Company gradually took the shape of a bureaucratic- military establishment. (Maddison: 1971) Comparing with E.P Thompson's notion about rule of law which was used in its perverted form in 18th Century England, India witnessed the similar use of law as an instrument to destroy the customary economy and to reduce it to a mere provider of rich raw materials. However, the implications of colonialism in India were manifold, and not just economic, which created an urge among Indians to oust colonial rulers and attain sovereignty. The agenda of drafting a constitution for itself was one of the foremost demands put forward on several occasions.

The process of drafting a constitution in a post- colonial nation represents a character of ‘unstable constitutionalism’. This is seen in the intense disagreements and debates over the appropriateness of the institutional structure and the basic fundamental provisions in the constitution for a sovereign and fragile nation. (Tushnet and Khosla 5: 2015) However, debates and disagreements remain to be an essential characteristic of an enriched concept of deliberative democracy.

The Constituent Assembly of India which convened for the first time on 9th of December, 1946 was entrusted with the Herculean task of balancing the practical needs of the government in consonance with the shared ideals and aspirations of the newly independent nation. Clearly, the intention was not to bind posterity till the end of time, but to set up certain governing principles and guidelines to allow the state machinery to function in a favourable direction. The members of the Assembly realised that India would have to be stable enough to cope up with the changing times, and progress holistically i.e.; socially, economically, and politically. Thus, the constitution required maintaining a feasible balance between stability and dynamism.

The Constitution of India was to be a comprehensive document, and not merely a text enumerating the structures and functions of the different organs of the government. Thus, like in the case of South Africa, the Constitution of India evolved to be a substantive document enumerating normative values (Bhargava: 2008), while the procedural elements were also laid elaborately in the world’s lengthiest written constitution. The discourse on rights in India also materialised and enriched nearly five decades after the inception of the Constitution. This must be seen in the light of the immediate priorities and concerns of the framers during the aftermath of independence which had led them to delegate certain provisions, while upholding a few. The process of constitution- making in India marks the features of ‘deliberative- prioritization’. The sections to follow would elaborate the process of constitution making. The following section examines the circumstances under which India attained independence and unleashed the process of constitution- making.

The end of the Second World War triggered the consciousness of the colonies across the world, and eventually accelerated the process of decolonisation in Asia, Africa and Latin America. This was centred upon the need for establishing sovereignty as a necessary pre-requisite to enable the process of nation-building. While, the post-colonial wave of constitution drafting in the aftermath of the Second World War was signified by limited sovereignty, and the intervention of colonial powers in the drafting process; India remains an exceptional case. Though the process of drafting the constitution started before independence, India was able to eliminate all procedural constraints and exercise greater sovereignty. Undeniably, the Constituent Assembly was elected much according to the Cabinet Mission Plan, but, it did not signify a direct control of the British, like in the case of Sri Lanka. (Hanna Lerner in Khosla, Madhav, Mehta 106- 120: 2016)

The Constituent Assembly of India was not installed through a thoroughly democratic process, since not all members were elected through a uniform procedure. The assembly sought to promote the participation of the representatives from the princely states and included them by nomination. Despite the frugal size of the electorate, the process of decision making by the Assembly was palpably democratic and deliberative in nature.

The prolonged freedom struggle in India had found its momentous peak on several occasions, with the demand for independence being a common agenda. Mahatma Gandhi played a pivotal role in metamorphosing the national struggle against colonialism into a mass national movement. Notably, the Non-Cooperation (1920-22) and Civil Disobedience movements (1930-1934) appealed to the masses across all socio economic sections in India for the need to attain the goal of *Swaraj*; which is a broad and spiritual concept of which political independence is only a facet. It also contained a notion of social justice, attainable only through a moral and individual transformation. Therefore, the indigeneity and normativity of the notion of *Swaraj* is what essentially helped consolidate agonies across the colonial India, against the British rule.

One of the main reasons for the confrontation against the colonial rulers was the lack of adequate political representation of Indians, in the guise of a democratic and semi- democratic political structure. According to Bipan Chandra, “[*The Indian National Movement*] did not completely reject [constitutional] space, as such rejection in democratic societies entail heavy costs in terms of hegemonic influence and often leads to isolation but entered it and used it effectively in combination with non- constitutional struggle to overthrow the existing structure”.(Pg.1) Therefore like the National Movement, the task of constitution making was also well guiding by a constitutional framework which governed British India, but the complication arose in asserting and upholding the sovereignty and integrity of a nation immensely diverse and partitioned along communal lines. Adequate representation, participation, and non- discrimination were essential to nurture the process of nation- building while upholding positive democratic ideals.

“*One of the primary qualifications for a candidate, it is certain, was a record of active work in the Independence Movement.*” (Austin 14: 2015) In the concrete sense, the Constitution of India was largely a brainchild of the leaders of the Indian National Congress. From the freedom struggle until the initiation of the Constituent Assembly, leaders from the INC had played a dominant role in envisioning a model for independent India. “It has been argued that though a fourth of the nation could not be a part of the Assembly deliberations, the members were aware of the peculiarities of the nation and its diverse needs. “*The Indian Constitution expresses the will of many rather than the needs of a few*”. (Ibid 11-16: 2015) The following sub- section highlights a brief political history against the backdrop of which the Indian Constitution was drafted.

A study of the constitutional history of India highlights that communal disharmony and distrust amongst the Muslim political leadership against the INC, continued to act as a major obstacle in the way of constitution- making. The Motilal Nehru Report, 1928 provided a Constitutional blueprint for an independent India. It was an effort to strengthen and unify India into a single nation, and hence eliminated the provision allowing separate electorate to Muslims. It stressed on the need for Indians to structure a constitution for themselves, emphatically proclaiming the demand for granting dominion status. Another prominent feature of the Report was also a comprehensive section on fundamental rights²⁰, which later went on to become the central bone of contention between the INC and the British Government.

However, a year later, Jinnah attempted to further a parallel notion of fundamental rights, exclusively in the interests of the Muslims, as an outright disapproval of the Nehru Report. The Muslim League saw the Nehru Report as a tactic to subvert the interests of the minorities. In response to this, Jinnah's 14 Point Program outlined a set of basic principles and rights exclusively catering to the interests of Muslims. The inability to arrive at a compromise among the two political factions penetrated the evils of communal factionalism into the discourse of rights in India during that period.

The decade before 1947 saw a series of mixed reactions over the form, extent, and nature of fundamental rights suitable for sovereign India. The 1931 Karachi resolution saw all members of the Congress unanimously in favour of a written guarantee of fundamental rights. It called for free and compulsory primary education, better work conditions, protection of minorities; to name a few²¹. Therefore, the charged atmosphere after the end of the civil disobedience movement had led the party to enumerate a very ambitious set of *substantive* rights.

²⁰ The Nehru Report consisted of 19 clauses, of which fundamental rights were a prominent feature.

²¹ Note: The Karachi Resolution, 1931, had seen the prominent role of M.N Roy, the leading socialist leader of India. Therefore, the enumeration of socio economic rights in the document echoed socialist resolutions to the problems of inequality and injustice during the British Regime.

Later, the Joint Select Committee of the British Parliament on the Government of India Bill of 1934 went against the demand for a constitutional guarantee of fundamental rights. But, the vociferous condemnation against this White Paper in the year 1934 had reached out as a clear signal to the British that the Indian National Congress was firm about drafting a constitution of its own with a prior vision of an independent India

The need for a marked break from the British regime and the assertion for India's self-determination were signified on many occasions. *'The only satisfactory alternative to the White Paper is a constitution drawn up by the Constituent Assembly elected on the basis of adult franchise or as near it as possible, with the power, if necessary, to the important minorities to have their representatives elected exclusively by the electors belonging to such minorities'*. (As cited in, Johari 2: 1995) While retaining the sovereignty of the parliament, India decided to formulate a *constituent law* which was to act as a binding force.

The significance of the Patna session of the Congress Working Committee (1934) lay in proclaiming the first ever demand in favour of a Constituent Assembly. (Chaube 28: 2000) It also marked the formation of the Congress Socialist Party (CSP) which advocated practical reparative solutions to the economic and social inequality prevalent in India, as opposed to the impractical romantic vision advocated by Gandhi.

Later, unfortunately, the Government of India Act, 1935 contained a very limited space for fundamental rights. The Indian National Congress however continued its efforts in the form of a vehement protest against the 1935 Act during the Lucknow congress session: *'no constitution imposed by outside authority and no constitution which curtails the sovereignty of the people of India and does not recognize their right to shape and control fully their economic and political future can be accepted'*. (Jha 254: 2012)

The constitutional reforms led by the British masked their consistent attempts to widen Hindu-Muslim schisms for its own interests (Coupland 69: 1945). Therefore, the rights discourse in India during the independence movement could never emerge as a unified concept which could possibly have acted as a guide for India's Constituent Assembly. All efforts were continuously interrupted by the parallel interests of the Muslims. The Muslim League (ML) championed the rights of the Muslims, pitted against the rights of the Hindus. The insecurity and fear among the

Muslim leaders of being trampled and subjugated within sovereign India headed by the Congress, continued to loom large. All efforts of the Congress to assure its position and its religious neutrality in favour of a unified entity remained futile. However, the root of the problem lied in the deliberate tactic put forward by the British, laden in its policy of divide and rule.²²

However, the end of the Second World War led to a change in the political leadership in Britain. Under the new leadership of Prime Minister Clement Atlee from the Labour Party Government sent out the signal to further the self- determination and grant political sovereignty to India was displayed. Additionally, this political will to accord independence to India emerged as a result of the economic pressures exerted on Britain after the devastating war, due to which the retention and administration of its colonies became an additional burden.

The Cabinet Mission Plan, 1946 was an effort to reach at a political consensus and to arrive at a permanent solution to the political crisis among the rival factions. The British policy of divide and rule became more of a political conflict, which was clearly evident during the attempts by the Cabinet Mission which tried to appease both the INC and the ML under a unified platform. Despite consistent efforts by the Congress to prove its inclusivity, it failed to convince the ML. Also, the Cripps proposal deeply hurt the sentiments of nationalists in India as it bred the idea of partition along communal lines. It also subdued the spirit of establishing an Indian Union, along with laying the foundation of a Constituent Assembly. Fortunately, the Indian National Congress took over the onus of constituting the Interim Government despite the absence of the ML. The Indian Independence Act, 1947 was finally underway, which eventually led to the partition of India.

²² Note: The separate electorate system In India was introduced through the Indian Councils Act in the year 1909. Later, the Minto- Morley Reform in the year 1919 further allowed communal representation.

This historical backdrop explains the immediate concerns and tensions which led to a discourse on rights premised and restricted upon the connotation of equal civil and political rights in the Indian Union. It must be recalled that the partition of India essentially occurred due to the absence of political consensus and an egalitarian perspective of rights. The immediate concerns and priority of its founding fathers was to inculcate a connotation of rights which could erase the tendency of divisiveness and factionalism in the infant and delicate Indian Union and uphold the sovereignty and integrity of the nation. An added concern was to eliminate the social evils associated with the caste system. Therefore, there were multiple political, social and economic issues which the framers were consigned to take cognizance of all these factors. The following section would elaborate the Constitution making process in India, with particular focus on the discourse of rights.

1.2 CONSTITUTION MAKING PROCESS IN INDIA AND EVOLUTION OF THE RIGHTS DISCOURSE

*‘A time comes when we have to rise above party and think of the nation, think sometimes of even the world at large of which our nation is a great part’.*²³

A constitution must attempt to inculcate the best of the past traditions and also be able to provide a considered response to the needs of the present. The framers of the Indian Constitution adopted a far-sighted approach in giving primacy to the value of resilience, while acknowledging the needs of the future. (Khanna 3: 1981) The members of the Assembly consisted of the most politically active and popular public figures that were conscious of the gravity of the task entrusted to them, and thus sidelined petty partisan concerns in the greater interest of the nation.

²³ While addressing the commemoration of the Objective’s Resolution, Pt. Jawaharlal Nehru addressed the Assembly calling in favor of working together, while sidelining petty partisan concerns.

The representatives of the newly independent India were well aware of the nature of impediments which factionalism could possibly impose in the process of drafting the constituent law. The primary concerns and objectives stemmed from the consensual belief that the sovereignty and integrity of the nation were necessary pre- requisites to unleash the process of nation building. The members of the Assembly largely consisted of the leaders from the Indian National Congress, though hailing from diverse backgrounds and experiences. The plurality in the composition of the Assembly represented the very essence of the nation it was about to shape. It was necessary to ensure the democratic character of the Constituent Assembly in order to gather trust and legitimacy. The 292 seats of the Provincial Legislative Assembly were categorised on the basis of the three main communities, namely; the Sikhs, Muslims and General. Though, only 28.5% could vote in the Provincial Legislative Assembly, and the representative character of the Assembly was questionable. But, the thoroughly democratic character based on rigorous deliberation compensated for it.

One of the primary tasks taken up by the Assembly was establishing a Sub- Committee on Fundamental Rights in the months of July and August, 1946. Separate drafts were prepared by B.N Rau, Dr. B.R. Ambedkar and Harnam Singh, apart from referring to various foreign constitutions. (Austin 79: 2015) But it was a repeated challenge to determine what constitutes the basic minimum. Each fundamental right was debated and further ratified by the Minorities Rights Sub- Committee and the Advisory Committee which had already led to 150 amendments in the list adopted. It must be noted that constitution- making in India was bifurcated into a set of expert committees which looked into every matter with utmost care.²⁴

²⁴ Note: The prominent committees were: Rules, Steering, Advisory, Drafting, Union Subjects, Union Constitution, Provincial Committees, and States. Most of the committees were headed by prominent leaders such as Jawaharlal Nehru, Dr. Ambedkar, Dr. Rajendra Prasad and Sardar Vallabhbhai Patel. See, Austin (2015) [Rev. ed.].

“Sir, when I moved my motion for the consideration of this Report I did not anticipate any long debate on this question.”²⁵

The foundational guiding principles of the Constitution were stated in the Objective’s Resolution which was adopted on 22nd of January, 1947, and which prominently reflects in the preamble of the present Constitution. The authority and enforceability of the Resolution was derived from its character. It was a pledge, a solemn promise made by the Assembly, to weave a foundational text premised upon the values stated in it. A deviation or failure from achieving this task would be an act of deceiving its own people, which is nothing but, a sin. Therefore, the Objective’s Resolution bound the founding fathers and mothers to adhere to their duty. The need for enabling social, economic and political justice was well established, however, the pedestal upon which this could be realised was the strength and integrity of the nation. It must be understood that the welfare duties of the state were accepted as goals and directives to be achieved politically in the years. However, this decision was achieved after an elaborate constitutional wrangle among the members.

Christiano argues that along with equal participation, the process must have the ability to collectively resolve moral issues, as well as the problems of distributing scarce resources in society. (Christiano: 1996) The paucity of funds with the nation and the gross economic and social inequalities constrained the framers to guarantee the justiciability of *positive rights*. The *cautionary* approach of our founding fathers drove them to carve out a separate part (Part IV) in the Constitution. Directive Principles of State Policy as the name indicates, are “directives”, “goals”, “objectives” which are meant to guide state’s action in promoting the socio economic betterment of its citizens. During the constituent assembly debates, there were intense discussions over the deletion of term ‘directives’, and the need to substitute it with ‘fundamental’. *“I submit that if you introduce pious principles without making them justiciable, it will be something like resolutions made on New Year's day which are broken on the 2nd of January.”*²⁶

²⁵ Sardar Patel, CAD, Vol.iii, Tuesday, 29th April, 1947

²⁶ Naziruddin Ahmed, CAD, Vol7, p9, 19th November, 1948.

However, the prominence of these directives stemmed from the wide tentacles through which these goals could be achieved in the future. Clarifying the use of the term ‘state’ in Part IV of the Constitution, B.R Ambedkar clearly stated that the state is used in two senses; collective and distributive. The state, he stressed, also comprised of the village panchayats, or other local bodies, without conferring a title to the state²⁷. He believed that the onus rests on the future legislature and executive to enforce the intention of the framers, which the term *directives* clearly represent. Thus, drawing on the Irish experience, the Indian Constitution distinguished between enforceable fundamental rights, which were to be protected from incursions by the state, and non-enforceable directive principles, which were goals and duties of the state and included social and cultural rights highlighted in the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Social, Economic and Cultural Rights. (Shaylashri Shankar, Mehta in Gauri V., D.M Brinks 148: 2008)

According to Elster, constituent assemblies deliberative democracy may involve in two ways: firstly, as a part of the drafting process and secondly, in promoting deliberative democracy as one of the goals of the framers. (Elster in Bohman J. and William Rehg: 1997) In India, deliberation emerged to be an integral method of arriving at a consensus over the contents and limits of rights. Despite the fact that the Fundamental Rights Sub- Committee’s interim report was ratified thoroughly, the Assembly found it necessary to resolve the disagreements and focus on the minute details associated with the contents and phraseology of the rights in the Constitution.

²⁷ Note: Article 12 of the Indian Constitution states, In this Part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

While there were a few (such as Pandit Kunzru, R.K Sidhwa), in support of the inculcation of economic and social rights within the ambit justiciable rights out of the fear that several fundamental rights could also be reduced to mere “*declaratory rights*”²⁸ there were others who prioritized the immediate concerns in the light of the complex challenges which India was to confront in the initial years of independence. There were others members (eg. Somnath Lahiri), displaying a sense of uneasiness over the containment of each right with every *proviso* grave emergency²⁹ being the main conditional clause and the measly inclusion of rights in the text.

The Deliberative- Prioritization approach which went into the making of the Constitution can be highlighted through the rigorous debates over the issue of justiciable and non- justiciable rights in India. Habermas places deliberative democracy within the category of formal deliberation and which is backed by the discourse theory. He believes that deliberation is characterised as a form of *communicative rationality*, which was the defining feature of the Indian constitution making process. (Habermas: 1981) While the Objectives Resolution had outlined the intrinsic values of the nation, it did not specify the process through which these could be attained. Therefore, the drafting process evolved to be democratic and deliberative in nature.

Some of the central characteristics of a deliberative process must be; un- coerced, other-regarding, reasoned, inclusive and equal debate. (Chappell 7: 2012) The process of deliberation can rightfully exist through guaranteeing minimum equality among the members and if it includes all substantively elected citizens. The Constituent Assembly of India was an open floor, where each member had the authority to interject, allowing equality in the house. Also, the bifurcation of expert committees headed by members of diverse standpoints and backgrounds enabled a democratic process.

²⁸ Note: Mark Tushnet uses the term “declaratory” as rhetoric of Directive Principles, since they lack protection and are not justiciable in nature.

²⁹ Note: Article 354, 356, and 360 are Emergency Provisions in the Constitution which lead to the suspension of fundamental rights, and Habeas Corpus in the light of a severe emergency situation in the country.

John Rawls conceived rights to be essential for the human interaction and coexistence to be possible in normal conditions. He highlighted that the problem essentially stems from the scarcity of resources and the lack of altruism in the nature of human being. As a consequence, India adopted a liberal connotation of rights, largely influenced by the United States' cherishing the value of civil and political rights. However, the task of the state in independent India was to enable features of a welfare state, which was absent during the colonial rule. However, in the immediate aftermath of independence, India faced the massive difficulty of gross economic and social inequality. It must however be realised that socialist inclinations were well found in the Constituent Assembly of India.

Therefore, despite the delegation of socio economic rights to the future political representatives, it did not pertain that the improvement of the social and economic life of the people of this country was not of prominent concern. While, there was an explicit bifurcation between justiciable and non- justiciable rights in India, the discourse on rights represented prudence among the framers. The content of directives inculcated a clear vision "*to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life*"³⁰. It aimed to promote equal pay for equal work³¹, equal justice and free legal aid³², raising the level of nutrition, standards of living of its people, and the improvement of public health³³, to name a few. Therefore, since India was not in a sound economic position to guarantee the justiciability of these rights, the framers prioritized immediate concerns. It also led the founding fathers to eliminate the due process clause for the protection of individual liberty. (Mate 220: 2010)

³⁰ Part IV 38 [1], Constitution of India

³¹ Article 39(d) , Constitution of India

³² Article 39 (A), Constitution of India

³³ Article 47, Constitution of India

It must be noted, that Article 17 of the Indian Constitution emerged as an integral fundamental right in altering the practice of caste based discrimination. The Clause 6³⁴ of the Objectives Resolution was marginally fulfilled through it, constitutionally enabling social transformation. Deriving lessons from the past experiences, Articles 25 to 28 sought to provide the right to exercise religious freedom. But, the cautionary attitude was displayed in placing Articles 44 and 46 as non-justiciable rights in securing the rights of religious and caste minorities through policy formulations. Therefore the discourse of rights in India secured a ground for civil and political rights, while delegating the concerns of social and in the economic rights as integral goals to be fulfilled in the future

1.3 HISTORY AND CONSTITUTION MAKING PROCESS: THE SOUTH AFRICAN CASE

“The time for the healing of the wounds has come. The moment to bridge the chasms that divide us has come. The time to build is upon us. We have, at last, achieved our political emancipation. We pledge ourselves to liberate all our people from the continuing bondage of poverty, deprivation, suffering, gender and other discrimination.”³⁵

³⁴ Clause 6 states; Wherein adequate safeguard shall be provided for minorities, backward and tribal areas and depressed and other backward classes;

³⁵ Inaugural Speech by Mandela delivered on 10/5/1994, in Pretoria, http://www.africa.upenn.edu/Articles_Gen/Inaugural_Speech_17984.html, Accessed on 26th February, 2017.

The drafting of the 1994 Interim Constitution emerged as the ‘Birth Certificate’ (Ebrahim: 2011) signifying the creation of a new South Africa based on the ideals of democracy, social justice and fundamental human rights.³⁶ The formation of the Government of National Unity (GNU) eliminated the fear that the emergence of a new political class would attempt to subvert their past oppressors. Instead, the Constitution making process in South Africa was initiated by the first non- racial multi- party legislature. (Hopper: 2008)

This sudden commitment towards the ideals of democracy and human rights aroused a lot of scepticism. Why and how the white- dominated elite allowed a peaceful transition and consolidation of democracy with a common commitment towards substantive constitutionalism? (Cockrell: 1997) With an attempt to unravel this puzzle, this section attempts to first highlight a brief history of the apartheid regime which dominated South Africa from the year 1948 till late 20th century. Additionally, we elaborate the trajectory of events which exerted continual pressures and enabled the entrenchment of the values of democracy and constitutionalism in the country, and finally we highlight the Constitution making process which marked the emergence of the Constitution of the Republic of South Africa, 1996.

A) THE APARTHEID REGIME AND AFTER: A BRIEF ACCOUNT OF THE POLITICAL HISTORY OF SOUTH AFRICA.

The institutionalised system of racial discrimination operated under the white- dominated National Party Government; however its roots can be traced in the mid 17th century when the Dutch settlers, the East India Company fortified at Table Bay with the aim to forge connectivity with the Indian Ocean to enable expansion of trade. (Worden: 1998). This simultaneously led to the affliction of immense atrocities over the indigenous pastoralists belonging to the Khoekhoe, Xhosa and San tribes, by denying them land for grazing, water resources and in some cases also being robbed of their cattle by settler commandos. (Mhlauli, Salani, Mokotedi: 2015)

³⁶ Preamble, The Constitution of the Republic of South Africa, 1996.

Apart from this, slave trade (especially from the regions of Indonesia and Malaysia) which lasted from 1658 and 1834 (Worden: 1985) became a contributing factor in developing an overlapping relation between race and class, which continued to dominate the social structure in the Cape as something to be ‘natural and god- given’ (Elphick and Giliomee 1989: 544 as cited in Mhlauli, Salani, Mokotedi: 2015). In the 19th century, the colony also witnessed a significant influx of indentured labour from India. In 1910, South Africa emerged as a unified state as an outcome of the Anglo- Boer War (1899- 1902) after the British conquest of Transvaal and Orange Free State. (Worden 30: 2012) Therefore, South Africa came to be dominated by two polities of European settlers, the Afrikaners who were Dutch descendants and the English- speaking British.

The apartheid regime (1948- 1991) indicated a transition from colonialism to a system of structured racial segregation (Worden: 2012). The *modus operandi* of the apartheid lied in the application of the ‘pseudo social Darwinist approach’³⁷ by the European colonizers, a common tactic which was employed in all the other colonies in Asia and Africa. However, in South Africa it developed into a more systematic and legalized discrimination influencing all the dimensions namely; economic, social and political structure of the whole country in a more pervasive way than elsewhere. (Ibid: 2012) It was this system of racial classification which provided the institutional underpinning for apartheid, since all aspects of the private and public life of the citizens were influenced by the racial group to which he or she had been assigned.³⁸ Social inequalities were deeply embedded and reflected in all spheres of social life as a result of systematic exclusion of blacks, minorities, and women under colonialism and apartheid. (Badat: 2011) It operated as a multi- faceted system of oppression, segregation and dispossession. (Lowstedt 5:2014)

³⁷ N. Worden, *The Making of South Africa: Conquest, Apartheid, Democracy*

³⁸ Note: I am referring to the tri-cameral parliamentary system which allowed separate representation and voting for “coloured” and “blacks” people(s). Act 110, the Republic of South African Constitution, 1983. Prohibition on Mixed Marriages Act 55 of 1949 and Immorality Amendment Act, 1957 are examples of the entrenchment of racial discrimination into the private domain of the people.

The beginning of the racist apartheid regime under the National Party government, after the Afrikaner Nationalists won by a thin margin in the general elections in 1948, was clearly intimidated to the Blacks and other minorities through the passage of the notorious Groups Area Act, 1950³⁹ and Population Registration Act, 1950⁴⁰. The Suppression of Communism Act (1950) banned protests without outright ban of the trade unions. Other such acts were; the Pass Laws Act (1952)⁴¹, the Separate Amenities Act (1953)⁴², the Bantu Education Act (1953)⁴³ to name a few.

The regime clearly attempted to carve out exclusive white spaces and restricted the process of urbanization for their own benefits, while severely affecting the traditionally rooted occupational structure. However, the reinforcement of the apartheid government was in stark contrast with the international scenario, as during the same period i.e. in the aftermath of the Second World War, the process of decolonization and democratization had accelerated in the colonies of Asia, Africa and Latin America. In consonance with the international climate, the African National Congress, the South African Indian Congress, the South African Coloured People's Congress, and other liberal forces united in the year 1955 and consolidated their efforts to draft the Freedom Charter which proclaimed a vociferous condemnation against this systematic discrimination and called out in favour of the installation of a just authority, premised upon the will of the people. The Charter also signified the emerging discourse on human rights in South Africa. The objective of the Charter stated:

...that our country will never be prosperous and free until all our lives in brotherhood, enjoying equal rights and opportunities; that only a democratic state based on the will of the people can secure to all their birthright without distinction of colour, race, sex or belief; (Preamble: 1955)

³⁹ Note: The Groups Area Act of 1950 was an attempt to debar non- whites from settling in the developed urbanized spaces. It carved out separate residential and business localities on the basis of race.

⁴⁰ People in South Africa were issued photo identity cards, and were classified on the basis of race, namely, whites, or coloured. Further, natives were classified on the basis of the ethnic group or tribes belonged to.

⁴¹ The Pass Laws Act issued internal passports to specifically the Blacks. The law made carrying the passbook mandatory whenever travelling beyond the "homelands" they were legally associated with.

⁴² The law segregated public amenities for the Whites, Coloured and Blacks. Parks, benches, swimming pools and several other recreational spaces were officially reserved for the Whites.

⁴³ The act officially vested control under the Government of Union of South Africa over Bantu (meaning: native) higher education, and led to the establishment of Bantu schools.

However, simultaneously the roots of the discriminative regime were being strengthened, which was apparent in The Tomlinson Report, 1956. It stated that:

The policy of separate development is the only means by which the Europeans can ensure their future unfettered existence, by which increasing race tensions and clashes can be avoided, and by means of which the Europeans will be able to meet their responsibilities as guardians of the Bantu population. The Europeans should, therefore, be willing to take necessary action and to make the sacrifices required to put the policies into effect.⁴⁴

The Soweto uprising in 1972 emerged as one of prominent signals against the Apartheid regime, specifically against the imposition of the system of Bantu Education, which derived its legality through a very limited vision of African identity. This movement also characterised the ‘growing awareness of liberating ideas of Marxism- Leninism and a search for correct politics of social revolution’⁴⁵. It managed to gather widespread international attention. One of the accompanying reasons was the denial of the basic political right to avail South African citizenship through the passage of the Bantu Homelands Citizenship Act, 1970 which carved out a political space, referred to as the *Bantustans*, which compelled indigenous Africans to officially identify themselves as citizens of the bogus and forcefully constructed ethnic land which each supposedly belonged and rooted to.

According to Thompson (1990), the National party government applied apartheid in a plethora of laws and executive actions. He believes that there were primarily four major ideas which allowed the entrenchment of apartheid: the first was in developing a systematic bifurcation of the racial composition in South Africa namely; the whites, coloured, Indians and the Blacks, with the assertive assumption that each group cherished and practiced their unique inherited culture, independently. The second was the logic of racial superiority which advanced their supreme authority to govern over the territory; thirdly, this system of governance was to be based on the logic of priority of interests of the whites over the blacks.

⁴⁴ The Tomlinson report, page 106

⁴⁵ The Way Forward from Soweto’, Political Report adopted by the Plenary Session of the Central Committee of the South African Communist Party, April 1977, African Communist, no. 70, 1977.

Thus, the government was not obliged to provide equal facilities for the subordinate races and finally, the English speaking components comprised of a single most populous white nation, while relegating the status of other racial minorities to several district nations.

The mechanism of apartheid permeated across the constitutional reforms implemented from the 1980s onwards. South Africa was now heading towards the establishment of 'Racial Democracy', with providing space for electoral participation, while retaining the discriminative totalitarian regime. This was seen in the light of the persistence of unintended consequences for democratic consolidation, while the prospects of heading towards peaceful democratic transition seemed bleak. The Act 110 of the 1983 Constitution was the first attempt, though a failed one, to unleash constitutional reforms. The act established the tri-cameral parliamentary system, which continued to carry the stench of racism. This triggered widespread protests and in reaction a series of emergency were imposed in the effect of martial law in the year 1985 in 36 magisterial districts.⁴⁶

Apparently from the 1960s onwards, the apartheid government was repeatedly being charged with a concatenation of human rights violations and this exerted continual international pressure to end the racial policies. Article 55 and 56 of the Charter of UN placed the principle of equal rights and self- determination on the pedestal and proclaimed racism as an unacceptable form of discrimination. This was accompanied with strings of diplomatic sanctions imposed upon it. This emerged as a major contribution factor in determining the future path towards which South Africa was favourably heading.

Additionally, the reconciliation between the two political factions was premised upon the inevitable need to recognise human dignity in consonance with the language of human rights and democracy. In the following section, we attempt to describe the process which led to the formation of the final constitution, which came into force in the year 1996. We further argue that this process essentially involved reconciliation and necessary compromise between the rival political representatives.

⁴⁶ Source: <http://overcomingapartheid.msu.edu/multimedia.php?id=65-259-16>

B) AN OVERVIEW OF THE CONSTITUTION MAKING PROCESS IN SOUTH AFRICA

A close look at the preamble of the 1996 Constitution highlights its most striking feature and its very foundation. It is the role of memory, which acted as a constant reminder to the constitution framers for an inexorable need to display ethical statesmanship in the pursuit of installing a substantial constitution. (Plessis 1332: 2015) The foundational principles and values which were to govern this *just order* sprung from the horrors of apartheid and the need to brush off its miasma. Therefore, the drafters of the Constitution of South Africa had realized that it was necessary to establish the truth about the past in order to enable reconciliation and to prevent the repetition of past injustices.

The 1980s witnessed debates centred over the dilemma to incorporate the Bill of Rights in the future constitution. The criticism emerged from two distinct standpoints. The Conservative wing comprising of the white dominated National Party condemned the incorporation of individual rights as they claimed it to be against the spirit of *Afrikenom* and were in favour of entrusting the state with the task to enhance the rights. They argued that the language of human rights would largely be incompatible to the intrinsic cultural and religious tradition. This argument was backed by the guarantee that South Africa was already governed by a connotation of rights which was derived largely through the Roman common law tradition. On the other hand, the radical wing was largely influenced by the Marxists and displayed incredulity in the constitutional embeddedness of the individual rights in a country structured upon gross social and economic inequalities. The attempts to thrust the human rights tradition in South Africa was seen as an insufficient safeguard against racial discrimination. (Cockrell 518: 1997).

But democratization, and the necessary inculcation of rights was seen as the only feasible solution to replace the previous regime. Jon Pevehouse (2002) argues that the crucial role of international organisations and the influence of neighbouring countries as a catalyst in enabling the process of democratization. South Africa being one of the founding members was bound to succumb to the irritants imposed upon it in the form of diplomatic sanctions, after repeated failed attempts to resolve the issue through peaceful dialogue. On 6th of November, 1962, the UN General Assembly adopted resolution 1761(XVII) requesting all the member states to boycott

diplomatic relations with South Africa, imposing trade embargo, refusing landing and passage facilities to all aircrafts belonging to the Government of South Africa and in the year 1968, the GA called out to all members to completely sever relations in the sphere of culture, sports, education and other exchanges.⁴⁷

Additionally, in 1966, it labelled apartheid as a crime against humanity (resolution 2202 A (XXI) of 16 December 1966) and in 1984 the Security Council endorsed this determination (resolution 556 (1984) of 23 October 1984). The Apartheid Convention recognised the regime as an outright criminal offence.⁴⁸ In the year 1963, the Organisation of African Unity (OAU) which stood for the end of colonialism and to enable African unity through fostering relations in all spheres, collaborated its efforts with the liberation movements in guerrilla warfare against the all- white government. This exerted enormous economic pressures on South Africa which was already handicapped.

The international reputation of South Africa had tarnished immensely since it came to be recognised by the apartheid regime. This aroused the need to repair its image and unavoidably incorporate the language of rights in the new constitution, as a signal towards democratic consolidation. This successfully achieved international acclamation. The entrenchment and immediate enforceability of socio economic rights in the spirit of constitutionalism became inevitable, because the accusations and international pressures imposed upon South Africa were premised upon the colloquy on human rights.

Thus, South Africa sought to replace the segregationist government through furthering a process of establishing transitional justice. (Hollanda 1: 2013) The drafting of the constitution in South Africa was signified by a process which recognisably involved mutual agreement, compromise, and reconciliation between the rival political factions. Coalition emerged as a fruitful way to avoid the supercedence of *verkampte* elements by the majoritarian African National Congress.

⁴⁷http://www.geocities.ws/enugareddy/southafrica/1965Notes_on_the_Origin_of_the_Movement_for_Sanctions_against_Apartheid.pdf. Accessed on 18th February, 2017.

⁴⁸ Source: <http://legal.un.org/avl/ha/cspca/cspca.html>, Accessed on 20th February, 2017

Socio economic rights discourse by the late 20th century was dictated by the phraseology of the human rights discourse. The basic provisions to be incorporated in the constitution were already agreed upon. The drafting process by the legislators involved a two stage process: the interim constitution was to be a document incorporating all the principles which are mutually agreed upon. Therefore, it would not be an over- statement to claim that the basic governing principles and values which were to enable constitutional democracy, the justiciability of socio- economic rights, a multi- party system, the separation and decentralization of powers, were *pre-determined*.

The Memorandum from Nelson Mandela to F.W Klark was canonical in citing the major hindrances in the process of peaceful democratization. Mandela clearly stated that the predominance of the National Party government completely sidelined the interests of the majority. There was a *negotiation crisis* which was the fountainhead of the political quandary. Accusing the white government, Mandela stated: *“In the first place you have chosen to reject internationally accepted democratic principles which define a democracy. You have chosen to equate majority rule, which is quintessential hallmark of democracy, with black domination”*. The eminence of this memorandum emerges from the fact that it provided a practical and realistic solution for resolving the friction between the rival political factions, and also devised a mechanism for constitution- making:

- 1) To formulate and agree on a set of general constitutional principles at CODESA (the Convention for a Democratic South Africa).
- 2) To accommodate internationally accepted principles.
- 3) The Constituent Assembly must be elected through proportional representation to ensure members from all political formations.
- 4) It should be a legitimising and unifying procedure, all decisions must be passed through a sixty- six and two- third majority.

Formal negotiations thus began in the year 1991. The process of drafting the final constitution was achieved through a two- step approach. The interim Constitution ratified 34 constitutional principles⁴⁹, which were deemed to be intrinsic provisions and were to be a part of the permanent constitution. These principles were to provide substantial and procedural guidance in the constitution making procedure which was to be achieved through a negotiating process and was fixed blueprint to enable democratic transition. The second step involved the cardinal role of the Constitutional Court, which was established as the apex court of new South Africa, was saddled with the responsibility to oversee the drafting process and to ensure if the Constitution is in consonance with the pre- determined principles, or not, and to also assess the constitutionality of the said principles. It is undeniably true that the discourse on socio economic rights, with concern to the connotation of human dignity emerged as its cornerstone.

While, it is undeniable that the process of democratic transition in South Africa involved a process of Constitution- making which was characterised by a democratically elected assembly and deliberation, but was not a politically led transformation. Since the formation of the Constitutional Court played a dominant role in the making of the South African Constitution, the Court assumed a pivotal role in determining the legality of the text adopted. This method is 'judicial' as opposed to political contestation. (Regan 13:2012) Therefore, the lack of confidence in a democratically elected legislature became a definitive character of New South Africa not only during the drafting process, but in the years to follow, while embracing a constitutional democracy, as opposed to the parliamentary model.

This constitution making process could be linked with Rawls notion of first developing the basic principles which govern the nation and then head towards the devising it. The second stage involving the drafting of the final constitutionalism was largely pre- determined and therefore the process lacked the spirit of deliberation, as the process of political compromise had already been achieved.

⁴⁹ The Interim Constitution of South Africa contained a set of 34 Constitutional Principals which emerged as the guidelines towards the formation of the New Constitution.

John Elster (1998) highlights that the process of constitution making can be democratic in nature, despite being non-deliberative. This happens when the assembly is bound by certain rules and values which it is bound to adhere to. In the case of South Africa, the Assembly was strictly constrained by the discourse on human rights to gain international acceptance. This also allowed the process of democratization in tune with the global discourse of justice, which evolved to be closely tied with the idea of rights of the racial minorities.

According to Corder (1994), “*An important obstacle in the way of anyone wishing to describe the process of producing a new constitution for South Africa is the fact that, despite protestations and some isolated efforts to the contrary, the field of political negotiations over the past four years has been abysmally opaque.*” In trying to understand the logic behind the non-democratic components of constitution making procedure, Carol C. Gould (2004) argues that the norms of economic and social justice could possibly serve to limit the scope of democratic decisions. Thereby, the need to establish a democratic procedure takes a backseat, while the concerns in favour of social justice override it. Therefore, the constitution making process did not essentially give rise to a configuration of rights through a discursive exercise, but rather became the condition upon which further deliberations were conducted.

1.4 THE SOUTH AFRICAN RIGHTS DISCOURSE

One of the most contentious debates against Universal Human Rights has been premised upon the conception of cultural relativism, which claims that culture, which is indigenous and unique, must be the source of deriving a connotation of rights which would be relevant in a particular context. The idea of universal rights, which dominated the international rights discourse for a long time assumes human nature to be universal as well. This undermines the impact of systemic, historical and cultural variability as a factor in influencing human lives. What were the cultural aspects which the people of South Africa inherited? To what extent did the inherited culture and social institutions influence in devising a conception of rights?

‘In South Africa, the Universalist versus cultural relativist debate has, on the face of it, been rendered marginal by the 1996 Constitution which is based on a Universalist conception of human rights. The Bill of Rights, enshrining a range of internationally-recognized rights, is described as "a cornerstone of democracy" and applies, without exception, to all law in South Africa’.
(Grant: 2006)

This ready acceptance of the global perspective of rights by this fragile and embryonic democracy can be associated with the narrative of democracy and development proclaimed in the United National Declaration of Human rights, which sought to promote social progress and better standards of life through equal rights and preservation of basic human dignity.⁵⁰ This could also be seen in the light of the relative unification of the world after the collapse of bipolarity which existed in the cold war era and which was also marked by the proclamation of the ‘*doctrine of democratic enlargement*’ championed by the Clinton government. Therefore, democracy emerged as the most ethical and desirable system of government to capacitate this global unification which was mainly based on a common understanding of rights and freedoms, and which emerged to be the prerequisite requirement for the full realization of the declaration.
(Ibid)

However, the late 20th century had its own defining characteristics which were immensely influenced by the era of globalisation and for which democracy became a conditional requirement to reap benefits of it. The struggle against apartheid translated to a struggle for human rights. This also meant a clear departure from parliamentary sovereignty towards constitutional supremacy. (Dugard 5: 2012)⁵¹

The installation of the Constitutional Court not only signalled the centrality of the judiciary in the making of new South Africa, but also the subversion of the Parliament. Enumeration of enriched Bill of Rights and the watchman role played by the Apex Court since the making of the supreme law was a clear indication of the importance of it over the Westminster Parliamentary System in sought to replace. However, there were other contextual aspects to it too.

⁵⁰ Preamble, the Constitution of the Republic of South Africa, 1996.

⁵¹ <http://alyjofa.ru/jehofam.pdf>, Accessed on 18th May, 2017

South African Constitution marked an era of transition, which not only required an inculcation of a value laden assurance of rights to the people, but also involved taking up the challenging task of providing reparative justice to the sections of the society which had grossly suffered inhuman atrocities in the past. The country could not head in a forward- looking direction while strengthening democracy, but was forced to simultaneously recall the past injustices on regular occasions for substantiating the connotation of justice. Liberal theorists, most notably John Rawls and Robert Dahl, discuss issues of democracy and justice in the context of political democracy, and highlight the primacy of rights as being the foundation of liberal model of democracy.

The primary concern of democratic decision making has typically been seen as a constitutional framework that sets the boundaries of legitimacy for democratic decisions by protecting the rights and liberties of individuals and by specifying, limiting, and balancing the powers of government. The transitional phase in South Africa was signified by a wholesale incorporation of not just social and economic rights, but environmental rights, right to just administration, and the right to access of information as well. Chapter 2 guarantees civil and political rights, and over-ambitious claims such as, right to housing⁵², healthcare, food, water, security⁵³, education⁵⁴ ; to cite a few. Therefore, the South African discourse was largely derived from the Human rights connotation of human dignity.

⁵² Chapter 2, Section 26 (1), (2), (3), Ibid.

⁵³ Chapter 2, Section 27 (1), (2), (3), Ibid.

⁵⁴ Chapter 2, Section 29 (1), (2), (3), (4) Ibid.

CONCLUSION

A study of the political history which went into the making of the Indian and South African constitution highlights that the context and scenario in which constitutions are drafted reflects a marked difference in the process of constitution making, and also affects the nature of the constitution adopted. This helps problematize the generalised understanding of the post-colonial, and underlie the specificities of each.

The history and the role of the political participants in India and South Africa during the drafting process had major distinguishing features. While in India, the committee system allowed a thoroughly deliberative process in settling with the contents within the rights section, the South African founding fathers were already tied up by the dominant discourse on Human Rights, hence leading to explicit inclusion of social and economic rights as well. Another distinction is found in the urge to disassociate with the past and future while framing the constitution in the case of India. This meant that the ambitious concerns of the future must be delegated in the hands of the future political representatives, while in South Africa, the role of memory and the discriminative past acted as a constant reminder and also became the fountainhead of the necessity to elaborate rights and put them into force. Another feature, the Constituent Assembly (both interim and final), saw a major role played by the judiciary in ratifying the Constitution and analyzing whether the text is in consonance with the agreed broad principles. This meant that the nation building process rested upon the faith in the Constitutional Court as a neutral body, keeping a vigilant check on the legislature and executive. Post- apartheid era therefore signified the emergence of a constitutional democracy in South Africa.

	INDIA	SOUTH AFRICA
METHOD	DELIBERATIVE – PRIORITIZATION , CAUTIONARY APPROACH	CONSTITUTIONAL PRINCIPLES APPROACH.
LEGAL DETERMINER	DRAFTING COMMITTEE COMPRISING OF EIGHT SCHOLARS AND JURISTS.	THE CONSTITUTIONAL COURT
COMPOSITION AND ELECTION OF THE CONSTITUENT ASSEMBLY	SINGLE PARTY DOMINANCE, THE INDIAN NATIONAL CONGRESS.	POLITICAL FACTIONS, MAINLY COMPRISING OF THE AFRICAN NATIONAL CONGRESS AND THE NATIONAL PARTY GOVERNMENT.

Table 1: COMPARISON OF CONSTITUTION MAKING PROCESS IN THE CONTEXT OF BILL OF RIGHTS

The immediate concerns in India pertaining to rights were to eliminate social injustice and exclusion, especially on the basis of caste, apart from resolving the communal tension. The incorporation of Article 17 in the Constitution allowed the end of untouchability and various forms of caste- based atrocities. This can be associated with Mill's connotation of the other-regarding. But, Indian constitution makers were tied by the paucity of funds to allow the inculcation of economic rights. A deviation or inability to guarantee the rights would also mean a loss of sanctity and supremacy of the Constitution itself. While in South Africa, the Constitutional Court sought to become the supreme guarantor of rights, and was trusted as an institution. The subversion of the democratically- elected legislative body represents the not only a primacy of the Constitution, but of the Constitutional Court, through which holistic transformation of South Africa could be possibly achieved.

To sum up we could argue, that in India and South Africa, the original discourse of bill of rights signified the following: *firstly*; the founding fathers of the Indian delegated the concerns of social and economic rights to the future, through the adoption of a thoroughly deliberative approach. However, these goals remain integral to the governance of the country headed by the representatives in the future years to come, while in the case of South Africa, the international context, the fresh wounds inflicted upon the masses during the apartheid regime led the country in the direction of adopting certain judicially pre- determined principles, cherishing the discourse of human rights.

Secondly, though the constituent assembly in South Africa was not only bound by a pre-determined connotation of rights, but was also the subversion and supervision under the newly installed, Constitutional Court. While, India retained its faith in parliamentary democracy and deliberative method, South Africa adopted constitutional democracy. Later, the distrust in democracy in New South Africa also allowed a greater degree of transparency in the judicial appointments.⁵⁵

⁵⁵ Section 174, The Constitution of the Republic of South Africa, 1996.

Lastly, South Africa experienced political transition in a context when the international climate was charged with wave of globalisation, liberalisation, and human rights. Therefore, while the post- World War II era signified an assertion of self- determination and sovereignty of the newly independent colonies, the post- Cold war era was signified by a direct influence of the international climate.

Thus, the Constitution making process in India and South Africa were steered in different directions, only to witness a convergence. Additionally, the compelling circumstances affecting the formulation of the rights discourse varied significantly in both the cases. While in India economic restraints and ‘unity as the foremost goal’ delegated the concerns of social and economic rights as future goals, South Africa experienced international pressure in the era of globalisation to stand fast in the direction of adopting the liberal democratic model and the complementary notion of human rights. The next chapter would focus on the role of the courts in evolving discourse on rights in India and South Africa.

CHAPTER TWO

TRANSFORMATIVE CONSTITUTIONALISM AND THE EVOLUTION OF THE RIGHTS DISCOURSE: ROLE OF THE APEX COURTS IN INDIA AND SOUTH AFRICA

INTRODUCTION

“Political institutions (however the proposition may be at times ignored) are the works of men owe their origin and their whole existence to human will. Men did not wake up on a summer morning and find them sprung up. Neither do they resemble trees, which, once planted, are “aye growing” while men “are sleeping.” (Dicey: 1885)

The constitution as a document embodies human will and collective aspirations and the state acts as an entity which bears the humungous task of utilizing it in a favorable direction. In the context of India and South Africa, the inculcation of rights in the text provided a set of guiding principles with the aim to depart from the conditions which existed in the past. While the language of liberal constitutionalism and the predominance of Human Rights discourse have had an overarching influence over the working of the constitutions, the uniqueness in the adoption and enforcement of the enumerated normative values by the two nations have seemed to have set a ground for the emergence of post- colonial constitutionalism. Both the countries experience a perpetual process of democratization, and simultaneously struggle to establish social requisites to enable the same. Therefore, the process of strengthening democratic ideals and enriching the discourse on rights go hand in hand, with the constitutions providing a guiding path to accommodate human will; which is plural and dynamic.

The concept of *transformative constitutionalism* finds its relevance in viewing and internalizing the constitution as a text embodying these collective aspirations and normative values. This view broadens the traditional understanding of the constitution wherein it was merely seen a text outlining the procedural functions and rules of the state. This has emerged along with the broadening ambit of the basic legal rights, in consonance with the Universal Declaration of Human Rights (UDHR), 1948. The discourse on rights has over the years perished the dichotomy between the *negative* and the *positive* notions of liberty.⁵⁶ This also widens the benchmark constituting the basic minimum for enabling economic prosperity and social equity⁵⁷. But, the term Human Rights surrounds many ambiguities in not only carrying the burden of a universal transformative vision of the world, but in having excessive faith in the state and its sovereignty, which incrementally becomes an ethical entity.⁵⁸ (Baxi 3: 2002) However, the domain of rights and the question surrounding its enforceability is fiercely debated.

This contestation in the arguments put forward by the wing comprising of political constitutionalists⁵⁹. They favour the overarching role of representative institutions in expanding the domain of rights. They claim that rights in a constitution are essentially a product of a political process which went into the making of the text, and therefore the expansion of the scope and ambit of rights can rightfully take place within the political domain. They also strongly believe that there exists greater potential in reaching a fair outcome through a constant process of deliberation and reconciliation while tolerating disagreements and the complications associated with plurality.

⁵⁶ Note: Isaiah Berlin in his work 'The Two Concepts of Liberty' classifies rights into negative and positive. While negative is largely individual centric and the comprises of the area within which an individual is able to exercise freedom without the deliberate interference of other human beings. This is mainly used with reference to the exercise of civil and political rights. While positive liberty is more about the exercise of liberty as a collective agency. The advancement of socio economic rights cannot be fulfilled in mere isolation. The dominant discourse on Human Rights believes in the fulfillment of both civil and political as well as socio economic for the holistic well being of every individual.

⁵⁷ Secretary-General's Programme for Reform UNDoc. A/51/950 14 July 1997 (paragraphs 78 -79)

⁵⁸ Upendra Baxi

⁵⁹ Note: Most prominently being Richard Bellamy. For more, see, Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy, (Cambridge University Press, 2007).

Legal Constitutionalists, on the other hand, comprise of sceptics who display a ‘discomfort with democracy’⁶⁰ and hence consider the legal domain as appropriate in advancing the concerns of rights. They further claim that fundamental rights are naturally determined, and are intrinsic in nature. They precede the conspicuous political process of constitution making. (Goldoni: 2012).

In this chapter, we highlight the supremacy of judiciary in altering and expanding the discourse on rights in both India and South Africa). Section I would briefly highlight the alternative constitutional theories which highlight the specificities of post colonial nations indentified by social and cultural diversity.

The II Section seeks to elaborate the concept of transformative constitutionalism and the essence of it which is distinctly apparent in both India and South Africa.

Section III explains the circumstances in which the apex court in India undertook the task of furthering the definition of rights in favour of the poor and disadvantaged. We argue that in the post- Emergency period in India, there developed a deep distrust in political institutions which led the Courts to intervene and uphold the rights of the people. This not only ensured a shield to protect the civil and political rights, but also led the court to devise interpretative skills in upholding the “basic features” of the Constitution, in the spirit of advancing the major challenge of enabling socio- economic development. Additionally, we examine the rise in the activist role played by the Court leading to the expansion in the discourse on rights in India.

Section IV highlights the role of the Constitutional Court and the essence of the South African Constitution both of which had emerged through a complete distrust in the political. The era of democratic transition and consolidation in South Africa was marked by the birth of Constitutional Democracy. However, the court faces multiple challenges in enforcing and guaranteeing the elaborate section on rights engraved in the text. In the light, this section would also understand the established interpretative skills to examine the working of the court and the subtle changes it has undergone through citing cases. Additionally, the indigenous characteristics of the Constitution are also highlighted.

⁶⁰ Note: Roberto Unger laments that modern jurisprudence represents a discomfort with democracy (political representatives) and have assumed the duty of advancing rights of the people, in consonance with human rights.

2.1 ALTERNATIVE CONSTITUTIONAL THEORIES

In the context of post- colonial nations; such as India and South Africa, socio cultural diversity remains an essential defining characteristic. This also poses a pressing challenge over the concerns of the distribution of rights and complicates the task of determining the suitable domain through which rights could be advanced.

In this light, an alternative constitutional theory in this light has been put forward by Robert C Post. He champions the concept of *democratic constitutionalism* wherein citizens must be the agents for recognising the ‘authorship’ of state actions, and thus must devise a method of deliberation which could enable the recognition of a ‘unifying principle.’ The constitution would then be a display of the fundamental ethos of its people. According to Post, cultural heterogeneity is a fundamental marker in the post- colonial context and the constitution must have the capacity to attain the required unity, while cherishing plurality. (Post: 2000)

James Tully (Tully: 1995) also argues for a constitutionalism which is capable of accommodating cultural diversity. A constitution which provides space for open- ended negotiations within a federal setup can possibly trump imperial constitutionalism; which is rigidly structured upon the notion of uniformity. In the recent years however, the overarching discourse of rights and the associated connotation of substantive justice have witnessed a unilateral and unidirectional rise across nations with the growing influence of human rights.

Noticeably, *fragmentation* is a phenomenon that has occurred in the global order which has obscured the distinction between general international law and domestic law, and consequentially disassociates from the trend, making it unfit within a particular theoretical framework. International law has developed its *sui generis*. “*Human rights have a particularly important place in focusing attention on questions of governance in an ever- fragmenting system. The norms established by human rights restrain the activities of the states...and serve as a unifying base. [Thus] human rights often act as a core normative structure in the ever- fragmenting system*” in a post- statist arena. (Donoghue 95-96: 2014)

But alongside, it is seen that the advancement of the universally ratified connotation of rights-based justice also leads to the emergence of restorative justice, especially in the context of South Africa. The phase marked by a major political transition also accompanied an urgency to capacitate social reformulation, through restoring the ills of the past. The establishment of the Truth and Reconciliation Commission⁶¹ is a significant marker of a post- colonial effort to unleash the process of social transformation, inculcating dominant normative values; but carving a tract to provide reparative justice. India witnessed its own ways of recognising the peculiar social and accompanying economic problems and hence provided required legal solutions in the immediate aftermath of independence⁶². However, the role of the memory plays an overarching role in South Africa in the concern of rights. India on the contrary has not observed a similar remembrance of the horrors of partition reflecting in its rights discourse.

Another marked feature of post- colonial transition, evidently in the case of India and South Africa has been the rise of rights- based consciousness in the aftermath of state emergencies⁶³. This is seen in the case of India in the post- Emergency period and apparently during the fag end of the apartheid regime in South Africa. It must be noted that the marked difference lies in the fact that while the process of constitution- making was the consequence of the display of state excesses during the segregationist regime, the Supreme Court in India was to face the challenge of confronting the state within an established democratic and constitutional set up.

⁶¹ Note: The Truth and Reconciliation Commission was setup in the aftermath of apartheid (1994) in order to restore justice in the light of the gross human rights violations perpetrated against the Blacks and other minorities.

⁶² Note: Here we mean that India recognized the caste system, for instance, as a major problem in the society, also leading to the economic deprivation of the excluded. Notably, the inculcation of Article 17, 29, 30, 46 of the Indian Constitution.

⁶³ Note: While, the rebellion led by *Umkhonto We Sizwe*, the armed wing of the African National Congress in South Africa culminated in a series of Emergency Acts being passed by the apartheid government in the mid 1980s, India witnessed State Emergency in the year 1975 till 1977, under Prime Minister Indira Gandhi leading to the suspension of Habeas Corpus and fundamental rights.

Adding to this, there has been an apparent international trend which is characterised by the diminishing role played by representative institutions. Instead, the Courts have assumed a pivotal role in cultivating an enriching definition of rights. This has been referred to as the period of '*post- democracy*' (Mehta: 2007) wherein the judiciary has become the withholder and champion of *popular constitutionalism*. It is in this context that the role of Courts has become vital. In India and South Africa, the judiciary has helped in achieving this endeavour through adoption of expansive and alternative interpretative exercises in their judgements and thus cherishing the ideals of constitutionalism as a *living document*, while overseeing and challenging the state's role. Therefore, perpetuation of the major pillar of American political order marked by the supremacy of the Constitution (Hirschl: 2006) and the *judicialization of politics* is now shared and experienced across the globe.

The Indian Supreme Court and the Constitutional Court of South Africa have played an active role in expanding and transforming the discourse on rights through employing creative interpretative exercises. While the South African Constitution is deemed to be a transformative text in itself, the Indian experience has witnessed the rise of the judiciary in the post- Emergency period in an attempt to expand the discourse of rights in favour of the poor and marginalised. However, in the South African case also, the Constitutional Court has carved out a sphere of its own by allowing the inculcation of customary rights and furtherance of indigenous community rights (Ubuntu). This Chapter primarily seeks to trace this change in the discourse of rights which had dominated the Constitution- making process. To help locate this change, we focus on the developments which have taken place in the rights discourse in the aftermath of the post- Emergency period in India, and post- 1996 South Africa. We would specifically focus on the role of the Apex Courts in altering the discourse.

2.2 TRANSFORMATIVE CONSTITUTIONALISM: MEANING AND RELEVANCE

The term *transformative constitutionalism* implies the thickening and redefining of the social and economic rights to its citizens, in the pursuit of attaining substantive justice. As defined by Justice Laurie Ackermann, substantive transformation refers to the “*complete overthrow of non-ethical relationship between human beings.*” Additionally, it is an endeavour to enhance the conditions of the disadvantaged sections of the society, which cannot be merely identified by mechanically enumerating certain economic parameters, most prominently being; basic income, essentially due to the complex social stratification in countries like India and South Africa. According to Klare Karl, transformative constitutionalism is;

‘a long term project of constitutional enactment, interpretation and enforcement committed (not in isolation of course, but in historical context of conducive political developments) to transforming country’s political and social institutions and power relations in a democratic, participatory and egalitarian direction. Transformative Constitutionalism connotes an enterprise of inducing large- scale social change through non- violent political processes grounded in law.’⁶⁴

Complimenting to this endeavour in order to unleash transition, “a large proportion of reasoning rests explicitly or implicitly on an interpretation of historical record of constitutional change” (Sabetti: 1983) Both India and South Africa experienced a troubled past and paved their way towards democratization in two very different scenarios. There was a common agenda to disassociate with the discriminative past in both the nations, but this urge was more apparent in the case of South Africa as clearly stated in the preamble of the Constitution; the Supreme Law of the nation seeks to ‘*heal the divisions of the past and establish a society based on democratic*

⁶⁴ As cited in *The Quest for Constitutionalism; South Africa since 1994* (Hugh Corder and Veronica Federico)

*values, social justice and fundamental human rights*⁶⁵. However, over the years, both India and South Africa see a convergence in the method of achieving this complex goal, despite a major difference in the phraseology of rights originally inculcated.

The concept of socio economic rights which is closely tied with the notion of equal citizenship does find its origin in the Anglo American jurisprudence. India and South Africa were deeply influenced in imagining the ideals of the Constitution along these concepts. This was due to the colonial lineage and the seepage of the institutions and its understanding of rule of law in the structure which continued even after independence. In one way, the influence of the colonial state apparatus acted as an impetus to enable the ongoing process of democratization. But, both the nations realised the difficulties and challenges which emerged due to the blind emulation of the Western jurisprudence. This brought the necessity to reformulate the laws, change the governments, or even amend or rewrite the constitutions to actualize the goal of attaining substantive justice.

The essence of *transformative constitutionalism* in the two nations is not only to be found in the framework of the Constitution but more so, in its enforcement. In both the nations, the prominent role played by the courts in expanding the understanding and implementation of these rights is a marked feature of the process. It must be noted that the South African rights discourse was heavily influenced by the Human Rights discourse which was a predominant and collaborative ideal to be attained in the pursuit of materialising the role of the state as a welfare agency. While India realised the prominence of the discourse only after the fault lines of parliamentary democracy were highlighted during the emergency period. The prominence of individual rights and the need to safeguard the citizens from the excesses of the state led to a rise in the strengthening of the discourse on rights in consonance with the international consensus on human rights and welfare. In both the cases however, the central role of the courts has been a common feature.

⁶⁵ Preamble, 1996, The Constitution of the Republic of South Africa

This is the era of Human Rights redefining a contemporary understanding of democratic citizenship and the need to develop and enforce the *substantive* features of the Constitutions, despite the differences in the form and nature of texts adopted. Additionally, this has also seen the penetration of substantive due process in court's judgements leading to the advancement of un-enumerated constitutional rights.⁶⁶ This was seen in *Joseph and others and the City of Johannesburg and Others* in the case of South Africa, while in India, the comprehensive and extensive interpretation of Right to Life in several case (example: *Olga Tellis* case) has led to the advancement of a broadened connotation of rights, through manoeuvring between the text of the Constitution. (Chapter Three deals with this in detail.)

All these Court led endeavours are closely tied with shared goals, and a vision to rebuild a nation along broad normative considerations. However, one interesting observation while witnessing the working of the Constitutions in both the nations has highlighted that despite a very explicit, unambiguous and extensive section on socio economic rights in South Africa, as compared to India, the need to devise innovative interpretative techniques in order to further the enforcement of rights is found necessary. Thus, post colonial constitutionalism marks the inventive role of the Courts in order to fortify the execution of rights in favour of the poor and marginalised. Though, the historical and present context continues to play a major role in the form and extent in achieving this arduous goal.

In the case of South Africa, the influence of the discourse on contemporary Human Rights showed a remarkable insistence on the illegitimacy of institutionalized state racisms and its enduring contribution resides in the de-legitimation of an overly racist national constitutionalism. The United Nations Declaration on the Elimination of all Forms of Racial Discrimination, 1963, proclaimed discrimination on the basis of race, colour or ethnicity to be '*an offence to human dignity*'⁶⁷ and set the framework of the South African Constitution in the 1994 urging to end Apartheid⁶⁸ and viewing the state as a normative entity to take necessary affirmative action as

⁶⁷ Section 1, The United Nations Declaration on the Elimination of all Forms of Racial Discrimination, 1963

⁶⁸ Section 5, The United Nations Declaration on the Elimination of all Forms of Racial Discrimination, 1963

corrective mechanisms.⁶⁹ The massive influence of the discourse of Human Rights in the constitution making process is very apparent in the Bill of Rights.

Highlighting the purpose of the Constitution in one of the judgements, Justice Mohomad:

“The contrast between the past in which it repudiates and the future it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The constitution expresses in its preamble the need for a new order in which there is equality between people of all races. The past was redolent with statutes which assaulted the human dignity of the persons on the grounds of race and colour alone, Section 10 constitutionally protects that dignity...the postamble seeks to articulate an ethos which not only rejects its rationale but unmistakably recognises the clear justification for the reversal of accumulated legacy of such discrimination.”

Therefore, a logical break from the past in South Africa did not intend an erosion of memory. The Constitutional Hill located in the city of Johannesburg was built within the premises of the Old Fort Prison complex, which is a historical epitome of violence, and repression, and thus was chosen as the site to install the Constitutional Court as a constant reminder of the horrific past, while representing hope for a future based on the values of justice, and freedom. This is continually observed on many occasions in the judgments delivered by the Court while citing references of the apartheid.

In the context of India however, the rise of rights based litigation and *legal mobilization* was marked by the era of judicial review, and judicial activism indicating the rise of rights jurisprudence. This emerged as a marked feature in the post- Emergency period as an added effort by the Court to preserve its tarnished image. The Court devised creative interpretative skills in analysing the Constitution employing a structural approach and preserving the defining and basic features of it. Additionally, transformative constitutionalism in India was also marked by an expansive interpretation of fundamental rights, most prominently observed in the *Maneka*

⁶⁹ Section 2,3, The Constitution of the Republic of South Africa, 1996

*Gandhi vs. Union of India (1978)*⁷⁰ strengthening the Basic Structure Doctrine. This was later followed by a parallel development in the Court's role as an *activist tribunal* by eliminating the traditional principle of *locus standi* in the pursuit of making the Courts much more accessible to the poor and marginalised through the Public Interest Litigation (PIL) led by Justice P.N Bhagwati who was largely influenced by the need to make the Courts more accessible in the pursuit of attaining the Human Rights objectives⁷¹ while also keeping a check on administrative deviance.

However, there are mixed opinions regarding the activist role played by the courts. While, Tate and Vallinder observe it as a trend indicating towards the *judicialization of politics*, Pratap Bhanu Mehta and Shaylshri Shankar conclude that the Courts have adopted *weak remedies* and have displayed a cautionary and reluctant attitude towards the State mis-governance and plodding performance in advancing the issue of social and economic rights (Gauri and Brinks: 2008)But the extent of accessibility is largely questionable.⁷² The following section would deal with the alternative interpretative skills the Court has adopted in the light of advancing rights jurisprudence in India. The subsequent section would look into the activist role played by the Court to advance the same.

⁷⁰ *Maneka Gandhi vs. Union of India*, 1978 AIR 597, 1978 SCR (2) 621

⁷¹ Justice PN Bhagwati has immensely contributed towards the area of Human Rights and legal aid. He was also the President of World Congress of Human Rights in the year 1989.

⁷² Skeptics include Anuj Bhunia and Menaka Guruswamy and Bipin Aspatwar. They argue that the Court after the introduction of PIL has failed to live up to a pro- poor image.

2.3 ALTERNATIVE INTERPRETATIVE EXERCISES LED BY THE APEX COURT IN INDIA

Article 13(2) of the Indian Constitution⁷³ continually emerged as a very contentious and ambiguous provision which created tensions between the judiciary and the government. The Court's power to exercise judicial review was repeatedly questioned and was largely deemed as antithetical to the essence of representative and popular democracy cherished by India. Also, the extent of Parliament's power to amend the constitution under Article 368 seemed indeterminable and deemed to be excessive. Therefore, post independent India grappled with the complex rift in interpreting the provisions laid in the Constitution concerning rights and the immunity/alterability of fundamental rights. This is marked by an apparent conflict between the Parliament and the judiciary in a series of cases, beginning with the challenge posed by the Court against the government's efforts to push agrarian reforms⁷⁴ in the decade after independence, while arguing that this endeavour meddled with the sacred and fundamental rights.

The Court in *Golaknath vs. State of Punjab* (1967)⁷⁵ placed fundamental rights at a higher pedestal, by distinguishing it from ordinary laws and claiming that rights are *primordial* and '*necessary for human development*' and thus held a '*transcendental position in the Constitution.*' However, the tussle between the parliament and the judiciary rested around the language of immutability of fundamental rights and absoluteness of legislative amending power. The government found its supremacy as a necessary pre-requisite to unleash the social and economic reforms during the year 1971 while, the Congress party was consolidating and the insertion of Article 31C, which gave prominence to Directive Principles of State Policy in Article 39 (b) and (c) to override fundamental rights stated under Articles 14, 19 and 31. This was seen as a necessary move to further the goal of redistributing wealth and eliminating economic inequality. However, while the mission was in consonance with the human right discourse as well, but was highly contentious, since it amounted to the subversion of fundamental rights. This was accompanied by the government intervening in the judge's appointments to facilitate its motives.

⁷³ Article 13.(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

⁷⁴ The First Amendment, 1951 sought to enhance the plight of weaker sections through the enactment of *zaminadari* abolition laws leading to the passage of Article 19(1) which violated the freedom of speech and expression.

⁷⁵ <https://indiankanoon.org/doc/120358/>, Accessed on 20th May, 2017

In the landmark *Keshvananda Bharti Case vs. the State of Kerala (1973)*⁷⁶ the Courts chose to apply a structural interpretative approach while upholding the *Golaknath* judgement. (Padmanabhan A. in Choudhary, S., M. Khosla and P.B. Mehta: 2016) The “*view of the majority*” asserted that Article 368 does not enable Parliament to alter the basic structure or framework, while outlining the principles which are the cardinal features of the Constitution. But the 42nd Amendment during the Emergency (1975- 1977) overruled the judgment, only to be challenged later in the *Minerva Mills case*. It was in the aftermath of the emergency period in India that the court asserted its interpretative authority with the aim of protecting and promoting the rights of its citizens while preserving the essence of the Supreme text. The Court had to resolve the contradiction between individual and socio- economic rights, which were placed separately in the Constitution, and were distinctly enforceable. While one was intrinsic, the other was prominently aspirational in nature. Instead of outlining the trajectory of cases, this section attempts to firstly highlight the change in the role of the Courts in consonance with the popular discourse of rights which emerged in the aftermath of Emergency.

Therefore, the Emergency period in India was very significant in not only highlighting the possible perversion within a democratic system but, in also marking the beginning of the post-democratic period and the evolving discourse on rights. The Supreme Court of India has consciously aimed at evolving the constitution as a “living moment”, backing it with social and moral justifications. Upendra Baxi defines the term constitutionalism as being beyond governance and rules. It is also a site for resistance. It allows an arena wherein contested connotations of rights, justice, development and individual associational autonomy are debated and evolved. This quintessential character of constitutionalism transpired in India as a consequence of the tussle between the judiciary and the executive/ parliament from the 1950s onwards over the ambiguity surrounding Article 368.

⁷⁶ <https://indiankanoon.org/doc/257876/>, Accessed on 20th May, 2017

Sometimes, though rarely, words of the Constitution appear to speak for themselves". (Post: 1990)

The complications arose from the lack of clear a methodology which could assist in interpreting constitutions. Deriving "pure meaning" or "the original intention of the framers" requires the need to employ a backward looking method perhaps referring to the constituent assembly debates could provide a feasible solution. However, in India, the efforts to utilize the originalist approach of constitutional interpretation completely failed to resolve the confusion over the amending power of the parliament. *Shankari Prasad vs Union of India* (1951)⁷⁷, and later, *Sajjan Singh vs. the State of Rajasthan* (1965)⁷⁸ gave rise to complications over the ambiguity surrounding the meaning of Article 368, and in determining whether the parliament had the plenary power to amend all the provisions of the Constitution using a 2/3rd majority. Article 13 of the Indian Constitution provides immunity to fundamental rights against any law which attempts to violate or subvert it. The question over whether Article 13 provides an exception to Article 368 remained an interpretative complication. While the *Golaknath* judgement (1967) placed fundamental rights at a higher pedestal, differentiating it from other 'ordinary laws', the passage of the 24th Amendment overruled the judgement, jettisoning the sacrosanctity of rights.

Article 145(3) states that any substantial question of law needing constitutional interpretation of the text must be determined by a bench not consisting of less than five members. Political Constitutionals, as stated earlier, have displayed discomfort and warn about the perils of adopting a strong form of judicial review. They claim that judicial interpretation is not immune from personal inclinations and biases of the judges. A textualist and legal- positivist approach cannot possibly resolve an interpretative incertitude, especially if it pertains to the question of rights; which is an integral and is a highly sensitive normative concern. Therefore, the intervention of the judges is found necessary in upholding the basic tenants of the Constitution, and additionally in devising an alternative method in furthering the salubrious intentions of the government.

⁷⁷ <https://indiankanoon.org/doc/1706770/>, Accessed on 21st May, 2017

⁷⁸ <https://indiankanoon.org/doc/1308308/>, Accessed on 26th May, 2017

According to Robert Post (1990), “[However,] in case the Court is unable to derive the plain meaning of the text, which is bound to happen on several occasions, the judges must have the ability to justify their decisions and must be able to articulate a ‘theory’ of Constitutional interpretation”. The *Keshvananda Bharti Case* signified the efforts of the Supreme Court judges in India in upholding the salient features of the Constitution while substantiating it with valid interpretation. The landmark judgement led to the use of theory of “Constitutional Principles” to justify the pre-eminence of certain basic features of the Constitution while declaring all attempts to tamper over the basic structure/ features of the Constitution to be *ultra- vires*. This judgement can be referred to as a game- changer since it boldly carved out this approach as a guide book to assist the task of constitutional interpretation and to preserve the text from excess tamper. While the legal formalist and textualist approach constricted interpretation as merely an exercise involving the reading and the enforcement of the constitutional text as- it- is, the Basic Structure Doctrine emerged as the most creative approach in simplifying and explicitly highlighting the foundation over which the lengthy Indian constitution rests upon.

These basic features were carved out and were declared as being the defining characteristics, and thus constitute the physiognomy of the Constitution and the nation. Sudhir Krishnaswamy (2009) eloquently argues that the basic structure doctrine is a valid and coherent methodology of Constitutional interpretation and is legal, moral and sociological in character. The following features were recognised to be intrinsic: Constitutional supremacy, republican and democratic form of government, secular character, separation of powers and federal character of the Constitution. This is also seen in the light of employing a structural interpretation of the Constitution, which views the Constitution as a text in totality. According to Robin Elliot, structural interpretative approach is “*a form of argumentation that proceeds by way of drawing of implications from the structures of government created by.. and the application of the principles generated by those implications- which can be termed the foundational or organising principles of the Constitution- to a particular constitutional issue at hand*”. (As cited in Sudhir 180: 2009).

Later, in the post- Emergency era, the *Maneka Gandhi vs. Union of India*⁷⁹ made a remarkable contribution in effectively reading in substantive due process into the term “procedure established by law” stated in Article 21 which set in a new standard of non- arbitrariness based on Article 14 and 21. (Mate: 2016). It established a correlation between the right to equality and life, while upholding *audi alterum partem* derived from the theory of natural justice.

This can be seen in the context of a shift which occurred from the original intention, since our founding fathers had deliberately omitted of the ‘due process’ clause while drafting the Constitution due to the compelling circumstances during the immediate aftermath of the post-independent India (Mate: 2010). However, this case allowed the court to employ a higher level of scrutiny over the infringement of fundamental rights. This innovative interpretative technique led the Court to read the fundamental rights concurrently further strengthened the principle of “golden triangle” propounded by Justice Chardarchud emphasising that fundamental rights must not be read exclusively, but, in consonance with each other.

A living constitution like India’s has the extraordinary capacity to rearticulate— some would say domesticate—social struggles in the language of constitutionalism. This gives Indian constitutional law a variety, a thickness of doctrine and incentives to conceptually innovate in ways that are unprecedented.⁸⁰ (Sujit, Khosla,Mehta : 2016) Thus, the basic structure doctrine and the inculcation of the American jurisprudential precedent of “*due process*” have strengthened the essence of transformative constitution, through devising interpretative skills. The following section would delve upon the activist role played by the Court.

2.4 POST EMERGENCY AND THE JUDICIAL ACTIVISM IN INDIA

While analysing judicial review and judicial activism from the standpoint of a legal realist, Sathe (2003) notes that the rise of the judiciary signifies two notable trends; either an absolute break or rupture from the past, or an element of continuity merely leading to a slight alteration in articulation. However, undoubtedly he expresses that judicial activism has vested extraordinary powers to the Indian appellate judiciary, without signifying or marking a permanent essence. The initial tussle between the judiciary and the parliament signified a charismatic element, in the light of enhancing nation building practices. This Nehruvian era witnessed a vision, and a teleological motive of altering the social and economic structure of India through the furtherance of land reforms, which amounts accompanying changes in the right to property. While on the other hand, the post- Emergency era represented the era of progressive activism.

One of the most significant and unique moves led by the appellate judiciary in India was the phenomena of Public Interest Litigation (PIL). The marked feature of PIL was to eliminate the cumbersome procedural rules and regulations and to usher an era of, what John Hart Ely calls, '*substantive*' constitutionalism, through making the courts more accessible to the poor and marginalised. Anuj Bhunia (2014) calls it simply "*pro bono lawyering*". Despite PIL, the court has applied 'double standard approach', where economic and social policies of government receive rational type judicial review. While it must be noted that this concern was well recognised during the constituent debates but was delegated as a vital objective to be attained in the future.⁸¹ This move was indicative of a shifting discourse on rights, steering towards the concerns of social and economic rights enumerated under Part IV as a marked characteristic of the post- Emergency period.

⁸¹ N.G Ranga remarked, "(those) citizens who are so poor as not to be able to move the Supreme Court, should be enabled under proper safeguards, of course at the cost of the State, to move the Supreme Court in regard to the exercise of any of these fundamental rights." Constituent Assembly of India, vol. 3, book 1, 29 April 1947 in Anuj Bhunia.

Additionally, the efforts of the Court to represent as pro- poor image was seen as a desperate attempt to revive its tarnished image after the judgement passed in the *Habeas Corpus case* during the period of Emergency which had led to the passage of the Maintenance of Internal Security Act (MISA), which upheld preventive detention and had led to a direct infringement of the fundamental rights.

Therefore, the rise of judicial activism in advancing the concerns of socio economic rights is seen as a direct leap, without rectifying the concerns associated with the civil and political rights which were arbitrarily infringed during the period of Emergency. “All the Supreme Court’s celebrated ‘activist’ decisions . . . stemmed from a concern for equality rather than civil liberties. Indeed, civil liberties concerns have been palpably weak in Indian court” (Mehta: 2007). This apparent in the way the courts have continued to uphold the draconian anti- terror laws which are a direct infringement of the negative liberties of the people. Therefore, to compensate for, the courts have continually endorsed the goal to attain equality, by redressing the problems of the poor and compensate them for their underprivileged conditions. The idea of preserving the civil liberties of people has been reduced to, as Rajeev Dhavan calls it a ‘conservative concern’. (Bhuwania: 2014)

Criticism against judicial activism in India have emerged from many different standpoints, most notably, the observation in the post 1990s period, which was marked by globalization and privatization. It has observable that the courts have carved out an “asymmetrical rights terrain” in the favour of large businesses and corporate, while sidelining the interests of the poor. In observing the functioning of PIL and the extent of its contribution in advancing the concerns of distributive justice, Arun K.Thiruvengdum is forced to raise the skeptical question as to whether India has been swallowing the PIL as a “bitter pill”. Uma Ramanathan argues that PIL has focused more towards the interests of the middle class, rather than the concerns of the poor and marginalized, while Rajeev Shukla argues that the PIL started off as a pro- poor initiative but has taken a ‘*diametrically opposite direction*’ while dispensing justice.(Anil Thiruvengdum in Vinhela O, U Baxi and F. Viljoen: 2013)

Manoj Mate argues that the Court has adoptive a very deferential and limited scope of review favoring privatization and disinvestment, while sidelining the rights of the labourers and employees indicating the use of alternative interpretative techniques .⁸²

Law in India emerged as a medium to achieve social revolution, contrary to EP Thompson's defensive idea of law. The discourse on distributive justice became a fundamental characteristic of the Courts. There is also a visible element of populism in what the court is doing. The expansion of the domain of rights through creative interpretation and judicial activism may have a set of its own drawbacks but,

2.4 ROLE OF THE COURTS IN SOUTH AFRICA AND THE CHANGE IN THE RIGHTS DISCOURSE

The need to strengthen the appellate jurisdiction in South Africa was intensely felt during the apartheid regime, especially during the 1980s, when a series of emergencies were declared. This period was marked by gross human rights violation and brutal suppression of the people, especially the Africans. Thus, the foundation of new South Africa rested upon the need to replace the excesses of the State through the installation of the Constitutional Court, which replaced the supremacy of the Appellate court. This also led to the birth of constitutional democracy and the adoption of a transformative constitutional text, which eliminates the scope of trivialisation or excess tamper with the text.

Though, despite the section of rights in the constitution finds prominent and elaborate space, each of it contains an internal limitation and qualification, South Africa has recently witnessed the problem of inculcating an expansive section on Bill of Rights and the economic constraints in fulfilling these. This has given rise to a trend wherein the Court has devised interpretative skills to exert pressure on representative institutions while advancing the concern of rights. A few case study examples are cited in Chapter Three to validate this argument.

⁸² He cites the examples of the BALCO Employees Union vs. Union of India (2001), Rangarajan vs. Government of Tamil Nadu (2003),

The Constitution of South Africa contains a standpoint through which statutory interpretation is conducted. The section on Bill of Rights establishes the benchmark and the foremost position as stated under Section 39 (2) which states that; “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” Additionally, Du Plessis argues that *literalism-cum-intentionalism* has held a dominant position in the interpretation of the Constitution. This is indicative of the fact that the ‘text matters’, while the larger intention to advance the concerns of rights for all also remains prominent.(Plessis: 2015)

An interesting turn of events in South African jurisprudence was marked by the *KwaZulu Natal v Pillay*⁸³ case signifying the need to adopt a contextual approach and to incorporate a more pluralistic legal approach. Additionally, Etienne Mureinik (Vos: 2013) highlights that the South African jurisprudence uses history as a grand narrative in order to bridge a ‘*culture of authority*’ to a ‘*culture of justification*’. Thus, the use of the “bridge” metaphor to describe the South African Constitution highlights the forward looking approach in interpreting the text, while providing a logical break from the past. This logical break indicates that the past is used in two ways which assists interpretation and helps dispense justice: one, as a reminder of the repressive conditions under the apartheid, and second, the past which indicates a compromise political compromise which led to the birth of the new constitution.

The Courts in South Africa have faced a dilemma in unravelling the objective meaning of the Bill of Rights provision. However, it has been seen that the Constitution has actually emerged as a living document as the Constitutional Court has employed the contextual approach in allowing a degree of consistency and fixed meaning to the Constitution, while limiting the role of the Courts. While undoubtedly the role of history in analysing the Constitution cannot eliminate the problems associated with perspectivism and subjectivism, Apartheid and the common necessity to eliminate its evils has continued to act as a guiding path in strengthening rights.

⁸³ KwaZulu Natal vs. Pillai, CCT 51/06 [2007] 2ACC21

There are mainly two methods of interpretation, namely; the definitional approach, which associates a fixed meaning of rights. The method of adopting constitutional principles, and setting boundaries in South Africa highlights the presence of abstract meaning of rights. While this could be seen rigidly, South Africa has seen an interesting change in the discourse through creative interpretation, since the objectivity of rights is indeterminable. India on the contrary adopted a holistic approach initially, but then gradually headed towards a definitional approach. While carving out some principles which were deemed to be constitutive of the basic structure did not imply rigidity. India witnessed the use of Gandhian populist agenda of making courts much more accessible to the poor.

The foundational approach to justification believes that values and beliefs are fixed and unrevisable. The notion of rights in South Africa was derived through the application of reflective equilibrium wherein the end point of deliberation was reached and a degree of consistency is realised. While Nozick continued to be against the inclusion of socio economic rights in the Constitution, he along with Rawls claimed that the initial acquisition of property should not have been based on a process which is discriminative. However, both in India and South Africa it became necessary to advance the language of rights in order to ensure the fair outcomes to unfair beginnings.

Another marked deviation in the interpretative exercises in South Africa is the use of history as a tool to interpret the rights and dispense judgements. This has emerged in an apparent tussle between the executive and the court. It also emerges from other compelling circumstances which remain a marked feature of the post- colonial, that is, scarcity of resources in guaranteeing social and economic rights. While the *Grootboom* case saw the reference of apartheid to favour the appeal of the homeless, in *Soobramoney v Minister of Health (KwaZulu- Natal)* it denied the appeal on the grounds on scarcity. Therefore, the inculcation of an enriched configuration of rights in the Constitution, the state inefficiency and unwillingness, coupled with the post-colonial reality, has highlighted the drawbacks in emulating the human rights discourse. (Dealt in detail in Chapter Three)

2.5 THE INDIGENOUS CHARACTERISTICS OF SOUTH AFRICAN CONSTITUTION: THE INDIGENITY OF POST COLONIAL CONSTITUTIONS.

It has been widely agreed that a mere textual and formalist approach towards the Constitutional interpretation is a marked characteristic of in the post- colonial.(Maldonado 5-20: 2013) However, over the years there has been an apparent change in the variants of alternative interpretative exercises adopted in analyzing the text from a “living” angle. This represents a clear departure from the rigorous objectivity and mere replication of the Anglo- American jurisprudence. The Constitution and the textual configuration of the Bill of Rights have been viewed from a dynamic perspective and thus there have been efforts in India and South Africa to provide enrichment to the discourse.

The need for innovative interpretative techniques arises from the fact that the Bill of Rights provision has no objective meaning. This derives the necessity to determine the meaning in the pursuit of achieving socio economic justice, especially catering to the requirements of the underprivileged, marginalised, and oppressed sections in the society. Post- colonial constitutionalism has thus emerged as an amalgamation of international law, and is representative of a certain kind of derivative eclecticism.(Choudhary, S., M. Khosla and P.B. Mehta 58:2016) This has also led to a movement against the legal interpretation inherited from the past regime, more apparently in the case of South Africa.

In South Africa, the apartheid regime used legal formalism as a tactic to formulate and undertake draconian policies, precisely in the cast of legal prescript. (Krieglar 2: 2003). The Constitutional Court undertook the task of giving foremost priority to the rights of the citizens, based on the values of equality and human dignity. As we argued in the previous chapter, the process of drafting the Constitution led to placing the concerns regarding the rights in the forefront, while the suspicion against political representatives which previously operated under the garb of the Westminster Parliament, always remained, quite like the premises which had led to the birth of American constitutionalism. South Africa wished to clearly adopt and head towards a more substantive and value laden democracy. The process was facilitated by the Court playing a primary role. The Constitutional Court therefore undertook the task of devising mechanisms to

further the Bill of Rights in the interests of the people, through upholding the ideals of liberty, equality and justice. However, the Court faces a major challenge in exercising Appellate jurisdiction and guaranteeing the set of ambitious rights engraved into the text.

The incapacity of the representative institutions exerts an added burden on the Court. The South African process of drafting the Constitution clearly highlighted the ready consensus over the inculcation of second generation rights, without thorough deliberation. The political factions as a part of the Constituent Assembly were burdened with international pressures, and with already stated values, which bound them to restrict arguments regarding the prudence and practicability of incorporating social and economic rights.

Post- colonial constitutionalism is necessary the outcome of a contention between inherited Anglo American, liberal constitutionalism, and the indigenous values and ideas of constitutionalism. The Indigenous African value, *Ubuntu* has been a governing value and social practice which is deeply and traditionally rooted in its society. Its notable characteristics are difficult to define, since it is more notable in practice and experience. Essentially, Ubuntu places the community in the forefront and considers the meaningful survival and existence of oneself in a group. Due to the paucity and scarcity of resources, individual well being is possible only in a community life. The foundational values of Ubuntu are humanistic orientation, compassion, respect, human dignity and collective unity. While, South African constitution placed the value of human dignity as its primary and notable characteristic, this inculcation of this value has been seen as a mere replication of the human rights discourse. This completely disregarded the relevance of traditional and entrenched values, which echoed similar values, but, by giving greater prominence to community, over the individual. (Mokgoro 1998)

Interestingly, Section 32 of the South African Constitution provides guidelines to the Court for interpreting the Bill of Rights. Section 32(1) states the need to consider and inculcate international law and the Section 32(2) provides scope for '*developing*' common law and customary law in consonance with the Bill of Rights. This endeavour is strengthened by Section 32(3) which enables the Court to consider all forms of law as long as they are consistent with the Bill of Rights. Therefore, in the light of preserving the sanctity of the Constitution, the Courts carved out innovative techniques within the ambit of its appellate jurisdiction. The presence of

other bodies, the South African Human Rights Commission, the Public Protector (as mentioned in Chapter 9) have immensely failed in the pursuit of upholding the spirit of constitutional democracy and in functioning effectively, which has also seen a simultaneous rise in the role of the Court. (Ibid 9: 1998)

The reintroduction of the Traditional Courts Bill in 2012, after the government withdrew it in 2008 following widespread criticism, may have dire consequences for the rights of women. The bill aims to affirm the traditional justice system based on restorative justice and reconciliation. As such, it emphasizes the position of traditional leaders in the administration of justice, and effectively centralizes their power as the arbiters of customary law. However, the clash between customary law and modern law is primarily is certain. Vesting authority in traditional leaders might also provide a leeway to enforce controversial versions of customary law such as the practice of ukutwala (forced marriage), adjudicate compliance, and enforce penalties. The penalties are of particular concern as section 10 of the bill imposes sanctions including fines, forced labor, and the withdrawal of customary benefits, such as the enjoyment of communal land. But, the Constitution of South Africa provides a balance while acknowledging traditional leadership and simultaneously placing the rights enshrined in Chapter 2 as foundational.

While the synergy between African Law derived through *Ubuntu* and the dual ideals of equality and human dignity sourced from the international human rights discourse remains a controversy. These sceptics accuse un-codified traditional laws to be laden with prejudices, patriarchy and, supernaturalism, which cannot be the guiding practices in the spirit of achieving, said ideals. Also, customary law essentially derive legitimacy through an oral culture and is more profoundly traced in practice. Therefore, it is difficult to determine the marked features of this law and thus arouses ambiguity. Whereas, the codification and *writtenness* of modern law is the source of its legitimacy, which also ensures a degree of clarity and international consensus.

Chapter 12 of the South African Constitution signifies the importance and continuing relevance of traditional leadership in the lower levels of government as a way to uphold and preserve the customary law. One of the landmark judgements which allowed the furtherance and highlighted the necessity of incorporating customary law was *Makwanye vs. Another*, Justice Sachs iterated the need to recognise the long overdue African law and legal thinking, and incorporate and

consider them while deriving legal ideas, values and practices for new South Africa. But the scope of incorporating African law was always bound by the ambit of the Bill of Rights enumerated in the Constitution.

The relationship and coexistence of a Bill of Rights provision, heavily influenced by the international discourse on human rights and the promotion of indigenous African law, premised upon the ideals of Ubuntu, is contentious. Undoubtedly, a society evolves out of customs, practices and traditions. The persistence and relevance of these values vary distinctly in every multi-cultural, multi-linguistic and multi-religious nation. But an explicit provision towards the promotion of indigenous law in South African Constitution, as argued by I Keevy (2009) is highly incompatible with the human rights discourse. But it must be understood that the Court has carved out a suitable and definitional characteristic of Ubuntu which does not go against the spirit of modern constitutionalism. This nexus between the two derivatives of law are therefore constructively compatible, despite the anti-individualistic nature of rights enshrining the core values of Ubuntu. (Mokgoro: 1998)

In India, the constitution as a text developed to become a transformative text, however, there are certain entrenched ideals and values which evolved and influenced and enriched the discourse on rights. One of the prominent ideals of welfare state propounded by the Father of the Indian Nation is the concept of *Sarvodaya*, which essentially means progress for all. Equality, non-discrimination against untouchables in India and to ensure their socio-economic betterment were the goals fulfilled through the incorporation of Article 17, which is very specific to the socio-historical experience in India. This came under the ambit of fundamental right in the pursuit of enabling equality, liberty and dignity. Therefore, the cautionary attitude was displayed more observably in the inculcation and entrenchment of rights which required greater economic stability, while, the founding fathers and mothers of the Indian Constitution tried their level best in ensuring constitutional protection and promotion of the socially discriminated sections in India.

CONCLUSION

Post- Emergency period in India saw the Apex Court devising interpretive skills to enumerate the basic features of the Constitution, in order to preserve the integral character and the effort to uphold the inalienable definitive features of the Indian Constitution. This process also led to the assertion of the rights of the citizens. A similar methodology was witnessed in the making of the South African Constitution wherein the 36 constitutional principles were already stated and mutually agreed upon. These acted as the benchmark and guidelines for the Constituent Assembly. Both these processes in India and South Africa were seen with a common purpose, i.e. to preserve the rights of the citizens against the excesses of the state. What is ironical in both the cases is that, the Court in India attempted to uphold the basic precepts of the constitution within a democracy, while South Africa was heading to become one.

The role of the court in India in devising the Basic Structure and the expansive interpretation of Article 21, amounting to the expansion of the scope and domain of social and economic rights is seen as a marked feature of the period of post- democracy, leading to the rise of non-representative institutions. While, the increasing prominence of the court in enabling the enforcement of rights, has not always yielded the best results. The fact remains that interpretation of the Constitution only earmarks the beginning of a greater reliance of the state agency to fulfil the expansive connotation of legally recognizable rights. However, state incapacity and the simultaneous furtherance of draconian laws such as MISA and AFSPA, raises scepticism over the degree of expansion of rights. Therefore, the concerns of civil liberties are compromised while socio economic rights, in consonance with the human rights discourse are advanced. This change is markedly very distinct from the past.

A recent tussle between the judiciary and representative institutions has been seen in context of *right to privacy* in India. While the South Africa Constitution recognises it as a fundamental right, Indian courts have questioned the controversy surrounding the government's efforts to advance social and economic benefits and the easy accessibility of personal information of the individual. Therefore, the Court feels the need to read privacy reads in consonance with fundamental rights, highlighting the complication surrounding the textual configuration of the Constitution and the common law principle.

In the case of South Africa, the marked characteristic of constitutional interpretative techniques has observed the widespread use of history in delivering judgements. However, the central question remains whether these alternative interpretative techniques and the inculcation of indigenous features have led to a change in the discourse on rights. In South Africa for instance, the bulkiness of the rights inculcated in the text is emerging as a contentious issue, and leading the court to devise methods to settle with bargains through community dispensation of rights while continuing to cherish human rights discourse. This cannot be marked as a major change, but, it represents a character of unease and incompatibility of human rights. The role of the court is therefore, to devise interpretative techniques in order to withhold democracy and preserving its foundation. The following chapter elaborates this ongoing tussle.

CHAPTER THREE

RIGHT TO LIVELIHOOD IN INDIA AND SOUTH AFRICA

INTRODUCTION

The concept of Human Dignity⁸⁴ is closely associated with the Right to Livelihood. A decent livelihood requires the availability of housing, drinking water, basic healthcare and sanitation; along with quality education. Article 1 of the UDHR, 1948 also states that: all human beings are born free and equal in dignity and rights. However, states in the post- colonial world often face the common and pressing challenge of providing these basic necessary means, with the use of which each citizen can lead a life with self- respect. The inception of the South African Constitution essentially rests on the claim to provide adequate means to attain a dignified life through infusing an elaborate section of Bill of Rights (Chapter 2) in the text, in order to guarantee all essential means to livelihood, and put the representative institutions under the constant scanner of the Court. India on the contrary has over the years recognised the need to address the issue of quality of life, especially with the Court playing a leading and creative role in devising interpretative techniques as a way of exerting pressure on the State to create policies and legislations in order to enable the same.

⁸⁴ Note: The term appears in Chapter 1 Founding Provisions, and Chapter 2 Section 10 of the Constitution of the Republic of South Africa. While, the preamble of Constitution of India states; FRATERNITY assuring the dignity of the individual and the 2[unity and integrity of the Nation]

While, the South African Constitution enumerates the justiciability of socio economic rights; housing⁸⁵, health care, food, water, social security⁸⁶; and education⁸⁷, the Indian Constitution recently witnessed the inclusion of Right to Education (Article 21A) within the section of fundamental rights⁸⁸, while other livelihood rights⁸⁹ continue to remain as goals of the state, enumerated under the Directive Principles of State Policy (Part IV).

Additionally, the Indian Court also believes that a right could be treated as fundamental even if it was not present in the fundamental rights section of the constitution.⁹⁰(Gauri and Brinks 146: 2008) Therefore, the South African state bears the responsibility of providing adequate means of livelihood to its citizens, without dereliction of its duty, and the Court is expected to indispensably provide judicial relief in case of breach. While in the case of India, the state is duty bound to strive to fulfil the goals which were delegated as a formidable objective to be achieved by future political representatives.

The Constitution of the Republic of South Africa inheres an expansive provision for the ensuring the right to dignified life for its citizens. India had dreamt of heading in the same direction through the enactment of state policies. In the recent years however, South Africa has witnessed the major drawbacks of outlining a very over- ambitious section on justiciable rights in the light of its inability to guarantee the same. This also raises the issue of paucity of funds and unavailability of resources in post- colonial nations. Coupled with this problem is the lack of state efficiency and political unwillingness in guaranteeing the enumerated justiciable rights. The Bill of Rights is the cornerstone of democracy⁹¹, and hence, the intervention of the Court is seen as a fight to preserve the foundational values enshrined in the Supreme Law.

⁸⁵ Section 26 (1), (2), (3) of the Constitution of Republic of South Africa, 1996

⁸⁶ Section 27 (1), (2), (3) of the Constitution of Republic of South Africa, 1996

⁸⁷ Section 29 (1), (2), (3), (4) of the Constitution of Republic of South Africa, 1996

⁸⁸ The 86th Constitutional Amendment Act (RTE), 2002 made The Right of Children to free and Compulsory Education of all children of age six to fourteen years as a fundamental right.

⁸⁹ The Part IV, Article 47 of the India Constitution recognises the duty of the state to raise the standard of living, level of nutrition, improvement of public health.

⁹⁰ See Unnikrishnan v. State of AP, 1 SCC 645, 1993

⁹¹ Chapter 2, 7(1), of the Constitution of Republic of South Africa, 1996

In the case of India, the intervention of the Court and the expansive interpretation of Article 21 have allowed the seepage of several rights which further the livelihood of its citizens and which has additionally led to the infusion of the fundamental rights and DPSP. However, the justification of Court's intervention has remained questionable. While some strongly believe that this intervention of the Court is not seen as a breach of its jurisdiction, but in turn, exerts pressure on the State to fulfil the directives, which were always meant to be integral for the socio economic development of the country.

This chapter attempts to develop an understanding of the evolution of the right to livelihood in the context of India and South Africa. The following sections contain two important cases dealt by the court in each of the two countries. The scope of this chapter is limited to observing the complications and the 'role of an ameliorator' led by the court in India and South Africa while interpreting the constitution. This would be followed by a reflection over the judicial constraints in expanding the domain of livelihood rights due to the larger problem of state incapacity and economic constraints in guaranteeing the same. The case studies also try to look into the larger problem in the metropolitan regions in post- colonial nations creating widespread problems in providing adequate shelter and the means to attain a decent livelihood. The subsequent section would attempt to draw an analytical comparison between the two landmark cases in India and South Africa, and the final section highlights an overview analysis of other livelihood rights in both the countries.

3.1 RIGHT TO LIFE AND LIVELIHOOD IN INDIA: CASE STUDIES

The *Maneka Gandhi case (1978)*⁹² had led to the birth of due process in India and the need to expand the ambiguity surrounding Article 21 of the constitution which seeks to protect and promote the right to life of Indian citizens. The case also held that fundamental rights are not mutually exclusive to each other. This essentially implied that every right is concomitant to the other, and the court can derive the proper meaning while interpreting the rights in consonance with each other.

The connotation of what constitutes a dignified life has been widened ever since. In tune with the Human Rights discourse, the bifurcation between justiciable and non-justiciable rights has gradually obscured in India. “Life” therefore is seen to necessarily include a holistic ownership and exercise of various other complimentary rights. In this light, the term “livelihood” has gained a level playing field within the ambit of Article 21.

The following two cases would deal with two distinct complications the court confronted with. While the first case allowed the seepage of ‘right to live’ within the scope of ‘right to life’, the second case highlights the complication in reading the ‘right to derive a decent life’ within the same domain. In the *Olga Tells & Ors. VS. BMC & ors. etc., 1985*, Justice Chandarchud remarked⁹³

“(The petitioners) rely for their rights on Article 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood.”⁹⁴

⁹² 1978 AIR 597, 1978 SCR (2) 621, URL: <https://indiankanoon.org/doc/1766147/> Accessed on 25th March, 2017.

⁹³ AIR 1986 SC 180, URL: <https://indiankanoon.org/doc/709776/> Accessed on 28th March, 2017.

⁹⁴ Justice Chandarchud argued in favour of the petitioners understanding the background conditions under which the pavement dwellers were forced to live in appalling conditions, and thus highlighted the relation between right to livelihood within the ambit of right to life mentioned under Article 21. See, AIR 1986 SC 180

The landmark judgement was significant in outlining the role of the court in devising ways of giving prominence to greater normative values associated with the livelihood of citizens, within the phraseology of rights. The case dealt with a petition filed against the forceful eviction of slum dwellers by the Bombay Municipal Corporation (BMC) for illegally occupying the pavements, with regard to an order passed by the Maharashtra Government in the year 1981.

The petitioners claimed that forceful eviction had deprived them of their sole means to attain livelihood. Against the plea of the petitioners, the respondents in defence argued that; one, the right to settle anywhere in the Country under article 19(1) (e) does not confer the slum dwellers to settle down on city pavements, second, they had violated the norms of the Bombay Municipal Corporation (BMC), explicitly stated under sections 312, 313 and 314⁹⁵; and finally, eviction does not violate the right to life mentioned under Article 19. Apart from these central arguments, the respondents also accused that the dwellers had disallowed BMC to carry out its statutory functions, and additionally had violated sections 111 and 115 of the Police Act. Thus, the petitioners were stopped from contending in the Supreme Court that the temporary shelters installed by the dwellers on the pavements cannot be demolished.

This additionally required the court to look into the larger picture of the problem of the alarming number of poor residing illegally on pavements across the country. The prominence of this case derived from the fact that it was to affect millions of destitute and homeless, and thus the court felt the need to interpret fundamental rights as a tool to secure the larger interests of the people. Additionally, the court realised that it had to take into account of the fact that the concentration of job opportunities in the Metropolitan cities emerged as a dominant factor for migration and in turn, the illegal occupation of pavements. Therefore, it became necessary to derive the legality and reasonableness of the procedure established under the BMC Act.

⁹⁵ The Bombay Municipal Act, 1888, under Section 314 allows the commissioner to remove anything erected, deposited or hawked in contravention of section 312 and 313A, with or without issuance of notice. See Bombay Municipal Act III of 1888, The Mumbai Municipal Corporation Act. (As modified up to 18th January, 2016.)

Additionally, the court also sought to understand whether trespassing, which is tort, would also apply to the petitioners, and whether there involved any degree of criminality in dwelling on the streets due to compelling circumstances, here being; poverty. In this light, the court viewed that the pavement dwellers could not be regarded as trespassers since they had settled illegally out of economic compulsions and eviction would render them homeless. Also, since the place of shelter for the poor was in proximity with their place of work, the court felt the need to delve upon the relation between the ‘right to work’ within the ambit of right to live.

In its effort to derive the true meaning of Section 314, the court reached the conclusion that the clause did not confer the deportation process to be carried out, without issuance of a prior notice; interpreting the clause as an enabling provision. The court’s judgement allowed one month’s time for the dwellers to vacate, along with the decision to provide alternate accommodation in proximity to their place of work, while also securing the slums which have been existed for twenty years or more, until the place would be required to be utilised for public use. It also pronounced that the earnest execution of the Low Income Shelter Programme and the ‘Slum Upgradation Programme (SUP) should be carried out with immediate effect to resolve the problem of illegal squatting while securing the livelihood rights of the homeless.

The courts in India have dealt with emerging challenges and limitations while expansively interpreting Article 21. The Jubilee Hills Labour Welfare vs. the Municipal Corporation vs. Ors and the Municipal Corporation of Hyderabad and Ors dealt by the High Court of Andhra Pradesh stands apart from *Olga Tellis*, since it sought to determine the legality of conducting business activities on pavement. The petition was filed by the Jubilee Hills Labour Welfare Association and its 33 members who had accused the Municipal Corporation of seeking to evict the street vendors who had been carrying out various business activities for years. The vendors used legal electricity, and telephone connections and were regular tax payers to the Municipal Corporation.

“The easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.”⁹⁶

⁹⁶ *Basheshar Nath v. The Commissioner of Income Tax Delhi* (1959) Supp. 1 S.C.R. 528, referred to. 2.1

The counter petitioners stood in favour of the eviction programme taking the traffic situation and nuisance caused by the small businessmen into account. Additionally, they reiterated that pavements were not meant for carrying out business activities and instead are meant to decongest the city roads. Conducting business activities on the road side also stalled the municipal body to widen the roads and beautify the posh locality. The court considered the fact that the petitioners were beneficiaries of a Self- Employment Scheme, and hence had established business. Also, this also was the only source of livelihood for the people. The petitioners repeatedly claimed that they did not seek to claim ownership of the land they worked on and neither did they create any inconveniences.

The Court had to determine whether carrying out business activities on the pavements could be considered as the fundamental or legal right of a citizen. The petitioners claimed that the eviction carried out by the municipal body had led to the violation of their Right to Life under Article 21 along with Article 14 and Article 19(1) (g)⁹⁷ read together with the Directive Principles under Part IV. Earlier in the *Sodan Singh I*⁹⁸ case the Court had clearly set a distinction between the rights of the slum dwellers dealt in the *Olga Tellis* case and the rights of street vendors or hawkers. The court had reiterated that there exists a marked distinction between the two. While recognising the duty of the Municipal body to earmark locations for hawking in order to uphold the conveniences of the public in general, the court found its limitations in establishing and asserting the direct correlation between right to livelihood and the right to work.

Therefore, while the court could not interpret right to livelihood in favour of the hawkers and street vendors, while only being able to provide relief, it must be noted that in cities across India, street vendors are palpably present. It also is the sole means to derive a decent livelihood for several migrants. It is not just the problem of dwelling or living in slums that associates with the abrogation of the livelihood, but the seizure of the source of deriving a livelihood also leads to the direct infringement of Article 21. In this light, the court has sought to protect the rights of the hawkers by pressuring the municipal bodies to establish fair rules and regulations and assign locations to hawkers to conduct business activities.

⁹⁷ Article 19 (1) All citizens have the right to: (g) to practice any profession, or to carry out any trade, business, or profession.

⁹⁸ *Sodan Singh Vs. N.D.M.C.* : 1989 (4) SCC 155

Gainda Ram & Ors, and MCD & Ors highlighted the major drawbacks in furthering the concerns of livelihood rights, and the limitations of the court in merely directing the executive authorities to advance the concerns of rights to conduct business activities on pavements. This is also seen in the light of the court's inability and limitation in expansively interpreting right to work within the ambit of right to life. The case examined the failure of MCD in carrying out the allotment scheme effectively, which had sought to provide spaces for hawkers and street vendors in Delhi. Roughly 1/10th of the applicants were allotted spaces while several of them were evicted by the Municipal Bodies for illegally occupying spaces for conducting business activities.

Therefore, while the Directive Principles of State Policy under Article 38 seeks to promote overall welfare of the people, while Article 39 directs the state to formulate policies to enable the right to livelihood, distribute resources to promote common good, disallow concentration of wealth in the hands of few, and promote the health and dignity of the workers, India has witnessed a continual battle in advancing the socio economic goals. The executive authorities and the continual pressure exerted by the court to further the holistic understanding of livelihood underlie a constant tussle to secure and promote these goals in tune with the fundamental objective to secure basic human dignity. The endeavour to promote and unveil the deeper meaning of Article 21 which seeks to secure the life and liberty of the people, except according to procedure established by law in consonance with the value of human dignity and tying it with the additional requisites which could enable to secure the same is appreciable. The following section would highlight similar case studies in the context of South Africa.

3.2 RIGHT TO LIVELIHOOD IN SOUTH AFRICA: CASE STUDIES.

The enumeration of an enriched section on social and economic rights in the South African Constitution marks a transformative vision. It also displays a sense of urgency in the light of the delayed phase of democratization witnessed by the nation and the need to match pace with the other nations in a globalised setting. The need to provide the basic minimum to lead a dignified life was one of the uncontested and unilaterally ratified constitutional principles during the process of constitution- making. However, South Africa accepted a more elaborate connotation of livelihood rights, which exerted pressure on the state, more so; on the judiciary. This was however well expected, since the process of democracy building was accompanied by a complete distrust in representative bodies, while upholding the court as a champion of rights.

This section would highlight two distinct cases. Though there is no inter-linkage or similarity in the way the court meted out the judgements, but a common noticeable linkage is the perpetual problem South Africa has been witnessing ever since the adoption of an overtly substantive constitution. Additionally, it highlights how the court continues to play a mediating role in dispensing justice in the pursuit of upholding unanimously- agreed normative objectives. The focus remains on the most contentious provision in Chapter 2, the Right to Housing since, “[the South African Constitutional Court’s] housing rights jurisprudence is more developed than that regarding any other social and economic right contained in the South African Constitution.” (Williams 819: 2014)

The cause of the acute housing shortage lies in apartheid.⁹⁹ The apartheid history of South Africa was gripped with the troubled narratives of eviction and land grabbing through the State- led policies underlying racial segregation (As seen in Chapter One). The installation of constitutional democracy in the aftermath of the post- apartheid era echoed the shared agonies of millions who had been brutally evacuated and displaced. Therefore, securing the well being of its citizens, while upholding the dignity based on liberty and equality required the entrenchment of housing rights, which remains one of the foremost requisite to enable a decent livelihood.

⁹⁹ See, 2001 (1) SA 6 (CC)

Thus, the melancholic chorus evolved to be an ensemble which took the form of constitutional rights, with which the citizens of New South Africa associated their dreams. They were assured that the Court would act as a protector and guarantor of rights. However, a study of the judgments highlights that the judiciary has failed to provide direct relief and compensation to the litigants.

Ever since the pronouncement of the first landmark judgment; the *Grootboom case*, the Court has passed judgments based on the logic of reasonableness, merely imposing direct pressure over the state to devise policies and channel funds in the pursuit of progressively realizing the right to adequate housing enunciated under Section 26. The contribution of the important case lied in the expansive interpretation of Section 28 (1)(c) in consonance with Section 26, in terms of adequate housing being a *minimum core requirement* for a decent livelihood for not only children, but adults as well. This judgment was reached through a thorough study of international instruments, most notably being the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁰⁰

The City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] highlighted the contradictory nature of the right to property¹⁰¹ and the right to housing in South Africa. The case dealt with the breach of property rights of Blue Moonlight Properties 39 Pty. Ltd. The firm owned a commercial factory building, and garages in the city of Johannesburg¹⁰², which was illegally occupied by 89 poor people, who were living within the premises of the privately owned commercial spaces. The court faced a dilemma since the evacuation of the poor residents would have been unfair in the light of the failure of Municipal Authorities in providing adequate housing¹⁰³, while the retention of illegal occupiers would amount to the breach of the right to property of the owners.

¹⁰⁰ See, 2001 (1) SA 14 (CC)

¹⁰¹ See Section 25 (1-9), of the Constitution of Republic of South Africa, 1996

¹⁰² Source: <http://www.saflii.org/za/cases/ZACC/2011/33.html>, Accessed on 30th May, 2017.

¹⁰³ Note: Chapter 7 outlines the structure and functions of local government. Section 152 (1) (c): to promote social and economic development and Section 153 (a) states the responsibility of local government to give priority to basic needs of the community and channel and manage funds to promote social and economic development.

There were many problems which were brought to light. Firstly, the occupiers were poor and had no source of formal employment. They earned their living through the informal sector within the city. This sheds light on the issue that the concentration of job opportunities are confined to the major cities, which drive the poor to settle down in sub- standard conditions. Secondly, the owner of the property did not wish to bear the burden as a consequence of the failure on the part of local government in fulfilling the functions stated under Chapter 7 of the Constitution¹⁰⁴. Thirdly, the evacuation of the residents would render them homeless, and a breach of their adequate right to housing. Fourthly, the funds available with the city in order to enforce housing policies and to determine the constitutionality of the City's emergency housing policy became necessary.¹⁰⁵

The Supreme Court of Appeal issued an eviction order preserving the property right of Blue Moonlight while upholding the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)¹⁰⁶. The court reached to the conclusion that Chapter 12 of emergency housing policy is unconstitutional since it strives to provide "temporary" accommodation in emergency situations. Therefore, the Court pronounced the state to provide temporary relief to the occupiers.¹⁰⁷ The judgement aroused a lot of anger and disappointment, since the court failed to provide a permanent solution to the problem of lack of adequate and hygienic living conditions in the city.

¹⁰⁴ Chapter 7 of the SA Constitution, 1996 contains the structure and functions of the Local Government.

¹⁰⁵ Note: *The Grootboom case* highlighted the need to develop an emergency housing scheme under which evacuees could be provided adequate housing till the time the compensation is meted out. See National Housing Code, Section 4 of the Housing Act. See Also: 2012 (2) SA 27.

¹⁰⁶ The Act provides the prohibition of illegal eviction; and enumerates procedures for the eviction of unlawful occupiers. <http://www.gov.za/sites/www.gov.za/files/a19-98.pdf> Accessed on 4th June, 2017

¹⁰⁷ See, 2012 (2) SA 96, 97, 98.

Joseph and Others v City of Johannesburg and Others, 2009¹⁰⁸ is significant since it led to the cultivation of un-enumerated right by the Court, while expansively interpreting the right to housing and the contribution towards procedural fairness in South Africa. The term ‘adequate’ within Section 26 (1)¹⁰⁹ allows the flexibility in accommodating multiple means to avail a dignified means to livelihood, within the narrative of rights. The case dealt with appeal filed against the judgment of the high court with regard to the termination of electric supply in Ennerdale Mansions; a block consisting of 44 apartments, located in Johannesburg.

The complication arose from the fact that the tenants paid the electricity expense to the landlord, instead of the City Power (Pty) Ltd.¹¹⁰, which raised questions over the absence of legal relationship between the applicants and the Second Respondent; City Power, as per the Credit Control by- laws, and hence it also failed to establish the *prima facie* right to demand electricity and the question over the fact that whether the respondents had the right to receive electricity as a basic municipal service.

Some notable facts about the case were; firstly, no prior notice was sent out to the residents by the parastatal authority. This was seen in violation of section 3 (2) (b) of the Promotion of Administrative Justice Act 3 of 2000, also known as PAJA. However, since there was absence of a direct contractual relationship between the applicants (who couldn’t be regarded as ‘customers’) and the electricity supply body, the Court had to determine whether the applicants were entitled to procedural fairness under PAJA, or not.

¹⁰⁸ 2010 (4) SA 55 (CC) (9 October 2009) <http://www.saflii.org/za/cases/ZACC/2009/30.html>, Accessed on 5th June, 2017.

¹⁰⁹ Section 26(1): Everyone has the right to adequate housing.

¹¹⁰ Note: The City Power (Pty.) Ltd. is a *parastatal* authority which provides electricity to the people within the jurisdiction of the City of Johannesburg.

Secondly, most of the residents were poor, earning between R 3000 to R 4000, while some were jobless as well, thirdly, Mr. Nel, the owner of the residential apartment (also the fourth respondent) incurred an arrears of R400 000 to City Power which had led to the disconnection of power supply and additionally, he had failed to convey to the tenants regarding the disconnection notice. The residents in the building lived without electricity for over 12 months, making the living conditions in the building intolerable.¹¹¹

The applicants claimed a ‘*material and adverse*’ violation of their rights¹¹² due to the prolonged disconnection of electricity in the apartment stated under Section 26¹¹³ and Section 10¹¹⁴ of the Constitution, and also a violation of the contractual agreement signed with Mr. Nel.¹¹⁵ Additionally, Section 153 of the Constitution obliges the municipality to manage administration, budgeting and planning processes to give priority to the basic needs of the community.¹¹⁶ This claim was further backed by other legislations, such as, Section 73 of the Municipal Systems Act¹¹⁷ and Housing Act 107, 1999¹¹⁸.

Since the case involved the constitutional interpretation of PAJA, it was dealt by the Constitutional Court. The judgment proclaimed in favor of the applicants, and hence declared the termination of Electric supply to be unlawful thereby directing the parastatal authority to reconnect the electric supply. The case is significant in highlighting the diversion from a mere formalistic approach, and the ability of the Court to devise interpretative techniques to read the section on rights expansively, while cherishing the value of Human Dignity. It also signifies that the despite a very elaborate section on Bill of Rights enumerated in Chapter 2, the court felt the need to resolve the contention between rights and uphold the normative values which establish the very foundation of democracy in South Africa.

¹¹¹ See 2010 (4) SA 8,9 (CC)

¹¹² See 2010 (4) SA 31 (CC)

¹¹³ Chapter 2, Section 26 Right to Housing, Constitution of the Republic of South Africa, 1996.

¹¹⁴ Chapter 1, Section 10 Right to Human Dignity, Constitution of the Republic of South Africa, 1996

¹¹⁵ See 2010 (4) SA 11 (CC)

¹¹⁶ Section 153 states that: A municipality must—

(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community;

¹¹⁷ Note: the following Act obliges the Municipal Corporation to provide basic municipal services, and promote the development of local community. See, 2010 (4) SA 38 (CC)

¹¹⁸ Note: Imposes specific obligation on municipal bodies to provide basic services, including *electricity*. See 2010 (4) SA 39 (CC)

3.3 OLGA TELLIS AND GROOTBOOM CASE: A COMPARATIVE ASSESSMENT

The two landmark judgments pertaining to the right to livelihood in two democratic countries represent a series of convergences, as well as a character of distinctiveness. The *Olga Tellis* judgment highlighted the ability of the court to emotionally and normatively analyze the plight of the poor through a humane lens. This represents that judgments delivered by the court, especially concerning the destitute and poor, cannot be justly dealt in a rigorous and formalistic method.

The *Grootboom* case in South Africa was a bitter confrontation with reality, since the case highlighted the intolerable conditions under which the poor in South Africa lived in, and the inability of the State to guarantee adequate living conditions, which came as a promise through its Constitution. The court observed that the informal settlements in Wallacedene found nearly 50% of its residents to be children. The gravity of the case stemmed from the fact that it violated multiple rights enshrined in Chapter 2. While the Constitution consists of right to housing under Section 26, it also includes right to a healthy environment¹¹⁹ and children's rights¹²⁰. Concurrently, these violations led to the veritable transgression of the dignity of the citizens.

This highlights two marked distinctions in nature of complications in advancing livelihood rights in India and South Africa. In the *Olga Tellis* case the court considered it necessary to intervene since it underscored the larger picture of India. In this light, it became necessary to examine the scope of the constitution in advancing and securing the livelihood rights of the citizens through the application of the concurrence principle, in strengthening the socio economic rights jurisprudence, which is evolutionary in nature. On the other hand, the magnitude of rights violation in the South African case is much more intense. This is essentially because livelihood rights had already assumed a shape in the supreme text, and it remains the foremost duty of the court, along with the state to ensure that they are upheld and furthered.

¹¹⁹ Section 24, Constitution of the Republic of South Africa, 1996.

¹²⁰ Section 28 (1) (2) (3), Constitution of the Republic of South Africa, 1996.

Secondly, the exercise of creative interpretation of Article 21 and the attempts to infuse other associated rights is seen as an advancement of the original intention of the framers. The court necessarily needs to act as a buffer to remind the state regarding the primacy of the DPSP. The South African Constitutional Court signified hope in rectifying the draconian policies in the past and usher a ray of hope in advancing the rights of all. This also emerged from the lack of faith in the parliament and executive. Therefore, problems associated with lack of political willingness and political failure in advancing the concerns of rights was a notable character of the apartheid regime and thus was largely predictable, hence leading to the advancement of the model of constitutional democracy.

The Court observed the root problem of destitution and poverty in the atrocities inflicted against the non- Whites during the apartheid regime. The use of history in interpretation becomes necessary, because the laws passed in a post- colonial democratic country like South Africa get deeply penetrated, and therefore, reparative solutions can only be found through tracing back the injustices inflicted upon the subjugated races in the past. This was cited in the *Grootboom case* where the court reiterated:

The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas. Influx control was rigorously enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the “coloured labour preference policy.”¹²¹

¹²¹ SA 46; 2000 (11) BCLR 1169 (4 October 2000) (6), <http://www.saflii.org/za/cases/ZACC/2000/19.html>, Accessed on 6th June, 2017.

Some common difficulties which are profoundly traceable in India and South Africa and emerge as a major stumbling block in advancing livelihood rights effectively have been firstly, the lack of job opportunities in the rural areas leading to forceful migration to the cities, and the larger problem of poor occupying the pavements or illegally dwelling due to economic compulsions is a clear indication that legal assessment cannot be devoid of emotions and can favorably be routed towards the terrain of substantive enrichment of the rights discourse.

AN OVERVIEW OF RIGHT TO LIVELIHOOD IN INDIA AND SOUTH AFRICA: CONCLUDING CHAPTER

The Constitution of the Republic of South Africa, 1996 containing an elaborate section of Bill of Rights is largely indebted and influenced by the human rights discourse. However, as observed in the above case studies, human rights have proven to have little analytical traction. Its only strength remains that it is largely discursive and thus influential in nature. (Williams 845- 846: 2014) However, livelihood rights jurisprudence remains to be ‘evolving’ in nature and a heavy and explicit phraseology of rights in the text has rarely assisted the process of advancing social and economic rights. As observed in the case of the right to housing, South Africa continues to struggle with the lack of state capacity and resources in guaranteeing the same. Rights jurisprudence in the field of health and education projects a similar picture.

Section 27 (1) of the Constitution guarantees health care services, including reproductive health care. However, the lack of funding in the sector of health, clearly evident in the *Soobramoney v Minister of Health (KwaZulu- Natal)* in which a patient was denied renal dialysis treatment by the court in the light of scarcity of resources to allocate. The court observed that giving assent to the demand of the petitioner would disallow the just allocation of resources in the country, as there exists paucity and there remain constraints due to it. Therefore, South African Constitutional Court’s employment of deference has become an apparent scene. (Brand D. in *Vinhela O, U Baxi and F. Viljoen* 429: 2013)

Additionally, South African rights jurisprudence continues to heavily derive its reasoning from the past experiences, deeply entrenched into the country. In *Matukane vs. Laerskool Potgietersrus* it was observed that a non- aided school refused admission of (black) children on the grounds of culture. While Section 29 of the Constitution asserts the right to basic education, the court preferred to interpret the largely on the basis of unfair racial discrimination. (Berger. J in *Gauri, V. And Daniel M. Brinks* 64: 2008)

In the case of India, health remains a shared subject between the centre and the state in its federal setup and the health sector largely functions in the favor of the rich, while health services provided by the state remain inadequate and insufficient. The intervention of the court in India has led the doctors to become legally accountable for negligence and fraudulency. In *Cosmopolitan Hospitals and Another v. Vasantha P. Nair* the court allowed patients to get remedies through the consumer redressal forums. However, while the courts have strived hard to make private hospitals accountable and to regulate their functioning under the state, 72% of times the state has failed to bring private hospitals under the scanner. (Shankar, S and P.B Mehta in Gauri, V. And Daniel M. Brinks 128: 2008).

In another, *Paschim Banga Kheth Mazdoor Samiti v State of West Bengal* the Supreme Court pronounced upon the need to provide health entitlements in the case of a medical urgency. While the court recognized the financial constraints in providing the same, while promoting Article 47 of the Indian Constitution.

India has however witnessed the inculcation of The Right of Children to free and Compulsory Education of all children of age six to fourteen years within the ambit of fundamental rights. However, it must be noted that a mere inculcation of right, justiciable in nature cannot compensate for or guarantee the quality education, especially due to the appalling conditions of state run schools. It also brings the fact to light, that courts by themselves cannot bring about transformation. But devising interpretative techniques to widen the scope of Article 21 has led to the ban of sale of tobacco and *ghutka*, read concurrently with Article 47 under the Directive Principles in its endeavor to improve the condition of public health. Though, undoubtedly, the realization of transformative *telos* of the Constitution depends on the shape and substance of democratic politics. (Sudarshan R. in Gargarella, R., P. Domingo, T. Roux 163: 2006)

In expressing distrust in the state as an agency to advance the concerns of rights and the associated idea of dignity, Hannah Arendt (1996) says, “Human dignity needs a new guarantee which can be found in a new political principle, in a new land on earth, whose validity this time must comprehend the whole humanity, while its power must remain strictly limited, rooted in, and controlled by newly defined territorial entities.”

This work essentially attempted to observe the global phenomenon which seeks to operate in favour of a liberal constitutionalist model, while furthering an expansive discourse on human rights, which is a necessary pre-requisite to secure the dignity of each individual. While both the polities have recognised the need to further the concerns of rights, premised upon the language of internationally accepted connotation of human rights, the constitution making process had observed the dictation of a discourse of rights which was different in the case of India.

The constitutional principles approach in South Africa earmarked an era of consolidating democracy, while enshrining an elaborate section of rights, while on the hand, India was bound by a different set of historical compulsions which had led the framers to delegate the concerns of social and economic rights as future goals, while protecting and promoting the civil and political rights. This, as argued in chapter one, was a result of a long series of deliberations and a process of prioritization which ended up giving greater primacy to the immediate concerns.

While, post-apartheid South Africa was bound by a distinct set of compelling circumstances, largely influenced by the distinct era in which the process of constitution making had unleashed. The most apparent concern in the late 20th century, also marking the beginning of neo-liberalism, was to immediately advance the language of human rights, as a way to repair the tarnished international image and to avoid bearing the grave consequences of global isolation. Therefore democracy, laden with the human rights discourse, became the recognizable features of the South African Constitution.

However, the process of constitution making is relevant for us in deriving the background conditions under which the discourse on rights emerged in the two polities. There is no merit in the process of deliberation in itself but, the delegation of concerns in the case of India led to the expansion of the scope of social and economic rights in the years to come, as largely intended by the founding fathers. While, the inculcation of a pre-determined connotation of rights in South Africa emerged as a stumbling block in guaranteeing the justiciable rights. Adding to this is the nature of enriched rights discourse, enunciating an immediate call for social and economic transformation which continues to emerge as the Achilles' heel of the constitutional democracy established in New South Africa.

Undoubtedly, the enumeration of an enriched section on social and economic rights in the South African Constitution also marks a transformative vision. Additionally, it displays a sense of urgency in the light of the delayed phase of democratization witnessed by the nation and the pressing need to match pace with the other nations in a globalised setting. The need to provide the basic minimum to lead a dignified life was one of the uncontested and unilaterally ratified constitutional principles during the process of constitution-making. However, South Africa accepted a more elaborate connotation of livelihood rights, which exerted pressure on the state, more so; on the judiciary. This was however well expected, since the process of democracy building was accompanied by a complete distrust in representative bodies, while upholding the court as a champion of rights.

While the Indian Constitution gradually evolved to be a transformative text in itself with the assistance of the court playing a leading and creative role in expansively interpreting Article 21, leading to the infusion of due process in India. The Basic Structure Doctrine on the other hand is also seen as a coherent and independent form of judicial review, upholding the supremacy of the constitution, while recognising the key features of the text.

However, the influence of the post-democratic era has been seen in both the countries, evident in the rise of 'newly defined territorial entities'. While the rise of the judiciary in expanding the scope and ambit of rights in India was questioned, in South Africa, the upper hand of the judiciary in furthering then concerns of rights was largely intentional in nature. The tussle between the judiciary and the executive/parliament has therefore been intense in India, which has led the court to devise interpretative techniques in furthering the normative values engraved well within the constitutional text. Thus, the basic structure doctrine and the inculcation of the American jurisprudential precedent of "*due process*" have strengthened the essence of transformative constitution, through devising interpretative skills.

The post colonial is also marked by its own defining characteristics, notable from the socio cultural diversity. The relationship and coexistence of a Bill of Rights provision, heavily influenced by the international discourse on human rights and the promotion of indigenous African law, premised upon the ideals of *Ubuntu* has emerged as one of the notable characteristics. Undoubtedly, a society evolves out of customs, practices and traditions. The persistence and relevance of these values vary distinctly in every multi-cultural, multi-linguistic and multi- religious nation.

An added feature of the emerging South African jurisprudence has been the role of history, used as a tool for justification. History plays a very prominent role in both providing and denying socio economic rights. The apartheid history therefore provides a tool for justifying the rights discourse and in advancing the claims of social and economic rights. But, this also marks the constraints of the court in the light of paucity of resources in several cases. This has restricted the court from interpreting the expansive bill of rights, with a degree of limitation.

India has also observed its own set of drawbacks in advancing the claims of rights, with the court playing a leading role. This is seen in the criticisms against judicial activism in India which have emerged from many different standpoints, most notably, the observation in the post 1990s period, which was marked by globalization and privatization and the problem of post colonial constraints, apart from the limitations in interpretative exercise adopted.

Therefore, India and South Africa have both witnessed a change in the discourse of rights. While there have been a degree of convergence, notably the consonance with human rights discourse, both the transitions display the tensions which are apparently reflects the concerns of the *post colonial*. Despite the leading role played by the court, the nexus to be maintained with the state remains a problem advancing the concerns of rights. As observed in Chapter three, the complications in both India and South Africa in advancing the claims of livelihood rights emerge from the court's limitations in mediating with the state and the undeniable paucity of resources.

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