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Constitutionalism, Rule of Law, and Development Governance: A Comparative Legal Analysis of India and Africa

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ABSTRACT

The paper will compare the legal approaches of constitutionalism, the rule of law and development governance in India and various African nations and their ways of converging and diverging of these two concepts. It delves into interplay between the aspects of past colonial sources, aboriginal law, and contemporary global forces in the evolution of these paradigms that are critical. The analysis of these nations in the paper is done based on the challenge of how they manage the complexities of sorting out good constitutional democracies and models of development that are fair as they tend to have common issues in institutionalizing the idea of good governance and in protecting the basic rights. In addition, it discusses law and judicial interpretations effectiveness as a means of implementing constitution and sustainable development in different socio-political circumstances. Still not sure and with suspicions still plenty over the real meaning of the Rule of Law, and the institutional form in which it occurs, this paper proposes that the legal pluralist approach represents a more conscious standpoint as it is one which allows space to be given to fully varied conceptions and to practice in contexts. This methodology recognizes that legal systems are embedded in the different cultural norms and in different socio-economic discourses and leaves behind one singular, Universalist conception of constitutional values. Such a point of view is especially pertinent in the case of swamping multiplicity of legal systems, more often a create of colonialism, the operation of law generally requires a very fine tune so that it can be useful to sustainable development rather than a noxious obstacle to it.

1. INTRODUCTION

This article compares constitutionalism, rule of law and development governance of India and some African countries to take an intersecting and divergent trajectory to their respective post-colonial legal and political arena. This analysis explores the ways in which these jurisdictions, although they set in different socio-political frames and place constitutional structures differently, have been struggling similarly with the issues of constitutionalism and development [1].



The research will specifically examine the ways in which the idea of constitutionalism, which is frequently perceived through a very classical liberal prism in the discourse of comparative studies, can be observed in different ways in these regions, and in which aspects the idea can be seen in a multi-faceted manner. It will critically evaluate how African states have been affected by global constitutionalism since, as much as external models have been considered constitutive, secondarily, postcolonial countries have continually adapted these models to fit local needs and cultural pluralism. Moreover, such adaptations will also be studied in terms of creating a jurisgenerative constitutionalism in Africa where local conditions are taken to make and remake constitutional standards instead of passively importing foreign forms. The article shall also explore the thorny issue of the constitutionalism without constitutions in most of the African states, where the constitutional systems in place do not necessarily lead to the constitutional ideals or the rule of law. This is especially characterized by the instrumentalization of legal systems by political elites to co-opt power, whereby rule of law becomes rule by law. This is because the law is instruments being manipulated to be used in the interests of the hegemonies rather than being used to enforce justice and democratic rule across the continent similar to how it is evidenced in the process of implementing the ideas of constitutionalism in the continent. Otherwise, constitutionalism in India has taken a more judicial interpretation-focused turn, and that shows how a country may change and establish the constitutional system in the context of its own socio-political environment [2]. The Indian legal system has also been able to spread its influence beyond national boundaries, providing heuristic lessons in how constitutionalism was developed in other South Asian countries, as is seen in its influence on the Nepal Constitution of 2015. This type of constitutional borrowing and transplant, most clearly observed in South Asian constitutionalism, points to how common constitutional traits promote the process of borrowing and transplanting legal structures and principles across borders, frequently promoted by a global desire to uphold human rights as well as the growing impact of international law. It is this ambiguous process of internal adaption and exterior pressure that emphasises the diverse nature of the development of constitutional orders literatures in post-colonial economies that cannot be solely explained through the lens of Western-centrism of constitutional development.

2. Conceptual Framework: Constitutionalism, Rule of Law, and Development Governance

This part outlines the theoretical foundations of constitutionalism, the rule of law, and development governance that will create a conceptual framework that will guide the further comparative analysis. It will explore the ways in which scholars have tried to obtain this through different conceptual strategies such the concept of using adjectives as a way of constitutionalism to fit the multi-faceted form of constitutional principles, other than a single, romanticized model. This style recognizes how constitutional systems, especially in post colonial societies such as India and those in Africa, often incorporate local legal cultures and other socio-political imperatives, rather than the existence of conventional Western liberal-democratic punches. These adaptations require the reevaluation of the traditional methodologies of comparative constitutional law and the abandonment of Eurocentric approaches to constitutional change, with reassessment of the history of constitutional change toward a more inclusive perspective on the history of constitutional change worldwide. In fact, the efforts at provincialising Western accounts of the Rule of Law and global constitutional rule create space in which to map hitherto unexplored academic frontiers, sometimes being called neo-colonial. This profound reconsideration brings out the importance of examining that the constitutional notions are not just borrowed but are actively being redefined and reformulated within specific national and regional settings e.g. South Asia where a model of a constitutionalism oriented to the Indian model has been created [3], [4]. This Southern swing in comparative constitutional research takes into consideration the longstanding shadow of colonial experience on the theory of law and in the organization of law institutions, contending that non-Western experience ought to be approached more integrally in the global Constitution. This attitude also enables us to watch how the post-colonial politics of constitution making, particularly within such destinations as South Asia may also be labors beyond the crumbling impacts of colonialism which left horrendously fragmented societies and politized constructions of identity and in need of new postcolonial nomenclatures to articulate their own distinctive constitutional practices. Moreover, this Southern turn emphasizes distinctive constitutional experience in the form of colonial and marginal past in the prism of particular themes of socioeconomic transformation, struggle of political organization, and inequitable access to justice [5]. This shift to a more inclusive comparative constitutional analysis is what makes us understand global constitutionalism because it notes that there are many ways in which states developed and worked out their legal frameworks and implemented them. It is, with this earlier sight in one, that one critically comes to examine how these very notions as liberal constitutionalism, so often packaged globally as uniform solutions to all, are profoundly intoxicating a Euro-American centrism, which has lost any sense of the reality on the ground of such transitional societies. This acceptance demonstrates the importance of looking at constitutional change within the lens that does not exclusively consider the aspect of history in colonialism, but equally importantly, looks at the present fate of decolonization, particularly in the context of asserting the Rule of Law in post-colonial state. This shall all entail a very tough questioning of the assumption that law traditions and constitutional ideals could be generalized, especially at those occasions when historic injustices and power relations still take the lead in legal and political spheres. The study of constitutionalism in the Global South, in its turn, involves the study of the other paradigms such as that of transformative constitutionalism that was invented in South Africa and offers the approach to the active participation of legal institutions as the factor to correct the historical injustices, as well as changes in the society. This is in contrast to the apprehensions of



legalism in Western constitutionalism where the constitution is believed to be a means of realizing radical social transformation, tackling inequality and enriching democratic values. Nonetheless, transformative constitutionalism has not gone without its own critics, and some scholars have doubted its effectiveness in radically changing established socio-economic structures or the possibility of being too Western-oriented in its practice.

3. Constitutionalism and Rule of Law in India

In this section, I will explore the particular history of constitutional principles and the rule of law in India and its practical implementation in the Indian context, how the unique post-colonial path has influenced the legal identity of India. This study will be based on the interaction of constitutional theory and practice in India, especially seeking to establish how the legacy of its anti-colonial struggle is still visible, as well as the conscious attempt to establish a distinct Global South constitutionalism. This involves a discussion of the way that the constitutional structure in India, although inspired by the multiple traditions of law in the world, has actively attempted to provincialise Western constitutional histories, and has focused on native jurisprudence and socio-political facts. It was a complicated evolution of colonial legal traditions and the demands of the truly independent and equal society which meant that frequent results were some innovative interpretations of the Constitution which argued in favor of social justice and development and were not based on the traditional liberal concepts [6]. Additionally, the constitutional experience of India indicates a distinctive approach to the socioeconomic rights and to so-called transformative constitution, which is also used in other cases of the Global South, such as Brazil and South Africa, and is intended to actively transform the society, not to govern it. It is a comparative approach that emphasizes the current academic controversy about the development of a unique constitutionalism of the global south, which has the potential to enhance constitutional thinking and encourage a discourse between different legal cultures. Their comparison also becomes quite challenging by the fact that ideas like the rule of law and constitutionalism may be thin or thick interpretations and that it would be required to identify their substantive contents, which are rights, keenly. This present scholarly discussion is characterized by the necessity to conduct a more in-depth comparative legal study that extends beyond superficial comparisons and addresses the more nuanced constitutional innovations and judicial activism in other countries like India and South Africa. This discussion section will thus examine the under-structure of Indian constitutionalism, its historical context, its interaction with basic rights as well as the peculiar practice of the rule of law in a complex post-colonial socio-political environment. This will include comparing and contrasting the jurisprudential evolution of basic rights as institutionalized in Part III of the Indian Constitution which comprises on equality before the law and freedom of religion and with other post-colonial constitutional systems. The Indian Constitution, having been subject to influence and persuasion by the closeness in familiarity with the Diceyan rule of law by its framers, unknowingly instills this principle by guaranteeing the justice of all citizens through its Preamble, and through judicial decisions which incorporate obiter dicta asserting inherent priority of fundamental rights against parliamentary suppression [7]. The Indian court has been very clear in enforcing the rule of the constitution especially concerning fundamental rights and that it claims no person or any agency of government is above the law. This judicial activism has played a key role in the constitutional jurisprudence of India, being frequently compared to the interpretative legislation used by the South African Constitutional Court, particularly on socioeconomic rights and the legality principle. This powerful judicial review, along with the wide definition of the right to life to incorporate the right to a quality of life, shows, therefore, that India adheres to a substantive rather than a formal rule of law. It is a fact that the Indian judiciary by landmark cases has repeatedly established the idea of fundamental rights as essential to human survival and dignity, specifically relating landmark rule of law to the capacity of citizens to exercise liberty and have dignified lives [8].

4. Constitutionalism and Rule of Law in African Nations

The section will enquire how African countries have shaped their own constitutional models and understandings of the rule of the law, frequently in reaction to colonialism, dictatorship, and nation-building predicaments. Such discussion will point out the multiplicity of constitutional-design approaches and application of the rule of law principles in the continent noting that even the very notion of the rule of law may sometimes be a point of significant debate. However, an enormous quantity of African constitutions display a deliberate move in the direction of a more transformative constitutionalism that attempts to address historical injustices, societal solidarity, and socio-economic development, in the vast majority of cases through mighty bills of rights and effective constitutional tribunal agencies. This has led to judicial interpretation and legislative action in most of the African states in an attempt by the courts to create reality concerning constitutional promises following the problems of contemporary socio-economic and political transformation. A major aspect concerning this development is that the judicial review is used to safeguard constitutional rights and freedoms, though vigorous, they have prior restrictions, carved out by the rule of law and constitutional mechanism. The establishment and the empowerment of constitutional courts in most countries in Africa e.g. South Africa, is a good indicator of rightful adherence to the rule of law. Such courts often walk a fine line between claiming judicial independence and appeasing to the political realities of their domestic jurisdictions, and in many cases they rank among the most important referees in conflict situations concerning any form of executive overreach, or legislative challenges to core rights. The global constitutionalism 2.0 dream

also focuses more on the continued search to entrench limited government, as seen in the constitutional structures of most African countries, horizontal and vertical division of power, constitutional protection of individual and group rights and independent judiciary. This normative belief in democracy, human rights, and the rule of law, although it encounters practical difficulties in its realisation, is unanimously agreed to be the basis of constitutional government in modern Africa. Nevertheless, it is also commonly argued how such constitutional structures work in practice especially in the face of such ills as corruption, political instability, and the struggle to establish democratic rule in some states. Even with such challenges, the express declaration of socioeconomic rights in several African constitutions, especially those found in the post-apartheid South Africa system, is a meaningful step in the direction of transformative constitutionalism, in order to address long-standing imbalances and leave the realm of formal justice. This radical course wants to involve legal structures in the fulfillment of social alteration where the judiciary frequently finds itself at a strategic point in interpreting and carrying out such all-embracing constitutional directives. The South African Constitutional Court is such an example since it has consistently practiced and upheld the primacy of constitution and the rule of law in the sense that it is a very potent check on state power and in the sense that it has facilitated in safeguarding fundamental rights and therefore it is clear that the court has consistently grown with a clear understanding of its constitutional obligation. Further, even the experience of the other African countries, e.g. Kenya, Mali and Benin is another sign that constitutional courts may play more than significant role in the governing and even in the safeguarding of the rights even in the case when the political situation in the country is quite strained.

5. Development Governance in India

A interesting trend has been exported to African countries like Ghana through the notion of developmental constitutionalism or constitutional independence in particular institutions of the constitution and it has shown examples of acquisition of independence and technical capability in planning development [9]. Giving a proactive approach to rule of law and human rights within the centre of keeping national progress and development, this model focuses on direct application of constitutional principles into the development governance structure. This mixed approach brings out an intent to hold the state governments to their development plan that in many occasions can be formalized via entrenched right to development as a national constitutional right [10]. This framework is aimed at reducing the gap between the idealistic provisions offered on the framework to tangible actions plans of policy to ensure that human rights protection and progress can be naturally linked to development efforts. It is in this regard that countries such as South Africa and India, in addition to Brazil are ready to have their judicial institutions to hear cases that are constitutionally entrenched, thus reaffirming the state to respect social and economic rights. This interest in social-economic rights also serves to highlight a wider trend in Third World countries where the provisions of the constitution are now seen more as a measure towards substantive social justice, and no longer as a measure towards procedural legal order. Such an active judicial position guarantees that constitutionalism is not only the restraint of state power but the maintenance of the state pursuant to delivering the basic socio-economic right of the populace such that the society becomes more balanced. In fact, this judicial activism is most often concerned with concretizing textual meaning in constitutional norms whereby the courts play an important role in delimiting, augmenting, or clarifying the content of these norms, which is an aspect of law-making [11]. Judiciary in India has been especially prolific in the process of interpretation of right to development, as an international law concept making it a non-binding yet national component of jurisprudence. Examples include the interpretations of the Indian Supreme Court that Directive Principles of State Policy were fundamental human rights inalienable and that social and economic democracy are the roots of stable political democracy and that these could be justiciable despite a lack of being expressly read into fundamental rights. Such judicial activism has resulted in different rights-based measures especially in terms of civic engagement in poverty reduction and decentralization of political and economic resources, which have been central to a new form of governance and development paradigm [12]. This proactive role played by the judiciary especially under Public Interest Litigation has facilitated the formulation and expression of development objectives that focus on human rights as opposed to market-focused approaches mostly espoused by international financial institutions [13].

6. Development Governance in African Nations

Although political and civil liberties have long been notably taken into account, many Sub-Saharan African governments have been reluctant to accord legal enforceability to socioeconomic rights in the past, in part because of the resource implication of their justiciability [14]. The new developments though demonstrate more willingness to recognize and utilize these rights typically necessitated by constitutional amendments and enhanced judicial activism. This shift is more a reflection of a wider acknowledgement that the achievement of socioeconomic rights is a significant element of sustainable development and social security, and that it is not a question of civil-political or socioeconomic rights any longer [15]. This new realization speaks of a larger topic of wholesale promotion of human rights wherein right of development is regarded as more of an emancipatory procedure which touches more on preference and liberty as thought by the African Commission of Human and Peoples right. This fantasy has the tendency of suggesting developed combination of nominal capitalism,

communitarian socialism, and modern culturalism which concentrates on the numerous and heterogeneous aspects of the African nations as development and governance problems requiring comprehensive treatment. The view around is aligned with the greater international development debate that still thinks that economic growth is bound to human rights, good governance and democratization as primed by such organizations as the World Bank and the International Monetary Fund. Nevertheless, the concept of the right to development in Africa is not a mere abstract assertion and has begun to be considered as a justiciable right which requires a legal obligation and impunity which serves in changing the lives of people in collective lawsuings those holding power. Moreover, the African Charter to Popular participation affirms that the lack of human development is a significant obstacle to human development in the continent, and they urge development models that support human potential rather than development strategies that simply exploit African people to their state and market development. The African Charter on Human and Peoples' Rights, the only instrument to acknowledge rights of the third generation, including right to development, and confirmed by multiple adjudications of the African Court on Human and Peoples' Rights, this point of view is highly justified. An example is where the African Commission on Human and Peoples' Rights has clearly stated that the economic, social, and cultural rights within Africa have judicial enforceability and therefore requirements of strong compliance mechanisms. This holistic form of integrating human rights and more so in the right to development means a break of silence of the previous models that focused on economic growth without sufficiently taking into account the human well being due to the interrelationship of all the rights. This is a framework that guarantees economic development in such a way as to hold human dignity and desirable societal results. The African human rights system indeed has adopted a more complex and innovative form of development governance by explicitly incorporating into itself a wide range of civil, political, economic, social and cultural rights, shaped by its specific post-colonial experience [16].

7. Comparative Legal Analysis: India and Africa

In this section, we shall explore a comparative law study of constitutionalism, rule of law and development governance in India and Africa and identify the points of convergence and divergence between their methodologies of socioeconomic rights and the right to development. To be more specific, it will focus on the influence of the legal frameworks and judicial interpretation of these regions on the exercise of these rights, especially in the contexts of extreme poverty, and of achieving sustainable development. It will critically evaluate how well each of their legal mechanisms was able to solve developmental issues and facilitate inclusive development based on case studies and scholarly discourses in both regions to shed some light on best practices and enduring challenges. It will also examine the level at which these legal systems have helped promote a human rights based approach to development which goes beyond economic measures of development compared to the multidimensional nature of poverty and inequality [17]. This review indicates that although India has trusted in the large understanding of the right to life to include socio-economic rights, South Africa, as an example, has actually written and qualified by its constitution various socio-economic rights, which provide a unique jurisprudential response. In contrast, past development models in Africa have often failed to increase standards of living and there is a need to establish a right-to-development governance model which conceptualizes development as a human right entrenched in a legal framework. According to this model of rights-based, development in Africa will have to face a fundamental transformation, which lies in the process of governance that is based on human rights approach. It is more focused on the need to pursue egalitarian redistributive justice, adherence to human rights norms, and the elimination of poverty with the goal of improving standards of living and sustainable development. The judiciary in India has actively sought to apply the provisions of the constitution especially under Article 21 provision of the right to life, to include a broad spectrum of socioeconomic rights, such as the right to livelihood, education and health, thus providing a legal foundation to challenge destitution and demand social assistance. This form of judicial activism, especially in Public Interest Litigation, has made possible a broad extension of the doctrine of the living tree to give succor to the defenseless citizens and help in solving social problems such as hunger and environmental protection. This evolutionary approach to constitutional interpretation has practically eliminated the unconstitutionality of justiciability of socio-economic rights, and the necessity to have the judiciary intervene where the government does not act (or does not act) to provide social justice [7].

8. Conclusion

This school of thought emphasizes the position of the judiciary in promoting social justice and securing the fulfillment of the basic rights even where they are not explicitly stated in the constitution. In South Africa, a more direct route to the justiciability of socio-economic rights is given even by the text of the constitution, but in both countries there is a similar devotion to an organic and transformative approach to constitutional interpretation. This can be seen in the example of the judicial review in both jurisdictions which by interpretation of an anti-positivist text adheres to a s/hearing of a living tree can be approached to constitutionalism and consequently changes constitutional rights and obligations in order to give effect to socio-economic rights. This interpretive approach highlights a very important dissent with the classical style of legal positivism, in that the emphasis is made on the constitution as a living tool that can be reconfigured to meet changing societal requirements and desires towards justice. A wider global process of constitutionalism suggests an interest in



emphasizing socio-economic rights as constituents of human dignity and equitable development, which can be seen in the growing quantity of judicial review in both India and South Africa. This is an interactive construction of interpretation such that provisions of the constitution do not grow obsolete and can be used to respond to the current socio-economic issues, and therefore offers a strong legal structure in terms of development governance in both territories. Moreover, although the judicial activism in India has broadened the area of Article 21 to encompass other socio-economic rights, the South African Constitution has provided these rights explicitly, on different but overlapping routes to justiciable social welfare. An example of such rights is contained in the South African Constitution, which spells out the right to house, medical services, food, water, and social security and requires such rights to be achieved progressively. Such explicit listing of the socio-economic rights in South Africa is in contrast to India, where these rights tend to be derived by judiciary interpretation of the wider right to life, reflecting different constitutional building projects, but the agreement on human dignity and social wellbeing. This difference points to different approaches to integrating socio-economic entitlements into legal systems of the two countries, though both countries apply the effective tool of judicial review as a means of promoting constitutionalism and social inequalities. Although these differences exist on constitutional organization, the highest courts in both countries have been involved in influencing the policy that is based in social spheres, which can be negotiated with the elected governments to make them comply with the ruling which recognizes the boundaries of judicial authority. This is a fine line juxtaposed between judicial discretion and government action depicting the intricacies involved in the process of adjudicating socio-economic rights in a democratic system. This juxtaposition of India and South Africa on judicial review and its manifestation in constitutionalism, specifically in advancing the socio-economic rights, demonstrates how judicial activism may promote transformational constitutionalism, even though along different constitutional and jurisprudential strains.

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