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Globalization and Judicialization of Socio-Economic Rights in India and South Africa

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ABSTRACT

The impact of Globalization is not limited to economic development. Studies have shown that it has impacted the social and political aspects of a country too. When such a manifold development occur it impacts the state-subject relationship and require deep understanding of rights, social and economic. In this era of globalization both the Legislature and Judiciary has contributed towards the protection of domestic interests in a globalized world. The judicialization of rights through judicial interpretations, the emerging conflict of rights, and the interpretive methods employed needs to be revisited in order to better understand the emerging trends in global jurisprudence.

Keyword: *Judicialization, Globalization, Socio-Economic*

1. INTRODUCTION

Globalization has completely changed the socio-political and socio-economical dynamics in the entire world. In a world where we are witnessing Global Institutions like World Bank, IMF, WTO, ILO etc. leading us to more globalized standards at domestic levels, be it finance, trade, Labour Laws, maritime, space and many others, globalization has also influenced the sovereign – subject relationship. With countries being ranked on the basis of Living Standards, life expectancy, happiness index etc. the global standards are being imported, or rather incorporated, at the domestic jurisdictions through both legislative and judicial institutions. Be it the Right to privacy or the right to be forgotten, the cyber-space has brought nations together in their understanding of 'Rights'. The UDHR, ICCPR, ICSER or UNHRC has guided the world by recognizing the fundamental freedom that a man must have in the Global Community. With the farmers and villagers challenging the large scale developments projects and Land acquisitions seeking a right over property and the global movements against laws pertaining abortion, blasphemy, gay marriage, a new social and economic spectrum has emerged across the globe. These changing events has more often led to liberal and broader interpretations of Rights by the Constitutional Courts. Rights are recognized as of two types firstly, civil and political rights and secondly, social and economic rights. The social and economic rights are more or less the different manifestation of the civil and political rights. For example, Right to live (civil and political) and its various aspects such as Right to health, Right to privacy, Right to environment, Right to education, Rights of the prisoners etc. (socio-economic manifestations). The judicialization of rights is a by-product of the 'increased interactions among different judicial bodies around the world. In Europe, for instance, national courts have established an ever–closer dialogue with both the European Court of Human Rights and the European Court of Justice. However, these vertical relations that are typical of supranational systems tell only part of the story. Perhaps the most salient features of judicial globalisation —as understood by liberals— include the emergence of "judicial comity" in transnational litigation; the practice of Constitutional cross– fertilisation among judges from different nationalities, with national courts integrating ideas, principles and modes of argument that have been created and expounded by foreign courts; and finally, the multiplication of "face–to– face" meetings among judges around the world.' Mark Tushnet refers this process as the Top-down process of judicialization. He argues 'that the globalization of constitutional law is impelled by both "top-down" and "bottom- up" forces with reasonably deep roots in the political and economic system'. On the other hand he argues that the apart from the top down process of citing and referring International norms in the Bottom-up process the Nations compete to secure better version of rights to their citizens. In a globalized economy, people with high levels of human capital are just about as mobile as investment capital, and they will locate themselves in nations that provide them with what they want by way of freedom. If that is correct, nations will compete to offer such people constitutional protections of personal freedom, for the same reasons that they will compete to offer property rights protections.

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Similarly various other scholars have thrown light upon the subject. While some remained concerned with the impact of competing rights, others have sought to identify the methods employed in judicialization. The objective of this article is to understand both the impact and the interpretive tools. It seeks to identify the role of the court in securing and balancing the conflicting rights and the various interpretive methods employed towards the same. In this regard the two models are referred to. In Section – B, The Indian Model is understood in light of the direct impact of the globalization on the domestic rights framework and the competition between the national development programmes and their conflict with basic socio economic rights such as right to environment, right to property and tribal rights etc. In Section – C, the South African Model has been explored rather from a different perspective to identify the techniques and methods employed by the judicial institutions to refer to the transnational or international authorities and to import/incorporate them into domestic framework. Thus referring to the different models in two different perspective gives us a broader understanding of the competing rights and judicial methods to better appreciate the idea of judicialization of socio- economic rights. Finally, few observations are made with respect to the techniques employed and the race between the competition rights in Part D.

2. THE INDIAN APPROACH TO CONFLICTING RIGHTS

With the introduction of economic reforms in 1991, India welcomed the globalization and liberalization of its economy. This led to major developments in terms of infrastructure projects, economic legislations and the interpretation of rights. The role of Supreme Court has been pivotal in identifying and judicialization of the global version of rights in order to protect the socio-economic interests of the community. The court dramatically enhanced the scope of rights and adopted innovative tools such as PIL. However it has been observed that somehow the socialistic approach to rights was missing in these interpretations. Though the Court played crucial role in safeguarding the environmental rights of the people including that of clean water and air, however the development has been prioritized to certain extent.

After the 1991 economic reforms the development policies have been in direct challenge to them. The Supreme Court in this regard has sought to balance the development with the rights, however some argue that it has left the asymmetrical rights terrain. 'This "asymmetrical rights terrain" in development can be traced to the Court's embrace of an international law conception of the right to development, which the Court has deployed so as to effectively subsume other individual rights. The UN Declaration on the Right to Development, 1968 defines the right to development as an "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural[,] and political development, in which all human rights and fundamental freedoms can be fully realized." In this regard though Kripal J. has recognized an interplay of conflicting rights in development projects, the court seemed to have prioritized the right to development over the rights to tribals and farmers. For example in Narmada Bachao Andolan v. Union of India, although the Supreme Court had earlier stayed construction on the project in earlier orders, the final decision clearly endorse and validate the project from legal point of view. Kripal J. was pleased to note that "In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority . . . . If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive . . . "The court sought to balance the right to life, livelihood etc by citing the rehabilitation and resettlement programs stating that it would benefit the lives of those displace without looking into the cultural aspect of the same. In a similar incidence of N.D. Jayal v. Union of India the court held that the precautionary principles was not applicable to the hydroelectric projects and further that right to development itself was covered under Article 21 and only enhances other manifestations of the same.

However the Supreme Court has not taken it to extremities and in Samatha v. State of A.P. It has protected the rights of the tribal under the Fifth Schedule of the Constitution. Further in Nandini Sundar v. State of Chattisgarh the Court recognized some of the negative implications of globalization in India and suggested that globalization policies has resulted in the rise of violent agitation movements like Naxalism. The Court further in the 2G Teleom and CoalGate case questioned the processes through with the national resources are allocated.

However many scholars still argues that the Indian Constitutionalism has been largely dominated by the market is prioritized over the socio-economic justice. In the words of Baxi "What is new about contemporary

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economic globalization is that it encases the Indian constitution within the emergent paradigm of global economic constitutionalism. This paradigm creates many-sided impacts, principal among which is the transformations of notions of accountability/responsibility. The Indian state is placed in a situation where internationally assumed (or imposed) obligations to facilitate the flows of global capital, trade and investment command a degree of priority over the order of constitutional obligations owed to Indian citizens and peoples. The three Ds of economic rationalism (deregulation, disinvestment, and denationalization), for example, favour many development policies that threaten, and at times nullify, achievements of rights and justice discourse."

A similar example can also be found in other forms of rights such as the right to livelihood for example "The violence unleashed by anti-poor judgments like Almitra H Patel v Union of India has been a cause of celebration by elite citizens for whom homeless people are encroachers and an eyesore to potential investors in Delhi. In this case, while commenting on the government's policy of rehabilitating slum dwellers, the SC remarked that "the promise of free land at the tax payers cost, in place of a jhuggi [slum], is a proposal which attracts more land grabbers. Rewarding an encroacher with free alternatives sites is like giving a reward to a pickpocket." It is argued that over the past years, millions of slum dwellers from the Yamuna Pushta and other Jhuggi colonies of Delhi have been removed on the orders of the Supreme Court and rendered homeless or sent to Bawana without any sanitation, water, electricity, or even drainage.

3. THE SOUTH AFRICAN MODELS AND THE INTERPRETIVE TOOLS

The case in South Africa is more constitutionally supported than in India. Though both being the common law countries have inherited the practice of legal developments through judicial interpretation, in case of South Africa the Constitution has enabling provision in this regard. As per Section 39 of the South African Constitution the judges are empowered to incorporate extra- systemic legal information for interpreting the Bill of Rights. In view of such empowerment the Constitutional Court has developed techniques for these extra-systemic inferences. Consequently, the South African experience has become interesting on a globally because the judges had tackled the problem of setting up the criteria and limits. In this regard Andrea Lollini argues that 'four recurrent patterns of argument can be seen to occur: (1) probative importation;

(2) Scanning the horizon; (3) the mechanism of setting two extremes; (4) comparative distinguishing.'

Probative importation: This technique involves use of foreign text in interpretations already settled in mind and using it to oppose the majority or minority opinion of the bench. For example in the matter of Phillips and others v. Director of Public Prosecutions and others The court was concerned with the Right of Freedom of speech and expression where the Section 160(d) of the Liquor Act of 1989 required the bar owners not to sell liquor where 'offensive, indecent or obscene' performances are done by people not properly clothed. The question was whether it was justified in view of reasonable restrictions. The Court held the said provision to be unconstitutional. In his dissenting opinion Ngcobo J. relied on a Canadian Judgement in Re Koumoudouros et al. and Municipality of Metropolitan Toronto wherein the Canadian Court has held that the freedom of artistic expression doesn't apply to expressions with obscene content for the purpose of selling a larger quantity of liquor. Here Ngcobo J.'s argument that the end purpose of performance is not to express art but rather to increase the sales of liquor. However the majority found the law unconstitutional. This technique is also used for legitimizing the choice of principles in a certain dispute by judges. Hence it becomes easier to justify the principles used for defining the topography of the case and further to pursue the efficacy of the choices made.

Scanning the horizon: This technique is used to conduct the comparative survey as to how a particular principle is enforced or understood in other jurisdiction(s). This technique help distil the possible interpretations and for reassurance that the interpretations are in line with constitutional principles. In Lawrie John Fraser v. Children's Court et al. the Court was concerned with Section 18 of the Children Care Act 1983 the court was concerned with a case where the mother has unilaterally given the consent for adoption without that of father. The court examined the various conditions such as family structure, gender inequalities, gender discrimination parentage etc. in South Africa and then compared it with the situation, legislations and jurisprudence in the first world countries. The court observed that the socio-economic factors in South Africa and First World countries are not similar. The Court found that in South Africa the birth rate is high due to sexual violence which resulted into parental relations. The Court warned the legislature of the consequences of including father's consent as

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obligation like in other jurisdiction. The Court also claimed that the said requirement was not best suited for South Africa.

The mechanism of setting two extremes: In this technique the Court usually set two extreme interpretive paradigms and locate its judgement and look for balance point to restrict the oscillation of their judgement without aligning it to any one extreme. The dissenting opinion of Madala J. in Lawyers for Human Rights and Ann Francis Eveleth v. Minister of Home Affairs is of great significance here. The matter concerned the constitutionality of the provisions of the arrest and detainment of the illegal immigrants' viz. a viz. the right to approach the court directly if a right under the Bill of Rights is violated. Madala J. cited two different interpretations from India and Canada. He claimed that the Canadian courts relies on three criterion i.e. that the action raises serious legal question, the petitioner has genuine interest and there is no other remedy. Whereas in India only those citizens could approach the Court whose rights were violated by states or public authorities. Madala J. in his dissenting opinion inclined towards the Canadian Interpretation so as to secure more effective protections under Section 38.

Comparative distinguishing: In this technique the Courts explicitly negates the necessity of relying upon the foreign decisions in a specific case even though they are compatible with the domestic system. A similar incidence occurred in the matter of Mashavha v. President of the RSA and Others. The order of the High Court upholding the constitutional validity of the Presidential Proclamation R7/1996, which assigned the administration of the welfare system under the Social Assistance Act 1992 to the Provincial governments was challenged. One of the major questions was that such a measure would lead to asymmetric system of enjoying rights in the same countries in different provinces and thus, violates the Right to Equality. The Appellant, in its pleadings, made comparison between various decentralized constitutional systems for various countries such as Austria, Canada, Denmark, France, India and Poland. The Constitutional Court however stated that the segregationist system had created different peculiarities in South Africa and hence in view of the prevailing socio-economic modalities those systems are not applicable.

The above stated techniques are also used in combined way to interpret the provisions to the advantages of the citizens while keeping the constitutional fabric intact. The end result is that the Constitutional Court is South Africa often look from a global perspective rather than a national this has resulted into the convergence of the national and global constitutional interpretations.

9. CONCLUSION

Throughout the course of the above discussions, it has been observed that the judicialization of rights in light of the globalization has resulted into the convergence of global constitutional system in their understanding of basic liberties. Though the Indian Model hereinabove is found to be pro-development, this is partially true. There have been many developments which has led to taking of the basic rights in India to the global standards, Bangalore Declaration is one such example of this. Further the techniques studies in context of the South African model is also relevant to other constitutional systems. More or less the approach of the Countries in Global South has been proactive when it comes to judicialization and internationalization of rights. The Author hopes that these developments would further contribute the global jurisprudence of rights and state obligations.

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