JUDICIAL REVIEW IN SOUTH AFRICA AND INDIA: ADVANCING CONSTITUTIONALISM OR UNDUE ACTIVISM?*

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SUMMARY

The Supreme Court of India and the Constitutional Court of South Africa, as apex courts, also function as guardians of the constitutions of each respective country. This article seeks to establish the extent to which judicial review in India and South Africa can be said to be more aligned with constitutionalism or undue activism. An assessment of the aforesaid is determined with regard to the transformative and progressive constitutional interpretation approach adopted by the aforesaid courts which also gives impetus to the living tree doctrine, the role that dignity plays in giving substantive meaning to democracy, ineptitude, and or corruption on the part of the executive precluding the effective realisation of socio-economic rights as well as parliament's failure to hold members of the executive to account. The extent to which constitutionalism, as opposed to undue activism, has been advanced by the aforesaid courts is demonstrated with reference to specific cases.

1 INTRODUCTION

Anti-majoritarian scholars advocate ring-fencing judicial review on grounds that judicial activism subverts the authority of the democratically elected arms of government. Instances arise where the executive fails to fulfil its duties either on account of strained financial resources, ineptitude, corruption, poor service delivery, or a combination of all these factors. The same may apply where parliament fails to hold its members accountable. Essentially a vacuum is created by the government. What role do our courts in general and in particular, the Supreme Court of India and Constitutional

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Court of South Africa (apex courts) then assume as guardians of the constitution? Since the separation of powers can never be conceived of in absolute terms, is there not a constitutional duty on the court to intervene – not as a substitute for the other branches of government – but to complement the democratic process of policy development and service delivery?

The aim of this article is to establish whether judicial review in India and South Africa is consonant with constitutionalism or undue activism. In answering this question, the following aspects will be considered. First, the shared experiences of the two countries for the purpose of establishing the comity between the countries as comparators. Secondly, a discussion of judicial activism as manifested in the two jurisdictions. This is assessed with reference to the transformative and generous manner in which the courts have interpreted their respective constitutions so as to give effect to the living tree doctrine of progressive interpretation. A further assessment is the role dignity has come to assume in giving deeper meaning to democracy. The discussion then focuses on the vacuum created by a failure on the part of the executive, due to a lack of financial resources, indolence, corruption, or a combination of such factors to deliver on socio-economic rights. Similarly, where parliament fails to hold the executive to account, what are the implications thereof for our courts? For the sake of brevity, and for purposes of contextualising the aforesaid, this article has selected specific cases that serve as a point of reference.

2 KINDRED SPIRITS IN LAW AND SO MUCH MORE

India and South Africa share a rich bittersweet heritage. Until the early twentieth century indentured Indian labourers were sent to work on sugar cane plantations in South Africa.[1] Both are vibrant pluralistic secular societies. They were subject to British domination prior to gaining sovereign independence yet remain members of the Commonwealth[2] that now share international economic and political cooperation as members of BRICS. The Constitutional Court of South Africa and the Indian Supreme Court enjoy a "cross-pollination" of jurisprudence.[3]

Part III (Articles 12–35) of the Indian Constitution,[4] sets out certain fundamental rights, namely equality before the law,[5] freedom of religion,

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1 Henrico "The Rule of Law in Indian Administrative Law Versus the Principle of Legality in South Africa Administrative Law: Some Observations" 2021 42(3) *Obiter* 486.

2 South Africa left the commonwealth 31 May 1961 and re-joined in 1994.

3 Henrico 2021 *Obiter* 498. See *S v Makwanyane* 1995 (3) SA 391 (CC) 16; *S v Dodo* 2001 (3) SA 382 (CC) 32; *S v Mamalobo* 2001 (3) SA 409 (CC) 49; Pillay "Protecting Judicial Independence Through Appointments Processes: A Review of the Indian and South African Experiences" 2018 3 *Indian Law Review* 283–311; Bentele "Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law" 2009 37 *Georgia Journal of International and Comparative Law* 219 248.

4 Adopted by the Indian Constituent Assembly on 26 November 1949, coming into effect on 26 January 1950.

5 Article 14.

race, caste, sex, place of birth,[6] equality in matters of public employment,[7] and the right to freedom of expression.[8] While the rule of law is not expressly mentioned, the author has argued that it is to be inferred or implied from the Preamble's wording that India secures "to all its citizens justice".[9] It has also long been recognised that the Indian Constitution is implicitly premised on the rule of law with reference to the extent to which the framers were all too familiar with the Diceyan concept of the rule of law. In *Golaknath v State of Punjab*,[10] the Court held that parliament could not curtail any of the fundamental rights contained in the Constitution since:

> "[r]ule of laws under the Constitution has the glorious content. It embodies the concept of law involved over the centuries".[11]

The rule of law underpins constitutionalism as it manifests itself in administrative law in general and judicial review in particular in ensuring that the exercise of public power is *intra vires*.[12] Unlike the South African Constitution of 1996, which expressly recognises the rule of law, the rule of law "permeates the entire fabric"[13] of the Indian Constitution. The court in *ADM Jabalpur v S Shukla* (per Kanna J) held:

> "[the] rule of law is the antithesis of arbitrariness […] Rule of law is now the accepted norm of all civilized societies."[14]

The Indian Constitution recognises that nobody is above the law and the Constitution.[15] Every person, irrespective of their status in society or the executive, is subject to the supremacy of the rule of law.[16] Moreover, in a system subject to the rule of law, unbridled power can never be countenanced; it is always subject to the constraints imposed by the rule of law.[17] All government agencies including the courts, who are vested with discretionary powers are thus subject to the rule of law in as much as their decisions must be premised upon cogent legal principles that promote fairness, transparency, and equality.[18] This is not unlike the South African Constitution which recognises the supremacy of the Constitution and the rule

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6 Articles 15(1)–(5).
7 Article 16(1)–(3).
8 Article 19(1)(*a*)–(*e*).
9 Henrico 2021 *Obiter* 490.
10 1967 2 SCR 276.
11 *Golaknath v State of Punjab supra* 98.
12 See *ADM Jabalpur v S Shulka* (1976) 2 SCC 521.
13 Jain and Jain *Principles of Administrative Law* (2015) 20.
14 *ADM Jabalpur v S Shulka supra* 154. See also Henrico 2021 *Obiter* 492–493.
15 Jain and Jain *Principles of Administrative Law* 21.
16 See *State of Punjab v Khanchand* (1974) 2 SCR 768; *VC Mohan v Union of India* (1969) 2 SCC 262; *Pancham Chand v State of HP* (2008) SCC 123.
17 *Maya Devi v Raj Kumari Batra* (2010) 9 SCC 486; *Mohinder Singh Gill v Chief Election Commissioner* (1978) 1 SCC 405.
18 *Maya Devi v Raj Kumari Batra supra*. See also Tyagi "The President of India: The Constitutional Head with Discretionary Powers" 2017 63 *Indian Journal of Public Administration* 330 337–340 and Henrico 2021 *Obiter* 493.

of law.[19] As such, no power may be exercised unless authorised by law and their decisions cannot be ignored unless set aside by a court of law.[20]

Reference to notions of "fairness" and "equality" draw strongly on the important role to be assumed by the Indian judiciary in transformation by taking into account the emphasis placed on substantive equality and social justice. Section 39(1)–(3) of the South African Constitution obliges our courts, when interpreting legislation or the Bill of Rights, to do so in a manner that promotes the values of the Constitution and develops the common or customary law. Thus, the judiciary – while subject to the rule of law – is an activist of social change; activists that seek to bring about substantive changes in the lives of those that plead their cases before them, particularly the poor, vulnerable, marginalised persons of society. It is this active socio-economic change brought about through judicial intervention that calls into question the issue of judicial activism.

3 THE PHENOMENON OF JUDICIAL ACTIVISM

3 1 Organic interpretation of the text

Judicial activism is a relative term. It has been defined in various ways.[21] One description reads as follows

> "[j]udicial activism [is] the power of the Supreme Court and High Courts to declare a law unconstitutional if it affects the larger section of the society and to promote justice".[22]

The power to declare a law unconstitutional is also known as substantive judicial review powers, while the promotion of socio-economic justice is a matter lending itself to wide debate as to whether the judiciary (as the unelected branch of government) has any business meddling in matters that are falling within the domain of the elected branches of government. While no universal definition of judicial activism exists, the context in which the Indian Supreme Court and the Constitutional Court of South Africa have given effect to certain provisions of their respective constitutions is important to consider for purposes of reflecting on whether this is inimical or supportive of constitutionalism.

Both Indian and South African legal systems are based on the common law tradition. A common refrain is that judges speak through their judgments. Since the coming into operation of constitutional dispensations in both countries, a significant body of judicial precedent or judge-made law has been established. For reasons that appear from the cases discussed below, the glib assertion that judges merely interpret the law is not only naïve, but

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19 Henrico 2021 *Obiter* 493. See ss 1(*c*), 2 and 8(1)–(2) of the Constitution.

20 Burns and Henrico *Administrative Law* (2020) 9–11.

21 Susanta "For Public Administration: Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny" 1997 XLII *The Administrator* 1; Rishi and Ananth "Judicial Activism in India: Whether More Populist or Less Legal?" 2017 1 *Indian Journal of Constitutional and Administrative Law* 11–23.

22 See Morwal and Mathur "Evolution of Judicial Activism in India" 2020 3(3) *International Journal of Law Management & Humanities* 1211 1212.

out of touch with reality. Judges play an instrumental role in developing (and animating) the law (with reference to the demands of present-day society) as they adjudicate cases against the backdrop of relevant legislative regimes as read with normative constitutional rights and obligations. Yet, they do not interpret or give effect to the aforesaid without also having regard to the underlying constitutional values and principles informing fundamental human rights and relevant international law and instruments. A failure to do so would be myopic. Their contribution to our jurisprudence is transformative in the sense that they bring about change(s) in respect of cases as pleaded. They afford litigants standing, an opportunity to be heard, and the possibility of being afforded relief that translates into social justice, thus a change for the better.

The gloss placed on a specific text of the constitution animates such text. To this end, it can be argued, and rightly so, that a judge is an activist. A perusal of the law reports clearly shows a general tendency to not merely dispense the "law", but rather to give effect to the latter with due consideration of various factors including, but not limited to, social justice imperatives. This speaks to the creative role of the judiciary and in particular the apex courts acting as guardians of the constitution and of the most vulnerable and marginalised persons in society.

Transformative constitutionalism[23] in South Africa is consistent with the "living tree" metaphor approach of progressive constitutional jurisprudence. The metaphor was introduced by Lord Chancellor Sankey in *Edwards v Attorney-General for Canada*[24] in a case involving an interpretive provision under the then Canadian constitution involving gender equality justice. It is used as a means of interpreting the constitution in an organic way; to read "broadly and progressively so that it may adapt to changing times".[25] It is no small coincidence that the Constitutional Court has adopted as its official logo, a tree which has been pointed out by retired Constitutional Court justice Sachs as representing, "[t]he court's place in Africa and the Constitution's historical roots in the struggle for human rights".[26] It is thus befitting that a tree is a place "[u]nder whose branches the poor and vulnerable could seek the shelter afforded by the justice system."[27]

India and South Africa are both victims of colonial domination and oppression. While India has been in the felicitous position of being a

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[23] The term "transformative constitutionalism" was coined by Karl Klare who described it as follows, "[a] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction." See Klare "Legal culture and transformative constitutionalism" 1998 14(1) *South African Journal on Human Rights* 146–188. For further reading on transformative constitutionalism, see Meirenik "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 10(1) *South African Journal on Human Rights* 10; Van Marle "Revisiting the Politics of Post-Apartheid Constitutional Interpretation" 2003 3 *TSAR* 549; and Langa "Transformative Constitutionalism" 2006 *Stellenbosch Law Review* 351–360.

[24] 1930 AC 124 (PC 1929).

[25] Corder and Brickhill "The Constitutional Court" in Hoexter and Olivier (eds) *The Judiciary in South Africa* (2014) 355 363.

[26] Corder and Brickhill in Hoexter and Olivier *The Judiciary in SA* 355 363.

[27] Corder and Brickhill in Hoexter and Olivier *The Judiciary in SA* 363.

constitutional state since the 1950s – when South Africa was still in the early grips of the apartheid regime – both countries have had to transform (and continue to transform) as an ongoing process aspiring to the elusive goal of egalitarianism. The "living tree" doctrine does not expressly appear in any judgments, however, the progressive approach that renders constitutional interpretation organic and transformative, as opposed to formal and parsimonious, is evident in the judgments of many of the courts in both jurisdictions and particularly the apex courts of both countries. It has been correctly pointed out that as early as 1977 the Indian Supreme Court has given effect to the "living tree" doctrine through a liberal interpretation of the Constitution that has since given expression to the changing needs and demands of society.[28] The consequence thereof has been the relief afforded vulnerable citizens under Public Interest Litigation (PIL) and the expansive interpretations of the right to life under article 21 to accommodate additional rights such as, for example, the right to shelter, rights to privacy, right to free legal aid, right to pollution free water and air, right to clean environment, protection against hazardous industries, right to free education up to the age of 14 years, right to livelihood, and the right to a speedy trial.[29]

Moreover, with reference to environmental law, the judiciary in India has always been privy to international developments and sustainable development initiatives and has thus itself been a trailblazer in this field of jurisprudence by successfully expanding the scope of the fundamental personal liberty right under article 21 of the Constitution to include the right to a healthy environment.[30] The South African judiciary and the Constitutional Court in particular have been vested with powers to give substantive effect to the rights of equality, freedom, and human dignity.[31] Evidence of this appears from a host of applications brought by way of judicial review where a more expansive and generous notion of "public law" relief with reference to constitutional values and principles has been provided which would not otherwise have been afforded through the strict confines of private law.[32]

The aforesaid shows that through a generous interpretation of the Constitution, the apex courts have actively contributed to the organic development and transformation of society in a manner that has given substantive meaning to the rights contained in the respective Constitutions.

3 2 Human dignity awareness

The author has elsewhere referred to the curiosity of human rights awareness that became a focal area of legal discourse since 1945.[33] Former Chief Justice Chaskalson stated:

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[28] Boruah "Living Tree Doctrine: Role of Indian Judiciary Against Constitutional Silence in India" 2019 *Rajiv Gandhi National University of Law Student Law Review* 53.

[29] Boruah 2019 *Rajiv Gandhi National University of Law Student Law Review* 55.

[30] Chakravarty "Indian Constitution and Judiciary" 2006 *Indian Law Institute* 99 102–105.

[31] In terms of s 39(1)–(3) of the Constitution.

[32] See, for example, *Ferreira v Levin NO* 1996 (1) SA 984 (CC); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); and *Joseph v City Power* 2010 (4) SA 55 (CC).

[33] Mc Crudden "Human Dignity and Judicial Interpretation of Human Rights" 2008 19(4) *The European Journal of International Law* 655 662–663; Besson "Human rights and

> "The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second-world war."[34]

Albie Sachs has pointed out:

> "Respect for human dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal […] [An open and democratic society] acknowledges the foundational character of the principle of human dignity, and aspires to accept people for who they are. It presupposes diversity and welcomes and treats everyone with equal concern."[35]

Dignity *per se* may be ineffable, but its application has been instrumental in the protection, affirmation, and realisation of other basic rights such as the right to equality, adequate health care, and a clean environment. Referring to human dignity, Nugent JA, in *Minister of Home Affairs v Watchenuka*[36] stated: "[it is] the ability to live without positive humiliation and degradation".[37] It is beyond dispute that human dignity forms an inexorable component in the protection of human rights and as such has provided an impetus to a robust corpus of jurisprudence.[38] In its Preamble, the Indian Constitution expressly warrants "… assuring the dignity of the individual …" Human dignity also finds articulation in the Directive Principles and Fundamental Duties, but not in the text on Fundamental Rights.[39] With a history of legislated racial segregation, it is no surprise that the South African Constitution has a stand-alone section that reads: "Everyone has inherent dignity and the right to have their dignity respected and protected."[40] It is worth recalling that in *Maneka Gandhi v Union of India*,[41] (which had to do with the right to travel) the Supreme Court observed:

> "These fundamental rights represent basic values cherished by the people of this country since Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest. They weave 'a pattern of guarantees on the basic

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Democracy in a Global Context: Decoupling and Recoupling" 2011 4 *Journal of Ethics & Global Politics* 19 27–28; Dodoo "The Demand For Human Rights in a Diverse Socio-Cultural World Society: Approaches and Tools" 2011 4 *Journal of Politics & Law* 162 163–164 and Mutua "Standard Setting in Human Rights: Critique and Prognosis" 2007 29 *Human Rights Quarterly* 547 552–554. See Henrico "Educating South African Legal Practitioners: Combining Transformative Legal Education with Ubuntu" 2016 *US-China Law Review* 817 820.

34 Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" 2000 *SAJHR* 193 196.

35 Sachs *The Strange Alchemy of Life and Law* (2011) 213–214.

36 2004 (4) SA 326 (SCA).

37 See *Minister of Home Affairs v Watchenuka supra 32.*

38 For further reading see, Du Bois "Rights Trumped? Balancing in Constitutional Adjudication" in Du Bois (ed) *The Practice of Integrity: Reflections on Ronald Dworkin & South African Law* (2005) 155; Ackermann *Human Dignity: Lodestar for Equality on South Africa* (2013)*;* Botha "Human Dignity in Comparative Perspective" 2009 *Stellenbosch Law Review* 217–220.

39 Chia-Shin Hsu "Introduction: Human Dignity, Human Rights, and Cultural Change in Asia" in Chia-Shin Hsu (ed) *Human Dignity in Asia: Dialogue Between Law and Culture* (2021) 12.

40 S 10.

41 1978 SC 597.

> structure of human rights' and impose negative obligations on the State not to encroach on individual liberty in its various dimensions."[42]

The self-worth of individuals located in a constitutional society would only be enhanced through the realisation of socio-economic imperatives. Conversely, as long as socio-economic goals such as access to adequate health services, housing, education, clean environment are *not* realised it impacts adversely upon human dignity inasmuch as people are forced to live in abject poverty and in conditions not fit for human habitation. In this sense, dignity must conceptually and notionally inform the type of democracy under which citizens have agreed to be governed. To this end, Dworkin asserts that democracy can only exist where human rights are recognised and respected.[43] Bilchitz advances the following supportive argument:

> "[where] millions of people live in dire poverty, the exclusion of guarantees in a Constitution which address the economically depressed living conditions of so many would impact on the very legitimacy of the system itself. This point highlights the fact that when courts enforce such guarantees against the other branches of government, they are not acting in an undemocratic manner; rather they are defending the conditions for the legitimacy of the constitutional order itself in which many are excluded".[44]

Dignity takes on a broader dimension than mere recognition of self-worth. The citizenry, together with all organs of the state and the judiciary have a collective role to play in contributing to a stronger (deeper) sense of democracy. Hence, we must conceive of a form of civic dialogue arising from participatory democracy that plays itself out not only by way of exercising political rights, for example, voting, but other rights such as *locus standi* that seeks to hold the exercise of public power (on the part of government), or rather the failure of government to act, accountable by way of judicial review. The assertion by Bilchitz lends credence to the enforcement of the (justiciable) socio-economic rights by the courts in South Africa and the non-justiciable enforcement of socio-economic rights by the courts in India.

Support for this appears from the writings of Erin Daly who compellingly argues that the nexus between dignity and democracy is sufficiently strong to justify judicial activism, through the lens of enhancing the status and sovereignty of the people as opposed to the court. Adjudication on the part of the courts, especially apex courts (as impacted upon by international law, human rights imperatives, and demands for consolidated democratic models) is more demonstrative of the "*constitutionalisation* of politics" as opposed to "judicialisation of politics" or politicisation of the courts". What this translates into is that courts "[ensure] that the politics of the day stay within the bounds of constitutional limits and further constitutional values".[45]

While courts must always be alert to their limited powers as the unelected branch of government,[46] their enforcement of socio-economic rights should

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42 See *Maneka Gandhi v Union of India supra* 667–668.

43 Dworkin *Justice for Hedgehogs* (2011) 320.

44 Bilchitz "Constitutionalism, the Global South and Economic Justice" in Bonilla (ed) *Constitutionalism of the Global South* (2021) 97.

45 Daly *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (2021) 147.

46 For further discussion in this regard, see Anand "Judicial Review-Judicial Activism-Need for Caution" 2000 *Journal of Indian Law Institute* 149 155; Khosla "Judicial Activism" 2008 *The*

not be seen as usurping either elected branch of its powers; instead, it should be seen as an "enhanced role for both the political and the judicial branches, and one that requires ongoing interaction between the two".[47] In this sense, judicial intervention shouldn't be seen as undue activism but rather as part of the democratic process facilitating "policy development and service delivery monitoring"[48] and also furthering the cause of civic dialogue.

Dignity assumes a role far greater than recognising self-worth. It is essentially the vanguard on which the status quo, progression, and development of democratic government are showcased. Stripped to its basics, there is no room for equivocation as to the humiliating and degrading impact that homelessness or abject poverty has on the self-worth of any human being, thereby compelling judicial intervention (in a vacuum left by the government) where it fails or neglects to act. The extent to which our courts have been compelled to act, against the backdrop of human dignity awareness and progressive constitutional interpretation requires consideration of certain Indian and South African decisions.[49]

4 JUDICIAL APPROACH

4 1 The Indian courts

Part IV of the Indian Constitution contains Directive Principles of State Policy relating to socio-economic rights. These are non-justiciable (in terms of article 39). The rationale is that it is a guide for the government as a policy maker to take necessary welfare measures in securing socio-economic rights for its citizens. This much appears from article 38. The increase of PIL and the exercise of writ jurisdiction on the part of the Supreme Court has given rise to the latter being referred to as the most "vigorous" organ of state in the world impinging on the functions of the other two arms of government.[50]

In principle, constitutional enshrinement of health as a socio-economic obligation to be imposed (as policy initiatives) on the executive to take reasonable and necessary steps to implement relevant legislative regimes giving effect to the realisation of health rights and opportunities is noble. Unfortunately, the reality is less noble. Ongoing inequality, increased unemployment, and the need for healthcare services naturally gave impetus to PIL. Thus, the interpretation of the right to health, as read with Articles 9 and 14 of the Constitution as a fundamental right came to be recognised by

Indian Journal of Political Science 113 123; and Khosla "Addressing Judicial Activism in the India Supreme Court: Towards an Evolved Debate" 2009 *Hastings International and Comparative Law Review* 55 55 and the authorities cited at ft 2; Corder "Constitutional Reform in South African History" in Corder, Federico and Orrù (eds) *The Quest for Constitutionalism: South Africa since 1994* (2020) 181 191.

47 See Daly *Dignity Rights* 152.

48 Daly *Dignity Rights* 158.

49 For the sake of brevity and for purposes of this article, regard is given in the main to decisions of the Supreme Court of India and South African Constitutional Court. This contribution does not purport to suggest that these decisions are an exhaustive account of all the reported cases, since such a task would fall without the scope of this article.

50 Singhania "Judicial Activism in India" 2018 4(2) *International Journal of Law* 238.

the court in *Minerva Mills v Union of India*,[51] and in *Parmanand Katara v Union of India*,[52] wherein it was held that the right to emergency medical care is a fundamental right that cannot be denied by any hospital. In addition, the Supreme Court reiterated the need and essence of access to primary healthcare facilities in *Paschim Banga Khet Mazdoor Samity v State of West Bengal*.[53] Finding that local municipal bodies were responsible for the maintenance of hygiene and sanitation, the Supreme Court ordered the municipality to build proper drainage and filling of a cesspool to protect members of the public from the flow of such draining in *Municipal Council, Ratlam v Shri Vardhichand*.[54]

Enforcement of socio-economic rights also appears from *Francis Coralie Mullin v Union Territory of Delhi*,[55] in which an expanded notion of fundamental rights to life and personal liberty was made to include the right of a detainee to "live with human dignity" including "the bare [necessities] of life.[56] The court associated the right to life with the socio-economic Directive Principles in *Bandhua Mukti Morcha v Union of India*,[57] explaining that the "right to live with human dignity, enshrined in Article 21 derives its life breath from the Directive Principles".[58] Judgments have gone as far as dealing with full-scale policymaking, such as the case of *Union for Civil Liberties (PUCL) v Union of India, Writ Petition (Civil)*[59] wherein the Court declared a duty on the part of the state to provide emergency nutrition and issued 49 various interim orders between 2001 and 2005 implementing its judgment at a detailed level of social policy, touching on everything from school lunches to accountability.[60]

Further examples include *Common Cause v Union of India (Writ Petition (Civil)*,[61] involving the recognition of passive euthanasia; the *Independent Thought v Union of India (Civil)*,[62] where the court criminalised sexual intercourse by a husband with his wife who is below 18 years of age; *Shakti Vahini v Union of India Writ Petition (Civil)*,[63] where the court held that the consent of the family or community is not necessary once the two adult individuals agree to enter into wedlock since it is their fundamental right to marry of their own choice.[64] Judicial activism on the part of the Supreme Court of India has been lauded for giving imputes to social justice and thus served the interests of the greater society. As praiseworthy as the

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51 (1980) AIR 1789.
52 AIR [1989] SC 2039.
53 AIR [1996] SC 2426.
54 (1980) AIR 1622.
55 (1981) 2 SCR 516.
56 Menell "Judicial Enforcement of Socioeconomic Rights: A Comparison Between Transformative Projects in India and South Africa" 2016 49 *Cornell International Law Journal* 724 733.
57 (1983) 90.
58 Menell 2016 *Cornell International Law Journal* 734.
59 No. 196 (2001).
60 Menell 2016 *Cornell International Law Journal* 734.
61 No. 215 (2005).
62 WP. No. 382 of 2013.
63 No. 231 (2010).
64 Singhania 2018 *International Journal of Law* 239.

intervention of the judiciary may be especially in invoking its powers under article 142 of the Constitution, it has also been urged that the judiciary needs to tread cautiously in interpreting fundamental rights so broadly and generously as to assert social justice for society in instances where there is no compelling reason(s) for the judiciary to be meddling in matters of governance by the executive arm of government.

4 2 The Constitutional Court of South Africa

A marked difference between the Indian and the South African Constitution is that the latter does contain in its Bill of Rights justiciable socio-economic rights. In this regard, reference is had, for example, to the right to an environment that is not harmful to one's health or well-being;[65] the right to have access to adequate housing;[66] the right to have access to health care services, including reproductive health care and access to sufficient food and water and social security;[67] and the right to basic education, including adult basic education and further education.[68]

In *Soobramoney v Minister of Health, KwaZulu-Natal*,[69] the Constitutional Court dismissed the applicant's claim for state-funded dialysis treatment, finding the policy of the state to prioritise treatment for curable cases to be reasonable with reference to a limitation. In *Republic of South Africa v Grootboom*,[70] the state was ordered to take reasonable measures towards the progressive realisation of the right to access to adequate housing – within the state's available means. The irony (and sadness) is that the house for the applicant was only built some years after the court order, and after the demise of the applicant, Irene Grootboom. In *Nokotyana v Ekurhuleni Metropolitan Municipality*,[71] the Court held that the government's failure to reach a final decision to improve an informal settlement violated residents' rights to adequate housing but deferred to the government's proposed plan to review and remedy the situation and refused to grant monetary relief to individual claimants. Restraint was also exercised by the court in *National Treasury v Opposition to Urban Tolling Alliance*,[72] in which the Constitutional Court set aside an interdict granted by a lower court against the government on the basis that the order was a clear violation of the separation of powers as the lower court failed to consider the budgetary implications of its order on government.

In *Njongi v Department of Welfare, Eastern Cape*,[73] the Court called the cancellation of a disabled woman's benefits without notice or explanation "devoid of all humanity" and ordered the restoration of her benefits.[74]

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65 S 24(*a*).
66 S 26(1).
67 S 27(1)(*a*)–(*c*).
68 S 29(1)(*a*)–(*b*).
69 1998 (1) SA 765 (CC).
70 2001 (1) SA 46 (CC).
71 2014 (4) BCLR 312 (CC).
72 2012 (6) SA 201 (CC).
73 2008 (4) SA 237 (CC).
74 Menell 2016 *Cornell International Law Journal* 735–736.

However, the recent case of *Thubakgale v Ekurhuleni Metropolitan Municipality*[75] saw the court dismiss an appeal by the applicants against the state for failing to realise their rights to adequate housing. In this instance, there was evidence of corruption on the part of the local government (municipality) tasked to build houses for the applicants. When the applicants sued for constitutional damages, on account of the government failing to take reasonable measures to realise their rights to adequate housing, their claim was ultimately dismissed on the basis that non-fulfillment of a socio-economic right on the part of the state does not translate into a citizen being entitled to an award of constitutional damages against the state. The restraint exercised by the Constitutional Court in *Soobramany*; *National Treasury* and *Thubakgale* is indicative of the court duly acknowledging the role to be assumed by the executive and parliament in terms of their own responsibilities.

In the case of *National Director of Public Prosecutions v Freedom Under Law*,[76] a non-governmental organisation had successfully challenged decisions to drop criminal charges as well as disciplinary charges against a senior police officer. The court of first instance ordered the NDPP to reinstate the original charges and the Commissioner of Police to reinstate the disciplinary proceedings. The SCA set the decision aside on the basis that the order in the form of interdicts was a clear violation of the separation of powers doctrine and could see no compelling reasons to interfere with the decision of the executive, alternatively assume a function that fell within the realm of the executive. It would appear that in neither *National Treasury* nor *Freedom Under the Law* there was sufficient evidence before the Constitutional or Supreme Court to find a compelling basis on which to interfere in the realm of the executive.

A particular aspect of undue activism levelled against the Constitutional Court has arisen under the nomenclature of "warfare". In reference to the writings of Comaroff,[77] Corder and Hoexter refer to the latter as having been employed to mean "the use of litigation as 'a weapon of the weak'".[78] A phenomenon that has characterised South African jurisprudence is the use of litigation to resolve contentious political disputes, to this end courts have been approached by civic groups and or political parties to rule on matters that should essentially be resolved by political means and are hence not justiciable.[79] This is particularly prevalent in instances where parliament has failed (or refused or neglected) to hold members of the executive accountable, leaving it essentially in the hands of the court.

In *Minister of Justice and Constitutional Development v Southern Africa Litigation* Centre,[80] the court upheld a decision of the court of the first

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75 2021 ZACC 45.

76 2014 (4) SA 298 (SCA).

77 Comaroff and Comaroff "Millennial Capitalism: First Thoughts on a Second Coming" in Comaroff and Comaroff (eds) *Millennial Capitalism and the Culture of Neoliberalism* (2001) 305.

78 Corder and Hoexter "'Lawfare' in South Africa and its Effects on the Judiciary" 2017 10 *African Journal of Legal Studies* 105 106.

79 Corder and Hoexter 2017 *African Journal of Legal Studies* 107.

80 2016 (3) SA 317 (SCA).

instance finding that the government had acted unlawfully and unconstitutionally in failing to arrest President al-Bashir of Sudan in terms of warrants for his arrest issued by the International Criminal Court.[81] The Constitutional Court in *Economic Freedom Fighters v Speaker, National Assembly*,[82] affirmed the binding nature of remedial action taken by the Public Protector against former state president Jacob Zuma and went so far as to declare President Zuma and Parliament as having failed in their most fundamental constitutional obligations with reference to personal upgrades at President Zuma's private homestead Nkandla.[83] The High Court per Vally J, ruled in favour of an opposition political party against former President Zuma, compelling him to produce the full record of his Cabinet decisions as well as the reasons for them, at a time when he was still State President. While the reshuffle of the Cabinet by the head of the executive is usually regarded as the epitome of a political decision, the reshuffle announced on 30 March 2017 resulted in the dismissal of an effective former finance minister Pravin Gordhan, known to be stringently against corruption by the state, led to South Africa's financial rating to "junk" status.[84]

The growth of a mafia state was a feature of the presidency of Jacob Zuma. This was made possible by the power vested in the President as head of state and head of the executive. This culminated in the State of Capture Commission of Inquiry (the Commission) which has completed its mandate and released a comprehensive report detailing the extent of looting and corruption within the government. Hearings before the Commission highlighted the complicity (and direct involvement) of members of the executive while under the watchful eye of President Zuma who did nothing to stem the cancer of corruption to effectively aid and abet the growth of a "dual state" or "state of capture". Parliament's dismal failure to address corruption and its attempt to "smother the findings of the Public Protector in the Nkandla investigation, that Zuma and his family had been unduly enriched at public expense by some of the 'security upgrades' made to his private rural compound at Nkandla" was only aggravated by the National Assembly's appointment of a commission rival investigations that exonerated President Zuma. This is clearly irresponsible and unlawful conduct on the part of a body charged with holding the executive to account.[85]

The unwillingness or inability of various portfolio committees in Parliament, and of the responsible cabinet ministers to tackle manifest corruption in the corporate governance of state-owned enterprises led to opposition parties and NGOs turning to the courts to fill the accountability vacuum.[86] What is heartening is the extent to which the judiciary seems to have retained its independence of mind despite the efforts made to appoint compliant judges. The erstwhile Chief Justice himself has been cited as an example of a judge who "confounded expectations (presumably shared by

81 Corder and Hoexter 2017 *African Journal of Legal Studies* 111–112.
82 2016 (3) SA 580 (CC).
83 Corder and Hoexter 2017 *African Journal of Legal Studies* 113–114.
84 Corder and Hoexter 2017 *African Journal of Legal Studies* 114.
85 Corder and Hoexter 2017 *African Journal of Legal Studies* 118–119.
86 Corder and Hoexter 2017 *African Journal of Legal Studies* 119.

President Zuma when he appointed him) that he would be pliant and beholden to the executive."[87]

Disobedience of court orders is another insidious and slow but potentially very effective way of undermining the judiciary. Continual non-compliance with court orders imperils judicial authority and the rule of law as pointed out by the Constitutional Court in *Nyathi v MEC for Department of Health, Gauteng*.[88] The flagrant disregard by members of the executive of judgments is also borne out in the Minister of Social Development. In *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*,[89] wherein the court found that a substantial tender for the nationwide payment of social grants had been awarded unlawfully. A personal cost order has been made against the Minster who is unable to pay the same. Sadly, the structural interdict granted by the court has still not been complied with by the parties.[90]

Corder and Hoexter have suggested that lawfare has arisen on account of a clear failure on the part of the executive and legislature to carry out their functions properly or at all. This has placed the courts in an unenviable position where they are effectively the only arm of government to which concerned parties can turn for relief. Ironically, when relief is granted by way of judicial review against the executive or parliament, the latter has contemptuously disregarded court orders, alternatively asserting that the courts are guilty of undermining the institution of democracy in South Africa. It is this battle that has the tendency, as correctly pointed out by the learned authors, to translate into a greater concern, which is public confidence in judicial legitimacy.[91]

Enforcement of socio-economic rights on the part of the Supreme Court of India has clearly taken place by means of the "living tree" or progressive constitutional interpretive approach. It may well be argued that this approach was in and of itself a compelling reason to obviate the exclusion of justiciability on account of Directive Principles of State Policy. However, history and the clamouring demand for social justice, combined with ineptness on the part of the government in realising such justice, effectively resulted in recourse to the courts for the relief that should otherwise (but did not) come from the government. To this end, there can be no sinister connotation attached to judicial activism as courts are compelled to act in a vacuum created by the government. Socio-economic rights have always been justiciable under the South African constitutional dispensation. Our courts have also adopted a progressive approach in giving effect to transformative constitutionalism but have not disregarded judicial deference. It does appear that if there is no compelling reason to interfere, our courts will refrain from doing so.

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87 Corder and Hoexter 2017 *African Journal of Legal Studies* 122, referring to the former Chief Justice Mogoeng Mogoeng.

88 2008 (5) SA 94 (CC) par 63; 83 and 129. See also Corder and Hoexter 2017 *African Journal of Legal Studies* 122.

89 2014 (1) SA 604 (CC).

90 Corder and Hoexter 2017 *African Journal of Legal Studies* 123.

91 Corder and Hoexter 2017 *African Journal of Legal Studies* 126.

The approach of the courts in both jurisdictions draws strong parallels with an anti-positivist textual interpretation of the respective constitutional texts, which is consonant with a "living tree" progressive approach. This has animated the constitutional rights and duties in a manner that makes both constitutions essentially transformative in nature so as to give effect to socio-economic rights. Moreover, the weighty status assumed by dignity has effectively served to enhance the protection of various fundamental rights and created a more prominent place for the judiciary to be more vigilant in protecting the socio-economic rights of the most indigent in society.

5 CONCLUDING REMARKS

Many may argue that the best guarantor of constitutional rights and liberties is an apex court. It must be accepted that neither the Supreme Court of India nor the Constitutional Court of South Africa has limitless powers. The rule of law imposes inherent limitations on the exercise of their judicial powers. Both courts are also restrained by their respective constitutions. The Supreme Court of India has been referred to as an organ of the state. This terminology cannot be employed with reference to the Constitutional Court[92] (or any court) in South Africa. Section 8(1) of the Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary, and all organs of the state. One cannot disregard the fact that the judiciary is represented by a gamut of experienced individuals. While each one is unique in her or his jurisprudential schooling, experiences, inherent prejudices, ideologies, and so forth it would be far-fetched and fanciful to assert that a judge seized with a judicial review application is not advertent to polycentric or lawmaking issues that should best be left to the respective arms of government.

Case law appears to suggest a tendency to provide relief in instances where the executive or parliament has failed to take reasonable or necessary steps to realise the rights of citizens, alternatively where parliament fails to perform its own job; this then in effect demands action on the part of the court through means of an appropriate court order. However, the effectiveness of the latter is by and large also dependent on the extent to which there is cooperation on the part of the other arms of government in implementing or giving effect thereto, thus demonstrating that the reach of our courts is limited. However, a far more sinister phenomenon gripping South African jurisprudence is warfare. When courts are used to resolve political spats, the real danger exists of the credibility and legitimacy of the judiciary being questioned. Is this, as opposed to judicial review in general or activism in particular, anathema to constitutionalism?

[92] S 239 of the Constitution defines an organ of state as an administrative body to the exclusion of "a court or a judicial officer".