TRANSFORMATIVE CONSTITUTIONALISM IN THE GLOBAL SOUTH: A COMPARATIVE ANALYSIS OF AFFIRMATIVE ACTION IN INDIA, BRAZIL, AND SOUTH AFRICA

Athul A K, Gujarat National Law University

ABSTRACT

Nations around the world, particularly the global south, have used constitutional as an emancipatory tool to transform the society, by healing the wounds of the past and guide towards a better future. This paper examines the transformative role played by the constitution in global south nations, specifically: India, South Africa and Brazil. This paper adopts a comparative legal analysis approach; this paper is confined to the domain of transformative constitutionalism in addressing social disabilities, and does not extend to other dimensions of constitutional transformation.

Introduction

Can a constitution do more than just regulate government; can it dismantle centuries of social inequality? As observed by Justice Langa, the core idea of transformative constitutionalism is to heal the wounds of the past and guide us to a better future.[1] By transformative constitutionalism, we use the constitution as a tool to transform the society. Transformative constitutions cherish a broader emancipatory project, which attributes a key role to the state in pursuing change[2]. This emancipatory project was particularly made in use in global south countries—specifically India, South Africa, and Brazil—whom were mired in social disabilities; such as, slavery, apartheid, and caste hierarchies.

The normative meaning of transformative constitutionalism is usually attributed to jurist Karl

[1] Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. 351 (2006).
[2] Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMP. L. 527 (2017).
[3] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146 (1998).

Klare, who defined transformative constitutionalism as a "long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[3] This normative definition entails the three organs of the states—legislative, judiciary, and executive—and their combined commitment to transform the country's political and social institutions.

The post-Apartheid South Africa, which is often hailed for its progressive constitution and judgments, used its constitution to dismantle the racial discrimination and used it for uplifting the communities that were socially excluded based on the color of their skin. Whereas, in postcolonial India, which was mired in casteism, the state strove to achieve substantive equality by invoking constitutional amendments to circumvent the judgments, which were fixated on the notion of formal equality, or what is otherwise called "color-blind equality"—a phrase attributed to Justice John Marshall Harlan of the Supreme Court of the United States, dissenting in the notorious Plessy v. Ferguson. The post-1988 Brazilian Constitution has also been used as a tool to enact certain policies to effect social changes, particularly in the context of racial and socioeconomic inequalities.

By doing a comparative study of transformative constitutionalism across India, South Africa, and Brazil, one can discern both the shared aspirations, the governmental policies, and the judicial interpretations used by each country to achieve their emancipatory project.

The objective of this paper is to provide a comprehensive overview of the legal framework and judicial interpretations across the three countries. Further, to juxtapose the models adopted by these countries in order to transform their society. By doing so, it becomes possible to identify the area of convergence and divergence. Therefore, to identify lessons and insights that can inform future legal and constitutional reforms. This paper particularly focuses on the affirmative action policies—specifically relating to social disabilities.

This paper is organized into five parts. Part I examines the jurisdiction of India and how India, through its institutions, deals with casteism. This part is further divided into legal framework and judicial interpretations, wherein the constitutional and other statutory overviews are delved into to see how they're used as a tool for social transformation. Furthermore, the judicial interpretation part deals with the role of the judiciary in expanding the affirmative action rights.

Part II focuses on the South African constitution and its various policies used to empower the colored communities and the role of the judiciary in playing an active role in promoting substantive equality. As with the above section, this has also been divided into legal framework and judicial interpretations. Part III focuses on the Brazil constitution and its judicial approach. The IV provides for comparative assessment, synthesizing the insights from the three jurisdictions and highlighting divergence, convergence, and lessons India can learn. Finally, Part V deals with the conclusion.

I. Indian Perspective

On 15 August 1947, the nation-state of India entered into a tryst with destiny. Indians became the drivers of their own destiny; however, there existed wounds of the past—specifically pertaining to the casteist past—which needed to be rectified. Subsequent to this need, the adopted constitution included an affirmative action provision, through which a once ostracized part of the society was tried to be brought to the mainstream. The Indian approach for transformative constitution can be understood through the lens of the existing legal framework and the judicial interpretations, wherein the judiciary acted as an agent for transforming the society—particularly on the affirmative action policies.

a. Legal Framework

The drafters of the constitution, and subsequently the parliament, have inculcated provisions for introducing affirmative action for the communities that had faced social disabilities in the past. Articles 15 and 16 define the contours of the affirmative action policies.

Article 15(1) prohibits the state from discriminating against citizens only on the grounds of religion, race, caste, sex, place of birth, or any of them. This formal equality was used by the Apex Court in various cases to strike down policies brought in to ameliorate the backward castes, which, according to Gautam Bhatia, was the first clear exposition of "caste blindness" by the Apex Court. To circumvent these issues, the First Constitutional Amendment was brought in, wherein a fresh article was added, Article 15(4), which enabled the state to make special provisions for the advancement of the socially and economically backward class and SC & ST.

Additionally, Article 16(1) gave equal opportunity to every citizen in regard to employment in

government offices. However, Article 16(4) enables states to make reservations for the backward class if they're not adequately represented.

Article 17 abolishes untouchability and signifies a direct constitutional attack on caste oppression. In pursuant to meet this goal, The Protection of Civil Rights (PCR) Act, 1955 was enacted. This Act penalized various acts of untouchability.

Further, Directive Principles of State Policy, which act as the guiding principles for state policy, also deals with the affirmative actions. Particularly, Article 38 and Article 46. The former deals with states promoting welfare of people by securing social order in which social, justice, economic and political in all institution of national life. The latter directs state to promote special care, educational and economic interests of the weaker sections of the people, particularly SC and STs, and protect them from social injustice and all forms of exploitation.

In additions of these explicit articles embedded into the constitution, judiciary played a prominent role, actings as an agent in transforming the society.

b. Judicial Interpretations

Initially the courts acted in a colour bind manner which looking at equality in a formal manner; without taking the substantive aspect into consideration. The State of Madras had a preconstitutional reservation policy for admission to medical institutions, which allocated seats among 'non-Brahmin Hindus', 'Backward Hindus', 'Brahmins', 'Harijans', 'Anglo-Indians', and 'Muslims', on a quota basis. Soon after the Constitution came into force, this policy was challenged by Champakam Dorairajan[3], an aspiring Brahmin medical student, who argued that the government's reservation policy violated her right to non-discrimination under Article 15(1), and her right to non-discriminatory access to State educational institutions under Article 29(2) (Article 15[4] did not exist at the time). In State of Madras v. Champakam Dorairajan, the Supreme Court agreed, holding that 'the right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. A policy that made admission conditional upon class membership, therefore, was unconstitutional.[4] It took First

[3] *State of Madras v. Champakam Dorairajan, [1951] S.C.R. 525 (India).*
[4] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS (2019).

Constitutional amendment to circumvent this judgment—by inserted Article 15(4).

As for public appointment, until N M Thomas, it was accepted that, Article 16(4) is an exception to Article 16(2). Although, Justice Subba Rao had made his famous dissent in T. Devadasan case, which finally became the rule of the land in NM Thomas, wherein Chief Justice Ray propounded the view that Article 16(4) was not an exception to Article 16(1) but existed as 'one of the methods of achieving equality embodied in Article 16(1)'.[5]

Thereafter, the question of affirmative action case again into foray, after the implementation of Mandal Commission report. Pursuant to this report, the government allocated reservation of 27% of for social, and economical class of citizens, as determined by the committee, in direct recruitments. Writ petition as a PIL was filed challenging this. This case was heard by a bench of 9 judges, and in 6:3, held the OM issued by the government as constitution, however subject to certain conditions. While keeping a ceiling of 50%, which could be breached only in extremely rare circumstances. [6]

In recent Davinder Singh [7]case, sub-classification of SC was decided valid, thus preventing elite capture in that class of people. Thus, court have inculcated the concept of substantive equality and by putting a ceiling and sub-classification, prevents elite capture and give reservation to the needed ones.

II. South African Perspective:

The term Apartheid is the name give to the policy initiated in 1947—even though racial discrimination can trace back to the beginnings of Dutch colonization of the Cape of Good Hope in 1652—by then National Party government. [8] This extremely oppressive system finally collapsed in 1990; due to extreme international pressure and boycotts by the rest of the countries in the word, and the outbreak of civil war in South Africa. In 1990 the National Party government—to everyone's surprise— renounced Apartheid, and accepted the principle that all people in South Africa, black as well as white, should participate in the electoral process.[9]

[5]Id.
[6] *Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (India).*
[7] *State of Punjab v. Davinder Singh, 2024 S.C.C. OnLine S.C. 1860 (India).*
[8] N.L. CLARK & WILLIAM H. WORGER, SOUTH AFRICA: THE RISE AND FALL OF APARTHEID (4th ed. 2022).
[9] *Id.*

In 18 December 1996 the President promulgated the South African constitution, which came into effect on 4 February 1997. Although it is particularly noteworthy that, prior to this final draft of constitution being enacted there existed an interim constitution, and certain judicial interventions were carried out wherein the Constitutional Court refused to certify the initial text of the constitution (popularly known as "First Certification Judgment"). [10]However, the intricacies of making the constitution of South Africa are outside the scope of this paper.

The new constitution's—according to the former CJI of South African—heart lies in the commitment to transform our society into one in which there will be human dignity, freedom and equality.[11] To achieve these vital commitments, the constitution is used as a prominent tool.

This section aims to examine how South Africa—through black letters of the constitution and transformative interpretations by judiciary—endeavored to heal the wounds of the past and guide us to a better future[13]. The section comprises of two subsections: i) Legal framework, wherein the various provisions of the constitution would be examined; and ii) Judicial Interventions, wherein three cases—regarding affirmative action—would be examined, in light of transformative interpretation by the judiciary.

i) Legal Framework

The analyses of the legal framework—with respect to affirmative action—begins with examination of the constitutional provisions, and is followed by the statutes, which are used to enforce affirmative action, mainly in the employment sector.

The affirmative action stems from the section 9 of the Constitution. The section 9 is equality clause, which is co-extensive of section 8, of the erstwhile Interim Constitution. The section envisages; the 'equality before law', the 'right to equal protection', and the 'benefit of law'.

The equality in the context of section 9 refers to 'substantive equality'; not mere formal equality.[12] The positive measures to ensure the substantive equality are provided in the section

[10] STU WOOLMAN & MICHAEL BISHOP EDS., CONSTITUTIONAL LAW OF SOUTH AFRICA (2d ed. Juta, 5 vols. 2013).
[11] *Soobramoney v. Minister of Health, Kwazulu-Natal* 1997 (1) SA 765 (CC) at para.8(S.Afr.).
[13] Langa, supra note 1.
[12] WOOLMAN & BISHOP, supra note 11, at 2616.

9(2); this sub-section have two parts in it, the opening part provides that "Equality includes the full and equal enjoyment of all rights and freedoms", and the subsequent part provides for positive measures for "promote the achievement of equality".

In an earlier draft, the words "aimed at" was there, in place of "designed to achieve". According to Mureinik, the former words create the intention-action problem. In his words, "…provision might be construed to empower the court to review the intentions of the authors of the measure, but not its effects." It is imperative to note that he had his reservations to the newly introduced phase also; to reconcile this ambiguity, he proposed the words "constructed so as to achieve" — this proposal failed to include in the final draft of the constitution, which was promulgated by the President.

Accordingly, to achieve the goal of substantive equality—specifically relating to affirmative action—the government have enacted. inter alia, the 'Broad-based Black Economic Empowerment Act, 2003' and 'Employment Equity Act, 1998'.

The 'Employment Equity Act, 1998' was enacted with the objective to get equity in the workplace by promoting equal opportunity and fair treatment in employment by;" promoting equal opportunity and fair treatment in employment"," implementing affirmative action measures to redress the disadvantage"—to achieve equitable representation. The section 5 of EEA,1998, imposes a negative obligation, by imposing prohibition of unfair discrimination, under various heads, as given therein. It is crucial to note that the affirmative action measures don't come under the ambit of 'unfair discrimination'.

Further the Act imposes obligation on the designated employer to prepare employment equity plan, as prescribed in the Act. The employment equity plan are the implementation plans taken by the designated employer to progress towards employment equity in their workplace. The publication of the plan report—in annual financial plan— and the submission of the report to Director- General once every year, on the notified date in mandatory. The mandatory disclosure, and the threat of sanction, are the two integral factors that makes this Act effective. This act is, one of the, pivots used by the South African government to achieve the goal for transforming the society. The other being the 'Broad-based Black Economic Empowerment Act, 2003'.

The 'Broad-based Black Economic Empowerment Act, 2003' aimed particularly at promoting

economic transformation, by enabling meaningful participation of the black people in the country's economy. Further the Act envisages to achieve in making substantial change in racial composition in the ownership and management of— existing and new—enterprises. In accordance with the section 9 of the Act, the code of good practice on black economic empowerment is issued, which introduces scorecard mechanism through which preferential procurement, and eligibility in the issuing of licenses, concessions and other economic activities. What is particularly noteworthy is that, no tangible positive impact in the net profit of the firm's vis a vis BEE scores[13]. On the other hand, this "carrot and sticks" approach by the government have resulted in an appeal to compliance, rather than commitment approach.[14]

Having examined the black lettered law, and their commitment to transform the society; it is now pertinent to analyze the role played my judiciary. Accordingly, this paper turns the examination towards judicial interventions done by the judiciary—particularly the Constitution Courts—to use Constitution as a "…historic bridge between the past of a deeply divided society … and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex", as stated in the Postamble of the Interim Constitution.[15]

ii) Judicial Intervention

While the black letters of law lay down the legal framework, it is through the judicial interpretation of those letters that gives rational meanings to the words[16]. This part will examine the landmark judicial decision—specifically; Minister of Finance v Van Heerden[17], South African Police Service v R M Barnard[18], and Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association[19]—relating to affirmative actions.

Minister of Finance v Van Heerden marked a watershed moment in the affirmative action

[13] M. Busse, N. Kupzig & T. Vogel, *The Impact of Black Economic Empowerment on the Performance of Listed Firms in South Africa*, 53 J. COMP. ECON. (2025).
[14] Frank M. Horwitz & Harish Jain, *An Assessment of Employment Equity and Broad Based Black Economic Empowerment Developments in South Africa*, 30 EQUAL. DIVERSITY INCLUSION: INT'L J. 306 (2011).
[15] Constitution of the Republic of South Africa, Act 200 of 1993
[16] AHARON BARAK & SARI BASHI, *What Is Legal Interpretation?*, in AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Princeton Univ. Press 2005).
[17] *Minister of Finance v. Van Heerden* 2004 (6) SA 121 (CC) (S. Afr.).
[18] *S. Afr. Police Serv. v. Solidarity obo Barnard* [2013] ZACC 23 (S. Afr.).
[19] *Min. of Just. & Const. Dev. v. S. Afr. Restructuring & Insolvency Practitioners Ass'n* 2018 (5) SA 349 (CC) (S. Afr.).

jurisprudence; this case examined the section 9(2) in detail, and laid down a three-pronged test—known as the Heerden's test. The conspectus of the facts is such: the respondent Political Office-Bearers Pension Fund, claiming that it violated the equality clause of the Constitution, as it treated former political and the latter one's on a different footing—while calculating pension.

The High Court decided the dispute in favour of the respondent; on aggrieved by this, the applicants filed an Appeal. The Constitutional Court rejected the proposition of the respondents, by applying three yardsticks: a) "Whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination"; b) "whether the measure is designed to protect or advance such persons or categories of persons"; c) "whether the measure promotes the achievement of equality". As the policy passed the above-mentioned three yardsticks, it was said have passed the muster of section 9(2). By virtue of section 9(2), the legislative or the other measures, are not deemed to be unfair. It is particularly noteworthy to mention that, while deciding the dispute, the Constitution Court made an important observation that: "Remedial measures are not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole".

By building on the Van Heerden judgment, another important case was adjudicated, called the South African Police Service v R.M. Barnard case. In this case, the respondent was a female police officer, she repeatedly tried the promotion in South African Police Service. However, in spite of scoring the highest marks, she was rejected repeatedly owing to under-representation of the black men and women as opposed to the employment equity targets. Thus, she approached various forums, and the Supreme Court of Appeal decided in favour of Barnard. Aggrieved by this, the South African Police Service approached the Constitutional Court. In Constitutional Court set aside the Supreme Court of Appeals decision, and held that the National Commissioner had exercised his discretion rationally—not rigidly, as to amount as quotas— to achieve the targets of the targets. What is particularly noteworthy is that, this case involved two historically discriminated groups—one based on the race, and other on gender. However, as women were over-represented at the salary level to which Ms. Barnard was applying; thus, the racial representation was prioritized over the gender representation.

The South African Constitution acted as a tool towards an equal society, and to achieve this,

certain restitution measures as envisaged in the section 9(2) of the Constitution. Further the Van Heerden test circumscribed the scope of unfair discrimination; if the legislation or policy pass the muster of Van Heerden test, then they are immune from being invalidated on the ground of being 'unfairly discriminative'. As a result, the constitution and the judicial action have acted in tandem to obtain the objective result of—to heal the divisions of the past and establish a society based on democratic values, social-justice and fundamental human rights.

Having examined the legal framework and the judicial interpretations; we now turn to Singapore, to examine their existing legal frameworks and judicial pronouncements regarding the affirmative action.

III. Brazilian Perspective

Unlike the previously discussed countries, which followed Common Law legal system, Brazil came from rich Civil Law traditions. As highlighted by Michel Fontaine, "One hundred years after abolition, Brazil remains a country of marked racial inequality". [20]The lived experience during the slavery period have effectively crippled the AfroBrazilians in a way, which made them unable, in the century after emancipation, to compete effectively against whites for jobs, education, housing, and other social goods.[21] The Brazilian Constitution of 1988, popularly known as the "Citizen constitution". Although racial discrimination has been always a part of, but it was only in 1996 it was openly acknowledged—by then president Fernando Henrique Cardoso— that their existed a racial discrimination problem in Brazil. [24]

This research segment examines the constitutional and legislative framework of affirmative action in Brazil and analyses judicial interpretations that have transformed these policies from political experiments into constitutional doctrines. It assesses how Brazil navigates between legal universality and targeted protection, and how its judiciary legitimizes differential treatment in pursuit of substantive justice.

a. Legal Framework

The 1988 Constitution, popularly known as the "Citizen Constitution", envisages a normative

[20] PIERRE-MICHEL FONTAINE ED., RACE, CLASS, AND POWER IN BRAZIL (1986).
[21] REBECCA J. SCOTT ET AL., THE ABOLITION OF SLAVERY AND THE AFTERMATH OF EMANCIPATION IN BRAZIL (Duke Univ. Press 1988).
[24] Keith S. Rosenn, *Recent Important Decisions by the Brazilian Supreme Court*, 45 U. MIAMI INTER-AM. L. REV. 297 (2014).

commitment to social transformation after decades of dictatorship. Despite not having an explicit provision for relating to affirmative action, the foundational principles act as a bedrock for the implementation of affirmative action.

The Article 1, III proclaims that the Federative Republic of Brazil is founded on the dignity of the human person. Further, the equality clauses—Article 5—though only says about formal equality; however subsequent judicial interpretations, especially by the STF, have read it as substantive equality.

The Article 3, III is where the article which serves as a constitutional directive to legitimize the affirmative action. This Article mandates the eradication of poverty and reduction of social and regional inequalities, alongside the promotion of the well-being of all, regardless of race, colour, or origin. Additionally, Articles 206 and 207—relating to Autonomy of Public Universities and Social Rights—emphasize equal access to education and university autonomy. This provision has also been used by the courts to give constitutional legitimacy to the affirmative action policies.

In 2010, the government enacted the Law No. 12.288/2010, which is a landmark statutory instrument, which formally acknowledges the existence of racial inequality and mandates state promotion of Afro-Brazilian participation in education, employment, health, and media. Further legislative action was taken in the form of Law No. 12.711/2012, popularly known as "University Quota Law" which mandated 50% reservation in federal universities for students from public schools, with sub-quotas for: Black (Preto), Brown (Pardo), Indigenous (Indígena), and economically disadvantaged backgrounds. Furthermore, Law No. 12.990/2014 was enacted which reserved the 20% of federal civil service posts for Afro-Brazilians.

These legislative actions were challenged before the Supreme Federal Court; thus, judicial interpretation was imperative for legitimizing the affirmative action policies.

b. Judicial Interpretations

The Supreme Federal Court (STF) has emerged as the principal architect of affirmative action jurisprudence. Through landmark decisions, it has reconciled affirmative action with constitutional principles, rejecting arguments grounded in formalist objections. In April 2012, STF gave verdict to what is generally accepted as a watershed moment for affirmative action

in Brazil. [22]The Democrat's, a political party, challenging the constitutionality of the University of Brasilia's affirmative action program, which for a ten-year period reserves 20 percent of its admissions for blacks (and a few spots for indigenous persons). The program was instituted in 2004. The essential argument of Democrat's was that affirmative action violated the Constitution's guarantee of equality, and that race-based admissions are unnecessary in a country like Brazil where racism was never institutionalized.205 Like other historic cases, the STF held public hearings and considered amicus curiae briefs before reaching its decision. The STF held that in order to have a diverse student body. Article 206 (III) of the Constitution mandates that education be given "pluralism of ideas and pedagogical concepts," despite Article 206 (I) requiring "equality of conditions for access to and remaining in school." In order to distribute public resources more fairly, the equality principle must be utilized in a way that gives social justice substance rather than in an abstract manner.[23]

A month later, the STF was to decide upon the constitutionality of the Law 11.096 of 2005. [24]In the virtue of this law, full scholarships were provided to people of coming from limited family background, who attended private universities. Certain quotas were blacks, browns (pardos), indigenous, and those with special needs. It was first established in 2004 by a Provisional Measure, which Congress later changed to become Law 11.096 of 2005. Confederation of Teaching Establishments National (CON) FENEN) challenged this program directly for unconstitutionality on a number of technical grounds and for violating the equality principle. The STF dismissed the argument that this type of affirmative action was unconstitutional by a vote of seven to one. Minister Marco Aurelio, the lone dissenter, said that the Provisional Measure—an Executive decree with temporary legal force—did not satisfy the urgency and relevance requirements of the constitution.[25]

Following this judgment, the President Dilma Rousseff enacted one of the most comprehensive affirmative action laws in history into law on August 29, 2012, in response to these rulings. According to the law, students from public high schools must be given preference for at least half of the spots at federal colleges.[26]

[22] S.T.F., ADPF No. 186, Relator: Min. Ricardo Lewandowski, 26.04.2012 (Braz.).
[23] Rosenn, *supra* note 21.
[24] S.T.F., ADI No. 3330, Relator: Min. Ayres Britto, 03.05.2012 (Braz.).
[25] *Id.*
[26] *Id.*

Comparative Analysis:

By comparing how each state operationalizes their constitutional obligation of socially disabled community, allows to examine the effectiveness, and nuances of each country, and what we can learn for them.

In India, the Articles 15(4), 15(5), and 16(4) of the Indian Constitution expressly provide the state the authority to make reservations for SCs, STs, and OBCs in employment and education. Legislation like the SC/ST (Prevention of Atrocities) Act of 1989, which aims to provide social justice for marginalized people by penalizing discrimination against them. Further landmark Apex court judgments like Indra Sawhney v. Union of India (1992) and N.M. Thomas v. State of Kerala (1976) have been essential in maintaining a balance between substantive equality, without compromising with merit.

South Africa's affirmative action framework, on the other hand, is deeply intertwined with its history of apartheid, which institutionalized racial segregation and exclusion of the Black majority. The policies such as Employment Equity Act and Broad-Based Black Economic Empowerment have increased the participation of coloured community in institutions where they were previously excluded. Further, cases such as *Minister of* Finance v. Van Heerden (2004), has emphasized that affirmative action measures must be rational, proportionate, and aimed at genuinely redressing disadvantage without imposing arbitrary restrictions. Although South Africa doesn't have quota systems, however their targeted policies especially in the private sector is something which India could take inspiration from.

Ther Brazil's affirmative action stems from the colonial history, and it is similar to India's affirmative action policies; the fully funded scholarship and admission quota in universities.

While India, South Africa, and Brazil have different historical causes of social marginalization, as caste is a India, racial segregation and discrimination during the apartheid in South Africa, and slavery-based racial hierarchy in Brazil. However, all three agree that formal equality alone is insufficient; substantive equality is what needs to be required, to uplift the socially disabled communities. The judiciary in these countries have played a proactive role in expanding the scope of affirmative action.

In comparative perspective, India can learn several lessons for Brazil and South Africa. India

could strengthen the scholarship schemes similar to the initiative undertaken by the Brazil, for fully funded scholarship to private universities; so that the marginalized communities could get access to high quality education provided by the private universities. Further, a robust monitoring and reporting mechanisms, such as those required by South Africa's Employment Equity Act, could improve the transparency and effectiveness of India's reservation system. Furthermore, giving benefits to companies during government contract procurement process, for having adequate amount of people from the socially disable castes, in likes of the South Africa's Employment Equity Act. This could improve the proportion of people from that community increase in private sector, and thereby climb the economic ladder.

As we have concluded the different perspective, we shall, go turn to conclusion reflection.

Conclusion

Each of these three countries—India, South Africa, and Brazil— had divergent social segregations and discriminations; however, all the three converged on the shared aspiration, to transform the society through law.

From the comparative analysis, this a understood that transformative constitutionalism must be constantly enacted, enforced, and interpreted by the state's institutions, particularly the judiciary, legislature and the executive. In India the transformative ideals are found in the Article 15(4) and 16(4), and constitutionals amendments used by the legislative to circumvent the "colour-blinded equality", as proposed by the judiciary. The Indian affirmative action is still confined to the public sphere, and elite capture is prevalent. There needs to a transformative measure in private sphere also, as demonstrated by South Africa; further, there needs to be periodic review to mitigate elite capture.

South Africa, on the contrary, does not rely on rigid quotas but mandates proactive corrective duties, enforced through legislation like the Employment Equity Act and Broad-Based Black Economic Empowerment Act. The South African courts have played an active role in affirming the transformative measures. This jurisprudential clarity represents one of South Africa's greatest contributions to global constitutionalism.

The Brazilian Constitution lacked explicit affirmative action provisions, yet it laid a normative foundation through equality, dignity, and social justice clauses. The Brazilian Supreme Federal

Court (STF) stepped into this constitutional silence, validating policies such as university quotas and civil service reservations. Brazil demonstrate how transformation can function through educational democratization and state-funded inclusion.

In the all three countries, judiciary have played a pivotal role. By not sitting as a mere interpreter, the judiciary acted as an agent for social change. However, judiciary can't play as a loner warrior; the legislative and the executive as equally important, in the quest for social transformation.

That said, transformative constitutionalism is not free of critique. The proactive role played by the judiciary could lead to a situation of judicial over-reach, where by the judiciary acts as an super-executive or super-legislature. Despite all these legal victories, the marginalized class, still experience social hostilities. Thus, the transformative constitutionalism shouldn't be just confined to the courtroom; but also, its effect should trickle down to economic structures and cultural narratives.