

Lost in Transformation: Social Rights Under a Contradictory Constitution

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Social rights provisions are a hallmark of a transformative constitution. In fact, the notion of transformative constitutionalism has been inextricably intertwined with the rise of justiciable social rights, particularly in the post-apartheid South African context. More broadly, however, transformative constitutions articulate an explicit promise to change, and reflect, at their core, a commitment to substantive equality. These two transformative elements have played a significant role in the South African Constitutional Court's interpretation and application of its social rights provisions. Specifically, the Court has used the Constitution's promise of change and substantive equality commitment as a means of justifying its involvement in matters of social policy – so as to realise the transformation envisioned by the Constitution. It has thus adopted a contextual approach, treating social rights as part of the overall transformative project. But how is a court to enforce social rights when they are embedded in a constitution that encompasses – rather than such transformative elements – regressive elements (what may be described as a “contradictory” constitution)? The paper seeks to answer this question with reference to the case of Nepal. In doing so, it examines Nepal's constitutionalization of social rights in the 2015 document, the role of its courts in enforcing social rights pre- and post-2015, and the saga of the rights-implementing legislation passed in 2018. The paper concludes by reflecting on the increasing constitutionalization of social rights around the globe, and argues that the Nepali case is not exceptional, especially for recent constitution-making experiences.



Dr Mara Malagodi is a Senior Lecturer at City Law School, City, University of London. She is a comparative constitutional lawyer with a linguistically-informed specialism in South Asian law and politics (in particular Nepal, India, and Pakistan), human rights law, and legal history. Dr Malagodi has worked as an external consultant for various United Nations agencies, and has been teaching at the Foreign & Commonwealth Office Diplomatic Academy. She is also an award-winning documentary film-maker.



Dr David Vitale is an Assistant Professor in the School of Law at the University of Warwick. His research interests lie at the interface of constitutional law, political/social theory and social rights. His work has been published in the Oxford Journal of Legal Studies, Queen's Law Journal and the Review of Constitutional Studies. Dr Vitale has also served as a judicial clerk to the Justices of the Court of Appeal for Ontario and the Supreme Court of Israel, and has conducted research with the Center for Constitutional Transitions.



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