
A COMPARATIVE STUDY ON THE ROLE OF JUDICIARY IN ADVANCING TRANSFORMATIVE CONSTITUTIONALISM: INDIA AND SOUTH AFRICA

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ABSTRACT

Transformative constitutionalism is a theory that sees the constitution as a living instrument to redress historical wrongs and to achieve substantive equality. In India, Judiciary has been instrumental in interpreting the constitution to address institutionalised problems like caste bias, gender inequalities, and socio-economic inequities. Public Interest Litigation (PIL) have given the power in hands of marginalized communities to access to Justice. Many landmark judgments have broadened the meaning of the “fundamental rights” under Articles 14, 15 and 17, reflecting the achievement of constitutional goals of social justice. In the same way article-39 of South African constitution of 1996 has played a significant role in eradicating racial and economic inequality in post-apartheid south Africa. The Constitutional Court has delivered some landmark judgments like in “Grootboom and Treatment Action Campaign” where it affirmed socio-economic rights to housing and healthcare. In both India and South Africa, the courts have recognized that formal equality is not enough, and that substantive equality, i.e. "disadvantaged groups are given an equal opportunity and protection" is necessary. But problems remain in both countries, such as enforcing the rulings, political backlash, and worries about judicial activism. However, the courts still hold a powerful role in making the visionary promises of their constitutions a reality, that justice, dignity, and equality continue to be the focal points of all legal and social reform.

Keywords: Transformative constitutionalism, Substantive equality, Fundamental rights, Socio-economic rights

1. INTRODUCTION

Transformative constitutionalism is a concept in which the constitution is used as a tool to address historical injustices, inequality and exclusion bringing social change in the society. It sees the constitution as a living document to achieve social justice, human dignity and democratic governance. This concept has been employed both by India and South Africa, whose constitutions were designed to not only provide government structure but to also bring change in their respective societies toward equity and inclusion.

In India, the framed Constitution is post-colonial in nature, which involves discontinuance of caste-based discrimination, gender inequality, and economic exploitation. The Supreme Court of India played an important role in furthering transformative constitutionalism. Powers like judicial review and Public Interest Litigation have enabled the judiciary to interpret the constitution in order to expand the meaning of fundamental rights in providing socio-economic justice. Landmark judgments on environmental protection, equality for women and social and economic rights have shown the realization of constitutional promises into reality for citizens.

Likewise in South Africa, transition from apartheid regime to democracy called for formation of a new constitution. The constitution of 1996 was especially crafted to transform the society from a deeply divided society to a more inclusive society. South Africa's Constitutional Court has acted as a powerful pillar in enforcing rights related to equality, housing, and health, including landmark cases like *Grootboom* and *Treatment Action Campaign* aimed at socio-economic equality. In both countries, the judiciary had played a central role, upholding and interpreting constitutional principles in ways that effectuated social justice and reform so that transformative constitutionalism remained an effective force in governance.

In this paper, I will discuss transformative constitutionalism and the role of the judiciary in advancing the same in the context of India and South Africa. For this, we will delve into discussing some landmark judgments propounded by their respective courts to promote transformative constitutionalism. At last, I will discuss some challenges faced by the judiciary in implementing the same and a comparative perspective will also be discussed to provide a comprehensive analysis of the working of Transformative constitutionalism of both countries.

2. Background of Transformative Constitutionalism

2.1 Origin and Concept

In India, instances like the abolition of sati, “the Hindu Remarriage Act”, “Female Infanticide Prevention Act” are some examples of social change that aligned with the idea of Transformative constitutionalism. But these reforms happen in colonial times. Nevertheless, after India gained independence, the judiciary played an important role in developing the concept of transformative constitutionalism in the Indian constitutional jurisprudence. Justice Krishna Iyer in the case of “*Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*”¹, held that the constitution should not be viewed as merely a legal document, rather it has to be seen as a document of bringing social changes, focusing on the struggles of the marginalized and deprived ones. Justice P.N Bhagwati in the case of “*S.P. Gupta vs. Union of India*”², devised the concept of PIL, which has provided easier access to Justice for the Vulnerable and marginalized section of the society.

However, the concept of transformative constitutionalism finds its roots in the post-apartheid south Africa era. In 1998, Prof. Karl E. Klare a constitutional scholar and professor at Columbia University in his paper titled “Legal Culture and Transformative constitutionalism” discussed this concept. He defines 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 However, The definition of the said term is still debated around the world with regard to their meaning and its usefulness. Justice Pius linga, former chief justice of South Africa said that the constitution of the country with a colonial history are framed as a tool of social and political transformation, where the wounds of the colonialism are healed through it, with the aid of the judiciary. In nutshell, Transformative Constitutionalism is mechanism of bringing social and political change in a society by using the constitution as tool to fulfill the aim and objective of such constitution.

2.2 Adoption in India

The adoption of transformative constitutionalism in India is rooted in the socio-political context of the time. The makers of the Indian Constitution strive to create a new India based on the principles of justice, equality, and liberty, after centuries of British colonialism. The Indian

¹ (1981) 1 SCC 246

² AIR 1982 SC 149, (1981) Supp SCC 87

³ Klare, K. E. (1998). Legal Culture and Transformative Constitutionalism. *South African Journal on Human Rights*, 14(1), 146–188.

movement for independence was inextricably linked with the struggles of the marginalised sections, including Dalits, women, and tribal populations who suffered under oppressive socio-economic conditions. The framers, led by visionaries like Dr B.R. Ambedkar, are aware that the new Constitution of India is not only a mere document but a tool for social transformation -an answer to historical wrongs and the creation of an egalitarian future.

The transformative Vision of the Indian constitution is aimed at dismantling societal inequalities to promote Justice, liberty, equality and fraternity. Its purpose is not restricted to regulating the government but also to provide a foundation to structure the relationships among individuals within society. The framers did not only subscribe to the traditional vision of liberty which limits the government's power and protects individual freedom but also tasked the constitution with a specific mission to eradicate the inequality, prejudice and discrimination in Indian society.⁴

The Preamble of the Indian Constitution is the explicit expression of transformative constitutionalism. Apart from liberty and equality, the fraternity is a tool aimed at equalising relationships among individuals, demolishing the divisions created by caste, religion and other social inequalities. The principle of fraternity is not only meant to address discrimination but it also ensures the realization of liberty and equality in an inclusive manner. Therefore, the Preamble provides a blueprint for achieving the transformative goals of the Constitution.

The Equality Clause i.e. Article-14-17 is the bedrock to the transformative vision of the Constitution. Article- 14 guarantees equality before the law and Equal protection of Laws to every person. However, the framers recognised that formal equality would not be sufficient to address the historical injustices. Article-15 & 16 further prohibited discrimination based on caste, race, gender, religion and others while allowing affirmative action to uplift the marginalised and deprived ones. Article-17 further abolishes untouchability which shows the constitutional stance on the societal practices that were derogatory to human dignity.

Another important feature of the Constitution in regard to its transformative vision is its Directive Principles of State Policy (DPSPs). Although not enforceable, the DPSPs have been the basis over the years of interpretation of laws and policies underlying the state welfare

⁴ K. Bagchi, *Transformative Constitutionalism, Constitutional Morality and Equality*, 51 *Verfassung Und Recht in Übersee/L. & Pol. Afr., Asia & Lat. Am.* 367, 367–380 (2018), available at <https://www.jstor.org/stable/10.2307/26630273>.

model. The judiciary has invoked DPSPs to provide relief in cases related to environmental protection, labour rights, education and others substantial issues. Based on DPSPs, the right to education under Article 21A, which entitles all children to free and compulsory education, became a fundamental right. This describes how the Directive Principles serve as a connecting link between the Constitution's transformative ideals and its legal enforceability.⁵

2.3 Adoption in South Africa

The South African constitution was drafted to fix the problem of unfair treatment and inequality suffered by the people during colonialism and apartheid era. Apartheid was a system of racial discrimination in which the society was divided into white South African and non-white south African or black South African and the law at that time treats these group differently. White South Africans were given more power, wealth and rights and black South Africans were forced to live in separate areas and the basic rights required by a human being to live were denied .⁶

The need for transformation arises to address the deeply entrenched racial discrimination and socioeconomic inequalities persisted in society since many decades. It was necessary to redefine the nature of rights, shifting the focus from formal equality to substantive equality. The South African constitution has incorporated Article 39 which precisely provides the constitution to be a tool of social change. Thus, aligning with the notion of transformative constitutionalism. Therefore, we can say that transformative constitutionalism is constitutionally granted tool, aimed at tackling the problem of unequal treatment and racial discrimination persisting in society for many decades creating huge inequalities in wealth, opportunities and access to rights specifically for black South Africans.

2.3.1 The transition from parliament sovereignty to constitutional supremacy

Before 1994, South Africa was under parliamentary sovereignty. Wherein, the parliament is the supreme and no courts can check the action of parliament regardless of how unreasonable or unjustifiable the action is. This rests the transformation aspects at the whims of the majority rule. The new constitution marks a significant departure and adopts the principle of supremacy of the constitution. Which makes it compulsory to justify every action of government. The new

⁵ Ibid

⁶ Eric Kibet and Charles Fombad, 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 African Human Rights Law Journal 340-366.

constitution makes the courts to be custodians of the constitution, by protecting the ideals and principles enshrined under it. The Constitution introduced a new Grund-norm for the state and the politics binding all the people, including kings/chiefs or traditional authorities who for decades enjoyed ancient traditional privileges of acting arbitrarily. In the case of “*Executive Council Western Cape Legislature v President of the Republic of South Africa*”⁷, it was held that...

“The new Constitution establishes a fundamentally different order, compared to the parliamentary sovereignty system, that parliament can no longer claim supreme power or authority subject to restrictions imposed by the Constitution. That it is the subject in all respects to the provisions of the Constitution and has only the powers as vested in it by the Constitution expressly or implicitly”.

The constitutional supremacy represents a condemnation of the past and strives to create a rich future based on the democratic principles.

2.3.2 Bill of Rights

The bill of rights provided under Ch-2 of the South African constitution are the foundational pillar in achieving the transformative goals of the constitution. Especially, article -39 of the South African Constitution which provides how the Bill of rights to be interpreted. It provides that the interpretation of the bill of rights is not at the discretion of the judges rather it is interpreted in a way which it promotes the value of human dignity, freedom and equality. These rights are enacted not only to protect individual rights but also to dismantle the inequalities deeply rooted in the apartheid regime. Rights including the right to equality, dignity, and socio-economic security together strive to close the gaps of inequalities created by years of racial discrimination and oppression. The constitution recognises these rights as fundamental and casts a duty upon the state to actively promote justice and redress historical injustices, particularly for groups who faces severe injustices under the apartheid policies.

The Bills of Rights not only provide formal equality but also substantive justice, thereby representing the transformative vision of the Constitution. Socio-economic rights, such as the right to housing, healthcare, and education, further support this mandate by ensuring that access to basic services is secured under constitutional principles. Each of these rights empowers the

⁷ [1995] 10 BCLR 1289 (CC), 1995 (SA) SA 877 (CC)

citizens and communities to express and assert their freedom and dignity while compelling the government to take policies that ensure real equality and social cohesion, pointing to a basis for a more just and inclusive society.

2.3.3 Constitutional Courts (CC)

The judiciary of South Africa with the constitutional value signifies hope to the nation's democracy. The constitutional courts (CC) Play the central role of the judiciary, which has the authority to serve as the guardian of South Africa's transformative goals of social rebuilding, justice and development. The CC has been tasked to uphold the Bill of Rights, ensuring that all citizens are treated with fairness, equality and dignity. For discharging such duties, the constitution has made the judiciary an autonomous institution, free from any government interference, which allows them to administer justice impartially.⁸ Moreover, it also allows them to hold government officials accountable, a basic tenant of a working democracy. In this way, the court not only upholds legal order but also upholds basic human rights, ensuring that transformative constitutionalism is alive and active in society.⁹

Since 1994, the Constitutional Court has been the central force behind the protection of human rights and the implementation of transformative constitutionalism across South African society.¹⁰ In this regard, it acts as a safeguard in respecting and enforcing all the rights enshrined under the Bill of Rights. For instance, life, dignity, equality, and even the right to housing, healthcare, and education are upheld by the constitutional court on numerous occasions. Moreover, The CC ensures intact the principle of separation of powers and rule of law, with an equal balance between the various arms of government and not permitting anyone to transgress the constitutional limits. Contrary to previous judicial systems, which had limitations in terms of parliamentary sovereignty, the CC can review or challenge actions undertaken by the legislature, the executive, or other institutions of the state. This authority allows the Court to safeguard individual rights but also grants it the power to make society just and equitable with South Africa's vision in its transformative constitution toward becoming an inclusive,

⁸ Moseneke, D., (2008). Separation of Powers, Democratic Ethos and Judicial Function. Wits University, Johannesburg. 23 October 2008.

⁹ Mogoeng, M., (2013). The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards. Chatham House. 25 June 2013.

¹⁰ Christiansen, E., (2010). Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice. *Journal of Gender, Race & Justice*, 13, 575 - 614., Botha, H., (2009). Equality, Plurality and Structural Power. *South African Journal on Human Rights*, 25, 1 – 37.

democratic state that places equality and human rights at its core.

3. ROLE OF COURTS IN TRANSFORMATIVE CONSTITUTIONALISM

3.1 INDIA

The Indian judiciary has played a very important role in the realization of the Constitution's transformative vision. The courts have interpreted the Constitution not merely as a static legal document but as a dynamic tool aimed at societal change, contributing in transforming India's socio-political landscape. The Indian judiciary, being the guardian of constitutional values plays an essential role in addressing the inequalities and ensuring the fulfilment of fundamental rights and democratic principles.

3.1.1 Judiciary as the Guardian of Constitutional Values

In India, The judiciary, as a custodian of constitutional principles, plays a fundamental role in transformative constitutionalism. The courts have the obligation to interpret the principle enshrined under the Constitution in both letter and in spirit. It includes both enforcement of constitutional rights and protection of constitutional spirit against arbitrary action of legislative and executive.¹¹

The judiciary through the power of judicial review, ensures every law and executive action conforms with the Constitution.¹² “**Article-13 & 32**” of the constitution give the power to the constitutional court to declare any law to be unconstitutional which abridges the fundamental rights and constitutional principles.

The ability of the court to interpret the Constitution in a living and evolving way has made the judiciary an agent of social change, which allows the Constitution to adapt to society's ever-evolving needs.¹³ The judiciary as the final interpreter of the constitution, provides the necessary checks and balances to the different organs of the government, preventing them from transgressing beyond the constitutional mandate.

¹¹ M. Asadullah & S. A. Khan, *Doctrine of Basic Structure and Constitutional Guardianship of Indian Judiciary*, 5 Int'l J. Legal Rsch. & Analysis 2021.

¹² India Const. arts. 13, 32

¹³ Malik, Ausaf. (2022). Role of Law and Judiciary in Social Transformation in India: A Need for a Changing Society. RESEARCH REVIEW International Journal of Multidisciplinary. 7. 12-26.
10.31305/rrijm.2022.v07.i07.003

3.1.2 Public Interest Litigation (PIL) as a Mechanism for Social Change

PIL is the most potent tool employed by Indian judiciary to advance transformative constitutionalism. It is evolved as inclusive form of litigation contrary to the traditional legal model where it often excludes the deprived sections of society from accessing justice. This procedural innovation eased the conventional requirement of *locus standi* in courts, allowing any individual or group to come before the court on behalf of groups or person that are vulnerable or disadvantaged. This shift illustrates a movement toward participatory justice where the courts is at better position to address collective societal grievances and public interest questions the executive or legislature have neglected.

The PIL capacity to promote social justice and equality perfectly aligned with the transformative goals of the constitution, which is to destroy the deep-rooted structure of power and oppression. The judiciary, through PIL, addressed important issues including environmental protection, gender justice, workers' rights, and rights of the marginalized sections- Dalits, Adivasis, and other underprivileged groups. It enables the judiciary to make the government accountable for its failure to discharge the constitutional duties and ensure that the policies pursued by the state are in accordance with the values of justice, equality, and dignity embodied in the DPSP.¹⁴

The procedural barriers removed by PIL have made justice accessible to the masses and empowered them to challenge state inaction or policies. In this way, PIL has become an important tool through which judiciary exercises its power in correcting constitutional failures and filling the gap between constitutional principles and social realities. It allows the judiciary to facilitate inclusive governance, where the transformative potential of the Constitution is extended to all sections of society, particularly to the most vulnerable. Moreover, PIL has brought non-justiciable DPSPs within the realm of judicial reasoning, as they are interpreted along with fundamental rights.

3.1.3. The Basic Structure Doctrine and the Protection of Constitutional Principles

The “**Basic Structure Doctrine**”, is probably the best judicial innovation of the Indian Supreme Court in the Indian constitutional jurisprudence in limiting the state power.

¹⁴ *ibid*

Established in the landmark case of “*Kesavananda Bharati v. State of Kerala*”¹⁵, the doctrine states that although Parliament is vested with the ability to amend the Constitution under Article 368, it can neither alter nor destroy the basic structure of the Constitution. This limitation on Parliament's amending power was judicially devised in fear of unrestrained amending power of the legislature, which might undermine the transformative ideals postulated in the Constitution.

The basic structure consist of fundamentals features of the constitution like parliamentary form of government, secularism, democracy, judicial autonomy, federalism, rule of law, and the protection of fundamental rights. By making these features outside the scope of amendment, the doctrine ensures the intactness of the core constitutional values even in the evolving political and social sphere of the country.¹⁶

The Basic Structure Doctrine proves to be an effective check on the excesses of majoritarianism and political attempts to dilute the transformative promise of the Constitution. At times of greater political instability or authoritarianism, like the Emergency of 1975-1977, this doctrine was applied by the judiciary to defend the Constitution against amendments that sought to undo its democratic and egalitarian character. The Judiciary, by restricting Parliament's power to amend the Constitution in ways that compromise its foundational principles, ensured that it remains a robust and enduring framework for governance.

In the broadest sense of transformative constitutionalism, the Basic Structure Doctrine is integral in maintaining the progressive trajectory of the Constitution. It prevented political forces in employing regressive changes, which could reverse or unscramble all the transformative gains since independence. The doctrine ensured that every amendment of the Constitution aligned with the goals of justice, equality, and liberty for all citizens. In this manner, the judiciary protected the transformative values of the Indian Constitution for posterity.¹⁷

3.2 SOUTH AFRICA

¹⁵ A.I.R. 1973 S.C. 1461

¹⁶ A. Padmanabhan, *India's Constitution and its Supreme Court*, in *Routledge Handbook of Contemporary India* 65 (Atul Kohli ed., Routledge 2015), available at <https://library.oapen.org/bitstream/handle/20.500.12657/46406/1/9781317403586.pdf#page=65>.

¹⁷ *ibid*

Transformative constitutionalism requires that all the laws, rules, regulation, policies and state actions should be interpreted and implemented in such a way that safeguards the values of human dignity, equality and freedom. So, the final goal of every judiciary is to do purposive interpretation which the constitution aims to achieve the south African judiciary promotes the substantive equality by interpreting the rights in a way that requires the state to take positive measures to address the social and economic inequality in the society. This has ensured that the disadvantaged or marginalised group must have access to bare minimum things required for subsistence of life. The emphasis on achieving substantive equality is not just to make formal balance in the society but to change the structure of the society to create a more just and inclusive social order.

Since the enactment of the South African constitution in 1996, the judiciary has played a transformative role in interpreting, developing and shaping the constitutional law. Through a series of landmark cases, the judiciary has ensured that the transformative vision of the Constitution should be realized. This includes in giving wider interpretation of Fundamental rights, promoting socio-economic justice and upholding constitutional supremacy. We will discuss the significant changes and interpretations brought by the judiciary through the various landmark cases in the next section.

3.2.1 Judiciary as a Catalyst for Accountability and Constitutional Supremacy

The transformative role of judiciary is to uphold the principle of constitutional supremacy. In South Africa, there is a constitutional supremacy which means that constitution is the supreme law of the land and all the laws, policies, rules and regulations and the action of the state must conform the core values of the constitution. The judiciary has the power of judicial review to ensure that the legislative and executive action must not overreach the constitution and must be held accountable for its obligation.¹⁸

A critical aspect of the judiciary's transformative role has been its insistence on accountability and good governance. The judiciary from time to time scrutinize the state's action to ensure that they are consistent with constitutional principles, particularly the principles of transparency, accountability and responsiveness. The judiciary has never hesitated to intervene

¹⁸ Justice SM Mbenenge, 'Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape' "(Public Lecture, Nelson R. Mandela School of Law, University of Fort Hare, 17 April 2018)."

when the state's action violates constitutional principles or when executive acted unlawfully.

3.2.2 Human Dignity and Social Justice: Centre Pillars of Interpretation

The core purpose of every constitution is to protect the human dignity. The judiciary has interpreted this right very expansively and recognized that human dignity is not all about individual autonomy but also creating a condition for people to live life of equal worth and value. This broad interpretation of socio-economic rights is very essential for upholding and protecting human dignity.¹⁹

For example, access to housing, healthcare, education and social security is not only a matter of policy issues but as a fundamental rights that is crucial for upholding human dignity. The judiciary has many times emphasized that the state should take positive measures to ensure that these rights are enjoyed by the citizen. This interpretation aligns with the aim of transformative constitutionalism, which seeks to build a society based on social justice and respect for human dignity.

3.2.3 Integration of Cultural Principles

The South African Constitution of 1994 casts duty upon the different institutions of Government to bring harmony and a sense of belongingness between people in a racially divided country. The Judiciary of South Africa discharges this duty by using the philosophy of *ubuntu* to interpret the constitution, emphasizing upon the Transformative aspect of the Constitution. The Term "*ubuntu*" refers to a native African philosophy that represents compassion, shared humanity and morality, stating that individual well-being is deeply connected to Societal well-being.²⁰ The adoption of *ubuntu* in the interpretative framework, The judiciary creates a conducive legal environment that goes beyond individualism and embraces that "*Real Justice*" rests on the collective well-being of the society. This notion of justice becomes necessary for the society which is striving to overcome its colonial and apartheid legacy.

The principle of *ubuntu* allows the judiciary to interpret the law in consideration of its broader

¹⁹ Solange Rosa, 'Transformative Constitutionalism in a Democratic Developmental State' (2011) 3 Stell LR 542.

²⁰ Mbigi L and Maree J *Ubuntu: The Spirit of African Transformation Management* (Sigma Press Johannesburg 1995) 1-7

social impact, meaning that the judiciary can make decisions to heal the societal wounds of colonialism and apartheidism, promoting social solidarity and reconciliation. It also strengthens the judiciary's role in addressing systematic injustices by accepting that justice must aim to promote healing at the societal level.

4. IMPORTANT CASE LAWS

4.1 INDIA

Protection of Human Rights

“Maneka Gandhi vs UOI”(1978)²¹- In this case, the supreme court expanded the scope of Article-21. It was held that personal freedom/liberty of an individual cannot be curtailed except through just, fair and reasonable procedure. The ratio of this case ensured that the state cannot curtail personal freedom by acting arbitrary.

“D.K Basu vs state of west Bengal”(1997)²²- herein, the apex court formulated guidelines for the arrest and detention of an individual to protect them from custodial violence and abuse of power by law enforcement bodies. This guideline became a part of the legal jurisprudence and it was crucial for human dignity. This decision plays a significant role in ensuring protection of basic right of an individual.

Socio-economic rights

“Bandhua Mukti Morcha vs. Union of India” (1984)²³: This was a case of bonded labour, where the court enlarged the interpretation of Article 21, Right to Life includes right to live with dignity. The Court realized that poverty and exploitation were constitutional issues and directed the state to adopt active measures for the rehabilitation of bonded labourers. The case epitomises the judiciary's call for social and economic justice, in line with the transformative goals of the constitution i.e. to abolish exploitative practices and restore human dignity.

“Olga Tellis vs. Bombay Municipal Corporation” (1985)²⁴: In this case, the supreme court extended the right to live and includes the right to livelihood under the article-21. It was a case

²¹ AIR 1978 SC 597.

²² AIR 1997 SC 610.

²³ AIR 1984 SC 802.

²⁴ AIR 1986 SC 180.

related with eviction of pavement dwellers, and though the Court appreciated the need of the state to remove encroachments, yet the court held that the state cannot do so without affording alternative accommodation and without any reasonable procedure. This judgment brought the socio-economic rights of vulnerable sections of people to the forefront, reflecting the transformative vision of the constitution.

Civil Rights

“Navtej Singh Johar vs. Union of India” (2018)²⁵- This case interpreted section 377 of Indian Penal code and decriminalises the consensual sex between homosexuals. The Supreme Court reiterated that Article 21 includes rights to privacy and dignity. It was a landmark decision marking the watershed in the constitutional rights of the LGBTQ community and proceeding in the direction of principles of equality, dignity of man, and autonomy- the key principles of transformative constitutionalism.

“Indra Sawhney vs. Union of India” (1992)²⁶- Also known as Mandal commission case, this case upholds the validity of affirmative action taken by state to provide reservation to uplift the social and economically backward classes. However, it also introduced the concept of "creamy layer" to ensure that the benefits of such reservation policies reached the most disadvantaged persons of the society. The court's support for affirmative action played a transformative role in redressing historic injustices while fostering social equality and finally making for the most inclusive society.

Privacy Rights

“Justice K.S. Puttaswamy vs. Union of India” (2017)²⁷- This case is a watershed moment in the Indian constitutionalism history as it declare the “right to privacy” as a fundamental right protected under Article-21. The judgment, while protecting the said right, put forth the significance of dignity, autonomy, and personal liberty as fundamental elements of privacy. This decision has significant and consequential implications for individual rights in the digital world and it also serves as foundational basis to foster LGBTQ community's right.

²⁵ AIR 2018 SC 4321.

²⁶ AIR 1993 SC 477

²⁷ AIR 2017 SC 4161.

Cultural Rights

“T.M.A. Pai Foundation vs. State of Karnataka” (2002)²⁸- In this case, the court acknowledged the autonomy of private educational institutions under Article-19(1)g to establish and operate their establishments without unbridled governmental interference. the court said that the excessive interference can potentially impede the growth and development of such institutions.

“Indian Young Lawyers Association vs. State of Kerala” (2018)²⁹- This landmark judgement strikes down the ban on women's entry in Sabarimala Temple when they are in Menstrual age i.e. 10-50 years of age. It is found that the said practice discriminate against the women of menstruating ages, and declared it unconstitutional because it violated the rights to equality and freedom of religion. the Court reaffirmed its judgment that religious freedoms cannot transcend constitutional principles of equality and non-discrimination. This case shows the judiciary proactive role in challenging the regressive practices and promoting the gender equality.

4.2 SOUTH AFRICA

Human Rights Protection

“S Vs Makwanyane and Another”³⁰- The court decides that death penalty is irrevocable in nature and it is absolute denial of right to life guaranteed by the constitution as this right is fundamental and cannot be arbitrarily infringed upon. Further, it also held that right to dignity is closely intertwined with right to life and emphasized that death penalty undermines human dignity, as it treats people's life as mere object.

The ruling in this case had a profound impact on South Africa's legal and human right's landscape. It affirmed the role of judiciary as the guardian of the constitution in protecting fundamental rights of the individual.

²⁸ AIR 2003 SC 355.

²⁹ AIR 2018 SC 4321.

³⁰ 1995 (3) SA 391 (CC)

Socio-Economic Rights

“Government Of the Republic of South Africa Vs Grootboom”³¹-The constitutional court unanimously held that government’s housing program was unconstitutional as it failed to provide housing facility to homeless or person having inadequate housing during emergency situations. The court recognized that right to have adequate housing mentioned under section 26 imposes duty upon the state to take reasonable legislative and other measures, within its available resources, to provide housing facility to homeless people in crisis situation. The *Grootboom* case was a watershed moment in defining socio- economic rights in the country. It established that government’s housing policy must be flexible and consider the immediate needs of homeless people.

“Minister Of Health Vs Treatment Action Campaign (TAC)”³²- The constitutional court held that the government’s policy regarding restriction on Nevirapine drug was unreasonable as it violates the right to access health care services under section 27 of the constitution. The court directed the government to extend the access of Nevirapine drug and implement a comprehensive plan to prevent mother-to-child transmission of HIV.

This ruling emphasized that socio-economic rights are justiciable, and the judiciary has power to direct the state to perform its positive obligation towards the people. This judgement reinforced the role of judiciary in protecting socio-economic rights and setting a precedent for holding state accountable for its constitutional obligation in the health sector.

Civil Rights

“Bhe Vs Magistrate, Khayelitsha and Others”³³- The court held that the customary law of primogeniture discriminates between male and female from inheritance of ancestral property and violates “right to equality” under section 9 and right to dignity under section 10 of the constitution. The court emphasized that women and children should be treated equally in matters of inheritance and they should not be excluded on the basis of customary law . This landmark ruling not only protected the rights of the women and children in relation to inheritance matters but also sets the precedent that customary laws should be aligned with the

³¹ 2001 (1) SA 46 (CC)

³² 2002 (5) SA 721 (CC)

³³ 2005 (1) SA 580 (CC)

equality and dignity principles enshrined in the constitution. This case reinforced how judiciary by transformative constitutionalism is achieving gender equality and protecting women's right.

“Daniels Vs Scribnate and Another”³⁴ - The court held that the occupier has the right to make improvements in her dwelling without owner's consent for her safety and to live a dignified life, provided that the improvements are necessary and reasonable. This ruling significantly advanced the rights of occupiers, ensuring that secure tenure includes living in human conditions that uphold dignity and safety. This case ensures that the constitutional commitment to social justice must be upheld.

Strengthening Democratic Accountability and Constitutional Supremacy

“Economic Freedom Fighters v. Speaker of the National Assembly and Others” (Nkandla)³⁵

The issue in this case was that Whether the president, Jacob Zuma and the national assembly had violated the constitution in handling the report submitted by the public prosecutor on the misuse of state funds for upgrades to Zuma's private residence in Nkandla.

The “constitutional court” unanimously ruled against the president and national assembly and held that the report on remedial action submitted by the public prosecutor is binding unless it is set aside by the court of law. President Zuma's failure to implement the report was violation of the constitution. The court found that president Zuma failed to defend, uphold and respect the constitution. It was the landmark case in upholding the principle of democratic accountability and reinforced the supremacy of the constitution emphasizing that no one, not even the president is, above the constitution.

“United Democratic Movement v. Speaker of the National Assembly” (Secret Ballot Case)³⁶

The “constitutional court” held that the speaker of the National assembly had the discretion to decide whether a vote of no confidence motion against the president can be conducted by secret ballot, but the discretion must be reasonable and non- arbitrary. The ruling in this case reinforces the accountability of the executive towards the democracy and emphasized the

³⁴ 2017 (4) SA 341 (CC)

³⁵ 2016 (3) SA 580 (CC)

³⁶ 2017 (5) SA 300 (CC)

importance of protecting democratic process and the independence of MPs.

Cultural Rights

*“Shilubana v. Nwamitwa”*³⁷ - The court held in that women can be appointed as the leader of the tribal community. The court ruled that customary laws must evolve with the time and should reflect the existing values of the society, including the gender equality. Further, it said customary law is evolving law and it should evolve with the changing societal conditions. This ruling was a significant development in gender equality in South Africa, particularly with the realm of customary law.

5. CHALLENGES & CRITICISM

Despite the judiciary’s significant role in promoting transformative constitutionalism in India and south Africa, several challenges and criticisms also arise. Some of them are: -

5.1 INDIA

5.1.1 Judicial Overreach

The main criticism about the proactive role of the judiciary points out judicial overreach - that is, courts being seen to be overstepping onto the domain of executive and legislature. In cases of PIL, the judiciary often goes beyond its constitutional limits by assuming the policymaker roles. This meddling raises concern for the separation of power principle as it begins to function in areas which is exclusively reserved for legislature, such as issue of “Vishakha guidelines for preventing sexual harassment at workplace.”

While judicial role is a must needed approach for redressing social injustices, excessive court interventions have been said to create risks for democratic governance by weakening of the role of elected representatives.

5.1.2 Implementation of Judicial rulings

One of the major problem judiciaries is facing in discharging its transformative role is the ground implementation of its rulings, which are delayed or opposed by government bodies.

³⁷ 2009 (2) SA 66 (CC)

Even landmark judgements with the potential of social change fails to enforced effectively without the active co0opretion from executive and bureaucracy. For example, in the case of “*MC Mehata vs UOI*”³⁸, the supreme court has ordered the state to covert the public transport to be run on CNG fuel in order to reduce air pollution in Delhi. Despite this, the implementation was prolonged due to opposition from transport operators and government authorities. These Cases show how decisions of the courts, however reformative or progressive, may diminish its potential in changing society without effective implementation.

5.1.3 Inter-Institutional Frictions with the Legislative and Executive

The judiciary's expansive interpretation of the constitution leads to tension between the judiciary and different branches of the government. Court invalidates numerous laws and policies that offend constitutional principles, leading to the accusation of interference in policymaking. For example, there have been cases involving economic policy or the acquisition of land in which judicial intervention has sometimes come into conflict with the development agenda of the government. Similarly, the attempt of the legislature to overhaul the judicial rulings by enacting a law or amendment has also contributed to the said strained relationship.

5.2 SOUTH AFRICA

5.2.1 Implementation of Court Rulings

Implementation of court rulings is the most difficult task for any court. Court often lacks the means to enforce their judgements, particularly in case of “socio – economic rights” which require significant state resources. For instance, the **Grootboom** and **TAC** cases resulted in judicial victories, yet the practical implementation of these rights affirmed in these cases remain inconsistent. The judiciary can declare any rights or give any direction, but the implementation for these requires the equal cooperation from the legislative and executive branch, which may not always align with the judicial mandates.

5.2.2 Judicial Independence and Political Pressure

The independence of judiciary is very essential to keep checks and balances upon the legislative and executive branch in any state. However, the judges in south Africa often faces political

³⁸ A.I.R. 1998 S.C. 2963

pressure while dealing with high-profile cases involving politicians and government officials. There are many instances where the executive and the government tries to undermine the judicial authority or influences the judicial outcomes, raising concerns about the Judiciary autonomy.

5.2.3 “Judicial Activism Vs Judicial Restraint”

The judiciary’s role in transformative constitutionalism often sparks the debate between judicial activism vs judicial restraint. While some people argue that judiciary must be proactive in enforcing rights and promoting social change, but at the same time judiciary must keep in their minds that they should not overreach and enter the domain of other branches i.e legislative and executive, which often leads to the conflict between three branches of the government. So the judiciary must respect the separation of power and should not enter into the domain of others.

6. CONCLUSION

In advancing transformative constitutionalism, the Judiciary of both countries has played an important role in eliminating historical injustices through the interpretation and enforcement of constitutional principles. Under the Public Interest Litigation (PIL) and expansive interpretation of fundamental rights in India, the Supreme Court facilitated significant progress in areas such as human rights, gender equality, and socio-economic justice. Similarly, in South Africa, the Constitutional Court has been an important institution in ensuring that the rights provided in the 1996 Constitution not only just remain symbolic but it is actively implemented to their full potential.

However, the journey of transformative constitutionalism is filled with obstacles and challenges. Both country’s Judiciary have been criticized for judicial overreach and the uncertainty of their judgments in their implementation by the executive and the legislative. Among all these constraints, the judiciary is committed to upholding the transforming visions enshrined in their respective constitutions and paving advancements toward justice, dignity, and equality for all citizens. As India and South Africa continue to evolve, their judiciary will be the pivotal force in shaping the progressive transformation of their societies.