
THE ROLE OF CONSTITUTIONAL COURTS IN PROTECTING HUMAN RIGHTS IN THE 21ST CENTURY: EVOLVING STANDARDS AND EMERGING CHALLENGES

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ABSTRACT

The purpose of this paper is to discuss how the role of constitutional courts in protecting human rights has changed during the 21st century, comparing both India and South Africa. It contends that the constitutional court has transformed from a limited interpretive function to an active institution working towards substantive human rights. In India, the Supreme Court has extended the definition of Article 21 (right to life) by interpreting it in a manner that incorporates the recognition of socio-economic rights such as right to health, education, livelihood, the right to a healthy environment, and the right to dignity, using Public Interest Litigation as the primary tool for doing so. In comparison, the South African Constitutional Court has a constitutional framework that explicitly acknowledges socio-economic rights and applies a reasonableness standard to evaluate executive actions, as in the Grootboom case and Minister of Health v. Treatment Action Campaign. Both judicial models demonstrate the judiciary's potential to promote human rights; however, they are constrained by ongoing issues of enforcement, executive noncompliance, institutional capacity, and fears of judicial overreach. In addition, emerging issues like climate justice, digital privacy, and gender identity will continue to challenge the adaptability of constitutional courts. This paper concludes that the effectiveness of constitutional courts depends not only on the constitutional texts but also on institutional design, enforcement mechanisms, and the court's ability to balance judicial activism with democratic legitimacy.

Keywords: Constitutional Courts, Human Rights Protection, Judicial Review, Constitutionalism, Socio-Economic Rights

1. INTRODUCTION

Constitutional courts originated as an essential guardian of human rights in the 21st century, ensuring that the principles of constitutionalism are not reduced to abstract ideas but are actively enforced against ideological but are actively enforced against state excesses. By exercising judicial review, they act as a check on legislative and executive power, promoting constitutionalism, accountability and the rule of law.

The different jurisdictions have quite different institutional structures for constitutional review, some are dispersed such as in the United States and India , while others are concentrated , like in Germany and South Africa. Although these constitutions vary structurally, a common strand that remains in the fabric of constitutional adjudication all over the world is the judiciary developing the role of interpreting and safeguarding rights in a time of digital surveillance, socio-economic precarity, unstable climate and growing state power. It is in this larger context that the comparative analysis of India and South Africa gains specific importance since both countries are not only alike in the experience of post-colonial constitutional change but also employ different models of judicial review. Both of the systems have entrusted their courts with the legitimisation of constitutional government, the resolution of conflict between the state powers and personal freedom, and with increased substantiveness of the contents of rights as a means of accommodating the undergoing social realities.

The Constitutional Court of South Africa, having a distinctly transformative Constitution of 1996, has led a jurisprudence that is based on dignity, equality, socio-economic rights and the moral reconstruction of the society. Though the Supreme Court of India works under a different institutional and textual framework, it has followed an equally broad path by the imaginative application of Article 21. Cases like *Maneka Gandhi v. Union of India (1978)*¹, which held that procedural due process is implicit in individual liberty; and *Olga Tellis v. Bombay Municipal Corporation (1985)*², which read the right to livelihood into the right to life ; *NALSA v Union of India (2014)*³, Transgender rights have been recognised and *M.K. Ranjitsinh v. Union of India(2024)*⁴, which extended article 21 to incorporate climate change protections, collectively illustrates this expanding human rights jurisprudence.

¹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

² *Olga Tellis v. Bombay Mun. Corp.*, (1985) 3 SCC 545

³ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

⁴ *M.K. Ranjitsinh v. Union of India*, (2024) SCC OnLine SC 353.

The concept of rights as tools for social transformation has been strengthened in South Africa through a similar approach. *Government of the Republic of South Africa v. Grootboom (2000)*⁵, on the right of housing, *Treatment Action Campaign v. Minister of Health (2002)*⁶ about access to HIV/AIDS treatment, is an expression of a judicial philosophy that is determined to realise the socio-economic rights in a practical, enforceable manner. Collectively, these two jurisdictions demonstrate the ways in which constitutional courts can take the initiative in addressing the contemporary issues of inequality, the state of health, environmental destruction, and the exclusion of identity, and later find the fine line between judicial activism and democratic legitimacy. However, amidst these improvements in the doctrines, the constitutional courts globally have continued to be criticized on a continuous basis on the basis of inconsistent application, institutional restraint and democratic resistance. The twenty-first century has brought its peculiarities: mass surveillance supported by artificial intelligence, mass movement, growing authoritarian inclinations, expanding socio-economic inequalities, and the existential crisis of the climate change.

These concerns cause the courts to re-interpret the ancient rights in modern situations. Jurisprudence may be progressive even in areas where jurisprudence is conspicuous. As an example, the Rule of Law Index (2023) by the World Justice Project ranks India 79th out of 142 countries⁷, indicating that still there are issues with the access to justice and ineffective mechanisms of its application. Similarly, the South African Human Rights Commission's 2023 reports describe administrative and structural barriers that, despite a strong constitutional framework, limit the substantive implementation of socio-economic rights. The United Nations Human Rights Council (2024) states that the courts all over the world need to revise their strategies toward new areas of human rights attention, including climate justice, digital privacy, and algorithmic governance, highlighting that the traditional way of how it has been portrayed to publicize the mass media might not suffice anymore.⁸

These loopholes provoke one urgent question: in case constitutional guarantees are not properly implemented, courts are to lose the public trust, therefore, making the executive power work

⁵ Alicia Ely Yamin & Andrea Dugger, Adjudicating Health-Related Rights: Proposed Considerations for the United Nations Committee on Economic, Social and Cultural Rights, and Other Supranational Tribunals, 17 *Chi. J. Int'l L.* 80 (2016).

⁶ *Minister of Health v. Treatment Action Campaign (No. 2)*, 2002 (5) SA 721 (CC)

⁷ World Justice Project, India Ranks 79th out of 142 in Rule of Law Index, (Oct. 25, 2023), available at https://worldjusticeproject.org/sites/default/files/documents/India_1.pdf

⁸ U.N. Hum. Rts. Council, *Mapping Report: Human Rights and New and Emerging Digital Technologies*, U.N. Doc. A/HRC/56/45 (Aug. 20, 2024).

and putting more inequalities in their places, especially those of women, minority members, migrants and economically disadvantaged segments of the population. The difficulty is, then, not only that of delivering progressive judicial utterances but of institutional efficacy, institutional doctrinal flexibility and on-ground realization of rights. This comparative analysis between India and South Africa is, therefore, timely as both jurisdictions provide the twin realities of doctrinal growth and the struggle of enforcement providing a promising platform to evaluate how constitutional courts could be resilient human rights guardians, in the ever-changing political and social contexts.

The current study puts constitutional courts in these modern conflicts of human dignity and democratic responsibility. It aims to give a subtle insight of how such courts have developed in interpretation and their application of rights in the twenty-first century and the extent to which their institutional fabric, jurisprudential principles, and instruments of enforcement go in achieving or restricting the achievement of human rights. The study will shed light on the constitutional court in terms of its use as an arena of dispute and bargain between ideals of the law and reality of politics by exploring landmark cases, structural design, and practical problems facing both India and South Africa.

At the core of this analysis lies the main assumption, under which the research is structured; it is the capacity of constitutional courts to adjust the interpretive standards to evolving social and political circumstances that can ensure the success of the constitutional courts in the protection of human rights. This hypothesis recognises that the traditional judicial methods are no longer sufficient in a world whose technological, environmental, and political changes are taking place at a very high rate. The work therefore does not just examine the development of the doctrine alone but the institutional ability of courts to address new rights assertions. Thus, the introduction summarises the key topics that characterise the research: the evolution of constitutional courts' human-rights jurisprudence, how the structure and functioning of South Africa and Indian courts contribute to the degree to which rights outcomes are linked to review processes. The research question advances the international discourses of constitutional court studies on the future of the constitutional court, the quality of judicial power, and the dynamics of the criteria of rights protection in the twenty-first century.

Finally, it attempts to show that even though constitutional courts are still vital elements of democracy, their persistence and success is dependent on their capacity to balance activism and

democracy and to redefine their interpretive structures to address the challenges of a changing world.

2. REVIEW OF LITERATURE

The existing literature on the *Enhancing Human Rights Protections in Constitutional Systems*⁹ consistently emphasizes the central role of constitutional courts in expanding, protecting and shaping the Human Rights production. The article enhancing Human Rights protection in constitutional systems it shows that theoretical foundation for this discussion by arguing constitutional mechanism when combined with progressive judicial interpretation and alignment with the International Human Rights norms can significantly strengthen domestic rights protection. So the author hear situations constitutional account ability within the broader framework of social justice and evolving political reality through constitutional provision and judicial decisions the paper underscores that a dynamic constitutional structure supported by judicial activism and open to International Norms is essential for building a resilient right-based system. However the work remains largely theoretical and does not empirically evaluate how these mechanisms perform across jurisdiction thereby leaving space for comparative outcome-based research.

The Judiciary is practical role in operationalising these constitutional ideas is examined in the *Role Of Courts in Protection of Human Rights*¹⁰, talking about justice P. Sathashivam's insights, the article that constitutional courts are not merely interpreters of law but active guardians of human rights and dignity. By analysing landmark judgement such as *Nilabati Behra v. State of Odisha*¹¹, *Hussainara Khatoon v. state of Bihar*¹² and *Vishakha v. State of Rajasthan*¹³ the study demonstrates how Indian codes have expanded the meaning of fundamental rights through creative interpretations and also Public Interest Litigation. It highlights that courts convert constitutional text into lived reality, particularly for the marginalised community. At the same time, the article recognises institutional challenges including delays and structural limitations and suggests strengthening of district-level Human Rights courts. Nevertheless, it does not sufficiently engage with comparative constitutional experiences or contemporary concerns

⁹ Ruchita Kaundal, *Enhancing Human Rts. Protections in Const. Sys.*, 1 J. Indian L. & Juris. 1 (2024).

¹⁰ P. Sathasivam, *Role of Cts. in the Protection of Hum. Rts.* (Feb. 25, 2012) (address at S. Zone Reg'l Judicial Conf., Tamil Nadu State Judicial Acad.).

¹¹ *Nilabati Behera v. State of Odisha*, (1993) 2 S.C.C. 746.

¹² *Hussainara Khatoon & Ors. v. Home Secretary, State of Bihar*, (1979) 3 S.C.R. 532.

¹³ *Vishaka & Ors. v. State of Rajasthan & Ors.*, (1997) 6 S.C.C. 241.

such as digital privacy and gender justice, which are increasingly relevant in modern constitutional discourse.

A comparative dimension is further developed in *Constitutionalism in India and South Africa: Comparative Study from a Human Rights Perspective*¹⁴. This study explores transformative constitutionalism in both jurisdictions, drawing upon scholars such as Upendra Baxi and Karl Klare. It highlights that while India has expanded Article 21 to derive numerous implied rights, South Africa has explicitly made social-economic rights justiciable. The comparison demonstrates how historical transitions and constitutional design influence Judicial review and rights enforcement. The article suggests that courts can function as transformative instruments of social change when supported by strong constitutional text and political commitment. However, its focus remains largely on constitution-making and theoretical development rather than on evaluating contemporary adjudicatory performance or emerging rights challenges.

A broader institutional perspective is introduced in the *African Courts on Human Rights and People's Rights: Safeguarding the Interest of African States*¹⁵. This article critically examines the political and legal motivations behind the establishment of regional Human Rights courts in Africa. By analysing the African charter related protocols and institutional developments, the author questions whether these courts were created purely to enhance human rights or partly to respond to international pressure while preserving state sovereignty. The study reveals the underlying tension between judicial Independence and political restraints. Unlike the Indian judiciary, which has often embraced activism, African States appear cautious about empowering Supranational bodies that may override national authority. While the article provides valuable doctrinal insight, it does not empirically assess the actual impact of the African court's decisions on member states, nor does it deeply explore issues of accountability and enforcement.

Finally, *Constitutional challenges in 21ST century*¹⁶ shift the discussion towards contemporary development. The article examines the Indian Supreme Court's evolving role in the post-liberalization era, noting how the Judiciary increasingly engages with globalisation, corporate

¹⁴ V. Sripathi, *Constitutionalism in India & S. Afr.: A Comp. Study from a Hum. Rts. Persp.*, 6 Tul. J. Int'l & Comp. L. 49, 50 (2007).

¹⁵ Gina Bekker, *The Afr. Ct. on Hum. & Peoples' Rts.: Safeguarding the Interests of Afr. States?*, 51 J. Afr. L. 151, 152 (2007).

¹⁶ S.B. Sinha, *Const. Challenges in the 21st Century*, 21 Nat'l L. Sch. India Rev. 117 (2009).

power and governance complexities. By referring to cases such as *PUCL v. Union of India*¹⁷ and drawing comparison with European Human Rights jurisprudence, the study argues that courts have moved beyond traditional adjudication to actively shaping policy frameworks, it does not fully address newer technological challenges such as Artificial Intelligence surveillance and digital governance, which present significant constitutional questions.

Taken together, these works established that constitutional courts occupy a Central and evolving position in human rights protection. Whether through progressive interpretation, public interest Litigation, regional adjudication, comparative constitutional design, or procedural mechanisms such as constitutional questions, the judiciary remains a crucial actor in balancing state authority and individual Liberty. At the same time, gaps remain in empirical evaluation, contemporary technological challenges and deeper comparative assessment between India and African jurisdictions. The present study builds upon these doctrinal and theoretical foundations while attempting to address these identified limitations in a more integrated and comparative manner.

3. Evolution of Human Rights Constitutional Courts In Interpreting And Enforcing Human Rights in the 21st Century

In the 21st century, constitutional courts worldwide have played an essential role in expanding human rights, adapting constitutional remedies to new challenges of authoritarian government, climate change, and socio-economic inequalities. The courts have evolved in a very significant way in their interpretation and enforcement of human rights. Initially, courts were limited in interpreting and safeguarding the fundamental rights, which were also narrowly defined under the Indian Constitution. They were primarily guardians of the constitutional provisions. However, in the 21st century, the courts have a more dynamic and expansive approach towards human rights issues. Courts have protected the rights of people in numerous cases, whether it is a right against violence in custody, to live in a pollution-free environment, rights to health, rights to adequate wages of the workers, safety of the woman at the workplace, compensation to the rape victims and rights of the child labourers and so on.¹⁸

A significant characteristic of this evolution is judicial activism, where constitutional courts

¹⁷ Chaitanya Ramachandran, *PUCL v. Union of India Revisited: Why India's Surveillance Law Must Be Redesigned for the Digital Age*, 7 NUJS L. Rev. 105 (2014).

¹⁸ Amandeep Kaur, *Human Rights*, 1 *Jamia L.J.* 45 (2016).

have invented new remedies and enforcement mechanisms. The role of the constitutional courts extends far beyond the legal interpretation to encouraging social peace and domestic legitimacy in the middle of the global and domestic challenges such as globalisation, political instability and terrorism.¹⁹ Despite these developments, some critics contend that public mobilisation and wider societal support are necessary for courts to be effective. If citizens lack the organisation and authority to oppose rights violations, courts may find it difficult to uphold rights on their own.

Another critical development of constitutional courts has been the increased receptivity to international human rights law and comparative jurisprudence. Instead of continuing to be inward-looking, apex courts like the Indian Supreme Court or the South African Constitutional Court are increasingly relying on international treaties and foreign court jurisprudence to add to the domestic rights standards and to interpret constitutional provisions in a more cosmopolitan and universalist way. This has enabled a conversation of courts worldwide and has avoided what scholars have dubbed as constitutional laziness and has promoted a progressive introduction of fundamental rights. In addition to this, constitutional courts have been instrumental in addressing issues that have been presented by the development of globalisation and the appearance of potent non-state actors, such as multinational corporations, and transnational networks which influence state sovereignty and the protection of human rights. These courts have, using landmark decisions, imposed rights duties beyond the state upon the actions of the private actors and thereby closed the gaps in protection that existed under traditional models that were based entirely on the law of the state. The other important change is the rise of transformative constitutionalism, in which the courts do not just apply the laws of the day, this is because they are now participants in social change. It is seen in their readiness to design endemic transformations of the likes of environmental safety, gender justice and minority rights to the point of going where the legislatures once had the monopoly. Significant instances are the establishment of a right to privacy, environmental jurisprudence that advances, and greater rights of the LGBTQ+ and marginalized communities in a number of jurisdictions over the past twenty years. However, constitutional courts are becoming more and more conscious of their constraints they are appreciating that long term transformations need concerted actions by other governmental institutions, sound institutions and active citizenries. Effective enforcement, political will and popular support are often critical to the

¹⁹ Constitutional Challenges in the 21st Century, 22 *Estudos de Direito Const.* 1 (2021).

sustainability of rights that are court-led, without which the transformative judgment that can be achieved through the court can be just a mere show. Therefore, even with the phenomenally growing involvement of constitutional courts as guardians and agents of human rights, the current literature stresses a comprehensive, collaborative strategy by the court, the legislature, the executive, and the civil society in the achievement of human rights in the 21st century.

4. Structural And Functional Features Of Constitutional Courts In India And Africa: A Comparative Examination

The constitutional courts in India and Africa play a very important role in safeguarding human rights, but there are important functional and structural differences when we compare these courts shaped by history, constitutional design, judicial philosophy and socio-political context. Understanding these differences throws light on how constitutional review operates with these two diverse legal traditions and the specific challenges each faces in advancing human rights protections.

4.1. FUNCTIONAL DIFFERENCES

4.1.1. Judicial review and scope of rights

The Supreme Court of India exercises substantial judicial review powers over legislation and executive actions and has created a strong body of jurisprudence regarding both civil-political and socio-economic rights. Even though the Indian Constitution differentiates between justiciable fundamental rights and non-justiciable Directive Principles of State Policy, the court has adopted a very liberal and expansive approach. It reads aspects of directive principles into fundamental rights to enforce the socio-economic safeguards such as the right to livelihood, health, education and dignity through a doctrine of implied fundamental rights. The court has also moderated the locus standi rules to allow PIL, enabling marginalised groups to access justice and question human rights infringement actively.

The scope of judicial review in India is wide and enforced in Articles 32 and 226 of the Constitution which allows the Supreme Court to invalidate laws or acts of the executive that violate the fundamental rights. Although the Constitution distinguishes between the fundamental rights (Part III) to be enforced and the non-justiciable Directive Principles of State Policy (Part IV), the Court has ingeniously overlapped the lines. It has construed rights broadly

through landmark judgments as it has incorporated socio-economic guarantees in the scope of civil-political rights. Indicatively, the right to life as defined by Article 21 has been construed to include the right to livelihood, health, shelter, fair wages and education. In *Olga Tellis v. Bombay Municipal Corporation (1985)*. The Court believed that the right to livelihood is implicit in the right to life whereas in *Unnikrishnan v. State of Andhra Pradesh (1993)*²⁰ it declared the right to education among children up to the age of 14 as basic one. Through this judicial innovation, the Court has constitutionalized indirectly socio-economic entitlement using fundamental rights jurisprudence.

In South Africa, especially the African side, the socio-economic rights to water, healthcare, housing, and social security are guaranteed under the Bill of Rights in the 1996 Constitution (Sections 26 and 29). This explicit textual commitment is the hallmark of South Africa as opposed to India where the social-economic protections were first held non-justiciable realm. The South African Constitutional Court applies these provisions on a standard of reasonableness review as stipulated in the cases such as *Government of the Republic of South Africa v. in Grootboom (2000)*. It was where the Court, declared that the state had not met its constitutional duty of ensuring that the vulnerable had proper housing. Equally, under Minister of Health, It forced the state to provide reasonable access to anti-retroviral drugs against HIV-positive mothers (Treatment Action Campaign, 2002). The Court in South Africa applies the rights of socio-economic rights as directly as a claim of incorporation, as opposed to the approach of implied incorporation used in India. In this way the constitutional court of India is functionally dependent on judicial creativity and implied right doctrines to promote welfare guarantees, and most African courts on textual guarantees contained in their post-transition constitutions.

4.1.2. Interest Litigation and Access to Justice.

Relaxation of procedural barriers to justice by way of Public Interest Litigation (PIL) is among the greatest contributions of Indian Supreme Court to adjudication of human rights. In cases like *S.P. Gupta v. People Union of Democratic Rights v. Union of India (1981)*²¹. In 1982, the Court watered down the classical principles of locus standi in *Union of India (1982)*, where social activists, NGOs and even concerned citizens could petition the Court on behalf of the

²⁰ *Unni Krishnan, J.P. v. State of A.P.*, (1993) 1 SCC 645

²¹ *S.P. Gupta v. Union of India*, AIR 1982 SC 149, (1981) Supp SCC 87.

marginalised group. This created opportunities of systemic human rights inquires to be presented thus making the Court a forum of the people to raise socio-economic grievances. PIL has played a key role in tackling bonded labour, environmental destruction, custodial violence and the rights of women.

The Constitutional Court of South Africa also has the inclusive vision of standing that is organized into more formal standards. The broad standing is clearly identified in Section 38 of the South African Constitution, which gives citizens or even groups of people the right to request the constitutional remedies. But both systems seek to broaden the reach of justice, Indian PIL tends to be agenda-setting, judicially, which results in sometimes being criticised of judicial overreach, whereas South African model is formalised in constitutional text.

4.1.3. Judicial Philosophy

The Indian Supreme Court has been characteristically activist and experimental, especially in human rights matters. It has been described as having a judicial creativity, flexibility, and moral reading of the Constitution. By contrast, the African courts are influenced by the post-apartheid and post-authoritarian transitions and focus on transformative constitutionalism, which is the deliberate attempt to relate constitutional law as a form of social transformation. This does not only involve the judicial acknowledgement of rights but proactive demands on the positive duties of the state to make redress to historical inequalities and structural injustice.

4.1.4. Structural Differences

Design and Institutional Structure of Courts. India uses the model of an integrated judiciary system, according to which the Supreme Court is a top of a single court system, to which the High Courts appeal. The Court is not only the ultimate decoder of the rights but also a general Court of Appeals in both civil and criminal cases. Its scope therefore goes beyond the constitutional adjudication. In contrast, the African constitutional courts like the South African one or the Benin Constitution Court usually have the so-called special constitutional court model. The Constitutional Court in South Africa was originally created as a tribunal that serves solely constitutional issues. Though this has since been broadened to grant it jurisdiction in this area, it remains the ultimate authority on interpreting the Constitution and has exclusive jurisdiction over some constitutional issues, including the validity of constitutional amendments. This separation of powers strengthens the narrow constitutional watchdog it has

over India compared to the multifunctional Supreme Court.

4.1.5. Appointment and Tenure

The judges in India are selected under the collegium system whereby senior judges make decisions on appointments and transfers together. Although this system occasionally has controversies in terms of transparency and accountability, it provides judicial independence through the limitation of political interference. In South Africa, the Judicial Service Commission (JSC) which is a group of judiciary, executive, legislative, and civil societies representatives is involved in ordaining judges in the Constitutional Court. There are also variations in tenure models: Indian judges are in office until a certain retirement age (65 years old in Supreme Court), and South African Constitutional Court judges are in office up to 12 years that can never be renewed or until the age of 70 (whichever occurs first). Such disparities affect the judicial independence and generational renewal.²²

4.1.6. Enforcement of Decisions

One of the differences is the enforceability of human rights decisions. India does not have a robust monitoring mechanism and as such, implementation is mostly left to executive cooperation and this has raised the issue of gaps in compliance, particularly in socio-economic environments. By comparison, in South Africa, the orders of the Court frequently consist of structural interdicts, continuing supervisory orders necessitating periodic reporting by the government to the Court that the order is complied with, such as in Treatment Action Campaign. This remedial nuance represents a structural variance of judicial enforcement approach.

5. CONSTITUTIONAL COURTS' COMMON CHALLENGES IN ADJUDICATING HUMAN RIGHTS BEFORE INDIA AND AFRICA COURTS

The constitutional courts of India and some African countries have a huge burden to safeguard the human rights in societies that are being characterized by different historical circumstances, economic issues and pervasive social inequalities. Although they are important in the protection of rights and the accountability of states, these courts face a number of typical

²² The Independence of South African Judges: A Constitutional and Legislative Perspective, 2015 PER 42 (Potchefstroom Elec. L.J.).

problems which influence the efficiency and credibility of their human rights adjudication. These problems are functional, structural and contextual, including the problem of enforcement, the problems of political pressure, resource scarcity, and the problem of balancing socio-economic rights and developmental needs.

5.1. Difference in implementation and enforcement.

The most prominent issue that can be noted in both India and Africa as far as the constitutional courts are concerned is the fact that even after assessing human rights by pronouncing them in relation to the human rights issues, there is always a gap between what the court says and what is happening on the ground. Courts are able to issue landmark rulings broadening the rights protection but the machinery of enforcement is often weak or politicized and this compromises the ability of constitutionalism to change things.²³

In India, although the Supreme Court jurisprudence is quite broad on the socio-economic and civil rights, many of its rulings are not implemented or partially implemented.²⁴ As an example, proposals that require welfare or environmental safeguards are often faced by opposition or inaction by executive agencies at the state and federal level.²⁵ The Supreme Court has several times stated justiciable socio-economic rights, including the right to education or health, but systemic bureaucratic inefficiency, resource limitation and conflicting political priorities make them difficult to enforce.²⁶ In addition, social-political influences including caste discrimination, poverty and institutional corruption are deeply ingrained obstacles to the achievement of rights.

Likewise, African constitutional courts such as the South African one also face problems of enforcement.²⁷ Despite the frequent issuance of structural interdicts by the courts that compel the government officials to make regular reports, the application of socio-economic rights is still disproportional because of the shortage of financial resources, administrative capacity, and political intendment. The difficulties are compounded in most African countries, by the fact that post-conflict and transitional governance arrangements are accompanied by judicial

²³ *Minister of Health v. Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC),

²⁴ *Olga Tellis v. Bombay Municipal Corp.*, (1985) 3 SCC 545

²⁵ *People's Union of Civil Liberties ... v. Union of India & Anr.*, AIR 1997 SC 568, JT 1997(1) SC 288, 1996 (9) SCALE 318 (India) (Dec. 18, 1996)

²⁶ *Unni Krishnan, J.P. v. State of Andhra Pradesh*, (1993) 1 SCC 645

²⁷ *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC).

decisions that address housing, healthcare or educational access, in collision with the rest of the socio-economic context, and the capacities of the state. It is the question of how to actualize rights without too much strain on weak institutions without losing judicial power and legitimacy.

5.2. Political Interference and Executive Resistance

The problem of political interference is also extremely important in both areas and imposes a threat to the independence of the judiciary and human rights protection. Even though constitutional courts can be described as being independent on paper, often, they are pressured by influential political forces who might be try to flout or disregard unfavourable decisions.

Political interference in India can be seen not only in the lack of executive cooperation in following the orders of the court but also in discussion of the issues of judicial appointments, the openness of the collegium system, and public disparagement by government officials. The legal precedents that include minority rights, freedom of speech or police misconduct tend to be politically controversial and it is hard to realize the basic freedoms offered by the court.

Political crises are also one of the threats to the constitutional courts in African countries. The judges who find themselves making decisions against the power brokers or incumbents can be intimidated, their budget slashed or they can be made to revamp the judicial appointments. A number of courts in Africa have been torn between the increasing judicial review and the established executive authority. Enhancing judicial autonomy in politically unstable jurisdictions is an uphill challenge and this has a direct effect on the adjudication of human rights. Finding a balance between Socio-Economic Rights and Resource Constraints. One of the key issues particular to those developing nations in India and Africa is how to arbitrate the socio-economic rights (when resources of the state are limited and development agendas conflict). The two courts have the challenge of interpreting rights like to housing, health and education that cannot be fulfilled by the state without positive action, and have to acknowledge fiscal realities.

The large socio-economic right view of the Indian Supreme Court has attracted criticism as well as applause. Although it resulted in liberal protective decisions, the extent of judicial overreach and the ability of the courts to cope with complicated policy issues traditionally handled by the executive branch is still in question. The doctrine of progressive realisation and

reasonable review is heavily dependent on by the courts, along with their inability to formulate standards of efficient application, hence resulting in inconsistent jurisprudence.

The jurisprudence of South African Constitutional Courts on socio-economic rights directly addresses such tensions by the reasonableness standard to ensure governments are held accountable, but not directing them to adopt certain policies or certain spending levels.²⁸ However, the judiciary can be criticized as putting the judicial decision making in an arena that is highly influenced by the executive budgeting and politics. In countries with limited resources, the ability of the court to affect policy is limited in some way, which poses a challenge to the successful implementation of human rights.

5.3. Barriers of Access to Justice and Inclusivity

Although legal doctrines of progressively broadened standing and enabled public interest litigation (PIL) in India and facilitated extensive access by the disadvantaged groups to constitutional redress by the African courts, there are still practical obstacles that restrict the access of disadvantaged groups to the constitutional redress.

In India, PIL has made the right to courts more democratic when it comes to the right to claim of human rights, yet there are structural constraints of participation in PIL, including the language, expenses involved, geographical isolation, as well as socio-cultural discrimination. These are further augmented by the ineffective legal practices and delays in the judiciary processes, which disproportionately impact vulnerable communities such as Dalits, Adivasis, women, and economically disadvantaged communities.²⁹

The African courts also have similar problems with regard to inclusivity. Marginalized groups may be restricted in their involvement in constitutional processes due to limited knowledge of the law, insufficient legal aid funding and cultural/social hierarchies. Further, localized customary laws or informal dispute resolution mechanisms also come into conflict with official constitutional adjudication, which leads to tension in human rights protection. *Developing Rights and New Realities*.

The swift changes of social, technological and environmental means pose the constitutional

²⁸ Amnesty Int'l, Human Rights in India.

²⁹ Drishti IAS, NHRC and Associated Challenges.

courts with continuous problems of the interpretation and application of human rights. The question of environmental justice, digital privacy, gender identity rights, and safeguarding against new types of state surveillance are some of the issues which courts must strike a balance between innovation and constitutional values. Recently, the Supreme Court of India has accepted new rights such as the environmental protection as the right to life, although this is not easy to enforce. On the same note, African courts are being called upon to deal more with the implications of climate change, gender-based violence, and minority rights in the changing constitutional provisions. Courts need to come up with jurisprudential instruments that can suit these dynamic and multifaceted rights questions whilst should be accessible and effective.

6. EFFECTIVENESS OF STRONG CONSTITUTIONAL REVIEW MECHANISMS IN ADVANCING HUMAN RIGHTS PROTECTION

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.³⁰ Both are vibrant pluralistic secular societies. They were subject to British domination prior to gaining sovereign independence yet remain members of the Commonwealth³¹ that now share international economic and political cooperation as members of BRICS.

6.1. Cross-Pollination of Jurisprudence

The Constitutional Court of South Africa and the Indian Supreme Court enjoy a "cross-pollination" of jurisprudence. The Indian Constitution acknowledges the idea that no one is above the law³² and the Constitution. No one, regardless of his or her position in society or in the executive, can ever be allowed to be above the law; it is always limited by the restrictions offered by the rule of law.³³

Strong constitutional courts like the Supreme Court of India and the Constitutional Court of South Africa are far much more effective in protecting and achieving human rights than the regular judicial institutions of most other jurisdictions. Their strength does not rest only in their formal capacity to strike down and declare unconstitutional legislations, but their

³⁰ Radley Henrico, *The Rule of Law in Indian Administrative Law Versus the Principle of Legality in South African Administrative Law: Some Observations*, 42 *Obiter* 486.

³¹ South Africa left the Commonwealth on 31 May 1961 and rejoined in 1994.

³² *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 326 (India).

³³ *Maya Devi v. Raj Kumari Batra*, (2010) 9 SCC 486 (India).

jurisprudential creativity, their readiness to impose transformative social change, and their sensitivity to the effective realities of the vulnerable population. The Constitution in South Africa expressly lists the socio-economic rights that are justiciable and the Constitution Court has a very tangible mandate to interfere when the state fails to discharge its duties about the rights of housing, health care, education, etc.³⁴ The Cases like *Government of the Republic of South Africa v. Grootboom*³⁵ and *Minister of Health and others v. Treatment Action Campaign*³⁶ shows how the Court has held the executive personally responsible in neglecting the basic rights duty. The Court however applies reasonableness standard which demands that the state take tangible measures towards achieving constitutional rights, and the core competencies and resource limitations of the executive and legislature are also acknowledged. According to Henrico, this model gives the courts the necessary authority to initiate substantial reform, but imposes on courts the restraint of judicial restraint in case more vigorous supervision might upset political separation, or may be outpaced by socio-economic reality.³⁷ The Supreme Court in India, its constitution having initially made socio-economic rights inaccessible at all, as Directive Principles, has gone still further than this to cull a wide spectrum of rights under Article 21 (right to life and personal liberty), hence its name. The Court has integrated rights to food, shelter, health, clean environment, education and many others through activist judgements, in particular through Public Interest Litigation (PIL). Thus, Indian judges have occupied very dangerous voids caused by governmental inertia or incapacity, and have democratised constitutional redress to enable the poor and the marginalised. This living tree approach makes the constitution dynamic and, in a position, to fulfil modern societal demands, though with the danger of extending into the policy sphere.

6.2. Comparative Insights

First, the constitutional courts of India and South Africa have led an international change: rights have not only been seen as the safeguards against the abuse of the state but as an entitlement, as a right that obliges governments to take certain actions to ensure the dignity and well-being of citizens. Second, these courts are best instituted where they are institutionally autonomous, constitutional mandate and broad remedial authority such as the capacity to

³⁴ Sandra Liebenberg, Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa, 8 S. Afr. J. Hum. Rts. 483 (1995).

³⁵ *Gov't of the Republic of S. Afr. v. Grootboom*, 2001 (1) SA 46 (CC).

³⁶ *Minister of Health v. Treatment Action Campaign* (No. 2), 2002 (5) SA 721 (CC)

³⁷ Henrico, *Reasonableness Review in S. Afr.*, 25 S. AFR. J. HUM. RTS. 101, 115 (2009).

monitor state adherence by issuing continuing mandamus or supervisory orders. Third, their effectiveness is determined not only by doctrine but also by context: continual judicial activism is frequently hampered by resistance of the government, failure to comply by the bureaucrats, lack of resources, and in other instances, by opposition, which may endanger the effectiveness or legitimacy of the court. However, strong constitutional courts are endowed with an exclusive and a higher order of promoting human rights. The South African experience shows the value of explicit constitutional text, while the Indian model demonstrates the power of interpretive innovation and procedural openness. Both have delivered radical outcomes, the breaking down of HIV/AIDS obstacles in South Africa and the Right to Food movement in India are merely two of the most remarkable examples of this, but both also face the eternal dilemma of how to convert judgments into action.³⁸

6.3. Challenges and Limitations

It is widely recognized that constitutional courts that are strong tend to safeguard and promote human rights more as compared to any other traditional or weak judicial system, especially when the court possesses institutional authority, constitutional legitimacy, and inclusive procedures. Nevertheless, their efficiency cannot be perceived individually. The constitutional courts exist in a broader democratic ecosystem, which will involve the legislature, the executive, the administrative institutions, the civil society, and the overall political culture. Even the most liberal judicial ruling need collaboration of these actors in order to transform constitutional principles into real lives. Even though constitutional courts have the power to bring about social change by identifying rights, developing the governance standard, and bringing the state to account, the structural and functional limitations restrict the potential to provide sustainable results. Judicial power is finally reactive and subject to enforcement by the executive and thus the courts are at the mercy of non-compliance, delay or even unilateral application. Without proper administrative abilities and political goodwill, judicial interventions may only end up being symbolic but not transformative. In addition, the growing mandate of constitutional courts brings questions of institutional overreaching and the legitimacy of the democracy. When the courts are forced to deal with complicated questions of policy, such as the question of resource distribution, socio-economic planning or technical skills, they may have to venture into the territories traditionally held by the elected authorities. This may create political opposition and undermine the confidence of the people in the

³⁸ Rishika Sahgal, *In the Aftermath: Poverty as a Ground in South Africa and India*, 14 Const. Ct. Rev. (2024),

judiciary, especially when judicial solutions are seen to be unrealistic or played out of touch with actualities on the ground. Constitutional courts do not however serve best as agents of reform on their own, but as agents in a larger system of accountability. Their involvement in the protection of human rights requires a long-term involvement in legislative activities, responsive governance, an active involvement of civil society, and the acceptance of values of the Constitution by people. The awareness of these limits does not deny the constitutional courts any importance but in fact this calls a balanced and collaborative solution whereby the leadership of judiciary is supported by the institutions to ensure that the meaning of human rights is realised and achieved on the ground.

7. CONCLUSION

The relative position of constitutional courts in South Africa and India proves that the bodies are not merely a dispute-settlement organs, but a mechanism of social change. Citizens living in a world where inequality or insensitivity towards a group or disorganization and not organization is a common cause of human rights abuse, are well placed with constitutional courts since they provide an effective means of holding governments accountable. Article 21 and Public Interest Litigation tool have had many widespread interpretations, which have been utilized by the Supreme Court of India to implement socio-economic rights, although there is a common tendency to place them within Directive principles. It has done this to democratize access to the justice and provide rights to food, shelter, health, education and environment. In the meantime, judicial activism has been denounced as encroaching on policy domains and causing practical obstacles to its application, primarily in those instances where it is not supported by executive and bureaucratic collaboration. The Constitutional Court of South Africa, however, operates in the context of the particular constitutions which expressly protect the socio-economic rights. Its judicial cynicism in cases like *Grootboom* and *Treatment Action Campaign* suggest that its balance is very fine: the state must act and the test of reasonableness which it provides do not go further into the forbidden areas of the institution and does not exceed the boundaries of its resources. This model is more legitimating in text and has the issue of the discrepancy between law in word and law in deed. The three most important lessons that have been highlighted in the comparison are that the constitutional courts should be independent with broad remedial instruments and with the support of the civil society and responsive political organizations. Innovations in the judiciary or textual assurances will never be able to guarantee human rights unless it is included in a broader accountability ecosystem.

Finally, the Indian and South African experiences are a good illustration of two mutually supporting paths; the power of the interpretive creativity and the power of the explicit constitutional text. Together, they prove that principled, yet flexible constitutional courts remain one of the most efficient human dignity guardians in the 21st century.