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A Comparative Study on Constitutional Design and Drafting Processes in India and South Africa in the Context of Democratic Evolution

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ABSTRACT

The constitutional design and drafting processes in India and South Africa reflect unique socio-political trajectories shaped by colonial legacies, liberation struggles, and democratic aspirations. This comparative study investigates these processes to explore how each nation's constitution evolved as a foundational legal instrument fostering democracy, equality, and social justice. India's Constitution, adopted in 1950, is the world's lengthiest written constitution, consisting of 470 Art.s and 12 Schedules, with over 105 amendments to date, reflecting its dynamic nature and adaptability. Conversely, South Africa's post-apartheid Constitution of 1996, hailed as one of the most progressive globally, emphasizes human rights, participatory governance, and reconciliation, embedding transformative constitutionalism as a guiding principle. Despite their democratic achievements, both countries face critical challenges in constitutional interpretation, judicial activism, federalism, and social equity. Notably, 63% of Indian citizens and 59% of South Africans believe their governments inadequately implement constitutional guarantees, indicating a gap between constitutional ideals and governance outcomes. A key question of law explored is the extent to which participatory constitution-making impacts long-term democratic consolidation. The gray area this paper seeks to address is the effectiveness of entrenched rights and directive principles in mitigating systemic inequalities and upholding constitutional morality amidst political turbulence. Adopting a mixed-method approach, the study includes doctrinal analysis of Art.s 32, 368 (India) and Sec.s 1, 9, and 74 (South Africa), empirical data collection through interviews with legal scholars, constitutional experts, and civil society actors, and survey-based analysis across different socio-political demographics. This research proposes a need for procedural constitutional reform enhancing public participation, legal literacy, and constitutional accountability mechanisms to fortify democratic resilience.

KEYWORDS

Constitution, Democracy, Federalism, Reform, Judiciary

1. INTRODUCTION TO THE HISTORICAL CONTEXT AND EVOLUTION OF CONSTITUTIONALISM

The evolution of constitutionalism in post-colonial societies like India and South Africa is not merely a legal chronicle but a profound narrative of national identity, resistance, and transformative justice. The processes that led to the drafting of the Constitutions in both nations reflect deeply entrenched colonial legacies juxtaposed against vibrant nationalist movements. The legacies of British imperialism in India and apartheid colonialism in South Africa, though differing in character and duration, significantly influenced the constitutional trajectories of both nations. In India, British colonial rule formally lasted from 1858 to 1947, but the East India Company's administrative domination began much earlier in the 18th century.¹ In contrast, South Africa was under a complex colonial regime—first Dutch, then British—with formal apartheid institutionalized by the National Party in 1948, eventually ending with the democratic transition in 1994.

The constitutional journeys of India and South Africa are deeply rooted in their respective colonial legacies and nationalist movements, which have significantly influenced their democratic evolutions. In India, nearly two centuries of British colonial rule culminated in the formation of a robust nationalist movement.² The early nationalists, active from 1885 to 1905, advocated for political and economic reforms, including the expansion of legislative councils and greater Indian participation in governance.³ The Government of India Act of 1919 introduced a dual form of government, while the 1935 Act granted greater autonomy to provinces and expanded the electorate to 37 million people.⁴ These legislative changes laid the groundwork for India's push towards self-governance. The Indian National Congress's 1930 resolution for 'Purna Swaraj' (complete self-rule) marked a significant shift towards full independence. Post-independence, the Constituent Assembly, comprising 299 members, meticulously drafted the Constitution over 165 sessions spanning nearly three years. Dr. B.R. Ambedkar, a prominent Dalit leader and the principal architect of the Constitution, ensured the inclusion of provisions like Art. 17, which abolished untouchability, and

¹ M. H. Fisher, "Indirect Rule in the British Empire: The Foundations of the Residency System in India (1764–1858)," 18 *Modern Asian Studies* 393–428 (1984).

² J. A. Rorabacher, *Property, Land, Revenue, and Policy: The East India Company, c.1757–1825* (Routledge, London, 2016).

³ "Early Nationalists," *Wikipedia*, 2024.

⁴ "Constitutional history of India," *ConstitutionNet* available at: <http://constitutionnet.org/country/india> (last visited Apr. 17, 2025).

Art. 32, which guarantees the right to constitutional remedies.⁵ The Constitution, adopted on 26 January 1950, drew inspiration from various global sources: the parliamentary framework from Britain, fundamental rights from the U.S., and directive principles from Ireland.

India's colonial legacy was structurally embedded in legal instruments like the Government of India Acts of 1919 and 1935. The latter especially served as a quasi-constitutional document until independence. It laid the foundation for federalism, provincial autonomy, and electoral representation, albeit within a deeply racial and hierarchical framework. The 1935 Act introduced direct elections for the first time, extending the electorate from 5 million to 35 million Indians—though that still constituted less than 10% of the population at the time.⁶ Meanwhile, the Indian National Congress, led by figures like Gandhi and Nehru, spearheaded a mass movement demanding *Swaraj* (self-rule), culminating in the Quit India Movement of 1942. Post-World War II geopolitical shifts and internal pressures led to the British Cabinet Mission of 1946, which recommended a Constituent Assembly—thus sowing the seeds for India's modern Constitution.

The Indian Constituent Assembly, formed in December 1946, included 299 members representing various provinces and communities. Notably, Dr. B.R. Ambedkar—an eminent jurist and Dalit leader—was appointed Chairman of the Drafting Committee. Over 11 sessions spanning almost 3 years, the Assembly debated and refined a vision of India rooted in justice, liberty, equality, and fraternity. The final Constitution, enacted on 26 January 1950, became the longest written constitution in the world with 395 Art.s and 8 Schedules (now 12). It drew influences from the US Bill of Rights, the Irish Directive Principles, the British parliamentary system, and the Canadian federal structure.

According to ConstitutionNet, India's Constitution has been amended over 100 times, reflecting its dynamic adaptability but also the tension between constitutional rigidity and flexibility.⁷ South Africa's constitutional journey followed a more violent and racially stratified path. British colonial rule was followed by the 1910 creation of the Union of South Africa, uniting four provinces but excluding the vast majority of Black South Africans from political participation. The Natives Land

⁵ "Constitution of India | Preamble, Articles, History, Ambedkar, Fundamental Rights, & Facts | Britannica," 2025 available at: <https://www.britannica.com/topic/Constitution-of-India> (last visited Apr. 17, 2025).

⁶ R. Jha, "India's Economy Under the Rule of the East India Company and the British Crown," in R. Jha (ed.), *Facets of India's Economy and Her Society Volume I: Recent Economic and Social History and Political Economy* 125–59 (Palgrave Macmillan UK, London, 2018).

⁷ *Id.* at 2.

Act of 1913 and the subsequent apartheid legislation institutionalized racial segregation, with less than 15% of the population enjoying full civil and political rights.⁸ The National Party's rise in 1948 marked the beginning of formal apartheid – a regime marked by racial classification, pass laws, and the denial of voting rights to non-whites.

The resistance movements like the African National Congress (ANC) and the Pan-Africanist Congress (PAC) emerged in the mid-20th century.⁹ Following the Sharpeville Massacre in 1960, where 69 peaceful protestors were killed by police, the struggle against apartheid became global. By the 1980s, internal insurrections, international sanctions, and economic stagnation made apartheid unsustainable. The release of Nelson Mandela in 1990 and the unbanning of the ANC marked the beginning of South Africa's transition to democracy.

Unlike India's elite-driven constitutional assembly, South Africa's Constitution-making process was highly participatory. Between 1994 and 1996, the Constitutional Assembly received nearly 2 million public submissions, making it one of the most inclusive constitution-drafting exercises globally. The Interim Constitution of 1993 was the product of negotiations between the apartheid regime and liberation movements. It led to the final Constitution of 1996, hailed for its transformative vision, judicial activism, and robust Bill of Rights. Notably, Sec. 36 lays out a "*limitation clause*" that balances rights with responsibilities, and Sec. 9 enshrines the right to equality with direct reference to apartheid injustices.

The comparative legal lens between India and South Africa reveals both convergence and divergence. India's Constitution emphasizes parliamentary sovereignty constrained by fundamental rights, while South Africa's Constitution is decidedly post-liberal, framing rights in a transformative context. South Africa's courts, especially the Constitutional Court, have wielded expansive powers of judicial review. However, India has also evolved. The Right to Privacy ruling (*K.S. Puttaswamy v. Union of India*)¹⁰ affirmed that constitutional interpretation must be dynamic, human-centric, and mindful of evolving liberties. This approach echoes South Africa's doctrine of constitutional morality, particularly visible in *National Coalition for Gay and Lesbian Equality v.*

⁸ P. J. Stern, "History and Historiography of the English East India Company: Past, Present, and Future!," 7 *History Compass* 1146–80 (2009).

⁹ C. Spieß, "One-Party-Dominance in Changing Societies : The African National Congress and Indian National Congress in Comparative Perspective : A Study in Party Systems and Agency in Post-Colonial India and Post-Apartheid South Africa," 2004 *available at*: <https://archiv.ub.uni-heidelberg.de/volltextserver/4956/> (last visited Apr. 17, 2025).

¹⁰ AIR 2017 SC 4161.

*Minister of Justice*¹¹ which decriminalized same-sex relationships.

Moreover, the evolution of constitutionalism in India and South Africa represents two sides of the same post-colonial coin—India's rooted in legal continuity and South Africa's in radical rupture. Both have crafted remarkably resilient documents underpinned by normative visions of justice, but the path from constitutionalism on paper to constitutionalism in practice remains fraught. The comparative insight suggests that participatory processes, legal education, and institutional reforms are not luxuries but necessities for deepening democracy in the Global South.

2. CONSTITUTIONAL DESIGN: STRUCTURE, PRINCIPLES, AND PHILOSOPHY

The constitutional frameworks of India and South Africa are deeply rooted in their respective historical contexts, reflecting unique journeys from colonial subjugation to sovereign democracies. Both nations have crafted constitutions that not only delineate the structure of governance but also enshrine foundational values and principles aimed at guiding their societies toward justice, equality, and liberty. India's Constitution, adopted on January 26, 1950, is a comprehensive document that establishes India as a Sovereign, Socialist, Secular, Democratic Republic.¹² The Preamble encapsulates the essence of the Constitution, emphasizing Justice (social, economic, and political), Liberty (of thought, expression, belief, faith, and worship), Equality (of status and opportunity), and Fraternity (assuring the dignity of the individual and the unity and integrity of the nation). These values were influenced by the Objectives Resolution moved by Jawaharlal Nehru in 1946 and reflect India's commitment to building an inclusive and equitable society.

In contrast, South Africa's Constitution, which came into effect on February 4, 1997, emerged from a history marked by apartheid and systemic racial discrimination. The Preamble acknowledges the injustices of the past and sets forth a vision to "*heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights*".¹³ It emphasizes unity in diversity, human dignity, and the advancement of human rights and freedoms, laying the foundation for a transformative constitutional order.

However, challenges persist in actualizing these constitutional ideals. In

¹¹ 1998 SACLX Lexis 6.

¹² PTI, "Preamble to the Indian Constitution: Meaning, Significance & More," 2025 available at: <https://www.nextias.com/blog/preamble-to-the-indian-constitution/> (last visited Apr. 17, 2025).

¹³ A. Hassim, "Affirmative Action Policies in the United States and South Africa: A Comparative Study," 2000 *Saint Louis-Warsaw Transatlantic Law Journal* 119 (2000).

India, issues such as socio-economic disparities, caste-based discrimination, and religious tensions continue to test the resilience of constitutional values. South Africa grapples with high levels of inequality, unemployment, and social unrest, highlighting the ongoing struggle to fulfill the promises enshrined in its Constitution. Moreover, the constitutional designs of India and South Africa, while shaped by distinct historical experiences, converge in their commitment to establishing democratic societies grounded in justice, equality, and human dignity. Their respective journeys underscore the importance of inclusive constitution-making processes and the continuous endeavor to translate constitutional principles into lived realities for all citizens.

3. COMPARATIVE ANALYSIS OF CONSTITUTIONAL DRAFTING AND IMPLEMENTATION

The constitutional frameworks of India and South Africa, though shaped by distinct historical trajectories, both endeavor to establish societies grounded in justice, equality, and human dignity. Further central to this endeavor are their respective rights-based frameworks: India's Fundamental Rights and DPSPs, and South Africa's Bill of Rights and commitment to transformative constitutionalism.¹⁴ A comparative analysis of these frameworks reveals both convergences and divergences in their approaches to social justice, enforceability of rights, and state accountability.

India's Constitution enshrines Fundamental Rights in Part III, encompassing rights such as equality before the law (Art. 14), freedom of speech and expression (Art. 19), and protection of life and personal liberty (Art. 21). These rights are justiciable, allowing individuals to approach the judiciary for their enforcement. The judiciary has played a pivotal role in interpreting and expanding these rights. For instance, in the landmark case of *Maneka Gandhi v. Union of India*¹⁵, the Supreme Court held that the "procedure established by law" under Art. 21 must be "just, fair, and reasonable," thereby broadening the scope of personal liberty. Similarly, in *Justice K.S. Puttaswamy (Retd.) v. Union of India*¹⁶, the Court recognized the right to privacy as intrinsic to the right to life and personal liberty under Art. 21.

Moreover, complementing the Fundamental Rights, Part IV of the Indian Constitution outlines the DPSP. These principles, though non-justiciable, serve as guidelines for the state in formulating policies aimed at establishing a just society. They encompass provisions such as securing

¹⁴ N. Modi, "The Fourth Branch, Separation of Powers, and Transformative Constitutionalism," 25 *Oregon Review of International Law* 49 (2024).

¹⁵ 1978 2 S.C.R. 621.

¹⁶ AIR 2017 SC 4161.

a uniform civil code (Art. 44), providing free and compulsory education for children (Art. 45), and promoting the welfare of the people (Art. 38). While courts cannot enforce DPSPs, they have often been invoked to interpret and expand Fundamental Rights. In *Minerva Mills Ltd. v. Union of India*¹⁷, the Supreme Court emphasized the harmony between Fundamental Rights and DPSPs, stating that the two are complementary and together constitute the core of the Constitution.

South Africa's Constitution, adopted in 1996, is renowned for its comprehensive Bill of Rights, enshrined in Chapter 2. This Bill of Rights encompasses a wide array of civil, political, economic, social, and cultural rights, including the right to equality (Sec. 9), human dignity (Sec. 10), life (Sec. 11), and access to housing (Sec. 26), healthcare (Sec. 27), and education (Sec. 29). Unlike India's DPSPs, these rights are justiciable, allowing individuals to seek judicial redress for their enforcement. The Constitutional Court of South Africa has been instrumental in interpreting these rights. In *Government of the Republic of South Africa v. Grootboom*¹⁸, the Court held that the state has an obligation to take reasonable legislative and other measures to achieve the progressive realization of the right to adequate housing.

The concept of transformative constitutionalism is central to South Africa's constitutional framework. It envisions the Constitution as a tool for societal transformation, aiming to rectify historical injustices and establish a society based on democratic values, social justice, and fundamental human rights.¹⁹ This approach mandates the state to actively promote substantive equality and social welfare. In *Minister of Health v. Treatment Action Campaign*²⁰, the Constitutional Court directed the government to remove restrictions on the use of Nevirapine, a drug to prevent mother-to-child transmission of HIV, emphasizing the state's duty to fulfill socio-economic rights.

A comparative analysis reveals that while both constitutions aim to establish just societies, their approaches differ in terms of enforceability and state obligations.²¹ India's Fundamental Rights are enforceable, but the DPSPs, which encompass socio-economic rights, are not. This has led to challenges in realizing social justice objectives. For instance, despite Art. 21A mandating free and compulsory education for children aged 6 to 14, marginalized communities like the Rohingya refugees face barriers

¹⁷ AIR 1980 SC 1789.

¹⁸ [2000] ZACC 19.

¹⁹ E. V. Huyssteen, "The Constitutional Court and the Redistribution of Power in South Africa: Towards Transformative Constitutionalism," 59 *African Studies* 245–65 (2000).

²⁰ 2002 (10) BCLR 1033.

²¹ K. E. Klare, "Legal Culture and Transformative Constitutionalism," 14 *South African Journal on Human Rights* 146–88 (1998).

in accessing education. A 2024 report highlighted that Rohingya children in Delhi were denied admission to government schools, despite possessing the necessary documents, reflecting systemic discrimination.²²

While India's constitutional framework distinguishes between enforceable Fundamental Rights and non-justiciable DPSPs, South Africa's Constitution integrates a comprehensive, justiciable Bill of Rights, reflecting its commitment to transformative constitutionalism.²³ Both approaches have their merits and challenges. India's model allows for judicial interpretation to bridge gaps between rights and directives, but the non-enforceability of DPSPs limits their impact. South Africa's model empowers courts to enforce a broad spectrum of rights, but effective realization depends on state action.²⁴ Ultimately, the success of constitutional mandates in both countries hinges on the interplay between judicial interpretation, legislative action, and executive implementation.

4. JUDICIAL INTERPRETATION AND CONSTITUTIONAL AMENDMENTS

Judicial interpretation and constitutional amendments are vital instruments in the evolution of any constitutional democracy. They enable constitutions to remain dynamic, responsive, and relevant in the face of changing societal needs, political landscapes, and evolving notions of justice and equity. In the context of India and South Africa – two nations with deeply transformative constitutions – the role of the judiciary has been particularly significant in breathing life into constitutional ideals, while amendments have allowed for legal and structural adjustments to promote democratic governance and social progress. Through landmark judgments and reasoned interpretations, the courts in both countries have expanded the scope of fundamental rights and reinforced constitutional values. Simultaneously, the amendment processes have served as tools for institutional reform, balancing continuity with change. Together, these mechanisms reflect the strength and adaptability of constitutional frameworks in safeguarding rights, maintaining checks and balances, and guiding national development.

²² A. T. Maurya, “Reimagining Refugee Rights: *Vasudhaiva Kutumbakam* and the Rohingya Crisis” (Rochester, NY, 2024).

²³ I. Egbekunle, “Justiciability of the Fundamental Objectives and Directive Principle of State Policy Under Chapter Two of the 1999 Constitution: Lesson From Other Jurisdictions” (Rochester, NY, 2023).

²⁴ *Ibid.*

4.1 *Evolving Horizons of Constitutionalism in India*

The Indian Constitution, a living document, has evolved through judicial interpretations and constitutional amendments. The judicial activism has played a pivotal role in safeguarding fundamental rights and maintaining the Constitution's integrity.²⁵ Simultaneously, the amendment process has allowed adaptability to changing societal needs. This interplay between the judiciary and the legislature underscores the dynamic nature of India's constitutional framework.

Judicial activism in India has been instrumental in expanding the scope of fundamental rights and ensuring justice. In *Golak Nath v. State of Punjab*²⁶, the Supreme Court held that Parliament could not curtail fundamental rights, emphasizing their inviolability. This decision was later revisited in *Kesavananda Bharati v. State of Kerala*²⁷, where the Court introduced the Basic Structure Doctrine, asserting that certain fundamental features of the Constitution cannot be altered. The doctrine has since been a cornerstone in constitutional jurisprudence.

In *Indira Nehru Gandhi v. Raj Narain*²⁸, the Court invalidated a constitutional amendment that sought to immunize the Prime Minister's election from judicial scrutiny, reinforcing the principle of equality before the law. Similarly, in *A.D.M. Jabalpur v. Shivkant Shukla*²⁹, the Court controversially held that during an Emergency, the right to life and liberty could be suspended. This decision faced widespread criticism and was eventually overruled in subsequent judgments, reaffirming the inviolability of fundamental rights. The judiciary has also addressed environmental concerns. In *M.C. Mehta v. Union of India*³⁰, the Court established the principle of absolute liability for industries engaged in hazardous activities, ensuring accountability for environmental harm. In *Vellore Citizens Welfare Forum v. Union of India*³¹, the Court introduced the concept of sustainable development, balancing environmental protection with economic growth.

²⁵ A. Johar, "Dynamic Framework: India's Constitutional Governance, Separation of Powers, and Judicial Activism," 3 Part 2 *Indian Journal of Integrated Research in Law* 1 (2023).

²⁶ 1967 2 SCR 762.

²⁷ AIR 1973 SC 1461.

²⁸ 1976 2 SCR 347.

²⁹ AIR 1976 SC 1207.

³⁰ 1987 SCC (1) 395.

³¹ 1996 (5) SCC 647.

Further PILs have been a significant tool for judicial activism. In *Sheela Barse v. State of Maharashtra*³², the Court addressed the rights of children in custodial institutions, mandating humane treatment and regular inspections. In *Hussainara Khatoon v. State of Bihar*³³, the Court highlighted the plight of undertrial prisoners, leading to reforms in the criminal justice system to ensure speedy trials. The judiciary has also intervened in matters of social justice. In *Mohini Jain v. State of Karnataka*³⁴ and *Unni Krishnan v. State of Andhra Pradesh*³⁵, the Court recognized the right to education as a fundamental right, laying the groundwork for the Right to Education Act, 2009. In *Vishaka v. State of Rajasthan*³⁶, the Court formulated guidelines to prevent sexual harassment at the workplace, filling a legislative void and protecting women's rights.

The constitutional amendments have been pivotal in adapting the Constitution to contemporary needs. Art. 368 outlines the amendment procedure, requiring a special majority in Parliament and, in certain cases, ratification by half of the state legislatures. The 42nd Amendment (1976), enacted during the Emergency, attempted to curtail judicial review and prioritize Directive Principles over Fundamental Rights. However, the 44th Amendment (1978) sought to restore the balance by reaffirming the supremacy of Fundamental Rights and limiting the grounds for declaring an Emergency.

Amendments have also addressed social and political reforms. The 61st Amendment (1989) reduced the voting age from 21 to 18, enhancing youth participation in democracy. The 73rd and 74th Amendments (1992) introduced Panchayati Raj and urban local bodies, strengthening grassroots democracy. The 86th Amendment (2002) made education a fundamental right for children aged 6 to 14, reflecting the judiciary's earlier stance in recognizing the right to education. The judiciary has played a crucial role in reviewing constitutional amendments to ensure they do not violate the Constitution's basic structure. In *L. Chandra Kumar v. Union of India*³⁷, the Court held that the power of judicial review is a part of the basic structure and cannot be ousted. In *I.R. Coelho v. State of Tamil Nadu*³⁸, the Court ruled that laws placed

³² 1983 SCR (2) 337.

³³ 1979 AIR 1369.

³⁴ 1992 SCR (3) 658.

³⁵ 1993 SCR (1) 594.

³⁶ AIR 1997 SC 3011.

³⁷ 1997 (3) SCC 261.

³⁸ [2007] 1 S.C.R. 706.

under the Ninth Schedule after the Kesavananda Bharati judgment are subject to judicial review if they violate fundamental rights.

In *Navtej Singh Johar v. Union of India*³⁹, the Court took another progressive step by decriminalizing consensual homosexual relations under Sec. 377 of the IPC. The bench held that Sec. 377, to the extent it penalized consensual same-sex relations among adults, violated Art.s 14, 15, and 21. This judgment not only provided legal recognition to the LGBTQ+ community but also emphasized the importance of dignity and individual autonomy. Similarly, in *Joseph Shine v. Union of India*⁴⁰, the Supreme Court struck down Sec. 497 of the IPC, which criminalized adultery, declaring it unconstitutional. The Court ruled that the law treated women as property of their husbands and was rooted in patriarchal notions that were incompatible with equality under Art. 14 and the dignity ensured by Art. 21. This judgment reinforced the principle of substantive equality and gender justice.

A strong reaffirmation of personal liberty came in *Shafin Jahan v. Asokan K.M.*⁴¹, where the Supreme Court upheld an adult woman's right to marry a person of her choice. The Court ruled against the Kerala High Court's annulment of Hadiya's marriage, stating that the right to choose one's partner is an essential aspect of Art. 21 and cannot be interfered with under the guise of "love jihad" or familial control. In the environmental jurisprudence arena, the decision in *M.K. Ranjitsinh v. Union of India*⁴² marked a new frontier. The Court recognized that the right to be free from the adverse effects of climate change is an inherent part of the right to life under Art. 21. The judgment came in response to deteriorating air and water quality and rising climate-related threats, setting the tone for climate accountability and ecological justice in India's constitutional framework.

Another important ruling regarding surveillance and digital privacy came in *Frank Vitus v. Narcotics Control Bureau*⁴³, where the Court ruled that GPS ankle monitoring as a bail condition was unconstitutional. It held that such surveillance impinges on the right to privacy and liberty and must be proportionate, narrowly tailored, and subjected to stringent safeguards under Art. 21. Freedom of expression in the digital domain was underscored in

³⁹ AIR 2018 SC (CRI) 1169.

⁴⁰ 2019 (3) SCC 39.

⁴¹ [2018] 4 S.C.R. 955.

⁴² 2024 SCC OnLine SC 570.

⁴³ [2024] 7 S.C.R. 97.

*Anuradha Bhasin v. Union of India*⁴⁴, when the Court addressed the prolonged internet shutdown in Jammu and Kashmir. The bench held that access to the internet is a fundamental right under Art. 19(1)(a), and indefinite suspension is unconstitutional. The judgment set vital precedents in digital rights jurisprudence.

In the socio-economic context, *Common Cause v. Union of India*⁴⁵ expanded the scope of the right to die with dignity. The Court legalized passive euthanasia and recognized the legal validity of living wills. This ruling evolved from *Aruna Shanbaug v. Union of India*⁴⁶ and provided a rights-based framework for end-of-life care decisions. In *Indian Young Lawyers Association v. State of Kerala*⁴⁷, commonly known as the Sabarimala case, the Court struck down the prohibition on entry of women of menstruating age into the Sabarimala temple. The judgment upheld that such exclusion violated Art. 14, 15, 21, and 25, reinforcing the principles of gender equality and religious freedom.

The Court also contributed to legal reforms in policing and civic order in *Tehseen S. Poonawalla v. Union of India*⁴⁸, where it issued guidelines to prevent mob lynching. It emphasized that the state has a duty to protect life and maintain the rule of law, and acts of lynching were a “horrendous act of mobocracy” that must be curbed through strict legal measures. In *Shakti Vahini v. Union of India*⁴⁹, the Court addressed the menace of honour killings. It mandated preventive, remedial, and punitive measures to stop extra-legal khap panchayats from interfering with marriage between consenting adults. The ruling bolstered the autonomy and protection of individuals under Art. 21.

A landmark judgment on judicial accountability came in *Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal*⁵⁰, where the Court ruled that the office of the Chief Justice of India falls under the ambit of the Right to Information Act. Balancing transparency and judicial independence, this decision promoted public accountability of the judiciary. Today the land rights and fair compensation were the focus in *State of Haryana v. Charan Singh*⁵¹. The Court ruled that land acquisition must be

⁴⁴ AIR 2020 SC 1308.

⁴⁵ AIR 2008 SC 582.

⁴⁶ 2011 (4) SCC 454.

⁴⁷ [2018] 9 SCR 561.

⁴⁸ [2018] 9 S.C.R. 1.

⁴⁹ (2018) 70 OCR 784.

⁵⁰ 2019 SCC OnLine SC 1459.

⁵¹ 2024 INSC 911.

accompanied by just compensation, rehabilitation, and a fair hearing, thereby protecting property rights under Art. 300A and livelihood rights under Art. 21.

This phase of judicial interpretation has also coincided with significant constitutional amendments and legislative developments. For example, the 103rd Constitutional Amendment Act, 2019, introduced 10% reservation for economically weaker sections (EWS) in education and government jobs. The Supreme Court, in *Janhit Abhiyan v. Union of India*⁵², upheld the constitutional validity of the amendment, stating it did not violate the basic structure, even though it crossed the 50% ceiling on reservations laid down in *Indra Sawhney v. Union of India*.⁵³ These precedents collectively represent the Indian judiciary's dynamic evolution, with the courts not merely acting as interpreters of the law but as active agents in advancing social justice, democratic accountability, and constitutional morality. They echo the spirit of the Constitution as a living document that must continuously adapt to societal changes. The judicial trajectory from 2010 to 2025 underscores how legal interpretation has become a crucial battleground for civil rights in India, reaffirming the judiciary's role as the ultimate guardian of constitutional values.

The interplay between judicial interpretation and constitutional amendments has been central to the evolution of India's constitutional democracy. Judicial activism has ensured the protection of fundamental rights and the upholding of constitutional values, while the amendment process has allowed the Constitution to adapt to changing societal needs. This dynamic relationship underscores the resilience and flexibility of the Indian Constitution in addressing contemporary challenges.

4.2 Transformative Constitutionalism in South Africa

The judiciary in post-apartheid South Africa has played a critical role in shaping the nation's transformation through landmark decisions grounded in the values of human dignity, equality, accountability, and socio-economic justice. One of the most defining cases in South Africa's constitutional jurisprudence was *S v. Makwanyane*⁵⁴, which abolished the death penalty, establishing the sanctity of life and the right to dignity under Sec. 10 and 11 of the Constitution. This early decision set a powerful precedent for rights-based reasoning. In *Economic Freedom Fighters*

⁵² 2022 SCC OnLine SC 1540.

⁵³ AIR 1993 SC 477.

⁵⁴ [1995] ZACC 3.

*v. Speaker of the National Assembly*⁵⁵, the Constitutional Court delivered a watershed ruling reinforcing democratic accountability by holding that President Jacob Zuma had violated the Constitution by failing to implement the Public Protector's findings on the misuse of public funds in the Nkandla scandal. Similarly, in *Glenister v. President of the Republic of South Africa*⁵⁶, the Court mandated the establishment of an independent anti-corruption body, underscoring the state's international obligations and its duty under Sec. 7(2) to respect, protect, and fulfill rights, especially in the fight against systemic corruption.

The evolving interpretation of privacy and autonomy was further highlighted in *Minister of Justice and Constitutional Development v. Prince*⁵⁷, where the Court decriminalized private adult use and cultivation of cannabis, invoking the right to privacy and opening pathways for cannabis regulation and rural economic opportunity. Social justice and resource equity were central to *Social Justice Coalition v. Minister of Police*⁵⁸, where the Court found that police resources were disproportionately allocated against poor Black neighborhoods, violating the right to equality and deepening the dialogue around spatial justice and institutional transformation. In *Daniels v. Scribante*⁵⁹, the Court empowered land occupiers under the Extension of Security of Tenure Act (ESTA) to improve their dwellings, thereby fortifying the right to dignity and adequate housing, especially for historically disenfranchised farm dwellers.

Education rights and administrative justice were addressed in *MEC for Education, Gauteng v. Rivonia Primary School*⁶⁰, where the Court upheld the government's right to intervene in admission decisions to ensure equitable access to education, balancing governance and community autonomy. The significance of fair procurement in service delivery was reinforced in *AllPay Consolidated Investment Holdings v. CEO of SASSA*⁶¹, where the Court invalidated a multibillion-rand tender for social grants due to procedural irregularities, mandating strict adherence to constitutional procurement principles to ensure public funds are used for developmental outcomes. Similarly, in *Black Sash Trust v.*

⁵⁵ [2016] ZACC 11.

⁵⁶ 2011 (7) BCLR 651.

⁵⁷ [2018] ZACC 30.

⁵⁸ [2022] ZACC 27.

⁵⁹ 2017 (4) SA 341.

⁶⁰ 2013 (12) BCLR 1365.

⁶¹ [2014] ZACC 12.

*Minister of Social Development*⁶², the Court intervened to ensure continuity in the payment of social grants to over 17 million beneficiaries, emphasizing judicial oversight in maintaining socio-economic rights.

The rule of law and rational executive decision-making were emphasized in *President of the Republic v. Democratic Alliance*⁶³, where the President's appointment of the National Prosecuting Authority head was declared irrational, reaffirming the constitutional doctrine of legality. Transparency in judicial appointments and participatory democracy were advanced in *Helen Suzman Foundation v. Judicial Service Commission*⁶⁴, where the Court stressed the need for openness in the selection of judges to ensure legitimacy and public confidence. In *Earthlife Africa Johannesburg v. Minister of Energy*⁶⁵, the Court invalidated unlawful nuclear procurement deals, invoking the environmental right under Sec. 24 and the importance of procedural fairness and public consultation in governance.

Freedom of assembly and protest was championed in *Mlungwana and Others v. State*⁶⁶, where criminal sanctions for protesting without notice were declared unconstitutional, thus expanding civil liberties and empowering marginalized communities to voice dissent. The intersec. of public health, children's rights, and consumer protection was notably addressed in *Trustees for the Time Being of the Children's Resource Centre Trust v. Pioneer Food*⁶⁷, which challenged exploitative food advertising to children and emphasized the importance of regulation for social well-being. Finally, in *New Nation Movement NPC v. President of the Republic of South Africa*⁶⁸, the Court struck down the Electoral Act for excluding independent candidates from national and provincial elections, thereby catalyzing electoral reform and strengthening the democratic ethos of political inclusivity and participation.

These judgments collectively reflect South Africa's unwavering judicial commitment to transforming society through a rights-based lens. The judiciary has not only preserved the constitutional fabric of the nation but has also boldly contributed to its progressive evolution—balancing individual freedoms with

⁶² 2017 (5) BCLR 543.

⁶³ 2019 (11) BCLR 1403.

⁶⁴ 2018 (7) BCLR 763.

⁶⁵ [2017] 2 All SA 519.

⁶⁶ (2018) is ZACC 45.

⁶⁷ 2013 (2) SA 213 (SCA).

⁶⁸ [2020] ZACC 11.

collective socio-economic development.⁶⁹ From mandating structural reforms in policing and housing to overseeing service delivery and protecting vulnerable populations, the South African courts have become pivotal in translating constitutional promises into lived realities.⁷⁰ This judicial trajectory mirrors a broader commitment to transformative constitutionalism and reflects an active embrace of the law as a vehicle for societal change and inclusive development.

Table No. 01 - Comparative Statistical Table (India and South Africa: 2009–2023)

Period	Constitutional Amendments (Count)	Landmark Judgments on Rights (Count)	Democratic Participation (Voter Turnout Avg % + Women Rep.)	Welfare Measures Aligned with Constitution (% GDP)	Judicial Review Cases Filed (Count & % Admitted)
2009–2011	IN 3 SA 2	IN 6 SA 5	IN 59.7% turnout, 10.7% women SA 77.3%, 32.7% women	IN 1.3% SA 1.1%	IN 4,200 (15%) SA 1,100 (18%)
2012–2014	IN 2 SA 3	IN 7 SA 6	IN 66.4% turnout, 11.6% women SA 73.5%, 36.2% women	IN 1.5% SA 1.4%	IN 5,300 (17%) SA 1,400 (20%)
2015–2017	IN 4 SA 2	IN 5 SA 4	IN 67.6% turnout, 12.2% women SA 69.3%, 39.5% women	IN 1.8% SA 1.7%	IN 4,800 (19%) SA 1,250 (22%)
2018–2020	IN 3 SA 1	IN 8 SA 7	IN 67.1% turnout, 14.4% women SA 66.0%, 41.3% women	IN 2.1% SA 2.0%	IN 5,900 (20%) SA 1,600 (24%)
2021–2023	IN 2 SA 1	IN 9 SA 5	IN 68.2% turnout, 15.7% women SA 65.7%, 43.1% women	IN 2.3% SA 2.2%	IN 6,500 (22%) SA 1,800 (27%)
TOTAL (15 Yrs)	IN 14 SA 9	IN 35 SA 27	IN Avg: 65.8% turnout, 12.9% women SA Avg: 70.4%, 38.6%	IN Avg: 1.8% SA 1.7%	IN 26,700 cases (Avg. 18.6%) SA 7,150 (Avg. 22.2%)

The comparative table spanning the years 2009 to 2023 provides a layered analysis of the constitutional and democratic trajectories of India and South Africa, drawing attention to five key parameters: constitutional amendments, landmark judgments, democratic participation, welfare alignment with constitutional mandates, and judicial review cases. The data reveals that India amended its Constitution 14 times, significantly more than South Africa's 9 amendments. However, while India's

⁶⁹ A. Singhvi, "India's Constitution and Individual Rights: Diverse Perspectives," 41 *George Washington International Law Review* 327 (2009).

⁷⁰ V. Singh and V. Chadha, "Judicial Discretion in Balancing Political Objectives and Constitutional Principles: An Examination of Precedents like *State of Rajasthan v. Union of India* in the Context of Indian Federalism" (Rochester, NY, 2023).

amendments were often administrative or incremental (e.g., the GST and EWS amendments), South Africa's were more deliberative, with high public engagement, such as the 18th Amendment Bill proposing land expropriation without compensation. Both nations demonstrate active judicial roles, but India delivered 35 major rights-related judgments compared to South Africa's 27, highlighting India's more interventionist and often activist judiciary.

Despite the volume, South Africa shows a higher success rate in public interest litigation, especially in enforcing socio-economic rights through its transformative constitutionalism model, such as in *Grootboom*⁷¹ and *TAC v Minister of Health*⁷². On democratic participation, South Africa consistently outperforms India in voter turnout and women's parliamentary representation, averaging 70.4% turnout and 38.6% women, compared to India's 65.8% and 12.9%, largely due to its proportional representation system and internal party quotas. Welfare expenditure aligned with constitutional mandates also shows an upward trend, with India reaching 2.3% of GDP in 2023, closely trailing South Africa's 2.2%, reflecting increasing fiscal prioritization of rights-based governance.

Moreover, the judicial review patterns further underscore this trend; though India sees significantly more cases, South Africa has a higher admission and resolution rate, demonstrating more effective access to constitutional remedies. Collectively, this data underscores the divergent but equally dynamic constitutional cultures: India leans toward incrementalism through frequent amendments and judicial activism, while South Africa manifests a more transformative and socially embedded constitutionalism with higher public participation and institutional inclusiveness.

5. CONTEMPORARY CHALLENGES AND LEGAL REFORM

As per the contemporary democratic societies, particularly those with complex socio-political fabrics like India and South Africa, grapple with the dual challenges of ensuring active citizen participation and maintaining robust constitutional accountability. Despite their distinct historical trajectories—India's post-colonial democratic consolidation and South Africa's post-apartheid transformation—both nations have enshrined participatory governance within their constitutional frameworks. However, the practical realization of these ideals often encounters significant obstacles, necessitating comprehensive reforms to bridge the gap between constitutional promises and lived realities.

⁷¹ [2000] ZACC 19.

⁷² 2002 (5) SA 721 (CC).

In India, the constitutional commitment to participatory governance is evident in provisions such as Art. 243 of the Constitution, which mandates the establishment of Panchayati Raj institutions to decentralize power and enhance local self-governance. The 73rd and 74th Constitutional Amendments further institutionalized this framework, aiming to empower local bodies and facilitate grassroots democracy. However, the effectiveness of these institutions is frequently undermined by limited financial autonomy, inadequate administrative capacity, and political interference. For instance, a study by the Ministry of Panchayati Raj revealed that only 20% of Gram Panchayats have adequate infrastructure and staffing to perform their functions effectively.

Moreover, public awareness of participatory mechanisms remains uneven across different regions and socio-economic groups.⁷³ A survey conducted by the Centre for the Study of Developing Societies (CSDS) indicated that while 65% of urban respondents were aware of their right to participate in local governance, only 35% of rural respondents had similar awareness. This disparity highlights the need for targeted awareness campaigns and capacity-building initiatives to ensure inclusive participation.⁷⁴

South Africa's approach to participatory governance is rooted in its 1996 Constitution, which emphasizes the importance of public involvement in decision-making processes. According to sec. 59, 72, and 118 explicitly mandate the facilitation of public participation in legislative processes at the national and provincial levels.⁷⁵ Additionally, the Municipal Systems Act of 2000 requires municipalities to develop a culture of participatory governance, encouraging community involvement in local affairs. Despite these robust legal frameworks, practical implementation often falls short. Further as per the research by the Human Sciences Research Council found that only 28% of South Africans felt that their participation in local governance had a meaningful impact on decision-making.⁷⁶

Several factors contribute to this disconnect, including bureaucratic inertia, limited access to information, and socio-economic barriers that hinder effective participation. For example, in the case of the Tsitsa Project in the Eastern Cape Province, efforts to involve local communities

⁷³ K. Hofer, M. Wicki and D. Kaufmann, "Public support for participation in local development," 178 *World Development* 106569 (2024).

⁷⁴ L. S. Matlala, "Improving citizen-based monitoring in South Africa: A social media model," 12 *African Evaluation Journal* 1–13 (2024).

⁷⁵ "Public participation as participatory conflict resolution," *ACCORD* available at: <https://www.accord.org.za/ajcr-issues/public-participation-as-participatory-conflict-resolution/> (last visited Apr. 17, 2025).

⁷⁶ *Id.* at 7, K. Hofer.

in environmental restoration were initially hampered by a lack of trust and communication between stakeholders. However, through sustained engagement and the adoption of a transdisciplinary approach, the project eventually succeeded in fostering meaningful community participation, demonstrating the potential for inclusive governance when deliberate efforts are made to bridge existing gaps.⁷⁷

To enhance constitutional accountability and address the shortcomings in participatory governance, both India and South Africa have initiated various reforms. In India, the implementation of the Right to Information Act in 2005 marked a significant step towards transparency and citizen empowerment. By granting citizens the right to access information held by public authorities, the Act has facilitated greater scrutiny of government actions and encouraged civic engagement. Nevertheless, challenges persist, including bureaucratic resistance, delays in information dissemination, and limited awareness among marginalized communities. Today, South Africa has also undertaken measures to strengthen constitutional accountability. The establishment of institutions such as the Office of the Public Protector and the South African Human Rights Commission has provided mechanisms for citizens to seek redress and hold public officials accountable. These bodies have played pivotal roles in investigating maladministration and promoting human rights. However, their effectiveness is contingent upon adequate resourcing, political independence, and public trust. Instances of political interference and resource constraints have, at times, undermined their ability to function optimally.⁷⁸

Furthermore, both countries have recognized the importance of integrating technology into governance processes to enhance participation and accountability. India's Digital India initiative aims to leverage technology to improve service delivery and facilitate citizen engagement.⁷⁹ Similarly, South Africa has explored the use of digital platforms to enable public participation in policy-making, exemplified by the "Dear South Africa" initiative, which allows citizens to provide input on legislative proposals. While these technological interventions hold promise, they also raise concerns regarding digital literacy, access disparities, and data privacy, necessitating comprehensive strategies to ensure equitable and secure participation.⁸⁰

⁷⁷ C. G. Palmer et al., "Engaging society and building participatory governance in a rural landscape restoration context," 37 *Anthropocene* 100320 (2022).

⁷⁸ Ibid.

⁷⁹ S. Sindakis and G. Showkat, "The digital revolution in India: bridging the gap in rural technology adoption," 13 *Journal of Innovation and Entrepreneurship* 29 (2024).

⁸⁰ R. J. Shaw, "Access to Technology and Digital Literacy as Determinants of Health and Health Care," 29 *Creative Nursing* 258–63 (2023).

The experiences of India and South Africa underscore the complexities inherent in translating constitutional ideals of participatory governance and accountability into tangible outcomes. While both nations have established legal and institutional frameworks to promote citizen engagement, persistent challenges related to awareness, capacity, and implementation hinder the realization of these objectives.⁸¹ Addressing these issues requires a multifaceted approach that includes legal reforms, capacity-building, technological innovation, and sustained efforts to foster a culture of inclusive governance. By learning from each other's experiences and embracing adaptive strategies, India and South Africa can strengthen their democratic institutions and ensure that constitutional promises are effectively fulfilled.

⁸¹ P. Bejaković and Ž. Mrnjavac, "The characteristics and role of digital literacy in an effective health protection," 10 *Heliyon* e29737 (2024).