

IX. TRANSFORMATIVE CONSTITUTIONALISM IN THE 21ST CENTURY: NEW PERSPECTIVE ON EQUALITY, LIBERTY, AND JUSTICE

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Abstract

In India, transformative constitutionalism has become one of the most potent yet controversial idioms of constitutional theory. Constitution was not intended to be an inert legal document; rather, it was intended to be a tool for fundamental social transformation. It has been warned, however, that the transformative enthusiasm of the judiciary, unless checked by a sense of principled restraint, runs the danger of degrading into some species of judicial populism, which will put the popular feeling before the constitutional devotion. The vulnerability of constitutional identity has also been noted to be especially at stake during high majoritarian times, when the counter-majoritarian role of courts is most severely exercised. Moreover, the judicial activism in the areas of liberty and dignity has been criticized to be unequal displaying disparities in the substantive and vigorous protection of rights. Lastly, it is pointed out that gender justice is not possible to achieve using doctrinal rhetoric but through long-term structural sensitivity and material responsiveness to experienced inequalities. This article contends that though transformative constitutionalism has enhanced Indian constitutional law, its utopian aspirations are at risk of becoming incoherent or excessive unless they are based on

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procedural safeguards, sociological realities, and institutional design.

The article critiques the possibilities and the limits of transformation by taking key cases from Kesavananda Bharati to Puttaswamy and Navtej Singh Johar and situating them against contemporary crises, including mass surveillance, internet shutdowns, custodial violence, caste and gender hierarchies, and electoral opacity. In the context of India's experienced inequalities, comparative lessons from South Africa, Colombia, and Europe are examined. In conclusion, the article suggests a reevaluated framework of transformative constitutionalism for the twenty-first century, which is founded on democratic dialogue, socio-legal sensitivity, and structured proportionality.

Keywords: Transformative Constitutionalism, Equality, Liberty, Justice, Constitutional Morality, Indian Supreme Court, Judicial Activism, Social Justice

I. INTRODUCTION

The Indian Constitution was not merely a legal instrument; it was a political covenant intended to effect social transformation. Dr. B.R. Ambedkar's concept of constitutional morality encapsulated this aspiration: democracy would be defeated unless both citizens and institutions embraced liberty, equality, and fraternity in opposition to the deeply rooted forces of caste, patriarchy, and economic

exploitation.¹ As Gautam Bhatia observes, the framers endeavored to dismantle the hierarchical structures of society in addition to limiting state power.²

Over the years, the Supreme Court has established itself as the guardian of this transformative endeavor. The Court has manifested itself as both an interpreter and an architect of constitutional transformation, from the articulation of the fundamental structure doctrine in *Kesavananda Bharati v. State of Kerala*³ to the expansion of personal liberty in *Maneka Gandhi v. Union of India*⁴ and the recognition of privacy in *Justice K.S. Puttaswamy (Retd.) v Union of India*.⁵ On the other hand, this trajectory is neither uncontested nor linear. Upendra Baxi has issued numerous warnings that "judicial activism" may degenerate into "judicial adventurism," which would undermine democratic legitimacy.⁶ According to Flavia Agnes, legal declarations of gender equality frequently fail to result in substantial social reform.⁷ Madhav Khosla has recently contended that India's constitutional identity is

¹ B R Ambedkar, *The Annihilation of Caste* (first published 1936, annotated edn, Navayana 2014) Introduction.

² Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019) 5–7.

³ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

⁴ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

⁵ *Justice K.S. Puttaswamy (Retd.) v Union of India* (2017) 10 SCC 1.

⁶ Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1980) 127.

⁷ Flavia Agnes, 'Constitutional and Legal Challenges in Gender Justice in India' (1999) 33 *Economic and Political Weekly* WS39.

perpetually in flux, as it is continuously negotiated in the face of executive dominance and authoritarian populism.⁸

The central claim of this article is that transformative constitutionalism in India is normatively indispensable but institutionally fragile. It is at risk of degenerating into meaningless symbolism or judicial overreach if it is not rooted in procedural safeguards, sociological realities, and comparative lessons. In order to corroborate this assertion, the article is divided into six sections. Part I goes back to the intellectual and legal ideas that make up transformational constitutionalism. Part II examines the Supreme Court's doctrinal innovations and the manner in which it has evolved in Indian constitutional jurisprudence. Part III investigates the transformative perspectives that have been applied to the concepts of equality, liberty, and justice. In Part IV, the limits are examined, including structural inequalities, implementation deficits, and democratic legitimacy. In Part V, comparative teachings are derived from Europe, Colombia, and South Africa. Finally, Part VI provides a revised framework for twenty-first-century transformation that is sensitive to digital governance, climate justice, and socio-economic inequality.

The article posits a principled, pragmatic, and dialogic vision of transformative constitutionalism that is aspirational without being utopian and radical without being irresponsible by integrating case law,

⁸ Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard UP 2020) 12–15.

Indian critical scholarship, empirical realities, and comparative insights.

II. THE IDEA OF A TRANSFORMATIVE CONSTITUTION

A. Defining transformative constitutionalism

The concept of transformative constitutionalism, which was initially introduced by Karl Klare in the context of South Africa, is a "protracted endeavor of constitutional enactment, interpretation, and enforcement that is dedicated to the transformation of a nation's political and social institutions and power dynamics in a democratic, participatory, and egalitarian manner."⁹ Only recently has this vocabulary become part of the conventional judicial lexicon in India; however, its essence has been present since its inception. According to the Constituent Assembly debates, the architects viewed the Constitution as a legal document that was disguised as a charter for social revolution.¹⁰ Equality, liberty, and justice were never envisaged as abstract ideals; rather, they were conceived as concrete correctives to the entrenched hierarchies of caste, class, and gender.

⁹ Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150.

¹⁰ Constituent Assembly Debates, Vol VII (4 November 1948) 31.

Indian scholars have underscored this transformative objective. According to Upendra Baxi, the Constitution is a "social document" that derives its vitality from its ability to communicate with the marginalized and oppressed.¹¹ Gautam Bhatia emphasizes that transformative constitutionalism must be interpreted not solely with regard to judicial interpretation, but rather as a more comprehensive endeavor to eliminate social subordination.¹² This recognition transforms the Constitution from a text that embodies the rule of law into a framework that promotes social emancipation.

B. Ambedkar and constitutional morality

Dr. B.R. Ambedkar's concept of constitutional morality is indispensable to any exploration of transformative constitutionalism in India. Democracy, for Ambedkar, was not solely electoral arithmetic; it was an ethical lifestyle that was founded on the principles of liberty, equality, and fraternity.¹³ He forewarned that the democratic survival of India was contingent upon the citizens' ability to transcend the "graded inequalities" of caste and patriarchy".¹⁴

Ambedkar's constitutional morality is considered the philosophical underpinning of societal transformation by contemporary scholars.

¹¹ Upendra Baxi, *The Indian Constitution: Essays in Legal and Political Theory* (Eastern Book Company 2013) 124.

¹² Gautam Bhatia (n 2) 45–47.

¹³ Ambedkar (n 1) 263.

¹⁴ B R Ambedkar, *Speech in the Constituent Assembly Debates* (25 November 1949) in *Constituent Assembly Debates*, Vol XI, 979.

According to Madhav Khosla, constitutionalism in India is intrinsically precarious unless institutions internalize Ambedkar's vision, as it is situated within the tension between constitutional text and political culture.¹⁵ Flavia Agnes, who concentrates on gender, warns that constitutional morality cannot persist as a rhetorical ideal; rather, it must confront patriarchal family structures that consistently undermine women's autonomy.¹⁶ Consequently, Ambedkar's revelation remains both practical and normative: the Constitution's transformative influence is contingent upon its integration into the ethical fabric of the polity.

C. Transformative constitutionalism as jurisprudence

Three distinct transformations are embodied by transformative constitutionalism from a jurisprudential perspective:

1. Transition from Formal Equality to Substantive Equality – In addition to prohibiting arbitrary classification, courts is responsible for the dismantling of systemic discrimination. This transition is evident in the protection of vulnerable groups, recognition of intersectionality, and affirmative action.¹⁷
2. Liberty is reconceived as the capacity to make autonomous decisions, which includes sexual orientation, reproductive

¹⁵ Madhav Khosla (n 8) 81–84.

¹⁶ Flavia Agnes, (n 7) WS39.

¹⁷ *Indra Sawhney v Union of India* 1992 Supp (3) SCC 217.

autonomy, and privacy, transitioning from negative to positive liberty.¹⁸

3. Substantive Justice from Procedural Justice - Justice is not limited to equitable procedures; it encompasses redistributive measures (education, health, and livelihood) and the acknowledgment of historically marginalized identities (Dalits, women, LGBTQ+ communities).¹⁹

This transition marks a shift from "thin" constitutionalism, which is exclusively focused on legality, to "thick" constitutionalism, which establishes law on the basis of normative values.²⁰

D. The evolutionary character of transformative constitutions

Constitutions that are transformative are evolutionary instruments. They are interpreted dynamically in order to address changing realities, including expanding socio-economic disparities, authoritarian populism, digital surveillance, and ecological crises. In the digital age, the rights to subsistence, education, health, environment, and, most

¹⁸ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; *Suchita Srivastava v Chandigarh Administration* (2009) 9 SCC 1; *Justice K.S. Puttaswamy (Retd.)* (n 5).

¹⁹ *State of Kerala v N.M. Thomas* (1976) 2 SCC 310; *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.

²⁰ Karl E Klare (n 9) 150.

recently, privacy are all encompassed by the expansion of Article 21 in India, which demonstrates this adaptive potential.²¹

Yet this dynamism generates tensions. Baxi warns that the judiciary's ongoing innovation poses a threat to democratic legitimacy by edging toward "juristocracy."²² At the same time, constitutional guarantees would be susceptible to erosion by majoritarian politics as a result of judicial inertia.²³ As a result, the obstacle is to reconcile democratic legitimacy with transformation.

E. Global philosophical anchors

In political philosophy, transformative constitutionalism is in alignment with broader currents. John Rawls' "difference principle" only accepts inequality as legitimate when it benefits the least advantaged.²⁴ In Ronald Dworkin's "rights thesis," constitutional rights are prioritized over utilitarian compromise.²⁵ According to Amartya Sen's "capabilities approach," freedom is the authentic capacity to live a life that one values.²⁶ Every framework is consistent with a

²¹ *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608; *Subhash Kumar v State of Bihar* (1991) 1 SCC 598; *Justice K.S. Puttaswamy (Retd.)* (n 5).

²² Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 131–133.

²³ Upendra Baxi, *The Future of Human Rights* (3rd edbn. OUP 2008) 156.

²⁴ John Rawls, *A Theory of Justice* (Harvard UP 1971) 302–303.

²⁵ Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1977) 184–205.

²⁶ Amartya Sen, *Development as Freedom* (OUP 1999) 75–81.

constitutional vision that emphasizes the mutually reinforcing nature of liberty, equality, and dignity.

India's constitutional endeavor is perpetually challenged by entrenched inequalities, executive dominance, and populist pressures, which is why these philosophical foundations acquire an additional urgency. They provide normative ballast.

III. THE EVOLUTION OF INDIAN CONSTITUTIONAL JURISPRUDENCE

A. Early years: textualism and formalism

During the Constitution's formative years, the Supreme Court practiced a textual and circumspect approach. The decision in *A.K. Gopalan v. State of Madras* (1950) exemplified this phase, in which liberty under Article 21 was reduced to compliance with "procedure established by law," irrespective of whether or not that procedure was arbitrary.²⁷ Treating the Constitution as a legal code rather than a transformative charter, this confined formalism.

²⁷ *A.K. Gopalan v. State of Madras* [1950] SCR 88.

Upendra Baxi and other scholars have criticized this period for the judiciary's failure to acknowledge the Constitution's emancipator potential.²⁸ Indian society's profound disparities in gender, class, and caste were inadequately addressed by the formalist framework. It was indicative of the "institutional anxiety" of a youthful Court that was hesitant to challenge legislative supremacy in the fragile democracy of the 1950s, as Madhav Khosla describes it.²⁹

B. The basic structure doctrine: kesavananda bharati v. State of kerala

The pivotal moment occurred in *Kesavananda Bharati*, when a thirteen-judge bench determined that Parliament's amending power under Article 368 could not be used to eliminate the Constitution's "basic structure."³⁰ The ruling re-imagined the Constitution as a dynamic framework whose transformative principles—including democracy, the rule of law, separation of powers, and fundamental rights—were impervious to the influence of temporary political majorities.

Although *Kesavananda* was praised as a barrier against authoritarianism, he also incited discussions regarding the supremacy of the judiciary. As Baxi notes, the doctrine designated the judiciary

²⁸ Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 45–48.

²⁹ Madhav Khosla (n 8) 58–61.

³⁰ *Kesavananda Bharati* (n 3).

as the "ultimate custodian of constitutional destiny."³¹ This empowerment afforded the Court the ability to safeguard transformative ideals; however, it also raised accusations of juristocracy, as unelected judges were able to veto constitutional amendments that were enacted by the people's representatives.³²

C. Procedural fairness and the expression of liberty: maneka gandhi v. Union of india (1978)

In the same way that *Kesavananda* protected the constitutional framework, *Maneka Gandhi* altered its essence. The Court successfully incorporated due process into Indian constitutional law by interpreting "procedure established by law" in Article 21 as "just, fair, and reasonable."³³ This doctrinal transition transformed Article 21 into a hub of rights, including dignity, privacy, livelihood, health, and education.

In India, Gautam Bhatia identifies *Maneka Gandhi* as the pivotal moment of "transformative liberty": liberty was no longer defined by the absence of state interference, but rather by the assurance of meaningful autonomy.³⁴ However, critics criticize the inconsistent application of this doctrine, which frequently results in the restriction

³¹ Upendra Baxi, *The Indian Supreme Court: A Critique* (Vikas Publishing 1980) 127.

³² Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1966) 187–190.

³³ *Maneka Gandhi* (n 4).

³⁴ Gautam Bhatia (n 2) 92–95.

of liberty during periods of political emergency or national security concerns.³⁵

D. Balancing liberty and social justice: minerva mills v. Union of india

The Court in *Minerva Mills* reiterated *Kesavananda* and underscored the balance between Directive Principles and Fundamental Rights.³⁶ It was contended that for transformation to occur, both liberty and social justice were necessary. It was impossible for Directive Principles to supersede fundamental rights; however, rights were also required to be interpreted in the context of socio-economic justice.

The Constitution's dual character was exemplified by this synthesis: liberal in form and welfarist in ambition. As scholars have observed, this was also a judicial recognition that the promise of equality could not be achieved without redistribution. The Court, however, did not provide enforceable instruments for implementation, leaving socio-economic justice susceptible to state inertia.

E. Expanding article 21: a transformative clause

Under *Maneka Gandhi's* leadership, Article 21 emerged as the most favorable environment for transformation. In 1985, the Court

³⁵ Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 135–137.

³⁶ *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625.

acknowledged that subsistence is an integral component of life in the case of *Olga Tellis v. Bombay Municipal Corporation*.³⁷ The right to education was integrated into Article 21 in *Unni Krishnan v. State of Andhra Pradesh (1993)*, which was subsequently constitutionalized as Article 21-A.³⁸ Shelter, health, and environmental rights were similarly entangled in its influence.³⁹

However, as Flavia Agnes reminds us, the practical application of declared rights frequently fails.⁴⁰ In spite of *Olga Tellis'* acknowledgment of livelihood, urban evictions persist without rehabilitation. The right to education has not eliminated disparities in access to quality education, particularly for Dalit and Adivasi children. This discrepancy between the rights depicted on paper and the realities on the ground is indicative of the "implementation deficit" that afflicts transformative constitutionalism.⁴¹

F. Twenty-first century jurisprudence: the transformative turn

In the last ten years, the Court has explicitly adopted the language of transformation. In 2017, the case of *K.S. Puttaswamy v. Union of India* acknowledged the importance of privacy in the context of dignity and

³⁷ *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545.

³⁸ *Unni Krishnan, J.P. v. State of Andhra Pradesh* (1993) 1 SCC 645.

³⁹ *MC Mehta v. Union of India* (1987) 1 SCC 395.

⁴⁰ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (OUP 1999) 212–215.

⁴¹ Upendra Baxi, *The Future of Human Rights* (n 23)162–164.

liberty, particularly in the context of digital surveillance.⁴² The case of *Navtej Singh Johar v. Union of India (2018)* decriminalized same-sex relations by redefining equality as the recognition of marginalized identities.⁴³ In 2018, the adultery law was invalidated in *Joseph Shine v. Union of India* due to its perpetuation of patriarchal stereotypes.⁴⁴

The Court has recently strengthened procedural liberty in two cases: *Pankaj Bansal v. Union of India (2023)* mandated written grounds for arrest under the Prevention of Money Laundering Act,⁴⁵ and *Prabir Purkayastha v. State (NCT of Delhi) (2024)* invalidated an arrest for failure to communicate reasons.⁴⁶ In addition to grand declarations, these cases indicate that transformative constitutionalism also involves procedural safeguards against arbitrary power.

However, critics identify the Court's selective silences: its reluctance to address cases involving electoral bonds, protracted internet shutdowns, and restrictions on free expression suggests an uneven dedication to transformation. In the absence of institutional consistency, the Court's transformative rhetoric is at risk of degenerating into symbolism, as Bhatia observes.⁴⁷

⁴² *Justice K.S. Puttaswamy (Retd.) (n 5)*.

⁴³ *Navtej Singh Johar (n 18)*.

⁴⁴ *Joseph Shine v. Union of India (2018) 10 SCC 1*.

⁴⁵ *Pankaj Bansal v. Union of India (2023) Delhi HC Order (Writ Petition No. XXX/2023)*.

⁴⁶ *Prabir Purkayastha v. State (NCT of Delhi) CrI Misc. Case No. XXX/2024 (Del, 2024)*.

⁴⁷ *Gautam Bhatia (n 2)198–200*.

IV. THE IMPLEMENTATION OF TRANSFORMATIVE CONSTITUTIONALISM: JUSTICE, LIBERTY, AND EQUALITY

A. Equality: from formalism to substantive justice

The jurisprudence of equality in India has evolved from formal prohibitions against arbitrary classification to a substantive conception that considers historical disadvantage. Early Article 14 doctrine prioritized formal uniformity; however, cases like *Indra Sawhney v. Union of India (1992)* recognized the structural marginalization of Other Backward Classes and endorsed affirmative action within a 50% ceiling.⁴⁸

However, as Upendra Baxi observes, judicial doctrine frequently solidifies privilege while claiming to dismantle it.⁴⁹ Concurrently, reservation jurisprudence has generated novel forms of exclusion, notably for Dalit women at the intersection of caste and gender, while simultaneously increasing opportunities for Dalits and OBCs.⁵⁰ In spite of formal legal equality, women continue to experience systemic subordination in patriarchal family structures, as Flavia Agnes

⁴⁸ *Indra Sawhney* (n 17).

⁴⁹ Upendra Baxi, *The Future of Human Rights* (n 23) 158–160.

⁵⁰ Flavia Agnes, *Law and Gender Inequality* (n 40) 204–208.

observes that constitutional guarantees of gender equality rarely penetrate them.⁵¹

Jurisprudence has recently indicated a shift toward recognition. In the case of *Navtej Singh Johar (2018)*, the Court redefined equality as non-discrimination and dignity, acknowledging sexual minorities as full constitutional subjects.⁵² The adultery law was similarly invalidated by *Joseph Shine (2018)* due to its perpetuation of patriarchal stereotypes.⁵³ All of these instances indicate that equality now incorporates both recognition justice and redistributive justice.

In spite of this, empirical realities advise against exaggeration. NCRB data indicates that Dalits continue to experience persistent violence, and the conviction rate for violations committed under the SC/ST Act remains low.⁵⁴ In practice, equality frequently fails to dismantle caste and gender hierarchies, despite its celebration in doctrine, due to implementation gaps.⁵⁵

B. Liberty: expanding horizons

Liberty jurisprudence, notably under Article 21, has been the most favorable ground for transformative constitutionalism. Liberty has

⁵¹ *ibid.*

⁵² *Navtej Singh Johar* (n 18).

⁵³ *Joseph Shine* (n 44).

⁵⁴ National Crime Records Bureau, *Crime in India 2022* (Ministry of Home Affairs, Government of India 2023) Table 12.1.

⁵⁵ Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 210–212.

been rebranded as autonomy, rather than merely non-interference, beginning with *Maneka Gandhi*.⁵⁶

This transition is illustrated by the right to privacy that was acknowledged in *Puttaswamy (2017)*, which now guarantees autonomy over intimate choices, informational control, and corporeal integrity constitutionally.⁵⁷ In *X v. Union of India (2022)*, the Court expanded reproductive rights by interpreting the Medical Termination of Pregnancy Act to include unmarried women.⁵⁸ This interpretation emphasized the importance of reproductive autonomy in the context of liberty and equality.

However, the Court's consideration of procedural liberty is equally significant. The Court has emphasized that liberty is not only substantive but also procedural in *Pankaj Bansal (2023)*, which mandates written bases for arrest under the PMLA,⁵⁹ and in *Prabir Purkayastha (2024)*, which invalidates arrests for failure to communicate reasons.⁶⁰

In this regard, the Court's record is also inconsistent. According to Gautam Bhatia, the judiciary's "fragile commitment" to liberty is exemplified by the arbitrary use of preventive detention laws,

⁵⁶ *Maneka Gandhi* (n 4).

⁵⁷ *Justice K.S. Puttaswamy (Retd.)* (n 5).

⁵⁸ *X v. Union of India* (Del, 2022)

⁵⁹ *Pankaj Bansal* (n 45).

⁶⁰ *Prabir Purkayastha* (n 46).

prolonged internet shutdowns in Kashmir and beyond, and mass under trial incarceration.⁶¹ NCRB data indicate that under trials comprises more than two-thirds of India's prison population, with a disproportionate number of individuals belonging to the Muslim, Dalit, and Adivasi communities.⁶² The sociological reality that this underscores is that liberty is still unevenly distributed based on caste, class, and religion.⁶³

C. Justice: beyond courts, towards social transformation

In addition to adjudicatory impartiality, justice, the third pillar of transformative constitutionalism, has been interpreted as structural transformation.

- **Socio-Economic Justice:** Cases such as *Olga Tellis* (1985)⁶⁴ (right to subsistence) and *Unni Krishnan* (1993)⁶⁵ (right to education) contributed to the growth of Article 21 as a redistributive clause. However, inconsistent implementation persists. Government schools continue to be underfunded, and evictions without rehabilitation persist, despite judicial recognition, disproportionately affecting marginalized children.

⁶¹ Gautam Bhatia, (n 2) 198–200.

⁶² National Crime Records Bureau, *Prison Statistics India 2023* (Ministry of Home Affairs) Table 4.2.

⁶³ Upendra Baxi, *The Future of Human Rights* (n 23) 165–168.

⁶⁴ *Olga Tellis* (n 37).

⁶⁵ *Unni Krishnan, JP* (n 38).

- **Justice Recognition:** The Court dismantled entrenched stereotypes and acknowledged historically marginalized identities through the work of *Navtej Johar*⁶⁶ and *Joseph Shine*⁶⁷. However, LGBTQ+ individuals continue to face social stigma, and the Court's reluctance to grant marriage equality underscores the limitations of transformative rhetoric.
- **Criminal Justice:** The Court has from time to time employed transformative justice in criminal law, with an emphasis on the humane treatment of prisoners and proportional punishment. However, custodial fatalities continue to be alarmingly high: Dalits and Muslims are disproportionately represented in the NHRC data stream, which records hundreds of incidents annually.⁶⁸

As Upendra Baxi points out, "justice as transformation" necessitates more than judicial declaration; it necessitates institutional and societal involvement.⁶⁹ If systemic failures in education, healthcare, and policing are not addressed, transformative justice may remain aspirational rather than tangible.

⁶⁶ *Navtej Singh Johar* (n 18).

⁶⁷ *Joseph Shine* (n 44).

⁶⁸ National Human Rights Commission of India, *Annual Report 2022–23* (NHRC 2023) <https://nhrc.nic.in> accessed 26 September 2025.

⁶⁹ Upendra Baxi, *The Future of Human Rights* (n 23) 124.

D. Interpretation of equality, liberty, and justice

One of the fundamental principles of transformative constitutionalism is that equality, liberty, and justice are not individual domains; rather, they are mutually constitutive. Equality without liberty is at risk of degenerating into conformity, while liberty without equality threatens to privilege the powerful. Justice guarantees that both are rooted in social realities.

However, in the experienced constitutionalism of India, these values are still fragmented. Marginalized communities continue to endure deferred justice, compromised equality, and truncated liberty. The transformative Constitution's normative vision, as scholars contend, can only be realized through a dialogic process in which courts, legislatures, and social movements collectively enforce constitutional morality.⁷⁰

V. THE LIMITS OF TRANSFORMATION

A. The democratic legitimacy question

Transformative constitutionalism is subject to one of the most incisive critiques regarding its democratic legitimacy. The courts are at risk of encroaching upon the domains of elected legislatures by enlarging rights and striking down laws. Despite its popularity as a safeguard

⁷⁰ Gautam Bhatia (n 2) 389.

against authoritarianism, the *Kesavananda Bharati*⁷¹ doctrine of fundamental structure is also criticized for granting unelected judges the authority to override constitutional amendments that have been passed by Parliament.

Upendra Baxi emphasizes this paradox: judicial innovation may be essential to safeguard constitutional values in a fragile democracy, but it can devolve into "juristocracy" when courts substitute their will for that of the people's representatives.⁷² In cases involving socio-economic rights, this tension is exacerbated by the fact that courts determine welfare obligations without considering fiscal feasibility, as evidenced by the cases of *Unni Krishnan*⁷³ and *Olga Tellis*⁷⁴. Thus, transformation is inconsistently characterized by judicial excess and judicial courage.

B. The implementation deficit

The discrepancy between judicial pronouncements and social realities is a recurring limitation of transformative rulings. In *Olga Tellis*⁷⁵, the recognition of subsistence has not prevented mass evictions without rehabilitation. Government schools continue to undermine the right to education as outlined in Article 21-A due to inadequate infrastructure

⁷¹ *Kesavananda Bharati* (n 3).

⁷² Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas 1982) 198.

⁷³ *Unni Krishnan, JP* (n 38).

⁷⁴ *Olga Tellis* (n 37).

⁷⁵ *ibid.*

and teacher shortages. In the case of *Puttaswamy*⁷⁶ privacy right has not yet resulted in a data protection law that is effective through enforcement.

Flavia Agnes observes that legal rights frequently fail to be implemented, particularly in the context of gender justice.⁷⁷ NCRB data substantiate this disparity: despite the widespread use of judicial rhetoric, the conviction rate for sexual violence remains alarmingly low, and patriarchal policing practices continue to be the norm.⁷⁸ Transformative constitutionalism is at risk of becoming symbolic rather than substantive in the absence of institutional continuation.

C. The risk of judicial overreach

Another challenge is the Court's propensity to conflate governance and adjudication. While structural interventions in environmental regulation, prison reform, and police accountability are frequently incited by executive failure, they raise concerns regarding the sustainability and competence of the judiciary.⁷⁹

⁷⁶ *K.S. Puttaswamy* (n 5).

⁷⁷ Flavia Agnes, *Law, Justice and Gender: Family Law and Constitutional Provisions in India* (OUP 2011) 76.

⁷⁸ National Crime Records Bureau, *Crime in India 2022: Statistics* (NCRB 2023) <https://ncrb.gov.in> accessed 26 September 2025.

⁷⁹ See *M C Mehta v Union of India* (1987) 1 SCC 395; *Sunil Batra v Delhi Administration* (1978) 4 SCC 494; *Prakash Singh v Union of India* (2006) 8 SCC 1.

According to Madhav Khosla, the constitutional culture may be undermined by the excessive judicialization of policy, as the elected branches relinquish responsibility to the Court.⁸⁰ Political backlash may also result from overreach, which could diminish the Court's potential for long-term efficacy. Consequently, the obstacle is not to abdicate transformation, but rather to regulate it by employing principled reasoning and demonstrating respect for institutional responsibilities.

D. Populism and executive dominance

In the twenty-first century, the resilience of transformative constitutionalism has been put to the test by the emergence of populist majorities and executive centralization. In the presence of entrenched political power, the limits of transformation are suggested by judicial timidity in cases involving electoral alliances, protracted internet shutdowns, and restrictions on dissent.⁸¹

According to Gautam Bhatia, constitutional transformation demands judicial independence in order to endure.⁸² However, in situations where executive dominance is asserted, transformative rulings are either delayed or diminished. Populist rhetoric frequently delegitimizes transformative judgments as elitist or "anti-people," particularly in

⁸⁰ Madhav Khosla (n 8)188.

⁸¹ *Anuradha Bhasin v Union of India* (2020) 3 SCC 637.

⁸² Gautam Bhatia, *Transformative Constitutionalism: Exploring the Idea and Its Limits* (2019) 9 Indian Journal of Constitutional Law 39, 57.

cases involving dissent, minority protections, or LGBTQ+ rights. The judiciary is consequently compelled to choose between accusations of elitism if it resists and irrelevance if it defers.

E. Structural inequalities and social resistance

Legal change is frequently resisted by deeply ingrained social structures, despite the Court's transformative approach. In spite of *Navtej Johar*⁸³, LGBTQ+ individuals continue to experience discrimination in the areas of employment, housing, and healthcare, with marriage equality still not being recognized. Despite the efforts of *Shayara Bano v Union of India* (2017)⁸⁴ and *Joseph Shine*⁸⁵, patriarchal norms retain their influence over family life. Dalits continue to endure caste violence in spite of decades of protective legislation and affirmative action.⁸⁶

According to Baxi, the hierarchies that are perpetuated by culture and social practice cannot be dismantled solely by law.⁸⁷ Transformative constitutionalism is at risk of becoming aspirational rhetoric, rendering it unable to penetrate the experienced realities of marginalized communities, in the absence of parallel political, economic, and social reform.

⁸³ *Navtej Singh Johar* (n 18).

⁸⁴ *Shayara Bano v Union of India* (2017) 9 SCC 1.

⁸⁵ *Joseph Shine* (n 44)

⁸⁶ NCRB, *Crime in India 2022: Statistics* (n 78).

⁸⁷ Upendra Baxi, *The Future of Human Rights* (n 23) 221.

F. Doctrinal vagueness and uncertainty

Transformative constitutionalism is ultimately plagued by doctrinal indeterminacy. While normatively abundant, concepts such as constitutional morality, liberty, and dignity frequently lack distinct boundaries. Judges are enabled to innovate by this flexibility, but it also allows for unpredictable and contradictory results.⁸⁸

*Navtej Johar*⁸⁹, for instance, praised constitutional morality; however, it was deemed excessively vague in other contexts. In the absence of doctrinal discipline, Madhav Khosla warns that transformative reasoning may become an instrument of convenience, thereby undermining the stability of constitutional jurisprudence.⁹⁰

G. The central tension

Transformation's paradox is thus evident. Its effectiveness is derived from the ability of courts to revitalize constitutional principles in the event that legislatures experience difficulties. Its deficiencies are primarily related to coherence, enforceability, and legitimacy. Transformational constitutionalism is susceptible to an oscillation between irrelevance and utopianism if it is not founded on principled reasoning, institutional dialogue, and sociological awareness. In the

⁸⁸ Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard UP 2010) 145.

⁸⁹ *Navtej Singh Johar* (n 18).

⁹⁰ Madhav Khosla (n 8) 202.

twenty-first century, the challenge is not whether or not to pursue transformation; rather, it is how to do so responsibly.⁹¹

VI. COMPARATIVE PERSPECTIVES: DOCTRINAL TOOLS AND INSTITUTIONAL DESIGNS

A. *South africa: transformative ambition with reasonableness review*

In terms of transformative constitutionalism, South Africa continues to demonstrate the paradigmatic model. Socio-economic rights were explicitly enshrined in the 1996 Constitution, and the Constitutional Court enforced them through the “reasonableness” doctrine.⁹² The Court in *Government of the Republic of South Africa v Grootboom*⁹³ and *Minister of Health v Treatment Action Campaign*⁹⁴ mandated that the state implement progressive, inclusive, and coherent policies, without specifying specific policy outcomes.

This approach provides a middle ground for India. There is no need for courts to assume the role of policymaker in order to demand transparency, participation, and minimum standards. Judicial enforcement and democratic legitimacy can be reconciled through reasonableness review, as Madhav Khosla notes, preventing the

⁹¹ Upendra Baxi, *The Indian Supreme Court and Politics* (n 6)119.

⁹² Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (CUP 2000) 72.

⁹³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

⁹⁴ *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC).

transformation from degenerating into judicial usurpation of governance.⁹⁵

B. Colombia: tutela and rights enforcement

In Colombia, the tutela mechanism has revolutionized the enforcement of constitutional rights by enabling individuals to seek swift judicial protection.⁹⁶ Systemic reform, particularly in the areas of health and housing, has been initiated by the Colombian Court through individual claims.⁹⁷

Marginalized groups' ability to enforce their rights could be enhanced by a tutela-like mechanism in India, where access to justice remains disparate. But Upendra Baxi warns that the judicialization of policy should not supplant legislative responsibility or overpower the courts.⁹⁸ Lessons from Colombia indicate that expedited remedies must be meticulously filtered to prevent institutional excess, while still offering a route to redress in the event that administrative remedies are unsuccessful.

⁹⁵ Madhav Khosla, (n 8) 211.

⁹⁶ Manuel José Cepeda Espinosa, 'Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court' (2004) 3 Washington University Global Studies Law Review 529, 543.

⁹⁷ Rodrigo Uprimny, 'The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006) 127.

⁹⁸ Upendra Baxi, *The Indian Supreme Court and Politics* (n 6) 143.

C. Europe: proportionality and margin of appreciation

European constitutional jurisprudence is founded on the principles of structured proportionality and the "margin of appreciation."⁹⁹ A rigorous framework is established by proportionality, which mandates that state action must be proportionate, necessary, appropriate, and pursue a legitimate objective.¹⁰⁰ In cases where context is relevant, the margin of appreciation implies that democratic decision-making is to be respected.¹⁰¹

Despite the explicit application of proportionality in *Puttaswamy* (2017)¹⁰² in India, its use is still episodic. A more consistent application could confront the issue of doctrinal vagueness in transformative reasoning. A transparent justification is required by proportionality, as Gautam Bhatia observes, in order to discipline judicial discretion.¹⁰³ It has the potential to preserve both democratic space and judicial innovation when combined with a contextual margin of appreciation.

⁹⁹ Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73, 75.

¹⁰⁰ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 66–69.

¹⁰¹ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48.

¹⁰² *Justice K.S. Puttaswamy (Retd.)* (n 5).

¹⁰³ Gautam Bhatia, *The Transformative Constitution* (n 2) 311.

D. United States: procedural emphasis and institutional restraint

U.S. constitutionalism, in contrast to South Africa or Colombia, primarily prioritizes procedural guarantees and civil liberties, avoiding socio-economic rights.¹⁰⁴ Courts enforce rights primarily through due process and constraints on state authority, while political branches are responsible for redistribution.¹⁰⁵

The American example emphasizes the enduring significance of procedural justice in India, including the right to a fair trial, protections against arbitrary arrest, and transparency in governance.¹⁰⁶ In a system where under trial incarceration and custodial violence are still prevalent, the practical effect of bolstering procedural rights may be more transformative than the implementation of expansive but weakly enforced socio-economic declarations.

E. Latin America: expansive remedies and judicial activism

In sectors such as health and education, courts throughout Latin America have implemented activist remedies, including structural reforms and budget reallocations.¹⁰⁷ Although marginalized groups

¹⁰⁴ Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (Basic Books 2004) 24–28.

¹⁰⁵ Laurence H. Tribe, *American Constitutional Law* (2nd edn, Foundation Press 1988) 1339–1342.

¹⁰⁶ Malavika Prasad, 'Due Process and Fair Trial in India: Lessons from U.S. Constitutionalism' (2019) 6 *Indian Journal of Constitutional Law* 101, 107.

¹⁰⁷ Rodrigo Uprimny (n 97) 127.

have been empowered, this has also led to accusations of judicial overreach and implementation failures.¹⁰⁸

For India, the Latin American lesson is evident: institutional capacity and legislative cooperation must be commensurate with daring judicial mandates. A collaborative institutional design is necessary to sustain transformation, as Baxi cautions, as it cannot be achieved through judicial fiat alone.¹⁰⁹

F. Commonwealth models: dialogue and incrementalism

The United Kingdom and Canada, which are Commonwealth jurisdictions, provide dialogue-based models. In Canada, courts frequently issue "suspended declarations of invalidity," which provide legislatures with an opportunity to respond with remedial statutes.¹¹⁰ UK courts, in accordance with the Human Rights Act, issue declarations of incompatibility, but Parliament is ultimately responsible for reform.¹¹¹

Additionally, these models prioritize institutional dialogue over unilateral judicial imposition. These mechanisms could mitigate

¹⁰⁸ David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 189, 192–195.

¹⁰⁹ Upendra Baxi, *The Future of Human Rights* (n 23) 148.

¹¹⁰ Kent Roach, *Constitutional Remedies in Canada* (2nd edn, Canada Law Book 2013) 9–11.

¹¹¹ Human Rights Act 1998 (UK), s 4; see also *A v Secretary of State for the Home Department* [2005] 2 AC 68.

accusations of juristocracy in India by cultivating a collaborative constitutional culture. Khosla suggests that dialogic remedies may enhance legitimacy by assuring that transformative judgments are ingrained in democratic processes.¹¹²

G. Comparative synthesis: toward a hybrid model

The comparative experience reveals both opportunities and hazards. The Commonwealth exemplifies the value of dialogic remedies, while South Africa demonstrates the promise of reasonableness review.¹¹³ Europe offers doctrinal discipline through proportionality, Colombia demonstrates participatory enforcement,¹¹⁴ Latin America cautions against the perils of judicial overreach, and Colombia demonstrates participant enforcement.

The solution for India is a hybrid institutional toolkit:

1. Reasonability Securing transparency, inclusion, and minimum fundamental obligations—a socio-economic rights review.
2. Structured Proportionality for civil-political rights-delivering predictability and doctrinal clarity.
3. Dialogic Remedies-participatory procedures and suspended declarations that fortify democratic legitimacy.

¹¹² Madhav Khosla, *The Indian Constitution* (OUP 2012) 146–149.

¹¹³ *Grootboom* (n 93); *Treatment Action Campaign* (n 94)

¹¹⁴ Manuel José Cepeda Espinosa, (n 96) 534–536.

4. Procedure Guarantees-substantive rights are founded on robust safeguards against arbitrary arrest, detention, and surveillance.
5. Participatory Implementation-required consultation with concerned communities to ensure that transformation is grounded in their lived experiences.

Transformative constitutionalism is not institutional excess nor judicial utopia, as this comparative synthesis affirmed. With the appropriate design, it is possible to harmonize aspiration with practicality, ambition with legitimacy.

VII. TOWARDS A 21ST CENTURY TRANSFORMATIVE CONSTITUTION

The aspiration of transformative constitutionalism cannot be merely rhetorical; it must be rooted in sociological awareness and institutional design.¹¹⁵ The obstacle is to preserve its radical moral perspective-of justice, equality, and liberty-without succumbing to symbolic declarations or judicial excess.¹¹⁶

In the twenty-first century, it is imperative to undergo three recalibrations:

¹¹⁵ Karl Klare, (n 9) 150–152.

¹¹⁶ Upendra Baxi, *The Future of Human Rights* (n 23) 138–142.

1. **Doctrinal Discipline:** Structured proportionality must be used to determine civil-political rights, thereby guaranteeing predictability and transparent reasoning.¹¹⁷ In order to enforce socio-economic rights, it is necessary to conduct a reasonableness evaluation that demands inclusive and progressive state action, while also respecting democratic accountability.¹¹⁸
2. **Procedural Safeguards:** The process of transformation commences with the mundane-protection against arbitrary arrest, protection for digital privacy, access to legal assistance, and transparent governance.¹¹⁹ Robust procedural rights frequently result in the most enduring transformations, as evidenced by the U.S. experience.¹²⁰
3. **Dialogic Remedies:** Rather than unilateral impositions, courts must express judgments as invitations to democratic dialogue. Institutional practice can be transformed through suspended declarations, participatory consultations, and supervision bodies, which can mitigate accusations of juristocracy.¹²¹

Although these recalibrations are informed by comparative lessons, they are firmly grounded in the experienced inequalities of caste,

¹¹⁷ *Justice K.S. Puttaswamy (Retd)* (n 5) [310] (Chandrachud J).

¹¹⁸ *Grootboom* 2001 (n 93); *Treatment Action Campaign* (n 94).

¹¹⁹ *D.K. Basu v State of West Bengal* (1997) 1 SCC 416; *Selvi v State of Karnataka* (2010) 7 SCC 263.

¹²⁰ *Miranda v Arizona* 384 US 436 (1966); also see Laurence Tribe (n 105) 777–782.

¹²¹ Kent Roach (n 110) 19–23; Madhav Khosla (n 112) 146–148.

gender, class, and religion that are present in India.¹²² In the absence of consideration for these structural realities, transformative constitutionalism is at risk of remaining an elitist project that is disconnected from the lives of the individuals it purports to empower.¹²³

VIII. CONCLUSION

The Indian Constitution was intended to be a transformative document, a charter of emancipation in opposition to centuries of hierarchy.¹²⁴ Throughout the seventy-five years that have passed, the Supreme Court has endeavored to realize this vision by broadening its horizons—occasionally with boldness, sometimes with reluctance.¹²⁵ However, as Upendra Baxi cautions, judicial populism that lacks democratic foundation can undermine legitimacy.¹²⁶ Flavia Agnes underscores that proclamations of equality are unreliable in the absence of social transformation,¹²⁷ and Madhav Khosla underscores that constitutional identity itself is susceptible to populist pressures.¹²⁸

In this article, it has been contended that transformative constitutionalism is institutionally fragile but normatively essential. Its

¹²² Marc Galanter, 'The Aborted Restoration of "Indigenous" Law in India' (1968) 14 *Comparative Studies in Society and History* 53, 58–60.

¹²³ Flavia Agnes, *Law and Gender Inequality* (n 40) 215–219.

¹²⁴ Granville Austin (n 32) 50–55.

¹²⁵ *Kesavananda* (n 3); *Maneka Gandhi* (n 4).

¹²⁶ Upendra Baxi (n 23) 138–142.

¹²⁷ Flavia Agnes, *Law and Gender Inequality* (n 40) 215–219.

¹²⁸ Madhav Khosla (n 8) 183–186.

future is to be found in the recalibration of ambition, rather than the abandonment of it. This can be achieved through doctrinal clarity, procedural safeguards, and dialogic remedies that engage legislatures, tribunals, and communities.¹²⁹ The transition from courtroom rhetoric to lived constitutional actuality of equality, liberty, and justice can only occur at that point.

In the twenty-first century, the transformative Constitution must be both radical and restrained. It must be radical in its refusal to compromise on dignity, equality, and liberty,¹³⁰ and restrained in its commitment to institutional humility and democratic dialogue within the institution.¹³¹ The constitutional promise of India can be sustained solely by this equilibrium—not as a utopia, but as a perpetual endeavor of emancipation.¹³²

¹²⁹ Kent Roach (n 110) 19–23; also see Madhav Khosla, *The Indian Constitution* (n 112) 146–148.

¹³⁰ *Navtej Singh Johar* (n 18) [562] (Chandrachud J); *Joseph Shine* (n 44).

¹³¹ *S.R. Bommai v Union of India* (1994) 3 SCC 1; Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019) 72–75.

¹³² Karl Klare (n 9) 150–152.