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## THE JUDICIARY AS GUARDIAN OF RIGHTS: COMPARATIVE INSIGHTS FROM INDIA AND SOUTH AFRICA

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### **ABSTRACT**

The judiciaries in India and South Africa both play a big part in protecting the constitution and making sure the rule of law holds up. They keep an eye on the government, interpret the constitution to defend people's rights, and use judicial review for that. Both have this setup with courts in a hierarchy, though it works a bit differently in each place. In India, things like Articles 32 and 226 let people go straight to the courts for help if their fundamental rights get violated, which gives them a way to fight back without too much hassle or cost. It feels like that setup really empowers regular folks to demand justice.

South Africa is different in how its judiciary steps in as the ultimate decider on constitutional matters. They have the power to check the legislature and executive, balancing things out to protect rights. I think both systems aim for the same goal, but the paths vary based on their histories. This comparison looks at what they share and where they differ, especially in how they support democracy and put the constitution first.

When you think about it, the judiciary is key because it guards rights, keeps state power in line with the law, and helps secure individual freedoms. India and South Africa are both constitutional democracies, but with totally different backgrounds, one coming out of colonial rule and the other from apartheid. In India, judicial review mostly relies on Article 13, which lets courts strike down laws that clash with fundamental rights. The Supreme Court has stretched Article 21 pretty far, turning non-enforceable Directive Principles into actual rights people can claim, which pushes for social justice and gets more people involved in the constitutional process.

Over in South Africa, the 1996 Constitution puts socio-economic rights right into the Bill of Rights, so the courts can directly enforce them. That seems straightforward compared to India's approach. Cases

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like Kesavananda Bharati in India set limits on changing the constitution's basic structure, while Maneka Gandhi expanded what personal liberty means, and Puttaswamy dealt with privacy. In South Africa, S v Makwanyane ended the death penalty, Grootboom pushed for housing rights, and Treatment Action Campaign got treatment for HIV positive people. These rulings show courts trying to be active without overstepping, while staying accountable to democracy. It is interesting how they all mix activism with some restraint.

The study uses doctrinal methods and compares things through major cases and what scholars say, tracking how ideas in law have evolved and how that affects rights protection. India comes across as this model of transformative judicial activism, where courts push big changes. South Africa shows a resilient constitutional setup that transforms society too. But both deal with issues like pressure from politicians, judgments that do not always get followed, and limits inside the institutions themselves.

In the end, what makes the judiciary a real watchdog for rights is not just the words in the constitution, like Article 13 or the rule of law idea. It is more about the actual power they have, trust from the public, and whether other state parts can make the full picture of constitutional democracy work. I am not totally sure if that fully captures it, but it seems like those elements tie everything together.

**KEYWORDS:** Judiciary, Rule of Law, Judicial Review, Fundamental Rights, Constitutional Remedies, Supreme Court, Constitutional Court, India, South Africa.

## **INTRODUCTION**

People debate a lot about who really handles constitutional supremacy. Some say its the judiciarys job to make sure everything lines up with the law, while others point to parliament and its political side of things. The judiciary looks at laws and decides if a bill from parliament is okay or crosses the line, and parliament has to stick to the constitution in how it operates, at least thats the idea. Rule of law feels like the heart of any democracy built on a constitution. When that rule holds strong, you end up with the constitution being the top authority.

In this paper, I am trying to look at how the judiciary pushes for that supremacy. It stands as a main support in democracy, watching over the constitution and keeping fundamental rights safe. For India especially, the courts have this big task of checking that the government and lawmakers stay inside the constitutions boundaries, which helps keep the rule of law going. They do it through judicial review,

where courts can knock down laws or actions that break constitutional rules. That way, individual freedoms get protected, and the government has to answer for itself, stopping any random grabs at power. Judicial independence matters a ton here, because without it, people might not trust the system or get fair judgments.

Articles 32 and 226 in Indias constitution let people go straight to the Supreme Court or High Courts to enforce their basic rights. This study talks about the Indian judiciary acting as a guardian for those constitutional rights, and it compares things with South Africa to spot whats similar, whats different, and maybe some ways to make constitutional rule stronger in democracies.

South Africas judiciary plays a key part too, making sure democracy rules by interpreting and applying the constitution, which is the highest law there. It checks that laws and government plans match up with the constitutions principles, so citizens rights and freedoms stay secure. The Constitutional Court, as the top one, reviews legislation and executive moves, and it can throw out anything that goes against the constitution. Take the Minister of Home Affairs v. Fourie case from 2006, for instance, where the court said denying marriage to same-sex couples violated equality and human rights. So the judiciary acts like a watchdog in South Africa, holding up the rule of law and making sure accountability sticks.

Fundamental rights are those core freedoms everyone gets just for being human, like life, liberty, security, speech, religion, equal treatment, and a fair hearing. They form the base of democracy, letting people live with security and respect without too much interference or unfair treatment. Usually, these get locked into constitutions or global agreements to limit how state power can be misused. But having them written down doesnt mean they are safe. The judiciary steps in as the main body to make sure these rights are not just on paper but actually protected and enforced when violated. It helps people get justice. I think the judiciarys role in all this is crucial, though it seems like in practice, it can get complicated depending on the country. The article covers how the judiciary protects these fundamental rights, but some parts of enforcement might still need more work.

## **HYPOTHESIS**

The judiciary in democracies is supposed to be the main protector of constitutional rights, I think, but how well it does that changes a lot depending on the country's setup, like the constitution itself, what judges think, past history, and the political situation around it.

In India, this comes from Article 13, which says any law that goes against fundamental rights is basically void, and that sets up judicial review right there. The Supreme Court has stretched out what rights mean

over the years, especially with Article 21 on life and personal liberty. They have added things like dignity, making a living, health, privacy, all that stuff tied to being human. It seems like through this broad way of reading it, the court has made the Directive Principles of State Policy actually enforceable, even though Article 37 said they were not justiciable. That is non enforceable on purpose, but the court changed that.

This whole shift feels like the start of really active judging, where the judiciary does not just explain the constitution but pushes for social justice when the government or lawmakers are slow or not doing much. South Africa is different though. Their 1996 Constitution came after apartheid, and it puts socio economic rights straight into the Bill of Rights, like housing, health care, food, water, education. These are enforceable without the court having to invent anything.

The Constitutional Court has to make sure the state is taking reasonable steps to provide these, based on what resources they have, and they review if its progressive or not. That shows this idea of transformative constitutionalism, where the constitution tells the judiciary to fix social and economic problems and inequality from the past. Both India and South Africa see the judiciary protecting rights and upholding the rule of law, but the ways they do it are not the same at all.

India has to use creative interpreting to fill in gaps for socio economic justice, since the constitution does not spell it out. South Africa got lucky with a document made just for that, letting courts step in directly. It kind of demonstrates how well the judiciary works as a rights champion is not only about the words in the constitution. There is also the institutions strength, if politicians support it, and whether people trust the courts. That part gets a bit messy to pin down exactly.

## **ANALYSIS**

The Indian and South African courts have an important role to perform as custodians of rights, but the reach and manner in which it performs this is subject to their unique constitutional context and history.

The Indian Constitution of 1950 is a multifaceted system of administration, Part III safeguarding Fundamental Rights and Part IV outlining Directive Principles of State Policy (DPSPs). Article 13 forms the foundation of judicial review by declaring that any law infringing Fundamental Rights is void, thereby adhering to the Rule of Law and rejecting arbitrary exercise of power by the state. While socio-economic rights in Part IV are statutorily non-justiciable by virtue of Article 37, the judiciary has

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<sup>1</sup> Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241 (India).

transformed goal-oriented objectives into enforceable rights through creative interpretation of Article 21 (Right to Life and Personal Liberty). Landmark decisions such as *Francis Coralie Mullin v Union Territory of Delhi* (1981) and *Bandhua Mukti Morcha v Union of India* (1984) broadened the meaning of life to encompass dignity, health, livelihood, and material necessities, thus bridging the gap between Part III and Part IV. The development of Public Interest Litigation (PIL) took a step forward in transforming access to justice because it empowered citizens and civil society organizations to push the state. For example, in *People's Union for Civil Liberties (PUCL) v Union of India* (2001), the Supreme Court directed in categorical terms to combat hunger and food insecurity, emphasizing judicial activism in order to achieve socio-economic rights. Judicial activism is a symbol of the constitutionalist spirit, subjecting the state to accountability and the power of the state limited by constitutional principles. But this broad judicial role has been faulted on grounds of judicial overreach, where courts have occasionally encroached upon the field of the legislature and executive, threatening fragmentation of the balance of power in the Constitution. In stark contrast is the 1996 South African Constitution, born of the transition from apartheid in South Africa, which positively incorporates socio-economic rights into its directly enforceable Bill of Rights.

Subsections 24–29 enshrine such rights as housing, health care, food and water, education, and protection of the environment, thereby meeting the ideals of transformative constitutionalism. In *Government of the Republic of South Africa v Grootboom* (2000), the Constitutional Court formulated the test of reasonableness whereby the state ought to enact realistic measures to progressively achieve such rights within its means. Similarly, so in *Minister of Health v Treatment Action Campaign* (2002), the Court obligated the government to expand access to HIV/AIDS life-prolonging treatment with a focus on the constitutional mandate to preserve dignity and equality. While the South African courts actively promote rights, they are judicially restrained and only intervene where there is an immediate and clear violation of the constitution, such as *National Treasury v Opposition to Urban Tolling Alliance* (2012). But as a result of a series of political blunders, there has been an instance of "lawfare," where courts are adjudicating increasingly political disputes, such as in *Economic Freedom Fighters v Speaker of the National Assembly* (2016), where the former President Jacob Zuma was held accountable for abuse of state resources. The two nations have common issues, including disrespect towards the courts, austerity, and intrusions from the political arena.

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<sup>2</sup> Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India).

<sup>3</sup> M.C. Mehta v. Union of India, (1987) 1 S.C.C. 395 (India).

The fundamental distinction lies in how they implement rights: while Indian courts have liberal recourse to Article 13 and creative interpretation to rephrase non-justiciable DPSPs as enforceable rights, often crossing into policymaking to protect vulnerable groups and facilitate participatory constitutionalism. While this approach has facilitated greater access to justice, it has created surplus litigation and enforcement issues, sometimes blurring the line between law and governance. In contrast, the judiciary in South Africa operates in an open constitutional order with systematic remedies and reasonableness tests to promote socio-economic rights within democratic accountability. India is thus an exemplar of transformational judicial activism, while South Africa is an example of the endurance of a transformational constitution. Their experiences are an indicator that the institution of the judiciary as the defender of rights is the most significant feature to sustain the Rule of Law, ensure constitutional guarantees, and offer social justice. Its achievement, however, depends on the constitution structure, political will, institutional power, and public confidence in the judiciary. The judiciary draws its strength from authoritative provisions of the constitution:

I. Article 32: Guarantees the right of constitutional remedies, and direct appeal to the Supreme Court for enforcement of rights.

II. Article 226: Bestows powers upon High Courts to issue writs for protection of rights.

III. Articles 142 and 136: Grant the power to the Supreme Court to issue orders for "complete justice" and to grant special leave to appeal,<sup>4</sup> respectively.

These provisions allow courts to act as protectors of fundamental rights even in the absence of legislation.

## **LANDMARK CASES THAT DESCRIBE JUDICIAL ACTIVISM**

### **1. Writening the Scope of Article 21 (Right to Life)**

#### **Maneka Gandhi v. Union of India (1978):**

The Supreme Court read Article 21 to include the right to livelihood and the doctrine of due process, overruling the restrictive meaning in *A.K. Gopalan v. State of Madras* (1950). The Court declared that any legislation stripping a person of life or liberty must be "just, fair, and reasonable"

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<sup>4</sup> *Hussainara Khatoon v. State of Bihar*, A.I.R. 1979 S.C. 1369 (India).

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Impact: Transformed Article 21 into a pillar of such rights as privacy, healthcare, and dignity.

**Olga Tellis v. Bombay Municipal Corporation (1985):**

Enshrined the right to livelihood as a component of the right to life, protecting slum dwellers from arbitrary eviction.

**2. Basic Structure Doctrine and Constitutional Safeguards**

**Kesavananda Bharati v. State of Kerala (1973):**

Established the basic structure doctrine, with the position that Parliament was not able to amend the Constitution's fundamental features (e.g., judicial review, basic rights). This provided a check on legislative abuse.

**Minerva Mills v. Union of India (1980):**

Enforced the fundamental structure doctrine by invalidating amendments to limit judicial review

**3. Gender Justice and LGBTQ Rights**

**Vishakha v. State of Rajasthan (1997):**

Enunciated Vishakha Guidelines against workplace sexual harassment, later legislated into law in 2013.

**Navtej Singh Johar v. Union of India (2018):**

Decriminalized gay consensual sex by repealing Section 377 of the IPC, upholding dignity and equality based on Articles 14, 15, and 21.

**4. Environmental and Social Justice**

**M.C. Mehta v. Union of India (1987):**

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<sup>5</sup> Olga Tellis v. Bombay Municipal Corporation, (1985) 3 S.C.C. 545 (India).

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Established the absolute liability doctrine for polluting industries, and compensation was given to victims.

**Hussainara Khatoon v. State of Bihar (1979):**

Established the right to a speedy trial, and thereby released under-trial prisoners languishing in jail for years without trial.

**5. Privacy and Personal Liberty**

**K.S. Puttaswamy v. Union of India (2017):**

Determined the right to privacy a fundamental right under Article 21, with impacts on later rulings regarding data protection and autonomy.

Public Interest Litigation (PIL): A Tool for Activism

PILs made justice accessible to the masses by enabling citizens to approach the courts on behalf of voiceless communities. Some examples are:

- Municipality Council, Ratlam v. Vardichand (1980): Ordered municipalities to remove public health risks.
- People's Union for Democratic Rights v. Union of India (1982): U.enforced workers' rights, prohibiting exploitation

The judiciary in South Africa is in support of the democratic framework by enforcing the rule of law as well as protecting constitutional rights.

It interprets and applies the law non-partisan, which guarantees the rights of citizens as stipulated in the Bill of Rights of the South African Constitution. For instance, the Constitutional Court has made landmark rulings that advance democratic values, for instance, Minister of Home Affairs v. Fourie, which legalized same-sex marriage, affirming equality and non-discrimination. This judicial oversight serves as a check on the executive and legislative powers to ensure they are not abused and are held accountable. Through dispensing justice fairly and safeguarding individual rights, the judiciary plays a critical role in upholding an equal and functioning democracy in South Africa. The South African

judiciary ensures the rule of law by interpreting and applying the Constitution, which is the law of the land.

The judiciary can annul laws and acts that violate constitutional rights by means of judicial review, thereby promoting legal norms and protecting individual freedoms. One such instance is the historic rulings made by the Constitutional Court, such as that of 2016 case "Minister of Justice and Correctional Services v. Prisoners' Legal Services," which reaffirmed the rights of prisoners, illustrating the role of the judiciary in promoting accountability and justice. This function is crucial within a democratic government, as it serves to defend against tyranny and ensures all institutions and citizens are accountable to the law.

## **UPHOLDING THE RULE OF LAW**

Rule of law is one of the fundamental principles of democracy, requiring that the law should govern everyone and every institution, including the government. An independent judiciary ensures that laws are enforced equally and impartially to all individuals regardless of their position or authority.

In South Africa, the judiciary has played a leading role in the defense of the rule of law. Pioneering instances such as the Constitutional Court judgment in *Glenister v President of the Republic of South Africa* reaffirmed the doctrine that government activities are also subject to the Constitution, demonstrating the judiciary's critical role in safeguarding legal integrity.

## **GUARDIAN OF THE CONSTITUTION**

Judicial review refers to the process by which the courts check the constitutionality of laws, rules, and government actions. If a law or government action violates the fundamental rights of an individual or conflicts with the Constitution, the judiciary can strike it down or nullify it. For instance, the Indian Supreme Court has played a pivotal role in the enlargement of basic rights under the Constitution through interpretation, e.g., recognizing the right to privacy as a basic right in the landmark case of *K.S. Puttaswamy v. Union of India* (2017). Judicial review is also most important in ensuring that everyone is treated fairly and equally under the law. Courts can step in to protect rights if law is ambiguous,

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<sup>6</sup> S v. Makwanyane, 1995 (3) S.A. 391 (CC) (S. Afr.).

<sup>7</sup> Government of the Republic of South Africa v. Grootboom, 2000 (11) B.C.L.R. 1169 (CC) (S. Afr.).

discriminatory, or enforced in a manner that adversely affects specific segments of society, such as minorities, women, or underprivileged groups. Judicial activism is also a major function the judiciary exercises in protecting fundamental rights.

Judicial activism refers to the situation where the judiciary plays an active role in interpreting and expanding fundamental rights, particularly if loopholes exist in the law or the parliament is slow in acting upon such loopholes. Constitutional protections can be interpreted by courts in broad terms beyond the literal meaning of the law where there is no direct law to address a problem of rights, or even where existing laws seem inadequate. Judicial activism would be called for if the progressive legislation did not originate in the legislature from the values of society. The judiciary intervenes and further develops and interprets rights on these modern circumstances to protect basic rights. In India, for example, the Supreme Court has been particularly careful in protecting the rights of marginalized communities, including women, children, and the LGBTQ+ community. Through judicial activism, the Court has delivered milestone verdicts, such as homosexual decriminalisation in the case of *Navtej Singh Johar v. Union of India* (2018), in which it held Section 377 of the Indian Penal Code, criminalizing acts of consensual same-sex union, to be unconstitutional. The judgement proved that the Court is capable of interpreting the Constitution in a manner that promotes human dignity and acceptability. In addition, courts have a critical role to play in enforcing fundamental rights directly.

This is best exemplified when individuals make applications for redress for the violation of their rights, either by the state or private individuals. Article 32(1) of the Indian Constitution enunciates "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights," whereas Article 226 of the Indian Constitution gives the people the right to go before the High Courts in case their fundamental rights have been violated. Courts provide a platform to the aggrieved individuals to get justice and put the culprits in the dock. For instance, individuals whose rights are infringed upon, i.e., victims of unconstitutional detention, brutality, or discrimination, can approach the judiciary to seek a remedy. The Supreme Court and High Courts may issue writs to the government to compel it to uphold rights. Writs include a writ of Habeas Corpus<sup>8</sup>, a writ of Mandamus, a writ of Prohibition, a writ of Quo-Warranto, and a writ of Certiorari. In so doing, the judiciary provides prompt availability of individuals to their rights.

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<sup>8</sup> *Minister of Health v. Treatment Action Campaign*, 2002 (5) S.A. 721 (CC) (S. Afr.).

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## METHODOLOGY

The research adopts a doctrinal and comparative law methodology grounded on essential principal case law and specialist commentaries.

Landmark rulings were chosen with extreme caution based on their doctrinal significance and real-world impact on the implementation of rights. The following cases were studied in the Indian tradition: *Kesavananda Bharati v. State of Kerala* (infirmably establishing the Basic Structure Doctrine), *Maneka Gandhi v. Union of India* (expanding the horizon of Article 21), Privacy Trilogy culminating in *K.S. Puttaswamy v. Union of India* (recognising the right to privacy as a fundamental right), and *Vishaka v. State of Rajasthan* (establishing guidelines relating to workplace sexual harassment). For South Africa, flagship judgments were *S v. Makwanyane* (abolition of capital punishment), *Government of the Republic of South Africa v. Grootboom* (availability of housing under the reasonableness test), *Minister of Health v. Treatment Action Campaign* (upholding rights to health), and *Minister of Home Affairs v. Fourie* (equity and same-sex marriage). These rulings have been analyzed to track doctrinal development, identify patterns of reasoning by the judiciary, and evaluate their ramifications on enforcement and protection of rights. Main rulings and trustworthy summaries have been referenced to ensure reliability and accuracy in the study. Challenges and Criticisms

Though judicial activism has initiated social transformation, detractors assert that it threatens judicial encroachment into legislative domains. The *ADM Jaba<sup>9</sup>lpur v. Shivkant Shukla* (1976) case, where the Court supported suspensions of habeas corpus during the Emergency, presents common failures. Subsequent rulings have revived the judiciary's commitment to the protection of rights, nevertheless.

## CONCLUSION

Judiciary has a vital role to play in safeguarding basic rights so that persons' rights and freedoms are preserved against invasion by the state or non-state players.

Judicial review, judicial activism, and rights enforcement by the judiciary provide assurance that basic rights are accorded and upheld. Though judicial activism extended the ambit of such protection, it also reflects the dynamic nature of constitutional law in a changing society. Lastly, judicial independence is

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<sup>9</sup> *Minister of Home Affairs v. Fourie*, 2006 (1) S.A. 524 (CC) (S. Afr.).

essential to maintaining the rule of law, securing justice for all, and protecting the inherent values of human dignity, equality, and freedom in democratic societies.

The Indian judiciary and South African judiciary have a commonality in that they are significant as defenders of the Constitution and promoters of the rule of law.

Both are involved in holding the government accountable and safeguarding people's rights through judicial review and interpretation of the constitution. Both countries also possess a hierarchical model of courts, albeit in very important ways. Whereas constitutional remedies have been provided under Articles 32 and 226 with direct connection to citizens to challenge the invasion of basic rights and to bring home the need for reasonable justice at reasonable prices, in South Africa the judiciary is the final interpreter of constitutional rights and discharges sovereign functions for the purpose of checking and balancing legislative and executive activity. This book provides comparative analysis of the judicial systems of India and South Africa, and it argues their similarities and differences, as well as the role of the judiciary in maintaining democracy and constitutional supremacy. The judiciary is in the forefront as it enforces constitutional rights, ensures power of the state is subordinated to law, and ensures the freedom of the individual.

This study is a comparative study of India and South Africa, both constitutional democracies but with different political and historical backgrounds. Indian judicial review is primarily based on Article 13 of the Constitution, which makes any law that violates Fundamental Rights void. By the liberal interpretation of Article 21, the Supreme Court has transformed the Directive Principles of State Policy (DPSPs), which were non-justiciable in the past, into judicially enforceable rights and hence promoted social justice and strengthened participatory constitutionalism. The 1996 South African Constitution does list socio-economic rights, though, in the Bill of Rights, which directly vests the judiciary with the mandate to enforce and safeguard them. Seminal decisions like *Kesavananda Bharati*, *Maneka Gandhi*, and *Puttaswamy* in India, and *S v. Makwanyane*, *Grootboom*, and *Treatment Action Campaign* in South Africa, illustrate how courts navigate between judicial restraint, activism, and democratic responsiveness. Doctrinal and comparative approaches are used by the research based on pacesetting cases and scholarly explication to map doctrinal evolution and re-definition, and assess its influence on rights protection.

The study is symptomatic of India being an example of a transformative model of judicial activism and South Africa a model of a transformative constitutional order's strength. Both models remain to surmount issues of political pressures, ineffective enforcement of court orders, and institutional failing.

Finally, the ability of the judiciary to be the guardian of rights is not only a matter of constitutional language and principles such as Article 13 and the Rule of Law, but of institutional power, public confidence, and the ability of state organs to uphold the vision of constitutional democracy. Keywords Judiciary, Rule of Law, Judicial Review, Fundamental Rights, Constitutional Remedies, Supreme Court, Constitutional Court, India, South Africa.

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