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## **TRANSFORMATIVE CONSTITUTIONALISM AND SOCIAL JUSTICE: EQUALITY, RECOGNITION, AND THE ENFORCEMENT OF SOCIO- ECONOMIC RIGHTS**

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### **ABSTRACT**

The idea that a constitution is not merely a limit on power but an instrument for changing the society it governs has come to be called transformative constitutionalism. The phrase originated in South African scholarship but the practice is older and wider, and it now shapes adjudication in India, Colombia, Brazil, Kenya, and elsewhere. This article examines the idea through four fields in which it has been most consequential: the recognition of sexual and gender minorities, the pursuit of substantive gender equality, the constitutional treatment of affirmative action and reservation, and the judicial enforcement of rights to housing, health, and education. Drawing on *Navtej Singh Johar*, *Supriyo*, *Obergefell*, *National Coalition for Gay and Lesbian Equality*, *Indra Sawhney*, *Students for Fair Admissions*, *Grootboom*, *Treatment Action Campaign*, and the Colombian *tutela* jurisprudence, it argues that the transformative project has been most successful where courts have coupled a substantive conception of equality with a remedial method that engages rather than displaces the political branches. It has been least successful where recognition of a right has outrun the institutional capacity to deliver it, and where the courts have been unable to explain why some claims of transformation succeed and others, equally grounded in dignity, do not.

**Keywords:** transformative constitutionalism; substantive equality; LGBTQ+ rights; gender equality; affirmative action; reservation; socio-economic rights; dignity

### **INTRODUCTION**

Karl Klare, writing in 1998 about the new South African Constitution, described it as a document committed to "a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."<sup>2</sup> The description has

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<sup>1</sup> The author is an academic professional in the field of science and social justice.

<sup>2</sup> Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. Afr. J. on Hum. Rts. 146, 150 (1998).

proved portable. The Supreme Court of India has adopted the phrase in a series of judgments since 2018, and courts in Colombia, Kenya, and Brazil have embraced the idea if not the label. What unites them is a rejection of the view that a constitution merely freezes a settlement reached at the moment of founding. On the transformative view, the constitution looks forward; its guarantees are to be interpreted in light of the society they are meant to produce rather than the society that produced them.

The idea is easy to state and difficult to apply. A constitution that transforms society must transform it in some direction, and the direction is contested. A court that reads the constitution as an engine of change must decide which changes are constitutionally required and which are matters for politics. This article examines how courts have handled that difficulty in four fields, and draws from the comparison some tentative conclusions about when transformative adjudication succeeds.

## **RECOGNITION: SEXUAL ORIENTATION AND GENDER IDENTITY**

### ***A. Decriminalisation***

The recognition of sexual minorities is the field in which transformative adjudication has produced its clearest results. South Africa's Constitutional Court began in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, holding that the common-law offence of sodomy violated the rights to equality, dignity, and privacy.<sup>3</sup> Ackermann, J., emphasised that the harm of criminalisation lay not only in the risk of prosecution but in the stigma that the existence of the offence attached to a group, so that the law degraded a class of citizens whether or not it was enforced.<sup>4</sup> The Court went on in *Minister of Home Affairs v. Fourie* to hold that the exclusion of same-sex couples from marriage was unconstitutional, giving Parliament a year to remedy the defect, which it did through the Civil Union Act.<sup>5</sup>

India's path was longer. The Delhi High Court read down section 377 of the Penal Code in *Naz Foundation* in 2009,<sup>6</sup> the Supreme Court reversed that decision in *Suresh Kumar Koushal* in 2013 on the ground that the affected group was a "miniscule fraction" of the population,<sup>7</sup> and

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<sup>3</sup> *nat'l coal. for gay & lesbian equal. v. minister of justice* 1999 (1) sa 6 (cc).

<sup>4</sup> *id.* ¶¶ 28–32.

<sup>5</sup> *minister of home affairs v. fourie* 2006 (1) sa 524 (cc).

<sup>6</sup> *naz foundation v. government of nct of delhi*, (2009) 160 dlt 277 (del.).

<sup>7</sup> *suresh kumar koushal v. naz foundation*, (2014) 1 scc 1, ¶ 43.

a five-judge bench overruled *Koushal* in *Navtej Singh Johar* in 2018.<sup>8</sup> The judgments in *Navtej* are the fullest judicial statement of transformative constitutionalism in Indian law. Misra, C.J., described the Constitution as "a living, organic document" whose purpose was to "transform society for the better," and Chandrachud, J., wrote that the Constitution's guarantees were designed to remedy the "constitutional wrongs" of a society organised around hierarchies of caste, gender, and sexuality.<sup>9</sup> The decision relied on *Puttaswamy*'s recognition of privacy and on the *NALSA* judgment of 2014, which had recognised the right of transgender persons to self-identification of gender.<sup>10</sup>

Latin America and East Asia supply further variations. The Brazilian Supreme Federal Tribunal recognised same-sex stable unions in 2011 by reading the constitutional protection of the family in light of dignity and the prohibition of discrimination, and in 2019 held that the legislature's failure to criminalise homophobia was an unconstitutional omission, directing that such conduct be treated under the existing racism statute until Congress legislated.<sup>11</sup> The second decision is a striking example of transformative technique, because it converts a legislative omission into a judicially supplied rule. Taiwan's Constitutional Court, in Interpretation No. 748, held that the Civil Code's exclusion of same-sex couples from marriage violated the guarantees of equality and freedom of marriage, and gave the legislature two years to act, after which same-sex couples could register directly.<sup>12</sup> The legislature acted within the deadline, making Taiwan the first jurisdiction in Asia to recognise same-sex marriage. The pattern of declaration coupled with a deadline recurs across these systems, and it is not accidental: it allows the court to fix the constitutional principle while leaving the legislative design to the body best equipped to produce it.

### ***B. The Limit: Marriage***

The limits of the transformative approach appeared five years later in *Supriyo v. Union of India*.<sup>13</sup> A five-judge bench unanimously held that there was no fundamental right to marry and declined to read the Special Marriage Act to include same-sex couples. The majority reasoned that the recognition of marriage was a matter for Parliament, that reading the Act in a gender-

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<sup>8</sup> *navtej singh johar v. union of india*, (2018) 10 scc 1.

<sup>9</sup> *id.* ¶¶ 95–100 (misra, c.j.); *id.* ¶¶ 604–07 (chandrachud, j.).

<sup>10</sup> *national legal servs. auth. v. union of india*, (2014) 5 scc 438.

<sup>11</sup> s.t.f., adi 4277 e adpf 132, relator: min. ayres britto, 05.05.2011 (braz.); s.t.f., ado 26, relator: min. celso de mello, 13.06.2019 (braz.).

<sup>12</sup> judicial yuan interpretation no. 748 (const. ct. may 24, 2017) (taiwan).

<sup>13</sup> *supriyo v. union of india*, 2023 scc online sc 1348.

neutral way would disturb the interlocking web of personal laws and statutes that referred to husbands and wives, and that the Court could not undertake such a task without exceeding its institutional role.<sup>14</sup> The minority, led by Chandrachud, C.J., would have recognised a right to form a civil union and directed the state to give it legal effect, but agreed that the marriage statute could not be rewritten.<sup>15</sup>

*Supriyo* is instructive because the same judges who had embraced transformation in *Navtej* declined to carry it further, and the ground on which they declined was institutional rather than substantive. Nothing in the majority judgment suggests that the exclusion of same-sex couples is consistent with equality; the judgment holds only that the remedy lies elsewhere. The contrast with *Obergefell v. Hodges*, in which the United States Supreme Court held that the fundamental right to marry extends to same-sex couples and required every state to recognise such marriages,<sup>16</sup> and with *Fourie*, in which the South African court reached the same result while deferring the remedy to Parliament, shows three different answers to the question of what a court should do when a right is clear but the remedy is complex. *Fourie* is arguably the most defensible: it declared the right, set a deadline, and left the legislative design to the legislature.

### **GENDER EQUALITY: FROM FORMAL TO SUBSTANTIVE**

The transformative conception of equality is substantive rather than formal. It asks not whether the law treats like cases alike but whether the law, in its operation, entrenches or dismantles the disadvantage of a group. The distinction is central to the gender cases. In *Anuj Garg v. Hotel Association of India*, the Indian Supreme Court struck down a colonial statute prohibiting the employment of women in premises where liquor was served, rejecting the argument that the prohibition protected women and holding that protective legislation premised on stereotypes about the role of women was itself a form of discrimination.<sup>17</sup> The reasoning was extended in *Joseph Shine*, which struck down the offence of adultery on the ground that it treated the wife as the property of the husband,<sup>18</sup> and in *Indian Young Lawyers Association* (the *Sabarimala* case), in which a majority held that the exclusion of women of menstruating age from a Hindu temple violated the Constitution, though the decision was subsequently referred

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<sup>14</sup> *id.* ¶¶ 100–125 (bhat, j.).

<sup>15</sup> *id.* ¶¶ 300–340 (chandrachud, c.j.).

<sup>16</sup> *obergefell v. hodes*, 576 u.s. 644, 675–76 (2015).

<sup>17</sup> *anuj garg v. hotel ass'n of india*, (2008) 3 scc 1, ¶¶ 41–51.

<sup>18</sup> *joseph shine v. union of india*, (2019) 3 scc 39.

to a larger bench and remains unsettled.<sup>19</sup> In *Secretary, Ministry of Defence v. Babita Puniya*, the Court directed that women officers in the Army be considered for permanent commissions on the same terms as men, and rejected the government's submissions about physiological limitations and the composition of the troops as resting on stereotypes.<sup>20</sup>

The South African Constitutional Court's approach in *President of the Republic of South Africa v. Hugo* set out the substantive conception explicitly. The President had pardoned mothers of young children but not fathers. The Court upheld the pardon, but Goldstone, J., made clear that the question was not whether the distinction was based on sex but whether it impaired the dignity of the group excluded, and that a measure which reflected a stereotype about the role of women could be unfair even if its immediate effect was to benefit them.<sup>21</sup> The Canadian Supreme Court's decision in *Andrews v. Law Society of British Columbia* made the same move a decade earlier, rejecting the "similarly situated" test in favour of an inquiry into whether the law perpetuated disadvantage.<sup>22</sup> Substantive equality has become, across these jurisdictions, the shared grammar of transformative adjudication.

The grammar has its limits, and the limits appear when equality confronts religious autonomy. The *Sabarimala* reference, still pending, arose because the majority in the original decision had treated the exclusion of women as a straightforward violation of Article 14 while the dissent had treated it as a matter of the denomination's right to manage its own affairs under Article 26.<sup>23</sup> Similar tensions have arisen in the litigation over the entry of Muslim women into mosques and the practice of female genital mutilation among the Dawoodi Bohra community, both of which were bundled into the same reference. The transformative constitution promises to dismantle hierarchy wherever it is found, but it also protects the autonomy of communities whose internal arrangements may be hierarchical, and no court has yet articulated a principled way to decide which promise prevails. The South African Court's decision in *Christian Education South Africa*, upholding the prohibition of corporal punishment in religious schools, suggests one approach: the state may regulate a practice that causes harm to a vulnerable member of the community, but must accommodate the community's beliefs so far as it can.<sup>24</sup>

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<sup>19</sup> *Indian Young Lawyers Ass'n v. State of Kerala*, (2019) 11 scc 1; *Kantaru Rajeevaru v. Indian Young Lawyers Ass'n*, (2020) 2 scc 1 (referring questions to a larger bench).

<sup>20</sup> *Sec'y, Ministry of Def. v. Babita Puniya*, (2020) 7 scc 469, ¶¶ 54–69.

<sup>21</sup> *President of the Republic of S. Afr. v. Hugo* 1997 (4) SA 1 (CC) ¶¶ 41–47.

<sup>22</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 164–71 (Can.).

<sup>23</sup> *Indian Young Lawyers Ass'n*, (2019) 11 scc 1, ¶¶ 1–20 (Malhotra, J., dissenting).

<sup>24</sup> *Christian Educ. S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) ¶¶ 31–36, 51.

## **AFFIRMATIVE ACTION AND RESERVATION**

### ***A. India: Reservation as a Constitutional Commitment***

The transformative constitution's most explicit tool for dismantling entrenched inequality is affirmative action, and here the comparison between India and the United States is stark. The Indian Constitution authorises reservation of seats in legislatures, admissions to educational institutions, and posts in public employment for the Scheduled Castes, Scheduled Tribes, and, in the case of education and employment, other backward classes.<sup>25</sup> Reservation is not an exception to equality that must be justified against it; it is treated as an expression of equality, the mechanism through which a society structured by caste redistributes opportunity.

The doctrine was consolidated in *Indra Sawhney v. Union of India*, in which a nine-judge bench upheld the reservation of 27 per cent of central government posts for other backward classes, held that the total reservation should not ordinarily exceed 50 per cent, required that the "creamy layer" of economically advanced members of backward classes be excluded, and held that reservation in promotions was not permitted under Article 16(4).<sup>26</sup> Parliament responded to the last holding by amendment, and the Court in *M. Nagaraj* upheld the amendment while requiring the state to demonstrate backwardness, inadequacy of representation, and the maintenance of efficiency before reserving promotions.<sup>27</sup> The 50 per cent ceiling was tested and reaffirmed in the *Maratha reservation* case in 2021,<sup>28</sup> and then breached, in effect, by the One Hundred and Third Amendment, which introduced a ten per cent reservation for economically weaker sections outside the existing categories. In *Janhit Abhiyan* a majority upheld the amendment as not violating the basic structure, reasoning that economic criteria were a permissible basis for affirmative action and that the ceiling was not inviolable.<sup>29</sup> The dissent by Bhat, J., objected that the amendment, by excluding the Scheduled Castes, Scheduled Tribes, and backward classes from the new category, practised the very discrimination the equality code forbade.<sup>30</sup>

Most recently, in *State of Punjab v. Davinder Singh*, a seven-judge bench held that states may sub-classify Scheduled Castes to provide preferential treatment to the most disadvantaged

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<sup>25</sup> india const. arts. 15(4), 15(5), 16(4), 330, 332.

<sup>26</sup> *indra sawhney v. union of india*, 1992 supp (3) scc 217, ¶¶ 809–12, 859.

<sup>27</sup> *m. nagaraj v. union of india*, (2006) 8 scc 212.

<sup>28</sup> *jaishri laxmanrao patil v. chief minister*, (2021) 8 scc 1.

<sup>29</sup> *janhit abhiyan v. union of india*, (2023) 5 scc 1.

<sup>30</sup> *id.* (bhat, j., dissenting).

among them, overruling *E.V. Chinnaiah*, and four judges expressed the view that the creamy layer principle should apply to Scheduled Castes as well.<sup>31</sup> The trajectory is towards ever finer calibration of who is entitled to what, which is the natural consequence of treating reservation as a permanent feature of the constitutional order rather than a temporary corrective.

### ***B. The United States: The Retreat***

The United States has moved in the opposite direction. From *Bakke* through *Grutter*, the Supreme Court permitted the consideration of race in university admissions as one factor among many, justified by the compelling interest in the educational benefits of diversity, while rejecting quotas and remedial justifications based on societal discrimination.<sup>32</sup> *Grutter* had itself predicted that the use of racial preferences would no longer be necessary in twenty-five years. In *Students for Fair Admissions v. Harvard*, decided twenty years later, the Court held that the admissions programmes of Harvard and the University of North Carolina violated the Equal Protection Clause, because the diversity interests they invoked were not measurable, because they used race as a negative for some applicants, and because they had no logical end point.<sup>33</sup> Justice Jackson's dissent framed the disagreement in terms that an Indian reader would recognise: the majority, she wrote, adopted a "let-them-eat-cake obliviousness" to the persistence of race-based disadvantage, and the Constitution did not require the state to be colour-blind in the face of a society that was not.<sup>34</sup>

The two systems began from different texts, and the difference explains much. The Indian Constitution authorises reservation expressly; the Fourteenth Amendment says nothing about it. But the difference is also one of constitutional philosophy. The American majority treats equality as a constraint on the state's use of classifications. The Indian tradition, like the South African and Canadian, treats equality as a mandate for the state to address the conditions that make classifications relevant in the first place. That is the difference between a constitution that limits and a constitution that transforms.

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<sup>31</sup> *state of punjab v. davinder singh*, 2024 scc online sc 1860.

<sup>32</sup> *regents of the univ. of cal. v. bakke*, 438 u.s. 265 (1978); *grutter v. bollinger*, 539 u.s. 306 (2003).

<sup>33</sup> *students for fair admissions, inc. v. president & fellows of harvard coll.*, 600 u.s. 181, 213–30 (2023).

<sup>34</sup> *id.* at 407 (jackson, j., dissenting).

## **SOCIO-ECONOMIC RIGHTS**

### ***A. South Africa: Reasonableness Review***

The South African Constitution's inclusion of justiciable rights to housing, health care, food, water, social security, and education was the transformative project's boldest wager.<sup>35</sup> The Constitutional Court's response, developed in *Grootboom* and *Treatment Action Campaign*, has been to review the reasonableness of the state's programme rather than to define a minimum core entitlement that each individual may claim. In *Grootboom*, the Court held that a housing programme which made no provision for those in desperate need was unreasonable, and issued a declaratory order.<sup>36</sup> In *Treatment Action Campaign*, it held that restricting the antiretroviral drug nevirapine to research sites was unreasonable, and ordered the government to make it available throughout the public health system.<sup>37</sup> The approach has been criticised for offering little to the individual applicant; Mrs Grootboom herself died without a house. But it has the considerable merit of being sustainable. A court that reviews the reasonableness of a policy can go on doing so indefinitely; a court that orders the state to house every applicant will soon issue orders that cannot be obeyed. The limits of the method were exposed in *Mazibuko*, where residents of Soweto challenged the city's free basic water allocation and the installation of prepaid meters. The Court rejected the invitation to determine the quantity of water that the right required, holding that it was not for a court to fix the content of a socio-economic right and that the city's policy, which had been revised several times in response to the litigation, fell within the range of reasonable choices.<sup>38</sup> Critics saw the decision as a retreat; its defenders saw it as the reasonableness model working as designed, with the litigation itself prompting the policy improvement that the Court then declined to second-guess.

Kenya's 2010 Constitution borrowed the South African model of justiciable socio-economic rights in Article 43, and the Kenyan courts have borrowed the South African remedy while sharpening it. In *Mitu-Bell Welfare Society v. Kenya Airports Authority*, the Supreme Court of Kenya held that the eviction of an informal settlement without notice or alternative accommodation violated the right to housing, and confirmed that courts may issue structural interdicts requiring the state to report on the steps taken to comply, though it cautioned that

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<sup>35</sup> s. afr. const., 1996, §§ 26, 27, 29.

<sup>36</sup> *government of the republic of s. afr. v. grootboom* 2001 (1) sa 46 (cc) ¶¶ 41–44, 99.

<sup>37</sup> *minister of health v. treatment action campaign (no 2)* 2002 (5) sa 721 (cc) ¶¶ 67–81, 135.

<sup>38</sup> *mazibuko v. city of johannesburg* 2010 (4) sa 1 (cc) ¶¶ 59–68, 159–63.

such orders must be framed with precision and must respect the separation of powers.<sup>39</sup> The decision is notable for its explicit recognition that the right to housing imposes an immediate obligation not to render people homeless, distinct from the progressive obligation to provide housing over time, a distinction that the South African Court had drawn in *Grootboom* but that Kenya's text makes more prominent.

### ***B. India and Colombia: Two Routes to Enforcement***

India's directive principles are expressly non-justiciable, and the Supreme Court has enforced socio-economic interests by reading them into the right to life. *Olga Tellis* held that the right to life includes the right to livelihood, though it upheld the eviction of pavement dwellers subject to procedural protections,<sup>40</sup> and *Unni Krishnan* held that the right to education up to the age of fourteen was implicit in Article 21, a holding that Parliament later constitutionalised in Article 21A.<sup>41</sup> The *Right to Food* litigation, conducted through interim orders over more than a decade, produced the universalisation of the midday meal scheme in schools and the eventual enactment of the National Food Security Act.<sup>42</sup> The Indian route is effective but unstructured: the content of the right is whatever the bench in a particular case is prepared to order.

Colombia's Constitutional Court has developed the most systematic method. Through the *tutela*, an individual action for the protection of fundamental rights that must be decided within ten days, the Court receives hundreds of thousands of health claims each year. In Sentencia T-760 of 2008, faced with the systemic failure of the health system, the Court consolidated twenty-two tutelas, identified structural defects, and issued orders directing the government to unify the benefit plans of the contributory and subsidised regimes, to update the plans periodically, and to report on compliance.<sup>43</sup> The Court's earlier declaration of an "unconstitutional state of affairs" in respect of internally displaced persons had followed the same pattern.<sup>44</sup> The Colombian method combines the individual remedy that South Africa lacks with the structural supervision that India improvises, and it has been influential in Latin America. Its cost is that the Court has become a permanent participant in health and social

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<sup>39</sup> *mitu-bell welfare soc'y v. kenya airports auth.* [2021] kesc 34 (klr) (kenya).

<sup>40</sup> *olga tellis v. bombay mun. corp.*, (1985) 3 scc 545, ¶¶ 32–37, 57.

<sup>41</sup> *unni krishnan v. state of andhra pradesh*, (1993) 1 scc 645; india const. art. 21a.

<sup>42</sup> *people's union for civil liberties v. union of india*, writ petition (civil) no. 196 of 2001 (s.c.) (interim orders of nov. 28, 2001 and subsequent dates).

<sup>43</sup> corte constitucional [c.c.] [constitutional court], julio 31, 2008, sentencia t-760/08 (colom.).

<sup>44</sup> corte constitucional [c.c.] [constitutional court], enero 22, 2004, sentencia t-025/04 (colom.).

policy, and there is a respectable argument that this has weakened rather than strengthened the political incentive to reform.

## **CONCLUSION**

Transformative constitutionalism succeeds on its own terms when it changes the position of a disadvantaged group in a way that persists after the judgment. By that measure the recognition cases have succeeded almost everywhere they have been decided, because decriminalisation and the recognition of identity require nothing of the state except that it stop. The gender cases have succeeded where they have dismantled stereotypes embedded in law, and less clearly where they have confronted religious practice or the organisation of the family. The affirmative action cases show two constitutional traditions moving apart, one treating redistribution as the meaning of equality and the other treating it as an exception that must eventually end. The socio-economic rights cases show three methods of enforcement, of which the South African is the most restrained, the Indian the most improvised, and the Colombian the most ambitious.

The comparison suggests that the transformative project depends less on the breadth of the rights a court recognises than on the discipline of the remedy it chooses. *Fourie*, *Grootboom*, and *T-760* each declared the right fully and then engaged the political branches in delivering it, whether by deadline, by declaration, or by supervised structural order. *Supriyo* declined to declare the right at all, and *Students for Fair Admissions* withdrew one that had been recognised for half a century. The transformative constitution is not self-executing. It requires courts willing to say what equality means, and institutions willing to be told.