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TRANSFORMATIVE CONSTITUTIONALISM IN INDIA: JUDICIAL CREATIVITY UNDER ARTICLE 21 AND EXPANDING HUMAN RIGHTS JURISPRUDENCE IN INDIA

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ABSTRACT:

This article digs into how Article 21 of the Indian Constitution has gradually become the backbone of transformative constitutionalism in India.. The analysis follows a fascinating trajectory, from the framers' conscious selection of "procedure established by law" instead of "due process," a move specifically meant to keep courts from overstepping, all the way to the Supreme Court's later, sweeping reinterpretation that pretty much brought substantive due process back through the side door. At first, Article 21 was hemmed in by a strict interpretation handed down in A.K. Gopalan v. State of Madras (1950).But everything changed with Maneka Gandhi v. Union of India (1978): suddenly, Articles 14, 19 and 21 were woven together into a single tapestry of liberty, with fairness and reasonableness now required at every step along any legal procedure. Here's where things really take off,the research tracks how this "right to life" ballooned outward, touching areas like socio-economic entitlements, protections within criminal justice processes, personal privacy rights, and even recognition for marginalized groups who'd long been left out in the cold.. Alongside this expansion comes a sharp look at how judges have wielded tools such as purposive interpretation (reading between legislative lines), public interest litigation (letting citizens bring issues directly before the court), and continuing mandamus (keeping cases open until orders are fully carried out). Of course, it isn't all smooth sailing; real concerns crop up around potential judicial overreach, unpredictability in bail decisions, whether these rights apply across private actors ("horizontal application"), and, perhaps most frustratingly,the recurring chasm between what gets recognized on paper versus what people actually experience on the ground.

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Introduction:

When the Indian Constitution came into force on January 26, 1950, it carried an audacious promise for a country newly freed from colonial rule. But a written constitution, however elegant, doesn't automatically translate into social change. The real test is whether it can leap off the page and remake everyday life. This dissertation argues that Article 21, a mere nineteen words declaring, "No person shall be deprived of his life or personal liberty except according to procedure established by law", has operated as the principal engine of transformative constitutionalism in India[1]. Through imaginative interpretation, the Supreme Court has turned what looked like a narrow procedural guardrail into a vast, still-growing wellspring of human rights jurisprudence. The central paradox is hard to miss: the framers consciously rejected America's "due process of law" model because they feared judges would overreach and derail social welfare legislation. They opted for "procedure established by law" instead, betting on Parliament as the main driver of social transformation. Yet that pared-down phrasing, ironically, left room for exactly the kind of judicial creativity it was meant to restrain. What followed has been a seven-decade shift from rigid literalism to substantive due process, from procedural formalism to a living document that now protects everything from livelihood and health to privacy and dignity.

The Framers' Vision and Its Unresolved Tensions

The Constituent Assembly debates lay bare a tension that still runs through India's constitutional order. When Kazi Syed Karimuddin and others pushed for "due process," they warned that without it, any majority could bulldoze arbitrary laws so long as the formal steps were followed. But B.R. Ambedkar and Alladi Krishnaswami Ayyar spearheaded the opposition. Their central anxiety was giving judges a tool to dismantle social welfare reforms, much as America's Supreme Court had used due process to strike down minimum wage laws during the Lochner era.[2] Ambedkar was blunt: such a clause would hand enormous discretion to judges who could second- guess nearly any law. The Assembly ultimately stayed with "procedure established by law," and kept Article 21 deliberately spare. Granville Austin, the great historian of the Indian Constitution, observed that the framers were building a living framework meant to endure across generations. By keeping the language broad and open-ended, they made adaptability possible. Yet that same openness dumped substantial interpretive

[1] See short discussion in Karl Klare, "Legal Culture and Transformative Constitutionalism" (1998).
[2] For a short account of the Lochner era's influence, see Constituent Assembly Debates, vol. 7 (1948).

ISSN: 2582-6433

responsibility onto judges, precisely what the framers had tried to avoid. Three unresolved tensions flowed from this founding choice. First, liberty versus authority: the framers wanted protection against state overreach, but also needed a state powerful enough to deliver sweeping social reform. Second, judicial power versus parliamentary supremacy: by rejecting due process, they hoped Parliament would remain supreme, yet they still gave courts formidable powers of review over fundamental rights. Third, formal equality versus substantive justice: Article 21 offered procedural protection but didn't directly confront deeper structures like poverty or caste, which were pushed into the non-justiciable Directive Principles.

The Foundational Era: Gopalan to the Emergency (1950-1977)

For roughly the first twenty-five years, the Supreme Court largely hewed to the framers' literalist expectations. In A.K. Gopalan v. State of Madras (1950), the Court held that each fundamental right is self-contained, its own mini-code. "Procedure established by law" meant whatever procedure a competent legislature enacted; fairness, in that framing, wasn't the Court's problem[3]. That cramped approach dominated for over two decades.Still, the ground was shifting, quietly. In Kharak Singh v. State of Uttar Pradesh (1962), the majority struck down domiciliary night visits by police, describing "life" as more than bare animal existence, it meant living with dignity. The real jolt, though, came from Justice Subba Rao's dissent. He argued that Articles 14, 19, and 21 operate together as an integrated scheme protecting liberty. Even more presciently, he insisted that privacy is embedded in personal liberty itself. It would take nearly fifty years for that view to become the settled position. Then came the Emergency of 1975-1977, the crucible that changed the Court's trajectory. In ADM Jabalpur v. Shivkant Shukla (1976), four of five judges held that during an Emergency, even the right to life could be suspended; citizens had no locus to invoke Article 21. Justice H.R. Khanna stood alone. He maintained that life and liberty aren't gifts handed out by legislatures; they are primal natural rights that exist independent of both the Constitution and the State[4]. His dissent cost him the Chief Justiceship, but it marked the road ahead. The Emergency made the fatal weakness of procedural formalism impossible to ignore: if "liberty" simply meant whatever process Parliament prescribed, freedom could be erased with a pen stroke.

[3] A short analysis of the Gopalan court's literalism appears in AIR 1950 SC 27 at para 15
[4] Justice Khanna's dissent is quoted in short form at AIR 1976 SC 1207, para 142.

ISSN: 2582-6433

The Watershed: Maneka Gandhi and the Due Process Revolution:

On January 25, 1978, the Supreme Court delivered Maneka Gandhi v. Union of India, widely treated as a constitutional turning point. The dispute began with something that looked almost ordinary: Maneka Gandhi's passport was impounded without a hearing, allegedly "in public interest." The Court's response reshaped Article 21. First, Gopalan was effectively dismantled. Articles 14, 19, and 21 don't sit in sealed compartments; they form a "golden triangle" or "triple talisman" that protects liberty in a unified way. Any law depriving someone of liberty must satisfy Article 21's procedural requirement, Article 19's reasonableness test, and Article 14's non- arbitrariness standard at the same time. Second, "procedure established by law" was re-read in a way that changed its practical meaning. Not every legislatively enacted procedure would do. The procedure had to be "right and just and fair," not "arbitrary, fanciful, or oppressive." Justice Bhagwati made it unmistakable: the right to a fair hearing flows from natural justice. In effect, due process values entered Article 21 through the side door, exactly what the framers had tried to keep out. Third, "personal liberty" was expanded far beyond physical restraint to include all freedoms essential to human dignity, including the right to travel abroad. The consequences were swift. In Hussainara Khatoon (1979), the Court held speedy trial to be part of Article 21, freeing thousands of undertrial prisoners stuck in jail for years. In Sunil Batra (1978), it affirmed prisoners' rights, incarceration doesn't switch off constitutional protections. In Francis Coralie Mullin (1981), Justice Bhagwati offered one of the Court's most resonant formulations: "The right to life cannot be restricted to mere animal existence. It includes the right to live with human dignity."

The Explosion of Rights Under Article 21

The post-Maneshka period saw an extraordinary widening of what the right to life includes. This dissertation maps these offspring rights across four major domains. Socio-Economic Entitlements:

In Olga Tellis v. Bombay Municipal Corporation (1985), the Court held that the right to livelihood is integral to the right to life; without a means of earning, life becomes hollow. The Right to Food case (PUCL v. Union of India, 2001 onwards) converted eight nutrition programs into enforceable entitlements, mandated cooked mid-day meals in schools, and empowered village councils to run social audits. The Court has recognized the right to health as flowing from Article 21 read with the Directive Principles, and the right to education, first recognized in Unni Krishnan (1993), was eventually constitutionalized as Article 21A through amendment.

ISSN: 2582-6433

The right to shelter, and the right to a clean environment, have also been firmly established.

Protections for Accused and Prisoners:

Beyond speedy trial and free legal aid, the Court has held that handcuffing is inherently degrading unless exceptional circumstances justify it. Delayed execution of death sentences, sometimes exceeding ten years, has been treated as an Article 21 violation and used to justify commutation to life imprisonment. The right against involuntary administration of truth drugs (Selvi v. State of Karnataka, 2010) protects mental privacy against narco-analysis, polygraphs, and brain mapping.

Privacy and Dignity Rights:

The long arc toward privacy culminated in K.S. Puttaswamy v. Union of India (2017), where a nine- judge bench unanimously overruled Kharak Singh and M.P. Sharma, holding that privacy is intrinsic to Article 21. Justice Chandrachud grounded privacy in dignity, autonomy, and identity. The Court also recognized the right to die with dignity through passive euthanasia and living wills (Common Cause v. Union of India, 2018), and even the right to sleep (Re: Ramlila Maidan Incident, 2012), reasoning that sleep is essential to human dignity.

Rights of Marginalized Communities:

In NALSA v. Union of India (2014), the Court recognized transgender persons' right to self-identified gender and directed governments to treat them as a "third gender" across policy. Navtej Singh Johar v. Union of India (2018) struck down Section 377 of the Indian Penal Code to the extent it criminalized consensual same-sex intimacy, holding that sexual orientation is integral to dignity and that constitutional morality must prevail over popular morality.

Tools of Transformation

The Supreme Court used an impressive toolkit to pull off this transformation. Purposive interpretation replaced strict literalism; instead of asking only what the words technically permit, judges asked what the Constitution is trying to achieve. Harmonious construction stitched fundamental rights together rather than treating them as isolated silos. The basic structure doctrine (from Kesavananda Bharati, 1973) shields the Constitution's core features, including Article 21, from being destroyed even by amendment. The living document doctrine treats the Constitution as something that evolves with society.Public Interest Litigation changed access to justice by relaxing locus standi, allowing anyone acting bona fide in the public interest to file petitions. The Court even treated letters and postcards as writ petitions. It also crafted novel remedies like continuing mandamus, where the Court keeps jurisdiction to oversee implementation, as in the Right to Food litigation that has run for over two decades.

ISSN: 2582-6433

The Unfinished Symphony: Four Persistent Challenges

This is not a tidy story of unbroken progress. Four interconnected challenges continue to strain the transformative project.

Judicial Overreach:

The framers' fear of judicial overreach has returned, especially around Article 142, which empowers the Supreme Court to "do complete justice." Vice President Jagdeep Dhankhar has called Article 142 "a nuclear missile against democratic forces," and questioned whether courts can direct Presidents or Governors on constitutional powers. Critics cite instances where the Court imposed liquor sale bans or ordered CBI investigations without state consent. The legitimacy problem won't go away: judges aren't elected, so what authorizes them to make broad policy calls?

The Consistency Crisis:

Few areas show inconsistency as starkly as bail jurisprudence under UAPA and PMLA. A review of 37 cases reveals sharply divergent outcomes across benches, sometimes even involving the same judges. In Gurwinder Singh (February 2024), a bench denied bail to a UAPA accused after five years in custody, holding that delay can't justify bail for serious offenses. Six months later, the same bench granted bail to a PMLA accused on effectively the opposite logic. The "rule of Bench" begins to displace the rule of law; liberty can look robust for journalists and politicians, yet fragile for young men charged under anti-terror laws. Legal scholar Sarthak Gupta proposes a "Khalid Test" with three pillars: constitutional primacy (no statute may extinguish Article 21), procedural fairness (extended pre-trial detention without real trial progress violates Article 21), and non-discrimination (the standard must apply consistently to all accused).

The Horizontal Application Debate:

Kaushal Kishor v. State of Uttar Pradesh (2023) reignited the debate over whether fundamental rights apply horizontally to private actors. A five-judge bench held, by majority, that Articles 19 and 21 can be invoked against non-state actors. Justice Nagarathna's dissent warned that this risks "constitutional dismemberment", effectively rewriting the constitutional scheme without amendment. Whether this is transformative progress or structural dismantling remains unsettled.

ISSN: 2582-6433

The Implementation Gap:

The most stubborn obstacle is the gap between what courts proclaim and what people actually experience. Rights recognized in judgments don't always become rights realized. The Right to Food litigation has crossed the twenty-year mark, with court-appointed commissioners still monitoring compliance, yet starvation deaths haven't disappeared. Undertrial prisoners continue to languish despite clear constitutional commands. Even the Court has admitted the limits of judicial power: it can't run programs, allocate resources on the ground, or rewire entrenched social attitudes.

Three Interlocking Commitments

First, unwavering consistency in applying Article 21, operationalized through the "Khalid Test", so liberty isn't a gamble depending on the bench or the accused's social identity. Second, genuine collaborative constitutionalism, where courts, legislatures, executives, and civil society work in tandem to animate constitutional values. Legislatures must translate judicial recognition into enforceable statutes; executives must implement faithfully; civil society must keep pressure on every institution. Third, constitutional humility, knowing when courts should step back, while still staying vigilant in protecting rights. That, in turn, requires institutional reforms to strengthen accountability: transparency in collegium appointments, independent mechanisms to investigate judicial misconduct, and clearer boundaries for Article 142.The framers gave India a Constitution meant for transformation, but deliberately withheld due process language out of anxiety about judicial power. Over seven decades of creativity, courage, and sometimes controversy, the Supreme Court has carried forward the transformative spirit while pushing beyond procedural limits. Article 21 now functions as the Constitution's "mystery box", with each generation[5] discovering unexpected answers inside its nineteen words.The gulf between judgment and reality remains wide. Inconsistency eats away at the rule of law. Questions of legitimacy demand candid engagement. The unfinished symphony of Indian constitutionalism is still waiting for its next movement, one where collaboration, consistency, and humility finally close the distance between parchment promises and lived dignity for every citizen.

[5] Austin offers a short but incisive summary in The Indian Constitution: Cornerstone of a Nation (1966), p. 308.