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Global's South Courts and their transformative role. Implications and challenges of a new paradigm

In contemporary constitutional theory, the transformative power of courts in the Global South challenges the traditional understanding of the judicial function, the boundaries of interpretation, and the very architecture of legal modernity. Within post-authoritarian and post-colonial contexts, constitutional courts have assumed a distinctly creative role that reshapes the relation between law and politics, legality and legitimacy, norm and justice. The jurisprudence emerging from jurisdictions such as India, Colombia, South Africa, Brazil, and Kenya illustrates a profound epistemic reconfiguration of law's sources and its capacity to intervene in social reality. These courts do not merely apply pre-existing norms; they participate in the generation of new meanings for rights and duties, often filling normative gaps left by legislative inertia or executive overreach. This judicial transformation is not reducible to activism in the conventional sense but expresses a deeper philosophical and juridical transition in the theory of law itself: from a model of judicial restraint grounded in formal legality to a paradigm of transformative adjudication oriented toward substantive justice. The Southern experience compels a rethinking of classical jurisprudential categories – positivism, separation of powers, sovereignty, and the nature of legal interpretation – because it exposes law's performative dimension: its power not only to represent but to produce social order.

The South African notion of “transformative constitutionalism”, originally conceived as a constitutional project of social reconstruction, epitomizes this shift. It locates the Constitution not at the end of history but at its beginning – a living, normative framework through which societies seek to overcome structural inequality and historical injustice. When the judiciary becomes the guardian and engine of this transformative mandate, adjudication ceases to be a merely technical exercise and becomes instead a constitutional practice of emancipation, a site where law's potential for change materializes. This idea resonates across the Global South, where courts frequently expand the scope of justiciable rights to include socio-economic entitlements, environmental protection, indigenous claims, and even the rights of nature. Through techniques such as structural injunctions, dialogic remedies, and the relaxation of standing rules, judges have transformed the courtroom into a space of participatory constitutionalism – an institutional arena where the marginalized may articulate demands for recognition and accountability. The procedural innovations of the Indian Supreme Court in public interest litigation, the Colombian Constitutional Court's tutela mechanism, and the Kenyan judiciary's deployment of structural remedies in environmental cases all demonstrate how Global South courts experiment with new juridical forms that transcend the traditional individualistic and adversarial logic of litigation. These practices reconfigure access to justice and redefine the relationship between the citizen and the state, presenting adjudication as an ongoing conversation about the meaning of the constitutional promise. The emergence of these

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judicial forms suggests that the theory of law cannot be confined to the analysis of rules or principles in isolation but must instead grapple with law's institutional creativity – its capacity to engender new normative spaces when conventional politics fail. In this sense, courts in the Global South illuminate a dialectic between legality and legitimacy that classical legal theory often obscured. The positivist insistence on the separation of law and morality, once functional to the stabilization of modern constitutional orders, encounters its limits in societies where formal equality masks material exclusion. For these courts, fidelity to the constitution entails not the mechanical repetition of legislative text but the realization of its normative aspirations. Their judgments embody a jurisprudence of action, one that reads the Constitution as a project rather than a closure, a performative act of faith in the transformative capacity of legal interpretation. Yet, this same power to transform inevitably generates tensions with democratic theory and the principle of “classic” separation of powers. When courts impose affirmative obligations on the State or elaborate detailed policy frameworks, they risk transgressing the boundaries of judicial competence and encroaching on the prerogatives of elected institutions.

This tension cannot be dismissed as mere institutional friction but must be understood as a constitutive feature of modern constitutionalism. The contemporary court in the Global South operates at the frontier of law's dual identity as both a system of norms and an instrument of justice. It is precisely at this intersection that law becomes political in the deepest sense – not as partisan choice, but as the negotiation of collective values under conditions of structural inequality. Judicial creativity thus embodies both the promise and peril of transformative legality: it can democratize governance by enforcing accountability and inclusion, yet it can also erode the representative legitimacy that sustains the democratic order. The challenge for general jurisprudence is to articulate a theoretical framework capable of capturing this ambivalence without reducing it to a binary opposition between activism and restraint. Theories of dialogic constitutionalism, weak-form review, and responsive adjudication attempt to conceptualize the equilibrium between judicial innovation and democratic legitimacy, proposing that courts act not as sovereign legislators but as facilitators of deliberation. In practice, many Southern courts have internalized this ethos, issuing conditional rulings, deferred invalidations, and compliance orders that invite political cooperation rather than confrontation. Their jurisprudence reflects an awareness that authority in a democratic society cannot rest solely on coercive power but must be continually re-legitimated through dialogue, transparency, and participation. This judicial style signals an epistemological break with hierarchical understandings of law: it conceives adjudication as a communicative process embedded within society, not as a monologic exercise of authority from above. The comparative study of these developments enriches the general theory of law by showing that the locus of norm creation has shifted from the legislator to a complex network of institutional interactions. The court, in this light, becomes a constitutional interlocutor rather than an external arbiter – a node in a pluralistic legal order characterized by multiple sources of normativity, from international human rights law to local customary practices. The Global South's judicial experiments reveal that legal interpretation itself can be an act of social construction, that jurisprudence is not the passive reflection of reality but an active instrument in its reconstitution. The philosophical implications of this phenomenon are profound: if courts can instantiate new rights, reshape social expectations, and redefine the parameters of public reason, then law must be understood

as a dynamic and generative force rather than a static repository of rules. The emergence of rights to health, housing, water, and a clean environment in constitutional adjudication demonstrates that legality is increasingly measured by its capacity to sustain human dignity and ecological equilibrium, not merely by its formal coherence. The recognition of the rights of nature, first articulated by the Ecuadorian and Colombian courts, extends this logic beyond anthropocentrism, suggesting that constitutional reason in the Global South is pioneering a post-liberal conception of legal personhood. This jurisprudential creativity signals a movement toward an ecological and relational understanding of justice that transcends the individualist foundations of classical constitutionalism. At the same time, the transformative role of courts in the Global South illuminates the fragility of judicial legitimacy. When judicial pronouncements become instruments of large-scale social engineering, they expose the limits of the judiciary's democratic mandate. The general theory of law must therefore confront the paradox that judicial empowerment – though often necessary to protect rights in fragile democracies – can inadvertently weaken the participatory ethos it seeks to promote. This paradox invites a reconceptualization of the judicial function as neither strictly adjudicative nor purely legislative, but as a mediating practice situated between normativity and factuality, between institutional authority and civic agency. In this mediating space, judges do not replace politics but transform its grammar: they translate social demands into the language of rights, rendering visible forms of suffering and exclusion that political institutions overlook. Through this translation, the judiciary participates in the continual rearticulation of constitutional meaning, ensuring that law remains responsive to evolving conditions of justice. The Global South thus provides not merely a set of empirical examples but a theoretical lens through which the future of legal development can be envisaged. It demonstrates that the transformative potential of law lies not in the rigidity of its forms but in the openness of its interpretive practices, and that the legitimacy of courts depends on their capacity to embody reason-giving institutions within democratic life. Far from signaling judicial overreach, this evolution points toward a reconceptualization of legal authority as dialogical, contingent, and reflexive – an authority grounded not in the will to power but in the commitment to reasoned justification and collective learning. The prospects for the development of the general theory of law in the twenty-first century will thus depend on its ability to integrate these Southern experiences into a broader account of law's transformative vocation, one that recognizes that the rule of law, to endure, must also be the rule of justice.