

ANALYSING THE WORKING OF THE INDIAN DEMOCRACY THROUGH THE PRISM OF NATURAL LAW PHILOSOPHY: A SUBALTERN VIEW

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Abstract

Indian democracy is essentially dynamic. The changes may be gradual, but these changes indicate the democracy's desirability toward social transformation. In the neoliberal era that the world order is stepping in, natural law principles are playing a pervasive role in the realms of ethics, politics, governance, society, culture, and law. This article reappraises the natural law philosophy's role in the legitimisation of democratic principles and practices. A functioning democracy pins its hopes on the conscience of the society, not just for its sustenance but also for its development. The article reflects the post-structuralist approach of merging social movements to 'constitution-making' and the subaltern proposition to defend their worldviews and relative ideas. The article is an attempt to demarcate 'democracy as a progressive idea' from 'democracy as a theoretically operating idea.' The article focuses on three fundamental components of modern Indian democracy *viz.* transformative constitutionalism, inclusive justice, and good governance.

Keywords: Democracy, Natural Law, Constitutional Change, Transformative Constitutionalism, Justice

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I. Introduction

LOOKING AT the socio-political climate in India post the 1990s, democratic capitalism and democratic internationalism were seen as the only model for economic integration and rule of law. Globalization left no option but to liberalize, first economically and then politically.¹ It was based on the assumption that the world would be increasingly flat,² i.e., as income grows,

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¹ Shashi Tharoor and Samir Saran, *The New World Disorder And The Indian Imperative*, 236 (Aleph Book Co., 2020).

² Thomas L. Friedman, *The World Is Flat: A Brief History Of The Twenty-First Century* 5-6 (Straus and Giroux, New York: Farrar, 2005); Paul Kapteyn, "The 'Domestic' Law Effect of Rules of International Law Within the

citizens would demand greater political power. Writings of early political philosophers indicate that the word ‘democracy’ was endorsed as an approach entrusted with the task of stabilizing social order through people’s participation and creating structured mechanisms for social existence.³ However, the post-modern era is witnessing the de-restructuring of people’s participation through elections, where elections have become a mechanism to foster elected dictatorship or democratic authoritarianism. This brings up the fundamental question of whether any functioning democracy without the rule of law can guarantee justice in practice.

The Rule of law like natural law is not a segment of positive law, nor a body of theoretical propositions from which positive law can be simply decoded.⁴ As Prof. Baxi argues, “rule of law as a “thin” notion entailing procedural restraints on forms of sovereign power and governmental conduct, which may also authorize Holocaustian practices of politics and as a “thick” conception involving the theories about the “good”, “right”, and “just”.”⁵ Natural law thinking lean towards the thick notions of principles of democracy like accountability, rule of law, good governance, and participatory governance that are fundamental for the development of a stable social order. The Post-World War II era saw the revival of contemporary natural law thinking.⁶ The era also witnessed the proportional rise of democracies.

The creation of India as a democratically constituted political unit with a sovereign independent republic constitutional identity was a bold experiment.⁷ To give two hundred million people the right to choose their government breaking away from the shackles of imperialism has no precedent in human history. The Indian Constitution is a symbol of social revolution in the third world and is also the Indian society’s response to the idea ‘the subaltern cannot speak’.⁸ Democracy as a political norm received legitimacy post the Constitution coming into force. Indian democracy prospects constitutional authority as creative and artistic control. It was perceived by civilizers with ‘Whiteman’s burden’ mindset as a revolutionary document. During

European Community System of Law and the Question Of the Self-Executing Character Of GATT Rules” 8 *The International Lawyer* 1, 74-82 (1974).

³ Melissa Lane, “Ancient Political Philosophy”, in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Winter Edn., 2018), available at: <https://plato.stanford.edu/archives/win2018/entries/ancient-political/> (last visited on April 15, 2020).

⁴ Robert L. Calhoun, “Democracy and Natural Law”, 48 *Natural Law Forum* 34-40 (1960).

⁵ Upendra Baxi, “The Rule of Law in India” 6 *Sur - Revista Internacional de Derechos Humanos* 7 (2007).

⁶ Josef L. Kunz, “Natural-Law Thinking in the Modern Science of International Law” 55 *The American Journal of International Law* 955 (1961).

⁷ Pratap Bhanu Mehta, *The burden of Democracy* 13 (Penguin Publications, New Delhi, 2003).

⁸ Gayatri Chakravorty Spivak, “Can The Subaltern Speak?”, in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Macmillan: London, 1988).

the phase of decolonisation that followed the aftermath of World War II, India was one of the earliest colonies to get independence.⁹ It was rare among the many post-colonial states to decide its tryst with constitutional fate. The Constitution of India has been the framing device for many crucial debates that have been central to India's evolving culture of justification, constitutionalism, and legitimate governance. The Indian Constitution as the moral autobiography of the nation has become the governance framework of the world's most populous and diverse democracy.

The Constitution of India could be identified as an exemplar of positive law in practice. However, its interpretation bears great significance to principles of natural law.¹⁰ From Aristotle and Thomas Aquinas to modern social revolutionaries have shared a fundamental belief that humanly created "positive" law is morally good or bad, just or unjust depends on its conformity to the standards of "natural" law.¹¹ The search for absolute values in a functioning democracy to find perfection in law is indispensable. World history has witnessed many examples where rulers have used positive law to legitimize immoral actions. Law in itself has never been or will never be the "test" to recognize any sovereign action as just or unjust. Only the essential elements like "higher" principles of law can decide the justness of law. The history of revolutions in world politics shows that universal principles of natural law played a foundational role in the development of democracies. Thomas Jefferson appealed to "the Laws of Nature and Nature's God" in justifying the American Revolution.¹² While in India, Mahatma Gandhi appealed to abide by principles of morality, ethics, and the rule of law in the freedom struggle.¹³ Seldom do modern commentators disagree that the framers of the American Constitution were firm believers in natural law and sought to craft a constitution that would conform to and embody its basic principles for the design of a just political order.¹⁴

⁹ Arun K. Thiruvengadam, *The Constitution of India: A Contextual Analysis 2* (Bloomsbury Publishing, Hart edn. 2017).

¹⁰ S. P. Sathé, "India: From Positivism to Structuralism", in Jeffrey Goldsworthy (ed.), *Interpreting Constitutions: A Comparative Study* 226 (Oxford University Press, 2013).

¹¹ Robert P. George, "Natural Law, The Constitution, and the Theory and Practice of Judicial Review" 69 *Fordham Law Review* 6 (2001).

¹² Stephen E. Lucas, *The Stylistic Artistry of the Declaration of Independence*, Spring 1990 issue of Prologue: Quarterly of the National Archives and Records Administration: United States Government's National Archives, available at: <https://www.archives.gov/founding-docs/stylistic-artistry-of-the-declaration> (last visited on April 15, 2020); Thomas W. Benson (ed.), "Justifying America: The Declaration of Independence as a Rhetorical Document", in *American Rhetoric: Context and Criticism* (Southern Illinois University Press, 1st edn., 1989).

¹³ B.S. Chimni, "The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi's Hind Swaraj or Indian Home Rule" 23 *European Journal of International Law* 1159–73 (2012).

¹⁴ Robert P. George, *The Clash Of Orthodoxies: Law, Religion, And Morality In Crisis* 220 – 30 (Open Road Media, 2014).

The same idea of building a moral and just society was reflected in the intent of Constitution framers in India. Laws of nature have been a dominating factor of history, politics, law, religion, and social philosophy in India. Recent international debates like abortion, terrorism, social inclusion revolve around the search of identifying the meaning of common words like ‘life’, ‘religion’, ‘race’, and ‘law’. Legal philosophy would be incomplete unless the commonest words like ‘democracy’ in a political order are left academically untouched and unexplored. In the present paper, the author attempt to review how natural law principles play a fundamental role in unsnarling the transformative character of democracy.

II. Decriminalising Humanity: Tracing the Universal Principles Leading to Constitutional Change

The title expresses two perplexing locutions - ‘decriminalising’ and ‘humanity’. These expressions represent not their literal meaning but are used to mean how India as a constitutionalist republic has used the transformative character of the Indian Constitution to strike down repressive practices and legislations which were antithetical to the benevolence of humankind. The Establishment of a legal system should not be confused with the establishment of the rule of law. Similarly, a constitution coming into force is not the same thing as the constitutional principles coming into force.

The neologism “transformative constitutionalism” was coined by K.E. Klare.¹⁵ It indicates the process of attempts to bring about a social change directed towards an egalitarian, democratic, and progressive society through a process constructed in law. What can be traced from the journey of the constitution is the fact that the *grundnorm* over time has restructured the society itself. A clear example would be weeding out the atrocious practices committed by authorities other than the State. A brief study of Indian history would show us that in the Indian subcontinent, it was not the State *per se* that was the Leviathan, there were institutions both social and cultural other the political sovereign who were perpetrators of anti-social practices that jeopardised individual autonomy and freedoms, thereby creating social hierarchies by socially legitimising inequality.

¹⁵ Karl E. Klare, Legal Culture and Transformative Constitutionalism”14 *South African Journal on Human Rights* 146- 88 (1998).

‘Constitution’ as a philosophy has to be scrutinised, analysed, and empowered according to the unprecedented emergencies that a nation face. Interpreting constitutionalism as a limit in disguise also leads to an insoluble dilemma of ambivalence.¹⁶ Constitutional interpretivism by distancing itself from constitutional morality, counter-majoritarianism, and progressive realisation is the real threat to Indian democracy. The Indian Constitution has transformed Indian society in two ways. Firstly, by bringing in principles like ‘liberty’, ‘rule of law’, ‘due process’, ‘justice’, ‘constitutional morality’, *etc.*, it made the relationship between the individual and the state morally synchronised and protected. With suffrage, citizens became entitled to civil, economic, and political rights in a constitutional democratic republic state.¹⁷ Secondly, with Part III of the Constitution came the inherent protection of rights and freedom against despotism. Even though government by the people became the norm of the constitutional scheme, Parts III and IV envisaged the idea of normalisation of higher principles for sustainable constitutional development. The Indian Constitution aimed at bringing egalitarianism,¹⁸ inclusivity,¹⁹ protection of minority rights²⁰ as a democratic and social necessity. As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative.²¹ Thus, through its transformative nature, our Constitution embodies universal ideals to address societal oppression both vertically and horizontally. The development of subaltern constitutionalism reflects this transformation in the Indian legal system.²²

A. Supreme Court’s interpretation of the Constitutional Trinity

In modern legal philosophy, Indian structuralism has been majorly based itself on liberal interpretation and balancing of power. There are two models of constitutional interpretations.²³ One emanates from the ‘black letter law’ tradition, which seeks to interpret as an autonomous reality.²⁴ In this approach, the law is separated from morality and other natural law principles

¹⁶ Jan Klabbers, ‘The Bustani Case before the Iloilo: Constitutionalism in Disguise?’ 53 *The International and Comparative Law Quarterly* 455-63 (2004).

¹⁷ Constituent Assembly Debates on July 24, 1947, available at: <http://loksabha.nic.in/writereaddata/cadebatefiles/C24071947.html> (last visited on April 15, 2020).

¹⁸ The Constitution of India, art. 14.

¹⁹ The Constitution of India, arts. 14, 15, 16, 17.

²⁰ The Constitution of India, art. 30.

²¹ Ruti G. Teitel, *Globalizing Transitional Justice* 93 (Oxford University Press, 2015).

²² Vrinda Narain, ‘Postcolonial Constitutionalism in India: Complexities & Contradictions’ 26 *Canadian Journal of Women and the Law* 124 (2016).

²³ *Supra* note 9, pg. 226

²⁴ Conrado Hübner Mendes, ‘Interpreting Constitutions: A Comparative Study’ 6 *International Journal of Constitutional Law* 349-57 (2008).

and interpreted positively following self-constituted principles. The other model is the structuralist interpretation. This approach gives a liberal perspective and wider creativity to the judiciary and is called the teleological or result-oriented approach.²⁵ With the birth of judicial innovations like ‘epistolary’ jurisdiction, social action litigations²⁶ or the ‘basic structure’ doctrine,²⁷ the courts in India over the period have moved away from strict positivism to inscribe structuralism into Constitutional interpretation. This structuralism is seen predominantly in the interpretations of the golden triangle *viz.* articles 14, 19 and 21 by the Supreme Courts.

In his closing speech to the Constituent Assembly, the day before the Constitution was adopted; Dr. B.R. Ambedkar resonated this view and said:²⁸

Political democracy cannot last unless there lies at the base of its social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality, and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of the trinity. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become the natural course of things. It would require a constable to enforce them.

It would be foolhardy to think of rights without contours, like absolutism. Absolutism leads to chaos. While correlating ‘rights’ with the social contract theory, it is seen that there can be only a conditional realisation of rights, because of the correlative duty that the social contract imposes.²⁹ However, how far these rights can be curtailed would depend on the justification given by the authority. Grievances are identified as arising from the growth of the role of the State in the development, both as a social regulator and as a service provider.³⁰ Constitutional

²⁵ Jeffrey Goldsworthy, *Interpreting Constitutions: A Comparative Study*, 226 (Oxford University Press, 2007).

²⁶ Upendra Baxi, “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” 4 *Third World Legal Studies* 107 -32 (1985).

²⁷ Virendra Kumar, “Basic Structure of the Indian Constitution: Doctrine of Constitutionally controlled governance [From Kesavananda Bharati to I.R. Coelho]” 49 *Journal of the Indian Law Institute* 365 (2007).

²⁸ Speech by Dr. B.R. Ambedkar on November 25, 1949, Chairman of Drafting Committee, Parliament of India, IX Constituent Assembly Debates 979 (1949).

²⁹ Peter McCormick, “Social Contract: Interpretation and Misinterpretation”, 9 *Canadian Journal of Political Science/Revue canadienne de science politique* 1, 63 (1976).

³⁰ John F. Mceldowney, *Public Law*, 446 (Sweet & Maxwell, 1st Ed. 1994).

principles do so by deepening democracy in the public sphere, where it insists upon a ‘culture of justification’, *i.e.*, every act of public power be justified by the touchstone of the Constitution.³¹ It is the moral duty and constitutional responsibility of the courts to maintain the balance of power by insisting upon the ‘culture of justification’.³²

Post-colonial nationalism also played a fundamental role in restructuring the discourse of law. The complexities and contradictions of the Indian society post the colonial era had to be critically evaluated through the institutional regime. The judiciary’s efforts towards reinforcing the democratisation of justice and smoothening access to justice cannot be underplayed. In *Maneka Gandhi v. Union of India*,³³ the Supreme Court held that every law must contain and fulfill the moral as well as procedural criteria within it, otherwise, it would be disregarded as law. Court held that the mere prescription of some kind of procedure is not enough to comply with the mandate of article 21. The procedure prescribed by law has to be fair, just and reasonable and not fanciful, oppressive, or arbitrary, otherwise, it should not be a procedure at all and all the requirements of article 21 would not be satisfied.³⁴ A procedure to be fair or just must embellish the principles of natural law *i.e.*, natural justice.

In *Joseph Shine v. Union of India*, a Constitution Bench of the Supreme Court struck down the adultery provisions as unconstitutional and envisaged a transformative vision of gender equality and intersectional feminism.³⁵ Justice Indu Malhotra in her opinion observed that “the true purpose of affirmative action is to uplift women and empower them in socio-economic spheres. Legislation that takes away the rights of women to prosecute cannot be termed as ‘beneficial legislation’.”³⁶

In *Navtej Johar case*,³⁷ section 377 was read down to exclude consensual same-sex relations between adults. The judgment explicitly laid down the concept of the transformative character of the constitution, right to self-determination, individual liberty, and progressive realisation of rights. It was also laid down that legislation discriminating based on an ‘intrinsic and core trait’ of an individual was, *ipso facto*, which is a breach of the right to equality guaranteed under

³¹ Gautam Bhatia, *The Transformative Constitution* Xxxviii (Harper Collins Publishers, 2019).

³² Kai Möller, “Justifying the Culture of Justification” 19 *International Journal of Constitutional Law* (2018).

³³ 1978 SCR (2) 621.

³⁴ *Id.*, at 624.

³⁵ W.P. (Criminal) No. 194 Of 2017 (Supreme Court of India: 2018).

³⁶ *Joseph Shine v. Union of India*, W.P. (Criminal) No. 194 Of 2017, Opinion of Justice Indu Malhotra in Judgment dated September 27, 2018, para 14.

³⁷ *Navtej Singh Johar v. Union of India thr. Secretary Ministry of Law and Justice*, W. P. (CrI.) No. 76 of 2016; D. No. 14961/2016 (Supreme Court of India: 2017).

article 14.³⁸ In *Sabarimala entry case*, the Supreme Court in a 4:1 decision allowed entry to women in the Sabarimala Temple. Judgment is a powerful example of articulation of the transformative interpretation of articles 25 and 26 *vis-à-vis* constitutional moralities.³⁹

Similarly, in the *K. Puttaswamy case*, the Apex court while guaranteeing the right to privacy as a fundamental right also put out the negative aspect of privacy, which casts a duty on the State to stick to the procedural prerequisites to tackle arbitrariness of governmental power.⁴⁰ In *NCT of Delhi v. Union of India*, the Supreme Court dealing with the case of Special Status of NCT of Delhi to clarify the scope of powers of the Delhi Government concerning the LG adopted the purposive interpretation of article 239AA to reinforce the settled principles of constitutional jurisprudence *viz.* democracy and federalism. In the judgment authored by Justice (Dr.) D.Y. Chandrachud observed that “not just the forms and procedures of the Constitution, but provides an enabling framework that allows a society the possibilities of self-renewal”.⁴¹ This approach of purposive interpretation to Constitutional principles is the conformation of man-made law to natural law principles.⁴²

Though the search for absolute values is still a journey, the momentum it needs is ensured through the judiciary’s progressive constitutional vision and creativity. In a transformative democracy, the judiciary plays a quintessential role in this quest for perfection. The apex court for this purpose is entrusted with unrestricted plenipotentiary power in the form of article 142 which ensures that the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing ‘complete justice’ in any cause or matter pending before it.⁴³ It is axiomatic that the courts must apply the natural law principles of justice, equity, and good conscience while passing such orders.

B. External Rationality *vis-à-vis* Transformative Constitution

The purpose of adopting a constitution was an effort to bring social change through a constitutional action. Post-colonial India had to rebuild its civilization. The newly drafted

³⁸ W. P. (CrI.) No. 76 of 2016; D. No. 14961/2016, at para 14.3.

³⁹ *Indian Young Lawyers Association v. The State of Kerala*, Writ Petition (Civil) No. 373 Of 2006 (Supreme Court of India: 2018).

⁴⁰ *Justice K. S. Puttaswamy (Retd.) v. Union of India*, Writ Petition (Civil) No. 494 of 2012 (Supreme Court of India: 2017).

⁴¹ *NCT of Delhi v. Union of India*, (2018) 8 SCC 501, (Supreme Court of India: 2018) paras 49 & 55.

⁴² Stephen Breyer, “On the Uses of Legislative History in Interpreting Statutes” (1992) 65 *S. Cal. L. Rev.* 845, 847. John F. Manning, “Textualism and the Equity of the Statute” (2001) 101 *Colum. L. Rev.* 1, 109. Benjamin N. Cardozo, *The Nature of the Judicial Process* 24-25 (Haven: Yale University Press, 1928).

⁴³ The Constitution of India, art. 142.

constitution of India was then used as a structure to build this civilization based on the values of equality, liberty, rule of law, and fraternity. This social change promised a new future while explicitly rejecting the imperial past.⁴⁴

The makers of the Indian Constitution were conscious of the role of the judiciary in ensuring the development, modernisation, and realisation of constitutional guarantees. The need to engage citizens to ensure coexistence was one of the underwritten emancipatory goals of the Constitution. A constitutionalist can seldom disagree that the framework of the Indian Constitution cannot ensure the total realisation of rights by the judiciary. While ‘governmentality’ has become the legitimising rationale in many of the functioning democracies, there is a need to ingrain the voices of the subaltern as a norm, rather as an exception while deciphering what is rationality.

The executive branch has the onus as well as the responsibility to fulfill many of these constitutional promises.⁴⁵ The development of ‘social action litigation’ has breathed a fresh perspective in defining the contours of the government’s rationality.⁴⁶ Interestingly, it is a dilemma whether the linkage of enforceable Part III and non-enforceable Part IV as interpretational creativity of the judiciary was envisaged by the Constitutional makers. However, the intent of the makers has several times been departed away to match the present-day realities. Granville Austin in his classic ‘The Indian Constitution: Cornerstone of a Nation’ talks about social revolution and democracy. According to him,⁴⁷

The Constitution...by its very existence was a social revolutionary statement. It was to be a modernising force. Social revolution and democracy were to be the strands of the seamless web most closely related. Democracy, representative government, personal liberty, and equality before the law, were revolutionary for society.

The Constitution of India is the guiding light for future generations. Constitutional development is an arduous pursuit for the realisation of universal principles. Democratic governance as a feature of modern Indian constitutionalism is also a mechanism to express the

⁴⁴ Upendra Baxi, “Postcolonial Legality”, in Henry Schwarz and Sangeeta Ray (eds.), *A Companion to Postcolonial Studies* 540-44 (2000).

⁴⁵ Werner Menski, “Fuzzy Law and the Boundaries of Secularism” 13 *Porchefstroomse Elektroniese Regsblad* 47-49 (2010).

⁴⁶ Upendra Baxi, “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” 4 *Third World Legal Studies* 6 (1985).

⁴⁷ Granville Austin, *The Indian Constitution: Cornerstone Of A Nation* xiii (Oxford University Press: New Delhi, 1996).

aspirations of the ‘sleeping sovereign’.⁴⁸ Fundamental rights are embodied in Part III of the Constitution and they include the right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, and right to constitutional remedies. The golden triangle of articles 14, 19, and 21 embodies universal principles of natural law. The concept of ‘natural law’ is central to the progressive interpretation of fundamental rights.⁴⁹ The idea of a ‘transformative constitution’ has become the new buzzword since Supreme Court has started interpreting the constitution extensively breaking the silos of orthodoxy and relying more on ‘demosprudence’, morality, reason, and rationality as the touchstone of progressiveness.⁵⁰ However, it can be argued that both ‘originalism’ and ‘living constitutionalism’ have remained unfaithful to the sleeping sovereign.⁵¹

The transformation of democracy is not limited to inherent factors. External rationality also plays a prominent role in the development of society. Philosophers like Thomas Hobbes, John Locke, and Thomas Aquinas, argued that moral requirements are based on standards of rationality.⁵² However, these standards were external rational principles that are discoverable by reason from nature. External rationality also helps in the development of natural law. The term ‘natural law’ has been variously deciphered and untangled by different people, with different ideologies at different times.⁵³ Natural law philosophy⁵⁴ guides a democracy in four ways: it philosophically lays down the ideals which guide legal development and administration; it gives a basic moral quality in law which prevents a total separation of the ‘is’ from the ‘ought to’; it gives the framework and method of discovering perfect law. The content

⁴⁸ Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press, 2016).

⁴⁹ Robert P. George, “Natural Law, the Constitution, and the Theory and Practice of Judicial Review” 69 *Fordham Law Review* 2269 (2001).

⁵⁰ Upendra Baxi, “Law, Politics, and Constitutional Hegemony: The Supreme Court, jurisprudence, and demosprudence”, in Sujit Choudhary, *et. al.* (eds.), *The Oxford Handbook of the Indian Constitution* 141 (Oxford University Press, 2017).

⁵¹ David Singh Grewal and Jedediah Purdy, “The Original Theory of Constitutionalism”, in Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* 667 (Cambridge University Press, 2016).

⁵² Robert Johnson and Adam Cureton, “Kant’s Moral Philosophy”, in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Spring ed., 2019), available at: <https://plato.stanford.edu/entries/kant-moral/> (last visited on April 15, 2020).

⁵³ John Finnis, “Natural Law Theories”, in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (Winter Ed., 2016), available at: <https://plato.stanford.edu/entries/natural-law-theories/> (last visited on April 15, 2020).

⁵⁴ Fasso, Guido, “On Natural Law as the Basis of Democracy Note” 74 *Natural Law Forum Paper* (1962); Ulrich K. Preuss, “Perspectives of Democracy and the Rule of Law” 18 *Journal of Law and Society* 3. 353 (1991); Philip Soper, “Some Natural Confusions about Natural Law” 90 *Michigan Law Review* 8, 23 (1992).

of perfect law is deducible by reason, and it guides the conditions *sine quibus non* for the existence of law.⁵⁵

III. Decoding ‘Justice’ in Indian Democracy

The transformative agenda of social revolution through the Indian Constitution mandates the institutions to redress injustices. While the law is the primary catalyst and agent for social change in any developed society, the ends of law are nothing but justice. The idea of human and social development devoid of justice would be dysfunctional. The justness of rights entails a plan of policies that avoids disproportionality. The value of justice and just development is enunciated in the founding values and principles of the Indian Constitution. The complexity of societal structure also makes the implementation of justice institutional and complex. Michael Walzer referred to it as ‘complex equalities.’⁵⁶ Indian Constitution’s development through reservations, progressive development, and inclusivity is an attempt to simplify this complexity. Globalization and multi-culturalism are changing the way we think and argue about justice.

In a democracy with a transformative constitution, the theory of justice is undergoing a paradigm shift. The grammar of the theory of justice is being transformed. Aristotle distinguished “corrective justice” and “distributive justice”.⁵⁷ What could be called the “theory of social justice” now appears as the “theory of democratic justice.”⁵⁸ The idea of justice in a transformative democracy is to address questions of enhancing justice and removing injustice, rather than to create a smokescreen by defining the nature of ‘perfect justice’. The emergence of natural law has made principles of democracy transnational and global through universalising notions. It relates to global social policy and regulation in this tangled and interlinked democratic discourse. An appeal to natural law also justifies the responsibility of a dynamic democracy to uncover and realise inclusive justice. This movement from individualistic liberalism to unsystematic collectivism has brought changes in the social order through the formulation of new notions of rights and duties.

⁵⁵ Dias, *Dias Jurisprudence* 470 (Lexis Nexis, 5th edn. 2013).

⁵⁶ Michael Walzer, “Complex Equality”, in Louis P. Pojman & Robert Westmoreland (eds.), *Contemporary Political Theory: A Reader* (Oxford University Press: USA, 1997).

⁵⁷ Paul A. Boer Sr. Et. Al., (Eds.), *Aristotle’s Corpus Aristotelicum: Volume V: Ethics and Politics* 3-4 (Createspace Independent Publishing Platform, 1st Ed., 2016).

⁵⁸ M.D.A. Freeman, *Lloyd’s Introduction to Jurisprudence (Classic Series)* 1415 (Sweet and Maxwell, 9th edn., 2014).

The history of a civilization's struggle will ultimately set the pattern for the future jurisprudence of social justice. India's living democracy is a pronouncement of social ethics sustaining on natural reasoning. The main reason to recognise democracy and justice as an underlying basis of natural law is to promote and preserve sustainable elements of society. However, majoritarianism in a democracy could be used as a weapon to weaken pluralism, promote authoritarianism, fulfil undemocratic objectives, and even legitimise undemocratic actions.⁵⁹

A. The Idea of Justice in the Post-Modern era

One of humanity's urgent challenges is to find solutions to problems having a fatalistic impact on democracies. The other global concerns include climate change, nuclear weapons, global poverty, terrorism, and an unregulated world economy. Post-modern thought originates from the rejection of many of the core assumptions developed during the Enlightenment period.⁶⁰ In terms of justice, the school of thought suggests maintaining a sceptical eye towards the conventional notion of justice. Law as a means to achieve justice gives rise to an ample amount of academic and institutional resources being directed towards access to justice.

Liberal and progressive ideas have finally found their recognition in the constitutional structure. Social norms which are against the very basic tenets of humanity are eroding. Today, delivery of justice in the post-modern era is not a limited privilege available to institutions, justice dispensation in the present era has been privatised. Privatisation of justice is not divorced with repercussions. It has led to the parturition of anti-societal notions and obsequious forms of probity like 'mob justice' and 'vigilante justice'. Post-modernists also lay great stress on access to justice. Social justice as a means to achieve absolute justice or complete justice would still be an unachievable goal unless justice as an idea develops into a transcendental intuition. The twenty-first century is an era of a globalised legal order, where changes in one part of the world will have a direct impact on the other part of the world. A radical change in one developed society can have a direct impact on other developing societies. As Kofi Annan pointed out, the twenty-first century is dealing with 'problems without passports.'⁶¹ Modern terms of justice have no territorial limitations, problems like climate change, nuclear threats,

⁵⁹ Samir Saran, "Democracy, Diversity, Development: 2016 was dominated by their dark sides, can we channel the Force this year?" *The Times of India*, Jan. 10, 2017.

⁶⁰ Loretta Capeheart and Dragan Milovanovic, *Social Justice: Theories, Issues, And Movements* 125 (Rutgers University Press, 1st ed., 2007).

⁶¹ Kofi A. Annan, "Problems Without Passports", *Foreign Policy*, Nov. 9, 2009, available at: <https://foreignpolicy.com/2009/11/09/problems-without-passports/> (last visited on April 15, 2020).

and human rights, can never find solutions if justice as a global ideal is objectified and restricted into silos. The responsibility of the world order is to ensure that the voices of the subaltern are not kept unheard.

B. Justice in Practice (JIP)

India was ranked 68th in the 2019 Rule of Law Index released by the World Justice Report (WJR).⁶² The United Nations and WJR's Rule of Law indicators are mainly associated with the absence of corruption, open government, access to justice, and regulatory framework. The contemporary political philosophy of democracy can be identified as 'government by discussion'. The phrase was coined by Walter Bagehot,⁶³ but it was given literary relevance by John Stuart Mill.⁶⁴ Deliberative democracy cannot function in a vacuum. Justice cannot be achieved in practice in a democracy where public reasoning and discussions are exclusive or privilege to few. The transformative task of creating a substantive egalitarian society as envisaged in the Preamble, Part III and IV of the Constitution, lies with the political arm of the State. However, the responsibility of the state like ensuring justice, equality and freedom as envisioned in the Preamble does not begin and end with the Preamble. There has to be an element of conscious responsibility of the State to ensure substantive justice, welfare and a fair and positive administration for all. Radicalism in the principal values of the Indian Constitution began through the adoption of universal adult suffrage and social reforms fostering constitutional facts. However, there is much to mourn about the global democratic order's partial demise and anti-robustness.

Extensive interpretation of the constitution through the principles of natural law has led to the evolution of ideas like constitutional morality, transformative constitutionalism, constitutional integrity, but it is the voice and outrage of the people that must be heard by direct action to restore the real value of a constitution. Democracy can never necessarily guarantee democratic justice.⁶⁵ Contemporary constitutionalism sees democratic constitutional law-making as a result electorate's sustenance. The world has seen justice as an end derailing due to the form

⁶² Global Press Release: World Justice Project Rule of Law Index 2019, *available at*: <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019> (last visited on April 15, 2020).

⁶³ Russell Barrington (Ed.), *Walter Bagehot, The Works And Life of Walter Bagehot, Vol. 5 (Historical & Financial Essays; The English Constitution)* 11-25 (Longmans, Green, And Co.: London, 1915).

⁶⁴ J.S. Mill, *An Essay On Government (1824)* 53-95 (Reprinted in Lively and Rees, 1978).

⁶⁵ Ian Shapiro, "Elements of Democratic Justice" 24 *Political Theory* 4, 579 (1996); Robert Post, "Democracy and Equality" 603 *The Annals of the American Academy of Political and Social Science* 24-36 (2006).

of democracies in practice. The flexibility of a democratic system of governance can be easily hijacked as a legitimising tool by undemocratic forces to vindicate diabolical objectives. Too much populism may lead to constitutional anarchy. Thus, there is a dire need to focus equally on republicanism along with democracy. Indian democracy due to challenges so novel seldom finds a reflection of solutions to adopt from western democracies. The form of justice that Indian democracy breathes for is the idea of ‘inclusive justice’.

IV. Good Governance as a Democratic Necessity

Dr. Shashi Tharoor and Dr. Samir Saran in their recent work argues that “the international order often in the name of defending democracy and free markets, frequently broke the liberal rules it had underwritten, whether of sovereignty or self-determination, human rights, or even liberalism itself.”⁶⁶ It also reflects how governance and human rights are intrinsically linked to democratic reforms. The correlativeness of both these notions stipulates that they are mutually reinforcing. India has reduced democracy to elections which happens every five years. But the real essence of democracy is what happens during the five years. The public policy responses and politico-legal changes between the period of elections reflect the context of a democracy.

Modern thinkers are of the view that democracy’s ultimate end is to provide a form of governance adequately able to protect human rights. Good governance is closely interlinked to human rights and the democratization of justice. Democracy has a characteristic of a mode of life that is neither simply fact nor simply ideal, but rather an open-ended reality. Article 21 of the Universal Declaration of Human Rights (UDHR) recognizes the importance of a participatory government.⁶⁷ The UDHR also states that “everyone is entitled to a social and international order in which the rights and freedoms outlined in the Declaration can be fully realized.”⁶⁸ A functioning democracy requires good governance.

Good governance requires a government to be more open, democratic, participatory, responsive, equitable, inclusive and consensus-oriented. Accountable and transparent governance encompasses a broad reform strategy to strengthen civil society and social institutions. The Committee on Economic, Social and Cultural Rights stated that “Good

⁶⁶ Shashi Tharoor and Samir Saran, *The New World Disorder and The Indian Imperative* 239 (Aleph Book Co., 2020).

⁶⁷ The Universal Declaration of Human Rights, Art. 21.

⁶⁸ The Universal Declaration of Human Rights, Art. 28.

governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.”⁶⁹ Viewing good governance through the lens of natural law is a proposition that could be realised only through good law. The transformative potential of rights enshrined in the constitution with an enabling environment to realise these rights can compel the State to adhere to these principles of good law. Acculturation, rationality and process of law form the foundational pillars of good governance. A democracy cannot survive in a watertight environment of positive sanctions without any ingredients of natural law. Governance has to be justified morally, socially and technically.

In a neo-liberal view, good governance involves improving social and educational services for the respect of liberty rights. Lon Fuller coined the term ‘*Eunomics*’ which he defines as “the theory or study of good order and workable arrangement”.⁷⁰ Time has arrived to interpret the Constitution as a mere extension of positive law with certain elements of natural law which provides a platform for good governance. The ultimate aim of a transformative democracy was to evolve from a procedural democracy to liberal democracy. A transformative Constitution has an inherent characteristic of responsibility. As a framework for governance, the Constitution has the responsibility to provide an ‘enabling environment’ to ensure the implementation of human rights. Over time, constitutional principles have enabled a structure to guide policies and effectuate implementation.

A ‘right-sensitive’ good governance approach improves the capacity of the State to enhance inclusion and improve standards of accountability. However, the effectiveness of a functioning democracy lies in its enforcement mechanisms. An example of this crisis can be drawn from the functioning of Indian courts. The proactiveness of the judiciary’s role in society as an agent of social change has resulted in a large number of people approaching the courts. At the same time, due to the systematic crisis of backlog of cases, the proactive role of courts is overshadowed by its institutional failures. Modern democracies are primarily facing two problems in terms of enforcement and governance-related practice. First, the incapacity of institutions to enable consensus-oriented administration, and second, the lack of implementation of inclusive policies to address the issues surrounding inequalities.

Constitutionally enshrined values of social justice and equality were developed to protect citizens against discrimination and to ensure that inclusive policies become a norm. While there

⁶⁹ Thomes Pogge, *Freedom From Poverty As A Human Right: Theory And Politics* 311 (UNESCO, 2009).

⁷⁰ Wibren van der Burg, “Review: The Work of Lon Fuller: A Promising Direction for Jurisprudence in the Twenty-First Century” 64 *The University of Toronto Law Journal* 736-52 (2014).

has been a suggestion towards institutionalization to preserve the sanctity of these rights by establishing a ‘Central Equality Commission’.⁷¹ Social inclusion in a neoliberal perspective should be an active endeavour to focus on disadvantaged groups through smoothening the effectiveness of public policy and its implementation.⁷² In a representative democracy like India, inclusive policies should resonate individual’s rights, free choice and moral equality.⁷³ However, the Indian model of inclusivity finds comprehensive coverage in electorally motivated populist policies. This has also created tension between populism and constitutionalism.⁷⁴

A State’s response to honour the commitments of Constitutional norms can bring about a substantial change in how these creeping issues could be addressed. A perfect example of the Constitution enabled social change is Albania’s post-crisis journey.⁷⁵ Constitution-making in Albania took place amid the conflict through citizen participation to ensure transparency and ethnicity.⁷⁶ This led to the drafting of a new constitution entailing strong commitments to ensure the promotion of human rights and strong institutional frameworks to guarantee these rights.

V. Conclusion

Democracy in its very essence is a socio-political phenomenon. The world is witnessing a phase where a maximum number of countries are embracing elections as a mechanism to achieve progressiveness. It is seldom possible for a society to transform purely relying on inherent rationality without the elements of natural law. Natural law and principles of natural justice have an indispensable role in the development of democracy. Rule of law which is the foundational aspect of any functioning conventional democracy is now a constitutional guarantee. The Indian Constitution has tried to adopt the principles of natural law and justice

⁷¹ The Anti-Discrimination and Equality Bill, 2017 (Bill No. 289 of 2016).

⁷² Chau-kiu Cheung, “Public Policies that Help Foster Social Inclusion” 112 *Social Indicators Research* 1 (2013).

⁷³ Andrew Altman, “Policy, Principle, and Incrementalism: Dworkin’s Jurisprudence of Race” 5 *The Journal of Ethics - Morality and the Law: The Contributions of Ronald Dworkin to the Philosophy of Law* 3 (2001).

⁷⁴ Mark Tushnet & Bojan Bugarcic, *Populism and Constitutionalism: An Essay on Definitions and Their Implications*, Harvard University DASH Repository (2020), available at: <https://dash.harvard.edu/bitstream/handle/1/42660123/Populism%20and%20Constitutionalism%20law%20review%20version.pdf?sequence=1&isAllowed=y> (last visited on October 20, 2020).

⁷⁵ OHCHR, ‘Good Governance Practices for the Protection of Human Rights’, *Office of the High Commissioner for Human Rights*, New York and Geneva (2007), available at: <https://www.ohchr.org/en/issues/development/goodgovernance/pages/goodgovernanceindex.aspx> (last visited on April 15, 2020).

⁷⁶ Constitutional history of Albania, *Constitution Net*, available at: <http://constitutionnet.org/country/constitutional-history-albania> (last visited on April 15, 2020).

during different stages of its drafting. The idea of giving the people a constitution was not just a modus operandi to empower the electorate, but the intent was to formalise their aspirations. This would have been a recalcitrant end unless it was justifiable.

The political philosophy of social contract theory gives legitimacy to the authority over its subjects. India's political democracy has witnessed a transformation in terms of how it views its people. The colonial hangover of treating people as 'subjects' changed to treating people as 'citizens', who are empowered with the credos of shared governance. In contemporary democracy, it is not the sole responsibility of the State to govern; citizens are equal partners, who are capable of bringing change in law and system of governance.. With this transfer of power to the public, situations may arise when public morality may contradict natural principles of justice. The real essence of a transformative democracy is to develop a culture of practising what is not right just for the majority, but for the society *in toto*.