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# SOCIAL JUSTICE AND A TRANSFORMATIVE CONSTITUTION

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As the largest democracy in the world, India clearly aims to achieve social justice and equality. Fair treatment, equal rights, and access to the judicial system are foundational presumptions of justice. The welfare state requires the idea of social justice. This idea is embraced by the Indian Constitution in a number of provisions, such as the Preamble's invocation of "Socialist," "Social and Economic Justice," "Equality," and related ideals, which makes it abundantly evident that the state has long been engaged in the social welfare of its citizens and works to create an equal society. Social justice calls for preferred treatment of the historically disadvantaged rather than a blind application of equal treatment. To guarantee social justice in society, government programmes must be implemented appropriately and fairly.

## INTRODUCTION: THE IDEA OF SOCIAL JUSTICE

Compared to justice, social justice is a more expansive notion. The term "social" is associated with society. It involves social and economic transformation because of its broad breadth, which includes social issues, challenges, and changes. Social justice refers to actions performed to improve the lot of the underprivileged and depressed segments of society. Hence, it calls for social engineering which is an attempt to restructure society in order to address entrenched social problems. Laws can be used to bring about such socio-economic

changes. The goal of social justice is to eradicate caste and class divisions and establish political, economic, and social democracy. It blends democratic personal freedom with socialist ideals. Thus, the term "social" has a broad meaning related to society, including how it should be structured and what its social values should be. There are various ways to describe the concept of justice. Justice, according to the Greek philosopher Plato, is the fundamental tenet of social existence. British political scientist Ernest Barker argued that justice was the central organising principle of Plato's political philosophy.

The concept of social justice is to establish a community or organisation that is founded on the values of equality and fraternity, that recognises the worth of every human being, and that comprehends and respects human rights. People began searching for new frameworks to anchor society, driven by fear of the brutality and prejudice entrenched in feudal structures. Various regions of the world rebelled against aspects of feudalism. At that time, the world developed the idea of democracy, which was founded on the principles of social fairness. The spirit and content of the Indian Constitution are distinct. This permits the application of social justice in a broader sense, encompassing both social and economic fairness. Social justice, though not explicitly defined in the document, functions as both an objective and the cornerstone of the

Indian Constitution. Social justice is used to increase the effectiveness of the democratic system. It has been made very clear that no one should be treated unfairly due to social, religious, or cultural bias. In the early 1990s, social justice emerged as a key political catchphrase in India. The concept of transformativeness encompasses a wide range of political and social dimensions. In the introduction to Transformative Constitutionalism, Baxi, Vilhena, and Viljoen explain Langa J. idea as “an enterprise of promoting large-scale change in society through nonviolent political methods grounded in law.” The phrase “the constitution expresses a ‘magnificent goal’ of the South African transformation” aptly captures the spirit. The goal is to heal a severely damaged civilisation. Without having a deeply therapeutic and diagnostic character and potential, the South African Constitution cannot accomplish its purpose. Although the aforementioned claim was made in the context of South Africa, it can be generalised *mutatis mutandis* to the majority of other post-colonial societies. Every one of these communities has wounds to mend and dreams to nurture. For instance, in the Indian context, bonded labour, untouchability, and other issues need to be addressed. The word “transformation” is fundamental to the Indian Constitution since, from its founding, it has placed a strong emphasis on the positive duty of enacting significant social change. This article aims to convey the many facets of this dynamic and all-encompassing document, which has occasionally been shaped by the judiciary, and to understand the potential of this crucial branch of government to address the difficulties encountered in the operation of Indian society. A “living constitution” is one that, without being formally altered, develops, shifts over time, and adjusts to new situations. For a democratic nation like India, the Constitution is extremely sacred since it reflects

the country’s lengthy history. It has changed over time to meet the particular needs of society and the times. The original text of this document has undergone 106 revisions to date. This shows that “legal pluralism” exists and is respected throughout the nation. Without mentioning Eugene Ehrlich, the jurist who pioneered the concept of the living nature of law, any discussion about it would be incomplete. His views diverged from Marx’s widely known ideology in that he disagreed with the latter’s assertion that “law withers away after the establishment of a classless society.” Instead, Ehrlich was persuaded of the social determinism that served as the foundation for law when he developed his notion of “living law.” The only way to comprehend the significance of his theory is to situate oneself in the social, legal, political, intellectual, and regional environment in which he developed it. According to Strauss, “it seems we want to have a constitution that is living, adapting, and changing and, simultaneously, invincibly stable and impervious to human manipulation.” The Indian Supreme Court’s Basic Structure jurisprudence aims to strike a balance between stability and the necessity for change.



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## THEORETICAL FOUNDATIONS OF A TRANSFORMATIVE CONSTITUTION

The concept of transformative constitutionalism, though most extensively theorised in South African jurisprudence, has significant resonance for the Indian constitutional experience. Integrating the principles of liberty, equality, fraternity, and dignity into the social structure is the essence of transformative constitutionalism. A key tenet of transformative constitutionalism is the underlying goal of the constitution, which is to improve society by making it more inclusive and progressive. In essence, society must change if social problems and the constitution work together. It implies that societal morality is subordinated to constitutional morality. The essence of the constitution will always remain the same, even though it may change over time in response to societal shifts. Secularism, liberty, and gender justice are some of the fundamental tenets of the constitution that best represent its transformative objectives.

The Supreme Court's embrace of transformative constitutionalism is evident across a series of landmark judgments. These include the recognition of the right to privacy as a fundamental right in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017), the affirmation of women's right of entry into the Sabarimala Temple in *Indian Young Lawyers Association v. State of Kerala* (2018), the striking down of adultery as a criminal offence, and the affirmation of the right to life with dignity and the freedom to choose a partner. The concept of transformative constitutionalism holds that the Supreme Court interprets constitutional provisions so that they are not limited to the literal meaning of their words but are given a meaningful construction that reflects their intent and purpose in accordance with changing times. The Supreme

Court is guided by the spirit of the Constitution rather than its text alone.

The Supreme Court recently reaffirmed the idea of transformative constitutionalism in Indian law by decriminalising Section 377 of the IPC in *Navtej Singh Johar and Others v. Union of India* through Secretary, Ministry of Law and Justice (decided on 06.09.2018). The best way to understand the term "transformative constitutionalism" is to adopt a pragmatic perspective that will aid in acknowledging the reality of the present. As a singular term, transformation denotes change, alteration, and the capacity to metamorphose; it is completely at odds with everything that is static and stationary. Therefore, the idea of transformative constitutionalism which applies to all constitutions, but especially to the Indian Constitution refers to the constitution's capacity to change and evolve in response to the evolving demands of the times.

No other constitution in the world, according to constitutional expert Granville Austin's seminal study, "has provided so much impetus towards changing and rebuilding society for common good." Social justice is, by this account, the cornerstone of the Indian Constitution. The following section examines how this commitment to social justice is expressed through the Constitution's provisions. Social justice is promoted by the Preamble and articles found in Part IV of the Constitution. In order for each person to live with human dignity, it discusses fairness for all. It is an effective tool for easing the suffering of the underprivileged, weak, Dalits, tribal people, and other marginalised groups in society and bringing them closer to equality. The Preamble itself declares: "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens — JUSTICE, social, economic

and political.” This clearly shows that social justice in all its forms and to all citizens was regarded as fundamental to the structure that our founding fathers prescribed for the nation. In the Preamble, the terms “socialist secular,” “democratic,” and “republic” have been included to express the concept of the “social welfare state.” In the Preamble, the word “justice” refers to three different types of justice: social, economic, and political. The Indian Constitution forbids discrimination based on religion, ethnicity, caste, or sex in order to uphold the right to equality as a fundamental component of justice. “Equality” refers to the absence of special treatment for any group within society. In order to safeguard citizens’ rights, the Indian Constitution provides social justice through Fundamental Rights and Directive Principles in Part III. Fundamental Rights are a clear articulation of the rights of common citizens, while Directive Principles give the state guidance under state policy and stipulate that the state must direct its policy towards achieving these goals.

## **THEORETICAL FOUNDATIONS OF A TRANSFORMATIVE CONSTITUTION**

“Transformative constitutionalism presents a distorted lens,” contends Baxi. Perhaps one of the most important questions to examine is “what is transformed and what is left intact” by the process of creating constitutions. The complex chambers of constituent assemblies are never the source of the struggles that create historical transformation; yet, these assemblies result in the crafting of constitutions in which the parts of revolutionary vision are frequently overshadowed by what is left “intact.” The Constitution’s signals can occasionally serve as a lighthouse to help the judiciary navigate through choppy waters. At other times, one must envision the lighthouses. Making or discovering the law requires an understanding

of what one is doing and why. Despite this, interpretations are both diachronic and the outcome of dialogical processes. According to Keith Whittington, “the field is only partially covered by constitutional choices made with the drafting and ratification of text.” Many issues need to be resolved in later practice, most notably through judicial interpretation of the Constitution, but also frequently and crucially through political action that interprets, applies, and expands the text of the Constitution. Only when there is widespread agreement on the fundamentals of the constitution and the interventions required for change can transformative constitutionalism be a successful endeavour. According to Rawls, there are two types of constitutional essentials: first, essential ideas that outline the fundamental framework of government and the political process, such as the authority of the legislative, executive, and judicial branches and the extent of majority rule; and second, legislative majorities are required to uphold equal fundamental rights and liberties of citizenship, including the freedom of conscience, freedom of opinion and association, the right to vote and engage in politics, and the safeguards of the rule of law. The Indian Supreme Court has ruled quite progressively on the majority of topics, but its jurisprudence has been somewhat unstable on a few, such as the question of political participation (*Javed v. State of Haryana*). The Indian Supreme Court’s approach to the idea of transformative constitutionalism would be quite evident if one were to examine its jurisprudence through the prism of Rawls’ two aforementioned tenets.

The idea of social justice is crucial in India because of the pervasive social injustices. In order to protect people’s rights and basic obligations, social justice is essential. In particular, lower castes like the Scheduled Castes (SC) and Scheduled Tribes (ST) are su-

subject to various forms of discrimination and exclusion. Justice is crucial because it is fundamental to our nation's residents, ability to improve their standard of living. Backward classes were not treated equally in society during the time of independence, and they were denied all rights, including the freedom to vote, the right to life, and the right to personal liberty. While some of the constitution's provisions went into effect on the day of adoption, the remaining provisions did not come into force until January 26, 1950. This day is commemorated as Republic Day and is referred to in the constitution as the "date of its commencement." The Indian Constitution has a number of noteworthy characteristics that set it apart from the constitutions of other nations, while drawing inspiration from nearly every constitution in the world. Equal treatment of all residents without social distinctions based on caste, colour, race, religion, sex, and other factors is the essence of social justice. It entails improving the status of women and members of the underprivileged classes (SCs, STs, and OBCs) and not granting benefits to any specific segment of the population exclusively. This foundational commitment is reflected in a series of provisions designed to give social justice practical effect. The Indian Constitution's drafters were well-versed in applying and synthesising a number of justice-related concepts. They sought to find a kind of justice that would satisfy the demands of the entire movement. Pt. Jawaharlal Nehru presented a vision to the Constituent Assembly: that the assembly's first task was to declare India's independence by drafting a new constitution that would provide starving people with food and clothing, and give each Indian the best opportunity to advance personally. Everyone can benefit from social justice in its adaptable and compassionate form. A person's sense of social justice is a relative term that is subject to change based on their goals, culture,

time, and circumstances. India's social injustices need an equal and commensurate response.

Since there were disadvantaged groups during the period of independence, such as Scheduled Castes, Scheduled Tribes, and other backward classes, the Indian Constitution is a legal document that plays a significant role in promoting social justice, equality, and liberty. This article essentially examines the constitutional provisions that deal with the Directive Principles of State Policy and their role in uplifting backward classes. Numerous constitutional adjustments have been made, such as the adoption of the OBC reservation policy based on the Mandal Commission Report, which is the source of the numerous OBC reservations and the backward classes' reliance on the reservation scheme. All of our nation's people have equal access to justice, which has contributed to the current structure of citizens' rights. The idea of the creamy layer was first addressed in the landmark case of *Indra Sawhney v. Union of India*, which illustrates the judiciary's role in calibrating reservation rules for the welfare of citizens.

The Preamble and other articles in Part IV of the Constitution support social justice so that each person's life has purpose and can be lived with dignity. The Constitution's concept of social justice is made up of a variety of ideas that are primarily intended to support each citizen's orderly personal development. Therefore, social justice is a crucial component of justice in general. Social justice is a dynamic strategy to lessen the suffering of the weak, impoverished, Dalits, tribal people, and other marginalized groups in society and to raise them to the level of equality so they can live with dignity. Justice is the genus, and social justice is one of its species.

The Preamble of our Constitution contains a vow to uphold the triune phenomenon of social justice, economic justice, and political

justice. Economic democracy expressively prioritises socialist democracy and has a material character. The Preamble's commitment to justice, liberty, equality, and fraternity thus forms the constitutional foundation upon which the entire social justice architecture is built.

Articles 12 to 35 of the Indian Constitution's "Fundamental Rights" section guarantee all citizens the freedom and liberty to exercise their human rights. Everyone has the same fundamental human rights under our Constitution, regardless of their caste, gender, or economic standing. Every clause mentioned in the Constitution is a fundamental right of every member of society and facilitates everyone's access to justice. A few of these articles concentrate on communities specifically.

**Article 14 — Right to Equality:** Article 14 discusses equality before the law and equal protection under the law for all citizens. This implies that the state shall treat all Indian and non-resident Indian residents similarly. Since it has been established that every person has the right to have a fulfilling life with equal opportunities under the law, it deals with equal protection. Equal protection: Since the reservation policy requires particular assistance to attain equality, this article addresses the legal basis for it.

**Article 15 — Prohibition of Discrimination:** Article 15 addresses discrimination based on race, religion, sex, and place of birth. It promotes social justice because it permits the state to create special provisions for the advancement of socially and educationally disadvantaged groups as well as SC and ST communities to assist them in accessing equal opportunity. These provisions deal with reservation seats in educational institutions, political parties, government jobs, and access to education from which they can obtain social and economic upliftment as well as equal opportunities to live a good and prosperous life.

**Article 16 — Equality of Opportunity in Public Employment:** Article 16 essentially deals with a guarantee of equal opportunity for all citizens in matters of public employment. It addresses the employment of backward classes for government jobs and the reservation policy. This article is crucial because, historically, SC, ST, and OBC communities have been under-represented in government jobs, which have been dominated by upper caste groups. However, because of this article, backward classes can now access equal opportunity in employment and improve their livelihoods.

**Article 46 — Promotion of SC/ST's Educational and Economic Interests and Weaker Sections:** Article 46 is found in the Directive Principles of State Policy, which provides guiding principles that the state must follow in governance. This article articulates the state's obligation to promote the economic and educational interests of SC, ST, and the weaker sections of society, through which they can obtain social justice. Article 46 provides the moral foundation for the reservation policy in education and government employment for backward classes to improve their quality of life. DPSPs are not merely capable of serving as guiding principles for government when drafting policies relating to education, employment, and social welfare. Due to financial constraints, the government offers special scholarships and assistance to educational institutions so that students from these communities can receive an equitable education.

## **CASE STUDIES OF TRANSFORMATIVE CONSTITUTIONALISM**

Transformative constitutionalism, as a concept, merges two distinct but complementary ideas: transformation and constitutionalism. Accordingly, "causing a ma-

-jor change to something or someone, especially in a way that makes it or them better” refers to bringing about change via a methodical approach. Constitutionalism is defined as “adherence to or government according to constitutional principles.” It is important to note that constitutionalism is not the same as the Constitution. The Constitution is a written document that describes the rules that govern how the government operates, defining its structure. The word “transformative constitutionalism” emerges from the combination of these two ideas. However, there are some essential components that make up the term.

By interpreting constitutional provisions, the judiciary has been granted the authority to give life to the words of the law. Many academics have criticised the Indian courts in recent years for “over-reaching” or taking on an “activist” role. One of the fundamental premises of this argument is that the court has been given a “proper role” in a democratic system, which is overreaching. In a society, the people are ultimately in charge because they have given the state powers to act in their best interests. Elected officials are answerable to the public and have actual authority. However, because the judiciary derives its power from the Constitution rather than from democratic representation, it is not directly answerable to the general population. Marshall’s constitutionalism paradigm, which has two key elements, is relevant in nations having written constitutions. First, the rule of constitutional legitimacy applies to nations with written constitutions, the Constitution is the ultimate law of the land, and the authority of all branches of government, including the legislature, executive, and judiciary, is derived from it. Second, the constitution provides the foundation for judging the validity of governmental decisions and acts. Any government activity must satisfy the require-

-ments outlined in the constitution in order to be deemed legal. The constitution is the final authority for determining whether a government action or decision is valid or not. The government institutions are viewed as the trustees or agents of the sovereign people, and the courts may use their judicial review authority to verify the legitimacy of their decisions or actions if they violate the people’s rights or any requirements outlined in the constitution. A court may deem such activities to be illegal or unconstitutional. Therefore, the court is not abusing its authority; rather, it upholds the people’s will. In the end, the constitution serves as a vehicle for expressing the will of the sovereign people. The Supreme Court is not expressly given final authority to interpret the whole Indian Constitution. Although the court has the authority to declare legislation or orders that contradict the Constitution null and void, this authority is not made entirely explicit. On the other hand, the US Constitution’s supremacy clause grants the federal Supreme Court finality and exclusivity when interpreting the entire document. The judiciary in India created the Basic Structure doctrine to defend its power to interpret the Constitution from rulings in disputes between the legislative and the judiciary.

The Supreme Court’s 2018 Sabarimala ruling also touches on the necessity of changing course in the face of historical wrongs. The statement “Our conversations with the Constitution must be restructured to evolve both with the broadening of the content of liberty and dignity and the role of the Court as an enforcer of constitutional doctrine” is noteworthy in Justice Chandrachud’s judgment. The predominance of the principles of liberty, equality, and fraternity as tools for attaining individual dignity is the fundamental principle that must direct any analysis in this field, if we are to genuinely escape from the dark shadows of a culture that has oppressed

certain segments of our populace for ages due to bigotry.

The Basic Structure doctrine emerged in the case of *Kesavananda Bharati v. State of Kerala*, and it was decided that although Parliament could amend the Constitution's fundamental rights, the basic structure of the document should not change. As the guardian of the Indian Constitution, the Supreme Court ruled that any constitutional change that modifies the "Basic Structure" would be unlawful. This decision established the Indian Constitution's "Basic Structure Doctrine" and became a crucial precedent for courts around the world.

According to the ruling in *Maneka Gandhi v. Union of India*, Article 21 of the Constitution refers to the procedure established by law, and such a law cannot be arbitrary, unfair, or unjust. Additionally, it gave rise to many sub-rights under Article 21. Many transformative sub-rights resulted from the liberal interpretation of Article 21.

The Supreme Court determined that the "Right to Privacy" is essential to life and liberty and is safeguarded by Article 21 of the Indian Constitution in the case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*. In India's jurisprudence on the right to privacy, this decision set a significant precedent. The fundamental right to life under Article 21 cannot be suspended, even in the event of a proclamation of emergency or a suspension order from the President, thus confirming Justice Khanna's correctness.

The Supreme Court attempted to establish a suitable solution that preserves a delicate balance between society and the rights of the disadvantaged and backward sections in *Indra Sawhney v. Union of India*. The Supreme Court's decision regarding the Mandal Commission Report's validity was the primary matter at hand. In actuality, the Apex Court had to make numerous difficult rulings with wide-ranging effects. Through reservations, this hist-

-oric ruling enabled Indian society to transform and improve the opportunities and standard of living for the underprivileged.

The Supreme Court held in *Joseph Shine v. Union of India* that the criminalisation of adultery under Section 497 of the Indian Penal Code was unconstitutional. That clause had penalised a man who had sex with a married woman without her husband's permission. This clause was overturned because it was deemed arbitrary and discriminatory due to its silence regarding a married woman's consent.

The Delhi High Court's ruling in *Dr. Maya D. Chablani v. Radha Mittal* (2021) was widely noted. Article 21 of the Indian Constitution was liberally extended to encompass the "Right to Life" of street dogs. In this instance, it was decided that street dogs had a "right to food" and that people could feed them as long as they did not violate anybody else's rights. Additionally, the High Court created detailed guidelines for these dogs' diets. It was asserted that the right under Article 21 also safeguards the life of animals.

The relevance and significance of social justice in the modern world cannot be overstated. It aims to treat every state citizen fairly. A democratic system must make sure that social growth is in line with democratic norms and principles, which represent equality of social position and possibilities for social welfare, social security, and development. In India, the caste system undermines the foundations of democracy. Caste identity is maintained by the misuse of democratic facilities such as legislative forums, freedom of speech, expression, and association, equality, and participation in elections. It is accurate to say that India has always had an unequal society. Significant disparities exist in our society, which are seriously undermining Indian democracy. Therefore, authorities must not exhibit excessive timidity in addressing the issue of inequality by refusing to implem-

-ent essential regulatory measures, nor must they enforce needless legislative prohibitions. In order to attain socio-economic justice, it is imperative that individual independence and liberty be upheld while being subject to appropriate regulation and management. Adopting essential and acceptable measures is necessary to attain social fairness. That, in a nutshell, is the idea of social justice and its consequences. In order to establish a just society, the fundamental goal of social justice is to eliminate the disparities in people's social, political, and economic lives. It entails giving justice to people who have historically been routinely denied it due to a well-established societal framework.

## CONCLUSION

According to former Supreme Court of India judge Justice V.R. Krishna Iyer, "Social justice is not cant but conscience, not verbal borrowing from indistinguishable documents but the social force of the supreme law."

While legal justice is directed, regulated, and granted by law, social justice is focused on the needs of the people. Social justice is a multifaceted term that has been interpreted differently by political scientists, philosophers, and legal experts. Social justice denotes the fair allocation of social, material, and political resources among all citizens; the equilibrium between the privileged and the dispossessed. It aims to eliminate all forms of discrimination and inequality in the social, economic, and political spheres and provides equal opportunity for men and women in both social and economic spheres. Social justice, which aims to guarantee everyone's equality of status and opportunity, emerges as a necessary response to the persistence of social injustice. "The right of the weak, poor, aged, destitute, children, women, and other under-privileged persons in society" represents its most generic and enduring definition.

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