

## THE INDIAN CONSTITUTION AND ITS LIBERAL LEGAL IDEOLOGY

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### INTRODUCTION

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It is put forth that to know about the liberalism of our constitution we should know the concept of liberalism. Liberalism is an ideology committed to liberty and rights of individuals. Constitution of different countries whether written or unwritten are either liberal or illiberal. There is prejudice among lawyers that constitution must be liberal in order to be worthy of name. Our constitution must embody certain principles such as consent, rule of law, mechanism that limit governmental power, individual rights. Liberal in “liberal constitutionalism” is an insistence that only individual rights are recognized, and that these rights are to maximize individual autonomy and equality. The result is a concentration of power in the hands of state that undermines the essential virtues necessary for constitutionalism.

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### RESEARCH PROBLEM

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In what way the constitution of our India is liberal?

Keeping in mind the objective and purpose of the constitution which can be understood through the reading of the Preamble of the Indian Constitution, we shall attempt to understand to what extent the purpose of the existence of the Indian Constitution adheres to the notion of the Liberalism. Additionally it is to be noted that the Indian Constitution on the face of it lays down certain provisions that seem to confer to the notions of liberalism. Through this paper I shall attempt to explore the scope of applicability the liberal ideology disguised in the provisions laid down in the Indian Constitution.

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### SCOPE AND OBJECTIVE OF THE STUDY

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In the light of the purpose and intention behind the Indian Constitution, I am attempting to understand the liberal view present in the form of legal provisions laid down in the Indian Constitution. This seeks to include those provisions that depicts and represent the idea of liberalism and shall be restricted to the same. It is pertinent to note that I shall be examining whether the provision is affirmative in conforming to the notions of liberalism or whether it is in direct negative of the existence of the postulates of liberalism. Therefore, for the purpose of this study it is to be clearly understood that the attempt to understand the degree of conformity is based on utilising the axioms laid down under the concept of liberalism without raising questions to the existence of the axiom utilised. Moreover, this

is written with an outcome to add to the understanding of the notions of liberalism intertwined within the legal provisions laid down under the Indian Constitution.

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## EXISTING LEGAL SITUATION

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Constitution of India came into existence on 26 January 1950 is said to be the lengthiest written constitution in the world with 395 articles but now 448 articles. Administrative provisions to a large extent based on the Government of India act 1935, and various provisions were borrowed from other constitution of the world at the time of creation. It also provides details regarding administration of union and states and codifies relation between federal government and state governments. Constitution prescribes federal structure of government which defines separation of legislative and executive powers between the federation and states. Law passed by parliament of India is binding on all citizens. Our Constitution has certain unitary features, such as vesting power of amendment solely in the Federal Government, the absence of dual citizenship, and the overriding authority assumed by the Federal Government in times of emergency. Time taken by courts to deliver their judgments is a source of worry and agony for all at present. The State which constitutes of central and state governments and departments, authorities under them is the largest litigant in India and thus the major sufferer of this plight. The judgements need to be delivered in time for smooth functioning of our legal system of India. Recent trends emerging from the Supreme Court provide a sign of relief. For the past few years, the Supreme Court has been disposing of cases at a faster rate. Chief justice T.S. Thakur's publicly stated 'top priority' is of reducing judicial pendency. The Supreme Court has disposed of an increasing number of cases for the past three years – 40,189 in 2013, 45,042 in 2014 and 47,424 in 2015.

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## BRIEF INSIGHT INTO THE IDEA OF LIBERALISM

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Before we begin our quest in understanding the relationship between liberalism and how the Indian Constitution deals with the idea of Liberalism, it is pertinent to understand in what context liberalism is spoken about by understanding the generic outlook on liberalism and the ties it seems to have with the legal discipline. To begin with the generic idea is rooted to the rationale of individual freedom<sup>1</sup>, although there has been a transformation of this idea over the years. The notion of Liberalism is primarily based on the principles of liberty and equality.<sup>2</sup> The notion of equality that constitutes liberalism was supported by

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<sup>1</sup> Edward B. Myers, *Liberalism and Legal Science: The Jurisprudence of Morris Raphael Cohen*, 52 Notre Dame L. Rev. 653 (1977). Available at: <http://scholarship.law.nd.edu/ndlr/vol52/iss4/6>

<sup>2</sup> Liberalism In general, the belief that it is the aim of politics to preserve individual rights and to maximize freedom of choice." *Concise Oxford Dictionary of Politics*, Iain McLean and Alistair McMillan, Third edition 2009, ISBN 978-0-19-920516-5, , political rationalism, hostility to autocracy, cultural distaste for conservatism and for tradition in general, tolerance, and ... individualism." John Dunn, *Western Political Theory in the Face of the Future*, Cambridge University Press, (1993), ISBN 978-0-521-43755-4, , With a nod to [Robert Trivers](#)' definition of altruistic behaviour ([Trivers 1971](#), p. 35), [Satoshi Kanazawa](#) defines liberalism (as opposed to

Dworkin in his conception of Liberalism.<sup>3</sup> His views of liberalism were proposed in the form of two principles that were as follows:-

a. That governments

*“Treat all those in its charge as equals, that is entitled to equal concern and respect”*<sup>4</sup> and

b. Derived therefore

*“That the government treat all those in its charge equally in the distribution of the same resource of opportunity, or at least work to secure the state of affairs in which they all are equal or more nearly in that respect”*<sup>5</sup>

The above principles put forth by Dworkin are relevant since with respect to Indian Constitution the principle of equality and the concept of welfare state are imbibed and the same is in part prevalent in the aforementioned principles. Moreover, in addition the mode of governance Dworkin also had devised a judicial system that required its agents to apply the law in a manner that achieved the best possible result keeping in mind equal concern and respect for the citizen. To draw an analogy, it is to be noted that the constitution also through the preamble seeks to secure equality to every individual. Also, it is to be noted that this concept is just not restricted to the theory of freedom, equality and the public good, but also serves to connote a certain discipline of power. By discipline of power, I mean creating power and controlling it. This specific feature is a subset of liberalism known as constitutional liberalism. This principle dates back to the late seventeenth and eighteenth century and finds its origins amongst the writings of John Locke, Montesquieu and the framers of the constitution of the United States (In specific James Madison). Liberal Constitutions in general impose certain restraints on the power of any single branch of governance and a state as a whole. The purpose behind such restraints is to prevent the phenomenon of tyranny and protect the state from impulsive and overreaching decisions. In furtherance to this, it is pertinent to understand that the fulcrum of liberalism is that power arbitrarily exercised is destructive not only of individual liberty but also to the rule of law. In the words of Stephen Holmes, limited power can be *“more powerful than unlimited power”*<sup>6</sup> This feature that sets a bar or a limit to the exercise of the states power over the ir people and seems to exist within the Indian constitution in terms of the doctrine of Rule of law. Additionally to understand the impact of liberalism onto the Indian Constitution, it is imperative to understand that the modern democratic liberalism seeks to promote the creation as well as control of power which includes taking into consideration the Rights for racial minorities, women etc but is not restricted to the same and thus by

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conservatism) as "the genuine concern for the welfare of genetically unrelated others and the willingness to contribute larger proportions of private resources for the welfare of such others" ([Kanazawa 2010](#), p. 38).

<sup>3</sup> <http://www.gerardkelly.com.au/dworkindissertation.html>

<sup>4</sup> A Matter of Principle, Harvard University Press, London, 1985, p 190

<sup>5</sup> Loc cit

<sup>6</sup> Stephen Holmes, "The Liberal Idea," The American Prospect (Fall 1991), 81-96.

this approach, aiming to promote a creative and productive society.<sup>7</sup> In addition to this, keeping a generic outlook in mind liberal constitutions usually adopt measures such as checks and balances, public deliberations, timely elections and adopt other means through which they attempt to control the state power and prevent the occurrence of despotism . The Indian Constitution does possess such provisions that are based on the principle of checks and balances.

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## INDIAN CONSTITUTION AND THE LIBERAL LEGAL IDEOLOGY

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In view of the above discussed concept of liberalism, we shall attempt to understand the provisions through which the Indian Constitution supposedly imbibes the notion of Liberalism.

### PREAMBLE

Before we dwell into the provisions, it is pertinent to note that we understand that there exists a certain idea of liberalism in the existence of various provisions laid down under the constitution since the preamble to the Indian Constitution connotes the same. It is to be noted that the preamble sets out the objectives and purpose of the constitution. <sup>8</sup> In furtherance to the objectives, the preamble categorically states that *justice, equality and liberty*<sup>9</sup> are to be assured to the citizens of the nation. The purpose of the existence of the constitution itself seems to support the idea of liberalism in terms of components that constitute the idea of liberalism.<sup>10</sup>

### FUNDAMENTAL RIGHTS

Given the wording of the rights and the purpose of their inclusion into the constitution, it could be said that they are available in every liberal democratic state. For example, these rights exist in the American constitution in the form of "Bill of Rights". Moreover, these rights offer a standard by which the extent of the liberal character of a state could be judged. Thus, these rights are liberal in nature and represent a liberal tradition which Granville Austin rightly acknowledges in the following words: "Fundamental rights of the Indian constitution are, in general, those rights of citizens or those negative obligations of the state not to encroach on individual liberty, that have become well known since the late eighteenth century and since the drafting of the Bill of Rights of the American constitution - for the Indians, no less than other people, became heir to this liberal tradition<sup>11</sup> Further, It is to be noted that the presence of the fundamental rights reaffirms the concept of Liberalism with respect to the theory of natural rights etc. This is construed due to the

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<sup>7</sup> <https://www.princeton.edu/~starr/articles/articles07/Starr-Liberalism-Ch1.pdf>

<sup>8</sup> Indian Constitutional Law, 7<sup>th</sup> Edition , MP Jain , Lexis Nexis , page 13, Para 3

<sup>9</sup> The Preamble of India

<sup>10</sup> Refer to the discussion under section 2 of this paper

<sup>11</sup> G.Austin, Indian Constitution, op.cit. Pp.50-l.

provision of equality which is laid down under article 14<sup>12</sup> of the Indian constitution which deals with the Right to equality. This clause seems to adhere to the notion of liberalism. In the tradition of Emanuel Kant and John Locke, the reasons for embracing such rights are to be considered in the form of empirical evidence and not basic moral principle. Moreover, it is to be kept in mind that everybody equally possesses the core moral rights to individual liberties. In addition to the right to Equality doctrine, the right of the Indian Constitution that deals with the prohibition of discrimination. The existence of this provision when read in light of liberalism *reaffirms the notion of equality* since it does not prevent the state from making special provisions for women and children, and from making any special provision for the advancement of any socially and educationally backward class of citizens or for the scheduled caste and scheduled tribes and thus falls within the scope being considered as a provision that illuminates a sense of liberalism. But it is pertinent to note that with respect to the notion of liberty, article 19 that guaranteed freedom to expression serves to be the crux of the capturing the essence of liberalism. Keeping in mind the fundamental principle of freedom, this provision under the Indian Constitution depicts the presence of freedom by assuring the citizens the freedom to express under article 19. With respect to the freedom of expression is forcefully asserted by great liberals such as John Stuart Mill in the following words. He says "if all mankind minus one were of one opinion, and only one person were of one opinion, mankind would be no more justified in silencing that one person than he would be, if he had power, justified in silencing 100 mankind".<sup>13</sup> The *idea of such a freedom*<sup>14</sup> under the constitution is in direct conformity to the notion of liberalism. Moreover this aspect of freedom extends to religious freedom as well as guaranteed by article 25 -28 of the constitution of India. Where every citizen has a right to practice and promote their religion peacefully. Also, the Right to life and Liberty in accordance to procedure established by law guaranteed is a standing provision that is in direct conformity to the idea of liberalism. Article 21 reads that, "*No person shall be deprived of his life or personal liberty except according to the procedure established by law*". Article 22 also protects personal liberty by providing safeguards against arbitrary arrest and detention. These rights again remind us of the concept of personal liberty which we discussed earlier with regard to Article 19. Apart from protecting personal liberty these Articles promote other liberal values which were much talked about during the classical liberal period. For instance, by protecting personal liberty they protect the dignity and personality of the individual. It is the idea of dignity and personality upon which the liberal theory is based, and this takes us close to the Kantian conception that human beings should be seen as ends in themselves. Further, these Articles explicitly mention the rule of law which early liberals used as a potent instrument in their fight against tyranny and

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<sup>12</sup> Article 14 of the Constitution of India provides for equality before the law & equal protection within the territory of India and prohibits discrimination on grounds of religion, race, caste, sex or place of birth, or any of them.

<sup>13</sup> J.S. Mill, *Utilitarianism, on Liberty and Representative Government*, Everyman Library, London, 1964, p.83.

<sup>14</sup> The means through which such freedom can be expressed is through various means set under article 19 of the Indian constitution .

despotism. Thus, these two Articles (21 and 22), by establishing rule of law and restricting the power of the state could be interpreted as a part of the classical liberal tradition. Moreover, the protection of liberty and personality of the individual receives further impetus from Article 23 and Article 24. Art.23 (1) prohibits exploitation in its various forms and Article 24 protects children from being misused for pecuniary purposes. By implication, they oppose compulsion which was a much hated term during the classical liberal tradition and it is compulsion which the liberals always tried to remove as an impediment to human freedom. Moreover, the concept of compulsion conceptually associated with the idea of personal freedom and both belong to the domain of classical liberalism. There are, however, other considerations for instance the violation of right to contract in the Article 24.

## EXAMPLES

### Liberalism in capital punishment

Concept of capital punishment is prevalent to protect country from callous criminals but our judiciary sometimes announces liberal decisions which can be a threat to nation. The Indian jurisprudence is a mix of reformatory and impediment hypotheses. While the punishments are to be forced to hinder the wrongdoers, it is likewise unavoidable piece of Indian reformatory law that the guilty parties ought to be given open door for renewal. Remembering these crucial principles, the governing bodies drafted **Sec. 354 (3) of the CR.P.C.** This subsection fundamentally sets out that unique reasons are to be recorded by the Court for passing death punishment in capital offenses. In this way, the position of law after Cr.P.C. 1973 turned into that the general govern was life detainment while capital punishment was to be forced just in unique cases. It was held in **Jagmohan Singh v. state of U.P.** that capital punishment go about as discouragement and dissatisfaction as concerned by the wrongdoing of the general public, where the murder is detestable in origination and merciless in execution and that such killers can't be just released discovering plausible excuses in the social maladjustment of the killer. Practicality of transplanting western involvement in our nation was rejected, as social conditions thus likewise the general scholarly levels are unique. The court alluded to the 25th Report of the Law Commission of India, in which it was expressed that India can't hazard the analysis of cancelation of the death penalty. The way that the likelihood of a mistake being submitted in the matter of sentence can be amended by claims and updates to higher courts was depended upon. The approach of our Supreme Court in the matter of capital punishment is mindful and additionally prohibitive which is in consonance with the cutting edge and liberal patterns in criminal law. The principle of Rarest of Rare developed by the summit Court mirrors the humanist Jurisprudence. There have been sufficient occurrences where the Supreme Court has confined the utilization and burden of capital punishment just to cases accompanying in the class of rarest of uncommon. Under sec 354(3) of the Criminal Procedure Code, 1973 another arrangement has been acquainted with say that when the conviction is for an offense culpable with death or, in the option with detainment forever

or detainment for a term of years, the judgment should express the purpose behind the sentence granted and on account of sentence of

## THE GOVERNANCE

With respect to the means through which the state exercises its power, first and foremost the constitution provides with a structure through which this enormous country can be governed through. It does so by first by segregating the branches through which the nation can function i.e. through the executive, legislature and judiciary.<sup>15</sup> In furtherance to this, the sacred document divides the governance of the state in a 3 tier mechanism. The national level, the state level and the district level. Such a mechanism of working is also seen in the hierarchy followed in the Indian Judiciary in the form of the existence of a Supreme Court, High courts at every state and district court at the district level. Keeping aside the organisational structure, it is to be noted that the constitution also provides certain principles that serves as guidelines to the state in terms of achieving good governance. Theoretically, these guidelines fall within the domain of a welfare state. It is to be noted that the fundamental directive principles are ideally those that help guarantee the enforcement of the fundamental rights in the sense the state is to be motivated or in other words driven to secure the intended purpose of the establishment of rights. Although the state may possess the power to enforce or carry out its duties in accordance to the Directive principles of State Policy, the constitution through various provisions restricts such power. For example, the existence of various lists under which various subjects through which certain subjects can be legislated on by different levels of government. In addition to this the constitution also mentions that those legislations which are intervening with the fundamental rights of an individual are not to be valid or can be construed to be as unconstitutional. Moreover, the existence of various constraints<sup>16</sup> on the power of the state also seems on the face of it to conform to the notion of liberalism in terms of preventing the phenomenon of tyranny or dictatorship.

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## THE CRITICAL OUTLOOK

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It is to be noted that although on the first instance by taking a positive approach there seems to exist an elements of liberalism, it is pertinent to take cognizance of the question i.e. to what extent can the provisions actually confer to the object of liberalism or in other words the aim of liberalism. Through this section my aim is to draw your attention to the fact that the Indian Constitution from a different frame of reference also attempts to put a limit to the applicability on adhering to the generic ideas under the concept of liberalism.

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<sup>15</sup> The purpose of such segregation is with respect to the principle of maintaining checks and balances as discussed in section 2 of this paper.

<sup>16</sup> Refer to section 2 of this paper, to understand the context in which it is spoken