# Chapter 5

## The Constitution of India: Criticism of Reflected Ideologies

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5.1 Introduction

This chapter deals with the criticism of reflected various ideologies in the Constitution of India. Nearly seven decades, in 2018, passed since the adoption of the Constitution of India. The Constitution originally consisted of 395 Articles arranged under 22 Parts and eight Schedules. Today, after various amendments, many articles have been extended out of original 395. Now 12 Schedules are there in the Constitution. It is probably the longest constitution of the world.

The Preamble outlines the objectives of the whole Constitution. The ideology and direction of the Indian civil society has been reflected in the Preamble of the Constitution. It declares India to be “Sovereign Socialist Secular Democratic Republic. The Constitution is a document in which provisions expressing general principles and humanitarian sentiments.

Basically liberalism and socialism are interwoven into the Constitution like liberty, equality and fraternity cannot be divorced from each others. According to Dr. Babasaheb Ambedkar, “The Principle of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to diverse one from other is to defeat the very purpose of democracy. Nor can liberty and equality be divorced from fraternity. Without equality liberty would produce the supremacy of the few over many. Equality without liberty would kill individual initiative”.¹ For liberty, some principles of Liberalism, for equality, some principles of socialism and for social justice humanism have been made basic ideology in the Indian Constitution.

Hence the liberty, equality and fraternity are reflected in the Constitution in a trinity form. And the Constitution ensures the social, economic and political justice to all citizens. It has to obtain the economic democracy; to remove the economic inequality as possible as. The accountability to government is, do not give up people as marginalized, and to avail the equality before the law and equal
opportunities, individual dignity. Dr. Ambedkar in the Constituent Assembly said, without social democracy political democracy will not alive for long lasting. 
“What does social democracy mean? It means way of life which recognizes liberty, equality and fraternity”.

Dr. B.R. Ambedkar criticized the Constitution himself, “I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However a bad Constitution may be, it may turn out to be good if those who are called to work, it happens to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution”. He stated in the Assembly on 25th of November 1949, that it is meaningless to put a final judgment on the Constitution. No Constitution is good or bad it is depend on the people who operate it.

In India the Constitution is not only an instrument for the governance of the country but also to create a new nation based on equality, liberty and justice of social, political and economy to all people. It is to create new society’ and ‘new nation’. It is to create free society. Now India as nation is of 22 languages.

Balanced Liberalism, Democratic Socialism, secularism and Constitutionalism prevails in the Constitution. Gandhism has been reflected in some extent as well. This chapter is going to deal with criticized part to these ideologies and its reflections in the Constitution of India.

5.2 Nature of Secularism in the Indian Constitution

In the Constitution, the term ‘secular’ does not prevail as a precise defined. The word “secular” was not introduced in the Constitution at the stage of its making. However, its operation was visible in the Fundamental Rights and Directive Principles. The secular philosophy prevails deeply in the Constitution. The 1976, through the 42 Amendment of Constitution, the concept of secularism was made explicit by amending the Preamble. By this Amendment, the word
“secular” was introduced in the Preamble to the Constitution and, thus, what was hitherto implicit was made explicit.

Reference may be made in this connection to Articles 25-28, 29-30, to Articles 14, 15, and 16 as well as to Articles 44 and 51A. These various constitutional provisions promote the idea of secularism and its implication prohibits the establishment of a theocratic state. The state is under an obligation to accord equal treatment to all religions and religious sects and denominations.

**The Concept is Flexible**

The concept of secularism is not static; it is elastic in connotation. In this area, flexibility is most desirable as there cannot be any fixed views on this concept for all time to come. The courts decide from time to time the outline of the concept of secularism and enforce it in practice.

India is inhabited by people of many religions. The framers of the Constitution desired to introduce the concept of secularism, meaning state neutrality in matters of religion. They also wanted to confer religious freedom on various religious groups. Religion has been a very volatile subject in India both before and after independence. The Constitution therefore seeks to ensure state neutrality in this area.

**Necessity of the secularism**

India has a society which is heterogeneous character. There are many cultures, languages and religions. There is not adequate political culture for democracy. In these circumstances it is very difficult to establish liberty, equality, fraternity and social justice in India. The heterogeneous phenomenon caused to adopt the concept of secularism. Its main object is to secure individual liberty. The Constitution declares India is to stand as a Secular State. Now Secularism is a basic or an essential feature of the Constitution.
Secularism is a basic feature

In *Bommai* and *Shri Kumar v. Union of India* the Supreme Court has ruled the secularism is a basic or an essential feature of the Constitution. The reflected Secularism in the Constitution is, “the State is to accord the equal treatment to all religions and religious sects and denominations”. Democracy is the basic feature of the Indian Constitution. Free and fair election has been held to be a basic feature of the Constitution. Secularism is a basic feature of the Constitution.

Behavior in Secular Society

In India, due to the Secularism in the Constitution, the Court ruled the correct behavior in a secular society. A candidate at an election should not make an appeal for votes in the name of his religion. A candidate seeks the vote at an election on the ground of the candidate’s religion in secular state is as statutory provision declares this as a corrupt practice is constitutionally valid. The Representation of the People Act, 1951, makes it a corrupt practice to seek votes in the name of religion.

Prayer through vice amplifiers

In the Constitution Article 19(1) (a) “Right to speech implies the right to silence. It implies freedom, not to listen, and not to be forced to listen”. “A person cannot claim his freedom of speech so as to interfere with the human fights and Fundamental Rights of others”. Court have implied this reasonable limitation.

Article 19(1) (a), read with Art. 21, the citizens have a right of a decent environment and have a right to live peacefully, right to sleep at night and a right to leisure which are all necessary ingredients of the right to life guaranteed under Art. 21.
No religion requires that prayers be performed through voice amplifiers. Here the question of religious freedom does not arise. The Court directed that the guidelines framed by the Government under the relevant rules framed under the Environment protection Act 1986, must be followed by the concerned authorities. The Rule of law is one of the basic structures of the Constitution. “Government’s discretion to grant largess must be structured by rational, relevant and non-discriminatory standards or norms”. These ideas are of the secular characters in the Constitution of India.

The State has no religion

Religious tolerance and equal treatment of all religious groups are essential parts of secularism. Secularism in India does not mean irreligion. It means respect for all faiths and religions. The state does not identify itself with any particular religion. India being a secular state, there is no static or preferred religion as such and all religious groups enjoy the same constitutional protection without any favour or discrimination.

Articles 25 to 28 of the Indian Constitution confer certain rights relating to freedom of religion not only on citizens but also on all persons in India. These constitutional provisions guarantee religious freedom not only to individuals but also to religious groups.

Equal Protection to all Religious people

The concept of secularism is not merely a passive attitude of religious tolerance. It is also a positive concept of equal treatment of all religions. Articles 25 to 28 seek to protect religion and religious practice from state interference. India has no state religion. All religions are treated alike. They get equal constitutional protection without any favour or discrimination. No specific
protection has been given to any religious group. If the secular rights of the people effecting badly, then the State will interfere in such policies.

Equality has been accorded to each citizen in the matter of franchise and the electoral role is prepared on a secular basic. Under Article 325 no person is ineligible for inclusion in the electoral role on the ground only of religion, race, caste, sex or any of them. Article 15 which bans discrimination against any citizen on grounds of religion, sex, etc. in political as well as other rights. The Court has emphasised that Article 325 is of crucial significance insofar as if seeks to promote the secular character of the Constitution.

**Disqualification of voting as secular character**

Under Article 326 the right to vote is a constitutional right. A person who has reached the age of 18 is entitled to vote, a person may be disqualified to vote by a statute but only on such grounds as, non-residence, unsoundness of mind, illegal practice. Democracy and free and fair elections these are the two crucial practices in secular character.

**Secularism: Definition by the Court**

Secularism in Bommai six-Judge Bench of the Supreme Court referred to the concept of secularism in the Indian context. According to Justice Savant

“…religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship are an essential part of secularism enshrined in our Constitution…”

B. P. Jeevan Reddy, J. observed:

“…while the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose, so far as the state is concerned, i.e.,
from the point of view of the state, the religion, faith or belief of a person is immaterial. To it, all are equal and all are entitled to be treated equally. 7

A secular state does not extend patronage to any particular religion. The state is neither pro any particular religion nor anti any particular religion. The state maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation of secular parts. 8

The concept of secular state is very essential for successful functioning of a democratic system. The State confers religious freedom on citizens. But it deals with the individuals as the citizens irrespective of his faith and religious belief. The Indian Constitution neither promotes nor prefers any one specific religion. There can be no democracy if anti-secular forces are allowed to play as they will divide followers of different religious faiths who will then be fighting with each other. Therefore, the Constitution leaves the purely religious matters to the individual and permits the state to take charge of the secular matters.

Verma, J., delivering the majority opinion in M. Ismail faruqui v. Union of India, 9 observed in relation to the concept of secularism:

“It is clear from the Constitutional scheme that it guarantees equality in the matter of religion to all individuals and groups irrespective of their faith emphasizing that there is no religion of the state itself. The preamble of the Constitution read in particular with articles 25 to 28 emphasizes this aspect and indicates that it is in this manner the concept of secularism embodied in the constitutional scheme as a creed adopted by the Indian people has to be understood while examining the constitutional validity of any legislation on the touchstone of the Constitution. The concept of secularism is one facet to the right to equality woven as the central golden thread in the fabric of depicting the pattern of the scheme in our constitution”. 202
To underline the great significance of secularism, in Bommai, the Supreme Court declared it as the basic feature of the Constitution. “Any step inconsistent with the constitutional policy is, in plain words, unconstitutional”.

**Freedom to profess or practice Religion**

Article 25(1) guarantee to every person and not only to the citizens of India, the ‘freedom of conscience’ and the right freely to profess, practice and propagate religion.

**‘Religion’ defined by the Court**

The term ‘Religion’ has not been defined in any precise definition in the Constitution. The Supreme Court has observed in Lakshmindra:

> “Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any Intelligent First Cause”.

As the Supreme Court has observed

> “Religion is the belief which binds spiritual nature of men to super-natural being’. It includes worship, belief, faith, devotion, etc. and extends to rituals. Religious right is the right of a person believing in a particular faith to practice it, preach it and profess it.”

> “What constitutes an essential part of a religion or religions practice has to be decided by the court with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of as religion”.

The judicial role in this area has been described by the Supreme Court as follows:
“The Court therefore, while interpreting Articles 25 and 26 strikes a careful balance between the freedom of the individual or the group in regard to religion, matter of religion, religious belief, faith or worship, religious practice or custom which are essential and integral part and those which are not essential and integral and need for the State to regulate or control in the interest of the community”.\textsuperscript{13}  

As early as 1963, the Supreme Court observed in this connection.\textsuperscript{14}

“In deciding the question as to whether a given religious practice is an integral part of the religion or not … whether on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and tenets of its religion.”

\textbf{Non-Brahmin to perform puja}

Non-Brahmin to perform puja is a secular policy of the State. The Constitution does not discriminate on the ground of only caste, creed, religion and birth. The Supreme Court has upheld appointment of a non-Brahmin to perform puja and other religious rites in a Siva temple. The person concerned should be one who is well versed in performing all the rites and ceremonies peculiar to the temple concerned. “As long as anyone well versed and properly trained and qualified to perform the pooja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran dehors his pedigree based on caste, no valid or legally justifiable grievance can be made in a court of law.”\textsuperscript{15}

The appointment as archaka being a secular act, the legislature can abolish the hereditary right to appointment as an archaka and such a law is not violative of Article 25(1) or 26(b). A person can exercise his religious freedom so long as it does not come into conflict with the exercise of Fundamental Rights of others.
“Freedom guaranteed under Art. 25 of the Constitution is such freedom which does not encroach upon a similar freedom to the other person.”

**No Rights can be absolute**

The Supreme Court has observed that, “no rights in an organized society can be absolute. Enjoyment of one’s rights must be consistent with the enjoyment of rights also by others. And “a particular Fundamental Right cannot exist in isolation is a water-tight compartment. One fundamental Right of person may have to co-exist in harmony with the exercise of another fundamental Right by others also with reasonable and valid exercise of power by the exercise of power by the State in the light of the Directive Principles in the interests of social welfare as a whole”

The Court has also held it a violation of Article 19(1) (a) to punish a student for not singing the National Anthem. Thus, the negative right, the right to remain silent, has been implied in the freedom of speech guaranteed by Article 19(1) (a). The court has also ruled that none of the freedoms guaranteed by Arts. 19(1) (a) to (g) can be curtailed by a mere administrative order not having statutory force.

Article 26 gives special protection to religious denominations. The term ‘religious denomination’ in Article 26 means a religious sect having a common faith and organization and designated by distinctive name.

Article 26 lays down that every religious denomination or a section thereof has the right-

(a) To establish and maintain institutions for religious and charitable purposes;
(b) To manage its own affairs in matters of religion;
(c) To own and acquire movable and immovable property; and
(d) To administer such property in accordance with law. This right is subject to public order, morality and health.

**Management of temple property**

The management of the property belonging to a temple is not a religious matter. The general principle followed by the courts is that secular matters relating to a religion may be controlled by the Legislature. The management of the property belonging to a temple is not a religious matter under Art. 25(1), but is a secular matter which can be controlled by law under Article 26(d) without its coming into conflict with the rights guaranteed by Articles 25(1) and 26(a) and (b). The legislature is thus competent to make a law regulating management of property provided that the denominational right of management is not extinguished altogether.

**No taxation to promote a religion**

To maintain the secular character of the Indian polity, not only does the Constitution guarantee freedom of religion to individuals and groups, but it is also against the general policy of the Constitution that any money be paid out of the public funds for promoting or maintaining any particular religion. Accordingly, Article 27 lays down that no person “shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”

**No religious education**

According to Article 28(1), no religious education is to be provided in any educational institution which is wholly maintained out of the state funds. Article 28 distinguishes between three types of educational institutions.
(a) In institutions of a completely public nature, there is absolute prohibition on religious education.

(b) In institutions where the state acts as a trustee, religious instruction is permitted.

(c) In State aided denominational institutions, religious instruction on a voluntary basis is permitted, Article 28(3) thus supplement Art. 30(1). 21

“A provision for an academic study of, and research in, the life and teachings or the philosophy and culture of any great saint of India in relation to, or their impact on, the Indian and world civilizations could not be considered as providing for inculcation the tenets, the rituals, the observances, ceremonies and modes of worship of a particular Sect, or denomination.”

In Aruna Roy v. Union of India, 22 the Supreme Court has ruled recently that “Article 28 does not ban a study of religions. The whole emphasis of Article 28 is against imparting religious instruction.” There is no prohibition on “study of religious philosophy and culture, particularly for having value based social life in a society which is degenerating for power, post or property.” 23

In the words of Dharmadhikari, J., “study of religions, therefore, in school education cannot be held to be an attempt against the secular philosophy of the Constitution.” 24

‘In spite of existence of various communities in India, the Constitution opposed to communal policy and stands for a secular state of India. A single common citizenship is assured to all irrespective of religion, caste, creed or sex. Every citizen of India is free to practice the religion of his or her choice. The state scrupulously refrains from discrimination of religious grounds of patronizing of propagating any particular faith. The ideal is based on the theory that a secular state deals only with the relations between man and man not between man
and God. The state regulates the individual’s behavior only in relation to other human beings.’

5.3 Nature of Liberalism in the Indian Constitution

Essential characteristic of liberalism is upholding civil rights and individual liberty. It can be seen, the idea of liberalism is protected in the Constitution of India through its basic structure. The basic structure has been derived from the Court’s interpretation of the Constitution. Some of the basic features regarded by the Court non-amendable by legislature under Article 368 are:

(i) Supremacy of the Constitution;
(ii) Republican and democratic form of government;
(iii) Secular character of the Constitution;
(iv) Separation of powers between legislative, executive and the judiciary;
(v) Federal character of the Constitution.

The idea of basic structure has implies the liberal character of the State. There are two, to be the aim of this ‘basic structure’ of the Constitution, first, no arbitrary government, and second, upholding liberty of the person.

The liberalism reflected in the Fundamental Rights in great extent, which upholds the ‘individual liberty’, that is guaranteed by the Constitution of India. The political parties cannot violet the Fundamental Rights by their power of majority. It is justiciable and enforceable in the Court.

It is seen very difficult problem to establish balance between individual rights and state or society as a whole, between individual liberty and social control. The Supreme Court has taken efforts as to interpret the Constitution.

Emphasize has to be given social control in economic matter. Otherwise it would be very difficult to achieve the ‘social justice’ and ‘economic equality’. And the Constitution of India does so, to some extent by removing the right to property from the part 3rd of the Fundamental Rights. But, with some exception,
the Court has interpreted the Fundamental Rights in a liberal manner as whole and treated each right as distinct and separate entity.

The Supreme Court observed, “Liberty of the individual and protection of his Fundamental Rights are the very essence of the democratic way of life adopted by the Constitution”. “These are based on high public policy”.

The Article 13 is that the Fundamental Rights cannot be infringed by the government either by enacting a law or through administrative action. In his ‘The Indian Constitution Cornerstone of a Nation’ Granville Austin writes, “Hence domestic conditions-food shortages, communal riots, communist subversion-had a marked effect on the content of the Constitution, and events abroad also carried lesions”.27

This new dimension of Article 14 transcends the classificatory principle. Article 14 is no longer to be equated with the principle of classification. It is primarily a guarantee against arbitrariness in State action and the doctrine of classification has been evolved only as a subsidiary rule for testing whether a particular state action is arbitrary or not. If a law is arbitrary or irrational it would fall foul of Art. 14.28

A law which was justified at the time of its enactment way, with the passage of time, becomes arbitrary and unreasonable with the change in circumstances. In Motor General Traders v. State of Andhra Pradesh, 29 the Supreme Court has observed:

“What was once perfectly valid legislation may, in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14.”

In Synthetics and Chemicals Ltd. v. State of Uttar Pradesh,30the Supreme Court has observed that “restriction valid under one circumstance may become invalid in changed circumstances”. The Bar Council made a rule debarring
persons aged above 45 years from enrolment as an advocate. The Supreme Court declared the rule to be discriminatory, unreasonable and arbitrary and thus isolative of the principle of equality enshrined in Art. 14.\textsuperscript{31} This one of the core principles of Liberalism.

**Exception to the fundamental Rights**

Article 33 of the Constitution constitutes an exception to the fundamental Rights. A government servant is also entitled to enjoy fundamental Rights. A person does not lose his fundamental Rights ipso facto by joining government service. But, under Article 33, Parliament is endowed with power to restrict or abrogate the Fundamental Rights of a few categories of government servants. Article 33 empowers Parliament to determine, by law, to what extent any of the Fundamental Rights shall in its application:

(a) The members of the Armed Forces; or
(b) The members of the forces charged with the maintenance of public order; or
(c) Persons employed in any bureau or other organization established by the state for purposes of intelligence or counter intelligence’ or
(d) Persons employed in, or in connection with the telecommunication systems set up for the purposes of any force, bureau or organization referred to in clauses (a), (b) and (c).

**Court Martial**

The tribunals, known as the court-martial, are established under the Military law. Court Martial discharges judicial function for the overall mechanism by which the military discipline is preserved. These tribunals have been excluded by Article 136(2) from the Supreme Court’s appellate jurisdiction under Article 136 (1). These tribunals also been excluded from the power of
superintendence vested in a High Court under Art. 227 [Art. 227(4)] …. However, the Fundamental Rights of the armed force can be curtailed under Art. 33 a Parliamentary law and, to that extent, the court-martial can be excluded from the purview of Arts.32 and 226.

**Suspension of Article 19**

In India, a proclamation of emergency under Article 352 affects the fundamental Rights of the people very drastically. Fundamental Rights are preserved and not annihilated even during the emergency.

National Human Rights Commission (NHRC) has been set up as statutory body the Protection of Human Rights, 1993. The Purpose of setting up the Commission is to strengthen the machinery for more effective enforcement of Fundamental Rights of the people. The Court pointed out that the country is governed by Rule of Law. The State is bound to protect the life and liberty of every human being, be he a citizen or otherwise. The Commission is expected to play an active role in ending violations of human rights.

The Constitution of India is not merely a proforma for the Parliamentary Democracy. It has such as the basic structure. “A restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct.”

The Court emphasised that “fundamental Rights could not be controlled ‘hypothetical and imaginary consideration.’”...the right to freedom of speech which is the very foundation of democratic way of life”. Freedom of speech and expression is “Life blood of democracy”.

The power has specifically conferred on the Supreme Court (Art. 129) as well as each High Court (Art. 215) to punish its contempt. The freedom of speech and expression guaranteed by Article 19 (1) (a) is thus subject to Arts.
Contempt of other Courts can be punished by the High Court under the Contempt of Court Act. 1952

The law of the contempt of Court as administered by the Supreme Court under Article 129 has been held to be reasonable under Art. 19(2) S. 228, I.P.C., also makes some cases of contempt of Court punishable.

While the Constitution guarantees freedom of speech and expression, it also lays down that in exercising that right, contempt of Court may not be committed. The underlying idea is that authority of Courts be preserved and obstructions to the due administration of justice removed. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable.

Amendment of the Constitution

In changing context, according to new problems and new circumstances, the Constitution may be changed. The process to amend and adapt other provisions of the Indian Constitution is contained in Art. 368. The Phraseology of Article 368 has been amended twice since the inauguration of the Constitution.

Originally, the marginal note to Article 368 read as: “Procedure for amendment of the Constitution”. In 1971, this was changed to “Power of Parliament to amend the Constitution and Procedure therefore”.

In 1976, the following two clauses were added to Art. 368 by the Forty-second Amendment of the Constitution:

“(4) No amendment of this Constitution (including the Provisions of Part.III) made or purporting to have been made under this article whether before or after the commencement of S. 55 of the Constitution (Forty-second) Amendment Act. 1976 shall be called in question in any Court on any ground.”
In the *Golak Nath* case, the majority of the Supreme Court while holding the **Fundamental Rights** as no-amendable emphasized the **great value** and significance of these rights and expressed the apprehension that if these rights were to be diluted or curtailed then it would usher in a totalitarian regime in the country.

The Supreme Court protects some of the basic values to the Constitution from the onslaught of transient majority in Parliament.

**Doctrine of Judicial Review**

In democratic countries, the judiciary is given a place of great significance. Primarily, the courts constitute a **dispute-resolving mechanism**. The primary function of the courts is to settle disputes and dispense **justice between one citizen and another**. But courts also resolve **disputes between the citizen and the state** and the various organs of the state itself.

In many countries with **written constitution**, there prevails the **doctrine of judicial review**. It means that the **Constitution is the supreme law of the land and any law inconsistent therewith is void**. The courts perform the role of explaining the provisions of the constitution and exercise power of declaring any law or administrative action which may be inconsistent with the constitution as unconstitutional and hence void.

**Constitutionalism**

Modern political thoughts draw a distinction between ‘**constitution and constitutionalism**’. A country may have a constitution but not necessarily constitutionalism. **Constitutionalism denotes a constitution not only of powers but also restraints as well**. A constitution envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary.
“Constitutionalism has one essential quality” it is legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law… Judicial Review is the cornerstone of constitutionalism. Judicial Review is one of the useful doctrines for Liberalism. And it prevails in the Indian Constitution.

The Constitution of India explicitly establishes the doctrine of judicial review in several articles, such as, 13, 32, 131-136, 143, 226, and 246. The judicial review is the essential feature of the Indian Constitution, constituting part of its basic structure. Judicial Review is one of the useful doctrines for Liberalism. And it prevails in the Indian Constitution.

Judicial Review in India

The Constitution of India explicitly establishes the doctrine of judicial review in several articles, such as, 13, 32, 131-136, 143, 226, and 246. The doctrine of judicial review is thus firmly rooted in India, and the explicit sanction of the Constitution. The judicial review is the essential feature of the Constitution, constituting part of its basic structure. The courts in India are thus under constitutional duty to interpret the Constitution and declare the law as unconstitutional if found to be contrary to any constitutional provision.

Justifying judicial review is to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens. Accordingly, it is useful doctrine for the Liberalism. Ramaswami, J., has observed in S.S. Bola v. B.D. Sharma.

“The founding fathers very wisely, therefore, incorporated in the Constitution itself the provisions of judicial review so as to maintain the balance of federalism, to protect the Fundamental Rights and Fundamental freedoms guaranteed to the citizens and to afford a useful weapon for availability, availsment and enjoyment
of equality, liberty and Fundamental freedom and to help to create a healthy nationalism. The function of judicial review is a part of the constitutional interpretation itself. It adjusts the constitution to meet new conditions and needs to the time”.

Thus, the judicial review has become an integral part of our constitutional system. So, obviously the liberalism prevails in the Constitution of India.

“It is they who have to ensure that balance to power envisaged by the Constitution is maintained and that the legislature and executive do not, in the discharge of their function, transgress constitutional limitation…”

Thus, the jurisdiction conferred on the Supreme Court under Article 32 and on the High Courts under Arts. 226/227 of the Constitution has been held to be part of the inviolable basic structure of the Constitution which cannot be ousted (remove and replace) even by a Constitutional Amendment.

**Literal Interpretation**

Broadly, there are two types of interpretation of constitution, literal and liberal. Judicially, the principle was laid down in these words: “In interpreting the provisions of our Constitution, we should go by the plain words used by the constitution – makers”.

**Liberal Interpretation:**

The liberal approach is designed to give a creative and purposive interpretation to the Constitution “with insight into social values, and with suppleness of adaptation to changing needs.” For example, freedom of information has been held to be implicit in the guarantee of freedom of speech and expression.
The idea of liberal interpretation many times underlines the role of the Court as the protector and guardian of the Constitution especially, of the Fundamental Rights of the people and the democratic values. The courts by adopting liberal approach constantly expand the frontiers of the people’s Fundamental Rights so as to make the government more and more liberal and democratic. “Many a time, the Supreme Court has stated the proposition that the Constitution should be interpreted liberally, as a constitution and not as a statute”.43

The Supreme Court has emphasized that44 the judicial approach to the Constitution should be dynamic rather than static, pragmatic and not pedantic, elastic rather than rigid. Constitution is not to be interpreted as mere statute but as machinery by which laws are made.

The Supreme Court has observed in India Cement: 45 “It has to be remembered that it is a constitution that requires interpretation. Constitution is the mechanism under which the laws are to be made and not merely an Act which declares what the law is to be”. “A constitutional provision is never static; it is ever evolving and ever changing and, therefore, does not admit of narrow, pedantic or syllogistic approach”. “It is to be construed not as mere law but as the machinery by which laws are to be made”. “...the Constitution is not a just document in solemn form, but a living framework for the Government of the people…”

In the Golak Nath case,46 the majority of the Supreme Court while holding the Fundamental Rights as no-amendable emphasized the great value and significance of these rights and expressed the apprehension that if these rights were to be diluted or curtailed then it would usher in a totalitarian regime in the country.
The Supreme Court protects some of the basic values to the Constitution from the onslaught of transient majority in Parliament. The Supreme Court adopted the doctrine of **immutability** (unable to change) of the “basic feature” of the Constitution which is judge-made concept.

By an expansive interpretation of Article 21, the Court has spelled out several fundamental Rights which are not specifically mentioned in the Constitution. Some of the rights implied from Art. 21 are:

(i) right to livelihood,  
(ii) right to education,  
(iii) right to privacy,  
(iv) right to clean and pollution-free environment,  
(v) right to shelter,  
(vi) right against sexual harassment,  
(vii) right to legal aid and speedy trial.

These are various other rights are held to emanate from Article is still being expanded. Under Art. 21 it is the state which has to establish the constitutional validity of a law depriving a person of his life or personal liberty.

The Court has also been consistently adopting the approach that Fundamental Rights and directive principles are supplementary and complementary to each other and that the provisions in Part III (Fundamental Rights) should be interpreted having regard to the Preamble and the Directive Principles of the State Policy.

(i) Right to economic justice,  
(ii) Right to economic empowerment of women and weaker section of the society,  
(iii) Right to social justice.
Constitutional interpretation is a more creative function than statutory interpretation. In *Kesavananda*, a view has been expressed that the Preamble to the Constitution is of extreme importance and the Constitution should be read and interpreted in the “light to the grand and noble vision expressed in the Preamble.”

Hegde, J., said, “There is nothing like a political power under our Constitution in the matter of relationship between the executive and the citizens”.52

We must not to forget that it is our Constitution that we are to interpret, and that interpretation must depend on the context and setting of the particular provision which has to be interpreted.53 The principle of harmonious interpretation has been applied to Fundamental Rights and Directive Principles so as to give effect to both as far as possible.54

**Art. 13 and 368 and Principle of harmonious interpretation**

The Court reconciled the conflict between Articles 13 and 368 by applying the principle of harmonious interpretation.

According to Article 13, no ‘law’ can abridge any Fundamental Right. According to Article 368, on the other hand, Parliament can amend any constitutional provision by passing a law according to procedure laid down in Art. 368. If both these Articles are given broad interpretation, a conflict, arises between them.

In *Shankari Parsad, Patanjali Sastry, J.*, observed:

“In short, we have two Articles (Arts. 13 and 368) each of which is widely phrased, but conflicts in its operation with the other. Harmonious construction requires that one should be read as controlled and qualifies by the other. We are of the opinion that in the context of Article 13 ‘law’ must be taken to mean
rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent powers, with the result that Article 13(2) does not affect amendments made under Article 368”.  

Wisdom of the Legislature

“The Court cannot sit in judgment over the wisdom of the legislature.”  

The Constitutionality of a statute passed by a competent legislature cannot also be challenged on the ground that is not reasonable or just unless the Constitution expressly imposes such a stipulation (condition) as in Art. 19. Mr. Justice Douglas has very forcefully reiterated this point thus: “Congress acting within its constitutional powers, has the final say on policy issues. If it acts unwisely the electorate can make a change.”

Supreme Court not bounded by its own decisions

Das, Acting C. J., speaking for the majority on the Bench observe: “There is nothing in our Constitution which prevent us from departing from a previous decision if we are convinced of it error and its baneful effect on the general interest of the public.”

Protection against arrest

The Constitution made great efforts to protect the personal liberty of the individuals. The Protection of the individual from oppression and abuse by the police and other enforcement officers is a major interest in a free society.

Article 22 guarantees the minimum rights which any person who is arrested will enjoy. Clauses (1) and (2) of Article 22 ensure the following four safeguards for a person who is arrested:
1. He is not to be detained in custody without being informed, as soon as may
be, of the grounds of his arrest (Art. 22(1)).

2. He shall not be denied the right to consult, and to be defended by, a legal
practitioner of his choice (Art. 22(2)).

3. A person arrested and detained in custody is to be produced before the
nearest Magistrate within a period of twenty four hours of his arrest
excluding the time necessary for the journey from the place of arrest to the
magistrate’s court (Art. 22(2)).

4. No such person is to be detained in custody beyond this period without the
authority of magistrate (Art. 22(2))

In other words, a person’s personal liberty cannot be curtailed by arrest without
informing him, as soon as is possible, why he is arrested”. The requirement to
produce and arrested person before a magistrate may come to an end of he is
released on bail. When an arrested person has been produced before a High Court
and remanded to custody, it is not then necessary to produce him before a
magistrate also.60 Article 22(3) makes two exceptions. Articles 22(1) and 22(2) do
not apply to:

(a) enemy aliens, and

(b) to persons arrested or detained under a law providing for preventive
detention.

Preventative Detention

Preventive detention means detention of a person without trial and
conviction by a court, but merely no suspicion in the mind of an executive
authority. Preventive detention is fundamentally and qualitatively different from
imprisonment after trial and conviction in a criminal court. Preventative detention
and prosecution for an offence are not synonymous.
Preventive detention is thus preventive, not punitive, in theory. Preventative detention is not to punish an individual for any wrong done by him, but at curtailing his liberty, with a view to preventing him from committing certain injurious activities in future. 61

The Supreme Court has observed 62 “Whereas punitive incarceration in after trial on the allegations made against a person preventative detention is without trial into the allegations made against him”.

Preventive Detention has not been unknown in other democratic countries like Britain, U.S.A. and Canada, but only as a war-time, and not a peace-time, measure. 63 In India, the Constitution itself visualizes the possibility of a law of preventive detention. In spite of all the emphasis on individual liberty, it has been found necessary in India to resort to preventive detention during peace-time because of unstable law and order situation in the country. 64 The right of representation under Article 22(5) is a valuable constitutional right and is not a mere formality. Article 22 (5) casts a dual obligation on the detaining authority viz.:

(i) To communicate the grounds of detention to the detenu at the earliest;

(ii) To afford him the earliest opportunity of making a presentation against the detention order which implies the duty to consider and decide the representation when made, as soon as possible.

65 Advisory Board-another safeguard in provided by Article 22(4) to detenu under preventive detention. Under Article 22(4) (a), preventive detention for over three month is possible only when an advisory board holds that, in its opinion, there is sufficient cause for such detention. The board must report before the expiry of three months. If the report is not made within three months of the date of detention, the detention
would become illegal.  

Parliament enacted the National Security Act (NSA), 1980. This is the prevailing law on preventive detention.

**COFEPOSA ACT**

Besides NSA, Parliament has also enacted the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, (COFEOPSA). This Act provides for preventative detention with a view to prevent smuggling and to prevent anyone from action in a manner prejudicial to conserving and augmenting foreign exchange.

The Act contemplates two situations for making orders of preventive detention:

(a) To prevent violation of foreign exchange regulation; and  
(b) To prevent smuggling activities.

The CFEOPSA Act is related to ‘security of state’. In addition to the above mentioned two statues, Parliament has also enacted the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (PBMSECA). The Supreme Court has itself defined its role, when the liberty of a person is involved under a law of preventive detention, as follows:

“It is the bounden duty of the court to satisfy itself that all the safeguards provided by the law have been scrupulously observed and that the subject is not deprived of the personal liberty otherwise than in accordance with law.”

The Supreme Court has emphasized from time to time that personal liberty is one of the most cherished values of mankind; without it, life will not be worth living and, it is, therefore, necessary that the courts always lean in favour of upholding personal liberty. The power of preventing detention is an extraordinary power which can be exercised strictly in accordance with the provisions of the Constitution and the law.
The Court has emphasized from time to time that the power of preventive detention being a “draconian” power, it is tolerated in a free society, as a “necessary evil”. 68 A detention order can be quashed if any relevant material in not placed before the detaining authority. 69 A detention order is bad if it is based on a no-existent ground. 70 as already stated, issuing a preventive detention order is a matter of subjective satisfaction of the detaining authority. 71

Under Article 21 a person may not be deprived of his personal liberty except only in accordance with the procedure established by law”. Therefore in the matter of preventive detention, the Administration must follow scrupulously and strictly the procedural norms laid down in clauses 4 to 7 of Art.22 and relevant preventive detention law under which the order in question has been made. 72

**Reasonable Procedure** - Article 21 now signifies that the procedure prescribed by law to deprive a person of his personal liberty must be reasonable, fair and just’ The law of preventive detention must also pass this test. It is therefore, necessary that the preventive detention procedure be fair. 73

“The basic commitment of the constitution is to foster human dignity and the well-being of the people. It is unfair to deny the service of a lawyer to a detenu”. Human dignity is the core principle of the Liberalism.

**Right to education**

Reading cumulatively, Article 21 along with the Directive Principles contained to Arts. 38, 39(a) 41 and 45, the Court opined that “it becomes clear that the framers of the Constitution made it obligatory for the State to provide education for its citizens. The Constitution (Eighty-Sixth Amendment) Act, 2002 introduced Article 21A which makes the right to education a fundamental right.
Rights against Exploitation

According to Article 23 (1), traffic in human beings, beggar, and other similar forms of forced labour prohibited and any contravention of this provision shall be an offence punishable in accordance with law. Article 23(1) proscribes three unsocial practices:

(1) Beggar,
(2) Traffic in human beings; and
(3) Forced labour.

A significant feature of Article 23

A significant feature of article 23 is that it protects the individual not only against the State but also against private citizens. Most of the Fundamental Rights operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and the rights are only enforceable against the State. But there are certain Fundamental Rights which are enforceable against the whole world, e.g., Articles 17, 23, and 24. Article 23 is not limited in its application against the State, but strikes at such practices wherever they are found, and, thus, the sweep of Article 23 is wide and unlimited.

Beggar Abolished

The term beggar means compulsory work without any payment. Begar is labour or service which a person is forced to give without receiving any remuneration for it. The practice was widely prevalent in the erstwhile princely States in India before the advent of the Constitution. It was a great evil and has, therefore, been abolished through Article 23(1) 74

Withholding of pay of a government employee as punishment has been held to be invalid in view of Art. 23 which prohibits beggar. “To ask a man to work and
then not to pay him any salary or wages savours of beggar. It is a Fundamental Right of a citizen of India not to be compelled to work without wages”.

**No Traffic in human beings**

The expression traffic in human beings, commonly known as slavery, implies the buying and selling of human beings as if they are chattels, and such a practice is constitutionally abolished. Traffic in women for immoral purposes in also covered by this expression.

**Forced labour: Defined by Justice Bhagwati**

“It is difficult to imagine that the Constitution makers should have intended to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting other forms of forced labour.”

The word ought to be interpreted to include not only physical or legal force but also force arising from the compulsion of economic circumstances “which leave no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage”. The Court has declared in Asiad:75 “We are, therefore, of the view that where a person provide labor or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words “forced labour” under Article 23.”

The Court Said that due to economic compulsions, workmen are forced to work under inhuman or subhuman conditions, without the safeguards, facilities and amenities secured to them under the law being made available to them, irrespective of wages paid to them and their apparent content, the labour employed will be forced labour contrary to Art. 23.
The Court has ruled that a prisoner sentenced to rigorous imprisonment can be made to do hard labour. But, even then, he should be paid equitable wages for his work. No prisoner can be made to do labour free of wages. “It is not only a legal right of a workman to have wages for the work, it is a social imperative and an ethical compulsion, Extracting somebody’s work without giving him anything in return is only reminiscent of the period of slavery and the system of Begar”.

Bhagwati, J., speaking on behalf of the Supreme Court, has picturesquely characterized the process of identification and release of bonded labours “as a process of discovery and transformation of non-beings into human beings”.

Bhagwati, J., has emphasized that this is a “constitutional imperative” that “the bonded labourers must be identified and released from the shackles of bondage so that they can assimilate themselves in the main-stream of civilized human society and realize the dignity, beauty and worth of human existence.”

**Prostitution Socio-Economic Problem**

The expression “traffic in human beings” used in Art. 23(1) commonly known as slavery, implies the buying and selling of human beings as if they are chattels, and such a practice is abolished by Art.23(1) The parliament has enacted the Suppression of Immoral Traffic in Women and Girls Act. 1956(SITA) now it is known as Immoral Traffic (Prevention) Act, 1956. The act aims at suppressing the evils of prostitution in women and girls and achieving a public purpose, viz. to rescue the fallen women and girls to stamp out the evils of prostitution and also to provide an opportunity to these fallen victims so that they could become decent members of the society. The evil of prostitution is not only a social but also a socio-economic problem.

Article 24 prohibits the employment of child below the age of fourteen years to work in any factory or mine, or on any other hazardous employment.
Now in Article 21A education up to the age of 14 years has been declared to be Fundamental Right. Right to health, right to potable water, meaningful right to life—all these rights have been declared to Fundamental Rights. The child is equally entitled to all these Fundamental Rights.

**Basic Structure of the Constitution**

Basic Structure means even Constitutional Amendment offending to the Structure of the Constitution is *ultra vires or Un-Constitutional.*

Equality is the basic feature, structure of the Constitution of India.

The Supreme Court declared, Democracy is as basic structure of the Constitution.  

“Judicial Review” has been characterized as the “basic feature” of the Constitution.  

“Rule of Law” has been held to be a “basic structure” of the Constitution. Dicey includes “absence of arbitrary power”, “equality before law”, “individual liberty” in the doctrine of Rule of Law. Indian Constitution guarantees equality of status and of opportunity. M.P. Jain in his “Indian Constitutional Law” (2014) writes for example, the Constitution of India upheld the Rule of Law through:

a) Parliament and state legislature are democratically elected on the basis of “adult suffrage”.

b) Constitution makes adequate provisions guaranteeing independence of the judiciary.

c) “Judicial Review” has been guaranteed through several constitutional provisions.

d) **Article 14** of the Constitution guarantees the “equality before law”

Then he write this Constitutional provision has now assumed great significance as it is used to control administrative powers lest they should become arbitrary.

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The Supreme Court has not finalized the list of the ‘basic structure’ or ‘basic features’. But judicial decisions up to now observe the basic features time to time, this list is: 80a

(a) Supremacy of the Constitution.
(b) Rule of Law.
(c) Theory of separation of power.
(d) Declared objectives in the Preamble to the Constitution.
(e) Judicial Review; Articles 32 and 226/227.
(f) Federalism.
(g) Secularism.
(h) Sovereign, democratic, republic structure.
(i) Liberty and dignity of individual.
(j) Unity and integrity of the nation.
(k) Theory of equality- not every feature of equality but essentials of equal justice.
(l) Essentials of other Fundamental Rights of the part III.
(m) Concept of social and economic justice- creation of welfare state; whole part IV.
(n) Balance between Fundamental Rights and Directive Principles of State Policy.
(o) Government of Parliamentary system.
(p) Independent and impartial election.
(q) Prohibition on the constitutional amendment power under Article 368.
(r) Judicial Independency within the constitutional limits.
(s) Easiness in Justice.
(t) Supreme Court’s power under articles 32,136, 141, and 142.
(u) Reasonability.
(v) Social Justice, etc.
The conclusion of this point is that the idea of Constitutionalism implies the idea of liberalism. But the idea of liberalism and socialism is interwoven into each other. Rightly it has been said “more liberty demands more equality”.

5.4 Nature of Socialism in the Indian Constitution

India is to stand as a Socialist State. The Constitution did not give a concise definition of Socialism. But nature of Socialist State for India has been reflected in the Directive Principle of State Policies and the Preamble of the Constitution, and the interpretation of the Supreme Court of India. The Court has interpreted the concept of Socialism in the Constitution is ‘economically egalitarian society’. Egalitarian meant equality. Economically egalitarian means the society, in which should have economic equality.

The Supreme Court has in number of decisions referred to the concept of socialism and has used this concept along with the Directive Principles of State Policy to assess and evaluate economic legislation. The Court has derived the concept of social justice and of an economically egalitarian society from the concept of socialism. According to the Supreme Court, “the principal aim of socialism is to eliminate inequality of income and status and standards of life, and to provide a decent standard of life to the working people.”

Democratic socialism aims to end the poverty, ignorance, disease and inequality of opportunity. Socialistic concept of society should be implemented in the true spirit of the Constitution. In Samatha v. State of Andhra Pradesh, the Supreme Court has stated while defining socialism: “Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution.”

The Court has laid emphasis on social justice so as to attain substantial degree of social, economic and political equality. Social justice and equality are complimentary to each other. Complete justice –social, economical and political-is what Indian Constitution promises to each and every citizen. Such a
promise, even in its weakest form and content, cannot condone policies that turn a blind eye to deliberate infliction of misery on large segments of our population.

Another idea propounded by the Court is that socialism means distributive justice so as to bring about the distribution of material resources of the community so as to subserve the common good.

By reading the word ‘socialist’ in the Preamble with the Fundamental Rights, contained in Arts. 14 and 16, the Supreme Court has deduced the Fundamental Rights to equal pay for equal work and compassionate appointment\(^{81}\).

Before going into detail there is need to know briefly, concept of socialism.

According to Supreme Court of India, “the principal aim of socialism is to eliminate inequality of income and status and standard of life and to provide a decent standard of life to the working people”.\(^ {82}\)

The Fundamental Rights are not to be recognized as contradictory to the Directive Principles of State Policy and Fundamental Duties. Otherwise it does so, and then the tension would arise to equality, liberty and fraternity to come into reality in its inseparable trinity form.

Hence the Supreme Court emphasised that the “Fundamental Rights must not be read in isolation but along with Directive Principles and Fundamental Duties”.

Karl Marx thought that the dictatorship of proletariat is necessary to establish economic equality. But without liberty, there is no meaning of equality. Dictatorship is a dictatorship it is whoever may be. In dictatorship, there is no guarantee of the basic human rights.

The Constitution avoided the dictatorship through the “Rule of Law”, but the objectives of the Socialism incorporated in itself. The Rule of Law implied no arbitrary government and upholding individual liberty. The Constitution guaranteed the essential human rights in the form of fundamental rights.
Now it has to be considered that there is no incompatibility between the liberalism and socialism except the dictatorship and the way to achieve the goal of human society. And this incompatibility between the liberalism and socialism has been removed in the Constitution of India. So, the Constitution permits to the “non-violent social revolution” and egalitarian society in India.

**Non-Violent Social Revolution**

The non-violent road to social revolution is reflected in the Constitution of India. “The Social revolution meant ‘to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education’.”

Dr. Radhakrishnan wanted to must have not only satisfaction of the fundamental needs of the common man but also fundamental change in the structure on Indian society. Pandit Jawaharlal Nehru wanted “Democratic Socialism” in India. According to him, it is the true way of the Constitution and should be implemented to end poverty, ignorance, disease and inequality of opportunity. “The Court has stated while defining socialism”, “Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution”.

**Social Change**

The Constitution wants social change by non-violent way and to raise the suppressed people equally to others social strata. Members of the Constituent Assembly realized that the Constitution could not by itself make a new India, but they intended it to light the way. Hope was to fundamental change in the structure of Indian society and to fulfill the basic need of common man. The government should be greater attentive, to Fundamental Rights and Directive Principles of State Policy, while determining the national policy.

Pandit Jawaharlal state in the Constituent Assembly, “The service of India means the service of the millions who suffer. It means the ending of poverty and
ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over.”

Nehru emphasised, by the new constitution, on the raising to the people to higher levels and hence, the general advancement of humanity, and to give every Indian the fullest opportunity to develop himself according to his capacity.

**Matter of Policy**

The Supreme Court has reiterated that the Courts cannot act as an Appellate Authority and examine the correctness, suitability and appropriateness of a policy nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. Judicial review in this area is confined to the examination as to whether any Fundamental Rights have been violated or it is opposed to the provisions of the Constitution or any statutory provision or is manifestly arbitrary. It is through this “manifestly arbitrary door” that challenges are likely to be made to formulation of policies and in such a case the Court must necessarily examine the provisions of the policy to come to the conclusion as to whether it is manifestly arbitrary or not, In effect the Court to a certain extent will act as an appellate authority although the court says that the courts cannot act as such an appellate authourity.

But the court has held that even if a law cannot be declared ultra vires on the ground of hardship it can be so declared on the ground of total unreasonableness”. The benefit of “equality before law” and “equal protection of law” accrues to every person in India whether a citizen or not. As the Supreme Court has observed on this point:

“We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human-being and certain other rights on citizens.
Every person is entitled to equality before the law and the equal protection to the laws”.87

**Judicial Discretion**

Discretion vested in a judicial officer exercisable on the facts and circumstances. The discretion given to the judge to sentence an accused convicted of murder either to death or to imprisonment for life is not invalid under Art. 14.

**Grant of benefits by the state**

“The administration cannot act in an arbitrary or discriminatory manner even in the area of grant of largess or conferring benefit by it on individuals. The government is not as free as a private person to pick and choose the recipients of its largess. A *democratic government cannot exercise its power arbitrarily or discriminately* because Article 14 is always there to *regulate its discretion in all spheres*. The exercise of the power to award contract must be structured by “rational, relevant and non-discriminatory “standards or norms.

**Usually, the courts do not interfere with policy matters.** But, in the instant case, the Supreme Court quashed the policy because it was framed in ignorance of the facts. The court stated; “Any decision be it a simple administrative decision or a policy decision, of taken without considering the relevant facts, can only be termed as an arbitrary decision.”88

It is the settled law that no one has fundamental right to carry on trade or business in liquor.89 In exercise of its regulatory power, the State is entitled to prohibit absolutely any form of activity in relation to an intoxicant e, g, manufacture, possession, storage, import, export, etc, The State has the exclusive privilege to manufacture, sale, etc., of liquor. “Ignoring the instructions subject to which the tenders are invited would encourage and provide scope for
discrimination, arbitrariness and favoritism, “which are totally opposed to the Rule of Law and our constitutional values”.  

**Sale of government property**

Sale of government property the principle is that the sale should take place openly and the effort should be to get the best price. The following three main propositions emerge from the Court decision:

(i) Divestment (disinvestment) by the government in a public enterprise is a **matter of economic policy** which is for the government to decide. The **Court does not interfere with economic policies unless there is a breach (break) of law**.

(ii) Sale of an undertaking to the highest bidder after global advertisement inviting tenders at a price which was way above the reserve price fixed by the government could not be said to be vitiated (corrupted) in any way. The procedure followed was proper.

(iii) The matter of fixation of the reserve price, the matter being a question of fact, the Court does not interfere unless the methodology adopted for the purpose is arbitrary.  

Under the Land Acquisition Act, the government can acquire land for a government company or a public company but not for a private company or an individual. This is a valid classification. The intention of the legislature clearly is that private companies should not have the advantage of acquiring land inasmuch as **the profit of their venture goes to a few hands**.  

A legal provision providing for **compulsory transfer of land** by landowner to the municipal committee for a public purpose without payment of compensation has been held to be violative of Art. 14. The imposition of the condition of
prohibition on transfer of land granted to backward class for a particular period does not constitute any unreasonable restriction.

Special provisions can be made by a legislature to protect and preserve the economic interests of persons belonging to the Scheduled Castes and Scheduled Tribes and to prevent their exploitation. 93 “The power of the Government of India to expel foreigners is absolute and unlimited and there is no provision in the Constitution fettering its discretion and the executive government has unrestricted right to expel a foreigner”. 94

Mare hardship is no ground to strike down a valid legislation. But the court has held that even if a law cannot be declared ultra vires on the ground of hardship, it can be so declared on the ground of total unreasonableness applying the Wednesbury “unreasonableness”. 95

Favorable treatment shown to public sector undertaking is not discriminatory being in public interest. “Similarly it has been held that preference shown by the State to cooperative societies does not violate Art. 14 as these societies play a positive and progressive role in the economy of our country”. 96 Article 14 does not outlaw discrimination between the state and a private individual because the two are not placed on the same footing. Thus, creation of a monopoly by the state in its favour will not be bad under Art.14.

Exemption granted to the State from payment of court-fees has been held valid because. In any case, the State has to bear the expense of the administration of civil justice. 97

“The principle of classification is applied somewhat liberally in case of taxing statute. The legislature enjoys a great deal of latitude in the matter of classification of objects and purposes of taxation. The courts adopt a more tolerant attitude towards a tax law”. “The reason for greater judicial tolerance
shown towards a tax law is that taxation is not merely a source of raising money to defray government expenses but it is also a tool to reduce inequalities in society. 98

For, equality before law can be predicated meaningfully only in an equal society. 99 A notification issued by a Taxing Department of a State which lacks a sense of reasonability because it is not able to strike a rational balance of classification between the items of the same category would be ultra vires Art. 14. 100

A classification of the basis of capacity to pay for purposes of taxation is valid. It is therefore permissible to levy a higher tax on those who are economically stronger than those who are weaker. “The object of a tax is not only to raise revenue but also to regulate the economic life of the society.” 101 When unequally placed persons are treated equally, Art. 14 is violated. 102

“The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved”. There is no fundamental Right on a citizen to carry on trade or business in liquor. 103

“…all in the same ‘class’ should be subjected to the same law; there cannot be selectivity within a class. If within the same class some are subjected to a more drastic procedure than others, then it is discriminatory and bad under Art. 14. If two laws apply to a class, then the one which is more burdensome is discriminatory and so void under Article 14”. Special provisions can be made for each university as each university is a class by itself. Article 14 does not require that provisions of every University Act must always be the same. 104

The prime Minister is allowed the use of an Indian Air Force aircraft for non-official purposes (including election) but not so the leaders of other political
parties. This is not discriminatory because in view of the P. M.’s status and duties, he is a class by himself. It is necessary to ensure his personal safety and enable him to discharge official business promptly so that national interests may not suffer.105

“Though the principle that law should lay down the policy if discretion to classify is vested by it in the executive and that the executive cannot be given an uncontrolled authority to differentiate”.

In Sudhir Chandra106 the Supreme Court has observed:

“Our Constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines which may permit denial of equality before law is the antithesis of rule of law. Absolute discretion not judicially reviewable inhere the pernicious tendency to be arbitrary and is therefore violative of Art. 14. Equality before law and absolute discretion to grant or deny benefit of the law are diametrically opposed to each other and cannot co-exist.” It means that the legislature cannot validly enact a provision conferring naked or arbitrary power on the Administration to be exercised by it in its absolute discretion. No law ought to confer excessive discretionarly power on any authority.

The rationale underlying this proposition is that unbridled discretionary power may degenerate into arbitrariness, or may result in discrimination and, thus, contravenes Art.14 which bars discrimination.107

Bhagwati, J. has enunciated the principle in Maneka Gandhi as follows: “…when a statute vests unguided and unrestricted power in an authority to affect the right of a person without laying down any policy or principle which is to guide the authority In exercise of this power, it would be affected by the vice of
discrimination since it would leave it open to the Authority to discriminate between persons and things similarly situated”.  

In the context of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, the Supreme Court has held that the initiation of proceedings under the Act must be as last resort and the doctrine of proportionality should be applied to find out whether the power has been reasonably exercised.

“The vesting of discretionary power in the State or public authorities or an officer of high standing is treated as a guarantee that the power will be used fairly and with a sense of responsibility.”

“The government can be expected to exercise its powers with extreme caution and care”. “The status of an officer is no guarantee that he will not misuse his powers”. In fact, the Supreme Court has itself warned that “wide discretion is fraught (load) with tyrannical potential even in high personages, absent legal norms and institutional checks.”

“It is incumbent (obligatory) on the government to adopt criterion or restrict its power by reference to norm which, while designed to achieve its object, nevertheless, confine the flow of that power within constitutional limits”. Although the principle is well-established that discriminatory administrative action can be challenged under Art. 14. “The authority concerned would be obligated to explain the circumstances under which the order was made”.

Interview Test and Article 14

The Court pointed out that the written test assesses the man’s intellect and the interview test the man himself and “the twain shall meet” for a proper selection. The Court laid down the following guidelines so that the interview system might not be vitiated under Art. 14.
“If the marks allocated for the oral interview do not exceed 15% of the total marks and the candidates are properly interviewed and relevant questions are asked with a view to assessing their suitability with reference to the factors required to be taken into consideration the oral interview test would satisfy the criterion of reasonableness and non-arbitrariness”. The Court further suggested that the interviews e tape-recorded so that there is evidence to judge whether interviews were conducted in an arbitrary manner or not.\textsuperscript{110}

Those who crafted the Indian Constitution felt that it has to be in accordance with people’s aspirations and changes in society. The Constitution describes the institutional arrangements in a very legal language.

Article 50 is based on the bedrock of the principle of independence of the judiciary. The separation of the judiciary from the executive is regarded as a very necessary element for proper administration of justice on the country. The separation of powers between the legislature, the executive and the judiciary constitutes one of the basic features of the Constitution.\textsuperscript{111} The Supreme Court declares that the independence of the Judiciary is a part of the basic structure of the Constitution.

It has been rightly concluded at one place; first, our Constitution reinforces and reinvents forms of liberal individualism. This is an important achievement because this is done in the backdrop of a society where community values are often indifferent or hostile to individual autonomy. Second, our Constitution upholds the principle of social justice without compromising on individual liberties.

Third, against the background of inter-communal strife, the Constitution upholds its commitment to group rights (the right to the expression of cultural particularity). This indicates that the framers of the Constitution were more than
willing to face the challenges of what more than four decades later has come to be known as multiculturalism.

Dr. Rajendra Prasad stated on 26 November 1949, “Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has provision in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them”.

In words of Dr. D.D. Basu, the foundation of the Indian Constitution has been shaken by the 42nd Amendment Act, 1976. It is more accurate to say “review of the Constitution” for the 42nd Amendment Act. Unnecessary changes in the Constitution decreases the sacredness of the Constitution.

Arbitrarily changes in the Article 368 made dangers to the supremacy of the Constitution and to the Fundamental Rights. According to Dr. D.D. Basu, not to go any court for amendments made under Article 368, this is the irrelevant idea to the jurisprudential point of view.

### 5.5 Gandhism in the Indian Constitution

Gandhiji conceived new ideal social order, Sarvodaya, in which the aim of good and welfare of all people and not select few. His concept of Sarvodaya is as an egalitarian society. Egalitarian society fully reflected in the Constitution.
Gandhiji *dreamt of building up a non-authoritarian, non-exploitative society*. The Indian Constitution through its various mechanism such as “Constitutionalism”, “Rule of law”, Supremacy of the Constitution, “Federal structure”, “sovereignty of the people”, “Responsible Government”, “Judicial Review”, ensured “Fundamental Rights”, “Division of the Power” among executive, legislative and judiciary, etc. prevented the State to become an authoritarian. So, Gandhiji’s non-authoritarian idea is reflected in the Indian Constitution. The Supreme Court has emphasized that the purpose of the Directive Principles is to fix certain socio-economic goals for immediate attainment by bringing about a non-violent social revolution.

5.6 Nature of Conservatism in the Indian Constitution

Conservatism is a political doctrine that emphasizes the value of traditional institutions and practices. Conservatism is an idea promoting traditional social institutions in the context of culture and civilization. The central theme of conservatism includes tradition and human imperfection. Conservatives seek to preserve a range of institutions such as monarchy, religion, and property rights with the aim of emphasizing social stability and continuity. It seeks a return to "the way things were". Those traditions are preserved, by the State in India, which are consistent with the Indian Constitution. If the traditions are inconsistent to that extent they are unconstitutional. The Constitution wants non-violent social change. It is the document of social change. It wants India to transform into social and economic democracy. Accordingly, the idea of conservativism is not prevails in major extent in the Indian Constitution

5.7 Nature of Traditionalism in the Indian Constitution

Traditionalism is adherence to the doctrines or practices of traditions. It is the beliefs or thoughts of those opposed to modernism, liberalism, or radicalism.
The core idea of traditionalism is upholding or maintenance of tradition, especially so as to resist change. Traditionalism is the theory that all moral and religious truth comes from divine revelation passed on by tradition, human reason being incapable of attaining it. "Traditionalism" was a philosophy of history and a political program developed by the Counter revolutionists in France.

But scientific attitudes, social change, reasonability, believe in human capacity reveals in the Indian Constitution. The Constitution does not oppose to the moderate liberalism, democratic socialism, modernism in its limit. It does not oppose to the social change as traditionalism. The Constitution made the constructive social doctrine rests on the conception of human progress. Its good mechanism provides the conditions in which to liberate living spiritual energy of the people.

5.8 Nature of Capitalism in the Indian Constitution

Capitalism is the economic and social system in which the means of production are predominantly privately owned and operated for private profit, and distribution and exchange is in a mainly market economy. It is usually considered to involve the right of individuals and corporations to trade using money in goods, services, labour and land.

The Indian Constitution does not want to concentration of wealth in a few hands. India has mixed economic policy. Now it is transforming into regulated economy. The Constitutional mandate is India transform into socialist country. It has to create social and economic democracy. Indian citizens are free to do any profession. But there is State’s monopoly on trade and commerce. The idea of ‘eminent domain’ prevails in the Constitution of India. And Right to Property is not protected under the Fundamental Right. India should be transform into classless, exploitation-free society. Negative liberalism prevails in the
Constitution. Accordingly, the Indian Constitution does not mandate to create the capitalist society in India.

5.9 Conclusion

Secularism, Liberalism, Socialism and Gandhism is reflected majorly in the Indian Constitution. Conservatism and traditionalism is reflected in very less extent. Capitalism is reflected equal to none in the Indian Constitution.
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