CHAPTER III:
THE LIBERAL
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The Constitution of India commenced on January 26, 1950 and it granted seven fundamental rights to the citizens of India (though not to all). The fundamental rights constituted a safeguard against the arbitrary acts of the legislature and the executive and prescribed negative functions for the State. But if we look beyond the negative character of the right, it could be seen that the fundamental rights seem to contain a larger theoretical content. Their protective character takes them closer to the liberal tradition, but given their nature, function and scope, they appear to resemble the classical liberal tradition, thus to any other version of liberalism. Because the protection of life, liberty, poverty, human dignity, which is the main concern of fundamental rights, was central to the classical liberal tradition also.

Before an attempt is made to elaborate the fundamental rights differently, in order to locate the elements of classical liberalism within them, it is necessary to mention a few things at the outset. As far as the scope of this section is concerned, it will include what the fundamental rights protect and guarantee precisely, excluding the comprehensive history of each and every provisions of the fundamental rights. Similarly, in dealing with classical liberalism, this part of the work will include what were the common features of classical liberalism, and it will exclude from its scope the debate among the classical liberals on particular points. (such as the bounds of toleration of extent of freedom). While doing this I will encounter the argument that liberalism is a product and import of the west and that the atmosphere in India was never congenial for the growth of the liberal tradition.
Thus, let us start relocating the classical liberalism within fundamental rights by starting from a classification of the fundamental rights.

Article 14 deals with the principle of equality and it provides – the state shall not deny to any person equality before law or the equal protection of law.

Article 15 prohibits discrimination on the ground of religion, race, sex, caste or place of birth. It explicitly mentions “the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

No citizen shall on grounds only to religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to:

access to shops, public restaurants, hotels and places of public entertainment; or

the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public.

The article does not, however, 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.

Article 17 deals with abolition of untouchability by explicitly saying “‘untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘untouchability’ shall be an offence
punishable in accordance with law”. The article now stands in amended from as protection of Civil Right Acts.

The act in its enlarged form includes the following:

insulting a member of a scheduled caste on the ground of untouchability.

Preaching untouchability, directly or indirectly;

justifying untouchability on historical, philosophical or religious grounds or on the ground of tradition of the caste system.

Article 18 abolishes the titles. It however, does not prevent other public institutions, such as universities to center titles or honours. The article does not prevent the state from awarding military or academic distinctions, even though they may be used as titles. Under this article the state is not prevented from conferring any distinction or award, such as for social service which cannot be used as a title, that is, as an appendage to one’s name. Thus the award of Bharat Ratna or Padma Vibhusana cannot be used by the recipient as a title and does not, accordingly, come within the constitutional provision.

Article 19 six rights in the nature of freedoms and those are known as ‘six freedoms’ under the constitution. The article, containing the rights right

All citizens shall have the rights –

to freedom of speech and expression;

to assemble peacefully and without arms;

to form associations or unions;
to move freely throughout the territory of India;

to reside and settle in any part of the territory of India; and

to acquire, held and dispose of property;*

to practice any profession or to carry on any occupation, trade or business.

However, the state is not debarred from restricting –

The right (a) in the interests of the sovereignty and integrity of India, the security of the state, friendly relation with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Right (b), in the interest of the sovereignty and integrity of India or public order.

Right (c), in the interest of the sovereignty or integrity of India or public order or morality.

Right (d) and (e), in the interest of the general public or for the protection of the interests of any Scheduled Tribe.

Right (g), in the interests of general public, and the right does not prevent the state from making any law relating to –

i) The professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or

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* The right to property has been deleted by the 44th amendment act. I nevertheless, include this right because it serves the purpose of comparing Fundamental Rights with classical liberalism.
ii) The carrying on by the state, or by a corporation owned or controlled by the state, of any trade, business, industry or service, whether to exclusion, complete or partial, of citizens or otherwise.

Article 20 protects against Retrospective criminal legislation double jeopardy and compulsion to give self-incriminating evidence. It runs as follows –

i) “No person shall convicted of any offence except for violation of a law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence”.

ii) “No person shall be prosecuted and punished for the same offence more than once”.

iii) “No person accused of any offence shall be compelled to be a witness against himself”.

Article 21 protects the personal freedom by laying down “No person shall be deprived of his life or personal liberty except according to the procedure established by law”.

Article 22 deals with the Preventive Detention. It provides the following safeguards under the article –

The Government is entitled to detain such person (who is arrested under a law of preventive detention in custody only for three months. If it seeks to detain the arrested person for more than 3 months, it must obtain a report from an Advisory Board – who will examine the papers submitted by the Government and by the accused – as to whether the detention is justified.
The person so detained shall, as soon as may be, be informed of the grounds of his detention excepting facts, which the detaining authority considers to be against the public interest to disclose.

The person detained must have the earliest opportunity of making a representation against the order of detention.

Article 23, confers the right against exploitation. It says “(i) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law”.

The article, however, does not prevent state from imposing compulsory service for public purposes, and in imposing such service the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article 24 prohibits employment of children in factories etc. by explicitly stating “No child below the age of fourteen years, shall be employed to work in any factory or mine or engaged in any other hazardous employment”.

Article 25 to Article 28 confer freedom of conscience and free profession, practice and propagation of Religion. The following provisions follow from the articles –

The state will not compel any citizen to pay any taxes for the promotion or maintenance of any particular religion or religious institution.

No religious instruction shall be provided in any educational institution wholly provided by state funds;
Even though religious instruction be imparted in any educational institutions recognized by or receiving aid from the state, no person attending such institution shall be compelled to receive that religious instruction without the consent of himself or of his guardian (in case the pupil be a minor).

However, this right has been restricted in the interest of public order, morality and health.

Article 29 and Article 30, relate to cultural and educational rights. Article 29 provides that "the state shall not impose it (a religious community where it is in minority) any culture other than the community's own culture.

Article 30 – Such community shall have the right to establish and administer educational institutions of its choice and the state shall not, in granting aid to educational institutions, discriminate against such an educational institution maintained by a minority community on the ground that it is under the management of a religious community.

Further, Article 31 A provides that full compensation has to be paid if the state seeks to acquire, the property of a minority educational institution.

Article 32 guarantees constitutional remedies for enforcement of Fundamental Rights. The Article provides safeguards against the arbitrary action of the Executive and the Legislature. Under the said article: if any act of Executive or Legislature violates the provisions guaranteeing Fundamental Rights, it will be declared as void by the Judiciary which has been armed with the power to issue writs in the nature of habeas corpus, mandamus, prohibition, certiorari, and quo warranto. Further, the rights so guaranteed shall not be suspended
except during a proclamation of emergency, - in the manner laid down by the constitution.

The explicit provisions of clause (1) and (2) of Article 32 run as follows–

“(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by this part.”

Thus the Fundamental Rights aim to protect the rights and liberties of individuals, by providing safeguards against the arbitrary actions of the Executive and the Legislature.

Of these fundamental rights, three are designed to protect the individual against the action of other private individuals e.g. Art. 17, 15(2), and article 23. Again, while certain rights extend to all persons within the territory of India, others are available only to Indian citizens. D.D. Basu makes another important classification by saying “some fundamental rights are negatively worded as prohibitions to the state, e.g. Article 14 Says – the State shall not deny to any person equality before the law... similar are the provisions of Art.15(1); 16(2); 18(1); 20, 22(1); 28(1). There are others which positively confer some benefits upon the individual [e.g. the right to religious freedom

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1 The list and classification of fundamental rights have been taken from D.D. Basu’s *Introduction to the Constitution of India*, Wadhwa and Company Law publishers, New Delhi, 1960, pp.78-147.

under article 25 and the cultural and educational rights, under article 29(1), 30(1)).

But it would be worthwhile to mention at the outset that the purpose of this chapter goes beyond mere elaboration and classification of the fundamental rights. It will attempt to establish the way in which the fundamental rights resemble the liberal tradition, or in other words what is the liberal content of these 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 Granvile 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”. Hence, for Austin, the fundamental rights are part of a liberal tradition, and as Indians were heir to that liberal tradition, it made its way into the Indian constitution.

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But a simplistic characterization of the fundamental rights such as the above one seems to be problematic in certain respects. Because, the view that the fundamental rights constitute a part of the liberal tradition and it is through them that the liberal tradition has made its way into the Indian constitution would appear to support those array of views which suggest that modern political values and institutions have been imported to India from outside. The gamut of such views extends in application from the modernist project of Nehru to political values of secularism and liberalism. In other words it has become almost a common place to associate these views as much with secularism and liberalism as with the Nehruvian project of modernity. For instance, Sudipta Kaviraj, talking in the context of the failure of the Nehruvian project of modernity for which he blames the elite around Nehru, says “the dependence of the political system on the intermediation of a hierarchy of local notables is both reflection and cause of the seeming failure of elite around Nehru to create or to create quickly a popular common sense about the political world taking the vocabulary or rights, institutions and impersonal power into the vernacular everyday discourse of rural or small town Indian society”. He further says that the ideals of modern nationalism, industrial modernity, secular state and democracy were intelligible only to the modern elite because these ideals owed their inheritance not to a common national movement; instead they formed the part of a modernity which was not sought to be grounded in the political vocabulary of the national or at least its major part.”

5 Sudipta Kaviraj quoted in Reinventing India, J. Harriss and S. Corbridge, Oxford University Press, New Delhi, 2000, p.51.

result” say Corbridge and Harriss “the whole project of modernization and the rational developmental project remained largely external and imposed.”

Kaviraj, however, was saying in a different context – failure of the Nehruvian project because of its excessive dependence on the intermediation of the local big men. But the implication of this observation is significant at least in one respect. It presents modern political values and institutions as external to the Indian society. But interestingly when he explains this externality he seems to be supporting this view directly. For instance, he says, “European state forms, absolutist, constitutionalist, are finally liberal democratic, emerged from and were shaped by the historical sense of necessity of these societies, and the institutions were therefore commensurate with some popular understanding of their internal structure and functions. In India, these remained external imposition or suggestions and therefore resisted effectively either by miscomprehension of their nature and functions or some times a more serious resistance because they constituted a threat to traditional ways of rural existence.”

Therefore the absence in India of such a commensurability, either because a popular understanding like the above one was simply non-existent or due to some other reason, contributed largely to the perception of externality of these institutions. Kaviraj, however, cautious about using the argument about the externality saying that some of the institutions ceased to be external when understood what they implied.”

7 J. Harriss and S. Corbridge, Reinventing India, Oxford University Press, New Delhi, 2000, p.51. (This argument, however is not their own original position. In this argument Corbridge and Harriss here explain what Kaviraj perhaps intends to imply)
9 Ibid., p.32, ref.no.22.
*(Even though Kaviraj cautious about using the argument of externality with care, it seems that the idea pervades most of it arguments. For example, see, “On the Crisis of Political Institutions in India”, Contribution to Indian Sociology, Vol.18, no.2, 1984, Sage Publication, New Delhi, pp.223-242).
the argument advanced by Sunil Khilani that liberalism had never its root deep in the Indian soil. Khilani further says “to suggest that one could find in India’s past precursors or embryonic forms of constitutional and democratic politics is, it seems to me, a case of faith triumphing over evidence”.

Taken together, these views show that liberalism, along with the fundamental rights as its political and constitutional manifestation, is a western import because Indian society and culture were never congenial to the growth of liberal tradition in India.

But history suggests something contrary. And if we could afford to believe in the above characterization, we could do so only at the risk of overlooking some of the liberal strands in the Indian politics that existed at least since the days of Raja Ram Mohun Roy. There existed liberal ideas and practices, even though in a scattered and unsystematic way and even before the formal political modernization of Indian polity. It is often true that the Indian intellectuals were influenced to a great extent by Western political ideas, but it must not be assumed that they borrowed the liberal ideas of the Western political philosophers unaltered and implanted them in the Indian constitution. Karunakaran also supports this fact by saying that “even though most of the leaders based their thought on Western ideas from this fact we must not however conclude that there is no such thing as modern Indian political thought because even when Indian leaders accepted Western political theories they did not apply them mechanically to India, but learning from their rich experiences in leading political movements altered some of these theories partially and in

some cases completely to suit to the condition of the country”\textsuperscript{11}. For instance, the Indian liberals' demand for the state protection for indigenous industries, even though it violated the liberal principle of free trade, is a bigger testimony to the ideological adaptation on the part of the Indian liberals. Hence, we can start with K.M. Pannikar, for whom “Raja Ram Mohun Roy was the real founder of liberal tradition in India with his commitment to the principle of equality, religious freedom, women’s right to freedom and establishment of a casteless society.”\textsuperscript{12} He was also first in the modern India to raise the standard of revolt against the tyranny of the so-called scripture and dogma. Liberal in character and emancipatory in effect these ideas appear closely akin to those with which J.S. Mill vehemently attacked the tyranny of society in his famous “On Liberty”. Raja Ram Mohun Roy also introduced an element of rationalism by asserting the supremacy of reason as a substitute for blind submission to the authority of priesthood and scripture. Equally liberal in spirit was his fight for a free, equal and dignified womanhood. Raja Ram Mohun Roy attacked the caste system on the ground of equality, and urged the authorities to stop child marriage. His attack upon child marriage seems to be based on the assumption that marriage should be based on the consent of the parties. This, in turn reflects the liberal sentiment of recognizing man and women as distinct personalities capable of voluntarily taking decisions in matters affecting their life. That Raja Ram Mohun Roy was a great believer in the freedom of press is evident from the memorial which he, together with his five colleagues, presented as a protest against an ordinance issued in 1823, prohibiting publication of newspapers or other periodicals without a government license.

\textsuperscript{12} K.M. Pannikar, \textit{In Defence of Liberalism}, Asia Publishing House, New Delhi, 1962, pp.2-3.
They (Raja and his colleagues) maintained that “freedom of press is necessary for the sake of government and for the governed.” Moreover, he was a liberal at heart is evident from the letter he wrote to Buckingham when he heard about the suppression of the people of Nepal at the hands of Austrians. He wrote: “I am obliged to conclude that I shall not live to see liberty universally restored to the nations of Europe and Asiatic nations, and especially those that are European colonies... under these circumstances I consider the cause of Nepolitans as my own and their enemies as ours. Enemies to liberty and friends of despotism have never been and never will be ultimately successful”. On the face of it one can not but agree with Sankar Ghose that “the first spark of Indian liberalism was lighted by Raja Ram Mohun Roy”.

The Indian liberal tradition was kept alive by many who were both liberal at heart and social reformers in action. For instance, Keshub Chandra Sen, who led the Bramho Samaj, also played his part in the development of liberal tradition in India. He attacked the caste system as it was based upon, and helped to perpetuate, the system of inequality. Keshub asserted the supremacy of individual conscience to decide what is right and what is wrong in matters which hitherto were the domain of tradition and scriptures. This implies a sense of individualism which was urgently needed to restore to individual his right to use his judgment in all matters of rightness and wrongness.

Beside these early reformers, there were the moderates who appeared on the national scene after the formation of Indian National Congress. These

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people dominated the Indian National Congress from 1885, the year of its inception up to 1905 and were referred to as 'Liberals'. The challenge to their leadership came first from the 'Extremists' who emerged as a major political force at the beginning of the 20th century. "Since then," says Karunakaran "these earlier leaders were referred to as the 'moderates'."16 These people were more of reformers and political leaders than doctrinaire liberal philosophers. But this fact does not affect the conclusion that they also contributed their share in the development and continuity of Indian liberal tradition, even though more in action and less in words. As Karunakaran says, "the student of modern political thought is, therefore, faced with the fact that although there are no systematically worked out theories of importance in this field of study, he can not ignore ideological implications of the views held by many statesmen".17 Hence one should not get disappointed at the absence of systematically worked out liberal theories, and instead look into the speeches and programmes of the early moderates in order to find out the ingredients of what can be called a liberal theory. These people, inspired by the ideal of individual right and liberty, fought for the liberalization of Indian administration and introduction of the representative institutions into India and it is in these demands that their liberal ideas are grounded. That their social reform programme was also guided by the same liberal spirit that inspired their speeches is evident from the words of Ranade, who speaking in the context of the end of social reform, said "the end is to renovate, to purity, and also to perfect the whole man by liberating his intellect, elevating his standard of duty and perfecting all his powers".18

17 K.P. Karunakaran (ed.), Indian Political Thought, the Peacock press, New Delhi, 1976 p2.
18 Ranade quoted in M.A. Buch, Rise and Growth of Indian Liberalism, Author, Baroda, p.110.
Indian liberals, keeping in line with the liberal tradition, adopted the gradualist method and it is the adoption of gradualist method that led them to repose their faith in the British rule and in the British sense of justice, which they believed would one day bring the representative institutions of the England to India gradually. As Dadabhai Naroji, while replying to an English audience said “we hope to enjoy the same liberty, the same strong institutions which you in this country enjoy”. 19 Naroji criticized the suppression of freedom under the British rule by saying that “the Indian bureaucrats were wiping out whatever was left of the good name of the British by Russianizing the system and by repressing freedom of speech and the liberty of the subject and the government has ceased to be British government and has assumed the role of Russian government”. 20

That the Indian liberals were convinced that the constitutional agitation would bring freedom and rights is well reflected in the speeches of Surendranath Banerjee. He said: “constitutional agitation will secure for us those rights, those privileges which in less favoured countries are obtained by sterner means. But peaceful as are the means to be enforced there is a stern duty to be performed by every Indian. And he who fails in that duty is a traitor before God and man”. 21 But it should always be born in mind that the Indian liberals were also reformers and it was their reformist programmes that equally contained the liberal ingredients. Thus, they attacked the existing caste hierarchy in India because they believed that political progress of India was conditional upon the liberalization of Indian social life, and they saw caste system as one of the greatest hurdles in the way of achieving that objective. Hence, Gokhle, attacking the argument which suggested a similarity between the caste based

21 S. Banerjee quoted in K P.Karunakaran’s *Indian Political Though*, *op cit.*, p.88.
inequality in India and the class based inequality in the West said “the classes of the West are perfectly elastic institutions and not rigid or cast-iron like our caste”. He further said that “modern civilization has accepted greater equality for all as its watchword, as against privilege and exclusiveness which were root ideas of the old world”.

It then seems that Indian liberals or moderates had also a sense of human freedom, and they were also conscious of the political rights of the individual. Similarly they had contempt for the suppression of individual rights and liberty. They wanted the same rights and freedoms that the Britons enjoyed in England as well as in India, and as true liberals they believed in the adoption of gradualist and constitutional methods. It is also true that they could neither develop a coherent and systematic theory of liberal ideas, as their Western counterparts did, nor could they maintain a consistent liberal tradition through regular intellectual contribution. But before we take into account their insufficiency at the intellectual level, it should be borne in mind that the Indian liberals and moderates were practical men. According to Sankar Ghose “they did not engage themselves in any elaborate discussion on the nature of representative government nor did they concern themselves with the first principles. They spoke of no abstract equality but of the equality as promised in the Queen’s proclamation or in the Charter Acts. And they did not quarrel with the government merely because it was a foreign government but they inveighed against it because it sought to maintain deliberately its foreign character.” It, then explains the absence of a well articulated and coherent liberal theory in

22 Ibid., p.203.
23 Ibid., p.203.
24 Sankar Ghosh, op.cit., p.190.
India, and to find out the ingredients of what can be called a liberal theory one has to go deep into the speeches and reformist programmes of these leaders. But if it is the liberal ideas not necessarily in the form of a coherent theory but well reflected in the course of action that define a liberal, then more recently Nehru and Gandhi could also be seen as part of the Indian liberal tradition. The individualism of Nehru is well expressed in his “Basic Approach” where he asks “if the individual is ignored and sacrificed for what is considered good for society, and is that the right objective to have?” He himself answers: “The individual should not be sacrificed and the real social progress can only be achieved only when opportunity was given to the individual to develop; provided that the individual was not the representative of a selected group but of the whole community”. Nehru, notwithstanding his socialist ideas, which he often symbolizes, did not altogether renounce his individualism. It is evident when he tries to reconcile both. He says; “I hope that socialism does not kill or suppress individuality. I do not see why under socialism there should not be a great deal of freedom for the individual: indeed for greater freedom of conscience and mind, freedom of enterprise and even the possession of private property in a restricted scale. Above all he will have the freedom which comes from economic security, which a small number posses today.” It, then seems now plausible to say that Nehru had also a conception of freedom which was different in scope and content, from the conception of freedom found in the early liberal tradition.

25 A. Appadorai, *Indian Political Thinking in Twentieth Century – From Naroji to Nehru*, Oxford University Press, New Delhi, 1971, p.76.
Besides this, Nehru also talks of the scientific method, which takes him closer to the rationalist aspect of the liberal tradition. “The scientific temper”, says Nehru, “alone was a true guide to life. It is the temper of a free man. True, some phenomenon were outside the preview of scientific method of objective inquiry. But even when we go to the region beyond the reach of scientific method and visit the mountain tops where philosophy dwells and emotions fill us or gaze at the immensity beyond, that approach and temper are still necessary”.27

In addition to this, the liberal ideas of Nehru can be found rooted deep in his idea of secularism, because it is secularism that forms one of the defining features of liberalism.

Thus, it now seems plausible to argue with Rajeev Bhargava that “at least since Ram Mohun Roy, and well before the radical politicization of Indian National congress, a distinct liberal stream existed which merged with and inherited a diffused but persistent strain of something akin to a liberal view within the local Indian traditions”.28 Bhargava contests the claim that the transformation of nationalist demands into a mass movement ended the short phase of liberal politics in India by arguing that though a great distance exists between a politics of resistance to the state, and politics conducted within parameters of institutionalized opposition permitted by the state, both are part of the liberal tradition. Hence, the nationalist movement based on resistance to the illegitimate state was very much a part of the liberal tradition. He further

27 The Discovery of India, p.526.
explains that “liberalism, while admitting right to resistance to an illegitimate state, is not clear on the methods to be adopted for such resistance”. As liberal politics of resistance varies in different contexts the mass movement in India could be seen as much a part of the liberal tradition as any peaceful resistance to a despotic power. Bhargava, citing the example of the American war of Independence, seems to be saying that as long as a movement is guided by a strong liberal vision, it remains a part of the liberal tradition, notwithstanding the method of active resistance.

But if we agree with Bhargava that the Indian National Movement, based on active resistance to the British Imperialism, was as much a part of the liberal tradition as any institutionalized opposition because liberalism, being unclear about the methods to be adopted, allows different forms of resistance in different contexts, then we have to admit that the extremists “Swaraj” agenda was also a part of liberal tradition. Because the struggle for “Swaraj”, based by the conception of “self-rule” and an active resistance to an illegitimate foreign power also appears to have been guided by the same strong liberal vision that was the guiding force behind the French Revolution and the American war of Independence.

Therefore, on the face of these arguments, it seems untenable to argue that a congenial atmosphere hardly existed in India for the growth of liberalism, and that it has largely been imported from outside. It is true that there has been Western influence on Indian thought to a considerable extent and such influence has continued even after the termination of British rule. It is also equally true that in their utterance the Indian liberals quoted speeches of

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\(^{29}\textit{Ibid}, \text{p.31.}\)
the European Liberal such as Mill and Gladston but to say that the Indian intellectuals borrowed the modern political ideas of the West and gave them institutional form seems somewhat exaggerated.

After establishing that there existed a distinct liberal stream which merged with and was enriched by Western liberalism, the task is now to find out which version of liberalism underlies the Fundamental Rights. And because most of the people dealing with the subject have not tried to find out the exact variant of liberalism underlying these rights the task becomes more difficult. For instance, K.M. Pannikar, like Austin, also believes in the liberal character of fundamental rights, but for him it is the directives principles also that equally embody essential liberal principles. He says "this comprehensive and organic conception of liberalism which was to find expression in the Indian constitution and which with all the imperfections inherent on the realization of political programmes, remains the policy of Indian government goes, it will be considered, much beyond what the great liberals of the past considered to be their doctrines". 30

Thus, current writings show only that the liberal tradition is alive within the fundamental rights and directive principles. But a closer examination might reveal that, it is classical liberalism rather than any other version of it that seems to be predominantly present within the Fundamental Rights because the liberal values discussed in the preceding chapter are generally associated with the classical liberal tradition. Let’s now examine Fundamental Rights. These rights are mostly individualistic in nature. Their restrictions are based upon certain considerations like general interest, integrity of the nation, or public

decency and it is so because no liberal society can afford to offer absolute freedoms to its citizens which will lead to chaos and the feeling of insecurity that characterized the Hobbesian state of nature. It is, therefore, in the interest of freedom itself that freedom should be limited.

Articles 14 to 18 contain the right to equality. The state is required to maintain the principle of equality unless circumstances demand otherwise. Now it is possible to offer a liberal interpretation of the right to equality, because it was the concept of equality that the liberals looked up to as the basis of liberalism. For instance, the early liberals claimed that the state of nature was also the state of equality. They further argued that every body should count as one and no body should count as more than one. That the right to equality can be fitted within the classical liberal tradition is evident from the fact that it implies legal and political equality which precisely is what the early liberals meant when they talked about the concept of equality, and it seems that while deliberating upon this right the framers of the Indian constitution also had in mind this kind of equality.

Article 19 contains seven freedoms that have already been mentioned earlier. The freedom of speech and expression is as old as liberalism itself, and without it liberalism would appear incomplete. 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
mankind”. He further discusses the merits of allowing diversity of opinions. This freedom is so deeply entrenched in the liberal thought that it did not change a bit even during the period when liberalism underwent an ideological transformation. Thus, it is present in the domain of both classical and new liberalism, and it would not be problematic if we say that the existence of freedom of speech takes fundamental rights close to the classical liberalism. There are other freedoms also like freedom to assemble peacefully and without arms; to form associations or unions; to move freely throughout the territory of India; to reside and settle in any part of India; Apart from some special considerations, which will be discussed later, these freedoms are restricted by the consideration of public order and morality, and these freedoms can be interpreted as personal freedom which was the hallmark of classical liberal tradition. And it was the concept of personal freedom which restricted the power of the state and which was forcefully asserted by liberal figures such as Mill and Berlin. That it was mostly these kinds of freedoms which Berlin had in mind when he said of personal liberty of a man as “preservation of that portion of a man’s life which constitutes his identification as a man”32. He further said that, “the violation of this minimum area would be regarded as a sin against the truth that he is a man”.33 Mill also seems to be implying this when he says “social control should be commensurate with the prevention of harm to others interests; otherwise individual is free in his own concern; over himself, over his own body and mind the individual is sovereign”.34 The liberal view of the minimalist state advocated by Nozick and others

33 Ibid p12
34 J.S. Mill, Utilitarianism, On Liberty and Representative Government, op.cit., p.73.
also postulates largely these freedoms. Even though the recent libertarians' arguments lead to a powerful theory of property right their concept of freedom could be taken to imply an area in the life of an individual which the state required to respect. Hence, it is these freedoms which were described as “personal freedom consisting in absence of restraints” in the classical liberal language.

Similarly, the other freedoms in the same article such as to acquire, hold and dispose of property, and to practice any profession or to carry on any occupation, trade or business, appear to belong to the region of classical liberalism. The structure of their language suggests the existence of a kind of economic liberalism which was akin to the classical liberal tradition. For instance, Locke advanced the theory of natural rights among which he included the “right to property”, and it was incumbent upon the state not to interfere with but to protect this right of the individual. Further, economists like Adam Smith also endorsed the property right and it gradually led to evolution of the concept of “laissez-faire”. Similarly, the two kinds of rights mentioned above assert the economic liberty of the individual and ask the state not to interfere with this liberty. Therefore, the freedoms guaranteed by the Article 19 could be linked to the classical liberal tradition.

Article 21 says, “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 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.

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.

Article 25 to Article 28 and further, Article 29 deals with the religious freedom and make India a secular state. As we have discussed earlier secularism is deeply entrenched in the liberal tradition, and from the very beginning it went along with the development of liberalism. Again, though secularism remained aligned with liberalism in the same way as before even after the transformation of latter, it was during the classical liberal period that
secularism as a political value made much headway. Thus it would not be
problematic if we assign secularism a place within classical liberal tradition.
Further, the formulation of secularism runs through the writings of classical
liberals such as Locke. As he says “a sovereign who tried to dictate how we
practiced our religion was overstepping the proper bounds of his authority.
Conversely, a church that tried to dictate the secular law was overstepping the
bounds of its authority”.
35 Thus secularism, as mutual separation of politics and
religion, was a part of the classical liberal tradition and therefore, the articles
dealing with religious liberty could be said as belonging to the domain of
classical liberalism.

But before we satisfy ourselves about the liberal origin of the secularism
we have to deal with a much-debated issue. The issue here is that, do the
articles offering religious liberty to the individual make India truly a secular,
and by implication, a liberal state? The answer to this question is the point of
discussion among the recent political theorists. For instance, D.E. Smith
36 develops three components of a secular state in his version of secularism and
uses them as the criteria for judging the secular character of a state. Those are
as follows. The first one suggests a relationship between individual and his
religion from which the state is excluded. This envisages the religious freedom
of the individual. Here the subject is free to reject all religion, or to embrace
one, or to renounce his own religion and embrace another one, without
interference of the state. The second component consists in the relationship
between state and individual from which religion is excluded. This relation

Political Philosophy”, p.300.
finds expression in the principle of equal citizenship. In such case “the state views individual not as a member of any particular religious group. Religion becomes entirely irrelevant in defining the terms of citizenship. The third component is instrumental to the integrity of these two relations. In other words the integrity of these two relations is dependent upon the maintenance of the third factor, namely the separation of state and religion.

After defining the three components of the secular state, Smith proceeds to examine to what extent they are maintained in the Indian case through the various constitutional provisions. He finds the religious liberty in article 25(1), 27 in its individualistic form and article 30 in its collective form. The second component presupposing equal citizenship finds expression in the provisions of Articles 14. Article 15(1) and in Article 16. The third component postulating the separation of state and religion exists in the following forms; No provision regarding an official state religion; No religious instructions in the schools aided by state funds; No taxes to support any particular religion. This is expressed in the Article 29.

However, in the final analysis Smith finds these components in somewhat compromised forms and some of the deviations can be found rooted in the same articles that guarantee religious freedom. For example, the religious liberty has often been interfered by the state when it tried to regulate the administration of temples, or when the state made it possible for the Dalits to enter into the temples. Thus, Smith says, “there are undoubtedly serious problems in each of these areas (the three components which according to Smith constitute the character of a secular state). Freedom of religion especially collective freedom of religion is compromised by constitutional sanction for
extensive state interference in religious affairs; citizenship based on equality and non-discrimination by the state is weakened by the numerous special provisions made for the underprivileged classes on the basis of caste.\footnote{Ibid., p.221. (Even though Smith finds deviations in the Indian case he nevertheless appears optimistic about the flourishing of secular culture in India)} Hence, he answers to the question “Is India a Secular State” in the form of a qualified “yes”.

But if we take into account the defence advanced by Rajeev Bhargava, we will find that notwithstanding the deviations from strict standards of secularism in the form of interference by the state on Hindu religion, or in the forms of special provisions, the Indian state nevertheless remains truly secular. Bhargava sees Smith’s formulation as implying a concept of secularism based upon the concept of ‘equidistance’. As a substitute he advances the concept of ‘principled distance’\footnote{Rajeev Bhargava, “India’s Secular Constitution” in India’s Living Constitution (ed.), Zoya Hasan, E. Sridharan, R. Sudershan, Permanent Black, New Delhi, 2002, p.167.}. Bhargava claims that according to principled distance, the state may intervene or refrain from interfering in religion, depending upon whether or not some values are protected or advanced. The promotion of a particular value constitutive of secularism,” says Bhargava, “some religion, relative to other religious, may require greater interference from the state”\footnote{Ibid., p.167.}. From this premises he leads to the conclusion that a state interfering in one religion more than in other does not automatically depart from secularism. “Secularism”, Bhargava argues “requires principled distance, not exclusion or equidistance”\footnote{Ibid., p.167.}. Hence, for Bhargava secularism in India developed its own modern variant suited to social and cultural life of India, and this variant based
upon the concept of principled distance need not always confirm to the
standards advocated by Smith.

But another question suggests itself. If the articles guarrenting religious
liberty of the individual embody secularism and as a part of secularism, belong
to the classical liberal tradition, can the same be said of the articles 29 and 30
offering community specific rights? In other words, are articles 29 and 30 the
constitutional manifestations of secularism, and in turn belong to the liberal
tradition? If yes, how can these articles with their communitarian aspects be
made compatible with the egalitarian component of secularism embodying the
principle of equal citizenship, because the communitarian_aspect demands
favourable treatment from the state much against the requirements of equal
citizenship. And is the concept of “principled distance” of any help in this
regard?

Community specific rights such as those offered by article 29 and 30,
according to Bhargava, could be seen as the non-individualistic aspect of
religious liberty. In this view the state is required to refrain from interfering
with the right of the community to its own practices. Bhargava perhaps try to
visualize the communities as separate individuals, and on this basis, wants to
argue that in the same way as an individualistic construction of religious liberty
permits every individual to enjoy his or her religious liberty, a communitarian
construal of religious liberty allows each community to enjoy its religious
liberty. He further says that “commitment of secularism to equal citizenship
can, in principle, accommodate reasonable demand for community specific
political rights which due to peculiar social and cultural circumstances of the
country meant community specific social rights.\textsuperscript{41} The implication of this is that the principle of equality dictates some special treatment to some communities, which otherwise will be unable to preserve their cultures from the forces of assimilation. Hence, the accommodation of community-specific rights within the framework of equal citizenship is required by the demand of the principles of equality and justice. Thus, group rights could be seen as non-individualistic construction of religious liberty, and they exist for the sake of the values of equality and justice, and therefore, the articles that offer group rights in defiance of the principles of equidistance, nevertheless embody a version of secularism. Therefore, we have here religious liberty and the principle of equality in their non-individualistic communitarian aspect. On the face of it, it is hard not to agree with Bhargava who argues that "a critique of constitutional secularism on the ground that it acknowledges group rights, or that it gives up on neutrality, simply does not wash."\textsuperscript{42} So, Articles 29 and 30 embody secularism in its non-individualistic dimension and hence, by virtue of embodying secularism belong to the domain of classical liberalism. But it raises another question. That is the existence of these community-specific rights suggests a departure from classical liberal tradition since the egalitarianism of classical liberalism does not recognize any such right and it confers rights upon the individual as individual, not as a member of any specific community. There are however, other aspects which have to bear with the nature of these rights and need a separate treatment and which, we will discuss in the next chapter at length. As for now, we will examine that fundamental right in the absence of which the existence of other fundamental

\textsuperscript{41} Bhargava, ‘India’s Secular Constitution’, \textit{op.cit.}, pp.125-6.

\textsuperscript{42} \textit{Ibid.}, p.127.
rights would appear meaningless, namely the right to constitutional remedy and this has been admitted by Dr. B.R. Ambedkar in the constituent Assembly. He said:

"Sir, I am very glad that the majority of those who spoke on this article have realised the importance and significance of this article. If I was asked to name any particular article in this constitution as the most important – an article without which this constitution could be a nullity – I could not refer to any other article except this one. It is the very soul of the constitution and the very heart of it and I am glad that the House has realised its importance."\(^{43}\)

He further says, "this in my Judgment is one of the greatest safeguards that can be provided for the safety and security of the individual".\(^{44}\) Article 32 enforces the rights of individual by redressing the grievances. But how can it be linked to classical liberalism? If we examine closely, then this right reminds us of those liberal values and practices that we discussed in the previous chapter. Liberalism right from the beginning initiated a struggle against despotism, and constitutionalism with its corollary rule of law, became the guiding vision in this liberal struggle. It is these liberal practices in the form of rule of law and constitutionalism that form the core of the right to constitutional remedy. Further, the structure of this right suggest that it is an effective safeguard against despotism, and it is in this right that one can find a strict adherence to constitutionalism and rule of law.

By its very nature the right to constitutional remedy restricts the state power, and in this form it closely resembles the idea of limited government.

\(^{44}\) Ibid., p.953.
which was the hallmark of classical liberal tradition. Therefore, it is classical liberalism with its restricted scope for the involvement of state than any other version of liberalism, which could be seen at work in the Indian constitution through this right.

So, the fundamental rights can be seen as a part of the classical liberal tradition, and as certain elements remained unchanged even when liberalism transformed itself due to survival necessity, it would not pose any problem if we put these liberal components more in the classical liberal tradition than in any other version of liberalism.

But several doubts still persist. Are the all fundamental rights to be seen as the part of classical liberal tradition or in other words, is classical liberalism exclusively present in the fundamental rights? As suggested above apart from the community specific rights there are other group rights that are offered to different groups, not on the ground of religion, but on the basis of their socio-economic status? For example Article 15(4) which empowers the state to make special provisions for the Scheduled Castes and Scheduled Tribes. The existence of these rights precludes the possibility of a blanket characterization of fundamental rights as embodiment of classical liberalism, and indicates the presence of an other version of liberalism within the fundamental rights. It is the existence of these rights which apart from being group specific, embody the concept of an active state in contrast to the concept of the state with minimum function. So the task is now to find out to which version of liberalism do these Rights belong to? Do they constitute a part of the classical liberal tradition in defiance of the egalitarian tenet, or do they belong to an another version of liberalism which modifies, to some extent, some of the early liberal principles?
These rights, which specially care for the interests of those who for long have been the victims of hitherto existing inequalities and injustice, were seen by the framers of the Indian constitution as promoting the value of social justice. The concept of social justice was in ascendant when liberalism underwent an ideological transformation and the adjective “New” was prefixed to “Liberalism”. According to K.M. Pannikar, “the idea of social justice, among other things, constituted the new basis of liberalism.”45 After seeing the rights that uphold the value of social justice as embodying “New Liberalism”, the next task now is to find out whether the new liberalism accommodated, in principle, the existence of group rights and for this purpose, allowed for the active engagement of the state in the life of individual. This subject matter will form the content of the following chapter where, apart from an explanation of the similarity between new liberalism and the Directive Principles, effort will also be made to find out whether this new liberalism co-exists with the Fundamental Rights through these rights.