

Is the Indian Constitution liberal?

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The Preamble to the Constitution of India 1950 loudly proclaims India to be a sovereign, socialist, secular, democratic republic. Further, it expressly aims to secure for all its citizens liberty of thought, expression, belief, faith and worship. At no point in the Preamble, or anywhere else in the Constitution, does the word ‘liberalism’ find a place. So, does a Constitution have to self-identify as ‘liberal’ or should we rely on specific institutional arrangements of state or guarantees of civil and constitutional rights to characterize a constitution as a liberal one? As a full-throated embrace of electoral democracy in India throws up political formations whose ‘liberal’ commitments are yet to be tested, this is a timely and important question to answer.

There have been some efforts to determine whether the Indian constitution is properly described as a liberal constitution. However, they appear to assume that the Indian constitution is liberal and seek to avoid the charge that some features of the constitution render it illiberal. Chakravarthi Ram-Prasad explains why group rights to protect vulnerable groups are not illiberal additions but integral to a multicultural conception of liberalism.¹ Mathew John is concerned with the failure of Indian constitutional liberalism to draw on ‘Indian epistemologies regarding identity and community.’²

In this essay, I revisit the question of whether one should assume that the Indian constitution is liberal. Part A examines whether liberalism was invoked by framers of the constitution either expressly or implicitly in the Constituent Assembly Debates. Part B reviews whether liberalism or liberal justifications have been commonplace in the Supreme Court’s interpretation of the constitution. In Part C, I assess whether key features of the Indian constitution are exclusively justified on liberal grounds or necessary features of a liberal constitution. In a brief conclusion I show that as a liberal society does not require a liberal constitution, it is arguably a mistake to insist that liberalism is produced through a constitution. Instead those passionate about sustaining a liberal India must engage in a substantive politics that organizes and educates around a liberal politics rather than to passively hope that the constitution will do this for us.

A. Liberalism in the Making of India’s Constitution

The long history of constitution making in India arguably began with The Constitution of India Bill 1895. This Bill was produced by the initial protagonists of the freedom movement though its author remains unidentified. It does incorporate institutional features associated with liberalism such as the separation of powers and some fundamental rights, but it does not expressly proclaim its liberal character. While a fuller account of the nature of

¹Chakravarthi Ram-Prasad, *Pluralism and Liberalism: reading the Indian constitution as a philosophical document for constitutional patriotism*, 16 *Critical Review of International Social and Political Philosophy* 676 (2013)

²M John, *Constitutionalism as Instruction for Nationhood*, 17 *Jus Politicum* 589 (2017)

Indian liberalism³ in constitution making deserves careful study, for the purposes of this essay I will confine my analysis to the most intense period of constitution drafting by the Constituent Assembly.

The Constitution of India 1950 was drafted by a Constituent Assembly (hereafter 'CA') through 165 days of debates in a little less than three years. A close review of these debates reveals the extent to which the framers of the constitution invoked the concept of liberalism to describe or defend their constitutional design choices. Significantly, the CA did not engage at any stage in a debate about including the words 'liberal' or 'liberalism' into the constitutional text. However, there were two debates in which 'liberalism' was invoked to support amendments to draft articles of the Constitution.

First, KT Shah urged the CA to introduce a new Article 40A to expressly require a full separation of the three organs of government: legislative, executive and judicial. This he argued was a "very basic requirement of a liberal constitution."⁴ He distinguished sharply between the institutional arrangements' characteristic of the 'liberalism of the English constitution' and the American 'liberal constitution' to show that a full separation of powers between all three arms of the government in the American model should inspire the Indian constitution. This amendment was rejected though a slightly modified form of the separation of powers principle that guarantees separation of the judiciary from the executive at the lower levels of government survives as Article 50.

The second debate where liberalism was used to justify a constitutional amendment sought to add the freedom of the press and publication expressly to the current Article 19(1)(a) guarantee of free speech and expression. Once again it was KT Shah who very strongly argued that for the Constitution of India to be called a "progressive liberal constitution"⁵ it must expressly provide for the protection of press freedoms. Despite his evocative plea, the CA rejected the amendment and it was left to the Supreme Court to incorporate press freedom into the constitution through interpretation.

To be sure it was not just KT Shah who invoked liberalism in the CA. In very early debate on the draft Constitution, NG Ranga commended the drafters for hedging the scope of fundamental rights by allowing sufficient scope for state regulation. For him, limited rights were essential to ensure that partisans of "liberalism at one and communism at the other" cannot "take advantage of these rights to pave the way to totalitarianism." Ranga alluded to the Weimar experience under the Third Reich to urge that too much 'liberalism' was the recipe for constitutional breakdown. For him, limited rights ensured that both citizens and state power would be kept in balance.⁶ In this instance, NG Ranga was congratulating the CA for avoiding a strong liberal view of rights.

In a similar vein, AK Ghosh complained that the draft constitution is shaped by the government's point of view rather than that of the citizens. In particular, he was concerned that the draft constitution relied too heavily on foreign borrowing and was inadequately liberal in its approach to constitutional rights, the structure of government and the economic

³See C.A Bayly *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (CUP 2011)

⁴CADINDIA, 7.71.11 at <https://cadindia.clpr.org.in>

⁵CADINDIA, 7.64.40

⁶CADINDIA, 3.18.50

model it embraced.⁷ For Ghosh, the constitution inadequately reflects liberal political values and needed substantive amendment. No such amendments occurred.

This review of liberalism in the CA throws up very surprising conclusions. First, as noted earlier liberalism was barely invoked in the constitution drafting process as an explanation or justification for constitutional choices made in the CA. Secondly, when members of the CA invoked liberalism in support of proposed amendments, they were invariably political outsiders in the CA and their proposals were rejected. Thirdly, where members used liberalism to describe the constitution, they invariably did so to emphasize its absence. While some members commended the move away from constitutional liberalism, others lamented the lack of liberalism in the constitution. Hence, by paying careful attention to the CA debates we begin to doubt assumptions that the Indian constitution is resolutely liberal in character. This drafting discourse suggests an alternative conclusion: that the framers of the Constitution actively avoided describing their efforts to be directed towards a liberal Constitution.

B. A Liberal Constitution in the Supreme Court

After the Constitution was adopted, its authoritative interpretation and characterization were left to the Supreme Court of India. In the Part above, we found that the framers of the constitution did not engage too deeply with liberalism as a political philosophy or with the nature of a liberal constitution. In this section, I examine whether these ideas had greater traction in constitutional argument before the Supreme Court. Do lawyers and judges use this conceptual framework to understand and interpret the constitution?

A careful review of Supreme Court decisions from 1950 suggests a modest reliance on the concepts of liberalism and a liberal constitution to interpret and apply the Constitution to hard cases. The earliest reference to ‘liberalism’ is in *Indira Gandhi v Raj Narain*⁸ where a Constitutional Bench of the Supreme Court applied the basic structure doctrine to declare the Constitution (39th Amendment) Act, 1975 to be unconstitutional. The court ruled that Parliament could not divest the judicial branch of the power of judicial review over election disputes related to the Prime Minister. Chief Justice Ray surveyed the historical lineages of the concept of separation of powers⁹ and democratic constitutionalism. He approvingly cited Bertrand Russell’s conclusion that ‘19th-century liberalism’ was designed to prevent the arbitrary exercise of power by separating out the governmental power into three branches even at the cost of efficiency. Though CJ Ray canvassed a wide range of academic materials to support his opinion, it’s fair to say that the conclusion on the constitutional principle of separation of powers partially rested on an account of ‘liberalism.’¹⁰

For the next four decades, the court did not draw on these ideas in any substantive manner. There are stray references to economic liberalism which is more properly described as the policy of economic liberalization.¹¹ However, in *Bhanumathi v State of UP*¹² Justice AK

⁷CADINDIA, 11.161.213

⁸*Indira Gandhi v Raj Narain*, 1975 Supp SCC 1.

⁹See also *State of UP v Jeet S. Bisht*, (2007) 6 SCC 586, SB Sinha J at ¶ 81

¹⁰*Ibid* ¶ 537 – 539

¹¹See *Hussainbhai Calicut v Alath Factory Thezhilali Union, Kozhikode*, (1978) 4 SCC 257, Krishna Iyer J at ¶4; *Inder Singh v State (Delhi Administration)*, 1978 (4) SCC 161, Krishna Iyer J at ¶ 11.

Ganguly upheld a State legislative amendment that permitted a motion of no-confidence in local government leadership as it was essential to maintain a republican form of government. Further, he concluded that this republicanism was consistent with democratic socialism and radical liberalism in the Constitution. Though Justice Ganguly did not develop a full account of these concepts and how they are manifested in the constitution, this is surprisingly only the second substantive reference to liberalism by the Supreme Court in 60 years.

This neglect of liberalism in the Constitution appears to have changed in the last two years. In *N Radhakrishnan v Union of India*,¹³ Chief Justice Mishra speaking for a three-judge bench denied the request for a ban on a book on the grounds that it offended religiously minded temple goers. He affirmed that the free speech guarantee in the constitution protected the 'liberalism' necessary for artistic expression. For the first time in Indian Supreme Court adjudication, he affirmed liberalism as an epistemic personal requirement for writers and artists to read any material and to express themselves in diverse ways.

In *Indian Young Lawyers Association v State of Kerala* the court had to decide whether the individual liberty of menstruating women to enter a temple would override the religious and customary practices of the priests that barred their entry. Chief Justice Mishra emphatically upholds individual liberty and writes:

Constitutional democracies do not necessarily result in constitutional liberalism. While our Constitution has adopted a democratic form of governance it has at the same time adopted values based on constitutional liberalism. Central to those values is the position of the individual. The fundamental freedoms which Part III confers are central to the constitutional purpose of overseeing a transformation of a society based on dignity, liberty and equality.¹⁴

In this opinion, CJI Mishra clarifies the place of liberalism in the constitution in two distinct ways: first, he finds that fundamental rights in Part III of the constitution express the political value of liberalism and secondly, he outlines the tension between the simultaneous pursuit of the democratic and the liberal principle in a constitutional regime. This is a significant advance in the recognition and understanding of liberalism in the constitution by the Supreme Court, albeit by only one opinion in the case.¹⁵

When Justice Chandrachud dissenting in the *Aadhaar* case,¹⁶ summons liberalism to challenge the Aadhaar scheme he surprisingly relies on a distinction between positive and negative liberty. He rightly points out that liberalism may demand both restraint and positive action from the state, and then remarkably concludes that the direct benefit transfers enabled by Aadhaar are a form of neo-liberalism. In any event, these reasons do not drive his conclusion that the Aadhaar scheme is unconstitutional and are best seen as providing additional support.

¹²Bhanumathiv v State of UP, (2010) 12 SCC 1

¹³*N Radhakrishnan v Union of India*, (2018) 9 SCC 725.

¹⁴*Indian Young Lawyers Association v State of Kerala* 2016 SCC OnLine SC 1783, Mishra CJI at ¶ 188.

¹⁵I will not address CJI Mishra's evocation of 'egalitarian liberalism' in *Navtej Johar v Union of India* (2018) 10 SCC 1, CJI Mishra ¶ 97. CJI Mishra's use of the phrase egalitarian liberalism would not adhere to any standard account of political liberalism and is best understood on its own terms.

¹⁶*KS Puttaswamy v Union of India*, (2017) 10 SCC 1, Chandrachud J invoked among others Isaiah Berlin, FA Hayek, Amartya Sen, Martha Nussbaum, Henry Shuetto discuss liberalism and positive and negative liberty.

The recent heavy lifting of liberalism in the constitutional interpretation of the Supreme Court appears to rest on the shoulders of one judge. CJI Mishra has now retired and with him, it is likely that this trend will witness a quiet demise. When other judges do engage with political liberalism they do so inadequately or in surprisingly obtuse ways. An overall assessment of the trajectories of political liberalism in the Indian Supreme Court based on the discussion above would be that it is a minor aspect of Indian constitutional law doctrine. It appears very rarely to explain or justify a particular interpretation of the separation of powers and the scope of fundamental rights. However, even in these cases, it does not offer a distinctive or indispensable reason for the conclusions reached.

C. Liberalism in Constitutional Design

So far in this essay, I've focused on the express invocation of the word or the concept of liberalism by the framers to explain or justify their constitutional choices, or by the Supreme Court's to justify its constitutional interpretation. I found that both political projects do not extensively use liberalism to make constitutional choices or to interpret the constitution. In this part, I explore if we should nevertheless describe the Indian constitution to be a liberal constitution when we locate it in the global family of national constitutions. This exploration would necessarily be comparative and typological. First, one must have an account of the features of a constitution that would make it 'liberal' and secondly, if the Indian constitution possesses these features in full or in greater proportion than many other constitutions across the world.

Professor Dieter Grimm's effort to develop a typology of constitutions is instructive and the appropriate place to begin this enquiry.¹⁷ He usefully distinguishes between a typology built on the legal features of a constitution – written/unwritten, higher or ordinary law, rigid or flexible - from one that is made by reference to political values - democratic/non-democratic, liberal/illiberal. While there are strong historical linkages between the legal features of a constitution and its political values, this is not a necessary conceptual connection. Hence, we may discover that an unwritten constitution may be properly described to be liberal or illiberal depending on the constitutional norms observed in a particular society. So, it follows that liberalism may be embedded in the legal or non-legal aspects of the constitutional arrangements in any society.

For Grimm, a liberal constitution is one that fully embraces the pluralism of individual opinions and interests. A deep liberal commitment would entail that citizens would have the right to express their political choices not just electorally but at all other times and places. Hence, though the democratic principle would legitimize and institutionalize majority rule, if any particular group were able to suppress the expression of any other opinions and interests, the liberal character of the constitution would come under threat. While a constitution may be both liberal and democratic, it cannot accommodate the maximalist expression of either principle in institutional design or practice. So as a practical matter, the hyphenated expression 'liberal-democratic' constitution must be understood as a mutual

¹⁷D Grimm, *Types of Constitutions*, in A Sajo & M Rosenfeld *Oxford Handbook of Comparative Constitutional Law* (OUP 2012)

compromise between these two political values essential for their simultaneous expression in a modern society.

Before we turn to the institutional expression of political liberalism in a constitution, it is useful to sketch the dimensions along which we may expect the political idea of liberalism to exert itself. For Mill¹⁸, liberalism was committed to protecting individual freedom from social power exercised by traditional societies – with aristocratic or monarchical regimes – and more modern democratic societies through unbridled majoritarian power. Further, he was clear that the paternalistic or feudal exertion of social power even when unrelated to political state power was a core threat to liberty that liberalism must combat. Thirdly, while he endorsed property rights and market arrangements, he was no enthusiast for laissez-faire liberalism with unregulated markets. Above all, he stressed the need for the state to regulate private markets or to directly provide ‘liberal essentials’ like education, work and other public goods essential for an individual to exercise autonomy and self-government. Hence, liberalism is best understood as a political principle that operates in all three spheres where collective authority impinges individual freedom – namely, the social, political and economic spheres.

So now we may ask whether the Indian constitution is ‘liberal’ along the dimensions identified above. While a full answer to this query requires a comprehensive review of the entire constitutional text and its practice, in this essay I will confine myself to evaluating a few key features of the Indian constitution – namely, judicial review and fundamental rights. Both these institutional features are identified in the cases discussed in Part B of this paper and tightly linked to securing what Grimm describes as a liberal commitment to pluralism. In this part, to show that the Indian constitution is liberal we will need to show that these key features are necessary for a liberal society both conceptually and in political and social practice.

I. Judicial Review

The Indian constitution embraces a fully developed version of judicial review. The Supreme Court and High Court are expressly given the power to strike down legislation and executive action that infringes fundamental rights, oversteps subject matter and territorial jurisdiction or otherwise abridges the constitution. The Supreme Court has expanded this power of judicial review to include control over the power to amend the constitution through the doctrine of basic structure and more recently proposed to use a new doctrine of constitutional morality as an implicit limit on political power.

As this brief description of the institutional feature of judicial review suggests, it is primarily concerned with limiting the scope of the political power of the state to constrain individual freedom. While it is occasionally exercised ‘horizontally’ to restrict the civic power of private actors, it is at its core concerned with the vertical political relationship between the state and citizens. When rights are interpreted to generate positive duties on the state or private actors to ensure the achievement of ‘liberal essentials,’ judicial review may be reconfigured to operate as an institution that enhances the autonomy of individuals to fully participate in political and social life.

¹⁸ See John Stuart Mill *On Liberty* (CUP 2011).

Judicial review is commonly understood to be an essential feature of a liberal constitution. As liberalism is committed to the protection of liberal rights, it is assumed that it must also be committed to the protection of liberal rights through the robust institutional arrangements of independent judicial review. This view is often associated with the constitutional debates that led to the founding of the Constitution of the United States, 1789. However, in the much-cited Federalist Papers No. 78 Alexander Hamilton reveals that the core motivation for the institution of judicial review was to check the abuse of power by Congress. He emphasized the need to check majoritarian excess rather than any special ability of the judiciary to protect fundamental rights.

Hence, it is more accurate to view judicial review as an institutional mechanism that constrains the full expression of the majoritarian democratic principle rather than to see it as being essential to the protection of liberal freedoms. This is made clearer when we assess whether constitutions without judicial review may be liberal. In the English parliamentary model constitution, the absence of judicial review did not result in the erosion of liberal freedoms. While England has moved away from this model, and its adoption elsewhere in the world is clearly declining, these shifts are not indicative of a shift from an illiberal to a liberal constitutional arrangement. The adoption of judicial review appears to be critical to demarcate the extent to which the democratic principle may be expressed in a constitutional society. This check on majoritarian democratic expression is compatible with limited protection of liberal freedom.

So far in this section, I've shown that while the Indian constitution adopts a robust version of judicial review, judicial review is not necessarily designed to protect liberal freedom but instead to limit the excesses of majoritarian democratic power. However, I have not addressed whether the practice of judicial review in India has effectively enhanced liberal freedom. The best summary one may offer is that at various points in India's constitutional history, the courts have been erratic in their protection of liberal freedom. A cumulative assessment of this institutional feature would require a complicated and lengthy enquiry – one that is beyond the scope of this essay.

II. Fundamental Rights and Directive Principles

The Indian constitution guarantees a wide array of fundamental rights in Part III as well as a bundle of Directive Principles in Part IV of the Constitution. The Indian constitution guarantees a wide array of rights: conventional individual rights to life and liberty, equality and non-discrimination, speech and expression, conscience and profession; unconventional group rights to affirmative action and for the protection of minority religious groups; and a directly applicable right prohibiting caste-based untouchability. These rights impose obligations on the state and under certain circumstances on other citizens. The constitutional guarantee of rights is often seen as the ultimate expression of political liberalism in the constitution, though group rights are often described as an illiberal aspect of the Indian constitution.

While rights guarantees have become commonplace in post-World War II constitutions, the Indian constitution goes further to outline a set of directive principles to guide legislation and executive policy-making and implementation. These principles are wide-ranging and include

directions to prevent the accumulation of economic power and wealth, regulate the labour markets and to ensure education, nutrition and public health. The courts have been ambiguous about the legal status of these principles, but in recent years they have gained greater political and legal salience. These principles are often presented as a socialist manifesto and hence unrelated to political liberalism. However, they may be well described as a part of the 'liberal essentials' bundle that extends political liberalism beyond the political to the social and economic spheres. By requiring the state to ensure that the conditions necessary for individuals to exercise their autonomy and self-determination are satisfied either directly by the state or through the regulation of the market and social spheres, directive principles may be seen to be part of the liberal character of the Indian constitution.

The place of rights in a constitutional order is best understood from a historical perspective. Where a legal order already protects liberal freedoms through ordinary law and political practice, a constitutional guarantee of rights is unnecessary to ensure a liberal society. Hence, English constitutional law did not adopt a bill of rights till 1998 and yet was arguably a liberal society since the 19th century. However, in India, the pre-Independence colonial regime disavowed rights guarantees and preserved an illiberal political regime through the brazen exercise of the police power. Hence, the adoption of the constitutional guarantees of fundamental rights in India coincided with the introduction of liberal legal and political order. So, while constitutional fundamental rights are not conceptually necessary for a liberal society, in India these rights inaugurated the birth of a liberal society.

Rights are a power-shifting device in two senses: they shift power away from the legislature and the executive towards the courts and secondly, they shift power away over some choices from the state to the citizen. In this sense, constitutional fundamental rights perform two functions – as a check on democratic majoritarianism and to enhance liberal autonomy. However, the directive principles in the constitution, unlike fundamental rights, are not directly enforceable by the courts. Hence, directive principles don't shift power away from the democratic branches to the courts. Their work in the constitution is to enhance the ability of citizens to exercise their autonomy in the social, political and economic spheres.

In this section, I've briefly reviewed whether the presence of fundamental rights and directive principles make the Indian constitution a liberal one. We find that fundamental rights serve a dual function: to enhance liberal autonomy and to simultaneously constrain democratic majoritarianism. Directive principles, on the other hand, I argue prioritize the 'liberal essentials' by targeting democratic power to their achievement. This is a novel and uncommon constitutional legal instrument that has been poorly understood in Indian constitutional practice.

In the section above, while discussing judicial review, I observed that a full review of the practice of a constitutional feature was not possible within the confines of this essay. This is truer of the twin features of fundamental rights and directive principles. While the Indian Supreme Court has been awash with fundamental rights litigation, it has disavowed engagement with directive principles altogether. On balance, the court has protected fundamental rights against majoritarian democratic power at critical junctures of Indian constitutional history. However, it has not done so with a keen appreciation of the nature of liberal autonomy.

Despite the tepid evocation of liberalism in the Indian courts, rights talk has permeated deep into Indian social life. It is the lingua franca of all types of protesting groups and social movements. This social and political rhetoric has more often focused on translating the 'liberal essentials' in the directive principles into rights claims through legislation. This emphasis on juridification and legal enforcement of the directive principles has ironically enhanced its anti-democratic character. The popular and judicial confusion about the directive principles has arisen primarily from the failure to recognize its critical liberal function.

In this part of the essay, I've asked whether the features of the Indian constitution are exclusively motivated by, or best understood to be an application of the political ideas of liberalism. I've analyzed three key features of judicial review, fundamental rights and directive principles. We found that except for directive principles, the other two features in the constitution responded more to concerns of the separation of power between the democratic and non-democratic branches rather than affirming individual autonomy.

This is not an exhaustive analysis of all the features of the constitution that could potentially be understood to be a part of a liberal constitution: the horizontal separation of powers between the branches of government and the vertical division of powers between territorial units are appropriate candidates for analysis. However, even a cursory review of the literature and cases on these features of a constitution, reveal that they're motivated by several concerns that go beyond political liberalism. The discussion so far confirms that while the Indian constitution shows liberal features, there is no part of the constitution that can be described as a necessary feature of a liberal constitution. I will conclude this essay by saying more about why this is so.

D. Conclusion

I began this essay with the common assumption that the Indian constitution is liberal in character. I then explored whether this assumption has a sound basis. Part A showed that the constitutional framers did not set out to create a self-consciously liberal constitution. Next, I demonstrated that the Indian Supreme Court has not mobilized political liberalism to explain or justify their interpretation of the constitution in any significant manner either. Finally, in Part C I showed that key features of the Indian constitution like judicial review and fundamental rights are not conceptually necessary for a liberal society and are primarily motivated by the need to preserve the political value of constitutionalism by constraining democratic majoritarianism. Notably, directive principles are more keenly focused on securing 'liberal essentials' necessary to enhance self-determination and autonomy by empowering the democratic branches to undo social and economic barriers to liberty.

By reassessing the liberal character of the Indian constitution in these three ways I raise several reasons to doubt a full-throated proclamation of the Indian constitution as a liberal constitution. However, are these conclusions about institutionally structured Indian constitutional discourse and design a result of oversight or indicative of a need to rethink the relationship between political liberalism and the constitution? It may be that political liberalism in Indian society is not directly encoded in the Indian constitution but nested in the relationship between state and society that has emerged through the governance and regulatory practices of the post-Independence Indian state. So, while constitutional

mechanisms may prevent backsliding in a liberal society under some circumstances, India may become an illiberal society without a change in the constitutional text or its constitutional interpretation. So those concerned with the preservation of political liberalism in India would do well not to rely on its constitutional entrenchment but rather invest in embedding liberalism in our collective social and political institutions and practices.