
UNIT 5 PHILOSOPHY OF THE CONSTITUTION OF INDIA

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5.0 OBJECTIVES

The significance of the philosophy of the Constitution of India for us today is much more than in the early decades of independence when there was a widely shared agreement on the essentials of public life and the laws and institutions required to sustain them. In the wake of the conflicts regarding the essentials of public life, many take recourse to the Constitution, which underscores the philosophical principle of “unity – in – diversity,” as a guide to conflict resolution. In this Unit you are expected to:

- Analyse the preamble of the Constitution;
- Reflect on the salient features of the Constitution; and
- Understand its fundamental orientation rooted in philosophical principles.

5.1 INTRODUCTION

Every Constitution has a philosophy of its own. For the philosophy underlying *our* Constitution we must reflect on the following Preamble to the Constitution:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity *and integrity* of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

For a proper understanding and appreciation of the philosophy embodied in the Constitution, we must turn to the various expressions contained in this Preamble:

WE, THE PEOPLE OF INDIA means the ultimate sovereignty and authority of the people of India. The Preamble declares in unequivocal terms that the source of all authority under the Constitution is the people of India and that there is no subordination to any external authority. It is SOVEREIGN as it has the independent power to legislate on any subject without being controlled by any other State or external power. As a REPUBLIC, it has a government by the people and for the people headed by an elected President. Hence it is a DEMOCRATIC republic. It is democratic not only from the political but also from the social standpoint. In other words, it envisages not only a democratic form of government but also a democratic society which is SOCIALISTIC and SECULAR. The Constitution envisages a socialistic pattern of society where the principal means of production are under social ownership or control and there is equitable distribution of wealth. However, it is not that type of State socialism which involves 'nationalisation' of *all* means of production, and abolition of private property. Instead of a total nationalisation of all property, it envisages a 'mixed economy,' but aims at offering 'equal opportunity' to all, and the abolition of 'vested interests.' The socialistic society should also be secular. The secular objective of the State has been specifically expressed by inserting the word 'secular' in the Preamble by 42nd Amendment of the Constitution in 1976. It means that the State protects all religions equally and does not itself uphold any religion as the State religion. In this way, the State promotes JUSTICE.

which is the absence of any arbitrary distinction of human and human in social, economic and political sphere. Justice guarantees LIBERTY of thought, expression, belief, faith and worship. Liberty nourishes EQUALITY of status and of opportunity. Equality furthers FRATENITY among all sections of people composed of so many races, religions, languages and cultures. A fraternity cannot be maintained unless the dignity of each of its citizens is upheld. The Constitution seeks to achieve this objective by guaranteeing equal fundamental rights to each individual. The philosophy contained in the Preamble has been further highlighted by emphasising that each individual shall not only have the fundamental rights, but also a corresponding fundamental duty, such as to uphold the sovereignty, unity and integrity of the nation by maintaining secularism and fellowship among all the people of India.

The fittest tribute to the Indian Constitution – adopted by the Constituent Assembly on November 26, 1949 and coming into force on January 26, 1950 – is its enduring and encompassing nature in vivid contrast to several other Constitutions of the world. The Constitution has always preserved, articulated and inculcated a sense of national identity shared by a billion people despite their ethnic, linguistic, religious, regional, social, political, economic, philosophical, ideological, and other cultural diversities and disparities. Thanks to the remarkable philosophical vision of *unity-in-diversity*, or *one-in-many*, of its founding fathers who – in conformity with the rich cultural traditions of our motherland – wanted this document to be large hearted enough to accommodate within its ambit the entire spectrum of pluralities without compromising its inherent universality and underlying unity, and thus defining nationhood as a celebration of unimpeachable plurality in unison with its citizens. The steady stream of inspiration flowed from this philosophical vision implicit in the Constitution ensured the integration of our society by warding off formidable challenge to its authority while retaining its own legitimacy and credibility very much manifest in its adoption of parliamentary form of democracy, in the incorporation of the fundamental human rights,

in the envisioning of a federal structure of governance with power to be shared between the Union and the States, in the categorical assertion that the State would be resolutely secular and equidistant from the religious affiliations of its citizens, in the insistence on the necessity of safeguarding minority rights, and in the ensuring of Reservation for the Scheduled Castes and the Scheduled Tribes. This philosophical vision of the founding fathers of the Constitution is very much visible in their explicit inclusion of the Fundamental Rights into it.

5.2 FUNDAMENTAL RIGHTS

We shall dwell briefly with various types of fundamental rights assured in the Indian Constitution:

Right to Equality (Art. 14-18): This right states the equality of all citizens before law. The principle of equality does not mean that every law must have universal application for all who are not by nature, attainment or circumstances, in the same position, as the varying needs of different classes of persons often require separate treatment. Also this principle does not take away from the State the power of classifying persons for legitimate purposes. But such classification should be reasonable and must be based upon some real and substantial distinction bearing a real and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis. For a permissible classification two conditions must be fulfilled: (1) that the classification must be founded on an intelligible *differentia* which distinguishes persons or things that are grouped together from others left out of the group, and (2) that, that *differentia* must have a rational relation to the object sought to be achieved by the statute in question. What is necessary is that there must a *nexus* between the basis of classification and the object of the Act under consideration. To the question what are the conditions for a reasonable classification, it is not easy to give all the circumstances under which a classification may be considered reasonable. The basis of classification may be geographical, historical, difference in time, or based on the difference in the nature of persons, trade, calling or occupation, etc. The guarantee of equality extends to rights as well as privileges.

While the State has reasonable right for classification of person, Art. 15 of the Constitution forbids such any discrimination on certain grounds like religion, race, caste, sex, place of birth, etc. Access to public places also is not to be denied. But the article expressly states that the State is authorised to make reservations for backward classes and castes, for women and children, or the socially underprivileged. Also equality of opportunity should be provided (Art. 16) for all citizens, regardless of caste, religion, race, sex, descent, place of birth, etc., for employment or appointment to any office under the State. Here too reservation is permissible. Abolition of *untouchability* is made an important issue here (Art. 17); it is a crime punishable under the law. Abolition of titles is also mentioned under this right.

Right to Freedom (Art. 19). Under this right comes various expressions of the aspect of freedom. All citizens have the right to (a) freedom of speech and expression, (b) to assemble peaceably and without arms, (c) to form associations or unions, (d) to move freely throughout the territory of India, (e) to reside and settle in any part of the territory of India, and (f) to practice any profession, or to carry on any occupation, trade or business.

Right Against Conviction (Art. 20): The Constitution says: “No person shall be convicted of any offence except for violation of a law at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than which might have been inflicted under the law in force at the time of the commission of the offence. No person shall be prosecuted and punished for the same offence more than once. No person accused of any offence shall be compelled to be a witness against himself.” The article guarantees that a person must not be convicted of any offence except for the violation of a law in force at the time of the commission of the act. This means the criminal law has no retrospective effect. In awarding penalty the law in force at the time of commission has to be taken into account; and a person should not be prosecuted and punished for the same offence for than once, this is immunity from double punishment. This article also grants the privilege of self-incrimination.

Right to Protection of Life and Personal Liberty (Art. 21): “No person shall be deprived of his life or personal liberty except according to procedure established by law.” The objective of this article is to prevent encroachment upon personal liberty by the Executive save in accordance with law, and in conformity with the provisions thereof. It is for this reason that the confinement of an under-trial prisoner or the arrest and detention of a person by the police under the Code of Criminal Procedure is considered legal. The reason for which a person is deprived of one’s life or personal liberty should be fair and just, and not arbitrary. It is for the Court to decide by the exercise of its power of judicial review, whether the deprivation of life or personal liberty in a given case is by procedure which is reasonable, fair and just or otherwise. When the law has been often misused by the Executive especially in the case of the poor and other deprived persons the Court has often entered in to set matters right. But at the same time many who could not have access to the court have suffered due to the ‘unreasonable’ use of the law. This article can be suspended during Emergency prevailing in the country. Prior to 1976, the Supreme Court had held that notwithstanding the suspension of Art. 21, it was still open to a person imprisoned or detained to challenge such order on any ground outside Art. 21, e.g., that the order was *ultravires* or *mala fide* or based on extraneous considerations.

Protection Against Arrest and Detention in Certain Cases (Art. 22): When a person is arrested, under the ordinary law of the land he must be informed soon after the arrest of the grounds of his/her arrest, and an arrested person must be given the opportunity to consult a lawyer of his choice and to be defended by him. An arrested person must be produced before a Magistrate within 24 hours of his arrest (excluding the time required for bringing him/her to the Magistrate). No person can be detained in custody beyond 24 hours without the authority of the Magistrate. Art. 22 does not form a complete code of constitutional safeguards relating to preventive detention. Since it deprives the person of his liberty, restrictions placed on a person preventively detained must be minimal in so far as that is consistent with the effectiveness of detention. The right to be informed of the grounds of arrest is a safeguard so that on learning the reasons the person arrested will be in a position to make an application to the appropriate Court for bail, or move the High Court for habeas corpus. The intimation will also enable the arrested person to prepare his/her defence in time for the purposes of trial. The arrested person has also the right to consult a legal adviser of his/her choice, ever since the moment of his/her arrest and also to have effective interview with the lawyer out of the hearing of the police, though it may be in their presence. The right extend to any person who is arrested, whether under the general law or under a special statute. The government is also bound to give free legal aid to an indigent person, provided it can be proved that he is a *pauper* and the State needs to come to

his/her assistance. The object of the framers of the Constitution in giving a constitutional status to preventive detention was that though they recognized the necessity of law for preventive detention, they wanted to provide certain safeguards to prevent an abuse of power.

Right Against Exploitation (Art. 23-24): This right forbids trafficking in human beings and *begar* and other similar forms of forced labour. When a person is employed against his/her will, even if it is for remuneration or other consideration, it is forced labour. It is immaterial whether there is a contract or whether the compulsion is due to economic reasons or legal provisions. This right also forbids employing of children below the age of fourteen.

Freedom of Religion (Art. 25-28): Subject to the restrictions the Constitution imposes every person has a fundamental right not merely to entertain such religious belief as may be approved of by his/her judgment of conscience but to exhibit his/her belief and ideas in such overt acts as are enjoined or sanctioned by his/her religion and further to propagate his/her religious views for the edification of others. Such a freedom is subject to public order, morality or health. Propagation of faith does not mean 'conversion' for the other person is also entitled to 'freedom of conscience'; but of course the other person has the freedom to adopt another religion through the free exercise of his/her conscience. Since India is a secular State equal rights are given to all citizens in respect of freedom of conscience and religion. The religions have the right to own and administer institutions, own and acquire movable and immovable properties, and to administer the property in accordance with the law. This right also excludes the power for the State to levy any religious tax from any citizen, and to promote any particular religion in government owned institutions. Religious instruction is forbidden in educational institutions wholly maintained by the State funds.

Cultural and Educational Rights (Art. 29 – 30): These rights as envisioned in the Constitution seems mainly applicable to minorities – linguistic, religious, etc. The linguistic minority has the right to retain its language and teach it through their educational institutions. The right to conserve the language includes the right to agitate for the protection of that language, including political agitation. All linguistic and religious minorities have also the right to establish and administer educational institutions of their choice. The right is to establish institutions which will effectively serve the needs of the community and the scholars who resort to such institutions. Hence establishment of institutions of high grade is also included in this right. The right would be nugatory if the scholars of such institutions are debarred from such opportunities for higher education or for a useful career in life. But this right is not an absolute right in the sense that the State shall have no right to regulate the administration of the institutions established by the minority communities. If they are mismanaged, or the purpose for which they have been established is not served the State has the right to intervene. In granting aid the State is not supposed to discriminate any educational institution on the ground that it is under the management of a minority, whether based on religion or language. As the notion of minority has not been defined by the Constitution, the general understanding is that the members of the community should be less than 50%. Whether a community is a 'minority' is to be determined with reference to the particular legislation which is impugned.

Earlier right to property was considered as a fundamental right, but with the 44th amendment of the Constitution it has been reduced to a legal right the violation of which can be questioned in the court. The main argument in favour of abolition of private property was that it stood in the way of progressive or socialistic legislation.

Check Your Progress I

- Note:** a) Use the space provided for your answer.
b) Check your answer with those provided at the end of the unit.

1) Explain briefly the right to equality.

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2) What do you understand by freedom of religion?

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5.3 FUNDAMENTAL ORIENTATION OF THE FUNDAMENTAL RIGHTS

Freedom

The Preamble of the Constitution sets the tone of the Constitution. It shows the general purpose behind the several provisions of the Constitution, and thus it is not to be regarded as a source of any substantive power, prohibition or limitation. As the Preamble sets forth the goal of Indian political society, it can be invoked to determine the ambit of the Fundamental Rights and the Directives, since the ideals of *democracy*, *socialism* and *secularism* are highlighted in it.

The freedom envisaged in the Constitution is given a general setting in the Preamble: a setting that *emphasizes* the equality of the citizens, *guarantees* justice to them, and *promotes* the dignity of the individuals and the integrity of the Nation. Hence the freedom set in this setting not only cannot jeopardize any of these fundamental values, but it has to contribute towards a realization of them. It is not just one of the values set forth in the Constitution; freedom rather is the queen of all values, as it serves as the steps and means to attain them.

The section on the ‘*Right to Freedom*’ (Art., 19) speaks of six areas of public life, with regard to which freedom is specifically guaranteed by the Constitution. While guaranteeing the right to freedom to the individuals, the state reserves its right to place ‘reasonable restrictions’ on the individuals’ freedom. The ‘right to freedom’ (Art., 19) is intended to protect the freedom of the individuals against *State Action* other than in the legitimate exercise of its power to regulate private rights in the public interest. The Constitution, by giving a list of individual liberties and the possible legal restraints or

‘reasonable restrictions’ on them, tries to strike a balance between individual liberty and social control.

The freedom that is promised in the Constitution is to be taken as the *freedom of the citizens of India*. But it is ordinarily taken, and justifiably so, as a freedom of choice: as an Indian I am not curtailed, but free to decide for myself. But when we look at it from a philosophical point of view, we can see freedom in its ontological sense. Freedom is always linked to Being; when one is able to choose to be oneself, to be one’s Being, one is said to be ontologically free. It is a freedom for one’s Being. What one *is* or one’s Being is not anything that is statically given; but rather one *can* be, what one *is* (Being). If one *can* be what one *is*, then one *ought* to be so. Thus we find the trilogy, *is-can-ought*, as closely linked. This needs to be further clarified in relation to the freedom promised in the Indian Constitution.

Being, in the contemporary philosophical understanding, is not a static notion or a dead label, but is to be taken in the dynamic sense. Thus *my being Indian* speaks at the same time of the twofold dimension of the *already* and the *not yet*. I am *already* an Indian, but at the same time *not yet*. This dialectics challenges me to move from the *already* to the *not yet*. What I am already is not merely to be preserved or maintained, but is to be developed by the constant process of becoming more and better of myself. Thus my being Indian calls me to try to be more of an Indian. This is what is implied in what is said above, ‘what one *is*, one *can* be’. Every Indian, by his/her freedom, has the ability to improve upon his/her being an Indian. Thus freedom implies ‘self-creativity’: my *freedom as Indian* implies that I keep on creating my *Being as Indian*.

Freedom implies not only one’s *self-creativity* but also one’s *ought-character* or *ethicality*. If I am given, by my freedom, the capacity to create myself or my Being, then I *ought* to strive towards it. It is an ethical demand that is ingrained in my Being. As an Indian I am ethically challenged to keep on growing in my being an Indian. Only in the light of the ethical or ought-character of freedom can we understand what is traditionally referred to as *freedom for* and *freedom from*. Indians as ‘ought to be’ are free *for* being Indians, and free *from* not being Indians. Thus as far as the freedom of the Indians is concerned, the greatest ethical ought or value is ‘to be Indian’ and the greatest ethical evil is ‘not to be Indian’. The section on ‘fundamental duties’ given in the Constitution reminds every Indian citizen of his/her ethical responsibility *to be Indian*.

The Freedom of the Indians, promised in the Constitution and enabled by the timely State legislation, has to be appropriated by every citizen of India. To use the language of Gabriel Marcel, freedom is to be taken as a *grace*, as an invocation to be free. Thus I become free by my creative response to the appeal of my Being—my being Indian. Standing rooted in the cultural-historical heritage of my Being, I respond to its appeal and invocation. If *Dharma*, *Satya*, *Ahimsa*, justice, peace and integrity are the constitutive values of my Being Indian, my freedom demands that these be appropriated, and thus I grow in my ontological freedom. But in order to grow in and to move towards freedom, I need to have freedom as the ‘springboard’ of movement. Freedom is thus the *whence* and the *whither*, the *basis* that enables me to grow, and the *goal* towards which I grow. If all the Indians were to be convinced of their freedom, not as a privilege, but as a collective responsibility to the freedom of everyone and to the common good, there would have been an *India*, different from what it is today.

Equal and Fraternal Social Order

Inspite of Ivor Jennings contemporaneous critique of the Constitution as ridden with contradictions and as the paradise of lawyers, Indian Constitution came to terms with the profound complexity of India and with the normative questions of how to enable people caught in this complexity to strive after a good life. For the purpose it did not merely foreground certain ideals but a definitive order of rights and enabling provisions, and thus envisioning an equal and fraternal social order. It made place not merely for individual rights but group claims as well. It did not hold aloft a single conception of any good life in a decisive sense and generally took it for a fact that there are pluralities of such conceptions which not merely be permitted sufferance but enabled to be pursued as well. At the same time, the Constitution admitted certain reasonable limits for the pursuit of these conceptions and persuaded them to keep a broad conception of public good in view. But across the board it built up preferential provisions for disadvantaged groups. It underscored many expressions of disadvantage and held up enabling provisions to offset specific forms of disadvantage. It tried to avoid the pitfalls of both liberalism and Marxism and their corresponding economic expression either in terms of a market based or centralized economy. It embodied a democratic conception of governance which was not merely representative but which was demonstrably accountable at all levels from the locality to the nation as a whole.

Secularism as Guarantor of Freedom and Social order

Secularism in India does not mean animosity towards religion. It implies equal respect for all religion. It has nothing against private religious feeling or the individual pursuit of religion but it definitely demands the exclusion of religion from public life or from affairs of the state. It is a technique of building a national political community in a situation of religious pluralism. Pluralism and secularism are twins. As against monistic conception of society, pluralism denotes that in a social structure there are distinct cultural units revealing themselves as a multi-layered society, having plurality of religions, castes, sects, cults etc. While secularism seeks out the fundamental unity in the core ideas of different religions and is, therefore, a cohesive force, communalism lays maximum emphasis on the exclusive features and is, thus, a divisive force. It is secularism, not communalism, which is thus the true guarantor of freedom and social order.

5.4 LET US SUM UP

The Constitution has always maintained a sense of national identity shared by a billion people, despite all their diversities and disparities, thanks to the remarkable philosophical vision of *unity-in-diversity*, or *one-in-many*, of its founding fathers. The significance of this philosophical vision for us today is much more than in the early decades of independence when there was a widely shared agreement on the essentials of public life and the laws and institutions required to sustain them. This, for example, is evident with regard to the freedom promised in the Constitution. That promised freedom is the *basis* that enables one to grow, and the *goal* towards which one grows. That promised freedom, nevertheless, obliges one to be convinced of it as a collective responsibility to the freedom of everyone and to the common good of all through a strict adherence to human and fundamental rights. What is being questioned in many circles today is the entire process of nation-building and economic development without respecting these rights, which has already marginalized the dalits, tribals, the religious and linguistic minorities and the regional identities on the periphery. The need of the

hour is a sustained combat against prejudices of these particular identities through a process of dialogue aimed at the establishment of a more egalitarian society.

Swami Vivekananda and
Aurobindo

Check Your Progress II

Note: a) Use the space provided for your answer.
b) Check your answer with those provided at the end of the unit.

1) How does the Constitution envision an equal and fraternal social order?

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2) How do you understand secularism in the Constitution?

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5.5 KEY WORDS

- Rights

: Rights are legal, social, or moral freedoms to act or refrain from acting, or entitlements to be acted upon or not acted upon. While the concept is fundamental to civilized societies, there is considerable disagreement about what is meant precisely by the term *rights*.
- Ultra vires

: Ultra vires *is a Latin phrase that literally means “beyond the powers.” Its inverse is called intra vires, meaning “within the powers.”*
- Mala fides

: Mala fides or Bad faith (Latin: *mala fides*) is a legal concept in which a malicious motive on the part of a party in a lawsuit undermines their case. It has an effect on the ability to maintain causes of action and obtain legal remedies.

5.6 FURTHER READINGS AND REFERENCES

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5.7 ANSWERS TO CHECK YOUR PROGRESS

Answers to Check Your Progress I

- 1) **Right to Equality** (Art. 14-18): This right states the equality of all citizens before law. The principle of equality does not mean that every law must have universal application for all who are not by nature, attainment or circumstances, in the same position, as the varying needs of different classes of persons often require separate treatment. Also this principle does not take away from the State the power of classifying persons for legitimate purposes.
- 2) **Freedom of Religion** (Art. 25-28): Subject to the restrictions the Constitution imposes every person has a fundamental right not merely to entertain such religious belief as may be approved of by his/her judgment of conscience but to exhibit his/her belief and ideas in such overt acts as are enjoined or sanctioned by his/her religion and further to propagate his/her religious views for the edification of others. Such a freedom is subject to public order, morality or health. Propagation of faith does not mean ‘conversion’ for the other person is also entitled to ‘freedom of conscience’; but of course the other person has the freedom to adopt another religion through the free exercise of his/her conscience.

Answers to Check Your Progress II

- 1) Indian Constitution came to terms with the profound complexity of India and with the normative questions of how to enable people caught in this complexity to strive after a good life. For the purpose it did not merely foreground certain

ideals but a definitive order of rights and enabling provisions, and thus envisioning an equal and fraternal social order. It made place not merely for individual rights but group claims as well. It did not hold aloft a single conception of any good life in a decisive sense and generally took it for a fact that there are pluralities of such conceptions which not merely be permitted but enabled to be pursued as well. Across the board, it built up preferential provisions for disadvantaged groups. It underscored many expressions of disadvantage and held up enabling provisions to offset specific forms of disadvantage. It tried to avoid the pitfalls of both liberalism and Marxism and their corresponding economic expression either in terms of a market based or centralized economy. It embodied a democratic conception of governance which was not merely representative but demonstrably accountable at all levels from the locality to the nation as a whole.

- 2) Secularism in India does not mean animosity towards religion. It implies equal respect for all religion. It has nothing against private religious feeling or the individual pursuit of religion but it definitely demands the exclusion of religion from public life or from affairs of the state. It is a technique of building a national political community in a situation of religious pluralism. Pluralism and secularism are twins. As against monistic conception of society, pluralism denotes that in a social structure there are distinct cultural units revealing themselves as a multi-layered society, having plurality of religions, castes, sects, cults etc. While secularism seeks out the fundamental unity in the core ideas of different religions and is, therefore, a cohesive force, communalism lays maximum emphasis on the exclusive features and is, thus, a divisive force. It is secularism, not communalism, which is thus the true guarantor of freedom and social order.