



CONSTITUTIONAL ETHOS IV: LIBERTY AND FREEDOM



DELHI



JAIPUR



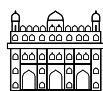
HYDERABAD



PUNE



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LUCKNOW



CHANDIGARH



GUWAHATI



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BHOPAL

INTRODUCTION

The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of law, where there is no law, there is no freedom.

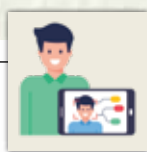
John Locke (The Second Treatise of Civil Government)

According to Locke, all men are naturally in a **state of perfect freedom** within the bounds of the **law of nature**. They don't depend upon the will of any other man. But the enjoyment of such **freedom or equality of men** by nature is **very uncertain** and **constantly exposed** to the **invasion of others**. So, to overcome the **fears** and **continual dangers** to freedom, he **seeks out or joins society** with others to put themselves under government for the **preservation of their lives, liberties, and estates**.

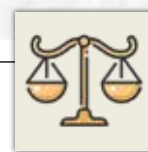


Such a government enjoys **Political power** – an **integrated concept** which includes **power or authority** (to influence others' behaviour) and **civil and political rights** (which influence the functions and policies of the authority). It is the **primary factor** behind the **development of a sovereign state**, i.e., a set of institutions with jurisdiction over a territory.

The **Constitution of India** is the foundational document on the state of India. It provides guidance on the **frameworks, institutions** and principal functions of the **sovereign state**. Being a **democratic country**, the Constitution of India has:



Recognized several civil and **political rights** which are essential for the citizens; and













Balances the state authority or **power** with these rights to ensure that the citizens enjoy **Civil liberties** and **Freedom**.

In this article, we will start with a brief on the **principle of Civil liberties** and **Freedom**, followed by the Civil liberties and Freedom guaranteed by the Constitution of India to its citizens – with special emphasis on the **Protection of life and personal liberty**. Next, we will identify the objectives and significance of civil liberties and freedom. After that, we analyze the actual situation in India to identify the issues citizens face in exercising these liberties. Based on those issues, we will focus on a possible way forward which preserves the reciprocal relationship between the state and its citizens.

PRINCIPLE OF CIVIL LIBERTIES AND FREEDOM

Liberty is defined as 'the state of being free within society from oppressive restrictions imposed by authority on one's way of life, behaviour, or political views'. The liberties which are guaranteed by the Constitution are known as the **Civil liberties** of citizens.

Civil liberties act as a **restraint on government treatment of the citizens**. E.g. **Article 19** guarantees **freedom of speech and expression**. So, the government **can't make laws** which infringe on **freedom** of speech and expression. (Although, there are positive and negative conceptions of liberty).

Negative liberty	Positive liberty
 <p>It defines and defends the area of an individual's life where no external authority can interfere.</p>	<p>It defines the area of society where an individual can be free with some constraints made by the society and the government.</p> 
 <p>It is not concerned with the conditions of the society.</p>	<p>It is concerned with the enabling conditions of the society.</p> 
 <p>It is concerned with explaining the idea of 'freedom from'.</p>	<p>It is concerned with explaining the idea of 'freedom to'.</p> 
 <p>This area comes into personal domain of the individual.</p>	<p>This area comes into social domain of the individual.</p> 
 <p>More negative liberty leads to more freedom.</p>	<p>More positive liberty checks excess of freedom to an individual, which could be an obstruction for social stability.</p> 

Freedom is defined as 'the situation in which a person has the power or right to speak, act, and think as one wants'. Highlighting the absence of constraints, freedom often goes **hand in hand** with civil liberties as both are primarily associated with the absence of restrictions/obligations from authorities.

But the **perception of freedom and liberty is highly personal** as it is based on multiple factors such as nurture, education, culture, religion etc.



CIVIL LIBERTIES IN INDIA AND THEIR OBJECTIVES

Based on India's rich **socio-cultural diversity** and aspirations of **freedom struggle**, it guarantees six **types of civil liberties** (fundamental rights) to every Indian for a **meaningful life**. The six types are:

CIVIL LIBERTIES (FUNDAMENTAL RIGHTS)



RIGHT TO EQUALITY

- > **Article 14:** Right to equality (equality before law)
- > **Article 15:** Prohibition of discrimination on grounds of religion, race, caste, Sex or place of birth
- > **Article 16:** Equality of opportunity in matters of public employment
- > **Article 17:** Abolition of untouchability
- > **Article 18:** Abolition of titles



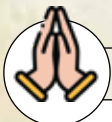
RIGHT TO FREEDOM

- > **Article 19:** Protection of certain rights regarding freedom of speech, etc.
- > **Article 20:** Protection in respect of conviction for offences
- > **Article 21:** Protection of life and personal liberty (Article 21A: Right to Education)
- > **Article 22:** Protection against arrest and detention in certain cases



RIGHT AGAINST EXPLOITATION

- > **Article 23:** Prohibition of traffic in human beings and forced labour
- > **Article 24:** Prohibition of employment of children in factories, etc.



RIGHT TO FREEDOM OF RELIGION

- > **Article 25:** Freedom of conscience and free profession, practice and Propagation of religion
- > **Article 26:** Freedom to manage religious affairs
- > **Article 27:** Freedom as to payment of taxes for promotion of any particular religion
- > **Article 28:** Freedom as to attendance at religious instruction or religious worship in certain educational Institutions



CULTURAL AND EDUCATIONAL RIGHTS

- > **Article 29:** Protection of interests of minorities
- > **Article 30:** Right of minorities to establish and administer educational institutions



RIGHT TO CONSTITUTIONAL REMEDIES

- > **Article 32:** Remedies for enforcement of rights conferred by part III of the Indian Constitution

Objectives of Civil Liberties



Secure equal rights to all (creating a sense of equality).



Establish political democracy.



Upheld supremacy of law.



Protect minorities and weaker sections of society.



Create a sense of responsibility in public authorities by removing absolute state control.

Other Constitutional Rights



Article 265: Right to not to be taxed without the authority of law.



Article 300A: Right to property.



Article 301: Freedom of trade, commerce, and intercourse throughout the territory of India.



Article 326: Right to Vote.

PRINCIPLE: PROTECTION OF LIFE AND PERSONAL LIBERTY (ARTICLE 21)

- The protection of life and personal liberty is the most **fundamental right** among all other rights and considered as **'the procedural Magna Carta of India'**.
- It can't be **suspended** during **emergency** and overtime, **judicial interpretations** have made it the most **dynamic fundamental right** among all to achieve **two notable objectives** as:



Objective 1: Prohibit deprivation of life except according to the procedure established by law

- Under Article 21, 'No person shall be deprived of his life or personal liberty except according to procedure established by law' which means that 'state can take the life of a person only through the **'procedure established by law'**.
 - **In Maneka Gandhi v Union of India, 1978** – Supreme Court (SC) ruled that application of Article 21 includes **'due process of law'** along with **'procedure established by law'**.
 - This implied that the application of Article 21 shouldn't be **arbitrary, unfair or unreasonable**. It should agree with the **principles of equality and freedom** under **Article 14 and 19**.



Objective 2: Guarantee a dignified life to citizens

- With growing concerns for **human rights**, a number of **implied rights** are added to the scope of Article 21. These rights are vital for a **dignified life**, i.e. Right to live with human dignity. Some of these **implied rights** which aren't expressly mentioned in the Constitution but emerged from SC judgments are:
 - **Right to live with Human Dignity and ensure Natural Justice** (Maneka Gandhi v Union of India, 1978).
 - **Right to Livelihood** (Olga Tellis v Bombay Municipal Corporation, 1986 – on pavement dwellers)
 - **Right to Emergency Medical Aid** (Parmanand Katara v UoI, 1989).
 - **Right to clean and healthy environment** (Subhash Kumar v State of Bihar, 1991).
 - **Right to Education** (Mohini Jain v State of Karnataka, 1992 and J P Unnikrishnan v State of AP, 1993).
 - **Right to Shelter** (Chameli Singh v State of UP, 1995).
 - **Right to Health and Medical Care** (State of Punjab v. M.S. Chawla, 1996).
 - **Right to Privacy** (Justice K.S. Puttaswamy (Retd.) v UoI, 2018) etc.

- › These implied rights have transformed the ‘**Protection of Life and Personal Liberty**’ into the most dynamic right of Indian Constitution and place significant checks on:
 - › **State actions.** E.g. some individual sections of the **Aadhar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016** were struck down by SC as unconstitutional while upholding the act as constitutional.
 - › **Private Business Affairs.** E.g. SC upheld the constitutional validity of the provision in the **Right of Children to Free and Compulsory Education Act, 2009** for 25% reservation to children from socially and economically weaker sections in non-minority private unaided schools.
 - › **Constitutional (Eighty-sixth Amendment) Act, 2002** added **Article 21A** on **Right to Education** to the Constitution. It makes **free and compulsory education** a fundamental right for all children in the age group of 6-14 years in a neighborhood school.
 - › **Individual activities.** E.g. the Right to clean and healthy environment under Article 21 allows courts to grant financial compensation to people and protect the environment by incorporating principles such as **Polluter Pays Principle, Precautionary Principle** etc. which puts a limit on individual actions.
 - › In **2010, the National Green Tribunal (NGT)** was established to ensure **healthy environment for its citizens guaranteed under Article 21.**

WHAT IMPORTANCE DO CIVIL LIBERTIES HOLD?

Common to most **liberal democracies** of the world, the **protection of freedom and liberties** is an important achievement of the common law. Adding them into the Constitution (**fundamental law of the land**) as Civil liberties make them even more significant as:



Civil Liberties promote material and moral protection:

- › Civil Liberties promote free will and bring a **sense of equality**. It helps protect individual dignity, which is necessary for the **material and moral protection** of citizens.



Civil Liberties are Justiciable Rights

- › Citizens can enforce them against the State by directly approaching the Supreme Court or the High Court.
 - › It comes under the **Writ Jurisdiction** of the Supreme Court under **Article 32** and of High Courts under **Article 226**.
 - › It is not necessary that only the aggrieved party should approach the court. **Public Interest Litigation (PIL)** allows anyone to approach the court in the public interest.
 - › Also, the High Court and Supreme Court can act **suo moto** in public interest on the basis of media reports.



Civil Liberties are part of the Basic Structure of the Constitution

- > In this context, the parliament can amend them only to the extent of non-violation of the basic structure. Being **positive rights for Citizens**, they are considered **negative obligations on the state**.
- > It also puts some **positive obligations on the state** to support the citizens in the formation of skills and opportunities to enjoy freedom and liberties. E.g.
 - » State duty to **ensure the safety of the protestors** when people protest against its policies even though its primary obligation is to 'stay out' of it.



Put a check on state and private individuals' actions

- > These provisions act as a **check on State actions and of private individuals** as well, protecting-
 - > Citizens from state tyranny or any arbitrary action, and
 - > Overturning the old inequalities practised via social practices. For instance,
 - » **Abolition of untouchability** and **prohibition of discrimination** on the grounds of religion, race, caste, sex, or place of birth.
 - » **Forbid human trafficking** and forced labour.
 - » Give **protection to cultural and educational rights** of religious and linguistic minorities etc.



Indicator of Democratic Stability

- > Civil Liberties of citizens are an important indicator of the **quality of democracy** of a nation.

Writs in the Indian Constitution

Habeas Corpus, i.e. To Have the Body

- > Habeas Corpus is issued for the **production of a person before the court**.
- > It is Issued in case of **illegal detention/imprisonment** of a person.

- > It is issued for the **performance of duty**.
- > It is Issued **against a public authority** or official or lower court or **tribunal** etc. when they fail or refuse to do their duty.

Mandamus, i.e. We Command

Prohibition, i.e. To forbid or Stop

- > It is issued to **stop lower courts** from **exceeding its jurisdiction** or **usurping** the jurisdiction that it **doesn't possess**.
- > It is preventive in nature and issued against judicial and quasi-judicial authorities.

- > It is issued to **lower courts or tribunal; authorities, board** etc. to **submit the records for review**.
- > It is **corrective in nature** as it **subjects the decisions** to the **higher judicial review**.

Certiorari, i.e. To be Certified

Quo Warranto, i.e. By what Authority or Warrant

- > It is Issued to **prevent the illegal assumption of public office**.
- > It asks for the **qualifications (legality)** of a person claim to **hold the public office**.

Protection to Citizens from abuse of power from state as it removes **absolute state control**

Protection of the Interests of minorities (e.g. religious freedom) and other weaker sections by promoting social equality and social justice



Citizen's participation opportunity in the legislation and administration, including their right to criticize state

Status of Rule of Law and equal protection of the law in a country

WHAT ARE THE ISSUES IN THE EXERCISE OF CIVIL LIBERTIES?



Nature of Civil Liberties

- > Civil liberties are **competing rights**, i.e., protection of one person's liberties may involve violation of other rights or reasonable restrictions. E.g., **Right to Information** under Freedom of Speech vs National Security.
- > These FRs are **neither absolute nor immune** from constitutional amendments. They can be altered by **avoiding changes to the basic structure** of the constitution like secularism, democracy, federalism, and separation of powers.
- > Further, **Article 359** empowers the President to suspend other fundamental rights, barring **Articles 20 and 21**, during the **proclamation of emergency** in operation.



Gaps in the enforcement of laws

- > Despite the creation of laws which envisage ensuring that people enjoy civil liberties, gaps still exist in the actual enjoyment of civil liberties. E.g., the **Existence of child labour** due to poverty and limited education opportunities.
- > According to the **2011 census**, child labour in India was around 4.35 million.



State Actions

- > Over the course of time, there have been instances when State actions have resulted in restrictions on Civil Liberties or weakening of the framework on Civil Liberties.
- > For instance, the **Ninth Schedule** was inserted in the Constitution with laws insulated from any challenge in case of violation of FRs.



'Consciousness of rights' or 'political consciousness'

- > **Political consciousness**, i.e., the mutual recognition and appreciation of rights that belong to the citizens. There have been some issues in its context-
 - > Infringement of Civil Liberties by individual or state action. For instance, exploitation of labour happens as there is limited awareness about civil liberties in this section of the population.
 - > **Non-appreciation of reasonable restrictions** i.e., limited understanding of Civil Liberties creates scenarios where individuals overstep their bounds and harm the collective well-being.

WAY FORWARD FOR APPRECIATION AND EXERCISE OF CIVIL LIBERTIES



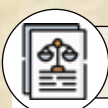
Development of Positive Liberty

- > The State should aim to create the necessary conditions for individuals to achieve self-realization or self-determination:
 - > Directly by creating awareness on civil liberties and their importance through **Information, Education and Communication (IEC) strategy**.
 - > **Indirectly** by using Behavioral science such as **nudge techniques** which lead citizens to follow a preferred path. E.g., Enacting a Data Protection Law to **empower ordinary citizens** to protect their **data** and **privacy**.



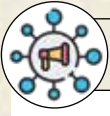
Laws and Liberty go hand-in-hand

- > According to **Kautilya's Arthashastra**, safeguarding the welfare of people is one of the major duties of the ruler. This wisdom holds good for modern-day democracies as well and efforts should be made to:
 - > Ensure that the **government follows its obligation** to safeguard people's welfare.
 - > **Avoid laws which infringe** upon these liberties and freedom.



Independent Judiciary

- > Independent Judiciary is critical to meaningful recourse on violation of civil liberties, curbing law enforcement abuse and having judicial oversight over increasing efforts for new authority over citizens.



Encouraging Civil Society and Media

- > In order to make '**Protection of Liberties and Freedom**' a fundamental political value, watchdogs of the society such as lawyers, journalists, civil society etc. can play an instrumental role by:
 - > **Identifying** the current status and suggesting improvement in present laws and policies.
 - > **Creating awareness** for the importance of civil liberties and mobilization of people to protect them.
 - > **Promote accountability** from the State while framing laws and their implementation.

Conclusion

Freedom and liberties are important aspects of modern societies. It is vital for the **well-being of a free and democratic society**. It protects individual dignity by controlling state power through duties. Also, without them, no government can maintain **long-term peace and equality**.

"Those who would give up Essential Liberty to purchase Temporary Safety, deserve neither Liberty nor Safety."

- **Benjamin Franklin**



TOPIC AT A GLANCE

Liberty and Freedom

Liberty

Liberty is 'the state of being free within society from oppressive restrictions imposed by authority on one's way of life, behaviour, or political views'

Freedom

Freedom is 'the situation in which a person has the power or right to speak, act, and think as one wants'

Civil Liberties (Fundamental Rights)



Right to Equality (Article 14-18)



Right to Freedom (Article 19-22)



Right against exploitation (Article 23 and 24)



Right to Freedom of Religion (Article 25-28)



Cultural and Educational Rights (Article 29 and 30)



Right to Constitutional Remedies (Article 32)

Objectives of Civil Liberties



Secure equal rights



Establish political democracy



Uphold supremacy of law



Protect weaker sections



Create a sense of responsibility



Importance of Civil Liberties

- Promote material and moral protection.
- Justiciable in nature.
- Part of the Basic Structure of the Constitution.
- Put a check on state and private individuals' actions.
- Act as an indicator of Democratic Stability.



Issues with the Exercise of Civil Liberties

- They are neither absolute nor immune from constitutional amendments.
- Gaps in the enforcement of laws.
 - Restriction of state liberties via state action. (E.g., the creation of 9th Schedule)
 - Infringement of Civil Liberties by the individual or state action.
 - Non-appreciation of reasonable restrictions by citizens.



Way Forward

- Development of Positive Liberty i.e., the State should aim to create the necessary conditions for individuals to achieve self-realization.
- Ensure that the government follows its obligation to safeguard people's welfare.
- Avoid laws which infringe upon these liberties and freedom.
- Independent Judiciary for meaningful recourse on violation of civil liberties.
- Encouraging Civil Society and Media in order to make 'Protection of Liberties and Freedom' a fundamental political value.

