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THE CONSCIENCE OF THE CONSTITUTION—

THE FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES OF STATE POLICY—I

. . . It is the business of the State . . . to maintain the conditions without which a free exercise of the human faculties is impossible.
T. H. Green

THE Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire constitution by the aim of national renascence, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution.

The Fundamental Rights and Directive Principles had their roots deep in the struggle for independence. And they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India. The Rights and Principles thus connect India's future, present, and past, adding greatly to the significance of their inclusion in the Constitution, and giving strength to the pursuit of the social revolution in India. In the present chapter we will examine the origin and development of the Rights and Principles, the negative and positive obligations of the State towards the social revolution, prior to the formation of the Constituent Assembly and then within the Assembly itself.

The Assembly's handling of 'due process' as it affected liberty and property will claim our especial attention, for here lies the best insight into the members' approach to the issue of liberty and the social revolution, to the classic dilemma of how to preserve individual freedom while promoting the public good.[1]

The Fundamental Rights of the Constitution are, in general, those

[1] In this chapter the words 'freedom' and 'liberty' are used synonymously.

rights of citizens, or those negative obligations[2] 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 peoples, become heir to this liberal tradition. These rights in the Indian Constitution are divided into seven parts: the Right of Equality, the Right of Freedom, the Right Against Exploitation, the Right to Freedom of Religion, Cultural and Educational Rights, the Right to Property, and the Right to Constitutional Remedies. The Rights lay down that the state is to deny no one equality before the law. All citizens are to have the right to freedom of religion, assembly, association, and movement. No person is to be deprived of his life, liberty, or property, except in accordance with the law. Minorities are allowed to protect and conserve their language, script, and culture. And various means are provided whereby the citizen can move the Supreme Court and other courts for the enforcement of the Fundamental Rights.

Although the Fundamental Rights primarily protect individuals and minority groups from arbitrary, prejudicial, state action, three of the articles have been designed to protect the individual against the action of other private citizens. Article 17 abolishes untouchability; Article 15(2) lays down that no citizen shall suffer any disability in the use of shops, restaurants, wells, roads, and other public places on account of his religion, race, caste, sex, or place of birth; Article 23 prohibits forced labour—which, although it had been practised by the state, was more commonly a case of landowner versus peasant. Thus the state, in addition to obeying the Constitution's negative injunctions not to interfere with certain of the citizen's liberties, must fulfil its positive obligation to protect the citizen's rights from encroachment by society. The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few.

In the Directive Principles, however, one finds an even clearer statement of the social revolution. They aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from fulfilling their best selves.[3]

To do this, the state is to apply the precepts contained in the Directive Principles when making laws. These Principles are not justiciable, a court

[2] The 'notion of "negative" freedom' of Sir Isaiah Berlin, in *Two Concepts of Liberty*, see p. 7 and pp. 7–16.

[3] This is one aspect of 'positive' freedom as described by Berlin, op. cit., p. 16, when he writes, 'The "positive" sense of the word "liberty" derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind'.

cannot enforce them, but they are to be, nevertheless, 'fundamental in the governance of the country'.[4] The essence of the Directive Principles lies in Article 38, which, echoing the Preamble, reads:

> . . . the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political, shall inform all the institutions of the national life.

To foster this goal the other provisions of the Directive Principles exhort the state to ensure that citizens have an adequate means of livelihood, that the operation of the economic system and the ownership and control of the material resources of the country subserve the common good, that the health of the workers, including children, is not abused, and that special consideration be given to pregnant women. Workers, both agricultural and industrial, are to have a standard of living that allows them to enjoy leisure and social and cultural opportunities. Among the primary duties of the state is the raising of the level of nutrition and the general standard of living of the people. The Principles express the hope that within ten years of the adoption of the Constitution there will be compulsory primary education for children up to the age of fourteen years. The other provisions of the Principles seek equally to secure the renovation of Indian society by improving the techniques of agriculture, husbandry, cottage industry, etc.

By establishing these positive obligations of the state, the members of the Constituent Assembly made it the responsibility of future Indian governments to find a middle way between individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate 'the powers of all men equally for contributions to the common good'.[5]

SIXTY YEARS OF GROWTH

Although the Fundamental Rights and Directive Principles appear in the Constitution as distinct entities, it was the Assembly that separated them; the leaders of the Independence Movement had drawn no distinction between the positive and negative obligations of the state. Both types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself.

The Indian desire for civil rights had its roots deep in the nineteenth century. It was implicit in the formation of the Indian National Congress in 1885: Indians wanted the same rights and privileges that their British

[4] Article 37.

[5] T. H. Green, *Liberal Legislation and Freedom of Contract*, see *T. H. Green*, edited by R. L. Nettleship, Vol. III, p. 372.

masters enjoyed in India, and that Britons had among themselves in England; they wanted an end to the discrimination inherent in a colonial regime. Perhaps the first explicit demand for fundamental rights appeared in *The Constitution of India Bill*, 1895. Article 16 of this Bill laid down a variety of rights including those of free speech, imprisonment only by competent authority, and of free state education.[6] A series of Congress resolutions adopted between 1917 and 1919 repeated the demand for civil rights and equality of status with Englishmen. The resolutions called for equal terms and conditions in bearing arms;[7] for 'a wider application of the system of trial by jury', and for the right of Indians 'to claim that no less than one-half the jurors should be their own countrymen'.[8] A further resolution stated the 'emphatic opinion' that Parliament should pass a statute guaranteeing 'the Civil Rights of His Majesty's Indian subjects', which would embody provisions establishing equality before the law, a free press, free speech, etc. The statute should moreover lay down that political power belonged to the Indian people in the same manner as to any other people or nation in the British Empire.[9]

This demand for equality of rights and for self-government exemplifies not only the well-known desire for negative freedom, but also that aspect of positive freedom so perceptively described by Sir Isaiah Berlin as 'the desire for the "positive" freedom of collective self-direction'.[10] 'The "positive" sense of liberty comes to light', wrote Berlin, 'if we try to answer the question, not "What am I free to do or be?", but "By whom am I ruled?" or "Who is to say what I am, and what I am not, to be or do?" '[11] The demand for this particular aspect of positive liberty and the demand for negative freedom were to come to their logical fulfilment with the attainment of independence and of its corollary, adult suffrage, and with the inclusion of fundamental rights in the Constitution.

By the mid-twenties, Congress and Indian leaders generally had achieved a new forcefulness and a consciousness of their Indianness and of the needs of the people, thanks largely to the experience of World War I, to the disappointment of the Montagu-Chelmsford reforms, to Woodrow Wilson's support for self-determination, and to Gandhi's arrival on the scene. These influences were reflected in the tone and form of demands for civil rights. These no longer aimed at establishing the rights of Indians *vis-à-vis* Englishmen, a goal that was to be achieved through the Independence Movement; the purpose now was to assure liberty among

[6] *The Constitution of India*, 1895, author unknown: Shiva Rao, *Select Documents*, I.

[7] Resolution of 1917; Chakrabarty and Bhattacharya, op. cit., p. 19.

[8] Resolution dated 1917; see ibid. [9] Ibid., p. 26.

[10] Berlin, *Two Concepts*, pp. 47–48, does not refer to two aspects of 'positive' liberty; the distinction is the author's.

[11] Ibid., p. 15; see also pp. 16 and 41–57.

Indians. The experience of colonial status would, however, continue to be reflected in the demand for rights, for, as a great American judge has said, 'such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and . . . they withstand the winds of logic by the depth and toughness of their roots in the past'.[12]

The next major development was the drafting of the seven fundamental rights provisions of Mrs. Besant's Commonwealth of India Bill of 1925. These laid down that individual liberty, freedom of conscience, free expression of opinion, free assembly, and equality before the law were to be ensured. There was to be 'no disqualification or disability on the ground only of sex'.[13] According to two other provisions, all persons in the Commonwealth of India were to have the right to free elementary education (a right that was to become enforceable as soon as arrangements for educational facilities could be made), and all persons were to have equal right to the use of 'roads, courts of justice, and all other places of business or resort dedicated to the public'.[14] Thus were presaged several provisions of the Fundamental Rights and one of the Directive Principles.

Within two years of the printing of the Besant Bill came the announcement that the Simon Commission would undertake a study of possible constitutional reforms in India. In response, the Forty-Third Annual Session of the Congress at Madras in 1927 resolved that the Working Committee be empowered to set up a committee 'to draft a Swaraj Constitution for India on the basis of a declaration of rights'.[15] That a declaration of rights had assumed such importance was not surprising: India was a land of communities, of minorities, racial, religious, linguistic, social, and caste.[16] For India to become a state, these minorities had to agree to be governed both at the centre and in the provinces by fellow Indians—members, perhaps, of another minority—and not by a mediatory third power, the British. On both psychological and political grounds, therefore, the demand for written rights—since rights would provide tangible safeguards against oppression—proved overwhelming. 'The community, so to say, is a federal process', Laski wrote.[17] And Indians believed that in their 'federation of minorities' a declaration of rights was as necessary as it had been for the Americans when they established the first federal constitution.[18]

[12] Judge Learned Hand. See Hand, *The Spirit of Liberty*, ed. by Irving Dillard, p. xviii.

[13] *Commonwealth of India Bill*, Clause 8(g).

[14] Ibid., Clause 8(d) and (e). [15] Chakrabarty and Bhattacharya, op. cit., p. 27.

[16] The Hindu community is a majority community, but, generally speaking, it is so fragmented within itself by caste and linguistic divisions, that it is better to view it as a collection of closely related minorities.

[17] *The Grammar of Politics*, p. 97.

[18] It will be remembered here that, although most of the thirteen original states already had Bills of Rights in their state constitutions, it was the general demand of the states that a list of rights be included in the federal constitution that caused the addition of the first ten amendments.

The committee called for by the Madras Congress resolution came into being in May 1928. Motilal Nehru, father of Jawaharlal, was its chairman, and its membership represented the views of Muslims, Hindu orthodoxy, non-Brahmins, labour, and Liberals. The committee's report —known as the Nehru Report—contained an explanation of its draft constitution that speaks for itself.

The first concern of Indians, the report declared, was 'to secure the Fundamental Rights that have been denied to them'. In writing a constitution, the report continued,

> It is obvious that our first care should be to have our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances . . . Another reason why great importance attaches to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion. We could not better secure the full enjoyment of religious and communal rights to all communities than by including them among the basic principles of the Constitution.[19]

The Fundamental Rights of the Nehru Report[20] were reminiscent of those of the American and post-war European constitutions, and were in several cases taken word for word from the rights listed in the Commonwealth of India Bill. Several clauses had, however, a more particularly Indian origin—such as, 'no breach of contract of service or abettment thereof shall be made a criminal offence', which related directly to forced labour. The rights of the Nehru Report were a close precursor of the Fundamental Rights of the Constitution; ten of the nineteen sub-clauses re-appear, materially unchanged, and three of the Nehru Rights are included in the Directive Principles. The first sub-clause of the Rights (that all power and authority of government derived from the people) was the *raison d'etre* of the Constituent Assembly as expressed in the Objectives Resolution. The content, although not the form, of other provisions is also to be found in the Constitution; e.g., the sub-clause on language became Part XVII on Language.

In the Nehru Report the desire to afford protection to minorities was especially prominent. For example, the right to freedom of conscience and to the free profession and practice of religion was included explicitly to prevent 'one community domineering over another'.[21] There was also special provision made for the elementary education of members of minorities. Such rights as these were called Minority Rights in the early days of the Assembly, and they appear in the Constitution as Rights

[19] All Parties Conference, *Report of a Committee to Determine Principles of the Constitution for India*, the *Nehru Report*, pp. 89–90.

[20] The rights were listed in nineteen sub-clauses of Clause 4; see ibid., pp. 101–3.

[21] Ibid., p. 29.

Relating to Religion, Cultural and Educational Rights, and also in Part XVII on Language.

In 1931 a new dimension was added to the demand for constitutional rights. Heretofore almost exclusively devoted to the State's negative obligations, the demand now equally emphasized the State's positive obligations to provide its people with the economic and social conditions in which their negative rights would have actual meaning. The Congress Session held at Karachi in March 1931 adopted the Resolution on Fundamental Rights and Economic and Social Change, which was both a declaration of rights and a humanitarian socialist manifesto. The Karachi Resolution, as it came to be called, meant that the social revolution would have a vital share in shaping India's future constitution, and the provisions did in fact become the spiritual, and in some cases the direct, antecedents of the Directive Principles.

The Karachi Resolution stated that 'in order to end the exploitation of the masses, political freedom must include the real economic freedom of the starving millions'.[22] The state was to safeguard 'the interests of industrial workers', ensuring that 'suitable legislation' should secure them a living wage, healthy conditions, limited hours of labour, and protection from 'the economic consequences of old age, sickness, and unemployment'.[23] Women and children were also to be protected in various ways and accorded special benefits. The state was to 'own or control key industries and services, mineral resources, railways, waterways, shipping and other means of public transport'.[24] Another item called for the reform of the systems of land tenure, revenue, and rent.

Several clauses reflected the Gandhian side of the Congress: for example, the demand for greatly reduced military expenditure, the ceiling of five hundred rupees per month for civil servants' salaries, no salt duty, prohibition, and the demand for protection against foreign cloth. The provisions concerning the salt tax, prohibition, and protection for domestic textiles had the ring of a tactical programme for the Independence Movement—these subjects had, indeed, been at the centre of the Civil Disobedience campaign of the previous year—and of them only prohibition reached the Constitution.

The negative rights of the Karachi Resolution were derived, in some cases textually, from those of the Nehru Report. Four new provisions, however, were included: the State should confer no titles; franchise should be on the basis of adult suffrage; there should be no capital punishment; and citizens should have the right to freedom of movement throughout India.

[22] Chakrabarty and Bhattacharya, op. cit., p. 28. The text of the Karachi Resolution given by Chakrabarty and Bhattacharya is actually the corrected version adopted by the AICC in Bombay in the autumn of 1931. The difference between the two versions is, however, not great. The text of the original Karachi Resolution is to be found in the Report of the *45th Indian National Congress*, 1931, pp. 139–41.

[23] Ibid. [24] Ibid., p. 29.

Jawaharlal Nehru has been given credit for drafting the Karachi Resolution, although the 'Gandhian' provisions do not sound particularly like him and the list of negative rights could have been prepared by anyone.[25] The humanitarian cast of the provisions concerning the welfare of workers and of the people generally, the placing of the primary responsibility for social reform on the State, and the emphasis on the legislative approach, however, do reflect Nehru's ideas and read as if he had written them. Yet there can be little doubt that these sentiments were generally accepted, for Patel, as Congress president, was presiding at Karachi during their adoption, and they have characterized the Congress's approach to the social revolution from that day to this.

The next major document on rights of the pre-Assembly era was the *Sapru Report*, published at the end of 1945. The report suggested a constitutional scheme for India, and although the portions of the report dealing with fundamental rights contained overtones of the social revolution, it addressed itself mainly to the problem of placating minority fears, which were again overshadowing the political scene. With independence likely in the not too distant future, the minorities had to face the responsibility of living together and of creating a state.

The fundamental rights of the new constitution, said the Sapru Report, will be a 'standing warning' to all

> that what the Constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life.[26]

Not only must the rights protect minorities, the report went on to say, but they must prescribe 'a standard of conduct for the legislatures, government and the courts'.

Perhaps the most striking thing about the treatment of rights in the Sapru Report was the distinction made between justiciable and non-justiciable rights. The distinction was not made, as it would be in the Constitution, in the context of positive and negative rights, but in connection with minority rights. Skilful lawyers, said the report, should find it possible to divide the assurances and guarantees given to the minorities 'in such a way that the breaches of some may form the subject of judicial

[25] Narendra Dev, *Socialism*, p. 203, and Brecher, *Nehru*, p. 175. Brecher also cites a confidential (British) Government of India document to the effect that M. N. Roy may have had some influence on the drafting. Nehru, himself, has said that he drafted the Resolution, incorporating several of Gandhi's suggestions. Ibid., p. 176. Nehru has himself given the general background of the Karachi Resolution, although it is regrettably incomplete; see *Autobiography*, op. cit., pp. 265–7.

[26] Sir Tej Bahadur Sapru and others, *Constitutional Proposals of the Sapru Committee*, the *Sapru Report*, p. 260. The Sapru Committee styled itself, with justice, a conciliation committee, and for this reason presumably considered economic rights extraneous to its report.

pronouncement, and the breaches of others may be remedied without resort to courts of law'.[27] A few months more than a year later the Constituent Assembly began framing the Fundamental Rights and the Directive Principles of State Policy.

THE ATMOSPHERE OF 1947

The basic question facing the members of the Assembly was the most easily answered. Should a list of rights be included in the Constitution? The answer was, Yes. In every document concerning rights since 1895[28] Indians had rejected the British view of rights enunciated by Dicey and subscribed to by others, including the British Government, that a proclamation of rights in a constitution 'gives of itself but slight security that the right has more than a nominal existence'.[29] Britain had applied this belief in the Indian context when in 1934 the Joint Parliamentary Committee refused the Indian request to include a list of rights in the 1935 Act.[30] Only in 1946 did the British tacitly acknowledge the validity of the Indian view when the Cabinet Mission Plan suggested that the Assembly constitute an Advisory Committee on fundamental and minority rights to make recommendations concerning constitutional provisions.

Indians rejected the British view of rights for many reasons. Foremost among them was the belief that independence meant liberty, that rights expressed this liberty and must, both in their positive and negative forms, be enshrined in the Constitution. The desire for written rights was reinforced by the suspicion of government engendered by colonial rule—a

[27] Ibid, p. 259; see also p. 258.

[28] The near universality of the demand for rights can be seen in the *Nehru Report*, the *Proceedings and Reports* of the Round Table Conference, in the *Sapru Report*, particularly in its appendixes, and in the pronouncements of minority groups during the 1920's, 30's, and 40's—for which the *Indian Annual Register* is an excellent source. See also subsequent pages in this chapter.

[29] Dicey, *Law of the Constitution*, p. 207. Other constitutionalists holding the view are Professor Wheare and Sir Ivor Jennings. See Wheare, *Modern Constitutions*, pp. 54–57, and Jennings, *Some Characteristics of the Indian Constitution*, pp. 49–50 and 54. See even Laski, *Grammar of Politics*, p. 104: 'It is the proud spirit of citizens, less than the letter of the law, that is their (rights) most real safeguard.'

[30] *Report of the Joint Parliamentary Committee*, 1934, H.C.5 (1 Part I), pp. 215–16. The committee's given reason for not including written rights was that abstract declarations of rights are useless unless there exists the will to make them effective, and that written rights might put embarrassing restrictions on the legislature. The relevant passages read: 'The Statutory Commission observed with reference to the subject: "We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and means to make them effective." With these observations we entirely agree . . . But there are also strong practical arguments against the proposal, which may be put in the form of a dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or other of the rights so declared.' Ibid., para 366.

suspicion that was certainly not diminished by the scoffing attitude of the imperial government toward such rights. The various minority communities also believed that their safety depended upon the inclusion in the constitution of measures protecting their group rights and character. In the eyes of the minorities, too, the Congress was on trial. During the years when independence had been more of a hope than a reality, the Congress had been loud in demanding written rights. With independence and the Congress's assumption of power near, to reject them would have created a vast and crippling suspicion of the Congress leaders' motives. The party leadership, aware of this, was eager to demonstrate its good intentions.

Moreover Britain had often claimed that it had a special obligation to protect the minorities, because Indians could not find justice at the hands of other Indians. Assembly members in general and the Congress leadership in particular intended to refute this. As Sardar Patel told the first meeting of the Advisory Committee:

> It is for us to prove that it is a bogus claim, a false claim, and that nobody can be more interested than us in India, in the protection of our minorities. Our mission is to satisfy every one of them. . . . At least let us prove we can rule ourselves and we have no ambition to rule others.[31]

The decade of the 1940's generally was marked by a resurgence of interest in human rights. The denial of liberties under German and Russian totalitarianism and elsewhere resulted in the Atlantic Charter, the United Nations Charter, and the activities of the United Nations Human Rights Commission. Assembly members were sensitive to these currents, which supported their own faith in the validity of written rights.

That the Constitution would contain positive rights as well as negative safeguards was nearly as certain as the appearance of the written rights themselves. For as the inclusion of negative rights was primarily a product of the national revolution and of the minorities situation, so the impetus for the inclusion of the state's positive obligations came largely from the social revolution and reflected the social consciousness that had increasingly characterized the twentieth century both in India and abroad.

By 1947 it was a commonly accepted belief that the state bore a major responsibility for the welfare of its citizens. Nehru, the Indian Socialists, and the very winds of social and political thought had brought to India the ideas of Marx, T. H. Green, Laski, the Webbs, and many others.[32] The expression of such ideas had begun before the end of the nineteenth

[31] Proceedings of the Advisory Committee, 27 February 1947; Shiva Rao, *Select Documents*, II. In Assembly terminology, followed here, 'Proceedings' means a verbatim record and 'Minutes' means abridged proceedings.

[32] 'The ghosts of Sidney and Beatrice Webb stalk through the pages of the text' of the Directive Principles, wrote Sir Ivor Jennings in something of an oversimplification. See *Some Characteristics*, p. 31.

century with the views of Swami Vivekananda, and continued with those of R. C. Dutt, and M. Visvesvaraya, among others.[33]

Members of the Assembly would have accepted without hesitation the views of other humanitarians and socialists that 'political equality . . . is never real unless it is accompanied by virtual economic equality',[34] and that 'true individual freedom cannot exist without economic security and independence. Necessitous men are not free men.'[35] There would have been equal agreement that 'left to itself, or to the operation of casual benevolence, a degraded population perpetuates and increases itself'.[36] Yet in India these sentiments of political philosophers—true as they were and influential as they had been—were dwarfed and made commonplace by the needs of India's millions.

Sustained by theory though members of the Assembly may have been, they were actuated by the facts of the situation around them. Most members believed that the type of 'socialism' India should have was not theirs to decide (nor is the issue yet settled), but it was clear to them that 'the utility of a state has to be judged from its effect on the common man's welfare',[37] and that the Constitution must establish the state's obligations beyond doubt.[38] This was the purpose of the Directive Principles of State Policy.

The content of the Directive Principles was also to some extent a product of the anti-colonial revolution. As the negative rights expressed a desire for civil liberty in reaction to the political subservience experienced under an imperial regime, so the positive rights represented the casting off of the economic inferiority of colonial status. In the minds of colonial or recently ex-colonial peoples in the mid-twentieth century, colonialism is associated with capitalism, with the domination of indigenous economic life by foreign capitalists, along with native capitalists who have sided with the colonial government in order to safeguard their property and to increase their privileges. Political independence is associated, by newly independent peoples, if not with socialism, at least with the freedom to determine themselves the status of private property within their own country and their country's economic orientation. Such was the case in India. Notwithstanding the number of Indian capitalists who had contributed to the Congress, the popular image was that of British capitalists

[33] See K. R. Karunakaran, Ed., *Modern Indian Political Tradition*, pp. 720ff for quotations from Vivekananda. See also R. C. Dutt, *India in the Victorian Age*, and M. Visvesvaraya, *Reconstructing India*.

[34] Laski, *Grammar*, p. 162.

[35] A quotation attributed to Franklin D. Roosevelt by K. T. Shah in a letter to Prasad dated 15 February 1947. *Prasad papers*, File 4–C/47. Shah was supporting the inclusion of 'economic and social' rights in the Constitution.

[36] Green, op. cit., p. 376.

[37] *CAD* VII, 2, 221; H. V. Kamath.

[38] See also speeches in the Assembly by Sidhwa, *CAD* II, 1, 259; Nehru, *CAD* I, 5, 60; Mme. Pandit, *CAD* II, 1, 261; Ambedkar, *CAD* I, 7, 98; Banerjee, *CAD* III, 5, 509.

exploiting a subject people and of Indian monied interests siding with the British for self-protection. Nor was this image unfounded.[39]

The Directive Principles were a declaration of economic independence, a declaration that the privilege of the colonial era had ended, that the Indian people (through the democratic institutions of the Constitution) had assumed economic as well as political control of the country, and that Indian capitalists should not inherit the empire of British colonialists.[40]

THE ASSEMBLY DRAFTS THE FUNDAMENTAL RIGHTS

The Cabinet Mission laid down in its 16 May Plan that the Constituent Assembly should have an Advisory Committee whose duty it would be to report to the Assembly on

> the list of Fundamental Rights, the clauses for the protection of minorities and a scheme for the administration of the tribal and excluded areas and to advise whether these Rights should be incorporated in the Provincial, Group, or Union Constitutions.[41]

The Cabinet Mission's recommendations and the intentions of the Congress coincided: the Working Committee of the Congress drew up a resolution establishing the Advisory Committee at its meeting of 8 December 1946,[42] the day before the Constituent Assembly was convened. The resolution was to be moved during the early days of the first session, but was delayed for a month in the hope that the Muslim League might enter the Assembly.[43] It was not until 24 January 1947 that the Assembly voted to create the Advisory Committee. It was originally to have been elected by the Assembly, but instead the Congress leadership arranged that the members be chosen in off-the-floor conferences held between Assembly leaders and the chief members of each minority group. For this reasons the various religious minorities, the Scheduled Castes, and the backward tribes were all proportionally represented on the com-

[39] That the Indian economy was run largely with the interests of Britain in mind, and that British business interests had a privileged position in India is too well-known to need documentation here. The relationship between Indian monied interests, particularly landowners, and the colonial regime, which is equally well documented, appears revealingly in the *Report of the Joint Parliamentary Committee*, pp. 217–18.

[40] The 'private sector' of the Indian economy has continued to expand, however, and the 1956 Resolution of the National Development Council acknowledged the important place of private endeavour. The 'socialist pattern of society' that is the aim of the Indian planned economy includes private enterprise provided it serves the needs of the community. 'Private enterprise, free pricing, private management are all devices to further what are truly social ends; they can only be justified in terms of social results.' *Second Five Year Plan*, pp. 22–23.

[41] Cabinet Mission Plan, Para, 20, Gwyer and Appadorai, op. cit., p. 283. See also Para. 19(iv), ibid.

[42] Minutes of the meeting, *Prasad papers*, File 16–P/45–6–7.

[43] *CAD* II, 4, 308–9; Pandit Pant.

mittee, and, because the minorities had been consulted when the committee was being established, their representatives were of their own choosing.[44] Twelve well-known, influential Congressmen (including two women) by another Working Committee decision were also made members of the committee representing a 'general' category. Among them were Patel, who became chairman of the Advisory Committee, and Acharya Kripalani, who was to be chairman of the Fundamental Rights Sub-Committee. Five others from this group were also members of the Rights Sub-Committee.[45]

The membership of the Fundamental Rights and other sub-committees was set up, as had been the whole Advisory Committee, by the leadership of the Congress in consultation with the leaders of the minority groups themselves. Members of the Rights Sub-Committee were: the two ladies, Rajkumari Amrit Kaur and Hansa Mehta, Acharya Kripalani, Minoo Masani, K. T. Shah, A. K. Ayyar, K. M. Munshi, Sardar Harnam Singh, Maulana Azad, B. R. Ambedkar, J. Daulatram, and K. M. Panikkar—who was appointed to the committee to represent the Princely States by President Prasad in March, but who sat with the committee only from 14 April onward. Three of the members already had some familiarity with the formal consideration of rights issues. K. T. Shah and K. M. Munshi had both been members of the Congress Experts Committee, which had drafted a list of rights for the Assembly's guidance.[46] Ambedkar had attended the Round Table Conference and taken a strong interest in rights issues. At the sub-committee's first meeting, the members chose Kripalani as chairman.

When the Fundamental Rights Sub-Committee met for the first time on 27 February 1947, it had before it draft lists of rights prepared by B. N. Rau,[47] Shah, Munshi, Ambedkar, Harnam Singh, and the Congress Experts Committee, as well as miscellaneous notes and memoranda on various aspects of rights. These lists, sometimes annotated or accom-

[44] Ibid., p. 324. The Advisory Committee was established by a motion that was amended by general agreement immediately after it was introduced in the House. For details of the creating of the committee and choosing its members, see ibid., pp. 308–25. Although the Advisory Committee was originally to have seventy-two members, its maximim membership was sixty-four.

[45] There were three sub-committees of the Advisory Committee: that on Fundamental Rights, one on Minorities, and one on Tribal and Excluded Areas—this sub-committee had supporting committees that examined the condition of tribesmen in selected areas.

[46] See footnote 26, Chapter 2. Shah had also attended the Round Table Conference in 1930, as an advisor to the Indian Princes, where he may have dealt with rights issues. The original draft of the Expert Committee's list of rights had been prepared by K. Santhanam, who had also written the introductory note to the compilation of rights clauses from various world constitutions that was prepared by the Sapru Committee. K. Santhanam in an interview with the author; see also *Sapru Report*, para. 364.

[47] Rau's draft rights were in addition to the extensive passages on rights in his *Constitutional Precedents*, op. cit., See *Precedents*, First Series, Parts 8–12 and Third Series, Parts II–V. Pages 10–24 on rights in the Third Series appeared in Rau, *India's Constitution in the Making*, as Chapter 13.

panied by explanatory memoranda, were lengthy and detailed and contained both negative and positive rights taken from foreign constitutions and from the Indian rights documents that we have considered earlier.[48]

Drawing on this mass of precedent, the sub-committee drafted the rights during ten meetings held in March and April 1947. Early in April it passed its tentative conclusions to the Minorities Sub-Committee of the Advisory Committee for suggestions, and on 4 April completed a draft report. After considering the sub-committee's recommendations and reconsidering their own draft report, the Rights Sub-Committee members submitted their report on 16 April to the Advisory Committee as a whole. Five days later the Advisory Committee met and made certain changes in it. Patel, as committee chairman, presented the Interim Report of the Advisory Committee on the Subject of Fundamental Rights to the Constituent Assembly on 29 April 1947.[49] The Assembly debated it for the remainder of the Third Session, and considered the rights a second time in November 1948 during the debate on the Draft Constitution. Except for several controversial provisions, the drafting of the rights was completed by mid-December 1948.

When the sub-committee began drafting the rights in March 1947, the members found that although there was some disagreement on techniques, there was little on principles; history had done much of the members' work for them. What disagreement there was centred primarily around the classic predicament of the degree to which personal liberty should be infringed to secure governmental stability and the public peace, of how conditional the statement of a right should be. The members of the sub-committee quickly decided that the Fundamental Rights should be justiciable, that they should be included in the Constitution, and they decided what form these rights should take. The Rights to Freedom were drafted with only brief argument over the wording of the proviso to the Right of Freedom of Association. The provision abolishing

[48] The importance of European and American constitutional precedent to the framing of the Fundamental Rights (and Directive Principles) is already evident and will become increasingly so. One has only to look at Rau's *Constitutional Precedents* to see an example. The affinity between Ireland and India, as we shall see later, bore special fruits. The unpublished *Annexure II* of the Fundamental Rights Sub-Committee's Report to the Advisory Committee even lists the foreign derivation of each rights. clause; e.g., Clause 4 adopted from Weimer 109(1) and second part from U.S.A. Amend. 14, Section 1, etc., etc.

Rau's additional list of rights is not available in its entirety. Shah's list is in File 4–C/47, *Prasad papers*. Munshi's list is in the *Munshi papers* in two forms, a separate list of Draft Rights, dated 15 March 1947, and one included as part of an incomplete draft constitution. Ambedkar's list of rights appear in B. R. Ambedkar, *State and Minorities, What are their rights and how to secure them in free India*, pp. 27ff and Article II. Harnam Singh's list of rights is to be found in *Law Ministry Archives*, File CA/43/Com/47. And the rights drafted by the Congress Experts Committee are in *Prasad papers*, File 16–P/45–6–7.

[49] *Interim Report of the Advisory Committee on the Subject of Fundamental Rights, Reports of Committees, First Series*, pp. 20–34.

Untouchability was adopted with equal swiftness,[50] as were the provisions giving protection against double jeopardy, ex-post facto laws, etc.

That fundamental rights, while protecting individual freedom, were not to prevent state intervention in the interests of the social revolution became apparent in the drafting of several rights provisions. It had long been evident, for example, that a clause protecting freedom of conscience and the profession and practice of religion would be in the Constitution. Yet in sub-committee meetings, Amrit Kaur opposed allowing the free 'practice' of religion since this could include such 'anti-social' practices as devadasi (temple prostitution), purdah, and sati, and because it might invalidate such secular gains as the Widows Remarriage Act.[51] Ayyar came to her support with a note saying that the Minorities Sub-Committee's use of the word 'practice' was too wide[52] and cited the example of the 1935 Act, when the British Parliament had 'refused to insert any provision that might interfere with social reform'.[53] This protest had its effect: the Advisory Committee altered the sub-committee's provisions and in its own report laid down that the right freely to practice religion should not prevent the state from making laws providing for social welfare and reform, a provision that was carried into the Constitution.[54]

Equality before the law was another right that might have been thought unexceptionable. Yet Ayyar believed that it could hamper reform. It might prevent the passage of laws differentiating between men and women factory workers, thereby denying women special protection. It might also prevent treating children and adults differently in criminal courts. Equality before the law, Ayyar maintained, was a fine principle of English law, but it was self-defeating when written into a constitution. He preferred using the phrase that 'no person should be denied the equal protection of the law'.[55] The Advisory Committee heeded Ayyar's advice, for despite the contrary precedents in the Nehru Report and in the Fundamental Rights Sub-Committee's report, the clause in the Advisory Committee's Interim Report read that no person should be denied equality before the law—and this wording was carried into the Constitution.[56]

The conflict between individual liberty and the state's responsibility was also evident in the provision concerning forced labour. The Nehru

[50] Minutes of the Fundamental Rights Sub-Committee meeting, 29 March 1947, File 4–F/47, *Prasad papers*. The limitations on rights in the form of provisos, however, proved on occasion quite controversial as we shall see subsequently.

[51] In a note dated 20 April 1947. *Prasad papers*, File 1–F/47. See also sub-committee Minutes for 26 March 1947, File 4–F/47, ibid.

[52] Note dated 20 April 1947, *Ayyar papers*.

[53] Quoted from a letter from Ayyar to B. N. Rau, dated 4 April 1947; ibid.

[54] *Interim Report*, Clause 13, Explanation 3, *Reports*, *First Series*, op. cit., p 25.

[55] See his notes on this subject to the Fundamental Rights Sub-Committee, dated 10 and 20 April 1947, *Ayyar papers*.

[56] See Article 14 of the Constitution and Clause 9 of the *Interim Report*, *Reports*, *First Series*, p. 25.

Report had a thinly disguised clause aimed at eliminating it.[57] And the Fundamental Rights Sub-Committee found that they were in no disagreement about abolishing forced labour, begar (a form of forced labour practised particularly in the United Provinces), and traffic in human beings (primarily directed against prostitution), but they disagreed strongly on the question of involuntary labour in the form of military or social conscription.

The two ladies, Mehta and Kaur, were against conscription and the latter opposed compulsion in any form.[58] K. T. Shah favoured conscription for social service, and apparently had no objection to compulsory military service.[59] Ambedkar, Munshi, and Ayyar did not want to write into the Constitution a clause prohibiting military conscription. Munshi believed that any such prohibition would be very dangerous in time of war, and Alladi Krishnaswami reminded the sub-committee that although India might not choose to have conscription, it was another matter completely to deny oneself recourse to it. Fundamental rights in India, Ayyar said, rest on the bedrock of Indian national security.[60]

It is not clear who introduced or championed the clause prohibiting conscription, but the sub-committee adopted it at its meeting of 27 March 1947. Opponents of this move called for another vote at the next day's session and the count was five to three against military conscription. At Dr. Ambedkar's request a second vote was taken on conscription for military training only. The vote was five to four against, and it appears that these five votes were cast by Masani, Kripalani, Kaur, Mehta, and Jairamdas Daulatram.[61] The sub-committee's 16 April report did permit 'compulsory service under any general scheme of education'. The Advisory Committee was not satisfied with the wording of this prohibition of conscription, however, and appointed several sub-committees to scrutinize it. A sub-committee, apparently comprised of Pant, Rajgopalachari, Munshi, and Ambedkar redrafted the provision reversing the stand of the sub-committee. The new wording provided that nothing in the forced labour clause should 'prevent the State from imposing compulsory service for public purposes'[62]—essentially the form in which the provision appeared in the Constitution.

[57] *Nehru Report*, clause 4(xvi), p. 103; 'No breach of contract of service or abetment thereof shall be made a criminal offence'.

[58] See their undated minute of dissent (April 1947); *Prasad papers*, File 1–F/47.

[59] In a minute of dissent dated 20 April 1947; ibid.

[60] See Ayyar's note dated 17 April 1947; ibid.

[61] Minutes of the meeting of 28 March 1947, ibid.

[62] See Proceedings of the Advisory Committee meeting, 21 April 1947, Rao, *Select Documents*, II, and minutes of the special sub-committee meeting, 22 April 1947; *Munshi papers*. Also *Interim Report*, Clause 11, *Reports*, *First Series*, p. 25. A later sub-committee of seven members headed by S. Varadachariar recommended the retention of the proviso because the wording of the body of the provision would prevent military conscription. *Report of the* Ad Hoc *Committee on Clause* 11 *of the Interim Report of the Advisory Committee*; Shiva Rao, *Select Documents*, II.

The protection of minorities took two forms. First was the inclusion in the Fundamental Rights of the freedom of religion, and other such provisions, plus those special provisions relating to the protection of script and culture, the rights of minorities to maintain their own educational institutions, and so on, that appear in the Cultural and Educational Rights of the Constitution. Protection of this kind had, as we know, long been part of the rights demand, and this continued to be the case in 1947. Minority groups of all kinds—Buddhists, Jains, Christians, Sanatanists, Shia Muslims, Harijans, Kumaonis, linguistic groups, and so on—wrote letters to the Assembly asking that special consideration be given to their problems and their interests protected. Although the Advisory Committee and the sub-Committees took note of these sentiments, they found that minority views were well represented among the Assembly's membership. The Rights Sub-Committee sent a questionnaire, drafted by Munshi, in March 1947 to minority community leaders to determine what political, economic, religious, cultural, and other safeguards they believed should be incorporated in the Constitution. In early April, using replies to the questionnaire and Munshi's draft rights as a model, the sub-committee framed a list of minority rights and included the list in its report to the Advisory Committee. On 17, 18, and 19 April the Minorities Sub-Committee under the Chairmanship of H. C. Mookerjee considered the minorities provisions of the report and on 19 April sent its own report to the Advisory Committee, having made few changes of substance in the Rights Sub-Committee's recommendations.[63] The Advisory Committee incorporated several changes suggested by the sub-committee and the rights appear in the Constitution in essentially the same form as they appeared in the Advisory Committee Interim Report.[64] A most important exception to this was the question of language, which it had been thought at first should be included in the Fundamental Rights. The Advisory Committee, however, omitted it from the Interim Report on rights, and the subject ultimately came to be treated in a separate part of the Constitution.[65]

The second type of protection for minority interests was the inclusion in the Constitution, but not within the Fundamental Rights, of provisions providing for adequate minority representation in legislatures and civil services, and other forms of special consideration. These provisions were a good deal more controversial than the issue of safeguards for religious and cultural rights, where there was little important difference of opinion. The matter of reservation, representation, electorates, etc., was close to

[63] For a list of the twenty-eight members of the Minorities Sub-Committee, see Appendix II.

[64] *Reports, First Series*, p. 26.

[65] See Chapter 12.

the heart of the minorities and involved crucial questions of constitutional and social philosophy. The Minorities Sub-Committee took these matters up in July 1947, separately from rights issues, and they will be treated in later chapters.[66]

As has been said earlier, the corollary to the demand for the positive liberty of independence was adult suffrage, or universal franchise. Although some Assembly members had doubts about enfranchising the masses, in general the right to vote was considered fundamental. The Fundamental Rights Sub-Committee unanimously voted that there should be universal suffrage and secret and periodic elections.[67] The Advisory Committee, when considering this provision in the sub-committee's report, agreed with the principle, but recommended that these provisions find another place in the Constitution.[68] The Assembly adopted this suggestion and provided for adult suffrage in Article 326 of Part XV on elections.

Having made the Fundamental Rights justiciable, the sub-committee next included within the Rights the legal methods by which they could be secured. To do this they adopted the English device of prerogative writs, or directions in the form of writs. Munshi, Ambedkar, and Ayyar strongly and actively favoured the inclusion of the right to constitutional remedies and the other members of the sub-committee agreed with them. Munshi in his draft constitution had included two clauses relating to prerogative writs; one laid down that every citizen had the right to move for a writ of right, and the second named these rights as habeas corpus, mandamus, prohibition, and certiorari.[69] Ayyar, although favouring the principle of writs, preferred supplanting them with directions in the nature of writs, for in England, he said, these directions had proved to be the more convenient device for the protection of rights.[70] The decision to include the prerogative writs in the Constitution was taken by the Rights Sub-Committee at its meeting on 29 March 1947. At this time Ayyar moved that all High Courts and the Supreme Court should have the power to issue writs of habeas corpus. This suggestion ultimately led to the inclusion in the constitution of a provision saying that Parliament could empower any court in India to issue these writs in the same

[66] See especially Chapter 6, on the Legislature.

[67] Minutes of the meeting, 29 March 1947; *Prasad papers*, File 1–F/47.

[68] Advisory Committee, *Interim Report*, in *Reports*, *First Series*, p. 22. This was decided at the Advisory Committee meeting of 21 April 1947. See proceedings of the meeting in Advisory Committee, Shiva Rao, op. cit.

[69] Munshi also suggested the inclusion of a Writ of the Constitution; see Part XVIII of draft rights; *Munshi papers*. Munshi explained to sub-committee members that in England the prerogative writs were an extremely powerful device. He believed that they had been brought to India by Judge Impey who, when drafting its charter, gave the Calcutta Supreme Court the powers of the Kings Bench Division in England; Note of 17 March 1947, *Munshi papers*.

[70] In a note dated 17 March 1947. *Prasad papers*, File 1–F/47. Ayyar frequently reiterated that the rights must be enforceable.

manner as had previously been done by the Supreme Court and certain High Courts.[71]

Although ordinary remedies exist for the protection of rights, the prerogative writs have put teeth in the Fundamental Rights provisions. The writs have become popular for they are commonly believed to be 'the corner-stone of freedom and liberty'.[72] The impetus that this belief had given towards the achievement of the social revolution has, one expects, been very great.

Sardar Patel, chairman of the Advisory Committee, presented the committee's Interim Report on Rights to the Assembly on 29 April 1947, the second day of the Third Session.[73] If any one thing characterized the Assembly's debate on this report, it was the favour with which it was received. There was heated debate over one or two principles and over many details, but if all the 189 amendments to the rights provisions had been accepted—and few of them were—it would have made little difference to the content of the rights, whose basic principles were not questioned.[74]

LIMITING THE RIGHTS

Although the rights to be included in the Constitution were considered to be fundamental and enforceable by the courts, they could not, Assembly members realized, be absolute. The question was to what extent and in

[71] Article 32(3). Today, all High Courts and many inferior courts, in addition to the Supreme Court have this power, the High Courts drawing this authority specifically from Article 226 of the Constitution. At the time that the Fundamental Rights Sub-Committee framed these rights, only the High Courts of Madras, Calcutta, and Bombay were empowered to issue such writs.

The decision to allow Parliament to make such laws was taken after the Advisory Committee submitted its Interim Report on 23 April 1947. This report laid down that the Supreme Court could issue the four writs and that this did not prejudice any powers existing in lower courts to issue such writs. *Interim Report*, Clause 22(2). In the final version in the Constitution, a fifth writ, that of *quo warranto*, was added. Sir Tej Bahadur Sapru claimed some credit for the bestowing on the High Courts of this power, saying that he had made the suggestion to a friend in the Assembly, *The Hindustan Times*, 19 August 1947.

[72] Alexandrowicz, *Constitutional Developments in India*, p. 38. For a most illuminating description of the use of the writs up to 1955, see ibid., pp. 35–45.

The popularity of the writs would have been increased had N. G. Ranga's quixotically attractive suggestion been adopted. Ranga would have had the Constitution provide that 'those citizens who are so poor as not to be able to move the Supreme Court, should be enabled, under proper safeguards, of course, at the cost of the State to move the Supreme Court in regard to the exercise of any of these Fundamental Rights.' *CAD* III, 2, 389. The paper-work involved made this suggestion administratively impossible, and the cost would have been overwhelming.

[73] In his letter transmitting the report to the President of the Assembly, Patel wrote: 'We attach great importance to the constitution making these rights justiciable. The right of the citizen to be protected in certain matters is a special feature of the American Constitution and the recent democratic constitutions.' *Interim Report*, *Reports*, *First Series*, p. 21.

[74] For the texts of these amendments, see *Orders of the Day*, of the Constituent Assembly, Vol. I, Orders for 28 April 1947 through 2 May 1947, *INA*. For the debate on rights, see *CAD* III, 1–5.

what way the rights should be limited. The rights, it was decided, could best be limited by attaching provisos to the particular right and by providing for the rights to be suspended in certain circumstances. The device of written provisos to rights was one with which members of the Assembly were acquainted not only from foreign precedent but from Indian rights documents as well. In the Karachi Resolution, for example, the right of free speech was not to contravene law or morality. A. K. Ayyar explained to the Rights Sub-Committee that the U.S. Constitution laid down civil rights in a general fashion and the scope of the rights had been narrowed and expanded by judgements of the Supreme Court. Later constitutions, particularly those drafted after World War I, attempted to expand the rights and to define them more precisely with provisos by 'compendiously seeking to incorporate the effects of the American decisions'. The Assembly, he said, had to choose between the principles and techniques involved in the two systems.[75] The device of limiting the rights by suspending them, as we shall see, grew in favour as the Assembly proceeded with its work.

Additionally the rights had further to be qualified, Assembly members found, in two directions. About the need to limit individual liberty by allowing state intervention for certain social purposes, there was little argument. The right to equality was not to prevent the state from making special laws protecting women and children.[76] And, as we have seen, the freedom of religion was not to prevent the state from passing social reform legislation.

About the need to circumscribe the basic freedoms of speech, assembly, association, and movement, however, there was no easy agreement. At issue was the always delicate and explosive question of freedom versus state security and, to a lesser extent, of liberty versus licence in individual behaviour. The two strongest advocates in the sub-committee of the limitation of rights were A. K. Ayyar and K. M. Munshi, and with one or two exceptions their fellow members supported them. At its meeting on 25 March 1947, the sub-committee drafted the 'rights to freedom' of the Constitution and voted to qualify each with the proviso that the exercise of these rights be subject to 'public order and morality'.[77] To the freedom of assembly, it attached the restrictive proviso of the Irish Constitution.[78] At this meeting the members also decided to limit the rights according to categories of persons. Certain rights were to extend

[75] Ayyar, in a note to the Rights Sub-Committee, undated, but circulated to the sub-committee on 5 March 1947; *Law Ministry Archives*, File CA/43/Com/47.

[76] See Clause 4, *Interim Report*, *Reports*, *First Series*, p. 23 and Article 15 of the *Constitution*.

[77] Minutes of the meeting; *Prasad papers*, File 1–F/47.

[78] Ibid. This proviso is Article 40(6) (i) and (ii) of the Irish Constitution and it allows prevention or control of meetings deemed a danger or a nuisance to the general public or in the vicinity of the Parliament buildings. Ayyar believed this unnecessary because 'public order and morality' applied to all important contingencies.

to all persons in India; others were to extend only to Indian citizens. Freedom of association, for example, as well as assembly, the right to bear arms, and secrecy of correspondence were confined to citizens. The inviolability of the home and no deprivation of life or liberty without due process of law extended to all persons.[79] Within several days, however, all the rights to freedom were limited to citizens with the exception of the right to life and liberty, which continued to apply to aliens as well—a distinction carried into the Constitution. Several attempts were also made at this time, principally by K. M. Panikkar, the Princely States' representative on the sub-committee, to have the rights divided into two lists: one, embodying general rights, would apply to the Union, while a second list, consisting of relatively less consequential rights, would be enforceable only by the provinces and States. The sub-committee heartily disagreed with this proposition, believing that the rights must be uniformally applied.

A few days later, Munshi suggested that both the provincial governments and the central government be given the power to suspend these rights to freedom in times of emergency. The majority of the sub-committee balked at this, however, rejecting the idea as one which would make the rights illusory, and refused to incorporate the proviso in its draft rights of 3 April.[80] This decision so perturbed Ayyar that he wrote a letter to B. N. Rau, who, in his position as Constitutional Advisor, usually attended the meetings of the Rights Sub-Committee. 'The recent happenings in different parts of India have convinced me more than ever', wrote Ayyar, referring to unrest in Assam and Bengal, and to communal riots in the Punjab and NWFP, 'that all the Fundamental Rights guaranteed under the Constitution must be subject to public order, security, and safety, though such a provision may to some extent neutralize the effect of the rights guaranteed under the Constitution.'[81] Ayyar followed up this letter with a note to members of the sub-committee in which he suggested that if the rights were not made liable to suspension in times of emergency, the words 'security and defence of the state or national security' be added to the already existing proviso.[82]

Ayyar verbally presented his arguments to the sub-committee at its meeting of 14 April and again put the necessity of limiting rights in time of emergency. On this occasion the members took his advice—and Munshi's—and inserted in the introduction to the 'rights-of-freedom' clause a phrase making the rights subject to suspension in times of

[79] Ibid. The right to bear arms was eliminated a few weeks later by the Advisory Committee, as was secrecy of correspondence; 'due process' also underwent changes. See below.

[80] Referred to in Ayyar note of 10 April 1947; *Munshi papers*, Advisory Committee File. Munshi had included in his Draft Rights, op. cit., a provision laying down that rights were exercisable subject to the needs of, among other things, national defence.

[81] Letter dated 4 April 1947; *Ayyar papers*.

[82] Note of 10 April; see footnote 80.

emergency when the security of the national or a provincial government was threatened.[83]

The full membership of the Advisory Committee met on 21 and 22 April to consider the reports of the two-sub-committees. The situation in Delhi and India was as turbulent and anxious as the mood of the meetings was calm and analytical. Although an important handful of the Princely States would be sending representatives to the third Assembly session, to begin in a week, the States problem was causing Nehru and his colleagues acute worry. The Nawab of Bhopal, chancellor of the Chamber of Princes, was digging in his heels against the tow of history as he tried to sabotage the entry of the States into the Assembly, and Sir C. P. Ramaswamy Aiyar, Dewan of the Princely State of Travancore, was beginning his intransigence. Within several days the Muslim League was due to hand down its final decision on joining the Assembly or quitting India. The Punjab had boiled intermittently for more than a month. Millions of rupees damage had been done, and 'ghastly, mutilated corpses' lay in drains and sewers.[84] Delhi had had more than a week of all-night curfew. Gandhi and Jinnah had published their joint appeal calling on the population to refrain from disorder and violence. Fundamental Rights were to be framed among the carnage of fundamental wrongs.

These events had their effect on the members of the Advisory Committee, although a much smaller one than might have been expected. The most important result was the removal of due process as a protection of individual liberty, which will be considered in detail subsequently. The committee also deleted from the sub-committee's list the right to bear arms. S. P. Mookerjee supported its retention, but Patel, the chairman and also the Home Minister, opposed this, saying that 'in the present state of our society (this) will be a dangerous thing'.[85] Opposing a suggestion that the matter be left to the units of the federation to decide, Ambedkar, reflecting the anxiety over the Princely States, said that the law must be applied uniformly to prevent one unit from arming its population against another.[86] Ayyar would have added to the proviso of the freedoms clause that the exercise of free speech, etc., must not 'promote class hatred'.[87] Others would have worded it 'class or communal hatred'. Rajgopalachari held this view and later moved such an amendment in the Assembly. The committee members rejected these recommendations for two reasons. In the first place it was claimed that the preaching of communal hatred could be prevented under the existing Penal Code. Second, the members contended, the preaching of class hatred could not be prohibited in the constitution because the courts

[83] Minutes of the meeting; *Munshi papers*, Advisory Committee file. See also Report of the Sub-Committee on Fundamental Rights, 16 April 1947.

[84] *The Hindustan Times*, 13 March 1947.

[85] Proceedings of the meeting, 21 April 1947; Shiva Rao, op. cit., II.

[86] Ibid. [87] Ibid.

might use such a provision to prevent speeches, common in a socialist age, calling for the removal of class distinctions and the reform of the social structure of society. The committee, however, added a clause to the proviso making punishable the utterance of seditious, obscene, and libellous matter.

The Advisory Committee also deleted two other rights from the list submitted by the sub-committee. These had nothing to do with the immediate situation and their omission apparently caused no stir at the time. But more than two years later, as we shall see, the rank and file of the Assembly would use these actions to prise from the leadership a liberalization of other rights. The clauses removed at the April meetings were those providing for secrecy of correspondence and for security of person and dwelling from unreasonable searches and seizures and from searches without warrant. Panikkar, Ayyar, Pant, Bakshi Tek Chand, B. N. Rau, Rajgopalachari, and Patel led the attack on the clauses. Secrecy of correspondence might aid spies and criminals, they said, and it would impair the working of the Indian Evidence Act of 1892. As to the second provision, it was claimed that the need was met under the Criminal Procedure Code. Moreover, Ayyar argued, 'under Indian conditions of distance and lack of transport in the interior' there might be need for immediate search when a warrant was unobtainable. If the police had to produce a warrant, the whole case might be lost, said Patel; 'what you are suggesting is a dangerous thing'.[88] Such clauses will help no one but lawyers, said a lawyer and a former High Court judge, and, anyway, said another lawyer, India in 1947 is different from the United States in 1790.

In the Assembly a week later, the provisos received a mixed reception. Their supporters explained that they were to prevent the misuse of the rights by subversive groups and were nothing more than the embodiment of precedent as it had been established by case law. The more common view was that the provisos so circumscribed the rights that they no longer had any meaning. As one member put it, the rights had been framed 'from the point of view of a police constable'.[89] The resistance to the provisos so evident on the floor of the House during the first two days of the session came to a head in the Congress Assembly Party meeting held on the evening of 29 April. That day had been one of 'Panic and Fear in Delhi City'; the streets and bazaars had been desolate, the coffee houses empty; wives had opened their doors slowly and fearfully before admitting their husbands returning from work.[90] Yet in the evening

[88] Ibid. See also Panikkar's minute of dissent to the Rights Sub-Committee Report, *Prasad papers*, File 1–F/47. For Ayyar's and Rau's views, see Ayyar letter to Patel, 18 April 1947, *Law Ministry Archives*, File CA/43/Com/47, and Ayyar's note on the subject, 17 April 1947, *Prasad papers*, File 1–F/47. Ayyar also opposed including a provision in the rights prohibiting excessive bail and cruel and unusual punishments; in his note cited above.

[89] *CAD* III, 2, 384; Somnath Lahiri. Pandit Kunzru felt the same way, see ibid., p. 380ff.

[90] From reports in *The Hindustan Times*, 30 April 1947.

the members of the Assembly Party resolved to omit all the provisos to the rights to freedom, leaving them qualified only by the condition that the rights be exercised subject to public order and morality and subject to exception in grave emergency.[91]

The Drafting Committee during its deliberations of late 1947 and 1948 turned its back on the will of the Assembly and revived the provisos in an even more intricate form, making the rights of free speech, assembly, association, movement, etc., subject to public order, morality, health, decency, and public interest. Furthermore, in the case of speech, the utterance must not be seditious, slanderous, or undermine the authority of the state.[92] The mechanism for suspending all the fundamental rights in emergencies had also been expanded. According to the Emergency Provisions in Part XI of the Draft Constitution, executive action could be taken even in contravention of the rights to freedom of Article 13, and the President of the Republic was allowed to suspend the right to constitutional remedies both during the emergency and for an additional period of six months.[93]

These changes, and the arbitrary manner of their making, aroused the ire of the Assembly, and the members strongly attacked the provisos during the debate on the Draft Constitution in the autumn of 1948. In reply Ambedkar gave the classic defence of the provisos. The rights of the American Constitution are not absolute, he said: 'In support of every exception to the Fundamental Rights set out in the Draft Constitution, one can refer to at least one judgement of the U.S. Supreme Court.' The purpose of the provisos, Ambedkar continued, was to prevent endless litigation and the Supreme Court having to rescue Parliament. The provisos permit the state 'directly to impose limitations on the Fundamental Rights. There is really no difference in the result,' he said.[94] But the attack persisted. The rank and file of the Assembly were not to be diddled again. Thakur Das Bhargava led the final assault, moving an amendment that would put a 'soul' back in Article 13 by inserting the word 'reasonable'

[91] Ibid. The Assembly consolidated into one other proviso several conditions made on the rights, particularly those regarding residence and acquisition of property, in the interests of the Adibasis, the Scheduled Tribes. For Jaipal Singh's strong advocacy of these protections for Adibasis, see proceedings of the Advisory Committee, 21 April 1947, op. cit.

[92] Article 13 of the *Draft Constitution*.

[93] Articles 279 and 280 of the *Draft Constitution*. The Drafting Committee (in a footnote, *Draft*, p. 132) explicitly denied this power to provincial governments and governors thereof. As all emergency powers were later taken from provincial governors and vested in the Union (see Chapter 8 below), this action lost its meaning.

[94] *CAD* VII, 1, 40–41. See also *CAD* VII 2, 3, and 4, and especially VII, 17 and 18. Ayyar also held this view. In a letter to the editor of the *Indian Express* (Madras), dated 28 July 1948, he explained that: 'The Draft Constitution, instead of leaving it to the Courts to read the necessary limitations and exceptions (to the rights) seeks to express in a compendious form the limitations and exceptions.' *Ayyar papers*. See also *The Indian Constitution* by B. N. Rau, reprinted from *The Hindu* of 15 August 1948 in Rau, *India's Constitution*, pp. 363–64.

before 'restrictions' in the various provisos.[95] The pressure on the floor and in the Assembly Party had been so great that the leadership capitulated. The Oligarchy agreed to sanction the amendment, and when Bhargava moved it, Ambedkar—chairman of the Drafting Committee—accepted it, and the Assembly adopted it.[96] Liberty had scored a triumph over bureaucracy's desire for maximum security. Thus the Constitution placed a major restriction on the scope of legislative competence, for the judges may review the reasonableness of restrictions placed upon rights and thus have '*mutatis mutandis* the same power in relation to Article 19 (of the Constitution, Article 13 of the Draft) which American judges enjoy generally under the due-process-of-law clause'.[97]

For some unexplained reason, the qualifying of the restrictions in the provisos by the word 'reasonable' was not done in the case of freedom of speech. This oversight—if such it was—was remedied a year later when the first amendment to the Constitution laid down that the right to freedom of speech should not prevent, among other things, 'the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order', etc.[98]

The Assembly's next task, so far as the Fundamental Rights were concerned, was to consider again limiting the rights by suspending them in times of emergency. The debate on the two relevant articles of the Draft Constitution took place in August 1949 at the time of the major debate on the Emergency Provisions. The first of the two provisions, which laid down that while a Proclamation of Emergency was in force, nothing in the seven-freedoms article should restrict state action, was passed with a minor change, only three voices raised in dissent.[99] To the critics, whose general point was that sufficient limitations on the rights already existed, Ambedkar replied that the Article did not suspend the rights; it only made certain state actions permissible.[1]

[95] *CAD* VII, 17, 735–40; Thakur Das Bhargava.

[96] The following day the Assembly adopted a reworded version to the proviso to the freedom of speech. In the new form, the word 'sedition' was omitted, although utterances still should not endanger the security of, or tend towards the overthrow of, the state. This change was apparently made largely on Munshi's insistence (see ibid., pp. 730–2) that sedition had too general a meaning.

[97] Alexandrowicz, op. cit., p. 46.

[98] *The Constitution* (*First Amendment*) *Act* 1951, para. 3(a). This amendment to the Constitution was not a result of this omission; the amendment stemmed from other causes to do with court interpretations of the freedom of speech clause. For a detailed account of this, see Alexandrowicz, op. cit., pp. 47–49. For an illuminating discussion of the Fundamental Rights and their provisos, see Alexandrowicz, pp. 46–64 and Chapter 3.

[99] Article 279 of the *Draft Constitution*. The change (see Article 358 of the *Constitution*) established that if any law repugnant to the freedoms of Article 19 (Draft 13) were passed during the Emergency, the law should to the extent of this repugnance be void when the Proclamation of Emergency ceased to operate.

[1] *CAD* IX, 5, 180–6, especially 185.

The Assembly's reaction to article 280, which would have allowed the right to constitutional remedies (including habeas corpus) to be suspended not only during the period of emergency, but for six months thereafter, was both sharp and effective. The objections had built up to such a point that, within an hour of the debate being opened, Ambedkar asked that the article be held over pending further consideration by the Drafting Committee. When the article was reintroduced sixteen days later, it had been greatly modified in response to the various criticisms. The new version did not allow the blanket suspension of the right to constitutional remedies, but only the suspension of recourse to the courts for the enforcement of any right specifically named in a presidential order issued under a Proclamation of Emergency. Furthermore, such an order should last only during the declared period of emergency, or for a shorter time; it could apply to parts as well as to the whole of the country; and every presidential order made under the article must be laid 'as soon as may be' before Parliament.[2] The new version appears to have had the tacit support of some of its earlier critics,[3] but it remained unpopular with the rank and file despite the assurances of A. K. Ayyar that the President would not act 'in a spirit of vandalism' and the arguments of Ambedkar and others that the whole article had its source, if not its equivalent, in the power of the American Congress to suspend the right of habeas corpus, and in the American President's interim right to take such action.[4] This provision continues to be disliked and feared a decade and a half later. There is, however, little evidence that under it the Government has worked injustice on the people of India.

THE ASSEMBLY AND THE DIRECTIVE PRINCIPLES

The Directive Principles of State Policy set forth the humanitarian socialist precepts that were, and are, the aims of the Indian social revolution. With these precepts, few if any Assembly members disagreed. Amid the general acclaim for the Principles, which were the offspring of the Objectives Resolution, almost the only critical voices were those of members who believed that the provisions of the Directives should be justiciable if they were to be adequate to their task, and those of a few members who had a quarrel with a particular provision within the Principles. T. T. Krishnamachari found few supporters for his colourful description of the Directive Principles as 'a veritable dustbin of sentiment

[2] Article 359 of the *Constitution*.

[3] For the debate on this provision, see *CAD* IX, 5, 186–96, and *CAD* IX, 14, 523–4. See particularly the speech of H. N. Kunzru (*CAD* IX, 5, 192–93) in relation to the final version.

[4] *CAD* IX, 14, 549. For a discussion of this provision, see Alexandrowicz, op. cit., pp. 29–30.

. . . sufficiently resilient as to permit any individual of this House to ride his hobby horse into it'.[5]

The roots of the Directive Principles may be traced back to the 1931 Karachi Resolution, or farther, and to the two streams of socialist and nationalist sentiment in India that had been flowing ever faster since the late twenties. It is not unreasonable to conjecture also that the placing on the government of a major responsibility for the welfare of the mass of Indians had an even deeper grounding in Indian history. Under a petty ruler, a Mogul emperor, or the British Raj, responsibility for both initiation and execution of efforts to improve the lot of the people had lain with the government. What the government did not do, or see done, usually was not done. The masses had, generally speaking, looked to the ruler for dispensations both evil and good. Heir to this tradition, Assembly members believed that the impetus for bringing about the social revolution continued to rest with the government.

There were also many contemporary instances of the same process. Assembly members, and especially the select group in the Fundamental Rights Sub-Committee, knew that in the United States it had become constitutional practice for the federal and state governments to play an ever increasing role in the nation's social and economic life. Their knowledge of the constitutions of Europe—particularly those of Germany and East Europe—framed after the First World War could only have shown them that 'the most characteristic feature of the new constitutions was the recognition of the fact that one of the chief functions of the State must be to secure the social well-being of the citizens and the industrial prosperity of the nation.'[6]

Equally, the Congress's long-standing affinity with the Irish nationalist[7] movement made the example of constitutional socialism expressed in the Irish Directive Principles of Social Policy especially attractive to a wide range of Assembly members. The ideal of secular socialism in the European style also received strong support, of course, from members of the small, but influential, Congress Socialist Party. The Hindu outlook and the Gandhian experience would ultimately make themselves felt in the Assembly as we shall see, and would affect the content of the Directive Principles, but at no time did the Assembly attempt to base its socialist aims upon, or to draft the Directive Principles in terms of, a religious

[5] *CAD* VII, 12, 583. Some two months after giving this speech, Krishnamachari became a member of the Drafting Committee and his criticisms of the Draft's provisions became much less barbed.

[6] Agnes Headlam-Morley, *The New Democratic Constitutions of Europe*, p. 264.

[7] The Irish-Congress relationship extended back to the late nineteenth century. Discussing the question of Fundamental Rights, the authors of the Nehru Report spoke of Ireland as 'the only country where the conditions obtaining before the treaty were the nearest approach to those we have in India'. The first concern of the Irish and the Indians, the Nehru Report continued, was 'to secure the Fundamental Rights that have been denied to them'. *Nehru Report*, op. cit., p. 89.

ethic exhumed from an almost mythical past. Nehru and other Assembly members at times referred to the ancient roots of Indian socialism, but these allusions were made more for the sake of form than from historical conviction.[8]

The framing of the Directive Principles in the Rights Sub-Committee proved the wide acceptance of both the device of precepts, and if the effectiveness of the device itself was questioned, of the sentiments they expressed. The most weighty support came from B. N. Rau and Ayyar, and secondly from Ambedkar and K. T. Shah— whose suggestions proved them to be thoroughly liberal in outlook. Of the four, Rau was the most influential. He approached the question of fundamental rights, unlike Sapru, Ayyar, and many other British-trained lawyers, with a certain scepticism. The difficulty of defining negative rights and then of effectively protecting them led him to skirt this 'controversial ground',[9] and instead to prefer 'to set out the positive rights merely as moral precepts for the authorities concerned and to bar the jurisdiction of the ordinary courts . . .'.[10] This belief, in turn, led to Rau's acknowledged emulation in his *Constitutional Precedents* of the Irish example of distinguishing between justiciable and non-justiciable rights, and to his putting the emphasis on precepts rather than on justiciable rights. His Precedents, during the actual drafting of the Directive Principles, supplied the members of the sub-committee with at least five of the original twelve provisions and the preamble of the Principles.[11]

In later months Rau publicly defended the Directives: '. . . Many modern constitutions do contain moral precepts of this kind', he wrote in *The Hindu* in August 1948, 'nor can it be denied that they may have an educative value.'[12] He would also have lifted the Principles above the level of precepts. It may be occasionally necessary, he believed, for the state to invade private rights in the discharge of one of its fundamental duties—e.g., to raise the nation's standard of health, of living, etc. But the Fundamental Rights being justiciable and the Directive Principles being without legal force, the private right may over-ride the public weal. It is thus a matter for careful consideration, he continued, whether 'the Constitution might not expressly provide that no law made and no action taken by the state in the discharge of its duties under Chapter III of Part

[8] There are many persons in India, however, who do choose to root Indian socialism in a Hindu base. Of several books on the subject, two are: A. R. Desai, *Social Background of Indian Nationalism*, and a recent volume, Sampurnanand, *Indian Socialism*.

[9] Rau, *Constitutional Precedents, Third Series*, p. 22.

[10] Ibid., p. 11. See pp. 10–24. The major portions of this work appears in Rau, *India's Constitution*, op. cit., Chapter 13.

[11] Compare ibid., pp. 21–22 with the text of the Directive Principles as they were first presented to the Assembly in August 1947; *Supplementary Report of the Advisory Committee on Fundamental Rights, Reports, Second Series*, pp. 48–49. In his *Precedents*, Third Series, Rau makes the origin of some of these provisions clear; see pp. 21–23.

[12] Reprinted in Rau, *India's Constitution*, pp. 364–5.

III (the Directive Principles) shall be invalid merely by reason of its contravening the provisions of Chapter II (the Fundamental Rights).'[13]

Munshi, Ambedkar, and Shah would have gone even farther than Rau. They would have made the Directive Principles, or an even more rigorous social programme, justiciable. They disliked mere precepts and in the end, supported them in the belief that half a loaf was better than none. Munshi had included in his draft list of rights 'Rights of Workers' and 'Social Rights', which included provisions protecting women and children and guaranteeing the right to work, a decent wage, and a decent standard of living. In his letter transmitting the list to the Assembly secretariat, he noted that India had special social problems because of the gap between socialist thinkers and the feudalism of some areas.[14] Later, Munshi came out strongly in favour of the Principles: 'Even the non-justiciable rights have to be announced', he wrote, 'in order to form the basis of protest against arbitrary legislation. They are a body of doctrines to which public opinion can rally.'[15]

Ambedkar submitted to the Assembly a lengthy (and one must add, fascinatingly detailed) list of fundamental rights that included the rights proper plus provisions regarding minorities, particularly the Scheduled Castes, and a social scheme to come into force in ten years. This scheme provided, among other things, that all key industries should be owned and operated by the state, that all land should be nationalized and agriculture become a state industry—with organized plots to be formed by villagers. Insurance should be a state monoply and every adult Indian should be compelled to have life insurance—an idea akin to American Social Security.[16] His social scheme, as well as many other provisions in his programme, was rejected on several occasions in the Assembly on the ground that such provisions should be left to legislation and not be embodied in the Constitution.[17] From this position Ambedkar retreated to the support of the Directive Principles. The party in power, he said, would certainly 'have to answer for them before the electorate at election time'.[18]

[13] Rau, *Notes on Certain Clauses* (of his Draft Constitution of 7 October 1947); Shiva Rao, op. cit., II.

[14] Munshi to H. V. R. Iengar, secretary of the Assembly, 15 March 1947; *Law Ministry Archives*, File CA/43/Com/47. The list of rights is that of 15 March 1947, op. cit.

[15] Munshi, *Notes on a Constitution*, undated, but possibly written late in 1947, *Munshi papers*.

[16] Ambedkar, *States and Minorities*, Section II, Clause 4. Ambedkar's views here show a close relationship to those of T. H. Green. Ambedkar believed that his draft provisions did not go beyond the proper scope of fundamental rights because of the connection between 'liberty and the shape and form of the economic structure'. Many persons have to relinquish their fundamental rights to exist, he said. 'In other words, what is called liberty from the control of the State is another name for the dictatorship of the private employer.' See ibid., Explanatory Note, pp. 31–32.

[17] See correspondence with Kripalani, Patel, and the Steering Committee of the Assembly, plus minutes of Steering Committee meeting 28 April, 1947; *Prasad papers*, File 2–S/48.

[18] *CAD* VII, 1, 41–42.

K. T. Shah, a graduate of the London School of Economics, one time member of Gray's Inn, and a Bombay advocate since 1914, was perhaps the most doctrinaire socialist in the Constituent Assembly. He supported Ambedkar in the above instance, believing also that there must be a specified time limit within which all the Directive Principles must be made justiciable. Otherwise they would be mere 'pious wishes' and so much window dressing for the social revolution.[19] Shah also made it plain many times in the Assembly that he thought that all natural resources should be the state's property, as well as key industries and other aspects of the economy.

Alladi Krishnaswami Ayyar held more sceptical views on the Directive Principles. In a note to the Rights Sub-Committee he doubted the effectiveness of such precepts in a federal constitution; yet he supported their inclusion in the Constitution.[20] His position appeared to change somewhat as a result of Partition and as the strongly centralized federalism of the Constitution emerged. By November 1948 he could tell Assembly members critical of the lack of socialism in the Draft Constitution that the legislatures of the nation could evolve such an order because it was 'idle to suggest' that any freely elected legislature would ignore the sense of the Directive Principles.[21]

The initial approach of Rights Sub-Committee members, perhaps even more than Rau and others, was to make no distinction between positive obligations and negative liberties: both had long been part of the national demand, why should they now be separated? As the members drafted the negative rights, however, it became evident that some were more susceptible to court enforcement than others, and members began talking of a section of non-justiciable rights. The right to free primary education, for example, was first included among the justiciable rights and then taken out again. The right of equality before the law was taken from the Principles and made justiciable.

At the meeting on 30 March 1947, the sub-committee turned its full attention to the positive rights. Using Rau's draft, his collection of precedents,[22] and particularly the example of the Irish Constitution, the members adopted in rapid succession provisions laying down that the state should promote social, economic, and political justice; that the state

[19] Shah's minute, dated 20 April 1947. *Prasad papers*, File 1–F/47. Also his letter to the sub-committee of 10 April 1947; Shiva Rao, op. cit., II. For Shah's support of Ambedkar, see his letter to Prasad, 23 April 1947; *Prasad papers*, File 2–S/48. For Shah's scheme for an economic council to be provided for in the Constitution, see Rau, *India's Constitution*, p. 88.

[20] Ayyar, note for the Rights Sub-Committee, dated 24 or 25 March 1947; *Ayyar papers*.

[21] *CAD*, VII, 4, 336.

[22] Rau, *Precedents*, Third Series, op. cit., pp. 21–22. The members also drafted provisions based on Munshi's draft fundamental rights and based on articles in Lauterpacht's 'International Bill of Rights of Man'. See minutes of the meeting; *Prasad papers*, File 1–F/47.

should try to secure an adequate livelihood for all citizens and should control the nation's economy and material resources in the common interest; that equal pay should be given for equal work; and a variety of like provisions.[23] The members also drafted a clause stipulating that marriage should be based on mutual consent, but this was later dropped.[24]

At the next day's meeting, the sub-committee decided to introduce the Directive Principles of Social Policy, as they were then called, with a preamble explaining that they were for the general guidance of the government and were not cognizable in any court. The break with the Fundamental Rights had been made. The members went on to adopt provisions based on Rau's draft to the effect that the state should raise the level of nutrition and the standard of living of the people, and promote international peace and just dealings between nations.[25] Certain changes and counter-changes were made during the next several weeks, but, in general, the first stage of drafting the Directive Principles was over.

The framing of the provision regarding a uniform civil code provides an interesting aside to the sub-committee's work. In India in 1947, despite the inroads on personal law during the British period, many Indians lived their lives untouched by secular law, whether civil or criminal. The idea of a uniform civil code, therefore, struck at the heart of custom and orthodoxy, Hindu, Muslim, and Sikh. During the days when the Principles were to be justiciable, Minoo Masani moved in a sub-committee meeting that it was the state's responsibility to establish a uniform code, in order to get rid of 'these water-tight compartments', as he called them.[26] The members voted against the recommendation five to four on the ground that it was beyond the sub-committee's competence.[27] Yet two days later the members approved the inclusion of the provision, but only after it had been decided to create a non-justiciable section of the rights where the clause could be put. The reason behind these actions was not, as it might at first appear, the wish to avoid a clash with Hindu orthodoxy, but a sensitivity, particularly on Nehru's part, to the fears of the Muslims and the Sikhs. Had the provision been in the rights, it would have been justiciable and perforce applicable equally to all communities. In the Principles, action could be taken at the will of Parliament in regard to one community—as happened with the Hindu Code Bill a few years later. That the sub-committee refused to make the clause justiciable largely to calm Muslim fears can be seen in a letter written to Patel, as

[23] The provisions adopted were those later listed as Clauses 2–7 of the *Supplementary Report on Rights, Reports, Second Series*, p. 48. See minutes of the meeting, op. cit.

[24] A provision borrowed from the Japanese Constitution (Art. XXIV) of 1946, ibid.

[25] Clauses 9, 10, and 12 of the *Supplementary Report*.

[26] Minutes of the meeting, 28 April 1947; *Prasad papers*, File 1–F/47. See also Masani's minute of dissent to the sub-committee's draft rights, undated; ibid.

[27] Voting for the justiciable code were Masani, Mrs. Mehta, Amrit Kaur, and Ambedkar; against were Kripalani, Daulatram, Shah, Munshi, and Ayyar. Minutes of the meeting, 30 March 1947; ibid.

chairman of the Advisory Committee, in late July 1947 by Masani and Amrit Kaur and Mrs. Mehta, who had supported Masani's initiative the previous March. The letter recalled the earlier rejection of their efforts and went on, 'In view of the changes that have taken place since (meaning, certainly, Partition) and the keen desire that is now felt for a more homogenous and closely knit Indian nation' we wish the Advisory Committee again to consider the matter when it meets on 28 July.[28] Their efforts were unsuccessful, however, and the clause remained one of the Directive Principles.

The second stage in the framing of the Principles took place on the Assembly floor in November and December 1948 during the debate on the Draft Constitution. An earlier debate—held in August 1947 on the occasion of Patel's presentation of the Advisory Committee's Supplementary Report—was of little consequence.[29]

The Assembly's reaction to the draft Principles revealed two major currents of opinion: one that the Directives did not go far enough towards establishing a socialist state, and the other that they should have placed greater emphasis on certain institutions and principles central to Indian practice and to Hindu thought, particularly those glorified by Gandhi's teaching. These two reactions became increasingly evident from March 1948 onward as amendments to the Draft Constitution began to come into the Assembly Secretariat; by November 1948 there were scores of amendments to the Principles.[30]

The majority of the amendments would have encouraged the development of village life and economy and the panchayat system of village organization, as we have seen. Some Assembly members sought to make the promotion of cottage industry a government responsibility and to make it incumbent upon the government to prevent the slaughter of cattle and to improve the methods of animal husbandry and agriculture. A further provision demanded by this same group was prohibition of harmful drugs and intoxicating drinks—a provision founded largely on Gandhian puritanism and directed primarily towards socially and physically depressed industrial workers.

Gandhi had made cottage industries, particularly home spinning, for psychological if not for economic reasons, a central part of the independence movement. Gandhi's economic aims were two: to attack village poverty and to provide an alternative supply of textiles to the hated foreign cloth. In the Assembly there was, as even Ambedkar admitted, 'a considerable amount of feeling'[31] in favour of government encouragement for cottage industries, and this sentiment forced him, as

[28] Letter dated 25 July 1947; *Law Ministry Archives*, File CA/24/Com/47–III.

[29] See *CAD* V, 11, 333–75. The wording of the Directive Principles in the Draft Constitution was virtually that of the Supplementary Report.

[30] For the texts of these amendments, see *Amendment Book* I, pp. 87–106.

[31] *CAD* VII, 11, 535.

the spokesman of the Drafting Committee, to accept an amendment placing 'the promotion of cottage industries' in the Directive Principles.[32] The motives of the Assembly members supporting the provision may be described as more romantic than clear-eyed, more well-intentioned than practical. And for good or ill, the cottage industries programme since 1950 has received less support from the federal and state governments than others named in the Principles—less than, for example, the programme to build up panchayats and to improve agriculture.

The provision pertaining to the improvement of agricultural and animal husbandry techniques and the prohibition of cow slaughter was added to the Directive Principles for a mixture of reasons. The need to improve agriculture was obvious, and cattle generally, the cow particularly, held a place of special reverence in Hindu thought. The religious aspect of cow protection had also long-standing political ramifications. Indian Muslims killed cows both for food and as part of religious ceremonies.[33] Hindus, of course, resented this; cow protection societies had existed for at least sixty years prior to the Assembly, and a religious difference had become a major political cause espoused by genuine believers and unscrupulous opportunists alike, for reasons both honourable and otherwise. In the days of the British Raj, many Hindu revivalists had promised themselves that with independence cow killing would stop. Those of this persuasion in the Assembly believed that the time for action was ripe and, as a result of agreement in the Congress Assembly Party meeting,[34] the measure passed without opposition. No one would have quarrelled with the need to modernize agriculture, but many may have found the reference to cow-killing distasteful. There is good evidence that Nehru did.[35] Generally speaking, however, Hindu feeling ran high on the subject, and one may surmise that those who opposed the anti-cow-killing cause bent with the wind, believing the issue not sufficiently important to warrant a firm stand against it. As various provisions of the Irish Constitution show that Ireland is a Roman Catholic nation, so Article 48 shows that Hindu sentiment predominated in the Constituent Assembly.

With prohibition it was a different matter. Hindus relying on Gandhi's teaching and Muslims deriving their authority from the Koran could all inveigh against the evils of drink. Moreover, drinking had never been common among the Indian middle classes. The arguments for prohibition

[32] See Article 43 of the *Constitution*. The amendment that Ambedkar accepted was moved by I. A. R. Chettiyar; see ibid., p. 532.

[33] Hindus slaughtered cattle, too, of course, and in vastly greater numbers than did Muslims—a fact acknowledged in the Assembly by a supporter of the ban on cow-killing, Thakur Das Bhargava. See *CAD* VII, 12, 578–80.

[34] *CAD* VII, 12, 568.

[35] See Nehru's letter to Prasad 7 August 1947; *Prasad papers*, File, Important Letters from Various Files.

were not wholly unreasonable. In many industrial areas (the steel mills of Bihar and Bengal, for example) and especially in Harijan areas, depressed, underfed workers sought solace in liquor to the great detriment of their health. The advocates of prohibition had both social and doctrinal strings to their bow, and they were supported by the Congress's decade-old official dedication to the cause of prohibition.[36] Opposition to this conservative outlook came from the more liberal elements in the Assembly, who cited the United States' disastrous experience, and particularly from members of provincial governments, who knew to what good use the huge income from liquor excise could be put.[37] The Assembly, however, adopted a revised version of the amendment moved by a Muslim and a Hindu.[38] The prohibition of liquor and harmful drugs (e.g. opium) became a fundamental principle of governance, and today the sale of alcoholic drinks is in varying degrees restricted in nearly every state in India.

The second major criticism, as has been said, of the draft Principles when they were introduced in the Assembly was that they did not go far enough in encouraging a socialist society. The several dozen amendments submitted in this vein called for the nationalization of various industries, and phrases such as 'socialist order' and 'socialist economy' were common. One amendment read that 'the profit motive in production (should be) entirely eliminated in due course of time'.[39] Another was aimed at giving 'the workers in the fields and factories effective control of the administrative machinery of the State'.[40] Most of these amendments were voted down in Assembly Party meetings or were withdrawn by their initiators. Those substantive amendments reaching the Assembly floor were not adopted because the majority of members held with the Oligarchy that the Principles should be kept general, leaving 'enough room for people of different ways of thinking' to reach the goal of economic democracy.[41]

[36] In 1937, when the Congress ministries assumed office, the party high command ordered them to enforce prohibition within three years regardless of the loss of revenue. R. Coupland, *The Indian Problem*, Vol. II, p. 141.

[37] In the fiscal year 1936–7, excise duties on liquor and drugs yielded an average of 17 per cent. of provincial income (26 per cent. in Bombay, 25 per cent. in Madras, and 13 per cent. in U.P.); the strict enforcement of prohibition in Bombay cost that government nearly 200 lakhs of rupees—about £1,500,000. Ibid. Despite this, B. G. Kher, the prime minister of Bombay, supported prohibition in the Assembly, *CAD* VII, 12, 561ff.

[38] K. S. Karimuddin and M. Tyagi. See *CAD* VII, 9, 500ff, and *CAD* VII, 10 and 12.

[39] Amendment 894, submitted by V. D. Tripathi, *Amendment Book* I, p. 92.

[40] Amendment 866, submitted by A. R. Shastri, ibid., p. 90.

[41] *CAD* VII, 9, 494–5; Ambedkar.