

Granville Austin, The Indian con
Cornerstone of a Nation
OUT

4

Fundamental Rights—II Social Reform and State Security Versus 'Due Process'

THE classic statement of the right to 'due process' is that of the Fifth Amendment of the American Constitution: ' . . . nor shall any person . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.' Since 1787 every people who have intended to give themselves a written constitution have had to decide what are the citizen's rights to life, liberty, and property, and within the context of their own aims and experience in what way and to what degree these rights are to be limited for the good of society as a whole. India was no exception to this. The Constituent Assembly's treatment of the due process issue is worthy of detailed study for it shows how the members approached the conflict between, on the one hand, the principles of abstract justice and the desire of all good men to be just and fair, and on the other hand, the need to solve the pressing problems of social reform and state security (stability being a pre-requisite to reform) as a means to advance the common good.

Although many Assembly members first approached the due process issue as if it were one simple issue, experience in constitution making soon taught them that it was intimately connected with two very important problems: with the expropriation of property, and compensation for it, and with preventive detention. It took Assembly, members nearly three years to decide how to treat these matters in the Constitution.

When the Fundamental Rights Sub-Committee took up the question of due process, it voted five to two, with two abstentions, to include the clause in its classic form.¹ Two days later the members reinforced their earlier decision, providing that no private property could be acquired for public use unless the law called 'for the payment, according to principles previously determined, of just compensation for the property acquired'.² In this form the matter went to the Advisory Committee.

On 21 April the Advisory Committee as a whole met and considered the due process clause. The importance of the meeting lay as much in its effect on the attitudes of members as in the decision reached.³ Early in the discussion Pandit Pant gave his opinion that due process would be understood only in a procedural sense. But Ayyar quickly disillusioned him, to be subjected to a return fire of questions from Pant. Could a legislature under the clause empower the Executive to detain a person for six months without trial, Pant asked. Could a legislature pass a law acquiring property for public purposes at ten times the rental value when the market value was thirty times the rental? Could a tenant-at-will be ejected from his holding? Alladi answered. In the first place, he said, the aim of due process is to limit legislative power. He recognized that the clause might endanger property, tenancy, and other legislation, and that much depended on the ideas and interpretations of judges. Yet the Fundamental Rights Sub-committee had taken all this into consideration and had still decided to retain the clause.⁴ 'Personally, I am for the retention of the clause,' he said. He told Pant that the acquisition of property in his example might not be 'due process' because the compensation was so small, nor was it certain that tenants could be ejected. Rajagopalachari told Pant that detention without trial could not take place under due process.

What you are saying comes to this, then, said Pant: that the future of the country will be determined 'not by the collective wisdom of

¹ Minutes of the meeting, 26 March 1947; *Prasad papers*, File 1-F/47.

² Minutes of the meeting, 28 March 1947; *ibid.*

³ All citations from this meeting have been taken from the proceedings in Shiva Rao, *op. cit.*, II.

⁴ Ayyar had expressed these views verbally to the sub-committee at the meeting of 25 March, and in a note, undated but probably written in mid-April; see *Prasad papers*, File 1-F/47.

the representatives of the people but by the fiats of those elevated to the Judiciary'. We cannot be subject to varying court judgements, to the whims and vagaries of judges. And, he continued, if we can't put mischief makers in jail 'there is no end to these communal disorders.' He declaimed: 'To fetter the discretion of the Legislature would lead to anarchy.'

Ambedkar and Munshi opposed Pant's view. Ambedkar said he could see Pant's point, but he didn't agree that the leader of the opposition in the United Provinces (where Pant was premier) could be jailed for six months without trial. There is no need to give *carte blanche* to the government to detain with a 'facile provision', he said. The Fundamental Rights, including *habeas corpus*, could be suspended in an emergency, said Ambedkar, and this was enough basis for detention. As to property and tenancy legislation, the latter would not be endangered by due process and a special proviso could keep property legislation out of the courts. Munshi replied to Pant that no provision prohibiting detention had been put in the clause so as not to fetter government action. But, he said, due process prevented legislative extravagance, and there should be no fear that judges would replace the legislatures.⁵

At this point Panikkar suggested that life and liberty should be separated from property in the rights. The courts should guard our life and liberty, he said, and there should be no detention. But, 'so far as property is concerned, it must be subjected to legislation'.⁶ Patel, who had said little previously, interrupted here, arguing that they must deal with property separately. And a few minutes later he made a motion to this effect. The committee adopted this course—with Pant's parting shot that he didn't agree but would keep quiet. The clause in the committee's Interim Report to the Assembly read that

⁵ In their respective lists of draft rights, op. cit., Munshi and Ambedkar had both included due process as a protection for life, liberty, and property.

⁶ Panikkar had expressed the view to the Rights Sub-Committee that: ' . . . the Judiciary should be the guardian, the upholders, and the champion of the rights of the individual, (but) it should not be entrusted with powers restricting the legislative powers of the Union except to the barest extent possible and solely for the purpose of resisting the encroachments of the State on the liberty of the individual.' Minute of dissent to the Rights Sub-Committee Report, dated April (about mid-month) 1947; *Prasad papers*, File 1-F/47. Panikkar was the States' representative on the sub-committee and joined it on 14 April, 1947.

no person could be deprived of life or liberty without due process of law. A few days later the Assembly adopted the provision without debate.⁷ Reference to property had been made elsewhere.

The committee's decision had no clear relation to Indian constitutional precedent. Neither the Nehru Report nor the Karachi Resolution had used the wording of due process, although the phrases employed in them could be interpreted to mean something akin to it.⁸ The 1935 Government of India Act had made no mention of personal liberty, but did provide that no person could be deprived of his property except by authority of law and that no legislature could authorize the compulsory acquisition of property unless the law provided for the payment of compensation and either fixed the amount of compensation or the principles on which it was to be paid.⁹ The rights drafted by the Congress Experts Committee during the summer of 1946 had also omitted reference to due process and personal liberty, saying only that property could not be taken from its owner without 'compensation prescribed by law'.¹⁰

B. N. Rau's advice to the Assembly and the committees had been to dispense with due process altogether. In his *Precedents* series he had explained that due process in the Fifth and Fourteenth Amendments to the American Constitution had been conceived as a limitation on legal procedure, but came to apply to substantive questions as well. He warned the Assembly that:

The Courts, manned by an irremovable Judiciary not so sensitive to public needs in the social or economic sphere as the representatives of a periodically elected legislature, will, in effect, have a veto on legislation exercisable at any time and at the instance of any litigant.¹¹

After the Fundamental Rights Sub-Committee had included the due process clause in its report to the Advisory Committee, Rau

⁷ CAD III, 3, 468. For the text of the provision at this stage, see *Interim Report*, Clause 9; *Reports, First Series*, p. 25.

⁸ Both the Nehru Report and the Karachi Resolution used the phrase that liberty and property were the individual's 'save in accordance with the law'. It would be argued subsequently in the Assembly that 'save in accordance with the law' permitted judicial review because it meant natural law, whereas review could be blocked by using the phrase 'according to procedure established by law', which meant law as laid down by the legislature. See below, pages 105 and 113.

⁹ 1935 Act, Section 299, to which frequent references will hereafter be made.

¹⁰ See *Prasad papers*, File 16-P/45-6-7.

¹¹ Rau, *Precedents*, Third Series, op. cit., pp. 17–18.

reiterated his warning. Forty per cent of the litigation before the U.S. Supreme Court during the past fifty years had centred around due process, he wrote, and due process means only what the courts say it means. To include it in the Constitution might open to litigation tenancy and property laws as well as laws concerning debt, moneylenders, and minimum wages.¹² 'It must be admitted', he continued, 'that the clauses are a safeguard against predatory legislation, but they may also stand in the way of beneficent social legislation.'¹³ He concluded that it might be a wise idea to steer a middle course and to adopt the device in the Irish Constitution, which provided that the exercise of certain rights 'be regulated by the principles of social justice'.¹⁴

In the following sub-section we shall continue to examine the Assembly's treatment of the property issue. And in sub-section 3 we shall consider the Assembly's discussion of due process as it applied to life and liberty.

1. Due Process and Property

By the decision of the Advisory Committee to remove from private property the protection of due process the Legislature had gained in power at the expense of the Judiciary and perhaps of abstract justice. This trend would become even more marked. The day after the Advisory Committee took this action, it moved to restrict further the power of the Courts to review property legislation.

On 22 April the Advisory Committee took up the Rights Sub-Committee's draft clause that property could be acquired for public use only on the payment of just compensation—'just' being the word that clearly left the provision open to judicial interpretation.

¹² In their dislike of due process Rau and later Ayyar seemed prone to seek the Support of U.S. Supreme Court decisions of the early part of the century, when wages and hours legislation had been invalidated on the ground that it violated due process, and not to look to the decisions handed down in the thirties and forties modifying or overturning these judgements. Only in cases concerning compensation and property were more recent opinions cited, cases in which the Court had declared compensation for expropriated property inadequate.

¹³ Rau, *Explanatory Notes on Clauses*, Annexure II, to the F.R. Sub-Committee report of April 1947; op. cit.

¹⁴ Ibid. Rau referred to Article 43(2) 1 and 2 of the Irish Constitution, 1937.

Opening the meeting, Pant asked if 'public use' meant tenancy legislation. Ayyar replied that it did not. Patel then called for a vote on the clause. He announced that eighteen members favoured its retention, and that it would be kept as worded.¹⁵ Ambedkar, however, was more cautious. What did 'public use' mean, he wondered. Pant then said: Suppose the government acquires zamindari rights and then abolishes them. Or what if the Government takes over Connaught Place (the central shopping and office area of New Delhi) and then redistributes the buildings to the tenants? The first stage is acquisition. Does that come under this clause? To Ayyar's answer of 'Certainly', Pant replied that he opposed the wording if it meant that the government would not be free to determine the compensation it would have to pay. If this clause covers all cases of acquisition, said Rajgopalachari, then the question of the justness of compensation will go to the courts 'with the result that government functioning will be paralyzed'.

Ayyar replied that the wording of the clause was close to that of Section 299 of the 1935 Act, which had never interfered with the acquisition of property. He added: 'After all, "compensation" carries with it the idea of "just compensation". Therefore the words "just compensation" have been used.' Under the wording of Section 299¹⁶ said Ambedkar, programmes like Pant's Zamindari Abolition Bill in the U.P. might still be affected. To which Panikkar suggested that they should take out the 'just' so that it would not be justiciable. Pant replied that if this covered acquisition for social purposes, 'then I submit payment of compensation should not even be compulsory'. Patel concluded the discussion. 'If the word "just" is kept,' he said, 'we came to the conclusion that every case will go to the Federal

¹⁵ All citations here are taken from proceedings of the meeting, 22 April 1947; Shiva Rao, op. cit., II.

¹⁶ Section 299 laid down that no one could be deprived of his property 'save by authority of law'. No legislature in the provinces or at New Delhi could authorize the compulsory acquisition of any sort of property unless the law provided 'for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined'. But essential to the property safeguards of the Section was Clause (3), which provided that no law for the taking of property, or rights in land revenue, could be introduced in any legislature without the previous sanction in his discretion of either the Governor-General or the Governor of the province.

Court. Therefore "just" is dropped.¹⁷ Yet the matter was not so easily solved. Two years would elapse before the Assembly completed drafting the provision.

The Assembly greeted the committee's actions favourably. Only two members opposed the provision on the grounds that it did not provide for 'just' compensation; others sharing this attitude may have decided to hold their peace, however, rather than publicly support such an unpopular cause.¹⁸ The speakers demanded that positive action be taken to protect the tiller of the soil, that 'landlordism' and capitalism must be abolished, and that if compensation were paid to an expropriated zamindar—the debaters concerned themselves wholly with agricultural land—it should be nominal, perhaps enough for a few years maintenance for himself and his family.¹⁹ Zamindars were subjected to such intense criticism partly because they were popularly associated with support for the British Raj, a belief that had some justification in fact,²⁰ and partly because they had, generally speaking, rarely improved the land and had rack-rented their tenants for generations. In some areas anti-zamindari sentiment also had a communal aspect; in parts of Bihar and the United Provinces, for example, many Hindu peasants had Muslim landlords, a situation easy to exploit politically, particularly at this time.

Sardar Patel closed the debate with a speech that sounded like a requiem for landlords. Patel began by saying that the clause was not directed primarily at zamindars, although land and 'many other things may have to be acquired'.²¹ Moreover, compensation would be paid for property taken; there would be no expropriation. But, he continued, zamindars could not protect their interests with speeches in the Assembly for before the Constitution came into effect 'most of the zamindaris will be liquidated'. Legislation was already being framed in many provinces to eliminate zamindaris,

¹⁷ Proceedings, op. cit.

¹⁸ The two were: Jaganath Baksh Singh and Syamandan Sahaya; *CAD III*, 5, 506 and 515–16.

¹⁹ For this debate, see *CAD III*, 506–18.

²⁰ For example, the *Report of the Joint Parliamentary Committee*, pp. 217–18, said that the 1935 Act should give 'specific attention' to land rights of jagirdars and Talukdars (especially those of Oudh) with rights dating from Mogul and Sikh times, and those given by Britain in return for services.

²¹ *CAD III*, 5, 518.

'either by paying just compensation or adequate compensation, whatever the legislatures there think fit'.²² Despite Patel's assurances that landlordism was all but finished, and that the provision under discussion had little to do with it anyway, Assembly members continued to think primarily in these terms.

The property provisions in the Draft Constitution appeared briefly before the Assembly in November and December 1948 during the year-long debate on the Draft Constitution. The first of the two provisions considered was the right 'to acquire, hold, and dispose of property'. This article dated from the Advisory Committee's Interim Report, and the Assembly adopted it with little debate. As part of the omnibus 'freedoms' article, this right was liberalized by Bhargava's amendment, becoming subject only to 'reasonable' restrictions either in the public interest or the interests of Scheduled Tribes.²³

With the right to possess property guaranteed in the Constitution, the Assembly again considered the extent of the state's power to deprive a person of his property in the name of social justice. Article 24 of the Draft Constitution was little different from Section 299 of the 1935 Act and was thus, in essence, like the provision the Assembly had adopted in May 1947. The power of the Governor-General and Governors in relation to property legislation had, not surprisingly, been omitted, and a new clause, added by the Drafting Committee, stipulated that nothing in the article should prevent the state from passing legislation promoting public health or preventing danger to life or to property. This latter clause was to be, as we shall see, the foundation of the state's 'police power' in matters of property.

But when Article 24 came to the floor for debate on 9 December 1948, the Assembly decided to defer its discussion for the time

²² Ibid.; emphasis added. In both Uttar Pradesh and Madhya Pradesh legislatures, resolutions of intent favouring zamindari abolition had been passed as early as 1946. By the latter part of 1948 zamindari abolition Bills, or land tenure legislation had been introduced into, or passed by, the legislatures of Bihar, Madras, and Assam. Bombay passed various land tenure acts in 1949, and other provinces did so before 1952. Had not these states been anti-zamindari, the powerful influence of Bihar and U.P. on the Assembly would have almost certainly had the same effect.

²³ Article 19(5) of the Constitution. See also page 73 above for the passage of the liberalizing amendment. For this debate in the Assembly, see CAD VII, 18, 75off.

being, ostensibly to let the Drafting Committee sort out the large number of complicated amendments to it that members had submitted. The real reason was, however, that the members of the Drafting Committee themselves were not agreed on the wording of the article, and the Assembly Party was even more deeply split on the issue. The differences of opinion had grown steadily since 1947 and primarily concerned two questions: What sort of compensation was economically feasible and morally just? And to what degree could the Union Government interfere in provincial actions to expropriate property?

The Union government's policy on the issue was not clear. The Congress Election Manifesto of 1945 had called for state ownership or control of a wide variety of industries and services and for 'the removal of intermediaries between the peasant and the state'. The rights of the intermediaries, said the Manifesto, should be acquired by the payment of 'equitable compensation'.²⁴ Nehru, Patel, and others were known to be anti-zamindar, and Nehru was known to favour a larger public sector in industry—which could come about, of course, by creating new state industries and did not necessarily mean expropriating existing ones. The Union Cabinet, early in 1948, in a broad resolution on industrial policy, had noted the inherent right of the state to acquire industrial undertakings and had laid down that if property was acquired by the government 'the fundamental rights guaranteed by the Constitution will be observed and compensation will be awarded on a fair and equitable basis'.²⁵ Furthermore, two ministries had made their professional advice available. The Ministry of Works, Mines, and Power had suggested to the Drafting Committee that the word 'equitable', 'fair', or 'just' be inserted before 'compensation' in Article 24.²⁶ And the Ministry of Industry and Supplies had recommended that Article 24 specify 'reasonable' compensation.²⁷ Yet in contrast to these views, the Advisory Committee under Patel's chairmanship had

²⁴ AICC, *Congress Election Manifesto*, 1945.

²⁵ *Government of India Resolution on Industrial Policy*, No. 1(3)-44/(13)/48, dated 6 April 1948. For more on this resolution, see Chapter 8.

²⁶ Memorandum from the Ministry of Works, Mines, and Power, dated 15 October 1948; included in Constituent Assembly, *Comments on the Draft Constitution by Various Ministries*, hereafter called the *Comments Volume*. The minister at this time was S. P. Mookerjee.

²⁷ Memorandum from the Ministry of Industry and Supplies, dated 5 October 1948; *ibid.* N. V. Gadgil was minister at the time.

removed due process and the qualifying 'just' as protections to property, and the Drafting Committee, under the chairmanship of the Minister, of Law, Ambedkar, had decided to leave them out of the Draft Constitution. To add to the confusion, there was some doubt, as there would be many months later, about the meaning of words such as 'equitable'—equitable to whom, the property owner or the masses? Also, the Constitutional Adviser, Rau, had given his opinion that it was not necessary to qualify the word compensation with an adjective such as 'just', because 'the noun compensation, standing by itself, carries the idea of an equivalent'.²⁸

Popular sentiment continued to lean towards keeping compensation out of the courts, particularly where it concerned zamindars. Although eight Assembly members had submitted amendments to the Draft Constitution calling for reasonable compensation, a more common view was that of Damodar Swarup Seth. His amendment declared: 'It will be determined by the law in which cases and to what extent the owner shall be compensated.'²⁹ Other amendments were harsher in tone if not in effect. One would have prohibited compensation for 'large estates which were owned by members of former foreign dynasties or which were granted to individuals by foreign usurping authority'—a provision aimed at certain classes of Hindus, Muslims, and British alike.³⁰ An amendment by Pandit Pant provoked the most controversy. Pant would have left 'the mode and manner of compensation entirely to the discretion of the legislatures concerned'.³¹ This raised the issue not only of the reasonableness of compensation but also a federal question: Should the states of the new India have unfettered discretion over all forms of expropriation?

²⁸ B. N. Rau in a note appended to the suggestion of the Ministry of Industry and Supply; *ibid.* In support of his view, Rau cited the U.S. case of *Monongahela Navigation Co. v. United States*—U.S. 148 Lawyers Edition 37—and the speech of Syamandan Sahaya in the Assembly—*CAD III*, 5, 515–16.

²⁹ *Amendment Book I*, op. cit., Amendment 720, p. 76. Seth, who had been a Congress Socialist but who had not split away with many others to form the Socialist Party, apparently moved this amendment for J. P. Narayan, who as we know, had refused to join the Assembly. Narayan had suggested an identical amendment to the Drafting Committee early in 1948. See *Prasad papers*, File of Suggestions for Amendments to the Draft Constitution.

³⁰ *Amendment Book I*, Amendment 779, p. 82, by R. S. Chaudhry.

³¹ *The Hindu*, 10 December 1948. The text of Pant's amendment is not available, but other reports of it support this version.

And if such was to be the case, was there, indeed, any reason to include the right to property among the Fundamental Rights?

Word of Pant's amendment reached A. K. Ayyar and so perturbed him that he wrote to Patel. If what he had heard of Pant's amendment was correct, he said, 'it will have the effect of making capital shy and driving it in some measure out of industry.'³² He suggested that Patel bring the matter up at the Assembly Party meeting scheduled for two days later. It is doubtful if Pant's amendment was directed at industry, although it nevertheless might have had the effect Ayyar feared. Pant was aiming at zamindars, and, particularly, he must have been trying to create a situation in which his own pet anti-zamindari Bill in the United Provinces Legislature could not be tampered with by the Union Government. Although 'big business' was far from popular in the Assembly, generally speaking members reserved their special wrath for zamindars, whether of the landlord or rent-farmer variety.

The federal aspect of the expropriation issue was to some degree already covered by the Draft Constitution. According to the Concurrent Legislative List of the Draft, both the provinces and the centre could legislate in regard to the principles upon which compensation could be paid.³³ The dual control of the principles of compensation was in the interests of 'uniformity', said the Drafting Committee.³⁴ To increase Union control of such legislation even further, T. T. Krishnamachari proposed an amendment that reverted to Clause 3 of Section 299 of the 1935 Act. On the same day that Ayyar wrote to Patel, Krishnamachari moved that no expropriation Bill—which included certain kinds of tenancy Bills and rent-control Bills—could be introduced or moved in any provincial legislature or in the Union Parliament without the previous sanction of the President.³⁵

The Congress Assembly Party was unable to reconcile such widely conflicting views at its meeting of 7 December. The Assembly therefore postponed consideration of Article 24 to allow time for a solution to the problem to be worked out backstage in Assembly committees and in the Assembly Party.

³² Ayyar letter to Patel, 5 December 1948; *Ayyar papers*.

³³ *Draft Constitution*, List III, Item 35, and List I, Item 43, and List II, Item 9.

³⁴ *Draft Constitution*, Para 14(c), p. 10.

³⁵ *Orders of the Day*, Amendment 42, List I of 5 December 1948. On 28 November, B. Das had submitted a nearly identical amendment that would have given this power to the Chief Justice; *ibid.*, 28 November 1948, Amendment 74, List I.

Further attempts at solution began seven months later, continued until the Assembly thrashed out an acceptable formula. The debate began again with the basic principles. Assembly members argued the pros and cons of justiciable compensation and about the manner in which compensation should be paid. They argued about the propriety of singling out zamindari property as liable to expropriation under special terms. The 'federal' issue became submerged in the flood of opinions, to reappear briefly only towards the end of the debate. But settlement of the controversy finally turned on a fine point. It turned not on whether compensation as such should be justiciable, but on the right of the courts to examine one aspect of property acquisition laws: the principles on which compensation was to be paid. This was because of the political power and the personal experience of Sardar Patel.

Patel was not the immovable monolith that he is often pictured. He compromised, and indeed under pressure from Nehru and Pant he compromised to some extent on this issue. His power in the Congress, in the Government, and in the Assembly was such, however, that no action could be taken without his consent. This was true of any Article of the Constitution but especially so of Article 24, for it is generally agreed that the compensation issue was one on which Patel had firm views.³⁶ He had favoured zamindari abolition, as we have seen, on the floor of the Assembly and in the Advisory Committee, where he had been willing to eliminate due process as applied to property and the word 'just' as qualifying compensation in order to keep 'every case' from going to the Supreme Court. He had favoured zamindari abolition for many years. During his presidency, the Kisan (Peasants) Conference at Allahabad in 1935 had passed a resolution calling for 'a system of peasant proprietorship . . . without the intervention of any zamindar or talukdar', but the resolution had said that expropriated zamindars should be paid 'reasonable compensation'.³⁷ Patel has also been described as 'against any son of violent expropriation, which he always described as *choree* (theft) or *daka* (dacoity)'.³⁸

³⁶ According to a large number of persons interviewed by the author.

³⁷ H. D. Malaviya, *Land Reforms in India*, pp. 58–59.

³⁸ V. P. Menon, *The Integration of the Indian States*, p. 489. For a further, although somewhat too simplified, account of Patel's views, see K. L. Panjab, *The Indomitable Sardar*, pp. 145–7 and 208–10.

Moreover, Patel had had personal experience with land acquisition legislation passed under the authority of Section 299 of the 1935 Act, which, it will be recalled, laid down that legislation acquiring property for public purposes must either specify the compensation or the principles on which it was to be paid. In 1938 Patel was chairman of the Congress Parliamentary Board, and on the board his special responsibility was the affairs of the Bombay region. Part of the control that the Parliamentary Board exercised over the provincial Congress ministries during the 1937–39 period was to scrutinize certain types of proposed legislation before the ministry could present it in the provincial Legislative Assembly; property acquisition Bills fell in this category. So the board, and Patel particularly, had approved a draft Bill entitled The Bombay Forfeited Lands Restoration Act. And Patel had an additional link with the provision because it had particular force in the Bardoli area of Gujarat, where just ten years before he had led a satyagraha against increased land tax, and was rewarded with renown and the honorific 'Sardar'.

The Bombay Forfeited Lands Restoration Act of 1938 provided for the acquisition by the provincial government of certain lands and rights in land in order to return them to their original owners, who had lost them by confiscation for refusing to pay land revenue to the pre-Congress provincial government during the Civil Disobedience Movement. The confiscated lands had been sold at very low prices to other persons, and it was from these persons, who had profited by the nationalism of other Indians, that the Congress government intended to regain the lands. The Act clearly stated that restoration to the original owners was the 'public purpose' for which the lands were being acquired. Compensation under the Act was to be paid on the following principles: the amount of compensation was to be the price paid to the provincial government for the occupancy rights to the land, plus expenditures on improvements, plus the amount of land revenue paid during the occupancy, plus 4 per cent interest on these amounts. From this total could be deducted profits from the land or the value of damage done to the land. But in no case could the compensation be less than the amount paid for the land plus the cost of improvements.³⁹ Thus

³⁹ *The Bombay Forfeited Lands Restoration Act, 1938*, Bombay Act No. XXII of 1938; *Bombay Code*, Vol. II, 1921–49, pp. 2085–8. The author is indebted to K. M. Munshi for the initial suggestion of the importance of this Act to Patel.

the principles of compensation were laid down as demanded by the 1935 Act, and yet, it was evident, compensation calculated according to these principles would amount to considerably less than the market value of the property.

To Patel, therefore, the wording of Section 299 seemed to provide the solution to the Assembly's dilemma. Under it the power of both the legislature and the courts would be limited. The courts would be unable to invalidate land reform and other property acquisition legislation provided reasonable principles had been established, and the legislatures would be unable to expropriate property without payment of compensation. Justice and social reform would both be served. With Patel's position in mind, we can return to the events that led to the adoption of his view.

The re-opening of the debate on Article 24 was on 24 July 1949, during a series of meetings held by the Drafting Committee with the premiers and finance ministers of the provinces and the ministers of the Union Government. At the meeting, Pandit Pant reiterated his belief that the Legislature alone should have the authority to give such compensation 'as it considers to be fair not only in the sense that it is fair in terms of the market value, but considering the circumstances and the paying capacity of the state and the purpose for which the property is being acquired'.⁴⁰ Ayyar replied that in that case there might as well be no Fundamental Right. T. T. Krishnamachari expressed the fear that if there were no provision like Article 24, no foreign capital would come to India. Prime Minister Nehru disagreed with this, saying that foreign capital would be dealt with on special terms by agreement.⁴¹ He added that compensation for property should be paid, but that payment must be made largely or only in bonds. To talk of cash payment when

⁴⁰ Proceedings of the meeting, 24 July 1949; *Law Ministry Archives*. All citations from this meeting are taken from this source.

⁴¹ Nehru had made a speech on this subject in April 1949 to the Constituent Assembly (Legislative) in which he had said: '... if and when foreign enterprises are compulsorily acquired, compensation will be paid on a fair and equitable basis as already announced in the Government's statement of policy (Resolution on Industrial Policy, op. cit.).' *Constituent Assembly of India (Legislative) Debates*, Vol. IV, No. 1, p. 2386 of 6 April 1949. The reference here to equitable compensation was frequently misquoted thereafter as applying to indigenous property, including zamindaris.

there wasn't enough cash was impractical, he said; 'it just means red revolution and nothing else'.

K. M. Munshi thought that if the manner of compensation was kept out of the courts, the payment of it could be spread over '100 years'. He also believed that leaving the quantum of compensation to legislatures was unwise because some of them might lack a sense of fair play. Yet he was willing to 'exclude the zamindari (from the protection of the article) and let the rest remain'. This idea of applying different rules to the expropriation of zamindaris and other forms of property would be strongly advocated in the coming weeks. During the meeting on 24 July, Patel said nothing indicative of his opinions. The Finance Minister, John Matthai, did not attend the meeting. Away in London on official business, he returned only in time for the consideration of sales tax on the following day. The meeting took no firm decision and the issue continued to simmer.

The next month witnessed a continuous campaign specifically against zamindars. B. N. Rau, acting his self-established part as an impartial adviser and draftsman, prepared for Pant a version of Article 24 that, he said, might prevent the courts from blocking land legislation. A new clause laid down that nothing in the article should affect laws made in the discharge of the state's duties under Article 31—an omnibus provision in the Directive Principles that said, among other things, that the ownership and control of material resources should be distributed to subserve the common good and that the operation of the economic system should not result in the concentration of wealth.⁴² Several days later Rau submitted another draft that would have made compensation obligatory and payable

⁴² B. N. Rau letter to G. B. Pant, 24 July 1949; *Law Ministry Archives*, File CA/19(5)/Cons/49. Although Rau may have often, in the functions of his office, drafted provisions whose import he disliked, he openly favoured the general welfare over private rights, and he may, therefore, have approved of this provision drafted for Pant. This conclusion is supported by the advice given Rau by Eamon De Valera—on whose views Rau placed considerable weight—that De Valera 'would make the right of property guaranteed in the Constitution expressly subject to laws intended for the general welfare'. Rau, *India's Constitution*, p. 310. A like provision had been moved in the Drafting Committee meeting of 20 January 1948, only to be withdrawn the following day. Only B. N. Rau, N. M. Rau, and Ambedkar, plus staff, were present at these meetings. See Minutes of the meetings, 20–21 January 1948; *Munshi papers*.

in cash or securities and that stipulated that no law making provision should be questioned in court on the grounds that the compensation was inadequate or unjust. On the same day he prepared a note reiterating his belief that the word 'compensation' in fact meant 'just compensation'.⁴³ There were also circulated that day, 2 August, amendments drafted several days previously by Pant, Ayyar, and N. Gopalaswami Ayyangar. Of these only that by Ayyangar bluntly laid down that the compensation established by law would be deemed adequate. An Assembly Party meeting discussed the amendments that morning, but reached no decision. That afternoon Munshi, Ambedkar, and Ayyar circulated an amendment that would have assured the payment of compensation much in the manner of Article 24. Apparently it had a cool reception.

For the party meeting of 4 August the Drafting Committee drafted a new formula providing that compensation must be paid for all property acquired for public purposes, but that a legislature could prescribe different principles for the payment of property acquired for different purposes.⁴⁴ The meeting was able to agree only that compensation could be paid in cash or bonds, the argument on other points being indecisive. The Nehru-Pant forces, which held that the Legislature must be supreme, fought against the Matthai-led group, which believed, in Matthai's words, that 'if the credit of the country was to be maintained, there must be specifically adequate compensation'.⁴⁵ Apparently a formula was evolved at the meeting calling for compensation to be paid for all property acquired by the state but providing that 'the transference to public ownership or

⁴³ Undated note, perhaps written about 26 July 1949; *ibid*. Precisely what Rau meant here is difficult to determine. The word compensation standing by itself might carry the meaning of 'just' or equivalent value to property acquired. But did it mean this in the context of Section 299? Although some authorities believed so, the experience with The Bombay Forfeited Lands Restoration Act indicated the opposite. In fact, no one could be sure what the wording of any provision meant in the eyes of the courts until the provision had been tested by the new Supreme Court. Nevertheless, the conflicting opinions of the definition of compensation played an important, if largely immeasurable, role in the framing process, for Assembly members opposed or favoured certain versions of Article 24 depending on their interpretation of compensation and whether or not they believed compensation should be justiciable.

⁴⁴ *Law Ministry Archives*, File CA/19(5)/Cons/49.

⁴⁵ *The Hindu*, 6 August 1949, dispatch dated 4 August.

the extinguishment or modification of rights in land intermediate between those of the cultivator and the state, including rights and privileges in respect of land revenue' should be compensated according to terms established by the Legislature, which would then be deemed 'just and adequate'.⁴⁶

The next day saw another heated party meeting as the members debated this formulas and a new draft by the Drafting Committee—again with a special provision aimed at zamindars. One newspaper reported that a cabinet minister (read Matthai) said that he would rather quit the Government than acquiesce in such a dangerous provision.⁴⁷ A letter from Patel, read to the meeting by Munshi, called on the members to remember the Congress's promises to pay just compensation and laid the 'present economic deterioration' in the country to the Congress's failure to take a firm stand on the issue. 'No one', Patel was reported to have written, 'should be discriminated against in the eyes of the law and compensation in all cases should be made justiciable.'⁴⁸ Again, the meeting produced no agreement.

During the following three weeks various groups, appointed and informal, as well as individuals, drafted and redrafted new provisions. At one point, members of the Assembly Party voted 57 to 52 to make compensation for commercial and industrial property justiciable and to leave zamindars entirely to the mercy of the Legislature.⁴⁹ Yet the issue still was not settled. One suspects that this was in part because a majority of five votes was not considered sufficient on such an important matter—the Assembly preferred to decide matters by consensus rather than by a narrow majority—and in larger part because Patel opposed the provision.

⁴⁶ *The Hindustan Times*, 5 August 1949. See also *The Hindu*, 7 August 1949. The dates on which these events were reported seem to indicate that either one newspaper made a grave error of time or, more likely, that *The Hindustan Times* reported the formula on the day it was evolved and *The Hindu* on the day it was debated. News from North India frequently appeared in *The Hindu* (published in Madras) a day late.

⁴⁷ *The Hindu*, 7 August 1949.

⁴⁸ *The Hindustan Times*, 6 August 1949. The same account in all relevant points appeared in *The Hindu* of 7 August.

⁴⁹ On 9 August. See *The Hindu*, 11 August 1949 and *The Hindustan Times*, 10 August 1949.

As August progressed, the provisions being drafted in back-stage discussions came more and more to resemble Section 299. According to press reports this was a result of conversations between Patel and several Assembly members in Bombay.⁵⁰ By the end of the month a generally acceptable formula had been found. It was much like Section 299 and was said to protect zamindari abolition legislation past and pending. The Assembly Party adopted it by a vote of 56–34.⁵¹ A week later the formula, bearing the names of Nehru, Pant, Munshi, Ayyar, and N. G. Ayyangar, was moved in the Assembly as an amendment to the Draft Constitution.⁵² The amendment provided that no one could be deprived of his property except by law and the law must name the compensation or the principles on which it was to be paid. A third clause provided that property acquisition Bills must have presidential assent before becoming law. Clause (5) provided for the state's police power relative to property. Clause (4) and (6) laid down that property legislation enacted in a state one year (later changed to eighteen months) before the inauguration of the Constitution and certified by the President within three months of its inauguration, and property legislation pending at the inauguration of the Constitution, later enacted, and then assented to by the President, could not be questioned in court on the grounds of the compensation or principles named in the law.

The provision had in it everything Patel wanted and was at the same time moderately satisfactory to Pant and Nehru. Others, supporters of complete review powers for the courts, like Matthai, and those in favour of unfettered power for legislatures, must have been disappointed by the compromise. So far as Patel was concerned Clause (2), taken directly from Section 299, provided for his middle-of-the road approach to land acquisition. But because legislatures had the authority to prescribe the principles of compensation, the expropriation of zamindars could be undertaken on different principles than the acquisition of commercial or industrial property—an aspect pleasing to many Assembly members. The clause reserving all property legislation

⁵⁰ *The Hindu*, 20 August 1949.

⁵¹ *The Hindustan Times*, 1 September 1949.

⁵² See Amendment 369, List VII, *Orders of the Day*, 8 September 1949; INA. See also *The Hindu*, 9 September 1949. The text of the amendment is essentially that of Article 31 of the Constitution.

for presidential assent must also have been included at Patel's demand. For it meant that, so long as he lived, Patel could block any legislation that seemed to him unjust—'the President', of course, meant the Cabinet, and in the Cabinet Patel had veto power. And Nehru, one presumes, was also not averse to the Union Executive's having the opportunity to dampen unseemly zeal in the states. Clauses (4) and (6), it was made explicitly clear in the Assembly, were included to protect land reform legislation pending in the legislatures of Bihar, Madras, and the United Provinces. Representatives of these governments in the Assembly, particularly Pant, had fought hard for their protection. But here too Patel could exercise his veto, for although the compensation in these laws once enacted would not be justiciable, they must have presidential assent before becoming law.

The meaning of the provision was best explained to the Assembly by K. M. Munshi. Munshi had become Patel's spokesman on the issue, as he had on several others, and he was especially well qualified to interpret the origins of the provision because he had been Home Minister in the Bombay government in 1938. As such he had been closely connected with the passage of the Forfeited Lands Restoration Act. The import of the clauses, Munshi told the members, was that Parliament would be the sole judge of two matters: 'the propriety of the principles laid down, so long as they are principles' and that the 'principles may vary as regards different classes of property and different objects for which they are acquired'. If the legislature lays down genuine principles for compensation, 'the court will not substitute their own sense of fairness for that of Parliament', Munshi assured the Assembly; 'they will not judge the adequacy of compensation from the standard of market value; they will not question the judgement of Parliament unless the inadequacy is so gross as to be tantamount to a fraud on the fundamental right to own property.'⁵³

⁵³ CAD IX, 32,1299–1300. Dr. Ambedkar later gave a version of the controversy during the drafting of Article 24:

'... The Congress Party, at the time when Article 31 (read 24) was being framed was so divided within itself that we did not know what to do, what to put and what not to put. There were three sections in the Congress Party. One section was led by Sardar Vallabhbhai Patel, who stood for full compensation. . . . Our Prime Minister was against compensation. Our friend Mr. Pant had conceived his Zamindari Abolition Bill before the Constitution was being actually framed. He wanted a very safe delivery for his baby. So he had his own proposition.'

Nehru also informed the Assembly that 'eminent lawyers have to us that on a proper construction of this clause [Clause (2)], normally speaking, the Judiciary should not and does not come in'. He added that 'no Supreme Court and no Judiciary can stand in judgement over the sovereign will of Parliament representing the will of the entire community'. Nehru also made clear the Congress's long-standing programme to abolish zamindari and its promise of equitable compensation. But equity, he said, applies to the community as well as to the individual: 'No individual can override ultimately the rights of the community at large. No community should injure and invade the rights of the individual unless it be for the most urgent and important reasons.'⁵⁴

Patel remained silent. He knew the provision would be adopted and he had already achieved his aims. Ayyar summed up the debate with sentiments appropriate to the occasion. He spoke of the law 'as an instrument of social progress'. The law, he said, 'must reflect the progressive and social techniques of the age'. Dharma and the duty the individual owed to society were the basis of India's social framework, he continued; capitalism as practised in the West was 'alien to the root idea of our civilization. The sole end of property is Yagna and to serve a social purpose', he concluded.⁵⁵ The Assembly adopted the new provision, which became Article 31 of the Constitution.

2. Amending the Property Article

Nehru may or may not have believed that Article 31 would stand the test of time, that it was adequate to India's social needs as he saw them. He may have accepted the compromise because he could move Patel no further. In any case the first moves to amend Article 31 began within five months of Patel's death,⁵⁶ and there have been several subsequent amendments to the property provision.

There was thus a tripartite struggle and we left the matter to them to decide in any way they liked.' See *Parliamentary Debates, Rajya Sabha, Official Report*, Vol. IX, No. 19, 19 March 1955, Columns 2450–2, cited in D. N. Banerjee, *Our Fundamental Rights, their Nature and Extent*, p. 313.

⁵⁴ CAD IX, 31, 1192–95.

⁵⁵ CAD IX, 32, 1274.

⁵⁶ For the views of one who believes this to have been treachery to Patel, see Panjab, op. cit., p. 146.

The First Amendment Act (1951) was aimed primarily at zamindars and rent-farmers, although it also extended the state's police power. The Act added Articles 31A, 31B and the Ninth Schedule to the Constitution. Article 31A allowed the state, despite any inconsistency with Articles 14, 19, or 31,⁵⁷ to legislate for the acquisition of estates, the taking over of property by the state for a limited period in the public interest, and the extinction or modification of the rights of directors or stockholders of corporations. The first part of the article, as Dr. Ambedkar, speaking as Law Minister, explained it, was intended

to permit a State to acquire what are called estates . . . (It) not only removes the operation of the provision relating to compensation, but also removes the article relating to discrimination . . . It does not apply to the acquisition of land. It applies to the acquisition of estates in land, which is a very different thing.⁵⁸

The second part of the article allowed the state to take over for short periods, without actually expropriating them, such property as businesses whose financial or other condition was harmful to the public interest.

Article 31B gave protection to various land reform acts passed by state legislatures by laying down that none of the Acts, which were listed in the new Ninth Schedule, should be declared void because they controverted any other Fundamental Right.⁵⁹

The next amendment to Article 31, the Fourth Amendment Act, was occasioned by two judicial decisions, one of which had interfered with expropriation legislation, the other with the exercise of the state's police power. Instead of attacking the court's judgement, Nehru and

⁵⁷ Article 14 provided for equality before the law; Article 19 was the 'freedoms' article, including the right to acquire, hold, and dispose of property; Article 31, of course, concerned expropriation and compensation.

⁵⁸ *Parliamentary Debates*, 18 May 1951, columns 9024–8, cited in Banerjee, op. cit., P. 393.

⁵⁹ The Ninth Schedule listed such acts as the Bihar Land Reforms Act of 1950. Defending the provision, Nehru said that India's basic problem was land, that measures passed in state assemblies must not be held up, and he reiterated that the Congress was firmly committed to zamindari abolition 'with adequate and proper compensation, not too much'. *Parliamentary Debates*, 16 May 1951, columns 8830–37 cited in Banerjee, op. cit., pp. 388–9. For the texts of Constitutional Amendments Acts I–XIV, see *The Constitution of India*.

the Cabinet set about amending the Constitution. The responsibility for the economic and social welfare policies of the nation should lie with Parliament, Nehru said, not with the courts. The decisions of the Supreme Court, he said, showed that there was 'an inherent contradiction in the Constitution between the Fundamental Rights and the Directive Principles of State Policy . . . It is up to this Parliament to remove this contradiction and make the Fundamental Rights subserve the Directive Principles of State Policy.'⁶⁰

The Fourth Amendment Act (1955) made two changes in Article 31. By amending Clause (2), it laid down that no law passed under the article should 'be called in question in any court on the ground that the compensation provided by that law is not adequate'.⁶¹ Parliament made this change because 'in Bela Banerjee's case . . . it was unequivocally held that the compensation that will be paid under this clause (Clause 2) should be the full equivalent of the property'.⁶²

The second change made by the Fourth Amendment was the addition of Clause 2 A to Article 31. This new clause laid down that if a law did not provide for the actual transfer of ownership of property to the state, it should not be deemed to have been compulsory acquisition even though persons had been deprived of their property.⁶³ Thus the state would not be liable for compensation. Parliament made this clarification of the extent of the state's police power primarily in response to the Supreme Court's decision in the second Sholapur Mills case. The Union Government had taken over the operation of the Sholapur Spinning and Weaving Company on the ground that it was being grossly mismanaged to the detriment of the public and of its stockholders. The Government took this action under its police powers, apparently believing that it was constitutional according to the provisions of Article 31A. The Supreme Court, however, held that the Government's action deprived the owners and the stockholders of the company of their property and that compensation should be paid them.⁶⁴

⁶⁰ See *Lok Sabha Debates*, 14 March 1955; cited in Banerjee, op. cit.

⁶¹ *Constitution*, 1963 Edition, Op. cit., pp. 285–7.

⁶² Speech by Pandit Pant. See *Parliamentary Debates*, Rajya Sabha, 20 April 1955, cited in Banerjee, op. cit., pp. 327–8. For Bela Banerjee's case, see *Supreme Court Reports* 1954, Vol. V, Part V, pp. 558–65.

⁶³ Quoted from Banerjee, op. cit., p. 331.

⁶⁴ *Ibid.*, p. 382.

Thus in the nine years from 1947 to 1956 had the demands of the social revolution taken the right to property out of the courts and placed it in the hands of the legislatures. Good sense, fairness, and the commonweal might still be served, but so far as property was concerned, due process was dead.⁶⁵

3. Due Process and Individual Liberty

Just as the story of due process and property in the Constituent Assembly was largely concerned with how the land and land rights of the few could be placed at the disposition of the many for the sake of social and economic gain, so the decline and fall of due process as a safeguard for personal liberty placed the citizen's freedom at the disposition of the legislature for the sake of a public peace in which social and economic reforms could be achieved. And as due process was eliminated from the property provisions of the Constitution because of the substantive interpretations that could be placed upon it, so it was not applied to liberty primarily because of the procedural interpretations that flowed from it. Ultimately, the story of due process and liberty in the Constituent Assembly was the story of preventive detention.

Wealth was the responsibility of the few and liberty was the possession of the many; the members of a Constituent Assembly who would enthusiastically expropriate another's property were loathe to endanger their own liberty. Most of the rank and file supported Nehru on expropriation and compensation. Patel, Matthai, and a few others constituted a minority. But many members, led by more than a dozen ranking Congressmen and several Assembly leaders, opposed the sacrifice of due process as a protection of liberty, although Nehru, Patel, and others favoured its elimination. None would have disputed that stable government and peaceful conditions throughout the country were necessary for the achievement of the social revolution. But many thought that individual liberty should not be imperilled even for such ends, and to save what they could they fought the issue into the final days of the Assembly. The harsh provisions of the Constitution, while bestowing great authority on the state, were at the same time,

⁶⁵ Since 1956 only the Seventeenth Amendment Act, 1964, has concerned property rights. This Act also removes certain state land reform legislation, particularly in regard to ryotwari holdings, from the purview of the courts.

however, framed to give the individual some protection from vagaries of state detention laws. It must be remembered, too, that while India has preventive detention, it has allowed Communists to govern a state and to sit in Parliament. Yet in the United States, where according to the Constitution there is more individual liberty than in India, the Communist Party is an illegal organization. Had India not once been a colony, the members of her Constituent Assembly might or might not have provided for preventive detention in the Constitution. But the British had practised preventive detention in India for many years—openly since 1818.⁶⁶ It would appear that, along with representative government, preventive detention was also a legacy of the empire of which Britain was so proud.

The elimination of due process was initially a result of B. N. Rau's influence, although other personalities and the events of the times played a part as well. The seeds had been sown even before the Assembly adopted the due process clause in May 1947. Rau, in his comments on the report of the Fundamental Rights Sub-Committee, as we have seen, pointed out how a substantive interpretation of due process might interfere with legislation for social purposes. Then, during the Advisory Committee meeting of 21 April 1947, the procedural difficulties that due process could cause were brought to the attention of Pant and Patel. Rajgopalachari and Ayyar told them that under due process the Executive could not detain persons without trial.⁶⁷ The Assembly favoured due process, however, and Rau included the provision in his Draft Constitution published in early October 1947, although he qualified 'liberty' with the adjective 'personal'.⁶⁸

Soon after, Rau began his trip to the United States, Canada, Eire, and England to talk with justices, constitutionalists, and statesmen about the framing of the Constitution. In the United States he met Supreme Court Justice Felix Frankfurter, who told him that he considered the power of judicial review implied in the due process clause both undemocratic—because a few judges could veto legislation enacted by the representatives of a nation—and burdensome to the Judiciary;⁶⁹

⁶⁶ The Bengal State Prisoners Regulation III of 1818.

⁶⁷ See page 85 above.

⁶⁸ Rau, *Draft Constitution*, Clause 16. This change greatly narrowed the scope and meaning of liberty. See Alexandrowicz, op. cit., pp. 11–13.

⁶⁹ Rau, *India's Constitution*, p. 303. Rau originally reported this to the President of the Assembly, Prasad, in an airmail letter dated 11 November 1947; *Prasad papers*,

Frankfurter had been strongly influenced by the Harvard Law School's great constitutional lawyer, James Bradley Thayer, who also feared that too great a reliance on due process as a protection against legislative oversight or misbehaviour might weaken the democratic process.⁷⁰ Thayer's views had impressed Rau even before he met Frankfurter. In his *Constitutional Precedents*, Rau had pointed out that Thayer and others had 'drawn attention to the dangers of attempting to find in the Supreme Court—instead of in the lessons of experience—a safeguard against the mistakes of the representatives of the people'.⁷¹ Rau's emphasis at this time—and it remained so in the future—was on the substantive meaning of due process, not on the procedural aspect. But the supporters of due process would have preserved it for its procedural safeguards, primarily against arbitrary Executive action.

As a result of his conversations with Frankfurter, Rau proposed an amendment to his Draft Constitution 'designed to secure that when a law is made by the State in the discharge of one of the fundamental duties imposed upon it by the Constitution and happens to conflict with one of the fundamental rights guaranteed to the individual, the former should prevail over the latter; in other words, the general right should prevail over the individual right'.⁷² Rau could not get the members of the Drafting Committee to accept this amendment at their meetings in the autumn of 1947, so he tried to obtain the same result by other means and suggested that the due process clause be eliminated in favour of the phrase 'according to the procedure established by law'. It was Rau's enthusiastic espousal of Frankfurter's views that originally caused the Drafting Committee to reconsider the issue.⁷³

File 2-N/47. The account of the trip abroad included in *India's Constitution*, edited by Rau's brother, B. Shiva Rao, is essentially the same as that submitted to Prasad by Rau on 24 November 1947. See *Prasad papers*, File 2-N/47. The book, however, does not indicate the material that Rau thought important enough to deserve immediate transmission.

⁷⁰ Felix Frankfurter, *Felix Frankfurter Reminiscences*, pp. 299–301.

⁷¹ Rau, *Constitutional Precedents*, Third Series, p. 23.

⁷² Rau, *India's Constitution*, p. 302; for the text of his suggested amendment, see *ibid.*, p. 313.

⁷³ The view of H. V. R. Iengar, once head of the Assembly Secretariat, but at this time Home Secretary, expressed in a letter to A. V. Pai, Nehru's private secretary, dated 22 July 1949; *Law Ministry Archives*.

The Drafting Committee took up the matter again during its meetings of January 1948, and at some time after 19 January the members decided to omit due process. It is not clear precisely what happened, but some reconstruction of the event is possible. Of the seven members of the Drafting Committee at the time (Ambedkar, the chairman, Munshi, Ayyar, N. G. Ayyangar, D. P. Khaitan, N. Madhava Rau, and Mohammed Saadulla), four had been supporters of due process—Munshi, Ayyar, Ambedkar, and Saadulla. Ayyangar apparently did not support it; N. M. Rau's views are not known; and Khaitan, a Marwari who was close to Patel, may be presumed to have opposed it. To eliminate due process, one of the four supporters had to change sides. Apparently this was A. K. Ayyar. B. N. Rau had several times met Ayyar since his return and had convinced him of the dangers inherent in substantive interpretations of due process.⁷⁴ And, as we shall see, Ayyar later became one of the most outspoken opponents of the clause. It is doubtful if Ambedkar or Saadulla also changed sides; certainly Munshi did not. But Ayyar's vote was sufficient. An added reason for removing due process may have been an increasing conviction that preventive detention provided the best weapon against the communal violence that had racked North India during the past year. This view, if it existed, could only have been strengthened by the cataclysm of Gandhi's assassination a few days later on 30 January. Justifying its decision to supplant due process with the phrase 'according to procedure established by law', the Drafting Committee said merely that the latter was 'more specific'.⁷⁵

Disapproval of the Drafting Committee's action soon became evident in the amendments to the Draft submitted by Assembly members. K. M. Munshi's voice was heard first. Because of his insistence, the Drafting Committee reconsidered the question during its meetings in March 1948, but declined to return due process to Article 15.⁷⁶ Within several months twenty other Assembly members sponsored amendments that would have made the right to personal liberty justiciable. Twelve of them would have reinserted due process, and the remaining eight members would have replaced 'procedure established

⁷⁴ K. M. Munshi and others in interviews with the author.

⁷⁵ *Draft Constitution*, first footnote, p. 8. The committee cited as its precedent Article XXXI of the Japanese Constitution of 1946.

⁷⁶ Minutes of the meeting, 23 March 1948; *Munshi papers*.

by law, by 'save in accordance with law'. In the latter phrase 'law' could be interpreted either as the law passed by a legislature or as natural law or natural justice, as 'lex' or 'jus', while the phrase 'procedure established by law' could only be interpreted as law enacted by a legislature. Had 'save in accordance with law' been used the provision would have been justiciable.⁷⁷

Among the supporters of these amendments were Dr. Sitaramayya, president of the Congress 1948–9, T. T. Krishnamachari, later a member of the Drafting Committee, K. Santhanam, M. A. Ayyangar, deputy speaker of the Constituent Assembly (Legislative), Dr. B. V. Keskar, Deputy Minister of External Affairs and a general secretary of the Congress, S. L. Saksena, Thakur Das Bhargava, Hukam Singh, a leader of the Akali Sikhs, and four of the Muslim League members in the Assembly. In later debates, many members who had not submitted amendments spoke in favour of due process, among them Baksi Sir Tek Chand, at one time a judge of the Lahore High Court.

When Article 15 came to the floor of the House for debate on 6 and 13 December 1948, the supporters of due process immediately attacked it. Mahboob Ali Baig made several points that would bear weight in the debate on preventive detention. The Drafting Committee, said Baig, claimed the Japanese Constitution as its precedent for using the phrase 'procedure established by law'. Yet in the Japanese Constitution several fundamental rights endangered by the omission of due process had been separately guaranteed—for instance, the right of a person not to be detained except on adequate cause and unless at once informed of the charges against him, the right to counsel and to an immediate hearing in open court, and the right of a person to be secure against entry, search, etc., except on a warrant.⁷⁸

K. M. Munshi said that a substantive interpretation of due process could not apply to liberty of contract—the basis on which the United States Supreme Court had, at the beginning of the century, declared

⁷⁷ See the speeches of M. A. Baig (*CAD* VII, 20, 845) and T. D. Bhargava (*ibid.*, 846). For a Supreme Court decision corroborating this view, see p. 113 below. For the texts of the amendments, see *Amendment Book I*, pp. 55—57.

⁷⁸ *CAD* VII, 20, 844–5. Baig was referring to Articles XXXII, XXXIV, and XXXV of the Japanese Constitution—drafted in 1946 under American aegis.

some social legislation to be an infringement of due process and hence unconstitutional—but only to liberty of person, because ‘personal’ had been added to qualify liberty. ‘When a law has been passed which entitles the government to take away the personal liberty of an individual,’ Munshi said, ‘the court will consider whether the law which has been passed is such as is required by the exigencies of the case and therefore, as I said, the balance will be struck between individual liberty and social control.’⁷⁹ Other Assembly members agreed: whilst not wishing to impede the passage of social reform legislation they sought to protect the individual’s personal liberty against prejudicial action by an arbitrary Executive.⁸⁰

Munshi also referred to the issue that was on everyone’s mind—due process versus preventive detention in the light of public security. He said he realized that many Assembly members believed due process a dangerous luxury considering the unsettled conditions of the country. But it would protect the individual against inroads on his fundamental rights, whilst at the same time the dangers to public security were likely to be so great that the courts would uphold the provincial Public Safety Acts (which in most cases provided for preventive detention). Thus both the individual and society would be protected.⁸¹

Ambedkar, torn between his belief in due process and his official duty to uphold his committee’s decision, remained on the fence. He explained the implications of including due process in the Constitution and of omitting it, and then left the House ‘to decide in any way it likes’.⁸²

A. K. Ayyar upheld the Drafting Committee’s position, revealing for the first time on the Assembly floor that he had changed his mind about due process. He now supported its omission on the grounds that its substantive interpretation might impede social legislation—something, one recalls, that he had been willing to risk in April 1947.⁸³ Yet he did this without any reference to the procedural

⁷⁹ Ibid., p. 852.

⁸⁰ For example, two of the amendments submitted to Article 15 expressly stipulated that due process should never be used to say that a person had been denied freedom of contract. *Amendment Book I*, amendments 516 and 518, p. 55.

⁸¹ CAD VII, 20, 852.

⁸² CAD VII, 25, 1001.

⁸³ See proceedings of the Advisory Committee meeting 21 April 1947, op. cit.

importance of due process, the aspect most crucial to the debate of the moment. Moreover, he supported his position not with new arguments but with points he had rejected earlier, never explaining why he had changed his mind.⁸⁴ It was one of the sorriest performances ever put on by the Assembly leadership.

The amendments were defeated, and on 13 December 1948 Article 15, without the due process clause, was confirmed as part of the Draft Constitution. It quite possibly took the Whip to assure its adoption, however, for controversy had been widespread; even Ayyar recognized that 'a good number of members in this House' favoured the retention of due process.⁸⁵ And public reaction to the omission of due process during 1949 was most unfavourable. 'No part of our Draft Constitution', reported Ambedkar to the Assembly in September 1949, '... has been so violently criticized by the public outside as Article 15.'⁸⁶ This reaction, this widespread fear of Executive excesses and repression, had its roots in the Indian preventive detention laws—and to some degree in the manner in which several rights questions had been handled in the Assembly. To understand why the issue was reopened in September 1949 it would be well to pause here and examine this situation.

Preventive detention came to India officially with the Bengal State Prisoners Regulation III of 1818, 'the oldest statute dealing with preventive detention' in India,⁸⁷ and it was extended in 1819 and 1827 to Madras and Bombay Presidencies. These three regulations were permanent, and the Bengal regulation was extended to other parts of India during the period from 1879 to 1929. Preventive detention was also authorized in other ways. Provincial assemblies passed such Acts. Detention was either authorized, or power was provided to authorize it, by the Defence of India Acts of 1915 and 1939, by the Government of India Act 1919, by the infamous Rowlatt Act, and

⁸⁴ CAD VII, 20, 854. Ayyar had sent a strong note to Nehru emphasizing many of these points just three days before he spoke in the House. Note dated 3 December 1948; *Ayyar papers*. Ayyar's suspicion of due process later developed to an absurd degree. He once told the Assembly that 'if that expression remained there (in the Constitution) it would prevent the State from having any detention laws, any deportation laws, and even any laws relating to labour regulations'. CAD IX, 35, 1535.

⁸⁵ Ibid., p. 853.

⁸⁶ CAD IX, 35, 1497.

⁸⁷ A. Gledhill, *The Republic of India*, p. 173.

by such other measures as the Restriction and Detention Ordinance III of 1944.⁸⁸

Congressmen had for the most part been on the receiving end of detention orders (including all the Oligarchy and most other leaders). During their two years in office from 1937 to 1939 they had done away with some of these laws, but the Congress ministries had also prosecuted for sedition under special powers and emergency acts.⁸⁹ And in the years from 1947 to 1950 there was a rash of Public Order and Public Safety Acts throughout the country. No less than twelve provinces adopted such acts. The Bengal regulation of 1818 was itself brought up to date by the Bengal State Prisoners Regulations (Adaptation) Order, promulgated in 1947 by the Governor-General under the Indian Independence Act.⁹⁰

Although there were similarities between the provincial Public Safety Acts, there were also great differences in the amount of protection accorded the person detained. The Acts allowed detention for from fifteen days to six months, with extensions permitted by some provinces. In all provinces, excepting the United Provinces, the statutes required that the detenu be informed of the grounds on which he was being held. In the United Provinces the law of 1949 allowed detention for six months without informing the detenu of the grounds, and only if this period was to be extended had the person to be so informed and the particulars of the case referred to a special tribunal. All these Acts, excepting that of Bombay, granted the detenu the right to make representation against his arrest and detention, but some laws laid down that only such attention need be paid to this representation as the Governor desired. Few of the provincial laws allowed the detenu counsel. The West Bengal Act

⁸⁸ Mohammed Iqbal, *The Law of Preventive Detention in England, India and Pakistan*, p. 137.

⁸⁹ See Coupland, op. cit., Vol. II, Chapter XII. In 1938, for example, an AICC resolution stated that 'the Congress warns the public that civil liberty does not cover acts of incitements to, violence or promulgation of palpable falsehoods.' *IAR* 1938, II, p. 278. This was aimed at communal troubles. In general, however, Congress ministries lived up to the party's condemnation of detention laws, and many such laws were repealed or lapsed during the tenure of the ministries. See Coupland, *ibid.*

⁹⁰ This action was taken under Section 9 of the Indian Independence Act, Iqbal, op. cit., p. 126.

III of 1948 provided that if detention were to exceed three months, the provincial government was bound to place the case before a Calcutta High Court Judge, who could release the individual for insufficient grounds. If the detention was upheld, the person could be detained for six months before the case again went before the High Court Judge.⁹¹

There is little evidence that these laws allowing preventive detention were loosely or cruelly used. They were aimed not at thought-control, or at intimidating the masses into subservience, but at actual saboteurs who would have endangered the physical security of the nation by attacking railways or public utility installations or at individuals who incited or abetted communal friction or frenzy. Several of the League Muslims in the Assembly spoke against these 'lawless laws', charging that Hindu governments, particularly in the United Provinces, had been much more severe on Muslims than on Hindus in communally disturbed areas—an allegation in which, one expects, there was some truth. But, in general, Assembly members believed that provisions for preventive detention were necessary and few attacked the principle of detention in the debates.⁹² What members did fear was that governments, in exercising their powers of preventive detention, would infringe other fundamental rights.

The reasons for this apprehension reached back to the spring of 1947. At that time, it will be remembered, the Advisory Committee had declined to include among the rights the clauses guaranteeing secrecy of correspondence and no arrest without a warrant.⁹³ The Advisory Committee also passed over the clause in Munshi's draft those rights providing that no person could be detained without being informed of the grounds for his detention or be denied counsel, and that he must be brought before a magistrate within twenty-four hours of his arrest. During the various debates on the Fundamental Rights, members of the Assembly had called for the inclusion of all these rights. Additional pressure in favour of some of them was brought by persons outside the Assembly. The editor of the

⁹¹ Ibid., pp. 161–3.

⁹² For example, the subject of preventive detention had come up several times relative to its place on the Legislative Lists (see *CAD* IX, 20, 730; *CAD* IX, 23, 866 and its existence was never questioned. See also *CAD* VIII, 3, 73ff.

⁹³ See above, page 72.

Indian Law Review of Calcutta and other members of the Calcutta Bar, for example, suggested that the 'no searches and seizures' provision should be added to the Rights.⁹⁴ Ambedkar even accepted an amendment to this effect on the floor of the House on 3 December 1948, but at some later date it was quietly dropped.

Ayyar and others might claim that it was reasonable to omit such rights in the interests of crime prevention, but without protection the innocent could also suffer, Assembly members realized—and in any case, the principle was the same. The due process clause would have achieved the purposes of such rights provisions; so long as it was in the Draft, all was not lost. But when it was deleted, Assembly members felt the absence of the other rights even more keenly, particularly in view of the wide variety of detention laws existing in the provinces. They had obeyed the Whip in December 1948; they had adopted Article 15 minus the due process clause. But by September 1949 they were determined to redress the balance of liberty and to restore at least some safeguards for individual freedom.

In May 1949 three Assembly members had moved amendments designed to curtail the Executive's power to detain.⁹⁵ Of these the most important was Thakur Das Bhargava's, which called for freedom from detention without trial except for alleged participation in dangerous or subversive activities affecting the public peace, the security of the state, or affecting different classes and communities. Detention, according to Bhargava's amendment, could only take place after a declaration had been made by the Executive that an abnormal or dangerous situation existed—and this declaration itself could not be questioned in court. No person could be detained longer than fifteen days without the case being presented before an independent tribunal presided over by a High Court judge or the equivalent. In cases where detention lasting longer than fifteen days

⁹⁴ Item 3, *Suggested Amendments to the Constitution; Prasad papers*.

⁹⁵ Amendments 52, 53, and 54 of Consolidated List of 5 May 1949; *Orders of the Day*, 5 May 1949. These amendments were submitted by two Muslims, Z. H. Lari and Mohd. Tahir, and by T. D. Bhargava. Lari's and Tahir's amendments provided that there could be no detention without adequate cause, and they provided for a speedy and public trial. That such amendments were moved was another indication that the Assembly's aim was to control, not to prohibit, preventive detention.

was upheld, there were to be quarterly reviews by the special tribunal. No person was to be detained for more than a year.⁹⁶

The pressure brought by the Assembly on its leaders produced results in August and September, those hectic months when final decisions had to be made on other tangled issues such as federalism, compensation for property, and language. On 15 September Ambedkar submitted to the Assembly a new Article 15A, which provided that any arrested person must be brought before a magistrate within twenty-four hours of his arrest, informed of the nature of the accusation, and detained further only on the authority of the magistrate.⁹⁷ The arrested person should not be denied counsel. But these provisions were not to apply to persons held under preventive detention laws. An individual so held could not be detained longer than three months unless an Advisory Board consisting of High Court judges, or persons qualified to be judges, supported further detention, and unless laws permitting greater periods of detention were in existence. Parliament could by law prescribe, according to Ambedkar's article:

The circumstances under which and the class or classes of cases in which a person who is arrested under any law providing for preventive detention may be determined for a period longer than three months and also the maximum period for which any such person may be detained.⁹⁸

Ambedkar's new article was not as solicitous of individual liberty as Bhargava's, or as Ambedkar himself later claimed it to be. It limited the Executive's power to detain, but gave Parliament authority to prescribe detention for long periods. The article did, however, make all detention beyond a three month's period subject to the control of the Advisory Board. During August, when the provision was being framed, the Home Affairs Ministry, the branch of the Executive most immediately concerned, did not take kindly to this interference with its prerogatives and attacked the measure.

⁹⁶ Bhargava's amendment was No. 54 as above.

⁹⁷ For the text of Article 15a, see CAD IX, 35, 1496–7, and Amendment I, list I, of 12 September 1949, *Orders of the Day*—where it bore T.T. Krishnamachari's name as well as Ambedkar's.

⁹⁸ Ibid.

The substance of Ambedkar's provision had been communicated to H. V. R. Iengar, secretary in the ministry, by S. N. Mukerjee of the Assembly Secretariat, who explained that certain members believed that Article 15 as then passed would not provide adequate safeguards against unwarranted arrest and detention. 'More recently,' Mukerjee wrote, 'there have been further criticisms of a similar nature from certain quarters.' Would Iengar let him know quickly what were the Home Ministry's comments?⁹⁹

The Home Affairs Ministry's reply, in all likelihood approved by Patel, claimed that the terms of Article 15A would hamper its police activities. The letter conveyed the ministry's 'very strong objections' to the powers projected for Advisory Boards. 'It would not be possible', the reply read, 'for the Executive to surrender their judgement to an Advisory Board as a matter of constitutional compulsion.' The ministry wanted the details of detention to be left in the hands of the legislatures, and the most it would concede was that the Union Government would suggest to provincial governments that they abide by Advisory Board decisions.¹⁰⁰

Introducing Article 15A in the Assembly, despite the Home Ministry's objections, Ambedkar noted that Article 15 had been violently criticized by the Indian public. And 'a large part of the House, including myself, were greatly dissatisfied with the wording of the Article', he said. 'We are therefore now, by introducing Article 15A, making, if I may say so, compensation for what was done then in passing Article 15.' The new article, Ambedkar believed, 'certainly saves a great deal which had been lost by the non-introduction of the words 'due process of law'. . . . Those who are fighting for the protection of individual freedom ought to congratulate themselves that it has been possible to introduce this clause.' Some powers of preventive detention had to be kept, Ambedkar explained, due to the 'present circumstances in the country'.¹⁰¹

The Assembly's reaction to Ambedkar's new article was, in general, favourable. Most speakers agreed that the times demanded

⁹⁹ Letter from S. N. Mukerjee to H. V. R. Iengar, Home Secretary, dated 16 August 1949; *Law Ministry Archives*.

¹⁰⁰ Letter from H. V. R. Iengar to S. N. Mukerjee, dated 19–20 August 1949; *ibid.*

¹⁰¹ *CAD IX*, 35, 1497–8.

some extraordinary measures, but that detention procedures should be strictly controlled. The more substantial amendments would have given detenus the rights reserved by Article 15A for other classes of arrested persons—those of a speedy public hearing before a magistrate, the use of counsel, etc. Pandit Kunzru spoke most cogently, as was so often the case, against the excesses of preventive detention. He supported the right of a detenu to present his case both at the time of his arrest and later before the Advisory Board. He also favoured a maximum limit for detention. To the argument that the representatives of the people in Parliament could do no wrong, Kunzru replied that in the United States there were safeguards against Congressional excesses, and that even the Japanese under a military occupation had rights not provided by Article 15A.¹⁰²

Ambedkar, replying, conceded these points and moved amendments granting detenus the right to know the grounds for their arrest and to make representation against it. He claimed, however, that the detenu's right to make representation to the Advisory Board was 'implicit' in Article 15A and the right of cross-examination and other rights of accused persons were protected by the provisions of the Criminal Procedure Code.¹⁰³ After a closure motion had ended the debate, the Assembly negatived all amendments excepting those of Ambedkar to his own article; the amended provision was passed.

But the issue was not yet settled. The Government, prodded by the Home Ministry, intended to have its way. Less than two weeks before the Constitution was completed, on 15 November 1949, T. T. Krishnamachari moved an amendment in the Assembly embodying the views that the Home Ministry had expressed the previous August: there was to be no interference with Executive action in detention cases.

The amendment gave to Parliament the power to prescribe the maximum period of detention, the power to prescribe the categories of cases in which a person could be detained for longer than three months 'without obtaining the opinion of an Advisory Board', and the power to lay down the procedures to be followed by Advisory Boards. Commending the amendment to the House, Krishnamachari said that a number of members had seen it and agreed with its terms.

¹⁰² CAD IX, 36, 1551–2.

¹⁰³ Ibid., pp. 1560–3.

He called it a 'wholesome' amendment and concluded by saying indefinite detention had been made impossible.¹⁰⁴ He failed to point out, however, that this amendment made it possible for Parliament to make laws providing for detention unscrutinized by Advisory Boards and could so circumscribe Advisory Board procedure as to make it useless as a protection of individual liberty.

None of the Oligarchy spoke on the amendment. But Ambedkar defended it, somehow contriving to say that he believed that it lessened the 'harshness' of Article 15A. He defended detention unsupervised by the courts on the grounds that there might be cases when it would endanger state security if members of the Judicial Board knew the facts regarding the detention of any particular individual. Ambedkar also pointed out that Parliament must specifically define the categories to which such extraordinary detention would apply.¹⁰⁵ His arguments let in but little sun on a gloomy scene. And one wonders if he could himself have believed them.

Patel had won a victory. The authority of the courts in cases of personal liberty had been lessened and the individual had lost another of the remaining vestiges of the protection of due process. This particular aspect of personal freedom had been whittled down until on paper, at least, it was nearly non-existent. And although Assembly members had resisted this, in the end they had pinned their faith upon the mercy of the Legislature and the good character of their leaders.

4. Preventive Detention since 1950

The Provisional Parliament passed the first Preventive Detention Act within a month of the inauguration of the Constitution, in February 1950. In the Act, 'The courts were expressly forbidden from questioning the necessity for any detention order issued by the Government. The subjective satisfaction of the authorities was to be the determining factor in every case.'¹⁰⁶ And, it was subsequently discovered, the

¹⁰⁴ For the text of the amendment, and Krishnamachari's defence of it, see *CAD XI*, 2, 531. These provisions became part of Clause (7) of Article 22 of the *Constitution*.

¹⁰⁵ *CAD XI*, 3, 576.

¹⁰⁶ O. H. Bayley, *Preventive Detention in India*, p. x.

courts could not enquire into the truth of facts put forward by the Executive as grounds for detaining an individual.¹⁰⁷ The nation was indeed at the mercy of the Legislature and the Executive.

Commending this first detention Bill to Parliament, Patel explained that it would be used against those 'whose avowed object is to create disruption, dislocation, and tamper with communications, to subvert loyalty and make it impossible for normal government based on law to function'.¹⁰⁸ He cited labour troubles, the Telengana uprising and pointed to the Communists in justification of such Executive powers. The original Act has been extended eleven times since 1950 and seems now to be a fixture of Indian life. Subsequent versions of the law have been softened, however, and Advisory Boards now have power to release detenus if they think that the Executive has no case for detention.¹⁰⁹

That the Constituent Assembly had successfully removed due process from the Constitution so that judicial review of preventive detention cases would not be possible was established in the well-known Gopalan's case.¹¹⁰ The detention of Gopalan was upheld because the Supreme Court 'found it impossible to interpret the term "law" in Article 21 of the Constitution as meaning *jus* as distinct from *lex* and consequently refrained from examining the consistency of procedure laid down in the Preventive Detention Act with the principles of natural justice'.¹¹¹

The authority thus given to the Government in India is a potential danger to liberty. It has been used with restraint, however, and no one has ever proved the charge that the Executive has used it for partisan purposes. Gopalan and other Communist leaders, for example, were finally released and may 'pursue their political activities as long as they do not amount to violence and subversion'¹¹²—and Kerala has shown

¹⁰⁷ All India Reporter (AIR) 1954, S.C. 179. See *ibid.*, Appendix I, p. 129.

¹⁰⁸ *Ibid.*, p. 12.

¹⁰⁹ *Ibid.*, p. 25.

¹¹⁰ 1950 *SCJ*, pp. 174–311.

¹¹¹ Alexandrowicz, *op. cit.*, p. 24. This court decision bore out the argument M. A. Baig had made in the Assembly; see p. 105 above.

¹¹² *Ibid.*, p. 34. For an excellent review of the legal aspects of preventive detention see *ibid.*, Chapter 2. The number of detenus in India in 1950 was 10,962 of whom over 6000 were Communists in Telengana. In 1951 the figure had dropped to 2316 and in 1960 to 153. Bayley, *op. cit.*, pp. 25 and 32.

that the Union Government can be very tolerant indeed. Those who wish India well can only hope that the Union Government will continue, despite the extreme provocation of such events as the border war with China, its past policy of treating the Preventive Detention Act as primarily a psychological deterrent in the fight against subversive activities throughout India, and will not use it to bring about ideological conformity and the downfall of liberty.

The Fundamental Rights and Directive Principles: A Summing Up

It is quite evident that the Fundamental Rights and the Directive Principles were designed by the members of the Assembly to be the chief instruments in bringing about the great reforms of the social revolution. Have they, one may ask, helped to bring Indian society closer to the Constitution's goal of social, economic, and political justice for all?

Briefly, the answer is yes. The purpose of a Bill of written rights is to create or to preserve individual liberty and a democratic way of life based on equality among the members of society—only in theory are rights and liberties separable from democracy. In India it appears that the Fundamental Rights have both created a new equality that had been absent in traditional Indian (largely Hindu) society and have helped to preserve individual liberty. The character of rights issues and the behaviour of human beings what they are, it is the absence of comment about the state of rights in India, rather than its presence, that is significant: it is the denial of rights, not their existence, that makes news. A strong indication, therefore, of the reasonably healthy condition of civil liberties in India is the lack of criticism of their absence—and there is no reason not to attribute this in some measure to the Constitution. The number of rights cases brought before High Courts and the Supreme Court attest to the value of the Rights, and the frequent use of prerogative writs testifies to their popular acceptance as well. The classic arguments against the inclusion of written rights in a Constitution have not been borne out in India. In fact, the reverse may have been the case. Those who argue against written rights cite public opinion as the greater safeguard of rights, but in a politically underdeveloped country like India, which also lacks the rapid communications necessary to the formation and expression of public opinion, it may be that written rights come close to being a necessity.

The Directive Principles have also been sceptically received by some authorities. Dr. Wheare has doubted 'whether there is any gain, on balance, from introducing these paragraphs of generalities into a Constitution'.¹¹³ Yet as we have seen, the Directive Principles have been a guide for the Union Parliament and state legislatures; they have been cited by the courts to support decisions; governmental bodies have been guided by their provisions. The Government of India Fiscal Commission of 1949, for example, recognized that its recommendations should be guided by the Principles. 'It is obvious', the report said, 'that a policy for the economic development of India should conform to the "objectives" laid down in the. . . . Directive Principles of State Policy.'¹¹⁴

K. M. Panikkar believes that both the Rights and the Principles have been the source and inspiration of reform legislation, for under their aegis 'the Indian Parliament has been active in the matter of social legislation, whether it be called by the Hindu Code or by another name'.¹¹⁵ The Fundamental Rights of other constitutions may have served as well as—or even better than—those of the Indian Constitution in protecting the existing rights and liberties of the peoples concerned. It is very doubtful, however, if in any other constitution the expression of positive or negative rights has provided so much impetus towards changing and rebuilding society for the common good.

¹¹³ K. C Wheare, *Modern Constitutions*, p. 69. See also Jennings, *Some Characteristics*, pp. 30ff.

¹¹⁴ *Fiscal Commission Report*, Chapter devoted to Fundamental Objectives of an Economic Policy, p. 9. See also *The First Five Year Plan, a Draft Outline*, p. I, and *Third Five Year Plan*, pp. 1-6.

¹¹⁵ Panikkar, *Hindu Society*, p. 52.

5

The Executive— Strength with Democracy

The Parliamentary system produces a stronger government, for (a) members of the Executive and Legislature are overlapping, and (b) the heads of government control the Legislature.

K. M. Munshi

THE members of the Constituent Assembly were committed to framing a democratic constitution for India, and there was little doubt that this democracy should be expressed in the institutions of direct, responsible government, and not in the indirect system envisaged by Gandhi and some of his followers. In the Euro-American constitutional tradition, to which the Assembly looked for its examples, there had grown up three major types of Executive: the American presidential system, the Swiss elected Executive, and British cabinet government. Which of these should the Assembly adopt? Or could some workable combination of them be made?

The Assembly had to find the answer in the context of the past—India's familiarity with cabinet government—and in the needs of the present and future. The needs were strength and quick effectiveness, for huge strides in industrial, agricultural, and social development had to be made and an enormous population well and fairly governed. In the rapidly moving world of the mid-twentieth century, a new India had to be built almost overnight. How was the leadership for this task to be provided? What type of Executive would be stable, strong, effective, and quick, yet withal, democratic?

The Assembly chose a slightly modified version of the British cabinet system. India was to have a President, indirectly elected for a term of five years, who would be a constitutional head of state in