IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) NO. 829 OF 2013

IN THE MATTER OF:-

S.G. Vombatkere & Anr. ..... Petitioners

Versus

Union of India and Others ..... Respondents

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C. ARYAMA SUNDARAM
SENIOR ADVOCATE

26.07.2017

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SUBMISSIONS OF MR. C. ARYAMA SUNDARAM, SENIOR ADVOCATE, ON BEHALF OF THE STATE OF MAHARASHTRA

I. PRIVACY IS NOT A FUNDAMENTAL RIGHT:-

A. Privacy is not a fundamental right. There can be rights whose violation may be considered as a violation of a Fundamental Right, but these rights have to trace back directly to one of those rights protected under Part III. Merely because such rights whose violation is challenged may also fall under a person's claim for privacy, would not ipso facto result in such right being protected as a facet of privacy or emanating from Privacy, but would only be protected because it emanates from a stated Fundamental Right.

B. Merely because the right sought to be protected is found by the Court in a given case to trace directly to a Fundamental Right and that right also is one, that may be a manifestation of one's privacy, would not make privacy a Fundamental Right. A challenge to such violation would rest not on the action being a violation of privacy but on the same being an invasion of a Fundamental Right.

C. The instant reference centers around whether "*there is any fundamental right of privacy under the Indian Constitution.*" This would necessitate answering three basic questions:-

a. What is Privacy?

b. Is the term "Privacy" capable of a definite understanding, unambiguous in terms, which could then crystallize into a right?

c. And if so, whether such right would be a Fundamental Right, as found in Part III?

II. MEANING OF PRIVACY:-

A. "Privacy" is not a definite term. It is an inchoate expression, incapable of an exact definition. An attempted definition has been "*the right to be left alone.*" Some of the Dictionary meanings are (a) The New Shorter Oxford Dictionary (1993) "*Privacy – The state or condition of being withdrawn from the society of others from public attention; freedom from disturbance or intrusion, seclusion*"; and (b) Black's Law Dictionary, 9th Edition (2009) – "*the condition or state of being free from public attention to intrusion into or interference with one's act or decision.*" In *Sharda versus Dharmpal*reported as *2003 (4) SCC 493,* this Court defined Privacy as the *"state of being free from intrusion or disturbance in one's private life or affairs."*

B. Therefore, if any of the above meanings was taken to be the definition of privacy, we would have to read in as a Fundamental Right, "the right to be left alone" or "theIright to withdraw from society of others and from public attention" or "the right to be free from disturbance or intrusion or seclusion" or "the right to be free from public attention to or intrusion into.or interference with one's acts or decisions" or "the right to be free from intrusion or disturbance in one's private life or affairs." To treat the right to privacy itself as a Fundamental Right would therefore mean that one would have to define the term privacy, and then confer on it the status of a Fundamental Right, since no Fundamental Right can be included in Part III except through Constitutional amendment. The question would then arise as to whether such a definition of Privacy in its entirety, can trace to a FundamentalRight?

C. It is therefore seen that privacy is a concept that includes within itself several expectations. If protection has to be afforded, it would have to be given to the particular expectation that is belied or violated. For such violated expectation to be accorded Constitutional protection, it would necessarily have to be traced to one of the stated Fundamental Rights. What can be protected therefore, is the violation of a particular Fundamental Right and not the violation of a "right to privacy". It is perhaps for this reason, that the Petitioners'attempt has been to treat the expression privacy as synonymous with liberty so as to bring it within the ambit of right to life and personal liberty under Article 21. The fallacy in treating privacy in its entire manifestation as encompassed within the right to life and personal liberty under Article 21, is to overlook the fact that privacy and liberty are not synonymous or inter – changeable. This would therefore militate against the attempted seamless interplay being privacy and liberty, as sought to be canvassed by the Petitioners.

D. Liberty without a doubt is one of the most cherished rights available to mankind and may even be traceable to pre – Constitutional natural rights that are Constitutionally recognized and protected. But that does not amount to saying that privacy per se could be equated to liberty and that the two are inter – changeable and therefore, privacyshould be accorded similar treatment. In point of fact, liberty encompasses various human rights, some of which may, owing to the wide area involving human

privacy, happen to fall within the same. However, merely because a person's right to liberty may include a right which is also a part of his protection against being intruded on, would not make privacy a Fundamental Right but would merely be a protection against unlawful intrusion with the liberty of man.

E. Therefore, to accord privacy the status of a Fundamental Right would result in including what would otherwise not amount to a Fundamental Right, such status. In fact, it is for this very reason that despite certain decisions regarding the right to privacy as a Fundamental Right, in actual point of fact, this Court while determining the legality or otherwise of the action complained against, has traced the protection back to Articles 19 or 21.

F. A person complaining of an action violating his Fundamental Right cannot complain that it violates his right to privacy and is hence protected, but would instead have to trace the violation to either Article 21 or some other provision of Part III. Merely because a right to privacy is said to be affronted, it would not ipso facto amount to a violation of a Fundamental Right, but the test is whether the action complained of can be traced to a stated Fundamental Right.

G. It is for this reason, that this Court in the case of *Kharak Singh versus State of U.P.* reported as 1962 (1) SCR 332, while referring to the Preamble of the Constitution observed that the Constitution was designed to "*assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories.*". (Pg. 93 – 122,@ 109, Petitioners' Compilation)It is in this context, that *Kharak Singh* held that "*In dealing with a fundamental right such as a right to free movement or personal liberty, that only can constitute an infringement which is both direct as well as tangible. And it could not be that under these freedoms, the Constitution makers intended to protect or protected mere personal sensitiveness.*".(@ 102, Petitioners' Compilation)And therefore, this Court concluded that "*the right of privacy is not a guaranteed right under our Constitution and therefore, the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.*" (@ 112, Petitioners' Compilation)

H. The denial of the right to privacy in *Kharak Singh*has to be read in the context in which it arose. The very fact that one of the actions complained about was struck down by this Court, on the ground of being violative of Article 21, would indicate, that this Court was not laying down that merely because the right claimed could also

incidentally have a connection with the privacy of the person, it would not cease to be a right emanating from the protection of his personal liberty. But that is not to say that everything emanating from a person's privacy would *ipso facto* become a right protectable under Article 21.

I. *Kharak Singh* therefore, should be read as laying down the proposition that there was no Fundamental Right to privacy but nonetheless there could be aspects also linked with the privacy of a person that could amount to an expression of his personal liberty.

J. It is for this reason, that in the case of *Gobind versus State of M.P.* reported as 1975 (2) SCC 148, this Court proceeded on the *Kharak Singh* doctrine, and tested the impugned action qua Article 21 and held that "*Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individual. It therefore, relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.*" (123 – 133 @ 131, Petitioners' Compilation)

K. In fact, this Court also clearly held that "*Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty*" (@ 131, Petitioners' Compilation)and then proceeded to adjudicate the dispute before it on an assumption as to the existence of a right to privacy. *Gobind*itself therefore, did not recognize the right to privacy as a Fundamental Right. Whileso, the subsequent judgements that sought to so recognize the right to privacy as a Fundamental Right proceeded on the ratio of *Gobind*on an assumption that *Gobind*had so held, when in fact, that was not the case.

L. The various subsequent judgements of this Court when protecting a right to privacy have really adjudicated on the legality of the action itself and has protected infringement thereof by tracing that action to Article 21. Nowhere, has the right to privacy been seen as a standalone right to be protected.

M. In any event, such a right to privacy can never be treated as absolute, as noticed in *Gobind*itself wherein this Court observed that "*The right to privacy in any event will necessarily have to go through a process of case – by – case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.*" [emphasis supplied](@ 123 @ 132, Petitioners' Compilation)

N. Even in the United States, privacy has never been seen as being an absolute Constitutional right. The Sixth Circuit Court of Appeal has similarly held that "*not all rights of privacy or interests in non – disclosureof private information are of Constitutional dimension, so as to require balancing Government action against individual privacy*" (refer:-*J.P. Et al vs Andrew J. DeSanti*reported as *653 F. 2d 1080)*, a copy has been annexed herewith Annexure – R (17 – 28 @ 27).

III. CONSTITUTIONAL HISTORY OF PROTECTION TOPRIVACY:-

A. In support of the foregoing, it is submitted that the Constitutional history regarding the right to privacy would itself show that privacy as a standalone right was considered, debated upon but rejected by the Framers of the Constitution.

B. In India, the concept of privacy traces its origins to the Debates of the Constituent Assembly, at the time of the framing of the Constitution during 1946 – 1949. The following are relevant in this context:-

a. K.M. Munshi's Draft Constitution submitting to the Sub – Committee on Fundamental Rights, dated 17.03.1947, annexed herein as Annexure – A. (29 – 34 @ 31 – 32)

b. Dr. Ambedkar's Memorandum and Draft Articles on the Right of States and Minorities, dated 24.03.1947, annexed herein as Annexure – B. (35 @ 38)

c. Draft Report of the Sub – Committee, dated 03.04.1947, annexed herein as Annexure – C. (48 @ 51)

d. B.N. Rau's notes on the Draft Report dated 08.04.1947, annexed herein as Annexure – D. (55 @ 60)

e. AlladiKrishnaswamiAyyar's comments on the Draft Report, dated 14.08.1947, annexed herein as Annexure – E. (61 @ 62 – 63)

f. Comments and Suggestions on the Draft Constitution, dated Feb – October, 1948, annexed herein as Annexure – F. (66 @ 73 – 74)

g. Debates of the Constituent Assembly, dated 29.04.1947, annexed herein as Annexure – G. (77 @ 79)

Reference to the above documents are from the Debates of the Constituent Assembly – 29 – 30 March 1947, as contained in *The Framing of India's Constitution : A Study* by B. Shiva Rao, 1968.

C. Of relevance is the fact that the makers of the Constitution were aware of the existence of the concept of the "Right to Privacy" as also the 1st Amendment of the U.S. Constitution (adopted by the US Congress in 1792), and yet, chose to exclude the same in their wisdom from the Indian Constitution. This is fortified by the

following extracts from the papers presented by the members of the Constituent Assembly in the Debates, as mentioned hereinabove:-

a. FOR:-

i. Dr. B.R. Ambedkar :-

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by oath of affirmation and particularly describing the place to be searched and the persons or things to be seized," (35 @ 38)

b. AGAINST:-

i. B.N. Rau:-

"If this means that there is no search without a court's warrant, it may seriously affect the powers of investigation of the police. Under the existing law, e.g., Criminal Procedure Code, Section 165 (relevant extracts given below), the police have certain important powers. Often, in the course of investigation, a police officer gets information that stolen property has been secreted in a certain place. If he searches it at once, as he can at present, there is a chance of his recovering it; but if he has to apply for a court's warrant, giving full details, the delay involved, under Indian conditions of distance and lack of transport in the interior, may be fatal." (55 @ 60)

ii. AlladiKrishnaswamiAyyar:-

"In regard to secrecy of correspondence, I raised a point during the discussions that it need not find a place in a chapter on fundamental rights and that it had better be left to the protection afforded by the ordinary law of the land contained in the various enactments. There is no such right in the American Constitution. Such a provision only find its place in the post First World War Constitutions. The effect of the clauses upon provisions of the Indian Evidence Act bearing upon privilege will have to be considered. ... The result of this clause will be that every private correspondence will assume the rank of a State paper or, in the language of Sections 123 and 124, a record relating to the affairs of the State. (@ 62)

A clause like this may checkmate the prosecution in establishing any case of conspiracy or abetment in a criminal case and might defeat every action for civil conspiracy, the plaintiff being helpless to prove the same by placing before the court the correspondence that passed

between the parties, which in all these cases would furnish the most material evidence. ....On a very careful consideration of the whole subject, I feel that inclusion of such a clause in the chapter on fundamental rights will lead to endless complications and difficulties in the administration of justice." (@ 62)

On Clause 10 pertaining to unreasonable searches he stated "*In regard to this subject, I pointed out the difference between the conditions obtaining in America at the time when the American Constitution was drafted and the conditions in India obtaining at present after the provisions of the Criminal Procedure Code in this behalf have been in force for nearly a century. The effect of the clause as it is, will be to abrogate some of the provisions of the Criminal Procedure Code and to leave it to the Supreme Court in particular cases to decide whether the search is reasonable or unreasonable." (@ 63)*

D. Historical Constitution, as submitted by the Socialist Party of India, 1948, used the expression "liberty" and not "personal liberty" as finally found in the Constitution, annexed herein as Annexure –H:- (83)

"RIGHTS OF FREEDOM

24. (a) All citizens of the Republic shall enjoy freedom of movement throughout the whole of the Republic. Every citizen shall have the right to sojourn and settle in any place he pleases. Restrictions may, however, be imposed by or under a Federal Law for the protection of aboriginal tribes and backward classes and the preservation of public safety and peace. (b) Every citizen shall have in every Unit of the Republic equal civil rights and duties with the citizens of that Unit.

25. The citizens are guaranteed, consistent with other provisions of the Constitution and public order and morality, (a) freedom of speech and expression; (b) freedom of the press; (c) freedom to assemble peacefully without arms; (d) freedom to form associations and unions; (e) secrecy of postal, telegraphic and telephonic communications.

26. No person shall be deprived of his life or liberty, nor shall his dwellings be entered, save with due process of law.

27. Traffic in human beings and forced labour in any form, including beggar and involuntary service, except as a punishment of crime whereof the party shall have been duly convicted, are hereby prohibited and any contravention of this prohibition shall be an offence, provided that the state may impose, in accordance with law, compulsory service for public purposes without any distinction on grounds of race, religion, caste, or class."

IV. WHAT IS PERSONAL LIBERTY?

A. The run up to the Indian Constitution saw a movement of what ultimately became Article 21, from Civil Liberty to Personal Liberty. A recommendation that rather than "personal liberty" the expression "liberty" be used, was also not accepted. In particular:-

a. Report of the Sub – Committee on Fundamental Rights, dated 16.04.1947, annexed herein as Annexure – I.(84 @ 88)

b. Interim Report of the Advisory Committee on the Subject of Fundamental Rights, dated 29.04.1947, annexed herein as Annexure – J. (89 @ 94)

c. Note on Certain Clauses by the Constitutional Advisor (B.N. Rau) dated 07.10.1947, annexed herein as Annexure – K. (97 @ 100)

d. Draft Constitution prepared by the Constitutional Advisor (B.N. Rau) dated 27.10.1947, annexed herein as Annexure – L. (101 @ 107)

e. Minutes of the Meeting of the Drafting Committee, dated 31.10.1947, along with the relevant extract from "*The Framing of India's Constitution – A Study*" by B. Shiva Rao, 1968, annexed herein as Annexure – M (colly). (110 @ 111, 115 – 116)

f. Draft Constitution prepared by the Drafting Committee, dated 21.02.1948, annexed herein as Annexure – N. (117 @ 119 and 131)

g. Debates of the Constituent Assembly, between 08.11.1948 – 13.12.1948 and on 23.05.1949, annexed herein as Annexure – O (colly). (133 @ 134 – 135, 138 @ 139 – 140, 141 @ 142, 143, 145 @ 146 – 148, 149 – 150, 179, 181, 182)

B. There is a definite distinction between the expression "civil liberty", "liberty" and "personal liberty". Civil liberty has been defined by Blacks' Dictionary, Ninth Edition, as "*freedom from undue governmental interference or restraint. This term usually refers to freedom of speech, freedom of the press, freedom of religion, freedom of association, and other liberties associated with the Bill of Rights. In American law, early civil liberties were promulgated in the Lawes and Libertyes of Massaschusetts (1648) and the Bill of Rights (1791). In English law, examples are found in Magna Carta (1215), the Petition of Rights (1628), and the Bill of Rights (1689).* The term "*personal liberty*" though not specifically defined under the Black's Dictionary, directs one to the definition of "*liberty*". "*Liberty*" is defined in the said Dictionary as "*1. Freedom from arbitrary or undue external restraint, especially by a Government <give me liberty or give me death>. 2. A right, privilege or immunity*

enjoyed by prescription or by grant; the absence of illegal duty imposed on a person <the liberties protected by the Constitution>."

C. Although the Preamble to the Constitution refers to the expression "*liberty of thought, expression, belief, faith, worship*", Article 21 is the only Fundamental Right that refers to "liberty", specifically qualifying it to a "right of personal liberty" and in the context of a right to life. It is Article 19 which brings in the freedomof expression and Article 25 which protects freedom of conscience and the right to freedom of religion. The reference to "liberty" found in the Preamble therefore, finds expression in Articles 19 and 25. The right to life and personal liberty found in Article 21 would be traced to a natural right duly recognized by Article 21. Such a natural right, for a person not to be deprived of his life or personal liberty, except by procedure established by law, would trace back to the Magna Carta and to basic human rights.

D. Prior to the Magna Carta, "*the relationship of subject and Monarch was conceived of as a personal one, involving a bargain under which the Monarch gave the subject protection and undertook to govern according to the laws of the land, and the subject owed the Monarch legally enforceable allegiance. It did not involve the subject having any legally enforceable rights against the crown, and the duties of protection ow4ed by the Crown were not justiciable."* (refer:- para 26, Halsbury's laws of England, Vol. 8(2), 4th Edition, Reissue – 184 @ 185). It is the Magna Carta that for the first time, introduced a restraint on the Sovereign in his deprivation of a person's life and personal liberty in a fair trial, that has thereafter become a fundamental concept in a civilized world. In India, the Constitution, which is the receptacle of the rights of a citizen and restraints of a Sovereign, recognizes and reiterates such natural and inalienable rights to life and personal liberty. The Magna Carta stated "*The Crown or it's ministers may not punish, imprison or coerce the subject in an arbitrary manner: no freeman may be taken or imprisoned or disseized of his freehold, liberties or free customs, or be outlawed or exiled, or in otherwise molested; nor may he be judged or condemned, except by the lawful judgement of his peers, or by the law of the land, nor may justice or right be sold, denied or delayed to any man."* (refer: para 374, Halsbury's laws of England, Vol. 8(2), 4th Edition, Reissue – 184 @ 186). The relevant extracts from Halsbury's laws of England has been annexed herewith as Annexure – P. (184 – 186)

E. The issue, however, arises when seeking to interpret a deliberate use of the expression "personal liberty" in juxtaposition to "life" in Article 21 as being similar to "civil liberty" or even to a much wider concept of "liberty". There was a deliberate decision of the Framers of the Constitution to restrict liberty in Article 21 only to personal liberty and in the context of life. This concept of personal liberty is traceable to the right of protection of the person against deprivation of life or the taking of his physical liberty. It is for this reason that Article 22 was read by Chief Justice PatanjaliSastri, in the case of *State of Madras versus V.G. Row* reported as 1952 SCR

597 @ 605 as "*If then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards "fundamental rights" as to which this Court has been assigned the role of a sentinel in the qui vive.*" Rights to air, food, light, clean environment, hygiene etc., all trace themselves directly to a right to life, and judgements with regard to including such rights as fundamental rights, recognize them as being part of the right to life.

F. *Kharak Singh* recognized a protection against unjustified domiciliary visits at night as affronting a right to personal liberty since it was a physical affront on the person and dwelling of a man. It is only in the case of *R. Rajagopal and Another versus State of Tamil Nadu and Others* reported as 1994 (6) SCC 632 (Pg. 287 of the Petitioners' Compilation)that this Court extended liberty to a non – physical area and introduced a concept of privacy. However, this too was done qua a right against another private party. Authority therefor, was found in *Gobind* which, however, did not deal with such issue nor decide that the right to privacy was in fact a Fundamental Right.

G. The attempt to read in privacy of a person into right to personal liberty would in effect amount to treating a protection against unreasonable invasion of his physical dwelling and physical self by the State as an infringement of the intangible aspects, that go to make up a person's persona. To do so would be to read in to the expression "*personal liberty*", an aspect that was specifically considered and rejected by the framers of the Constitution. Further, personal liberty qua Article 21, deriving its flavor from Article 22, would be to protect the physical aspects of a person's liberty.

H. The difference between Articles 19 and 25 on the one hand, and Article 21 on the other, is that while the former confer positive rights on a citizen, Article 21 prohibits the State from taking away a pre – existing inalienable right in a person. The facets of a right to mental, ideation or information privacy of a person, were not part of the inalienable natural rights, reiterated and protected in Article 21, but would be recognition of new rights, becoming necessary, in a new and changing world. These therefore, would not be within the compass of Article 21 (which merely protects a pre – existing right), but would amount to the creation or conferment of a new right, which can be found in other Articles like 19 and 25. In fact, even the right originally considered in the draft Constitution as a prevention of intrusion into the dwelling of a person within the then Article 26 (now Article 21) was then subsequently deleted. (32 (K.M. Munshi's draft note), 51(Draft Report of the Sub Committee) and 83(Historical Constitution by the Socialist Party) 87 (Report of the Sub Committee)) This would itself indicate that the intrusion contemplated by the Framers of the Constitution, as an invasion of the personal liberty was an intrusion into the physical self of man. .

I. There is a distinct difference in the meaning of the expressions "Civil Liberty" and "Personal Liberty". While "civil liberty" could be taken as a collective for all the

rights – political, religious and civil which a person has in a given social body, the term "personal liberty" is necessarily circumscribed to the person of the individual and for reasons aforesaid, *"person"* would be the physical person of an individual since liberty as contemplated in Article 21 was thepre – existing, inalienable, and natural right. When the framers of the Constitution specifically noticed the difference between "civil liberty" and "personal liberty" and introduced "Personal" in Article 21, to thereafter widen the meaning of liberty to encompass other civil liberties, would be incorrect. It is in this context relevant that in the Constitution of the United States, or in the Human Rights Convention or even in the United Kingdom, reference to liberty is not circumscribed by the word "personal", which is found only in the Indian Constitution. Therefore, it would not be proper to transfer body and soul, American or European concepts into Article 21 of the Constitution of India. In fact, in India, the inclusion of the word "personal" before the word "liberty" was deliberate and done with the intention of restricting the scope of the term "liberty" since otherwise it was capable of being construed widely. For example, even price control may be regarded as interference with liberty of contract between buyer and seller. (Page 100 (Note on clauses, B.N. Rau)). Similarly, the limitation through the addition of "personal" to "liberty" was also deliberately introduced in the belief that otherwise the term was so wide as to include within it, aspects of freedom found in Article 15 of the draft Constitution, which is now Article 19. (See Comments of Drafting Committee on Article 15 of the Draft Constitution at Page 131). The current interpretation sought to be put by the Petitioners of bringing in a right of privacy within the right to personal liberty, would amount to stretching the meaning of the words "personal liberty", by dropping the natural and intended meaning, thereby resulting in doing exactly what was decided not to be done by the framers of the Constitution. While without a doubt with the changing times, and with new technological advances, invasions in a person's liberty may arise, the answer thereto, would be to ensure suitable regulatory mechanisms and not to redefine Article 21 of the Constitution and include within it's purview what was never so intended. In fact, doing so would in effect be, conferring a new right through a provision (Article 21) which was nothing but a provision to protect a pre – existing right. The inclusion of such a right as a specific right can only be done through a Constitutional amendment.

J. An instructive Article on the true meaning of the term liberty by Justice Charles E. Shattuck titled *"The True Meaning of the Term "Liberty" In Those Clauses In the Federal and State Constitutions Which Protect "Life, Liberty, And Property""* published as 4 Harv. L. Rev. 365, annexed herewith as Annexure – Q. (187 – 201)

K. Fundamental to the concept of Sovereignty is that it is the decision of the Sovereign to confer such rights, privileges or protection on a person as that Sovereign desires. Hence, similar rights would not be available to a person in a country like China, or the United Arab Emirates, with regard to free speech as may be found in India or the United Kingdom. Similarly, while the right to a trial by one's peers may be regarded

as fundamental in the United States, it is not so in India. Such rights, protections and privileges as are granted by any Sovereign in any one country are found in the Constitution / local laws of that country, and it is the interpretation of the Constitution of that country can determine what the Sovereign has decided to grant it's citizens. It is not open for a citizen to demand that his Sovereign grant him something beyond what is stated in the Constitution of that country or to demand that his Constitution be brought in line what that of another Sovereign. In this case especially, the expression "personal liberty" would have to be read in the context of the Indian Constitution through reference to the Constitutional history in India and not be interpreted in lines of the expression "liberty" as found in the Constitution of other countries.

V. SCOPE OF THE "RIGHT TO PRIVACY":-

A. It is the Petitioners' case that this Court ought not to endeavor a definition of the term *"privacy"* and that the effect of the right to privacy would have to be noticed, evolved, and determined on a case to case basis. Therefore, the Petitioners seek a blanket and all – encompassingstatus of a Fundamental Right being accorded by this Court to the "right to privacy", without there being any clarity on the meaning and scope of the said term.

B. Privacy is not a right. There cannot be an absolute right to privacy in the abstract. A person's privacy may be affronted in a number of ways, and one would need to address the actual affront and determine whether the same is traceable to one of the Fundamental Rights. In fact, the very case of the Petitioners proceeds on the basis that various aspects of what they have stated to be Privacy would be protected under any one of the Fundamental Rights being, Articles 14, 19, 21 and 25. Similarly, various instances where the Courts have protected the citizen against violations tracing them to a Fundamental Right have been cited, but in all such cases, the act complained of was traced to Article 21.

C. For instance, a claim to privacy may extend to stopping somebody from barging into one's house. However, the action of barging in is traced not to the right to privacy but as to whether such action would affect one's liberty under Article 21 or would be arbitrary under Article 14 or would amount to violation of a freedom prescribed in Article 19. There are many aspects arising out of a claim of privacy not falling within life or liberty. Those cannot be protected although they would fall within the umbrella of privacy. Hence, every right protected must be one affecting either "Life" or "Liberty". However, every claim of privacy may not be one traceable to right tolife or liberty, nor is a man's home being his castle an absolute. In order to determine the scope of the "right to privacy" one would therefore need to arrive at a workable meaning to the term "personal liberty" of which, some facets of privacy, would at best, be a part. Therefore, what is protected is personal liberty and not privacy.

VI. EVERY FACET OF PRIVACY CANNOT BE PROTECTED:-

A. Every facet of privacy is not protected. Only those which amount to a threat to life, liberty, movement etc. It is only those aspects of privacy that are required as a means of ensuring the full development and evolution of a person which could at all be considered, as deserving of the protection as a right to Life and Liberty. Each and every aspect of privacy would not so qualify.

B. Instances of actions which would otherwise have been deemed to have been barred under "right to privacy" but are perfectly permissible and cannot be challenged as a violation of a right under Part III are:-

a. Taxation laws requiring the furnishing of information;
b. In relation to a census;
c. Details and documents required to be furnished for the purposes of obtaining a passport;
d. Prohibitions pertaining to viewing pornography.

These are restrictions thatdo not affect the right to life or liberty of an individual.

C. In fact, it is relevant that the Petitioners' submissions have proceeded on the basis that different aspects of the right to privacy find themselves covered under various provisions of Part III. Therefore, the relevant question is not whether an action is violative of a right to privacy, but instead, whether it is violative of one of the stated provisions of Part III. Such an action may also infringe upon a person's exercise of some facet of his privacy, but the reason for the Constitutional protections is not that it infringes on a facet of privacy but that it infringes the person's right under Article. 21 or any other relevant Article.

D. Privacy, even if read as a right, would necessarily have to be restricted to the body and physical intrusions by the State and cannot extend to that which would normally be required by a Sovereign for the welfare of the nation at large or by a Sovereign administering the State.

VII. INTERPRETATION OF KHARAK SINGH VERSUS STATE OF U.P. REPORTED AS 1962 (1) SCR 332:-

A. The judgement of this Court in the case of *Kharak Singh* (Pg. 93 of the Petitioner's Compilation) dealt with the following three issues:-

a. That fundamental rights were mutually exclusive i.e., pigeon holed (@ 108);

b. That privacy was an intangible right and was in itself not a fundamental right (@ 102); and

IX. DATA PROTECTION – IT IS A REGULATORY REQUIREMENT AND NOT A FUNDAMEMENTAL RIGHT:-

A. Of significance, is the fact that the claiming of protection of data and information of a person as private and as property of that person would more correctly be traced to Article 300A of the Constitution and not Article 21. It is here relevant that right to property found in Article 19(1)(f) was specifically deleted from Part III and introduced as Article 300A, by the 44th Amendment, 1978. Personal data pertaining to an individual and the individual's sole right over it, without an intrusion by other persons thereto, especially in atechnological age if treated as amounting to the exclusive property of an individual, with a right to his protecting the same, such right is traceable to Article 300-A and not Part III of the Constitution. As noticed by a Constitution Bench in the case of *K.T. Plantation Private Limited and Another versus State of Karnataka* reported as *2011 (9) SCC 1 @ 51, para 168,* wherein it has been held by this Court "*Article 300-A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature. The expression "property" in Article 300-A confined not to land alone; it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognized by law."* [emphasis supplied]

B. The forerunner of digital technology and it'sprotection was "correspondence" in the age of post and telegraph. The protection as to the secrecy of a citizen's correspondence was specifically contemplated in the draft Constitution, (vide Article 5 (Munshi – 32), 9(Draft Report of the Sub Committee – 51), 10 (Report of Sub Committee – 87)equivalent to Article 19), stating that such right was more properly protected under other Statutes, which also dealt with the same.(See Comments and Suggestion of B.N. Rau - 74).It was therefore, the intent of the framers of the Constitution, not to include these as Fundamental Rights but as rights with statutory protection found in other Legislations. It is for this reason that such protection of Data could trace itself to statutory protection and not through introducing a new Fundamental Right of privacy in Part III, which otherwise would not form part thereof. It is therefore submitted, that it is a regulatory framework and it's sufficiency to protect rights qua Data Protection, that is open to judicial review, and not by the conferment of a status of a Fundamental Right not otherwise found in the Constitution.

C. In fact, at the maximum, qua Data Protection, a citizen may claim that the data taken from him by the State is held by the State in a fiduciary position and to this extent a fiduciary relationship extends between the State and the Citizen. Such was the ratio of this Court in a judgement under the Right ToInformation Act, in the case of*Institute*

of Chartered Accountants of India versus Shaunak H. Satya and Others reported as *2011 (8) SCC 781 @ 796, para 22,* wherein it was stated that "*In other words, anything given and taken in confidence expecting confidentiality to be maintained will be information available to a person in fiduciary relationship.*" (Also see, *CBSE versus Aditya Bandopadhyay*reported as *2011 (8) SCC 497 @ 522, paras 37 – 40)*

D. Such fiduciary relationship gives rise to a right in tort either through an Action in Trover or breach of trust should the information be wrongly utilized or appropriated,and judicial review would extend to the safeguards and checks in place to prevent such an exigency. This would therefore, again amount only to a common law right or a statutory right and not a Fundamental Right and such common law right would be a law in force in India under Article 372 of the Constitution as recognized by this Court in the case of *Supt. And Remembrancer of Legal Affairs versus Corpn. Of Calcutta* reported as *AIR 1967 SC 997* and as discussed in the case of *Subramanian Swamy versus Union of India, Ministry of Law and Other* reported as *2016 (7) SCC 221 @ 290, para 67.*

X. SUBMISSIONS ADDRESSED BY THE PETITIONERS:-

D. The Constitution recognizes the concept of personal liberty and the protection of every facet of it. Privacy is a "right of Choice" and therefore, would fall within the ambit of Liberty. Liberty as a concept and as a right predates the Constitution. It is not a right that has been introduced and recognized for the first time in the Constitution.

E. A perusal of the Preamble of the Constitution would reveal the use of phrases such as "thought", "expression", "belief", "faith" and "dignity", all of which would encompass within their scope the right of privacy. Privacy is nothing but the free will of an individual, the right to exercise a choice, and is embedded in the concept of personal liberty.

F. Privacy implying the right to be left alone, cannot be contemplated only in the context of physical space, but would also include within its ambit, the mental space to think, exercise one's choice and make an informed decision.

G. Facets of the concept of privacy have already been recognized in other Articles of the Constitution.

H. The ratio of *Kharak Singh* proceeded on the distinctiveness of each of the Fundamental Rights and further stated that the freedoms contemplated fell within Article 19, and all that was residuary was to be pigeon holed into Article 21. This ratio was specifically overruled in the case of *Maneka Gandhi versus Union of India,* reported as *1978 (1) SCC 248 @ para 5*, resuscitating the minority view on this issue of Subba Rao J, in *Kharak Singh.*

I. Especially in the age of digital technology, protection of data information is vital, which would require protection thereof, as a right to privacy through it's protection as a fundamental right.

XI. SUBMISSIONS IN REJOINDER:-

A. *Kharak Singh* continues to be good law with respect to the proposition that right to privacy does not form part of Article 21. The only aspect of the judgement that was overruled by *Maneka Gandhi* was with respect to the ratio of the Articles 19 and 21 being mutually exclusive.

B. While liberty is an essential right protected by the Constitution and may in fact, trace itself to a natural right of a civilized world, the Petitioners' attempt to equate liberty and privacy is erroneous since privacy is not synonymous with liberty. Merely because an action complained about as an affront or a violation of a person's liberty may also be one which intrudes on his privacy, it would not grant privacy the right to be protected under Part III of the Constitution.

C. Data protection would require regulatory mechanism, adequacy of which can be judicially reviewed, but would not amount to conferring a fundamental right protecting against the demanding or imparting of data.

XII. CONCLUSION:-

The result of this Court recognizing an independent right of privacy as falling within the right to personal liberty would bethat according a status of a Fundamental Right to privacy would result in various common law and Statutory rights becoming Fundamental Rights merely because they emanate from a right to privacy. Equally, a person could approach the Court under Article 13 merely on the ground of privacy being violated and it would be for the State to justify the action on the grounds of reasonable restriction or the larger public interest. The danger of according privacy the status of a Fundamental Right is that then the entire ambit of privacy containing both its private and public elements, and including elements not arising out of personal liberty would be accorded such status. That was not the intention of the Founding Fathers and ought not be introduced at this juncture. The correct approach would be for the person complaining of an infringement of a Fundamental Right through some State action that may also be an intrusion of hisprivacy, to seek protection thereof only as a violation of his right to life or liberty or other rights guaranteed under Part III, and not as a violation of his right of privacy. Only on his satisfying the Court that the right sought to be protected is traceable to Part III of the Constitution, would the State then be required to justify the action as being reasonable and otherwise justifiable. In absence thereof, recourse to Article 13 would not be permissible.

c. That the action complained of had to be tested against a stated fundamental right and to this extent, personal liberty in Article 21 would include within it ordered liberty. (@ 110).In fact, one of the provisions challenged was struck down as violative of such aspect of Article 21. The latter two declarations of the judgement have not been questioned or upset by any subsequent judgement of this Court. In fact, in *Gobind* (Pg. 123 of Compilation), this concept of ordered liberty was applied by this Court in adjudicating the grievance and while referring to *Kharak Singh*, this Court specifically desisted from declaring whether privacy would be a fundamental right. The discussion as regards the impugned Regulations vis a vis a right to privacy was only an assumption to test whether the restriction was reasonable or not.(@ 132, paras 28 and 31)

B. The ratio of *Kharak Singh* that the right to privacy was not an independent fundamental right but that the action would have to be traced to being violative of a stated fundamental right was followed in *Gobind*. The subsequent judgements of 2 – Judge Benches of this Court have based their decisions on the ratio of *Gobind* to hold that there was a fundamental right to privacy whereas *Gobind*itself did not say so.The ratio in *Kharak Singh*, therefore was that the right to privacy was not a Fundamental Right and that the action impugned of had to be traced to an existing / stated Fundamental Right continues to be good law.

VIII. PART III RIGHTS ARE APPLIED VERTICALLY AND NOT HORIZONTALLY:-

A. Assuming there is a right arising out of privacy, the protection under Part III can only be against State action. It cannot extend inter se private persons and their respective rights between them would be regulated by common or civil law. To read in a horizontal right would then require the State's intervention even in the regulation of purely personal rights.

B. To read in such a right would mean that the State would be bound to have suitable legislation regulating the encroachment by one person of the privacy rights of another. The danger in this is that such regulation by the State may require the State to invade the privacy of another person. It could even result in restraining another's liberty.

C. For example, if a man requires anonymity and claims it as his right, and requires the State to ensure that no one interferes with such right, it would lead to a paradoxical situation. A person asked by his friends as to who the best Doctor with respect to an ailment, would give such a list with personal details. The Doctor on the other hand, may object to this dissemination of his details. The State's interference in this entirely personal issue through regulation would lead to an absurdity and would amount to such regulatory method itself being an invasion of a person / privacy or liberty.

ANNEXURE - A1

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653 F.2d 1080
United States Court of Appeals,
Sixth Circuit.

J. P., et al., Plaintiffs,
M. R., et al., Plaintiffs-Appellants, Cross-Appellees,
v.
Andrew J. DeSANTI, et al., Defendants-Appellees, Cross-Appellants.

Nos. 79-3478, 79-3479.

Decided and Filed July 15, 1981.

Juveniles brought action to enjoin compilation and dissemination of social histories prepared by state probation authorities in connection with proceedings involving the juveniles. The United States District Court for the Northern District of Ohio, Robert B. Krupansky, J., denied claims for damages but enjoined certain uses of the social histories and all parties appealed. The Court of Appeals, Cornelia G. Kennedy, Circuit Judge, held that: (1) Younger required abstention with respect to preparation and use of the social histories and pending juvenile proceedings; (2) Younger did not require abstention with respect to postadjudication dissemination of the reports; and (3) postadjudication dissemination of the reports did not violate any federal constitutional privacy right of the juveniles.

Reversed.

West Headnotes (11)

[1] **Federal Courts** ⇐ Families and children

Where class included all juveniles, who were appearing before the juvenile courts on complaints of delinquency, unruliness, neglect, or dependency and who were adversely affected by preparation of social histories, and where that class included some 11,000 juveniles each year, there was a state court proceeding pending against some member of the class so that application of *Younger* abstention principles to action in which injunction against use of the social histories was sought was proper.

4 Cases that cite this headnote

[2] **Federal Courts** ⇐ Younger abstention

Younger abstention is not triggered only by substantial interference with a proceeding involving important state interests; abstention is required when federal intervention would cause even minimum interference with such a state proceeding and the federal issues can be raised in the state proceeding.

7 Cases that cite this headnote

[3] **Federal Courts** ⇐ Families and children

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Relief requested by juveniles who sought to enjoin use of social histories in juvenile proceedings would entail ongoing federal court interference with the daily operations of the juvenile court, so that *Younger* abstention principles were applicable.

6 Cases that cite this headnote

[4] **Federal Courts** ⇐ Families and children

Ohio court rules permitted juveniles to raise in juvenile proceedings the issue of the permissibility of using social histories compiled by probation officers, so that *Younger* abstention principles were applicable to federal court action seeking to enjoin use of the histories.

1 Cases that cite this headnote

[5] **Federal Courts** ⇐ Families and children

Minimal invasion of juvenile's privacy occurring through the compilation by probation officers of the social history in connection with juvenile proceeding was not of such magnitude as to justify federal court's otherwise inappropriate intervention in state affairs and was not sufficient to overcome general abstention principles.

2 Cases that cite this headnote

[6] **Federal Courts** ⇐ Families and children

Juveniles' challenge to postadjudication use of social histories compiled by probation officers could not be raised in any pending state judicial proceedings, so that *Younger* abstention principles were not applicable to action seeking to enjoin disclosure of the social histories to various agencies.

6 Cases that cite this headnote

[7] **Federal Courts** ⇐ Jurisdiction of Entire Controversy;Pendent and Supplemental Jurisdiction

Federal courts have the power to hear state law claims if one would ordinarily be expected to raise them with one's federal claims in a single judicial proceeding and if the federal claim is of sufficient substance to confer subject-matter jurisdiction on the federal court.

1 Cases that cite this headnote

[8] **Federal Courts** ⇐ Tort claims

If juveniles who brought constitutional challenge to disclosure of their social histories were interested in raising state law questions, they would have done so in federal proceedings and, because their claim that their constitutional rights of privacy had been violated was at least colorable, district court had the power to decide whether the dissemination of the social reports violated state law.

47 Cases that cite this headnote

[9] **Federal Courts** ⇐ Families and children

Where issue of whether dissemination of juvenile social histories violated state law was raised by district court and not by any of the parties, where proper interpretation of state law rested on factual issues which had not been addressed by the parties, where state law was not clear on the issue, and where the federal constitutional

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issue would have to be reached regardless of the decision on the state law issue, trial court abused its discretion in resolving the state law issue.

1 Cases that cite this headnote

[10] **Constitutional Law** ⇦ Disclosure of personal matters

Constitution does not encompass the general right to nondisclosure of private information.

106 Cases that cite this headnote

[11] **Constitutional Law** ⇦ Records or Information

Infants ⇦ Access and dissemination;confidentiality

Dissemination of social histories, compiled by probation officers in connection with juvenile proceedings, to social and religious agencies did not violate any federal constitutional right of privacy.

49 Cases that cite this headnote

Attorneys and Law Firms

*1081 Kenneth D. Petrey, Margaret L. Terry, Cleveland, Ohio, for plaintiffs-appellants, cross-appellees.

John T. Corrigan, Prosecuting Atty., Thomas P. Gill, Cleveland, Ohio, for defendants-appellees, cross-appellants.

Before MERRITT, BROWN and KENNEDY, Circuit Judges.

Opinion

CORNELIA G. KENNEDY, Circuit Judge.

This case requires us to decide whether under the principles first articulated in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the District Court was obliged to abstain from deciding a class action challenge to certain aspects of state juvenile court procedures, and further, whether there exists a constitutional right of privacy which is violated by disclosure of juvenile court records. The District Court ruled that abstention was inappropriate. It reached the merits of all of the issues raised by appellant class, in the process finding a constitutional right to nondisclosure. We reverse.

This action was brought by appellants, the class of juveniles who have appeared in the past or may appear in the future before the Juvenile Court of Cuyahoga County, Ohio, on complaints of delinquency, unruliness, neglect, dependency and abuse. Appellees/cross-appellants (appellees) are those employees of the juvenile court responsible for compiling social histories of juveniles, submitting them to the judges, and maintaining custody of the social histories after disposition of a juvenile's case.

When a young person is brought before the Juvenile Court of Cuyahoga County, *1082 Ohio, it is the practice of the court's probation officers to compile a social history of the juvenile. Social histories contain information from a number of sources, including the complaining parties, the juveniles themselves, their parents, school records, and their past records in the juvenile court. They also include any information on record pertaining to other members of the family, and any other information that the probation officer thinks is relevant to the disposition of a case before the juvenile court.

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Receipt of written consent from juveniles or their families is not a prerequisite to compilation of social histories, and although access to social histories is available to juveniles' lawyers, access is not available to juveniles or their families.

Ohio R.Juv.P. 32 authorizes submission of a social history to the juvenile court judge for certain limited purposes prior to adjudication of a juvenile's case on the merits. The District Court found that the practice in Cuyahoga County is to make the social history available to the court before the adjudicatory hearing as a matter of course, although the juvenile court judges did not consult the social history prior to adjudication or an admission by the juvenile. The District Court also found that juvenile court referees frequently discuss a juvenile's case ex parte with probation officers before an adjudicatory hearing. At the conclusion of a case the social history is kept on file at the juvenile court, where, upon request, it is available to 55 different government, social and religious agencies that belong to a "social services clearinghouse."

Appellants brought this action under 42 U.S.C. s 1983 to enjoin the juvenile court's use of social histories as unconstitutional. Appellants further asserted that insofar as Ohio R.Juv.P. 32 authorizes the pre-adjudication use of social histories, it, too, is unconstitutional. In addition, two named members of appellant class demanded $25,000 damages for violation of their constitutional right to privacy.

Appellees moved the District Court to abstain on the basis of Younger v. Harris. The District Court denied the motion and proceeded to enjoin all ex parte communications between juvenile court judges and probation officers before a juvenile's adjudicatory hearing. It made receipt of written consent from juveniles or their parents a prerequisite to compilation of the social history, but did not require that juveniles receive an exhaustive list of the consequences of consenting. It ruled that juveniles and their families must be afforded pre-adjudication access to the social histories. The District Court held that Rule 32 is constitutional insofar as it provides for limited pre-adjudication use of social histories, but it enjoined the Cuyahoga County Juvenile Court from any pre-adjudication use not specified in Rule 32. The District Judge denied the claim for damages, but found that the post-adjudication dissemination of social histories violated appellants' constitutional right to privacy. He limited post-adjudication dissemination of social histories to employees of the juvenile court, and established detailed procedures under which those employees could obtain access.

I ABSTENTION

In Younger v. Harris the Supreme Court held that absent extraordinary circumstances a federal court should not enjoin a pending state criminal proceeding. Subsequent decisions have made clear that the policy of equitable restraint expressed in Younger was not based on factors unique to a criminal trial:

> (Younger) reflects a strong policy against federal intervention in state judicial processes in the absence of great and irreparable injury to the federal plaintiff .... The basic concern that threat to our federal system posed by displacement of state courts by those of the National Government is also fully applicable to civil proceedings in which important state interests are involved.

Moore v. Sims, 442 U.S. 415, 423, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979). See also, Trainor v. Hernandez, 431 U.S. 434, 444, 97 S.Ct. 1911, 1918, 52 L.Ed.2d 486 (1977).

Appellants' suit challenges the methods by which an Ohio juvenile court administers *1083 complaints involving Ohio youth. This is a matter in which the State of Ohio unquestionably has important interests. Thus, Younger principles of abstention are called into play if there existed a pending or ongoing juvenile proceeding.

[1] The District Court's first ground for denying appellees' motion to abstain was that "(t)he principles of Younger are inapplicable to the instant action, inasmuch as the Juvenile Court proceeding against (a named class member) has been resolved." In reaching this conclusion the District Judge did not have the benefit of our decision in Parker v. Turner, 626 F.2d 1 (6th Cir. 1980). In that case a class of plaintiffs consisting of indigent fathers who were under a state court

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order to pay child support sought to guarantee that the juvenile court would observe due process of law when citing them for contempt for nonpayment. We held that Younger barred the federal suit, although there was no showing that any member of the class was currently the subject of a state contempt proceeding. Judge Merritt, concurring, noted that the "pending state proceeding" hurdle had been cleared because the relief sought on behalf of the class would affect all pending state contempt proceedings for nonpayment. 626 F.2d at 10.

The same reasoning applies with even more force here. Appellant class consists of

> those juveniles appearing before the juvenile court on complaints of delinquency, unruliness, neglect, dependency, and abuse who are adversely affected by the preparation and use of "social histories" prior to an adjudicatory hearing of the outstanding charges and retention and dissemination of those "social histories" or information therefrom subsequent to the final disposition of the pending charges.

In its order certifying the class the District Court relied on the fact that the proposed class consisted of approximately 11,000 juveniles per year who appear before the juvenile court and are subject to the complained of practices. It is a certainty that there are always juvenile court proceedings pending with respect to some class members. Thus, Younger required the District Court to abstain unless some exception to the doctrine applied.

The District Court's alternative ground for declining to abstain was that the use of social histories by juvenile court referees and judges "is merely collateral to the adjudicatory proceedings conducted by the Juvenile Court, and the declaratory and injunctive relief demanded by the plaintiff will therefore not substantially interfere with the administration of the Juvenile Court." (Emphasis added) Hence, the court concluded, the rationale for abstention did not apply. In so holding, the District Judge relied on Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and Conover v. Montemuro, 477 F.2d 1073 (3d Cir. 1973). [1]

[2] The Supreme Court held in Gerstein v. Pugh that Younger did not bar a federal suit by a state defendant in pretrial custody who sought a probable cause hearing before he could be further detained. The Court reasoned that since the federal issue could not be raised as a defense to the criminal prosecution, and federal resolution of the pretrial detention issue "could not prejudice *1084 the conduct of the trial on the merits," the federal court could grant relief. 420 U.S. at 108 n.9, 95 S.Ct. at 860 n.9. The Supreme Court reviewed Gerstein as follows in Moore v. Sims, supra: "(Gerstein) held that the District Court properly found that the action was not barred by Younger because the injunction was not addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves." 442 U.S. at 431, 99 S.Ct. at 2381. Because the relief granted in Gerstein caused some interference with Florida's handling of its criminal prosecution, the Court's statements in Gerstein and Moore can be read to imply that abstention is not called for where the interference with state proceedings is of a magnitude less than or equal to that at issue in Gerstein. However, as the Court in Moore went on to say: "This Court has addressed the Younger doctrine on a number of occasions since Gerstein." 442 U.S. at 431-432, 99 S.Ct. at 2381-2382. In light of those subsequent cases we do not think the Supreme Court intends that Younger abstention will be triggered only by "substantial" interference with a proceeding involving important state interests. Indeed, we think the Court's cases require abstention if federal intervention would cause even minimal interference with such a state proceeding and the federal issue can be raised in the state proceeding.

In Trainor v. Hernandez, supra, the federal plaintiffs were charged in a state action with fraud against the state. In conjunction with the fraud action the state attached the federal plaintiffs' property. The federal plaintiffs sought only to enjoin the attachment in the federal suit, arguing on the strength of Gerstein that Younger did not bar the injunction because granting it would not interfere with the underlying fraud action. The Supreme Court found that the attachment was sufficiently related to the fraud action to require abstention. 431 U.S. at 446 n.9, 97 S.Ct. at 1919 n.9.

We do not perceive any significant distinction between the level of interference that triggered abstention in Trainor v. Hernandez and that at issue in Gerstein. Rather, it is the federal plaintiffs' opportunity to raise their claim in the

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state proceedings that distinguishes the cases. The Supreme Court explicitly found that no such opportunity existed in Gerstein, 420 U.S. at 106, 95 S.Ct. at 859, and remanded for consideration of this issue in Trainor. 431 U.S. at 447, 97 S.Ct. at 1919. Once again we find support in Moore v. Sims: "In Juidice v. Vail, 430 U.S., (327) at 336-337, (97 S.Ct. 1211 at 1217-1218, 51 L.Ed.2d 376), we noted that the teaching of Gerstein was that the federal plaintiff must have an opportunity to press his claim in the state courts ...." 442 U.S. at 432, 99 S.Ct. at 2381.

[3] Thus, the collateral issue exception to abstention relied on by the District Court is overbroad. Federal courts may hear those issues that can be raised in a state proceeding only if their resolution will not cause even minimal interference with a pending state proceeding that implicates important state interests. The federal suit by appellant class clearly interfered with Cuyahoga County juvenile proceedings. The challenged practice the juvenile court's predisposition use of social histories is an integral part of the juvenile court's handling of cases. The relief granted entails ongoing federal court interference with the daily operation of the juvenile court. Alleged violations of the injunction against ex parte communication concerning a juvenile's case, or questions about whether a juvenile was fully informed as to the consequences of consenting to compilation of the social history, would have to be heard in the first instance in the federal district court.

[4] [5] Appellant class argues that Ohio law afforded it no opportunity to challenge the use of social histories in the juvenile court. Appellants have not established this claim, cf. Moore v. Sims, 442 U.S. at 432, 99 S.Ct. at 2381, and our review of Ohio law indicates the contrary. Ohio Rev.Code s 2151.23, the statutory grant of jurisdiction to the juvenile courts, does not limit the juvenile court to deciding only particular aspects of a juvenile's case, or in any ***1085** way restrict its jurisdiction, other than by limiting the court to dealing with juveniles. Section 2151.01 states that juvenile court jurisdiction is to be "construed liberally to assure the parties a fair hearing in which their constitutional and other legal rights are recognized and enforced." Ohio R.Juv.P. 22(A) provides that a party may move to dismiss the complaint in a juvenile action "or for other appropriate relief," which on its face certainly affords appellant class an opportunity to enjoin the juvenile court's use of social histories before and during the adjudication. If it does not, Ohio R.Juv.P. 45 states that "(i)f no procedure is specifically prescribed by (the Rules of Juvenile Procedure) the court shall proceed in any lawful manner not inconsistent therewith."

Appellant class also argues that to require it to challenge the use of social histories in the first instance in the state court will subject it to irreparable harm, in that there is an invasion of privacy as soon as a social history is compiled, and by the time the adjudicatory hearing is held it is far too late to correct this violation of a constitutional right. Appellants misperceive the nature of the irreparable harm that justifies ignoring the principles of the Younger abstention doctrine. As the Supreme Court stated in Huffman v. Pursue, Ltd., 420 U.S. 592, 603, 95 S.Ct. 1200, 1208, 43 L.Ed.2d 482 (1975),

> (t)he seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence.

Younger counsels abstention unless the threatened injury is "great, immediate, and irreparable"; unless " 'extraordinary circumstances' render the state court incapable of fairly and fully adjudicating the federal issue before it ...." Moore v. Sims, 442 U.S. at 433, 99 S.Ct. at 2382 (citation omitted). The minimal invasion of appellants' privacy that occurs through compiling a social history is not of such a magnitude to justify our otherwise inappropriate intervention in state affairs. In fact, plaintiffs in Moore v. Sims raised a very similar concern in their claim that they would be irreparably harmed by an anonymous report that they were child abusers under Texas law, since that report would be filed in a national registry. Sims v. State Dep't of Public Welfare, 438 F.Supp. 1179 at 1187. The Supreme Court did not find sufficiently great and irreparable injury to justify federal court intervention.

The District Court should therefore have abstained from deciding those claims that pertained to the compilation and use of social histories prior to or during the adjudicatory hearing.

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II POST-ADJUDICATION DISSEMINATION OF SOCIAL HISTORIES

[6] Unlike appellants' challenges to the juvenile court's use of social histories before and during an adjudication, their challenge to post-adjudication use of the social histories could not be raised in any pending state judicial proceedings. Moreover, adjudication of this claim does not interfere in any manner with ongoing juvenile court proceedings. This aspect of appellants' claim is logically and legally unrelated to their other claims for relief. Thus it falls into that class of claims so collateral that abstention is not appropriate.

Appellant class alleged that the post-adjudication dissemination of juveniles' social histories to 55 governmental, social, and religious agencies that were members of a "social services clearing-house" violated their constitutional right of privacy. The class sought to enjoin access to social histories by anyone except juvenile court personnel. Two named members of the class sought damages of $25,000.

The District Judge held that dissemination beyond juvenile court employees was a violation of Ohio Rev.Code s 2151.14 which provides that "the reports and records of the probation department shall be considered confidential information and shall not be made public." He also found, apparently *1086 on a constitutional basis, that the disclosure "violates the right of juveniles and their family members 'to have intimate biographical details protected from exposure by the government.' " He enjoined the continued dissemination of social histories to any but juvenile court employees and established specific procedures under which those employees could obtain access, but denied appellants' claim for damages. Appellees appeal the conclusion that their practices violate either state law or the Federal Constitution.

[7] [8] Our initial inquiry is whether the District Court properly exercised jurisdiction over the state law issue. The question of state law was properly before the District Court, if at all, only pendent to the federal claim. The federal courts have the power to hear state law claims if one would ordinarily be expected to raise them with one's federal claims in a single judicial proceeding, and if the federal claim is of sufficient substance to confer subject matter jurisdiction on the court. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). In this case, the conduct that is alleged to violate the Federal Constitution is the same conduct which the District Court found to violate Ohio law. If appellants were interested in raising the state law issue, they would have done so in this federal proceeding. Appellants' claim that their constitutional right to privacy has been violated is at least colorable. Thus, under Gibbs the District Court had the power to decide whether the post-adjudication dissemination violated Ohio Rev.Code s 2151.14.

However, the Supreme Court in Gibbs went on to draw a distinction between the power to decide a state law claim under the doctrine of pendent jurisdiction and the exercise of that power:

> That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

Id. at 726, 86 S.Ct. at 1139 (footnotes omitted). The state law issue involved here, raising as it does questions of state intrusion into individual privacy, is a matter in which Ohio has substantial interest. Thus, considerations of comity loom large.

[9] Appellants did not raise the question whether post-adjudication dissemination of social histories violated Ohio law. Neither did appellees. There is no mention of Ohio Rev.Code s 2151.14 in the entire record on appeal other than in

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the opinion of the District Court. From the record it appears that the District Court struck out on its own in search of state law relevant to appellants' suit. The case for exercising pendent jurisdiction is substantially weakened when it is the District Court that raises the state law question.

The exercise of pendent jurisdiction is further questionable where the record is not sufficient to permit a well-considered decision. A proper interpretation of section 2151.14 rests on whether releasing juvenile court records to members of a social services clearinghouse is the same as making them "public," or is a breach of "confidentiality." Resolution of these questions depends on the nature of the organizations that have access to the juvenile court records through the social services clearinghouse, and the use they make of such records. However, because neither appellant class nor appellees addressed this issue, the record on appeal is silent as to the purpose of disclosing juvenile court records to those agencies or even the nature of the agencies, beyond what is apparent from their names.

Nor is Ohio law at all clear on the proper resolution of this important question of *1087 state law. The cases that the District Court cites do not support, or even relate to, its conclusion that the post-adjudication dissemination in this case violated section 2151.14. State v. Hale, 21 Ohio App.2d 207, 256 N.E.2d 239 (1969), held only that there was no violation of section 2151.14 where a probation officer testified as to the existence of juvenile court records in a criminal proceeding against a former juvenile, but did not testify as to the content of any records. State v. Sherow, 101 Ohio App. 169, 138 N.E.2d 444 (1956), held that section 2151.14 did not give a juvenile court judge the power to enjoin publication of the names of juvenile delinquents.

There are situations where it is nonetheless desirable to decide a question of state law to avoid deciding unnecessarily a hard question of federal constitutional law. However, this policy does not support the exercise of pendent jurisdiction here. The two named appellants sought damages for the invasion of their constitutional right of privacy by dissemination of juvenile court records. As a result, the District Court was required to decide the constitutional claim, the resolution of which does not depend on state law.

For the above reasons we hold that the District Judge abused his discretion by exercising jurisdiction to interpret section 2151.14.

The District Court made no attempt to tie the constitutional right "to have intimate biographical details protected from exposure by the government" to any particular provision of the Constitution. The Constitution does not explicitly mention a right of privacy.[2] Nor has the Supreme Court recognized the existence of a general right to privacy.

At various times the Court has found a concern for privacy underlying some of the provisions of the Bill of Rights. See, e. g., Stanley v. Georgia, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969) (the first amendment protects the right to read and observe what one pleases in the privacy of one's home); Terry v. Ohio, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1872-1874, 20 L.Ed.2d 889 (1968) (the fourth amendment protects areas in which one has a reasonable expectation of privacy from unreasonable searches and seizures); Katz v. United States, 389 U.S. 347, 350 n.5, 88 S.Ct. 507, 510 n.5, 19 L.Ed.2d 576 (1967) (the third amendment's prohibition against the peacetime quartering of soldiers protects an aspect of privacy from governmental intrusion); Griswold v. Connecticut, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965) (several of the provisions of the Bill of Rights create "zones of privacy," including the fifth amendment, which creates a zone of privacy that an individual cannot be forced to surrender to his detriment). The Supreme Court has also held in a line of cases that the Constitution protects an individual's interest in independence in making certain kinds of important decisions. Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876-877, 51 L.Ed.2d 64 (1977). Thus, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and progeny have established a woman's right to choose for herself whether to carry a pregnancy to term, at least until the fetus is viable. As the Court recognized in Roe, id. at 152-153, 93 S.Ct. at 726-727, this right to independence has also been found for certain decisions relating to marriage, Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655 (1942); contraception, Eisenstadt v. Baird, 405 U.S. 438,

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453-454, 92 S.Ct. 1029, 1038-1039, 31 L.Ed.2d 349 (1972); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925).

*1088 However, the fact that the Constitution protects several specific aspects of individual privacy does not mean that it protects all aspects of individual privacy. Nor is there indication in any of the above decisions of a constitutional right to nondisclosure of juvenile court records. Rather, such disclosure is indistinguishable from that permitted in Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). There the respondent alleged that circulation to merchants by police of the fact of his arrest for shoplifting (he had not been convicted) violated his constitutional right to privacy. The Court recognized that "zones of privacy may be created by more specific constitutional guarantees ...." Id. at 712-713, 96 S.Ct. at 1165-1166. However, the Court held, "personal rights found in (the) guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' .... Respondent's claim is far afield from (the privacy) line of decisions." Id. at 713, 96 S.Ct. at 1166.

The otherwise dispositive effect of Paul v. Davis is somewhat clouded by two subsequent Supreme Court decisions and their construction by the courts of appeal. In Whalen v. Roe, supra, the Court was asked to declare unconstitutional as an invasion of privacy New York's requirement that the names and addresses of all persons who obtained certain drugs be recorded in a central computer file. In the course of its discussion the Court stated:

> the cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

429 U.S. at 598-600, 97 S.Ct. at 875-877 (footnotes omitted). The language from Whalen v. Roe respecting the right to nondisclosure was repeated in Nixon v. Administrator of General Services, 433 U.S. 425, 457, 97 S.Ct. 2777, 2797, 53 L.Ed.2d 867 (1977).

Some courts have uncritically picked up that part of Whalen pertaining to nondisclosure and have created a rule that the courts must balance a governmental intrusion on this "right" of privacy against the government's interest in the intrusion. Thus, in United States v. Westinghouse Electric Corp., 638 F.2d 570, 577-580 (3d Cir. 1980), the court relied on Whalen to hold that there was a constitutional right of privacy in employee medical records kept by an employer, but that the government's interest in investigating dangers to the safety of the employees was sufficient reason to compel disclosure of the records to permit their examination by the National Institute of Occupational Safety and Health. Similarly, in Fadjo v. Coon, 633 F.2d 1172, 1175-1176 (5th Cir. 1981), the court relied largely on the above-cited language from Whalen to find that an allegation that a state divulged to private parties material that it uncovered in a criminal investigation stated a cause of action under 42 U.S.C. s 1983, and that on remand the district court would have to balance the intrusion into privacy against the government's need for the disclosure. See also, Plante v. Gonzalez, 575 F.2d 1119, 1132, 1134 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979) (Whalen v. Roe identified a strand of privacy called the "right to confidentiality." A balancing standard is appropriate in weighing intrusions on this right).[3]

We do not view the discussion of confidentiality in Whalen v. Roe as overruling *1089 Paul v. Davis and creating a constitutional right to have all government action weighed against the resulting breach of confidentiality. The Supreme Court's discussion makes reference to only two opinions Griswold v. Connecticut, supra, in which the Court found that several of the amendments have a privacy penumbra, and Stanley v. Georgia, supra, a first amendment case neither of which support the proposition that there is a general right to non-disclosure. Whalen v. Roe, 429 U.S. at 599 n.25, 97 S.Ct. at 876 n.25; see id. at 607-609, 97 S.Ct. at 880-881 (Stewart, J., concurring). On the facts before it in Whalen the Court held that recording the names of persons who obtained certain drugs did not violate any possible constitutional right to have information kept private. The Court explicitly refused to address the existence of such a right: "We ... need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data whether intentional or unintentional ...." Id. at 605-606, 97 S.Ct. at 879-880. To assure that there would be no

misunderstanding, Justice Stewart wrote separately to note that the Court's opinion did not support the proposition that broad dissemination of the information collected by New York would violate the Constitution. Id. at 608-609, 97 S.Ct. at 881.

Nixon v. Administrator of General Services, supra, is the only other case in which the Supreme Court has explicitly mentioned a general right to nondisclosure. The former president challenged on constitutional grounds the Presidential Recordings and Materials Preservation Act, 58 Stat. 1695, note following 44 U.S.C. s 2107, which directed the Administrator of General Services to take custody of presidential tapes and other materials that accumulated during Mr. Nixon's presidency, to separate the private from the public, and to retain the public. In the course of its opinion rejecting Mr. Nixon's challenge the Court stated that "one element of privacy has been characterized as the individual interest in avoiding disclosure of personal matters." 433 U.S. at 457, 97 S.Ct. at 2797.

Like Whalen, Nixon does not overrule Paul v. Davis and create a general constitutional right of nondisclosure against which government action must be weighed. The Court's cite to Whalen was for the apparent purpose of establishing that Mr. Nixon had an expectation of privacy in his papers that entitled him to fourth amendment protection. The Court did not purport to establish a constitutional right to nondisclosure.[4] Lest there be any doubt about the Court's analysis, Justice Stewart concurred with the understanding he expressed in Whalen that the Court was not establishing a general right to nondisclosure of private information. 433 U.S. at 455 n.18, 97 S.Ct. at 2796 n.18.

bsent a clear indication from the Supreme Court we will not construe isolated statements in Whalen and Nixon more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure. Analytically we are unable to see how such a constitutional right of privacy can be restricted to anything less than the general "right to be let alone" that Justice Brandeis called for in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) *1090 (Brandeis, J., dissenting).[5] "Virtually every governmental action interferes with personal privacy to some degree." Katz v. United States, 389 U.S. at 350 n.5, 88 S.Ct. at 510 n.5. Courts called upon to balance virtually every government action against the corresponding intrusion on individual privacy may be able to give all privacy interests only cursory protection. The Framers rejected a provision in the Constitution under which the Supreme Court would have reviewed all legislation for its constitutionality. They cannot have intended that the federal courts become involved in an inquiry nearly as broad balancing almost every act of government, both state and federal, against its intrusion on a concept so vague, undefinable, and all-encompassing as individual privacy.

Inferring very broad "constitutional" rights where the Constitution itself does not express them is an activity not appropriate to the judiciary. In this context, we note that of the cases cited holding that there is a constitutional right to nondisclosure of private information, none cites a constitutional provision in support of its holding. It is understandable, though rare, to fail to cite a supporting provision of the Constitution when one is dealing with such well-established rights as those in the first or fourth amendments. It is quite a telling failure when the constitutional right at issue is not well-established.

[10] For all of the foregoing reasons we conclude that the Constitution does not encompass a general right to nondisclosure of private information. We agree with those courts that have restricted the right of privacy to its boundaries as established in Paul v. Davis, supra, and Roe v. Wade, 410 U.S. at 152, 93 S.Ct. at 726 those personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." See, e. g., McElrath v. Califano, 615 F.2d 434, 441 (7th Cir. 1980); United States v. Choate, 576 F.2d 165, 181 (9th Cir.), cert. denied, 439 U.S. 953, 99 S.Ct. 350, 58 L.Ed.2d 344 (1978) ("rights under the ninth amendment are only those 'so basic and fundamental and so deeprooted in our society' to be truly 'essential rights,' and which nevertheless, cannot find direct support elsewhere in the Constitution") (citation omitted).[6] The interest asserted by appellant class in nondisclosure of juvenile court records, like the interest in nondisclosure at issue in Paul v. Davis, is "far afield" from those privacy rights that are "fundamental" or "implicit

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in the concept of ordered liberty." The District Court erred in finding that disclosure of juvenile court records to 55 governmental and social agencies violates the Constitution.[7]

Our opinion does not mean that we attach little significance to the right of privacy, or that there is no constitutional right to nondisclosure of private information.

*1091 (A) controlling principle for the governance of society (is) that "there are frontiers not artificially drawn, within which men should be inviolable, these frontiers being defined in terms of rules so long and widely accepted that their observance has entered into the very conception of what is a human being." And it is the idea of the uniqueness of the human quality that makes the concept of privacy so important.

The University of Chicago Magazine, supra, at 12. We agree that "the very notion of the national Constitution is that there are aspects of individual behavior that no government, federal or state, could subject to control." Id. We recognize the problem that in today's society

> liberty is no longer limited by laws alone, but far more frequently by executive orders, by administrative regulations, by bureaucratic guidelines, by simple exercise of discretion at the lowest level of the governmental pyramid and even by judicial actions forging major policy determinations for society without constitutional or legislative authority.

Id. at 35. Like the Supreme Court,

> (w)e are not unaware of the threat to personal privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially harmful or embarrassing if disclosed.

Whalen v. Roe, 429 U.S. at 605, 97 S.Ct. at 879.

[11] Our opinion simply holds that not all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing government action against individual privacy. As with the disclosure in Paul v. Davis, protection of appellants' privacy rights here must be left to the states or the legislative process.

The judgment of the District Court is REVERSED.

All Citations

653 F.2d 1080

Footnotes

1 At issue in Conover was a federal challenge to Philadelphia Juvenile Court intake procedures, procedures that determined which juveniles would be brought before the court. The Third Circuit reviewed its rules for abstention, among which it included the following:

> G. Even if a state prosecution is pending, injunctive or declaratory relief against state officers with respect to violations of federal constitutional rights not amounting to an injunction which will halt or substantially interfere with a pending prosecution may still be available.

477 F.2d at 1080 (emphasis added). The court held:

Since a remedy with respect to the intake procedures would not necessarily interfere with the adjudication functions of the Commonwealth's juvenile court, it is therefore not necessarily precluded by Younger v. Harris, supra, or Samuels v. Mackell, (401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688) supra.

Id. at 1082.

2 In fact, privacy received little attention as a legal category until 1890, when the publication of "Right to Privacy," 4 Harv.L.Rev. 193 (1890) led to the creation of the tort right of privacy. Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S.Ct.Rev. 173, 176-177.

3 At least one other court has found a broad right of privacy, although without relying on Whalen. In Doe v. Webster, 606 F.2d 1226, 1238 n.49 (D.C.1979), the appellant sought to have expunged the record of his conviction which had been set aside under the Youth Corrections Act. The court stated that the right to privacy asserted in Utz v. Cullinane, 520 F.2d 467, 482 n.41 (D.C.Cir.1975), and based on Roe v. Wade, should encompass a substantial measure of freedom for the individual to choose the extent to which the government may divulge criminal information about him, at least where no countervailing government interest is asserted. The court in Doe v. Webster proceeded, however, to order expungement solely on statutory grounds.

4 Though the Court does not explicitly say so, its analysis of the privacy issue in Nixon appears to be based on the fourth amendment's requirement that all searches and seizures be reasonable, not on the scope of a general constitutional right to privacy. 433 U.S. at 455-465, 97 S.Ct. at 2796-2801. The district court in Nixon concluded that the fourth amendment's warrant requirement was not applicable to the case, since Congress itself had approved the search and had built judicial safeguards into the statute. Nixon v. Administrator of General Services, 408 F.Supp. 321, 361 n.56 (D.D.C.1976). The district court proceeded to find that the search was reasonable under the fourth amendment, and hence that Mr. Nixon's rights of privacy were not violated. The Supreme Court agreed that the warrant clause was inapplicable, 433 U.S. at 458 n.21, 97 S.Ct. at 2798 n.21, and also agreed that the search was a reasonable intrusion on Mr. Nixon's legitimate expectations of privacy, in an analysis similar to that used by the district court.

5 We are not alone in our inability to limit or define the right of privacy. "The right of privacy is undefined, perhaps, because it is undefinable." Kurland, The Private I, The University of Chicago Magazine, Autumn 1976 at 7, 12. When privacy is defined as "the claim of individuals ... to determine for themselves when, how, and to what extent information about them is communicated to others," every attempt to limit the right is confounded. Gerety, Redefining Privacy, 12 Harv.Civ.R.-Civ.L.L.Rev. 233, 261-262 (1977). In fact, "privacy" may not be a meaningful legal concept. Given its "protean capacity to be all things to all people," the concept lacks readily apparent limitations of its own. Id. at 234. "Despite over a decade of privacy precedent, the right eludes definition and remains analytically unclear." Eichbaum, Toward an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy, 14 Harv.Civ.R.-Civ.L.L.Rev. 361 (1979).

6 For cases prior to Whalen v. Roe to the same effect, see O'Brien v. DiGrazia, 544 F.2d 543 (1st Cir. 1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76-78 (8th Cir.), cert. denied, 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976).

7 Our decision does not leave the privacy rights of appellant class unprotected. To the contrary, Ohio law provides for the sealing or expungement of juvenile court records two years after a disposition. Ohio Rev.Code s 2151.358. The aforementioned section 2151.14 provides that juvenile court records shall not be made public. We simply hold that the Constitution is not the source of the protection appellants seek.

End of Document

ANNEXURE - A

CITIZENS, THEIR FUNDAMENTAL RIGHTS AND DUTIES

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K M MUNSHI'S DRAFT SUBMITTED TO THE
SUB COMMITTEE ON FUNDAMENTAL RIGHTS

1 Article I

(1) , Unless otherwise expressly qualified by this Constitution all citizens of the Union are under and by virtue of this Constitution equally entitled to all the nghts and subject to nil the duties described in tins Chapter throughout the territories of the Union

(2) In this Chapter 'right' includes 'power', 'privilege' or '011100011/ and the right to enforce the same according to the remedies mentioned In this Chapter or otherwise, 'duty' includes liability' and 'obligation 1 and words importing masculine gender only include the feminine gender

(3) Fundamental Rights and Duties shall mean the nghts and duties in this Chapter

(4) All existing law or usage in force within the territories of the Union inconsistent with the Fundamental Rights and Duties shall be abrogated to the extent of such inconsistency, nor shill any such right or duty be taken away, abridged or modified save as provided in this Chapter by legislative action of the Union or a State or Otherwise

(5) No restriction on Fundamental Rights may be imposed unless in the manner provided by this Chapter and unless it is general in character and applicable to all persons within the same class and must be In tbe interest of,

(a) public order, morality, or health, and general welfare,

(b) the co-relative duty to respect the rights of others, and

<c) National Defence

Article III RIGHT TO EQUALITY. 30

(1) All persons irrespective of religion, race, colour, caste, language or sex are equal before the law and are entitled to the same rights, are subject to the same duties.

(2) All citizens are entitled to equal opportunities in all spheres, political, economic, social and cultural.

(3) Women citizens are tire equal of men citizens in all spheres of political, eco- nomic, social and cultural life and are entitled to the same civil rights and are subject to the same civil duties unless where exception is made in such rights or duties by the law of the Union on account of sex. ,

(4) (a) Untouchability is abolished and the practice thereof is punishable by the law of the Union.

(b) All persons shall have tire right to the enjoyment of equal facilities in public places subject only to such laws as impose limitations on all persons, irrespective of religion, race, colour, caste or language.

(5) All citizens are entitled to equal opportunity —

(a) in matters of public employment and office of power and honour;

(b) in the exercise of trade, profession or calling; and

(c) in the exercise of franchise according to the law of the Union; and no citizen shall be denied the right on ground of religion, race, colour, caste or language.

(6) All citizens of the Union have the right to reside in any part of the territories of the Union that they choose, to settle there, acquire property, and pursue any means of lawful occupation, subject only to the restrictions imposed by the law of the Union.

(7) Every citizen has the right to emigrate to countries outside the Union and the right to expatriation.

(8) All citizens within and without the territories of the Union are

entitled to the protection of the Union.

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(9) No citizen may be handed over to a foreign government for trial or punishment.

(10) No person shall be denied equal protection of the laws within the territories of the Union.

Article IV.

NATIONAL LANGUAGE.

(1) Hindustani, including Hindi and Urdu shall be the national language of the Union written at the choice of a citizen in the Nagari or Persian characters.

(2) It shall be competent to the Union by law to declare that all official or educational medium in any State or a part thereof shall be Hindustani in addition to any other language.

Article V

RIGHTS TO FREEDOM.

(1) Every citizen within the limits of the law of the Union and in accordance therewith has :

(a) the right of free expression of opinion;

(b) the right of free association and combination,

(c) the light to assemble peacefully and without arms,

(d) the right to personal liberty,

(e) the right to be informed within twenty four hours of his deprivation of liberty by what authority and on what grounds he is being so deprived,

(f) the right to the inviolability of his home,

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(g) the right to the secrecy of his correspondence,

(h) the right to maintain his person secure by the law of the Union from exploitation In any manner contrary to law or public authority, and

(i) the right of free movement and trade within the territories of the Union

(2) The Press shall be free subject to such restrictions imposed by the law of the Union as in Its opinion may be necessary in the interest of public order or morality

(3) The conduct of research and/or the publication of the results thereof shall be free subject to the restrictions imposed by the law of the Union in the interests of a fair return to those responsible for the results and of national defence

(4) No person shall be deprived of his life, liberty or property without due process of law

(5) Every citizen has the right to choose the government and legislators of the Union and his State on the footing of equality in accordance with the law of the Union or the Unit as the case may be in free, secret and periodic elections

Article VI

THE RIGHT TO RELIGIOUS AND CULTURAL FREEDOM

1) All citizens are equally entitled to freedom of conscience and to the right freely to profess and practise religion in a manner compatible with public order, morality and health

Provided that the economic, financial or political activities associated with religious worship shall not be deemed to be included in the right to profess or practise religion

(2) All citizens are entitled to cultural freedom, to the use of their

mother tongue and the script thereof, and to adopt, study or use any other language and script of his choice

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(3) Citizens belonging to national minorities In a State whether based on religion or language have equal rights with other citizens in forming controlling and administering at their own expense, charitable, religious and social institutions, schools and other educational establishments with the free use of their language and practice of their religion

(4) No person may be compelled to pay taxes the proceeds of which are specifically appropriated in payment of religious requirements of any community of which he is not a member

(5) Religious Instruction shall not be compulsory for a member of a community which does not profess such religion

(«) Nb person under the age of eighteen shall be free to change his j religious persuasion without the permission of his parent or guardian

(7) Conversion from one religion to another brought about by coercion, undue influence or the offering of material inducement Is prohibited and is punishable by the law of the Union

(8) It shall be the duty of every Unit to provide. In the public educational system towns and districts in which a considerable proportion of citizens of other than the language of the Unit are residents, adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such .citizens through the medium of their own language.

Nothing in this clause shall be deemed to prevent the Unit from making the teaching of the National Language in the varient and script of the choice of the pupil obligatory in the schools.

(9) No legislation providing State-aid for schools shall discriminate against schools under the management of minorities whether based on religion or language.

(10) Every monument of artistic or historic interest . or place of

natural interest throughout the Union is guaranteed immunity, from spoilation, destruction, removal, disposal or export except under a law of the Union, and shall be preserved and maintained according to the law of the Union.

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ANNEXURE - B.

report shall be referred to the Federal Court for decision and the decision on such reports taken by the Federal Court shall be binding on the Cabinet concerned. (*See* Sapru Conciliation Committee Report, p. 259 onward.)

(*d*) *Ambedkar's Memorandum and Draft Articles on the Rights of States and Minorities*

March 24, 1947

PROPOSED PREAMBLE

We the people of the territories of British India distributed into administrative units called Provinces and Centrally Administered Areas and of the territories of the Indian States with a view to form a more perfect union of these territories do—

ordain that the Provinces and the Centrally Administered Areas (to be hereafter designated as States) and the Indian States shall be joined together into a Body Politic for legislative, executive and administrative purposes under the style *The United States of India* and that the union so formed shall be indissoluble, and that with a view:

(i) to secure the blessings both of self-government and good government throughout the United States of India to ourselves and to our posterity,

(ii) to maintain the right of every subject to life, liberty and pursuit of happiness and to free speech and free exercise of religion,

(iii) to remove social, political and economic inequality by providing better opportunities to the submerged classes,

(iv) to make it possible for every subject to enjoy freedom from want and freedom from fear, and

(v) to provide against internal disorder and external aggression,

establish this Constitution for the United States of India.

ARTICLE I—SECTION 1

Admission of Indian States into the Union

Clause 1

The United States of India may, on application and on fulfilment of the terms prescribed by an enabling Act of the Union Legislature laying down the form of the Constitution admit an Indian State into the Union provided the Indian State seeking admission is a Qualified State.

For the purposes of this clause a list of Qualified Indian States shall be drawn up. A State shall not be deemed to be a Qualified State unless it is proved that it is of a standard size prescribed by the Union Legislature and is endowed with natural resources capable of supporting a decent standard of living for its people and can, by reason of its revenues and

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population function as an autonomous State, protect itself against external aggression, maintain law and order against internal disturbance and guarantee to its subjects minimum standards of administration and welfare which are expected from a modern State.

Clause 2

The territory of an Indian State which is a Qualified State but which has not entered the Union and the territory of the Indian States which are disqualified shall be treated as incorporated territories of the United States of India and shall at all times form integral parts thereof and shall be subject to such parts of the Constitution of the United States of India as may be prescribed by the Union Legislature.

Clause 3

The United States of India shall have power to reform, rearrange, redistribute and amalgamate the territories of Disqualified Indian States into suitable Administrative Units for admission into the Union as States of the Union.

Clause 4

After a State has been admitted into the Union as a State no new State shall be formed or created within its jurisdiction nor any new State shall be formed by the junction of two or more States or parts of States without the consent of the Legislatures of the States concerned as well as of the Union Legislature.

ARTICLE I—SECTION II

Clause 1

The United States of India may admit into the Union any territory which forms a natural part of India or which is on the border of India on terms and conditions mutually agreed upon. Provided that the terms shall not be inconsistent with the Constitution of the United States of India and the admission is recommended by the Legislatures of one half of the States comprising the United States of India in the form of a resolution.

Clause 2

The United States of India may acquire territory and may treat it as unincorporated territory. The provisions of the Constitution of the United States of India shall not apply to the unincorporated territory unless a provision to the contrary is made by the Legislature of the United States of India.

ARTICLE II—SECTION I

Fundamental Rights of Citizens

The Constitution of the United States of India shall recognize the following as fundamental rights of citizenship:

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1. All persons born or naturalized within its territories are citizens of the United States of India and of the State wherein they reside. Any privilege or disability arising out of rank, birth, person, family, religion or religious usage and custom is abolished.

2. No State shall make or enforce any law or custom which shall abridge the privileges or immunities of citizens; nor shall any State deprive any person of life, liberty and property without due process of law; nor deny to any person within its jurisdiction equal protection of law.

3. All citizens are equal before the law and possess equal civic rights. Any existing enactment, regulation, judgment, order, custom or interpretation of law by which any penalty, disadvantage or disability is imposed upon or any discrimination is made against any citizen shall, as from the day on which this Constitution comes into operation, cease to have any effect.

4. Whoever denies to any person, except for reasons by law applicable to persons of all classes and regardless of their social status, the full enjoyment of any of the accommodations, advantages, facilities, privileges of inns, educational institutions, roads, paths, streets, tanks, wells and other watering places, public conveyances on land, air or water, theatres or other places of public amusement, resort or convenience, where they are dedicated to or maintained or licensed for the use of public, shall be guilty of an offence.

5. All citizens shall have equal access to all institutions, conveniences and amenities maintained by or for the public.

6. No citizen shall be disqualified to hold any public office or exercise any trade or calling by reason of his or her religion, caste, creed, sex or social status.

7. (i) Every citizen has the right to reside in any part of India. No law shall be made abridging the right of a citizen to reside except for consideration of public order and morality.

(ii) Every citizen has the right to settle in any part of India, subject to the production of a certificate of citizenship from the State of his origin. The permission to settle shall not be refused or withdrawn except on grounds specified in sub-clause (iv) of this clause.

(iii) The State in which a citizen wishes to settle may not impose any special charge upon him in respect of such settlement other than the charge imposed upon its own inhabitants. The maximum fees chargeable in respect of permits for settlement shall be determined by laws made by the Union Legislature.

(iv) The permission to settle may be refused or withdrawn by a State from persons :

(a) who have been habitual criminals;

(b) whose intention to settle is to alter the communal balance of the State;

(c) who cannot prove to the satisfaction of the State in which they

wish to settle that they have an assured means of subsistence and who are likely to become or have become a permanent burden upon public charity;

(d) whose State of origin refuses to provide adequate assistance for them when requested to do so.

(v) Permission to settle may be made conditional upon the applicant being capable of work and not having been a permanent charge upon public charity in the place of his origin, and able to give security against unemployment.

(vi) Every expulsion must be confirmed by the Union Government.

(vii) The Union Legislature shall define the difference between settlement and residence and at the same time prescribe regulations governing the political and civil rights of persons during their residence.

8. The Union Government shall guarantee protection against persecution of a community as well as against internal disorder or violence arising in any part of India.

9. Subjecting a person to forced labour or to involuntary servitude shall be an offence.

10. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

11. The right of a citizen to vote shall not be denied or abridged on any account other than immaturity, imprisonment and insanity.

12. No law shall be made abridging the freedom of speech, of the press, of association and of assembly except for consideration of public order and morality.

13. No Bill of attainder or *ex post facto* law shall be passed.

14. The State shall guarantee to every Indian citizen liberty of conscience and the free exercise of his religion including the right to profess, to preach and to convert within limits compatible with public order and morality.

15. No person shall be compelled to become a member of any religious association, submit to any religious instruction or perform any act of religion. Subject to the foregoing provision, parents and guardians shall be entitled to determine the religious education of children up to the age of sixteen years.

16. No person shall incur any penalties of any kind whatsoever by reason of his caste, creed or religion nor shall any person be permitted to refuse to fulfil any obligation of citizenship on the ground of caste, creed or religion.

17. The State shall not recognize any religion as State religion.

18. Persons following a religion shall be guaranteed freedom of association and shall have, if they so desire, the right to call upon the State to

pass legislation in terms approved by them making them into a body corporate.

19. Every religious association shall be free to regulate and administer its affairs, within the limits of the laws applicable to all.

20. Religious associations shall be entitled to levy contributions on their members who are willing to pay them if their law of incorporation permits them to do so. No person may be compelled to pay taxes the proceeds of which are specifically appropriated for the use of any religious community of which he is not a member.

21. All offences under this section shall be deemed to be cognizable offences. The Union Legislature shall make laws to give effect to such provisions as require legislation for that purpose and to prescribe punishment for those acts which are declared to be offences.

ARTICLE II—SECTION II

Remedies against invasion of Fundamental Rights

The United States of India shall provide :

Clause 1

(1) That the judicial power of India shall be vested in a Supreme Court.

(2) The Supreme Court shall have the power of superintendence over all other courts or officers exercising the powers of a court, whether or not such courts or officers are subject to its appellate or revisional jurisdiction.

(3) The Supreme Court shall have the power on the application of an aggrieved party to issue what are called prerogative writs such as *habeas corpus, quo warranto,* prohibition, *certiorari* and *mandamus,* etc. For purposes of such writs the Supreme Court shall be a court of general jurisdiction throughout India.

(4) The right to apply for a writ shall not be abridged or suspended unless when in cases of rebellion or invasion the public safety may require it.

Clause 2

That the authority of the Legislature and the Executive of the Union as well as of every State throughout India shall be subject to the following limitations :

It shall not be competent for any Legislature or Executive in India to pass a law or issue an order, rule or regulation so as to violate the following rights of the subjects of the State :

(1) to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property;

(2) to be eligible for entry into the civil and military employ and to all educational institutions except for such conditions and limitations as may be necessary to provide for the due and adequate representation of all classes of the subjects of the State ;

(3) to be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, educational institutions, privileges of inns, rivers, streams, wells, tanks, roads, paths, streets, public conveyances on land, air and water, theatres and other places of public resort or amusement except for such conditions and limitations applicable alike to all subjects of every race, class, caste, colour or creed;

(4) to be deemed fit for and capable of sharing without distinction the benefits of any religious or charitable trust dedicated to or created, maintained or licensed for the general public or for persons of the same faith and religion;

(5) to claim full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by other subjects regardless of any usage or custom or usage or custom based on religion and be subject to like punishment, pains and penalties and to none other.

Clause 3

(1) Discrimination against citizens by Government officers in public administration or by private employers in factories and commercial concerns on the ground of race or creed or social status shall be treated as an offence. The jurisdiction to try such cases shall be vested in a tribunal to be created for the purpose.

(2) The Union Legislature shall have the right as well as the obligation to give effect to this provision by appropriate legislation.

Clause 4

The United States of India shall declare as a part of the law of its Constitution :

(1) That industries which are key industries or which may be declared to be key industries shall be owned and run by the State;

(2) That industries which are not key industries but which are basic industries shall be owned by the State and shall be run by the State or by corporations established by the State;

(3) That insurance shall be a monopoly of the State and that the State shall compel every adult citizen to take out a life insurance policy commensurate with his wages as may be prescribed by the Legislature;

(4) That agriculture shall be a State industry;

(5) That the State shall acquire the subsisting rights in such industries, insurance and agricultural land held by private individuals, whether as owners, tenants or mortgagees and pay them compensation in the form of debenture equal to the value of his or her right in the land. Provided that in reckoning the value of land, plant or security no account shall be taken of any rise therein due to emergency, of any potential or unearned value or any value for compulsory acquisition;

(6) The State shall determine how and when the debenture holder shall be entitled to claim cash payment;

(7) The debenture shall be transferable and inheritable property but

neither the debenture holder nor the transferee from the original holder nor his heir shall be entitled to claim the return of the land or interest in any industrial concern acquired by the State or be entitled to deal with it in any way;

(8) The debenture holder shall be entitled to interest on his debenture at such rate as may be defined by law, to be paid by the State in cash or in kind as the State may deem fit;

(9) Agricultural industry shall be organized on the following basis:

(i) The State shall divide the land acquired into farms of standard size and let out the farms for cultivation to residents of the village as tenants (made up of group of families) to cultivate on the following conditions:

(*a*) The farm shall be cultivated as a collective farm;

(*b*) The farm shall be cultivated in accordance with rules and directions issued by Government;

(*c*) The tenants shall share among themselves in the manner prescribed the produce of the farm left after the payment of charges properly leviable on the farm;

(ii) The land shall be let out to villagers without distinction of caste or creed and in such manner that there will be no landlord, no tenant and no landless labourer;

(iii) It shall be the obligation of the State to finance the cultivation of the collective farms by the supply of water, draft animals, implements, manure, seeds, etc.;

(iv) The State shall be entitled to—

(*a*) to levy the following charges on the produce of the farm:

(i) a portion for land revenue;

(ii) a portion to pay the debenture holders; and

(iii) a portion to pay for the use of capital goods supplied; and

(*b*) to prescribe penalties against tenants who break the conditions of tenancy or wilfully neglect to make the best use of the means of cultivation offered by the State or otherwise act prejudicially to the scheme of collective farming;

(10) The scheme shall be brought into operation as early as possible but in no case shall the period extend beyond the tenth year from the date of the Constitution coming into operation.

ARTICLE II—SECTION III

Provisions for the protection of minorities

The Constitution of the United States of India shall provide:

Clause 1

(1) That the Executive—Union or State—shall be non-Parliamentary in the sense that it shall not be removable before the term of the Legislature.

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(2) Members of the Executive if they are not members of the Legislature shall have the right to sit in the Legislature, speak, vote and answer questions.

(3) The Prime Minister shall be elected by the whole House by single transferable vote.

(4) The representatives of the different minorities in the Cabinet shall be elected by members of each minority community in the Legislature by single transferable vote.

(5) The representatives of the majority community in the Executive shall be elected by the whole House by single transferable vote.

(6) A member of the Cabinet may resign his post on a censure motion or otherwise but shall not be liable to be removed except on impeachment by the House on the ground of corruption or treason.

Clause 2

(1) That there shall be appointed an Officer to be called the Superintendent of Minority Affairs.

(2) His status shall be similar to that of the Auditor-General appointed under section 166 of the Government of India Act of 1935 and removable in like manner and on the like grounds as a judge of the Supreme Court.

(3) It shall be the duty of the Superintendent to prepare an annual report on the treatment of minorities by the public, as well as by the Governments, Union and State, and of any transgressions of safeguards or any miscarriage of justice due to communal bias by Governments or their officers.

(4) The annual report of the Superintendent shall be placed on the Table of the Legislatures, Union and State, and the Governments, Union and State, shall be bound to provide time for the discussion of the report.

Clause 3

(1) The social boycott, promoting or instigating a social boycott or threatening a social boycott as defined below shall be declared to be an offence.

(i) *Boycott Defined.*—A person shall be deemed to boycott another who—

(*a*) refuses to let or use or occupy any house or land, or to deal with, work for hire, or do business with another person, or to render to him or receive from him any service, or refuses to do any of the said things on the terms on which such things should commonly be done in the ordinary course of business, or

(*b*) abstains from such social, professional or business relations as he would, having regard to such existing customs in the community which are not inconsistent with any fundamental right or other rights of citizenship declared in the Constitution, ordinarily maintain with such person, or

(*c*) in any way injures, annoys or interferes with such other person in the exercise of his lawful rights.

(ii) *Offence of boycotting.*—Whoever, in consequence of any person having done any act which he was legally entitled to do or of his having omitted to do any act which he was legally entitled to omit to do, or with intent to cause any person to do any act which he is not legally bound to do or to omit to do any act which he is legally entitled to do, or with intent to cause harm to such person in body, mind, reputation or property, or in his business or means of living, boycotts such person or any person in whom such person is interested, shall be guilty of the offence of boycotting:

Provided that no offence shall be deemed to have been committed under this section, if the court is satisfied that the accused person has not acted at the instigation of or in collusion with any other person or in pursuance of any conspiracy or of any agreement or combination to boycott.

(iii) *Offence of instigating or promoting a boycott.*—Whoever—

(*a*) publicly makes or publishes or circulates a proposal for, or

(*b*) makes, publishes or circulates any statement, rumour or report with intent to, or which he has reason to believe to be likely to cause, or

(*c*) in any other way instigates or promotes the boycotting of any person or class of persons,

shall be guilty of the offence of instigating or promoting a boycott.

Explanation.—An offence under this clause shall be deemed to have been committed although the person affected or likely to be affected by any action of the nature referred to herein is not designated by name or class but only by his acting or abstaining from acting in some specified manner.

(iv) *Offence of threatening a boycott.*—Whoever, in consequence of any person having done any act which he was legally entitled to do or of his having omitted to do any act which he was legally entitled to omit to do, or with intent to cause any person to do any act which he is not legally bound to do, or to omit to do any act which he is legally entitled to do, threatens to cause such person or any person in whom such person is interested, to be boycotted shall be guilty of the offence threatening a boycott.

Exception.—It is not boycott—

(i) to do any act in furtherance of a *bona fide* labour dispute;

(ii) to do any act in the ordinary course of business competition.

(2) All these offences shall be deemed to be cognizable offences. The Union Legislature shall make laws prescribing punishment for these offences.

Clause 4

That the power of the Central and Provincial Governments to make grants for any purpose, notwithstanding that the purpose is not one for which the Union or State Legislature as the case may be may make laws, shall not be abridged or taken away.

ARTICLE II—SECTION IV

Safeguards for the Scheduled Castes

Part I. Guarantees

The Constitution of the United States of India shall guarantee to the Scheduled Castes the following rights:

Clause 1

Right to Representation in the Legislature

(1) *Quantum of Representation.*—(*a*) (i) The Scheduled Castes shall have minimum representation in the Legislature—Union and State—and if there be a group Constitution then in the group Legislature equal to the ratio of their population to the total population, provided that no other minority is allowed to claim more representation than what is due to it on the basis of its population.

(ii) The Scheduled Castes of Sind and the N.W.F. Province shall be given their due share of representation.

(iii) Weightage where it becomes necessary to reduce a huge communal majority to reasonable dimensions shall come out of the share of the majority. In no case shall it be at the cost of another minority community.

(iv) Weightage carved out from the share of majority shall not be assigned to one community only. But the same shall be divided among all minority communities equally or in inverse proportion to their

(1) economic position,

(2) social status, and

(3) educational advance.

(*b*) There should be no representation to special interests. But if the same is allowed it must be taken out of the share of representation given to that community to which the special interest belongs.

(2) *Method of Election*—

(A) For Legislative Bodies

(*a*) The system of election introduced by the Poona Pact shall be abolished.

(*b*) In its place, the system of *Separate Electorates* shall be substituted.

(*c*) Franchise shall be adult franchise.

(*d*) The system of voting shall be cumulative.

(B) For Local Bodies

The principles for determining the quantum of representation and the method of election for municipalities and local boards shall be the same as that adopted for the Union and State Legislatures.

Clause 2

Right to Representation in the Executive

(1) The Scheduled Castes shall have minimum representation in the Executive—Union and State—and if there be a group Constitution then in the group Executive equal to the ratio of their population to the total

population provided that no minority community is allowed to claim more than its population ratio.

(2) Weightage where it becomes necessary to reduce a huge majority to reasonable dimensions shall come out of the share of the majority community. In no case shall it be at the cost of another minority community.

(3) Weightage carved out from the share of the majority shall not be assigned to one community only. But the same shall be divided among all minorities equally or in inverse proportion to :

(i) their economic position,

(ii) social status, and

(iii) educational advance.

Clause 3

Right to Representation in the Services

(*a*) The quantum of representation of the Scheduled Castes in the Services shall be as follows :

(i) *In the Union Services.*—In proportion to the ratio of their population to the total population in India or British India as the case may be.

(ii) *In the State and Group Services.*—In proportion to their population in the State or Union.

(iii) *In the Municipal and Local Board Services.*—In proportion to their population in the Municipal and Local Board areas:

Provided that no minority community is allowed to claim more than its population ratio of representation in the services.

(*b*) Their right to representation in the Services shall not be curtailed except by conditions relating to minimum qualifications, education, age, etc.

(*c*) The conditions prescribed for entry in services shall not abrogate any of the concessions given to the Scheduled Castes by the Government of India in their Resolutions of 1942 and 1945.

(*d*) The method of filling up the vacancies shall conform to the rules prescribed in the Government of India Resolutions of 1942 and 1946.

(*e*) On every Public Services Commission or committee constituted for filling vacancies, the Scheduled Castes shall have at least one representative.

Part II. Special Responsibilities

That the United States of India shall undertake the following special responsibilities for the betterment of the Scheduled Castes :

Clause 1

(1) Governments—Union and State—shall be required to assume financial responsibility for the higher education of the Scheduled Castes and shall be required to make adequate provisions in their budgets. Such provisions shall form the first charge on the Education Budget of the Union and State Governments.

(2) The responsibility for finding money for secondary and college education of the Scheduled Castes in India shall be upon the State Governments and the different States shall make a provision in their annual budgets for the said purpose in proportion to the population of the Scheduled Castes to the total budget of the States.

(3) The responsibility for finding money for foreign education of the Scheduled Castes shall be the responsibility of the Union Government and the Union Government shall make a provision of rupees ten lakhs per year in its annual budget in that behalf.

(4) These special grants shall be without prejudice to the right of the Scheduled Castes to share in the expenditure incurred by the State Government for the advancement of primary education for the people of the State.

Clause 2

1. The following provision shall be made in the constitution of the Union Government :

(i) There shall be a Settlement Commission under the new Constitution to hold uncultivated lands belonging to the State in trust for settlement of the Scheduled Castes in separate villages.

(ii) The Union Government shall set apart annually a fund of Rs. 5 crores for the purpose of promoting the scheme of settlement.

(iii) That the commission shall have the power to purchase any land offered for sale and use it for the said purpose.

2. The Union Government shall from time to time pass such legislation as may be necessary for the commission to carry out its functions.

Part III. Sanction for Safeguards and Amendment of Safeguards

Clause 1

The Constitution of the United States of India shall provide that—

The United States of India undertakes to give the safeguards contained in Article II, Section IV a place in the Constitution and make them a part of the Constitutional Law of India.

Clause 2

The provisions for the Scheduled Castes shall not be altered, amended or abrogated except in the following manner :

Any amendment or abrogation of Section IV of Article II or any part thereof relating to the Scheduled Castes shall only be made by a resolution passed in the manner prescribed below by the more popular chamber of the Union Legislature.

(i) Any proposal for amendment or abrogation shall be initiated in the form of a resolution in the more popular chamber of the Union Legislature.

(ii) No such resolution shall be moved—

(a) unless 25 years have elapsed after the Constitution has come into operation and has been worked ; and

(b) unless six months' notice has been given to the House by the mover of his intention to move such a resolution.

(iii) On the passing of such a resolution, the Legislature shall be dissolved and a new election held.

(iv) The original resolution in the form in which it was passed by the previous Legislature shall be moved afresh in the same House of the newly elected Union Legislature.

(v) The resolution shall not be deemed to have been carried unless it is passed by a majority of two-thirds of the members of the House and also two-thirds of members of the Scheduled Castes who have been returned through separate electorates.

Part IV. Protection of Scheduled Castes in the Indian States

The Constitution of the United States of India shall provide that the admission of the Indian States into the Union shall be subject to the following condition:

All provisions relating to the Scheduled Castes contained in Section IV of Article II of the Constitution of the United States of India shall be extended to the Scheduled Castes in the Indian States. Such a provision in the Constitution of an Indian State shall be a condition precedent for its admission into the Union.

Part V. Interpretation

I.—For the purposes of Article II the Scheduled Castes, as defined in the Government of India Scheduled Caste Order, 1936, issued under the Government of India Act, 1935, shall be deemed to be a minority.

II.—For the purposes of Article II a caste which is a Scheduled Caste in one State shall be treated as Scheduled Caste in all States of the Union.

APPENDIX I

EXPLANATORY NOTES

Preamble

The Preamble gives constitutional shape and form to the Resolution on Objectives passed by the Constitutent Assembly on Wednesday the 22nd January 1947.

Article I—Section I

Clauses 1—4

The admission of the six hundred and odd Indian States into the Union raises many difficult questions. The most difficult of them is the one which relates to their admission into the Union. Every Indian State is claiming to be a Sovereign State and is demanding to be admitted into the Union in its own right. The Indian States fall into different classes from the view of size, population, revenue and resources. It is obvious that every State admitted into the Union as a State must have the capacity to bear the burden of modern administration to maintain peace within its own borders and to possess the resources necessary for the economic advancement of its people. Otherwise, the United States of India is likely to be encumbered with a large number of weak States which, instead of being a help to the Central Government, will be a burden upon it. The Union Government with such small and weak States as its units will never be able to pull its full weight in an emergency. It is therefore obvious that it would be a grave danger

ANNEX-C

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THE FRAMING OF INDIA'S CONSTITUTION

SELECT DOCUMENTS

THE PROJECT COMMITTEE

Chairman

B. SHIVA RAO

Members

V. K. N. MENON J. N. KHOSLA
K. V. PADMANABHAN C. GANESAN
P. N. KRISHNA MANI

Chief Research Officer

SUBHASH C. KASHYAP

Asst. Research Officer

N. K. N. IYENGAR

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"in particular of the Scheduled Castes and the aboriginal tribes" should be enclosed in brackets. The expression "Scheduled Castes" which has reference to the Government of India Act 1935 may be amended at a subsequent stage.

(IV) DRAFT REPORT OF THE SUB-COMMITTEE
April 3, 1947

Council House,
New Delhi, the 3rd April 1947.

To

The Chairman,
Advisory Committee on Minorities,
Fundamental Rights, etc.

Sir,

We, the undersigned, members of the Sub-Committee on Fundamental Rights appointed by the Advisory Committee on the 27th February 1947 have considered the matter referred to us and have now the honour to submit this our report.

2. We recommend that provisions on the lines set out in the Annexure be incorporated in the new Constitution so as to be binding upon all authorities, whether of the Union or the units.

3. We have attempted to divide fundamental rights into two classes :—

(1) Justiciable rights, that is to say, rights which can be normally enforced by legal action, and

(2) Non-justiciable rights, that is to say, those which are not normally either capable of, or suitable for, enforcement by legal action.

Typical of the former is the right which requires that the State shall not deprive a citizen of his liberty without due process of law. It is obvious that if this right is infringed, the citizen can and should have redress in a court of law, for it is possible for the court to find in a given case whether the right has been infringed or not. Typical of the latter is the right which requires the State to endeavour to secure a decent standard of life for all workers. Obviously, it is as impossible for a worker to prove, as for a court to find, that a general right of this kind has been infringed in a given case. We have, accordingly, put justiciable rights and non-justiciable rights into separate chapters and have made it clear that the latter are intended to be directions for the general guidance of the State and are not cognizable by any court.

(We have, etc.)

ANNEXURE

FUNDAMENTAL RIGHTS

Chapter I

Justiciable Rights

Definitions

1. In this and the next chapter, unless the context otherwise requires :—

(i) "The State" includes the legislatures and the governments of the Union and the units and all local or other authorities within the territories of the Union.

(ii) "The Union" means the Union of India.

(iii) "The law of the Union" includes any law made by the Union Legislature and any existing Indian law as in force within the Union or any part thereof.

Application of laws

2. Any law or usage in force within the territories of the Union immediately before the commencement of this Constitution and any law which may hereafter be made by the State inconsistent with the provisions of this Chapter / Constitution shall be void to the extent of such inconsistency.

Citizenship

3. Every person born or naturalized in the Union and subject to the jurisdiction thereof shall be a citizen of the Union. Further provisions governing the accrual, acquisition and termination of Union citizenship may be made by the law of the Union.

4. All citizens whether within the territories of the Union or outside are entitled to the protection of the Union.

Right to equality

5. (1) All persons within the Union shall be equal before the law. No person shall be denied the equal protection of the laws within the territories of the Union. There shall be no discrimination against any person on grounds of religion, race, caste, language or sex.

In particular—

(a) There shall be no discrimination against any person on any of the grounds aforesaid in regard to the use of wells, tanks, roads, schools and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(b) There shall be equality of opportunity for all citizens—

(i) in matters of public employment;

(ii) in the exercise or carrying on of any occupation, trade, business or profession;

and no citizen shall on any of the grounds aforesaid be ineligible for public office or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occupation, trade, business or profession within the Union.

(2) Any enactment, regulation, judgment, order, custom or interpretation of law, in force immediately before the commencement of this Constitution, by which any penalty, disadvantage or disability is imposed upon or any discrimination is made against any citizen on any of the grounds aforesaid shall cease to have effect.

6. "Untouchability" is abolished and the practice thereof shall be an offence.

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7. No titles except those denoting an office or a profession shall be conferred by the Union.

No citizen of the Union and no person holding any office of profit or trust under the State shall, without the consent of the Union, accept any present, emolument, office or title of any kind from any foreign State.

National language

8. Hindustani, written either in the *Devanagari* or the Persian script at the option of the citizen, shall, as the national language, be the first official language of the Union. English shall be the second official language for such period as the Union may by law determine. All official records of the Union shall be kept in Hindustani in both the scripts and also in English until the Union by law otherwise provides.

Rights to freedom

9. There shall be liberty for the exercise of the following rights subject to public order and morality:

(a) The right of every citizen to freedom of speech and expression.
The publication or utterance of seditious, obscene, slanderous, libellous or defamatory matter shall be actionable or punishable in accordance with law.

(b) The right of the citizens to assemble peaceably and without arms.
Provision may be made by law to prevent or control meetings which are likely to cause a breach of the peace or are a danger or nuisance to the general public or to prevent or control meetings in the vicinity of any chamber of a Legislature.

(c) The right of the citizens to form associations or unions.
Provision may be made by law to regulate and control in the public interest the exercise of the foregoing right provided that no such provision shall contain any political, religious or class discrimination.

(d) The right of every citizen to the secrecy of his correspondence.
Provision may be made by law to regulate the interception or detention of articles and messages in course of transmission by post, telegraph or otherwise on the occurrence of any public emergency or in the interests of public safety or tranquillity.

10. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

11. No person shall be deprived of his life, liberty or property without due process of law.

12. (1) Every citizen not below 21 years of age shall have the right to vote at any election to the Legislature of the Union and of any unit thereof, or, where the Legislature is bicameral, to the lower chamber of the Legislature, subject to such disqualifications on the ground of mental incapacity, corrupt practice or crime as may be imposed, and subject to such qualifications relating to residence within the appropriate constituency, as may be required by or under the law.

(2) The law shall provide for free and secret voting and for periodical elections to the Legislature.

(3) The superintendence, direction and control of all elections to the Legislature whether of the Union or of a unit, including the appointment of Election Tribunals shall be vested in an Election Commission for the Union or the unit, as the case may be, appointed, in all cases, in accordance with the law of the Union.

13. Subject to regulation by the law of the Union, trade, commerce, and intercourse among the units, whether by means of internal carriage or by ocean navigation, shall be free :

Provided that any unit may by law impose reasonable restrictions thereon in the interest of public order, morality or health.

14. Every citizen of the Union shall be free to move throughout the Union, to reside and settle in any part thereof, to acquire property, and to follow any occupation, trade, business or profession subject to such reasonable restraints as the law may impose.

15. (1) (a) Slavery,

(b) traffic in human beings,

(c) the form of forced labour known as *begar*,

(d) any form of involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted,

are hereby prohibited and any contravention of this prohibition shall be an offence.

Explanation.—Compulsory service under any general scheme of education does not fall within the mischief of this clause.

(2) Conscription for military service or training, or for any work in aid of military operation is hereby prohibited.

(3) No person shall engage any child below the age of 14 years to work in any mine or factory or any hazardous employment.

Rights relating to religion

16. All persons are equally entitled to freedom of conscience and the right freely to profess and practise religion subject to public order, morality or health and to the other provisions of this chapter.

Explanation I.—The wearing and carrying of *kirpans* shall be deemed to be included in the practice of the Sikh religion.

Explanation II.—The right to profess and practise religion shall not include any economic, financial, political or other secular activities that may be associated with religious worship.

Explanation III.—No person shall refuse the performance of civil obligation or duties on the ground that his religion so requires.

17. Every religious denomination shall have the right to manage its own affairs in matters of religion and to own, acquire and administer property, movable and immovable, and to establish and maintain institutions for religious or charitable purposes consistently with the provisions of this chapter.

The right to build places of worship in any place shall not be denied except for reasonable cause.

18. No person may be compelled to pay taxes the proceeds of which are specifically appropriated to religious purposes.

19. The State shall not recognize any religion as the State religion.

20. No person attending any school maintained or receiving aid out of public funds shall be compelled to take part in the religious instruction that may be given in the school.

21. The property of any religious body shall not be diverted, save for necessary works of public utility and on payment of compensation.

22. No person under the age of 18 shall be converted to any religion other than the one in which he was born or be initiated into any religious order involving a loss of civil status.

23. Conversion from one religion to another brought about by coercion or undue influence shall not be recognized by law and the exercise of such coercion or undue influence shall be an offence.

24. Every citizen is entitled as of right to free primary education, and it shall be the duty of the State to provide within a period of 10 years from the commencement of this Constitution for free and compulsory primary education for all children until they complete the age of 14 years.

25. Every citizen is entitled, as part of his right to free primary education, to have facilities provided for learning the national language either in the *Devanagari* or the Persian script at his option.

26. Equal opportunities of education shall be open to all citizens :

Provided that nothing herein contained shall preclude the State from providing special facilities for educationally backward sections of the population.

Miscellaneous rights

27. No property, movable or immovable, of any person or corporation, including any interest in any commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of just compensation for the property taken or acquired and specifies the principles on which and the manner in which the compensation is to be determined.

28. (1) No person shall be convicted of crime except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that applicable at the time of the commission of the offence.

(2) No person shall be tried for the same offence more than once nor be compelled in any criminal case to be a witness against himself.

29. No person shall be subjected to prolonged detention preceding trial, to excessive bail, or unreasonable refusal thereof, or to inhuman or cruel punishment.

30. (1) Full faith and credit shall be given throughout the territories of the Union to the public acts, records and judicial proceedings of the Union and every unit thereof, and the manner in which such acts, records and proceedings shall be proved and the effect thereof determined shall be prescribed by the law of the Union.

(2) Final civil judgments delivered in any unit shall be executed throughout the Union subject to such conditions as may be imposed by the law of the Union.

31. Subject to the law of the Union every monument or place or object of artistic or historic interest, declared by such law to be of national importance, is protected from spoliation, destruction, removal, disposal or export, as the case may be, and all such monuments or places or objects shall be preserved and maintained according to the law of the Union.

Right to constitutional remedies

32. (1) The right to move the Supreme Court for the enforcement of any of the rights guaranteed by this chapter is also hereby guaranteed.

(2) For the purpose of enforcing any such rights, the Supreme Court shall have power to issue directions in the nature of the writs of *habeas corpus, mandamus,* prohibition and *certiorari.*

(3) The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion or other grave emergency, the public safety may require it.

33. The Union Legislature may by law determine to what extent any of the rights guaranteed by this chapter shall be restricted or abrogated for the members of the armed forces or forces charged with the maintenance of public order so as to ensure fulfilment of their duties and the maintenance of discipline.

34. The Union Legislature shall make laws to give effect to those provisions of this chapter which require such legislation and to prescribe punishments for those

acts which are declared to be offences in this chapter and are not already punishable.

Chapter II

Non-justiciable Rights

35. The principles of policy set forth in this chapter are intended for the general guidance of the State. The application of these principles in legislation and administration shall be the care of the State and shall not be cognizable by any court.

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

37. The State shall, in particular, direct its policy towards securing—

(i) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(ii) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(iii) that the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership and control of essential commodities in a few individuals to the common detriment;

(iv) that there shall be equal pay for equal work for both men and women;

(v) that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their age and strength;

(vi) that childhood and youth are protected against exploitation and against moral and material abandonment.

38. The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness, disablement, and other cases of undeserved want.

39. The State shall make provision for securing just and humane conditions of work and for maternity relief for workers.

40. The State shall endeavour to secure, by suitable legislation, economic organization and in other ways, to all workers, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

41. The State shall endeavour to secure for the citizens a uniform civil code.

42. The State shall endeavour to secure that marriage shall be based only on the mutual consent of both sexes and shall be maintained through mutual co-operation, with the equal rights of husband and wife as a basis. The State shall also recognize that motherhood has a special claim upon its care and protection.

43. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the aboriginal tribes, and shall protect them from social injustice and all forms of exploitation.

44. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.

45. The State shall promote internal peace and security by the elimination of every cause of communal discord.

46. The State shall promote international peace and security by the elimination of war as an instrument of national policy, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings

ANNEXURE - D

of religion subject to public order, morality or health and to the other provisions of this chapter are guaranteed to every citizen.

In other words, we would like "freedom of religious worship" to replace "free practice of religion".

3. This is personal to me as I was unfortunately unable to discuss it with Mrs. Mehta. I would like clause 24 to read as follows:

> Every citizen is entitled as of right to free primary education and it shall be the duty of the State to provide this within a period of 10 years from the commencement of this Constitution for all children until they complete the age of 14 years.

4. We would also like to draw the attention of the Fundamental Rights Sub-Committee to what was, as a matter of fact, brought to their notice by you in regard to clause 27.

As it stands the clause might interfere not only with future legislation but might also entail revision of or invalidate past legislation. It would appear that section 299 of the Government of India Act is more progressive and fair enough and would, therefore, meet our purpose better.

5. While the non-justiciable rights shall not be cognizable by any court, we would respectfully urge that they are nonetheless fundamental. We would, therefore, like this to be stressed either in the foreword or at the end of clause 35 so that it shall be the duty of the State to take, as soon as possible, the necessary action in fulfilment of the directives. For example clause 41 is, in our opinion, very vital to social progress. Indeed all the non-justiciable rights are fundamental to the well-being and ordered progress of the State.

(c) B. N. Rau's notes on the Draft Report

April 8, 1947

Clause 2. In this clause the word "Constitution" has been inserted as an alternative to the word "Chapter". Any law or usage in force within the territories of the Union immediately before the commencement of the Constitution would be void not only if it is inconsistent with the provisions of this chapter but also if it is inconsistent with any of the provisions of the Constitution: *e.g.*, the provision that only the Union may deal with defence, foreign affairs, or communications. By restricting the clause to the provisions contained in this chapter we may give the impression that the provisions of other chapters may be violated with impunity.

Clause 3. The first part of the clause is adapted from Article XIV, section 1 of the U.S.A. Constitution; the portion relating to State citizenship in that Article has been omitted. Citizenship or nationality is part of the subject of foreign affairs and is therefore an exclusively Union subject. There cannot be a provincial citizenship as distinct from the citizenship of the Union, although it may be open to a Province to distinguish different classes

of Union citizens. For example, a Province may provide that only those citizens of the Union who have resided in the Province for a certain period shall be eligible to vote at Provincial elections. By so doing, the Province does not create a new citizenship, distinct from Union citizenship, but merely confers a special privilege on a certain class of Union citizens.

The second part of the clause is intended to cover the naturalization laws which may be passed by the Union or which may be adopted by the Constitution, *e.g.*, existing Indian laws subject to adaptation.

Clause 4. Adapted from the Weimar Constitution of Germany, Article 112 paragraph 2.

Clause 5. The first part of the main clause is adapted from Weimar Constitution, Article 109, paragraph 1, but widened so as to be applicable to all persons, not merely to citizens. The second part of the main clause is adapted from the U.S.A. Constitution, Amendment XIV, section 1.

The provision in *sub-clause* (*a*) follows, for the most part, drafts in the report of the All Parties Conference, 1928, and the Congress Declaration of 1933. It will be noticed that the clause as drafted will prejudicially affect the institution of separate schools, hospitals, etc. for women.

Sub-clause (*b*) is adapted from section 298 of the Government of India Act, 1935.

Clause 6. What exactly is meant by the practice of untouchability will have to be defined in the law meant to implement this provision. See clause 34.

Clause 7. The first part of the clause is adapted from Danzig Constitution, Article 73, paragraph 4. The second part of the clause is drafted on the lines of the U.S.A. Constitution, Article I, section 9, sub-section (8), but is much wider in scope as in the Irish Constitution, section 40(2)°.

Clause 8. Adapted from Irish Constitution, section 8.

Clause 9. Sub-clauses (*a*), (*b*) *and* (*c*) adapted from Irish Constitution, Section 40(6)1°, sub-clauses (i), (ii) and (iii).

Sub-clause (*d*). First clause adapted from Weimar Constitution, Article 117. The proviso to this sub-clause is taken from section 26 of the Indian Post Offices Act.

Clause 10. Adapted *in toto* from the U.S.A. Constitution, Amendment IV.

Clause 11. Adapted from the U.S.A. Constitution, Amendment V and Amendment XIV, section 1.

Clause 12. This secures that the right to vote is not refused to any citizen who satisfies certain conditions. The idea of an Election Commission to supervise, direct and control all elections is new.

Clause 13. The first paragraph of the clause is adapted from the Australian Constitution, section 92. The proviso is new.

Clause 14. Embodies one of the chief privileges or immunities of the citizens of the U.S.A., which no State is permitted to abridge, see Amendment XIV, section 1. See also Weimar Constitution, Article 111.

Clause 15—sub-clause (1). The provisions relating to "slavery" and "involuntary servitude" follow Amendment XIII of the U.S.A. Constitution. The prohibition of *begar* has been added to them and any contravention of the general prohibition contained in the clause is made an offence.

Sub-clause (2). No precedent available; on the other hand, some of the constitutions, *e.g.*, the Swiss (Article 18, paragraph 1), the Czechoslovakian (Article 127, paragraph 1) and the Chinese (Article 20) constitutions contain provisions imposing compulsory military service on their citizens.

Sub-clause (3). Based on Congress Declaration 1933. Also on the Yugoslavian Constitution, Article 23, paragraph 2.

Clause 16. Adapted from the Irish Constitution, section 44(2)1°.

Explanation I. Based on the recommendations of the All Parties Conference, 1928.

Explanation III. Adapted from the Yugoslavian Constitution, Article 12, paragraph 2, but omitting reference to military obligations.

Clause 17. Adapted from the Irish Constitution, section 44(2)5°.

The second paragraph of the clause is new.

Clause 18. Adapted from the Swiss Constitution, Article 49, paragraph 6.

Clause 19. Cf. Constitution of the U.S.A., Amendment I, Weimar Constitution Article 137, paragraph 1.

Clause 20. Based on the recommendations of the All Parties Conference, 1928. See also the Irish Constitution, section 44(2)4°.

Clause 21. Adapted from the Irish Constitution, section 44(2)6°.

Clauses 22 and 23. These clauses are meant to stop certain practices which, it is feared, are becoming increasingly common.

Clause 24. Based on the Irish Constitution, section 42(4), and the Chinese Constitution, Articles 21 and 160. The latter part of the clause is necessitated by Indian conditions.

Clause 26. Cf. Article 159 of the Chinese Constitution.

Clause 27. Adapted from section 299 of the Government of India Act 1935. See also the last clause of Amendment V of the U.S.A. Constitution.

Clause 28—sub-clause (1). Based on the U.S.A. Constitution, Article I, section 9(3); the Irish Constitution, section 15(5), and the Weimar Constitution, Article 116.

Sub-clause (2). Based on Amendment V of the U.S.A. Constitution.

Clause 29. Based on Lauterpacht, *An International Bill of the Rights of Man*, Article 1, (p. 70); also the U.S.A. Constitution, Amendments VI and VIII.

Clause 30—sub-clause (1). Adapted from the U.S.A. Constitution, Article IV, section 1; see also Australian Constitution, section 118.

Sub-clause (2). Adapted from the Swiss Constitution, Article 61.

Clause 31. Based on the Weimar Constitution, Article 150; the Chinese Constitution, Article 166.

Clause 32—sub-clause (1). Cf. the Swiss Constitution, Article 113, paragraph 3.

Sub-clause (2). The High Courts have, under section 491 of the Code of Criminal Procedure, power to issue directions in the nature of *habeas corpus.*

Sub-clause (3). Cf. the U.S.A. Constitution, Article 1, section 9(2); the Irish Constitution, section 40(4)3°.

Clause 33. Based on the Weimar Constitution, Article 133, paragraph 2; cf. also the Swiss Constitution, Article 66.

Clause 34. Based on the model of Amendment XIII, section 2, of the Constitution of the U.S.A., which enables the Congress to enforce by legislation a particular right guaranteed by the Constitution.

Clause 35. Adapted from the main clause of section 45 of the Irish Constitution.

Clause 36. Adapted from section 45(1) of the Irish Constitution.

Clause 37—sub-clauses (i), (ii) and (iii). Adapted from the Irish Constitution, Section 45(2), (i), (ii) and (iii).

Sub-clause (iv). Cf. the U.S.S.R. Constitution, Article 122.

Sub-clause (v). Adapted from the Irish Constitution, section 45(4)2°.

Sub-clause (vi). Adapted from the Constitution of Cuba, Title V, section 45, paragraph 2.

Clause 38. Adapted from Lauterpacht, *An International Bill of the Rights of Man,* Article 13, (p. 72); cf. also the U.S.S.R. Constitution, Articles 118 and 120.

Clause 39. Adapted from Lauterpacht, *op. cit.,* Article 14, (p. 72): provision for maternity relief for workers added.

Clause 40. Based on the Irish Constitution, section 45(2)(i); the U.S.S.R. Constitution, Article 119.

Clause 41. Cf. Section 94 of the Constitution of Canada.

Clause 42. Cf. the Swiss Constitution, Article 54, paragraph 2, and the Weimar Constitution, Article 119, paragraph 1. The second clause is based on Article 119, paragraph 3, of the Weimar Constitution.

Clause 43. This provision is peculiarly needed in India. For an analogous provision, see Article 169 of the Chinese Constitution, which provides for the education and economic advancement of the various peoples of China in the frontier regions.

Clause 44. Taken from the recommendations of the United Nations Conference on Food and Agriculture, 1943.

Clause 45. This provision also is one dictated by the peculiar conditions in India.

Clause 46. Adapted from the Declaration of Havana made in 1943 by the representatives of the governments, employers and work people of the American continent.

NOTE BY THE CONSTITUTIONAL ADVISER (B. N. RAU) ON THE EFFECT OF SOME OF THE PROPOSED CLAUSES

In sending the above "Notes on Clauses", I feel bound to draw attention to the possible effect of certain provisions of the draft.

Clauses 2, 11 and 27. Forty per cent. of the litigation in the Supreme Court of the U.S.A. during the last half century has centred round the "due process" clause, of which it has been said that, in the last analysis, it means just what the courts say it means. No other definition is possible. Our draft not only borrows this clause (see clause 11) but also gives it retrospective effect (see clause 2, which makes it applicable even to pre-constitution laws). The result is likely to be a vast flood of litigation immediately following upon the new Constitution. Tenancy laws, laws to regulate money-lending, laws to relieve debt, laws to prescribe minimum wages, laws to prescribe maximum hours of work, etc., will all be liable to be challenged; and not only those which may be enacted in future but also those which have already been enacted.

A good illustration of what may happen is furnished by the U.S.A. case *Louisville Joint Stock Land Bank* v. *Radford* (1935). In this case, the Frazier-Lemke Act passed by the Congress was held by the Supreme Court to be unconstitutional. The Act had been passed at a time of severe agricultural depression in order to give relief to farmers by scaling down their mortgage-debts and helping them to retain their farms. Declaring the law to be invalid, the court observed: "The Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation". It may be mentioned that in defence of the Act the mortgager sought to establish (1) that the welfare of the Nation demands that its farms be owned by those who work them, (2) that to permit widespread foreclosure of farm mortgages would result in transferring ownership to great corporations and in transforming farm owners into farm labourers, (3) that there was great danger at the time of the passing of the Act owing to the severe depression in agricultural prices that the foreclosure of the farms would become widespread. The court did not dispute any of these propositions but held in effect that they were irrelevant, the only question being whether or not the impugned Act had taken from the bank, without just compensation, property rights of substantial value. This question being answered in the affirmative, the Act was held to be void. It should be noted that the Fifth Amendment of the U.S.A. Constitution contains the "due process" clause and also another clause which provides that private property shall not be taken for public use without just compensation. Our draft contains both these clauses (see clauses 11 and 27). It must be admitted that the clauses are a safeguard against predatory legislation; but they may also stand in the way of beneficent social legislation. The Irish Constitution has sought to steer a middle course by inserting under

its guarantees of private property two qualifications :

43(2)1°. The State recognizes, however, that the exercise of the rights mentioned in the foregoing provisions of this article ought, in civil society, to be regulated by the principles of social justice.

2°. The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

If some such qualification is considered desirable in the Indian Constitution also, we may insert a provision on the following lines between clauses 27 and 28 of the draft, numbering it as 27A for the present :

27A. The State may limit by law the rights guaranteed by sections 11, 16 and 27 whenever the exigencies of the common good so require.

The reason for the inclusion of a reference to section 16 in the above clause will be apparent from the note under clause 16.

Clauses 7 and 8. I am not sure whether clauses 7 and 8 are enforceable by legal action in any one of the ways specified in clause 32.

Clause 10. If this means that there is to be no search without a court's warrant, it may seriously affect the powers of investigation of the police. Under the existing law, *e.g.*, Criminal Procedure Code, section 165 (relevant extracts given below), the police have certain important powers. Often, in the course of investigation, a police officer gets information that stolen property has been secreted in a certain place. If he searches it at once, as he can at present, there is a chance of his recovering it; but if he has to apply for a court's warrant, giving full details, the delay involved, under Indian conditions of distance and lack of transport in the interior, may be fatal.

[Search by police-officer.

165. (1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under sub-section (1) shall, if practicable, conduct the search in person.]

Clause 11. See notes on clause 2 above.

Clause 12. Under the existing law, the remedy for any electoral irregularity is by election petition and the finding of the election tribunal is final. Under the clause as now drafted the case can be taken to the Supreme Court. I am not sure whether this is intended.

ANNEXURE - E

provided for the utmost utilization of such sources of new wealth by collective effort and for the common benefit. If private individual proprietors have to be expropriated for this purpose, I would not object to reasonable compensation being given to them; though even here it must be pointed out that at least in the case of developed land or exploited mines, the individual proprietor must have in many cases benefited himself several times the value of his property; and this should be taken into account before any policy of expropriation with compensation is adopted and given effect to.

18. Article 9, dealing with several of the primary freedoms or civil liberties, makes them subject to "public order and morality". The last named is a very vague term. Its connotation changes substantially from time to time. There have been many instances, in this as well as in other countries, wherein, in the name of public morality, essential freedoms of thought or expression have been denied to citizens. The example of the bar placed by the Lord Chamberlain in England against the staging of some of Bernard Shaw's plays need hardly be cited to lend point to my objection. In a land of many religions, with differing conceptions of morality, different customs, usages and ideals, it would be extremely difficult to get unanimity on what constitutes morality. Champions of the established order would find much in the new thought at any time, which might be considered by them as open to objection on grounds of public morality. If this is not to degenerate into a tyranny of the majority, it is necessary either to define more clearly what is meant by the term "morality", or to drop this exception altogether.

These remarks are offered in response to your invitation in para 4 of your letter under reply. I hope they will be considered by the sub-committee before the report is finalised. As for the notes I had reserved my right to append, I am enclosing a copy of the note on the right to work, which may please be treated separately.

I hope you will receive this in time.

(g) *Alladi Krishnaswami Ayyar's comments on the Draft Report*
April 10, 14 and 15, 1947

Note dated April 10, 1947

There is one other point to which I should like to draw the attention of the committee. From the draft, which is a result of the deliberations, some of the rights guaranteed are subject to public order and morality. Other rights are not even subject to that qualification. During the time of war or a similar emergency, it may be difficult to bring these cases under public order or morality. Besides, public order or morality in our final draft covers only particular rights. A perusal of the Defence of India Act and the rules thereunder will illustrate the need for the security of the State also being added as a further qualification to the fundamental rights. Mr. Munshi suggested a general clause giving a suspending power to the Provincial or

the Union Government, but that was voted against by the committee on the ground that the fundamental right itself would be rendered illusory! Would it not therefore be better to add some such expression as "security and defence of the State or national security" to the words "public order".

Note dated April 14, 1947

Clause 5. On further consideration I feel that unless the latter part beginning with "There shall be no discrimination etc., etc.," is connected with the former part by a conjunctive it might be open to the construction that no sort of discrimination between even a citizen and a non-citizen can exist in regard to such matters as the exercise of a trade, calling or profession which is what is not intended. For example, a South African resident in this country or a foreign company even might claim equal rights with an Indian citizen. In this connection it is well to remember that the scheme of the chapter relating to discrimination in the Government of India Act is however confined to non-discrimination between British citizens and Indian nationals. All that was intended by the majority of the committee was that in such matters as trial before courts of law and the exercise of normal rights as human beings there should not be any distinction between man and man, the feeling being that in India it should take a broader view than is taken in the recent European constitutions which confine all the fundamental rights to citizens. I would therefore suggest to the committee the retention of 'and' or make the provision clearer in some other way.

Clause 9(a). I have the following note to submit in regard to the liberty secured under cl. 9. Its effect on s. 153-A of the Indian Penal Code will have to be carefully considered, though the attention of the committee was not drawn specifically to that section. Under the clause as it stands unless the class hatred is of the kind likely to affect public order and morality it will not be covered by the section. If the opening words alone were there, it might possibly cover cases under 153-A when the speech or the writing is of a virulent character. But the specific reference to "obscene, slanderous and libellous utterances" in cl. 9(a) might give rise to an argument that preaching class hatred might not come under that clause. The committee might therefore consider the inclusion in the clause of words to the following effect:— "or calculated to promote class hatred".

Clause (d). In regard to secrecy of correspondence I raised a point during the discussions that it need not find a place in a chapter on fundamental rights and that it had better be left to the protection afforded by the ordinary law of the land contained in the various enactments. There is no such right in the American Constitution. Such a provision finds a place only in the post-First World War constitutions. The effect of the clauses upon the sections of the Indian Evidence Act bearing upon privilege will have to be considered. The Indian Evidence Act hedges in the privilege with a number of

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restrictions—*vide* chapter 9, s. 120-127. The result of this clause will be that every private correspondence will assume the rank of a State paper, or, in the language of s. 123 and 124, a record relating to the affairs of State.

A clause like this might checkmate the prosecution in establishing any case of conspiracy or abetment in a criminal case and might defeat every action for civil conspiracy, the plaintiff being helpless to prove the same by placing before the court the correspondence that passed between the parties, which in all these cases would furnish the most material evidence. The opening words of the clause "public order and morality" would not be of any avail in such cases. On a very careful consideration of the whole subject I feel that inclusion of such a clause in the chapter on fundamental rights will lead to endless complications and difficulties in the administration of justice. It will be for the committee to consider whether a reconsideration of the clause is called for in the above circumstances.

Clause 10. Unreasonable searches. In regard to this subject I pointed out the difference between the conditions obtaining in America at the time when the American Constitution was drafted and the conditions in India obtaining at present after the provisions of the Criminal Procedure Code in this behalf have been in force for nearly a century. The effect of the clause, as it is, will be to abrogate some of the provisions of the Criminal Procedure Code and to leave it to the Supreme Court in particular cases to decide whether the search is reasonable or unreasonable. While I am averse to re-agitating the matter I think it may not be too late for the committee to consider this particular clause.

Clause 13. Though I have been in some measure responsible for the inclusion of this clause I feel it must be made clear that: (1) goods from other parts of India than in the units concerned coming into the units cannot escape duties and taxes to which the goods produced in the units themselves are subject.

(2) It must also be open to the unit in an emergency to place restrictions on the rights declared by the clause.

(3) It was not intended to extend this right to non-citizens carrying on trade. Elsewhere in the chapter a distinction has been drawn between citizens and non-citizens.

There is also a further point to be considered on the terms of the clause as it stands. If for any reason 'coastal trade' is ultimately left to the provincial jurisdiction, the units will not in any way be hampered by the right to the freedom of trade as put in the clause. To meet this point I would suggest that the clause might be recast either by the addition of 'coastal trade' or by the omission of the words "whether by means of internal carriage or by ocean navigation".

To meet the other points the following amendments will have to be made to the clause :

(1) After the proviso add : "or such restrictions as the unit may impose on an emergency declared as such".

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(2) Add another proviso to the effect: "provided that nothing in this clause shall prevent any unit from imposing on goods from other units the same duties and taxes to which goods produced in the unit are subject."

Clause 16. On further consideration and with due regard to the innumerable acts from the beginning of Anglo-Indian history bearing upon social rights and obligations which are inter-mixed with Hindu religion and the danger of such legislation being upset in the peculiar conditions of this country by force of this clause I am for some clause being inserted on the lines suggested by the lady members of the committee.

To meet the point an explanation or proviso to the following effect may be added: "The right to profess and practise religion shall not preclude the legislature from enacting laws for the social betterment of the people".

Clause 21. On further consideration the clause as drafted seems to me to require some slight modification. The intention as the committee might remember was not to rule out the cypres application of the funds of religious bodies or institutions but merely to prevent the State from expropriating property devoted to religious uses excepting for necessary works of public utility and on payment of compensation. The clauses as drafted may even prevent a court from directing a cypres application or the legislature of any unit from passing legislation authorizing cypres application. I would therefore suggest the inclusion of the words "or taken by the States" after the word "diverted".

Clause 32. While I do not want to re-agitate before the committee the point I raised with regard to writs, the draft as it stands might require slight modification. "Without prejudice to the powers that may be vested in this behalf in other courts" might be added at the beginning of sub-clause (2).

Note dated April 15, 1947

Clause 5. On a further consideration of the first part of this clause and the possible utilization of the clause as it stands by non-citizens for purposes for which it is not intended I am for the deletion of that part altogether. Sufficient protection is afforded to non-citizens within the Union by clause (ii). Omitting the first part the clause may read as follows: There shall be no discrimination against any person on grounds of religion, race, caste, or sex in regard to the use of ..... general public. Omit the word "language". The omission of the word "language" is rendered all the more necessary because the grounds referred to are not to disqualify a citizen from holding a public appointment. Clause (b) may be retained as it is.

* * *

The freedom of trade guaranteed to the citizens under this clause shall not in any way interfere with such Indian States as may become members of

the Union from continuing to levy customs or similar dues as are being levied under any arrangement or in the exercise of any power in that behalf until and unless the same is transferred to or vested in the Union in pursuance of any provision in the Constitution of the Union.

(VI) MINUTES OF DISSENT TO THE DRAFT REPORT
April 14, 1947

I

Clauses 8 and 25 give the citizen the option to learn and use the national language through the medium of either the *Devanagari* or the Persian script. I regret that my colleagues on the sub-committee did not find it possible to agree to the option being extended to the use of the Roman script as a further alternative. While those who have received English education may form a small part of our population, the fact remains that lakhs of Indians *are* familiar with the Roman script and that those of them, particularly in the South, who are not familiar at the same time with the *Nagari* or Persian script would find it easier to learn the national language and use it if they were able to do so through the medium of the Roman script. These considerations apply with special force to members of small minorities like the Indian Christians, Anglo-Indians and Jews who know the Roman script alone. So too the Indian Army has so far been successfully imparted training and education through the medium of "Roman Urdu", which means Hindustani in the Roman script. That is a salutary practice which has made it possible for mixed regiments to be taught the national language without distinction of religion or province. If it is now to be abandoned, it will mean that our national army will have to take cognizance of the religious grouping or provincial origin of each of its soldiers, thus making mixed regiments difficult to organize and to educate. I trust, therefore, that the Advisory Committee will add the Roman script to those already specified in clauses 8 and 25.

M. R. MASANI.

II

We are against the inclusion amongst fundamental rights of those embodied in clauses 17 and 21. It is clear that the right freely to profess and practise religion guaranteed by clause 16 and the rights of property guaranteed by clauses 11 and 27 amply safeguard the right of all religious denominations to acquire and administer such property as they wish and to build, establish and maintain places of worship, free from interference. There does not appear to be any necessity to sanctify the property rights of religious denominations any further by such specific recognition. We would,

ANNEX-F

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THE FRAMING OF INDIA'S CONSTITUTION

SELECT DOCUMENTS

THE PROJECT COMMITTEE

Chairman

B. SHIVA RAO

Members

V. K. N. MENON J. N. KHOSLA
K. V. PADMANABHAN C. GANESAN
P. N. KRISHNA MANI

Chief Research Officer

SUBHASH C. KASHYAP

Asst. Research Officer

N. K. N. IYENGAR

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ANNEXURE - I

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1

COMMENTS AND SUGGESTIONS ON THE DRAFT CONSTITUTION

February-October 1948

[The Draft Constitution as settled by the Drafting Committee was submitted to the President of the Constituent Assembly on February 21, 1948 (Vol. III, Doc. 6). It was published on February 26. Wide publicity was given, so that all individuals and organizations in the country interested in the framing of India's Constitution might have an opportunity of expressing their views.

Copies of the Draft were sent to every member of the Constituent Assembly with the request that he should send in any suggestions or criticisms on or before March 22, 1948, without prejudice to his right to propose any further amendments at a later stage. Copies were also sent to the Provincial Legislatures, Provincial Governments, Ministries of the Government of India, the Federal Court and the High Courts inviting criticisms and suggestions.

The Drafting Committee met on March 23, 24 and 27 to consider the comments and suggestions received till then. The Constitutional Adviser had examined them and prepared notes on most of them. The committee at its meetings held on these three days decided to recommend certain amendments to the Draft Constitution in the light of the comments and criticisms received.

Subsequently, the President of the Constituent Assembly constituted a Special Committee consisting mostly of the members of the Union Constitution Committee, the Provincial Constitution Committee and the Union Powers Committee, to examine the Draft Constitution as settled by the Drafting Committee and the various comments and suggestions received, with the recommendations of the Drafting Committee thereon. The committee was also asked to consider certain provisions in the Draft Constitution which departed from the previous decisions of the Constituent Assembly. These changes had been referred to by the Chairman of the Drafting Committee in his letter of February 21, 1948, forwarding the Draft to the President. It was expected that the views of this larger body on the Draft Constitution and the further recommendations of the Drafting Committee would enable the Drafting Committee to settle the final form of the Draft in such a way as to minimize the work of the Constituent Assembly.

The Special Committee met on April 10 and 11, 1948.

Suggestions for amendment continued to be received from the members of the Constituent Assembly, the Provincial Governments, the

Provincial Legislatures, Ministries of the Government of India and other Governmental organizations, as well as from non-official bodies and the general public. The Drafting Committee reassembled again on October 18, 1948, and at its meetings held on that date and on October 19 and 20 examined the comments and criticisms on the Draft Constitution received so far. The committee also further considered the recommendations of the Special Committee. As a result of this examination, the Drafting Committee selected some amendments which it proposed to support and also suggested certain others.

The Drafting Committee decided to issue a reprint of the Draft Constitution showing the amendments which it recommended for adoption opposite the articles which they sought to amend. This reprint was meant for circulation among the members of the Constituent Assembly for their use when the Draft came up before the Constituent Assembly for consideration. Accordingly when Ambedkar moved that the Draft Constitution as settled by the Drafting Committee be taken into consideration, the Assembly had before it the Draft Constitution as settled by the committee on February 21, 1948, together with the recommendations made by the Drafting Committee for amendment of certain provisions in the light of the comments and criticisms received.

In settling the Draft Constitution of February 1948, the Drafting Committee had not agreed with some of the recommendations of the Committees on the Centrally Administered Areas (Chief Commissioners' Provinces) and on the Financial Provisions of the Constitution. The Special Committee suggested that where the Drafting Committee had differed from the recommendations of these two committees, the proposals of the committees should be indicated as alternative provisions for the consideration of the Constituent Assembly. The Drafting Committee accordingly reproduced these proposals as alternative provisions in an appendix to the reprint of October, 1948.

In this Part, the more important comments and suggestions received during the period February to October, 1948, together with the amendments recommended by the Drafting Committee in the light of those comments and suggestions have been grouped together under each article of the Draft Constitution. The proposals for amendment together with the Constitutional Adviser's notes thereon (which reproduce fully the views of the Drafting Committee and/or of the Special Committee) and finally the recommendations of the Drafting Committee for amendment have been set out under each article.

In addition, the following documents have been included separately :

(i) Minutes of the meetings of the Drafting Committee, March 23, 24 and 27, 1948.

(ii) Minutes of the meetings of the Special Committee, April 10 and 11, 1948.

(iii) Letter from the Chairman of the Drafting Committee to the President of the Constituent Assembly, October 28, 1948.

The Draft Constitution was introduced in the Assembly on November 4, 1948, when Ambedkar moved that it be taken into consideration.

The clause by clause consideration began on November 15 and amendments were moved from time to time, both on behalf of the Drafting Committee and by individual members of the Assembly, as each clause was taken up for consideration. As already stated above, the papers included in this Part comprise only the comments and suggestions on the Draft Constitution made between February and October, 1948, i.e., prior to its introduction in the Assembly.]

(I) COMMENTS AND SUGGESTIONS

1. *Preamble*

B. Pattabhi Sitaramayya and others* : That for the word "belief" the word "association" be substituted.

Note : The reason for omitting "association" was that it would have seemed odd to stress so prominently freedom of association at a time when certain associations dangerous to the State were being banned.

B. Pattabhi Sitaramayya and others* : That for the "Fraternity" clause the following be substituted :

Fraternity assuring unity of the Nation and the dignity of the individual.

Note : This is purely a drafting amendment. It seeks to put the words "unity of the Nation" first and then the words "dignity of the individual" in the line commencing with the word "Fraternity" in the Preamble.

The reason for putting the dignity of the individual first was that unless the dignity of the individual is assured, the nation cannot be united. In the Preamble to the Irish Constitution "the dignity of the individual" comes before "the unity of our country". We may, therefore, retain the existing order of the phrase.

L. N. Sahu : That the following be added to the Preamble :

The people of India means representatives of the entire population of India, elected by adult franchise.

Note : The expression "the people of India" in the Preamble means the entire population of India: the Constituent Assembly is speaking in the name of the people of India. This amendment is misconceived. Further, it would not be correct to refer to the representatives "elected by adult franchise", as the members of the Constituent Assembly have not been elected by adult franchise. This amendment cannot, therefore, be accepted.

Upendranath Barman : That in the Preamble for the word "India" the word "Bharatbarsa" be substituted and appropriate changes be made throughout the Draft.

*Shrimati G. Durgabai, Thakurdas Bhargava, B. V. Keskar, T. T. Krishnamachari, M. Ananthasayanam Ayyangar and K. Santhanam.

Comments & Suggestions on the Draft Constitution, Feb-Oct 1948

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or decorations for gallantry, humanitarian work, etc., not carrying any title.

The Drafting Committee was of the view that for clause (1) of article 12 the following clause should be substituted :

(1) Titles or other privileges of birth shall not be conferred by the State.

The Special Committee further amended it as shown in the Drafting Committee's amendment prefixing the word "hereditary".

Decision of the Drafting Committee, October, 1948: The Drafting Committee decided to sponsor the amendment in the terms proposed by it.

ARTICLE 13

R. K. Sidhva : That at the end of each of the sub-clauses (a), (b), (c) and (g) of clause (1) of article 13, the words "throughout the territory of India" be inserted.

Note : The reference to the territory of India in sub-clauses (d) and (e) of clause (1) of article 13 is necessary because without such reference those sub-clauses would be meaningless. In the remaining sub-clauses of clause (1) of that article such reference is not necessary as in the absence of any restrictive provision the right conferred by those clauses will extend throughout the territory of India. This amendment is not therefore necessary.

B. Pattabhi Sitaramayya and others* : That for clause (2) of article 13 the following be substituted :

> Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law relating to libel, slander, defamation, offences against decency or morality or sedition or other matters which undermine the security of the State.

Note : The Special Committee considered this amendment and suggested that clause (2) of article 13 should be retained in its present form with the substitution of the word "security" for the word "authority".

B. Pattabhi Sitaramayya : That in clause (4) of article 13 the words "the general" be omitted and after the word "public" the words "safety, peace, and tranquillity" be inserted.

Note : The Special Committee also considered this amendment and suggested that in clause (4) of article 13 for the words "in the interests of the general public" the words "in the interests of public order or morality" should be substituted.

B. Pattabhi Sitaramayya and others* : That in clause (5) of article 13 for the words "State" and "aboriginal" the words "Parliament" and "scheduled" respectively be substituted.

Note : This amendment seeks to confer power only on the Union Parliament to impose the restrictions referred to in clause (5) of article 13. Such restrictions may have to be imposed on persons detained in prison or in

*Shrimati G. Durgabai, Thakurdas Bhargava, B. V. Keskar, T. T. Krishnamachari, M. Ananthasayanam Ayyangar and K. Santhanam.

mental hospitals, on criminal tribes, etc. "Prisons" is a subject in the State List (entry 5 of List II); "mental hospitals" and "nomadic and migratory tribes" are in the Concurrent List (entries 19 and 24); so the power to impose such restrictions by legislation cannot properly be taken away from the units. Again, Provincial Acts have in the past imposed restrictions (for example, the Bengal Tenancy Act, 1885) in the interest of aboriginals. Should the Provincial Legislatures be prevented from exercising such powers in future?

The amendment also seeks to substitute the word "scheduled" for the word "aboriginal" in the said clause. "Scheduled Tribe" instead of "aboriginal tribe" would be more specific and better. This part of the amendment may therefore be accepted.

B. Pattabhi Sitaramayya and others* : That in clause (6) of article 13 for the words "public order" the words "the general public" be substituted.

Note : This amendment seeks to replace the words "public order" in clause (6) of article 13 by the words "the general public", the very phrase which has been sought to be omitted from clause (4) of article 13. The words "public order" have been used in the Draft because the carrying on of certain occupations in certain localities may have to be prohibited or restricted in the interests of public order : *e.g.*, the sale of meat in the vicinity of a temple. The words "in the interests of the general public" are wider in scope and if the amendment is accepted, the whole phrase "public order, morality, or health" may be omitted. On the whole, the amendment seems unnecessary.

Thakurdas Bhargava and Govind Das : That to article 13, the following new clause be added :

> (7) Nothing in sub-clause (b) shall affect the operation of any law imposing disqualifications on the ground of age, citizenship, or residence, unsoundness of mind, crime or corrupt or illegal practice on the right of voting, or on the ground of age, holding an office of profit, unsoundness of mind, solvency, or inheritance of citizenship of a foreign power, non-residence, crime or corrupt or illegal practice on the right of membership and similar disqualification of a general nature not based on religion, caste, race or sex.

Note : The Drafting Committee did not accept this amendment. *See* the note on the amendments proposed by Thakurdas Bhargava and Govind Das to clause (1) of article 10.

Tajamul Husain : That in sub-clause (c) of clause (1) of article 13, after the word 'form' the word 'non-communal' be inserted.

Note : If this amendment is given effect to, then the expression "non-communal associations or unions" would be rather vague. Further it would then be doubtful if religious associations would at all be permissible. Presumably the intention of the sponsor of this amendment is to prohibit the

*Shrimati G. Durgabai, Thakurdas Bhargava, B. V. Keskar, T. T. Krishnamachari, M. Ananthasayanam Ayyangar and K. Santhanam.

formation of political organizations on the basis of religion. If this is so, then the proper course would be to make the following amendment :

After article 22, the following article be inserted :

22-A. No religious institution shall be used for political purposes and no political organization shall be based on religion.

Tajamul Husain : That in clause (5) of article 13, the words "or for the protection of the interests of any aboriginal tribe" be deleted.

Note : Provincial Acts have in the past imposed restrictions (for example, the Bengal Tenancy Act, 1885) in the interests of aboriginals. If the words "or for the protection of the interests of any aboriginal tribe" be omitted from clause (5) of article 13, then all existing restrictions imposed by Provincial Acts in the interests of aboriginals would become void and the Provincial Legislatures will be also prevented from exercising such powers in future. This would not surely be conducive to the welfare of the Scheduled Tribes for the protection of which special provision has been made in article 300 of the Draft Constitution. To be more specific, the expression "Scheduled Tribe" which has been defined in article 303 of the Constitution may however be substituted for the expression "aboriginal tribe" in this clause.

The Editor of the Indian Law Review and some other members of the Calcutta Bar have suggested that the following additions should be made in article 13 :

(1) *a new sub-clause to clause* (1) whereby all citizens are to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures ;

(2) *a new clause declaring :* The enumeration in the Constitution of the above-mentioned rights shall not be construed to deny or disparage others retained by the people.

(3) *another new clause :* Nothing in sub-clause . . of the said clause (the new sub-clause proposed) shall affect the operation of any existing law, or prevent the State from making any law imposing, in the interest of public order, restrictions on the exercise of the right conferred by the said sub-clause.

Note : The insertion of the new clause in article 13 as proposed in (1) and (2) above is open to objection. All searches and seizures of property are made in accordance with the provisions of law. Such searches or seizures are authorized by law not only in the interest of public order but also for the purposes of detection of various crimes. If, for example, a person is found removing any forest produce from a Government forest, the power conferred by the Forest Act on a Forest Officer to search that person or to seize the forest produce found in his custody cannot be said merely to have been conferred in the interest of public order. It will thus be necessary to qualify the right referred to in the new sub-clause proposed in (1) above very extensively if it is to be inserted as a fundamental right in the Constitution. It would therefore hardly be of any use to include such a right as a fundamental right.

The insertion of a new clause as proposed in (2) above to the effect that the enumeration in the Constitution of the above rights mentioned in clause (1) of that article shall not be construed to deny or disparage others retained by the people is also open to objection, as in the absence of a clear definition of such other rights, questions are likely to be raised about the existence of various rights giving rise to unnecessary speculation about such rights and resulting in abnormal increase in litigation. It is therefore hardly desirable to include the new clause as a fundamental right in the Constitution.

The Bihar Lawyers' Conference at its fourth session at Gaya has proposed that a new sub-clause (h) should be added to clause (1) of article 13:

> (h) to represent his case himself or through a pleader or recognized agent under the law for the protection of his life, liberty, property and rights in any judicial proceedings.

Note: Such a right is already conferred by the Code of Civil Procedure and the Code of Criminal Procedure which lay down the procedure to be followed in judicial proceedings. This is hardly a matter for inclusion as a fundamental right in the Constitution itself.

Atul Chandra Gupta (Advocate, Calcutta High Court) has suggested that in clause (5) of article 13 the words "affect the operation of any existing law, or" should be omitted and to the said clause the following proviso should be added:

> Provided that such law receives the sanction of the President of India before or after enactment.

Note: Attention is invited in this connection to the amendment of B. Pattabhi Sitaramayya and the note thereon. Provincial Acts have in the past imposed restrictions (*e.g.* the Bengal Tenancy Act, 1885) in the interest of aboriginals. These laws cannot be kept alive if the amendment proposed by Gupta is accepted, in view of clause (1) of article 8 of the Draft Constitution.

Jaya Prakash Narayan: Article 13 should be redrafted as follows:

> 13. Subject to public order or morality the citizens are guaranteed:
>
> (a) freedom of speech and expression;
>
> (b) freedom of the press;
>
> (c) freedom to form associations or unions;
>
> (d) freedom to assemble peaceably and without arms;
>
> (e) secrecy of postal, telegraphic and telephonic communications.
>
> 13-A. All citizens of the Republic shall enjoy freedom of movement throughout the whole of the Republic. Every citizen shall have the right to sojourn and settle in any place he pleases. Restrictions may, however, be imposed by or under a Federal law for the protection of aboriginal tribes and backward classes and the preservation of public safety and peace.

Original article 13 is very clumsily drafted. Rights guaranteed under clause (1) are considerably taken away by other clauses.

Note: The rights to freedom of speech and expression, to form associations or unions, and to assemble peaceably and without arms, have been guaranteed

in article 13 subject to certain restrictions which have been specified in clauses (2), (3) and (4) of that article. The restrictions which may be imposed under clause (2) of that article on the exercise of the right to freedom of speech and expression are all restrictions to be imposed in the interests of public order or morality. Under clause (3) of that article restrictions may be imposed on the exercise of the right to assemble peaceably and without arms in the interests of public order. The restrictions which may be imposed under clause (4) of that article on the exercise of the right to form associations or unions are, however, wider and any restrictions may be imposed under that clause in the interests of the general public. It has been suggested by the Special Committee that the words "in the interests of public order or morality" be substituted for the words "in the interests of the general public" in that clause. The new article 13 proposed by this amendment in so far as it provides for freedom of speech and expression, freedom to form associations or unions, and freedom to assemble peaceably and without arms is virtually the same as the provisions in that behalf made in article 13 of the Draft Constitution.

The amendment further seeks to provide for freedom of the press and secrecy of postal, telegraphic and telephonic communications. It is hardly necessary to provide specifically for freedom of the press as freedom of expression provided in sub-clause (a) of clause (1) of article 13 will include freedom of the press. It is also hardly necessary to include secrecy of postal, telegraphic and telephonic communications as a fundamental right in the Constitution itself as that might lead to practical difficulties in the administration of the posts and telegraph department. The relevant laws enacted by the Legislature on the subject (the Indian Post Office Act, 1898 and the Indian Telegraph Act, 1885) permit interception of communications sent through post, telegraph or telephone only in specified circumstances, such as, on the occurrence of an emergency and in the interests of public safety.

The new article 13-A proposed by this amendment is substantially the same as the provisions contained in sub-clauses (d) and (e) of clause (1) of article 13 of the Draft Constitution, but it confines the restrictions which may be imposed on the exercise of the right to freedom of movement and to sojourn and settle in any place, to restrictions for the protection of aboriginal tribes and backward classes and the preservation of public safety and peace; and it also seeks to confer power only on the Union Parliament to impose such restrictions.

The expression "preservation of public safety and peace" would not be sufficient and comprehensive as it may be necessary to impose restrictions in the interests of morality and in the interests of public health (for example, for the suppression of immoral traffic, prevention of contagious diseases). The expression "in the interests of the general public" used in clause (5) of article 13 is thus more appropriate.

Further, it may be also necessary to impose restrictions on persons detained in mental hospitals or in prison, on criminal tribes etc. Prison is a subject in the State List (entry 5 of List II); "mental hospitals and nomadic and migratory tribes" are in the Concurrent List (entries 19 and 24). So the power to impose such restrictions by legislation cannot properly be taken away from the States.

Again, Provincial Acts have in the past imposed restrictions in the interests of aboriginal tribes (for example, Bengal Tenancy Act, 1885). Should the Provincial Legislatures be prevented from exercising such powers in future?

Decision of the Drafting Committee, October, 1948: The Drafting Committee decided—

(i) that for the words "authority or foundation of" in sub-clause (2) of article 13 the words "security of, or tends to overthrow" be substituted;

(ii) that for the words "the general public" the words "public order or morality" be substituted;

(iii) that for the word "aboriginal" in clause (5) the word "scheduled" be substituted;

(iv) that for the words "public order, morality or health" in clause (6) the words "of the general public" be substituted.

ARTICLE 15

B. Pattabhi Sitaramayya and others*: That in article 15 for the words "except according to procedure established by law" the words "save in accordance with law" be substituted.

Note: There is no objection to the acceptance of this amendment which seeks to substitute the words "save in accordance with law" for the words "except according to procedure established by law". "Due process of law," which is the expression used in the American Bill of Rights originally meant no more than "due procedure prescribed or established by law", and this is the form in which the clause occurs in the Japanese Constitution which is believed to have been framed under American guidance. The expression "except according to procedure established by law" has been accordingly used in article 15. The expression "save in accordance with law" which is proposed to be substituted by this amendment is, as has been pointed out in the footnote to article 15, the Irish form of the same clause.

Upendranath Barman: That in article 15 for the words "except according to procedure established by law" the words "without due process of law" be substituted.

Note: The reason for the substitution of the words "except according to procedure established by law" for the words "without due process of law" which occurred in the Draft recommended by the Advisory Committee on

*Shrimati G. Durgabai, Thakurdas Bhargava, B. V. Keskar, T. T. Krishnamachari, M. Ananthasayanam Ayyangar and K. Santhanam.

Fundamental Rights has been explained in the footnote to article 15 of the Draft Constitution.

NEW ARTICLES 18-A AND 18-B

Jaya Prakash Narayan: The following new articles should be added:

18-A. Every citizen has the right directly or without anyone's approval to bring complaints to the law courts against official persons and governmental or self-governing bodies for illegal acts which they may commit against him in their official capacity. Special provisions may be prescribed by law for Heads of Governments, Ministers, judges and soldiers under colours.

18-B. The establishment of extraordinary tribunals shall not be permitted save only such military tribunals as may be authorized by law for dealing with military offences against military law.

The jurisdiction of military tribunals shall not be extended to or exercised over, the civil population save in time of war or armed rebellion, and for acts committed in times of war or armed rebellion, and in accordance with regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which ordinary law courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction.

Note: The new article 18-A sought to be inserted by this amendment, if adopted, would deprive all Government servants of the protection against prosecution and suits which they now enjoy under the Criminal Procedure Code, 1898, and the Civil Procedure Code, 1908, for acts done by them in their official capacity. If no such protection is afforded, then frivolous civil and criminal proceedings against Government servants will greatly increase and the day-to-day administration will be dislocated.

Further, article 25 of the Draft Constitution already provides remedies for the enforcement of fundamental rights conferred by Part III of the Constitution, and appropriate proceedings for the enforcement of such rights can be instituted against governmental or self-governing bodies. It is, therefore, hardly necessary to make any further provision for the conferment of the right to proceed against such bodies for illegal acts committed by them.

The new article 18-B proposed by this amendment seeks to ban the establishment of extraordinary tribunals except military tribunals for dealing with offences against military law. It is not, however, clear what is meant by the expression "extraordinary tribunal". The Draft Constitution provides for the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with the elections to Parliament and State Legislatures (*vide* article 289). Such tribunals are necessary for the speedy disposal of election disputes. It is not, however, clear whether the expression "extraordinary tribunal" would include such tribunals. Further, it may be necessary not only in times of war or armed rebellion but also

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ANNEX - G

29th March 194

29.04.1947

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1

Vallabhbhai J. Patel

Sir, I move:"That the Constituent Assembly do extend the time fixed for the presentation of the report of the Advisory Committee appointed by the resolution of the Assembly of the 24th January, 1947 until such date or dates as the President may choose in his discretion."

2

Vallabhbhai J. Patel

The House is aware that when this Resolution was passed we were required to submit an interim report on Fundamental Rights within six weeks, an interim report on Minorities Rights within ten weeks and our final report within three months from the date of our appointment. We have tried our best to adhere to this time table, but regret that it has not been possible for us to carry it out. At our first meeting held on the 27th February, 1947, we decided unanimously to request you to extend the time limit for the submission of the reports in anticipation of the sanction of the Assembly.

3

Vallabhbhai J. Patel

We are fully conscious of the necessity of completing our work with the utmost dispatch; but we fear it is not possible to work to a rigid time table. We request therefore that the Assembly may be moved to extend the time limit to such date or dates as you may choose in your discretion.

4

President

The question is:"That the Constituent Assembly do extend the time fixed for the presentation of the report of the Advisory Committee appointed by the resolution of the Assembly of the 24th January, 1947 until such date or dates as the President may choose in his discretion." The motion was adopted.----------INTERIM REPORT ON FUNDAMENTAL RIGHTS

5

Vallabhbhai J. Patel

Sir, I move:"That the Constituent Assembly do proceed to take into consideration the interim report on the subject of Fundamental Rights submitted by the Advisory Committee appointed by the resolution of the Assembly of the 24th January, 1947."

Vallabhbhai J. Patel

Sir, this is a preliminary report or an interim report, because the Committee when it sat down to consider the question of fixing the fundamental rights and its incorporation in the Constitution, came to the conclusion, firstly, that the fundamental rights should be divided into parts--the first part justiciable and the other part non-justiciable. Even while considering the first part it came to the conclusion that we could not come to a final decision as to what fundamental rights are to be incorporated in the Constitution. Considering all the circumstances that exist today and that may arise within the course of the consideration of the various Committees' reports and the drafting of the Constitution, points may arise for suggesting additional fundamental rights and also for making minor alterations or suggestions that may be considered advisable. This report is a draft report. I may also suggest for the consideration of the House that in considering the various clauses that have been recommended by the Advisory Committee, the House may not strictly consider the wording of each clause of the rights suggested. Certain changes may be required while actually legally drafting the clauses, and it would be better to leave the drafting to the Drafting Committee which will make such changes as may be necessary to put them in proper phraseology. What I would submit to the House to do today is generally to accept the principles of each of the clauses that have been suggested for consideration, so that we may not have to devote more time in considering the technical legal details of the phraseology to be adopted.

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Vallabhbhai J. Patel

We have now suggested for the consideration of the House those rights that are justiciable. The second chapter we have ourselves not been able to consider. The Fundamental Rights Sub-Committee met and considered this matter for a fortnight and devoted considerable labour and time. After that, the Report was passed on to the Minorities Rights Sub-Committee. That Committee also sat over this Report and anxiously considered various clauses and made certain changes and those changes were adopted. They sat for three days, and then this report was again placed before the Advisory Committee for its consideration. The Advisory Committee sat for two days and at their two sittings they considered the whole thing over again--so, the House will see that this is not a haphazard Report, it has been considered in all its various aspects. It is quite possible to make suggestions, alterations and additions and move amendments, but the House may not have that time which the Committees had, I would humbly submit to the House carefully to consider the various clauses that have been suggested, and when amendments are put forward before the House, they will also be carefully scrutinised. There are about 150 amendments, I hear and scrutiny of the amendments will take some

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time. The Office has been able to scrutinise about 25 or 30 amendments and that will perhaps take the whole of today's meeting. I move that the Report be taken into consideration, and if that motion is adopted, then we can go and consider the rights clause by clause.

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President

Motion moved:"Resolved that the Constituent Assembly do proceed to take into consideration the interim report on the subject of Fundamental Rights submitted by the Advisory Committee appointed by the resolution of the Assembly of the 24th January, 1947."

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Hirday Nath Kunzru

Mr. President, the Report before us purports to deal with only those fundamental rights that are enforceable by the courts, but a close study of it shows that it refers to matters which cannot be included under the head "Fundamental Rights", and that it deals with those fundamental rights which are not justiciable. To give an instance, Sir, if a matter which does not fall under the category of fundamental rights, I shall refer to clause 10 which makes "trade, commerce and intercourse among the units by and between the citizens" absolutely free.

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L. Krishnaswami Bharathi

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R. K. Sidhva

It is considered a justiciable and fundamental right. If a right to reside and settle is not a justiciable or fundamental right, I do not know what else it could be. Under the circumstances I do feel that the objections of Dr. Kunzru are untenable and I agree with Mr. Lahiri that in some respects this Report is certainly not complete, and we have to give elaborate personal and political rights. It is not that we have ignored that part. There are various amendments on the order paper; I have moved some of them and other Hon'ble Members have also done so. They will be considered by this House. I might also state that the Committee had suggested that the secrecy of correspondence should be guaranteed and that there should be no kind of interception of correspondence, telegrams and telephones, but the main Committee has deleted it. Therefore, it is unfair to say that

the Fundamental Rights Committee did not consider this question. We have now moved amendments to that effect, and it is for the House to consider those amendments. Mr. Lahiri should not have made all those general remarks; he should have confined himself to the amendments which have been moved. Therefore, I contend, Sir, that these fundamental rights are justiciable, and I do feel that the objection of Dr. Kunzru is not justifiable and that Mr. Lahiri, in his anxiety to move more amendments to protect the rights of every citizen, made an uncalled for remark that we will be making this country a laughing-stock of the world. This is too much indeed.

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Vallabhbhai J. Patel

Sir, when I moved my motion for the consideration of this Report I did not anticipate any long debate on this question. I thought that there would be plenty of opportunities for scrutinising the clauses, omitting some clauses, if necessary, that may be considered objectionable or improving any if need be. Now that the debate has taken place I want to place before the House certain aspects of the proceedings of the Committee which will give the House an idea that this is neither a haphazard Report nor a report cooked or uncooked. It is carefully considered Report. There were two schools of thought in the Committee and there was a large number of very eminent lawyers who could scrutinise every word of every sentence, even commas and semi-colons, from a very critical point of view. These two schools viewed the matter from two different angles. One school considered it advisable to include as many rights as possible in this Report--rights which could straightaway be enforceable in a court of law, rights in regard to which a citizen may without difficulty go straightaway to a court of law and get his rights enforced. The other school of thought considered it advisable to restrict fundamental rights to a few very essential things that may be considered fundamental. Between the two schools there was considerable amount of discussion and finally a mean was drawn which was considered to be a very good mean. It must not be understood, because this Report is called an Interim Report, that the second Report will be much bigger, or that many more important things will come under the subsequent report. It cannot, in the nature of things, be that the principal report which comes before the House would be containing less important things. Very essential things have been included in this Report. But there is another report which has to be considered and that is the report on fundamental rights which are non-justiciable. There may be other points that may strike this House or may be suggested from outside which may have to be considered and the Committee may take

them into account. But I may inform the House that this Report has gone through three Committees. Of course the third school of thought was absent in the Committee. That school would require that under the fundamental rights which were provided for a free India there should be no police, there should be no jail, there should be no restrictions on the press, the baton, the lathi or the bullet. Everybody should be free in a free India to do what he likes. That school was absent in the Committee. But the two schools of thought that considered this Report studied not the fundamental rights of one country alone but of almost every country in the World. They studied all the Constitutions of the world and they came to the conclusion that in this Report we should include as far as possible rights which may be considered to be reasonable. On that there may be difference of opinion in this House and this House is entitled to consider every clause from a critical point of view and to suggest alterations, modifications or omissions but what I have moved in this House, now is, that this Report may be taken into consideration. Therefore, I thought that any elaborate speech was not necessary and hence I suggested that whatever has to be considered, or whatever suggestions have to be made, may be made at the time when clauses are considered. As I told the House there are about 150 amendments, though the time given was about ten hours or so. The House contains members who are very studious, very critical and very well-informed and therefore it is to the credit of the House that we have got as much as 150 amendments in such a short space of time. I think if we proceed at this rate we will debate perhaps for a much longer period than we expect. So, I suggest that the Report be taken into consideration, and if that is accepted, we may take clause by clause.

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Somanth Lahiri

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Somanth Lahiri

My last amendment runs thus:"After clause 8 the following new clauses be added and existing clause 9 be renumbered as clause 14, and consequential changes be made in the subsequent clauses:-9. No person shall be detained in custody without trial.10. (a) Liberty of the press shall be guaranteed subject to such restrictions as may be imposed by law in the interests of public order or morality.(b) The Press shall not be subject to censorship and shall not be subsidised. No security shall be demanded for the keeping of a Press or the publication of any book or other printed matter.11. The privacy of correspondence shall be inviolable and may be infringed only in cases provided by law.....

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D. N. Datta

The Hon'ble Member is suggesting new clauses. We are now dealing with clause 8. He may at best move his amendments to clause 8 and not move new clauses.

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Somanth Lahiri

All these clauses have reference to the subjects' right to freedom and so on. I can move them now or later on. Both mean the same thing.

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ANNEXURE – 4

Draft Constitution of India, 1948 ⇒ Socialist Party of India

RIGHTS OF FREEDOM

24. (a) All citizens of the Republic shall enjoy freedom of movement throughout the whole of the Republic.Every citizen shall have the right to sojourn and settle in any place he pleases. Restrictions may, however, be imposed by or under a Federal Law for the protection of aboriginal tribes and backward classes and the preservation of public safety and peace. (b) Every citizen shall have in every Unit of the Republic equal civil rights and duties with the citizens of that Unit.

25. The citizens are guaranteed, consistent with other provisions of the Constitution and public order and morality, (a) freedom of speech and expression; (b) freedom of the press ; (c) freedom to assemble peacefully without arms; (d) freedom to form associations and unions; (e) secrecy of postal, telegraphic and telephonic communications.

26. No person shall be deprived of his life or liberty, nor shall his dwellings be entered, save with due process of law.

27. Traffic in human beings and forced labour in any form, including begar and involuntary service, except as a punishment of crime whereof the party shall have been duly convicted, are hereby prohibited and any contravention of this prohibition shall be an offence, provided that the state may impose, in accordance with law, compulsory service for public purposes without any distinction on grounds of race, religion, caste, or class.

ANNEXURE - # I

Vol 2

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Clause 19 was re-considered and was decided to be omitted.

Sardar Panikkar promised to place before the committee tomorrow a clause dealing with internal customs duties.

A draft report in the accompanying form was adopted.

(VIII) REPORT OF THE SUB-COMMITTEE ON FUNDAMENTAL RIGHTS April 16, 1947

To

The Chairman,

Advisory Committee on Minorities, Fundamental Rights etc.

Sir,

We, the undersigned, members of the Sub-Committee on Fundamental Rights appointed by the Advisory Committee on the 27th February 1947 have considered the matter referred to us and have now the honour to submit this our report.

2. The committee held three sittings. At the first sitting which was on the 27th February 1947 the procedure to be adopted and the general lines of business were discussed and settled. The second sitting of the committee was for a continuous period of eight days. During this sitting, after a full discussion of the various drafts placed before the committee, conclusions were reached in regard to the different clauses which embodied in most cases the decision of the majority of the members present and in other cases their unanimous decision. The third sitting was held between 14-4-47 and 16-4-47 in which the provisions embodying the conclusions reached in the previous sitting were discussed and revised.

3. When the committee began its work, it was resolved that a difference should be drawn in the list of fundamental rights between rights which are enforceable by appropriate legal process and provisions which are in the nature of fundamental principles of the social policy that is to regulate the governments concerned. In this respect, the committee has followed the Irish model and adopted a middle course between the one adopted by the framers of the American Constitution and the one pursued in recent European constitutions which have mixed up the two sets of rights. The committee also were of opinion that while certain human rights must be guaranteed to every resident of the Union, other rights must be confined only to citizens and accordingly it will be noticed that some clauses refer to every person and other clauses to citizens only.

4. While the committee has drawn upon the American and Irish Constitutions as also upon the recent European constitutions, the committee has throughout kept in view the complexity of Indian conditions and the peculiarities of the Indian situation and has made appropriate changes. In certain cases, provision has been made for penalties and sanctions being enacted by the law of the Union for violating the fundamental rights. This is of course

without prejudice to the provision which makes any law in contravention of the fundamental rights invalid or inoperative., A general provision has also been inserted for the enforcement of the rights by appropriate remedies before the Supreme Court to be established as a part of the Union constitution. The detailed provisions in regard to the enforcement of fundamental rights by appropriate writs and applications before the Supreme Court to be established as a part of the federal structure of the constitution will necessarily have to find a place in the powers and jurisdiction of the court to be so established as also in other provisions relating to the Union constitution.

5. Though clause 20 of the Statement of May 16, 1946 contemplates the possibility of distributing fundamental rights between the constitutions of the Union, groups, if any, and the units, we are of the opinion that fundamental rights of the citizens of the Union would have no value if they differ from group to group or from unit to unit or are not uniformly enforceable. Rights of man enforced uniformly have come to be recognized as an essential condition of stable society. We recommend that provisions on the lines set out in the Annexure be incorporated in the new Constitution so as to be binding upon all authorities, whether of the Union or the units.

6. We are of the opinion that every citizen is entitled to free trade, commerce and intercourse within the territories of the Union unburdened by any internal duties or taxes of customs. At the same time, we realize that many Indian States depend upon such duties and taxes for a considerable part of their revenue and cannot do without it all at once. Similar difficulties have arisen in the framing of the constitutions of other countries and unless there is a scheme for a smooth transition to free trade in the Union friction will inevitably arise. Some agreement will therefore have to be made with those States in the light of their existing rights with a view to their ultimate elimination within a period to be prescribed by the Constitution. Thereafter, there will be untramelled free trade within the Union.

7. The committee was of the opinion that the right of the citizen to have redress against the State in a court of law should not be fettered by undue restrictions. The committee however was not able to draft a suitable formula as the matter required more investigation than has been possible in the time at its disposal.

8. A proposal was made that a clause should be inserted to afford protection against discrimination against citizens mainly by Government officers in public administration on the ground of race or creed or social status. The committee decided by a majority that this was a matter which should be further discussed by the Minorities Sub-Committee who may, if necessary, refer back to this committee.

9. In regard to any particular matters in which individual members have not agreed with the majority view, they have appended a note of dissent.

10. While we are agreed (subject to the minutes of dissent) on the main

principle of the clauses we have recommended, we have not had time to examine in any detail the effect of these clauses on the mass of existing legislation.

11. Sardar Panikkar was nominated on 10-4-47 and joined our deliberations only on the 14th April. We had however the benefit of discussing the whole draft with him.

Signed on behalf of the committee.

J. B. KRIPALANI,
Chairman,
Fundamental Rights Sub-Committee.

ANNEXURE

FUNDAMENTAL RIGHTS

Definitions

1. Unless the context otherwise requires :

(i) "The State" includes the legislatures and the governments of the Union and the units and all local or other authorities within the territories of the Union.

(ii) "The Union" means the Union of India.

(iii) "The law of the Union" includes any law made by the Union legislature and any existing Indian law as in force within the Union or any part thereof.

Part I

Application of laws

2. All existing laws or usages in force within the territories of the Union inconsistent with the rights guaranteed under this Constitution shall stand abrogated to the extent of such inconsistency, nor shall the Union or any unit make any law taking away or abridging any such right.

Citizenship

3. Every person born or naturalized in the Union and subject to the jurisdiction thereof shall be a citizen of the Union. Further provisions governing Union citizenship may be made by the law of the Union.

Right to equality

4. There shall be no discrimination against any citizen on grounds of religion, race, caste, language or sex. In particular, there shall be no discrimination against any person on any of the grounds aforesaid in regard to the use of wells, tanks, roads, schools and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

5. There shall be equality of opportunity for all citizens :

(i) in matters of public employment ;

(ii) in the exercise or carrying on of any occupation, trade, business or profession ; and no citizen shall on any of the grounds mentioned in the preceding section be ineligible for public office or be prohibited from acquiring, holding or disposing of property on exercising or carrying on any occupation, trade, business or profession within the Union.

Nothing herein contained shall prevent a law being made prescribing that the incumbent of an office to manage, administer or superintend the affairs of a

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religious or denominational institution shall be a member of a particular religion, persuasion or denomination.

6. Any enactment, regulation, judgment, order, custom or interpretation of law, in force immediately before the commencement of this Constitution, by which any penalty, disadvantage or disability is imposed upon or any discrimination is made against any citizen on any of the grounds mentioned in section 4 shall cease to have effect.

7. "Untouchability" in any form is abolished and the practice thereof shall be an offence.

8. No titles except those denoting an office or a profession shall be conferred by the Union.

No citizen of the Union and no person holding any office of profit or trust under the State shall, without the consent of the Union, accept any present, emolument, office or title of any kind from any foreign State.

National Language

9. Hindustani, written either in the *Devanagari* or the Persian script at the option of the citizen, shall, as the national language, be the first official language of the Union. English shall be the second official language for such period as the Union may by law determine. All official records of the Union shall be kept in Hindustani in both the scripts and also in English until the Union by law otherwise provides.

Rights to freedom

10. There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the unit concerned whereby the security of the Union or the unit, as the case may be, is threatened :

(a) The right of every citizen to freedom of speech and expression. The publication or utterance of seditious, obscene, slanderous, libellous or defamatory matter shall be actionable or punishable in accordance with law.

(b) The right of the citizens to assemble peaceably and without arms. Provision may be made by law to prevent or control meetings which are likely to cause a breach of the peace or are a danger or nuisance to the general public or to prevent or control meetings in the vicinity of any chamber of legislature.

(c) The right of the citizens to form associations or unions. Provision may be made by law to regulate and control in public interest the exercise of the foregoing right provided that no such provision shall contain any political, religious or class discrimination.

(d) The right of every citizen to the secrecy of his correspondence. Provision may be made by law to regulate the interception or detention of articles and messages in course of transmission by post, telegraph or otherwise on the occurrence of any public emergency or in the interests of public safety or tranquillity.

(e) The right of every citizen to move freely throughout the Union.

(f) The right of every citizen to reside and settle in any part of the Union, to acquire property and to follow any occupation, trade, business or profession. Provision may be made by law to impose such reasonable restrictions as may be necessary in public interests.

11. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

12. No person shall be deprived of his life, liberty or property without due process of law nor shall any person be denied the equal treatment of the laws within the territories of the Union :

Provided that nothing herein contained shall prevent the Union Legislature from legislating in respect of foreigners.

13. (1) Every citizen not below 21 years of age shall have the right to vote at any election to the Legislature of the Union and of any unit thereof, or, where the Legislature is bicameral, to the lower chamber of the Legislature, subject to such disqualifications on the ground of mental incapacity, corrupt practice or crime as may be imposed, and subject to such qualifications relating to residence within the appropriate constituency, as may be required, by or under the law.

(2) The law shall provide for free and secret voting and for periodical elections to the Legislature.

(3) The superintendence, direction and control of all elections to the Legislature whether of the Union or of a unit, including the appointment of Election Tribunals, shall be vested in an Election Commission for the Union or the unit, as the case may be, appointed, in all cases, in accordance with the law of the Union.

14. (1) Subject to regulation by the law of the Union trade, commerce, and intercourse among the units by and between the citizens shall be free :

Provided that any unit may by law impose reasonable restrictions in the interest of public order, morality or health or in an emergency :

Provided that nothing in this section shall prevent any unit from imposing on goods imported from other units the same duties and taxes to which the goods produced in the unit are subject :

Provided further that no preference shall be given by any regulation of commerce or revenue by a unit to one unit over another.

[N.B.—A proviso will have to be added to meet the difficulty pointed out in para 6 of our report.]

(2) Trade, commerce or intercourse within the territories of the Union by or with any person other than the citizens shall be regulated and controlled by the law of the Union.

15. (1) (a) Slavery,

(b) traffic in human beings,

(c) the form of forced labour as *begar*,

(d) any form of involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted,

are hereby prohibited and any contravention of this prohibition shall be an offence.

Explanation

Compulsory service under any general scheme of education does not fall within the purview of this clause.

(2) Conscription for military service or training, or for any work in aid of military operation is hereby prohibited.

(3) No person shall engage any child below the age of 14 years to work in any mine or factory or any hazardous employment.

Rights relating to religion

16. All persons are equally entitled to freedom of conscience, to freedom of religious worship and to freedom to profess religion subject to public order, morality or health and to the other provisions of this chapter.

Explanation I

The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

ANNEXURE - J

INTERIM REPORT OF THE ADVISORY COMMITTEE ON THE SUBJECT OF FUNDAMENTAL RIGHTS

(PRESENTED ON 29TH APRIL, 1947)

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FROM

THE HON'BLE SARDAR VALLABHBHAI PATEL,

Chairman, Advisory Committee on Minorities, Fundamental Rights, etc.

To

THE *PRESIDENT*,

Constituent Assembly of India.

SIR,

On behalf of the members of the Advisory Committee appointed by the Constituent Assembly of India on the 24th January, 1947, I have the honour to submit this interim report on fundamental rights. In coming to its conclusions, the Committee has taken into consideration not merely the report of the Sub-Committee on fundamental rights but also the comments thereon of the Minorities Sub-Committee.

2. The Fundamental Rights Sub-Committee recommended that the list of fundamental rights should be prepared in two parts, the first part consisting of rights enforceable by appropriate legal process and the second consisting of directive principles of social policy which,

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* *Members of the Advisory Committee :—*

1. The Hon'ble Sardar Vallabhbhai Patel (*Chairman*).
2. Shri Jairamdas Daulatram.
3. The Hon'ble Shri Mohanlal Kumawat.
4. Dr. Gopi Chand Bhargava.
5. Bakshi Sir Tek Chand.
6. Dr. Profulla Chandra Ghosh.
7. Shri Surendra Mohan Ghose.
8. Dr. Syama Prasad Mookherjee.
9. Shri Prithvi Singh Azad.
10. Shri Dharam Prakash.
11. Shri H. J. Khandekar.
12. The Hon'ble Shri Jagjivan Ram.
13. Shri P. R. Thakur.
14. Dr. B. R. Ambedkar.
15. Shri V. I. Muniswami Pillai.
16. Sardar Jogendra Singh.
17. The Hon'ble Sardar Baldev Singh.
18. Sardar Pratap Singh.
19. Sardar Harnam Singh.
20. Sardar Ujjal Singh.
21. Gyani Kartar Singh.
22. Dr. H. C. Mookherjee.
23. Dr. Alban D'Souza.
24. Shri P. K. Salve.
25. Shri J. L. P. Roche-Victoria.
26. Mr. S. H. Prater.
27. Mr. Frank Reginald Anthony.
28. Mr. M. V. H. Collins.
29. Sir Homi Mody.
30. Shri M. R. Masani.
31. Shri B. K. Sidhwa.
32. Shri Rup Nath Brahma.
33. Khan Abdul Ghaffar Khan.
34. Khan Abdul Samad Khan.
35. The Hon'ble Rev. J. J. M. Nichols-Roy.
36. Shri Alba Imti.
37. Shri Phul Bhanu Shah.
38. Shri Devendra Nath Samanta.
39. Shri Jaipal Singh.
40. Acharya J. B. Kripalani.
41. The Hon'ble Maulana Abul Kalam Azad.
42. The Hon'ble Shri C. Rajagopalachariar.
43. Rajkumari Amrit Kaur.
44. Shrimati Hansa Mehta.
45. The Hon'ble Pandit Govind Ballabh Pant.
46. The Hon'ble Shri Gopinath Bardoloi.
47. The Hon'ble Shri Purushottamdas Tandon.
48. Sir Alladi Krishnaswami Ayyar.
49. Shri K. T. Shah.
50. Shri K. M. Munshi.
51. Shri Amritlal V. Thakkar.
52. Mr. M. Ruthnaswamy.
53. Shri Raj Krishna Bose.
54. Sardar K. M. Panikkar.

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though not enforceable in Courts, are nevertheless to be regarded as fundamental in the governance of the country. On these latter, we propose to submit a subsequent report; at present, we have confined ourselves to an examination only of the justiciable fundamental rights.

3. We attach great importance to the constitution making these rights justiciable. The right of the citizen to be protected in certain matters is a special feature of the American constitution and the more recent democratic constitutions. In the portion of the Constitution Act, dealing with the powers and jurisdiction of the Supreme Court, suitable and adequate provision will have to be made to define the scope of the remedies for the enforcement of these fundamental rights. These remedies have been indicated in general terms in clause 22 of the Annexure.

4. Clause 20 of the Statement of May 16, 1946, contemplates the possibility of distributing fundamental rights between the constitutions of the Union, the Groups, if any, and the Units. We are of the opinion that fundamental rights of the citizens of the Union would have no value if they differed from Group to Group or from Unit to Unit or are not uniformly enforceable. We recommend that the rights set out in the Annexure to this report be incorporated in the constitution so as to be binding upon all authorities, whether of the Union or the Units.

5. Clause 10 deals with the freedom, throughout the Union, of trade commerce and intercourse between the citizens. In dealing with this clause we have taken into account the fact that several Indian States depend upon internal customs for a considerable part of their revenue and it may not be easy for them to abolish such duties immediately on the coming into force of the Constitution Act. We, therefore, consider that it would be reasonable for the Union to enter into agreements with such States, in the light of their existing rights, with a view to giving them time, up to a maximum period to be prescribed by the constitution, by which internal customs could be eliminated and complete free trade established within the Union.

6. We have made a special provision in regard to full faith and credit being given to the public Acts, records and judicial proceedings of the Union in every Unit and for the judgments and orders of one Unit being enforced in another Unit. We regard this provision as very important and appropriately falling within the scope of fundamental rights.

7. Clause 2 lays down that all existing laws, regulations, notifications, custom or usage in force within the territories of the Union inconsistent with the fundamental rights shall stand abrogated to the extent of such inconsistency. While in the course of our discussions and proceedings we have kept in view the provisions of existing Statute law, we have not had sufficient time to examine in detail the effect of this clause on the mass of existing legislation. We recommend that such an examination be undertaken before this clause is finally inserted in the constitution.

8. The Fundamental Rights Sub-Committee was of the opinion that the right of the citizen to have redress against the State in a

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court of law shall not be fettered by undue restrictions. That Sub-Committee was not able, however, to draft a suitable formula as the matter requires more investigation than was possible in the time at its disposal. It was also suggested during our deliberations that certain additional fundamental rights should be inserted in the constitution. We have not had the time to consider these matters; we shall do so in due course and incorporate any recommendations we may have to make on them in our next report.

9. The Fundamental Rights Sub-Committee and the Minorities Sub-Committee were agreed that the following should be included in the list of Fundamental Rights :—

"Every citizen not below 21 years of age shall have the right to vote at any election to the legislature of the Union and of any Unit thereof, or, where the legislature is bicameral, to the lower chamber of the legislature, subject to such disqualifications on the ground of mental incapacity, corrupt practice or crime as may be imposed, and subject to such qualifications relating to residence within the appropriate constituency, as may be required by or under the law.

(2) The law shall provide for free and secret voting and for periodical elections to the legislature.

(3) The superintendence, direction and control of all elections to the legislature, whether of the Union or of a Unit, including the appointment of Election Tribunals, shall be vested in an Election Commission for the Union of the Unit, as the case may be, appointed, in all cases, in accordance with the law of the Union."

While agreeing in principle with this clause, we recommend that instead of being included in the list of fundamental rights, it should find a place in some other part of the constitution.

I have the honour to be,

Sir,

Your most obedient servant,

(Sd.) VALLABHBHAI PATEL,

Chairman,

Advisory Committee on Minorities, Fundamental Rights, etc.

COUNCIL HOUSE

New Delhi, the 23rd April, 1947.

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Definition

JUSTICIABLE FUNDAMENTAL RIGHTS

Definition

1. Unless the context otherwise requires—

(i) "The State" includes the legislatures and the governments of the Union and the Units and all local or other authorities within the territories of the Union.

(ii) "The Union" means the Union of India.

(iii) "The law of the Union" includes any law made by the Union legislature and any existing Indian law as in force within the Union or any part thereof.

Application of Laws

2. All existing laws, notifications, regulations, customs or usages in force within the territories of the Union inconsistent with the rights guaranteed under this part of the Constitution shall stand abrogated to to the extent of such inconsistency, nor shall the Union or any unit make any law taking away or abridging any such right.

Citizenship

3. Every person born in the Union or naturalised in the Union according to its laws and subject to the jurisdiction thereof shall be a citizen of the Union.

Rights of equality

4. (1) The State shall make no discrimination against any citizen on grounds of religion, race, caste or sex.

(2) There shall be no discrimination against any citizen on any ground of religion, race, caste or sex in regard to—

(a) access to trading establishments including public restaurants and hotels,

(b) the use of wells, tanks, roads and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public:

Provided that nothing contained in this clause shall prevent separate provision being made for women and children.

5. There shall be equality of opportunity for all citizens in matters of public employment and in the exercise of carrying on of any occupation, trade, business or profession.

Nothing herein contained shall prevent the State from making provision for reservations in favour of classes who, in the opinion of the State, are not adequately represented in the public services.

No citizen shall on grounds only of religion, race, caste, sex, descent place of birth or any of them be ineligible for public office or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occupation, trade, business, or profession within the Union.

Nothing herein contained shall prevent a law being made prescribing that the incumbent of an office to manage, administer or superintend the affairs of a religious or denominational institution or the member of the Governing Body thereof shall be a member of that particular religion or denomination.

6. "Untouchability" in any form is abolished and the imposition of any disability on that account shall be an offence.

7. No heritable title shall be conferred by the Union.

No citizen of the Union and no person holding any office of profit on trust under the State shall, without the consent of the Union Government accept any present, emoluments, office, or title of any kind from any foreign State.

Rights of freedom

8. There shall be liberty for the exercise of the following rights subject to public order and morality or to the existence of grave emergency declared to be such by the Government of the Union or the Unit concerned where by the security of the Union or the Unit, as the case may be, is threatened :—

(a) The right of every citizen to freedom of speech and expression :

Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slanderous, libellous or defamatory matter actionable or punishable.

(b) The right of the citizens to assemble peaceably and without arms :

Provision may be made by law to prevent or control meetings which are likely to cause a breach of the peace or are a danger or nuisance to the general public or to prevent or control meetings in the vicinity of any chamber of a Legislature.

(c) The right of citizens to form associations or unions :

Provision may be made by law to regulate and control in the public interest the exercise of the foregoing right provided that no such provision shall contain any political religions or class discrimination.

(d) The right of every citizen to move freely throughout the Union :

(e) The right of every citizen to reside and settle in any part of the Union, to acquire property and to follow any occupation, trade, business or profession :

Provision may be made by law to impose such reasonable restrictions as may be necessary in the public interest including the protection of minority and tribes.

9. No person shall be deprived of his life, or liberty, without due process of law nor shall any person be denied the equal treatment of the laws within the territories of the Union:

Provided that nothing herein contained shall detract from the powers of the Union Legislature in respect of foreigners.

10. Subject to regulation by the law of the Union trade, commerce, and intercourse among the units by and between the citizens shall be free:

Provided that any Unit may by law impose reasonable restrictions in the interest of public order, morality or health or in an emergency:

Provided that nothing in this section shall prevent any Unit from imposing on goods imported from other Units the same duties and taxes to which the goods produced in the Unit are subject:

Provided further that no preference shall be given by any regulation of commerce or revenue by a Unit to one Unit over another.

11. (a) Traffic in human beings, and

(b) forced labour in any form including *begar* and involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted,

are hereby prohibited and any contravention of this prohibition shall be an offence.

Explanation.—Nothing in this sub-clause shall prevent the State from imposing compulsory service for public purposes without any discrimination on the ground of race, religion, caste or class.

12. No child below the age of 14 years shall be engaged to work in any factory, mine or any other hazardous employment.

Explanation.—Nothing in this shall prejudice any educational programme or activity involving compulsory labour.

Rights relating to religion

13. All persons are equally entitled to freedom of conscience, and the right freely to profess, practise and propagate religion subject to public order, morality or health, and to the other provisions of this Chapter.

Explanation 1.—The wearing and carrying of *Kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation 2.—The above rights shall not include any economic, financial, political or other secular activities that may be associated with religious practice.

Explanation 3.—The freedom of religious practice guaranteed in this clause shall not debar the State from enacting laws for the purpose of social welfare and reform.

14. Every religious denomination shall have the right to manage its own affairs in matters of religion and, subject to the general law, to

own, acquire and administer property, movable and immovable, and to establish and maintain institutions for religious or charitable purposes.

15. No person may be compelled to pay taxes, the proceeds of which are specifically appropriated to further or maintain any particular religion or denomination.

16. No person attending any school maintained or receiving aid out of public funds shall be compelled to take part in the religious instruction that may be given in the school or to attend religious worship held in the school or in premises attached thereto.

17. Conversion from one religion to another brought about by coercion or undue influence shall not be recognised by law.

Cultural and Educational Rights

18. (1) Minorities in every Unit shall be protected in respect of their language, script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission into State educational institutions, nor shall any religious instruction be compulsorily imposed on them.

(3) (a) All minorities whether based on religion, community or language shall be free in any Unit to establish and administer educational institutions of their choice.

(b) The State shall not, while providing State aid to schools, discriminate against schools under the management of minorities whether based on religion, community or language.

Miscellaneous Rights

19. No property, movable or immovable, of any person or corporation including any interest in any commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of compensation for the property taken or acquired and specified the principles on which and the manner in which the compensation is to be determined.

20. (1) No person shall be convicted of crime except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than that applicable at the time of the commission of the offence.

(2) No person shall be tried for the same offence more than once nor be compelled in any criminal case to be a witness against himself.

21. (1) Full faith and credit shall be given throughout the territories of the Union to the public acts, records and judicial proceedings of the Union and every Unit thereof, and the manner in which and the conditions under which such acts, records and proceedings shall be proved and the effect thereof determined shall be prescribed by the law of the Union.

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(2) Final civil judgments delivered in any Unit shall be executed throughout the Union subject to such conditions as may be imposed by the law of the Union.

Right to Constitutional Remedies

22. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of any of the rights guaranteed by this part is hereby guaranteed.

(2) Without prejudice to the powers that may be vested in this behalf in other courts, the Supreme Court shall have power to issue directions in the nature of the writs of *habeas corpus*, *mandamus*, prohibition, *quo war ranto* and *certiorari* appropriate to the right guaranteed in this part of the Constitution.

(3) The right to enforce these remedies shall not be suspended unless when, in cases of rebellion or invasion or other grave emergency, the public safety may require it.

23. The Union Legislature may by law determine to what extent any of the rights guaranteed by this part shall be restricted or abrogated for the members of the armed forces or forces charged with the maintenance of public order so as to ensure fulfilment of their duties and the maintenance of discipline.

24. The Union Legislature shall make laws to give effect to those provisions of this part which require such legislation and to prescribe punishment for those acts which are declared to be offences in this part and are not already punishable.

ANNEX-K

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THE FRAMING OF INDIA'S CONSTITUTION

SELECT DOCUMENTS

THE PROJECT COMMITTEE

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NEW DELHI

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BOMBAY

ANNEXURE - K

1	2	3
Elections as defined in paragraph 70 of the Fourth Schedule to this Constitution.	Corrupt practices specified in Parts I and II of the Twelfth Schedule to this Constitution.	Six years from the date of the report of the tribunal holding the inquiry.
Elections as defined in the said paragraph 70 other than elections by the members of the House of the People or the Legislature of any unit to fill seats in the Council of States.	Corrupt practices specified in Part III of the Twelfth Schedule to this Constitution.	Four years from the date of the report of the tribunal holding the inquiry.
Elections as defined in paragraph 69 of the Sixth Schedule to this Constitution.	Corrupt practices specified in Parts I and II of the Twelfth Schedule to this Constitution.	Six years from the date of the report of the tribunal holding the inquiry.
Elections as defined in the said paragraph 69 other than elections by the members of a Provincial Legislative Assembly to fill seats in the Provincial Legislative Council.	Corrupt practices specified in Part III of the Twelfth Schedule to this Constitution.	Four years from the date of the report of the tribunal holding the inquiry.
Elections under the Government of India Act, 1935, or under the provisions of the Government of India Act as were set out in the Ninth Schedule to the Government of India Act, 1935.	Any corrupt practice within the meaning of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936 or of the Electoral Rules under the Government of India Act relating to the election in question, as the case may be.	Such period commencing on the date of the report of the Commissioners under the said Order or, as the case may be, the Electoral Rules relating to the election in question as is the maximum period of disqualification specified in the said Order for voting at any election defined in paragraph 3 of Part I of that Order or specified in those Rules for inclusion in electoral rolls thereunder.

(II) A NOTE ON CERTAIN CLAUSES BY THE CONSTITUTIONAL ADVISER

October 7, 1947

Clauses 4 to 7 deal with citizenship. Clause 5 deals with persons born before the date of commencement of the constitution and clause 6 with those born afterwards.

Clause 5 has been drafted in very wide terms so as to make provision not only for ordinary cases but also for the special case of the refugees that have been pouring into India. Sub-clause (*a*) confers citizenship upon every person who, or either of whose parents, or any of whose grandparents, was born in the territories initially included within the Federation. Although the laws of some States confer nationality upon descendants of their nationals without any limit as to the number of generations, the best authorities consider that there should be a limit and that it would be reasonable to stop at the second generation. The draft sub-clause does not therefore go beyond the grandchildren of persons born in India.

We have, however, to cover the case of those persons who and whose parents and grandparents may have been born in Pakistan and who have now been compelled by circumstances beyond their control to migrate to India. Such persons are not covered by sub-clause (*a*). Sub-clause (*b*) accordingly provides that every person who, at the date of commencement of the new constitution, has his domicile in India will be a citizen of the Federation. The proviso to the explanation under clause 5 prescribes a specially easy mode of acquiring a domicile in India for the purposes of the clause without prejudice to any other mode. All that the immigrant has to do is to reside in India for a month and then to make and deposit in a prescribed office a written declaration of his desire to acquire a domicile in India. These steps should be taken before the commencement of the new constitution. To make it quite clear that this special mode of acquiring domicile is without prejudice to any other mode, we might insert the word: "and without prejudice to any other mode of acquiring a domicile" after the words "said Act" in the proviso to the explanation. In order to discourage double citizenship and prevent divided loyalties, clause 6A has been inserted. The effect of this clause is that any person who is under any acknowledgement of allegiance or adherence to a foreign power or is a subject or citizen of a foreign power is disqualified for membership of any legislature in India whether Central or Provincial. The provision is on the lines of section 44(i) of the Commonwealth of Australia Act.

Clause 6 deals with persons who may be born after the commencement of the new constitution. This clause is on the lines of the corresponding provision in the British Nationality and Status of Aliens Act, 1914.

Clause 7 emphasizes the unqualified power of the Federal Parliament to make further provision for regulating citizenship so that, if either clause 5 or clause 6 is regarded as going too far, it will be open to the Federal Parliament to narrow the circle of citizenship within any desired limits. The Federal Parliament will also have unrestricted power to make provision for avoiding or terminating double citizenship.

Clauses 8 to 41 deal with fundamental rights and directive principles of State policy. The directive principles of State policy are contained in

clauses 31 to 41. They are not cognizable by the ordinary courts of law. Clauses 8 to 30 deal with fundamental rights of which the courts may take cognizance and indeed clause 28 emphasizes that the right to move the Supreme Court by appropriate proceedings for the enforcement of fundamental rights is guaranteed by the Constitution.

There is here a danger which ought to be pointed out. It may occasionally be necessary for the State for the proper discharge of one of its fundamental duties, *e.g.*, the duty prescribed in clause 39 (to raise the standard of living and to improve public health), to invade private rights. In other words, there may be a conflict between the directive principles of State policy and one of the rights or freedoms of the individual guaranteed in the fundamental rights. The latter, being justiciable under the Constitution, will in effect prevail over the former, which are not justiciable. That is to say, the private right may over-ride the public weal. For example, it may be necessary in the interests of public health for the State to take possession of unhealthy slums and demolish them. Clause 25 may be an obstacle in the way of such action, unless adequate compensation is paid to the slum owner. In England a local authority can in certain circumstances enter and demolish an insanitary house without payment of compensation and can even sell the materials in order to cover demolition expenses (sec. 13 of the Housing Act, 1936).

Plans for the nationalization of mineral resources, required by clause 32, may also be similarly hindered. These are only two illustrations of what may happen.

It is therefore a matter requiring careful consideration whether the constitution might not expressly provide that no law made and no action taken by the State in the discharge of its duties under Chapter III of Part III (which deals with directive principles of State policy) shall be invalid merely for reason of its contravening the provisions of Chapter II of the same Part (which deals with fundamental rights); clause 9 (2) of the draft would then need consequential modification.

Clause 16: The word "liberty" might be construed very widely unless qualified. Hence the insertion of "personal"*.

Clause 17: The phrase "if between the citizens of the Federation" might create needless complication in practice. It would be very inconvenient if there were internal trade barriers across which free trade would be allowed if and only if it was between the citizens of the Federation; for, we should then have to devise some means of ascertaining the nationality of the consignor and the consignee. It may therefore be better to omit the phrase altogether.

Clause 23: It is for consideration whether this clause should be confined

*For example, even price-control might be regarded as interference with liberty (of contract between buyer and seller).

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ANNEXURE - 4

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DRAFT CONSTITUTION PREPARED BY THE CONSTITUTIONAL ADVISER
October 1947

⇒ B.N Rau's Draft

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[As a preliminary to the drafting of the Constitution, the Constituent Assembly appointed a number of committees to consider and report on various important matters for which provision had to be made in the Constitution. The committees so appointed were the Advisory Committee on Fundamental Rights, Minorities etc., the Union Powers Committee, and the Union and the Provincial Constitution Committees. These committees submitted their reports during the period April to August 1947. By August 1947, the broad principles as set out in the recommendations of these committees had been discussed in the Assembly. (For the reports of these committees see Volume II.)

In pursuance of a recommendation of the Order of Business Committee [see *Vol. I, Document No. 81(iii)*] *which was subsequently adopted by the Constituent Assembly on July 14, 1947, the Constitutional Adviser undertook the preparation of a draft of the Constitution embodying the various decisions of the Assembly on the reports of its committees. In this task he was assisted by S. N. Mukerjee, Joint Secretary and Draftsman. Where the Constituent Assembly had not considered any matter, the recommendations of the relevant committees were incorporated; and in other cases appropriate provisions were included in the draft. This draft, containing 240 clauses and 13 schedules, was ready by October 1947. Almost every clause had a marginal note giving the references to the corresponding provisions in other constitutions or in the Government of India Act of 1935. The draft was placed before the Drafting Committee when it met on October 27. In all subsequent deliberations of the committee this draft constituted the basic document and its working paper. The text of the draft, explanatory notes on certain clauses by B. N. Rau, and suggestions and comments from K. M. Munshi, Alladi Krishnaswami Ayyar and D. P. Khaitan are reproduced below.]*

(i) TEXT OF THE DRAFT CONSTITUTION
October 1947

[*Note*: The provisions italicised have not yet been considered or adopted by the Constituent Assembly. The other provisions are based on decisions already taken by the Constituent Assembly, although these have had to be occasionally supplemented and made more definite. These supplemental provisions have not always been italicised.]

PREAMBLE

We, the people of India, seeking to promote the common good, do hereby, through our chosen representatives, enact, adopt and give to ourselves this Constitution.

PART I—THE FEDERATION AND ITS TERRITORY AND JURISDICTION

Name and territory of Federation.

1. (*1*) *As from the date of commencement of this Constitution "India" shall be a Federation.*

(*2*) *The territories of the Federation shall consist of—*

(*a*) *the Provinces, hereinafter called Governors' Provinces,*

(*b*) *the Provinces, hereinafter called Chief Commissioners' Provinces, and*

(*c*) *the Indian States for the time being included in the First Schedule to this Constitution, hereinafter called Federated States.*

(*3*) *On and after such date as may be appointed in this behalf by Act of the Federal Parliament, each unit of the Federation shall be called a "State".*

Admission of new territory. [*Cf.* Commonwealth of Australia Constitution Act, s. 121, U.S.A. Constitution (1787), Art. IV, s. 3(1).]

2. *The Federal Parliament may from time to time by Act include new territories in the First Schedule to this Constitution on such terms as it thinks fit and as from the date of commencement of such Act, that Schedule shall have effect as if those territories had been included therein.*

Creation of new units and alteration of areas or boundaries or names of existing units. [*Cf.* Govt.

3. (*1*) *The Federal Parliament may, with the previous consent of the Legislature of every Province and the Legislature of every Indian State whose boundaries are affected thereby, by Act—*

(*a*) *create a new unit;*

(*b*) *increase the area of any unit;*

of India Act, 1935, s. 290.]

(c) *diminish the area of any unit;*

(d) *alter the boundaries of any unit;*

(e) *alter the name of any unit;*

and may with the like consent make such incidental and consequential provisions by such Act as it may deem necessary or proper.

(2) *When any such Act creates a new unit, then as from the date of commencement of the Act that unit shall be deemed to be included in the First Schedule to this Constitution, and when provision is made by any such Act for the alteration of the area or the boundaries or the name of any unit, then as from the date of commencement of the Act any reference in that schedule to that unit shall be construed as a reference to the unit as so altered.*

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PART II—CITIZENSHIP

Interpretation.

4 *this Part, unless the context otherwise requires, the expression "Federal law" includes any existing law as in force for the time being.*

Citizenship at the date of commencement of the Constitution. [*Cf.* Constitution of Irish Free State, 1922, Art. 3.]

5. *At the date of commencement of this Constitution, every person—*

(a) *who, or either of whose parents, or any of whose grandparents was born in the territories included on that date within the Federation, or*

(b) *who on that date has his domicile in those territories,*

shall be a citizen of the Federation:

Provided that where any such person is a citizen of another State, he may, in accordance with the provisions made in that behalf by any Federal law, elect not to accept the citizenship conferred by this section.

Explanation: *A person shall, for the purposes of this section, be deemed to have his domicile in any territory if he has a domicile therein within the meaning of Part II of the Indian Succession Act, 1925;*

Act XXXIX of 1925.

Provided that notwithstanding anything contained in section 11 of the said Act, a person shall, for the purposes of this section, be deemed to have acquired a domicile in the territories included within the [illegible]ation if—

(a) *before the date of commencement of this Constitution he has made and deposited in some office within those territories appointed for the purpose*

by the Provincial Government a declaration in writing under his hand of his desire to acquire such domicile, and

(b) he has been resident within these territories for a period of not less than one month immediately preceding the time of his making such declaration.

Citizenship after the commencement of the Constitution.
[Cf. British Nationality and Status of Aliens Act, 1914 (4 & 5, Geo. 5 c. 17) s. 1(1).]

6. After the commencement of this Constitution—

(a) any person who is born in the territories of the Federation not being the child of an alien having diplomatic immunity therein or otherwise not subject to its jurisdiction :

(b) any person either of whose parents was at the time of that person's birth a citizen of the Federation and who fulfils any of the following conditions, namely :

(i) such parent was born within the territories of the Federation ; or

(ii) such parent had become a citizen of the Federation by naturalization or by reason of inclusion of new territory ; or

(iii) such parent was at the time of such person's birth in the service of the Federation ; or

(iv) such person's birth was registered in accordance with the provisions of any Federal law ;

(c) any person who is naturalized in accordance with the provisions of any Federal law ;

(d) any person born on board a ship of the Federation, whether in foreign territorial waters or not ;

shall be a citizen of the Federation.

Foreign nationals to be disqualified for membership of the Federal Parliament or the Legislature of any unit.
[Cf. S.44(i) Commonwealth of Australia Act.]

6A. Any person who is under any acknowledgment of allegiance or adherence to a foreign power or is a subject or citizen or entitled to the rights and privileges of a subject or a citizen of a foreign power shall be disqualified for being chosen as and for being a member of either House of the Parliament of the Federation or of the Legislature of any unit.

Acts of the Federal Parliament may regulate the right of citizenship.

7. Further provision may be made by Federal law for regulating the acquisition and termination of citizenship of the Federation and in particular for avoiding double citizenship and the provisions of sections 5, 6 and 6A shall have effect subject to the provisions of any such law.

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PART III—FUNDAMENTAL RIGHTS INCLUDING DIRECTIVE PRINCIPLES OF STATE POLICY

Chapter I—General

Definitions.

8. In this Part, unless the context otherwise requires,—

(*1*) "Federal law" includes any existing law as in force for the time being;

(2) "the State" includes the Government and the Legislature of the Federation and of each unit and all local or other authorities within the territories of the Federation.

Savings.

9. (*1*) All laws in force immediately before the commencement of this Constitution in the territories included within the Federation, in so far as they are inconsistent with any of the provisions of Chapter II of this Part, shall, to the extent of such inconsistency, be void.

[*Cf.* U.S.A. Constitution, (1868), Art. XIV, s. 1.]

(2) Nothing in this Constitution shall be taken to empower State to make any law which curtails or takes away or which has the effect of curtailing or taking away any of the rights conferred by Chapter II of this Part except by way of amendment of this Constitution under section 232 and any law made in contravention of this sub-section shall, to the extent of the contravention, be void.

(*3*) In this section, the expression "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in the territories of the Federation.

Application of the Principles set forth in Chapter III.

10. The principles of policy set forth in Chapter III of this Part are intended for the guidance of the State. While these principles are not cognizable by any court, they are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

[*Cf.* Irish Constitution, Art. 45.]

Chapter II—Fundamental Rights

Rights of equality

Prohibition of discrimination on grounds of religion, race, caste or sex.

11. (*1*) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or any of them.

In particular, no citizen shall, on grounds only of religion, race, caste, sex or any of them, be subject to any disability, liability, restriction or condition with regard to—

(*a*) access to shops, public restaurants, hotels and places of public entertainment, or

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(*b*) the use of wells, tanks, roads and places of public resort maintained wholly or partly out of the revenues of the State or dedicated to the use of the general public.

(*2*) Nothing in this section shall prevent the State from making any special provision for women and children.

Equality of opportunity in matters of public employment. [*Cf.* Government of India Act, 1935, ss. 275 & 298.]

12. (*1*) There shall be equality of opportunity for all citizens in matters of employment under the State.

(*2*) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them, be ineligible for any office under the State.

(*3*) Nothing in this section shall prevent the State from making any provision for the reservation of appointments or posts in favour of any particular classes of citizens who, in the opinion of the State, are not adequately represented in the services under the State.

(*4*) Nothing in this section shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Abolition of untouchability.

13. "Untouchability" in any form is abolished and the imposition of any disability on that account shall be an offence which shall be punishable in accordance with law.

Abolition of titles. [*Cf.* Irish Constitution, Art. 40(2) and U.S.A. Constitution (1787), Art. I, s. 9(8).]

14. (*1*) No title shall be conferred by the Federation.

(*2*) No citizen of the Federation shall accept any title from any foreign State.

(*3*) No person holding any office of profit or trust under the State shall, without the consent of the Federal Government, accept any present, emolument, title or office of any kind from or under any foreign State.

Rights of freedom

Protection of certain rights regarding freedom of speech, etc. [*Cf.* Irish Constitution, Art. 40(6), Constitution of Danzig, Art. 75.]

15. (*1*) There shall be liberty for the exercise of the following rights subject to public order and morality, namely:

(*a*) the right of every citizen to freedom of speech and expression;

(*b*) the right of the citizens to assemble peaceably and without arms;

(*c*) the right of the citizens to form associations or unions;

(*d*) the right of every citizen to move freely throughout the territories of the Federation;

(*e*) the right of every citizen to reside and settle in any part of the territories of the Federation, to acquire, hold and dispose of property and to practise any profession or to carry on any occupation, trade or business.

(*2*) Nothing in this section shall restrict the power of the State to make any law or to take any executive action which under this Constitution it has power to make or to take, during the period when a Proclamation of Emergency issued under sub-section (*1*) of section 182 is in force, or, in the case of a unit during the period of any grave emergency declared by the Government of the unit whereby the security of the unit is threatened.

(*3*) Nothing in this section shall affect the operation of any law which in the interests of the public including the interests of minorities and special tribes imposes restrictions on the exercise of any of the rights conferred by this section.

16. No person shall be deprived of his life or personal liberty without due process of law, nor shall any person be denied equality before the law within the territories of the Federation.

Protection of life and liberty and equality before law.
[*Cf.* U.S.A. Constitution (1868), Art. XIV, S. 1, Irish Constitution, Arts. 40(1) & 40(4).]

17. Subject to the provisions of any Federal law, trade, commerce and intercourse among the units shall, if between the citizens of the Federation, be free :

Provided that nothing in this section shall prevent any unit from imposing on goods imported from other units any tax to which similar goods manufactured or produced in that unit are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced:

Provided further that no preference shall be given by any regulation of trade, commerce or revenue to one unit over another:

Provided also that nothing in this section shall preclude the Federal Parliament from imposing by Act restrictions on the freedom of trade, commerce and intercourse among the units in the interests of public order, morality or health or cases of emergency.

Freedom of trade, commerce and intercourse among the units.
[*Cf.* Commonwealth of Australia Constitution Act, ss. 92 and 99, Government of India Act, 1935, s. 297.]

Prohibition of traffic in human beings and forced labour.

18. *Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law:*

Provided that nothing in this section shall prevent the State from imposing compulsory service for public purposes without any discrimination on the ground of race, religion, caste, or class.

Prohibition of employment of children in factories, etc.

19. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Rights relating to religion

Freedom of conscience and free profession, practice and propagation of religion. [*Cf.* Irish Constitution, Art. 44(2)1°.]

20. (*1*) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

Explanation I: The wearing and carrying of *Kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II: The rights conferred by this sub-section shall not include any economic, financial, political or other secular activities which may be associated with religious practice.

(2) Nothing in this section shall preclude the State from making laws for social welfare and reform and for throwing open Hindu religious institutions of a public character to any class or section of Hindus.

Freedom to manage religious affairs and to own, acquire and administer properties for religious or charitable purposes. [*Cf.* Irish Constitution, Art. 44(2)5°.]

21. Every religious denomination or any section thereof shall have the right to manage its own affairs in matters of religion and, in accordance with the provisions of law, to own, acquire and administer property, movable or immovable, and to establish and maintain institutions for religious or charitable purposes.

Freedom as to payment of taxes for promotion and maintenance of any particular religion or religious denomination. [*Cf.* Swiss Constitution, Art. 49, last para.]

22. No person may be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Freedom as to attendance at religious instructions or religious worship in certain schools. [*Cf.* Irish Constitution, Art. 44(2)4°.]

23. *No person attending any school maintained or receiving aid out of public funds shall be compelled to take part in any religious instruction that may be imparted in the school or to attend any religious worship that may be conducted in the school or in any premises attached thereto.*

Cultural and educational rights

Protection of the interests of minorities.

24. (*1*) The interests of minorities in the territories of the Federation in respect of their language, script and culture shall be protected and no law shall be passed or executive action taken by the State which may affect prejudicially the right conferred by this sub-section.

(*2*) No minority whether based on religion, community or language shall be discriminated against in regard to the admission of any person belonging to such minority into any educational institution maintained by the State.

(*3*) (*a*) All minorities whether based on religion, community or language shall be free to establish and administer educational institutions of their choice.

(*b*) The State shall not, in granting aid to schools, discriminate against schools which are under the management of minorities whether based on religion, community or language.

Miscellaneous rights

Compulsory acquisition of property. [*Cf.* Govt. of India Act, 1935, s. 299.]

25. (*1*) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition unless the law provides for the payment of compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principles on which and the manner in which the compensation is to be determined.

Protection in respect of conviction of offences. [*Cf.* Irish Constitution, Art. 38(1), and U.S.A. Constitution (1791), Art. V.]

26. (*1*) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law at the time of the commission of the offence.

(2) No person shall be punished for the same offence more than once nor, *save as provided in section 132 of the Indian Evidence Act, 1872 as in force at the commencement of this Constitution*, shall any person be compelled in any

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Government and Parliament and the Government and the Legislature of each of the States and all local or other authorities within the territory of India.

9. (1) All laws in force immediately before the commencement of this Constitution in the territory of India, in so far as they are inconsistent with any of the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this sub-section shall, to the extent of the contravention, be void.

(3) In this section, the expression 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in the territory of India or any part thereof.

10. [To be transferred to the Part dealing with the Directive Principles of State policy.]

Rights of equality

11. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or any of them.

In particular, no citizen shall, on grounds only of religion, race, caste, sex or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment, or

(b) the use of wells, tanks, roads and places of public resort maintained wholly or partly out of the revenues of the State or dedicated to the use of the general public.

(2) Nothing in this section shall prevent the State from making any special provisions for women and children.

12. [Held over.]

13. The custom of 'untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'untouchability' shall be an offence which shall be punishable in accordance with law.

14. (1) No title shall be conferred by the State:

Provided that nothing in this sub-section shall affect the right to confer titles exercisable before the commencement of this Constitution by the Ruler of any State specified in Part III of the First Schedule.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, title or office of any kind from or under any foreign State.

October 31, 1947

Present: (1) Dr. B. R. Ambedkar, (*In the chair*); (2) Shri N. Gopalaswami Ayyangar; (3) Shri Alladi Krishnaswami Ayyar; (4) Shri K. M. Munshi; (5) Maulavi Saiyid Muhammad Saadulla.

In attendance: (1) Shri S. N. Mukerjee, Joint Secretary; (2) Shri Jugal Kishore Khanna, Deputy Secretary; (3) Shri P. N. Krishna Mani, Assistant Secretary.

The committee considered the minutes of the meeting held on the 30th October, 1947 and made the changes shown in Appendix A to these minutes.

2. The committee then resumed consideration of the Draft Constitution.

Clause 12: This clause was approved subject to the substitution of the words "backward class" for the words "particular classes" in sub-clause (3) thereof.

Clause 15: It was decided that sub-clause (1) of this clause should be revised in the form shown in Appendix B to these minutes.

The consideration of sub-clause (2) of this clause was postponed till the provisions relating to declaration of emergencies by the Government of India and the Governments of the States specified in Parts I, II and in Part III of the First Schedule to the Draft Constitution have been considered and settled.

The committee was of opinion that sub-clause (3) of this clause should provide exception only in the case of laws imposing restrictions on the exercise of any of the rights conferred by clauses (d), (e), (f) and (g) of sub-clause (1) of this clause as revised, where public interest so requires for promotion of the interests of any tribes to be specified in such law, and that the reference to minorities should be omitted from sub-clause (3).

Clause 16: The committee was of opinion that the word "personal" before the word "liberty" should be retained in this clause, as the word "liberty" by itself might be construed very widely. Mr. Munshi, however, did not agree to this view. As the word "personal" was not in the original clause of fundamental rights as adopted by the Constituent Assembly, it was decided that the reason for its present addition should be explained in the committee's report. The committee was also of opinion that after the words "equality before the law" the words "or equal protection of the laws" should be inserted. This clause as revised by the committee is shown in Appendix B.

3. The committee then adjourned till 10.30 A.M. on the 1st November, 1947.

APPENDIX A

1. For clause 13, *substitute* the following:

13. 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'untouchability' shall be an offence which shall be punishable in accordance with law.

2. For clause 14, *substitute* the following:

14. (1) No title shall be conferred by the State:

Provided that nothing in this sub-section shall affect the right of the Ruler of any State specified in Part III of the First Schedule to confer titles on the citizens domiciled within the territories of, or serving under, such State if he had any such right before the commencement of this Constitution.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, title or office of any kind from or under any foreign State.

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THE FRAMING OF INDIA'S CONSTITUTION

A STUDY

THE PROJECT COMMITTEE

Chairman

B. SHIVA RAO

Members

V. K. N. MENON J. N. KHOSLA
K. V. PADMANABHAN C. GANESAN
P. N. KRISHNA MANI

Chief Research Officer

SUBHASH C. KASHYAP

Research Officer

N. K. N. IYENGAR

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discussions did not reveal any important difference of opinion. On an amendment moved by L. K. Maitra, the proviso mentioned above was deleted on November 29. Otherwise the articles were adopted by the Assembly and incorporated as articles 12 and 13 in substantially the same form in which they now stand part of the Constitution[1].

After discussing the subject of fundamental rights—described by Ambedkar as "the most criticized part" of the Constitution—for as many as thirty-eight days—eleven days in the sub-committee, two in the Advisory Committee and twenty-five in the Constituent Assembly—the Assembly ultimately adopted the comprehensive and impressive array of fundamental rights spread over twenty-two articles and divided broadly into seven categories of rights viz., (i) right to equality, (ii) right to freedom, (iii) right against exploitation, (iv) right to freedom of religion, (v) cultural and educational rights, (vi) right to property and (vii) right to constitutional remedies.

RIGHT TO EQUALITY
Articles 14-18

Equality before law (*Article* 14)

The principle of guaranteeing to every person equality before the law and the equal protection of the laws was first included in the drafts submitted to the Sub-Committee on Fundamental Rights by Munshi and Ambedkar[2]. After considering the drafts for two days—March 24 and 29, 1947—the sub-committee adopted Munshi's draft modified as follows:

> All persons within the Union shall be equal before the law.
>
> No person shall be denied the equal protection of the laws within the territories of the Union.
>
> There shall be no discrimination against any person on grounds of religion, race, caste, language or sex[3].

The sub-committee also approved the addition of a specific provision from Ambedkar's draft laying down that any existing enactment, regulation, judgment, order, custom, or interpretation of law by which any penalty, disadvantage or disability was imposed upon or any discrimination made against any citizen would cease to have effect[4]. The sub-committee's decision was that all persons in India (not merely citizens) should be equal before the law. The clause need not, the sub-committee felt, contain any definition of the expression "equal before the law" and left this expression to be interpreted by the courts in the light of precedents.

[1]*C. A. Deb.*, Vol. VII, pp. 607-12, 640-2, 644-6.
[2]Munshi's draft, article III(1) and (10); Ambedkar's draft, article II(1)(3). *Select Documents* II, 4(ii), pp. 74-5, 86.
[3]Minutes, March 24, 1947. *Select Documents* II, 4(iii), pp. 116-8.
[4]*Ibid.*, March 29, 1947, p. 132.

The draft report of the sub-committee contained a somewhat comprehensive provision in clause 5. The main clause read :

> All persons within the Union shall be equal before the law. No person shall be denied the equal protection of the laws within the territories of the Union. There shall be no discrimination against any person on grounds of religion, race, caste, language or sex.

Besides, the clause also provided for (i) prohibition of discrimination against any person on any of the above grounds particularly in regard to the use of public wells, tanks, roads, schools and places of public resort; (ii) equality of opportunity for all citizens in the matter of public employment or in the exercise or carrying on of any occupation, trade, business or profession; and for prohibition of discrimination against any citizen in the matter of appointment to public office or of acquiring, holding or disposing of property or of carrying on any occupation, trade, business or profession within the union. The clause also declared that all-pre-existing discriminatory laws, regulations, etc., would cease to have effect with the commencement of the Constitution[1]. In an explanatory note[2], B. N. Rau pointed out that the first part of the main clause—equality before the law—was adapted from the Weimar Constitution[3], but widened so as to be applicable to all persons and not merely to citizens; and that the second part—equal protection of the laws—was based on the Fourteenth Amendment of the U. S. Constitution[4].

In his note on the draft report, Alladi Krishnaswami Ayyar observed that the clause as drafted might be open to the construction that no discrimination of any sort could be made between a citizen and a non-citizen even in matters like the exercise of trade, calling or profession. All that the sub-committee had intended, he said, was that in such matters as trials before courts of law and the exercise of normal human rights there should be no distinction between man and man, the feeling being that in India one should take a broader view in this regard and not restrict all fundamental rights to citizens only, as was done in some European Constitutions[5]. In a

[1] Draft Report, Annexure, Clause 5. *Select Documents* II, 4(iv), pp. 138-9.

[2] *Ibid.*, II, 4(v)(c), p. 148.

[3] Article 109, para. 1 of the Weimar Constitution provided: "All Germans are equal before the law."

[4] The Fourteenth Amendment, Section 1, of the U.S. Constitution *inter alia* provides: "No State shall...deny to any person within its jurisdiction the equal protection of the laws."

[5] The constitutions of several European States which guaranteed legal equality restricted it to citizens only: for example *see* Czechoslovak Constitution [article 128 (1)], Weimar Constitution (article 109), Yugoslav Constitution (article 4), Danzig Constitution (article 73), Irish Constitution [article 40(1)] and USSR Constitution (article 123). *See* Comments on the Draft Report of the Sub-Committee on Fundamental Rights, note by Alladi Krishnaswami Ayyar, April 14, 1947. *Select Documents* II, 4(v)(g), p. 158.

subsequent note he suggested the deletion of the first part of the main clause and the formulation of a clause confined to the "equal protection of laws" in such a way as to bring it in line with the Fourteenth Amendment of the U. S. Constitution and to separate it from the non-discrimination clause[1]. The sub-committee, accepting this view, decided to transfer the first sentence of the clause dealing with "equality before the law" to the section on non-justiciable rights, the rest being redrafted and transferred from the "right to equality" section to the "right to freedom" section, to become clause 12 in the report submitted to the Advisory Committee on April 16, 1947[2]. The clause read as follows :

> No person shall be deprived of his life, liberty or property without due process of law nor shall any person be denied the equal treatment of the laws within the territories of the Union :
>
> Provided that nothing herein contained shall prevent the Union Legislature from legislating in respect of foreigners[3].

On April 20, 1947, Alladi Krishnaswami Ayyar submitted another note wherein he justified the omission of the phrase "equality before the law" and said that transforming the British common law maxim of "equality before the law" into a constitutional guarantee would be beset with difficulties in so far as the State might have to distinguish between adults and infants, between men and women and above all between citizens and non-citizens[4].

The Advisory Committee after some discussion[5] adopted the clause[6] with the omission of the words "or property" since it would be preferable to deal with property separately. When the clause came up for consideration before the Constituent Assembly on April 30, 1947, the Assembly adopted without any discussion two amendments moved by Munshi, one replacing the words "the equal treatment of the laws" by the words "equality before the law" and the other deleting the proviso attached to the clause[7].

The Constitutional Adviser's draft of the Constitution reproduced the clause as so amended[8]. The Drafting Committee was of the opinion that the phrase "equal protection of the laws" should also be restored and inserted

[1] *Select Documents* II, 4(v)(g), p. 160.
[2] Minutes of the sub-committee, April 14 and 15, 1947. *Select Documents* II, 4(vii), 164, 167.
[3] Report of the sub-committee, Annexure, clause 12. *Select Documents* II, 4(viii), 173.
[4] *Select Documents* II, 6(ii), p. 212.
[5] The discussion in the Advisory Committee centred round the words "due process law" and the word "property". The latter was omitted. *See* Advisory Committee ceedings, April 21, 1947. *Select Documents* II, 6(iv), p. 248. Also *see* under *Article* -Right to property.
[6] Interim Report of the Advisory Committee, Annexure, clause 9. *Select uments* II, 7(i), p. 297.
[7] *C. A. Deb.*, Vol. III, p. 457.
[8] *Select Documents* III, 1(i), clause 16, p. 9.

after the phrase "equality before the law" as in section 1 of the Fourteenth Amendment of the U.S. Constitution. The committee also gave its reason for qualifying the word "liberty" by the word "personal"; otherwise it might be construed so widely as to include the freedoms dealt with in article 13. Draft article 15 therefore read:

> No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the law within the territory of India[1].

When, at the stage of clause-by-clause consideration of the Draft Constitution the Assembly discussed draft article 15[2], there was no debate on the second part of the article dealing with equality before the law and the equal protection of the laws and the debate in the Assembly was entirely devoted to the first part[3]. The draft article as proposed by the committee was accepted by the Assembly without any change[4]. At the revision stage the committee split this article into two separate provisions, and in the Constitution as finally adopted, article 14 in the section relating to right to equality provides:

> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 21 in the section relating to right to freedom provides:

> No person shall be deprived of his life or personal liberty except according to procedure established by law[5].

Prohibition of discrimination (Article 15)

The fundamental right guaranteeing that there would be no discrimination against any one on grounds of religion, race, colour, caste or sex, was embodied in the drafts submitted by Munshi and Ambedkar. According to Munshi's draft:

> All persons irrespective of religion, race, colour, caste, language or sex are equal before the law and are entitled to the same rights and are subject to the same duties[6].

* * *

[1]Draft Constitution prepared by the Drafting Committee (Feb. 1948), article 15 and the footnote thereto. Also *see* Minutes of the Drafting Committee, October 31, 1947. *Select Documents* III, 6 and 5, pp. 523, 329.

[2]*C. A. Deb.*, Vol. VII, pp. 797-8, 842-57, 859, 999-1001.

[3]*See* under Article 21.

[4]*C. A. Deb.*, Vol. VII, p. 1001.

[5]Draft Constitution as revised by the Drafting Committee, November 1949. *Select Documents* IV, 18, pp. 754, 756.

[6]Art. III(1). *Select Documents* II, 4(ii)(b), pp. 74-5.

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DRAFT CONSTITUTION PREPARED BY THE DRAFTING COMMITTEE

February 21, 1948

[After a detailed scrutiny of the Constitutional Adviser's draft of the Constitution and other material,—notes, reports and memoranda—placed before it, the Drafting Committee submitted to the President of the Constituent Assembly a revised Draft Constitution on February 21, 1948. The draft contained 315 articles and 8 schedules. The full text of this Draft Constitution together with Ambedkar's letter submitting it to the President of the Assembly, is reproduced below.]

New Delhi, 21st February, 1948.

The H" "ie the President of the
Constit....- Assembly of India,
New Delhi.

EAR SIR,

Introductory: On behalf of the Drafting Committee ppointed by the resolution of the Constituent Assembly of ugust 29, 1947, I submit herewith the Draft of the new onstitution of India as settled by the committee.

Although I have been authorized to sign the Draft on ehalf of the members of the committee, I should make clear that not all the members were present at all the neetings of the committee. But at every meeting at which ny decision was taken the necessary quorum was present nd the decisions were either unanimous or by a majority f those present.

In preparing the Draft the Drafting Committee was of ourse expected to follow the decisions taken by the Constituent Assembly or by the various committees ppointed by the Constituent Assembly. This the Drafting Committee has endeavoured to do as far as possible. There were h ver some matters in respect of which the Drafting

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Committee felt it necessary to suggest certain changes. All such changes have been indicated in the Draft by underlining or side-lining the relevant portions. Care has also been taken by the Drafting Committee to insert a footnote explaining the reasons for every such change. I however think that, having regard to the importance of the matter, I should draw your attention and the attention of the Constituent Assembly to the most important of these changes.

2. *Preamble:* The Objectives Resolution adopted by the Constituent Assembly in January, 1947, declares that India is to be a Sovereign Independent Republic. The Drafting Committee has adopted the phrase "Sovereign Democratic Republic" because independence is usually implied in the word "Sovereign", so that there is hardly anything to be gained by adding the word "Independent". The question of the relationship between the Democratic Republic and the British Commonwealth of Nations remains to be decided subsequently.

The committee has added a clause about fraternity in the preamble, although it does not occur in the Objectives Resolution. The committee felt that the need for fraternal concord and goodwill in India was never greater than now and that this particular aim of the new Constitution should be emphasised by special mention in the preamble.

In other respects the committee has tried to embody in the preamble the spirit and, as far as possible, the language of the Objectives Resolution.

Article 1.

3. *Description of India:* In article 1 of the Draft, India has been described as a Union of States. For uniformity the committee has thought it desirable to describe the units of the Union in the new Constitution as States, whether they are known at present as Governors' Provinces, or Chief Commissioners' Provinces, or Indian States. Some difference between the units there will undoubtedly remain even in the new Constitution; and in order to mark this difference, the committee has divided the States into three classes: those enumerated in Part I of the First Schedule, those enumerated in Part II, and those enumerated in Part III. These correspond respectively to the existing Governors' Provinces, Chief Commissioners' Provinces and Indian States.

It will be noticed that the committee has used the term 'Union' instead of 'Federation'. Nothing much turns on the name, but the committee has preferred to follow the

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language of the preamble to the British North America Act, 1867, and considered that there are advantages in describing India as a Union although its Constitution may be federal in structure.

Articles 5 & 6.

4. *Citizenship:* The committee has given anxious and prolonged consideration to the question of citizenship of the Union. The committee has thought it necessary that, in order to be a citizen of the Union at its inception, a person must have some kind of territorial connection with the Union whether by birth, or descent, or domicile. The committee doubts whether it will be wise to admit as citizens those who, without any such connection with the territory of India, may be prepared to swear allegiance to the Union; for if other States were to copy such a provision, we might have within the Union a large number of persons who, though born and permanently resident therein, would owe allegiance to a foreign state. The committee has, however, kept in view the requirements of the large number of displaced persons who have had to migrate to India within recent months, and has provided for them a specially easy mode of acquiring domicile and, thereby, citizenship. What they have to do (assuming that they or either of their parents or any of their grand-parents were born in India or Pakistan) is—

(a) to declare before a District Magistrate in India that they desire to acquire a domicile in India, and

(b) to reside in India for at least a month before the declaration.

Articles 7 to 27.

5. *Fundamental Rights:* The committee has attempted to make these rights and the limitations to which they must necessarily be subject as definite as possible, since the courts may have to pronounce upon them.

Article 59.

6. *Powers of the President of the Union:* The committee has considered it desirable to provide that the President should have power to suspend, remit or commute death sentences passed in an Indian State, as in other units, without prejudice to the powers of the Ruler.

Article 278.

It will be remembered that the new Constitution empowers the Governor, in certain circumstances, to issue a proclamation suspending certain provisions of the Constitution; he can do so only for a period of two weeks and is required to report the matter to the President. The committee has provided that upon receipt of the report the President may either revoke the proclamation or issue a

fresh proclamation of his own, the effect of which will be to put the Central Executive in the place of the State Executive and the Central Legislature in the place of the State Legislature. In fact, the State concerned will become a centrally administered area for the duration of the proclamation. This replaces the "Section 93 regime" under the Act of 1935.

Article 60.

7. *Executive Power in respect of Concurrent List subjects:* Under the present Constitution, executive authority in respect of a Concurrent List subject vests in the Province subject in certain matters to the power of the Centre to give directions as to how the executive authority shall be exercised, *vide* Parts I & II of the Concurrent Legislative List in the Seventh Schedule to the Government of India Act, 1935. In the Draft Constitution the committee has departed slightly from this plan and has provided that the executive power shall vest in the Province (now called the State) "save as expressly provided in this Constitution or by any law made by Parliament." The effect of this saving clause is that it will be open to the Union Parliament under the new Constitution to confer executive power on Union authorities, or, if necessary, to empower Union authorities to give directions as to how executive power shall be exercised by State authorities. In making this provision the committee has kept in view the principle that executive authority should for the most part be co-extensive with legislative power.

Article 67.

8. *Composition of the Council of States:* According to a decision taken by the Constituent Assembly, the Council of States was to contain not more than 25 members (out of a total not exceeding 250) to be elected from panels or constituencies on a functional basis. The panel system having hitherto proved unsatisfactory in the country from which it was copied (Ireland), the committee has thought it best to provide for 15 members to be nominated by the President for their special knowledge or practical experience in literature, art, science, etc. The committee considers that no special representation for labour or commerce and industry among these nominations is necessary, in view of the fact that they are certain to be adequately represented in the elected element of the Union Parliament owing to adult suffrage.

Articles 68 and 151.

9. *Duration of Union Parliament and of State Legislatures:* The committee considers that under the Parliamentary

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system, particularly at the beginning of a new Constitution on the basis of adult suffrage, a longer term than four years is desirable. New ministers require some time to acquaint themselves with the details of administration, and their last year of office is usually taken up in preparing for the next general election. With a four-year term they will not have enough time for any kind of planned administration.

Articles 107 and 200.

10. *Supreme Court and High Courts:* Following the practice prevailing in the United Kingdom and the United States of America, the committee has proposed that in certain circumstances retired judges may be invited to serve in particular cases both in the Supreme Court and in the High Courts.

Article 131.

11. *Mode of selection of Governors:* Some members of the committee feel that the co-existence of a Governor elected by the people and a Chief Minister responsible to the Legislature might lead to friction. The committee has therefore suggested an alternative mode of appointing Governors: the Legislature should elect a panel of four persons (who need not be residents of the State) and the President of the Union should appoint one of the four as Governor.

Article 138.

Deputy Governors: The committee has not thought it necessary to make any provision for Deputy Governors, because a Deputy Governor will have no function to perform, so long as the Governor is there. At the Centre, the position is different, because the Vice-President is also the *ex-officio* Chairman of the Council of States; but in most of the States there will be no Upper House and it will not be possible to give the Deputy Governor functions similar to those of the Vice-President. There is a provision in the Draft enabling the Legislature of the State (or the President) to make necessary arrangements for the discharge of the functions of the Governor in any unforseen contingency.

Articles 212 to 214.

13. *Centrally administered areas:* In accordance with a resolution of the Constituent Assembly, you as the President, appointed a committee of seven members for the purpose of recommending constitutional changes in the centrally administered areas namely, Delhi, Ajmer-Merwara, Coorg, Panth Piploda and the Andaman and Nicobar nds. The committee submitted its report on October 21,

1947. The committee's recommendations were briefly these :

(1) Each of the provinces of Delhi, Ajmer-Merwara and Coorg should have a Lieutenant-Governor appointed by the President of India.

(2) Each of these provinces should normally be administered by a Council of Ministers responsible to the Legislature.

(3) Each of these provinces should have an elected Legislature.

As regards Panth Piploda the committee recommended that it should be added to Ajmer-Merwara and as regards the Andaman and Nicobar Islands the committee recommended that they should continue to be administered by the Government of India as at present, with such adjustments as might be deemed necessary: in other words, these Islands were to continue as a Chief Commissioner's Province. The member representing Ajmer-Merwara and the member representing Coorg on this committee appended a note to the committee's report, in which they said that the special problems arising out of the smallness, geographical position and scantiness of resources of these areas might at no distant future necessitate the joining of each of these areas to a contiguous unit. They therefore urged that there should be a specific provision in the Constitution to make this possible after ascertaining the wishes of the people concerned.

So far as Delhi is concerned, it seems to the committee that as the capital of India it can hardly be placed under a local administration. In the United States, Congress exercises exclusive legislative power in respect of the seat of the Government; so too in Australia. The Drafting Committee has, therefore, come to the conclusion that a more comprehensive plan than that recommended by the *ad hoc* committee is desirable. Accordingly, the Drafting Committee has proposed that these central areas may be administered by the Government of India either through a Chief Commissioner or a Lieutenant-Governor or through the Governor or the Ruler of a neighbouring State. What is to be done in the case of a particular area is left to the President to prescribe by order; he will, of course, in this, as in other matters, act on the advice of responsible ministers. He may, if so advised, have a Lieutenant-Governor in Delhi; he may, again, if so advised, administer Coorg

either through the Governor of Madras or through the Ruler of Mysore after ascertaining the wishes of the people of Coorg. He may also by order create a local Legislature or a Council of Advisers with such constitution, powers and functions, in each case, as may be specified in the order. This seems to the Drafting Committee to be a flexible plan which can be adjusted to the diverse requirements of the areas concerned.

The committee has also provided that Indian States (such as those of the Orissa group) which have ceded full and exclusive authority, jurisdiction and powers to the Central Government may be administered exactly as if they were Centrally Administered Areas, *i.e.*, through a Chief Commissioner, or Lieutenant-Governor, or through the Governor or the Ruler of a neighbouring State, according to the requirements of each case.

14. *Distribution of Legislative Powers :* For the most part, the Drafting Committee has made no change in the Legislative Lists as recommended by the Union Powers Committee and adopted by the Constituent Assembly, but I would draw attention to three matters in respect of which the Drafting Committee has made changes: *Articles 216 to 232.*

(a) The committee has provided in effect that when subject, which is normally in the State List, assumes national importance, then the Union Parliament may legislate upon it. To prevent any unwarranted encroachment upon State powers, it has been provided in the Draft that this can be done only if the Council of States, which may be said to represent the States as units, passes a resolution to that effect by a two-thirds majority.

(b) The committee has considered it desirable to put into the Concurrent List the whole subject of succession, instead of only succession to property other than agricultural land. Similarly, the committee has put into the Concurrent List all the matters in respect of which parties are now governed by their personal law. This will facilitate the enactment of a uniform law for India in these matters.

(c) While putting land acquisition for the purposes of the Union into the Union List and land acquisition for the purposes of a State into the State List, the committee has provided that the principles on which compensation for acquisition is to be determined

shall in all cases be in the Concurrent List, in order that there may be some uniformity in this matter.

In addition, in view of the present abnormal circumstances which require Central control over essential supplies, the committee has provided that for a term of five years from the commencement of the Constitution, trade and commerce in, and the production, supply and distribution of, certain essential commodities as also the relief and rehabilitation of displaced persons shall be on the same footing as Concurrent List subjects. In adopting this course, the committee has followed the provisions of the India (Central Government and Legislature) Act, 1946.

Articles 247 to 269.

15. *Financial provisions:* Broadly speaking, the Drafting Committee has incorporated in the Draft the recommendations of the Expert Finance Committee, except those relating to the distribution of revenues between the Centre and the States. In view of the unstable conditions which at present prevail in this field, the Drafting Committee has thought it best to retain the *status quo* in the matter of distribution of revenues for a period of five years, at the end of which a Finance Commission may review the situation.

Articles 281 to 283.

16. *Services:* The committee has refrained from inserting in the Constitution any detailed provisions relating to the Services; the committee considers that they should be regulated by Acts of the appropriate Legislature rather than by constitutional provisions, as the committee feels that the future legislatures in this country, as in other countries, may be trusted to deal fairly with the Services.

Articles 289 to 291.

17. *Elections, Franchise, etc.:* The committee has not thought it necessary to incorporate in the Constitution electoral details including the delimitation of constituencies. These have been left to be provided by auxiliary legislation.

Article 304.

18. *Amendment of the Constitution:* The committee has inserted a provision giving a limited constituent power to the State Legislatures in respect of certain defined matters.

Articles 292, 294 and 305.

19. *Safeguards for Minorities:* The Draft embodies the decisions of the Constituent Assembly and of the Advisory Committee in respect of the reservation of seats in the Legislatures and of posts in the public services. Although these provisions do not extend to the Indian States, nevertheless, in the larger interests of India, the Indian States should

adopt similar provisions for the minorities therein. The Drafting Committee has specially asked me to draw your attention to the importance of this matter.

First Schedule.

20. *Linguistic Provinces:* I would invite special attention to Part I of the First Schedule and the footnote thereto. If Andhra or any other linguistic region is to be mentioned in this Schedule before the Constitution is finally adopted, steps will have to be taken immediately to make them into separate Governors' Provinces under section 290 of the Government of India Act, 1935, before the Draft Constitution is finally passed. Of course, the new Constitution itself contains provisions for the creation of new States, but this will be after the new Constitution comes into operation.

Fifth and Sixth Schedules.

21. *Scheduled Tribes, Scheduled Areas and Tribal Areas:* The committee has embodied in the schedules to the Constitution the recommendations of the sub-committees on these subjects.

22. A separate note recorded by Shri Alladi Krishnaswami Ayyar on certain points (not involving any question of principle) is appended to the Draft at his request.

23. I cannot transmit to you this Draft Constitution without placing on record the committee's gratitude for the assis[illegible] the committee has received in this difficult task from Sir B. N. Rau, the Constitutional Adviser, Shri S. N. Mukerjee, Joint Secretary and Draftsman, and the staff of the Constituent Assembly Secretariat.

Yours truly,

B. R. AMBEDKAR.

DRAFT CONSTITUTION OF INDIA

Preamble.

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

JUSTICE, social, economic and political;

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

*This follows the decision taken by the Constituent Assembly. The question of the relationship between this Democratic Republic and the British Commonwealth of Nations remains to be decided subsequently.

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

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

IN OUR CONSTITUENT ASSEMBLY this———— ————of———— (————————day of May, 1948 A.D.), do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

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PART I

THE UNION AND ITS TERRITORY AND JURISDICTION

Name and territory of the Union.

*1. (1) India shall be a Union of States.

(2) The States shall mean the States for the time being specified in Parts I, II and III of the First Schedule.

(3) The territory of India shall comprise—

(a) the territories of the States;

(b) the territories for the time being specified in Part IV of the First Schedule; and

(c) such other territories as may be acquired.

Admission and establishment of new States.

2. Parliament may, from time to time, by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

Formation of new States and alteration of areas, boundaries or names of existing States.

3. Parliament may by law—

(a) form a new State by separation of territory from a State or by uniting two or more States or parts of States;

(b) increase the area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except by the Government of India and unless—

(a) either—

(i) a representation in that behalf has been made to the President by a majority of the representatives of the territory in the Legislature of the State

*The committee considers that, following the language of the preamble to the British North America Act, 1867, it would not be inappropriate to describe India as a Union although its Constitution may be federal in structure.

from which the territory is to be separated or excluded; or

(ii) a resolution in that behalf has been passed by the Legislature of any State whose boundaries or name will be affected by the proposal to be contained in the Bill; and

(b) where the proposal contained in the Bill affects the boundaries or name of any State, other than a State for the time being specified in Part III of the First Schedule, *the views of the Legislature of the State both with respect to the proposal to introduce the Bill and with respect to the provisions thereof have been ascertained by the President; and where such proposal affects the boundaries or name of any State for the time being specified in Part III of the First Schedule, the previous consent of the State to the proposal has been obtained.

Law made under articles 2 and 3 to provide for the amendment of the First Schedule and incidental and consequential matters.

4. (1) Any law referred to in article 2 or article 3 of this Constitution shall contain such provisions for the amendment of the First Schedule as may be necessary to give effect to the provisions of the law and may also contain such incidental and consequential provisions as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purposes of article 304.

PART II

CITIZENSHIP

Citizenship at the date of commencement of the Constitution.

5. At the date of commencement of this Constitution—

(a) every person who or either of whose parents or any of whose grand-parents was born in the territory of India as defined in this Constitution and who has not made his permanent abode in any foreign State after the first day of April, 1947; and

(b) every person who or either of whose parents or any of whose grand-parents was born in India as

*The committee is of opinion that in the case of any State other than a State specified in Part III of the First Schedule, the previous consent of the State is not necessary and it would be enough if the views of the Legislature of the State were obtained by the President.

defined in the Government of India Act, 1935 (as originally enacted), or in Burma, Ceylon or Malaya, and who has his domicile in the territory of India as defined in this Constitution,

shall be a citizen of India, provided that he has not acquired the citizenship of any foreign State before the date of commencement of this Constitution.

Explanation: For the purposes of clause (b) of this article, a person shall be deemed to have his domicile in the territory of India—

(i) if he would have had his domicile in such territory under Part II of the Indian Succession Act, 1925, had the provisions of that Part been applicable to him, or

*(ii) if he has, before the date of commencement of this Constitution, deposited in the office of the District Magistrate a declaration in writing of his desire to acquire such domicile and has resided in the territory of India for at least one month before the date of the declaration.

Parliament to regulate the right of citizenship by law.

6. Parliament may, by law, make further provision regarding the acquisition and termination of citizenship and all other matters relating thereto.

PART III

FUNDAMENTAL RIGHTS

General

Definition.

7. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India.

Savings.

8. (1) All laws in force immediately before the commencement of this Constitution in the territory of India, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

*The committee is of opinion that auxiliary action whether by legislation or otherwise may have to be taken before the commencement of this Constitution for the receipt of declarations, keeping of registers of such declarations and other incidental matters for the purpose of clause (ii) of the Explanation.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void:

*Provided that nothing in this clause shall prevent the State from making any law for the removal of any inequality, disparity, disadvantage or discrimination arising out of any existing law.

(3) In this article, the expression "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having the force of law in the territory of India or any part thereof.

Rights of Equality

Prohibition of discrimination on grounds of religion, race, caste or sex.

9. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or any of them.

In particular, no citizen shall, on grounds only of religion, race, caste, sex or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment, or

(b) the use of wells, tanks, roads and places of public resort maintained wholly or partly out of the revenues of the State or dedicated to the use of the general public.

(2) Nothing in this article shall prevent the State from making any special provision for women and children.

Equality of opportunity in matters of public employment.

10. (1) There shall be equality of opportunity for all citizens in matters of employment under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of them, be ineligible for any office under the State.

(3) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any †backward class of citizens who, in the opinion of the State, are not adequately represented in the services under the State.

*The proviso has been added in order to enable the State to make laws removing any existing discrimination. Such laws will necessarily be discriminatory in a sense, because they will operate only against those who hitherto enjoyed an undue advantage. It is obvious that laws of this character should not be prohibited.

†The committee is of opinion that before the words "class of ci " the word "backward" should be inserted.

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(4) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs or any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Abolition of Untouchability.

11. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Abolition of titles.

12. (1) No title shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, title or office of any kind from or under any foreign State.

Protection of certain rights regarding freedom of speech, etc.

13. (1) Subject to the other provisions of this article, all citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency or morality or undermines the authority or foundation of the State.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law, or prevent the State from making any law, imposing in the interests of public order restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law, or prevent the State from making any law, imposing, in the interests of the general public, restrictions on the exercise of the right conferred by the said sub-clause.

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(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law, or prevent the State from making any law, imposing restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or *for the protection of the interests of any aboriginal tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law, or prevent the State from making any law, imposing in the interests of public order, morality or health, restrictions on the exercise of the right conferred by the said sub-clause and in particular prescribing, or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

Protection in respect of conviction of offences.

14. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law at the time of the commission of the offence.

(2) No person shall be punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to witness against himself.

Protection of life and personal liberty and equality before law.

**15. No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the law within the territory of India.

*The committee is of opinion that no protection to any minority group is necessary in this article.

**The committee is of opinion that the word "liberty" should be qualified by the insertion of the word "personal" before it, for otherwise it might be construed very widely so as to include even the freedoms already dealt with in article 13.

The committee has also substituted the expression "except according to procedure established by law" for the words "without due process of law" as the former is more specific (c.f. Art. XXXI of the Japanese Constitution, 1946). The corresponding provision in the Irish Constitution runs: "No citizen shall be deprived of his personal liberty save in accordance with law".

The committee is also of opinion that the words "or the equal protection of the laws" should be inserted after the words " ity before the law" as in section 1 of Article XIV of the U. . Constitution (1865).

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

*16. Subject to the provisions of article 244 of this Constitution and of any law made by Parliament, trade, commerce and intercourse throughout the territory of India shall be free.

Prohibition of traffic in human beings and enforced labour.

17. (1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes. In imposing such service the State shall not make any discrimination on the ground of race, religion, caste or class.

Prohibition of employment of children in factories, etc.

18. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Rights relating to Religion

Freedom of conscience and free profession, practice and propagation of religion.

19. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

Explanation: The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

(2) Nothing in this article shall affect the operation of any existing law or preclude the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) for social welfare and reform or for throwing open Hindu religious institutions of a public character to any class or section of Hindus.

Freedom to manage religious affairs and to own, acquire and administer properties for religious or charitable purposes.

20. Every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

*The committee has omitted the words "by and between the citizens" which occurred after the words "trade, commerce and intercourse" in the provision as adopted by the Constituent Assembly. The qualifying words might necessitate elaborate inquiries at State frontiers as to the nationality of the consignor and consignee.

ANNEXURE - D(colly)

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CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME VII

Monday, the 8th November, 1948

The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Ten of the Clock, Mr. Vice-President (Dr. H. C. Mookherjee) in the Chair.

TAKING THE PLEDGE AND SIGNING THE REGISTER

The following Member took the pledge and signed the Register:

1. Mr. H. P. Mody (Bombay: General).

MOTION *re.* DRAFT CONSTITUTION

Mr. Vice-President (Dr. H. C. Mookherjee): It has been the decision of the House that we should close the general discussion today. There are about sixty names on my list and it is obviously impossible for me to give an opportunity.....

Many Honourable Members: We cannot hear you, Sir. Evidently the mike is not working.

Mr. Vice-President: It is obviously impossible for me to give an opportunity to every Member who wishes to speak. I have therefore decided to give Members of the minority communities the opportunity to speak first. Mr. Mahboob Ali Baig.

Mahboob Ali Baig Sahib Bahadur (Madras: Muslim): Mr. Vice-President, Sir, Dr. Ambedkar's analysis and review were remarkably lucid, masterly and exceedingly instructive and explanatory. One may not agree with his views but it is impossible to withhold praise for his unique performance in delivering the speech he did while introducing his motion for the consideration of this House.

I am afraid, Sir, I am unable to agree with either the form of Government or the form of constitution embodied in the Draft Constitution or the reasons that Dr. Ambedkar gave in their justification.

Firstly, let me deal with the form of Government. Dr. Ambedkar's view is that the British parliamentary executive is preferable to the American non-parliamentary executive on the ground that the former is more responsible though less stable, while the latter is more stable but less responsible. I am inclined to think, Sir, that the advantages of the parliamentary executive have been exaggerated and its defects minimised. It is common knowledge - and from experience also we have found - that the responsible executive under which we have been working for the last two decades has pointedly brought to our attention the fact that a removable parliamentary executive is at the mercy of hostile groups in their own party. Very little time is left to the executive to achieve the programme which is before it. It is so unstable. It is always in fear of being turned out by no-confidence motions. Further, Sir, it is there that the seeds of corruption are sown. A corrupt party-man cannot be turned out by the electorate under

For instance, one or two constituencies in each district may be made multi-member constituencies with ten or twelve seats in each. And, if you have the Lists system which prevailed sometime ago in Germany, that would serve a greater purpose; because voting will be on the basis of parties and not on the basis of persons. We want representation more in groups than individually. We do not want the spectacle of France repeated in India. But we do not wish to have a one-party Government which is liable to degenerate into something anti-democratic.

Before I conclude, Sir, I wish to say few words on the language question. I am not going to say anything in opposition to the prevailing sentiment on this matter. The need for the continuance of the English language for the time being has been advocated by the South. But as far as Hindi is concerned, there is no difference of opinion, provided we know what is Hindi. I personally am prepared to adopt the language spoken by Sardar Patel and the language in which he delivered his recent address at Bombay. He does not come from the Urdu-speaking tracts. He is a Gujerati. He speaks the language which is spoken by people everywhere. I had occasion to listen to the radio-relay of his speech at Chowpathi and I found that it was nothing but Hindustani or whatever name you give it. To me the language in which he spoke at Chowpathi was Hindustani. It is a language which is far better understood by the people than the language used by the Department under him, the A. I. R.

We have been told, Sir, that in this respect too, we are following the Gandhian conception. But people forget that Mahatma Gandhi stood for Hindustani to the last moment. He stood for Hindustani, in both Devnagri and Urdu scripts. Devnagri, as far as the script is concerned has nothing to rival it. It is the best possible medium. But what about the language? Hindi (you may call Hindustani), unless you mix it up with big Sanskrit words and fill it up with all common genders, is Hindustani. As I said, the language of the Deputy Prime Minister, coming from a province not speaking Urdu, should be our criterion and guidance. If the Members of the Constituent Assembly are willing to accept it I suggest that Hindustani, written in both Devnagri and Urdu, which was the last wish of Mahatma Gandhi and the most accepted in India today, should be adopted as the national language.

Sir, the Constitution is only framed once. It is not a thing which is done every other day. So it is but right and proper that in framing it we should give the utmost consideration, cool consideration, without heat and without rancour or mental reservations. I appeal to the House that they should forget and forgive the past. It is very painful, Sir, to be reminded every day that we are responsible for bringing Pakistan into existence. In its creation the Congress was as much a party as anybody else. In that spirit I request that Muslims should not be regarded as hostages. They should be regarded as citizens of India with as much right to live and enjoy the amenities of India - the land of their birth - as anyone else. I conclude my speech.

Begum Aizaz Rasul (United Provinces: Muslim): Sir, I congratulate the Honourable Dr. Ambedkar for his lucid and illuminating exposition of the draft Constitution. He and the Drafting Committee had no ordinary task to perform and they deserve our thanks.

Sir I feel it a great privilege to be associated with the framing of the Constitution. I am aware of the solemnity of the occasion. After two centuries of slavery India has emerged from the darkness of bondage into the light of freedom, and today, on this historic occasion we are gathered here to draw up a constitution for Free India which will give shape to our future destiny and carve out the social, political and economic status of the three hundred million people living in this vast sub-continent. We should therefore be fully aware of our responsibilities and set to this task with the point of view of how best to evolve a system best suited to the needs, requirements, culture and genius of the people living here.

Much has been said about the fact that most of the provisions have been borrowed from the Constitutions of the U.S.A., England, Australia, Canada, Switzerland, etc. Sir, I for my part see nothing wrong in so borrowing as long as the higher interests of the Nation and the well-being and prosperity of the country are kept in mind. There is no doubt that the draft Constitution has been framed to fit in with the present administration. But this had to be so in the very nature of things. After all, we have all become used to a certain way of life of government and of administration. If the draft Constitution had changed the whole structure of Government, there would have been chaos. India is a new recruit to the democratic form of Government. Its people have been used to centuries of autocratic rule and, therefore, to carry on more or less on the lines they have been accustomed for some time more, with changes here and there according to changed conditions, is the best thing possible. The important thing is that power is derived from the people and it is the people who will make or mar the destiny of India.

A lot of criticism has been made about Dr. Ambedkars' remark regarding village polity. Sir, I entirely agree with him. Modern tendency is towards the right of the citizen as against any corporate body and village panchayats can be very autocratic.

Sir, coming to the Fundamental Rights, I find that what has been given with one hand has been taken away by the other. Fundamental Rights should be such that they should not be liable to reservations and to changes by Acts of legislature. It is essential that some at least of the civil liberties of the citizen should be preserved by the Constitution and it should not be easy for the legislature to take them away. Instead of this, we find the provision relating to these Rights full of provisos and exceptions. This means that what has been given today could easily be changed tomorrow by an Act of the legislature.

To my mind it is necessary that some sort of agency should be provided to see that the Fundamental Rights and the Directive Principles are being observed in all provinces in the letter and in the spirit. Otherwise it may be that the absence of such an agency may give rise to the formation of communal organisations with the object of watching the interests of their respective communities. It should be the function of the agency I have suggested to bring to the notice of the Government the cases where the Fundamental Rights and the Directive Principles are not being followed properly. I hope this point of mine will be seriously considered by this august Assembly when we come to discuss the Draft Constitution clause by clause.

Sir, as a woman, I have very great satisfaction in the fact that no discrimination will be made on account of sex. It is in the fitness of things that such a provision should have been made in the Draft Constitution, and I am sure women can look forward toe quality of opportunity under the new Constitution.

Sir, I will not go into the details of the Constitution because I shall deal with the various provisions as we discuss the Constitution clause by clause, but there are a few fundamental issues which have been raised and discussed on the floor of this House during the last two or three days to which I may refer in passing.

Sir, the question of the reservation of seats for the minorities has engaged the attention of this House. It is true, Sir, that last year on the recommendations of the Minorities Sub-Committee, this House accepted the principle of the reservation of seats for certain communities. At that time also I was opposed to this reservation of seats, and today again I repeat that in the new set-up with joint electorates it is absolutely meaningless to have reservation of seats for any minority. We have to depend upon the good-will of the majority community. Therefore speaking for the Muslims I say that to ask for reservation of seats seems to my mind quite pointless, but I do agree with Dr.

Ambedkar that it is for the majority to realise its duty not to discriminate against any minority. Sir, if that principle that the majority should not discriminate against any minority is accepted, I can assure you that we will not ask for any reservation of seats as far as the Muslims are concerned. We feel that our interests are absolutely identical with those of the majority, and expect that the majority would deal justly and fairly with all minorities. At the same time, as has been pointed out by some honourable Members in their speeches, reservation of seats for minorities in the Services is a very essential thing and I hope that the members of this House will consider it when we deal with that question.

Then, Sir, another question which has been engaging the attention of this House is the question of language. Sir, the question of language in its very nature is a very important question because after all we have to devise something which is most acceptable to the people living in this country. It is quite true that the language of the country should be the language that is mostly spoken and understood by the people of the country, and I do not deny the fact that Hindi is the language which is understood and spoken by the majority of the people (*hear, hear*), but, Sir, the word 'Hindi' as it is being interpreted today is a very wrong interpretation. After all there is not much difference between Hindi and Hindustani. Every one will bear witness to the fact that the language spoken in the country, whether by Hindus or Muslims, is a very different language to that which is being described as Hindi and which is being advocated by the protagonists of Hindi. What is advocated is Sanskritised Hindi which is only understood by a small section of the people. If we take the villages, the language spoken there is very different to what is called Hindi here.

Then, Sir, I do not think that the forty million Muslims living in this country can immediately be asked to change their language. I agree that we will have to learn Hindi in the Devanagri script, but some time must be given to us to effect the change-over. It is very unfair of you to ask us suddenly to transact all the business of the state as well as the business in the legislatures in a language that we are not conversant with. I therefore feel that this is a matter which should be calmly and coolly considered. After all, this is not a matter which can be decided on the spur of the moment or on grounds of sentiment or passion. We have to keep in mind the requirements of the country. The Father of the Nation up to the last advocated Hindustani written in both the scripts as the only language which is most suitable and which can be acceptable to the mass of the people living in this country. I therefore recommend that, whereas Hindi in the Devanagri Script can be made the ultimate lingua franca of the country, a certain time limit, say about 15 years, must be given for the change over and until then Hindustani in both the scripts should remain the language of India.

In conclusion, Sir, I would say that whatever we put in this constitution, we must see that all our efforts are concentrated to make India strong and prosperous with equality of opportunity, happiness and prosperity for all so that India may lead the countries of the world on the path of peace and progress.

Dr. Monomohan Das (West Bengal: General): Mr. Vice-President, Sir, a few days have passed since the Draft Constitution was introduced on the floor of this House by our able Law Minister and Chairman of the Drafting Committee, Dr. Ambedkar. During these few days, the Draft Constitution has met with scorching criticism at the hands of different members of this House. With the exception of every few members who questioned the very competency and authenticity of this House to pass the Draft Constitution, all the other Members have been unanimous in their verdict. They have accepted the Draft Constitution with some alterations, additions and omissions, in some clauses and articles, as a fairly workable one to begin with. One very reassuring feature that we find in the Constitution is the single citizenship. As the Chairman of the Drafting Committee has said, unlike the American Constitution, the Draft Constitution has given

Wednesday, the 1st December 1948

The Constituent Assembly of India met in the Constitution Hall, New Delhi at Half Past Nine of the Clock,Mr. Vice-President (Dr. H. C. Mookherjee), in the Chair.

Shri H. V. Kamath (C. P. & Berar: General): Sir, before we proceed with the business of the day, may I request you to be so good as to see that my learned friend, Shri Alladi Krishnaswami Ayyar, who is frequently called upon to give us the benefit of his sage counsel is allotted a seat somewhere in the centre of the hall, neither too much to the right nor to the left so that he may be heard and appreciated in the House?

Mr. Vice-President (Dr. H. C. Mookherjee): We shall try to meet the wishes of the House.

We finished our discussion on Article 12 and Dr.Ambedkar gave his reply. I am sorry I cannot accommodate those Members who want to reopen it. I shall now put the different amendments to the vote one after the other.

Mr. Vice-President: The question is:

"That in clause (1) of article 12, after the word `title' the words `not being a military or academic distinction' be inserted."

The motion was adopted.

Mr. Vice-President: The question is:

"That in clause (1) of article 12, after the words `beconferred' the words `or recognised' be inserted".

The motion was negatived.

Mr. Vice-President: The question is:

"That in clause (1) of article 12, after the word`State' the words `and the State shall in no way recognize any title conferred by the Brit ish Government on any citizen of India prior to August 15, 1947' be inserted."

The motion was negatived.

Mr. Vice-President: The question is:

"That in clause (1) of article 12, after the word 'conferred' the words 'or recognised' be inserted."

The motion was negatived.

Mr. Vice-President: The question is:

'"That for clause (2) of article 12. the following clause be substituted.

'(2) No title conferred by any foreign State on any citizen of India shall be recognised by any State.'"

The motion was negatived.

Mr. Vice-President: The question is:

"That article 12, as amended, stand part of the Constitution."

The motion was adopted.

Article 12, as amended, was added to the Constitution.

Article 13

Mr. Vice-President: We shall now take up article 13 for consideration.

Shri Damodar Swarup Seth (United Provinces: General):Sir, I beg to move:

"That for article 13, the following be substituted:

'13. Subject to public order or morality the citizens are guaranteed--

(a) freedom of speech and expression;

(b) freedom of the press;

(c) freedom to form association or unions;

(d) freedom to assemble peaceably and without arms;

(e) secrecy of postal, telegraphic and telephonic communications.

13-A. All citizens of the Republic shall enjoy freedom of movement throughout the whole of the Republic. Every citizen shall have the right to sojourn and settle in anyplace he pleases. Restrictions may, however, be imposed by or under a Federal

Law for the protection of aboriginal tribes and backward classes and the preservation of public safety and peace.'"

Sir, article 13, as at present worded, appears to have been clumsily drafted. It makes one significant omission and that is about the freedom of the press. I think, Sir, it will be argued that the freedom is implicit in clause (a),that is, in the freedom of speech and expression. But, Sir,I submit that the present is the age of the Press and the Press is getting more and more powerful today. It seems desirable and proper, therefore, that the freedom of the Press should be mentioned separately and explicitly.

Now, Sir, this article 13 guarantees freedom of speech and expression, freedom to assemble peaceably and without arms, to form association and unions, to move freely throughout the territory of India, to sojourn and settle in any territory, to acquire and hold and dispose of property,and to practise any profession or trade or business. While the article guarantees all these freedoms, the guarantee is not to

affect the operation of any existing law or prevent the State from making any law in the general interests of the public. Indeed, Sir, the guarantee of freedom of speech and expression which has been given in this article, is actually not to affect the operation of any existing law or prevent the State from making any law relating to libel,slander, defamation, sedition and other matters which offend the decency or morality of the State or undermine the author ity or foundation of the State. It is therefore clear.Sir, that the rights guaranteed in article 13 are cancelled by that very section and placed at the mercy or the high-handedness of the legislature. These guarantees are also cancelled, Sir, when it is stated that, to safeguard against the offences relating to decency and morality and the undermining of the author ity or foundation of the State, the existing law shall operate. This is provided for in very wide terms. So, while certain kinds of freedom have been allowed on the one hand, on the other hand, they have been taken away by the same article as I have just mentioned. To safeguard against "undermining the author ity or foundation of the State" is a tall order and makes the fundamental right with regard to freedom of speech and expression virtually ineffectual. It is therefore clear that under theDraft Constitution we will not have any greater freedom of the press than we enjoyed under the cursed foreign regime and citizens will have no means of getting a sedition law invalidated, however flagrantly such a law may violate their civil rights.

Then, Sir, the expression `in the interests of general public' is also very wide and will enable the legislative and the executive author ity to act in their own way. Very rightly, Sir, Shri S. K. Vaze of the Servants of India Society while criticis ing this article has pointed out that if the mala fides of Government are not proved--and they certainly cannot be proved--then the Supreme Court will have no alternative but to uphold the restrictive legislation.The Draft Constitution further empowers the President, Sir,to issue proclamations of emergency whenever he

thinks that the security of India is in danger or is threatened by an apprehension of war or domestic violence. The President under such circumstances has the power to suspend civil liberty.

Now, Sir, to suspend civil liberties is tantamount to a declaration of martial law. Even in the United States, civil liberties are never suspended. What is suspended there, in cases of invasion or rebellion, is only the habcas corpus writ. Though individual freedom is secured in this article,it is at the same time restricted by the will of the legislature and the executive which has powers to issue ordinances between the sessions of the legislature almost freely, unrestricted by any constitutional provision.Fundamental rights, therefore, ought to be placed absolutely outs de the jurisdiction, not only of the legislature but also of the executive. The Honourable Dr. Ambedkar, Sir,while justifying the limitations on civil liberties, has maintained that what the Drafting Committee has done is that, instead of formulating civil liberties in absolute terms and depending on the aid of the Supreme Court to invent the doctrine or theory of police powers, they have permitted the State to limit civil liberties directly. Now,if we carefully study the Law of Police Powers in the United States, it will be clearly seen that the limitations embodied in the Draft Constitution are far wider than those provided in the United States. Under the Draft Constitutionthe Law of Sedition, the Official Secrets Act and many other laws of a repressive character will remain intact just as they are. If full civil liberties subject to Police Powers,are to be allowed to the people of this country, all laws of a repressive character including the Law of Sedition will have either to go or to be altered radically and part of the Official Secrets Act will also have to go. I therefore submit that this article should be radically altered and substituted by

the addenda I have suggested. I hope, Sir,the House will seriously consider this proposal of mine. If whatever fundamental rights we get from this Draft Constitution are tempered here and there and if full civil liberties are not allowed to the people, then I submit, Sir,that the boon of fundamental rights is still beyond our reach and the making of this Constitution will prove to be of little value to this country.

Mr. Vice-President: Do I understand that amendment No.441 will not be moved? I shall not allow any discuss on but I shall put it to vote. Do I understand that the mover does not intend to move this amendment."

(Amendment 441 was not moved.)

(Amendments No. 413 and No. 414 were not moved.)

Mr. Vice-President: Amendments Nos. 415 and 418. They are the same. I will allow amendment No. 415 to be moved. It stands in the names of Pandit Lakshmi Kanta Maitra and others, including Mr. Kamath.

these freedoms are guaranteed. That is to say, any exception which is made, unless justified by the spirit of the Constitution,the Constitution as a whole and every part of it included,would be a violation of the freedoms guaranteed hereby.

For instance, sub-clause (5) uses such a wide expression as to make anything come within the scope of the exception, and suffice to deny the practical operation of the freedoms that by one big clause you are supposed to guarantee. I, therefore, think that it is necessary to make the substitution I have suggested in this article, that the words "this Constitution and the laws there under or in accord there with at any time in force" may be substituted for the words "the other provisions of this article" and after the words "all citizens shall have" the words "and are guaranteed" be added. I hope the amendment will prove acceptable to the House.

Mr. Vice-President: Amendment Nos. 417 and 418 are of similar import. I can allow No. 417 to be moved. This amendment stands in the name of Mr. Lari.

An Honourable Member: He is not in the House.

Mr. Vice-President: Then amendment No. 418 which stands in the name of Shri Mukut Behari Lal Bhargava.

The amendment was not moved.

Mr. Vice-President: Amendment Nos. 420, 421, and 424 are of similar import and I suggest that the House should consider them together. I suggest that amendment No. 421 be moved. This stands in the name of Prof. K. T. Shah.

Prof. K. T. Shah: Mr. Vice-President, Sir, I beg to move:

"That in sub-clause (a) of clause (1) of article 13,after the word `expression'; the words `of thought and worship; of press and publication;' be added."

so that the article as amended would read:

"Subject to the other provisions of this article, all

citizens shall have the right--

(a) to freedom of speech and expression; of thought and worship; of press and publication;"

In submitting this amendment, I must confess to a feeling of amazement at the omission whether it is by oversight or deliberate. I do not know of these very essential and important items in what are known as Civil Liberties. The clause contents itself merely with the freedom of speech and of expression. I do not know what typeof freedom of speech the draftsman had in mind when he adds to it the

freedom of expression separately. I thought that speech and expression would run more or less parallel together. Perhaps "expression" may be a wider term, including also expression by pictorial or other similar artistic devices which do not consist merely in words or in speech.

Allowing that is the interpretation, or that is the justification for adding this word "expression", I still do not see why freedom of worship should have been excluded. I am not particularly a very worshipful man myself. Certainly I do not indulge in any overt acts of worship or adoration.But I think a vast major ity of people feel the need and indulge in acts of worship, which may often be curtailed or be refused or in other words be denied unless the Constitution makes it expressly clear that those also will be included. All battles of religion have been fought--and it must be very well known to the draftsman that they are going on even now--in connection with the right of free worship. The United States itself owes its very origin to the denial of freedom of worship in their original home to the Fathers of the present Union some 300 odd years ago.That is why in most modern constitutions, the freedom of worship finds a very clear mention. I certainly feel therefore that this omission is very surpris ing, to say the least. Unless the Drafting Committee is in a position to explain rationally, is in a position to explain effectively why this is omitted, I for one would feel that our Constitution is lacking and will remain lacking in a most essential item of Civil Liberties if this item is omitted.

The same or even a more forceful logic applies to the other "freedom of the press, and freedom of publication."The freedom of the press, as is very well known, is one of the items round which the greatest, the bitterest of constitutional struggles have been waged in all constitutions and in all countries where liberal constitutions prevail. They have been attained at considerable sacrifice and suffering. They have now been achieved and enshrined in those countries. Where there is no written constitution, they are in the well established conventions or judicial decisions. In those which have written constitutions, they have been expressly included as the freedom of the press.

Speaking from memory, I am open to correction, although I think it would not be necessary, even the United NationsCharter gives good prominence and special mention of freedom of the press. Why our draftsmen have omitted that, I find beyond me even to imagine. I dare say they must have very good reasons why the freedom of the press has not found specific mention in their draft. But, unless and until they give the reasons and explain why it has been omitted, I feel that an amendment of the kind I am proposing is very necessary.

The Press may be liable to abuse; I feel there may have been instances where the press has gone, at least in the mind of the established author ity, beyond its legitimate limits. But any curtailment of the liberty of the press is,as one of the present Ministers, who was then a former non-official member, called, a "black Act," in the last but onesession of the legislature when there was an attempt

Order, order. The Maulana Sahib is perfectly within hisrights if he wants to speak. I am sorry, Maulana Sahib, toask you to go back to your seat. It is regrettable to greetan old Member of this House in this fashion.

Mr. Mohammed Ismail Sahib (Madras: Muslim): Sir, Imove:

"That after sub-clause (g) of clause (1) of article 13,the following new sub-clause be added:--

'(h) to follow the personal law of the group or community to which he belongs or professes to belong.

(i) to personal liberty and to be tried by a competent court of law in case such liberty is curtailed'."

Shri C. Subramaniam (Madras: General): On a point oforder, Sir, the House has already passed an article in the Part on directive principles that there should be a uniform civil code. Here the Honourable Member wants to move thateverybody should have the liberty to follow the personal law of the group or community to which he belongs or professes to belong. This is going contrary to the article which hasalready been passed. We have already decided that as far aspossible personal law should come under a uniform civil codeand this amendment is against the principle of that article.

As regards the other part of the amendment, it shouldbe discussed when we take up article 15.

Mr. Vice-President: It is no point of order. Mr.Mohammed Ismail Sahib may continue his speech.

Mr. Mohammed Ismail Sahib: It is really true that Imade a similar proposal when the directive principles wereunder discussion. I made it clear that this question ofpersonal law ought really to come under the chapterFundamental Rights and I also said that I shall, when theopportunity came, move this amendment at the proper time.

Person law is part of the religion of a community orsection of people which professes this law. Anything whichinterferes with personal law will be taken by that communityand also by the general public, who will judge this questionwith some commonsense, as a matter of interference withreligion. Mr. Munshi while speaking on the subjectpreviously said that this had nothing to do with religionand he asked what this had to do with religion. He as anillustrious and eminent lawyer ought to know that thisquestion of personal law is entirely based upon religion. It is nothing if it is not religious. But if he says that areligion should not deal with such things, then that isanother matter. It is a question of difference of opinion asto what

a religion should do or should not. People differand people holding different views on this matter musttolerate the other view. There are religions which omitaltogether to deal with the question of personal law and there are other religions like Hinduism and Islam which dealwith personal law. Therefore I say that people ought to begiven liberty of following their personal law.

It was also stated by Dr. Ambedkar on the floor of this House that the question of following personal law was notimmutable. There were, as a matter of fact, sections ofMuslims who do not follow the personal law prescribed byIslam, but that is a different matter. It is not reasonableto say that simply because a section of people do not wantto follow a certain law of a certain religion or a certainpart of that religion that other people also should notfollow the law and that sections of people should becompelled not to follow that part of the religion whichcertain other sections of the same community are notfollowing.

That is not really reasonable, Sir, and it is reallyimmutable to the people who follow this law and thisreligion, because people, as they understand it, have notgot the right to change their religion as they please. Theremay be people who contravene their own religion, but that isa different matter and we cannot compel others also to contravene their religion. Here the question of personal lawaffects only the people who follow this law. There is nocompulsion exercised thereby on the general community or thegeneral public. This House will remember that on anotherquestion, which is really a religious question--I mean thequestion of cow-slaughter--an obligation has been placedupon other communities than the one which considers theprohibition of cow-slaughter as a religious matter. Butthen, Sir, respecting the views and feelings of our friends.the minor ity communities who have got the right andprivilege of slaughtering and eating the flesh of cows have agreed to the proposal put before the House, though that isgoing beyond affecting one particular community alone. Here,Sir, observance of personal law is confined only to the particular communities which are following these personal laws. There is no question of compelling any other community at all.

Pandit Thakur Dass Bhargava (East Punjab: General): Is the honourable Member aware of the restrictions of cow-slaughter in Pakistan?

Mr. Vice-President: Will the honourable Member kindly address the Chair."

Mr. Mohammed Ismail Sahib: I cannot hear him properly.I do not know what my friend is trying to say.

Mr. Vice-President: Do not pay any attention to that.Will the Honourable Member continue?

Pandit Thakur Dass Bhargava: I was enquiring of thehonourable Gentleman if he knows that there is a restrictionon cow-slaughter in Pakistan, in Afghanistan and in

manyMuhammadan countries. In India also the Muhammadan kingsplaced such a restriction.

Mr. Mohammed Ismail Sahib: They might have or not havemade a provision of that sort. My point is that this is aquestion which affects a particular community, but becausethat community wanted to prevent that slaughter the othercommunity, which need not prohibit that slaughte" has agreedto that proposal. But with regard to personal law, itconcerns a particular community which is following aparticular set of personal laws and there is no question ofcompelling other people to follow that law and it is thequestion of the freedom of the minor ity or the major itypeople to follow their own personal law. As a matter offact, I know there are an innumerable number of Hindus whothink that interference with the personal law is interference with their religion. I know, Sir, that theyhave submitted a monster petition to the author ities or to the people who can have any say in the matter. Therefore it is not only Muslims but also Hindus who think that this is areligious question and that it should not be interferedwith. The personal law of one community does not affect theother communities. Therefore, Sir, what I urge is that thefreedom of following the personal law ought to be given toeach community and it will not interfere with the rights of any other community.

Again, Mr. Munshi stated that Muslim countries likeEgypt or Turkey have not any provision of this sort. Sir, I want to remind him that Turkey is under a treaty obligation.Under that treaty it is guaranteed that the non-Muslimminor ities are entitled to have questions of family law andpersonal status regulated in accordance with their usage.That is the obligation under which Turkey has been placedand that is obtaining in Turkey now.

Then again with regard to Egypt, no such question ofpersonal law arose in that country. But what is to be notedis that whatever the minor ities in that country wanted hasbeen granted to them: in fact more than what they wanted hasbeen granted. And if personal law had also been a matter inwhich they wanted certain privileges, that would also havebeen granted.

Then there are other countries. Yugoslavia has agreedto give this privilege to the Muslims in following theirfamily law and personal law.

Therefdre, what I am asking for is not a matter whichis peculiar to myself or to the minor ity community in thiscountry. It is a thing, Sir, well understood in other partsof the world also.

Sir, I also mqve:

"That after clause (6) of article 13, the following newclauses be

added:

`(7) Nothing in the clauses (2) to (6) of this articleshall affect the right guaranteed under sub-clause (h) ofclause (1) of this article'."

This is consequential. The personal law is presumed to be guaranteed by the previous amendment, that is the newsub-clause (h) to clause (1) of article 13, and this clause(7) seeks to preclude any interference with the question ofpersonal law as a result of clauses (2) to (6).

Then coming to the new clause (i), it reads thus:

"to personal liberty and to be tried by a competentcourt of law in case such liberty is curtailed."

This has nothing to do with the minor ity or the major ity. It concerns itself with the right of everycitizen. Personal liberty is the core of the whole freedom.It is the basis upon which the freedom of the land must bebuilt. But here, Sir, in this bulky Constitution thisquestion of personal liberty is left almost as an orphan.Only one mention is made of personal liberty, i.e., inarticle 15 and it is left there, it is left to be taken careof by `procedure established by law'. I do not here enterinto the controversy whether it should be "by due process oflaw', or "by procedure established by law". But what I wantto say is that only a mention has been made in the Constitution with regard to personal liberty. But personal liberty is the most fundamental of the fundamental rights and it ought not to be dealt with insuch a cursory manner, as it has been done in the Constitution.

I request your permission to read a quotation toillustrate how the Constitutions of other countries havedealt with this all-important question of personal liberty.

Much smaller countries than India have taken a moreserious and, if I may say so, a sacred view of thisquestion. The Polish Constitution says, among other things:`If in any case the judicial order cannot be producedimmediately'--(it is only on a judicial order that a man'sliberty can be curtailed)--`it must be transmitted within 48hours of the arrest stating the reasons for the arrest.Persons who have been arrested and to whom the reasons for the arrest have not been communicated within 48 hours, inwriting over the signature of judicial author ities, shall beimmediately restored to liberty.'

`The laws prescribe the means of compulsion which maybe employed by the administrative author ity to secure thecarrying out of their order.'

Then again, the same Constitution says; "No law maydeprive a citizen, who is the victim of injustice or wrong,of judicial means of redress."

Sir, another State, viz., Yugoslavia, in regard to thismatter goes even further. It has provided:

"A man after he is informed of the reasons for thearrest or detention has got the right....."

Shri C. Subramaniam: Questions of personal liberty comeonly under article 15. They are irrelevant under thisarticle. It is article 15 that deals with personal liberty thus: "No person shall be deprived of his life or personal liberty except according to procedure established by law,nor shall any person be denied equality before the law orthe equal protection of the laws within the territory ofIndia." Therefore what is the use of discussing the questionof personal liberty under article 13?

Mr. Mohammed Ismail Sahib: I have already referred tothis point. Of course it is mentioned there. But to say thatbecause it is mentioned there it is necessary that thematter should be discussed only there is not correct. I amof the view that this subject is more appropriately broughtunder article 13 which speaks of the various freedoms of thecitizen. Of these freedoms, this is the most important.Therefore there is nothing wrong in my saying that this all-important question must be brought under article 13. Withthat view I have tabled this amendment and I am speaking onthis amendment.

Sir, my amendment, which I have moved with yourpermission, says that the citizen shall be guaranteed hispersonal liberty. As I was saying, the Constitution ofYugoslavia has provided: "No person may be placed underarrest for any crime or offence whatever save by order of

acompetent author ity given in writing stating the charge.This order must be communicated to the person arrested atthe time of arrest or within 24 hours of the arrest. Anappeal against the order for arrest may be lodged in theCompetent Court within three days. If no appeal has beenlodged.--(this is important)--within this period, thepolice author ities must as a matter of course communicatethe order to the competent court within 24 hours following.The court shall be bound to confirm or annul the arrestwithin 2 days of the communication of the order and itsdecision shall be given effect forthwith. Public officialswho infringe this provision shall be punished for illegaldeprivation of liberty"'.

Sir, ours is a bulky Constitution. Our friendscongratulated themselves in having produced the bulkiestConstitution in the world. And this Constitution from whichI read out an extract just now contains only 12 articles. It is a much smaller Constitution than ours and yet in thematter of personal liberty it has made such an elaborate provision as that Imentioned. This bulky Constitution of ours does not findmore than a few words where this all important question of personal liberty is concerned.

Now, Sir, there are various Public Safety Acts enactedand enforced in the various provinces of the country. Here,personal liberty as it stands is almost a mockery ofpersonal liberty. A man is being arrested at the will andpleasure of the executive.

He is put in prison and he doesnot even know for what he has been imprisoned or for whatcharge he has been detained. Even where the law puts theobligation on the Government to reveal to him the reasonsfor which he has been detained, the executive takes its owntime to do so. There are cases in which the personsconcerned were not informed of the charge for weeks andmonths and when the charges were communicated, many of themwere found to be of such a nature that they could not standbefore a court of law for a minute. No right has been givento a detenu or a person arrested or detained to test thevalidity of the order before a court of law. This kind ofadministration of law was not known even under foreign rule,that is, under Brit ish rule.

Now, Sir, another contention is being indulged in, andthat is that it was different when the Brit isher, theforeigner was in the country and that now its is our ownrule. True, but that does not mean that we can deal withliberty of the citizens as we please. Bureaucracy isbureaucracy, whether it is under foreign rule or self-rule.Power corrupts people not only under foreign rule, but alsounder self-government. Therefore, Sir, the citizen must beprotected against the vagaries of the executive in a verycareful manner as other self-governing countries have done.In almost every country in the world, they have madeelaborate provision for protecting the personal liberty of the citizen. Why should India alone be an exception, I donot understand. Therefore, the framers of the Constitution,I hope, will reconsider this question and make suitableprovisions for the protection of the liberty of the person.

Sir, in this amendment of mine I have not goneelaborately into the question of personal liberty. I onlywant the citizen concerned to be given the right of goingto, and being tried by, a court of law, if his personal liberty is curtailed. That one precious right I want to begiven to every citizen of India.

May I also, Sir, move the other consequentialamendments included in amendment No 502. I have moved onlythe one on page 53 of the List of Amendments, namely newsub-clause (7). That relates to personal law. May I move nowthe other portion of the amendment relating to new clauses(8) and (9) on page 54 of the List?

Mr. Vice-President: The Honourable Member may do so,but without making a speech.

Mr. Mohammed Ismail Sahib: Sir, I move that thefollowing new clauses be added:

"(8) Nothing in clauses (2) to (6) shall affect theright guaranteed under sub-clause (i) of clause (1) of thisarticle.

(9) No existing law shall operate after thecommencement of this

Constitution so far as the same affectsadversely the right guaranteed under sub-clause (i) ofclause (1) of this article and no law shall be passed by theParliament or any State which may adversely affect the rightguaranteed under sub-clause (i) of clause (1) of thisarticle."

These are only consequential amendments.

Mr. Vice-President: We shall now go on to amendmentsNos. 442, 499, the second part of 443, 468 and 501. Theseare all of similar import. I hold that the only twoamendments which can be moved under the new regulations areamendments Nos. 442 and 499. The others will be voted on.

Shri M. Ananthasayanam Ayyangar (Madras: General): Allthese relate to free choice in the election ofrepresentatives. In a sense this is a new subject and may onthat account be held over for consideration.

Mr. Vice-President: What about 499?

Pandit Thakur Dass Bhargava: That also relates to thesame subject.

Mr. Vice-President: The whole group will be held overfor consideration.

(Amendment No. 444 was not moved.)

Mr. Vice-President: Amendment No. 445.

Prof. K. T. Shah: Mr. Vice-President, Sir, I beg to move:

"That the following new clause be added after clause(1) of article 13:

'Liberty of the person is guaranteed. No person shallbe deprived of his life, nor be arrested or detained incustody, or imprisoned, except according to due process oflaw, nor shall any person be denied equality before the lawor equal protection of the laws within the territory ofIndia.'"

Sir, this again is of the same species of amendments which Iam trying my best to place before the House, that is to say,the enunciation and incorporation of those elementaryprinciples of modern liberal constitutions in which it is apity our Constitution seems deliberately to be lacking. Theliberty of the person, ever since the consciousness of civil liberties, has come upon the people, has been the mainbattleground of the autocrats and those fighting againstthem. In no single instance other than this has the power ofautocracy wanted to assert itself against the just claims of the individual to be respected in regard to his personal freedom. The liberty of the person to fight against anyarbitrary arrest or detention, without due process of law,has been the basis of English constitutional growth, andalso of the French Constitution that was born after theRevolution. The autocrat, the

despot, has always wished,whenever he was bankrupt of any other argument, just to shutup those who did not agree with him. It was, therefore, thatany time the slightest difference of opinion was expressed,the slightest inconvenience or embarrassment was likely to be caused by any individual, the only course open to thosewho wanted to exercise autocratic power was to imprison orarrest or detain such a person without charge or trial. Ithas been in fact in many modern constitutions among the mostcardinal articles that the liberty of the person shall besacred, shall be guaranteed by the Constitution. We arecovering new ground and should not omit to incorporate inour Constitution those items which in my opinion ought to besacrosanct, which would never lose anything by repetition,and which would also add to our moral stature.

This Constitution, Sir, was drafted at a time whenpeople were going through extraordinary stress and strain.The tragic happenings of some twelve or fourteen months agowere no doubt responsible for influencing those who draftedthis Constitution to feel that in the then prevailing goodsit was necessary to restrict somehow the freedom of theindividual. Therefore it is that the freedom of theindividual, the sacredness and sanctity of personal liberty has been soft-pedalled in this Constitution. But now afteran interval of fourteen months. I would suggest to this House that these sad memories should be left to the limbowhere they deserve to remain. We have had no doubt theunfortunate experiences in which individuals moved bywhatever sentiments had tried to exert violence and do injury to their fellows which no civilised State can put upwith. It was therefore at the time necessary that suchindividuals should be apprehended immediately. Inemergencies like this, in cases like this, if you wait forperforming the due processes of law, if you wait ,forreference to a magistrate for the issue of a proper warrant,or compliance with all the other formalities of legalprocedure to be fulfilled, it is possible that the ends ofjustice may not be served, it is possible that themaintenance of law and justice may be endangered. But, Sir,I venture to submit to this House that was anextraordinarily abnormal situation which we hope will notrecur. Constitution should be framed, not for these abnormalsituations, but normal situations and for reasonable peoplewho it must be presumed will be normally law-abiding and notthrow themselves entirely to the mercy of these goondas. Weare making a constitution, Sir, for such types of people andnot for those exceptions, the few who might have temporarilylost the possession of their senses, and who therefore maybe dealt with by extraordinary procedure.

We have in this Constitution as we have in many otherConstitutions provisions relating to a state of emergencywhere the normal Constitution is suspended. I am not at allenamoured of these extraordinary exceptions to the workingof constitutions; but even I might conceive that in momentsof emergency it may be necessary, however regrettable it maybe, to suspend constitutional liberties for the time being.But we must not, when framing a constitution, always assumethat this is a state of emergency, and therefore omit tomention such fundamental things as civil liberties.

I, therefore, want to mention categorically in this Constitution that the liberty of the person shall berespected, shall be guaranteed by law, and that no person shall be arrested, detained or imprisoned without due process of law. That process it is for you to provide. That process it is for laws made under this Constitution to lay down. And if and in so far as that process is fulfilled, there is no reason to fear that any abuse of such individual liberty will take place. Why then deny it, why then omit themention of personal liberty that has all along been the markof civilised democratic constitutions against the autocraticmight of unreasoning despots? I am afraid, looking at thefate of most of my amendments, that I may perhaps be hurlingmyself against a blank wall. But I will not prejudice myhearers and certainly not the draftsmen by assuming thatthey are unreasoning until they prove that they are guiltyof utterly unreasoning opposition.

Mr. Vice-President: Amendments Nos. 446, 447 and 448.These are all of similar import. Amendment No. 448 may be moved. It stands in the joint names of Shrimati Renuka Ray,Dr. Keskar, Shri Satish Chandra and Shri Mohanlal Gautam.

(Amendments Nos. 448 and 446 were not moved.)

Mahboob Ali Baig Sahib Bahadur: (Madras: Muslim): Sir,there is another amendment in my name, amendment No. 451:that is for the deletion of clauses (2), (3), (4), (5), and(6).

Mr. Vice-President: That comes under another groupwhich will be dealt with hereafter.

Mahboob Ali Baig Sahib Bahadur: Then, alternatively, Ishall move amendment No. 447. Sir, I move:

"That clauses (2) to (6) of article 13 be deleted and the following proviso be added to clause (1):

'Provided, however that no citizen in the exercise of the said right, shall endanger the security of the State,promote ill-will between the communities or do anything todisturb peace and tranquillity in the country'."

Mr. Vice-President, Sir, to me it looks as if thefundamental rights are listed in clause (1) only to bedeprived of under clauses (2) to (6), for in the firstplace, these fundamental rights are subject to the existinglaws. If in the past the laws in force, the law-less laws asI would call them, the repressive laws, laws which wereenacted for depriving the citizens of their human rights, If they have deprived the citizens of these rights under theprovisions under clauses (2) to (6), they will continue todo so. The laws that I might refer to as such are theCriminal Law

Thursday, the 2nd December 1948

The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Half Past Nine of the Clock, Mr. Vice-President (Dr. H. C. Mookherjee, in the Chair.

Mr. Vice-President (Dr. H. C. Mookherjee): We shall resume discussion of Article 13.

I should like to know the views of the House as to the way we should deal with the following amendments--we postponed consideration of these amendments yesterday:

Amendments No. 442, No. 499, second part of No. 443,No. 468 and No. 501.

Shri M. Ananthasayanam Ayyangar (Madras: General): MayI suggest that in as much as these relate to the free choice of vote and some other matters which are not already prescribed in article 13, these may stand over and be allowed to be moved as a separate clause later on in the Fundamental Rights, and that we need not delay the passing of article 13, amendments with respect to which have already been moved, and the discussion may start?

Mr. Vice-President: Is that the view of the House?

Honourable Members: Yes, yes.

Mr. Vice-President: Then we shall proceed with the general discussion of the article. A large number of honourable Members desire to speak on this article.Therefore, with the permission of the House, I would like to limit the duration of the speeches to ten minutes each ordinarily. I shall extend the time wherever I consider necessary. Have I the permission of the House to fix this time-limit?

Honourable Members: Yes.

Shri H. V. Kamath (C. P. and Berar: General): On a point of order, Sir, Two amendments have been held over.Unless they are moved, how can general discussion on the article as a whole go on?

Mr. Vice-President: What are those amendments please?

Shri H. V. Kamath: No. 499 and No. 442.

Mr. Vice-President: They will form part of a new clause.

Sardar Bhopinder Singh Man(East Punjab: Sikh): *[Mr.Vice-President, I regard freedom of speech and expression as the very life of civil liberty, and I regard it as fundamental. For the public in general, and for the minor ities in particular, I attach great importance to association and to free speech. It is through them that we can make our voice felt by the Government, and can stop the injustice that might be done to us. For attaining these rights the country had to make so many struggles, and after a grim battle succeeded in

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* [] Translation of Hindustani speech.

getting these rights recognised. But now, when the time for their enforcement has come, the Government feels hesitant;what was deemed as undersirable then is now being paraded as desirable. What is being given by one hand is being taken away by the other. Every clause is being hemmed in by so many provisos.

To apply the existing law in spite of change conditions really amounts to trifling with the freedom of speech and expression. From the very beginning we have stood against the existing laws, but now you are imposing them on us. You want to continue the old order so that there should be no opportunity of a trial, of putting up defence and of an appeal. If a meeting is held, then for breaking it up lathis may be used, and people may be put into jail without trial; their organisations may be banned and declared illegal. We do not like this shape of things. If you want to perpetuate all that, then I would like to say that by imposing all these restrictions you are doing a great injustice. There are a few rights to which I attach very great importance. You have included them in the articles relating to directive principles of State policy, and so we cannot go to a Court of law for their enforcement. You arediluting these rights with the result that nothing solid remains.

Mr. Vice-President, I want that these rights should not be restricted so much, and all opposition that is peaceful and not seditious should get full opportunity, because opposition is a vital part of every democratic Government.To my mind, suppression of lawful and peaceful opposition means

heading towards fascism.]

Seth Govind Das (C. P. and Berar: General): *[Mr. Vice-President, article 13 is the most important of all the articles concerning Fundamental Rights. The rights that have been granted to us by these articles are all very important. Yesterday Shri Damodar Swarup Seth and Shri K.T.Shah moved their amendments in this House. The purporse of the amendments is that the rights which have been given to us with one hand are being taken away by the other hand. This may be true to some extent but if we consider the present national and international situation as also the fact that we have achieved freedom only recently and our government is in its infancy, we shall have to admit that it was necessary for the government to retain the rights it has done after granting these fundamental rights. We should see what is happening in our neighbouring country, Burma. We should also keep in view what is happening in another great country of Asia--I mean war-torn China. In view of what is happening in our neighbouring countries and of the situation in our own country, we should consider how necessary it is that the Government should continue to have these powers.

I would have myself preferred that these rights were granted to our people without the restrictions that have been imposed. But the conditions in our country do not permit this being done. I deem it necessary to submit my views in respect to some of the rights. I find that the first sub-clause refers to freedom of speech and expression. The restriction imposed later on in respect of the extent of this right, contains the word 'sedition'. An amendment has been moved here in regard to that. It is a matter of great pleasure that it seeks the deletion of the word 'sedition'. I would like to recall to the mind of honourable Members of the first occasion when section 124 A was included in theIndian Penal Code. I believe they remember that this section was specially framed for securing the conviction of Lokamanya Bal Gangadhar Tilak. Since then, many of us have been convicted under this section. In this connection many things that happened to me come to my mind. I belong to a family which was renowned in the Central Provinces for its loyalty. We had a tradition of being

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*[] Translation of Hindustani speech.

granted titles. My grandfather held the title of Raja and my uncle that of Diwan Bahadur and my father too that of Diwan Bahadur. I am very glad that titles will no more be granted in this country. In spite of belonging to such a family I was prosecuted under section 124 A and that also for an interesting thing. My great grandfather had been awarded a gold waist-band inlaid with diamonds. The Brit ish Government awarded it to him for helping it in 1857 and the words "In recognition of his services during the Mutiny in 1857" were engraved on it. In the course of my speech during the

Satyagraha movement of 1930, I said that my great-grandfather got this waist-band for helping the alien government and that he had committed a sin by doing so and that I wanted to have engraved on it that the sin committed by my great-grandfather in helping to keep such a government in existence had been expiated by the great-grandson by seeking to uproot it. For this I was prosecuted undersection 124 A and sentenced to two years' rigorous imprisonment. I mean to say that there must be many Members of this House who must have been sentenced under this article to undergo long periods of imprisonment. It is a matter of pleasure that we will now have freedom of speech and expression under this sub-clause and the word 'sedition' is also going to disappear.

The next matter to which I would like to draw your attention is sub-clause (b) of this article. The expression" to assemble peacefully without arms", occurs in it. I want to draw your attention to the words "without arms" in particular. I agree that we should have the right of assembling in this way without arms only. We had accepted the creed of non-violence and through it we have

achieved freedom. It is true that in the present world situation weare compelled to maintain armies. But I hold that the welfare of humanity can be secured by means of non-violence alone. We should have a right of assembling but assembling without arms.

I would also like to draw your attention to the two following sub-clauses and these are sub-clauses (f) and (g)which run as follows:

"to acquire, hold and dispose of property;" and

"to practise any profession or to carry on any occupation, trade or business."

Speaking for myself I may say that just as I hold that humanity cannot achieve its welfare except through non-violence so also I do believe that there cannot be stable peace, unless and until private property is abolished. I am not a socialist or a communist but at the same time I hold that what the big capitalists, traders, zamindars,talluqdars have to do to protect their property does not allow of their enjoying true happiness. It is not true to say that people lacking wealth alone are unhappy. They are no doubt unhappy but in the present economy the moneyed are more unhappy than the moneyless, and this band of gold is today crushing the richman's neck. This wealth has been in their possession for long and that is why they are anxious to retain it. It is not for pleasure that they want to keep it. If they are forcibly deprived of their wealth, socialism or communism would not be established. The example of Russia bears testimony to it. Individual property was expropriated there by force and the result has been that it could not be

CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME VII

Monday, the 6th December 1948

The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Ten of the Clock, Mr. Vice-President (Dr. H. C. Mookherjee) in the Chair.

TAKING THE PLEDGE AND SIGNING THE REGISTER

The following Member took the Pledge and signed the Register:--

Shri K. Chengalaraya Reddy (Mysore).

DRAFT CONSTITUTION-(Contd.)

Article19-(Contd.)

Mr. Vice-President (Dr. H. C. Mookherjee): We shall now resume discussion on article 19.

Shri Lokanath Misra (Orissa: General): Sir, it has been repeated to our ears that ours is a secular State. I accepted this secularism in the sense that our State shall remain unconcerned with religion, and I thought that the secular State of partitioned India was the maximum of generosity of a Hindu dominated territory for its non-Hindu population. I did not of course know what exactly this secularism meant and how far the State intends to cover the life and manners of our people. To my mind life cannot be compartmentalised and yet I reconciled myself to the new cry.

The Honourable Pandit Jawaharlal Nehru (United Provinces: General): Sir, are manuscripts allowed to be read in this House?

Mr. Vice-President: Ordinarily I do not allow manuscripts to be read, but if a Member feels that he cannot otherwise do full justice to the subject on hand, I allow him to read from his manuscript.

The Honourable Pandit Jawaharlal Nehru: May I know what is the subject?

Mr. Vice-President: Mr. Lokanath Misra is moving an amendment to article 19. I ask the indulgence of the House because Mr. Lokanath Misra represents a particular point of view which I hold should be given expression to in this House.

Shri Lokanath Misra: Gradually it seems to me that our 'Secular State' is a slippery phrase, a device to by-pass the ancient culture of the land.

The absurdity of this position is now manifest in articles 19 to 22 of the Draft Constitution. Do we really believe that religion can be divorced from life, or is it our belief that in the midst of many religions we cannot decide which one to accept? If religion is beyond the ken of our State, let us clearly say so and delete all reference to rights relating to religion. If we find it necessary, let us be brave

Sir, with these words I support the amendment.

Shri H. V. Pataskar (Bombay: General): Mr. Vice-President, I have come forward only to take a few minutes of the House for supporting the amendment No. 528 which wants to substitute "except according to procedure established by law" by the words "without due process of law". Already the legal aspect of this matter has been discussed at length in this House, but I want to place it before the House from another point of view. We are, Sir, at the present moment in a state which is going to be a democracy. Now, democracy implies party Government and party Government, in our country, is rather new and we have instances which lead us to think that the party machine at work is likely to prescribe procedures which are going to lead to the nullification of the provisions which we have made in the Fundamental Rights, which are being given to the people. We know from experience that in certain provinces there are already legislations which have been enacted and which prescribe certain procedures for detention, which have come in for criticism by the public in a very vehement manner. I therefore, submit, Sir, that it is very essential from the point of view of the right of personal liberty, that the words "due process of law" should be particularly there. With these words, Sir, I support the amendment and would not like to repeat what has been said in favour of this amendment already.

Shri K. M. Munshi : Mr. Vice-President, Sir, I want to support amendment No. 528 which seeks to incorporate the words "without due process of law" in substitution of the words "except according to procedure established by law". In my humble opinion, if the clause stood as it is, it would have no meaning at all, because if the procedure prescribed by law were not followed by the courts, there would be the appeal court in every case, to set things right. This clause would only have meaning if the courts could examine not merely that the conviction has been according to law or according to proper procedure, but that the procedure as well as the substantive part of the law are such as would be proper and justified by the circumstances of the case. We want to set up a democracy; the House has said it over and over again; and the essence of democracy is that a balance must be struck between individual liberty on the one hand and social control on the other. We must not forget that the majority in a legislature is more anxious to establish social control than to serve individual liberty. Some scheme therefore must be devised to adjust the needs of individual liberty and the demands of social control. Eminent American constitutional lawyers are agreed on the point that no better scheme could have been evolved to strike a balance between the two. Of course, as the House knows, lawyers delight to disagree and there is a certain volume of opinion against it in America, but as pointed out by my honourable Friend, Mr. C. C. Shah, we have made drastic changes in the American clause. The American clause says that no person shall be deprived of his life, liberty or property without due process of law. That clause created great difficulties with regard to laws relating to property. That word has been omitted. The word `liberty' was construed widely so as to cover liberty of contract and that word has been qualified. This clause is now restricted to liberty of the person, that is, nobody can be convicted, sent to jailor be sentenced to death without due process of law. That is the narrow meaning of this clause which is now sought to be incorporated by amendment No. 528.

Now, the question we have to consider, I submit, is only this. What are the implications of this `due process'? Due process' is now confined to personal liberty. This clause would enable the courts to examine not only the procedural part, the jurisdiction of the court, the jurisdiction of the legislature, but also the substantive law. When a law has been passed which entitles Government to take away the personal liberty of an individual, 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 the social control. In the result, Governments will have to go to the court of law and justify why a particular measure infringing the personal liberty of the citizen has been imposed. As a matter of fact, the fear that in America the 'due process' clause has upset legislative measures, is not correct. I have not got the figures here, but I remember to have read it some where in over 90 per cent of the cases on the 'due process' clause which have gone to the American courts, action of the legislatures has been upheld. In such matters involving personal liberty Governments had to go before the court and justify the need for passing the legislation under which the person complaining was convicted. In a democracy it is necessary that there should be given an opportunity to the Governments to vindicate the measures that they take. Apart from anything else, it is a whole some thing that a Government is given an opportunity to justify its action in a court of law.

I know some honourable Members have got a feeling that in view of the emergent conditions in this country this clause may lead to disastrous consequences. With great respect I have not been able to agree with this view (Interruption). Take even our Public Safety Acts in the provinces. In view of the condition in the country they would certainly be upheld by the court of law and even if one out of several acts is not upheld, even then, I am sure, nothing is going to happen. Human ingenuity supported by the legislature and assisted by the able lawyers of each province will be sufficient to legislate in such a manner that law and order could be maintained.

Therefore, my submission is that this clause is necessary for this purpose and is not likely to be abused. We have, unfortunately, in this country legislatures with large majorities, facing very severe problems, and naturally, there is a tendency to pass legislation in a hurry which give sweeping powers to the executive and the police. Now, there will be no deterrent if these legislations are not examined by a court of law. For instance, I read the other day that there is going to be a legislation, or there is already a legislation, in one province in India which denies to the accused the assistance of lawyer. How is that going to be checked? In another province, I read that the certificate or report of an executive authority--mind you it is not a Secretary of a Government, but a subordinate executive--is conclusive evidence of a fact. This creates tremendous difficulties for the accused and I think, as I have submitted, there must be some agency in a democracy which strikes a balance between individual liberty and social control.

Our emergency at the moment has perhaps led us to forget that if we do not give that scope to individual liberty, and give it the protection of the courts, we will create a tradition which will ultimately destroy even whatever little of personal liberty which exists in this country. I therefore submit, Sir, that this amendment should be accepted.

Shri Alladi Krishnaswami Ayyar (Madras: General): Mr. Vice-President, Sir, the debate on this article reveals that there seems to be a leaning on the part of a good number of members in this House in favour of the expression `due process' being retained and not for substituting the expression `procedure established by law', which is the expression suggested by the Drafting Committee in its last stage. I am using the words `in its last stage' because my honourable Friend Mr. Munshi has taken the opposite view.

Sir, at least in justification of the change suggested by the Drafting Committee, I owe it to myself, to my colleagues and the respected Chairman of

the Drafting Committee, to say a few words, because, up to the last moment, presumably, the House is open to conviction.

The expression 'due process' itself as interpreted by the English Judges connoted merely the due course of legal proceedings according to the rules and forms established for the protection of rights, and a fair trial in a court of justice according to the modes of proceeding applicable to the case. Possibly, if the expression has been understood according to its original content and according to the interpretation of English Judges, there might be no difficulty at all. The expression, however, as developed in the United States Supreme Court, has acquired a different meaning and import in a long course of American judicial decisions. Today, according to Professor Willis, the expression means, what the Supreme Court says what it means in any particular case. It is just possible, some ardent democrats may have a greater faith in the judiciary than in the conscious will expressed through the enactment of a popular legislature. Three gentlemen or five gentlemen, sitting as a court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourses and arguments of briefed counsel on either side, may appeal to certain democrats more than the expressed wishes of the legislature or the action of an executive responsible to the legislature. In the development of the doctrine of 'due process', the United States Supreme Court has not adopted a consistent law at all and the decisions are conflicting. One decision very often reversed another decision. I would challenge any member of the Bar with a deep knowledge of the cases in the United States Supreme Court to say that there is anything like uniformity in regard to the interpretation of 'due process'. One has only to take the index in the Law Reports Annotated Edition for fifteen years and compare the decisions of one year with the decisions of another year and he will come to the conclusion that it has no definite import. It all depended upon the particular Judges that presided on the occasion. Justice Holmes took a view favourable to social control. There were other Judges of a Tory complexion who took a strong view in favour of individual liberty and private property. There is no sort of uniformity at all in the decisions of the United States Supreme Court.

Some of my honourable Friends have spoken as if it merely applied to cases of detention and imprisonment. The Minimum Wage Law or a Restraint on Employment have in some cases been regarded as an invasion of personal liberty and freedom, by the United States Supreme Court in its earlier decisions, the theory being that it is an essential part of personal liberty that every person in the world be she a woman, be he a child over fourteen years of age or be he a labourer, has the right to enter into any contract he or she liked and it is not the province of other people to interfere with that liberty. On that ground, in the earlier decisions of the Supreme Court it has been held that the Minimum Wage Laws are invalid as invading personal liberty. In recent times I quite realise, after the New Deal, the swing of the pendulum has been other way. Even there, there has not been any consistency or any uniformity. I hope that if this amendment is carried, in the interpretation of this clause our Supreme Court will not follow American precedence especially in the earlier stages but will mould the interpretation to suit the conditions of India and the progress and well-being of the country. This clause may serve as a great handicap for all social legislation, for the ultimate relationship between employer and labour, for the protection of children, and for the protection of women. It may prove fairly alright if only the Judges move with the times and bring to bear their wisdom on particular issues. But since the British days we have inherited a kind of faith in lawyers, legal arguments, legal consultations and in courts; I, for my part, having flourished in the law, have no quarrel with those people who believe in the lawyer. In the earlier stages of American history, lawyers ranged themselves on the side of

great Trusts and Combines and in favour of Corporations who were in a position to fee them very well, sometimes in the name of personal liberty, sometimes in the name of protection of property. After all the word `personal liberty' has not the same content and meaning as is imported into it by some of our friends who naturally feel very sensitive about people being detained without a proper trial. I equally feel it but that is not the meaning of personal liberty attributed by the American Courts in the context of `due process'. I trust that the House will take into account the various aspects of this question, the future progress of India, the well-being and the security of the States, the necessity of maintaining a minimum of liberty, the need for co-ordinating social control and personal liberty, before coming to a decision. One thing also will have to be taken into account, viz., that the security of the State is far from being so secure as we are imagining at present. Take for example the normal detention cases. I may tell you as a lawyer, I am against the man being detained without his being given an opportunity; but an opportunity is not necessarily given in a court of law, as a result of argument, as a result of evidence, as a result of examination or cross-examination. Today I know in Madras a Special Committee has been appointed consisting of a Judge of the High Court, the Advocate-General of Madras and another person to go into the cases of detention and to find out whether there are proper materials or not. Now,all these cases might have to go to Courts of law and possibly it is a good ...ng for lawyers. Though I am getting old I do not despair of taking part in those ...itests even in the future.

The support which the amendment has received reveals the great faith which the Legislature and Constitution makers have in the Judiciary of the land. The Drafting Committee in suggesting "procedure" for "due process of law" was possibly guilty of being apprehensive of judicial vagaries in the moulding of law. The Drafting Committee has made the suggestion and it is ultimately for the House to come to the conclusion whether that is correct, taking into consideration the security of the State, the need for the liberty of the individual and the harmony between the two. I am still open to conviction and if other arguments are forthcoming I might be influenced to come to a different conclusion.

Mr. Z. H. Lari : Mr. Vice-President, the last speaker who has spoken on this article has drawn the attention of the House to dangers to the State which are likely to arise if the article as it stands is amended by the amendment No.528 or 530. I have not got that experience which the learned speaker has but with the little knowledge of the working of the Legislatures during the last ten years, I can say that it is necessary not only in the interest of individual liberty but in the interest of proper working of legislatures that such a clause as due process of law clause should find a place in the Constitution. It is open to that speaker at the fag end of his life as a lawyer to have a fling at the profession of law but I can say that assistance of lawyers is absolutely essential to secure justice.

Shri Alladi Krishnaswami Ayyar: On a point of order. I had no fling at the profession of law.

Mr. Z. H. Lari: I stand corrected.

I feel that two things are necessary. We all know that the State, these days, is all-powerful. Its coercive processes extend to the utmost limits but still there is a phase of life which must be above the processes of Executive Government, and that is individual liberty. In America no such word as `personal' existed. There the word liberty alone existed and possibly in that state of things, it was possible to interpret it in such a way as to extend the scope of due process of law to other spheres of life but when the word `personal liberty' has been definitely inserted in

the clause, I doubt whether any Court which is conscious of the requirements of a State as well as conscious of the necessities of individual liberty, will be so uncharitable to the interest of the State as to interpret it in a way to thwart the proper working of the State. My friend admitted that in the latter rulings in America itself there has been a recognition of the necessities of the State and the word has been interpreted in such a way as not to obstruct the proper working of the State. My submission would be that in this land our Supreme Court will recognise the limits of individual liberty as well as the necessities of the State and interpret it in such a way as to ensure individual liberty of a man.

Pandit Thakur Dass Bhargava: The Drafting Committee also said so in their note.

Mr. Z. H. Lari: My friend is right; and the only reason which was given by the Drafting Committee of which the honourable Speaker who preceded me was a member also, was that the words `due process of law' is not specific and the word as was used in the Japanese Constitution is more specific. No doubt the words as they stand in the Japanese Constitution are specific because the procedure is indicated and definitely laid down there. What is the essence of the due process of law? I think they are two. First is, enquiry before you condemn a man. And then there is judgment after trial. If any procedure which is adopted by any legislature provides for the hearing of a person who is suspected or is accused, and then after a proper hearing, enables him to get the benefit of a judgment based on that enquiry, my submission is, that the requirements of the due process of law are complied with. And I would beg of the House to consider whether in any country, however emergent and however unstable its conditions, is it necessary or is it not necessary that every individual citizen should feel that he will be heard before he is condemned, and that he will be dealt with in the light of the judgment based on the enquiries and not be subject to arbitrary detention? The House will also remember that lately there was the question of drafting human rights, and already such a draft has been prepared. And one of the clauses therein is that nobody should be subjected to arbitrary detention. Now, what is the way to prevent arbitrary detention? If you have the words in this clause, as they stand at present, namely, `procedure established by law' it means that the legislature is all-powerful and whatever procedure is deemed proper under the circumstances will be binding upon the courts. But, Sir, there are certain procedures which are the inherent rights of man and the should not be infringed upon by any legislative Assembly. Men as well as assemblies, or any mass of people are subject to passing emotions, and you will realise that in the present state of things, particularly keeping in view the constitution that we are going to have; namely, a parliamentary government, the legislature is controlled by a Cabinet, which means by the executive. You have also the provisions about having ordinances which means that the cabinet--a body consisting of eight to ten persons--decide upon a particular course of action, issue as an ordinance, and, the legislature then has to approve of it, otherwise it would amount to a vote of censure. Therefore the legislature in the last analysis means only the cabinet or the executive and nothing but the executive. The question before us is whether you are going to give such powers to the Executive which can infringe even the elementary rights of a person, the elementary rights of personal liberty, or whether you should not put certain checks on the executive which can be done only if you accept the amendment which has been moved by a Congress member, *i.e.*, amendment No. 528. My amendment No. 530 is exactly similar.

My friend who spoke on the other side gave instances of legislation in the British period, of rights which were curtailed, and of innocent persons jailed. But I submit with all humility, that every legislature and every government is liable to

do such things which the British Government did. You cannot excuse excess of law simply because those excesses are committed by a popularly elected legislature. That is why there are two domains, one is the domain of individual liberty, and the other domain is where the State comes in to regulate our life. What do you leave to the State? You leave to the State everything except personal liberty. As to stability of the State my submission would be that if there are classes or communities which are prone to violence, there are sufficient provisions in this Constitution to deal with them--they are in article 13.There, the State can come in and curtail the liberty of such persons, and even nullify their activities. What can an individual do? If there are parties which have got objectives which run counter to the stability of the State, you have already got enough provisions where-by the State can declare those bodies unlawful. But this particular clause deals with a very small sphere of action, namely, personal liberty. My submission is that our State is not so weak as to be subverted by the activities of a particular individual, and mark that, that individual will not have the liberty to do everything. He can be brought before a court. He can be judged in a court of law; no doubt, he will have the assistance of counsel and the Government will have the obligation to produce evidence against him. Does this amount to curtailing the powers of the State? Does this amount to subverting the State? Does it amount to annihilating the State? With all respect to the previous ?aker, I feel he took a very uncharitable view of the citizens of our State, and ?k a still more uncharitable view of the strength of the State which will emerge after the promulgation of the new Constitution. No doubt, we have to go by realities. We have to take into consideration stern facts. But I may remind the House of one thing. In America, this clause is accepted and is reproduced in the Japanese Constitution. You know the Americans have been responsible for framing the Japanese Constitution. A constitution for a fascist country, a country where individuals are prone to violence--they wanted to overthrow the peace of the world--when they were drafting a constitution for such a country, composed of such citizens, they laid down clauses 31, 32, 33 and 34 which say that nobody shall be denied access to courts, nobody shall be arrested unless causes are shown against him, and nobody shall be denied the privilege of the assistance of counsel. May I say that if the framers of this latest constitution, based on experience and knowing the nature of the people living in Japan, who are not a very peace-loving people as was demonstrated in the last war, have accepted these provisions, that means that these provisions have stood the test of time and have safeguarded the liberty of the individual and also guaranteed the integrity of the state. There are two things by which we have to go. One is experience of others. No doubt, every clause can be criticised in one way or other. But we have to be guided by experience. Here is the experience of other countries, and this has shown that the words 'due process of law' can exist without jeopardising the existence of the State. Secondly, we know that not only here, but throughout the world every assembly is likely to misuse its power. It is bound to happen. Power corrupts. We should profit by the experience of other countries and by what has been observed for centuries. Or should we go by the *ipse dixit* of X, Y, Z who says that there seems to be some germ of disruption in this clause? My submission is that it is only making a bogey out of nothing. We should not be led away by this bogey into accepting this clause. If this clause is accepted, then the whole Constitution becomes lifeless. The article, as it stands, is lifeless and it makes also the whole Constitution lifeless. Unless you accept this amendment, you would not earn the gratitude of future generations. Therefore, Sir, I pray that this motion which has been supported by several members should be accepted.

With these words, Sir, I support the amendment.

Mr. Vice President: The House stands adjourned till 10 A.M. tomorrow.

The Constituent Assembly then adjourned till ten of the Clock on Tuesday the 7th December, 1948.

[Translation of Hindustani speech.]

Friday, the 10th December 1948

The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Ten o'clock, Mr. Vice-President (Dr. H. C. Mookherjee) in the Chair.

B. Pocker Sahib Bahadur (Madras: Muslim): Mr. Vice-President, Sir, may I have your permission to move that the House adjourn at one o'clock as to-day Friday and the Muslim members have to attend their Jumma prayers?

Mr. Vice-President (Dr. H. C. Mookherjee): We shalladjourn at one o'clock. That much of consideration will beshown to our Muslim brethren and I am quite sure that the House agrees with me.

Honourable Members: Yes.

B. Pocker Sahib Bahadur: Thank you, Sir.

Article 27-A

Mr. Vice-President: We shall consider Amendment No. 824to article 27-A:

(The amendment was not moved.)

Mr. Vice-President: Amendment No. 825 also in the name of Dr. Raghuvira. He is not in the House.

(Amendment No. 825 was not moved.)

Mr. Vice-President: Now we come to Part V. On page 106of the printed list of amendments, we have amendment No.1032 on the new articles 41--44 in the name or Shri GopalNarain.

Prof. K. T. Shah (Bihar: General): Sir, may I remind you that an amendment of mine was held over--amendment No.1030--which involves a big principle. By agreement it was held over with article 40-A. That is on page 105.

Mr. Vice-President: Yes, amendment No. 1030, Prof. K.T. Shah.

New Article 40-A

Prof. K. T. Shah: Mr. Vice-President, Sir, I beg to move:

'That after article 40, the following new article be inserted:

'40-A. There shall be complete separation of powers as between the principal organs' of the State, viz, the Legislative, the Executive, and the Judicial.'"

Sir, I regard this as the most important, the very basic requirement of what I would call a Liberal constitution. I am aware, Sir, that this Draft has been founded on the compromise between what are known as Presidential governments and Parll amentary governments. The Parll amentary government has a sort of link between the Executive, the Legislative and the Judiciary. The Presidential tries to keep no such link, and has complete separation of powers between the three principal organs o the State, each embodying the sovereignty of the people in the different aspects of a State's activities.

The ideal, however, and the reasons for that ideal,which have guided many modern States in basing their constitution upon a doctrine of complete separation have arisen from bitter past experience. In the constitutions like that of England centuries ago, the ultimate combination of all authority in the person of the King, had lead to many evils culminating in a Civil War, ending in the execution of one king, and a bloodless Revolution leading to the adbication or expulsion of another king. The arrangement which was evolved thereafter has been kept in conformity with the genius of the British people, not so much by a written Constitution, as by evolving constitutional conventions, supported by centuries of usage. And these have become even more sacred than the written word in a written constitution.

But I do not think this will be applicable to us in this country at this moment. I do not think that it would be easy to realise in new grounds, where new experiments of self-government are being tried on an imperial scale. As such I feel persuaded that when we start our own Constitution, when we make a beginning in this land, in theworking of democracy, I think it would be best if we havecomplete separation of powers between the three principal organs of the State.

For one thing, Sir, if you maintain the complete independence of all the three, you will secure a measure of independence between the Judiciary, for example, and the Executive, or between the Judiciary and the Legislature.This, in my view, is of the highest importance in maintaining the liberty of the subject, the Civil Liberties and the rule of law. If there was contract between the Judiciary and the Legislature, for instance, if it was possible to

interchange between the highest judicialofficers and the membership of the legislature, then, I am afraid, the interpretation of the law will be guided much more by Party influence than by the intrinsic merits of each case. The Legislature in a democratic assembly is bound to be influenced by Party reasons rather than by reasons of principle.

I am not decrying Parties. Please do not misunderstand me. All I am saying is that after all, Parties are mundane,dealing with mundane things, and as such they are bound to attach much more importance to considerations of the moment,to merely transitory ideas, to importance of personalities,by which a Judiciary would not be affected. It is of theut most importance that the Judiciary should be above suspicion, and, therefore, out of or above any contamination. I hope the word is not hard to anybody. It should be above containination by political prejudices that are rife in all political parties.

If contact or connection is maintained between the Judiciary and the Executive organs of the State, there is also the possibility of undue influence, of misleading, of misdirecting and mis-influencing those who are appointed to interpret the Constitution, those who are appointed to be guardians of Civil Liberties, those who have to administer justice.

In the environment in which we are living, in the traditions under which our judicial system has been evolved,I am afraid justice is a very costly luxury. It is really not the easy privilege of the poor man. Though you have provided a number of appeals, though you have provided a hierarchy of powers, you have also evolved, side by side, amost costly, a most wasteful, a most extravagant system of legal advice and legal assistance by professional lawyers,which only those who have undergone protracted litigationknow how costly it is, how confusing, and how almost prohibitive it is, to ordinary mortals.

But even so, even granting that justice must not be cheap and must be available to those who can pay for this luxury, let it not be tainted, I beg you, let it not be influenced by considerations other than the intrinsic merits of each case.

When the chapter dealing with the Judiciary comes up before the House I may have occasion to move other amendments to point out where and how our present system suffers. But we should have the ideal of absolute purity of justice; even though it should happen to be class justice,let us make it at least free from taint of ulterior motives.The administrators of justice are unconsciously or sub-consciously coloured by their own inherited or acquired class prejudice. That cannot be helped all at once. But leaving that aside, and leaving aside even such a matter as was discussed yesterday in the House--of having the right to move the Supreme Court--I would say that,

so long as you have not merely the combination of the Judiciary and the Executive, but also the possibility of translation from a high judicial office to an equally high or sonorous executive office; so long would your Judiciary be open to suspicion, so long your administration of justice would suffer by personal privileges or personal ambitions, and so long, therefore, you will not be able to maintain your civil liberties to the degree and in the manner of purity that is highly desirable in a country like this.

I would, therefore, suggest, in the first place, that the Judiciary should in any case be completely separated,and should attach regard only to the written letter of the law, irrespective, let us say, of the debates in this House at the time the Constitution itself was passed, irrespective of Party or personal considerations, irrespective of anyother motives that might otherwise affect human and mundane things.

The same logic, in a different form, applies also to the case of the Legislature and the Executive. The less contact, there is between them, the better for both, Iventure to submit. The executive is in a position to corrupt the House; the executive is in a position to influence votes of the members, by the number of gifts or

favours they have in their power to confer in the shape of offices, in the shape of Ministerships, in the shape of Ambassadorships, in the shape of Consulships, and any number of offices which the Executive has it in its power to be stow. We have come to a stage in political evolution when the old system called the "spoils system" is no longer upheld in any civilised country. But yet, in fact, it does happen that fifty, sixty,seventy, a hundred people may be open to be influenced by those who have it in their power to distribute even the highest offices of the State. In England, for instance, out of 615 Members of Parll ament, something like 70 members are Cabinet Ministers or Parll amentary Secretaries, or other Ministers and so on. This on a minor scale--I hope the House will pardon me for saying so--we are trying to reproduce here, by creating Ministers and Ministers of State and Deputy Ministers, and I suppose Parll amentary Secretaries to come. These may be--and I am sure they are--all honourable people influenced entirely by the desire of offering their services and their talents to the service of the country.But still the fact remains that the influence of the Party system, the idea of favouring one's own people, those who agree with them and become their camp-followers, is a much more influential and important consideration, than the absolute and exclusive eye to the merits or the fitness or the appropriateness of an individual for an office.

It is the exigency of Parll amentary government, as it has been developed in the West and which we are copying,that the consideration most prominent in such appointments is how many votes can an individual bring if he is

appointed to a given ministerial office rather than how much realservice he would be able to render to the country. As such for one unhesitatingly and unexceptionally condemn thesystem of Parll amentary Government, the system of a link between the Legislature and the Executive on which this Constitution is based.

I know that my voice almost appears as a voice in the wilderness. But I think it my duty to place this on record that, after a close study of the working of Constitutionselse where, after a close study stretching over perhapsthirty-five years of the development of political institutions in this country, and their influence on our public life, on our public morality, on even our private relations, I venture to suggest that this is not a very healthy example we are copying; and that the sooner we get rid of the combination of executive, judiciaryand legislature in some supreme Cabinet, in some supreme authority, the better for us it would be.

Lastly, Sir, I come to the division between the Executive and the Legislature. It has worked for over a hundred and fifty years in America, quite satisfactorily,where the Legislature and the Executive are kept wholly apart. They had before them, much more than we have before us, the model of the English Constitution where the combination had already been achieved to a degree ofperfection, that was looked upon even by such students as Burke or Fox as the basis of their Civil Liberties, of the liberalism of the English Constitution.

Nevertheless, under the influence and aegis of scholarsand thinkers of the type of Jefferson, they did devise a constitution which kept completely apart the Legislature,the Executive and the Judiciary. For a hundred and sixty years that Constitution has worked without any serious difficulty. Even in the midst of wars, and even underinternal civil war, they have been able to maintain their freedom and their liberal constitution. That would not have been the case, if they had started on the same lines, and worked their Party system in the same manner that the Whigsused for perhaps a century.

I could go on saying a great deal on this subject without once repeating myself. But I am aware that the patience of the Chair is not unlimited; and I know the temper of the House is not very sympathetic; and so having said my say in this matter, I would commend my proposition such as it

is to the House.

Shri K. Hanumanthaiya (Mysore): Sir, I listened with great respect to Prof. Shah's argument about his amendment.I fear the new clause he has moved is completely out of tune with the constitutional structure which this House has proposed and the Drafting Committee has adumbrated. We in this House

have given our approval to parll amentary system of government, and what Prof Shah sponsors in his amendmentis, I might say, the Presidential executive. Of course, we can argue about the merits and demerits of both the systems,but we have come to accept the parll amentary system to be suitable to this country and for very good reasons that system seems to be better adapted to conditions in India than Presidential executive. I think instead of having a conflicting trinity it is better to have a harmonious governmental structure. If we, as he says, completely separate the executive, judiciary and the legislature,conflicts are bound to arise between these three Departments of Government. In any country or in any Government,conflicts are suicidal to the peace and progress of the country. The first and foremost foundation on which a Government or society can work is peace to begin with and if there is separation--not separation but Prof. Shah wants complete separation--then conflicts are sure to arise between these three Departments of Government. Therefore, I say that in a Governmental structure it is necessary to have what is called "harmony" and not this three-fold conflict.

Then, it has become the fashion of the day with some people to decry the executive and make the judiciary look as if it is the paragon of all virtues. I would respectfully place this view before Prof. Shah and people of his way of thinking. Where as judges no doubt are impartial and they have no sides to take, we must remember also that the executive governments in India or any where else in the world, have to work under very difficult circumstances. To carry on a government and to please people is not an easy matter. Many a time they work under difficult circumstances with danger to their lives. They will naturally incurdispleasure. Some people are prone to take advantage of these conditions and displeasures to raise controversies andto decry the executive. To continually decry the executive and the legislature and to exalt the judiciary is not doing service either to the judiciary or to the governmental structure. If understand the term correctly, independence of the judiciary means that the executive or its officers should not interfere in the day to day administration of justice.That does not mean, as some people interpret it, that the judiciary must be the master of the executive or should be on a par with the executive government. Government in any country must govern. The powers of governing should vest with one set of people and it is unsafe for us to divide it into three equal parts and especially in the extreme degree that Prof. K. T. Shah contemplates. Even in America, though theoretically there is complete separation of powers between these three departments, we all know the party system of Government softens its rigours to a very great extent. In America there are two well organised parties and these parties determine what is to be done in their respective party meetings. At these meetings, conflicts which could have arisen between these three departments of Government,are softened, smoothened and ironed out so that the evils of this system are eliminated. Sometimes when one party has amajority in the Legislature and another in

the executive,conflicts surely arise. In order to make the judiciary impartial it is unnecessary for us to exalt it to the position of the Government or the Legislature. It is wrong to argue that a few judges of the Supreme Court are betterthan four hundred Members of the Legislature, the duly chosen representatives of the people, or the accredited leaders of the nation. This is a topsy-turvy argument. The sooner we give up this psychology which is born of political controversies, the better.

Therefore, I oppose the new clause. My main reason is that this House is wedded to a parll amentary system of democracy and this new clause is outof place in such a constitutional structure.

Prof. Shibban Lal Saksena (United Provinces: General):Sir, I agree with my friend, Mr. Hanumanthaiya that the clause as it stands here in the amendment will not be in its proper place in the Constitution. Yet I cannot help saying that I agree to a very great extent with the reasoning advanced by my learned friend, Prof. K. T. Shah. We haveexperimented with parll amentary democracy for so many years.Now I personally feel that, though Dr. Ambedkar in hisoriginal address very clearly told us that we have to choose between the British system and the American system, and said that the American system gives more security and the British system more responsibility, yet we had decided here to choose more responsibility; if it were left to his choice he would have preferred the American system. I agree to a very great extent about the evils of the present parll amentary system. We have seen parll amentary parties in so many provinces like in Sind, in Bengal and in other places, where Ministers try to keep their parties by giving bribes to the people who have even four or five votes so that the majority party may remain in being. I feel that this system where in people have merely to keep the majority in power is being put to abuse. I know that in England they are working the system in a perfect manner. But they have a tradition of 700 years. They have developed their methods whereas we are just entering upon our democratic freedom and we cannot imitate it to perfection. It will have to wait until the whole national character changes and it is not possible that we can imitate England. Probably our slavery has led us to imitate the British system. If left to our selves we would have copied the American system. In that system there is complete separation of the judicature from the legislature and the legislature from the executive. The legislature there can pass any laws which it thinks best for the country and the President has to obey them. Here the Leader of the majority party must have the House with him. The House will only pass those laws which the party thinks are necessary.The legislature cannot be independent of, but it has to be submissive to, the executive. In most places where the leaders are outstanding, the parties will say "ditto" towhat they say and the real will of the majority will not bevoiced. Therefore I think this becomes more like a one-man Government than anything else.In America, people are free; they

can pass laws even against the President. There have been cases where in spite of the laws passed by the legislature--the Congress--it has been set aside by the Supreme Court and the President has to see that any action of his is not against the fundamental laws of justice. The Supreme Court is far more powerful than anyone else. I, however, think that now we have gone too far to change the basis of our Constitution, because in the last two years we have passed everything in accordance with the British Constitution, and probably it is too late now in theday to change the whole system. But I do think that there is great force in what Prof. Shah has said and though this amendment is not in its proper place, still I do think that this House will remember that although we are all for a system which has been tried in England and is being worked out there in a satisfactory manner, still in our country wewill have to be careful to develop traits which make thatconstitutional working possible. In England, they couldthrow out even Churchill in the new elections although hewas the man who saved England and her freedom. Have we thatsort of characteristic in our country where we can throw outanyone if we think he is not good enough? What is necessaryfor our country we must do, even though it may be againstthe will of the biggest person. Until then, we cannot workpârll amentary democracy. I therefore think that thisamendment has given this

House an opportunity to express itsdoubt as to whether we have done wisely in accepting thepresent system. But I think it is now too late in the day tochange the whole system and also that this amendment has noplace at this time. It should have really come as a changeof the whole system. But still, I think that where theSupreme Court is concerned, I wish it were appointed by themajority in the legislature and not by one single person.Everywhere, its independence must be guaranteed and I havegiven amendments that the Supreme Court must be completelyindependent of the judicature and the legislature. It mustbe the one body which should decide what is guaranteed withrespect to our liberty, etc. I hope this amendment will atleast help us to see that the Supreme Court's independenceis not in any way minimized. In regard to this I heard oneof the most eminent authorities in the Assembly say "Todaythe High Courts are not independent; they are influenced bythe political consequences of their actions".

I hope in future our Supreme Court will be free fromthese influences and that they will do what is necessary andobserve the principles inherent in this Constitution.

Kazi Syed Karimuddin (C. P. and Berar: Muslim): Sir, I am entirely in agreement with the amendment of Prof. K. T.Shah. I know that the system approved by the ConstituentAssembly is a Parll amentary system of government but eventhen I had urged the adoption of a non-parll amentary systemof government in India. We have seen since 1920, that theworking of

Cont. of debates surrounding amendment of Article 15 (Life & Liberty) - Amendment to remove 'personal' from personal liberty - Amendment failed

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CONSTITUENT ASSEMBLY OF INDIA - VOLUME VII

Monday, the 13th December, 1948

Article 15

Mr. Vice-President: With the permission of the House, Ishould like to revert to an article left over: that isarticle 15. I have before me the proceedings of the Housefrom which it appears--this was considered on the 6thDecember last--that general discussion had concluded and Ihad called upon Dr. Ambedkar to reply. At that time it wassuggested that efforts should be made to arrive at some kindof understanding so that those who had submitted certainamendments might feel satisfied. I do not know the positionnow; but we cannot wait any longer. Dr. Ambedkar, will youplease make the position clear? If no understanding has beenarrived at, I would ask you to reply.

The Honourable Dr. B. R. Ambedkar: Mr. Vice-President.I must confess that I am somewhat in a difficult positionwith regard to article 15 and the amendment moved by myFriend Pandit Bhargava for the deletion of the words"procedure according to law" and the substitution of thewords "due process".

It is quite clear to any one who has listened to thedebate that has taken place last time that there are twosharp points of view. One point of view

says that "due process of law" must be there in thisarticle; otherwise the article is a nugatory one. The otherpoint of view is that the existing phraseology is quitesufficient for the purpose. Let me explain what exactly "dueprocess" involves.

The question of "due process" raises, in my judgment,the question of the relationship between

the legislature and the judiciary. In a federal constitution, it is always opento the judiciary to decide whether any particular law passedby the legislature is ultra vires or intra vires inreference to the powers of legislation which are granted bythe Constitution to the particular legislature. If the lawmade by a particular legislature exceeds the authority of the power given to it by the Constitution, such law would beultra vires and invalid. That is the normal thing thathappens in all federal constitutions. Every law in a federalconstitution, whether made by the Parll ament at the Centreor made by the legislature of a State, is always subject toexamination by the judiciary from the point of view of theauthority of the legislature making the law. The 'dueprocess' clause, in my judgment, would give the judiciarythe power to question the law made by the legislature onanother ground. That ground

would be whether that law is inkeeping with certain fundamental principles relating to therights of the individual. In other words, the judiciarywould be endowed with the authority to question the law notmerely on the ground whether it was in excess of theauthority of the legislature, but also on the ground whetherthe law was good law, apart from the question of the powersof the legislature making the law. The law may be perfectlygood and valid so far as the authority of the legislature isconcerned. But, it may not be a good law, that is to say, itviolates certain fundamental principles; and the judiciarywould have that additional power of declaring the lawinvalid. The question which arises in considering this matter is this. We have no doubt given the judiciary thepower to examine the law made by different legislativebodies on the ground whether that law is in accordance with the powers given to it. The question now raised by theintroduction of the phrase `due process' is whether thejudiciary should be given the additional power to questionthe laws made by the State on the ground that they violatecertain fundamental principles.

There are two views on this point. One view is this;that the legislature may be trusted not to make any lawwhich would abrogate the fundamental rights of man, so tosay, the fundamental rights which apply to every individual,and consequently, there is no danger arising from theintroduction of the phrase `due process'. Another view is this: that it is not possible to trust the legislature; the legislature is likely to err, is likely to be led away bypassion, by party prejudice, by party considerations, and the legislature may make a law which may abrogate what maybe regarded as the fundamental principles which safeguardthe individual rights of a citizen. We are therefore placedin two difficult positions. One is to give the judiciary theauthority to sit in judgment over the will of the legislature and to question the law made by the legislatureon the ground that it is not good law, in consonance withfundamental principles. Is that a desirable principle? Thesecond position is that the legislature ought to be trustednot to make bad laws. It is very difficult to come to anydefinite conclusion. There are dangers on both sides. Formyself I cannot altogether omit the possibility of aLegislature packed by party men making laws which mayabrogate or violate what we regard as certain fundamentalprinciples affecting the life and liberty of an individual.At the same time, I do not see how five or six gentlemensitting in the Federal or Supreme Court examining laws madeby the Legislature and by dint of their own individualconscience or their bias or their prejudices be

trusted to determine which law is good and which law is bad.It is rather a case where a man has to sail betweenCharybdis and Scylla and I therefore would not say anything. I would leave it to the House to decide in any way itlikes.

Mr. Vice-President: I shall now put the amendments oneby one to vote. No. 523.

The question is:--

"That in article 15, for the words "No person shall bedeprived of his life or personal liberty except according

toprocedure established by law" the words "No person shall bedeprived of his life or liberty without due process of law"be substituted."

The amendment was negatived.

Mr. Vice-President: The question is--

"That in article 15, for the words "except according toprocedure established by law" the words "due process of law"be substituted."

The amendment was negatived.

Mr. Vice-President: No. 528.

Shri S. V. Krishnamurthy Rao (Mysore): I do not pressit.

The amendment was, by leave of the Assembly, withdrawn.

Mr. Vice-President: No. 530.

The question is:--

"That in article 15, for the words "procedureestablished by law" the words "due process of law" besubstituted."

The amendment was negatived.

Mr. Vice-President: No. 526

The question is:--

"That in article 15 for the words "except' according toprocedure established by law' the words "save in accordancewith law" be substituted."

The amendment was negatived.

Mr. Vice-President: No. 527.

The question is:--

"That in article 15 for the words "except according toprocedure established by law the words "except in accordancewith law" be substituted."

The amendment was negatived.

Mr. Vice-President: I shall put the article to vote.

The question is:--

That article 15 stand part of the Constitution.

The motion was adopted.

Article 15 was added to the Constitution.

Monday, the 23rd May 1949

The Constituent Assembly of India met in the Constitution Hall, New Delhi, at Five of the Clock in the afternoon Mr. President (The Honourable Dr. Rajendra Prasad) in the Chair.

DRAFT CONSTITUTION-(*Contd.*)

Article 67-A-(*Contd.*)

Mr. President : We will take up article 67-A which was taken up the other day and was postponed.

The Honourable Dr. B. R. Ambedkar : (Bombay : General): Sir, I move for permission of the House to withdraw this article.

Mr. President : I think he did not move it and so there is no question of withdrawing it.

Mr. B. Pocker Sahib (Madras: Muslim) : No, it was taken up and the house is in possession of it. The honourable Member should therefore give his reasons for withdrawing it.

Mr. President : Yes, I am sorry I made a mistake. The honourable Dr. Ambedkar may give his reasons for withdrawing the article.

The Honourable Dr. B. R. Ambedkar : Sir, my reason is this. As I explained on the last occasion, we have made a provision for nominating certain persons to parliament. The original proposal was to nominate fifteen persons; subsequently it was decided that these fifteen persons should be divided into two categories, *viz.*, twelve representing literature, science, arts, social services, and so on; and a further provision should be made for the nomination of three persons to assist and advise the Houses of Parliament in connection with any particular Bill. I feel Sir, that the provision which is already contained in article 67 which permits the President to have twelve persons nominated to Parliament would serve the purpose which underlies this new article 67-A. The services that would be rendered by the persons nominated, if article 67-A were passed into law, would be also rendered by the persons who would be nominated under article 67; and therefore the nominations under article 67-A would be merely a duplication of the nominative system covered in article 67. Besides, it is felt that in an independent Parliament which is fully sovereign and representative of the people there should not be too much of an element of nomination. We have already twelve; there may be some nominations also regarding the Anglo-Indians; and it is felt that to add to that nominated quantum would be derogatory to the popular and representative character of Parliament. That is why I wish to withdraw this article 67-A.

Article 67-A was, by leave of the Assembly withdrawn

we wait for six, seven or eight months and the Legislature considers the ordinance only after that. But when the ordinance relates to the peace or security of the country, or to similar circumstances, requiring extraordinary action to be taken by the executive under an Ordinance, then I think, we have to see that the period during which the Ordinance remains in force is as short as possible, and that any legislation that may be required should be passed by Parliament after a due consideration of all the circumstances.

Sir, my objection is not merely that the period during which the ordinance may remain in force is too long; it also relates to the character of the Ordinance that may be promulgated. The executive may not be required in all its details. It is therefore necessary that the legislature should be given an opportunity, not merely of considering the situation requiring the passing of an Ordinance, but also the terms of the Ordinance. It is quite possible, Sir, that the legislature, while taking the view that some legislation is necessary, may not agree completely with the Executive, and may modify the Ordinance that has been promulgated. For these two reasons, Sir, I consider it very necessary that the power of passing an Ordinance given to the executive should be much more limited than it would be under article 102. I hope that my honourable Friend Dr. Ambedkar will give the matter the consideration that it deserves and will agree with me that this is a matter in regard to which, if necessary, the House may be asked to postpone consideration, if he is not ready with the necessary amendment.

It is quite possible Sir, that the amendment in the form in which I have put it may be defective. It may be perfectly easy for any Member to get up and point out the defects in it. But what is necessary is not that destructive criticism should be resorted to, but that such action should be taken as will be consistent with the new constitutional status of the country, and be in conformity with the responsibilities of the legislature.

Mr. President : May I just point out that you have to move amendment No. 1805 also, as that becomes necessary in case this amendment is accepted.

Pandit Hirday Nath Kunzru : Yes, Sir, I agree. I see that it should be moved. I therefore move, Sir:

"That the Explanation to clause (2) of article 102 be omitted."

I need not say anything about this amendment, because it is a necessary consequence of the amendment that I have already moved.

Mr. President : Mr. Jaspat Roy Kapoor has given notice of an amendment to this amendment. Does he move it?

Shri Jaspat Roy Kapoor : No, Sir.

Mr. President : Prof. Shah.

Prof. K. T. Shah : Mr. President, Sir, I beg to move:

"That in sub-clause (a) of clause (2) of article 102, after the word 'Parliament', where it first occurs, the words 'immediately after each House assembles' be inserted; after the word 'and' where it first occurs the words 'unless approved by either House of Parliament by specific Resolution' and after the word 'operate' the word 'forthwith' be inserted; and the words 'at the expiration of six weeks from the re-assembly of Parliament, or if, before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; be deleted."

Sir, the amended clause would be thus:

"Every such Ordinance shall be laid before both Houses of Parliament immediately after each House assembles, and unless approved by either House of Parliament by specific Resolution, shall cease to operate forthwith."

The words "at the expiry of six weeks, etc. etc.", will be all gone.

Sir, the principle of my amendment is the same as that which found such a powerful support from Pandit Kunzru. Most of us, I am sure, view with a certain degree of dislike or distrust the ordinance-making power vested in the Chief Executive. However we may clothe it, however it may necessary, however much it may be justified, it is a negation of the rule of law. That is to say, it is not legislation passed by the normal Legislature, and yet would have the force of law which is undesirable. Even if it may be unavoidable, and more than that, even if it may be justifiable in the hour of the emergency, the very fact that it is an extraordinary or emergency power, that it is a decree or order of the Executive passed without deliberation by the Legislature, should make it clear that it cannot be allowed, and it must not be allowed, to last a minute longer than such extraordinary circumstances would require.

This power is either not given in many constitutions, to the chief executive; or if given it is restricted as effectively and rigorously as possible, in some such manner as is proposed by this amendment. That is to say, if the ordinance has to be passed, in the hour of emergency or to meet extraordinary circumstances, it must be laid before either Houses of Parliament immediately it assembles; and unless each House approves of it by a Specific Resolution, it must cease to operate forthwith. This is the minimum needed in the interests of civil liberty.

I think we cannot show our distrust of this extreme power in the hands of the Executive more clearly than by requiring that, unless Parliament approves and thereby makes it, so to say, its own Act, unless the Legislature makes it its own enactment, executive legislation of this kind, passed by the President, must cease to operate immediately. We must leave no room for any doubt as to the maximum length of time during which the Presidential Ordinance can remain in operation. If Parliament is not in sessions, or if a general election is pending and therefore Parliament is not able to meet a margin of time may be allowed; but it must be the shortest possible. In that case, of course, other amendments which have been moved will operate, and I hope will operate, that is to say, the maximum life of the Ordinance must be limited by the Constitution. Even if it is any time necessary, even if it is unavoidable and justifiable under an emergency, the maximum life of the ordinance must be limited to three or four weeks, or six weeks at the most. The period is immaterial: the principle is important. By saying that the period is immaterial I do not suggest that it can be extended to any length. All I say is that between three, four or six weeks not much material difference may be found. Ordinance-making by itself being an unusual, extraordinary, and undesirable power, it should be qualified by a maximum period being described for its life.

Secondly, if a longer period or duration appears necessary, in any case within that period, the Parliament must be called; and either house must consider the Ordinance, and unless approved by each House by a special resolution the ordinance must be deemed forthwith to cease to operate.

On those terms, and under those limitations only, I think it may be possible to agree to this extraordinary power being vested in the President.

It is true that though the nominal authority which makes the Ordinance, is that of the President, he would be acting only on the advice of the Prime Minister and the Prime Minister naturally would be responsible to Parliament, where the ordinary remedies of responsible Ministries may take effect. Inspite of this factor, I would not leave it to the exigencies, or to the possibilities of party politics, to see that such extraordinary powers

are exercised at any time or for any time, and that is why I would require, under the constitution and by the constitution, that a maximum period is prescribed to the life of an ordinance; and that a definite procedure be laid down whereby the ordinance can be approved by either house of Parliament by a specific resolution. Otherwise it shall cease to operate immediately thereafter. I hope this very important matter will commend itself to the House, and the amendment will be accepted.

(Amendments Nos. 1804, 1806, 1807 and 1808 were not moved.)

Sardar Hukam Singh : Sir, I beg to move:

"That in clause (1) of article 102, after the words 'except when both Houses of Parliament are in session' the words 'after consultation with his Council of Ministers' be inserted."

This is so evident that I might be met with the reply that in all constitutions it is supposed that the constitutional head always acts on the advice of his Council of Ministers and in other constitutions it is never put down expressly that he should do so. With that consciousness I have moved this amendment, because I feel that we are framing a written constitution wherein we are giving every detail, with the result that it is so cumbersome and bulky. Under such circumstances I feel that a matter of such importance and which is so apparent must be expressly put down. It may be said that conventions would grow automatically and the President shall have to take the advice of his Ministers. My submission is that here conventions have yet to grow. We are making our President the constitutional head and we are investing him with powers which appear dictatorial. Conventions would grow slowly and as this constitution is written and every detail is being considered, why should we leave this fact to caprice or whim of any individual, however high he may be? If we clearly put down that he is to act on the advice of his Ministers, it is not derogatory to his position. with these words, Sir, I move my amendment.

Shri R. K. Sidhva (C.P. & Berar : General): On a point of order, Sir, the amendment moved by Mr. Pocker is out of order. His amendment reads:

"Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court law."

If you refer to article 15 under Fundamental Rights, which we have already passed, it says:

"No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India."

This article which we have passed definitely defines what are the personal liberties and how they should be safeguarded. Hence this amendment would be out of order.

Mr. President : I do not think it is out of order. It is not consistent with article 15 which we have passed. It only confirms it. Therefore I, allow the amendment.

Dr. P. S. Deshmukh (C.P. Berar : General): Sir, there are a good many amendments moved to this article. It is quite natural for the House to emphasise that the ordinary powers of the Parliament shall not be circumscribed nor the Parliament's wishes defeated in any indirect way. It is with that intention that many Honourable Members of this House have come forward to limit the period of time of the operation of the ordinance and to insist that the President shall call a session of the Houses of Parliament at the earliest possible moment. I am afraid I have not been much impressed by the speeches in support of any of the amendments that have been moved.

The first amendment that has been moved by Mr. Pocker has been moved at a very wrong place. Not only has adequate provision been made already by the House regarding arresting of any person without there being any law under which he can be arrested but this is not the place where such an amendment should be moved because essentially I do not think that the House need fear that the President would misuse his power for the sake of arresting people without providing for it, or would promulgate an ordinance only for the sake of depriving any set of the citizens of India of their liberties. In any case the fundamental rights having already been approved I do not think there is any need for the amendment moved by Mr. Pocker. At the present moment many people have lost their liberties under the laws of detention, the Public Safety Act and other laws passed in the Provinces. Honourable Members are correct in complaining that the provisions of the Public Safety Acts operating in the provinces have been somewhat arbitrarily and oppressively used and that it has caused considerable amount of dissatisfaction. But we are not dealing with the provinces, or their powers. we are here dealing with the legislative powers of the President and we have got to take notice of the fact that at the present moment Governments have ceased to be merely policemen or judges. But now-a-days there is nothing that is outside the sphere of governmental activity. Amongst other things, Governments of the present day are shop-keepers; they are commission agents and even contractors. Every sort of duty that an ordinary citizen was performing is being performed by the State under the exigencies of the present circumstances. I therefore feel, Sir, that the powers that we are giving to the President are all the more necessary because the day to day administration has become so complex.

Take, for instance, the administration of the controls. There are a thousand and one occasions when it would be necessary for the Executive to possess some such power. In the present extraordinary times through which the world is passing, Sir, I think it is absolutely necessary and desirable that the Head of the State should be empowered with these extraordinary powers.

Shri H. V. Kamath : The Constitution is not framed merely for extraordinary times; it is intended for many many years to come.

Dr. P. S. Deshmukh : I am sure, Sir, that the provisions that exist in this Constitution are such that there is no possibility of their being abused in ordinary circumstances also.

Pandit Kunzru said that it was well for the British Government to have had a section like this in the Government of India Act, 1935, when the Government was irresponsible. But when the Government is responsible to the Legislature there is no fear of its being abused. I think Pandit Kunzru has himself suggested a reply to his own argument. I am sure no president will act without the consent of the Cabinet and no Cabinet will act without the consent of the majority of the Members of the House. So, any power that is likely to be exercised under this Section by the President will have the tacit approval and consent of the Legislature, and for that reason I think the amendment of Sardar Hukum Singh is also not necessary. No President can continue to be in office if he were to issue ordinances which have not the consent of the Cabinet and ultimately of the Legislature. I, therefore, think, Sir, that there is no need for the safeguard which have been suggested. When the power of withdrawal of Ordinance has been given to the President, I am sure, Sir, he will, as constitutional head-as the guardian of the people-not permit any legislative measure to continue for a day more than is absolutely necessary.

Then, Sir, as a consequence of the amendment which Pandit Kunzru has moved, he wants to omit the explanations. Now, actually, Sir, there are not two explanations. There is only one explanation. The third sub-clause of the article is also, in my opinion, a very important provision. It reads as follows:

"If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

I think this provision should satisfy Mr. Pocker Sahib also, because if the legislative power exercised by the President goes counter to any of the Fundamental Rights, to that extent it shall be *ipso facto* void and shall be of no consequence whatever.

Under all these circumstances, Sir, I do not think there is need of any of the amendments that have been moved. I think the time which has been stated here, will probably be quite sufficient. But if in spite of this Dr. Ambedkar feels that he is convinced by the arguments that have been advanced and wants to make a provision for the immediate calling of the Parliament within the period of thirty days, I should have no objection, but I feel, Sir, that there is no likelihood of the legislative powers given to the President being misused and the powers of the sort which have been mentioned in the article are essential.

Mr. Tajamul Husain : Sir, I should first take up amendment No. 1802 moved by my honourable Friend Pandit Kunzru. Now, Sir, sub-clause (a) of clause (2) says that every ordinance shall be laid before Parliament and shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, etc. My honourable Friend Pandit Kunzru says that it should cease to operate at the expiration of thirty days from the promulgation of the Ordinance. I submit, Sir, I am unable to understand this. Ordinances are promulgated only in cases of emergencies. Suppose an emergency is such that it would last for more than thirty days, then what are we to do in that case?

Shri H. V. Kamath : Sir, the honourable Member has not properly understood Pandit Kunzru's amendment.

Mr. Tajamul Husain : Sir, I was not here when Pandit Kunzru moved his amendment. But from his amendment it is clear that he wants that the Ordinance should cease to operate at the expiration of thirty days from the time of promulgation of the ordinance. If that is the case, then I will place an example before you. Supposing the House of the People is dissolved today for the purpose of general election. It may take more than one month and in that case as soon as the dissolution takes place, the next day an emergency arises and the President of the Union promulgates an Ordinance. What are you going to do? There are no more members. How are you going to summon Parliament again? I oppose the amendment.

Now let me take amendment No. 1796 moved by Mr. Pocker. He says: 'Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law.' I cannot understand this. This is an extraordinary procedure. Ordinance means extraordinary procedure. In such an emergency the question of personal liberty does not arise. We do know what will happen at that time. Therefore his amendment also should be opposed.

The amendment moved by Sardar Hukam Singh says that when an Ordinance is promulgated, there should be prior consultation with the council of Ministers. It is very reasonable. we should support it. After all, the Prime Minister and the Cabinet are the chief representatives of the people. No doubt the President also represents the entire Union. But the Prime Minister and his Cabinet are I think more responsible people and they should be consulted before an Ordinance is promulgated. Therefore I support that amendment.

Mr. Mahboob Ali Baig Sahib (Madras: Muslim): Mr. President, Sir, I am in complete agreement with the amendment moved by Pandit Kunzru and also with the amendment moved by Mr. Pocker. I will speak first on the amendment moved by Pandit Kunzru. I

think it must be possible for my Friend Dr. Ambedkar to accept it. Pandit Kunzru has clearly pointed out that the ordinance regime might continue for six months, and for six weeks added on to six months. Now the question is whether it is desirable that in a democracy, where you have got people's representatives in the country who could be summoned at short notice, that you should give any opportunity to the executive to postpone calling the Parliament which the executive is entitled to do for six months and give six weeks more. It is I submit undemocratic and will lead to executive oppression, to say the least. what I find in the present day is the tendency on the part of Members of the Cabinet to bring forward legislation or make proposals in the Constitution itself based upon the present fears. The Government in power or the persons in charge of these matters consider that tension always exists and provision must be made for it, giving the executive power to meet any contingency. Well, we are prepared to give power to the executive to meet any contingency. Well, we are prepared to give power to the executive to meet the situation the moment any contingency arises. When Parliament can be called at once within a week or ten days, I do not see any reason why we should allow an opportunity to delay calling the Parliament in order to decide whether the ordinance promulgate should continue. It is fraught with danger and the chances are that the executive might arrogate to itself the powers and will be tempted to postpone calling the Parliament. so, Sir, democratically-minded Dr. Ambedkar must be able to accept the suggestion embodied in the amendment of Pandit Kunzru.

Now, with regard to the amendment of Mr. Pocker. I do not want to revive the controversy which arose in the course of the discussion of article 15. There it was ruled that the protection of personal liberty can be in accordance with the procedure laid down by law, that is by parliament. We have passed that. But why should we now not protect the liberties of the persons even from the arbitrary rule of the President, even though it may be for six months or two months? The merit of article 15 which was passed in that Parliament is to legislate with regard to the procedure. It is Parliament that has to lay down the procedure with regard to certain matters. For instance, when a man is deprived of his liberty without being brought to trial he may be clapped in jail, in accordance with the procedure laid down by Parliament. But now why should a single individual, the President, be allowed to pass an ordinance by which he might deprive a person of his liberty without letting him to be tried by a court of law? Therefore I support this amendment. I think it must be possible for Dr. Ambedkar to accept them.

The Honourable Dr. B. R. Ambedkar: Mr. President. Sir, my Friend, Pandit Kunzru, has raised some fundamental objections to the provisions contained in this article 102. He said in the course of his speech that we were really reproducing the provisions contained in the Government of India Act, 1935, which were condemned by all parties in this country. It seems to me that my Friend, Pandit Kunzru, has not borne in mind that there are in the Government of India Act, 1935, two different provisions. One set of provisions is contained in Section 42 of the Government of India Act and the other is contained in Section 43. The provisions contained in Section 43 conferred upon the Governor-General the power to promulgate ordinance which he felt necessary to discharge the functions that were imposed upon him by the Constitution and which he was required to discharge in his discretion and individual judgement. In the ordinances which the Governor-General had the power to promulgate under Section 43 the legislature was completely excluded. He could do anything-whatever he liked-which he thought was necessary for the discharge of his special functions. The other point is this; that the ordinances promulgated by the Governor-General under Section 43 could be promulgated by him even when the legislature was in session. He was a parallel legislative authority under the provisions of Section 43. It would be seen that the present article 102 does not contain any of the provisions which were contained in Section 43 of the Government of India Act. The President, therefore, does not possess any independent power of legislation such as the powers possessed by the Governor-General under section 43. He is not entitled under this article to promulgate ordinances

when the legislature is in session. All that we are doing is to continue the powers given under Section 42 of the Governor-General to the President under the provisions of article 102. They relate to such period when the legislature is in recess, not in session. It is only then that the provisions contained in article 102 could be invoked. The provisions contained in article 102 do not confer upon him any power which the Central Legislature itself does not possess, because he has no special responsibility, he has no discretion and he has no individual judgment. Consequently my suggestion is that the argument which was propounded by my friend, Pandit Kunzru, went a great deal beyond the provisions of article 102. If I may say so, this article is somewhat analogous--I am using very cautious language--to the provisions contained in the British Emergency Power Act, 1920. Under that Act, also, the King is entitled to issue a proclamation, and when a proclamation was issued, the executive was entitled to issue regulations to deal with any matter, and this was permitted to be done when Parliament was not in session. My submission to the house is that it is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be deficient to deal with a situation which may suddenly and immediately arise. What is the executive to do? The executive has got a new situation arisen, which it must deal with *ex hypothesi* it has not got the power to deal with that in the existing code of law. The emergency must be dealt with, and it seems to me that the only solution is to confer upon the President the Power to promulgate a law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary process of law because, again *ex hypothesi,* the legislature is not in session. Therefore it seems to me that fundamentally there is no objection to the provisions contained in article 102.

The point was made by my Friend, Mr. Pocker, in his amendment No. 1796, whereby he urged that such an ordinance should not deprive any citizen of his fundamental right of personal liberty except on conviction after trial by a competent court of law. Now, so far as his amendment is concerned, I think he has not read clause (3) of article 102. Clause (3) of article 102 lays down that any law made by the President under the provisions of article 102 shall be subject to the same limitations as a law made by the legislature by the ordinary process. Now, any law made in the ordinary process by the legislature is made subject to the provisions contained in the Fundamental Rights articles of this Draft Constitution. That being so, any law made under the provisions of article 102 would also be automatically subject to the provisions relating to fundamental rights of citizens, and any such law therefore will not be able to over-ride those provisions and there is no need for any provision as was suggested by my Friend, Mr. Pocker, in the amendment No. 1796.

The amendment suggested by my friend, Mr. Kamath, *i.e.,* 1793, seems to me rather purposeless. Suppose one House is in session and the other is not. If a situation as I have suggested arises, then the provisions of article 102 are necessary because according to this Constitution no law can be passed by a single House. Both Houses must participate in the legislation. Therefore the presence of one House really does not satisfy the situation at all.

Shri H. V. Kamath: Does it mean that when one House only is in session, say, the House of the People, the President will still have this power?

The Honourable Dr. B. R. Ambedkar : Yes, the power can be exercised because the framework for passing law in the ordinary process does not exist.

Shri H. V. Kamath: Shameful, I should say.

The Honourable Dr. B. R. Ambedkar : Now I come to the other question raised by my Friend, Mr. Kunzru, in his amendment No. 1802. His suggestion is that such legislation enacted by the President under article 102 should automatically come to an

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HALSBURY'S
Laws of England

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REISSUE

LORD HAILSHAM OF ST. MARYLEBONE
Lord High Chancellor of Great Britain
1970-74 and 1979-87

Volume 8(2)

BUTTERWORTHS
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ANNEXURE-P

[illegible] See para 103 post.
[illegible] See para 104 post.
[illegible] See 567 HL Official Report (5th series), 29 November 1995, written answers, cols 44–45; 567 HL Official Report (5th series), 30 November 1995, written answers, col 57; and *Questions of Procedure for Ministers* (Cabinet Office, May 1992) (as now revised: see para 416 note 1 post), para 8.

26. The relationship between subject and monarch. English law is still informed by the ancient conception of the relationship between the individual and the state as being one between the subject[1] and the monarch. The relationship of subject and monarch was conceived of as a personal one[2], involving a bargain under which the monarch gave the subject protection and undertook to govern according to the laws of the land[3], and the subject owed the monarch legally enforceable allegiance[4]. It did not involve the subject having any legally enforceable rights against the Crown, and the duties of protection owed by the Crown were not justiciable. With the development of the principle of legality[5] the individual has become progressively emancipated from the control of the monarch or Crown and now has a high degree of autonomy and personal liberty[6].

[illegible] The term 'subject' is commonly used instead of 'citizen' or 'individual' in case law and legal texts. As to the origin of the term in this context see para 29 post.
[illegible] See para 29 post.
[illegible] The Crown's duty towards the subject rested originally upon a semi-feudal bond, whereby the King, as liege lord, was bound to maintain and defend his people in return for service and obedience: see *Calvin's Case* (1608) 7 Co Rep 1a at 5a. There is, however, no legal duty on the Crown to afford by its military forces protection to British ships trading in foreign waters, and, if it does so, it is entitled to demand payment for so doing: *China Navigation Co Ltd v A-G* [1932] 2 KB 197, CA. See also para 28 post.
[illegible] See para 29 post.
[illegible] See para 6 ante.
[illegible] See para 105 et seq post. See also Oliver 'What is happening to relations between the individual and the State' in Jowell and Oliver (eds) *The Changing Constitution* (3rd Edn, 1994) ch 15.

27. The duties of the individual to the state. The individual is under certain common law duties to serve the public[1]. In practice he or she will now be called upon to act in exceptional circumstances. Thus, although the maintenance of order is the function of professional police forces, every citizen is under a duty to assist in the quelling of disturbances and the maintenance of the Queen's peace[2], and if a person refuses to accede to the request of a magistrate, a sheriff or a constable to assist in preserving the peace, he commits an offence at common law[3].

Many duties of service to the public are laid on individuals by statute. In general these duties, with the exception of those arising from service in the armed forces or in a civil capacity, are incumbent upon resident aliens no less than upon subjects[4]. Qualified persons may be compelled to serve on juries[5] and to give evidence in a criminal trial[6] or civil proceedings[7]. There are duties relating to the registration of births and deaths[8], the notification of infectious disease[9], and making returns for the purpose of registering electors[10], for the compilation of the decennial census[11], and for purposes of direct[12] and indirect[13] taxation. The parent or guardian of every child is under a duty to cause that child to attend school[14].

Many active duties are imposed on persons who voluntarily engage in certain occupations. Thus employers of labour have to make returns, for example under the legislation relating to public passenger vehicles[15], and under social security legislation[16], and also to collect and pay over sums by way of taxation under the PAYE scheme[17]; and all who serve the public in the armed forces[18] or in a civil capacity[19] bring themselves under active duties.

[illegible] The first writer to draw special attention to the active duties of the subject was Maitland: see Maitland *Constitutional History of England* (1908) pp 501–506. Very few of the duties of the subject to serve the

that a number of constitutional principles have been established by the great statutes or charters[2] and by the courts[3].

1 See paras 202 ante, 374–378 post.
2 As to the four great statutes and charters see para 372 ante.
3 See generally Jowell and Lester 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] Public Law 368; Sir John Laws 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] Public Law 59; Lord Woolf 'Droit Public – English Style' [1995] Public Law 57; Sir John Laws 'Law and Democracy' [1995] Public Law 72.

374. Limitation by Magna Carta. The Crown or its ministers may not punish, imprison or coerce the subject in an arbitrary manner: no freeman may be taken or imprisoned, or disseised of his freehold, liberties or free customs, or be outlawed or exiled, or in any other wise molested[1]; nor may he be judged[2] or condemned[3], except by the lawful judgment of his peers, or by the law of the land, nor may justice or right be sold, denied or delayed to any man[4].

1 Ie *aut aliquo modo destruatur* (literally 'destroyed'). See *Entick v Carrington* (1765) 19 State Tr 1029.
2 Ie *nec super eum ibimus*.
3 Ie *nec super eum mittimus*.
4 Magna Carta of Edward I (1297), c 29. For subsequent modifications and repeals see para 1 note 13 ante. As to Magna Carta see para 372 note 2 ante. Similar provision was made by the Petition of Right (1627) ss 3, 8 (repealed so far as relevant by the Justices of the Peace Act 1968, Sch 5): see, however, para 375 post.

375. Freedom from arrest. Any power to commit to prison, or to issue warrants of arrest or search warrants, which may have been exercisable at common law by the monarch in person, or by the Privy Council[1], members of the Privy Council or the Secretary of State, whether on their or his own authority or on the special direction of the monarch, has been abolished[2].

1 As to the Privy Council see paras 521–526 post.
2 Justices of the Peace Act 1968 s 1(7) (as originally enacted, replacing the Petition of Right (1627) ss 5, 7). Alien enemies do not enjoy this freedom from arrest and imprisonment: *R v Vine Street Police Station Superintendent, ex p Liebmann* [1916] 1 KB 268; and see WAR. For general powers of arrest see CRIMINAL LAW. As to the office of Secretary of State see para 355 et seq ante.

376. Laws may not be suspended. The Crown may not suspend laws or the execution of laws without the consent of Parliament[1]; nor may it dispense with laws or the execution of laws[2]; and dispensations by *non obstante* of or to any statute or part of it are void and of no effect except in such cases as are allowed by statute[3].

The Crown or its ministers may not erect courts where persons may be tried in an arbitrary manner, since the issue of commissions to try persons according to the law martial, as is used by armies in time of war[4], and the issue of commissions to erect illegal courts[5], are declared to be against law.

1 Bill of Rights s 1. As to the history and citation of the Bill of Rights see para 35 note 3 ante.
2 Ibid s 1. The words of this provision extend only to the dispensing power 'as it hath been assumed and exercised of late'; this saves the validity of old dispensations (see *Re Case of Eton College* (1815) Special Report by Williams), but the Bill of Rights s 2, rendered invalid all subsequent dispensation with statute unless specially allowed by the statutes. See *Vestey v IRC (No 2)* [1980] AC 1148 at 1195, [1979] 3 All ER 976 at 1002–1003, HL (Board of Inland Revenue's claim to the right to dispensed with law rejected). See also *IRC v National Federation of Self-Employed and Small Business Ltd* [1982] AC 617, [1981] 2 All ER 93, HL.
3 Bill of Rights s 2. This provision does not extend to common law offences, but the King was always held unable to license offences *mala per se*: it was otherwise as to *mala prohibita*: see *Thomas v Sorrell* (1673) Vaugh 330 at 332; *Langdale's Case* (1608) 12 Co Rep 58 at 61; *Anon* (1609) 12 Co Rep 30. An offence

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4 Harv. L. Rev. 365

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THE TRUE MEANING OF THE TERM "LIBERTY" IN THOSE CLAUSES IN THE FEDERAL AND STATE CONSTITUTIONS WHICH PROTECT "LIFE, LIBERTY, AND PROPERTY"

IF there is one truth which, more than another, should be constantly borne in mind by one whose object is to ascertain the true meaning of any part of the law of our American constitutions, it is that that law is not a manufacture, but a growth, and that it is, therefore, impossible thoroughly to comprehend its true scope and meaning, without at least some knowledge of its history and development. In this respect, English and American constitutional law differs widely from that of France, for example, which is substantially nothing more than an attempt to establish a system of government on entirely new and theoretical principles, artistic in form, but without any very deep basis in the history and habits of the people. Such law, while it is the source and "garantie" of fundamental rights, is in no proper sense a consequence or generalization of rights existing independently, and if it should be abolished, the rights which it guarantees would disappear with it. The English Constitution, on the other hand, so far from being a work of modern art, a manufacture, is the result of centuries of bloodshed and strife, during which the "freemen" of England gradually secured their fundamental rights in the law courts, and established limitations of the regal power. In this view it is rather a result than a cause. It exists as a consequence or confirmation of the rights which it represents, and unless those *366 rights had been independently secured, the English Constitution could never have existed. In other words, it is part and parcel of the law of the land, a generalization of common-law rights, the natural outgrowth of the customs of the people. And so is it also with our American constitutions. They are historical instruments, the possessions of a people with a legal history beginning, not with the Declaration of Independence, but with that of their English brethren. They are not the beginning, but the end; for they represent the last stage in a series of changes, the great landmarks of which are the Magna Charta, the Petition of Right, the Habeas Corpus Act, and the Bill of Rights.

It is obvious, therefore, that one who seeks to put a true construction on any part of our constitutions must have a constant eye to its history, and this is particularly the case when one is dealing with a clause in a bill of rights, because an American bill of rights is a collection of words and clauses, many of which have had a definite meaning for centuries. It may be true that if our constitutions are to meet all the requirements of a constantly advancing civilization, they must receive a broad and progressive interpretation. It is also true that upon no legal principle can an interpretation be supported, which ignores the meaning universally accorded to a word or clause for centuries, and the meaning which must, therefore, have been intended by those who inserted it in the constitution.[1] It is perhaps well to bear this in mind at a time when there is a manifest tendency to regard constitutional prohibitions as a panacea for moral and political evils, to look upon courts of law, as distinguished from legislatures, as the only real protectors of individual rights, and to trust to the courts for remedies for evils resulting entirely from a failure to attend to political duties, — at a time, that Is to say, when there is danger of loose and unhistorical constitutional interpretation.

It is not within the scope of this essay to discuss at any length *367 the nature and meaning of liberty, as that term is used in a broad and general sense to denote the great object of all free governments, — as it is used, for example, in

the preamble of the Constitution of the United States. There are, however, a few general principles which it will be well to notice at this point.

Liberty, or civil liberty, as it is often called, has been defined by a hundred eminent writers, one of whom has remarked that "most of these definitions are not worthy of notice." As the term is used by philosophical writers, it does not appear to have any very definite meaning. As used by jurists, it is more capable of definition, because it signifies not so much a theory as a condition, not so much an ethical conception as a concrete existence. In this sense it is defined by Blackstone to be the "liberty of a member of society," and "no other than natural liberty so far restrained by human laws (and no farther), as is necessary and expedient for the general advantage of the public." With "natural liberty," or, as Cicero phrased it, "the power of living as thou wiliest," writers who are concerned with facts have nothing to do. Such persons deal only with liberty as it does or may exist, that is, in a state of society and in a body politic. A state of nature is a fiction. In this view the term is obviously a relative one, and it is, accordingly, proper to speak of modern and ancient, of Pagan and Christian, of English, of French, and of American liberty. Each of these systems has peculiar features, but they are all alike in one respect, in that they each and all represent the number and kind of important individual rights which have been secured in the social state under different forms of government. They all differ, in that no two of them afford precisely the same degree of right or liberty to those living under them. In England and the United States the number of rights and remedies which have been secured is very large. In Russia it is very small. Consequently, it is correct to say that Anglican liberty has reached a very high stage of development, while Russian liberty is, if the term were used in a more ethical sense, hardly worthy of the name. We are apt to connect the term with the particular form of government under which we enjoy that for which the term stands. So it was with the ancients, — the Greeks and Romans, — who identified it with a republican form of government. So also Americans are apt to connect it with the same form of government, as represented by the Constitution of the United States. *368 At bottom, however, the word "liberty," used in its broadest and most general sense, means and includes all those great rights, remedies, and guarantees which a human being has in a given state of society or under a given government, and that is the way it was used by our ancestors, who entitled their bill of rights a "body of liberties," and by Blackstone, in his chapter on the Absolute Rights of Individuals.[1] Taken in this sense, as being synonymous with civil or social rights, as distinguished from "natural" rights, American liberty includes the rights of life; of freedom of the person, of speech, and of the press; of religious freedom; of petition; of discussion; of marriage; of taking part in the government, and many others. All such rights are — with certain limitations, which make them truly social or civil rights, and apart from which the above terms cannot be understood — enjoyed in this country, as a matter of fact, whether or not they are all declared in our constitutional law. The question with which we are at present concerned, however, is the latter, or rather, is the question as to how many of the above-mentioned rights are included under a particular term in a particular clause in our most fundamental law.

In the Federal Constitution and in the constitutions of at least twenty-eight of our States there are clauses which in substance declare that no person shall be deprived of "life, liberty, or property (sometimes 'estate'), but by the judgment of his peers or the law of the land." In some constitutions the same rights are first declared in the ancient terms of the prototype of these clauses (to be noticed later), and are then summarized as above; and in some we find instead of "judgment of his peers or law of the land," the expression "due course (or 'process') of law;" but it is well settled that "due process of law" and "law of the land" are identical in meaning,[2] and the other variations are not important, because they do not affect the identity or history of the clause. A somewhat similar combination of terms occurs in other places in several of our constitutions, where perhaps the term "liberty" is used in a different sense.[3] At present, however, we are concerned with it as it is used in this *369 peculiar connection, namely, in those clauses which forbid the taking of the three liberties in question unless by due process of law or the law of the land, unless, as Webster has so well expressed it, "by the general law, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, and property under the protection of the general rules which govern society." In this connection we shall perhaps find that the term "liberty" is fairly susceptible of a somewhat narrower construction than when used collectively to denote all those rights of which, generally speaking, no man ought to be deprived under any circumstances whatever; to denote, that is, an ideal of government. In this present connection the deprivation of the right

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named is contemplated as a necessary and usual thing. Indeed, it is worth noticing that in this connection the word and clause with which we are dealing are in almost every instance inserted in a section of the constitution dealing exclusively with the conduct of criminal trials, with the privileges of the accused, with a process in which the whole question is whether the person concerned shall be deprived of one or the other of certain rights; that is, of life, or personal liberty, or property as a penalty for crime; and it is declared that he shall not, without due process of law. A priori, therefore, it would seem that in this connection the term is not used in its broadest sense to denote all civil rights, but, like the terms "life" and "property," to denote one particular kind of civil right, of which the law is accustomed to deprive persons by way of punishment.

The clause in question has a definite and a most ancient history. It is of Teutonic origin, and Professor Stubbs states that the very formula here used is probably adopted from the laws of the "Franconian and Saxon Caesars." [1] At any rate we find it in almost precisely the same form in which it has been incorporated into many of our American constitutions at the beginning of the thirteenth century in the Magna Charta of King John of England. [2] That century comprises at once the gloomiest and the most auspicious period of English history. During that century the English people were oppressed by a foreign and conquering race, were ruled by two of the worst kings that ever ascended the *370 English throne, and were in large numbers reduced to a condition of slavery. Yet during that same period the foundations of the English parliament, the English constitution, and the science of the English common law were laid. On June 15, 1215, King John, at the point of the sword, was compelled by the English barons to affix his seal to the "Great Charter of English Liberties," — a document upon which the unstinted praise of historians of every school and stamp has ever since been ished. In one aspect the Magna Charta represents an end and consummation, in another a beginning. It was, for the most part, a compilation of the ancient customs of the realm, [1] or the laws of King Edward the Confessor as they existed before the Norman conquest. On the other hand it was the first great declaration of the rights of the new nation, the various elements of which several causes had combined to unite and consolidate, and from this time forth the constant demand of the people is for a confirmation, not of the "Leges Edwardi," but of the Magna Charta. It was, according to Lord Coke, confirmed no less than thirty-two times by subsequent monarchs. During the long reign of Henry III. the rights which had been wrested from King John were not only preserved, but also increased. During that of Edward I., who attempted to govern arbitrarily, it was the same. One remedial statute after another was passed, until finally every Englishman came to regard the Magna Charta and its confirmations as his birthright. We are told by Hallam that it is doubtful whether there are any essential privileges of Englishmen, "any fundamental securities against arbitrary power, so far as they depend upon positive institution, which may not be traced to the time of the Plantagenets. The same author has characterized the Great Charter as "still the keystone of English liberty. All that has since been obtained is little more than confirmation or commentary; and if every subsequent law were to be swept away, there would still remain the bold features that distinguish a free from a despotic monarchy."

It should be noticed, however, that the main object of those who did most to obtain the charter was to secure their own rights, not those of others. At that time the barons themselves were really the chief oppressors of the people. The king did all he could in that direction; but he was one, the barons many. *371 The king oppressed his barons, and they oppressed the people. The kind of oppression to which the barons were subjected by the king was, moreover, very different from that exercised by the former on the people. It consisted, mainly, of the hardships incident to the feudal system, such as wardship and marriage, aids and escuage. But the wrongs suffered by the people at the hands of the barons were far more intolerable. They were despoiled of their property, were taken and imprisoned in the castles of the barons in order to extort ransoms, and were even put to death without any pretence or process of law. The chronicles of that period afford evidence of systematic outrages practised by the barons on the people for which it would be difficult to find a parallel in English history. This has not been sufficiently borne in mind by those historians who have eulogized the English barons for their great solicitude concerning the interests of the people, for their generosity in caring for the interests of the people as well as their own, and for their foresight in establishing such far-reaching and eternal principles of liberty. The truth seems to be, not only that the charter was obtained chiefly through the efforts of the barons, but also that it was intended, first of all, for their protection. The bulk of it relates to feudal matters, applied only to those who held land by military

tenure, and therefore affected the mass of the people only indirectly. It has been suggested that those articles which do include the people, and which are of a fundamental character, were inserted at the instance of the king. Whether or not such is the truth, however, the Great Charter did contain at least one provision which included all freemen, protected them against all persons, and which, if enforced, would forever secure to them their most fundamental rights. Moreover, — and this is the point especially to be noticed, — that article was intended rather to afford a practical remedy for cruel and intolerable invasions of certain elementary rights than to announce theoretical principles of right for future ages, — or even for themselves, — or to establish a great principle of what we of this century are pleased to call "constitutional" law.[1] Nor did it declare it to be self-evident "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." This is worth observing, because it throws a strong light *372 on the article of which our "life, liberty, and property" clauses are either copies or slight variations.

The provision referred to is, of course, the thirty-ninth article of the Great Charter. It declares that "nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae."[1] No freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or any ways destroyed; nor will we pass upon him, nor send upon him,[2] unless by the legal judgment of his peers, or by the law of the land. In the confirmatory statute of 9 Henry III., which is the form of the Great Charter found in the Statutes at Large, and is therefore part of the existing law of England, the above article is slightly enlarged. After the word "disseized" we find "of his freehold, or liberties, or custom" ("de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis"),[3] — an addition obviously intended to explain the right of property which the word "disseized" represents and declares. In another statute, passed in the fifth year of Edward III., the same article is rendered as follows: "No man shall be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods, nor chattels seized into the king's hands, against the form of the Great Charter and the law of the land," — a clear declaration of the rights of personal liberty, life, and property. In 25 Ed. III. Statute 5, chapter 4, we find a more extended reading: "None shall be taken by petition or suggestion made to our lord the king, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done, in due manner, or by process made by writ original at the common law; nor that none be out of his franchises, nor of his freeholds, unless he be duly brought into answer and forejudged of the same by due course of law." Finally, in 28 Ed. III., c. 3, the same declaration of rights is put still more clearly as follows: "No man, of whatever estate or condition that he be, shall be put out of land *373 or tenement, nor taken nor imprisoned, nor put to death, without being brought in answer by due process of law."[1]

The last four enactments are simply confirmations of the thirty-ninth article of the original charter, just as that article may be said to be a confirmation of the common law as it stood in 1215.[2] The rights set forth were not conceived of for the first time in 1215. They were rights which free Englishmen had always claimed, and theoretically had always possessed under the common law. The importance of the thirty-ninth article of the Magna Charta is, that it was almost the first clear and perfect publication of those rights, and that after it the mass of the people came to know more thoroughly and more universally, precisely what their rights were in theory, and so were able to make a harder fight for them in practice.

In short, the article was a plain, popular statement of the most elementary rights. What, then, were those rights?[3] In the original clause and in all its confirmations the general classification is the same, and, expressed in more modern phraseology, is simply life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, not all individual rights), and property.[4] In 1215 the expression "personal liberty" was not in use, but the idea, or better, — considering the condition of England at the time, — the ideal, was not only known, but, as we see, was set up in the above series of enactments; and the terms employed to express it were sufficiently plain: "No freeman shall be taken or imprisoned." Could any words more clearly express what we of this century intend when we talk about personal liberty, or about the great Habeas Corpus principle of Anglican liberty? It would seem not. It would seem, indeed, that the words which we should naturally *374 use to-day to explain what is

meant by personal freedom are the precise equivalents of the plain, simple Latin terms of that age: "Nullus liber homo capiatur vel imprisonetur." These words were, morever, employed in the thirty-ninth article to express an idea which was just as dear to the men of that time as it is to us, remote as was the prospect of its complete realization in 1215. When they drew the famous thirty-ninth article that right was put first; and Lord Coke remarks, — in his commentaries on the article, where he points out that the evils from the laws of the land are to protect the subject, are recited in the order in which they most affect him, — that "this hath first place, because the liberty of a man's person is more precious to him than everything else that it is mentioned, and therefore with great reason should a man by law be relieved in that respect, if wronged." [1] Coke then discusses the meaning of the word "disseized," which he finds to include several varieties of rights, all of which may be included under the term "property," — which, however, does not occur in the Magna Charta or in any of its confirmations. According to Coke, this right is classified after that of personal liberty, because less sacred. Nevertheless, in the statute 28 Ed. III. c. 3, cited above, which is a confirmation of the thirty-ninth article in the original charter, the order of rights in the latter is reversed, property coming first, then personal liberty, then life. It seems, however, that no great importance is to be attached to the arrangement. The essential point is that all the enactments cited — to which others might be added — declare three great fundamental rights by prohibiting the doing of certain acts. Those rights are, perhaps, the most elementary and important rights conceivable, and are the ones with the development of which English constitutional history is chiefly concerned. They were brought together, and for the first time authoritatively and publicly announced to Englishmen as Englishmen in the thirty-ninth article of the Great Charter.

hat period the rights in question took on their present nomenclature and began to be termed the rights of "life, liberty, and property" it is impossible to say with any precision. The terms themselves are probably as old as the language. It cannot be said that they are fortunate ones in this particular connection and combination, because their meaning is vague and uncertain *375 without some historical explanation. Perhaps such uncertainty is a necessary evil in all instruments which, like American bills of rights, represent a long period of development. The terms used in the original article are much more definite, and in some of our constitutions have been copied literally, with the words "life, liberty, and property" added by way of summary, and, as it seems, by way of supererogation. [1] We have noticed that the term "liberty," generally in the plural number, was formerly used to denote a right or privilege. Thus the Magna Charta itself was entitled the "Charta Libertatum." We have also noticed that the expression "civil liberty" is, in the same sense, simply a collective for all the rights, political, religious, and civil (using the word "civil" in the narrow and rather loose sense which it has recently acquired in this country), which a person has in a given social body, that is, under a given government. The term was formerly used in still another way, to denote, not any right or privilege, but an exclusive right or a franchise, and that is probably the sense in which it was used in the thirty-ninth article of Magna Charta, as confirmed by 9 Hen. III. c. 29. In all these cases, however, the term was not used in connection with the fundamental rights of life and property to express a third great right, as is the case in our American constitutions, and in the latter it must, therefore, be held to have a different meaning. In them it is not used to denote any and all rights, or to denote a right vested exclusively in one person, but to denote a particular kind of right to which every person is entitled, unless t is taken away by due process of law. It is used, in other words, just as the terms "life" and "property" are used, each to express a special kind of right. It is as unreasonable to say that "liberty," in this connection, includes all civil rights, as it is to say that the term "life" includes them, or that the term "property" includes them. If it did, it would include life and property, and the clause reading, "no person shall be deprived of life, all his rights, or property," would be an absurdity on its face. The fact is that each of these terms has a peculiar and definite meaning, and it seems clear, on the whole, considering the history of the clause, that the term in question means personal liberty, or freedom of the person from restraint. Personal liberty was a common-law right in England in 1215, and long before; it was one of the great rights declared in the thirty-ninth article of the *376 Great Charter; it was insisted upon in all the confirmations of that article, and is there always found in connection with the rights of life and property; its infringement was the chief complaint in the Petition of Right of 1627, and the Habeas Corpus Act of 1679 was passed solely to secure it against usurpation. Altogether, it may be said that the history of the growth and development of the right of personal liberty is the main element in the history of early English constitutional law, that the idea of personal liberty pervades the history

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of the Anglo-Saxon race, and that it is, therefore, not surprising to find it classified with the rights of life and property as one of the three greatest civil "liberties."

It may, however, be contended that although the term "liberty" is not used in the clauses under discussion in its broadest sense to include all the rights one has in a body politic, it does include other great and important rights besides that of personal liberty, as, for example, religious liberty, liberty of speech and of press, liberty to bear arms, of petition and discussion, liberty to obtain justice in the courts, and many others, all of which are to-day regarded as fundamental rights in this country. [1] It may be argued, in other words, that the term "liberty" is a broader one than the terms used in Magna Charta, and may well be interpreted to include other rights besides that of personal freedom, for the reason that it was probably intended so to do by the framers of our constitutions. There are several answers to this argument. In the first place, the clauses in our American constitutions are, as we have seen, mere copies of the thirty-ninth article of Magna Charta, which knows nothing of such rights as the above. In the second place, the term "liberty," while it was not used in the thirty-ninth article, was used in its present connection with the terms "life" and "property" long before the framing of our American constitutions, and when so used meant simply personal liberty. It would, therefore, naturally be used by the framers of our constitutions in that sense. To establish this it is only necessary to refer to Blackstone. In one place Black-stone remarks: "The Great Charter protected every individual of the nation in the free enjoyment of his life, liberty, and *377 property unless declared to be forfeited by the judgment of his peers or the law of the land," referring, of course, to the thirty-ninth article. In another place he discusses the subject more at length, and after defining the absolute rights of individuals, "which are usually called their liberties," to be "those rights which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it," he goes on to enumerate them: "These rights may be reduced to three principal or primary articles: the right of personal security" (under which he includes life, limb, health, and reputation, the same rights which Coke and other commentators on the thirty-ninth article include under the terms "aliquo modo destruatur," and which may fairly be included under the term "life" in our constitutions), "the right of personal liberty, and the right of private property, because, as there is no other known method of compulsion or of abridging man's natural free will but by an infringement of one or the other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense." [1] Blackstone defines personal liberty to be the "power of locomotion, of changing situation, or moving one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law," and he observes that it is perhaps the most important of all civil rights. He means by personal liberty simply freedom from restraint of the person. It is instructive to note that Blackstone, in discussing each "absolute" right, points out that it is declared and secured by the famous article of the Great Charter. He cites the words "nullus liber homo aliquo modo destruatur" as the constitutional security for the right of life or personal security; the words "capiatur vel imprisonetur" for the right of personal liberty, and the words "dissaisiatur de libero tenemento" for the right of private property. It is evident, therefore, that his classification of fundamental rights under the terms "life," "liberty," and "property," like that of all other commentators, is derived from the thirty-ninth article. It is evident, also, that he had no conception of religious liberty, liberty of press and speech, or political liberty (meaning thereby the right to take part in the government, e.g., the right to vote) as absolute *378 rights of individuals. They are not mentioned in his discussion of the subject. He does, indeed, name certain other important individual rights besides those of life, personal freedom, and property, such as the right of petition, of securing justice in the courts, and of bearing arms; but he says that these "serve principally as networks or barriers to protect and maintain inviolate the three great and primary rights."

In "Care's English Liberties," a collection of important English Charters which had a wide circulation in the American colonies, the fifth edition of which was published in Boston in 1721, we find the same classification of rights in the same terms, and in every case the term "liberty" is explained to mean freedom of the person from restraint. For example, in his comment on the Habeas Corpus Act the author says: —

There are three things which the law of England (which is a law of mercy) principally regards and taketh care of, viz., life, liberty, and estate. Next to a man's life the nearest thing that concerns him is freedom of his person; for indeed,

what is imprisonment but a kind of civil death? Therefore, saith Fortescue, cap. 42, the laws of England do, in all cases, favor liberty. The writ of Habeas Corpus is a remedy given by the common law, for such as were unlawfully[1] detained in custody, to procure their liberty.1

Chancellor Kent made precisely the same enumeration of fundamental rights, with religious liberty added as a distinct and separate right.[2] There is no suggestion of its being included in the clauses in question. Indeed, religious freedom is a modern idea, and may be regarded as one of the contributions of this country to civil liberty. It was totally suppressed and unrecognized in England in the seventeenth century.[3] In theory it does not exist in England to-day. Any person who publishes a denial of the truth of the Christian religion, or of the existence of God, commits a blasphemous libel, and is, on the existing law, liable to imprisonment. It matters not whether the terms of the publication are decent or otherwise. So, a denial of the truth of Christianity, or of the Scriptures, by any person who has been educated as a Christian in England, is a criminal offence, entailing severe punishment.[1] *379 Even in this country religious liberty has not always flourished. In fact all the early colonies, except Rhode Island, absolutely denied it, and it cannot be said to have become generally established as a right until well into the last century. And so it is with what we call "liberty of the press," which means nothing more than liberty to publish any statement without the permission of a licenser, or freedom from censorship. This right is also of very recent origin. It is not mentioned in the Petition of Right (1627), nor in the Bill of Rights (1689), of so little importance did it seem to those engaged in redressing the grievances of that time in England.[2] In the colonies the feeling was the same. In 1671 Governor Berkeley, of Virginia, "thanked God that there were no free schools or printing: and I hope we shall not have them these hundred years; for learning hath brought disobedience and heresy into the world, and printing hath divulged them. God keep us from both."[3] He was speaking of the condition of the colonies in reply to English Commissioners. In 1683, when Governor Dongon was sent out as governor of New York, he was expressly directed not to allow any printing.[4] In Massachusetts the publication even of State papers did not become free until 1719.[5] Yet at this time, as always, the colonists most strenuously asserted their rights to life, liberty, and property; and Chalmers, in his Colonial Annals, declares that they are "assuredly entitled to the same liberties which are enjoyed by those whom they had left within the realms." "They were entitled to personal security, to private property, and, what is of most importance of all, to personal liberty."[6] On the whole, therefore, one is fully justified in saying that liberty of press and religion, and of speech, were unknown and unclaimed as rights, not only when the thirty-ninth article of Magna Charta was formed, but also centuries later when the terms of that article became paraphrased or consolidated into the more modern expression, "life, liberty, and property." That phrase was probably in use *380 long before the eighteenth century, and when used could not have included the above rights because they did not exist at all, or were not deemed important. Such being the case, and the terms having taken on a fixed meaning, it is reasonable to suppose that the makers of our constitutions used them with that meaning, just as Blackstone did when he employed them to denote the three great absolute rights of individuals.

In regard to such "liberties" as those of petition and discussion, of trial by jury, of Habeas Corpus, of bearing arms for defence, of taking part in the government, and many others, important as such rights are, they cannot be said to be fundamental in the sense that life, personal liberty, and property are fundamental rights. Strictly speaking, they are not substantial rights at all. As ends in themselves they are of no value. They are what Blackstone terms "subordinate" rights. In other words, they are really the remedies or means which must often be employed in order fully to obtain and enjoy the real and substantial liberties. If the term "liberty" is held to mean civil liberty in its broad sense, all such rights must undoubtedly be included within it; but so must the rights of life and of property. It is only fair to assume that when the term was used by the framers of our constitutions, it was intended by them to have a definite meaning. As has been indicated, it had always had a definite meaning in the past. It is barely possible that they intended it to comprise all the liberties a person was to have under the form of government which they were about to establish. But if such was their intention, why did they use the term in its ancient connection, with two other terms which had a historical meaning, but which, upon that theory, would be entirely superfluous and meaningless? If they intended it to mean civil liberty, and to include such rights as those of marriage, of education, and of employment, it would, of course, necessarily include

the more fundamental rights of life and property, and the enumeration of the latter would be useless. If their intention was as supposed, it would surely have been more natural for them to have inserted a clause reading: "No person shall be deprived of any of his civil rights or liberties unless by due process of law." Such a clause was inserted in the constitution of New York, article I, section r of which provides that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to *381 any citizen thereof unless by the law of the land or the judgment of his peers." And yet another section of the same article, in providing for the rights of criminals, declares that "no person shall be subject to be twice put in jeopardy for the same offence; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law." If the term "liberty" in the last clause has the meaning sometimes suggested, the first clause is entirely superfluous; and yet it is a canon of the interpretation of solemn instruments like constitutions, that a clause is not to be so construed as to render another clause entirely superfluous without very strong evidence.

Moreover, the important rights which, if the term is used in the broad sense, must be included within it, are in all our constitutions specially provided for in separate, and often elaborate clauses. Thus the Federal, and almost all the State constitutions, provide in different terms for freedom of religion, of speech, and of press, for the right of trial by jury, of bearing arms, and the right of petition. So also constitutional protection is afforded against unreasonable searches and seizures, against quartering soldiers in private houses, and against excessive punishments. All these are certainly civil rights, and a part of one's liberty under American government. Yet it seems to the writer that the mere fact that these — which may be described as rights of the second degree of magnitude — are provided for in separate clauses is a fair and strong argument to show that they were not intended to be included in a clause of a very different nature, which enumerates and protects in historical language those great liberties which have, from time unknown, been deemed the most fundamental rights of a freeman. That such a clause includes all rights, great and small alike, seems to the writer an untenable interpretation. And yet if it includes any besides the right of personal liberty, there seems to be no reason why it should not include all.

Finally, there is one other fact, already adverted to, in the nature of intrinsic evidence, which is worth noticing. If "liberty" includes all great civil rights, it must include such rights as religious liberty, trial by jury, and liberty of press. The clause being interpreted would then read: "No person shall be deprived of his religious liberty, etc., unless by due process of law." But the supreme, fundamental law, as declared by our constitutions, is that a *382 person shall never be deprived of those rights, that they shall be inviolate and sacred forever. Therefore, how can such rights fairly be construed into a clause contained in a section dealing with the punishment of crime, a clause naming rights which are constantly taken away, which itself implies that they must always constantly be taken away, and which only stipulates that they shall be taken by due process of law? In other words, is it fair to suppose that the framers of our constitutions intended, first, to declare certain rights to be in every case and under all circumstances inviolable, and then to declare, or to imply, that the same rights might be taken away by due process of law? It would seem that such an intention cannot be imputed to them.

So much for the question considered entirely as one of principle. If the conclusion arrived at is correct, the term "liberty," as used in those clauses which protect "life, liberty, and property," unless taken by "due process of law," means nothing more or less than freedom of the person from restraint, — the great Habeas Corpus principle of Anglican liberty, — a right, the illegal invasion of which gives rise to an action of false arrest or imprisonment. It must be admitted that this view is not altogether supported by the adjudged cases. In fact, the precise view here maintained is repudiated by several decisions. On the other hand, as far as the present writer has been able to discover, the courts themselves have not yet arrived at any very definite conclusion regarding the scope of the term. There is some general discussion in the books about the origin and nature of the clause as a whole. There are volumes of discussion of the meaning of the phrase "due process of law." There is also some loose and indefinite talk about life, liberty, and property. When, however, one seeks to ascertain the precise signification of "due process of law," he will not get a more definite idea from the decisions than from the concise, but necessarily rather vague, definition of Webster, already cited; and when one examines the cases to learn the meaning of the terms "life," "liberty," and "property," although he may be informed of some of the rights

which those terms do include, he gets little or no exact information regarding their precise scope — as to the rights which they do not include. This indefiniteness is particularly noticeable in some of the federal decisions.

The fifth amendment to the Federal Constitution, the object of which is to provide for prosecutions, trials, and punishments (we *383 have seen that the clauses in question are generally contained in such a section), declares, among other things, that "no person shall be deprived of life, liberty, or property without due process of law." This amendment, like most of the others, was aimed at the federal government only, and the writer has been unable to find a judicial construction of it which throws any light on the present question. The first section of the fourteenth amendment provides that

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The amendments to the Federal Constitution constitute its bill of rights. The fourteenth amendment was the second of a series of three, the purpose of which was to secure to a recently emancipated race all the civil rights that the whole people enjoy, and to give it the protection of the general government in the enjoyment of such rights whenever they should be denied by the States or their agents. It did not add anything to the rights of one citizen against another citizen. Such rights were left to the legislation of the States. [1] The second clause of the amendment is, like corresponding clauses in the State constitutions, taken from Magna Charta, and there is no reason why it should receive a different interpretation. The first decision to put a construction on the fourteenth amendment was that in the Slaughter-House Cases, 16 Wall. 36. In 1869 the Legislature of Louisiana created a corporation called the Slaughter-House Company, which was empowered to maintain stock landings and slaughter-houses at a specified place near New Orleans, and all cattle brought to New Orleans for food were required to be kept and slaughtered at these houses, the company being authorized to demand a compensation for the use thereof. The exclusive privilege thus conferred was to continue for twenty-five years. Certain persons *384 engaged in butchering in New Orleans brought actions in the State courts to test the constitutionality of this act, and those actions were afterwards carried to the Supreme Court of the United States. It was there contended that the act violated the thirteenth and fourteenth amendments, — the former by creating an "involuntary servitude," the latter by depriving the plaintiffs of their "privileges and immunities" as citizens of the United States, of the "equal protection of the laws," and of property without process of law. The court sustained the act, overruling all the above objections. Three judges, however, filed dissenting opinions, and each had something to say about the meaning of the term "liberty."

Mr. Justice Bradley, in discussing the meaning of the terms "privileges and immunities," quotes the thirty-ninth article of Magna Charta, and then says: —

English constitutional writers expound this article as rendering life, liberty, and property inviolable, except by due process of law. This is the very right which the plaintiffs in error claim in this case. Another of these rights was that of Habeas Corpus, or the right of having any invasion of personal liberty judicially examined into, at once, by a competent judicial magistrate. Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to wit: the right of personal security, the right of personal liberty, and the right of private property .... The Declaration of Independence lays the foundation of our national existence upon the broad proposition "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." ... Rights to life, liberty, and property are equivalent to life, liberty, and the pursuit of happiness.

Farther on, referring specially to the life, liberty, and property clause, the same learned judge says: —

In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. This right of choice is a portion of their liberty; their occupation is their property.

Mr. Justice Swayne took a similar view: —

*385 Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Property is everything which has an exchangeable value, and the right of property includes the right to dispose of it according to the will of the owner. Labor is property, and as such merits protection.

It is rather peculiar that Mr. Justice Bradley, after approving Blackstone's enumeration and definitions of absolute rights, should state that the right to choose an occupation is a part of one's liberty as that term is used in the clauses in question, and imply that Blackstone classifies the right of Habeas Corpus under the right of personal liberty as a distinct part thereof. [1] Blackstone's conception of the terms was more precise. The idea that one's labor is one's property is rather economic than legal, and indeed in another case a passage from Adam Smith's "Wealth of Nations" is the authority cited.

It is, however, to be observed that the court, while it did not much discuss the clause in question here, apparently took a view of it very different from that of the dissenting judges. It decided that a State can, in certain cases, grant a monopoly to a corporation. It asserted that this power is unrestrained by the thirteenth and fourteenth amendments, and that the rivileges referred to in the latter are those of citizens of the United States as such. It clearly implied that the ordinary undamental rights of all persons to hold property, to engage in trade, and all lawful occupations, are not among them. Finally it disposed of the life, liberty, and property clause in the following summary fashion: —

The argument has not been much pressed, in these cases, that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States .... And it is sufficient to say that under no construction of that provision that we have seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

*386 The court did not, apparently, consider it even arguable that the restraint upon following their lawful calling was a deprivation of "liberty." Moreover, the decision does not rest, so far as this clause is concerned, upon the ground that the act was a fair exercise of the police power, and so was due process of law. It proceeds on the ground that the fourteenth amendment has no application whatever to such a right as that contended for, namely, the right of every man to pursue a lawful occupation. So that the actual decision in the case is against, rather than in favor of, the broad construction of the term "liberty."

So also in Bradwell v. The State, 16 Wallace, 130, it was decided that a law of Illinois denying the females the right to practise law in that State violated no provision of the Federal Constitution, the plaintiff contending that it violated the fourteenth amendment. Here also the court seems to have decided, by implication, that the right to practise a lawful calling is not included in the life, liberty, and property clause. It expressly decided that it is not a privilege or immunity of a citizen of the United States. In Walker v. Sauvinet, 92 U. S. 90, the question was whether the right of trial by jury was secured by the fourteenth amendment. It was held that it was not, but there is no direct consideration of the term in question. In Munn v. Illinois, 94 U. S. 142, we find a direct statement on the point, although not in the opinion of the court. The question was as to whether a State legislature may fix the maximum of charges for the storage of grain in warehouses situated in large cities, without violating the fourteenth amendment. The court held that this could be done, that where property is devoted to a public use, the States may, in the exercise of the police power, to a certain extent

control it, and that the fourteenth amendment cannot be supposed to interfere with the police power. Mr. Justice Field, in a dissenting opinion, contended that the act did violate the fourteenth amendment, and among other things said: —

By the term "liberty," as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such a manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of happiness: that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment.

*387 Butchers' Union Company v. Crescent City Company, 111 U. S. 746, is another case where some of the judges insisted upon such a construction of the term as would include the right to follow any lawful occupation. The appellee in this case was the company to which the Legislature of Louisiana had, in 1869, granted the exclusive privileges for slaughter-houses which were sustained in the Slaughter-House Cases. The appellant company had received a grant of privileges of the same kind from the same State, in 1881, but had been restrained from exercising them by the lower courts. The Supreme Court now held that such privileges could be exercised by the appellants, that the power of a legislature to make an irrepealable contract did not extend to subjects affecting the public health and morals, so as to limit the future exercise of legislative power on those subjects, to the prejudice of the general welfare. In a concurring opinion Bradley, J. (with whom agreed Harlan and Woods, JJ.), who dissented in the Slaughter-House Cases, reasoned that the law creating the monopoly which was sustained in those cases abridged the "privileges" of the other citizens of New Orleans, which the fourteenth amendment was intended to protect, and then declared: —

But if it does not abridge the privileges of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen. And if a man's right to his calling is his property, as many maintain, then those who had already adopted the prohibited pursuits in New Orleans were deprived, by the law in question, of their property, as well as their liberty, without due process of law.

If "property" means pursuit of happiness, as the learned judge has before implied, it is difficult to perceive why there should be any distinction between a calling adopted and one not adopted. In either case one's "pursuit of happiness" may be interfered with by a prohibitive law. It is also difficult to distinguish liberty and property. If the latter has the meaning suggested, probably there is no distinction.

The above seem to be the only federal decisions which throw any light on this subject. In any view they are unsatisfactory. In no case does the opinion which stands as that of the court *388 discuss the present question, and while it does, in several cases, appear to proceed on the ground that the "life, liberty, and property" clauses do not include rights like that of pursuing any lawful occupation, it might just as well have rested on the ground that the acts in question were a fair exercise of the police power of the State, and so were due process of law. On the other hand, the opinions of the dissenting judges, so far as they concern this particular point, are not only of no authority as decisions, but are also somewhat too vague to be of much value in determining the true meaning of the term.

There are several cases decided in the Court of Appeals, of New York, in which views similar to those of the dissenting judges in the above cases were expressed. The first of these was Bertholf v. O'Reilly, 74 N. Y. 509. The remarks in that case, on the present question, were only by way of dictum, but they have been approved and enlarged upon in subsequent cases. The question was as to the validity of an act of the New York Legislature creating a cause of action in favor of a person injured by the act of an intoxicated person, against the owner of real property, whose only connection with the injury was that he leased the premises whereon the liquor causing the intoxication was sold. The defendant, a property owner, did not contend that the act was a violation of his "liberty." He argued (1) that it was an infringement of his right of property, and (2) that it violated another and distinct section of the New York Constitution, — already cited, — which declares that no member of the State shall be deprived of any of his rights unless, etc. The act was held a valid exercise

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of the police power, but the court took occasion to remark that "one may be deprived of his liberty in a constitutional sense without putting his person in confinement; the right to liberty includes the right to exercise one's faculties and to follow a lawful occupation for the support of life."

This view was followed in the case of In re Jacobs, 98 N. Y. 98, where an act prohibiting the manufacture of cigars in tenement-houses was held unconstitutional, as being an infringement of the rights of liberty and property, and as not being a proper exercise of the police power. The court says: —

So, too, one may be deprived of his liberty, and his constitutional rights thereto violated, without actual imprisonment or restraint of his person. Liberty in its broad sense, as understood in this country, *389 means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or occupation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed under the police power), are infringements upon his fundamental rights of liberty, which are under constitutional protection.

It is not clear whether the court had in mind the clause in the New York Constitution, protecting all rights, or that protecting simply life, liberty, and property. The defendant cited both clauses. Probably the court did not distinguish them.

People v. Marx, 99 N. Y. 377 (1885), is a similar case. Here a law prohibiting the manufacture and sale of oleomargarine was held void, as violating the clause protecting life, liberty, and property, and also that protecting any of the rights of a citizen of the State. The court says that it is now settled that "it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit," and then repeats the statements in the other New York cases that the term "liberty" includes the right to be free in the enjoyment of all the faculties with which one has been endowed by his Creator.

People v. Gillson, 109 N. Y. 399 (1888), was decided on the same ground. A statute made it a misdemeanor for any person who sold food to give away therewith, as a part of the transaction of sale, any other thing as a premium, gift, etc. The court held the act void as infringing liberty and property, and said: —

The defendant here appeals for his protection to the clause in the constitution which provides that no person shall be deprived of his life, liberty, or property, without due process of law. The meaning of this provision in our State constitution has frequently been the subject of judicial investigation, and this court has had occasion very recently to discuss it. The following propositions are firmly established and recognized: A person living under our constitution has the right to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit. The term "liberty," as used in the constitution, is not dwarfed into mere freedom from physical restraint of *390 the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.

The last New York case in which the point has been touched upon is People v. King, 110 N. Y. 418, where the court remarked, obiter: —

It is not necessary at this day to enter into any argument to prove that the clause in the bill of rights is to have a large and liberal interpretation, and that the fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense against unlawful invasion by the government, but also protects every essential incident to the enjoyment of those rights.

There is also a very recent decision by the Court of Appeals of West Virginia [1] in which similar expressions are used. An act of that State prohibited persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper except such as was specified in the act. The court held such act void as being "an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him." The court cites with approval the passage in People v. Gillson, above quoted. Although, however, the opinion does apparently rest upon the ground that the act was an infringement of the plaintiff's liberty, the "life, liberty, and property" clause strictly so called is not mentioned at all. The court quotes an entirely different section of the constitution of West Virginia, namely, article 3, section 1, which declares, like the Declaration of Independence, that all men are born free and equal, and have the right to pursue happiness, etc. Such a clause may well be held to include all the rights which the laws of West Virginia afford. It is also noticeable that the act is held to be an invasion of the right of property, and that the expressions used by the minority of the Supreme Court of the United States in the Slaughter-House Cases are repeated. The court says: "The property which every man has in his own labor, as it is the original foundation *391 of all other property, so it is the most sacred and inviolable." "The vocation of an employer, as well as that of his employee, is his property."

The writer has been unable to find any more satisfactory consideration of the subject than that represented by the above cases. As before remarked, the result of those cases is doubtful, their value small. They neither establish, nor much help to establish, the precise meaning of the term, and if they represent the existing law, the question is still an open one. All that can be said is that there is a tendency to give to the clause as a whole a wide scope, and to the term "liberty" a meaning at least sufficiently broad to include what are sometimes classified as "civil" rights, meaning thereby not all the rights of a citizen, not those of life and property, and not those great liberties which are commonly provided for in special clauses in our bills of rights, but simply freedom from restraint in the ordinary pursuits and avocations of the citizen. In the few cases in which there is anything like a clear and definite decision, the question before the court was whether the term included the right to pursue any lawful occupation in a lawful manner, — and it was decided that it did, that every person has the liberty to "exercise his faculties in all lawful ways." Whether, if the point should squarely come up, the courts would so interpret the term "liberty" as to render it prohibitive of any legislative invasion of the right of marriage, of education in the public schools, of resorting to any place of public amusement, and of receiving proper accommodation at the hands of innholders or common carriers, is not clear. The remarks of some of the judges would seem to indicate that result, and such rights are apparently often classified with the right to pursue any occupation, or to "exercise one's faculties," as "civil" rights. The cases in which there has been any discussion of such rights have arisen since the late war, and the question has always been as to the validity of statutes making certain discriminations in these matters between white and colored persons. These cases have always been decided with reference to that provision in the fourteenth amendment securing the "equal protection of the laws," and of course they naturally call for an interpretation of that clause rather than the one here in question. [1]

As regards the tendency to give the clause a broad interpretation, *392 and at the least to include within the term "liberty" the right to follow any lawful calling, natural and reasonable as such a construction may at first glance appear, it seems, upon examination, to have little real foundation either in history or principle. The use of the term "civil" to denote the ordinary substantive rights, other than life and property, which every citizen has, and constantly exercises in his daily life, is of recent origin, probably not extending back farther than the War of the Rebellion, and a construction of the term "liberty" making it coextensive with "civil rights" in that limited sense of the term "civil," seems to be unhistorical and arbitrary. One is obliged to ask why it should include thus much and no more. If it includes the right to pursue any lawful trade, why should it not include the right to worship in any lawful manner, to print or speak in any lawful manner, and to exercise one's political privileges in any lawful manner? Possibly, if the point should arise, it would be held to include all the above liberties, although the writer has not found any statements in the books to that effect. The reasons for supposing that the term should not be so interpreted have already been set forth.

NOTE. — This eassy received the prize offered by the Harvard Law School Association to the graduating class of 1890. — EDS.

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Footnotes

1 "The members of the convention unquestionably used the words they inserted in the constitution in the same sense in which they used them in their debates. It is their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual sense. And there is no reason to suppose that they did not use the word 'imports,' when they inserted it in the constitution, in the sense in which it had been familiarly used for ages, and in which it was daily used by themselves. If in this Court, we are at liberty to give old words new meanings when we find them in the constitution, there is no power which may not, by this mode of construction, be conferred on the general government, and denied to the state." — Chief Justice Taney in the Passenger Cases, 7 How. 478.

1 See also Lieber on Civil Liberty.

2 I Cooley's Blackstone, 135, n.

3 See, for example, the Constitution of Massachusetts, which, following the Declaration of Independence, declares that all men have natural rights to life, liberty, and the pursuit of happiness.

1 Constitutional History of England, vol. I, p. 577.

2 Stubb's Select Charters, 301.

1 Blackstone's Law Tracts, p. xii.

1 Macaulay's History of England, vol. 1, ch. 1.

1 Stubbs' Select Charters, 301.

2 That is, send others to pass upon, or condemn him; 2 Institute, 54.

3 "Libertatibus" is evidently used here in the technical sense, meaning a privilege of an exclusive nature — a franchise. "Liberis consuetudinibus" means simply customary rights.

1 For copies or confirmations of this article of Magna Charta by the early American Colonists see the Massachusetts "Body of Liberties" of 1641, and the "General Fundamentals" of the Plymouth Colony, 1 Hazard's State Papers, 408.

2 2 Coke's Inst., proem; 1 Blackstone's Com's, 128.

3 "But the essential clauses of Magna Charta are those which protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation. 'No freeman shall be taken or imprisoned,' etc. It is obvious that these words, interpreted by an honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of John's Charter, it must have been a clear principle that no man can be detained in prison without trial." Hallam's Middle Ages, 423.

4 4 Blackstone's Com's, 424.

1 Second Institute, 54.

1 See, for example, the constitutions of Massachusetts, New Hampshire, and Maryland.

1 See Judge Cooley's discussion of the fourteenth amendment in the appendix of his edition of Story on the Constitution. See also his discussion of "Civil Rights" in the "Principles of Constitutional Law."

1 1 Bl. Com's., chapter on "Absolute Rights of Persons."

1 Care's English Liberties (Ed. 1721), p. 185.

2 Kent's Com's, vol. 2, chap. 1.

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3 Hume's History of England, vol. vi. 158, 165.

1 9& 10 Will. III. c. 35; 53 Geo. III. c. 160; Dicey on the "Law of the Constitution," 257.

2 It was not fully obtained in England until 1694. See 2 Cooley's Blackstone, 135, note (a).

3 Chalmers' Annals, 328.

4 2 Hildreth's History, 77.

5 2 Hildreth, 298.

6 Chalmers' Annals, 678.

1 "It simply furnishes an additional security against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society." U. S. *v.* Cruikshank, 92 U. S. 354.

1 The right to be brought before a magistrate and have one's case examined is not the right of personal liberty any more than the right to a trial by jury is the right of life. It is simply "process of law."

1 State *v.* Goodwill et al., 10 S. E. Rep. 285. For similar cases see Godcharles *v.* Wigeman, 113 Pa. St. 431, and Hancock *v.* Yaden, 23 N. E. Rep. 253. In the former case the act was declared "utterly unconstitutional and void" without further discussion.

1 Pomeroy on Constitutional Law, p. 256 r-z.

4 HVLR 365

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