CHAPTER II

HISTORICAL BACKGROUND AND CONSTITUTIONAL INTENT 
OF RIGHT TO LIFE AND PERSONAL LIBERTY

In this chapter, after laying down a brief historical background about the inclusion of a set of Fundamental Rights in the Constitution of India, it is proposed to study the constitutional intent of right to life and personal liberty as enshrined in Article 21 of the Constitution of India. For this purpose, we have to look into the debates of the Constituent Assembly and deliberations of various Committees and Subcommittees constituted by the Constituent Assembly for framing the Fundamental Rights under the Constitution. The speeches of the members of the Constituent Assembly and other Committees and Subcommittees which run into hundred of printed pages constitute a veritable source of information throwing a flood of light on the genesis of many provisions of the Constitution, and the ideas and reasons underlying their adoption.¹ The study of the preparatory works will help us not only in knowing the original meaning and scope that the framers of the Constitution wanted to attribute to right to life and personal liberty, but also will help us to know any departure about their meaning and scope, made subsequently by the judicial pronouncements. That is to say, the above mentioned proposed study will ultimately throw light on the growth

of India's Constitutional Law with respect to right to life and personal liberty.

The inclusion of a set of Fundamental Rights in India's Constitution had its genesis in the forces that operated in the national struggle during British rule.² It was implicit in the formation of Indian National Congress in 1885. Indians wanted the same rights and privileges that their British masters enjoyed in India and that Britishers had among themselves in England.

Perhaps the first explicit demand for Fundamental Rights appeared in the Constitution of India Bill of 1895.³ The Bill envisaged for India a constitution guaranteeing to every one of her citizen freedom of expression, inviolability of one's house, right to property, equality before law and right to personal liberty.

A series of Congress resolutions adopted between 1917 and 1919 repeated the demand for civil rights and equality of status with Englishmen.

By the mid-twenties Congress leaders generally had achieved a new impetus and consciousness of their Indian-ness and needs of the people. This was brought about mainly by a number of factors like, the experience of World War-I, the disappointment of Montagu Chemsford

³. Mrs. Annie Beasant described it as the Home Rule Bill.
Reforms, Woodrow Wilson's support for self determination and Gandhi's arrival on the scene. These influences were reflected in the tone and form of demands for civil rights; the purpose was now to assure civil liberty among Indians.4

Another major development in this direction was drafting of "Mrs. Beasant's Commonwealth of India Bill of 1925", which contained a list of seven Fundamental Rights like the individual's liberty, freedom of conscience, free expression of opinion, free assembly and equality before law. It further provided that there would be no disqualification only on the basis of sex.5

The Congress Session at Madras in 1927 resolved that the Working Committee be empowered to set up a committee to draft Swaraj Constituition for India on the basis of declaration of rights.6

The Committee contemplated by the Madras Congress resolution, came into existence in May 1928. Pt. Moti Lal Nehru was appointed its Chairman. The Fundamental Rights of the Committees' report, known as Nehru Report were reminiscent of American and Post-American Constitutions and were reproduced verbatim from the Commonwealth of

5. Commonwealth of India Bill, Clause 8(9), quoted from G. Austin, Ibid., p. 54.
6. D. Chakravarty and C. Bhattacharya, Congress in Evolution, 1940, p. 27.
India Bill.  

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

"It is obvious that our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances..."  

The Indian Statutory Commission, 1930 did not support the general demand for the enumeration and guaranteeing of Fundamental Rights. Sir John Simon in his report observed:

"We are aware that such provisions have been inserted in many constitutions, notably in those of European States formed after the War. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective."

The demand for a declaration of Fundamental Rights in a constitutional document was again emphasized by several


9. This Commission was also popularly known as Simon Commission. The announcement that the Simon Commission would undertake a study of possible constitutional reforms in India, was made within two years of the printing of the Beasant's Bill.

10. See G. Austin, p. 58.
Indian leaders at the "Round Table Conference."

The Joint Select Committee of British Parliament in the "Government of India Bill of 1934" did not view with favour the demand for a constitutional guarantee of Fundamental Rights to British subjects in India. Expressing its agreement with the views of Simon Commission, the Committee observed:

".... there are also strong practical arguments against the proposal, which may be put in the form of a dilemma, for either the declarations of rights is so abstract in nature that it has no legal effect of any kind, or, its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the courts as being inconsistent with one or the other of the rights so declared." \[11\]

However, this did not dampen the enthusiasm of Indians to have a list of Fundamental Rights incorporated.

The next major document on Fundamental Rights of the pre-Assembly era was the "Sapru Committee Report" published at the end of 1945. The Committee was appointed by an "All Parties Conference, 1944-55".

"The Fundamental Rights of the new Constitution", said the Sapru Report, "will be a standing warning to all; what the Constitution demands and expects is perfect equality between one section of the community and another in matter of political and civil rights, equality and security in enjoyment of freedom of religion, worship and pursuits of the ordinary application of life."  

The British Cabinet Mission in 1946 recognized the need for a written guarantee of Fundamental Rights in the Constitution of India in Paragraph 19 and 20 of its statement of May 16, 1946, envisaging a Constituent Assembly for framing the Constitution of India. It recommended the setting up of an Advisory Committee for reporting, inter alia, on Fundamental Rights.  

The first meeting of India's Constituent Assembly in New Delhi, on 9th December 1946, was for many of its 296 members the fulfilment of a long-cherished hope. The business before the meeting was purely formal. But the meeting symbolized an event of unique significance, namely the commencement of great task of framing free India's Constitution without outside interference or pressure.  

Although many Assembly members first approached the "due process" issue, as if it were one simple issue,  

experience in constitution making soon taught them that it was intimately connected with one very important problem of preventive detention. It took Assembly members nearly three years to decide how to treat this matter in Constitution.  

As a first step towards the framing of the Constitution of India, on a motion by Govind Ballabh Pant, the Constituent Assembly adopted a resolution on January 24, 1947, setting up of the Advisory Committee on Fundamental Rights and Minorities. The Advisory Committee in its first meeting held on February 27, 1947 constituted five Sub-Committees, one of them being the Sub-Committee on Fundamental Rights with 10 members. On August 29, 1947 the Constituent Assembly appointed a Drafting Commi-

15. See 2 C.A.D., p. 308. Initially the Committee was to consist of only 50 members named in the resolution but the President was authorized to nominate to the Committee 22 more members. Sardar Vallabhbhai Patel was elected unanimously as Chairman of the Committee (The eleven volumes of the Constituent Assembly Debates will hereinafter be referred to as 1 C.A.D.; 2 C.A.D......11 C.A.D. etc.).
16. See B. Shiva Rao, The Framing of India's Constitution: Select Documents, Vol. II, pp.64-65. The names of the members of the Sub-Committee are: Acharya J.B. Kripalani, Mr. M.R. Masani, Prof. K.T. Shah, Rajkumari Amrit Kaur, Sardar Harnam Singh, Maulana Abul Kalam Azad, Dr.S.R. Ambedkar and Mr. Jairamdas Daulatram. In its very first meeting Acharya J.B. Kripalani was elected as the Chairman of the Sub-Committee.
The Fundamental Rights Sub-Committee completed the preparation of its report on Fundamental Rights and submitted the same on April 16, 1947 to the Advisory Committee. The Advisory Committee considered the report of the Sub-Committee on Fundamental Rights and with certain changes presented it as the Interim Report of the Advisory Committee on Fundamental Rights to the Constituent Assembly on April 29, 1947. The Constituent Assembly debated upon the Report thoroughly before the rights were finally adopted in the Constituent Assembly by December, 1948.

17. The order of the Business Committee, in its second report dated July 9, 1947 (See B. Shiva Rao, The Framing of India's Constitution: Select Documents, Vol. I, p.487) had recommended to the constituent Assembly the appointment of a Committee to scrutinize the Draft of the Constitution prepared by the Constitutional Advisor. Pursuant to this recommendation the Constituent Assembly by a resolution on August 29, 1947 authorized the appointment of a seven member Drafting Committee (5 C.A.D. p.319). In its first meeting held on August 30, the Committee elected Dr. B.R. Ambedkar as its Chairman. The members of the Committee were; Sir Alladi Krishna Swamy Ayyar, Mr.N.Gopala Swami Ayyangar, Dr.B.R. Ambedkar Mr.K.M. Munshi, Mr.Mohammad Saadulla, Mr.B.L. Mitter and Dr. D.P. Khaitan. See B. Shiva Rao, The Framing of India's Constitution: Select Documents, Vol. III, p.315

18. Pursuant to a recommendation of the order of Business Committee in its report of July 9, 1947 (4 C.A.D. p.560) which was adopted by the Constituent Assembly on July 14, 1947 (4 C.A.D. pp.543-54) the Constitutional Advisor undertook the preparation of a draft of the Constitution, embodying various decisions of the Constituent Assembly taken on the reports of its various Committees.
When the Sub-Committee on Fundamental Rights met on March 24, 1947, several members had already submitted the lists of their Draft Articles for its consideration. Of these, Mr. K.M. Munshi's Draft was taken as the model for the guidance of the Sub-Committee.¹⁹

Article V²⁰ of Mr. Munshi's Draft enumerated several rights including those of expression, free movement and association. One of the interesting aspects of Article V of Mr. Munshi's Draft was the separate enumeration of the right to "personal liberty" as a right

¹⁹. Mr. K.M. Munshi, Mr. Harnam Singh and Dr. B.R. Ambedkar are some of those who had submitted lists of Draft Articles of Fundamental Rights for the guidance of the Sub-Committee. See B. Shiva Rao, The Framing of India's Constitution: Select Documents, Vol. II, pp. 73-96.

²⁰. Article V of Mr. Munshi's Draft, inter alia, read as follows:

**Right 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 right 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;
   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 morality; and
   i) the right of free movement and trade within the territories of the Union.

4. No person shall be deprived of his life, liberty or property without due process of law.
independent of the other rights, i.e., the right of expression, association, movement etc. enumerated therein. In addition to the right to "personal liberty", Mr. Munshi's Draft Article contained another right which was to the effect that "no person shall be deprived of his life, liberty or property without due process of law". Two things are not clear from the text of Article V of Mr. Munshi's Draft. The first is with regard to his intention in enumerating the right to "personal liberty" as a separate right. The second is with respect to his intent in using the expressions "liberty" and "personal liberty" discriminately at different places. As regards the first the queries are: was it Mr. Munshi's intention to ascribe to the expression "personal liberty" an independent import? What was the exact meaning intended to be attached to the expression "personal liberty"? Obviously Mr. Munshi must have intended to ascribe an independent import to the expression "personal liberty", for otherwise the separate enunciation of the right to personal liberty would not have been necessary. This conclusion, however, does not disclose any clue to the exact meaning of the expression as intended by Mr. Munshi. Nevertheless, there is enough inferential evidence of indication from the text of the provision that, whatever be its exact import, the expression "personal liberty" was not intended to embrace the same aspects of "rights to freedom" as those intended

21. See foot note 20 above.
to be covered by the various Sub-Clauses of Article V. As to the second, it is not clear whether or not the concepts "liberty" and "personal liberty" were intended to convey the same meaning. One view is that they were intended to convey the same meaning. This view derives support from the proceedings of the meeting of the Sub-Committee on Fundamental Rights held on March 25, 1947. In this meeting the Sub-Comittee decided to drop Sub-Clause (d) along with Sub-Clause (e) of Clause (1) of Article V as it felt that these Sub-Clauses would be superfluous in the presence of Clause (4) of Article V, and the decision of the Sub-Committee was evidently agreeable to Mr. Munshi, for otherwise there would have been a note of dissent recorded in the minutes of the proceedings of the meeting. The other view is that they were not intended to convey the same meaning. This view derives support from the fact of the separate enumeration of the expressions "liberty" and "personal liberty" in the same provision.

Another aspect of Article V of Mr. Munshi's Draft that requires clarification is about the exact meaning of

24. ibid.
25. ibid.
26. See Supra foot-note 22.
the expression "due process of law" used in Clause (4) of the provision. There is no positive indication in this regard from the text of the provision. However, one thing is clear beyond doubt that when Mr. Munshi used the expression "due process of law" in Clause (4) of Article V of his Draft he was well informed of the constitutional implications of its import in the context of the American Constitutional Jurisprudence. This conclusion derives support from the fact that the clause embodying the concept of "due process of law" has been borrowed from V and XIV Amendments of the American Constitution. The reasonable inference should, therefore, be that the expression "due process of law" was intended to convey the same import even in the context of the Indian Constitutional Jurisprudence.

27. See Supra foot-note 20.

28. In the American Constitution the expression has had a chequered history. Originally its meaning was confined only to matters of procedure. Later its meaning was extended to substantive rights. This change in the judicial approach seriously affected the New Deal Legislation.

29. When the Sub-Committee on Fundamental Rights finalized its Draft Report, along with it, explanatory notes prepared by Mr. B.N. Rau, the Constitutional Advisor, were also circulated for the use of the members. In the explanatory note, dealing with Clause 11 of the Draft Report which corresponded to the Sub-Clause (4) of Article V of Mr. Munshi's Draft, it was mentioned that the Clause was adopted from V and XIV Amendments of the American Constitution. See B. Shiva Rao, The Framing of India's Constitution: Select Documents, Vol. II, p. 148.
It may be noted that while Clause (1) of Article V of Mr. Munshi's Draft did not provide for judicial review of legislation encroaching on the exercise of the rights guaranteed therein, Clause (4) contemplated judicial review of legislation depriving a person of his life, liberty or property.

The Sub-Committee on "Fundamental Rights" was faced with the problem of balancing the individual liberty vis-a-vis social control. The former being necessary for fulfilment of individual's personality and the latter for the peace and stability of society.

When the Sub-Committee on Fundamental Rights met to finalize the list of the Fundamental Rights, Sir Alladi Krishnaswami Ayyar advised the members of the Sub-Committee to look to the American experience as their model for the protection of the basic rights of the citizens. In support of his advice Sri Alladi explained to the members as to how the American Supreme Court under the XIV Amendment of the American Constitution prevented the State from depriving any person of his life, liberty or property otherwise than by "due process of law." Later, in one of the meetings of the Sub-Committee Sir Alladi, joined by Mr. B.N. Rau, appraised the members of the Sub-

Committee of the far-reaching constitutional consequences implied in the retention of the expression "due process of law" in Clause (4) of Article V of Mr. Munshi's Draft. They pointed out that the expression "due process of law" had been judicially interpreted in such a way as to cover the protection of not merely procedural rights but also of substantive rights. They sought to bring home to the members of the Sub-Committee the fact that if Sub-Clause (4) was retained in Article V in its then existed form, even tenancy legislation aiming at taking away certain rights from landlords for transferring them to tenants without payment of compensation might be declared by the courts as invalid and unconstitutional. Nevertheless, the Sub-Committee with full knowledge of such a possibility decided to retain the expression.

In the Draft Report submitted by the Sub-Committee to the Advisory Committee on April 3, 1947, Clause (4) was separated from the other Clauses in Article V and was numbered as Article 11. When the Draft Report was circu-

32. ibid.
33. Draft Report of the Sub-Committee April 3, 1947, Annexure, Clause 11, B. Shiva Rao, The Framing of India's Constitution: Select Document, Vol. II, p. 139. The provisions of Draft Reports of different Committees and Sub-Committees have been referred to sometimes as Articles and sometimes as Clauses in the debates and deliberations by the members. But for the sake of uniformity they have been referred to in this work as Articles.
lated among the members of the Sub-Committee, Mr. B.N. Rau, the Constitutional Advisor, endeavoured to draw the attention of members to the dangers inherent in retaining the "due process" Clause in Article 11.34

Despite the above warning Article 11 was retained.35 At its meeting held on April 15, 1947, the Sub-Committee, however, decided to modify Article 11 by combining "legal equality" provision with it.36

In the Final Report submitted to the Advisory Committee on April 16, 1947, Article 11 was re-numbered as Article 12.37 When this provision came up for discussion in the Advisory Committee on Fundamental Rights and Minorities, Sir Alladi argued for the retention of the expression "due process of law" in the provision notwithstanding the fact that it would entail far-reaching constitutional implications.38 He stated that the use of "due process" clause was aimed at restricting the powers of the legislature.39 Mr. Govind Ballabh Pant was, however, not agreeable to this, for he was keen to ensure legislative supremacy in matters of not only agrarian reforms but also preventive detention whenever the mainte-

34. ibid., p. 151.
35. ibid., p. 164.
36. ibid., p. 167.
37. ibid., p. 173.
38. ibid., pp. 240-241.
39. ibid., p. 241.
nance of public order and security of the Country demanded such a measure. Therefore, Mr. Pant argued for the replacement of the "due process" clause with a provision whose language would not lend to judicial vagaries in respect of its import. While Mr. Pant was keen to ensure legislative supremacy in respect of both property and liberty of the people, Mr. C. Rajagopalachari, Dr. B. R. Ambedkar, Sir Alladi, Mr. K. M. Munshi, Mr. K. M. Panikkar and Mr. Purshottam Das Tandon did not go that far. They sought to make a distinction between property on the one hand and liberty on the other. As regards property they were in agreement with Mr. Pant, but as far as liberties of the individuals were concerned they were not in agreement with Mr. Pant, for they were keen to ensure judicial supremacy for the protection of individual liberty. To solve this problem Mr. K. M. Panikkar struck at a compromise formula. He suggested the deletion of "property" from Article 12.

This was accepted by all the members except Mr. Pant. The provision so accepted became Article 9 in the Interim Report of the Advisory Committee.

40. ibid., pp. 243-245.
41. ibid., pp. 245-246.
42. ibid., pp. 246-247.
43. ibid., p. 297.
On 30th April 1947, the provision as recommended by the Advisory Committee was taken up for consideration by the Constituent Assembly and was adopted without any amendment having been moved. When Mr. B.N. Rau prepared his Draft Constitution he reproduced Article 9 of the Interim Report of the Advisory Committee as Article 16 with a significant change. He qualified the word, "liberty" by the insertion of the word "personal" before it. He sought to justify the change on the ground that the word "liberty" by itself might be interpreted liberally. So interpreted, even price control might be regarded as interference with liberty of contract between buyer and seller. 44 Mr. Rau felt that the insertion of the word "personal" before the word "liberty" would obviate such a possibility. The Drafting Committee in its meeting held on October 31, 1947, accepted the provision along with his explanation. 45 The Drafting Committee reiterated its position in its meeting on January 19, 1948. 46

But after the return of Mr. B.N. Rau, the Constitutional Adviser, from foreign trip, the Drafting Committee took up the matter again and effected a radical change in the provision. 47 The Drafting Committee not only qualified the word "liberty" with the word "personal" but also

45. ibid., p. 328.
46. ibid., p. 409.
47. ibid., p. 523.
supplanted the expression "without due process of law" by the expression "except according to procedure established by law."  

A perusal of the minutes of the meeting of the Drafting Committee would make it clear that the decision to omit the "due process" clause was taken sometime after January 19, 1948. It is also clear that the decision of the Drafting Committee was not unanimous. The minutes of the meetings of the Drafting Committee do not, however, provide any guidance to ascertain as to what prompted the members of the Drafting Committee to take such a decision. Again, there is no indication in the minutes about who supported the decision and who opposed it.

It would appear that Mr. B.N. Rau's visit to the United States and other countries in November, 1947 and his discussions with Justice Frankfurter and others on the power of judicial review of legislation affecting individual liberties had their invisible influence on the minds of the members of the Drafting Committee. It seems that Justice Frankfurter held the view that the power of judicial review implied in the due process clause "was not only undemocratic (because it gave a few judges power of

48. ibid.
49. ibid.
50. ibid., p. 328.
51. ibid., pp. 315-505.
vetoing legislation enacted by the representatives of the nation) but also threw an unfair burden on the Judiciary." 52 Mr.B.N. Rau was really overwhelmed by Justice Frankfurter's views on the power of judicial review implied in the "due process of law" clause which was also embodied in Article 16 of his Draft Constitution. Ever since his return from abroad, perhaps, he had been trying to persuade the members of the Drafting Committee to agree to drop the "due process clause" from the provision. Evidently, he was not successful till January 19, 1948, 53 but something happened thereafter and Mr. Rau did succeed in his mission. Though the minutes of the Drafting Committee are of little help to know as to who crossed the floor and why, 54 when one glances through the Constituent Assembly Debates one gets an idea as to who crossed the floor and for what reasons. It is evident from the speeches made in the Constituent Assembly that only Sir Alladi seems to have definitely changed his stand 55 on the ground that the contours of the "due process" clause were inherently vague, a ground which he did not mind earlier in the deliberations of both the Advisory Committee 56 and the Drafting Committee. 57 Dr.B.R. Ambedkar

52. ibid., p. 218.
53. ibid., p. 409.
54. ibid., pp. 315-505.
did not oppose the "due process" clause although he became less enthusiastic about its retention which was evident from his observations. K.M Munshi was the only member of the Drafting Committee who had been consistent in his views. He reiterated his views on the "due process" clause. As regards the views of the other members of the Drafting Committee neither the deliberations of the Drafting Committee nor the debates of the Constituent Assembly are helpful. One thing is clear and that is that there was no unanimous support either for or against retaining the "due process" clause in the Draft Article 15. Whatever support in whatever way was there it was only marginal, for otherwise Sir Alladi's defection would not have tilted the scale against the "due process" clause.

The draft of Article 15 evoked a keen controversy regarding the respective merits of expressions "due process of law" and "the procedure established by law" when it came up for consideration in the Assembly on 6th December, 1948. There were about twenty amendments, most of them seeking to replace the latter by the former or a similar expression. Almost the entire debate hinged on the controversy, with all the speakers including Munshi wanting the restoration of the expression "due process of

58. See 7 C.A.D., pp.1000-1001.
59. ibid., pp. 851-852.
Syed Karimmuddin and Mehboob Ali pointed out that the use of the phrase "procedure established by law" stripped a court of the power to go into the merits and demerits of the grounds on which a person was deprived of his life or liberty; a court could not look into the injustice of any law or of a capricious provision in any law, since its function would cease the moment it was satisfied that the "procedure established by law" had been complied with.

Thakurdas Bhargava, explaining the importance of the words "without due process of law," pointed out that if this phrase was used, the courts could go into the question of substantive law as well as procedural law; in other words, the courts would have the right to go into the question whether a particular law was just or not and protected the liberties of the people or not. If the Supreme Court came to the conclusion that any law was unconstitutional, unreasonable or unjust, such a law would cease to have effect. Z.H. Lari expressed the opinion that the essence of the "due process of law" was two fold; there would first be an enquiry before a man was condemned, and then there would be a judgement after trial. On the other hand if the words "procedure establi-

61. 7 C.A.D., pp. 842-1000.
62. ibid., pp. 843-845.
63. ibid., p. 846.
shed by law" were adopted it would mean that the legislature is all powerful.\footnote{ibid. p. 855.}

K.M. Munshi emphasized that with the omission of the word "property", and the word "liberty" qualified by the word personal, the "due process of law" provision had become no longer vulnerable to the difficulties of interpretation to which its counterpart in the United States was subjected to.\footnote{ibid., p. 851.} Referring to the fear that legislative majorities would be more anxious to establish social control than to serve individual liberty and might pass legislation in a hurry to give sweeping powers to the executive and the police, he said that it was necessary that a proper balance should be struck between individual liberty and social control. This could be done only if the governments had to go to the courts of law to justify a particular measure being passed infringing the "personal liberty" of an individual.\footnote{ibid., pp.851-852.}

Raising his voice in support of the retention of the expression "procedure established by law" as against "due process" provision, Alladi Krishnaswami Ayyar argued that the verdict of three or five gentlemen sitting as a court and stating what exactly is "due process of law" according to them in any particular case after listening
to long discourses and arguments of counsels on either side may not appeal to democrats more than the expressed wishes of the legislature or the action of an executive responsible to legislature.\textsuperscript{66}

In view of the trend of opinion in Assembly, Ambedkar suggested postponement of further consideration of the Draft Article. The suggestion was accepted. After a week, on 13th December, 1948, when the Article was again taken up, all the amendments for replacing the words "procedure established by law" by the words "due process of law" or other similar expressions were negatived and Article 15 as recommended by the Drafting Committee was adopted without any change.\textsuperscript{67}

The vote of the Assembly did not finally set the controversy at rest. A large part of the Assembly, as also Ambedkar himself, were greatly dissatisfied with the wording of the Article. Even outside the Assembly, the feeling in favour of incorporating in the Constitution the "due process of law" provision, in some form or the other, was so deep that the vote of the Assembly was considered to be "Carte Blanche" to the Parliament to provide for the arrest of any person under any circumstances it deemed fit. This was precisely the reason why it was thought that reconsideration of the whole issue was necessary to

\textsuperscript{66} ibid., pp. 853-854.
\textsuperscript{67} ibid., pp. 1000-1001.
guarantee certain minimum procedural safeguards to the detenus. To achieve this, a new Draft Article, i.e., 15-A was introduced in the Constituent Assembly on September 15, 1949.

Article 15-A read:

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for journey from the place of such arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate.

(3) Nothing in this Article shall apply —
(a) to any person who for the time being is an enemy alien; or
(b) to any person who is arrested under any law providing for preventive detention. Provided that nothing in Sub-Clause(b) of Clause 3 of this Article shall permit the detention of a person for a longer period than three months unless;
(i) an Advisory Board consisting of persons who are or have been or are qualified to be appointed as judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention; or
(ii) such person is detained in accordance with the provisions of any law made by Parliament under Clause 4 of this Article.

(4) Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person arrested under any law providing for preventive detention may be detained for a period longer than three months and also the maximum period for which any such person may be so detained.68

Introducing this Article in the Assembly on 15th Sept., 1949, Ambedkar observed that they were making, if he may say so, compensation for what was done in passing Article 15.69 He claimed that it might not satisfy those who believed in the absolute personal freedom of the individual, but the provision did contain the substance of the law of "due process".70 The first two Clauses of the Article embodied the two most fundamental principles of justice recognized by every civilized country and which

69. ibid., p. 1497.
70. ibid.
were already contained in Criminal Procedure Code. The Article only sought to raise these principles to the status of constitutional guarantees so as to restrict the power of Parliament and the State Legislatures to abrogate them by legislation. Ambedkar was satisfied that the Draft Article provided adequate protection against arbitrary or illegal arrests and that the inclusion of further safeguards against inroads by the executive and the legislature upon personal liberty of the individual urged by some members was unnecessary.

Ambedkar's speech did not allay the apprehensions of the members. A large number of amendments were moved. There was a long and spirited debate in which over twenty members took part. The consensus of opinion amongst the speakers appeared to be that the Draft Article as proposed by Ambedkar left much to be desired. Thakurdas Bhargava made the bitterest attack on the Draft Article for its inadequacy and moved several amendments.

In support of his amendments, Bhargava said that the rights sought to be extended by Clause 1 and Clause 2 of the Draft Article as proposed by Ambedkar constituted little compensation for the deletion of "due process" clause and were, in fact, so elementary that no civilized

71. See Sections 60, 61, 81 and 167 of the Criminal Procedure Code, 1898.
72. 9 C.A.D., pp.1497-1498.
73. ibid., pp. 1498-1508.
country and no civilized legislature could have the heart
to say that even these should not be recognized.

The provision pertaining to preventive detention
of the Draft Article was the main factor which evoked the
criticism from number of speakers so much so that Bakshi
Tek Chand remarked that Draft Article 15-A was most
reactionary in as much as there was no written
constitution in the world, which contained such provisions
for detention of persons without trial in normal times. 74

Towards the end of the long and animated debate,
Ambedkar accepted certain points made by the critics. He
dealt with the Draft Article and criticism against it
clause by clause and made certain suggestions towards the
end of the meeting on more important points. Regarding
Clause (1) there were two main points emphasized by
several members:

(I) That instead of providing that an arrested person
would be informed of the grounds of arrest "as soon
as may be", a time limit of twenty four hours, seven
days or fifteen days should be specifically laid down
for the purpose, and

(II) That an arrested person should have the right not
only "to consult", but also "to be defended" by a
legal practitioner of his choice.

74. ibid., pp. 1525-1535.
Commenting on the former, Ambedkar said that the words "as soon as may be", were integrally connected with Clause (2) which laid down that no person would be detained in custody for more than 24 hours without the authority for such detention being obtained from a Magistrate; since the Magistrate had obviously to be told of the grounds of arrest, "as soon as may be" could not extend beyond 24 hours. As for the second point, Ambedkar thought the right to consult includes also the right to be defended, because consultation would be purposeless if it was not for the purpose of defence. However, in order to remove the ambiguity, he agreed that the words "and be defended by a legal practitioner", as suggested by Thakurdas Bhargava, should be added after words "to consult".75

With regard to H.V. Pataskar's suggestion that in Clause (2) the word "Magistrate" should be replaced by words "First Class Magistrate", Ambedkar did not think this would be in the interest of the accused. The nearest Magistrate might not be a First Class Magistrate and it might then be necessary for a police officer to keep a man in custody for a longer period.76

In regard to the Proviso (3), Ambedkar referred to two criticisms made in the course of debates. The first

76. ibid.
was that in the case of a person arrested and detained under ordinary law, as distinct from the law relating to preventive detention, provision had been made in Clause(1) that he should be informed of the grounds of arrest. But such a provision had not been made in the case of a person held in "preventive detention". The second criticism was that the period of three months during which a person could be held in preventive detention without enquiry or trial was too long and needed to be reduced to 15 days or similar period.

Ambedkar considered former to be a legitimate criticism and agreed to amend the Draft Article by adding two new clauses which required the authority passing an order of detention to communicate the grounds of such detention to the person concerned "as soon as may be", unless it was against the "public interest" to disclose the facts. As for the second criticism, he said that the period of three months was considered reasonable, mainly on practical and administrative grounds as the number of cases of preventive detention might be considerable and adequate time had to be provided for their disposal by the Advisory Board.

Regarding the Advisory Board a few questions were raised —

(i) What procedure would the board follow?
(ii) would it be obligatory on the executive to place
before the Board all the papers connected with preventive detention of a person?

(iii) would the accused be entitled to appear before the Board, cross-examine the witnesses and make his own statement?

As to the first question, Ambedkar agreed to amend the Draft Article so as to give power to Parliament to make provision for procedure to be followed by the Advisory Board and with respect to second question Ambedkar observed that it was for the interest of the executive itself to place before the Board all the relevant documents. Replying to the third question, Ambedkar observed that the "right of cross-examination" was included in the "right to defend". Besides it was already contained in Indian Evidence Act of 1872 and Criminal Procedure Code of 1898.77

Thus the Article 15 which was finally adopted by the constituent Assembly read:

"No person shall be deprived of his life or personal liberty, except according to procedure established by law."

This became Article 21 in the Constitution. Article 15(A) was made Article 22 in the Constitution.

From the above discussion we find that the expression "personal liberty" was brought into the draft provision for the first time by Mr. B.N. Rau in his Draft Constitution. A similar expression was found in Article V of Mr. K.M. Munshi's Draft. It may be recalled that Mr. K.M. Munshi sought to enumerate the right to personal liberty as a separate and independent right along with other rights mentioned in that provision. In addition Mr. Munshi also sought to guarantee "liberty" separately. Later, in view of the separate guarantee of "liberty" he agreed to drop the separate enumeration of the right to "personal liberty" from his Draft Article V. From this, one can infer reasonably that to Mr. Munshi "liberty" and "personal liberty" did not mean and convey the same thing. This is evident from the fact of their separate mention in his Draft Article V. This view finds further support from his opposition to the replacement of the word "liberty" with the words "personal liberty". Similarly "personal liberty" was not intended to embrace all the other rights mentioned in Mr. Munshi's draft provision. This is again evident from the enumeration of the various rights in his draft provision in juxtaposition to one another.

78. See supra the text accompanying foot-note 44
79. See supra foot-note 20
80. ibid
81. ibid.
82. See supra text accompanying foot-note 23
As regards the import of "liberty" there is no clear guidance to discern the mind of Mr. Munshi. The only thing that can be inferred is that like "personal liberty", "liberty" was not intended to cover the other rights mentioned in his Draft Article. However, nothing is clear as to what "liberty" was intended to convey in its positive aspect. It can, perhaps, be said that Mr. Munshi himself was not very clear in his thinking on this aspect of the problem.

With the replacement of the word "liberty" with the expression "personal liberty" in the Draft Article of Mr. B.N. Rau's Draft Constitution and its approval by the Drafting Committee along with the explanation offered by him for the replacement, the need for ascertaining the meaning of "liberty" receded to the background, for there-after the need for ascertaining the meaning of the expression "personal liberty" became prominent.

As regards the meaning of the expression "personal liberty" there seems to have been no discussion on this aspect in the deliberations of the Sub-Committee on Fundamental Rights, the Advisory Committee on Fundamental Rights, B. Shiva Rao, The Framing of India's Constitution: Select Documents, Vol. II, p. 114-198.
Rights and Minorities and the Drafting Committee. It is only when the Draft Article 15 came up for discussion in the Constituent Assembly one gets an idea as to what the expression "personal liberty" meant to the makers of the Constitution. For example, to Mr. K.M. Munshi it meant "liberty of the person, that is, no body can be convicted, sent to jail or be sentenced to death without due process of law". Similarly, to Shri Chimanlal Chakkubhai Shah, it meant "liberty of the person". Most of the other members of the Constituent Assembly who spoke on the Draft Article did not focus their attention on the meaning of the expression "personal liberty" as they were more concerned with espousing the cause of the "due process" clause. Nevertheless, the tenor of their speeches would indicate that for them too the expression "personal liberty" meant only "liberty of the person". This is what it must have meant to Dr. Ambedkar also. This may be inferred from his speech where he said that Article 22 was necessary to qualify Article 21.

87. See supra foot note 51.
88. 7 C.A.D., p. 852.
89. ibid., p. 849.
90. See the speeches of Mohammad Ismail Sahib, Prof. K.T. Shah, Shri Alladi Krishna Swamy Ayyar, Shri Lari and Mahaboob Ali Baig Sahib Bahadur. 7 C.A.D. pp. 723, 726, 854, 855 and 844-45 respectively.
91. 9 C.A.D., pp. 1497-98.
As regards the meaning of the expression "procedure established by law" it would seem that the expression "due process of law" was consciously replaced by the expression "procedure established by law". It would appear that the intention behind the change was not so much to deny to the Indian Courts any opportunity to emulate the experience of their American counterparts in the matter of interpretation of the expression "due process of law" but it was more to confer legislative supremacy on the Indian Legislatures in all matters concerning deprivation of life and personal liberty. This finds adequate support from the Constituent Assembly Debates. There was a general consensus among the members of the Assembly that the draft provision if adopted would make the legislature absolutely supreme in matters concerning "life and personal liberty". At the same time it was felt that at least a few procedural safeguards should be guaranteed against the legislature to safeguard the "life and personal liberty" of the individuals. The result was that a new draft provision, i.e., Article 15A was introduced and adopted by the Constituent Assembly. This provision, as evident from the Constituent Assembly Debates, was intended to curb the supremacy of the legislature which is implied in the use of the expression "according to procedure established by law" in the Draft Article 15.

92. 7 C.A.D., pp.842,844,846,848,850 and 851 respectively.
93. 7 C.A.D., 1559.