CHAPTER-II
RIGHT TO LIFE AND PERSONAL LIBERTY AND
THE CONSTITUENT ASSEMBLY

(A) Prelude

The Constituent Assembly, an elected body, had representatives from almost all shades of public opinion. It started its deliberations on 9 December 1946. It became a sovereign body when India gained independence on 15 August 1947. Almost all the elements in political life participated in the Constitution-making.

Right to life and personal liberty finds a very important place in the Magna Carta of India. No fundamental right attracted so much debate at the time of framing the Constitution as the article containing right to life and personal liberty did.

(B) Adoption of Objectives Resolution

The Assembly elected Rajendra Prasad as its permanent Chairman on 11 December 1946. The very first task taken by the Assembly was the formulation of the objectives which were to be the basis of the Constitution. Jawahar Lal Nehru drafted these objectives and moved them in the Assembly on 13 December 1946. These objectives were adopted on 22 January

1. It was constituted for framing the Constitution of India. It consisted of the representatives elected by the popular provincial Legislatures and those of the princely states according to a scheme evolved by the British Cabinet Mission in consultation with Indian leaders in 1946. The Indian Independence Act, 1947 had recognized this body as the Constitution framing body for India. See A.C.Banerjee, The Constituent Assembly of India, 38-174(1947).
1947. The relevant parts of the resolution are the following:

(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a constitution.

(2) ....

(5) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality.5

Nehru, in his speech on the resolution, emphasised that the House should look at the "spirit" behind the resolution rather than looking at the "narrow legal wording".6 He stated

[Th]ere is a duty cast upon us ... to remember always that we are here not to function for one party or one group, but always to think of the welfare of the four hundred millions that comprise India.7

He concluded by observing:

I would beg of this House to consider this Resolution in this mighty prospect of our past, of the turmoil of the present and of the great and unborn future that is going to take place soon.8

In the Constituent Assembly, there had been good discussion on the Objectives Resolution. According to M.R. Jayakar, it was very vital resolution which lay down the fundamentals of the Constitution. It took away individual liberty to the extent the people desired.9 Recognizing the importance of the fundamental rights, S. Radha-Krishnan said that the fundamental rights were most cherished by the common man. According to him,

5. Id. at 57.
6. Id. at 60.
7. Ibid.
8. Id. at 62.
9. Id. at 72.
the liberty of the human spirit must be safeguarded and that the freedom contemplated was supported by the various principles which were laid down in the resolution. Nehru hoped that they would continue working till they finished the task they had undertaken.

In the Constituent Assembly, there had been a lot of discussion over the fundamental right to life and personal liberty, that is, whether "due process clause" should be included or not. The whole discussion and deliberations will be analysed step by step in the proceeding heads of this Chapter.

(C) Recommendations of The Sub-Committee
On Fundamental Rights

When the first meeting of the Advisory Committee on fundamental rights was held, five sub-committees including the Sub-Committee on fundamental rights were appointed. The Advisory Committee presented the notes on fundamental rights prepared by B.N.Rau, K.T.Shah, Alladi Krishna Swami Ayyar, K.M.Munshi, Harnam Singh and B.R.Ambedkar to the Sub-Committee.

B.N.Rau, the constitutional adviser, submitted a preliminary note on fundamental rights in which he analysed the scope of various rights as embodied in the Constitution of other countries of the world. In his note on the personal liberty clause, he desired that this clause should not be ambiguous and the courts must be given the power to enforce this

10. Id. at 275.
11. Id. at 62.
13. Id. at 67, 69,81 and 84.
clause so that it should not be a meaningless guarantee against the oppressive law.\textsuperscript{15} While referring to the constitutional development in the United States of America, he stated that the rights should not be absolute and the state must be authorised to impose restrictions on them.\textsuperscript{16}

Shah prepared a comprehensive note. He classified rights as civil, political, economic and social. According to him, the political rights were rights of citizens while the civil rights were rights of men. He felt that these rights should not be unconditional but these must be exercised subject to the laws of several communities as well as special legislation necessary during emergency like war.\textsuperscript{17} Alladi Krishna Swami Ayyar referred to the Constitution of United States and observed that the Supreme Court of United States of America had drawn a line between personal liberty and the need for social control and thus imposed limitations on social control as well as personal liberty. In United States, the "due process clause" was used either to expand or to limit the scope of the provisions guaranteeing personal liberty. He felt that the question before the Constituent Assembly was whether to follow the model of United States Constitution or any other constitution.\textsuperscript{18}

In the chapter on rights to freedom, Munshi's draft provided, "No person shall be deprived of his life, liberty or property without due process of law".\textsuperscript{19} The "due process clause" could be found in Article 5(1)(e) of the draft also which guaranteed to every person the right to be informed within twenty-four hours about the grounds due to which the person was deprived of his liberty.\textsuperscript{20} There were also provisions against

\begin{itemize}
\item \textsuperscript{15} B.Shiva Rao, supra note 12 at 30,32.
\item \textsuperscript{17} B.Shiva Rao, supra note 12 at 36-55.
\item \textsuperscript{18} Id. at 67-68.
\item \textsuperscript{19} Id. at 75.
\item \textsuperscript{20} Ibid.
\end{itemize}
prolonged detention before trial, excessive bail and unreasonable refusal of bail, refusal of safeguards, proper procedure and inhuman punishment. Ambedkar also laid down in his draft that the state should not deprive any person of life, liberty or property without "due process of law". He had prepared a long list of fundamental rights in which he included the right to life, liberty and pursuit of happiness. He incorporated these rights in his draft after studying the constitution of various countries but while doing so he took care that the rights should be borrowed only from those countries where the conditions were more or less analogous to the conditions in India. He was of the view that the Supreme Court should be given the power to issue a prerogative writ, that is, writ of habeas corpus on an application by the aggrieved party. According to him, unless there was rebellion or risk to public safety, the right to apply for a writ should not be taken away.

The subject-matter of right to life and personal liberty was discussed by the Sub-Committee from 24 March 1947 to 31 March 1947. Article 5 of Munshi's draft was discussed on 25 March 1947. It was argued that sub-clause 5(1)(e) should be dealt with separately. After discussing the subject, the sub-committee included two clauses 11 and 29 in its draft. Clause 11 provided:

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

Clause 29 laid down:

No person shall be subjected to prolonged detention preceding trial, to exercise bail, or unreasonable refusal thereof, or to inhuman

21. Id. at 79.
22. Id. at 86.
23. Id. at 84.
24. Id. at 87.
25. Id. at 88.
26. Id. at 119.
or cruel punishment. B.N.Rau commented on the draft report that clause 11 had been taken from the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Clause 29 was adopted from article 1 of Lauterpacht's "An International Bill of the Rights of man" as well as from the sixth and eighth Amendments of Constitution of the United States. According to him, forty percent of the total litigation in the United States in the preceding half century was due to this "due process clause" and this clause could be interpreted anyway by the courts. The draft not only borrowed the clause but also applied it retrospectively. All laws, tenancy laws, laws relating to money lending, laws to relieve debt, to prescribe minimum wages etc. were subject to challenge prospectively as well as retrospectively. Thus he expressed the fear that "the result is likely to be a vast flood of litigation immediately following upon the new Constitution". To overcome the problem, he suggested an additional clause 27A based upon the Irish Constitution which laid down:

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

So this clause could be used to empower the state to delimit by law the guarantees for private property if the exigencies of common good so required.

On 3 April 1947, the Sub-Committee incorporated in its draft report the conclusions regarding various provisions on fundamental rights. A copy of this report was submitted to the Advisory Committee. Its copies along

27. Minutes and Draft Report of the Sub-Committee, 119-122, 132, 139 and 141. The clause which contained the right to be informed of the authority and grounds of deprivation of one's liberty within twenty-four hours was omitted in view of the due process of law. See also Id. at 139 and 141.
28. B.Shiva Rao, supra note 12 at 149.
29. Id. at 151.
30. Id. at 151-152.
with the copies of explanatory notes prepared by B.N. Rau were sent to
the members of the Advisory Committee for their comments and sugges-
tions.31

The Sub-Committee on fundamental rights had also suggested in
its report to include right of liberty of person and security of person
and dwelling from unreasonable searches32 and seizures and from search
without warrant,33 but the Advisory Committee deleted them from the list
of rights because it was felt that such rights might help the criminals
and would have impact on the working of Indian Evidence Act, 1892 and
that sufficient safeguards for search and seizure were laid down under
the Criminal Procedure Code.

On 16 April 1947, the Sub-Committee on fundamental rights submi-
tted its final report to the Advisory Committee. The Sub-Committee
reproduced clauses 11 and 29 as clause 12 and 28 without any modification
except that the "legal equality" provision34 was also included in clause
12. Clause 12 provided:

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 territory of the Union, provided
that nothing herein contained shall prevent the
Union Legislatures from legislating in respect of
foreigners.35

(D) Recommendations of The Advisory Committee on
Fundamental Rights

The Advisory Committee, with Vallabhbhai Patel as its Chairman,

31. Supra note 27 at 137.
32. Ayyar, while discussing the provisions on unreasonable searches, had
pointed out the difference between the conditions prevailing in United
States of America at the time when Constitution was drafted there and
conditions in India at the time of independence. B.Shiva Rao, supra,
note 12 at 159.
33. B.Shiva Rao, supra note 12 at 172.
34. The legal equality clause remained combined with the provision regard-
ing life and personal liberty till the final stage when the drafting
(conted)
met to discuss the final draft report submitted by the sub-committee on fundamental rights on 21 April 1947. Before the Committee met, Alladi Krishna swami Ayyar expressed his intention to the Chairman suggesting some amendments to the clauses recommended by the Sub-Committee on fundamental rights. In the meeting, he stated that the phrase "due process of law" was uncertain and it could be interpreted in different ways. The expression "due process of law" taken from American history, had a "chequered history". In the beginning, it was applied only to procedural laws but later on it was extended to substantive rights also. Different judges gave different interpretation to this phrase. He gave the example of President Roosevelt's New Deal Legislation, in which judges gave interpretation in the direction of social utility, while in other cases, the interpretation was given in the direction of individual property. According to him, all the American courts had not shown unanimous approach towards interpreting this phrase. Ayyar felt that this fluctuating approach would be followed by the Indian courts also and it might stand in the way of "expropriatory legislation". If the judges were more inclined to property, they might put a wide construction upon the words so as to hamper "social legislation". If the judges were imbued with modern ideas, they might give a more liberal interpretation. He cautioned about the danger inherent in "due process" clause and observed:

It is a matter of fundamental right which is going to bind the future constitution of India. Whatever decision is reached, it is better that we are fully alive to the implications of what we are doing. Personally I am for the retention of the clause. I am willing to take that chance, but there is that danger.

committee separated and renumbered it as an independent article 14 under the Constitution.

35. B.Shiva Rao, supra note 12 at 151-152.
36. Id. at 240-241.
37. Id. at 241.
Thus Ayyar was not opposed to the "due process" clause but he wanted to make clear to the Committee about the implications of this clause. That is why he again emphasised, "let us maintain the decision with full knowledge of the implications. I am for retention of the clause".38

The retention of the phrase "due process of law" was strongly opposed by Govind Balabh Pant who proposed for the alteration of this clause because it was ambiguous and might result into divergent interpretations. He observed:

The future of this country is to be determined not by the collective wisdom of the representatives of the people, but by the fiat of those elevated to the judiciary. If this is the case, then I strongly oppose it. The words 'due process of law' should be altered. The language should be fool-proof so that every judge may be expected to give the same sort of ruling. We should not put in words which give rise to controversies... which will place the fate of the people of this country on the whims and vagaries of the judges.39

Pant felt that the power of the Legislatures should not be fettered to pass laws to empower the executive to detain persons who disrupt communal disorders, for short periods.40 He wanted to be clear about the social legislation. He opined that the legislatures must have power to pass tenancy laws and other measures to acquire private property for public purposes without paying compensation at market value. At the time when there was contemplation of abolition of zamindari, there might be a law to the effect that the bigger zamindars might be paid compensation at the rate of ten times their annual value and the smaller ones at forty times. The Zamindars might go to the court and demand compensation at market rate. The decision might be delayed for years in the Supreme Court and ultimately the state might have to pay heavy compensation.41

38. Id. at 242. 39. Id. at 243-244.
40. Ibid.
41. Id. at 245.
Pant's view to limit the right to liberty did not find any support in the Committee. The members felt that there was no reason for giving carte blanche to the government to arrest, except in a grave emergency, any person without "due process of law". Munshi did not support the view of Pant. He stated that there was a fundamental right not to be detained in many constitutions but such a provision has been purposely omitted in the draft so as not to fetter the power of the government. The "due process" clause was considered with regard to every legislation. "Due process of law" only meant that the legislation which was brought forward was a proper and necessary legislation to secure the end in view and it was not extravagant with respect to each particular situation. He made it clear that the American Supreme Court had every time applied these canons whether the legislation was a proper one. It allows socialistic legislation. It allowed detention to some extent in times of war. It upheld drastic legislation in most of the cases. He said,"It is not correct to say that judges will put themselves in the place of the legislature".

However, the practical difficulties created by coupling the "life and liberty" provision with the "property" provision were considered. K.M. Panikar, as a possible way out, suggested the omission of the latter from the text. Drawing a distinction between the "right to life and liberty" on the one hand and the "right to property" on the other, he said that while the former should be regarded as "absolutely sacred", not subject to any other restriction except that of public order and tranquility, the latter should be guaranteed only subject to legislation. Ambedkar agreed with this view. He suggested that the legislature, executive should not be placed in the absolute power to dispose of people's life and liberty.

43. B.Shiva Rao, supra note 12 at 244.
44. B.Shiva Rao, supra note 42 at 235; See also supra note 12 at 245-247.
45. B.Shiva Rao, supra note 12 at 246-247. He, however, agreed with Pant's view regarding legislation dealing with property and tenancy. See B. Shiva Rao, supra note 42 at 234-235.
Munshi and Rajagopalachari also supported Panikar's view and this suggestion generally appealed to the members but Pant remained unconvinced.\(^{46}\) Finally, the Chairman omitted the "property" provision from this clause and passed the remaining clause as it was.\(^{47}\) This provision was incorporated in clause 9 of the report submitted to the Constituent Assembly. Clause 9 read as under:

No person shall be deprived of 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.\(^{48}\)

After consideration, the Assembly adopted the provision without any amendment on 30 April 1947.\(^{49}\)

The decision of the Committee had no Indian Constitutional precedent in the background. The Nehru Report and the Karachi Resolution did not use the phrase "due process of law". Instead, these used the words "save in accordance with the law".\(^{50}\) The Government of India Act 1935 did not mention personal liberty but laid down that no legislature could authorize through any law, to compulsorily acquire any property without paying compensation. Either the compensation should be fixed or the principles, on which it was to be paid, must be fixed.\(^{51}\) The rights drafted by the Congress Experts Committee in 1946 did not refer to due process and personal liberty but provided that property could not be acquired without "compensation prescribed by law".\(^{52}\)

\(^{46}\) B.Shiva Rao, \textit{supra} note 42 at 235.
\(^{47}\) B.Shiva Rao, \textit{supra} note 12 at 247.
\(^{48}\) Id. at 297.
\(^{49}\) \textit{L C.A.D.} 457.
\(^{50}\) See Granville Austin, \textit{The Indian Constitution:Cornerstone of A Nation}, 86(1976,Reprint).
\(^{51}\) Ibid.
\(^{52}\) Ibid.
An Advisory Committee prepared an interim report about the whole of the constitution and submitted it before the Constituent Assembly on 23 April 1947.53

(E) First Reading of The Draft Constitution
In The Constituent Assembly

On 30 April 1947, Munshi, while moving clause 9 for the consideration of Constituent Assembly suggested that the words "the equal treatment of laws" be substituted by the words "equality before the law".54

The proviso to the right to personal liberty was dropped and the clause then provided:

No person shall be deprived of his life or liberty without due process of law nor shall any person be denied the equality before the law within the territories of the Union.55

(F) Right To Life And Liberty And Rau's Draft Constitution

B.N.Rau, the constitutional adviser, prepared a Draft Constitution in pursuance of the recommendations of the Constituent Assembly on the report of its committees.56 He reproduced the clause on liberty in clause 16 of his Draft Constitution of October 1947. Clause 16 provided:

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.57

While reproducing the provision on liberty, he restricted the scope of the expression "liberty" by adding the word "personal" before "liberty". He justified the change on the ground that the expression "liberty" was

53. See Advisory Committee Proceedings, April 21 and 22, 1947.
54. C.A.D., supra note 49 at 468.
55. Ibid.
57. Id. at 9.
very wide unless it was controlled by the word "personal". He examplified by saying that if the word "personal" was not used, even price control might be taken as a restriction on the liberty of contract between buyer and seller.  

Rau visited the United States, Canada, Ireland and United Kingdom to have personal discussion with justices, constitutionalists and statesmen about the framing of the Constitution. In the United States, he met Justice Frankfurter of the Supreme Court who considered the power of judicial review vested in the "due process clause" as undemocratic because it gave a few judges the power to veto Legislation enacted by the representatives of the nation. He also met Justice Hand of the Federal Circuit Court of Appeals who expressed the view that all the fundamental rights should be moral precepts and not legal fetters in the Constitution. After returning, he submitted a report of his discussion abroad to the President of the Assembly.

As a result of these discussions, Rau proposed amendments to his draft and observed:

> [W]hen a law made by the State in the discharge of one of the fundamental duties imposed upon it by the Constitution happens to conflict with one of the fundamental rights guaranteed to the individual, the former should prevail over the latter: in other words, the general welfare should prevail over the individual rights.

Rau could not pursue the members of the Drafting Committee in the meeting of the Drafting Committee in the autumn of 1947, so he tried to

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58. Id. at 199.
60. B.N.Rau, supra note 16.
61. B.Shiva Rao, supra note 56 at 217.
62. See B.N.Rau, supra note 16 at 302.
63. Austin, supra note 50 at 103-104.
obtain the same result in a different manner by suggesting that the "due process clause" should be eliminated and the phrase "according to procedure established by law" should be adopted. The latter expression, which was enthusiastic adoption of Justice Frankfurter's views borrowed from article 31 of the Japanese Constitution, was considered more specific by the members of the committee and it led the Drafting Committee to reconsider the issue.

In the elimination of the "due process" clause, many events and persons played a role but the main part was performed by B.N.Rau. The process had been started even before the Assembly adopted the "due process clause" in May 1947. While commenting on the report of the Fundamental Rights Sub-Committee, Rau had remarked that interpretation of "due process" might interfere with legislation for social purposes. Rau had always been in favour of substantive meaning of "due process" but the supporters of "due process" had always supported its procedural aspect so that it could be used against arbitrary executive action.

Thus the amendments proposed by B.N.Rau made the Drafting Committee to reconsider the issue.

(G) Recommendations of the Drafting Committee

On 29 August 1947, a Drafting Committee was appointed by the Assembly to scrutinise the Draft Constitution prepared by B.N.Rau. After a

64. B.Shiva Rao, supra note 42 at 235-236.
65. H.V.R.Iengar, Home Secretary, had expressed this view in a letter to A.V.Pai, Nehru's Private Secretary on 12 July 1949, "Law Ministry Archives", cited by Austin, supra note 50 at 104.
66. Austin, supra note 50 at 102.
67. Id. at 103.
detailed scrutiny of that Draft Constitution and other material, notes, reports and concerned memorandum placed before it, the Drafting Committee submitted to the President of the Constituent Assembly a revised Draft Constitution on 21 February 1948.\(^6\) It is not evident what really happened in the meeting but some reconstruction of the event is possible. Out of the seven members of the Drafting Committee at the time, Munshi, Ayyar, Ambedkar and Saadulla supported "due process" - Ayyengar apparently did not support it. N.M. Rau's views are not known. Khaitan, who was close to Patel might have opposed it. B.N. Rau many a time met Ayyar and convinced him about the dangers inherent in substantive interpretations of due process and Ayyar became a strong opponent of the "due process clause".\(^7\)

It is doubtful if Ambedkar or Saadulla also changed sides but Munshi did not do so. In fact the presumed reason behind the omission of "due process clause" was that it was felt that preventive detention could be used as the best weapon against the communal violence.\(^8\) So ultimately the Drafting Committee omitted the expression "without due process of law" and added the expression "except according to procedure established by law". The apparent reason given was that the Drafting Committee considered it more specific. The adopted expression was borrowed from article 31 of the Japanese Constitution. The text of the provision as incorporated in article 15 of the Draft Constitution was:

\[
\text{No person shall be deprived of his life or personal liberty except according to procedure established by law nor shall any person be denied equality before the law or the equal protection of the law within the territory of India.}\]

\(^6\) B. Shiva Rao, supra note 56 at 509.
\(^7\) See Austin, supra note 30 at 104.
\(^8\) Ibid.
\(^72\) B. Shiva Rao, supra note 56 at 523.
Copies of the Draft Constitution submitted by the Drafting Committee to the Assembly were sent to every member of the Constituent Assembly with the request that suggestions or criticisms should be sent on or before 22 March 1948. 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 23, 24 and 27 March 1948 to consider the comments and suggestions received till then. The constitutional adviser had examined them and prepared notes on most of them. During this meeting, the Committee 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 which was 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 21 February 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 Drafting Committee assembled again on 18 October 1948 and at its meetings held on 18, 19 and 20 October 1948 examined the comments.

74. The Special Committee met on 10 and 11 April 1948. It consisted of the members of the Union Constitution Committee, the Provincial Constitution Committee and the Union Powers Committee. See ibid.
75. B.Shiva Rao, supra note 73 at 3.
and criticisms on the Draft Constitution received so far. It also 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 to 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 21 February 1948 together with the recommendations made by the Drafting Committee for amendment of certain provisions in the light of the comments and criticisms received.

(H) Second Reading of The Draft Constitution In The Constituent Assembly

Ambedkar introduced a reprint of the Draft Constitution in the Constituent Assembly for its consideration on 4 November 1948. Along with this reprint, amendments recommended by the Committee members and the notes of Rau were also submitted.

76. Suggestions were received from the members of the Constituent Assembly, the Provincial Governments, the Provincial Legislatures, Ministries of the Government of India and the Governmental organizations, as well as from non-official bodies and the general public. See Id. at 3-4.

77. B. Shiva Rao, supra note 73 at 4.

78. The Drafting Committee had not agreed with certain proposals but on the suggestion of the special Committee, it reproduced these provisions as alternative provisions in an appendix to the reprint of October 1948. See ibid.

79. B. Shiva Rao, supra note 73 at 4.

Article 15 was discussed in the Assembly. This article was opposed by the supporters of "due process". Mahboob Ali Baig criticised the dependence on the Japanese Constitution for using the expression "procedure established by law" because in the Japanese Constitution, many fundamental rights endangered by the omission of "due process" were separately guaranteed, for example, the right of a person not to be detained except on adequate cause and unless at once informed of the charges against him, the right to counsel and immediate hearing in open court and the right of a person to be protected against entry, search etc. except on a warrant. He felt that the phrase "procedure established by law" would take away the power to check any capricious provision in any law and to test the merits and demerits of the grounds on which a person was deprived of his life or liberty because the court could not interfere when the "procedure established by law" had been complied with. The only extent to which courts could go was to find out whether there was bona fide or malafide intention for the action of the government and the burden was laid upon the person to prove that the intention of the government in issuing a warrant of arrest or detention was malafide. Therefore, the expression "procedure established by law" would mean that the future legislature might pass a law by which the right of a citizen to prove his innocence before a court of law would be taken away. He gave the example of England where all laws were subjected to the relevant principle that no man should be convicted and no man should be deprived of his liberty without a chance being given to him to prove his innocence.

81. These supporters were Pattabhi Sitaramayya, T.T. Krishnamachari, G.Durghabhai, Thakur Das Bhargava, B.V.Keskar, M.Ananta Sayanam, Ayyanger, K.Santhanam, Mahboob Ali Baig, Karimuddin and Munshi.
82. Supra note 80 at 844-845. Baig referred to articles 32, 34 and 35 of the Japanese Constitution.
83. Ibid.
84. Ibid.
Pattabhi Sitaramayya also recommended for the substitution of the words "save in accordance with law" for the words "except according to procedure established by law". According to Karimuddin, if the words "procedure established by law" were enacted there would be a great injustice done because as soon as a procedure according to law was complied with, the duties of the court would be over and the judges would not interfere with any law which might be unjust. He felt that the clause could do great mischief in a country which was the storm centre of political parties and where discipline was unknown.

Thakurdas Bhargava proposed to substitute the words "due process of law" for the words "procedure established by law" because the phrase "without due process of law" would help the courts to go into the question of substantive as well as procedural law, that is, whether the law enacted by Parliament was just or not and whether it protected the liberties of the people or not. If the Supreme Court came to the conclusion that the law was unjust, unreasonable or unconstitutional, such law would cease to have effect. According to him, the word "law" meant what was understood by the Japanese and other constitutions, that is, universal principles of justice. Regarding procedure also, he expressed the view, if any legislature took it into its own hands then the courts would be entitled to hold whether the procedure was just or not. He wanted to have a government which should respect the liberties of citizens of India. He felt that even if the legislature was carried away by the party spirit, the judiciary would save from the tyranny of the legislature and executive. He observed that in a democracy, the judiciary was the ultimate refuge of the citizens for the vindication of their rights and liberties and it should

85. Id. at 842-843.
86. Id. at 846.
be exalted to its right position of palladium of justice so that the people's rights and liberties should be protected under its protective wings.87

Z.H.Lahri expressed the view that the "due process" clause would bring two plus points, firstly, there would be enquiry before a man was condemned and secondly, there would also be a judgement followed by the trial. And our Supreme Court would recognize the limits of individual liberty as well as necessities of the state to interpret it in such a manner as to ensure individual liberty of a man. But if the phrase "procedure established by law" was used, the legislature would be all powerful and whatever procedure was deemed proper would have to be followed by the court. He felt that there were certain inherent rights of man which should not be infringed through any procedure laid down by any legislature. According to him, in our parliamentary form of government, the legislature would be controlled by the executive and the executive could be controlled only by adopting the phrase "due process of law".88

According to Munshi, with the word "liberty" being qualified by the word "personal", the "due process clause" would no longer be vulnerable to the problem of interpretation which problem had been faced in the United States because there it had been construed so widely as to include liberty of contract also and it had not been qualified by the word "personal". He opined that "due process clause" would control the sweeping powers of the executive and the police. He said:

When a law has been passed which entitles the 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

87. Ibid.
88. Id. at 855-856.
therefore, as I said, the balance will be struck between individual liberty and social control.89

Munshi had "public security" in his mind. So he referred to due process versus preventive detention. He felt that the fundamental rights of the individual would be protected by due process and at the same time the courts would upheld Public Safety Acts in order to maintain public security and hence there would be harmony between individual rights and public security.90

Alladi Krishnaswamy Ayyar opposed the "due process clause" and favoured the expression "procedure established by law" and thus, upheld the decision taken by the Drafting Committee. He disclosed his changed mind about "due process" on the Assembly floor but without telling why he changed his mind.91 He rejected "due process clause" on the ground that it was an hindrance in the way of social legislation, the ground which he avoided earlier. He favoured his points with the grounds which he had earlier rejected. He did not consider the procedural importance of "due process" which was very crucial at the moment. He referred to the absence of uniformity in the interpretation of the phrase in the United States and felt that it would be better if the Indian Supreme Court did not follow American precedents but moulded their interpretation to suit Indian conditions. He stated:

I trust that the House will take into account the various aspects of this question, the future progress of India, the well being and security of the state, the necessity of maintaining a minimum of liberty, the need for coordinating social control and personal liberty before coming to a decision.92

89. Id. at 852.
90. Ibid.
91. Ayyar had written a strong note containing his view to Jawahar Lal Nehru just three days before he spoke in the House.
92. C.A.D. supra note 80 at 853-854.
Ambedkar suggested postponement of further consideration of the draft article because no decision could be reached. On 13 December 1948, the matter was again taken up. Ambedkar presented to the Assembly both the positive as well as negative points of each of them. According to one view, legislature could be trusted that it would not enact such laws as would violate the fundamental rights of the individuals. The other view was that the legislature could not be trusted as being led by party prejudices and considerations, it might enact laws abridging fundamental rights of the citizens.93

In spite of the efforts of many Assembly members to include "due process clause" in article 15, this article was passed without the "due process clause". The non-incorporation of "due process clause" evoked a lot of public criticism.94 Ambedkar had reported to the Assembly in September 1949:

No part of our Draft Constitution...has been so violently criticised by the public outside as article 15. 95

The passage of article 15 without "due process clause" led to the feeling that this article gave to Parliament a carte blanche to enact any law for the arrest of any person under any circumstances it deemed fit. Ayyar also recognized that "a good number of members in the House favoured the retention of "due process".96 Thus such feeling and criticism by public led to the drafting of a new article 15-A. Article 15-A

(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 be denied the right to consult a legal practitioner of his choice.

93. Id. at 1001.
94. B.Shiva Rao, supra note 42 at 238.
95. IX C.A.D.1497.
96. Id. at 893.
(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of 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—
      (a) 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
      (b) such person is detained in accordance with the provisions of any law 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 who is 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.97

This article was introduced in the Assembly on 15 September 1949. Ambedkar felt that this article contained the substance of "due process" and that it would compensate for what was done in passing article 15. At the same time, he agreed that the believers of absolute personal freedom of the individual might not be satisfied by the addition of this article. The first two clauses of this article included two fundamental principles of justice. These provisions were already part of Criminal

97. Id. at 1496-1497.
Procedure Code. This article had checked the legislative power to violate the principles of justice by granting constitutional guarantees to them. Ambedkar was satisfied with the protection given to individual by this article.

There was a good debate over the inclusion of this article and many amendments were moved. Thakurdas Bhargava criticised this article and moved the following amendments seeking to widen the scope of the article so as to state clearly:

1. That every arrested person had the right to be produced before a magistrate within twenty-four hours of his arrest, to be informed of the accusation for his arrest, to be detained further only by the authority of the magistrate and for reasons to be recorded by him, to have access to courts, to have access to counsel of his choice, not only to consult but also to be defended by him, to a speedy and public trial, to produce his defence and cross-examine the prosecution witnesses, to freedom from torture and unnecessary restraints and unreasonable search of person and property, and to at least one appeal against his conviction; and

2. That in cases of preventive detention no person should be detained without trial for a period longer than necessary. Every case of detention for a period exceeding fifteen days was to be placed within a month before a duly constituted tribunal presided over by a High Court judge with powers of enquiry, including the examination of the detenu, and of passing orders of further detention or of conditional or absolute release. No detention was to continue unless confirmed.

98. See Sections 60, 61, 81 and 167 of the Criminal Procedure Code, 1898.
99. C.A.D., supra note 95 at 1497-1498.
within two months by an order of the tribunal; every case of continued
detention was to exceed a total period of one year. No person held in
preventive detention was to be subjected to hard labour or unnecessary
restrictions. 100

Bhargava criticised Ambedkar's draft article's clauses (1) and
(2) on the ground that these could not compensate for what was done in
article 15 and that these could not take place of "due process clause".
He felt that instead of granting further rights, this article even took
away the existing safeguards under the Criminal Procedure Code. He observed
that the draft article did not save a person from the tyrannies of the
police and the magistracy after arrest and detention but under the exist­
ing law in Criminal Code, no person could be kept in detention for a single
minute longer than was necessary or reasonable; the executive must produce
an arrested person before a court as soon as possible and no accused could
be kept in custody for a period longer than twenty-four hours except under
the authority of a magistrate and for reasons to be recorded by him. 101
According to him, preventive detention was unavoidable in the modern times.
So the law regulating preventive detention must fulfil the barest demand of
justice. In such a way, he supported his proposed amendments. 102

Purnima Banerji moved four amendments:

Firstly, the maximum period, for example fifteen days, should be
laid down during which every arrested person must be told of
the grounds of his detention and she felt that the draft article
had vaguely provided for it.

Secondly, she opted for the hearing by the Advisory Board before
it reported for the continuation of the detention beyond three months.

100. Id. at 1498-1508.
101. See supra note 98.
102. C.A.D. supra note 95 at 1497-1508. Hriday Nath Kunzu also supported
the views of Bhargava.
Thirdly, she felt that the maximum period of detention should not exceed six months, and

Lastly, a maintenance allowance should be paid to the dependents of a detenue if he was the sole earning member of his family.  

According to H.V. Kamath, the jurisdiction of the Supreme Court and the High Courts, especially in the area of issuing a writ of habeas corpus, should be made clear regarding preventive detention cases. He suggested that the maximum period of seven days should be prescribed during which the arrested person should be informed about the grounds of detention.  

H.V. Pataskar wanted this period to be only of twenty-four hours. Other amendments moved by him were that the power to authorize detention of a person beyond twenty-four hours should vest only in a first class magistrate and not in the nearest magistrate as mentioned in the draft article and that the Advisory Board should consist only of High Court Judges and should not include persons who were merely "qualified to be appointed as such judges."  

Deshmukh suggested that clause (3) of the new article should be deleted as it was "absolutely useless". He felt that it did not protect the individual anymore than it was so done under the Criminal Procedure Code. Instead, it had put obstacles in the way of Parliament enlarging the rights of the individuals or dealing in a more liberal manner with persons held in preventive detention.  

Mahavir Tyagi felt that instead of guaranteeing the rights of people, the Constitution-makers would deprive them

103. Id. at 1510-1511.
104. Id. at 1515-1517.
105. Id. at 1519-1523.
106. Id. at 1512-1514.
of their rights as article 15-A would change the chapter on fundamental rights into "a penal code worse than the Defence of India Rules of the old Government". R.K. Sidhva was of the opinion that unless the Advisory Board had definite evidence before it that a detene was a violent person out to destroy freedom and constituted a danger to society, his total continuous detention should not be allowed to exceed nine months. Bakshi Tek Chand was of the view that the draft article was most reactionary as there was no written Constitution in the world, which contained such provisions for detention of persons without trial in normal times. There was no provision in the draft article for the arrested persons to place an explanation before the Board considering the advisability of continuing his detention. The opinion of the Board only depended on the police reports or other papers placed before it by the government.

According to Jaspat Roy Kapoor, the draft article, instead of conceding any fundamental right only provided the extent to which the legislatures could freely go to impose limitations on personal liberties. He observed that the detenues were given no protection and they could be detained without the sanction of a magistrate for any length of time and without the reasons for detention being conveyed to them. He pleaded for periodical review of the cases of detention after every three months. Ayyangar also favoured such periodical review.

Alladi Krishnaswami Ayyar analysed the contents of the article and favoured it holding that it did not in any way alter or obstruct the continuance of the guarantees existing under the Criminal Procedure Code. Clauses (1) and (2) guaranteed only the minimum with which the Legislatures

107. Id. at 1541-1552.
108. Id. at 1525-1535.
109. Id. at 1541-1552.
could not interfere. He commented on clause (3) that in the prevailing conditions when there were some undesirable people who would violate the sanctity of the Constitution, the security of the state and the individual liberty, preventive detention was a necessary evil. According to him, it was not essential that only judges or ex-judges should be appointed on the Advisory Boards because there were many others who were more talented than the judges. Regarding the procedure to be followed by the Advisory Board, he observed that if the demand for notice, hearing, examination, cross-examination and a counsel was fulfilled then this Board would be converted into a magistrate's court with all its "paraphernalia" and the very purpose of this article would be defeated.\(^{110}\)

After the debate, Ambedkar accepted some points laid down by the critics and made some suggestions. Regarding clause (1) there were two main points emphasised 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, or 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. Ambedkar commented on the former 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 twenty-four hours without authority for such detention being obtained from a magistrate. Since the

\(^{110}\) Id. at 1535-1538.
magistrate had obviously to be told of the grounds of arrest, "as soon as may be" could not extend beyond twenty-four hours. Regarding the second point, Ambedkar felt that the right "to consult" included right "to be defended" because consultation would be purposeless if it was not for the purpose of defence. He, however, agreed that the words "and be defended by a legal practitioner" suggested by Bhargava should be added after the words "to consult".111

Regarding Pataskar's suggestion of replacing the words "magistrate" by the words "first class magistrate", Ambedkar observed that there would be problem in adopting that suggestion because 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 longer period. Responding to Bhargava's suggestion for making it obligatory upon the magistrate to record in writing his reasons for the detention order, he felt that this was not necessary as what was involved in the clause was only remand to custody for a further period and the magistrate was not to have the authority to consider whether the charge framed against the accused by the police was prima facie borne out.112 Referring to the view that clause (3) dealing with the preventive detention should be deleted, he stated that by virtue of the entries in the legislative lists, the Union and state already possessed complete powers to legislate on preventive detention. The intention of the new article was, in fact, to curtail these powers and render them subject to certain specific limitation. He pointed out that in the absence of such a provision, the legislatures might make any kind of law for preventive detention. Regarding the proviso to clause

111. B.Shiva Rao, supra note 42 at 243.
112. Ibid.
(3), he referred to two criticisms,

First, 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 his arrest, but such a provision had not been made in the case of a person held in preventive detention. Second, 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 fifteen days or some similar period.

Ambedkar took the first criticism as genuine criticism and agreed to add 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. With regard to second criticism, he stated 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.\(^\text{113}\)

With regard to the Advisory Board, few questions were raised:

(i) What procedure would be followed by the Board,
(ii) Would it be obligatory on the executive to place before the Board all the papers connected with the 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,

\(^{113}\) Id. at 243-244.
Regarding the first question, Ambedkar agreed to amend the draft article so as to give power to the Parliament to make provision for the procedure to be followed by the Advisory Board. As to the second question, he replied that for any detention beyond three months, the executive had to obtain a recommendation from the Advisory Board and it was in its own interest to place before the Board all the relevant documents. With regard to the last question, he pointed out that the right to defend included the right to examine and moreover right to cross-examine had already been included in the Indian Evidence Act and the Criminal Procedure Code.\textsuperscript{114}

While considering many suggestions regarding maintenance allowance for detenus and their families, periodic reviews of cases, laying down of the maximum period of detention and other matters, Ambedkar viewed that there was no need to provide for all these matters in the Constitution since provision could better be made in the law to be enacted by Parliament under clause (4). Replying to Kamath’s question regarding the issuing of writs by the High Courts for the benefit of the detenus, he said that a writ of 	extit{habeas corpus} could be issued in any case, but it would be subject to the finding whether the man was arrested under any law or merely by an executive whim. Once the court was satisfied that the man was arrested under some law, 	extit{habeas corpus} came to an end. Regarding other writs, it depended on the circumstances of each case; if any one had not been arrested under a law, he could ask for any writ which might be necessary and appropriate for redressing the wrong. He felt that there was no necessity of making any provision for it in the draft article.\textsuperscript{115}

\textsuperscript{114} Id. at 244.  
\textsuperscript{115} Id. at 244–245.
The new draft article 15-A as introduced by Ambedkar was adopted by the Assembly. It provided:

(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 and be defended by 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 twenty-four hours of such arrest excluding the time necessary for the journey from the place of 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 clauses (1) & (2) of 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 -

(a) 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

(b) such person is detained in accordance with the provisions of any law made by Parliament under clause (4) of this article.

(3-a) Where an order is made in respect of any person under sub-clause (b) of clause (3) of this article, the authority making an order shall, as soon as may be, communicate to him the grounds on which the order has been made and afford him the earliest opportunity of making a representation against the order.

(3-b) Nothing in clause (3-a) of this article shall require the authority making any order under sub-clause (b) of clause (3) of this article to disclose facts which
such authority considers to be against the public interest to disclose.

(4) Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person who is arrested under any law providing for preventive detention may be detained for a period longer than three months and also the maximum period for which any such person may be so detained, and Parliament may also prescribe by law the procedure to be followed by an Advisory Board in an enquiry under clause (a) of the proviso to clause (3) of this article.116

While revising the draft article, the Drafting Committee renumbered draft articles 15 and 15-A as articles 21 and 22 respectively. The other changes were:

(i) The "legal equality" provision coupled with the "protection of life and liberty" provision under article 15 was separated and transferred under the heading "Right to equality" as article 14, the renumbered article 21 was confined to right to life and personal liberty.

(ii) The proviso to clause (3) of draft article 15-A was converted into an independent clause (4) in the renumbered article 22; and

(iii) clauses (3-a), (3-b) and (4) were redrafted and renumbered as clauses (5), (6) & (7) respectively. These changes were all of a drafting nature.117

(1) Third Reading of The Draft Constitution
In The Constituent Assembly

When the revised Draft Constitution was considered by the Assembly on

116. Id. at 245-246.
117. Ibid.
14, 15 and 16 November 1949, no alteration was suggested in article 21 but article 22 was severely criticized and several amendments were moved. On behalf of the Drafting Committee itself, T.T. Krishnamachari moved two amendments which proposed to redraft clauses (4) to (7) so as to make clear that there would be a maximum period laid down by Parliament for which any person or any class or classes of persons could be detained by any law providing for such detention; even in cases where the Advisory Board approved of detention beyond three months, no authority in India could in any circumstances order the detention of a person beyond the maximum limit so laid down by Parliament. Kamath felt that if Parliament laid down in a class of cases the maximum period of preventive detention, then, a person could be detained upto that period without recourse to the machinery of the Advisory Board. He wanted to make it obligatory on the executive to refer to the Board every case of preventive detention where the detention was proposed to be prolonged beyond three months; the only right conferred by article 22 was the right to detain without trial, and by his amendments he was making a last attempt to safeguard the liberty of the individual or at least to control the abuse of power which might result into injustice. Purnima Banerji also opposed Krishnamachari's amendment to redraft clause (7) since she feared that under the redrafted clause, Parliament might dispense with the constitution of Advisory Board by laying down a general law authorising detention beyond three months upto a maximum period.

118. The Draft Constitution as revised by the Drafting Committee and submitted to the president of the Assembly on 3 November 1949. See B. Shiva Rao, supra note 73 at 745.
119. XI C.A.D. 466-467 and 531-532.
120. Id. at 532-533 and 535-536.
On 16 November 1949, Ambedkar explained the scope of the article as it was sought to be amended by the Drafting Committee:

First, every case of preventive detention must be authorised by law. It cannot be at the will of the executive. Secondly, every case of preventive detention for a period longer than three months must be placed before a judicial board, unless it is one of those cases in which Parliament acting under clause (7), sub-clause (a), has by law prescribed that it need not be placed before a judicial board for authority to detain beyond three months. Thirdly, in every case, whether it is a case which is required to be placed before the judicial board or not, Parliament shall prescribe the maximum period of detention so that no person who is detained under any law relating to preventive detention can be detained indefinitely. There shall always be a maximum period of detention which Parliament is required to prescribe by law. Fourthly, in cases which are required by article 22 to go before the judicial board, the procedure to be followed by the Board shall be laid down by Parliament.121

According to Ambedkar, the original article 15-A was open to two main criticisms:

(i) The cases of preventive detention referred to the Advisory Board under clause (4)(a) did not appear to be subject to the maximum period of detention prescribed by Parliament by law under clause (7), and

(ii) The requirements as to the communication of grounds of detention did not apply to persons detained as preventive detenus under clause (4) (a). The amended article met both these criticisms.

As to Purnima Banerjee's criticism, he stated that while he agreed that article 22 excepted certain cases from the purview of the Advisory Board, he felt that it was necessary to make such a distinction because in some particular cases of detention, the circumstances and the consequences were so dangerous that it would

121. B. Shiva Rao, supra note 42 at 247.
not be proper to let the members of the Board to know the facts. He felt that even in the cases which were taken away from the purview of the Board, there were two mitigating circumstances, firstly, such cases were to be defined by Parliament and not by the executive arbitrarily, and secondly, in every case the maximum period of detention would have to be prescribed by law. 122

Ultimately, the Drafting Committee's amendments as moved by Krishnamachari were adopted and article 22 of the constitution assumed its present form. Articles 21 and 22 as adopted read:

Article 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22.(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 be denied the right to consult, and to be defended by, 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 twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the place 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 clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention, shall authorize the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as judges of a High Court has

122. Id. at 247-248.
reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe -

(a) the circumstances under which, and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4). 123

In the Constituent Assembly the discussion concluded on 26 November 1949 and the Constitution was adopted by the Constituent Assembly on this date. In this meeting, Ambedkar cautioned to protect the liberties guaranteed under the Constitution in his speech delivered on 25 November 1949.

123. C.A.D. supra note 119 at 575-576 and 600.
He said:

[W]e must... observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not "to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions"....This caution is far more necessary in the case of India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world....in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship...he must...not... be content with mere political democracy. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life.124

(J) An Appraisal

The discussion which took place in different Committees of the Assembly show that the right to "life" and "personal liberty" consumed the maximum time. The right which injects life into all the fundamental rights had to be thoroughly discussed. The ultimate observation can be that the maximum number of members were initially in favour of including "due process clause" but the screening at different stages did not let it take the final shape. Finally, the expression "procedure established by law" was adopted. When criticism was made by the public and dissatisfaction was shown by the Assembly members, article 22 was introduced which qualified the right of legislature in the framing of laws. It is submitted that insertion of article 22 could not compensate for what had been lost by replacement of the phrase "due process of law" with "procedure established by law". In fact, the "due process clause" could not be adopted due to sheer false fear. Even after qualifying the word "liberty" with the word "personal", the fear of the founding fathers could not be controlled. They

124. Id. at 972-981.
did not want to guarantee a broader concept of liberty as it was provided in United States.

In the Assembly, the supremacy of legislature and the supremacy of judiciary was weighed on the balance and unfortunately balance tilted towards the supremacy of the legislature. The word "liberty was qualified by the word "personal" and the expression "procedure established by law" was used instead of the expression "due process of law". Thus, by the use of the expression "procedure established by law", the Constituent Assembly accepted the English principle of supremacy of law in preference to the American doctrine of judicial review of legislation affecting personal liberty. This expression shows that the procedure laid down by the legislature cannot be tested by the judiciary on the touchstone of justness, fairness and reasonableness.

The judiciary followed, the restricted interpretation of the expressions "life", "liberty" and "procedure established by law" in the pre-international emergency era excepting few dissenting judgements. In the post-international emergency era, the judiciary has heard the need of time and has adopted "due process" in its judgments. Where one organ of the state fails, the other organ of the state fulfils the vacuum. What was needed it an early stage, has been accomplished at later stage, but it is better late than never. How the previously rejected "due process clause" of American Constitution has overshadowed the Indian scene, has been picturised in the relevant Chapters.