Chapter IV

FUNDAMENTAL RIGHTS

The Historical Background. The Objectives Resolution of Sri Jawahar Lal Nehru had 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, expressions, belief; faith, worship, vocation, association and action, subject to law and public morality. It also promised to provide adequate safeguards "for minorities, backward classes, and tribal areas, and depressed and other backward classes." Therefore, it was essential to provide a chapter on Fundamental Rights in the Constitution of India. The first demand, however, for fundamental rights was made by the Indian National Congress at its special session held at Bombay on the 29th August, 1918 under the Presidency of Mr. Hasam Imam. It accepted the Montague proposals subject to a Declaration of Rights of the people of India, --(a) guaranteeing to them liberty of person, property, association free speech and writing, except under sentence of an ordinary court of justice as a result of lawful and open trial, (b) entitling Indians to bear arms, subject to the purchase of a licence as in Great Britain, (c) guaranteeing freedom of Press, dispensing with licence and security, on the registration of a Press or newspaper, and (d) guaranteeing equality to Indians before the law. Thus these demands were made with a view to having some positive safeguard from the tyranny of British rule in India. They were all political rights and no demand was placed for social or economic rights. Naturally it was not accepted by the British Parliament.

This demand, however, at once attracted the imagination of a few Indian leaders who could read in it a solution for all communal and minority problem in India.

They sought to infuse confidence in the various religious communities by providing adequate safeguards in fundamental rights. Therefore, it was further elaborated in the Commonwealth of India Bill prepared in 1925 wherein the following fundamental rights were demanded: (a) inviolability of the liberty of the person and of his dwelling and property, save by process of law in a duly constituted court of law, (b) freedom of conscience and the free practice of religion, subject to public order or morality, (c) free expression of opinion and the right of assembling peaceably and without arms, and of forming Associations or Unions, subject to public order or morality, (d) free elementary education as soon as practicable (e) the use of roads, places dedicated to the public, courts of justice and the like, (f) Equality before the law, irrespective of considerations of Nationality, and (g) equality of sexes. It was closely examined clause by clause by the labour Party of Great Britain and finally they passed it unanimously as embodying the resolutions passed by the labour Party from time to time.

Since then this demand for Fundamental Rights "captivated the imagination of minorities - it evoked the enthusiasm of the moderates and ideologues and affected a strange union of men with different outlook and programmes in bonds of common sentiments and ideals. The Muslim Community found in it a pacacea for all its ills and made it an integral part of its fundamental resolution...The principle fundamental safeguards was enthusiastically supported by all the political organisations in India, and became a vital part of Indian political programmes, while the minorities regarded it as the sheet anchor of their political existence. The Nehru Committee also suggested "fundamental safeguards" on the lines of the post-war constitutions of Poland, Esthonia, Czechoslovakia, Latvia and other States of Europe. It demanded the fullest liberty of conscience and religion.

1. Annie Besant: India Bond or Free, p. 212.
2. Ibid
5. R. Goupland: The Indian Problem Part I, p. 89.
But the Simon Commission rejected it outright. It observed "Many of those who came before us have urged that the Indian Constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens. We are aware that such provisions have been inserted in many constitutions, notably in those of the European states formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective. Until the spirit of tolerance is more widespread in India and until there is evidence that minorities are prepared to trust the sense of justice of the majority, we feel that there is indeed need for safeguards. But we consider that the only practical means of protecting the weaker or less numerous elements in the population is by the retention of an impartial power, residing in the Governor-General and the Governors of Provinces, to be exercised for this purpose."

On the other hand, the Karachi Session of the All India Congress declared in March 1931 that any Constitution which might be agreed to on its behalf should provide the following fundamental rights:

1. Every citizen of India has the right of free expression of opinion, the rights of free association and combination, and the right to assemble peacefully and without arms, for purposes not opposed to law or morality.

2. Every citizen shall enjoy freedom of conscience and the right freely to profess and practice his religion, subject to public order and morality.

3. The culture, language and script of the minorities and of the different linguistic areas shall be protected.

4. All citizens are equal before the law, irrespective of caste, creed or sex.

5. No disability attaches to any citizen, by reason of his or her religion, caste, creed or sex, in regard to public employment, office of power or honour, and in the exercise of any trade or calling.

6. All citizens have equal rights and duties in regard to wells, tanks, roads, schools and places of public resort, maintained out of State or Local funds, or dedicated by private persons for the use of the general public.

7. Every citizen has the right to keep and bear arms, in accordance with regulations and reservations made in that behalf.

8. No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated, save in accordance with law.

9. The State shall observe neutrality in regard to all religions.

10. The franchise shall be on the basis of universal adult suffrage.

11. The State shall provide for free and compulsory primary education.

12. The State shall confer no titles.

13. There shall be no capital punishment.

14. Every citizen is free to move throughout India and to stay and settle in any part thereof, to acquire property and to follow and trade or calling, and to be treated equally with regard to legal prosecution or protection in all parts of India.

The first Round Table Conference considered this demand for fundamental rights sympathetically as Ramsay MacDonald of the Labour Party was the Prime Minister of England. Dr. B. R. Ambedkar and Rao Bahadur R. Srinivasan demanded (1) Equal citizenship and (2) Free enjoyment of Equal Rights and that no discrimination was to be made against any subject of the State on account of untouchability.1

1. Indian Round Table Conference Vol. III, pp. 168-169.
Diwan Bahadur M. Rambhanda Rao also demanded the inclusion of fundamental rights in the constitution. He also wanted that provision should be made for enforcing these rights. He admitted the difficulties in investing the court with jurisdiction in these matters but he maintained that the subject required careful consideration.\(^1\)

Mr. K. T. Paul, on behalf of the Indian Christian Community demanded the implementation in the constitution, certain rights to which all citizens in India are entitled wherever they may live in India and to whatever community they may belong or whatever religion they may profess.\(^2\) He quoted articles 7, 8 and 132 of the Polish Constitution as specimen.\(^3\) Sir Misa Ismail also recognised the importance of providing fundamental rights in the constitution.\(^4\) It had already been recommended by the Indian Central Committee\(^5\) in the following terms "No subject of the King Emperor shall by reason only of his religion, place of birth, descent, color or caste, or any of them, be disabled from or prejudiced for the purpose of holding or being recruited for any office or post paid out of public funds: or of adopting freely any profession, trade or calling, or engaging in any industry: or acquiring any right, title or interest in any property; or finding admission to any educational institution supported out of funds in the hands of the Central or Provincial Government or a local body; or entering or using public roads, public wells and other places whatsoever so maintained; and all orders and enactments placing any such disability now in force are null and void.

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1. Ibid, p. 186
2. Ibid, p. 177
3. Ibid, p. 179
4. Ibid, p. 186
5. It consisted of the following members:
   Legislative Assembly
   1. Nasab Sir Zulfigar Ali Khan
   2. Sri Hari Singh Gour
   3. Dr. Abdullah Suhrawardy
   4. Mr. Kikabhai Premchand
   5. Rao Bahadur M. C. Rajah

Council of States
6. Sir Sankaran Nair
7. Sir Arthur Proctor
8. Raja Nasab Ali Khan &
9. Sardar Bahadur
   Shivdev Singh
   Ubaroi (Sikh)
"Provided that this provision shall not affect the Punjab Land Alienation Act or any similar Act for the protection of agriculturists in India."¹ Therefore, the Minority Committee of the First Round Table Conference, in Paragraph III stated "one of the chief proposals brought before the sub committee was the inclusion in the constitution of a declaration of fundamental rights safeguarding the cultural and religious life of the various communities and securing to every individual, without discrimination as to race, caste, creed or sex, the free exercise of economic, social and civil rights."²

In the course of debates on this Paragraph Dr. B. R. Ambedkar pointed out "That this declaration of fundamental rights is of no consequence. I attach no importance to it myself personally, because, after all, what is important to an individuals is not that his rights should be declared but that he should have the remedy in order to enforce those rights."³ He, therefore, pressed the necessity for inclusion in the constitution sanctions for the enforcement of the fundamental rights, including a right of redress when they are violated. In the alternative he advocated the inclusion in the Instrument of Instructions to the Governor-General and Governors of any propositions relating to fundamental Rights which could not be enacted in the Constitution Act itself.⁴ The Third Round Table Conference took into account "of the great importance which has been attached in so many quarters to the idea of making a chapter of fundamental rights a feature in the new Indian Constitution as a solvent of difficulties and a source of confidence: nor do they undervalue the painstaking care which has been devoted to framing the text of the large number of propositions which have been suggested and discussed."⁵

But there were practical difficulties in enforcing the fundamental rights and so

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2. Indian Round Table Conference, Vol. III, p. 156.
4. Indian Round Table Conference: Third Session, p. 63, footnote.
5. Ibid, p. 63.
they suggested that the course of wisdom was to rely on the special responsibilities of the Governor-General and the Governors to protect the rights of minorities.¹

The Joint Select Committee was also of the view that they were of no great practical value. The Committee observed "either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create grave risk that a large number of laws may be declared invalid by the courts because inconsistent with one or other of the rights so declared...There is further objection, that the States have made it abundantly clear that no declaration of fundamental rights is to apply in State territories, and it would be altogether anomalous if such a declaration had legal force in part only of the area of the Federation. There are, however, one or two legal principles which might, we think, be appropriately embodied in the constitution. There are others, not strictly of a legal kind to which perhaps His Majesty will think fit to make reference in any proclamation which he may be pleased to issue in connection with the establishment of the new order in India."²

Therefore "the Constitution Act of 1935 was passed without any Bill of Rights incorporated in it."³ But it did provide, however, for some of the fundamental rights in sections 298 and 299.⁴ Though the Indian National Congress accepted office, at its Calcutta Session in October 1937, it reiterated its demand for fundamental rights.⁵ But during the War years civil liberties lost all their meaning in India.

1. Ibid, p. 63.
After the World War, when the Attlee Ministry sincerely endeavoured to find out a
solution of the Indian Constitutional deadlock, the Sapru Committee strongly
recommended that "in the peculiar circumstances of India we are distinctly of the
opinion that the framing of fundamental rights is necessary not only for giving
assurances and guarantees to the minorities, but also for prescribing a standard
of conduct for the legislature, Government and the courts."¹ But the British
diplomats were not much concerned with a list of civil and political rights of
Indians. They were definitely anxious to provide adequate safeguards for the
minorities in the country before they handed over power to the Indians. So, in
the statement of Cabinet Mission on May 16th, 1946, it was stated, "The Advisory
Committee on the rights of citizens; minorities, and tribal and excluded areas
should contain full representation of the interests affected, and their function
will be to report to the Union Constituent Assembly upon the list of fundamental
rights, the clauses for the protection of minorities, and a scheme for the
administration of the tribal and excluded areas, and to advise whether these
rights should be incorporated in the Provincial, Group, or Union constitution."²
The minority problem was really baffling all solutions of the Indian
constitutional deadlock and it was gradually leading the country to partition.
Sincere efforts were made by the Indian national leaders to satisfy the minority
communities to avoid the division of the country on communal basis. The
objectives Resolution of Sri Jawaharlal Nehru, therefore, boldly declared that
there should be no interference in matter of conscience, religion or culture
and thereby there was no danger of the minority being placed at the mercy of the
brute majority. On the request of Sri Jawaharlal Nehru³ Prof. K. T. Shah also

¹ The Constitutional Proposals of the Sapru Com. (1945) para. 365.
² V. P. Menon: The Transfer of Power In India p. 473.
³ Letter from Prof. K. T. Shah to Dr. Rajendra Prasad dated 22nd Dec. '46.
Vide Paper In The President's Secretariat.
drafted a list of fundamental rights and submitted it to Dr. Rajendra Prasad, President Constituent Assembly of India. Therefore, after the Objectives Resolution was passed on the 21st January, 1947, the Constituent Assembly appointed an Advisory Committee on the rights of citizens and minorities on the 24th January, 1947 according to the Cabinet Mission Statement of May 16, 1946.

On the 23rd April, 1947, Sardar Vallabhbhai Patel, Chairman, Advisory Committee on Minorities, Fundamental Rights etc., presented the report to the President, Constituent Assembly of India. It was recommended that the list of fundamental rights should be prepared in two parts, the first part consisting of rights enforceable by appropriate legal process and the Second consisting of Directive Principles of Social Policy which, though not enforceable in courts, are nevertheless to be regarded as fundamental in the governance of the country. The original report contained rights as well as restrictions upon them. But as it was finally adopted, all the restrictions were deleted and thus it resembled the list of the U.S.A. The Drafting Committee, however, imposed restrictions on the Draft Constitution as the existing Political situation was very unsafe for the new state and the father of the Nation had been assassinated by a communal organization of the country. The original report divided the fundamental rights into the following heads (1) Rights of Equality (clauses 4 to 7) (2) Rights of Freedom (8 to 12) (3) Rights relating to religion (13 - 17), (4) Cultural and Educational Rights (18) (5) Miscellaneous Rights (19 - 21), (6) Right to constitutional Remedies (22 - 24).

General Provisions: The Sub-Committee on Fundamental Rights made some general provisions before enumerating the rights of the citizens. Thus in the Part

1. Letter from Prof. K. T. Sah to Dr. Rajendra Prasad dated 23rd Dec. '46. Vide Paper, In the President’s Secretariat.
2. CAD, Vol. II, No. 4, pp. 308-327.
"The State' included the legislatures and the Governments of the Union and the
Units and all local or other authorities within the territories of the Union.
'The Union' meant the Union of India and 'the Law of the Union included any law
made by the Union legislature and any existing Indian law as in force within the
Union or any part thereof. ¹ This recommendation was adopted by the House with a
few verbal amendments. ² The Drafting Committee adopted it. When it was recon-
sidered in the Constituent Assembly, Mahmood Ali Baig Sahib Bahadur³ pointed out
that it was not advisable that 'the State' should bear different meanings in
different parts of the enactment. It would create confusion. Moreover, the
definition was wide enough. Mr. Naziruddin Ahmad⁴ also said that by no stretch
of imagination could District Boards and Municipalities be called 'States'.

Repeating to the debate, Dr. B. R. Ambedkar⁵ said "The object of the fundamental
Rights is twofold. First, that every citizen must be in a position to claim those
rights. Secondly, he must be binding upon every authority ..., which has got
either the power to make laws or the power to have discretion vested in it. There-
fore, it is quite clear that, if the fundamental Rights are to be clear, they must
be binding not only upon the Central Government, they must not only be binding
upon the Provincial Government, they must not only be binding upon the Governments
established in the Indian States, they must also be binding upon District Local
Boys, Municipalities, even village Panchayats and taluk boards, in fact, every
authority which has been created by law and which has got certain power to make
laws, to make rules or make by-laws." The House agreed to this definition of
the State.

². Ibid p. 397.
³. Ibid p. 608.
⁴. Ibid p. 608.
⁵. Ibid p. 610.
Dr. Ambedkar, however, pointed out that apart from the territories that
formed part of India, there might be other territories which might not form part
of India, but might none-the-less be under the control of the Government of India
either under a mandate or trusteeship. There should be no discrimination so far
as the citizens of India and the residents of those mandated or trusteeship
territories were concerned in fundamental rights. Therefore, Dr. Ambedkar suggested
the inclusion of the words 'or under the control of the Government of India' in
this Article. The House accepted it.¹

The Sub-Committee on fundamental rights also recommended that 'all existing
laws, notifications, regulations, customs or usages in force within the
territories of the Union inconsistent with the rights guaranteed under this part
of the constitution shall stand abrogated to the extent of such inconsistency
nor shall the Union or any unit make any law taking away or abridging any such
right.'²

Rev. J. J. M. Nichols Roy³, however, demanded that the power to amend the
provincial law must lie in an autonomous province. Therefore, no provincial
power should be limited by any fundamental right or any of its powers should be
taken by the Union of India. He, therefore, suggested that consideration of
this clause be postponed till all the fundamental rights were adopted. Sardar
Patel⁴ opposed the motion. He, however, accepted the amendments moved by Sri K.
Santhanam.⁵ Sri K. Santhanam had pointed out the term "nor shall the union or
any unit make any law taking away or abridging any such right" should be re-
drafted. Otherwise we would not be able to change any of these rights, if found
unsatisfactory or inconvenient, even by an amendment of the constitution.

¹. CAD, Vol. VI, p. 607.
⁴. Ibid p. 399.
⁵. Ibid p. 398.
So he suggested that the following terms be substituted for it. "Nor shall any such right be taken away or abridged except by an amendment of the constitution." The House accepted the clause as amended.1

The Drafting Committee redrafted the clause and defined the term 'Law'. It also 'provided that nothing in this clause shall prevent the State from making any law for the removal of any inequality, disparity, disadvantage or discrimination arising out of any existing law.' The Drafting Committee added this proviso 'in order to enable the State to make laws removing any existing discrimination. Such laws will necessarily be discriminatory in a sense, because they will operate only against those who hitherto enjoyed an undue advantage. It is obvious that laws of this character should not be prohibited." The House, however, rejected this proviso.2

Mr. Naziruddin Ahmad pointed out that Law included "custom or usage having the force of law in the territory of India or any part thereof.", according to sub-clause 3. If it was read along with clause (2) it would be absurd as 'custom or usage' could not be made by a State which had power to make any law and custom or usage were also defined as law. He, therefore, pleaded that those words in clause (3) should be deleted.3 Dr. Ambedkar4 replied, "I should have thought that that construction was not possible, for the simple reason that subclause (3) of article 8 applies to the whole of the article 8, and does not merely apply to sub-clause (2) of article 8. That being so, the only proper construction that one can put or it is possible to put would be to read the word 'Law' distributively, so that so far as article 8, sub-clause (1) was concerned, law would include custom, while so far as sub-clause (2) was concerned 'Law would not include custom. That would be, in my judgment, the proper reading, and if it was

1. Ibid, p. 399.
2. CAD Vol. VI, p. 645.
3. Ibid.
read that way, the absurdity to which my friend referred would not arise.

'But I can quite understand that a person who is not properly instructed in
the rules of interpretation of Statute may put the construction which my friend
Mr. Naziruddin Ahmad is seeking to put, and, therefore, to avoid this difficulty' be
suggested that for clause (3) the following be substituted:

"(3) In this article, unless the context otherwise require,

(a) The expression 'law' includes any Ordinance, order, bye-law, rule,
regulation, notification, custom, or usage having the force of law in the territory
of India or any part thereof;

(b) The expression 'laws in force' includes laws passed or made by a legislature
or other competent authority in the territory of India before the commencement of
this constitution and not previously repealed, notwithstanding that any such law or
any part thereof may not be then in operation either at all or in particular areas."¹

The House accepted the amendment.²

RIGHT OF EQUALITY

(Articles 14, 15, 16, 17 and 18)

The framers of the Indian constitution declared that every person was equal
before the law. They prohibited discrimination on grounds of religion, race, caste,
sex or place of birth. They provided equality of opportunity to all the matter
of public employment. Untouchability in any form was abolished and so also all
titles except that of a military or academic distinction.

Equality Before the Law

Article 14 of the Constitution declares that "The State shall not deny to any
person equality before the law or the equal protection of the laws within the

1. Ibid, p. 645.
territory of India." In the original report of the sub-committee on fundamental rights there was no separate article as such. It was a part of clause 9 as "nor shall any person be denied the equal treatment of the laws within the territories of the Union." It was also subject to a provision "that nothing herein contained shall detract from the powers of the Union legislature in respect of foreigners." When it came for consideration in the constituent Assembly Sri K. N. Munshi moved that for the words "the equal treatment of the laws" the words "equality before the law" be substituted. He also moved that the proviso be dropped. Both amendments were accepted without any debate and clause 9 as amended was adopted. It was also included as a part of Article 16 in the Draft Constitution prepared by the Constitutional Adviser. In the Draft Constitution prepared by the Drafting Committee it was still a part of article 15. There was absolutely no debate on this part of the article and all attention was diverted towards the term "procedure established by law." The term 'equality before the law' is borrowed from the Irish Constitution where it runs: All citizens shall be human persons, be held equal before the law." The term 'equal protection of the laws' is borrowed from the constitution of the U.S.A. where it runs: ... nor deny to any person within its jurisdiction the equal protection of the laws." Both the phrases aim at establishing Rule of Law in India promising 'equality of status and of opportunity." as embodied in the Preamble of the Constitution. It is significant that equality before the law and equal protection of the law has been guaranteed to all persons whether they are citizens or aliens. This was adopted as part of Article 15 of the Draft Constitution. But it appeared as a separate Article No. 14 of the

2. Ibid, p. 428.
5. Article 49 (1)of the Irish Constitution.
Constitution of India. Sir Ivor Jennings has thus defined the principles of equality before the law: "Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike."¹ I do not understand that even after admitting this definition how Dr. K. V. Rao poses the question "Does 'equality' in a welfare state mean that all towns will have the same amenities as New Delhi, or that all children will be educated in Public Schools, may, does it at least mean that there will be schools at all in all villages?² To avoid any confusion I may quote the saying of Pahanjali Sastri J.: "It is undeniable that equal protection of the laws cannot mean that all laws must be quite general in their character and application. A legislature empowered to make laws on a wide range of subjects must of necessity have the power of making special laws to attain particular object and must, for that purpose, possess large powers of distinguishing and classifying the persons or things to be brought under the operation of such laws, provided the basis of such classification has a just and reasonable relation to the object which the legislature has in view."³

Prohibition of discrimination on certain grounds

The framers of the constitution were not satisfied with the right to equality before the law. They wanted to wipe out all the differences amongst the people on grounds of religion, race, caste, sex and place of birth or any of them. Whereas article 14 is applicable to all persons including aliens, article 15 which prohibits all discrimination on the above mentioned grounds is applicable only to citizens. Still its scope is much too wide. According to this article the State shall not discriminate against any citizen on grounds only of religion, race, caste,

sex, place of birth or any of them. Moreover, only on these grounds "no citizen shall ..... be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, road and place of public resort maintained wholly or partly out of State funds or dedicated to the use of general public." However, "nothing in this article shall prevent the State from making any special provision for women and children". It was clause 4 in the report of the Sub-Committee on fundamental rights.\(^1\) There the terms used were 'The State shall make no discrimination' and 'public funds'. They were changed to the terms as they exist at the suggestion of Sri K. M. Munshi and he further moved that 'and places of public entertainments' be added which was accepted by the House. Some member also suggested that the State should not discriminate also on the grounds of 'creed' or 'color' or 'of dress worn by any nationality'. But these amendments were not accepted. In the original draft there were omissions of the terms 'place of birth' after the word 'sex' wherever it was used; 'bathing ghats' after the words 'wells, tanks'; and 'Dharmasalas, Musafirkhanas' after the words 'restaurants, hotels'. Thus clause 4 as amended was adopted as Article 9 in the Draft constitution. Dr. B. Pattabhi Sitaramayya suggested that the word 'only' be deleted wherever it occurred.\(^2\) But there were advantages in retaining this word. For example, suppose because of discrimination against Indians in South Africa, India decides to discriminate against south African Europeans in India, such discrimination would be on grounds of race, but not on grounds only of race. The Draft Constitution as it was, would permit it, but not if it was amended as proposed.\(^3\) Dr. B. R. Ambedkar, however, suggested that, for the term 'revenues of the State' the words 'State funds' be substituted. He

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3. Notes on Amendments to the Draft Constitution of India. Ibid.
pointed out that in the administrative practice which had been in vogue in India
it was customary to speak of revenues of a Provincial Government or revenues
of the Central Government. In view of the fact that fundamental rights were
being made obligatory not merely upon the Central Government and the Provincial
Governments but also upon the district local boards and taluka local boards,
so it was desirable to use a wider phraseology 'State funds' in place of 'the
revenues of the State.' It was adopted. Syed Abdur Rouf moved that the words
'place of birth' be inserted after the word 'sex' wherever it occurred. Explaining
the amendment he observed, "Race has got a very comprehensive meaning and
applies in cases like the Aryan race, the Dravidian race, the Mongolian race,
etc. If anybody wants to make any discrimination on the ground that a particular
gentleman belongs to a particular province, the word 'race' cannot stand in his
way. In my opinion attempts may be made to make discrimination against citizens
on ground of place of birth and that under the guise of local patriotism. To
guard against this possibility I have brought in this amendment." It was there-
fore accepted by the House. Another amendment was also adopted that after the
words 'wells, tanks' the words 'bathing ghats' be inserted. At the suggestion
of Mr. Mohd. Tahir the words 'Dharmasalas, Musafirkhanas' were inserted after the
words 'restaurants, hotels.' Prof. K. T. Shah also suggested that in clause (2)
of article 9, which made provision for discrimination in favour of women and
children, be added the scheduled castes or backward tribes. They also suffered
from disabilities or handicaps and so they should be permitted special facilities
for some time so that real equality of citizens be established.  

2. Ibid, p. 659.
Ambedkar pointed out that the amendment might have just the opposite effect and the scheduled castes or backward tribes might be segregated thereby from the general public.\textsuperscript{1} So the amendment was not accepted.\textsuperscript{2}

Equality of Opportunity in Matters of Public Employment—As a natural corollary from the general declaration in Article 15 (1), Article 16 confers the right of equality for public employment irrespective of religion, race, caste, sex, descent, place of birth, residence or any of them. In the original report of the Sub-Committee on Fundamental Rights it runs as follows:\textsuperscript{3}

"There shall be equality of opportunity for all citizens in matters of public employment and in the exercise of carrying on of any occupation, trade, business or profession.

Nothing herein contained shall prevent the State from making provision for reservations in favour of classes who, in the opinion of the State, are not adequately represented in the public service.

No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth or any of them be ineligible for public office or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occupation, trade, business or profession within the Union.

Nothing herein contained shall prevent a law being made prescribing that the incumbent of an office to manage, administer or superintend the affairs of a religious or denominational institution or the member of the governing Body thereof shall be a member of that particular religion or denomination." GoVt. of India Act, 1935, pages 275 and 298, has thus been incorporated.

\textsuperscript{1} Ibid, p. 661.
\textsuperscript{2} Ibid, p. 664.
According to the suggestion of Sri K. M. Munshi\textsuperscript{1} para three was to follow para one. The term 'and in the exercise of carrying on of any occupation, trade, business or profession' in para one and the words 'or be prohibited from acquiring, holding or disposing of property or exercising or carrying on any occupation, trade, business or profession within the union' in para three were deleted. The reason was that all these rights were already provided elsewhere. The suggestions of Sri K. M. Munshi were accepted.\textsuperscript{2}

Sri Mahavir Tyagi moved that after the first para the following proviso be added: "Provided that a Unit may frame rules whereunder in the matters of public employment it may give preference over others to such citizens as are bona fide or domiciled residents of its own territory." Explaining the amendment he observed, "I think, to establish self-Government in the true sense of the word, it is most essential that in any part of the world, only the residents of that part should be Government servants and officials. If there are real chances for the residents of one province to serve in another, it means that the residents of that province shall not be able to enjoy self-Government. My real intention is that so far as possible, the administration of a province should be run by officers and employees who are residents of that province."\textsuperscript{3} Sardar Vallabhbhai Patel agreed with the point of argument but he did not find the amendment to be necessary. He said "This does not deprive the province of its rights to legislate. This simply removes ineligibility of a citizen: that should be so, and, therefore, it is provided in the Fundamental Rights."\textsuperscript{4} So it is not fair to say that "there was much 'behind the scene' activity and protracted negotiations on this point, and 'descent' and residence, which were not originally there, were added later on."\textsuperscript{5}

\textsuperscript{1}C. A. D. Vol. III, No. 3, p. 432.
\textsuperscript{2}Ibid, p. 436.
\textsuperscript{3}C. A. D. Vol. III, No. 3, p. 434.
\textsuperscript{4}Ibid, p. 437.
\textsuperscript{5}K. V. Rao: Parliamentary Democracy of India, p. 144.
The Drafting Committee adopted clause 5 as amended by Sri K. M. Munshi as Article 10. In the Constituent Assembly it was further scrutinised. Sri Ananthasayanan Ayyangar moved that in clause (1) of article 10 the words "in matters relating to employment or appointment to office" be substituted for the words "in matters of employment". He further suggested that in clause (2) of article 10, after the words 'ineligible for any' the words 'employment or' to clarify the position and also to include the word 'office' so that it might be more comprehensive. Therefore, these amendments were adopted. He further pointed out that not only could discrimination be made at the outset when a person was appointed, but after the appointment took place, he might be permanently kept in the first post which he occupied originally. In matters of promotion, etc. there might be discrimination. Ineligibility for appointment might not cover these classes of cases. Therefore, he moved that in clause 2 of Article 10 after the word 'ineligible' the words 'or discriminated against' be inserted. It was also adopted.

But the greatest controversy arose over the point raised by Sri Mahavir Tyagi in course of the debate on the original report and the interpretation of Sardar Vallabhbhai Patel that the clause did not deprive the province of its right to give preference by legislation to the residents of the province. Therefore, Sri K. M. Munshi and Sri Jaspat Roy Esplon suggested that in clause (2) of article 10 the word 'residence' be inserted after the words 'place of birth'. Sri K. M. Munshi observed "Every citizen irrespective of his place of residence should be eligible for employment under the State anywhere in the country. Sir, there being only one citizenship for the whole country, it should carry with it the unfettered right and privilege of employment in any part and in every nook and corner of the country. Sir, for sometime past we have been observing that provincialism has been growing

2. Ibid, p. 703.
4. Ibid, p. 703.
5. Ibid, p. 676 and 677.
in this country. Every now and then we hear the cry "Bengal for Bengalis", "Madras for Madrasis". The Unit of the country must be preserved at all costs." This amendment was, therefore, adopted.\(^1\)

But Sri Alladi Krishnaswami Ayyar stressed the necessity of providing that residence within the State was a necessary qualification for appointment by and within the State. It was reasonable for provincial governments laying it down as a rule that only those who possessed adequate knowledge of the provincial language should be eligible for employment in the province. It might also be laid down that persons seeking employment in the province must have adequate knowledge of the local conditions. That was in the interest of efficiency of the services. But instead of leaving it to individual states to make any rule they liked in regard to residence, it was felt that it would be much better if Parliament laid down a general rule applicable to all States alike, specially having regard to the fact that in any matter concerning fundamental rights, it must be Parliament alone that should have the power to legislate and not the different units in India. With that object in view they moved that after clause (2) of article 10, the following clause be inserted:

\(^2\)(a) Nothing in this article shall prevent Parliament from making any law prescribing in regard to a class or classes of employment or appointment to an office under any State for the time being specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment.\(^2\)

Sri T.T. Krishnasachari opposed this amendment on the ground that the proposal of Sri Jaspat Roy Kapoor as amended by Sri K. M. Munshi would be nullified if

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1. Ibid, p. 703.
Parliament decided that there should be residence of at least ten years before a person could qualify for an officer in the area.\(^1\) Accepting the amendment of Sri Alladi Krishnaswami Ayyar, Dr. B. R. Ambedkar explained, "It is the feeling of many persons in this House that, since we have established a common citizenship throughout India, irrespective of the local jurisdiction of the provinces and the Indian States, it is only a concomitant thing that residence should not be required for holding a particular post in a particular State because, in so far as you make residence a qualification, you are really subtracting from the value of a common citizenship which we have established by this constitution or which we propose to establish by this constitution. Therefore, in my judgment, the argument that residence should not be a qualification to hold appointments under the State is a perfectly valid and a perfectly sound argument. At the same time, it must be realized that you cannot allow people who are flying from one province to another, from one state to another, as mere birds of passage without any roots, without any connection with that particular province, just to come, apply for posts and, so to say, take the plums and walk away. Therefore, some limitation is necessary. It was found, when this matter was investigated, that already today in very many provinces rules have been framed by the provincial governments prescribing a certain period of residence as a qualification for a post in that particular province. Therefore, the proposal in the amendment...is not quite out of the ordinary."\(^2\) So it was adopted.\(^3\)

Sri Damodar Swarup Seth was of the opinion that reservation of posts or appointments in services for the backward classes meant the very negation of efficiency and good government. Moreover, it was not easy to define precisely the term 'backward'. It might also give rise to casteism and favouritism which should have nothing to do

1. Ibid, p. 698.
2. Ibid, p. 700.
3. Ibid, p. 703.
in a secular State. He, however, did not say that necessary facilities and concessions should not be given to backward classes for improving their educational qualifications and raising the general level of their uplift. But appointments to posts be left only to the discretion of the Public Service Commission, to be made on merit and qualification, and no concession whatever should be allowed to any class on the plea that the same happened to be backward. He, therefore, moved that clause (3) of article 10 be deleted. 1

Pandit Hirday Nath Kunaru, however, moved that protection should be given to the backward class only for ten years after the commencement of the constitution. 2 Mr. Asis Ahmad Khan moved to omit the word 'backward' as minorities also required protection. All those people required protection who had misgivings that in case protection was not given, their rights might not be preserved. 3 Dr. B. R. Ambedkar pointed out that a large number of members were in favour of keeping the word 'backward'. With regard to the protection for minorities there was a special reference to that in Article 296. What the backward community meant was left to be determined by each local Government. 4 Therefore, none of the amendments were adopted. 5 Article 10 as amended was adopted as Article 16.

Removal of Untouchability (Art. 17) - Article 17 abolishes untouchability and its practice in any form is made an offence punishable under the law. 6 It was adopted almost unanimously and a strong public opinion had been created in its favour as early as 1921 by no less a person than Mahatma Gandhi. He had observed "Swaraj is a meaningless term, if we desire to keep a fifth of India under perpetual subjection, and deliberately deny to them the fruits of national culture." 7 The sub-committee on Fundamental Rights recommended "Untouchability in any form

3. Ibid., p. 681.
4. Ibid., pp. 702-703.
5. Ibid., pp. 704.
6. Young India, 25th May, 1921.
is abolished and the imposition of any disability on that account shall be an
offence."¹ It was adopted without much debate.² The Drafting Committee redrafted
it as "ll. Untouchability is abolished and its practice in any form is forbidden.
The enforcement of any disability arising out of 'Untouchability' shall be an
offence punishable in accordance with law."³ But the greatest controversy arose
over the definition of the term 'Untouchability'. Sri R. R. Diwakar and Sri V. S.
Krishnamoorthy Rao tried to define it in their amendment as 'the custom which tabs
the touch of a person or his belongs to a particular religion.'⁴ Other criticised
that the article drafted was too wide as it forbade the practice of untouchability
in any form. It was also pointed out that apart from 'communal' untouchability
there was another form of untouchability in religious matters such as on occasions
like births, deaths, etc.⁵ Mr. Naziruddin Ahmed also pointed out, "I submit that
the original article ll is a little vague. The word 'untouchability' has no
legal meaning, although politically we are all well aware of it; but it may lead
to a considerable amount of misunderstanding as a legal expression. The word
'untouchable' can be applied to so many variety of things that we cannot leave
it at that. It may be that a man suffering from an epidemic or contagious disease
is an untouchable to Hindus and Muslims. According to certain ideas women of
other families are untouchables....... The word untouchable is rather loose".
He, therefore, moved that the following Article be substituted for article ll:
"ll. No one shall on account of his religion or caste be treated or regarded as
an 'untouchable'; and its observance in any form may be made punishable by law."⁶
Prof. K. T. Shah also pointed out the ambiguity of the term and wanted to have

². Ibid, p. 420.
³. Papers In The President's Secretariat: List of Amendments to the Draft
Constitution of India: List I: No. 35.
⁴. Ibid, Suggestions from non-members for amendments of the Draft Constitution.
a precise definition.\footnote{Ibid, p. 668.}

To these criticism the Constitutional Adviser replied that "These amendments seek to define untouchability. It would be difficult to define untouchability precisely. Under article 11 the practice of untouchability in any form is forbidden. The law which has to be enacted under article 27 for prescribing punishment for offences in respect of Untouchability will define the various forms in which it is practised. It would, therefore, be better not to attempt to define the expression in the Constitution." All these amendments were negatived and the draft article 11 was adopted\footnote{C.A.D. Vol. VI, p. 669.} as article 17 of the constitution.

Abolition of Capital Punishment - Mr. Z. H. Lari moved the amendment that "Capital punishment except for sedition involving use of violence is abolished."\footnote{Ibid, pp. 669 - 670.} He pleaded that human life is sacred and judgement was not infallible. Moreover, the reformative element in punishment was the most important factor and that should be the dominant consideration for abolishing capital punishment. Sri Amiyo Kumar Ghose opposed the amendment on the ground that by incorporating such a clause in the constitution, the hands of the State were practically fettered for all time to resort to such punishment even if it was required by the exigencies of the situation. Necessary amendments might be made in the Indian Penal Code and not in the Constitution itself.\footnote{C.A.D. 30. 1-18 p.471.} On the other hand Sri K. Hanumanthaiya opposed it on the principle that it was good both for the criminal to die than to be under transportation for life and for the State to be free of such criminals.\footnote{Ibid, p. 472.} Dr. B. R. Ambedkar also opposed it and the amendment was turned down.\footnote{Ibid, p. 472.}

Abolition of Titles (Art. 7 - 12 - 18) - In their zeal for a radical application

\footnotesize
1. Ibid, p. 668.
of the principle of democratic equality, the framers of the Indian constitution abolished all titles and tried to remove all artificial distinctions among members of the same society. The sub-committee on fundamental rights suggested "7. No heritable title shall be conferred by the Union." But this definition did not prohibit citizens from accepting title from any foreign state. Therefore, Mr. M. R. Masani suggested that clause 7 be substituted by the following:

"No title shall be conferred by the Union.

No citizen of the Union shall accept any title from any foreign State.

No person holding any office of profit or trust under the State shall, without the consent of the Union Government, accept any present, emoluments, or office of any kind from any foreign State." He pointed out that the last sub-clause would permit diplomats and other who might be permitted by their own Government to accept tokens of respect or appreciation from foreign Governments." Seth Govind Das wanted that all titles conferred in the past should also be abolished and "redeem the people from medals of slavery". On the other hand, Sri Balkrishna Sharma was certainly not "off the rails completely" when he pointed out that it was not proper to abolish all titles in free India. He said, "we have time and again tried to honour the dignitaries of this country in so many ways. We call some one 'Acharya', and Mr. President, we call you 'Deshratna', we call Mahatma Gandhi by the name of Mahatma. The present democratic feeling compelled them to say that there should be no titles in our country. But I think if in our free India some persons of our country do such work as deserves respect, there is no reason why we should not honour such great men with national titles on behalf of our countrymen. In

4. Ibid, p. 441. It was the remark of Sri Parkasa
Russia itself where socialism was first experimented upon, it was felt necessary after sometime that the country should honour its generals, its military leaders and its distinguished workers with titles and medals.  

Sardar Vallabhbhai Patel accepted the amendment of Sri M. R. Masani and replying to debate he observed "let us forget all about past titles, what we now want to do is to think about the future. Who is going to prevent people from conferring a title or take away a title conferred by the people? They are not titles really. They are attributes of virtues, which people see in them. We are legislating, or trying to legislate, on what the State will do or what the State should do, not on what the people can or should do."  

Therefore the amendment of Masani was adopted.

But the problem posed by Sri Balkrishna Sharma was pertinent enough. It was indeed not intended by the framers that titles such as 'Field Marshal', Admiral, 'Air Marshal', 'Chief Justice' or 'Doctor' indicating an office or profession, should be discontinued. It might be pointed out that the term 'State' as defined in article might conceivably include Universities, since the definition includes "All local or other authorities within the territory of India". Nor presumably, was it intended to prohibit the award of medals or decorations for gallantry, humanitarian work, etc. not carrying and title.

The corresponding provisions in certain other constitutions run thus:


1. Ibid p.441  
2. Ibid p.441  
3. Ibid p.444  
5. Art. 49 (g) of U.S.S.R. Constitution
Irish Titles of nobility shall not be conferred by the State. Orders of Merit may, however, be credited.  

Danish Titles, with the exception of academic degrees, shall not be awarded except when they devote an office or a profession. Titles of nobility shall no longer be conferred.  

Thus T.T. Krishnamachari observed that certain types of title had to be permitted. For instance, the Government had decided on three types of Military distinction to be granted - Mahavir Chakra, Param Vir Chakra and Vir Chakra. Further, the State might be willing to revive titles like Mahamahopadhyaya. Moreover, it was not desirable to prohibit the universities from awarding titles Honoris causa. He, therefore, amended subclause (1) of the Article as 'No title, not being a military or academic distinction, shall be conferred by the State.'  

It was accepted.  

Another criticism raised by Mr. Naziruddin Ahmad was that clause (2) of article 12 was not justiciable in the sense that if anybody accepted any foreign title, no penalty was provided for accepting it. So he moved that the following clause be substituted: "2. No title conferred by any foreign State on any citizen of India shall be recognised by the State." But Dr. B.B. Ambedkar explained that it would be perfectly open under the constitution for Parliament under its residuary powers to make a law prescribing what should be done with regard to an individual who did accept a title contrary to the provisions of this article. It was not a justiciable right. But the non-acceptance of titles was a condition of continued citizenship. It was a duty imposed upon the individual that if he

1. Art. 40 (2) 10  
2. Art. 78.  
3. CAD Vol. VII p. 704  
4. CAD Vol. VII p. 711  
5. CAD Vol. VII p. 706
continued to be the citizen of this country then he must abide by certain conditions, one of the conditions being non-acceptance of titles.\textsuperscript{1} Therefore, the amendment of Mr. Nasiruddin Ahmad was not accepted.\textsuperscript{2}

Sri R.K. Sidhwa observed that foreign States should not be allowed to confer any title on any of our countrymen. He, therefore, moved that in clause (3) of article 12 the word 'title' be deleted.\textsuperscript{3} But the Constitutional Adviser gave the following explanation: "This amendment appears to be based on a misunderstanding of the article. Clause (2) forbids any citizen of India to accept any title from a foreign State and the prohibition is absolute. But what about a citizen of a foreign State who, let us say, is temporarily employed by India? Supposing his own State desires to honour him with a title for services rendered before he came to India may he or may he not accept the title? Clause (3) deals with this point: he may accept the title with the consent of the President. Or, again, suppose a citizen of India is offered a prize by a foreign state for his contribution to literature or science: this is not covered by clause (2), but clause (3). There is no inconsistency between the two clauses.\textsuperscript{4} Thus article 12 as amended was adopted as Article 18 of the Constitution.

In any list of fundamental rights, the right to equality is of great importance. In fact the demand for fundamental rights was made mainly as a protest against political and social inequalities and the concept of privilege. That was the background of the evolution of Fundamental Rights in America and France. It was the tyranny of the privileged classes which compelled the masses to rise in revolt and assert their fundamental right to equality. 'Man is born free and he is everywhere

\begin{itemize}
\item[1.] Ibid pp 708 and 709
\item[2.] Ibid p. 711
\item[3.] CAD Vol. VII p.708
\item[4.] Notes on Amendments to The Draft Constitution of India: Amendment No. 38, Vide paper's In the President's Secretariat
\end{itemize}
in chains' was the cry of pain from which the Revolutionary enthusiasm arose.\(^1\)

These revolution, in a sense, might well be regarded as a victory for the principle of equality. The American Declaration of Independence asserts "All men are created equal". The French Declaration of Rights proclaims, "Men are born and always continue free and equal in respect of their rights." It was, therefore, incorporated in the Constitution as fundamental right to preserve this right forever and to assure it for all. In a country like India there is more justification than anywhere else for the incorporation of the right to equality as a fundamental right. The peculiar feature of our social organization is that people are divided into groups of privileged and unprivileged on grounds of birth. The time honoured customs and traditions based on the caste system which have even given a religious sanctity to social inequalities, and the presence of communal minorities are problems peculiar and dangerous to India. Dr. B.R. Ambedkar had rightly observed, "In this country both the minorities and the majorities have followed a wrong path. It is wrong for the majority to deny the existence of minorities. It is equally wrong for the minorities to perpetuate themselves .... To diehards who have developed a kind of fanaticism against minority protection I would like to say two things. One is that minorities are an explosive force which, if it erupts, can blow up the whole fabric of the State .... The other is that the minorities in India have agreed to place their existence in the hands of the majority. In the history of negotiations for preventing the partition of Ireland, Redmond said to Carson\(^2\) ask for any safeguard you like for the Protestant minority but let us have a United Ireland. Carson, reply was "Damn your safeguards, we don't want to be ruled by you." No minority in India has taken this stand. They have loyally accepted the rule of the majority which is basically a communal majority and not a political majority.\(^2\)

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2. CAD Vol. VII p. 39
Thus under such circumstances the right to equality must necessarily find a place in our constitution as a fundamental right.

Criticism: But economic equality has not been provided in the fundamental right. So long as there are inequalities of fortune there will be inequalities of treatment also (Laske's Grammar of Politics p. 254). Inequality is the situation in which some men have much and most have too little (Delisle Burns: - Political Ideals p. 157) Political equality is never real unless it is accompanied by virtual economic equality (Grammar of Politics p. 162).

**RIGHT TO FREEDOM**
(arts. 19, 20, 21, 22)

A guarantee of personal liberty as against the coercive powers of the State is a necessary condition of any democratic society. It has, however, been suggested that a guarantee of personal liberty, however, important under a monarchical government or a foreign government is not at all necessary in a democratic constitution. "founded upon the powers of the people and executed by their immediate representatives and servants." But the rights have sometimes to be safeguarded even though the executives and legislatures are democratic. As President W.H. Taft observed in his special message to the American Congress, "constitutions are checks upon the hasty action of the majority. They are self-imposed restraints of a whole people upon a majority of them to secure sober action and respect for the rights of the minority." Therefore, Sri Jawaharlal Nehru also proclaimed in the objectives resolution that "Freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality" shall be guaranteed and secured to all the people of India.

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1. It was the argument of the Federalist in U.S.A. Therefore there was no provision for E.R. in the beginning.
2. President Taft's special message to the Congress, August 15, 1911, quoted from I.J.P.Sc. Vol. IX No. 1 Jan - March 1968. P.C. Alexander: Equality as a fundamental right in India p. 56
The Sub-Committee on fundamental Rights had drafted the article as:

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

(a) The right of every citizen to freedom of speech and expression;

Provision may be made by law to make the publication or utterance of seditious, obscene, blasphemous, slandering, libellous or defamatory matter actionable or punishable.

(b) The right of the citizens to assemble peaceably and without arms:

Provision may be made by law to prevent or control meetings which are likely to cause a breach of the peace or are a danger or nuisance to the general public or to prevent or control meetings in the vicinity of any chamber of a legislature.

(c) The right of citizens to form associations or unions:

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

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

(e) The right of every citizen to reside and settle in any part of the Union, to acquire property and to follow any occupation, trade, business or profession:

Provision may be made by law to impose such reasonable restrictions as may be necessary in the public interest including the protection of minority groups and tribes."

While moving the article Sardar Patel did not move the proviso to clauses (a), (b) and (c) and thus followed the American pattern. It was more in accordance with the idea of Mahatma Gandhi who had observed "Democracy is not a State in which people act like sheep. Under democracy, individual liberty of opinion and action is jealously guarded. I therefore, believe that the minority has a perfect right to act differently from the majority."
Sri Sonnath Lahiri moved that the words 'defence of the Union' be substituted for the words 'security of the Union' in clause 3. But Sardar Patel opposed it as 'security' covered both external and internal chaos. So the amendment was not accepted.

Sri K. N. Mamab further pointed out that in clause (e) the right to acquire property was not enough. One should also have the right to 'hold or dispose of' property. To avoid ambiguity he further suggested that a citizen should have right not only 'to any occupation', etc. but 'to exercise or carry on any occupation', etc. These amendments were accepted.

Hon. Rev. J. K. N. Nichols Roy observed that the term 'reasonable' would create a great deal of contention and confusion in the proviso to sub-clause (e). Therefore, the term was deleted.

Mr. Jaipal Singh had the apprehension that the existing laws which offered special protection and security to the tribal people would be removed. Sardar Patel, however, explained that the clause was related to fundamental rights. Existing legislation was left untouched except for the protection of the Constitution. Therefore, Jaipal Singh did not press his amendment.

Thus article 8 as amended was adopted. But when the partition of the country aggravated communal tension and subversive activities of some of the native states threatened the security of the newly won independence, it was desirable to put restraints on these rights. Therefore, the Constitutional Adviser redrafted the Article with the proviso on the pattern of Irish and Danish Constitution.

In the Draft Constitution, February 1948, the article appeared as:

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1. CAD III p. 457
2. Ibid. p. 452
3. Ibid. p. 457
4. Ibid. p. 449
5. Ibid. p. 457
6. CAD Vol. III No. 3 p. 450
7. Ibid. p. 456
8. Ibid. p. 477
9. The Draft Constitution of India, 22nd September 1947 ART. 15
10. Art. 40 (6)
11. Art. 75
Subject to the other provisions of this article, all citizens shall have the right:

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;
(f) to acquire, hold and dispose of property; and
(g) to practise any profession or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency or morality or undermines the authority or foundation of the State.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law, or prevent the State from making any law, imposing in the interests of public order restrictions on the exercise of the rights conferred by the said sub-clause.

(4) Nothing in the sub-clause (d) of the said clause shall affect the operation of any existing law, or prevent the State from making any law imposing in the interests of the general public, restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clause (d), (e) and (f) of the said clause shall affect the operation of any existing law or prevent the State from making any law imposing restrictions on the exercise of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any aboriginal tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law, imposing in the interests of public order, morality or health, restrictions on the exercise of the right conferred by the said sub-clause and in
particular prescribing or empowering any authority to prescribe the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

Sir Nihar Ray Chattopadhyay moved that in clause (6) of Article 13, the words 'subject to the other provisions of this article' be deleted. Various provisions had been expressly mentioned in the article in clauses (2) to (6). Therefore, those words were unnecessary. That was adopted by the House.

Sri R K. Sidhva has suggested that at the end of sub-clauses (a), (b), (c), and (g) the words 'throughout the territory of India be inserted. But the Constitutional Adviser was of opinion that references to the territory of India in sub-clauses (d) and (e) was essential because without such reference they would be meaningless. But in the remaining sub-clauses such reference was not necessary as in the absence of any restrictive provision the right conferred by those clauses would extend throughout the territory of India. Therefore, the amendment was not necessary.

Freedom of the Press: - There had been much criticism that freedom of the Press had been omitted. Sri L N. Sahu had suggested that there should have been freedom of speech and expression 'both in the Press and the platform'. Though the Constitutional Adviser did not find it necessary, it was further suggested by Sri Jaya Prakash Narayan that 'freedom of press' be included in Article 13.

1. CAD Vol. VIII p. 715
2. Ibid p. 784
7. Papers In the President's Secretariat: Amendments to the Draft Constitution of India by Sri Jai Prakash Narayan: Sri Jai Prakash Narayan suggested that article 13 should be redrafted as follows: - 13. Subject to public order, or morality, the citizens are guaranteed (a) freedom of speech and a press; (b) freedom of press; (c) freedom to form associations or Unions; (d) freedom to assemble peaceably and without arms; (3) secrecy of postal, telegraphic and telephonic communication. All citizens of the Republic shall enjoy freedom of movement throughout the whole of the Republic. Every citizen shall have the right to sojourn and settle any place he pleases. Restrictions may, however, be imposed by or under a Federal Law for the protection of aboriginal tribes and backward classes and the preservation of public safety and peace. "Reason: original article 13 is very clumsily drafted. Rights guaranteed under clause (1) are considerably taken away by other clauses.
The Constitutional Adviser explained that it was hardly necessary to provide specifically for freedom of the press as freedom of expression provided in sub clause (a) of clause (1) of article 15 would include freedom of the press. But the matter was further discussed in the Constituent Assembly. Sri Banodar Sarup Seth formally moved the amendment of Sri Jai Prakash Narayan and, in reply to the note of the Constitutional Adviser, observed "I think, Sir, it will be argued that the freedom is implicit in clause (a), that is, in the freedom of speech and expression. But, Sir, I submit that the present is the age of the Press and the Press is getting more and more powerful today. It seems desirable and proper, therefore, that the freedom of the Press should be mentioned separately and explicitly." Prof. K. T. Shah also moved an amendment to that effect. He argued that freedom of press and publication had been provided in all the countries where a liberal constitution prevailed. Even the U.S. Charter made special mention of the freedom of the press. He, therefore, found very good reason for its omission in the India Constitution. Prof. Shri Ram Lal Varshney also pleaded for the provision of the 'freedom of the Press.'

Sri M. Azad, however, pointed out that freedom of Press meant freedom of expression. Dr. B. R. Ambedkar further explained that "press is merely another way of stating an individual or a citizen. The Press has no special rights which are not to be given or which are not to be exercised by a citizen in his individual capacity. The editor of a press and the manager are all citizens and, therefore, when they choose to write in newspapers, they are merely exercising their right of expression and in my judgment, therefore, no special mention is necessary of the freedom of the press at all." Therefore, the amendment was not accepted by the House.

Freedom of Thought and Worship: The Objectives Resolution of Sri Jawaharlal Nehru had promised freedom of thought and worship. Therefore, Prof. K. T. Shah confessed,

1. Ibid. Amendments to the Draft Constitution of India by Sri Jaya Prakash Narayan.  
3. Ibid. Amendment to the Draft Constitution of India by Sri Jaya Prakash Narayan.  
4. Ibid. Amendment to the Draft Constitution of India by Sri Jaya Prakash Narayan.  
5. Ibid. Amendment to the Draft Constitution of India by Sri Jaya Prakash Narayan.  
'a feeling of amazement' at the omission of the freedom of worship. Moving an amendment to that effect he observed, "I still do not see why freedom of worship should have been excluded. I am not particularly a very worshipful man myself. Certainly I do not indulge in any overt acts of worship or adoration. But I think a vast majority of people feel the need and indulge in acts of worship, which may often be curtailed or be refused or, in other words, be denied unless the constitution makes it expressly clear that those also will be included. All battles of religion have been fought...in connection with the right of free worship... That is why in most modern constitutions, the freedom of worship finds a very clear mention. I certainly feel, therefore, that this omission is very surprising, to say the least." ¹ Sri M. Amuthasayanan Ayyangar, however, ridiculed the idea of the freedom of thought and observed "As regards freedom of thought, I am surprised to see an amendment moved saying that freedom of thought ought to be allowed. Nobody can prevent freedom of thought. It is a fundamental right. It is only freedom of expression that has to be allowed."² Freedom of worship had already been provided elsewhere. The amendment was, therefore, negatived.³

**RIGHT TO BEAR ARMS**

Sri H. V. Karath ⁴ very strongly demanded that the citizens had a right to keep and bear arms. It was a demand of the Indian National Congress as well. The Congress had launched a satyagraha movement against the Arms Act at Nagpur in 1923 or 1924. Again, the All India Congress had very explicitly demanded at its Karachi session in 1931 that "Every citizen has the right to keep and bear arms in accordance with Regulations and reservations made in that behalf." It also did not go against the creed of Ahimsa of Mahatma Gandhi. Even Mahatma Gandhi used to say "Resist, defend, non-violently, if possible, but violently, if necessary. Whit I hate is cowardice." Sri Karath, therefore, moved an amendment to that effect. It was very strongly supported by Maulana Hasrat Mahani who observed, "But if there is any national Government..."

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¹. CAD Vol. VII pp. 715-716
². Ibid p. 773
³. Ibid p. 784
⁴. Ibid pp. 710-720
and Indian Government, then there is no reason why, you should deprive anybody of this right. If you too will forge an Arms Act and will deprive the people of this right, then I would say that your attitude and way of doing things is much worse than that of the Britishers. It will be much worse. The Arms Act, enforced by the British Government, was applicable to one and all with the exception of the ruling class. We were under the impression that under our own Government this restriction will be removed. Unfortunately, at present we have a party Government and they want to retain it, so that the Act may be applied against their political opponents and may not be enforced against their own party men.¹

Prof. Shiben Lel Sakeema also supported it. He said that "in most constitutions throughout the world this right has been recognized. We ourselves throughout recent history have asked that this should be our right. In fact, I remember, when Mahatma Gandhi wrote to Lord Irwin in 1930 about the eight points which he wanted be be accepted, one was about this right to bear arms. The question of this right to bear arms dates back to 1878 when, after the mutiny, the British Government disarmed the Nation. I think that after freedom we should at least allow this thing, as only an armed people can support the Government."² Sri M Ananthasayanam Ayyangar, opposing the motion, remarked that no doubt "the Congress has been from year to year passing resolutions that we must have the right to bear arms. The situation has changed now. We were then slaves and wanted to equip ourselves sufficiently so that in case of need we could use the arms for getting out of the foreign yoke. But, today, in the civilised world I should like to ask my honourable friend if he feels that everybody should be allowed to fight even to defend himself. Exception extreme circumstances no force should be used. Even when force has to be used, it must be concentrated in the State. The State it is that must stand between man and man and citizen and citizen when they want to fight. No individual citizen ought to be allowed to attack another. Very often the right to bear arms is abused."³ Dr. B. R. Ambedkar also observed, "It is quite true and everyone knows that the Congress Party had been agitating that there should be the right to bear arms. Nobody can deny that. That is history. At the same time I think the House should
forget the fact that the circumstances when such resolutions were passed by the Congress no longer exist ... It is because the British Government had refused to allow Indians to bear arms, not on the ground of peace and order, but on the ground that a subject people should not have the right to bear arms against an alien Government so that they could organize themselves to overthrow the Government. And consequently the basic consideration, on which those resolutions were passed in my judgment have vanished. Under the present circumstances, I personally myself cannot conceive how it would be possible for the State to carry on its administration if every individual had the right to go into the market and purchase all sorts of instruments of attack without any let or hindrance from the State.¹ Interceding, Sri H V. Kesav had pointed out that he had already moved the proviso providing for reasonable restriction on the right to keep and bear arms. Dr. Ambedkar, therefore, further remarked, "what the proviso can do is to regulate and the term 'regulation' has been judiciously interpreted as prescribing the conditions, but the conditions can never be such as to completely abrogate the right of the citizen to bear arms. Therefore, regulation by itself will not prevent a citizen who wants to have the right to bear arms from having them. I question very much the policy of giving all citizens indiscriminately and such fundamental right. For instance, if Mr. Kesav's proposition was accepted --- it would be open for thousands and thousands of citizens who are today described as criminal tribes to bear arms. It would be open to all sorts of people who are habitual criminals to claim the right to possess arms. You cannot say that under the proviso a man shall not be entitled to bear arms because he belongs to a particular class. The point is that it is not possible to allow this indiscriminate right. On the other hand, my submission is that so far as bearing arms is concerned, what we ought to insist upon is not the right of an individual to bear arms but his duty to bear arms. In fact, what we ought to secure is that when an emergency arises, when there is a war, when there is an insurrection, when the stability and securing of the State is endangered, the State shall be entitled to call upon every citizen to bear arms.

¹. Ibid p. 750
in defense of the State. That is the proposition that we ought to initiate and that position we have completely safeguarded by the proviso to article 17. Therefore, the House did not accept the amendment of Sri H. V. Kasmap. 2

RIGHT TO VOTE

Pandit Thakurdas Bhargava and Seth Govind Das demanded that the citizens should have the right "to exercise vote and free choice in the election of representatives and stand for election to seats in legislatures," with reasonable restrictions. 3 But the Constitutional Adviser pointed out that the franchise had been dealt with specially in article 67(6) and article 149(2) and adult suffrage, subject to the certain conditions, had been prescribed. It was, therefore, not necessary to deal with the subject again in article 15. This point was also considered by the Drafting Committee, but was not accepted for the above reason. 4

Right to follow personal law and right to Personal Liberty: - Mr. Mohammad Ismail Sahab demanded that every citizen should have the right "to follow the personal law of the group or community to which he belongs or professes to belong" and "to personal liberty and to be tried by a competent court of law in case such liberty is curtailed with reasonable restrictions." He argued "personal law is part of the religion of a community or section of people which professes this law. Anything which interferes with personal law will be taken by that community and also by the general public ... as a matter of interference with religion ... Therefore, I say that people ought to be given liberty of following their own personal law." 5 Mazi Syed Nazimuddin also regarded personal law as a part of religion which should be respected. 6 Maulana Hasrat Mohani also warned "that any party, political or communal, has no right to interfere in the personal law of any group. More particularly I say this regarding Muslims ... that Mussalmans will never submit to any interference in their personal law, and they will have to face an iron wall of Muslim determination to oppose them in every way." 7

1. CAD Vol. VII pp. 780-781
2. Ibid p. 783
3. President's file No. 34. List of Amendments to the Draft Constitution of India List I Nos. 41 and 145.
5. Ibid Vol. VII p. 722
6. Ibid p. 736, 737
7. Ibid p. 759
Sri M. Ananthasayyana Ayyanger, replying to the debate, observed, "There is absolutely no provision in the fundamental rights that you ought to ride rough-shod over their personal law. The law of the land as it exists today gives sufficient guarantee so far as that is concerned. But our friends who moved the amendments wanted a double guarantee that their personal law ought not to be interfered with. My submission is that it is impossible, for, in an advanced society, even the members who belong to a particular community may desire their personal law to be changed."  

He referred to the change of divorce laws of the Muslims and the Waif validation Act. Thus "as time may come when members belonging to the particular community may feel that in the interests of the community progressive legislation has to be enacted, but if we make a provision here that the personal law shall not be interfered with, there will not be any right to the members of that community itself to modify that law. Therefore, it is not necessary that we should introduce it as a fundamental right. There is absolutely nothing in this Constitution which allows the majority to override the minority. This is only an enabling provision. Without the consent of the minority that is affected, no such law will be framed. I, therefore, feel it is unnecessary to include it in the fundamental rights."  

Dr. B. R. Ambedkar further explained that "if such a saving clause was introduced into the constitution, it would disable the legislatures in India from enacting any social measure whatsoever. The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort ... I personally do not understand why religion should be given this vast expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field. After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which is so full of inequities, so full of inequalities, discriminations and other things, which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law should not be interfered with."
law shall be excluded from the jurisdiction of the State. Having said that, I should also like to point out that all that the State is claiming in this matter is a power to legislate. There is no obligation upon the State to do away with personal laws. It is only giving a power. Therefore, no one need be apprehensive of the fact that if the State has the power, the State will immediately proceed to execute or enforce that power in a manner that may be found to be objectionable by the Muslims or by the Christians or by any other community in India.

We must all remember including members of the Muslim community who have spoken on this subject, though one can appreciate their feelings very well - that sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must reconcile itself to the sentiments of different communities. No Government can exercise its power in such a manner as to provoke the Muslim community to rise to a rebellion. I think it would be a mad Government if it do so.¹ Therefore, the demand for Personal Law was not approved by the House.

Secrecy of Communication: Sri Jai Prakash Narayan had suggested to the Chairman Drafting Committee that 'secrecy of postal, telegraphic and telephonic communications' should also be guaranteed.² But the constitutional adviser found it hardly necessary to include it as a fundamental right in the constitution itself as that might lead to practical difficulties in the administration of the Postal and Telegraph Department. The relevant laws enacted by the legislature on the subject (The Indian Post Office Act, 1898 and the India Telegraph Act, 1885) permitted interception of communications sent through post, telegraph or telephone only in specified circumstances such as, on the occurrence of emergency in the interests of public safety.³ It was, however, formally moved by Sri Damodar Swaran Seth in the Constituent Assembly.⁴

Opposing the amendment Sri M. Ananthasayanam Ayyangar said: "As regards the secrecy

¹. CAD Vol. VII p. 761-762
³. Ibid
⁴. CAD Vol. VII p. 712
of telegraphic and telephonic communications, it is a debatable point and we ought not to allow any change in the existing provision."\(^1\) Therefore, the amendment was negatived.\(^2\)

Similar demands were, however, made by the Editor of the India Law Review and some other members of the Calcutta Bar that a citizen should have the right "to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that "the enumeration in the constitution of the above mentioned rights shall not be construed to deny or disparage other retained by the people."\(^3\) Provision was, however, to be made to impose restrictions in the interest of public order. The Constitutional Adviser, however, pointed out to certain objections. All searches and seizures of property were made in accordance with the provisions of law not only in the interest of public order but also for the purposes of detection of various crimes. Moreover, in the absence of a clear definition of such other rights, questions were likely to be raised about the existence of various rights giving rise to unnecessary speculation about such rights and resulting in abnormal increase in litigation. It was, therefore, not desirable to include these rights.\(^4\)

Right to be Defended: - The Bihar Lawyer's conference at its 4th session at Gaya proposed that a citizen should also be given the right "to represent his case himself or through a pleader or a recognized agent under the law for the protection of his life, liberty, property and rights in any judicial proceedings."\(^5\) But the Constitutional Adviser reminded that such a right was already conferred by the Code of Civil Procedure and the Code of Criminal Procedure which laid down the procedure to be followed in judicial proceedings. That was hardly a matter for inclusion as a fundamental right in the Constitution itself.\(^6\)

ROG TO PROPERTY

The House accepted without controversy that a citizen should have the right -

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;

(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;
But there was great controversy regarding the rights
(f) to acquire, hold and dispose of property; and
(g) to practise any profession, or to carry on any occupation, trade or business.

Sachchidanand Das opposed the inclusion of these sub-clauses in the constitution. He said, "I do believe that there cannot be stable peace, unless and until private property is abolished." But he disliked the abolition of private property by violence. He wanted to bring about a psychological change by non-violent means for the abolition of private property. He, therefore, concluded, "I hope that in time to come the articles concerning property will not find a place in the constitution." Sri Allauddin Shastri also said that the rights guaranteed in sub-clauses (f) and (g) are rather too wide! The type of freedom brought guaranteed implies that the capitalists and feudal aristocracy would have full rights to acquire and dispose of property. But the mode in which property is being acquired and held is such as permits the property-owners to have all the benefits while workers who create this property have all the toil as their share .... I submit that this right of property should be so interpreted in future as to permit the transformation of individualistic capitalism into State capitalism. All the means of production and the distribution of the commodity should be owned and controlled by the State and not by the individual .... To reach this goal it is necessary that these restrictive provisions should be interpreted in this way"  

Sri K. Hammanthaiya was very critical of these rights. These were not

1. CAU WOL. VII p. 751
2. Ibid. p. 752
3. Ibid. p. 769
really fundamental rights. They were matters incidental to legislation, that could be passed either by the Parliament or the legislatures of the units. These rights were not so treated by any other country except Ireland and Switzerland. These rights were not incorporated as fundamental rights in America. He, boldly stated, "I may be pardoned if I say this that the men who did the work of shaping these constitutional proposals, a majority of them, have come from the uppermost strata of society. After all, they can think of what suits their psychology and their class or their strata of society. It is from that point of view that they have framed these three rights. Really speaking, whether these three rights are fundamental or not, we ought to judge from the point of view of the people of the villages and of the units. I very much wish that the Drafting Committee and this Assembly could now delete these three rights and relegate them to the discretion of the legislature of the units but now it is too late and we have to accept them somehow or anyhow. Here arises a conflict in the future that the units in order to safeguard the right and interests of the people within their respective areas, may try to circumvent these three rights that are conferred by this constitution. It will happen."

But Prof. Yashvant Rai supported these rights and particularly the right to property. He said "At present it is the custom in the Punjab that only one particular community can purchase land and take to agriculture. But the Harijans, 90 percent of whom are cultivators, are not permitted to purchase land to cultivate, or to build houses. . . . our Indian National Congress was wedded to the creed that on establishing its Government every one will get house-building and agricultural facilities and no one will have any difficulty on these accounts. People are also realising that now as the congress is in power all

1. CAD VOL. VII p. 755
these facilities will have to be afforded to the Harijans. Therefore clause (f) of article 13 is very necessary because it provides the facilities we wanted."¹

Meeting the points of controversy, Sri T. T. Krishnamachari also observed "I am happy to see that the Drafting Committee was chosen to avoid importing into this particular article the economic implications in the enumeration of fundamental rights that obtain in other constitutions. I think it has been a very wise thing. I know a friend of mine in this House has objected to one particular sub-clause (f) of article 13, namely, to acquire, hold and dispose of property. I would like to assure him and those who hold the opinion that he holds that this does not really mean that there is any particular right in regard to private property as such, no more than what any person even in an absolutely socialistic regime will desire, that what he possesses what are absolutely necessary for his life, the house in which he lives, the moveables that he has to possess, the things which he has to buy, should be secured to him, which I think any socialistic regime, unless it be communistic, will concede, is a right that is due to an individual.

"Actually the economic significance that attaches to any enumeration of fundamental rights, such as the rights conceded in the Bill of Rights in the American Constitution and the addition to these in the Fourteenth Amendment, finds no place so far as this particular constitution is concerned, and I am able to say that that is one of the chief features of this Draft Constitution. We have chosen to avoid as far as possible, in spite of the fact that the vested interests are still with us and they have a certain amount of influence - We have chosen to avoid as far as possible laying that stress on the importance of the economic surroundings which is a significant feature of the American Constitution, and I do hope that my honourable friend, who objected to a particular sub-clause in this article, namely clause (f) will now realise that it has no meaning so far as property rights are concerned except in something that is clear to an individual and which is very necessary to concede in an enumeration of rights of this nature." Therefore all these rights were accepted by the House.²³

¹. Ibid, pp. 761 and 762
². Ibid, p. 772
RIGH T S AND OBL IGATIONS

But these rights were riddled with so many exceptions that they were condemned as a kind of deception. It was criticised that the exceptions had eaten up the rights altogether. In the opinion of the critics, fundamental rights were not fundamental unless they were also absolute rights. Sri Bimala Prasad Seth criticises that the rights in article 13 were cancelled by that very section and placed at the mercy or the high-handedness of the legislature. The guarantee of freedom of speech and expression, which had been given in this article, was not to affect the operation of any existing law or prevent the State from making any law relating to libel, slander, defamation, sedition and other matters which offended the decency or morality of the State. These were tall orders and made the fundamental right with regard to freedom of speech and expression virtually ineffective. The expression 'in the interests of general public' was also very wide and would enable the legislative and the executive authority to act in their own way. The Draft Constitution further empowered the President to issue proclamations of emergency whenever he thought that the security of India was in danger or was threatened by an apprehension of war or domestic violence. The President under such circumstances had the power to suspend civil liberties. But even in the United States, civil liberties were never suspended. What was suspended there, in cases of invasion or rebellion, was only the habeas corpus writ. Thus individual freedom secured in this article was at the same time restricted by the will of the legislature and the executive which had power to issue ordinances between the sessions of the legislature, unrestricted by any constitutional provision. He, therefore, suggested that fundamental rights ought to be placed absolutely outside the jurisdiction not only of the legislature but also of the executive.

Prof. K. T. Shah also observed "if all the freedoms enumerated in this article are to be in accordance with only the provisions of this article... then they would amount more to a negation of freedom than the promise or assurance of freedom, because in everyone of these clauses the exceptions are much more emphasised than the positive provision. In fact what is given by one right hand seems to be taken away by three or four or five left hands; and therefore the article is rendered nugatory in my opinion."
Mr. Naziruddin Ahmad also pressed the point that the legislatures should not abrogate these fundamental rights and, therefore, suggested that at the end of sub clauses a, c, d, e, f and g the words 'for any lawful purpose' be inserted. They would then be part of the fundamental rights and clauses (2) to (6) would not give any power to the legislatures to abrogate them.

Mabboob Ali Baig Sahib Bahadur also criticised these provisions. He expressed that the fundamental rights listed in clause (1) were only to be deprived of under clauses (2) to (6). Moreover, it was bad to empower the State Legislatures to impose restrictions like that of the German Constitution. That struck at the very root of fundamental rights and they would be reduced to ordinary rights. One could well imagine what would be the measure of fundamental rights that the people would enjoy under rule by a party. If absolute power was placed in the hands of a party Government such a legislature or executive would become absolutely corrupt. He, therefore, moved that clauses (2) to (6) be deleted and the following proviso be added to clause (1): "Provided however, that no citizen in the exercise of the said right, shall endanger the security of the State, promote ill will between the communities or do anything to disturb peace and tranquillity in the country." Sardar Bhupinder Singh Nan was very critical of the proviso. He lamented that what was being given by one hand was being taken away by the other. Every clause was being hedged in by so many provisos.

Kazi Syed Krimuddin also submitted that these fundamental rights could not be made subject matter of the vagaries of the legislatures. Clauses (2) to (6) of this article rob the people of the only guarantee which would make them secure. In the State legislatures the majority was capable of practically oppressing the minorities, political or communal. The fundamental rights were being enacted only with a view to placing restrictions on the legislation. There was no parallel to these restrictions in any constitution of the world. In the American Constitution all these rights had been entrusted to the judiciary simply because the political parties, who were elected from time to time, could not be entrusted with the interpretation of laws.

Sri H. J. Khandekar also criticized the provisos one by one, so also Amiya Kumar

On the other hand, Seth Govind Das preferred that these rights were granted without restrictions. But the conditions in the country did not permit it. If one considered the then existing national and international situation as also the fact that the freedom was achieved only recently and the Government was in its infancy, one had to admit that it was necessary for the Government to retain the rights.

Sri K. Manumehthaiya also very strongly supported the view that the legislature and not the judiciary be entrusted to impose restrictions on the rights guaranteed to the citizens. He stated, "courts can, after all, interpret the Law as it is. Law once made may not hold good in its true character for all time to come. Society changes; Governments change; the temper and psychology of the people change from decade to decade if not from year to year. The law must be such as to automatically adjust itself to the changing conditions. Courts cannot, in the very nature of things, do legislative work; they can only interpret. Therefore in order to see that the law automatically adjusts to the conditions that come into being in times to come, this power of limiting the operation of the fundamental rights is given to the legislature. After all, the legislature does not consist of people who came without the sufferance of the people. The legislature consists of real representatives of the people as laid down in this constitution. If at a particular time the legislature thinks that these rights ought to be regulated in a certain manner and in a particular method, there is nothing wrong in it, nothing despotic about it nothing derogatory to these fundamental rights.

I am indeed glad that this right of regulating the exercise of fundamental rights is given to the legislature instead of to the courts. Supporting the viewpoint, Sri Algu Rai Shastri also said "many friends have attacked its provisions on the grounds that the fundamental rights conferred by this article have been taken away by the limitations imposed therein. I feel along with freedom responsibility is essential. The friends who urge that the rights given in this article have been taken away under the sub-clauses (2), (3), (4), (5) and (6) have not taken into consideration:

1. Ibid pp. 769-770.  
2. Ibid. pp. 776-776  
3. Ibid p. 750  
the people who will elect members to the legislatures which have been authorised under these provisions to apply these restrictions, and the people who would compose these legislatures. I submit that those who would sit in the legislatures would be representatives of the people and they will impose only those restrictions which they consider proper. Such restrictions would be in the interest of the people.\textsuperscript{1} He further said "good citizenship implies restrictions".\textsuperscript{2} Sri Brajeshwar Prasad further supported these restrictions and remarked "individual freedom is risky in a community where more than 80 percent of the people are sunk in the lowest depths of poverty illiteracy, communalism and provincialism. It is a sheer illusion to think that personal rights of the individual can be firmly secured if these are laid down in the constitution in clear language without any reservations and safeguards. The enjoyment of these rights is dependent upon the fulfilment of certain social conditions outside the scope of any constitution. Man can never enjoy the blessings of personal freedom as long as society remains organised on the basis of capitalism, as long as the menace of war and foreign intervention looms large on the horizon, as long as poverty illiteracy communalism and provincialism remain in our midst ... It is not entirely due to the wickedness or ignorance of constitution maker that there are restrictions on individual rights. The legacy of centuries of backwardness and foreign misrule cannot be wiped out by one stroke of the pen. The concomitants of the age cannot be brushed aside by any constitutional guarantees\textsuperscript{3} Sri Rohini Kumar Chaudhury\textsuperscript{4} and Prof. Shibban Lal Seksenra\textsuperscript{5} also supported the provisos. Meeting the points of criticism Sr. T. T. Krishnamachari explained "there can be no absolute right and every right has got to be abridged in some manner or other under certain circumstances, as it is possible that no right could be used absolutely and to the fullest extent that the words conveying that right indicate. It is merely a matter of compromise between two extreme views. Having got our freedom only recently, it

1. Ibid p. 767
2. Ibid p. 769
3. Ibid p. 760-761
4. Ibid p. 762
5. Ibid p. 765-766
is possible that we want all the rights that are possible for the individual to exercise, unfettered. That is one point of view. The other view is that having got our freedom, the State that has been brought into existence is an infant State which has to pass through various kinds of travail, and what we could do to ensure that the State continues to function unimpaired should be assured even if it entails an abridgment of the rights conferred by this article ....... the Drafting Committee has chosen the golden mean of providing a proper enumeration of those rights that we considered essential for the individual and at the same time, putting such checks on them as will ensure that the State and the constitution which we are trying to bring into being today will continue unhampered and flourish ....... speaking today in the context of the situation in which we are placed, we cannot but envisage that those rights will be abridged in order to maintain the stability of the State. This State that has now been brought into being has been put to a lot of travail in the first eighteen months of its existence ... special powers are needed by the Government to meet not merely with the refugee problem, not merely with the fact that there are various forces in this country which do not like this State to grow in the present form, but also with the various economic troubles that now face this country ...... there is no use our comparing this particular article which happens to be the crux of the fundamental rights with either what obtains in the commentaries of the English Constitution or what obtains in the text of the American Constitution or any other constitution for the reason that the settings is totally different ... English jurisprudence is something totally different for the reason that English Parliament does not provide for the enumeration of all these rights which is absolutely based on custom on which you cannot depend for ever because Parliament there is supreme .... But so far as the American example is concerned ...... there is one distinction between our own way of thinking and what the founding fathers in America thought and what was sustained in America until recently viz. the economic basis of the American constitution is something totally different from what we envisage to be the economic basis of our constitution.\(^1\)

Sri Deshbandhu Gupta also opined "along with rights certain obligations and responsibilities have to come upon us. If we do not stand by those obligations then our freedom would be the freedom of the jungle". Dr. B. R. Ambedkar has already conclusively observed while presenting the Draft Constitution to the House, that "The critics rely on the constitution of the United States and to the Bill of Rights embodied in the first ten Amendments to that constitution in support of their contention. It is said that the fundamental rights in the American Bill of Rights are real because they are not subjected to limitations or exceptions.

"I am sorry to say that the whole of the criticism about fundamental rights is based upon a misconception. In the first place, the criticism in so far as it seeks to distinguish fundamental rights from non fundamental rights is not sound. It is incorrect to say that fundamental rights are absolute while non fundamental rights are not absolute. The real distinction between the two is that non fundamental rights are created by agreement between parties while fundamental rights are the gift of the law. Because fundamental rights are the gift of the State it does not follow that the State cannot qualify them.

"In the second place it is wrong to say that fundamental rights in America are absolute. The difference between the position under the American constitution and the Draft Constitution is one of form and not of substance. That the fundamental rights in America are not absolute rights is beyond dispute. In support of every exception to the fundamental rights set out in the Draft Constitution one can refer to at least one judgment of the United States Supreme Court .... In Gitlow Vs. New York in which the issue was the constitutionality of a New York 'criminal anarchy' law which purported to punish utterances calculated to bring about violent change, the Supreme Court said: "It is a fundamental principle long established that the freedom of speech and of the press, which is secured by the constitution does not confer an absolute right to speak or publish without responsibility whatever one may choose or an unrestricted and unbridled license that gives immunity for every

possible use of language and prevents the punishment of those who abuse this freedom." It is, therefore, wrong to say that the fundamental rights in America are absolute, while those in the Draft Constitution are not.

It is argued that if any fundamental rights require qualification, it is for the constitution itself to qualify them as is done in the constitution of the United States and where it does not do so, it should be left to be determined by the Judiciary upon a consideration of all the relevant considerations. All this, I am sorry to say, is a complete misrepresentation if not a misunderstanding of the American constitution. The American Constitution does nothing of the kind. Except in one matter, namely, the right of assembly, the American Constitution leaves it to the judiciary to impose limitations on fundamental rights. The right to impose limitations belongs to the congress. The real position is different from what is assumed by the critics. In America, the fundamental rights as enacted by the Constitution were no doubt absolute. Congress, however, soon found that it was absolutely essential to qualify these fundamental rights by limitations. When the question arose as to the constitutionality of these limitations before the Supreme Court, it was contended that the constitution gave no power to the United States Congress. To impose such limitation, the Supreme Court invented the doctrine of police power and refuted the advocates of absolute fundamental rights by the argument that every State has inherent in it police power which is not required to be conferred on it expressly by the Constitution. To use the language of the Supreme Court ......

"What a State in the exercise of its police power may punish those who abuse this freedom by utterances enimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question...."

"What the Draft Constitution has done is that instead of formulating rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permits the State directly to impose
limitations upon the fundamental rights. There is really no difference in the result. What one does directly the other does indirectly. In both cases, the fundamental rights are not absolute.\(^1\) Thus the provisos were not deleted and they were adopted with necessary amendments. Pandit Thakur Das Bhardwaj rightly posed the question: What would happen to the fundamental rights if the legislature had the right substantially to restrict the fundamental rights? Were the destinies of the people of the country and their rights to be regulated by the executive and by the legislature or by the courts? He submitted that Supreme Court should ultimately by the arbiter and should have the final say in regard to the destinies of the people. He, therefore, suggested that in clauses 3 to 6 the word 'restriction' be qualified by the adjective 'reasonable'. In clause 2 the word 'reasonable' be substituted for the word 'any' where it occurred for the second time. Thus the court would be empowered to examine whether the restrictions imposed by the legislature were reasonable or not. Thereby the legislature and the executive could not play with the fundamental rights of the people.\(^2\) Dr. B. R. Ambedkar accepted the suggestion. The House, therefore, adopted the amendment which had been deleted from the original report of the sub-committee on fundamental rights.

Mahboob Ali Baig Sahib Bahadur pointed out that the term "shall affect the operation of any existing law" in clauses (2) to (6) was quite contrary to the provisions of article 8 of the Draft Constitution. He, therefore, suggested that the clauses be qualified by the words "without prejudice and subject to the provisions of article 8" in the beginning of each clause.\(^3\) Dr. B. R. Ambedkar\(^4\) replied, "It seems to me that there is a good deal of misunderstanding about what is exactly intended to be done with regard to existing law. Now the fundamental article is article 8 which

\(^1\) CAD Vol. VII pp. 40 and 41.
\(^3\) CAD Vol. VII pp. 734.
\(^4\) Ibid pp. 740-743.
specifically, without any kind of reservation, says that any existing law which is inconsistent with the fundamental rights as enacted in this part of the constitution is void .... It is unnecessary to repeat the proposition stated in article 8 every time the phrase 'existing law' occurs, because it is a rule of interpretation that for interpreting any law, all relevant sections shall be taken into account and read in such a way that one section is reconciled with another .... In order to remove the misunderstanding that is likely to be caused in a layman's mind, I have brought forward this amendment" "that in clauses (3), (4), (5), and (6) of article 13, after the words 'any existing law' the words 'in so far as it imposes' be inserted. As sub-clause (6) was differently worded so after the words 'in particular' the words 'nothing in the said clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe or prevent the state from making any law' be inserted. Explaining he observed. "Now, the words, 'in so far as it imposes' to my mind make the idea complete and free from any doubt that the existing law is saved only in so far as it imposes reasonable restrictions." These amendments of Dr. B. R. Ambedkar were adopted.¹

FREEDOM OF SPEECH AND EXPRESSION

Thus freedom of speech and expression was granted to all the citizens but it did not prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency or morality or undermines the authority or foundation of the State". Dr. B. Pattabhi Sitaramayya suggested that the term "authority or foundation of the State" was not happy and it should be substituted by the term "security of the State".² The Special Committee accepted the suggestion.³ Sri K. M. Munshi⁴ further examined these restrictions imposed on the freedom of speech and expression. He suggested that a much better phraseology be used viz. "which undermines the security of, or tends to overthrow, the State." He further suggested that the word 'sedition' be deleted. It was of doubtful and varying import and had created considerable doubt in the minds of not only the members of this

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¹ CAD Vol. VII p. 787
² Papers in the President's Secretariat: List of Amendments on the Draft Constitution of India, List I No.
⁴ Ibid. Notes on Amendment on the Draft Constitution of India List I No.
procession was once considered sedition in England. Even holding an opinion against which would bring ill will towards Government, was considered sedition once. But, as a matter of fact, the essence of democracy was criticism of Government. Therefore, in a democratic Government a line must be drawn between criticism of Government which should be welcome and incitement which would undermine the security or order on which civilized life was based, or which was calculated to overthrow the State. The party system which necessarily involved an advocacy of the replacement of one Government by another was its only bulwark; the advocacy of a different system of Government should be welcome because that gave vitality to democracy. Therefore the word 'sedition' should be omitted. The House accepted this amendment of Sri K. M. Manshi 1 Mr. Mahb. Tahir demanded that the State should not also be prevented from making any law relating to 'communal passion' restricting the freedom of speech and expression 2. Kazi Syed Karimuddin also advocated that 'communal passion', i.e., exciting the minds of one community as against the other, should be made an offence 3. But Sri M. Aandalayyan Ayyanar said that provision was made in the Penal Code under Sections 153 and 155A for the purpose. 4 Therefore, the amendment was not accepted by the House. At the suggestion of Sri T. T. Krishnamachari 5 the words 'contempt of court' was added after the word 'defamation'. 6 Thus freedom of speech and expression was given to the citizen provided it did not affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

RIGHT TO ASSEMBLE

All citizens were given the right to assemble peaceably and without arms provided it did not affect the operation of any existing law, or prevent the State from making any law, imposing in the interests of public order restrictions on the exercise

1. CAD Vol. VII p 786
2. Ibid p 742
3. Ibid p 753
4. Ibid p 779
5. CAD 17.1049 p 394
of the right conferred." Ezi Syed Karimuddin observed that restrictions were already imposed. The right to assemble was subject to the conditions that it must be peacefully and without arms. Therefore, the legislatures of the States should not be empowered to have more restrictions as embodied in clause 3 of article 13. But the House adopted clause 3 as it had already been amended.

RIGHT TO FORM ASSOCIATIONS

All citizens were also given the right to form associations or unions provided that did not affect the operation of any existing law, or prevent the State from making any law, imposing, in the interests of the general public, restrictions on the exercise of the right conferred. But Dr. B. Pattabhi Sitaramayya pointed out that the term "in the interests of general public" was too wide and vague and so it should be substituted by the term "in the interests of public safety, peace and tranquility." The special committee considered this amendment and preferred the term "in the interests of public order or morality." It was accordingly moved in the Constituent Assembly by Dr. B. R. Ambedkar and was accepted by the House.

THE RIGHT TO FREE MOVEMENT, TO RESIDENCE AND TO PROPERTY

The right to move freely, to reside and settle in any part of the territory and the right to acquire, hold and dispose of property were guaranteed to the citizens provided they did not "affect the operation of any existing law, or prevent the State from making any law, imposing restrictions on the exercise of any of the rights conferred either in the interests of the general public or for the protection of the interests of any aboriginal tribe." But Dr. B. Pattabhi Sitaramayya suggested that power be conferred only on the Union Parliament to impose restrictions and not on the State. Syed Abdur Rauf also supported the viewpoint. He remarked that these were the most valuable of the fundamental rights. Therefore, the State should not be trusted with making laws regarding these rights. It was only Parliament which could, to the satisfaction of the people, deal with these questions. As it was very

1. GAD 2.12 48 p. 756
2. Papers in the President's Secretariat, List of Amendments on the Draft Constitution of India List I No 43
3. Ibid. Notes of Amendments on the Draft Constitution of India List I No 43
dangerous to leave this power in the hands of the small states which would
comprise even village panchayats we must be very careful and therefore 'Parliament'
be substituted for the word 'state'. The constitutional Adviser, however referred
to certain practical difficulties, in case the amendment was accepted. Such restric-
tions might have to be imposed on persons detained in prison or in mental hospitals
on criminal tribes etc. 'Prison' was a subject in the State list vide entry 5 of
list II; 'mental hospitals' and 'nomadic and migratory tribes' were in the concurrent
list vide entries 19 and 24. So, the power to impose restrictions by legislation
could not properly be taken away from the units. Again Provincial Acts had in the
past imposed restrictions (for example, the Bengal Tenancy Act, 1885) in the interest
of aboriginals. Therefore, it was not proper to prevent the provincial legislatures
from exercising such powers. Therefore, the House did not accept the amendment.

Mr. Atul Chandra Gupta, however, suggested a via media that laws enacted by the
State legislature should receive the sanction of the President before or after
enactment. But the Constitutional Adviser did not accept it. Provincial Acts had
in the past imposed restrictions in the interest of aboriginals. These laws could
not be kept alive if the amendment proposed by Mr. Gupta was accepted in view of
clause (1) of article 8 of the Draft Constitution.

Mr. Mohd. Tahir suggested that the protection of the interests of any aboriginal
tribe be deleted. It would make the clause of a general character, which would
certainly include the safeguards of the interests of the aboriginal tribes as well.
It was not accepted. Mr. B. Pattabhi Sitaramayya, however, suggested that the word
'aboriginal' be substituted by the word 'scheduled'. The Constitutional Adviser
also found it to be more specific and better. The Committee on Tribal Areas had
also used the phrase 'scheduled Tribes'. So Dr. B. R. Ambedkar moved the amendment
in the House, and that was accepted.
All citizens were given the right "to practise any profession or to carry on any occupation, trade or business" provided it did not "affect the operation of any existing law or prevent the State from making any law imposing in the interests of public order, morality or health, restrictions on the exercise of the rights conferred by the said sub-clause and in particular prescribing, or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

Sri Jaya Prakash Narayan had, however, suggested that no citizen should be subjected to any restriction with regard to "possession of property, exercising or carrying on any occupation, trade, business or profession within the Republic." He, therefore, wanted that this amendment be included as sub-clause (c) of article 9 of the Draft Constitution. He did not approve of any restriction on these rights. But the constitutional adviser remarked that in the case of practising any profession or the carrying on of any trade or business, such restrictions might be imposed in the interest of public order, morality or health. It might, for example, be necessary to impose restrictions on the carrying on of certain occupations, such as the occupation of rickshaw puller, the occupation of labour in mines by women. The amendment, if accepted, would not enable the State to impose any such restrictions. Further, in the case of possession of property, there were certain disabilities as with regard to possession of property on the ground of sex under the Hindu Law. Therefore, the amendment was not accepted.

Many critics, however, pointed out that it might so happen that people might have to be wholly prevented from carrying on any particular trade or business in any particular commodity of that commodity being in short supply the sale thereof was undertaken by the Government, or by dealers licensed by the Government, or if the production, sale or distribution of that commodity was undertaken by the Government as a part of its economic programme.

Existing clause(6) of article 13 which

1. Suggestion from Jaya Prakash Narayan, Vide Papers in the President's Secretariat.
2. Ibid.
embody restrictions to be imposed on the exercise of the right to carry on any trade or business in the interest of public order, morality or health would hardly enable such restrictions to be imposed by legislation. To meet the above criticism the Constitutional Adviser suggested that the term 'in the interest of the general public' be substituted for the term 'in the interest of public order, morality or health'. This amendment was moved by Dr. B. R. Ambedkar and the House accepted it.

Mr. Mhd Tahir further suggested that the occupation of beggary in any form or shape of person having sound physique and perfect health whether major or minor is totally banned and any such practice shall be punishable in accordance with law. But the House did not accept it.

Thus the House granted seven freedoms to the citizens after a heated controversy. Maulana Hazrat Mohani made personal remarks against Dr. B. R. Ambedkar and observed "Dr. Ambedkar's legal abilities are established, and if he wishes, he can turn night into day and day into night and can prove it conclusively." Sri K. Homemanthaiya made the most damaging remark, "I have no doubt whatsoever in my mind, that here arises plentiful source of litigation. Yesterday I happen to read Sir Ivor Jennings' opinion about our Fundamental Rights. He says, the rights conferred in this Chapter and especially in this Section are so complicated, are worded in such a verbose manner, that it will be a fruitful source of income to Constitutional Lawyers. There is a good deal of truth in it. The enunciation of the Fundamental rights and the exceptions added on by provisos are so worded - they had to be like that because it is impossible to foresee all the agencies and make provision for them now and then that there will be litigation on a scale which none of us have ever contemplated.

But it would be unfair to criticise Dr. B. R. Ambedkar alone. The original report of the Sub-Committee on Fundamental Rights was drafted under the chairmanship of Sardar Vallabhbhai Patel and he had piloted it in the Assembly. He was only defended by Jawaharlal Nehru. This draft article 13 was not piloted by Dr. B. R. Ambedkar alone. Sri M. Amanthasayanam Ayyangar had his able part and the learned

1. Suggestions from certain ministries of the Govt. of India, Provincial Legislatures etc., for the amendment of the Draft Constitution of India. Vide papers in the President's Secretariat.
counsel of the constitutional adviser was always forthcoming. Therefore, it would be wrong to impute any motive to Dr. B. R. Ambedkar.

As for the criticism that it was a lawyer's paradise, I feel it is unfair compared to the fundamental rights of the U.S.A., the draft constitution did not allow the judiciary a free play and the rights and the restrictions were specifically enumerated. The Makers were always eager to avoid vagueness of expression so that lawyers might not indulge in loose interpretation. However, Dr. B. R. Ambedkar was not ashamed of the criticism. He boldly confessed, "I am not prepared to say that this constitution will not give rise to questions which will involve legal interpretation or judicial interpretation. In fact I would like to ask Mr. Krishnamachari if he can point out to me any instance of any constitution in the world which has not been a paradise for lawyers. I would particularly ask him to refer to the vast storehouse of law reports with regard to the constitution of the United States, Canada and other countries. I am, therefore, not ashamed at all if this constitution hereafter for purposes of interpretation, is required to be taken to the Federal Court."¹

PROTECTION IN RESPECT OF CONVICTION OF OFFENCE
ART. 14 := ART. 20

The Sub-Committee on Fundamental Rights provided protection in respect of conviction of offence in the Chapter 'Miscellaneous Rights.' Article 20 of the report laid down: "(1) No person shall be convicted of crime except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than that applicable at the time of the commission of the offence.

(2) No person shall be tried for the same offence more than once nor be compelled in any criminal case to be a witness against himself."² It was moved by Sardar Vallabhbhai Patel and was adopted without debate.³

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¹ CAD 30.11.48 p. 700
² CAD Vol. III No. 2 p. 428
³ CAD Vol. III No. 5 p. 519
This article was similar to Article 38(1) of the Irish Constitution and Article V of the U.S.A. Constitution (1791).

The Drafting Committee used the term 'convicted for any offence' for the words 'convicted of crime' in clause (2) and clause (2) was divided into two separate parts. It was adopted as Article 14 and was included in the Chapter, 'Right to Freedom'. It was drafted as:

"14(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence nor be subject to a penalty greater than that which might have been inflicted under the law at the time of the commission of the offence.

(2) No person shall be punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

Sri T. T. Krishnamachari objected that clause (2) might probably affect cases where, as in the case of an official of the government who had been dealt with departmentally and punishment had been inflicted, he could not again be prosecuted and punished if he had committed a criminal offence or per contra. He, therefore, amended clause (2) as 'No person shall be prosecuted and punished for the same offence more than once.' It was accepted by the House.

Kazi Syed Karimuddin moved that the following provision be added as clause (4) of Article 14:

"(4) The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized'. There were similar provisions in the American Constitution (Art. IV), in the Irish Constitution as clauses (2) and (5) and in the German constitution as articles 114 and 115. He further pointed out that even Dr. B. R. Ambedkar had provided

2. Ibid. pp 31-32. 3. CAD 3 22.48 p. 795
4. Ibid. p 796
5. Ibid. p. 794.
for such right in his book 'Minorities and States' (page 11, item No 10).

Dr. B. R. Ambedkar agreed to the amendment and observed, "I think it is a useful provision and may find a place in our Constitution. There is nothing novel in it because the whole of the clause as suggested by him is to be found in the Criminal Procedure Code so that it might be said in a sense that this is already the law of the land. It is perfectly possible that the legislatures of the future may abrogate the provisions specified in his amendment but they are so important so far as personal liberty is concerned that it is very desirable to place these provisions beyond the reach of the legislature and I am, therefore, prepared to accept his amendment." The House accepted the amendment. But the matter was reopened and the Congress whip was applied to oppose it. So it was ultimately negatived.

PROTECTION OF LIFE AND PERSONAL LIBERTY
ART 15 :: 21.

The Sub-Committee on Fundamental Rights proclaimed "No person shall be deprived of his life, or liberty, without due process of law, nor shall any person be denied the equal treatment of the laws within the territories of the Union:

Provided nothing herein contained shall detract from the powers of the Union legislature in respect of foreigners." At the suggestion of Sri K. M. Munshi, the proviso was dropped. The right of 'equal treatment of the laws' formed a separate article after the third reading, which we have discussed already. That need not be repeated.

The Drafting Committee qualified 'liberty' by the adjective 'personal' as otherwise it might be construed very widely so as to include even the freedom already dealt with in article 13. The Committee also substituted the expression, 'except according to procedure established by law' for the words 'without due process of law' as the former was more specific (C.F.Art.XXXI of the Japanese Constitution, 1946). Thus the Drafting Committee assured that "No person shall be deprived of his

1. CAD 5.12  48 p 796
2. Ibid p. 797
3. CAD 6.12.48 p. 840
4. Ibid p. 841 vide Maulana Hasrat Mohani's statement
5. Ibid p. 842
life or personal liberty a cept according to procedure established by law\textsuperscript{1}.

A great controversy arose over the words "cept according to procedure establishe by law". Kazi Syed Karimuddin\textsuperscript{2} demanded that the term 'without due process of law' be resubstituted. He pointed out that according to the term used in the article, as soon as a procedure according to law was complied with by a court, there would be an end to the duties of the court and if the court was satisfied that the procedure had been complied with, then the judges could not interfere with any law which might have been capricious, unjust or iniquitous. The clause, as it stood, could do great mischief in a country which was the storm centre of political parties and where discipline was unknown. Supporting the amendment Pandit Thakurdas Bhargava\textsuperscript{3} observed "according to the present section procedure is held sacrosanct whereas the word 'law' really notes both procedural as well as substantive law. By using these words 'without due process of law' we want that the courts may be authorised to go into the question of the substantive law as well as procedural law". Besides others even Sri K. M. Mami\textsuperscript{4} expressed "In my humble opinion, if the clause stood as it is, it would have no meaning at all, because if the procedure prescribed by law were not followed by the courts, there would be the appeal court in every case, to set things right. This clause would only have meaning if the courts could examine not merely that the conviction has been according to law or according to proper procedure, but that the procedure as well as the substantive part of the law is such as would be proper and justified by the circumstances of the case. We want to set up a democracy, .... and the essence of democracy is that a balance must be struck between individual liberty on the one hand and social control on the other. We must not forget that the majority in a legislature is more an ious to establish social control than to serve individual liberty. Some scheme, therefore, must be devised to adjust the needs of individual liberty and the demands of social control".

He, therefore, said that the amendment would 'enable' the courts to examine not only

\textsuperscript{1} Draft Constitution of India, Est. 1948, Art. 15
\textsuperscript{2} Cad 6.12.48 p. 843
\textsuperscript{3} Ibid p. 846
\textsuperscript{4} Ibid pp. 851-852.
the procedural part, the jurisdiction of the court, the jurisdiction of the legislature, but also the substantive law. When a law had been passed which entitled government to take away the personal liberty of an individual, the court will consider whether the law which has been passed is such as is required by the exigencies of the case, and, therefore, as I said the balance will be struck between individual liberty and social control."

Opposing the viewpoint Sri Alladi Krishnaswami Ayyar observed "It is just possible, some ardent democrat may have a greater faith in the judiciary than in the conscience will pressed through the enactment of a popular legislature. Three gentlemen or five gentlemen, sitting as a court of law, and stating what exactly is due process according to them in any particular case, after listening to long discourses and arguments of briefed counsel on either side, may appeal to certain democrats more than the expressed wishes of the legislature or the action of an executive responsible to the legislature. This clause may serve as a great handicap for all social legislation, for the ultimate relationship between employer and labour, for the protection of children, and for the protection of women .... I trust the House will take into account the various aspects of this question, the future progress of India, the well-being and the security of the States, the necessity of maintaining a minimum of liberty, the need for coordinating social control and personal liberty, before coming to a decision. One thing also will have to be taken into account viz. that the security of the state is far from being as secure as we are imagining at present." Dr. B. R. Ambedkar summed up the arguments as "There are two views on this point. One view is this: that the legislature may be trusted not to make any law which would abrogate the fundamental rights of men .... One is to give the judiciary the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles .... There are dangers on both sides. For myself I cannot altogether omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we

1. CAD 6 12 40 pp. 853-854.
2. CAD 6 13 12 40 pp. 1000.
regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their prejudice be trusted to determine which law is good and which law is bad... I would leave it to the House to decide in any way it likes". The House rejected the amendment and article 15 was adopted.

PROTECTION AGAINST ARREST AND DETENTION
15 A : 22

Although article 15 was adopted, some pertinent points had been raised by Mahbub Ali Baig Sahib Bahadur. While criticising the term 'except according to procedure established by law' he said 'the only reason which has been advanced in the footnote is that this is more definite and that it finds a place in the Japanese Constitution..... It is no doubt true that in the Japanese Constitution article 31 reads like this but if the other articles that find place in the Japanese Constitution (Viz. articles 32, 34 and 35) had also been incorporated in this Draft Constitution that would have been incorporated in this Draft Constitution that would have been a complete safeguarding of the personal liberty of the citizen... Article 32 of the Japanese Constitution provides that "no person shall be denied the right of access to the court..." Article 34 of the Japanese Constitution provides that "no persons shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel, nor shall be detained without adequate cause and upon demand of any such person such cause should be immediately shown in open court in his presence and in the presence of his counsel"... Further, article 36 provides that the right of all persons to be secured in their homes and against entry, searches etc. shall not be impaired, except upon warrant issued only for probable cause and so on. If for the sake of clarity and definiteness you have imported into this Draft Constitution article 31 of the Japanese Constitution you should in fairness have incorporated the other articles of the Japanese Constitution, which are relevant and which were enacted for safeguarding the personal liberty of the honest.

1. CAD 6.12.45 pp. 844-845.
citizen." Dr. B. R. Ambedkar also confessed "that a large part of the House including myself were greatly dissatisfied with the wording of article 15. It will also be recalled that there is no part of our Draft Constitution which has been so violently criticised by the public outside as article 15 because all that article 15 does is this, it prevents the executive from making an arrest. All that is necessary is to have a law and the law need not be subject to any conditions or limitations. In other words, it was felt that while this matter was being included in the Chapter dealing with Fundamental Rights, we were giving a carte blanche to Parliament to make and provide for the arrest of any person under any circumstances as Parliament may think fit. We are, therefore, now introducing article 15A, making if I say so, compensation for what was done there in passing article 15. In other words, we are providing for the substance of the Law of 'due process' by the introduction of article 15A. So Dr. B. R. Ambedkar moved the following new article 15A in the Constituent Assembly on 15.9.49.

"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 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 twentyfour 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 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 -

1. CAD 15.9.1949, p. 1497
3. CAD 15.9.49, pp. 1496 1497
(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.

(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."

There was much misunderstanding about the term 'as soon as may be' in clause (1) of Article 15A. Srimati Purnima Banerjee, suggested that it should not be more than fifteen days. Sri H. V. Kamath pressed for a seven days time. 2 Sri H. V. Pataskar, on the other hand, pressed for twenty-four hours time only. 3 However, Dr. B. R. Ambedkar explained that "these amendments show a complete misunderstanding of what the words 'as soon as may be' mean in the context of which they are used. These words are integrally connected with clause (2) and they cannot, in my judgment, be read otherwise than by reference to the provisions contained in clause (2), which definitely say that no man arrested shall be detained in custody for more than 24 hours unless at the end of the 24 hours the police officer who arrests and detains him obtains an authority from the magistrate. That is how the section has to be read... Therefore, all those amendments which suggest fifteen days or seven days are amendments which really curtail the liberty of the individual. Therefore, I think these amendments are entirely misplaced and are not wanted. Hence all the amendments were negatived. 5

Pandit Thakurdas Bhargava suggested that one should have not only the right to consult a legal practitioner but also the right to be defended. 6 Sri M. Ananthasayanam Ayyangar also agreed to the suggestion. 7 But Sri K. Nauraj enquired "if the choice of a person for instance, a communist of the day, is a Russian lawyer, would you allow it?" 8

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1. CAD 15.9.49 - p. 1510  
2. Ibid, p. 1515  
3. Ibid, p. 1519  
4. CAD 16.9.49, p. 1557  
5. CAD Vol. IX, p. 1568  
6. CAD Vol. IX, p. 1496  
7. Ibid, p. 1544  
This question was again posed by Srimati G. Durgabai; "We know that Mr. Kasim Harvi engaged counsel from England whose appearance was refused. Now should it be open for this man to engage anyone from any place?... I suggest that after the words 'legal practitioner' the words 'qualified or authorised to appear in these cases' may be added." Explaining the position Dr. B. R. Ambedkar observed "Personally I thought that the words 'to consult' included also the right to be defended because consultation would be uttering purposeless if it was not for the purpose of defence. However, in order to remove any ambiguity or any argument that may be raised that consultation is used in a limited sense, I am prepared to add after the words 'to consult' the words 'and be defended by a legal practitioner', so that there would be both the right to consult and also the right to be defended... No doubt words 'of his choice' are important and they have been deliberately used, because we do not want the Government of the day to foist upon an accused person whom the Government may think fit to appear in his case because the accused person may not have confidence in him. Therefore we have used the words 'of his choice.' But the words, 'of his choice' are qualified by the words 'legal practitioner'. By the phrase 'legal practitioner' is meant what we usually understand, namely, a practitioner who by the rules of the High Court or of the Court concerned, is entitled to practise. The House, therefore, adopted the amendment of Dr. B. R. Ambedkar and all other amendments were negatived.\(^3\)

Sir H. V. Pataskar\(^4\) suggested that only first class Magistrates should be enabled to authorize detention. But Pt. Thakurdas Bhargava had observed earlier that unless and until the second class and third class Magistrates were also empowered, it would be difficult to work it in practice.\(^5\) To meet this objection Sri Pataskar replied "When we are guiding the liberty of a subject, it is better, even if a man is detained for a few days more rather than taking him before a Third or Second class Magistrate; he should be taken before a first class Magistrate, who is expected at any rate not to be influenced so much by mere police reports or the report of an executive officer." Dr. B. Ri

\(^{1}\) Ibid, p. 1556
\(^{2}\) Ibid, p. 1557
\(^{3}\) Ibid, p. 1570
\(^{4}\) Ibid, p. 1521
\(^{5}\) Ibid, p. 1503
Ambedkar replied, "Well, I find some difficulty in accepting the words suggested by him for two reasons. We have in clause (2) used very important words, namely 'the nearest Magistrate' and I thought that was very necessary because otherwise it would enable a police officer to keep a man in custody for a longer period on the ground that a particular Magistrate to whom he wanted to take the accused, or the Magistrate who would be ultimately entitled to try the accused, was living at a distance far away and therefore he had a justifiable ground for detaining him for a longer period. In order to take away any such argument, we had used the words 'the nearest Magistrate'... I think 'the nearest Magistrate' is the best provision in the interests of the liberty of the accused. I might also point out to my friend, Mr. Patankar, that even if I were to accept his amendment - "the nearest first-class Magistrate" - it would be perfectly possible for the Government of the day to amend the Criminal Procedure Code to confer the powers of a First Class Magistrate on any Magistrate whom they want and thereby cheat the accused." The House, therefore, did not accept the amendment.

Pt. Thakurdas Bhargava moved that in the first proviso the words 'and for reasons recorded' be added. Explaining he said "When a person is brought before a Magistrate, that is exactly the time when his fate is going to be sealed or to be bettered. If these words are put then it is the duty of the Magistrate to see how long the remand is to be given and give full reasons and these reasons could be scrutinised by the superior courts and the accused could get that order revised. If these words are not inserted the probability is that the Magistrate will mechanically make the order of remand." Dr. B. R. Ambedkar, however, remarked "I quite agree that that is a very salutary provision... Personally I do not think they are necessary. Let us take the worst case. A Magistrate, in order to please the police, so to say, got into the habit of granting constant remands, one after the other, thereby enabling the police to keep the accused in custody. Is it the case that there is no remedy open to the accused? I think the accused has the remedy to go to High Court for revision and say that the Procedure of the Court

1. CMD Vol. IX, pp. 1557 - 1558
2. Ibid, p. 1569
3. Ibid, p. 1503
is being abused." Therefore, the amendment was negatived. But Dr. Palkhi Tekchand further pursued the issue. He said "this article 15-A... is nothing but a cloak for denying the liberty of the individual. It really comes to nothing. The first two clauses of the proposed article do not go, as Pandit Thakur Das Bhargava pointed out, as far as the criminal procedure code does today. The article then provides for a Advisory Board or Tribunal which will, within three months, advise the local governments as to whether the grounds on which a person is arrested are sufficient for his further detention. But in the draft placed before the House today there is no provision that the person affected will be given an opportunity of being told what the grounds for his detention are. No doubt you have judges of the High Court on this Board, but what can the Judges do unless they hear the other side? They will only pass judgment ex-parte. Therefore, I submit that this provision is very defective.....the alternative amendment moved by Pandit Thakur Das Bhargava...says that.... If a man is to be arrested and remanded to custody, the Magistrate must record his reasons in writing. I do not think there can be any objection to this being incorporated in the Constitution." ¹ He himself suggested an alternative amendment² that in the proviso to clause (3) the following new clause be added: "(a) As soon as may be after the arrest of the person, the grounds on which he has been arrested shall be communicated to him, and he shall be informed that he may submit such explanation as he desires to make, which shall be placed before the Advisory Board referred to in sub-clause (a)." He further pleaded that the amendment did not go further than what was provided in the Safety Acts that had been enacted by some of the Provincial Legislatures, for instance clause (3) of the Madras Maintenance of Public Order Act (1 of 1947). Dr. B. R. Ambedkar³ also admitted it to be a legitimate criticism. He said, "I am prepared to redress the position, because I find that, even under the existing laws made by the various provincial governments relating to preventive detention, they have made provision for the information of the accused regarding the grounds on which he has been detained." He, therefore, moved that after clause (3)

1. CAD Vol. IX, p. 1534
2. Ibid, p. 1227
3. CAD Vol. IX, p. 1559
of article 13A the following clause be inserted:

"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 passed and afford him the earliest opportunity of making a representation against the order.

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

This amendment was adopted as clauses (5) and (6) of article 22 of the Constitution with necessary changes.

Pandit Thakur Das Bhargava suggested that such preventive detention should not exceed two months. He moved that in clause (4) for the words 'three months' the words 'one month' or 'two months' be substituted. He also suggested that the total period of such detention should in no case exceed one year. Sri R. K. Sidhva wanted to reduce it for nine months only. Replying to the debate Dr. B. R. Ambedkar observed "some members have said that it should not be more than 15 days and others have suggested some other period and so on. I would like to tell the House why exactly we thought that three months was a tolerable period and 15 months too long. It was represented to us that the cases of detenus may be considerable. We do not know how the situation in this country will develop, what would be the circumstances which would face the country when the Constitution comes into operation, whether the people and parties in this country would behave in a constitutional manner in the matter of getting hold of power, or whether they would resort to unconstitutional methods for carrying out their purposes. If all of us follow purely constitutional methods to achieve our objective, I think the situation would have been too different and probably the necessity of having preventive detention might not be there at all. But I think in making a law we ought to take into consideration the worst and not the best.... Supposing there is a large number of people...

1. CAD Vol. IX, p. 1560
2. Ibid, p. 1570
to be detained because of their illegal or unlawful activities and we want to give
effect to the provisions contained in sub-clause (a) of that proviso, what would be the
situation? . . . . . . Is it a practical possibility for the Advisory Board to dispose of
so many cases within three months."1 He further pointed out that in the proviso to
clause (4) it was definitely stated that in making such a law, Parliament would also
fix the maximum period. Therefore, all the amendments were turned down by the House. But
Dr. Ambedkar considered the question raised in the House as to what was the procedure
of the Advisory Board. Sub-clause (a) did not make any specific reference to the procedure
to be followed by the Advisory Board. He, therefore, suggested that the following words
be added at the end of sub-clause (4): -

"and Parliament may also prescribe the procedure to be followed by an Advisory
Board in an enquiry under clause (a) of the proviso to clause (3) of this article."2

It was adopted by the House. But Dr. Ambedkar did not accept the demand that the
accused person should be entitled to cross-examine the witnesses and that it should be
included in the Constitution. He explained that the right to cross-examination was
already there in the Criminal Procedure Code and in the Evidence Act.3

Srimati Pranima Banerji moved that "if the earning member of a family is so detained
his direct dependents shall be paid maintenance allowance."4

It was also supported by Srimati G. Durgabai5. But she later on admitted that this
would put a premium on delinquency. If one was assured of provision for one's family
one might go on committing crimes and challenging the foundations of the State. Therefore
it was better to leave this matter to the provincial Government.

The question of periodical review was also raised by Sri Jaspat Roy Kappo6. But
Dr. B. R. Ambedkar said that it was possible either for the Provincial Governments
in their own law to make provision for periodical review or for Parliament in enacting
a law under clause (4) to provide for it. Therefore it was a purely administrative
matter and could be regulated by law.7

3. Ibid, p. 1563
4. Ibid, p. 1510
5. Ibid, p. 1554
Thus article 15A was adopted after great controversy and with a few amendments.

RIGHT AGAINST EXPLOITATION

Arts. 23 and 24.

Prohibition of traffic an human beings
and enforced labor.

The Sub-Committee on Fundamental Rights recommended

(a) Traffic in human beings, and

(b) forced labour in any form including beggar and involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, are hereby prohibited and any contravention of this prohibition shall be an offence.

Explanation - "Nothing in this sub-clause shall prevent the State from imposing compulsory service for public purposes without any discrimination on the ground of race, religion, caste or class." ¹

When it came for consideration in the House, Sri K. M. Munshi moved that for clause 11 the following new clause be substituted: "Traffic in human beings, and beggar and other similar forms of forced labor are prohibited, and any contravention of this prohibition shall be an offence." ² Mr. M. R. Mesani and Sr. K. V. Kamath were satisfied that the explanation had been dropped by Sri K. M. Munshi. But Dr. B. R. Ambedkar apprehended that the deletion of explanation would not empower the State to introduce compulsory military service.³ Dr. P. K. Sen also pointed out the deletion of the explanation would not entitle the prisoners to exact labor from the prisoners, the reformatory schools from the children and the Borstal institutions from the adolescents.⁴ Therefore, at the suggestion of Dr. B. R. Ambedkar the article was referred back to the Committee.⁵ The Constitutional Adviser adopted it as: ⁶

"18. Traffic in human beings and beggar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law:

1. CAD Vol. III, p. 468 ²
2. Ibid, p. 469 ⁴
3. Ibid, p. 470 ⁵
4. Ibid, p. 472 ⁶
5. CAD Vol. III, p. 475
Provided that nothing in this Section shall prevent the State from imposing compulsory service for public purposes without any discrimination on the ground of race, religion, caste or class."

It was also incorporated by the Drafting Committee. Thus the Explanation was readopted.

Prof. K. T. Shah moved an amendment that explicit mention should be made for the prohibition of Devadasis.¹ But Sri T. T. Krishnamachari replied "there is no point in our trying to import into this particular part reform of all the abuses, which our society is now heir to."² Srimati G. Durgabai while appreciated the object of Prof. Shah in bringing forward this amendment, but she did not find it necessary. Madras had already prohibited this practice under a law passed a few years ago.³ The House, therefore, did not accept the amendment.⁴

Sardar Bhupinder Singh Man demanded that if the State was competent to impose compulsory service for public services, adequate compensation should also be paid.⁵ Dr/ B. R. Ambedkar, however, did not think it.. desirable to put any such limitation upon the authority of the State requiring compulsory service... It may be seen that non-payment of compensation could not be a ground of attack; because the fundamental proposition enunciated in sub-clause (2) is this: that whenever compulsory labor or compulsory service is demanded, it shall be demanded from all and if the State demands service from all and does not pay any, I do not think the State is committing any very great inequity."⁶ Therefore, the amendment was not accepted.

Sri R. V. Kamath was of opinion that the term 'public purposes' was vague and 'Social or national purposes' was a better term.⁷ But Dr. B. R. Ambedkar considered 'that the word 'public' was wide enough to cover both 'national' as well as 'social' and it is, therefore, unnecessary to use two words when the purpose can be served by one."⁸ At the suggestion of Prof. K. T. Shah, however, the word 'only' was added

\[1. \text{CAD Vol. VII, p. 804} \quad 5. \text{Ibid, p. 806} \]
\[2. \text{Ibid, p. 811} \quad 6. \text{CAD Vol. VII, pp. 812-813} \]
\[3. \text{Ibid, p. 806} \quad 7. \text{Ibid, p. 806} \]
\[4. \text{Ibid, p. 813} \quad 8. \text{Ibid, p. 812} \]
after the words 'discrimination on the ground', to make the meaning more exhaustive, specific and exclusive:

PROHIBITION OF CHILD LABOR
Art. 18 Art. 24

The Sub-Committee on Fundamental Rights recommended that: "10. No child below the age of 14 years shall be engaged to work in any factory, mine or other hazardous employment.

Explanation: - Nothing in this shall prejudice any educational programme or activity involving compulsory labor." Sri K. M. Munshi, however, moved that the Explanation had nothing to do with this clause and it should be deleted. The Explanation was perhaps incorporated to make the clause in conformity with article 36 of the Draft Constitution whereby the State was to provide for free and compulsory education to all children below the age of 14 years. But 'compulsory service for public purposes' in the previous article was wide enough to cover conscription also for social service e.g. for removal of illiteracy amongst the masses. It included any purposes in which the general interest of the community, as opposed to the particular interest of individuals, was directly and vitally concerned. Therefore, the explanation was deleted. The Constitutional Adviser brought about minor changes of purely verbal character and the Drafting Committee incorporated it as article 18.

Sri Damodar Svarup Seth was bitter that "no protection has been provided for the fairer and softer sex, who had been, in the past, employed in mines even at night time and in industries which are injurious to their health....it is just and desirable....that women may also be provided with due protection and may not be employed in mines at night and in industries which are not suited to their delicate health and position in society." Prof. Shibban Lal Saksens also supported it. But that was a matter of pure administrative legislation and so the amendment was not accepted.

3. Ibid, p. 476
6. CAD Vol. VII, p. 814
THE RIGHT TO FREEDOM OF RELIGION
(Arts. 25, 26, 27 and 28)

After seeking the consent of the Minorities Sub-Committee the Sub-Committee on Fundamental Rights recommended that "All persons are equally entitled to freedom of conscience, and the right freely to profess and propagate religion subject to public order, morality or health, and to the other provisions of this Chapter. Explanation - The wearing and carrying of kirpana shall be deemed to be included in the profession of the Sikh religion.

Explanation 2 - The above rights shall not include any economic, financial, political or other secular activities that may be associated with religious practices.

Explanation 3 - The freedom of religious practice guaranteed in this clause shall not debar the State from enacting laws for the purpose of social welfare and reform."

But no express provision had been made for opening all the temples to the Harijans, a subject most dear to Gandhiji. Therefore, Sri K. M. Munshi suggested that the following words be added at the end of the last Explanation "and for throwing open Hindu religious institutions of a public character to any class or section of Hindus."

The House accepted the addition.

This right relating to religion was after the pattern of Irish Constitution Article 44(2).4

The Drafting Committee redrafted it as clearly as possible since the courts were to pronounce on them. It appeared as article 19 in the Draft Constitution.

RIGHT TO PROPAGATE RELIGION

Sri R. R. Divakar and Sri S. V. Krishnamorthy Rao had objected to the right of propagating religion.5 The Muslims could have claimed a safeguard to propagate "with the sword in one hand and the Koran in the other."6 But with the partition of the country...
and the phenomenal rise of the Rashtriya Swayam Sevak Sangh, they were afraid of raising this question. Mr. Tajmul Hussain, therefore, pleaded that in a secular State it would be wrong to allow people to propagate religion. He even demanded the deletion of Explanation to clause 1 and that "no person shall have any visible sign or mark or name, and no person shall wear any dress whereby his religion may be recognized."¹ Prof. M. T. Shah also suggested that the right to propagate religion should be restricted that it might not be abused as in the past.² Sri Loknath Misra really felt "that this is the most disgraceful Article, the blackest part of the Draft Constitution. I beg to submit that I have considered and studied all the constitutional precedents and have not found anywhere any mention of the word 'propaganda' as a fundamental right, relating to religion .... You know that propagation of religion brought India into this unfortunate State and India had to be divided into Pakistan and India."³

On the other hand Pandit Lakshmi Kant Mitra defended that "the right to propagate any religion has been circumscribed by certain conditions which the State would be free to impose in the interests of public morality, public order and public health and also in so far as the right conferred here does not conflict in any way with the other provisions elaborated under this part of the Constitution. The argument that this right ought not to be permitted in a secular State is wrong. By a secular State is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. This means in essence that no particular religion in the State will receive any State patronage whatsoever."⁴ Sri K. Santhanam also explained "This article has to be read with article 13 ² article 13 has already assured freedom of speech and expression and the right to form religious association or unions. Therefore, article 19 is really not so much an article on religious freedom, but an article on, what I may call religious toleration. It is not so much the words "All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion" that are important. What are important are the governing words with which the article begins viz. "Subject to public order, morality and health"...."
After all, propagation is merely freedom of expression. I would like to point out that the word 'convert' is not there.² Sri T. T. Krishnamachara further pointed out "it does not mean that this right to propagate one's religion is given to any particular community or to people who follow any particular religion. It is perfectly open to the Hindus and the Arya Samajists to carry on their Suddhi propaganda as it is open to the Christians, the Muslims, the Jains and the Buddhists and to every other religionist, so long as he does it subject to public order, morality and the other conditions that have to be observed in any civilized government. So, it is not a question of conferring these rights on all the citizens and seeing that these rights are exercised in a manner which will not upset the economy of the country, which will not create disorder and which will not create undue conflict in the minds of the people."³ Sri K. M. Munshi conclusively argued "I was a party from the very beginning to the compromises with the minorities, which ultimately led to many of these clauses being inserted in the Constitution and I know it was on this very word that the Indian Christian community laid the greatest emphasis, not because they wanted to convert people aggressively, but because the word 'propagate' was a fundamental part of their tenet. Even if the word were not there, I am sure, under the freedom of speech which the Constitution guarantees it will be open to any religious community to persuade other people to join their faith."³ So all the objections were turned down by the House.⁴

HINDU RELIGIOUS INSTITUTION

Prof. K. P. Shah did not find any reason as to why only the Hindu religious institutions were to be thrown open to the public. It should have been applicable to all the leading religions of the country including the Jain, Buddhist and the Christian.⁵ The Editor of the Indian Law Review and some other members of the Calcutta Bar had also suggested that the word 'Hindu' be omitted.⁶ To meet these criticisms, the House agreed to accept the amendment of Sri K. M. Munshi that

1. CAD Vol. VII p. 814
2. Ibid p. 836
3. Ibid p. 877
4. Ibid p. 837
5. Ibid p. 828
6. Supplementary Report by Members for amendment of the Ninth Constitution, Art. 19
Explanation II be added to article 19 vis. "In sub-clause (b) of clause (2) the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."¹

In order to enlarge the scope of clause (2b) so that all sections of the Hindus might be included within it Srimati G. Durgabai suggested that 'any class or section' be changed to "all classes and sections."² It had been suggested by Dr. B. Pattabhi Sitaramayya earlier³ and the Constitutional Adviser had agreed to it.⁴ The House, therefore, accepted the change.

On the other hand, the Asliha Sabha Nangambakham (Madras) sent a representation for the amendment of article 19(2) on the ground that it would seriously interfere with the religious rights of the citizens. Several similar representations were also received from the South. The Constitutional Adviser opined that these criticisms expressed the orthodox point of view which was fully considered by the Sub-Committee of the Constituent Assembly. Article 19(2) was essential in the interests of social reform.⁵

FREEDOM TO MANAGE RELIGIOUS AFFAIRS
Art. 20: Art. 25.

The Sub-Committee on fundamental rights recommended that "every religious denomination shall have the right to manage its own affairs in matters of religion and, subject to the general law, to own, acquire and administer property, movable and immovable, and to establish and maintain institutions for religious or charitable purposes."⁶ Sri K. Santhanam wanted to know what was meant by 'general law'.⁷ Therefore, the word 'general' was omitted.⁸ Sri K. N. Namshil also realized that the use of the term 'religious denomination' might prevent a section of a denomination from being protected. Therefore, 'religious denomination and a section thereof' was substituted for it.⁹

1. CAD Vol. VII p. 837
2. Ibid p. 828
3. List of amendments to the Draft Constitution of India List I no. 49.
4. Notes on Amendments No. 49.
5. Suggestion from non-members.
Thus this article resembled Article 44(2)5 of the Irish Constitution.¹ The Drafting Committee attempted to make these rights as definite as possible since the courts might have to pronounce upon them. Therefore, it was redrafted as:

"20. Every religious denomination or any section thereof shall have the right -

(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property, and
(d) to administer such property in accordance with law"

Dr. B. Pattabhi Sitaramayya suggested that these rights should be "subject to public order, morality and health"² The Constitutional Adviser had no objection to it but he redrafted it as "subject to public order, morality and health"³ The House accepted this amendment introduced by Dr. B. R. Ambedkar.⁴

FREEDOM AS TO PAYMENT OF TAXES
Art. 22 : Art. 27

The Sub-Committee on Fundamental Rights recommended that "No person may be compelled to pay taxes, the proceeds of which are specifically appropriated to further or maintain any particular religion or denomination."⁵ It was accepted by the Constituent Assembly without any alteration.⁶ It resembled the last para of Article 49 of the Swiss Constitution viz. "No person may be compelled to pay taxes the proceeds of which are specifically appropriated in payment of the purely religious expenses of any religious community of which he is not a member. The application of this principle will be determined by Federal Legislation."⁷ This provision was adopted by the Drafting Committee. But Sri Guptaonath Singh objected to it. He observed "I am surprised at the fact that to-day we are going to perpetuate by article 21 the innumerable atrocities that have been perpetrated in India in

¹ Constitution Precedent (Third Series)
² List of Amendments List I no. 50
³ Notes on Amendments No. 50
⁴ CAD Vol. VII p. 863
⁵ CAD Vol. III p. 427
⁶ Ibid p. 480
⁷ Constitutional Precedent (Third Series)
the name of religion. It states that the property, which a person holds in the
name of religious institutions, would be exempted from all taxation. I hold that the
property in India which stands in the name of some religion or some religious insti-
tutions such as temples, mosques and churches, is extremely detrimental to the inter-
est of the country. That property is of no use to the society. I would like that
in our secular state such type of folly be ended once for all in our country. The
State is above all gods. It is the God of gods. I would say that a State being the
representative of the people, is God himself. Therefore, it should certainly have
the right of taxing every kind of property.\(^1\) On the other hand Sri M. Ananthasayanam
Ayyangar observed: "In the past we have had various kings belonging to various denomi-
 nations levying taxes in various shapes and forms. The Muhammadan kings recovered a
particular kind of tax for supporting Mosques. The Christians did not do so in this
country. The ancient Hindu kings collected a cess called Tirupati cess for supporting
a particular temple or temples in any part of the country. In a secular State where
the State is expected to view all denominations in the same light, and not give
encouragement to any one particular denomination at the expense of others, this pro-
vision is absolutely necessary. This is part and parcel of the Charter of liberty
and religious freedom to see that no particular denomination is given any advantage
over another denomination.\(^2\) Therefore, the article was adopted.\(^3\)

RELIGIOUS INSTRUCTION IN SCHOOLS
Art. 22 :: Art. 28

The Sub-Committee on Fundamental Rights recommended that "no person attending
any school maintained or receiving aid out of public funds shall be compelled to
take part in the religious instruction that may be given in the school or in the
premises attached thereto"\(^4\) It was referred back to the Advisory Committee to avoid
certain difficulties.\(^5\) On behalf of the Advisory Committee the same clause was moved
by Sardar V. Ilaahbhah Patel. But Srimati Purnima Banerji emphasized that even in
private 'Maktabas' and 'Pathshala', which were neither maintained or receiving aid

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1. CAD Vol. VII p. 865
2. Ibid pp. 865-866
3. Ibid p. 866
4. CAD Vol. III p. 427
5. Ibid p. 480
out of public funds, religious education should be given only "in the nature of the elementary philosophy of comparative religions calculated to broaden the pupil's mind rather than such as will foster sectarian exclusiveness". She further explained "when we were discussing the Minority Rights Report, we said that our aim should be to form a United Nation and we have done away with separate electorates and agreed on fundamental rights and given each the right to follow his own religion. But I do believe that however secular a State you may wish to build up, unless one member of it appreciates the religion of another member of the State, it would be impossible for us to build up a United India. Therefore, without interfering with the religion of anybody, the State should be perfectly entitled to see that, in the formative age of the child, when he is of the school-going age, the religious instruction is controlled and that the syllabus is of such a nature that the child will develop into a healthy citizen of India, capable of appreciating each other's point of view. We may be united by political parties, but if we do not appreciate each other's religion, we shall find that instead of having really men of religion in our midst, we shall be breeding a type of exclusiveness which will be most harmful and on that type of mind, I am afraid, the future of the nation cannot be built up."

To avoid the slightest loophole, Mrs. Menika Ray suggested that religious instruction even of 'denominational' character should not be provided in schools maintained by the State. However laudable the object of the amendments might have been, Sri K. M. Munshi said "that this is a justiciable right and, therefore, every word of it will have to be discussed, considered and decided upon by the different High Courts and the Supreme Court in the end. Now, if Mr. Banerji's amendment becomes law as a justiciable right, this will be the position. There is a school in which religious education is given. The first question raised by some friend or by some enterprising man will be 'Is it in the nature of elementary philosophy or comparative religions?' So the matter will have to be taken to the Supreme Court and eleven worthy judges will have to decide whether the kind of education given is of a particular religion or in the nature of elementary philosophy of comparative religion. Then, after having

decided that, the second point which the learned judges will have to direct their attention to will be whether this elementary philosophy is calculated to broaden the minds of the pupil or to narrow their minds. Then they will have to decide upon the scope of every word, this being a justiciable right which has to be adjudicated upon by them. I have no doubt members of my profession will be very glad to throw considerable light on what is and is not a justiciable right of this nature.... for a very good & s too. Then again they will have to consider whether a particular kind of teaching fosters sectarian exclusiveness. All this, I think will require any amount of litigation before a quietus can be given to this right... Then I come to the next amendment of Mrs. Ray. As far as the first part of it is concerned, viz. "no denominational religious instruction shall be provided in Schools maintained by the State," as far as the Federation is concerned, it is going to be a secular and democratic State. So far as the units are concerned, I do not think the provinces are going to be religious States. But at the present moment this fundamental right would not only affect the provinces, but also the States. If the Indian States are willing to accept that, it is a different matter, but it would not be right in my opinion to lay down this general principle in the present condition of India unless we are all unanimous on this point."¹ Sardar Vallabhbhai Patel was in full agreement when he observed, "The only thing that I have to say in considering the clause is that one has to keep in mind that this is one of the justiciable rights and we must in drafting or in adopting the clauses keep in mind that this is not a clause which belongs to British India only but to the whole of the Indian union and in adopting these clauses we have to consider the fact that it should not be such as to open the flood-gates of litigation and create many difficulties afterwards."²

There were other amendments as well. Sri R. V. Dhulekar suggested that 'teaching institution' was a better term than 'School'.³ Sri H. V. Pataskar also objected to

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1. CAD Vol. V. pp. 383-385
2. Ibid p. 386
3. Ibid p. 378
the term 'School' as it was used in a wider sense and so he suggested the term "educational institution."¹ Mrs. Ramuka Ray also suggested that 'Schools recognised by the State' was a better term than 'Schools maintained by the State'.² Sri K. M. Munshi confessed that the phraseology suggested by Mrs. Ray was an improvement on that adopted by the Advisory Committee.³ He further suggested that the term 'public funds' be substituted by the words "State funds." The object was that the money collected from public subscriptions should not be considered the same as 'State Funds'.⁴ Sardar Vallabhbhai Patel accepted the suggestions of Sri K. M. Munshi that 'public funds' be changed to 'State funds' and maintained to 'recognised'.⁵ But Pandit H. H. Kanzru asked "Does the acceptance of the amendment by the Honourable Sardar Vallabhbhai J. Patel mean that clause 16 will relate not to schools maintained by the State and aided out of State Funds?... That is, the schools maintained by the State are excluded from the scope of this clause. This is a curious phraseology and I should like the meaning of this clause to be clearly explained."⁶ The President suggested "We may get over the difficulty if we put the clause in the following: 'No person attending any school recognized or maintained by the State or receiving aid out of State funds etc.'"⁷ But Sardar Patel did not approve it. He said "So far as any School that is entirely maintained by the State is concerned, we cannot do anything by way of introducing fundamental rights for which the remedy of taking it to the court is given ... Therefore, if a Unit which is a State, take the case of Hyderabad wants to maintain wholly its own school in which it wants to introduce religious education, it may compel ... Therefore, the wording 'recognized by or receiving aid from the State funds' is introduced."⁸ Dr. S. Radhakrishnan, however, asked "If the institutions which are maintained by the State are to impart denominational religious instruction then what happens to a declaration that the State is a secular institution, which will not impart any instruction of any denominational kind?"⁹

1. CAD Vol v. pp. 381
2. Ibid. p. 380
3. Ibid pp. 383-385
4. Ibid
5. Ibid p. 386
6. Ibid pp. 386-387
7. Ibid p. 387
8. Ibid p. 380
9. Ibid pp. 385-385
Sitarammayya pointed out other difficulties. He said "now, the object is to exclude a category of institutions maintained by a certain Province or State or private funds without any connection with the State .... But, when you say recognized by or receiving aid from the State, then you have introduced two categories of institutions. One of them includes any institution recognized by the State. A state maintained institution is a recognized one and thus becomes included, when it was meant to be excluded. Thus, the right of compulsion is taken away and the very exemption that we have given is undone; because even a State maintained institution is a recognized one ..... Therefore, if you want to validate and affirm your exemption to the State-maintained institutions, you must say, 'recognized and receiving aid from the State.' That creates only one category. Otherwise, the language with 'or' would include those institutions which you have excluded". Therefore Sri K. Santhanam suggested that the clause be referred to the Drafting committee. The Drafting Committee redrafted the clause as "22(a) No religious instruction shall be provided by the State in any educational institution wholly maintained out of State funds: Provided that nothing in this clause shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(2) No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person, or if such person is a minor, his guardian has given his consent thereto.

(3) Nothing in this article shall prevent any community or denomination from providing religious instruction for pupils of that community or denomination in an educational institution outside its working hours." It resembled article 44(2) 4° of the Irish Constitution.  

1. 'CAD Vol. V p. 387
2. Constitutional Precedent (Sec nd Series)
Mr. Mubarak Ismail Sahib observed "article 22 in the Draft Constitution, as it stands, puts a taboo on all religious instruction being given in State aided schools or State educational institutions. It is not necessary for a secular State to ban religious education in State institutions." Prof. Shibban Lal Sahsena also demanded that "it should not be forbidden to provide religious education by the State. Now, after partition of this country, about 50 to 55 crores will be the majority community and if these people want that their children should have education in their religion, they will not be able to have it if this article is passed. This is not fair ... This clause as it stands will really preclude the majority from giving religious education to their children."²

On the other hand many members opposed any religious instruction in the school. Prof. K. T. Shah pointed out that the term "wholly maintained out of State fund" might be interpreted that religious instruction could be provided in any educational institution which was partly maintained out of State funds. He, therefore, suggested that after the term 'wholly' the word 'partly' be added.³ While supporting this amendment Sri R.K. Sidhwa further suggested that the proviso to article 1 be deleted.⁴ Sardar Bhupinder Singh Man suggested that the word 'educational' be omitted, as there were other places or institutions which were completely maintained by State funds and which in modern times could be used as a vehicle for religious or communal propaganda very effectively. He cited the example of radio. Therefore, there should be strict neutrality of the State as far as religious matters are concerned to maintain the secular character of the State.⁵ Mr. Tajaul Hussain suggested that the words 'by the State' in clause 1 be omitted, otherwise it might be construed that this article permitted institutions other than the State to give religious instruction. Sri Jaspat Roy Kapoor expressed the view that clause (3) be deleted as it was unnecessary in face of clauses (1) and (2).⁶ Accepting the last two amendments Dr. B. R. Ambedkar analyzed that there were two schools of thought. One view was that there

3. Ibid p. 868
4. List of Amendments List I Nos. 5 and 55.
5. CAD Vol. VII pp. 870-871
should be no ban on religious instruction and the other view was that there should be complete ban. He, therefore, endeavoured to follow a middle course by proposing this draft article with a few amendments he agreed to. As to the point that there should be no ban on religious instruction raised by Mr. Ismail, he said that article 21 stated that public funds raised by taxes should not be utilized for the benefit of any particular community. The House had already adopted it and that went against it. Moreover, in India there were multiplicity of religions and they were not only un-social but also anti-social - one religion claiming that it alone was right and all others were wrong. So clause (2) reconciled the claim of a community which started educational institutions for the advancement of its own children, to permit to give religious instruction in such institutions, notwithstanding the fact that it received certain aid from the State. It was also provided that children of other communities who attended that school should not be compelled to attend such religious instruction unless the parents gave consent to it. To the query made by Pandit L. K. Mehta as to whether the Gita and the Vedas could be taught, Dr. Ambedkar said that religious instruction should be distinguished from research or study. 1

Thus the article as amended was adopted.

Thus the makers of the Indian Constitution did not adopt a bold stand in declaring India to be a completely secular state. Dr. B. R. Ambedkar explicitly confessed that a middle course was adopted to satisfy all. 2 No doubt the State was not prevented from making any law regulating or restricting any economic, financial, political or other secular activity which might be associated with religious practice. But considering the fatal religious trends in the country it was desirable to explicitly provide in the constitution that "the use of religious basis is forbidden". It was exactly the suggestion made by Sri Jad Prakash Narain 3 and the Constitutional Adviser had redrafted it as "no religious institution shall be used for political purposes and no political organization shall be based on religion" 4. The Constituent Assembly never considered this proposal. Rather when

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2. Ibid p. 295.
4. Ibid.
Prof. K.T. Shah suggested that "The State in India being secular shall have no concern with any religion, creed or profession of faith," the House was in no mood to consider it seriously. Thus India today is once more exposed to disintegration on religious issues.

CULTURAL AND EDUCATIONAL RIGHTS
18 :: 24 :: 25 :: 29 and 30

The Sub-Committee on fundamental rights recommended that:

(1) Minorities in every Unit shall be protected in respect of their language, script and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect.

(2) No minority whether based on religion, community or language shall be discriminated against in regard to the admission into State Educational institutions nor shall any religious instruction be compulsorily imposed on them.

(3) (a) All Minorities whether based on religion, community or language shall be free in any Unit to establish and administer educational institutions of their choice.

(b) The State shall not, while providing State aid to schools, discriminate against schools under the management of minorities whether based on religion, community or language." It was moved by Sardar Patel in the Constituent Assembly on 1st May, 1947.

Sri Mohanlal Saksena and Sri Mahavir Tyagi moved that the clause be referred back to the Advisory Committee since it was not known whether India was to remain one or to be partitioned. Sri K.M. Munshi suggested that clause (2) be referred back to the Advisory Committee for reconsideration in the light of clause 16.

Dr. B. R. Ambedkar deprecated any idea of waiting and seeing what rights the minorities were given by the Pakistan Assembly before we determined the rights to be given

3. CAD Vol. III No. 4 '47 p. 491.
5. Ibid p. 498.
to the minorities in the Hindustan area. Rights of minorities should be absolute rights." No matter what others did, we ought to do what is right in our judgment, and personally I think that the rights which are indicated in clause 18 are rights which every minority, irrespective of any other consideration is entitled to claim. I do not know what objection my friend Mr. Munshi has to sub-clause (2) as it stands, but if it is necessary that this sub-clause may be referred back to the Committee, I certainly would raise no objection.¹ Sri Saksena withdrew his amendment and the clause was passed except clause (2). Clause 2 was reconsidered and Sardar Patel moved that "nor shall any religious instruction be compulsorily imposed on them" be deleted,² in view of clause 16. Mrs. Purnima Banerji wanted that no minority should be discriminated against in regard to the admission into State aided and State educational institutions. She, therefore, moved that after the word 'State', the words 'and State aided' be inserted.³ Sardar Patel, however, said that at present it should be only State schools and the rest could be left to the legislature to be adopted wherever conditions were suitable. But in the Fundamental Rights to do away with this would be a big step forward.⁴ Therefore, the amendment was negatived and the clause as moved was adopted.⁵

The Drafting Committee, however, changed clause (1) as: "23 (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script and culture of its own shall have the right to conserve the same." Mr. Z. H. Lari⁶ pointed out that the Draft article simply meant that a body of citizens should be entitled to use their own language in their private intercourse. Whereas the clause as it originally stood intended to lay down that no laws, no regulations should be passed which would adversely affect a minority in maintaining and fostering their own culture and language. So he moved that the original clause be restored. Dr. B. Ambedkar⁷ however, asserted that the Draft

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2. CAD V. I. V No. II 147 p. 596.
3. Ibid p. 397
4. CAD Ibid p. 401
5. Ibid pp. 401-402.
6. CAD 7.12.45 p. 893
7. Ibid 8.12.48 p. 922
Committee had sufficient justification in altering the language. In the original clause the term "minority" was used not in the technical sense of the word "minority" as we have been accustomed to use it for the purposes of certain political safeguards, such as representation in the legislature, representation in the services and so on. The word was used also to cover minorities which were not minorities in the technical sense, but which were nonetheless minorities in the cultural and linguistic sense. For instance, for the purposes of this article 23, if a certain number of people from Madras came and settled in Bombay for certain purposes, they would be although not a minority in the technical sense, cultural minorities. That was the reason why they dropped the word "minority" because they felt that the word might be interpreted in the narrow sense of the term. Moreover, the original clause only cast a sort of duty upon the State that the state should protect their culture, their script and their language. It only imposed a duty and added a clause that while the State might have the right to impose limitations upon these rights of language, culture and script, the State should not make any law which might be called oppressive, not that the State had no right to make a law affecting these matters, but that the law should not be oppressive. In the present article if a State made any law which was inconsistent with the provisions of this article, then that much of the law would be invalid by virtue of article 8 which has already been passed.

Some critics pointed out "that there are sections of citizens residing in the territory of India to whom clause (1) of article 23 would not afford any protection, e.g. it is said that the Muslims in West Bengal do not differ from the Hindus there in respect of their language and script, but have a distinct culture of their own, while the Andhras in Orissa have a language and script of their own but not a culture different from that of the majority community. Clause (1) of article 23 would not afford them protection to maintain their culture or their language and script". To meet this criticism Dr. B.R. Ambedkar moved that in clause (1) of article 23, for the words "script and culture" the words "script or culture" by substituted.

1. Notes on Amendments No. 60. 2. CAD 8.12.48 p. 891
All other amendments were negatived and clause (1) of article 23 as amended by Dr. B. R. Ambedkar was adopted.  

Another question raised by Z.N. Lari was whether a minority should not have the fundamental right embodied in the constitution for receiving education in the primary stage in the mother tongue. He, therefore, moved that the following new clause be inserted after clause (3) of article 23:  

"(4) Any section of the citizens residing in the territory of India or any part thereof having a distinct language and script shall be entitled to have primary education imparted to its children through the medium of that language and script."  

Mr. Syed Karimuddin added these words in the end, "in case of substantial number of such students being available." It was accepted by Z.N. Lari. Dr. Ambedkar accepted the principle that if primary education was to be of any service it would have to be given in the mother tongue of the child. But there was difficulty in putting this matter into a specific article of the constitution. Mr. Karimuddin had tried to solve this difficulty. But the difficulty remained who is to determine what was a substantial number? Either it should be left to the Executive or to the Judiciary and neither of the methods would be a safe method to enable the minority to achieve its object. Therefore, he submitted that we should be satisfied with the fact that it was such a universal principle that no provincial government could justifiably abrogate it without damage to a considerable part of the population in the matter of its educational rights. Therefore, the amendment was negatived.

Pt. Thakurdas Mahargsava moved that for clause (2) of Article 23 the following be substituted: - "(2) No citizen shall be denied admission into any educational...

1. CAD 8.12.48 p. 924
2. Ibid p. 900
3. Ibid p. 903
4. Ibid p. 924
5. Ibid p. 997
institution maintained by the State or receiving aid out of State funds on grounds
only of religion, race, caste, language or any of them." Here the term 'No minority'
has been substituted by the term 'no citizen.' The heading of this Chapter was
"cultural and educational rights" and so the minority rights as such should not find
any place under this section. Moreover, the national interests required that there
should be no discrimination between the minority and the majority, specially in educa-
tional matters. Secondly that not only the institution which were maintained by the
State would be included in it, but also such institutions as were receiving aid, out
of State funds. Thirdly the word 'community' had been removed from this provision
because it had no meaning. The words substituted were "race or caste". He further
moved that in clause (3) the word 'community' wherever it occurred be deleted.1
These amendments were accepted by Dr. Ambedkar and they were accepted by the House.2

The Madras Legislative Council had suggested that the clause (2) of Article
23 the word "subject to the provisions of article 37" be added. But there was really
no conflict between article 23 and article 37. Clause (2) of article 23 dealt with
justiciable fundamental rights whereas article 37 dealt with the non-justiciable
principles of State Policy and both the provisions could be given effect to without
any conflict. This amendment was, therefore, hardly necessary. This was the view
expressed by the Constitutional Adviser.*

Sri Jaya Prakash Narain suggested that the following should be substituted for
sub-clause (a) of clause (3) of article 23: "Linguistic minorities shall have the
right to establish, manage and control educational institutions for the promotion of
the study and knowledge of their language and literature as well as for imparting
general education to their children at primary and pre-primary stage through the
medium of their own language"3. This was moved in the Constituent Assembly by Sri
Damodar Swarup Seth. He pointed out that in original clause minorities based on

1. CAD 8.12.48 p. 899
2. Ibid. p. 925
* Suggestion from certain Ministries of the Govt. of India, Provincial legislatures
   etc. for amendment of the Draft Constitution of India.
3. Amendments to the Draft Constitutional India by Sri Jai Prakash Narain.
4. CAD 8.12.48 p. 899
religion and community had been recognized. But it should not be so in a secular state. It would not only block the way of national unity, so essential for a country of different faiths as India was, but would also promote communalism, and narrow anti-national outlook as was the case hitherto, with disastrous results. He, therefore, submitted that only minorities based on language should be recognized and be granted the right to establish and administer educational institutions and that too for the purpose of promotion of their language and literature and for imparting primary and pre-primary education in their own language. But it was negatived.1

Sri Jaya Prakash Narain2 felt that secularization of general education was necessary for the growth of national outlook and unity. He, therefore, suggested that the following sub-clause should be added to clause 3: - "(c) Denominational and communal educational institutions are forbidden except for the purposes of the study of religion and oriental learning." The Constitutional Adviser commented that if this amendment was accepted, the educational institutions established for the promotion of education among the Anglo-Indian community under special endowments or trusts such as La Martines College, St. Thomas School, St. Xavier's School, etc. would be hit by this provision, and it would conflict with article 298 of this constitution. Where special safeguards had been provided with regard to such institutions.

Thus article 23 as amended was adopted as articles 29 and 30 of the Constitution.

RIGHT TO PROPERTY
Art. 24; Art. 31

The right to property was a very controversial issue in the Constituent Assembly. Opinion had already been sharply divided while article 19 was being discussed in the House. To develop India's economy as well as to establish a stable political order it was essential to determine the rights of the individual to property and the duty of the State to enter the economic field and acquire private property for public purposes and general welfare. Thus the sub-committee on fundamental rights

1. CAD 8.12.48 p. 899

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

Raya Ragannahth Rakash Singh demanded that the compensation must be 'just'. He referred to Article V of the American Constitution where 'just' compensation was provided; so also in the section 51 of the Constitution of the Commonwealth of Australia. In the Danzig Constitution it was 'due compensation'.

On the other hand, Sri Ajit Prasad Jairajpuri lamented that section 299 of the India Act 1935 was reproduced in article 24 of the Draft Constitution. He opposed the idea of compensation as it would stand in the way of large scale social and economic reforms. The State should not act as a robber and arbitrarily seize properties of the people, but measures of social reforms stand on quite a different level. The present article would protect the microscopic minority of the propertyed class and deny rights of social justice to the masses.

But Sardar Vallabhbhai Patel pleaded that it would be wrong to assume that this article was intended for the purpose of acquiring Zamindary Land would be required for many public purposes, not only land but so many other things might have to be acquired. And the State would acquire them after paying compensation and not expropriate them. The process of acquisitioning the Zamindaris was already going on and the legislatures were taking steps to liquidate them. So all amendments were withdrawn, and the recommended clause was accepted.

The Constitutional Adviser, however, redrafted the clause as:

"(1) No person shall be deprived of his property save by authority of law.
(2) No property, movable or immovable, of any person or corporation, including any interest in any commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of compensation for the property taken or acquired and either fixes the amount of compensation and specifies the principles on which and the manner in which the compensation is to be determined."

Thus clause (1) of Section 299 of the Indian Act 1935 was incorporated in the new draft and the parliament was empowered also to fix the amount of compensation to avoid any litigation on the issue.

The Drafting Committee added a new clause to the article proposed by the Constitutional Adviser:

"3. Nothing in clause (2) of this article shall affect
(a) the provisions of any existing law, or
(b) the provisions of any law which the State may hereafter make for the purpose of imposing or levying any tax or for the promotion of public health or the prevention of danger to life or property."

It was necessary to provide that the Compensation clause would not apply in cases of laws providing for the imposition or levying of any tax and in cases of legislation made for the promotion of public health or the prevention of danger to life or property.

Meanwhile various provincial legislatures had passed legislation for the abolition of Zamindari. It was essential to provide for special protection to such legislations.

Therefore Sri Jaiweher Lal Nehru moved that the following article be substituted for the draft article 24.¹

24(a) No person shall be deprived of his property save by authority of law.

(2) No property movable or immovable, of any person or corporation, including any interest in any commercial or industrial undertaking, shall be taken or acquired

¹. CAD Vol. IX pp. 1191-1192.
for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of, or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined.

(3) No such law as is referred to in clause (2) of this article made by the legislature of a State shall have effect unless such law having been reserved for the consideration of the President has received his assent.

(4) If any Bill pending before the legislature of a State at the commencement of this constitution has, after it has been passed by such legislature, received the assent of the President, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article.

(5) Save as provided in the next succeeding clause, nothing in clause (2) of this article shall affect-

(a) The provisions of any existing law, or

(b) the provisions of any law which the State may hereafter make for the purpose of imposing or levying any tax or penalty or for the promotion of public health or the prevention of danger to life or property.

(6) Any law of a State enacted, not more than one year before the commencement of this Constitution, may within three months from such commencement be submitted by the Governor of the State to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or sub-section (2) of section 299 of the Government of India Act, 1935."

Explaining the motion Sri Jawaharlal Nehru said1 "The first clause in this article lays down the basic principle that no person shall be deprived of his property save by authority of law. The next clause says that the law should provide

1. CAD Vol. IX p. 1195.
for the compensation for the property and should either fix the amount of compensation or specify the principles under which or the manner in which the compensation is to be determined. There is no difference in this to any judiciary coming into the picture. Much thought has been given to it and there has been much debate as to where the judiciary comes in. Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in. In regard to the other clauses I need say very little except that clause (4) relates to Bills now pending before the legislature of a State. The House will know that there are such Bills pending. In order to avoid any doubt with regard to those measures, it says that as soon as the President has assented to that law no question should be raised in a court of law in regard to the provisions of that enactment. Previous to this it has already been said that the matter has to go to the President. That is, if you like, a kind of a check to see that in a hurry the legislature has not done something which it should not have done. If so, the President no doubt will draw their attention to it and suggest such changes as he may consider fit and proper for Parliament's consideration.

Clause (6) again refers to any law which has been passed within his last year or the year before the commencement of this constitution. It says that, if the President certifies that, no other obstruction should be raised."

Sri Jaya Prakash Narain¹ suggested an amendment which sought to provide that private property and economic enterprises, as well as their inheritance, might be regulated, limited, acquired, requisitioned, expropriated or socialized with or without compensation. The Constitutional Adviser, however, referred to Article 10.1 of the constitution of U.S.S.R. which protected personal property by law. viz: "the right of citizens to personal ownership of their incomes from work and their savings, of their dwelling houses and subsidiary household economy, their household furniture and utensils and articles of personal use and convenience as well as the right of inheritance of personal property of citizens, is protected by law."

¹ Amendments to the Draft Constitution of India by Jai Prakash Narain.
But Sri Damodar Swarup Seth pressed this very amendment in the Constituent Assembly. He warned that we must discard the theory that man had natura' right in property and also the idea that property was a projection of personality and any invasion on property was an inheritance with the personality itself. Property was a social institution and like all other social institutions, it was subject to regulations and claim of common interests. The property of the entire people was the mainstay of the State in the development of national economy and the right to private property could not be allowed to stand in the way or used to the detriment of the community. Therefore, the doctrine of compensation as a condition for expropriation could not be accepted as a gospel truth. It would make impossible any large project of social and economic amelioration to materialize.

Prof. Shibban Lal Saksena suggested that if compensation was to be paid it might be done in bonds. Moreover, he pointed out that in law 'compensation' meant 'fair and equitable compensation." What was fair and equitable should be decided by the Supreme Court and not the Parliament. But he did not like the idea of compensation at all and referred to a statement of Mahatma Gandhi that 'if a National Government comes to the conclusion that that place is necessary no matter what interests are concerned, they will be dispossessed and they will be dispossessed. I may tell you, without any compensation, because, if you want this Government to pay compensation it will have to rob Peter to pay Paul and that would be impossible." Prof. K. T. Shah also did not like that compensation should be paid to all property without any discrimination. The origin of property was not always unquestionable and he agreed with Proudhon that property in some cases was a theft. So in acquiring such property compensation should not be paid and so also in the nationalisation of natural wealth such as mines, forests, etc.

On the other hand several persons demanded fair and just compensation. The

2. Ibid p. 1202-1206.
3. Ibid p. 1217.
Ministry of Works, Mines and Power suggested that compensation should be 'equitable' or 'fair' or 'just'. The Ministry of Industries and Supplies also suggested that 'reasonable' compensation should be paid if property was acquired for public purposes. Government had already declared such a policy. Thus reference was made to the Government of India resolution No. 1 [31-48(13)/48] dated the 6th April, 1948, wherein the Govt.'s industral policy was announced, declaring that in the event of acquisition "the fundamental rights guaranteed by the Constitution will be observed and compensation will be awarded on a fair and equitable basis." But the Constitution Adviser hardly found it necessary to qualify 'compensation' either by 'just', 'equitable' or 'reasonable.' The noun 'compensation', standing by itself carried the idea of an equivalent. Accordingly even if the adjectives 'equitable', 'just', or reasonable' were not there, it would always be interpreted that the compensation should be equivalent of the property taken possession of or acquired.

Thus the Constituent Assembly at its meeting on 2nd May, 1947, had already rejected such amendments. But members were greatly disturbed by the statement of Sri Jawaharlal Nehru who, while introducing the motion in the House, had observed, 'The House had to keep in mind the transitional and the revolutionary aspects of the problem, because, when you think of the land question in India today, you are thinking of something which is dynamic, moving, changing and revolutionary. These may well change the face of India either way; whether you deal with it or do not deal with it, it is not a static thing. It is something which is not entirely, absolutely within the control of law and Parliaments. That is to say, if law and Parliaments do not fit themselves into the changing picture, they cannot control the situation completely. This is a big fact ....It must be said that we have to consider these problems not in the narrow, legalistic and juristic sense ....It has been not today's policy, but the old policy of the National Congress laid down years ago that the Zamindari institution in India, that is the big estate system must be abolished. So far as we are

1. Suggestions from certain ministries of the Government of India, Provincial Legislatures, etc. for amendment of the Draft Constitution of India.
2. Ibid.
3. Ibid.
concerned, we, who are connected with the congress, shall give effect to that pledge naturally completely, one hundred percent, and no legal subtlety and no change is going to come in our way. That is quite clear. We will honour our pledges. Within limits no judge and no supreme court can make itself a third chamber. No supreme court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole constitution is a creature of Parliament. But we must respect the judiciary, the supreme court and the other high courts in the land. As wise people, their duty it is to see that in a moment of passion, in a moment of excitement, even the representatives of the people do not go wrong; they might .... Therefore, if such a thing occurs, they should draw attention to that fact, but it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of Correction.  

This declaration of Sri Jawaharlal Nehru had disturbed many minds in the constituent assembly. Therefore, Sri B. Das demanded 'fair and equitable' compensation. He also referred to the Congress manifesto of 1945-46 that 'the reform of the land system which is urgently needed involves the removal of intermediaries between the peasant and the State. The right of such intermediaries should therefore be acquired on payment of equitable compensation.' Mr. Naziruddin Ahmed was also much perturbed over the statement of the Prime Minister that compensation was not to be determined by any court but by Parliament. He, therefore, demanded that compensation should not be less than twelve times the estimated average net income of the remainder of any degree. Mr. K.T.M. Ahmed Ibrahim suggested that compensation should be fair and equitable and based on the market value of the property acquired. On the other hand, Raja Jagannath Baksh Singh was not satisfied with mere market value but fifteen percent in addition to it considering the compulsory nature of the acquisition.

1. CAD Vol. IX pp. 1195-1196  
2. Ibid p. 1222  
3. Ibid p. 1233  
4. Ibid p. 248  
5. Ibid p. 1284
In opposition to these demands Sri Brajeshwar Prasad\(^1\) suggested that the President be authorised to decide the principle of compensation - Whereas Srimati Remuna Ray\(^2\) suggested that the entire power be vested in Parliament and no one should question it even if it was fraudulent or iniquitous.

Replying to the debate Sri Alladi Krishnaswami Ayyar pointed out that 'payment' did not mean cash payment and that too immediately. The legislature might provide the manner of payment which it could according to Entry 35 of the concurrent list.\(^3\) He further observed, "the principles of compensation by their very nature could not be the same in every species of acquisition. In formulating the principles, the legislature must necessarily have regard to the nature of the property, the history and the course of enjoyment, the large class of people affected by the legislation and so on. There is then further point that the legislature, in schedule seven, item 35 of the concurrent list already passed by this House, is clothed with plenary power to formulate the principle and the manner of compensation."\(^4\) Sri K.M. Munshi further elucidated that "there is a lurking feeling that if a law laying down principles of compensation goes to court, the court will invariably apply the market value standard. This has never been the case. In America, as I said, where the words in the constitution are 'just' compensation and where the Fourteenth Amendment arms the Supreme Court with the Due Process clause, it has never been so held. In one American case -- it was an extreme and extraordinary case -- one dollar was paid by way of compensation. The court held that looking to the circumstances of that case, even one dollar was just compensation. We need not assume therefore that our Supreme Court will consist of a set of stupid people who will indiscriminately apply the market value rule to every kind of acquisition."\(^5\) But at the same time Sri K.M. Munshi did not like that the President alone be empowered to decide the compensation and that was to him 'a reversal to barbarism'\(^6\) He also opposed that Parliament alone

\(^1\) CAD Vol. IX p. 286
\(^2\) Ibid p. 1260
\(^3\) Ibid p. 1271
\(^4\) Ibid p. 1272
\(^5\) Ibid p. 1301
\(^6\) Ibid p. 1298
should be fully empowered without any judicial review to take over property.\(^{1}\)

Therefore, the House turned down all amendments regarding the principle of compensation.

The other points of criticism were clauses (b) and (6) of the article. Prof. Shibban Lal Sahasna\(^{2}\) pointed out that a discrimination was being made between Zamindari property already acquired or to be acquired under a pending Bill and Zamindari property to be acquired thereafter. These clauses also discriminated between industrial property and zamindari property. Even Pandit Thakurdas Bhargava\(^{3}\) could not "understand why Madras, U.P. and Bihar Governments should have such laws passed in this manner and other States should be denied the liberty of having the Zamindari dissolved. I think we ought to be fair and equitable". Sri Jaspal Roy Kapoor\(^{4}\) further analyzed "Then, Sir, clause (4) makes a discrimination between one State and another. It makes a distinction between a State which has a legislature and a State which has no legislature. ... Clause (6) makes a distinction between a State which has a Governor and a State which has no Governor ... Why this distinction? Is it intention to encourage a revolution in those States? Is it our intention to ask the citizen to somehow stage a showdown and get a Governor so as to be able to take advantage of the provisions of clause (6)?" Raja Jagannath Baksh Singh\(^{5}\) was very critical as to why judicial redress was being prevented against interference by a State Govt. which was one of the basic rights of man. Begum Aizaz Rasul\(^{6}\) referred to article 25(1) of the Draft Constitution that every person had a right to go to the Supreme Court. Therefore, she asked why this right was being denied only to the people of U.P., Bihar and Madras?

Replying to these criticisms Pandit Govind Ballabh Pant\(^{7}\) said, "I stand for equitable compensation ... Equity cannot be defined in terms of any yardstick. When

1. CAD Vol. IX p.
2. Ibid p. 1203
3. Ibid p. 1228
4. Ibid p. 1284
5. Ibid p. 1286
6. Ibid p. 1294
7. Ibid pp. 1288-1289
we introduce a large measure of social reform, than it would be most iniquitous to provide compensation on terms which the State cannot fulfill, which cannot possibly be discharged and which will either break down the machinery of the State or which will be crumbled under its weight ..., What does compensation depend on even if you take market value? Market value is more or less the creature of the State. If you demonetize your currency tomorrow, the market value collapses or it may rise hundred fold under a different set of circumstances. Since we took up this legislation for the abolition of zamindaris, the market value of zamindaris has gone down considerably and zamindaris cannot get purchasers. Again it is open to us, to the Governor to impose land revenue to the extent of 95 percent of the total income, or impose agricultural income-tax to the extent of 15 annas in the rupee. There is nothing to prevent any State from doing so ... So let us not make too much of this mysterious and fashionable expression - "justiciable" - which seems to have possessed a large number of my friends today". Sri K.N. Munsil also observed in defense "I am not concerned with pointing out that these three Bills of Madras, Bihar and U.P. are already before the country. Action has already been taken under them. We cannot allow a vast number of people to have their rights left in uncertainty after the coming into force of this constitution ... We will not allow the validity of these legislations fought out before any court when the issues involved are so farreaching and millions of people are affected by them. If you take the number of zamindars who are to receive less than sixteen years purchase .... there are 13,000 of them, if you take 12 years purchase 5,000 people are only affected as against seven crores and twenty lakhs of tillers. Do you want that the rights of all these people should be hung up for six years so that the laborious process of litigation may proceed from the subordinate court to the District court, from the District court to the High court and so on, and all these new adjustments which have come into being should be upset? We cannot afford to do that. It will mean a revolution .... Are you going to have r revolution in the country - an agrarian revolt - so that a few thousand people may be kept entrenched in their luxuries and may have all that they have been having all these centuries?"
But Sri K.M. Munshi did not oppose all the amendments only for the sake of opposition. The suggestion of Kala Venkata Rao was accepted that in clause (b) the period of one year should be extended to eighteen months because the dates for the Madras and Bihar legislations could not be fixed accurately. In clause (2) it was explicitly provided that the compensation was to be determined "and given." It was also essential to give protection to the settlement of the evacuee property and, therefore, sub-clause (c) was added to clause (5) as: "The provision of any existing law made or of any law which the State may hereafter make, in pursuance of any agreement arrived at with a foreign state or otherwise with respect to property declared by law to be evacuee property." To avoid ambiguity, sub-clause (a) of clause 5 was redrafted as "the provisions of any existing law other than a law to which the provisions of clause (6) of this article apply, or any other law as the State may hereafter make, in pursuance of any agreement arrived at with a foreign state or otherwise with respect to property declared by law to be evacuee property."

Thus the House accepted the amended article 24 of the Draft Constitution of India. But clauses (b) and (6) definitely violated article 14 of the constitution whereby 'equality before the law' and equal protection of the law was guaranteed to all the citizens within the territory of India. The Makers of the Constitution were quite blind to this fact because it was adopted at a later stage. But the article ought to have been reviewed.

It will not be out of place to mention the advice given by De Valera of Ireland to Sir B. N. Rao on November 26, 1947. He said that if he were to rewrite the Irish constitution "he would make the fundamental right with respect to property expressly subject to any law passed by the State for the general welfare." He suggested similar change in the draft of the Indian Constitution. Therefore the Makers were so liberal in granting unfettered powers to the State Governments.

1. CAD Vol. IX, p. 1239 and 1303
2. Ibid, p. 1302. It was amendment No. 405 of Sri Yadubasnas Sahai. But it was moved by Sri Jaspat Roy Kapoor, CAD Vol. IX, p. 1242.
3. Ibid, p. 1242. It was redraft of the amendment moved by Sri Jaspat Roy Kapoor as suggested by M. Gopalswami Ayyanger.
4. Ibid, p. 1243
5. Ibid, p. 1309
6. Ibid, p. 1311
7. Letter from the Constitutional Adviser to Sri Jawaharlal Nehru vide Papers In the President's Secretariat.
This declaration of fundamental rights in the Indian Constitution would have remained a pious declaration if the remedy to enforce these rights were not provided for. Sardar Vallabhbhai Patel, Chairman of the sub-committee on fundamental rights, also admitted "If we provide for fundamental rights, it is necessary that we must provide also for a remedy." Therefore, the Sub-Committee recommended:

"(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of any of the rights guaranteed by this part is hereby guaranteed.

(2) Without prejudice to the power that may be vested in this behalf in other courts, the Supreme Court shall have power to issue directions in the nature of the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari appropriate to the right guaranteed in this part of the constitution.

(3) The right to enforce these remedies shall not be suspended unless where in cases of rebellion or invasion or other grave emergency, the public safety may require it."

Sri K. M. Munshi pointed out that the word 'guaranteed' was repeated in clause (1). So it should be substituted by the term 'provided for' where it was used for the second time. Sri K. Santhanam referred to an obvious slip in clause (3) where 'emergency' should have been "declared to be such by the Government of the Union or of the Unit concerned."

Sardar Vallabhbhai Patel accepted these amendments and requested the House to adopt the amended articles in spite of the various shortcomings. The House adopted the amended clauses.

But the Drafting Committee could not ignore the defects in the clauses that had been pointed out by Sri K. Santhanam. He had said that clause (1) might possibly imply that the Supreme Court was to be vested with exclusive original jurisdiction on all matter governed by the fundamental rights or it might mean that it was in-

1. CAD Vol. III, p. 521
2. Ibid, p. 427
3. CAD Vol. III, p. 520
4. Ibid, p. 521
5. Ibid, pp. 520-521.
vested with concurrent original jurisdiction with another court. Moreover in sub-
clause (2) the words "without prejudice to the powers that may be vested in this
behalf in other courts" were ambiguous. Which was the authority to vest it? Was it
Union legislature or the Unit Legislature?

The Drafting Committee, therefore, made further improvement and redrafted the
article as:

"25. (1) The right to move the Supreme Court by appropriate proceedings for the
enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders in the
nature of the writs of habeas corpus, mandamus, prohibition, quo warranto and
certiorari, whichever may be appropriate, for the enforcement of any of the rights
conferred by this Part.

(3) Parliament may by law empower any other court to exercise within the local
limits of its jurisdiction all or any of the powers exercisable by the Supreme Court
under clause (2) of this article.

(4) The rights guaranteed by this article shall not be suspended except as other-
wise provided for by this Constitution."

Thus the Drafting Committee met the objections of Sri R. Santhanam but the new
draft was criticised on other grounds. The Editor of the Indian Law Review and Mr.
Atul Chandra Gupta, Advocate, Calcutta High Court, suggested\(^1\) that in clause (2) of
article 25 the words "in the nature of the writs of habeas corpus, mandamus, prohi-
bition, quo-warranto and certiorari, whichever they may be, "should be omitted,
because the Constitution of India should not express itself by reference to other
laws, Indian or foreign. They were of opinion that the Supreme Court should be left
free to invent the nature of directions or orders without this reference to the
English writs. The Constitutional Adviser,\(^2\) however, opined "the power of the
Supreme Court to issue directions or orders is not restricted by the specific mention
of the English writs in clause (2) of article 25, but the said clause gives power

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1. Suggestions from non-members for amendment of the Draft Constitution of India.
2. Ibid.
to the Supreme Court to issue directions or orders in the nature of such writs."

But Mr. H. V. Kamath\(^1\) raised this objection in the House that it was not necessary
to particularise the various writs and the matter should be left quite open for the
Supreme Court to evolve such remedies as it might think proper in the circumstances
of the case. Explaining the point Dr. B. R. Ambedkar\(^2\) observed "while the powers of
the Supreme Court to issue orders and directions are there, the draft constitution
has thought it desirable to mention these particular writs. Now, the necessity
mentioning and making reference to these particular writs is quite obvious. These
writs have been in existence in Great Britain for a number of years. Their nature
and the remedies they they provided are known to every lawyer and consequently we
thought that, as it is impossible even for a man who has a most fertile imagination
to invent something new, it was hardly possible to improve upon the writs which have
been in existence for probably thousands of years and which have given complete sa-
tisfaction to every Englishman with regard to the protection of his freedom." He,
therefore, pleaded that these writs ought to be mentioned by their name in the
Constitution without prejudice to the right of the Supreme Court to do justice in
some other way if it felt it was desirable to do so. However, the verbal amendment
of Mr. Haziruddin Ahmad was accepted that for the words 'in the nature of the writs
of the words' or writs', including writs in the nature of' be substituted.\(^3\) The
acceptance of this amendment went a long way in clearing the misunderstanding of Sri
H. V. Kamath.

Dr. B. Pattabhi Sitaramayya\(^4\) pointed out that the existing clause (3) might
prejudice the powers conferred on the Supreme Court by clause (2). Therefore
Dr. B. R. Ambedkar moved that the following words be added at the beginning of clause
(3): "Without prejudice to the powers conferred on the Supreme Court by clause (1)
and (2) of this article".\(^5\) The House accepted the amendment.

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1. CAD Vol. VII, p. 932
2. Ibid., p. 952
3. CAD Vol. VII, p. 933
4. List of amendments to the Draft Constitution of India No. 72.
Sri R. K. Sidhva had suggested that only High Courts should be given such powers by Parliament.¹ The Constitutional Adviser referred to article 202 which vested the High Courts with the powers exercisable by the Supreme Court under clause (2) article 25. Therefore, clause (3) of article 25 sought to give power to Parliament to empower any other Court to exercise all or any of these powers for the convenience of parties so that a person might, instead of having to go to the High Court or the Supreme Court direct, have recourse to a nearer court for remedy.²

There was, however, great controversy over clause (4) of the article. Mr. Tajamul Husain³ demanded that it should be deleted. B. Focker Sahib Bahadur also lamented that clause (4) took away with one hand what was given by the other and so it should be deleted.⁴ On the other hand Sri M. Ananthasayanan Ayyangar⁵ opposed such amendments. Prof. Shibban Lal Saksena⁶ also agreed that in emergency suspension of these rights was necessary. Dr. B. R. Ambedkar⁷ also observed “In times of emergency the life of the State itself is in jeopardy and if the State is not able to protect itself in times of emergency, the individual himself will be found to have lost his very existence. Consequently the superior right of the State to protect itself in times of emergency, so that it may survive that emergency and live to discharge its functions in order that the individual under the aegis of the State may develop, must be guaranteed as the right of an individual. I know of no constitution which gave fundamental rights but which gives them in such a manner as to deprive the curtailing the rights of the individual”. He further pointed out that it was wrong to think that all the rights were suspended. According to article 279 only article 13 was suspended and article 280 suspended article 25. All other rights remained in tact.

The House adopted the article as amended. Rev. Jerome D’Souza was extremely gratified that such an important article was passed exactly on the second anniversary

1. List of amendments to the Draft Constitution of India List I, No. 73.
2. Notes on Amendments List I, No. 73.
3. CAD Vol. VII, p. 935
4. Ibid, p. 943
5. Ibid, p. 941
6. Ibid, p. 943
of the Constituent Assembly.\(^1\) Sri M. Aanathasayam Ayyangar\(^2\) regarded it as the
soul of democracy because the Supreme Court was the Supreme guardian of the citizens
rights in any democracy. Dr. B. R. Ambedkar\(^3\) observed "If I was asked to name any
particular article in this constitution as the most important - an article without
which this constitution would be a nullity - I could not refer to any other article
except this one. It is the very soul of the Constitution and the very heart of it and
I am glad that the House has realised its importance".

But this Article was considered superfluous and redundant by Jennings, because
where there is a Bill of Rights, the courts automatically get this power to enforce
them. Dr. K. V. Rao seems to have accepted this view.\(^4\) But Jennings forgets that
the provision of Fundamental Rights in the Constitution of India is based, not on the
principles of natural justice where in the British Common Law but an American prin-
ciple of Constitutional guarantee. The rule of law, upheld by an independent judiciary,
is thoroughly well established in England and therefore the rights are fully protected
there even without any declaration of a Bill of Rights. But in other countries, as for
example, France under the Reign of Terror rights most solemnly declared have been
of no help to protect them from infringement. Though such a provision is completely
absent in the American Constitution, yet the right is implicit. But this absence
of any express provision in the American Constitution was the subject of a bitter
controversy among American publicists in the early days of its history.\(^5\) Therefore,
the Makers of the Indian Constitution acted very wisely in expressly providing in
the Constitution this particular right of the citizen. Otherwise the whole structure
would have collapsed "like a house of cards."\(^6\) Moreover to distinguish the rights in
this Chapter with those of the Directive Principles of State policy, it was essential
to make them justifiable in clear and definite terms.

1. CAD Vol. VII, p. 938
2. Ibid, p. 940
3. Ibid, p. 53
5. Harvard Lee: The story of the Constitution, 1932, Chapter XIII.
6. Ibid, p. 204.
However, power was granted to Parliament to modify the rights conferred by this Part in their application to forces. It was essential to ensure the proper discharge of duties and the maintenance of discipline among them. This provision had been recommended by the Sub-committee on Fundamental Rights and the House adopted it. The Constitutional Adviser had redrafted it which was adopted by the Drafting Committee with verbal changes. The House accepted this article as amended by Dr. B. R. Ambedkar.

The Sub-Committee, however, had not recommended any restriction on the rights conferred by this Part while martial law was in force. Nor did the Drafting Committee make any such provision. It was, however, provided that "Parliament may, by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, for sentence ordered or other act done under martial law in such area."

Moreover, Parliament was authorized to make laws for prescribing punishment for those acts which were declared to be offences under this Part. It was further provided that existing Acts providing punishment for breaches of Fundamental Rights could continue in operation unless and until Parliament made another or a better provision. It had been recommended by the Sub-Committee on Fundamental Rights and was redrafted by the Constitutional Adviser. It was further drafted by the Drafting Committee which explicitly mentioned that the State legislature shall have no power in this context. The object was that Fundamental Rights, both as to their nature and as to the punishments involved in the infringement thereof, should be uniform throughout India. Therefore this right should be exercised only by Parliament.

1. CAD Vol. III, p. 429
2. Ibid, p. 522
4. CAD Vol. VII, P. 955
5. CAD Vol. III, p. 429
notwithstanding the fact that having regard to the list which deals with the distribution of power, such law might fall within the purview of the State legislature. The proviso to the clause was also an addition to the recommendation of the Sub-Committee and that of the Constitutional Adviser. With necessary verbal modification and a few amendments of Sri T. T. Krishnamachari, the Draft article was accepted by the House.

Assessment:—Thus the Fundamental Rights have been widely criticized. The Constitution leaves much to be desired. The declaration is not up-to-date. Liberty, equality and fraternity were magic words at the time of the French Revolution. The experience of the world since then, particularly with reference to the modern set-up of society, has shown that these fundamental ideas have to be developed and expanded to meet the needs of the present day society. There is in the constitution no guarantee of the economic conditions necessary to implement the elementary rights to live and to work for adequate wages—rights which are relegated to Directive principles in Part IV. And yet the experience of society in modern economic conditions shows that without such guarantee neither liberty nor equality would be of any value.¹ Even member of the Constituent Assembly had lamented that many fundamental rights such as the right to work, education had been ignored.² But Sri Ananthasayanan Ayyanger³ had already replied that only justiciable rights could be included. Anything other that would have been mere pious declarations. Dr. Ambedkar⁴ had clearly explained “I prefer the British method of dealing with rights. The British method is a peculiar method, a very real and a very sound method. British jurisprudence insists that there can be no right unless the Constitution provided a remedy for it. It is the remedy that makes a right real. If there is no remedy, there is no right of all, and I am, therefore, not prepared to burden the Constitution with a number of pious declarations which may sound as glittering generalities but for which the Constitution makes no provision by way of a remedy.” Thus, the right to work, the right to rest and leisure, the right to

². CAD Vol. X, p. 618
material security, etc. could not be included in the list of justiciable rights because they could not be secured to the citizens without the State assuming full ownership and control of all the material means of production. But the country is not yet ripe for this experiment. And some of these rights are covered by the Directive Principles of State policy which must be read along with fundamental rights. That would give an adequate and fair idea as to what the Makers of the Constitution attempted to achieve. It goes to the credit of the Makers of the Constitution that they were no mere visionaries but men of practical ideas and therefore they were not satisfied with a mere 'Declaration of Rights of Man and citizens' which would have precipitated a Reign of Terror in India.

Some critics point out that the Constitution is overweighed with what are only present problems viz. those of communal, minorities, and untouchables; it misses the wider problems of equity. These problems need not form a permanent feature of the constitution which should be founded on an expectation that by positive legislative and administrative measures all classes will, in course of time, rise to a level at which these special provisions will not be needed.¹ On the other hand it is suggested that these fundamental rights are based more on imitation than on an actual study of Indian conditions. The object of fundamental rights in every constitution has been twofold, first to provide the conditions essential to the development of human personality, and secondly to remedy the glaring evils of the social, economic and political life of the community. The fundamental rights in the Indian Constitution do not fall much short in the first but utterly lack in the second.² Thus these two contradictory views need no refutation.

It is also criticised that rights given by one hand have been taken away by the other. They are all subjected to widest exceptions.³ But 'freedom is Relative, Not Absolute. It is not easy to draw the correct line between the expression of opinions that are actually dangerous to orderly progress and the expression of opinions that, even if extreme, are within the boundaries of the liberty guaranteed by the Constitution. In any case, freedom cannot be absolute, that is, it does not give

the citizen a right to say anything he likes anywhere, at any time, regardless of circumstances. Thus even in the U.S.A. these rights have been restricted by the Court. Thus "there is really no difference in the result. What one does directly the other does indirectly. In both cases, the fundamental rights are not absolute." On the other hand, Mr. Vaze, on this very ground opposes all the restrictions imposed in the constitution. He points out that even when rights of freedom of speech or association are guaranteed without exception or saving clauses, interpretation by courts leads to the evolution of a doctrine of ordered liberty, so that ample scope is allowed for all restraint required to be imposed by State authorities in the interest of peace and order. But "the explanation is that unlike the American Constitution, the Draft Constitution of India contains an article which in terms states that any law inconsistent with the fundamental rights conferred by the Constitution shall be void; unless, therefore, the Constitution itself lays down precisely the qualifications subject to which the rights are conferred the Courts may be powerless in the matter." Moreover, all these rights and restrictions are in tune with the philosophy of Mahatma Gandhi that "The true source of rights is duty. If we all discharge our duties, rights will not be far to seek." It was really an ideal to be achieved and therefore rights were enumerated and restrictions imposed on them.

But it has been severely criticized by Sir W. Ivor Jennings who has regarded these rights as the 'Lawyers Paradise', where the last word will be with the courts. Dr. K. V. Rao also laments that the Constituent Assembly suffered from the superiority complex of the lawyer-makers and that the Assembly lacked a Napoleon to curb them. He also finds reasons to lament that Professors of political science and constitutional law could have equally curbed them; but they were totally absent. He has quoted a statutory example from the voluminous constituent Assembly Debates as to how Dr. Ambedkar hurled flings at non-lawyers, and even at the lesser fry among the lawyers, and silenced them. But he forgets that Dr. Ambedkar was always sympathetic towards non-

2. CAD Vol. VI, Dr. Ambedkar's speech
4. B. N. Rau - Indian Constitution, Hindi: 15.8.48
5. Young India, 8 Jan 1925
7. K. V. Rao: Parliamentary Democracy of India, p. 18
lawyer. He was prepared to amend clause (3) of article 8 of the Draft Constitution of India at the suggestion of Mr. Haziruddin Ahmad, though there was no legal flaw. He tried once again to satisfy the lay members by yielding to the suggestion. Moreover, the typical example quoted by Dr. K. V. Rao to color Dr. Ambedkar's personality, is a distortion of facts. Sri Mahavir Tyagi made positive insinuations when he said:

"Dr. Ambedkar will please pardon me when I express my fondest wish that he and other members of the Drafting Committee had the experience of detention in Jails before they became members of the Drafting Committee... I may assure Dr. Ambedkar that, although the British Government did not give him this privilege, the Constitutions he is making with his own hands will give him that privilege in his lifetime. There will come a day when they will be detained under the provisions of the very same clauses which they are making."

The House also did not appreciate such a remark and there was interruption while Mr. Tyagi was delivering his speech. It was in this context that Dr. Ambedkar gave the reply to Mr. Tyagi which has been quoted.

Dr. K. V. Rao further observes that when the remarks of Jennings that these rights are a lawyer's paradise, were brought to the notice of the Constituent Assembly by T. T. Krishnamachari, it had no effect. But long before Jennings criticised them as such, the Makers of the Constituent Assembly were conscious of the fact. The Editor of the Indian Law Review and some other members of the Calcutta Bar suggested that the following additions should be made to article 13:

"(2) The enumeration in the constitution of the above-mentioned rights shall not be construed to deny or dispossess others retained by the people." The Constitutional Adviser had ruled them out as that would give rise to unnecessary speculation about such rights resulting in abnormal increase in litigation. Again, it was not Sri T. T. Krishnamachari alone, but Sri K. Kamathamsiya as well who had pointed out to the Assembly: "Yesterday I happened to read Sir Ivor Jennings' opinion about our Fundamental Rights. He says, the rights conferred in this Chapter are so complicated, are worded in such a verbose manner, that it will be

1. CAD Vol. VI
2. CAD Vol. IX, p. 1547
4. Suggestions from Non-members for amendments of the draft constitution.
a fruitful source of income to constitutional lawyers. There is a good deal of truth in it. The enunciation of the Fundamental Rights and the exceptions added on by provisions are so worded - and they had to be like that because it is impossible to foresee all exigencies, and make provision for them now alone - that there will be litigation on a scale which one of us have ever seen or contemplated.¹ Dr. Ambedkar had refuted this charge earlier.² However, the Makars were quite conscious of it. Therefore, while considering the amendment of Smt. Purnima Banerjee in Article 22 of the Draft Constitution, Sri K. M. Munshi had observed, "I have no doubt members of my profession will be very glad to throw considerable light on what is and is not a justiciable right of this nature.... for a very good fee too."³ Again, while introducing article 24 of the Draft Constitution Sri Jawaharlal Nehru had said, "There is no reference in this to any judiciary coming into the picture. Much thought has been given to it and there has been much debate as to where the judiciary comes in. Eminent lawyers have told us that on a proper construction of this clause, normally speaking, the judiciary should not and does not come in."⁴ Moreover, as compared with the provisions of the United States of America relating to the civil rights, our position is better as things have not been left to the uncertainties of judicial interpretation. We know where we stand so far as our fundamental rights are concerned. And we may conclude with Dr. B. R. Ambedkar "I would like to ask Mr. Krishnamachari if he can point out to me any instance of any constitution in the world which has not been a paradise for the lawyers. I would particularly ask him to refer to the vast storehouse of law reports with regard to the constitution of the United States, Canada and other countries. I am, therefore, not ashamed at all if this Constitution hereafter for purposes of interpretation is required to be taken to the Federal Court"⁵.

Therefore, it is not fair to say that the objections raised by Sri T. T. Krishnamachari

1. CAD Vol. VII, p. 755
2. Ibid, p. 700
3. CAD Vol. VI, pp. 383-384
4. CAD Vol. IX, p. 1193
5. CAD Vol. VIII, p. 700.
cheri 'had no effect.' Rather the House was always alive to it and the smashing reply of Dr. Ambedkar silenced all such criticisms in the future except that of Sri K. Kamaraj. Moreover, it is to the credit of Sri Jawaharlal Nehru who did not play the role of a Napoleon to warn the makers of the Constitution not to quibble about words. It goes to the credit of the Makers as well that they were not so docile to any such imposition. Sardar Patel had tried to play a Napoleon while discussion was going on in the Constituent Assembly on clause 3 of the Interim Report on Fundamental Rights. He had warned the members, not to raise legal controversies and had said that "by commenting on every word in this, you will never come to an end."

But it was the President of the House who commented on the words of clause 3, and thus curbed a future Napoleon. Thereby he afforded ample opportunity to all schools of thought to express their minds freely and thus make the constitution the work of the whole people.

It also goes to the credit of the Makers of the Fundamental Rights to guarantee the rights of the minorities without any bargain. Indeed the majority has gone to the farthest extent to safeguard the rights of the minorities. The Fundamental Rights Committee was appointed before the partition took place. In fact these rights were written in this form before the partition had taken place on the assumption that there would be no partition. Yet the Makers did not change them nor did they try to barter away these rights.

However, it must be kept in mind that Fundamental Rights in India are not so fundamental as they are in other Constitutions of the World. In America these rights are amended only by a special procedure. Whereas in the Indian Constitution the procedure of amendment is easier and they can be amended as any other part of the Constitution. In America rights can be suspended only on declaration of a martial law and even then the right to suspend the Habeas Corpus is not there. But all the rights are practically suspended in India in case the President declares an emergency and no

1. CAS Vol. III, p. 407
court can be moved to enforce any of these rights. However, they are important as they cannot be amended by ordinary procedure and they are fully protected from interference by State Legislatures.