

Draft constitution of India

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BANGALORE-4

1948

**Some Suggestions for the Modification  
OF  
The Draft Constitution of India**

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**(Indian Council of World Affairs : Oxford University Press)**

**GOKHALE INSTITUTE OF PUBLIC AFFAIRS**

**BASAVANGUDI, BANGALORE—4**

**March 1948**

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## NOTE

The need to revise the Draft Constitution of India in respect of nine very important points is urged in this Note for the attention of the Constituent Assembly by Mr. M. Ramaswamy, a distinguished lawyer, whose well-known studies in constitutional law have by their learning and insight elicited warm commendation from competent authorities. The Council of the Gokhale Institute of Public Affairs, in issuing this Note to the public, trusts that the citizen in general will also find it useful as an elucidation of certain matters fundamental to his liberty and well-being. The Council is grateful to Mr. Ramaswamy for this timely and valuable contribution in furtherance of one of the principal objects of the GIPA which is to promote the dispassionate and scientific study of public questions.

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SOME SUGGESTIONS FOR THE MODIFICATION  
OF  
THE DRAFT CONSTITUTION OF INDIA

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In this Note I call attention to some of the more important of the additions and modifications which, in my view, are necessary in the Draft Constitution of India as prepared by the Drafting Committee appointed by the Constituent Assembly. I have also given briefly the reasons which impel me to recommend these changes.

1. *Trusts, Combines and Monopolies*: Nobody will, I think, deny to the future Indian Union Government the power to control the activities of combinations and monopolies which employ their wealth and economic power to the detriment of public well-being by creating artificial scarcities and bottlenecks in order to enrich themselves. The rapid industrialization of India which is now in process will inevitably bring with it price-fixing combinations, cartels, holding companies and other forms of concentrations of economic power which are so marked a feature of the economy of highly-industrialized nations, and more especially of the United States of America. In the United States, federal legislation to control the activities of combinations and monopolies which operate in interstate and foreign commerce is based upon the Commerce Clause (Article I, Section 8, Clause 3 of the Constitution). The Sherman Anti-Trust Act, 1890, The Clayton Act, 1914, The Federal Trade

Commission Act, 1914, The Packers and Stockyards Act, 1921, The Public Utility Holding Company Act, 1935, are notable statutes passed by Congress to deal with the activities of combinations and monopolies which work in restraint of interstate or foreign commerce. Actions and prosecutions under the Sherman Act which are launched after a good deal of prior investigation, form a considerable part of the normal work of the federal district courts. And many cases under the Sherman law reach the Supreme Court of the United States also. I believe it will be necessary for us in India also to pass legislation modelled upon similar legislation in the United States to deal with combines and monopolies.

I may also mention in this context that a Reuter's message from London, dated March 8, 1948,<sup>1</sup> reported that the British Government had ready for presentation to Parliament a Bill giving powers to deal with trusts, cartels and monopolies.

The question which arises for consideration is whether the Draft Indian Constitution vests in the Union Parliament effective legislative power to deal with trusts, combines and monopolies. Neither the Union list (List I) nor the Concurrent list (List III) contains any specific entry dealing with these subjects. It may be argued that items 17 and 73 of the Union list giving power to the Union Parliament to legislate with respect to foreign and interstate trade and commerce may be deemed to give adequate power to that authority to control the activities of trusts, combines and monopolies. Such a line of argument would have had much force behind it, but for the fact that, unlike the United States, where the powers of the federal Congress are enumerated leaving the undefind residue to the States, the draft Indian Constitution follows a different method of distribution of powers by defining the powers of both the Union Centre and the States. On a perusal of the State List

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1. See the *Hindu* of Madras dated March 10, 1948.

it will be found that item 32 deals with "Trade and Commerce within the State" while item 36 refers to "Production, supply and distribution of goods." When there is a double enumeration of powers (apart from the complication of a Concurrent list) it becomes necessary, as Sir Montague Smith delivering the judgement of the Privy Council in *Citizens Insurance Company v Parsons*<sup>1</sup> has pointed out, to read the lists together "and the language of one interpreted, and, where necessary, modified by that of the other." In view of the specific reservation of control over production (which would comprehend manufacture), it may be contended that a combination among producers—though their plants are located in different States—of an essential commodity like sugar for instance, cannot come within the purview of the Union Parliament, as manufacture and commerce are distinct operations and any effect of a combination with respect to manufacture or production upon commerce would only be an indirect one. Indeed a contention of this kind did find favour with the United States Supreme Court in the early case of *United States v E.C. Knight Co.*<sup>2</sup>, though, as I have already pointed out, there is no separate State list in the United States Constitution defining the powers of the States as we have in the Draft Indian Constitution. In this case a prosecution had been launched under the Sherman Act by the United States against E.C. Knight Co. and four other companies who between them manufactured 98% of the refined sugar used in the United States, and who had entered into contracts for the purchase by the American Sugar Refining Company of their shares of stock and property and the issuance in exchange to them of the shares of stock in the said American Sugar Refining Company. The charge was that the object of the contract being to acquire almost complete control over the production of refined sugar within the United States, there was a combination in restraint of interstate trade in refined sugar in contravention of the Sherman law. Mr. Chief Justice Fuller

1. [1881] 7 App. Cas.-96 at p. 109.

2. [1895] 156 U. S. 1.



delivering the opinion of the Supreme Court, held that there was no violation of the Sherman law, as, although the existence of a monopoly in the manufacture of sugar may have been established on the evidence, the object of the combination which was sought to be indicted being the exercise of control over manufacture, a local activity, the matter came within the reserved power of the States.

It is no doubt true that the reasoning adopted by the Supreme Court in the *Knighit* case has suffered considerable erosion because of the wider construction placed upon the commerce power of Congress in later cases like *Swift & Co. v United States*,<sup>1</sup> *Stafford v Wallace*<sup>2</sup> and *United States v Patten*.<sup>3</sup> In the *Patten* case, for instance, a conspiracy to corner the entire supply of cotton, by the purchase of that commodity on the New York Cotton Exchange for future delivery with the object of controlling the prices of that commodity at a later date, was held to come within the purview of the Sherman law, though the conspiracy had its *situs* in a single State viz, New York, the ground of the decision being that the conspiracy to control the prices of a commodity having an interstate market would greatly impede its movement in interstate commerce. Perhaps if a case of this kind arises in India, with item 32 of the State list "Trade and Commerce within the State" remaining as at present, it is not improbable that the conspiracy would be regarded as coming within the purview of State power as a local activity not controllable by the Union Parliament. The conspiracy involving sales of cotton for future delivery consummated on a local stock exchange may well be deemed to be an intra-state trade operation, though cotton itself may be a commodity which largely circulates in the channels of interstate commerce.

Under Section 51 (i) of the Commonwealth of Australia Constitution Act, 1900, power is given to the Commonwealth

1. [1905] 196 U. S. 375.

2. [1922] 258 U. S. 495.

3. [1913] 226 U. S. 525.

Parliament to make laws with respect to "Trade and Commerce with other countries and among the States." It may be mentioned that the Australian Constitution defines the powers of the Commonwealth Parliament only, leaving the residue of unallotted power to the States. Although this head of power in the Australian Constitution is very similar in language to the Commerce Clause of the United States Constitution, it has been found that the Commonwealth Parliament does not have the constitutional power to deal effectively with Trusts, Combines and Monopolies. In the year 1944, an Act entitled the Constitution Alteration (Post-war Reconstruction and Democratic Rights) Act, 1944, was submitted to a referendum of the people of Australia with the object of altering the existing Constitution by conferring power on the Commonwealth Parliament to deal with a number of matters including Trusts, Combines and Monopolies. The Right Hon'ble Herbert V. Evatt, the Attorney-General and Minister for External Affairs, in the speech he made on 11th February 1944 in the Commonwealth House of Representatives, in moving that the bill to initiate an alteration in the Constitution be read a second time, observed:

" 'Trusts, combines and monopolies' form the subject of the next paragraph. The post-war reconstruction period will probably witness the growth of many new industries, both in production and in commerce. The experience of every industrialized community shows that in periods of rapid development there is a special susceptibility to the formation of cartels, trusts, combines and monopolies detrimental to the public interest. In the Australian Industries Preservation Act, 1906, the Commonwealth endeavoured to deal with pernicious monopolies. But the Act could not be made effective, for the Commonwealth has no direct constitutional power either over production or over intra-state commerce."

I wish to draw pointed attention to the fact that the important reason assigned by Attorney-General Evatt for the Commonwealth Parliament being unable to deal with monopolies effectively was that it had "no direct constitut-

ional power either over production or over "intra-state commerce." As I have already pointed out, under the Draft Indian Constitution, production and intra-state trade and commerce come within the State sphere as they are specifically allotted to the States under List II of the Seventh Schedule. In Australia, the proposal for the expansion of Commonwealth Powers was rejected at the referendum. This is not surprising as people are generally reluctant to place additional powers in the hands of the Centre, once the distribution of powers is settled under a constitutional arrangement. Australian experience is both a pointer and a warning to us. It shows that Union power over interstate trade and commerce cannot be relied upon to give adequate authority to the Centre to deal effectively with combines and monopolies. It drives home the lesson that it would be best when the constitutional mould is still in a state of flux to make specific provision in the Constitution for the Union Parliament to deal with these subjects.

I may also mention that the residuary power given to the Union Parliament under item 9x of the Union list would not be of any use in this context as it gives power to that authority to deal only with those matters which are *not* enumerated in lists II and III. And production and intra-state trade and commerce *are* enumerated in list II.

It is true, of course, that Article 226 of the Draft Constitution allows the Union Parliament to draw into its legislative orbit the power to deal with any matter enumerated in the State List, if two-thirds of the members of the Council of States present and voting agree to such Union control. This provision is more or less a safety valve which comes into operation only when the need is pressing. It contemplates matters which, at their inception are local, and have at a later date attained such dimensions as to demand national control. But it seems to me that the problem of dealing with monopolies and combinations is so important that power to deal with it must be vested

in the Union Parliament from the very inception of the Constitution. I believe India will have to tackle this problem in the very near future, a problem which will have a vital bearing on the life of the people of the Union. And it would be wise, I think, for us to so fashion our Constitution as to make available to the Union Parliament adequate power to deal with these matters as in the case of the other Union subjects coming under its control.

I am in favour of power over "Trusts, Combines and Monopolies" being placed in the Concurrent list instead of in the Union list. Such an arrangement would, while giving power to the States to deal with combines and monopolies which are local in character, enable the Union Government to control the operations of combines and monopolies whose activities are of an interstate or international character. Moreover, the Union Government, under this arrangement, would not be bothered by questions of divided jurisdiction, because it can deal with any segment of this field on its own responsibility even by superseding State authority.

It would not be fair to saddle the State courts with the responsibility of taking cognisance of civil and criminal actions arising under Union legislation dealing with Trusts, Combines and Monopolies. Such cases use up a lot of time and are also complicated. It is only fair that they should be dealt with in the first instance by the lower federal courts, as is done in the United States. Article 219 of the draft constitution provides for the establishment of additional courts for the better administration of laws relating to the Union list of subjects only. If, as I have suggested, the item, Trusts, Combines and Monopolies, is put into the Concurrent list, Article 219 would have to be amended suitably so that the additional federal courts established by law may deal with cases under laws enacted by the Union Parliament with respect to this matter in the Concurrent list. If this item is placed in the Union list, of course, no change in Article 219 would be necessary.

2. *Central Control over Food Production, Supply and Distribution, Agricultural Colonies and Settlements.*— Next only to the problem of defence in national importance is the problem of making the country self-sufficient in the matter of food. We have seen with our own eyes the misery and suffering to which the country has been exposed during recent years for lack of adequate food resources. We are not out of the wood yet. We have had to go with the begging bowl all round the world for food grains and we have had to pay very dearly to purchase them. The colossal amounts paid for our food imports, the energy dissipated over this problem, the serious curtailment of the foreign exchange resources by having to foot the food import bills, and more than all, the anxiety which one feels over the food position in the future, ought to make us supremely alive to the imperative urgency of solving this problem. The country has arable land, water and labour in abundance. Only we have followed a policy of drift so far. The problem has to be tackled on a national scale. There is no doubt that if we apply ourselves with energy to solve this problem, the country can not only be made self-sufficient in point of food, but have a sizeable surplus after meeting normal demands. Mere planning, important as it is, will not do. The Centre must have adequate power to co-ordinate and even to compel the States and the people to follow a national policy not only of food production but of food distribution. As the draft constitution now stands, the Centre has no power to deal directly with this problem as both "Agriculture" (item 21) and "production" (item 36) are in the State field. I believe there is no point in placing reliance on Article 226, which allows a State subject to be drawn into the Central orbit, to help us out of this difficulty. In the first place, a 2/3rds majority of the Council of States is necessary to place power in Central hands, and this majority may not be forthcoming if local patriotisms begin to operate. In the second place, the States will view with apprehension and jealousy any attempt to invoke this provision - which

is after all a power to be used rarely - to encroach upon their domain. In planning our distribution of powers in the new Constitution, we must from the very beginning see to it that the Centre has adequate authority to deal with the food problem quickly and efficiently. The Food Minister, Mr. Jiramdas Doulatram, replying to the food debate in the Dominion Parliament on March 16, 1948, not only foreshadowed the appointment of an Agricultural Planning Commission to consider the whole question of planning—short and long-term—but also called attention to the fact that in finalising the new Constitution, it was necessary to think of giving adequate power to the Centre to attack the problem on a national scale as under the Draft Constitution agriculture happened to be a State subject.

It is true that item 34 of the Concurrent list which deals with "Economic and Social Planning" gives power to the Centre to evolve a plan for a country-wide scheme of food production. But the implementation of such a plan requires State co-operation, because, as I have said already, both agriculture and production are completely State subjects. If one or more States prove hostile or lukewarm, the whole plan may miscarry. While it is necessary to enlist the co-operation of the States in this matter, the Centre must have the power to act on its own authority, if such a need should arise, through its own agency and laws. Mere planning is so much labour lost unless it can be brought into commission. I would, therefore, suggest that a new item be inserted in the Concurrent list to run thus: "Food production, supply and distribution, Agricultural colonies and settlements." Items 21 and 36 of the State list which relate to "Agriculture" and "Production, supply and distribution of goods" will have to be made subject to this new item in the Concurrent list. In a planning arrangement evolved by the Centre, it would be possible, if the new item is incorporated into list III, for compelling particular regions, especially those served by large irrigation projects, to grow only particular varieties of food crops like paddy or wheat instead of commer-

cial crops like groundnut or cotton. Moreover this item, in view of the control it gives over the supply and distribution of food resources, could be used to compel surplus States to part with their hoards, even if they are unwilling, for the use of deficit areas.

I have included Agricultural colonies and settlements in the new item because I feel that with the prospect of such colonies and settlements springing up in the neighbourhood of big irrigation projects which have been planned, there must be power in the Union Centre to plan, co-ordinate and control the life and activities of such communities.

3. *Offences against the Law of Nations.*—Item 22 in List I of the Draft Constitution reads thus :—“ Piracies, felonies and offences against the law of nations committed on the high seas and in the air.” It will be noticed that offences against the law of nations committed on land are not covered by this item. This important omission has to be rectified, as offences committed on land comprise the bulk of such crimes. Article I, Section 8, Clause 10 of the United States Constitution which deals with this matter runs as follows :—“ To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.” The latter portion of this clause dealing with offences against the law of nations runs without any qualifications, making it possible to take cognisance of offences wherever committed—whether on land, sea or air. Item 22 of List I of the Seventh Schedule may, I think, be recast so as to read as “ Piracies and felonies committed on the high seas, and offences against the law of nations committed on the land, the high seas or the air.”

This provision will be of great use when the country is carrying on a war. It has been held in the United States that Congress in the exercise of the power conferred by Article I, Section 8, Clause 10 of the Constitution, had the authority to constitute military tribunals for the punishment of offences against the laws of war,

*Ex parte Quirin*;<sup>1</sup> *In re Yamashita*.<sup>2</sup> As Mr. Chief Justice Stone in delivering the opinion of the Supreme Court in the *Yamashita*<sup>3</sup> case has observed:

"In *Ex parte Quirin*, 317 U.S.1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offences against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article 1, Section 8, Clause 10 of the Constitution 'to define and punish...offences against the law of nations' of which the law of war is a part, had by the Articles of War recognized the 'military commission' appointed by military command, as it had previously existed in the United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the law of war."

In *Ex parte Quirin*<sup>4</sup> the petitioners, who were detained for trial by a Military Commission appointed by Order of the President, of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, had filed petitions for leave to file applications for writs of Habeas Corpus. The Petitioners were German citizens who had been clandestinely landed from a submarine on the American coast carrying explosives for the express purpose of sabotaging military plants in the United States and who had been caught in different places in civilian dress. The Court declining the leave sought, said that Articles 15, 38 and 46 of the Articles of War enacted by Congress had recognized the "military commission" as an appropriate tribunal for the trial and punishment of offences against the law of war not ordinarily tried by courts-martial and that therefore the petitioners were in *lawful* custody for trial by a military commission.

4. *Ownership of and Dominion over the Lands, Minerals and other things of value underlying the ocean seaward of the*

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1. [1942] 317 U.S.1. 2. [1946] 327 U.S.1. 3. 327 U.S.1, p. 7.  
4. [1942] 317 U. S. I.



ordinary low water mark on the coast extending Three Nautical miles. The very important case of *United States v California*<sup>1</sup> which was decided by the Supreme Court on June 23, 1947, raised the question whether the United States or the State of California owned and had the paramount rights in and power over the submerged land off the coast of California between the low water mark and the three-mile limit to take or authorize the taking of the minerals including the vast quantities of oil and gas underneath that land. The majority of the Court decided in favour of the United States, while, two judges, Justices Reed and Frankfurter, dissented. Mr. Justice Black in the course of his opinion for the Court has observed as follows (pp. 35-36):

“The very oil about which the State and Nation here contend might well become the subject of international dispute and settlement. The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual State, so if wars come, they must be fought by the nation. See *Chy Lung v Freeman*, 92 U.S. 275, 279. The State is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks. Conceding that the State has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries, these do not detract from the Federal Government's paramount rights in and power over this area. Consequently, we are not persuaded to transplant the *Pollard* rule of ownership as an incident of State sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern.”

There is no provision in the Draft Constitution of India which deals with this important matter. The New

1. [1947] 332 U. S. 19.

Indian Constitution must, I think, contain a clear provision to the effect that it is the Union Government and not the sea-coast State that is the owner of and that has the paramount rights in and power over the three-mile marginal belt extending seaward from the low-water mark, and as an incident to it full dominion over all the resources of the soil under that water area including oil. There may, however, be an express clause in that new provision saving the exercise of ordinary civil and criminal jurisdiction over this sea-area in favour of the States. I also think that the Instrument of Accession of every acceding maritime Indian State should contain a clear declaration admitting the rights of the Union Government in and over this area.

5. Discrimination in the matter of admission of students into state subsidized Educational Institutions.— Article 23 (2) of the Draft Constitution prevents any discrimination being made on the basis of religion, community or language, in the matter of admission of any person into educational institutions maintained by the State. Presumably this restriction is not applicable to private educational institutions which receive subsidies from the State exchequer. I see no reason why the provision against discrimination should not extend to State-subsidized institutions. To allow private educational institutions to receive subsidies from the public funds and at the same time to allow them to practise discrimination against any section of the community seems to my mind to be quite unjustified. If a private educational institution wants to control the admissions into its institution on a class or communal basis, it might well have the liberty to do so; only it should definitely *not* get any assistance from public funds. In dealing with this very important problem, the Committee which was appointed by President Truman to report on Civil Rights in their report has observed:

“ The second inadequacy in our present educational practices in America is the religious and racial discrimination that exists in the operation of some

private educational institutions, both with respect to the admission of students and the treatment of them after admission. The Committee is absolutely convinced of the importance of the private educational institution to a free society. It does not question the right of groups of private citizens to establish such institutions, determine their character and policies, and operate them. But it does believe that such schools immediately acquire a public character and importance. Invariably they enjoy government support, if only in the form of exemption from taxation and in the privilege of income-tax deduction extended to their benefactors. Inevitably, they render public service by training our young people for life in a democratic society..... Certainly the public cannot long tolerate practices by private educational institutions which are in serious conflict with patterns of democratic life, sanctioned by the overwhelming majority of our people. By the closing of the door through bigotry and prejudice to equality of educational opportunity, the public is denied the manifold social and economic benefits that the talented individual might otherwise contribute to our society."<sup>1</sup>

I would suggest for the reasons above mentioned that Article 23 (2) may be amended so that the last two lines of that provision might read as "to such minority into any educational institution maintained or subsidized by the State."

6. **Safeguard for the Life and Liberty of Individuals.** The Advisory Committee on Fundamental Rights appointed by the Constituent Assembly had suggested the following Clause as a safeguard for the life and liberty of individuals viz: "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."<sup>2</sup> The drafting committee has not only changed this clause out of recognition, but, as I shall presently show, has removed the very soul out of the original provision and left an

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1. The Report of the President's Committee on Civil Rights, United States Government Printing Office, 1947, pp. 65-67.

2. The Constituent Assembly of India: Reports of Committees (First series) From December 1946 to July 1947, p. 22.

empty shell in its place. When I say this I am referring to the opening portion of the Clause dealing with due process of law and not the closing part of it relating to the equal protection of the laws. The first part of the Clause as now to be found in Article 15 of the Draft Indian Constitution reads thus: "No person shall be deprived of his life or personal liberty except according to procedure established by law....."

I shall direct my attention now to the replacement of the dynamic words "without due process of law" by the innocuous and useless words "except according to procedure established by law." If the clause as drafted by the drafting committee is allowed to remain in the Constitution, then I believe that the safeguard for life and liberty pompously declared by it, is,—to use the very expressive words of Mr. Justice Jackson of the United States Supreme Court in *Edwards v California*,<sup>1</sup> employed in a somewhat different context,—"only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." I have no desire to exaggerate. That is, however, precisely what will happen if these new words are allowed to stand.

Now the clause as now worded means that if any law which deprives a person of his life or liberty has prescribed a particular procedure for such deprivation, and that procedure has been satisfied in any case, the court's enquiry is at an end, even though the court has every reason to feel that the procedure so sanctioned by law for deprivation of life or liberty is inadequate, or iniquitous, or unreasonable, or capricious. Moreover, the courts can do nothing even if the law which deals with a man's life or liberty takes away a vital interest of his, so long as the forms of procedure prescribed by the law are complied with. The rôle of the courts as helpless spectators of legislative omnipotence issuing edicts masquerading under legal forms to take away

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1. [1941] 314 U. S. 160 at p. 186.

valuable human rights is indeed a sad one. Anybody who has any acquaintance with the history of the working of the due process of law clauses embodied in the Fifth and Fourteenth Amendments to the United States Constitution will at once bear testimony to the magnificent part which these great clauses have played as bulwarks against arbitrary exercise of governmental power—legislative, executive or even judicial—to the detriment of the vital interests of human beings. I have discussed the great and significant part played by these clauses in safeguarding the lives and liberties of individuals in my book on *Fundamental Rights*.<sup>1</sup>

The Supreme Court has held that even laws emanating from a legislature, though professedly enacted in the public interest, may be scrutinized and set aside as violating the requirements of due process, if the courts feel that those laws constitute arbitrary, capricious or unreasonable deprivations of a man's life or liberty.

In criminal prosecutions, the constitutional guarantee of due process of law has been interpreted to require that the accused be given a fair trial. The Supreme Court has held, for instance, that a trial dominated by a mob, the jury having no chance to exercise its independent judgement; although conforming to the prescribed forms of judicial procedure, is not a fair trial, and a conviction made at such a proceeding is a denial of due process of law, *Moore v Dempsey*<sup>2</sup>; *Powell v Alabama*<sup>3</sup>. In the case of *Chambers v Florida*<sup>4</sup> Mr. Justice Black in his opinion for the Court setting aside the conviction for a capital offence which had been obtained upon a confession extorted by third degree methods, discussed the rôle of the due process of law clause of the Fourteenth Amendment in criminal prosecutions. In the course of a powerful and moving opinion which will bring a sympathetic echo from every human heart

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1. M. Ramaswamy: *Fundamental Rights*. 1946, Oxford University Press.

2. [1923] 261 U.S. 86. 3. [1932] 287 U.S. 45. 4. [1940] 309 U.S. 227.

as long as liberty and justice are cherished on this earth, he said (pp. 235-241) :

“ The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment - just as that in the Fifth - has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorably utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat, criminally punishable without legislation. And a liberty-loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by ‘ the law of the land ’ forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the ‘ law of the land ’ evolved the fundamental idea that no man’s life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve ‘ the blessings of liberty ’, wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed. The determination to preserve an accused’s right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically

unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of-entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless. This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment.....Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows without conflict the drag-net methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young coloured tenant farmers....Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning, without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings. Some were practical strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when anyone would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives—so far as these ignorant petitioners could know—in the balance. The rejection of petitioner Woodward's first 'confession', given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which 'broke' petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make the constitutional requirement of due process of law a meaningless symbol. We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective

of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American Court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

The drafting committee has recommended that the word "liberty" should be qualified by the insertion of the word "personal" before it, as it seems to think that "otherwise it might be construed very widely so as to include even the freedoms already dealt with in article 13." I do not think this apprehension is well-founded; and even if it is, I am very doubtful if the addition of the adjective "personal" to "liberty" will have the effect desired. It seems to me that the courts in construing the word "liberty" occurring in article 15 will, as a matter of common sense, exclude from its purview those fundamental rights specifically dealt with in the other articles included in part III. The Courts will not, I think, shut their eyes to those specific fundamental rights enumerated in Article 13 which not only defines their ambit but also marks out the limits to which the legislatures can go to abridge those rights in the public interests. If there is still an apprehension that "liberty" in article 15 may be construed as comprehending the fundamental rights enumerated in article 13—an apprehension which I do not share—I think a special



saving provision is needed. The addition of the adjective "personal" to qualify "liberty" will, it seems to me, not have the effect which the drafting committee seem to desire, because the freedoms enumerated in article 13 are also *personal* liberties. It seems to me that there is no point in adding the qualifying adjective "personal" to "liberty."

For reasons which I have elaborately set out in my book on *Fundamental Rights* pp. 95-107, I would suggest that there should be a clause providing that no law of a State shall be open to challenge in a court of law as depriving a person of his liberty without due process of law, on the ground that it interferes with his freedom of contract.

The words "equality before the law" occurring in article 15 of the draft constitution may, I think, be dropped as being superfluous. The phrase "equal protection of the laws" which occurs there is to my mind quite sufficient.

I have suggested in my book on *Fundamental Rights* that Taxation measures should be taken out of the purview of equal protection of the laws. I still adhere to that view. It seems to me that it would be better for us to leave the exercise of the taxing power, in a manner which is both fair and equitable, to the discretion of the legislatures (Union and State), instead of allowing the courts to exercise a wide control over taxing legislation by testing their constitutional validity with reference to so fluid a standard as the equal protection of the laws. This would prevent a great deal of expensive and speculative litigation.

I would recast draft Article 15 to read as follows:—

"15 (1) No person shall be deprived of his life or liberty without due process of law anywhere within the territory of India: but, no law shall be open to challenge in a court of law as depriving a person of his liberty without due process of law, on the ground that it interferes with his freedom of contract.

“(2) No person shall be denied the equal protection of the laws anywhere within the territory of India : but, no taxing law shall be open to challenge in a court of law, on the ground that it constitutes a deprivation of the equal protection of the laws.”

7. Election of the President of India. Under Articles 43 and 44 of the Draft Constitution, the President has to be elected by an electoral college consisting of members of both Houses of the Union Parliament and the elected members of the lower House of the State legislature where it is bicameral and the elected members of the single House where the State Legislature is unicameral. Having regard to the fact that the strength of the State legislatures viewed in relation to the state populations may vary from State to State, the Constitution, by the provisions contained in Article 44, has devised a somewhat complicated machinery to maintain uniformity in the scale of representation of the different States at the election of the President. Once the decision is taken to associate the members of the State legislatures in the election of the President, the need for a machinery such as the one embodied in Article 44 (2) is clearly manifest. But it seems to me, however, that there is no need to allow the elected members of the State legislatures to join in the electoral college to elect the President. As the total strength of the Union Parliament will be 750, consisting of 500 members in the House of the People elected directly by the people from territorial constituencies spread all over the country, and 250 members in the Council of States, the bulk of whom are elected by the elected members of the Lower Houses of the States, these 750 members, in my opinion, form a sufficiently representative democratic group constituted on a nationwide basis to be entrusted with the task of electing the Union President. It seems to me that the provision for the association of the members of the State Legislatures in the Presidential election would serve no useful purpose. In fact it definitely complicates the constitutional machinery for the election of the President. It is the elected members of the State Legislatures that elect the bulk of the members of the

Council of States. And the members of this Upper House will anyhow form part of the electoral college for electing the President. In view of this arrangement, it seems to me that there is no object in duplicating the process by allowing the members of the State Legislatures to take part in the election of the President. I should think that it would be quite satisfactory to provide for the Union President being elected by members of both Houses of the Union Parliament sitting together as a single body summoned for this specific purpose. After all, once we have provided for the cabinet form of executive for the Indian Union, the powers delegated to the Union President under the Constitution necessarily come within a narrow ambit. His powers will bear no comparison with the powers exercised by a President of the United States under the United States Constitution. To allow the President of India to be elected by the members of the Union Parliament alone cannot, I think, for the reasons above mentioned, be regarded as retrograde in any way. In fact this procedure would be a simple and straight-forward democratic method.

8. Impeachment of the President of India. The machinery provided for in Article 50 of the Draft Constitution for impeachment of the President for violation of the Constitution requires, in my submission, alterations in several important respects. After all it is a very serious matter to impeach the President of the day for charges of violating the Constitution. And any machinery devised for this purpose must be such that it will command respect both for its impartiality and for its dignity. Article 50 as it now stands does not say who is to preside in the case of a presidential impeachment. I presume that the idea is that it is the Speaker of the House of the People that has to preside when it is investigating a charge made by the other House, while it is the Vice-President of India as the ex-officio Chairman of the Council of States that has to take the chair when the charge is preferred by the House of the People. In my opinion, neither of

these persons should preside in the case of a presidential impeachment. The Speaker of the House is almost always a party man. When passions run high and the President has come into conflict with the party in power with regard to any action taken by him in the course of the execution of the duties of his office, fairness demands that the Speaker should not preside. The same reasons apply to the Vice-President of India. In fact, his case is on a worse footing in this respect. As the Vice-President would succeed to the Presidency if the latter is removed from office, it is obvious that it is quite inadvisable to allow him to preside over a presidential impeachment. Under Article I, Section 3, para 6 of the United States Constitution, when the President of the United States is being tried by the Senate, it is the Chief Justice of the United States that has to preside. I would strongly recommend that we should make a similar provision in Article 50 providing that the Chief Justice of India should preside when either the House of the People or the Council of States is investigating into a charge made against the President. Both by his training and by his detachment, he is the man best fitted to preside over such a proceeding. Moreover, it is necessary to give him specific power under a clause embodied in Article 50 itself to pass upon the admissibility of evidence and the general conduct of the trial. This is not a theoretical matter. When President Andrew Johnson was being tried before the Senate, Chief Justice Chase presiding, a similar question arose and the Senate decided that the 'presiding officer' might rule on the admissibility of evidence and that the rule should stand unless there was an objection, in which case the question should be passed on by the Senate itself.<sup>1</sup> I think that on the question of the admissibility of evidence and in regard to the general conduct of the trial, the presiding officer, viz., the Chief Justice of India, should have the final say.

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(1) A.C. McLaughlin: *A Constitutional History of the United States*, p. 671.

Under Article 50 (2) (a), the proposal to prefer a charge against the President may be moved after a notice in writing signed by not less than thirty members of either House. This number is too small. Any small disgruntled group might move a resolution, without any reasonable cause, probably to satisfy a private grudge. Although the resolution may ultimately be defeated by a large majority, the very debating of the question on the floor of either House of the Union Parliament may create an unhealthy atmosphere. After all, it must be the endeavour of every sensible person to protect the honour and dignity of the Presidential office. It seems to me that the proposal to prefer a charge should have the support of at least 150 members of the House of the People, or 100 members of the Council of States. Clause (a) of Section (2) of Article 50 may, I think, be amended in the manner suggested.

Under section (4) of Article 50, a resolution supported by not less than two-thirds of the total membership of the House by which the charge is investigated, declaring that the charge preferred against the President has been sustained, will have the effect of removing the President. In the United States also the two-thirds majority rule operates in Senatorial trial of Presidential impeachments. In the famous impeachment of President Andrew Johnson, the voting was 35 for and 19 against conviction. One more vote for conviction would have been sufficient to condemn the President. Competent observers think that President Johnson was unjustly arraigned before the Senate because of personal spite and partisanship. But the lesson we have to learn from American experience is that in moments when party passions run high, the 2/3rds rule may not be just to the President of the day. As Professor Andrew McLaughlin has stated :

“If the impeachment (of Andrew Johnson) had been successful, the result might have been accepted as a precedent of momentous influence on our constitutional system. ‘Once set the example,’ said Trumbull,

in giving the reasons for his vote, 'of impeaching a President for what, when the excitement of the hour shall have subsided, will be regarded as insufficient cause, and no future President will be safe who happens to differ with a majority of the House and two-thirds of the Senate on any measure deemed by them important, particularly if of a political character.' The trial stands today as the most regrettable and shameful exhibition of personal spite and ruthless partisanship in American History."<sup>1</sup>

I think, for the reasons which I have mentioned, it would be better to alter the words "by not less than two-thirds of the total membership of the House" occurring in Section 4 of Article 50 into "by not less than three-fourths of the total membership of the House."

9. Amendment of the Constitution. It is imperative, I think, that changes in the provisions contained in Part III relating to Fundamental Rights, should, like the changes sought to be made in any of the lists of the Seventh Schedule, require, in addition to the vote of the Union Parliament, the approval of a majority of the legislatures of the States. The safeguards for fundamental rights contained in the Constitution are too vital a matter to be whittled away by the simple process of a majority vote of two-thirds of the members of the Houses of the Union Parliament present and voting. I would add a new saving clause (d) in addition to the three clauses (a) (b) and (c) occurring in Article 304 to read as follows: "(d) in any of the provisions contained in Part III."

I would also recommend that the proviso to Article 304 may be altered so that the amendment shall also require to be ratified by the Legislatures of not less than two-thirds (instead of one half as in the draft) of the States for the time being specified in Part I of the first schedule and the Legislatures of not less than one-half (instead of one-third as in the Draft) of the States for the time being

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1. Andrew C. McLaughlin: *A Constitutional History of the United States*, p. 675.

specified in Part III of that schedule. After all, the matters covered by clauses (a) to (c) and the proposed new clause (d) are fundamental to the balanced functioning of a federal polity. If that balance has to be tilted, it is only fair that a large proportion of the constituent States should assent to the proposed change. Moreover, it stands to reason that the process by which changes in these essential matters can be effected should be made rather difficult. Otherwise a written constitution intended to establish a fairly stabilized form of polity would have little meaning if changes in it can be made by employing the facile legislative process applicable to changes in the ordinary laws of the land.

*21st March 1948*  
*Bangalore City*