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The Curious Case of 'Due Process' in the Indian Constitution

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The Constituent Assembly considered an American-style 'due process' clause for the Constitution but adopted a formula to limit judicial review. Unwilling to heed that limitation, judges fashioned doctrines to better protect the right to life and liberty.

"The President will see you now, sir," Rose Conway, the White House executive secretary, announced to her waiting guest. In the Oval Office, a beaming Harry Truman rose to greet his silver-curly-haired and elegantly dressed visitor. It was a cold yet sunny fall afternoon. The president's calendar for that day, 19 November 1947, was full. But Indian Ambassador Asaf Ali had managed to get an appointment for his guest from Delhi, Benegal Narsinga Rau, to see Truman.

Rau was the principal adviser to India's Constituent Assembly, which was debating a constitution for the newly independent country. Having prepared the first version of the proposed charter, Rau was in the United States to meet constitutional experts on a trip that also took him to Canada, England, and Ireland.

Truman got straight to the point. Similar to President Joe Biden's recent experience, Truman's Democratic Party had lost the House of Representatives in the 1946 mid-term elections. Still smarting from that loss, Truman exclaimed "Whatever else you may copy from our constitution, do not copy our provision for mid-term elections." Rau assured the president that India's president and House of the People would have five-year terms.

The meeting was a brief one. As the two men parted, Truman told Rau: "I am very greatly interested and should like to have, if I may, a copy of your constitution." With his trademark twinkle, the president added that he might borrow a point or two from it. (Truman would later despatch an effusive telegram when the Constitution of India came into force in 1950).

After Rau left the White House, he called on Justice Felix Frankfurter of the U.S. Supreme Court. A leading public intellectual and jurist, Frankfurter closely followed political developments in India. Rau shared his first draft with Frankfurter. Upon reviewing it, Frankfurter vehemently objected to a clause which guaranteed that no person's "life or personal liberty" could be taken away except "by due process of law."

Rau had borrowed this language from the American Constitution's Fourteenth Amendment. But Frankfurter warned Rau that the term "due process of law" could embolden Indian judges to indiscriminately invalidate economic and welfare laws, duly enacted by the people's representatives, for violating an individual's liberty.

Returning to Delhi, Rau reported Frankfurter's views to the Constituent Assembly's president. By then, the assembly's drafting committee had begun preparing an official draft constitution for public consultation. The draft constitution, published in February 1948, pointedly omitted the expression "due process of law" from Rau's basic draft. In its place, the draft constitution provided that no person could be deprived of their life or personal liberty "except according to procedure established by law."

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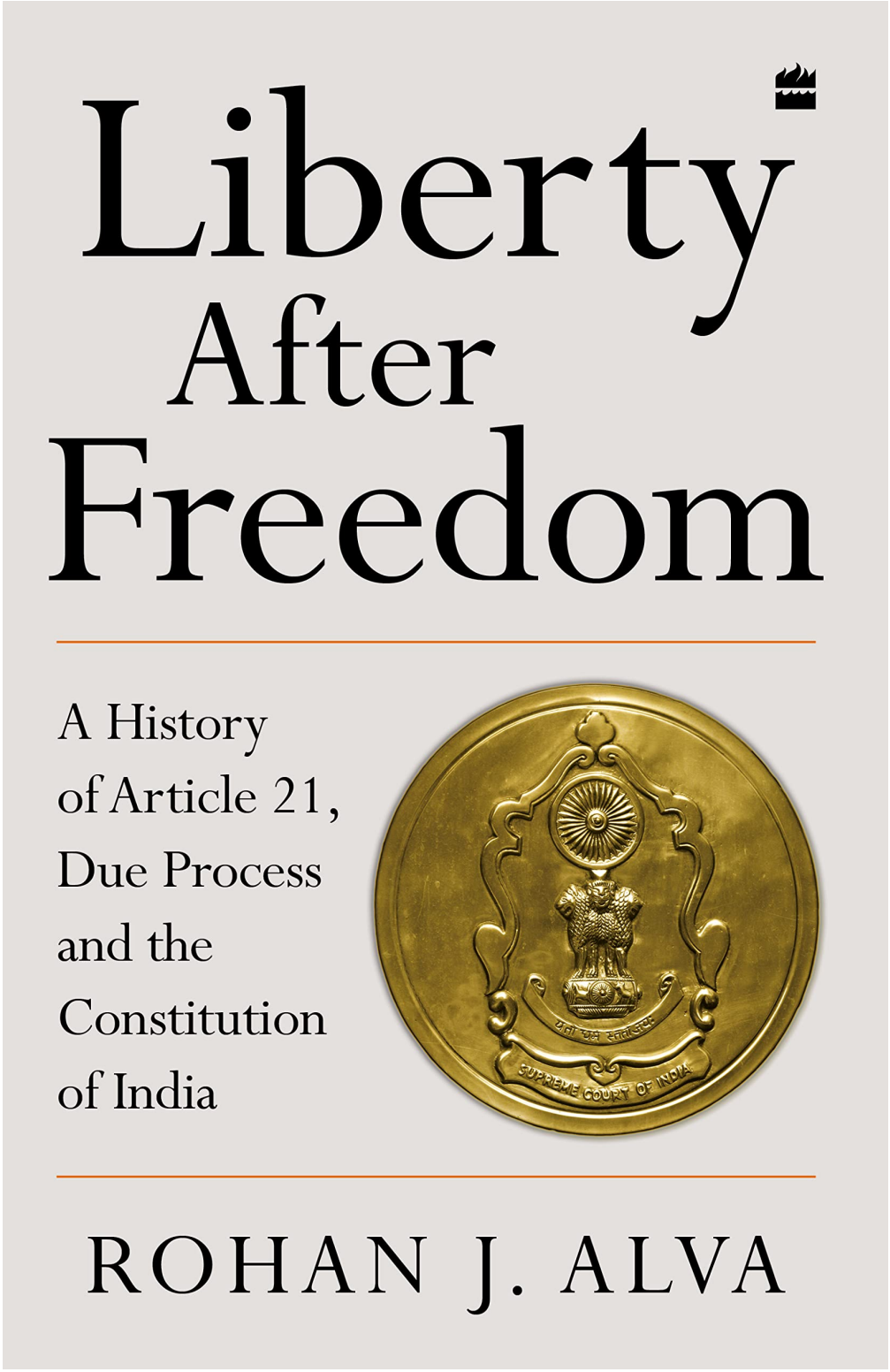
Who was responsible for this change? Why was it made? And what impact did it have on Indian constitutional life? In *Liberty After Freedom*, Rohan Alva investigates these questions that have vexed generations of judges, lawyers, and historians. The book is a product of methodical research, precise writing, and clear-eyed analysis. It is an important contribution to the study of India's founding as a republic. It especially underscores the judiciary's role in upholding the Constitution's rights and freedoms.



The author's lucid style appeals to a broader audience than just lawyers and historians. The book should be bought, borrowed, or downloaded and read in full. This article, therefore, is not a chapter-by-chapter review. Rather, this essay analyses some of Alva's key conclusions and offers some historical and contemporary reflections on the book's broader themes. Some of these themes are more fully explored by other recent books, mentioned below, which equally advance our understanding of the Constitution's past and present.

Early debates on the due-process clause

Alva opens with the Constituent Assembly's December 1946 session at which Nehru introduced the "Objectives Resolution." The resolution was a triumphalist manifesto of soaring principles and ideals for a sovereign republic. In the debate, Babasaheb Ambedkar criticised the resolution for omitting the "usual formula" that "no man's life, liberty, and property shall be taken without due process of law." Ignoring Ambedkar's criticism, the assembly proceeded to adopt the Objectives Resolution without any reference to "due process."

One reason may have simply been that members were, at that point at least, unfamiliar with the concept. Although the origins of due process can be traced to the Magna Carta, it was not a commonly cited principle in English law. "Due process of law" was not a frequently used expression in British imperial or commonwealth practice. Under the Raj, there were sporadic references to "due process" in British Indian statutes and judgments largely in the context of property. In the colonial legislature, S. Satyamurti and other Indian members exhorted the government to respect "due process" when imposing press restrictions. But the term was never used with any regularity by the national movement's leadership.

Although "due process" was mentioned in Madhav Rao's 1874 *Constitution of Native States*, the expression seemed largely missing from the national movement's constitutional proposals like the 1928 Motilal Nehru Report. The Government of India Act 1935 provides the closest pre-constitutional antecedent. Section 299 declared that no person could be deprived of property "save by authority of law." Moreover, when the assembly opened in 1946, not a single dominion constitution included a due process requirement.

As a legal concept, due process is primarily derived from the Fourteenth Amendment to the U.S. Constitution. Granting citizenship to former slaves, the amendment enjoins states from depriving persons of their "life, liberty or property without due process of law." A similar protection is found in the U.S. Fifth Amendment, which declares that no person may be deprived of their "life, liberty or property, without due process of law."

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In law and practice, there are essentially two concepts of due process. The commonly invoked concept is procedural due process. It requires the state to follow fair and reasonable procedures when it interferes with a person's life, liberty, or property. Thus, if a person is arrested, the state must inform the person about why they have been arrested, provide access to a lawyer, and produce the person before a judge.

The concept of substantive due process runs deeper. It focusses on whether the government is justified in interfering with a person's life, liberty, and property. It reflects the long-held belief that a constitution protects persons against unwarranted government interference. These protections are found in fundamental rights, like the freedom of religion, which are specifically enshrined in a constitution. They may also arise from rights that are not explicitly found in the constitutional text. The right to privacy is one such right. It is not expressly mentioned in the Indian Constitution, but it can be inferred from specific provisions in the document's text. Substantive due process requires that laws and state action must respect unenumerated rights just as they must comply with the fundamental rights that are expressly enshrined.

Who pulled the plug on due process?

Ambedkar was unwilling to give up so easily. He pointedly included a due-process clause in *States and Minorities*, his articles-based memorandum submitted to the assembly in March 1947. K.M. Munshi also advocated for due process in a detailed note that he circulated. Around this time, Viceroy Mountbatten and leaders of the Congress and the Muslim League were engaged in contentious negotiations that would lead eventually to the subcontinent's partition. While it awaited the outcome of those talks, the assembly met in smaller committees.

Two of these groups – the advisory committee on minorities, citizens, and tribal areas; and the subcommittee on fundamental rights – discussed rights and freedoms under the future constitution. Due process was an early item on the agenda. As Alva tells us, Alladi Krishnaswami Ayyar, the distinguished Madras lawyer, was initially sceptical about due process. He eventually became a supporter. K.M. Munshi remained a vocal and vehement champion. With Ayyar and Munshi's backing, the subcommittee recommended that the future constitution ensure that no person would be deprived of their life, liberty, or property "without due process of law."

In the advisory committee, Govind Ballabh Pant vigorously opposed the subcommittee's recommendation. A due-process guarantee, Pant argued, could affect the government's ability to control violence or enact land reforms. Some members supported Pant, but others disagreed. As a compromise, the advisory committee decided to guarantee due process for life and liberty, but not for property. In April 1947, the Constituent Assembly's plenary approved this proposal.

The action shifted to the drafting committee. Since drafting by committee is impossible, Rau was tasked with preparing a basic draft for members' consideration. Rau completed his assignment in late October 1947. Clause 16 of Rau's basic draft read in relevant part: "No person shall be deprived of his life or personal liberty without due process of law . . ."

Rau indicated that this formulation was based on the U.S. Fourteenth Amendment. But he tweaked the amendment's wording in two respects. Reflecting the advisory committee's decision, Rau dropped the reference to "property." He also inserted the qualifier "personal" before the word "liberty" borrowing it from the Irish constitution. Rau explained that the qualifier would restrict courts from applying due process requirements in economic cases.

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After he submitted his draft, Rau left on his foreign tour. In New York City, he met Judge Learned Hand who told him that fundamental rights ought to be moral precepts. In Washington, besides Truman, Rau met the chief justice of the United States and other judges. Rau spent a considerable amount of time with Frankfurter. The justice was very impressed by his Indian visitor and said so in his diary. Puzzlingly, however, the diary does not record any discussions between the two men on constitutional issues. It only provides a detailed summary of Rau's views on Palestine and the Jewish question.

Rau returned to New Delhi in early December 1947. In a report to the assembly's president, Rau highlighted Frankfurter's belief that a due-process guarantee was undemocratic. Frankfurter felt that due process would enable judges to veto laws validly enacted by the people's representatives. As Manoj Mate explains, Frankfurter's views were influenced by several U.S. Supreme Court decisions in the early 20th century. In those cases, a conservative majority struck down many socio-economic and welfare laws for interfering with an individual's liberty to contract. Relying on the substantive due process doctrine, the court reasoned that the liberty to contract fell within the Fourteenth Amendment's protection of liberty.

By the time that Rau met Frankfurter, however, the court had moderated itself. It refrained from interfering with progressive laws after President Roosevelt threatened to 'pack the court' by appointing new judges. Frankfurter, however, remained unmollified by what he had observed. Influenced by Harvard Law Professor Thayer, the justice firmly believed that judicial review under the guise of due process corrodes democracy. So opposed to due process was Frankfurter that he repeatedly advocated its repeal.

Interestingly, Alva argues that there is no evidence to suggest that Frankfurter had succeeded in convincing Rau to abandon due process all together. In fact, after Rau returned to Delhi, the drafting committee voted in January 1948 to retain the due process language in clause 16 of Rau's basic draft. However, the committee appears to have reversed itself shortly thereafter without any recorded discussion or vote. The draft constitution, which the committee finalised in February 1948, omitted any reference to due process. Draft article 15 was the functional equivalent of clause 16 in Rau's draft. It declared:

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

The Drafting Committee offered the barest explanation for this change. It simply noted that "procedure established by law" offered greater specificity. It borrowed this expression from article 31 of the Japan Constitution and retained the qualifier "personal" before "liberty" from Rau's clause 16.

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Granville Austin, the eminent constitutional historian, was convinced that it was Rau who orchestrated this silent but significant reversal. Reconstructing events after Rau's return to Delhi, Austin suggested that Rau persuaded Ayyar to have the drafting committee delete the due process clause before the draft constitution was issued. Ayyar's switch made a significant difference because the

committee was, until then, evenly divided between supporters and opponents of due process.

Alva acknowledges that Austin's privileged access gave him the unrivalled ability to offer such an account. Yet, Alva considers Austin's account to be "largely speculative" in some respects. Among other things, Alva argues that Austin ignores Rau's consistently held belief in some degree of due process protection. And yet — Alva complains — virtually every scholar and commentator has uncritically accepted Austin's narrative that it was Rau who influenced the drafting committee to drop due process.

It is certainly worth examining whether others, besides Rau and Ayyar, were responsible for omitting due process. However, until new evidence emerges, Austin's account must hold the day. After all, Austin's principal source was K.M. Munshi, a key member of drafting committee. Other assembly members, like T.T. Krishnamachari, also confirmed that it was Rau's report about Frankfurter's opinion that convinced the drafting committee to drop due process. Rau's involvement was also substantiated by Home Secretary H.V.R. Iengar who was previously served the Assembly's secretary. In a July 1949 letter to the prime minister's private secretary, Iengar stated:

> Mr. *Justice Frankfurter of the U.S. Supreme Court had himself suggested to B.N. Rau* that the due-process clause in the U.S. Constitution was undemocratic and threw an unfair burden on the judiciary. *It is as a result of this opinion* that the Drafting Committee reconsidered the matter (emphasis added).

It is also worth noting that, soon after the draft constitution of India was published, Rau wrote an article about the 1947 Constitution of Burma with whose framing he was involved. Importantly, the Burmese charter did not include a due process clause. It relied instead on the Irish Constitution's wording that no citizen shall be deprived of personal liberty "save in accordance with law." This formulation was even more restrictive than the "procedure established by law" wording of article 15A in India's draft constitution. Yet, Rau defended the Burmese provision on the ground that "exceptional measures" were required to deal with serious law-and-order problems following General Aung San's assassination in July 1947. Rau's reasoning seemed tailor-made to fit the situation in India following Partition, widespread communal riots, and Gandhi's assassination in January 1948.

Firestorm after omission

As Alva tells us, the omission of due process from the draft constitution caused a firestorm in the assembly. Backbenchers furiously opposed the decision to use "procedure established by law." It was an irresponsible cut-copy-and-paste job, members complained, undertaken without a proper appreciation of the Japanese charter's drafting history and structural framework. K.M. Munshi made a Herculean effort to retain due process. And Thakur Das Bhargava pointed out that it was ironical that the draft constitution — which only permitted *reasonable* restrictions on citizens' fundamental freedoms like assembly and movement — included no limitations on the government's ability to deprive a person's life or personal liberty.

For his part, Ambedkar seemed uncharacteristically ambivalent. He conceded that without due process, partisan legislatures could trample on individual liberties. He was, however, unwilling to let unelected judges decide whether a law was a good or bad one. Ambedkar's position is surprising. It was he who first put due process on the Assembly's agenda. Having switched sides in the drafting committee, Ayyar argued before the assembly that it was better to trust the legislature than risk a chamber of judges that could hinder the people's elected representatives.

Ayyar had the last word. Draft article 15 was adopted by a voice vote. It was later renumbered and became Article 21 in the final Constitution.

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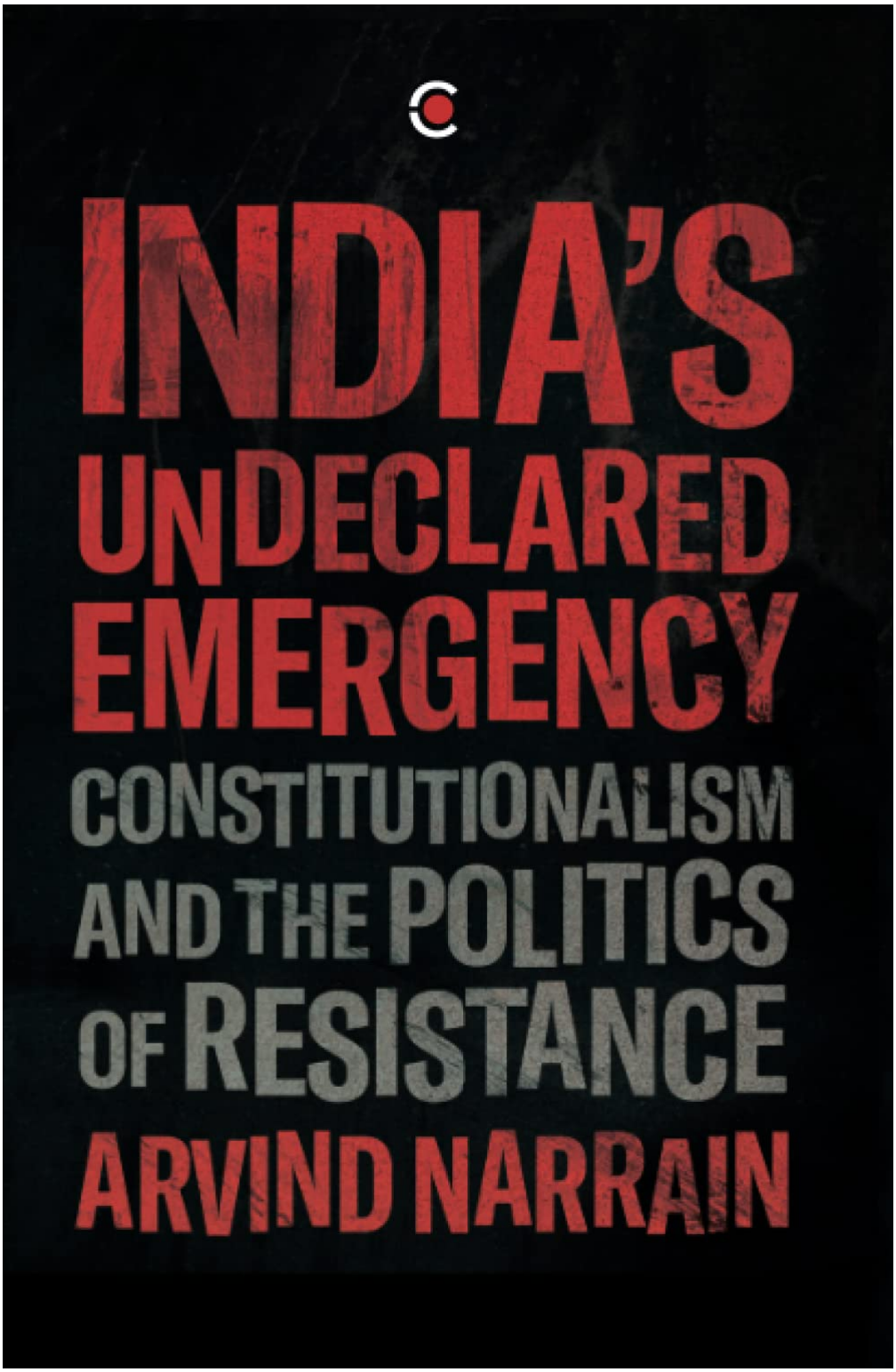
The drafting committee's decision to drop due process generated considerable opprobrium within and outside the Assembly. Troubled by the protests, Ambedkar belatedly introduced a new provision: article 15A (which eventually became Article 22 in the final Constitution). The article's first clause guaranteed every arrested person the right to legal representation and to be informed about the grounds for arrest. The second clause required arrested persons to be produced within twenty-four hours before the nearest magistrate. Ambedkar offered these provisions "as compensation" – Alva calls them an act of atonement – for the absence of due process.

But what one hand conceded, the other took away. The third-to-the-seventh clauses of draft article 15A (later Article 22) together established a framework to essentially continue the colonial practice of preventive detention: detaining individuals without charging them with a specific offence. In his recent book, *India's Undeclared Emergency*, Arvind Narrain suggests that draft article 15A aggravated the assembly even more than the omission of due process in draft article 15. It betrayed the fact that India's freedom-loving founding generation was unwilling to terminate a regressive practice, begun by the East India Company, that was fundamentally incompatible with democratic constitutional values. Few seemed persuaded by Ambedkar's legitimate point that the article, in fact, erected important guardrails to regulate the practice of preventive detention, which was going to continue anyway after India became a constitutional republic.



In his just released book, *Founding Mothers of the Indian Republic*, Achyut Chetan describes how the Assembly's women members made substantial, but overlooked, contributions to the due process and prevention debates. Arguing that preventive detention "without trial is obnoxious to the whole of idea of democracy," Purnima Banerji called for specific deadlines by which detenues ought to be released. Banerji also demanded that the government pay family maintenance for a detenue's lost livelihoods and income. In making this demand, Banerji drew on earlier work by her colleague, Hansa Mehta. Interestingly, this demand was vigorously opposed by another prominent women member, Durgabai Deshmukh who argued it was impractical and would irresponsibly drain valuable state resources.

Courts' interpretation

The assembly's decision to omit due process considerably curtailed citizens' ability to challenge laws and government actions that infringed their liberties. Barely a few months after the Constitution came into force, the Supreme Court declined to release the Communist leader A.K. Gopalan from preventive detention. The judges flatly denied Gopalan's prayer for a reasonable opportunity to establish his innocence before an impartial tribunal by pointing to the assembly's decision to delete references to due process. All that the Constitution required, the justices reasoned, was that a person be detained under a procedure authorised by law. The Court could not examine whether the procedure or its authorising law was just and fair. Dissenting, Justice Fazl Ali explained that the American constitutional lawyers, who framed the Japanese constitution, could not have intended "procedure established by law" to exclude basic procedural fairness which was at the heart of Gopalan's petition.

The *Gopalan* decision cast a shadow over civil liberties in India for many years. Yet, as time rolled by, judges grew discomforted by *Gopalan's* regressive logic. By 1970, the Supreme Court in *R.C. Cooper* seriously undermined *Gopalan*'s rigid view. It declared that the Constitution's key fundamental rights – equality in Article 14, the fundamental freedoms of Article 19, and the protection for life and liberty under Article 21 – were inter-related with each other. Laws had to satisfy each of these articles' requirements to be constitutionally valid. A few years later, in *Maneka Gandhi*, the Supreme Court declared that any procedure, which affected a person's life or liberty, must be just, fair, and reasonable. Moreover, the procedure had to be authorised under a validly made law.

The ruling in *Maneka Gandhi* was a significant departure from *Gopalan*. In subsequent cases, the Supreme Court went even further. It recognised that the Constitution does, in fact, embody basic procedural due-process requirements, such as adequate notice, legal representation, and a fair hearing – even if the text does not refer to them.

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Less clear, however, is whether the Constitution accommodates a substantive due-process doctrine that Frankfurter had strenuously opposed. Given the assembly's well-documented decision to omit due process, it had been generally understood that the doctrine had no relevance in India. However, this approach, too, began to be questioned after the *Maneka* decision held that both the procedure and the law must be fair and reasonable.

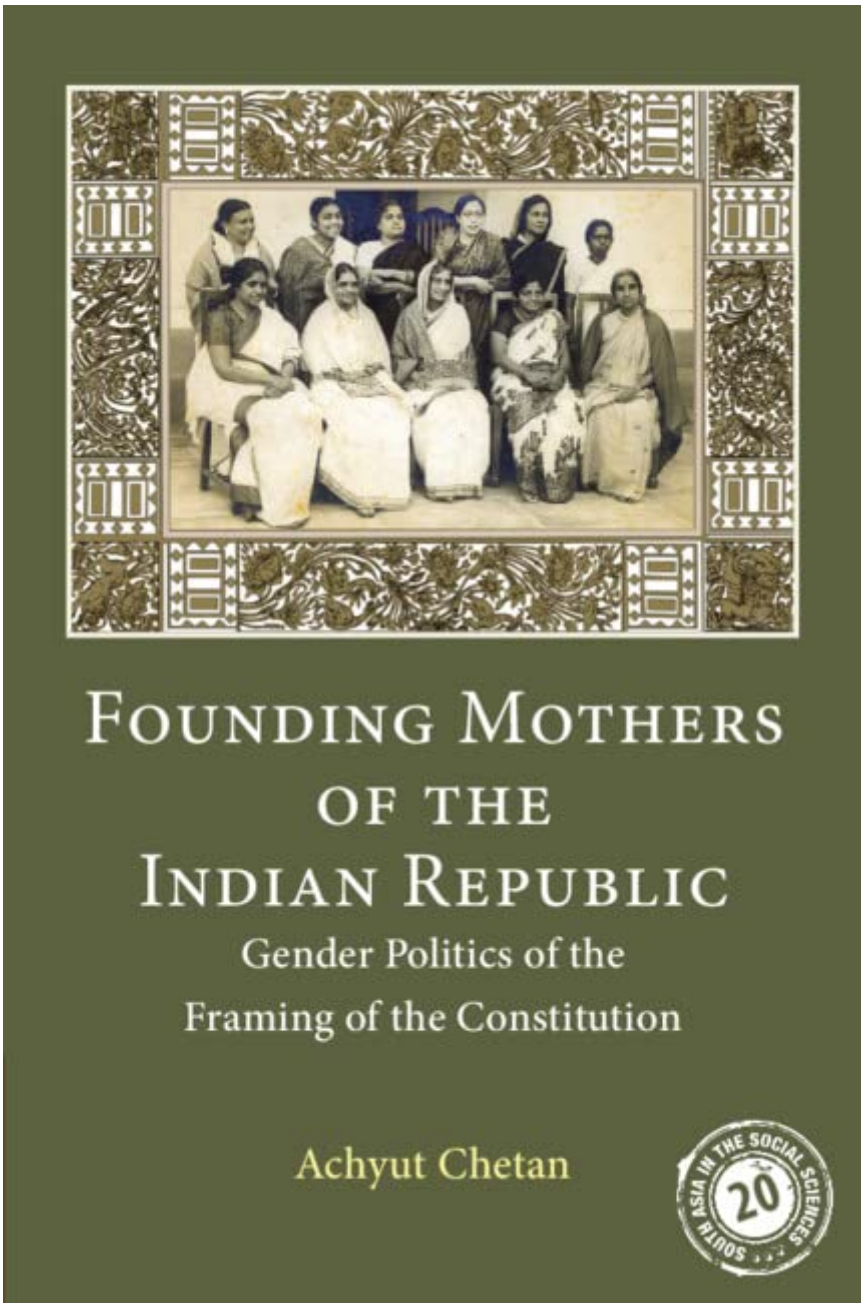
Justice Krishna Iyer, by finding that the Constitution protects prisoners' rights in *Sunil Batra* and other cases, and Chief Justice Y.V. Chandrachud, who invalidated mandatory death sentences under the Indian Penal Code in *Mithu*, appear to have relied on some form of substantive due process reasoning. Decades later, Chief Justice A.P. Shah and Justice S. Muralidhar of the Delhi High Court also relied on some form of substantive due-process reasoning to decriminalise consensual sex between same-sex adults in *Naz Foundation* by drawing on the unenumerated right to privacy. Finally, citing the *Maneka* and *Mithu* decisions, Justice Rohinton Nariman in *Mohammed Arif* announced that the wheel had come a full circle. "Substantive due process," Nariman declared, "is now to be applied to the fundamental right to life and liberty."

Nariman's view has, however, been disputed by other judges: notably, Justice Chelameswar, who reiterated the assembly's decision to omit due process, and Justice Nageswara Rao who delivered an illuminating lecture on the subject. On behalf of himself and three other judges, Justice D.Y. Chandrachud undertook a detailed examination of this question in *Puttuswamy-I*. To deprive persons of their life and personal liberty, Chandrachud ruled, the state had to follow a fair, just, and reasonable procedure prescribed by a law that did not infringe any fundamental right. Chandrachud, however, concluded that Indian courts should not apply a doctrine that the republic's founders had expressly rejected.

This conclusion, however, seems difficult to fully reconcile with a long line of cases that hold that the Constitution protects fundamental rights that are not expressly mentioned in its text. These unenumerated protections include the rights to travel abroad, a speedy trial, a clean environment, health, and shelter. As Manoj Mate points out, in recognising such unenumerated rights, Indian judges rely on the same interpretational technique that American judges use in substantive due process cases. The technique involves locating the unenumerated right in the Constitution's specific provisions or penumbras since the right is not specifically recognised by the text.

> In articulating and applying unenumerated rights, Indian courts have arguably gone even further than their American counterparts.

By 1993, in *Unnikrishnan*, Justice Mohan listed twelve such unenumerated rights. One of these rights, education, was later codified as a fundamental right in the Constitution itself through Eighty-Sixth Amendment. Twenty-four years later, Nariman updated this list to include 25 unenumerated rights. Most of these rights have been derived from or traced to Article 21's protection of a person's life and personal liberty. Chandrachud himself contributed to this list by locating a broad right to privacy in the Constitution in *Puttuswamy-I* and by striking down statutory provisions, which infringed that unenumerated right in *Puttuswamy-II (Aadhaar)*.



In articulating and applying unenumerated rights, Indian courts have arguably gone even further than their American counterparts. Courts in the United States typically invoke unenumerated rights only when reviewing whether a specific law or government action is constitutionally valid. Judges in India, however, have also relied on unenumerated rights to issue sweeping orders and remedial directions, particularly in public interest litigation cases that may not call upon a court to judicially review a specific law or governmental action. And in early January 2023, the Supreme Court held that some unenumerated fundamental rights, notably privacy, are horizontal – they can be enforced against the state as well as private citizens and entities. The every-day implementation and practical enforcement of these rights is, of course, another story.

Alternatives to due process

In 2022, the U.S. Supreme Court signalled a significant retreat from its decades-long progressive embrace of substantive due process in the celebrated case of *Roe v. Wade*, which recognised a penumbral right to privacy and abortion. In *Dobbs*, Justice Alito held that a penumbral right must be deeply rooted in American history to be considered an enforceable fundamental right. The majority overruled *Roe v. Wade* by holding that a right to abortion did not meet that standard. Justice Thomas even suggested that other substantive due process judgments, such as the one permitting same-sex marriage, should be reconsidered.

Whether and to what extent *Dobbs* will impact the use of the substantive due process doctrine in India remains to be seen. In any case, Indian courts have other tools and doctrines, besides due process, to review laws and executive actions that infringe a person's life or liberty.

One such doctrine is the concept of reasonableness. Since the Constitution's commencement, judges have examined whether laws and actions that impact the fundamental freedoms under Article 19, like speech, assembly, or movement, are "reasonable." After *Maneka*, judges may apply this reasonableness standard to measures that deprive a person's life and liberty under Article 21.

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Another doctrine is anti-arbitrariness, which emerged from *E.P. Royappa*. Under this doctrine, courts may invalidate government decisions that are arbitrary or capricious. When blended with *Maneka*'s just, fair, and reasonable standard, the *Royappa* anti-arbitrariness principle arms judges with sweeping power to review a wide range of administrative and contractual decisions. In *Sharaya Bano* (Triple Talaq) and *Puttuswamy-II* (Aadhaar), the Court held that even a statute may be held unconstitutional if it is found contaminated by manifest arbitrariness.

A third doctrine is proportionality. It basically requires that any law or executive action, which interferes with a person's rights, must not be disproportionate. Originally inspired by European jurisprudence, the doctrine has been constantly reshaped by Indian judges. Consequently, the doctrine's specific elements are confusingly described. Even so, proportionality is quickly emerging as the preferred benchmark in high-profile cases such as restrictions imposed in emergency situations and economic policy decisions, such as the 2016 demonetisation which the Supreme Court recently upheld.

It is especially notable that, in *Puttuswamy-II*, proportionality was applied to assess whether the statute in question violated the right to privacy. This approach of blending proportionality with an unenumerated right to test a law or action may be particularly important in cases involving information integrity, data protection, and communications and data privacy.

Deep well of Article 21

Liberty After Freedom reveals the peril and promise of a pithy and punchily worded provision like Article 21. No other article packs so much into such little space. Over time, Article 21 has been expanded and embellished to emancipate, enfranchise, and empower marginalised and vulnerable groups and individuals. And despite its birth defect in missing a due-process guarantee, the article is the fountainhead for contemporary articulations of constitutional rights, liberties, and freedoms. It is also a site for contest and struggle between citizens and the state.

These rights, liberties, and freedoms constitute the bedrock for Justice Gautam Patel's constitutional idea of India. Yet, it is only the vigorous practice of that idea that can sustain global appreciation for India's democratic experiment whether from foreign commentators, lawyers and judges, or leaders like President Barack Obama, who lauded India's commitment to fundamental rights seven decades after his predecessor Truman welcomed the Constitution's adoption.

(This review has been written solely in the personal capacity of the author.. It does not represent the views of any institution to which the author is professionally affiliated. The author is grateful to Arun Thiruvengadam, Suhrith Parthasarathy, Lalit Panda, Alok Prasanna, V. Venkatesan, Arvind Elangovan, and Dayaar Singla and others for comments and feedback.)

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