A Trojan Horse for Unrestrained Power? Due Process and Article 22 of the Constitution of India

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Abstract

The Constitution of India is one of very few that explicitly permits preventive detention. It does this through Article 22, on "Protection against arrest and detention in certain cases." This has functioned as a kind of a Trojan Horse in the Constitution, serving in the way in which it has been interpreted, even if not in its original intention, to extend executive power, and helping to create a permanent state of exception in which the fundamental rights of Indian citizens are ridden over roughshod. The paper examines recent writings on the Constitution to show how they shed light on the origins of Article 22 in the controversy over whether the right to life and liberty specified in Article 21 should be subject to due process of law, and on its implications—most recently in the passage of three new acts concerning the criminal justice system that significantly extend police power.

Keywords: Constitution of India, fundamental rights, preventive detention, due process of law, state of exception

¿Un caballo de Troya para un poder esenfrenado? Debido proceso y artículo 22 de la Constitución de la India

Resumen

La Constitución de la India es una de las pocas que permite explícitamente la prisión preventiva. Lo hace a través del artículo 22, sobre "Protección contra el arresto y la detención en determinados casos". Esto ha funcionado como una especie de caballo de Troya en la Constitución, sirviendo en la forma en que ha sido interpretada, aunque no en su intención original, para ampliar el poder ejecutivo, y ayudando a crear un estado de excepción permanente en el que los derechos fundamentales de los ciudadanos indios son pisoteados. El artículo examina escritos recientes sobre la Consti-

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tución para mostrar cómo arrojan luz sobre los orígenes del Artículo 22 en la controversia sobre si el derecho a la vida y la libertad especificado en el Artículo 21 debe estar sujeto al debido proceso legal, y sobre sus implicaciones—la mayoría recientemente en la aprobación de tres nuevas leyes relativas al sistema de justicia penal que amplían significativamente el poder de la policía.

Palabras clave: Constitución de la India, derechos fundamentales, prisión preventiva, debido proceso legal, estado de excepción

不受限权力的特洛伊木马？正当程序和印度宪法第22条

摘要

印度宪法是极少数明确允许预防性拘留的宪法之一。它通过宪法第22条“在某些情况下防止逮捕和拘留”来做到这一点。这在宪法中起到了一种特洛伊木马的作用，发挥了其被诠释的作用（即使诠释不是其原意），以期扩大行政权力，并有助于创造一种永久的例外状态，在这种状态下，印度公民的基本权利遭到践踏。本文分析了关于印度宪法的近期著作，以展示其如何在关于“第21条规定的生命权和自由权是否应接受正当法律程序”的争论中阐明第22条的起源，及其影响——最近通过了三项有关刑事司法系统的新法案，显著扩展了警察的权力。

关键词：印度宪法，基本权利，预防性拘留，正当法律程序，例外状态

Ultimately the story of due process and liberty in the Constituent Assembly was the story of preventive detention

— Granville Austin (1966, 102)

The Trojan Horse was the device whereby the Greeks, in the ancient world, managed to get inside the well-defended city of Troy and then to destroy it. The argument of this essay is that Article 22 of the Constitution of India can be seen as a kind of a Trojan Horse, introduced into the Constitution at more or less the last moment, and containing within itself—in the way in which it has been interpreted, even if not in its original intention—a

vehicle for ensuring the supremacy of the executive and eventually for the creation of a permanent state of exception in which the fundamental rights of Indian citizens are ridden over roughshod.[1] The result has been that India has come ever closer to slipping into "the abyss of unrestrained power," feared by a Chief Justice of India, Yeshwant Vishnu Chandrachud.[2]

Article 22 (summarised in the Appendix) is entitled "Protection against arrest and detention in certain cases," and in its first two clauses, taken almost verbatim from the Criminal Procedure Code of the colonial government of India, it does indeed set out provisions for the protection of civil liberty—the right of a detenu to be informed about the grounds for arrest, the rights to legal counsel, and to being produced before a magistrate within twenty four hours. The Article goes on to say, however, that nothing in the first two clauses applies to a person detained under "any law providing for preventive detention." It then proceeds to specify various guidelines for such preventive detention that in their wording provide a great deal of latitude for the exercise of executive power. The 44th Amendment Act of 1978, passed in the aftermath of the Emergency regime of Indira Gandhi, included revisions of Article 22 intended to provide for stronger safeguards in cases of preventive detention—but these provisions have still not been notified after more than 40 years. Successive governments of different persuasions have proven unwilling to give up the powers that Article 22 allows them—and certainly not the government of Narendra Modi. The three Criminal Justice Acts signed by the President of India on December 25, 2023, in their provisions, make significant use of these powers, as I discuss in the conclusion of this paper.

The Constitution of India is unusual in providing explicitly for preventive detention and supplying constitutional authority for the executive to exercise scarcely constrained powers to detain citizens for extended periods, so limiting the right to life and liberty promised in Article 21. The origins of Article 22 lie in one of the most fiercely debated questions taken up by the Constituent Assembly—that of whether or not the right to life and liberty should be made subject to "due process of law." What became Article 22 was introduced in an effort to compensate for what was seen by Ambedkar and others as a limitation of Article 21—perhaps even a "mistake" in its phrasing, though Ambedkar himself did not use this word—when the Assembly agreed *not* to make it subject to "due process."

The fear that Granville Austin expressed in his classic study of the Constitution, that "The authority given to the Government of India [by Article 22] is a potential danger to liberty"[3] (Austin 1966, 113)—has unfortunately proven more than amply justified, as Austin himself argued in his later study of the "working" of the Constitution (Austin 1999, 507–15). Though there are grounds, persuasively set out by Gautam Bhatia in his book *The Transformative Constitution* (Bhatia 2019, 287–93), for interpreting Article 22 dif-

ferently, and more positively than Austin did, Bhatia himself is fiercely critical of what he calls the "preventive detention regime" that has, in effect, been legitimised by the Article. With the legal scholar Abhinav Sekhri, we have to ask, "If Article 22 sought to restrict the use of preventive detention, then why has it failed so miserably in achieving the result?" (Sekhri 2020, 179). The points at issue here are ones of great importance for those of us who are interested in the history of democracy in India, and who are concerned about its erosion.

This essay examines several recently published books and articles for the light that they shed on the debate over "due process," on the origins of Article 22, and on its implications. In addition to the work of Bhatia and Sekhri, I refer to an important part of the argument of Madhav Khosla's book, *India's Founding Moment*: *The Constitution of a Most Surprising Democracy* (2020), and most extensively to Rohan Alva's study, *Liberty After Freedom: A History of Article 21, Due Process and the Constitution of India* (2022). Alva's focus is close to my own, though we finally reach different conclusions. Throughout, I refer to Granville Austin's classic work on the Constitution as a kind of a benchmark.

A Narrative History of Due Process and Articles 21 and 22

What I take to be the accepted narrative about due process and Articles 21 and 22 of the Constitution of India, is that of Granville Austin. The story is retold in gripping detail by Rohan Alva, a counsel practising in the Supreme Court of India, in his book *Liberty After Freedom* (2022). Citing a Supreme Court judgement of 2018, Alva also sheds further light on parts of the story, as well as bringing it up to date. Whereas at the time the Constitution was introduced, he says, Article 21 was widely considered unworthy of being labelled a fundamental right, it is today considered by the Supreme Court to be the "Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned" (Alva 2022, 9).

As Austin argues, a crucial decision in India—as in every other country that has a written constitution—had to do with what the rights to life, liberty and property of individual citizens should be, and how far they had to be limited in the interests of society as a whole (Austin 1966, 84). Those who framed the Constitution referred quite frequently to the Constitution of the United States, and as regards the decision about the balance between individual rights and the demands of pressing problems of social reform and security, the words of the Fifth Amendment to the American Constitution, "… nor shall any person … be deprived of life, liberty, or property without due process of law," were initially taken over verbatim. The aim of Alva's book is to answer the question of how it came about that "the Constituent Assembly came to disavow making any reference to 'due process' in the Constitution [so that Article 21] rather than operating as a bulwark against the state … opened the gates for life and personal liberty to suffer all

forms of deprivation with legal backing" (Alva 2022, 12). But what do the words "due process of law" mean?

This question came up at a meeting of the Advisory Committee (of the Constituent Assembly) on April 21, 1947, in the course of discussion of the Draft Report of the Fundamental Rights Sub-Committee,[4] when Pandit G. B. Pant, the prime minister of the United Provinces, argued that due process should be understood as referring only to legal procedure. But his argument was quickly countered by the noted Tamil lawyer, Alladi Krishnaswamy Ayyar, a key member both of the Sub-Committee and of the Drafting Committee, who said that "the aim of due process is to limit legislative power," while recognising that this might call into question, for example, the tenancy legislation that was then being introduced, and that much would depend on the individual views of judges. This opinion drew a swift response from Pant. The future of the country should be determined by "the collective wisdom of the representatives of the people" and must not be subject to the ideas of a few judges. "To fetter the discretion of the Legislature," he said, "would lead to anarchy" (Austin 1966, 85; quoted in Alva 2022). As Dr Ambedkar was to say later, in the Constituent Assembly, fundamentally what was involved in the difference of view was "the question of the relationship between the legislature and the judiciary" (CAD 13 Dec. 1948).

The exchange between Ayyar and Pant, which anticipated later, heated debates in the Constituent Assembly, clearly reflected different understandings of "due process." These are discussed by Madhav Khosla in *India's Founding Moment* (2020, Ch. 1). What was at stake was whether the language of Article 21 concerning the right to life and liberty (and only in its early stages the right to property[5]), should invoke what is called "procedural due process" or "substantive due process." The former refers to the power of the courts to review an action of the state and to examine whether it conforms to the statute that applies. Is the procedure required by the law being followed? In Khosla's example, if the law requires that the police hold a search warrant before entering a property, has this requirement been satisfied? "Substantive due process," however, which is what the language used—following the Fifth Amendment—in the *Interim Report of the Sub-Committee on Fundamental Rights* implies, means that the courts have the power to consider the validity of the legislative enactment itself (the "substantive law," not just its procedural requirements). Is the law itself fair, just, and reasonable, or does it—in itself—violate the right to life and personal liberty? There is, clearly, a big difference between the two ideas of due process, and this is what was at issue in the deliberations of the Drafting Committee and then in the controversy that took place in the Constituent Assembly over the Draft Constitution. In the end, the language that appears in Article 21, in which the right to life and liberty is subject "to procedure established by law," represents "procedural due process."[6] This meant, Alva argues, "that no

matter how unconscionable the procedure and how odious the ends it hoped to attain, the fact that a law had been enacted conferred complete immunity on the state" (Alva 2022, 12).

Khosla's discussion of the implications of the disagreements about due process is in the context of his argument about the importance of what he calls "codification" in the Constitution. The Constitution was envisaged by its framers, he argues, as an instrument of political education. It was to be the means of building a new civic culture, in a society ordered historically by norms and rules of hierarchy. To this end it was important to "create common meanings around democratic principles where few such meanings existed." (Khosla 2020, 28). Khosla argues, therefore, that the critical concern on the part of the framers when it came to the formulation of Article 21 was to avoid uncertainty or inconsistency. The experience in the United States showed, according to Alladi Krishnaswamy Ayyar—whose radical change of views about due process was probably a crucial influence on the decision eventually taken in the Constituent Assembly—that substantive due process could give a lot of power to a few judges whose decisions were influenced by ideology, leading to lack of consistency in due process.[7] It was this concern Khosla thinks, that accounted for the clause chosen by the Assembly, that the right to life and liberty should be protected only by procedural due process, rather than—as others, including Granville Austin, think—a preference for state power. This argument finds some support in Alva's account. He argues that B. N. Rau, the Constitutional Adviser, and a key figure in the narrative,[8] believed that the protection of the fundamental rights required that they should not be defined at a broad level of generality: "For Rau rights must not be structured in a manner that results in courts trying constantly to divine [their] meaning …" (Alva 2022, 93).

The importance of due process first came up in the Constituent Assembly on December 17, 1946, when Dr Ambedkar was invited to speak by the President of the Assembly. In his remarks Ambedkar expressed his surprise that the *Resolution on Aims and Objects,* that was under discussion, appeared to offer no remedies to citizens in the event that their rights were invaded by the state: "Even the usual formula that no man's life, liberty and property shall be taken away without due process of law, finds no place …." Thereafter, in the initial discussions of the Sub-Committee on Fundamental Rights, and in its Interim Report, presented to the Constituent Assembly in April 1947, the reference to due process went more or less without question. What happened after this, so that by the time the First Reading of the Draft Constitution took place, from November 4, 1948, the wording of the relevant article (Article 15 at this stage) had been changed from "due process of law" to "procedure established by law," is not entirely clear.

It is well known that B. N. Rau, though he continued to refer to "due process of law" in the relevant article (Clause 16 of Chapter II) of the Draft Constitution that he had drawn up by

October 1947, was unhappy about the possibility that it could lead to the court invalidating laws with a public welfare goal if they encroached on individual liberty. It was for this reason that he introduced the qualifying term "personal," in connection with liberty, in his Draft, to guard (as he explained in a note) against the possibility that the right to liberty could be applied, for example, to strike down price-controls as conflicting with freedom of contract. It was after the publication of his Draft that Rau travelled to the United States, and his meetings in particular with a judge of the Supreme Court, Felix Frankfurter, seem to have convinced him that due process could have outcomes that are undemocratic, when a few judges veto legislation passed by representatives of the nation, and also be burdensome to the judiciary, because of leading to constant dispute (the fears subsequently articulated by Alladi Krishnaswamy Ayyar in the Constituent Assembly [CAD 6 Dec. 1948]). Austin reports that "It was Rau's enthusiastic espousal of Frankfurter's views that originally caused the Drafting Committee to reconsider the issue [of due process]" (Austin 1966, 104). What happened subsequently in the Drafting Committee is unclear, though Austin's enquiries led him to think that it was A. K. Ayyar's change of view that caused the Committee to accept Rau's proposal to use the phrase "according to the procedure established by law"—supplying only procedural safeguards but having a clarity that would be lacking if "due process" were to be used (in line with Khosla's later argument).

Alva qualifies Austin's account, though questions still remain. He examines B. N. Rau's role very closely, concluding—*contra* Austin—that Frankfurter and the other American lawyers whom he met, did not in the end persuade Rau to abandon due process altogether: "Rau was not opposed to due process in its entirety and this meant that substantive due process could be pressed into service in all of those situations in which state action was for a purpose *other than public welfare*" (Alva 2022, 118, my emphasis). But Rau's efforts to introduce a limiting principle so that the due process guarantee would not affect laws promoting public welfare were not accepted in the Drafting Committee. Austin speculated that it was Rau, after his amendments failed to win acceptance, who was responsible for the change in the wording of what was eventually to become Article 21. This view was based on the recollections of K. M. Munshi. Alva, however, thinks that this doesn't correspond at all well with the evidence on Rau's "consistent stand on retaining some form of due process protection in the Constitution" (Alva 2022, 146). He does not disagree, however, with Austin's conclusion that it was probably Alladi Krishnaswamy Ayyar who changed his views so that the decision of the Drafting Committee swung against due process, and like Austin he thinks that the context of the violence that followed Partition, coupled with Gandhi's assassination, played an important part in this decision. The fear that due process would stand in the way of efforts at curbing the violence that India was witnessing may

well have been decisive—rather than detailed legal argument. This interpretation is perhaps borne out, not only by statements that were made by members of the Constituent Assembly, but also by the inadequacies of the explanations provided in the notes to the Draft Constitution for the change in the wording of its Article 15. As Alva argues, the reasons presented are flimsy and inadequate (Alva 2022, Ch. 3). This tends to support the broader argument in his book against an "originalist" reading of Article 21, or indeed of the Constitution as a whole, given the circumstances of their creation—not least that the Drafting Committee necessarily took a good many important decisions with few members present (a point that was recognised in the course of debates in the Constituent Assembly).[9]

When the discussion of the article (then Article 15) of the Draft Constitution on the right to life and liberty at last came up in the Constituent Assembly on December 6, 1948, it was greeted with dismay by many members. Kazi Syed Karimuddin led the critical charge with an amendment proposing the restoration of the original language of "due process." This, and similar amendments, were supported by a good many others, including K. M. Munshi, of the Drafting Committee—and one of the most influential members of the Assembly—who argued that Article 15, as it stood:

> 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 are such as would be proper and justified by the circumstances of the case. We want to set up a democracy; the House has said it over and over again; 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 anxious 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. (CAD, 6 Dec. 1948)

Speakers forcefully expressed their fears that the draft Article 15 would allow government to detain and jail people without giving them a fair and open hearing, or the chance to prove their innocence, simply by passing a law to that effect, that could not be questioned by the Supreme Court. In summing up—after a postponement that may have won him time to reach a compromise with critics in the Assembly—Ambedkar referred to the dangers posed on the one hand, by a legislature "packed with party men" bent on abrogating fundamental rights, and on the other by a situation in which "five or six gentlemen sitting in the Federal or Supreme Court [are] trusted to determine which law is good and which law is bad" (CAD 13 Dec. 1948). He left it to the house to decide between the two,

and the outcome was that Article 15 was accepted, with its language of "procedure established by law" inclining to the authority of the legislature.

But this was not the end of the matter. Ambedkar came back to the Constituent Assembly in September 1949, referring to the controversy over the wording of Article 15, both in the Assembly and outside. "No part of our Draft Constitution has been so violently criticized by the public," he said, and he expressed his own unhappiness with it: "… 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" (CAD 15 Sept. 1949). It was for this reason, he explained, that he now introduced Article 15-A—which eventually became Article 22—and that brought into the Constitution provisions from the Criminal Procedure Code intended to provide protections for detenus. He argued that the proposed Article provided for the substance of the law of due process, even without using these words, and that it represented "compensation for what was done … in passing Article 15" (CAD 15 Sept. 1949). While conceding that it might not satisfy "enthusiasts for personal liberty"—Ambedkar expressed himself "satisfied that the provisions are sufficient against arbitrary or illegal arrests" (CAD 15 Sept. 1949). He also referred to the "present circumstances of the country" that justified the government's having some powers of preventive detention. Granville Austin argues that the Assembly's reaction "was, in general, favourable" (Austin 1966, 111). Yet the records of the debate show that Ambedkar's assurances were not accepted by many members of the Assembly, who continued to argue for "due process."[10] Sekhri perhaps more accurately reflects the tenor of the prolonged debate when he writes: "To say that these proposals received flak from members of the Assembly would be an understatement" (Sekhri 2020, 178). In the end, however, at this stage, only amendments that Ambedkar himself proposed were adopted, and 15-A was passed.

Yet the Assembly was still not done with the issues raised by the phrasing of what was to become Article 21, and the response to them in Article 22. Two months later, just ten days before the Constituent Assembly concluded its work, an amendment was moved to 15-A, and soon accepted, that embodied the views of Sardar Patel's Home Ministry—concerned, Austin records —that 15-A threatened to hamper its police activities. The effect, in Austin's view, was to reduce the authority of the courts and to reassert the powers of Parliament to detain people with much less protection provided by the judiciary than had been intended by Ambedkar in the new article. Article 22 effectively excludes preventive detention cases from direct judicial scrutiny. Thus it came about, as Sekhri argues, that the Indian Constitution includes—puzzling though it may seem—a clause among the Fundamental Rights that effectively "offers a guide to legislatures on how to pass laws that allow for preventive detention" (Sekhri 2020, 176). Little was left of the protection that due process would have provided for personal freedom, and Austin

concludes his account of these events by saying that though Assembly members had resisted it, "in the end they had pinned their faith upon the mercy of the Legislature and the good character of their leaders" (Austin 1966, 112). Both Abhinav Sekhri and another legal scholar and practicing lawyer, Gautam Bhatia, contend that Article 22 was intended to *prevent* excesses on the part of the legislature, or as Bhatia puts it, "close reading of the Constituent Assembly debates suggests that Article 22 was not an *authorizing* provision, but a *saving* provision" (Bhatia 2019, 289, original emphasis). But both also show that in the way Article 22 has been interpreted it has served to legitimize rather than to curb the use of the power of preventive detention (Sekhri 2020, 180-181).

Subsequently, under the first Preventive Detention Act, passed in haste in February 1950, only 30 days after the promulgation of the Constitution, the courts were forbidden from questioning the necessity for any detention order. The Act was tested in the case of the communist leader, A. K. Gopalan who, having been in detention since December 1947, was further detained by the Government of Madras under the Preventive Detention Act. Gopalan made a number of claims against the Madras Government, including the claim that the provisions of the Act violated Article 22 of the Constitution. The judgement of a bench of the Supreme Court, however, upheld the legislation and the powers of the government under Article 22—lending authority, for years to come, to the view that laws on preventive detention were subject only to the tests of article 22, and not the other fundamental rights. Article 22 was held—though only by the Attorney General and one of the judges in the Gopalan case, not by a majority, as was claimed in the Court on later occasions—to be a "complete code." In other words, the legality of preventive detention laws is limited to being tested only against Article 22, and not against other fundamental rights (Sekhri 2016). The fundamental rights are to be read separately (they are, as it were, in "silos"). Austin summed up all these developments in his anxious words, "The authority thus given to the Government of India is a potential danger to liberty" (Austin 1966, 113)—though he went on to say that this authority, so far, had been used with restraint. The faith in the Legislature and in the leadership reflected in the deliberations of the Constituent Assembly seemed to have been justified. But what has happened over the longer run?

Rohan Alva's argument about what has happened since the inauguration of the Constitution, touched on his Prologue and then adumbrated in the Epilogue, is that thanks to the judgements of the Supreme Court, first in the case of *R. C. Cooper v. Government of India* (1970), when the bench passed a judgement resting on the view that rights form a whole and have to be read together (they are not in "silos," as had been interpreted in *Gopalan*), and then in the celebrated case of *Maneka Gandhi v. Union of India* 1978, the interpretation of Article 21 has been radically changed. "Personal liberty" has come to

be regarded as a phrase of "widest amplitude," connoting "a variety of rights which go on to constitute personal liberty"; and the phrase "procedure established by law" has come to be interpreted "to mean not just an enacted law but a law which was 'not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied'" (Alva, 2022, 332). Alva sums up by referring to Justice Krishna Iyer, whom he describes as one of the greatest Supreme Court judges. Krishna Iyer noted in a judgement reached soon afterwards "that although the Indian Constitution did not enumerate a due process guarantee, after the decision in *Maneka Gandhi*, due process guarantees were for all intents and purposes recognized by the Constitution" (Alva, 2022, 335, citing Krishna Ayer). Alva thus ends his version of the story on a celebratory note—though his view is not one that is shared by all legal scholars.[11]

The Preventive Detention Regime

Alva's note of celebration is also difficult to reconcile with the history of preventive detention that Upendra Baxi, cited by Gautam Bhatia, once described as a distinct legal regime, parallel to the criminal justice system. The latter is "characterized by elements of due process, personal rights and rigorous judicial review of State power," but "these features [are] absent in a parallel 'preventive detention system'" (Bhatia 2019, 255). The authority given to the Government of India to which Granville Austin refers, has not been used with the restraint that Austin thought he had observed up to the early 1960s.

The Preventive Detention Act 1950 was extended several times before it finally expired in 1969—to be replaced by a series of further acts of Parliament providing for preventive detention. A standard justification, in the words of a Congress Parliamentary Party pamphlet, was that public order comes first, "then all endeavours to promote social welfare are possible and practicable." Legislation under Article 22 became progressively more stringent, and was reinforced during the national emergencies of 1962, when India fought with China, and of 1971, in the conflict with Pakistan. The Indira Gandhi government also passed the Maintenance of Internal Security Act (MISA) in 1971. Based on the Preventive Detention Act, MISA allowed for the indefinite preventive detention of individuals, search and seizure of property without warrants, and for wiretapping, with the stated objective of the quelling of disorder and meeting external threats to national security. The Act was used, infamously, during the Emergency to justify the arrests of political opponents, and many thousands of people were detained for long periods.

The Janata government, that took office in 1977, had pledged the repeal of MISA, and did so in 1978, when it also passed the 44th Amendment that was supposed to provide for safeguards against a recurrence of the Emergency. Of particular significance were the safeguards added to Article 22 to tackle

what the law minister of the time called the "evil" of preventive detention. The Janata government, however, even after drawing up the 44th Amendment, argued for the value of the instrument of preventive detention in countering economic offences (such as black marketing), as well as in protecting national security. The relevant section 3 of the 44th Amendment, making for independent judicial review of preventive detention orders, has still not been enforced, more than 40 years after its passage in 1978. Successive governments have failed to bring the amendment of Article 22 into force, as an open letter submitted in 2021 by one hundred former civil servants to the law minister, pointed out. They asked that it be "notified" (enforced), in the context of what the signatories of the letter described as "brazen abuse of preventive detention laws in gross violation of human rights."[12]

Contemporary legal scholars' criticisms of the legislation on preventive detention amply justify the concerns that Austin expressed. Though Sardar Patel spoke in Parliament of his personal anguish over the need for the 1950 Act, why then, Abhinav Sekhri asks, "if the anguish was real," should it have been necessary to "craft a statute that treated persons in independent India worse than what the colonial regime had done?" (Sekhri 2020, 181). He points out—among other criticisms—that the Preventive Detention Act reduced the level of scrutiny required to regulate executive officers' use of the power from that which had prevailed under the colonial state, by excluding the word "reasonable" as a test. It further limited the scope for independent judicial review, and provided fewer rights to detained persons than did existing provincial laws of colonial India, or than had obtained in wartime Britain, including proscribing any court from allowing discussion of either the grounds of detention or the hearing before the Advisory Board. Article 22, as Sekhri and Bhatia have argued, has served in practice, thanks to constitutional jurisprudence, to authorise rather than to limit the use of the power of preventive detention (Bhatia 2019, 294-95, on the flaws in the way Article 22 has interpreted; Sekhri 2020, 180-81). Sekhri goes on to discuss the extent of "judicial abnegation," with the Supreme Court's repeated acceptance of the logic of limited judicial review, as in judgements relating to the National Security Act 1980—which has been widely criticized as an instrument for repression of fundamental rights (Austin 1999, 508-9). While he refers, like Alva, to the way in which *Maneka Gandhi* is seen as having, in effect, recognized due process, he also notes that the opinion of Chief Justice Beg in this case was that due process in the context of preventive detention meant nothing more than what Article 22 guarantees. The burden of Sekhri's argument is that there is a strong case for the deletion of Article 22 (though surely not for the protections provided in clauses (1) and (2) of the Article—Sekhri perhaps overstates his case and the objective that he seeks might be better served by the notification of section 3 of the 44th Amendment).

Gautam Bhatia holds that Article 22, no matter what its original intention, and the arguments from *Cooper* against reading the fundamental rights separately from each other notwithstanding, has been interpreted effectively to insulate preventive detention from the rest of the Fundamental Rights. He concludes, "The preventive detention regime is our first, judicially sanctioned state of exception" —using the term first suggested by the German jurist Carl Schmitt, when he wrote "Sovereign is he who decides the state of exception": the "sovereign" can suspend civil liberties in the name, supposedly, of the public good. This is exactly what has happened in India's preventive detention regime, and it has been sanctioned by the courts, which have upheld executive supremacy and "judicial abnegation" (or deference). There has been, Bhatia claims, "an almost overwhelming trend in Indian constitutional jurisprudence: the courts' willingness to uphold and endorse laws that curtail civil liberties by citing exceptional situations" (Bhatia 2019, 253). Court judgements have had the effect of normalizing the "state of exception," and of endorsing the establishment of "a permanent state of emergency."

Preventive detention may have been the first judicially sanctioned state of exception, but the Constitution also allows, of course, for the President to declare a state of Emergency, as happened in 1975, and elements of it "have been repeated in a slew of 'anti-terrorism laws'[13] and have been upheld by the Court" (Bhatia 2019, 267). What Bhatia argues is that the idea that India is subject to a whole range of threats from terrorism—from Pakistan, from Muslims in general, from Khalistanis, and increasingly, from all those who question in any way the authority of the present regime—has become so generally accepted that a permanent state of emergency now seems perfectly normal. The Supreme Court has participated in this logic. Its upholding of the terror statutes has followed a pattern, beginning with the construction of an uncontested narrative that justifies the idea of the existence of state of exception. Then, the "vesting of concentrated power in the hands of the executive, through clear departures from established rules of criminal law and criminal procedure, is justified by referring back to the state of exception." There is no judicial challenge to the idea of the state of exception. Bhatia writes, "the Court effectively requires that the Constitution be moulded and modified so that it fits with the demands and requirements of the state of exception," rather than seeking to bound the "drastic provisions," of a law such as the UAPA, by referring them to the fundamental rights. The "state of exception" has "woven itself so intimately into the fabric of the constitutional cloth," Bhatia thinks, "that it is no longer clear what is normal and what is the exception" (quoted in Bhatia 2019, 276).

The significance of the case of *Jyoti Chorge v. State of Maharashtra* (2012) for Bhatia is that the ruling of Justice Abhay Thipsay in the case involved a systematic repudiation of the logic of the state of exception. The case concerned two members of a troupe of

players who had used music and poetry to fight social injustice, and who were accused of being members of the proscribed Communist Party of India (Maoist)—of being "Naxalites." Their case involved a plea for bail after they had already spent eighteen months in jail under UAPA. Thipsay argued that because of the "drastic provisions" of UAPA, the concept of "membership" needed to be interpreted in the light of Article 19 of the Constitution (on "Protection of certain rights regarding freedom of speech, etc."), and, doing this, he rejected the grounds that the prosecution offered to substantiate the claim that the two were "members" of the CPI (Maoist). The argument of the prosecution was that there is a threat to the nation from the CPI (Maoist), and that evidence of any association of a person with this organisation is sufficient to make them "members." Thipsay's ruling included a statement to the effect that Indians who are concerned about the condition of the "weaker sections" of society might well be influenced by, and even attracted to Maoist philosophy, but this did not make them all "members" of an organisation dedicated to the overthrow of the state. Thipsay remained unmoved, Bhatia notes, by "incantations" of *salus populi suprema lux* ("the people's welfare is the supreme law"). In short, Justice Thipsay's reasoning in the case "challenged the very legitimacy of the permanent normalizing of the state of exception, with its attendant erosion of foundational civil rights" (Bhatia 2019, 281).

Bhatia's wider argument—which shares a lot with those both of Austin and of Khosla—is that the Constitution is imbued with a transformative vision. With independence and the foundation of the republic, Indians were no longer *subjects* but *citizens,* and the Constitution aimed to bring about a shift from the "culture of authority" that prevailed under colonial rule to a "culture of justification." What he means is that the accountability of the executive is fundamental in a democratic system, such as the Constitution aimed to establish. Those who, as he puts it, "for a time" exercise power, must justify their actions to citizens, and before the law. This, in his view, is what Ambedkar sought to achieve with Article 22—to require the executive to justify preventive detention. But as Bhatia himself and Sekhri have both shown, this not how the Article has been interpreted on a good many occasions by the Supreme Court, with the result that, "Starting with treating preventive detention as a 'complete code,' and emergency powers as non-justiciable, the Court has incrementally extended constitutional insulation to anti-terror laws, by extending the logic of the state of exception" (Bhatia 2019, 294). The significance of Justice Thipsay's reasoning in *Jyoti Chorge* is that he challenged this logic, and the culture of authority reflected so clearly in the UAPA. The tragedy is that though "Not rejected by the Supreme Court, but not endorsed either [Thipsay's judgement] enjoys a curious life in limbo" (Bhatia 2019, 253).

Conclusion

The contemporary writers whose work I have considered all engage, to a greater or lesser extent, with Granville Austin's study of the Constitution. Like Austin, all of them, though most expressly Bhatia and Khosla, interpret the Constitution making process, and its outcome, as having a transformative intention—what Bhatia aptly puts, in the context of his criticism of the idea of continuity from the colonial legal system to that of independent India, as the aim of bringing about the shift from a culture of authority to one of justification, in a democratic political system. All the four writers also engage, as Austin did, with the problem posed by the presence in Chapter III of the Constitution, of Article 22. In it, Austin saw a potential danger to liberty, and hence to Indian democracy. Much would depend, as he saw it, on "the mercy of the Legislature and the good character of [India's] leaders." Austin himself, in his later study of the working of the Constitution, showed that the framers' faith in these had proven misplaced, though he retained his belief in the success, imperfect though it might be, of India's democracy. Bhatia and Sekhri, taking account as they do, of the events of this century—and *contra* Alva's benign view of Court judgements—are very much less sanguine. No matter what the intention behind Article 22, the work of these writers shows that it has proven to be a Trojan Horse for the endorsement of executive supremacy and the extension of the logic of the state of exception that now so much endangers Indian democracy.

These trends have been taken further in the three Bills on the criminal justice system introduced into Parliament in August 2023 by the Home Minister Amit Shah and passed into law after little deliberation—and in the absence from Parliament of 143 opposition MPs, who had been suspended on dubious grounds—in December of that year. The process was sadly typical of the 17th Lok Sabha, in which bills have commonly been pushed through without serious deliberation or debate and in defiance of what are generally understood to be the norms of democratic government. The three new Acts, which have Sanskrit titles (an innovation), are intended—the government claims—to "decolonialise" the criminal justice system by replacing the Indian Penal Code, the Indian Evidence Act and the Criminal Procedure Code that had been inherited from the colonial government, with "laws made by India, for India and made in Indian parliament," according to the words of the Home Minister. No matter that a major part of each of the three new Acts reproduces the colonial legislation. In what is clearly new in the Acts, legal scholars find a clear intent to enhance the powers of the police and the discretion that the police may exercise, striking at the heart of civil liberties protection. G. Mohan Gopal found evidence of an intent "to establish permanent extra-constitutional emergency powers through statutory means" (Gopal 2023)—a view broadly shared by Abhinav Sekhri who saw in the bills the most significant undercutting of the

democratic promise of the Constitution since the retention of laws of preventive detention (under Article 22) (Sekhri 2023). The concerns of these scholars, and others (Bhalla 2024), are based —among other factors—on the ways in which the new legislation expands police powers for custodial detention and the already considerable powers of search and seizure that the police have; on the dilution of current laws in such a way as to allow the police to harass complainants and to refuse to register First Information Reports for legitimate complaints; on the effective duplication of the already draconian Unlawful Activities (Prevention) Act [UAPA] that allows the police to prosecute critics and opponents of the government on the basis of doubtful or even of fabricated evidence, but with a statute that does not have even the limited safeguards that UAPA includes;[14] and through enhancing the possibilities for the prosecution of those the government doesn't like, for the wide and ambiguously defined crime of "endangering sovereignty, unity and integrity of India" (which might, for example, include simply the publication of information inconvenient to government). In sum, the new legislation expands the scope of preventive detention, initially given constitutional legitimacy by Article 22. The Article surely has proven to be a Trojan Horse for executive power, enabling it to constrain citizens' freedoms and constrict democracy.

Appendix: Provisions of Article 22

Clauses (1) and (2) of Article 22 state that all those arrested and detained in custody have a right to legal counsel and the right to be informed about the reasons for their arrest, and that they should be produced before a magistrate within 24 hours. Article 22(3)(b), however, says that these clauses do not apply to those detained "under any law providing for preventive detention." Clause (4) states that "No law providing for preventive detention" shall authorise detention for longer than three months, unless this is approved by an Advisory Board constituted by "persons who are, or have been, or are qualified as judges of a High Court." But this is then made subject to Clause (7) which essentially gives Parliament the power to decide otherwise. Clause (5) states that the authority responsible for detention should communicate the grounds for it to the person concerned and afford him "the earliest opportunity of making a representation against the order." Clause (6), however, then says that nothing in (5) should require the authority concerned "to disclose facts which such authority considers to be against the public interest to disclose." The final Clause (7) gives the extensive powers to Parliament regarding detention and the procedures to be followed by an Advisory Board, referred to earlier.

The 44th Amendment revised Clause (7) in such a way as to limit the powers of Parliament (by deleting 7(a)), and redrafted Clause (4) in line with this, while also specifying detention for

no more than two months without the authorisation of an Advisory Board, the constitution of which is specified in greater detail. These revisions not yet notified.

Endnotes

1 I am grateful to the Editors and to an anonymous reviewer for their comments on an earlier draft of this paper.

2 Chandrachud spoke of Articles 14, 19 and 21 of the Constitution as a "golden triangle," standing "between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power," in his judgement in the Minerva Mill case (1980). He clearly feared that the "golden triangle" could give way.

3 Here Austin refers to the upshot of Article 22 and the Preventive Detention Act 1950, as they were supported in the judgement of the Supreme Court in the Gopalan case.

4 It was in the course of the meetings of the Advisory Committee in April 1947, for discussion of the Draft Report, that reference to property was omitted from what was eventually to become Article 21, in view of concerns about conflict with the land reforms which were then thought to be so important.

5 The possibility that including the right to property in the article would obstruct what was then seen as socially necessary land tenure reform, weighed heavily with the framers of the Constitution. How this problem was dealt with is discussed by Austin (1966), in Chapter 4.

6 Note, however, that Abhinav Chandrachud, who contributes the chapter on Due Process in *The Oxford Handbook of the Constitution of India* (edited by Sujit Choudhury, Madhav Khosla and Pratap Bhanu Mehta, Oxford University Press, 2016), argues that the framers of the Constitution intended, in Article 21, only what he calls "due form" due process, meaning that life and liberty can be deprived so long as deprivation proceeds under a validly enacted law—not even equivalent to "procedural due process," when the courts can judge whether the procedure is "fair, just and reasonable." Chandrachud also says that "doctrines like substantive and procedural due process are considered, even in the US, to be elusive and hard to define" (p. 792). The same is evidently true in India, as well, considering the somewhat different arguments of Khosla and Chandrachud.

7 On this, see also the arguments of Abhinav Chandrachud (2016), cited at note 6.

8 Alva makes clear his kinship relation to Rau, on his mother's side.

9 This argument is developed in Chapter 8 of the book, Alva (2022). T. T. Krishnamachari, himself a member of the Drafting Committee, in a statement before the Constituent Assembly on November 5, 1948, spoke of its unstructured and unsystematic functioning.

10 Alva (2022) points out (in Chapter 5) that A. K. Ayyar's intervention in the debate was intended to defend Article 15. But Ayyar then spoke of the need for 15-A, praising

Ambedkar for introducing it, effectively conceding that Article 15 did not provide protection for personal liberty.

11 Any sense of celebration is quashed by Gautam Bhatia in a lengthy note, in which he concludes that the *Maneka Gandhi* judgement is "better understood as a well-intentioned, but misguided, wrong turn" (Bhatia 2019, 462).

12 The Open Letter concerning the notification of the 44th Amendment, section 3 is available at: https://constitutionalconduct.com/2021/10/16/open-letter-to-the-minister-of-law-and-justice-government-of-india-notification-of-s-3-of-the-constitution-forty-fourth-amendment-act-1978-to-provide-for-impartial-and-independ/

13 This "slew" includes the Terrorist and Disruptive Activities (Prevention) Act [TADA], passed in 1985 to address the Khalistani Movement in Punjab but which was eventually applied to all of India, till it lapsed in 1995; it was followed, after the attack on Parliament in December 2001, by the Prevention of Terrorism Act [POTA] which included similar provisions; and then by the Unlawful Activities (Prevention) Amendment Act 2004, which has been subject to further amendments, most recently in 2019, always in the direction of increasing the arbitrary powers of government. This string of laws is based on the presumption that those accused are guilty unless it can be proven to the contrary, in an inversion of the normal process of law.

14 Mohan Gopal comments that the fact that the police have discretion as to whether to prosecute under UAPA or under the new penal code, means that there is an opportunity for rent-seeking and corruption, if those accused seek the limited safeguards that they have available to them under UAPA. See G. Mohan Gopal, "Second Avatar of the Criminal Law Bills: The Key Changes," *The Wire*, December 15, 2023.

References

Alva, Rohan J. 2022. *Liberty After Freedom: A History of Article 21, Due Process and the Constitution of India*. Delhi: Harper Collins.

Austin, Granville. 1966. *The Indian Constitution: Cornerstone of a Nation*. Oxford: Clarendon Press.

Austin, Granville. 1999. *Working a Democratic Constitution: A History of the Indian Experience*. Oxford University Press.

Bhalla, Vineet. 2024. "How the Modi government's new criminal laws drastically increase police powers." *Scroll.in*, January 7, 2024.

Bhatia, Gautam. 2019. *The Transformative Constitution: A Radical Biography in Nine Acts*. Delhi: Harper Collins.

CAD (Constitution Assembly Debates). 6 December 1948. Vol. VII. Government of India, Lok Sabha Secretariat, New Delhi, pp. 823-857. Available at: https://eparlib.nic.in/bitstream/123456789/762992/1/cad_06-12-1948.pdf

CAD (Constitution Assembly Debates). 13 December 1948. Vol. VII. Government of India, Lok Sabha Secretariat, New Delhi, pp. 991-1024. Available at: https://eparlib.nic.in/bitstream/123456789/763004/1/cad_13-12-1948.pdf

CAD (Constitution Assembly Debates). 15 September 1949. Vol. IX. Government of India, Lok Sabha Secretariat, New Delhi, pp. 1495-1541. Available at: https://eparlib.nic.in/bitstream/123456789/763310/1/cad_15-09-1949.pdf

Gopal, G. Mohan. 2023. "Using Criminal Law to Establish Permanent Extra-Constitutional Emergency Powers." *The Wire*, November 1, 2023.

Khosla, Madhav. 2020. *India's Founding Moment*: *The Constitution of a Most Surprising Democracy*. Cambridge: Harvard University Press.

Sekhri, Abhinav. 2016. "Preventive Justice Part 2: Looking Inside Pandora's Box." https://theproofofguilt.blogspot.in/2016/12/preventive-justice-part-2-looking.html

Sekhri, Abhinav. 2020. "Article 22 – Calling Time on Preventive Detention," *Indian Journal of Constitutional Law*, 9: 173-85.

Sekhri, Abhinav. 2023. "Decolonising Criminal Law?" *Verfassungsblog*, September 4, 2023. Accessed at: https://verfassungsblog.de/decolonising-criminal-law