"THE LITTLE DONE, THE VAST UNDONE"—SOME REFLECTIONS ON READING GRANVILLE AUSTIN'S *THE INDIAN CONSTITUTION*

*Upendra Baxi**

I. INTRODUCTION

The Indians' sense of their rich cultural heritage, their record of professional achievement in the arts and sciences of the modern world, and their faith in their ability to govern themselves, combined to give them a national maturity that allowed a reasoned approach to the creation and working of government. Equipped with the basic qualifications, attitudes, and experience for creating and working a democratic constitution, Indians did not default their tryst with destiny.

Thus ends one of the most painstaking and comprehensive reconstructions of India's recent constitutional past.[1] During these days when V. S. Naipaul's *An Area of Darkness* and the "Penguin" Scholar Ronald Segal's *The Crisis of India*[2] are on their way to popular acceptance as "classics" on modern India—at least in the West—and when their harsh critiques are not altogether divorced from the social and political realities of a troubled democracy, these words of high praise cannot but be welcome. But this book is welcome for many more significant reasons than the sobering effect it has on the popular and febrile export-image of modern India.

First, it provides the most comprehensive, insightful and balanced account of the work of the Constituent Assembly which drafted the Indian Constitution in the brief span of time from December, 1946 to December, 1949—a time of strife, turbulence and ferment not merely in India but in the entire world.[3] The book is based on painstaking and scrupulous research.[4] The author has not merely studied the

*B.A., LL.M. (Bombay); LL.M. (Berkeley, California); Associate Research Professor and Joint Editor, The Indian Law Institute.

A substantial part of this article was written during the author's sojourn as a visiting research scholar at the Department of International Law and Jurisprudence, University of Sydney, Australia, during the year 1966-67. The responsibility for the views here canvassed is of course solely author's.

1. Granville Austin, *The Indian Constitution: Cornerstone of A Nation* (Oxford University Press) 330 (1966). All citations in brackets in the text refer to this book; and the book will be hereafter cited as *Austin* in the footnotes.

2. Published by A. Deutsch (1964) and the Penguin Books (1965) respectively.

3. Austin emphasizes the turbulent background all through his book, beginning with his remarks at xii, though he is careful not to identify this as *the* dominant influence on Constitution-making.

4. This is reflected throughout the book whose utility is further enhanced by three valuable appendices. The latter contain relevant paragraphs of the Cabinet Mission Plan of 16 May, 1946 (331-33); a list of the members of the "most" important Assembly Committees (333-36), and finally two separate lists one giving "brief biographical sketches" of the "twenty one most important figures in the Assembly" (337-46) and the other carefully identifying, with ample caution as to the caste component, all the Assembly members and other persons mentioned in the text with their caste, community, party and provincial affiliations (347-53). These are followed by bibliographies accompanied by suitable explanatory notes, of the "primary" and "secondary" sources on which the learned author's study is based (354-68).

relevant manuscript sources and marshalled a large mass of literature on the subject but also done commendable field work by interviewing, and conferring with, many leading participants in the constitution-making process, happily in our midst today.[5]

The result is, second, that this book emerges as a most definitive study of the constitution-making in India. And this, in turn, should now help us displace all pseudo-literature on the subject. For the debates of the Constituent Assembly illustrate such a wide variety of attitudes and beliefs and reflect a myriad of prides and prejudices that it has become a generally permitted part of constitutional scholarship to cull and cite such aspects of the debates as would help establishment of a particular thesis. To the confusion thus created by resort to "quilt quotations"[6] —a confusion not unknown to relatively more compact and analytically more manageable areas of knowledge—further confusions[7] were ushered in by a profusion of memoirs, biographies, autobiographies and hastily written treatises.[8] The subject, already time-worn and tract-worn, and

5. Thus, to take just one example, Austin's meeting with Mr. K. M. Munshi led to an examination of the impact of the Bombay Forfeited Lands Restoration Act, 1938, on Sardar Patel's views, and consequently his position on the "due process" aspect of property rights. Patel's views ultimately prevailed. See *Austin*, at 93-94, and see text accompanying note 134 *infra*.

6. Walter Kaufmann uses this term to describe the process by which

> Sentences are picked from various contexts, often even out of different books, enclosed by a single set of quotation marks, and separated only by three dots, which are generally taken to indicate no more than the omission of a few words. Plainly, this device can be used to impute to an author views he never held.
>
> Here, for example, is a quilt quotation about war and arson: 'Do not think that I have come to bring peace on earth; I have not come to bring peace, but a sword...I came to cast fire upon the earth...Do you think that I have came to give peace on earth? No, I tell you....Let him who has no sword sell his mantle and buy one.' This is scarcely the best way to establish Jesus' views of war and arson.

Kaufmann, W., *From Shakespeare to Existentialism* 99 (Anchor Books 1960).

Though Kaufmann's point was made in the context of Hegelian scholarship, where irrespective of such devices, hazards of understanding are great, and though his illustration is too implausible, we feel that this point needs recurring emphasis in all scholarly contexts.

In reconstructing debates of the Assembly, by a rigorously chronological description, Austin has endeavoured (with almost complete success) to avoid quilt quotations himself and has also made possible the use of his study as a touchstone for these devices in future. In the present article, we are also forearmed against this device, being so vividly forewarned.

7. For example, one dangerous confusion has been generated by the "legend that Hindi became the official language of India by a majority of only one vote." And this has been nurtured by some statements in the autobiography of Govind Das and a tract by Ambedkar. Austin, studying this matter, feels that "one vote majority for Nagri numerals, if such there was," has been confused "as a victory for Hindi." See *Austin* 299-300.

8. See Austin's modest statement that these have not "contributed greatly to our knowledge of India in the years since World War II." *Austin* xiii, and also his bibliography of Secondary Sources (360-68).

getting increasingly intractable, has been now rescued for us by Austin's labours.

Third, the book is eminently readable. It is written in clear and simple English (no mean achievement in itself) though the style sometimes verges on headline journalism.[9] The subject is formidably technical but the presentation by no means arcane. The headnotes introducing each chapter, and subtitles to some of the chapters, are highly evocative and appropriate for the discussion to follow.[10] Without sacrificing either in spirit or substance the authenticity and the atmosphere of the Constituent Assembly proceedings, or his calling as a political historian, Austin has with almost a native ease avoided, to use David Easton's term, hyperfactualism[11] and (if we may provide a progeny to Easton's terminology) hyperquotism and hyperdocumentalism as well. And the expertise of the Oxford University Press in dealing almost unerringly[12] with a whole subcontinent of strange names adds to the pleasure of reading the book.

And, finally, although Austin approaches his task in the role of a "political historian" the overall impact of his study is to revive the vast mandate to the legal scholarship given by the Indian Constitution. By emphasizing time and again that the Indian Constitution is, above all, a "social" document, embodying the objectives of "social revolution," Austin's timely book offers a salutary reminder to us that a purely "legalistic" preoccupation with the Constitution may in the long run

9. *E.g.*, the sub-title at 39 "The Congress had never been Gandhian," or the incredible caption at 328 "The Credit Goes to the Indians," in 14 point bold letters, giving one an uneasy feeling of reading a newspaper instead of a treatise. Also the words "revolution" and "renaissance" have been unsparingly used, with the result they lose impact and create analytic doubts.

10. *E.g.*, headnote to chapter 1 :

> This cannot be done by the wisest of lawyers sitting together in conclave; it cannot be done by small committees trying to balance interests and calling that constitution-making; it can never be done under the shadow of an external authority. It can only be done effectively when the political and psychological conditions are present, and the urge and the sanctions come from the masses.
>
> Jawaharlal Nehru, *Austin* 1.

One regrets that Austin does not give us full source citations of these quotations.

11. David Easton (ed.): *Varieties of Political Theory* 3 (1966). Easton uses the term "hyperfactualism" to refer to "fact-gathering unregulated by theory." Our use of the term indicates another nuance of that meaning—viz. fact-reporting unregulated by either descriptive or analytic organization. Likewise "hyperquotism" and "hyperdocumentalism" may result, particularly when the writer is preoccupied with such materials as Austin's when descriptive or analytical organization is overthrown by an indiscriminate use of the source material.

The questions as to how far a historian can avoid these "hypers" and yet remain true to his task and how far such an avoidance may result in the extremity of "quilt quotations" though rewarding to pursue cannot be discussed within the present context.

12. *E.g.*, Delhi is misspelt as "Dehli" on 44; the last line in footnote 42, "...supported by advice given Rau by..." omits "to" after given (95); Ashok Mehta is spelled both as "Ashoka" on 48 and "Ashoke" on 14; and a quote from the *Hindustan Times* on 301 reads "council of despair."

result into a betrayal of that very mandate. There is no doubt that the Constitution contemplates attainment of a well-specified social order, assigning primacy to law as an instrument of social change. And in so doing the Constitution can be said to demand of the legal elite a heightened responsiveness to a broader conception of the relatedness between law and society in modern India. Fortunately, in recent years the need for this kind of direct engagement with social reality has become increasingly clear to many of us; but Austin's study adds an impetus to this awareness. It is precisely because Austin makes the conception of the Constitution as a means of "social revolution" as alive to us as it was in the minds and hearts of the majority, if not all, of the members of the Constituent Assembly that this dispassionate and avowedly historical narration of their work compels reading and reflection.

At the same time, resolutely if somewhat regrettably, Austin does not relate the mass of information about the Constitution-making to the present constitutional developments. And this deliberate and deep division between past and present (which perhaps constitutes the very meaning of historical method) is enhanced rather than eliminated by Austin's occasional attempts to interpret with easy optimism, some of these developments through brief summaries and bold judgments. These attempts, in fact, form a consistently unsatisfactory part of Austin's book.

In what follows, we will endeavour to systematize some thoughts that arose out of a refreshing encounter with India's Constitution-making past. And in so doing, we will also examine the central contributions and inadequacies of Austin's study.

II. "AN UNUSUAL BODY" AND SOME UNUSUAL BODIES

In the first chapter of the book (1-25), Austin introduces us to the events leading to the legitimation of the Constituent Assembly as a sovereign body, from the eve of the Cabinet Mission Plan of May 1946, to the passage, in the British Parliament, of the Indian Independence Act granting freedom to India from 15 August 1947, and creating Pakistan.[13] We are carefully acquainted with the tripartite relationship between the Assembly, the Congress, and the country :

> The Constituent Assembly was a one-party body in an essentially one-party country. The Assembly was Congress and the Congress was India. There was a third point that completed a tight triangle, the government (meaning the apparatus of elected government both provincial and national), for the Congress was the government too. The Assembly, the Congress, and the government, were, like the points of a triangle, separate entites, but, linked by over-lapping membership, they assumed a form infinitely meaningful for India. (8-9).

13. See *Austin* 1-8; and esp. 7-8.

But this powerful political monotheism did not mean an absence of dissent. As early as 1939 J. Nehru had written :

> The Congress has within its fold many groups, widely differing in their viewpoints and ideologies. This is natural and inevitable if the Congress is to be the mirror of the nation.[14]

The internal structure of this mass-party which brought India to freedom was itself highly democratised. And, it is indeed remarkable that the "national heroes", who stewarded the Constitution, should have combed the country for talent and expertise, notwithstanding the sufficiency of the party's own political resources. In seeking men and women for participation in the Constitution-making, dedication to the objectives of "social revolution" was the only "overriding consideration."[15] The Constitution, emerging out of this collective effort, will thus be made to express, to invert Austin's description, the needs of many rather than the will of the few.[16]

Thus, although not based on adult suffrage, the Assembly was a "highly representative body."[17] The sophisticated procedures of selection of the candidates for membership of the Assembly, which maintained a fine balance between the control by the Congress Working Committee and the autonomy of the provincial party units, and the generous disregard of technicalities, tend to show that no effort was spared to endow the Assembly with the fullest possible "representative" character.[18]

Austin tells us, that while the Working Committee issued specific directives for election of certain party luminaries from their provinces,[19]

---

14. *Austin* 11. The quotation is from J. Nehru, *Unity of India* 139 (3rd Imp. 1948).

15.

> One of the primary qualifications for a candidate, it is certain, was a record of active work in the Independence Movement, a qualification that produced a group of determined men of above average ability....

Austin 11.

Austin does not tell us what the "record of work" implied. Inevitably, participation in the struggle for Independence meant jail-going for most leaders and it is not unlikely that frequency of imprisonment may have been *one* of the important indications of the "participation." This even today continues to be an important factor as can be seen from the special mention the *Who's Who* of Lok Sabha makes of the detention by the British of some of its members. On this, and the seeming post-Independence perversion of this credential for leadership, see the brief but pertinent strictures by Bayley, *Preventive Detention in India* 108-09 (1962).

At the same time, it is to be noted that membership of the Congress party was not an indispensable qualification for being in the Assembly. Of the select group of twenty members, most influential in the formation of the Constitution, five had "never been the members of the Congress." See *Austin* 19.

16. "The Indian Constitution expresses the will of many rather than the needs of the few." *Austin* 9.

17. K. Santhanam told Austin in a personal interview that there was "hardly any shade of public opinion not represented in the Assembly." And this notwithstanding the official non-representation of the three political parties in the Assembly: the Communist Party, the Socialist party, and the Hindu Mahasabha. See *Austin* 13-14.

18. *Austin* 11-12.

19. *E.g.*, Nehru, Pant, Prasad, Rajgopalachari etc.

it did not interfere with the selection of other candidates by the provincial units of the party. And this was a fruitful precaution "that broadened the debate" and "helped to make the federal provisions of the Constitution durable (11)." Additional, though minor, infringements of the local autonomy also occurred in the process of securing adequate representation of the minorities. The "Cabinet Mission Plan guaranteed seats in the Assembly only for Muslims and Sikhs; it contained no specific provisions for other minorities(12)" and yet Parsis, Anglo-Indians, Indian Christians, Scheduled Castes and Tribes, and even women representatives had to be, and were, "fully represented in the Constituent Assembly, usually by members of their own choosing (13)." And although the attitudinal diversity within the Congress party was not insufficiently representative of all views, many non-Congress personalities were specially recruited to broaden the "ideological spectrum." To say the least, the Assembly, thus constituted, was "an unusual body."

But there were in it some unusual bodies as well. Austin finds a select group of about twenty members as the "most influential" participant in the making of the Costitution.[20] Four members of this group—Rajendra Prasad, Sardar Patel, Maulana Azad and Jawaharlal Nehru—constituted, according to Austin, an "Oligarchy." In addition, Pant, Sittaramayya, Ayyar, N. G. Ayyangar, Munshi, Ambedkar, and Satyanarayan Sinha participated in most of the eight major committees of the Assembly;[21] and to these names must be added the name of B. N. Rau, who though not a member of the Assembly, played a crucial advisory role.[22] It may be noted that twelve of the members of this group "were lawyers or had taken law degrees."[23]

Describing the individual and composite charisma of the Oligarchy, Austin says :

> Their honour was unquestioned, their wisdom hardly less so. In their god-like status they may have been feared; certainly they were loved. An Assembly

20. See in general, *Austin* 18-25. For thumbnail biographies of these members see Appendix III, 337-46; and 19-21. Austin tells us that all these twenty one individuals (including B. N. Rau) were "well-educated." "Azad, Ambedkar, and to a *lesser* extent Munshi and Prasad, can be called learned." (Emphasis ours). We do not quite understand what traits Austin seeks to subsume under the rubric "learned." Whatever they may be, in our estimation, Munshi can be considered as learned as Azad.

21. See table *Austin* 19. For a list of major committees see *Id.* Appendix 11, at 333-36.

22. Rau's services to the making of the Constitution were very great indeed. See *Austin* 20. We need separate studies of the contributions made by the members of the select group. These studies will provide an invaluable addition to the history of Indian constitutional law.

23. It may be interesting to find out, by a statistical survey, the occupational affiliations of all the members of the Assembly and likewise of the present and past members of the state and central legislatures. Professor Morris-Jones has done this kind of survey of the members of the Parliament which could well serve as a model. See his *Parliament in India* (1957). This writer has been urging such a study since sometime, See Baxi, "Patterns of Advanced Indian Legal Education and Legal Research" 4 *Jaipur Law Journal* 164 at 186 (1964).

> member was not greatly exaggerating the esteem in which his colleagues held these men when he said that the government rested 'in the hands of those who (were) utterly incapable of doing any wrong to the people'. (21-22).

And yet :

> The Oligarchy was responsive to the multifold currents of opinion in the Assembly, to the intra-party 'Opposition', for a variety of reasons. The members had not only spent much of their lives working for a free, democratic India; they were practising democrats....Moreover, the Oligarchy itself could not always present a united front, because of its own internal frictions....The responsiveness of the Oligarchy can be seen either as cold blooded practicality or as showing high moral sense.[24]

The Oligarchy, as a result, sought maximum consensus in decision-making. Whenever internal dissensions within the Oligarchy (and these were not so infrequent as one is usually led to believe) so dictated, majority votes decided the issue. But in these, and other situations, when voting became imperative, marginal majority was not considered dispositive of the issue. Even the Constitution itself was adopted by an acclamation of the Assembly. The "generally acceptable Constitution" was a result as much of "(D)emocratic decision-making" as of the "Oligarchy's refusal to arrogate to itself all wisdom and authority."[25] From this study of the "microcosm in action," and a detailed survey of the crystallization of this relationship between the Oligarchy and the members of the Assembly in eleven long chapters, Austin will offer us his conclusions, cardinal among which will be India's contribution of two "wholly Indian concepts" of consensus and accommodation to the art of decision-making in general and constitution-making in particular.[26]

The value of this chapter lies in its crucial focus on the composition and character of the Constitution-making elite and the perceptive account of the dynamics of leadership within the Assembly. A closer study of both these aspects dispels the easy myth that the composite and individual charisma of the Oligarchy, within which Nehru certainly predominated, made the Constitution-making less problematic and a relatively easy affair.[27] While it undoubtedly was India's enviable good fortune to have such helmsmen at the critical juncture of her attaining freedom, and while their impact on the making of the Constitution was indubitably great, the over-emphasis on their charisma, both

---

24. *Austin* 23-24.

The Oligarchy comes to life in Austin's usually sympathetic narration. See, for example, a sympathetic corrective to Sardar Patel's image as an "immoveable monolith" in Austin's discussion of the due process and property or Pant's picture as emerging from his participation in the same context. See *Austin* 93-94 and 85-86 respectively. But see somewhat harsh treatment of Rajendra Prasad as "willing to endanger the Constitution in pursuit of his own point of view," *Austin*, chap. V at 141.

25. *Austin* 25.

26. *Id.* 311-21; and our discussion in part VI of this article, *infra*.

27. A careful reading of Austin's book will surely help dispel this view, which is too often expressed both in lay and specialized discourse to need any illustrations.

during the drafting, and since the adoption, of the Indian Constitution has successfully obscured the real dynamics of leadership.[28]

The very same emphasis has also deprived us of an insight into the vital role that dedication as an attribute of leadership played in the formative era of independent India. The Indian Constitution came into being as a result of the collective indefatigable efforts of a large number of dedicated men. These men were primarily dedicated to the attainment of a politically free India—an ideal that evoked transcendent loyalty during the long years of struggle.[29] And freedom, while important in itself, was more important as an instrumentality of social reconstruction. Political independence and written Constitution were for them but the first steps towards a journey of a thousand miles.

Paradoxically, while the need and expectation for such dedication continue, despite the radical change of context from freedom-fighting to nation-building, the very institutionalisation of democracy has the opposite effect of ushering in (what we will here call) the professionalisation of politics and leadership. The latter means, among other things, a new orientation towards power-relationships and power-maximisation, this in turn fostering a new "political culture." New power-bargaining processes arise as a direct result of the importance of and the increase in the number and activities of interest-groups.[30] Group loyalties, and the resulting conflicts of loyalties, are exploited.[31] Demands of political self-preservation take precedence over, and dictate a denial of, power-sacrifices involved in transcendent loyalty to national interest and developmental tasks.[32] Even the rich legacies of the techniques

28. Thus giving rise to the pseudo-questions "After Nehru, Who?" or "After Nehru, what?." And we do not say this out of hindsight. Perceptive observers of Indian affairs have expressed their awareness of the dynamics of the leadership by meeting such questions head-on. See the study of Indian Parliament by Professor Morris-Jones *supra* note 23, at 328-29. He there concluded, writing in 1957 :

> A durbar without a prince is nonsense, but the Indian Parliament, for all the valuable influence of the Prime Minister, will still make very adequate sense when Pandit Nehru is no longer there.

29. There is no doubt that both the cause and the dedication to it nurtured the emergence of charismatic leadership though the notion is so confused that it is somewhat rash to put the proposition so categorically. On the "slipperiness" of the notion of "charisma" see Julius Stone, *Social Dimensions of Law and Justice* 600-01, 608-09 (1966) (hereafter to be referred as Stone, *Soc. Dim.*) But Stone's strictures should be read in the light of clarifications urged by R. Bendix, in his masterly exposition of Weber, *Max Weber-An Intellectual Portrait* 290-328, and esp. 325-30 (Anchor Books, 1962).

30. See the first-rate study by Myron Weiner, *The Politics of Scarcity—Public Pressure and Political Response in India* (1962) (hereafter referred to as Weiner, *Politics*).

31. The literature here is growing. For a general orientation see M. N. Srinivas, *Social Change in Modern India* 111-13, 115-17, 145-46 (1966). For more specialized studies, see Brass and Bailey, *infra* notes 37 and 41; and for a purely impressionistic, but still insightful survey, see Segal, *The Crisis of India* 228-76 (Penguin Books 1965).

32. On this see Weiner, *Politics*; and studies by Brass and Bailey referred *infra* notes 37 and 41.

of civil disobedience and, in Bayley's phrase, other "coercive means of protest" are increasingly employed for reinforcement of existing power-relationships divorced of the ethical milieu which accompanied the initial employment of these techniques and means and regardless of their detrimental impact (forseeable or unforseen) on the political, social or economic development of the nation.[33] To all this must be added the relative inadequacy of social reconstruction, with its inevitable bureaucratisation and routinisation, as a calling as stirring of dedication as a fight for freedom against an alien rule.[34]

Thus, in a broad sense, the promulgation of a new constitutionally desired social order brought about a transition from, what may be called dedicationism to professionalism in politics and leadership. And this transition is more marked now (and for all to see, including those actually involved) after the demise of Nehru—the last of the Oligarchs —though again its ubiquitousness has been hitherto marked by a frequent and facile, even if somewhat natural, recourse to charismatic aspects of leadership.

For most students of Indian politics, the inability to follow this transition has led to endless bewilderment resulting in hasty judgments and faulty prognoses. Even today the political multilinguism of Indian leadership, arising primarily from this uneasy transition, continues to baffle many, despite the pioneering attempt of Professor Morris-Jones to explain at least the three main political "idioms" of modern India—the modern, the traditional and the saintly.[35] Likewise, leadership studies dichotomizing between "indigenous" and "Westernised" or,

33. Surely, it would be somewhat startling if someone were to resort to a fast on the slow implementation of family planning measures or the under-implemented directive on promotion of the cottage industries or plan outlays on education. The only constitutional provisions which have invoked martyrdom of any kind are those pertaining to the cow-slaughter and the transition to Hindi as the official language. Nor is there any likelihood of these problems attracting the newly found techniques of *gherao* (emanating primarily from the State of West Bengal where workers besiege the executives till their demands, fair or otherwise, are nearer fulfilment) or *dharna* (a nominal or unto the death fast resorted to by many politicians, including the members of the Parliament, and state legislatures and other leaders).

We are not suggesting that constitutional modalities of self-expression be supplanted or even supplemented in pursuit of national causes (whether real or fabricated) but are merely seeking to illustrate the fact that the trans-constitutional methods are to a great extent employed to promote the ends of professional politics rather than to serve national and developmental causes.

34. Here of course is the problem of "image." On this see the highly original study by Boulding *The Image* esp. 97-114 (1959). The thesis needs to be more elaborately spelt out, especially in relation to the underdeveloped countries.

35. Morris-Jones, "India's Political Idioms" in Phillips (ed.) *Politics and Society in India* 133-54 (1963). To some extent, this approach was already foreshadowed in Prof. Morris-Jones' early book on Indian Parliament *supra* note 23 at 37-40. This latter book, though a bit dated, ought to be a prescribed reading for the constitutional law courses in India Law Schools, though unfortunately it seems to have been so far unnoticed.

Morris-Jones' study of political multilinguism is very important for all Western observers, and many native ones, of the Indian scene if we are to avoid simple-mindedness in political analysis. A good illustration of failure to be advertent to the above study is well-provided by Ronald Segal's treatment of Vinoba in his recent book, *supra* note 31, at 154-56. But in so far as Segal's perplexities arise from the general problem of communication because of the Indians' peculiar use of language, we share them; though his attempt to link this up with the Indian metaphysics, as he understands it, seems to be a false start. On the important problem of communication, see the recent symposium, Raghavan Iyer (ed.), *The Glass Curtain Between Asia and Europe* (1965).

"modernizing" and "traditional" (or some variants of these) elites very often tend to overlook that the political environment, affected by the transitional processes, has produced leadership of differing orientations, not easily subsumable under these rubrics.[36] A new typology of leadership, however, needs to be devised.[37]

Admittedly, the idea of "dedicated" leadership is, at the present stage, difficult to articulate scientifically.[38] Nor can the dichotomy between "professionalised" and "dedicated" leadership be too neatly drawn. It is evident that the present professionalism is not altogether untinged by dedicationism nor was (and indeed we are shortly to suggest ought to be) dedicationism altogether free of professionalism.

But there is no doubt that a basic shift in the nature of power system has occurred. This shift may be roughly described as consisting in the pre-Independence view of politics and leadership as informed by the idea of service to the country, with orientation towards personal power being secondary, and in some cases altogether absent, to the post-Independence view of leadership and politics as a "vocation" with ideas of service and dedication to the development of the country having a low power-potential.

This means that, in general, dedication to the ideas (and ideals) of economic and political development of India as a whole does not

36. Dankwart A. Rustow has made an attempt to meet this difficulty by speaking of an "amalgamate" pattern in his *Politics and Westernization in the Near East* (1956); and even if we take his, and Myron Weiner's clarification of this term, as we ought to, as signifying a-Western and a traditional pattern of political behaviour, we are of course still left with the problem of clarifying with respect to particular societies as to what these patterns are. See Myron Weiner's clarification in "Some Hypotheses On the Politics of Modernization in India" in Park and Tinker (ed.), *Leadership and Political Institutions in India* 18-38 at 26 (1959). We still think that the term "amalgamate" is unfortunate as without abundant clarifications it is likely to cause an impression of a cognitive, or at any rate a classificatory, retreat.

37. Myron Weiner in the above essay tentatively classified the political *groups* into: (1) The Hindu-Minded; (2) The "Unsuccessful" Western-Minded; and (3) The Western-oriented. Paul Brass offers a more well-worked out typology of leadership in the pre-Independence period, which though limited to the Uttar Pradesh Congress Party, can perhaps be generalized. The leaders fall into these three categories: (a) The Modernist and the Traditionalist (Nehru and Tandon); (b) The Ideologist and The Virtuoso Politician (Acharya Narendra Dev and Rafi Ahmad Kidwai); and (c) The Arbiter (Pandit Pant). Brass describes the present leadership as "singularly different" and observes that it seems to be characterized by an increasing absence (among other things) of the Arbiter type which may prove dangerous to the stability of the party. See Brass, *Factional Politics in an Indian State: The Congress Party in Uttar Pradesh*, 33-61 (1965).

38. More specific studies, along the lines of Brass, may help us identify the emerging patterns of professional political leadership. Besides, the idea of dedication needs to be explored a little more deeply than our context permits us to do. We do not need a definitional enterprise nor even attempts at formulating a dedication quotient in power relationships (though the latter may seem worthwhile to some in view of the present scientism of social sciences).

significantly influence or direct the transformation of power relationships and processes into power-structures[39] or help regulate power-conflicts. On the contrary, considerations of power and prestige predominate over these ideas so as to even adversely affect the developmental processes.[40]

This transition, although not so identified, and its consequences above described, are clearly demonstrated in the recent studies on Indian politics. Commenting on politics and leadership in the State of Orissa in 1959, Professor Bailey draws our attention to the absence of "moral" commitment by the Congress party workers and the consequent failure of the party to attain "legitimacy" in the society.[41] Professor Brass, in an exhaustive study of the "multifactionalism" in the Congress Party in the State of Uttar Pradesh, has likewise noted a similar "decline in loyalty to the Congress organisation" since Independence.[42] Our concern here being with the impact of the transition, we quote here in full some observations of Brass :

> Certainly, the younger generation of Congressmen lack the same attachment to the Congress which the pre-Independence leaders felt. For pre-Independence Congressmen, nationalism was their religion and the Congress represented their nationalism. For many Congressmen, the Congress symbolized a way of life. Few of the younger Congressmen have this feeling of attachment to the Congress. For many now, participation in the Congress organization is a purely "rational" activity, in the sense that calculations of personal advantage predominate over other motivations.[43]

Myron Weiner, writing in 1963, had seen the same political orientation, though from the perspectives of interest-group alienation. Dichotomizing between "elected policy-makers" and "non-governmental politicians"—the latter including "for the purposes of simplification all political leaders not in a position to make public policy"—Weiner tells us :

> One could cite case after case in which politicians neither considered the national interest in making demands nor argued for their group interests in terms of the national and public interest.[44]

We venture to suggest that further studies of politics and leadership in all states of India, and extending to all political parties, will

39. On this, see J. Stone, *Soc. Dim.*, 589-641, esp. 604-15.

40. On the prestige component of the present power structure, Brass rightly complains that this introduces an "element of irrationality" and "unpredictability" in the Uttar Pradesh politics. Brass, *supra* at 237-38. For similar evidence of "irrationality" though *not* so characterized see generally Weiner, *Politics*.

41. F. G. Bailey, *Politics and Social Change: Orissa in 1959* esp. 182-234 (1963). Bailey remarks, at 217, "Congress was a movement; after 1947, by degrees it became a party. Before Independence the members of the movement were united by a common moral purpose...After Independence—the fulfilment of their purpose—no new moral focus, none at least of the same power, was found."

42. Brass, *supra* note 37.

43. *Id.* at 243.

44. Weiner, *Politics* 33-34.

substantiate our main submission that a shift from dedicationism to professionalism has occurred. While this shift may be welcome from the viewpoint of political theory,[45] and may have been so well associated with stable democratic orders in the West as to give it an insignia of success,[46] there can be little doubt that a nascent and economically and politically underdeveloped democracy, like India, needs for her viability a complementarity of both professional and dedicational orientations in her politics and leadership at all levels.[47]

The hard question thus arises : in a political system engendering a steadily growing professionalisation, where dedication correspondingly becomes a disvalue (at least with respect to power goals), what changes within the system will reclaim dedication as an important factor both in power-relationships and power-structures? In other words, to what extent and in which manner can we (to adopt a barbarism) "powerise" dedication? Part of the problem, thus seen, also confronts us with the need to avoid the present de-politicisation and apoliticisation resulting from professionalisation on the one hand and what appears to be an "idealistic" pursuit of dedication on the other. Thus, for many pre-Independence (and some recent) political workers and leaders, mostly Gandhians, concentration on such tasks of social reconstruction as they feel summoned to perform, has meant an inevitable de-politicisation, meaning a low placement in the power system and the consequent gradual political self-annihilation. For others, similarly oriented, but more exclusively devoted, this has meant an apoliticisation, leading to a total transcendence from the political system, as exemplified by Vinoba Bhave, and some of his followers.[48] Both these modalities, and especially the latter, involve a division of leadership labour which an economically and politically underdeveloped country (at least in terms of leadership resources) can scarcely afford. Hence, the problem of "powerisation" of dedication as we see it.

---

45. This would seem to be implied in the general thesis of Weiner, as also of that of the Almond school of "political modernization." See Almond and J. S. Colemen, *The Politics of Developing Areas* (1960). Also see, Almond's Foreword to Weiner's *Politics* ix-xi.

46. See generally, J. Stone, *Soc. Dim.* 616-35; and the above literature.

47. This submission arises as a disagreement with the above general approach. See also our critique of Weiner, *infra* note 64.

48. But of course much depends on one's views of what constitutes "politics." Both Vinoba Bhave and Jay Prakash Narayan regard their movement as politics on a different, if not higher, level. For this see Naryan's tract, *A Plea For the Reconstruction of Indian Policy* (A. B. Sarva Seva Sangh Prakashan, Wardha, 1959; For Private Circulation). And see the lucid discussion of Bhave's general ideas on "politics," Morris-Jones, *supra* note 23; and also see the more recent sociological study of the political philosophy of Vinoba and Naryan in Oommon, "Myth and Reality In India's Communitarian Villages," 4 *Jl. of Commonwealth Political Studies* 94-116 (1966). We have here used the term "politics" in its (what we think) usual meaning in the context of state-systems where power processes operate and centre on the making of policy decisions. See generally, Stone, *Soc. Dim.* 595-96, and the recent literature there cited.

This problem can also be transposed to the illuminating framework of power-systems analysis recently provided by Professor Julius Stone.[49] In his terms, we may say that the problem is one of transpersonalisation of power, with the related problem of reclaiming the power-relationships within the benign impact of the Ethical Component Spectrum. Stone identifies transpersonalisation as "a further process in transformation of power relationships into power structures" which consists in "the reinforcement of power by associating it with some idea or principle which transcends the dominating persons." Further, transpersonalisation also "associates power with value-ideas or principles held by the members of society, and this association stabilises and consolidates the position of the power-weilders."[50]

Of the many intricate consequences of this process, the two most relevant in the present context are as follows. First :

> Paradoxically..., transpersonalisation buttresses the power structure with group convictions by adding to the subjects' submission tendencies, their tendencies to conform to the principles with which that power is identified. On the other hand, it checks power, since those in power, being identified with the rationalising principle, tend to conform to that principle, lest by flouting it they undermine their own power.[51]

And, second, the transpersonalisation process (along of course with the initial depersonalisation process) :

> tends (it is correctly said) to facilitate integration by reducing personal temperamental factors in the play of power.[52]

That such temperamental factors abound in Indian politics as demonstrated by the recent studies by Brass and others,[53] (although independently of either of the frameworks here suggested) testify to the urgent need for securing these very consequences of transpersonalisation of power in India today.

Likewise, the "Ethical Component Spectrum," one of the six spectrums offered by Stone, pertains to

> the degree to which the influence of those who weild power arises from their identification with ethical convictions which those subject to their influence also share. It is not material for this purpose whether this sharing arises because the former have somehow brought the subjects to accept these

---

49. Stone, *Soc. Dim.* 604-15.

The problem can also be seen as one of, in Almond's terminology, the "conversion function" in a political system. See Almond, "A Developmental Approach to Political System" 17 *World Politics* 183, esp. at 194-95 (1965-66). Almond there suggests a sixfold classification of the "political conversion functions" which may help us to see the dynamics of the "transpersonalisation" process more clearly.

50. Stone, *Soc. Dim.*, 605.

51. *Id.* at 607.

52. *Id.* at 627.

53. See *supra* note 40.

> convictions, or whether they have identified themselves with convictions already held by the subjects.[54]

If we prefer the somewhat incohate formulation of our problem in terms of powerisation rather than those of transpersonalisation oriented towards the Ethical Component Spectrum, it is because we want to focus attention on *how* the "*sharing*" (referred to in the above quote) can be brought about in a "polity of scarcity." The question is one of *initiation* of requisite changes within a power system rather than of their analytic systematization after they have been accomplished.[55]

In thus seeking to review the dedication motif, and to invest it with a high power-potential, we are not altogether unmindful of the twin dangers of the professionalisation of the dedication itself and of the inadvertent creation of an anti-political atmosphere within the political system. We will here deal briefly with both.

First, there is the problem of competing versions of development —economic, political, and social—for which dedication is invoked.[56] But this danger is not yet in any sense real; unless most political leaders are first oriented to some version of dedication to developmental tasks and thus awareness of group and factional loyalties is relgated to its proper scope and function,[57] the question of conflicting versions hardly arises. Besides, as and when such a multiplicity arises, the value orientations emanating from the constitutionally desired social order to which all power-weilders (actual or potential) are committed both in rhetoric and reality will guide and restrict this multiplicity, thus safeguarding the viability of the system.[58] In fact, future workings of democracy may require such variations in abundance.[59] But the *present*

54. Stone, *Soc. Dim.* 596-604. at 598. The spectrums there offered for the analysis of power relationship are: (a) Coercion Spectrum; (b) Ethical Component Spectrum; (c) Interests Affected Spectrum; (d) Influence Spectrum; (e) The Head Count Spectrum and (f) The Time Count Spectrum. Transpersonalised power, according to Stone, is located higher than depersonalised power on the Head Count, Time Count, and Ethical Component Spectrums.

55. Here of course lie the problematics of "political change" on which Almond's analysis, *supra* note 49, gives a fuller idea of the complexities involved. Paradoxically the apoliticisation and the depoliticisation processes may in the *long run* help bring precisely the change now sought. But the run may indeed prove too long.

56. This is to some extent evident from the studies of Weiner and Brass.

57. Factionalism performs both integrative and disintegrative functions, as the study by Brass has well shown, esp. at 238-42. One needs to be very careful in urging dedication as a sovereign orientation. Local interests and factions exist, and to an extent their existence is necessary. Within limits, they play a crucial role in the development of a democratic "political culture."

58. Unless political leaders pay due respect to the constitutional commitment they will not find it possible to attain "legitimacy." This is illustrated amply by the functioning of the Communist Party in India. And even the secessionists are sometimes heard to say that they are acting in the national interest!

59. This would seem to be one of the main submissions of Weiner, and in general of the "political modernization" or "political culture" theorists. We agree.

political orientation in general even does not achieve a minimum obeisance to the dedication motif so as to engender this very diversity which the future will require.

And, second, arising partly from the first, in a system where dedication is as yet not adequately "powerised" (or where a full transpersonalisation has not been attained) tensions will arise between the few who are so dedicated and the many who are not, especially when the former happen to be in Weiner's term, "elected policy-makers." This may result (and indeed has resulted to some extent) in a group antagonism creating a certain amount of political instability, which in its turn may ironically frustrate the fulfilment of what the elected policy-makers seek to realize through dedication. This has been beautifully brought out by Weiner:

> The policy-maker, with his public responsibility and image of the public interest, and the politician, with his responsiveness to group interests, often antagonize one another. Such antagonism is not only expressed in the inevitable conflicts between government and opposition, but often between the policy-maker and his own party; and it is most clearly and frequently evident between the state Congress party organizations and the state Congress governments ...
>
> The politicians' criticism of the policy-maker is not altogether unfair. Since the policy-maker gives the public and national interest, as he conceives it, paramount if not sole priority, he is often indifferent to local demands, even when feelings are extremely intense ....
>
> One model thus feeds on the other. The politician makes demands to which the government fails to respond. He then turns toward force to which the government does respond, and is thereby convinced that only such mass pressures will move a static and conservative government. In turn, many a policy-maker is unwilling to listen, and often unwilling to respond when he does listen. He is accordingly unable to assess the consequences of his own policies. When violence occurs, he is surprised. But then again, he is not, for violence vindicates his image of the political process as an irrational expression of narrow group interests.[60]

Thus, it would seem that paradoxically, dedication to national interest by some "elected policy-makers" leads to some kind of anti-political climate, leading to a retardation of "political culture,"[61] just as a similar dedication on the part of some non-policy making politicians makes them either depoliticised or apoliticised.

---

60. Weiner, *Politics* 34-35. This has been also noted by Bayley, before Weiner, and Segal, after him. Their observations deserve equal notice, though made in entirely different contexts. Thus, Bayley wrote:

> Because the Opposition is weak, it is ineffective; because it is ineffective, it may resort to direct action; because it resorts to direct action, it may be repressed.

Bayley, *op. cit.* note 32, at 119.

And Segal describes the same process somewhat dramatically thus:

> When fifteen million peasants quietly petition, the Congress leadership cannot hear, and when fifteen hundred rioters loot ships and fire trams, it stirs to respond. Thus, when it should attend, it ignores; when it should measure, it resists; when it should resist, it succumbs.

Ronald Segal *supra* note 31, at 244.

61. See *supra* note 45.

The problem again returns as being one of the dynamics of "powerisation" or "transpersonalisation" of power rather than one of the need and desirability of its attainment. In other words, the problem for the elected policy-makers is not merely one of showing more flexibility in the pursuit of their version of national interest (though this they ought to show) but also as to how to do this while simultaneously both appearing to maintain and actually maintaining the priority of national interest. The obverse of this problem will also equally haunt the non-policy-making politicians: How to escalate efficiently and effectively in the power-hierarchy without espousing group and factional interests, at the cost of national interest if need be, and without appearing to oppose (even while sometimes actually opposing), what the elected policy-makers urge in the name of or on behalf of dedication to national interest.[62]

In general then all this may be seen as a part of the political modernization process, which begins when the demands of economic growth come to odds with those of political development.[63] But this problem — of attaining simultaneously both democracy and, if we may so call it, demoeconocracy—can hardly be met, if indeed it can be met at all, by shifts in theoretical alliances among various social science disciplines or an amalgam of the latter or by a mere redistribution of emphases.[64] And to see this is at least to see that the burden of

62. The problem is somewhat overstated but it is not unlikely that is how it confronts some of the politicians. It would not arise, of course, if there is a harmony of interests between national and statal or local interests. We have stressed the "appearance" aspect of it to draw attention to the ancillary problem of "image." And see *infra* note 63.

63. See *supra* note 45.

In the context of group demands on political leadership, Weiner has recognized that just as there is need on the part of the leadership to recognize the functional significance of demands in the evolution of a political culture, there is also a corresponding need to moderate the inflow of such demands and pressures associated with them. And here he enlists "the tradition of renunciation", transformed by Gandhi into that of "self-help," as such a moderating factor. Weiner, *Politics* 228-29.

This recourse to the so-called traditions seems contradictory. If the pursuit of effective political culture demands recognition and encouragement of the interest groups, then this very process in turn should lead (notwithstanding the voluntary service organizations to which Weiner refers) to a weakening of such a tradition. Even presuming this to be unlikely, it is doubtful whether traditions of renunciation or self-help can furnish effective moderating devices with which to maintain the demands to a politically managable level.

64. This, is again to emphasize the need for abundant caution in urging policy guidance from only one perspective, however central.

Thus, for example, Weiner argues that "economic growth is not likely to diminish the political repercussions of scarcity." In fact, he feels that economic growth in the short term may usher in political instability. One must, accordingly, "look beyond the sphere of economics to find ways to progress and survive in a polity of scarcity." Weiner, *Politics* 238-39. We agree with the ways but not with the general conclusion, which seems to restrict unduly the relevance of economic theory to development of political culture. Political instability may be the price of economic growth; but it may be a price worth paying. Nor is the presumption warranted that such an instability will necessarily endanger the political system. The question would seem to be both of *kind* and *degree* of the instability engendered by economic growth as well as that of the tolerance of the political system to such instability. On this crucial point, there is little reason to believe that political theory will offer us a more determinate guidance than economic theory.

For a fuller appreciation of the entire problem, see Robert Packenham, "Approaches to the Study of Political Development," 17 *World Politics* 108-20 (1964-65).

India's leadership increases in almost a geometric progression to the problematics of economic, political, sociological and legal theory.[65]

But this relegation of our instant problem to its wider context is made only for the limited purpose of feeling the monster breathing on our necks, rather than to inspire suicide by an analytic bravado to fight it. Further exploration of the "powerisation" notion is required. The dynamics of transpersonalisation processes need to be studied both in the Indian and in the Third World contexts.[66] Policy guides on the small-scale aspects of development of political culture, *á la* Weiner, but *without* invocations of precedence of such development over requirements of economic growth, will have to be compiled.[67] And all this should receive an additional impetus from the necessary realization that scarcity of time for democratic experimentation is as real, and as crucial if not more, as scarcity of political and economic resources. Time has deposed the Oligarchy but it will be a poor tribute to these leaders if we were also to allow it to devalue the aspirations which commanded their dedication.

III. THE ROAD NOT TAKEN[68]

Chapter 2 of Austin's book (26-46) entitled "Which Road to Social Revolution?" is certainly a most unusual one in a book on Indian constitutional history. But it is unusual not because this question insufficiently agonized the makers of the Indian Constitution but rather due to our own unquestioned acceptance of what has been accomplished by it.

It is good to recall that the Constituent Assembly's mission "was to draft a Constitution that would serve the ultimate goal of social revolution, of national renascence(27)." But that entailed more than careful verbalisation of shared socio-political values. It entailed a threshold "choice" between tradition and modernity in political institutions and in social structure and a cautious eclecticism, after that "choice" was made, in utilising the constitutional history of the world for our own Constitution.

Theoretically, there were indeed many alternatives — broadly between a democratic and a pre- or neo-democratic political structure, between "European totalitarianisms or the Soviet system" or the more

65. This in itself further reinforces the need for a revival of dedicationism.

66. See *supra* note 45. The recent interest in developing countries and comparative politics oriented to these is salutary.

67. See, from the viewpoint of economic theory, the recent perceptive study by Wilfred Madlenbaum, "Government, Enterpreneurship, And Economic Growth In Poor Lands," 19 *World Politics* 52-68, esp. 66-68 (1966), discussing broadly the leadership aspects.

68. The sub-title is derived from one of the short poems of Robert Frost, where the poet recalling his decision at the crossroads, to take one of the two roads, feels that the road not taken "has made all the difference."

indigenous pattern of a benevolent "despot in his durbar." So strong was the commitment to the democratic principles, however, that these were almost ruled out *a priori* by the architects of modern India.

The only "alternative" that received some degree of serious consideration was embodied in the schemes submitted by Gandhi in January 1946 and January 1948, for reorganization of the Congress party based on village panchayats as the basic unit and involving a transmutation of the Party from a " 'propaganda vehicle and parliamentary machine' " into a "social service organization (28)." Although the basic idea behind Gandhi's proposals, examined below, may have been to influence national life more fundamentally than either Austin or many of us realize, the Congress Party and following it the Constituent Assembly rejected the Gandhian Plan as a serious alternative to parliamentary democracy.[69]

Ardent Gandhians attempted to formulate a constitution embodying some aspects of the ideal social order, essentially based on a conception of social justice which restricted the role of the state to an irreducible minimum and emphasized the "individual's responsibility for his own welfare (31)." This resurrection of the individual, and the moral and social awakening it implied would, it was hoped, lead to the attainment of an ideal community, the *Ram Raj*. In this sense, following the Euro-American models would be to "propagate immorality."[70] However, Austin tells us :

> The ideal of a revived village life with benevolent panchayats and decentralized government bringing democracy to grass-roots level appealed to Assembly members. Yet when considering the political tradition to embody in the constitution they had to ask themselves several questions concerning the Gandhian alternative : (a) Was the nature of man different in rural from in urban society ; would man become a moral being in one and not in the other ? (b) Was it possible in 1947 to change India back to a primarily agricultural, village nation ? (c) Did the state bear the responsibility for the welfare of its citizens ; if it did, could it fulfil the responsibility under a decentralized constitution ? (d) Did the villagers have — as they must have with a decentralized constitution and indirect government — the initiative to remake their way of life ? (31).

Whether or not so clearly perceived or articulated by the makers of the Constitution, these formidable questions about the Gandhian alternative almost answered themselves. But, in addition, there were other "reasons for the choice."

First, the "Congress had never been Gandhian" in *this* sense. The belief in "parliamentary government seemed, in fact, to be nearly

69. See the quotation from the Circular issued by the Congress Party. *Austin* 29.

70. *Austin* 28-31, at 31. The phrase is apparently S. N. Agarwala's, who wrote the *Gandhian Constitution For Free India* (Kitabistan, Allahabad, 1946). Also see in this context, K. G. Mashruwala, *Some Particular Suggestions for the Constitution of Free India* (Hamara Hindustan Publications, 1946).

universal."[71] Also in view of an "unusually lengthy and relatively (speaking in colonial terms) successful experience India had with representative government, it is not surprising that Indians should have favoured a parliamentary constitution."[72] World historical factors such as the high stock of representative democracy — "especially that of Britain and the United States" and "the victory of the democracies over the Nazis and Fascists" strengthened the "intellectual" commitment to the "liberal democratic tradition" even though historically the exposure of Indians to such a tradition may have been inadequate.[73] Second, being "in general, imbued with goals, the humanitarian bases, and some of the techniques of social democratic thought, such was the type of constitution that Constituent Assembly members created."[74] But there were, third, in Nehru's words, "the present facts, forces, and human materials" which gave a mid-twentieth century answer to Gandhi's "diagnoses of society's ills" and his proposed remedies. Eminent among these "facts" and "forces" were : the communal troubles, the near-famine conditions, the security problems, the problems of the Princely States and their integration, and of planned economic progress. Thus, the immediate survival of India seemed to dictate a powerful government structure.[75] And the last, but not the least, reason for the "choice" of parliamentary democracy was the commitment of the Congress Party to direct election by adult suffrage which had become "a *sine qua non* of independence."[76]

This is certainly an invaluable account, as it helps the re-emergence of many ideas and attitudes now almost entirely lost from view and vindicates the belief that adoption of parliamentary democracy — a culmination of almost a century of aspirations and struggles to secure them — was made in a spirit of dedication rather than out of some kind of historical inevitability. All studies of Indian society and politics must therefore acknowledge that this political pattern of a free India

71. Austin tells us that almost all the constitutions drafted by various political parties, including the Communist Party, subscribed to the parliamentary and centralized form of government. *Austin* 40.

72. *Austin* 40. On this K. M. Munshi's position seems to have been very persuasive. He argued from the premise that India had, on the eve of the drafting of the Constitution, almost a century long experience, even if limited, with the Parliamentary form of government. See *Austin* 41 ; and see for an analysis of this experience, Morris-Jones, *supra* note 23, at 43-73.

73. The recurrent emphasis on such world historical factors in Austin's narration needs to be taken with some caution. Many other Constitutions drafted around the same time do not seem to have been as much influenced by these factors.

74. Austin suggests that the common image of Nehru and other Laski-ite members of the Assembly being moderated by Sardar Patel may be overdrawn. This is one more example of Austin's empathy. See *Austin* 42-3 ; and also *supra* note 24.

75. *Austin* 43-45.

76. *Id.* 46-49. The basic assumptions about the impact of the universal franchise now need to be studied in the light of the present experience.

had been cherished by the Indian intelligentsia over generations and and in that sense had become almost Indianised though it may, in the thinking of some, have been as alien to the masses as the British rule itself. A part of what Professor Morris-Jones has recently called "India's political miracle" is certainly attributable to the above fact.[77]

But even this excellent reorganization of the Constituent Assembly material needs to be read with certain important correctives. First, the meaning in which Austin uses the term "alternative" (and "choice") is not quite clear. On Austin's own account, adoption of a parlimentary democracy based on direct adult suffrage was the only choice (but for that reason not necessarily the Hobson's choice) open to the makers of the Constitution. If so, it seems inapt to speak of a choice or alternatives. For surely the term "alternative" is meaningful only when at least two (if not more) feasible courses of action are open to decision-makers. Nor Austin be taken to mean "theoretically" open choices, irrespective of their prospects of realization. If, however, this is the meaning, the debates in the Constituent Assembly appear to have been grossly inadvertent to the range of alternatives, and it can even be said that both in view of their default, as well as the analytic responsibilities implied in such a meaning of the term 'alternatives', a consideration of such choices is *not* foreclosed even to-day, despite the adoption of the Constitution.

It may be, and this brings us to our second corrective, that Austin construes the Gandhian proposals as providing an alternative to the idea of a parliamentary democracy. But even this is suspect; because in Austin's own analysis, the former does not seem to have been considered a feasible course of action, either by the Congress or the Assembly.

It is necessary to emphasize this aspect for several important reasons. First, it is doubtful, to say the least, that Gandhi himself proposed this as a meaningful alternative. No doubt Gandhi favoured the views attributed to him by his followers at the time of the Constitution-making; but was he so naive as to project this as an institutional alternative to parliamentary democracy? Would a reconstruction of Gandhian thought substantiate such a view? Was Gandhi really a *passeiste*?[78] We think not.

The true position seems to be that he was ambivalent rather than absolutely averse to the idea of parliamentary democracy. If he was so decisively averse (as would appear from Austin's account) it is

77. W. H. Morris-Jones, "India's Political Miracle," XII *The Australian Journal of Politics and History: Special Number—Modern India* 213-20 (1966).

78. "*Passéiste*" is used to describe "one who is not adopted to the present age who is not a man of his time, one who lives in the past." Jean Paul Sartre, in one of the greatest biographies of our times, calls the use of this appellation in describing Genet as "barbaric;" and so it is. See Sartre, *Saint Genet: Actor and Martyr* (transl. by Bernard Fretchman, Mentor Paperbacks, 1963).

surprising that he did not either exploit his charismatic leadership or use a wide variety of means of interpersonal and group persuasion and moral coercion which would easily have won a wider and more compelling espousal of his views. While it is the task of Gandhian scholars to explain this puzzle, it is equally the task of a political historian to present this puzzle. Austin's questionings instead portray Gandhian thought as anachronistic even on the eve of Constitution-making.

Once this puzzle is presented at least two hypotheses arise. One, it is plausible that in acquiescing equivocally to the alternative plans to the constitution presented by his ardent followers, Gandhi, though aware of the impracticality of this alternative, was indulging in a characteristic act of saintly statesmanship. It is quite likely that he was thereby making it possible for the traditional elite to assert its values both in the Party and in the Assembly, thus hoping to create an atmosphere in which over-Westernisation of the projected political system can be consciously corrected.

Second, it is also possible that in so sharply focusing his attention on village as the basic unit, and eloquently pleading for a reorientation in the Congress, he was aiming at a creation of a healthy division within the party, one wing of which will at least be dedicated to bring about the social, moral, and individual transformation from below while the organizational and political wings engaged themselves in a frontal assault on the traditional society. Those who know the thought of Gandhi and his unsurpassed intuitive foresight would perhaps find this nationally beneficial astuteness quite credible and worthy of Gandhi.[79]

It is regrettable then that Austin did not prefer to explore a little more deeply the so-called Gandhian "alternative" and thus missed a valuable opportunity to present to us a historically and sociologically significant aspect of the Constitution-making.

In this connection, we also cannot help feeling that a wealth of ideas and inspiration is also being missed by Indian juristic learning in our not examining in sufficient depth the socio-legal philosophy of Gandhi. Even at the risk of inviting the allegation of "nationalisation of scholarship," we would suggest that one of the chief tasks of Indian jurisprudents is to explore and reconstruct Gandhian (and neo-Gandhian) thought on relationship between law and society in India. It is likely that as a result certain truisms about Gandhian tradition in this area, now current, will appear less true. But there are many more important reasons justifying such efforts.

For one thing, even when we know that it is particularly difficult to distinguish between rhetoric and reality in the contemporary Indian politics, it cannot be gainsaid that the influence of Gandhi permeates

79. And this indeed has been beneficial to India in many ways, the easiest illustration being some of the directives which have found expression in the Constitution. See *infra* Part IV.

the political environment, and provides a great reservoir of ideas and attitudes which move power-weilders and power-yielders alike, whether traditional or modern. And in this sense Arthur Koestler's acute observation, that modern India is a *Bapucracy*, rather than a democracy, would still seem to hold true.[80]

Equally important, and partly arising from the above, is Gandhi's rich legacy of techniques of civil disobedience and other "coercive means of protest." Their ubiquiubiquity on the Indian scene in itself is sufficient to warrant scholarly involvement. Besides, recourse to such modalities of political behaviour, in the context of Gandhian legacy, adds some fresh perplexities to the perennial problems of civil disobedience and of fidelity to law. What, however, makes scholarly attention more compellingly urgent is the fateful interaction of these modes of political behaviour, at times not far removed from the pre-legal practice of self-help, with efforts at creation of a democratic culture. Unfortunately, the fascinating problems arising in this area have remained more a subject of neglect than study.[81]

IV. DIRECTIVE PRINCIPLES : SOCIAL REVOLUTION IN A DUSTBIN ?

As in the Constitution itself, so in the present book, the directives have been uncomfortably juxtaposed with fundamental rights and occupy, on the scale of printed words, a rather brief space. And yet at least upon the fulfilment of some of the major directives now depends not merely the "success" of the Constitution but also the destiny of India.

Although Austin does not quite say so, the directives constitute at once the strength and weakness of the Indian Constitution and the Indian political life; and this perception is not merely the result of hindsight. The Constitution-makers also foresaw it well. This is reflected, at least in Austin's able account of the drafting process, in the very fact that the directives can be considered to be on the one hand, in Austin's already hackneyed words, as "the humanitarian socialist precepts, that were, and are, the aims of the Indian social revolution," and on the other, by Mr. T. T. Krishnamachari, a member of the Assembly, as a

80. "India is a democracy in name only; it would be more correct to call it a Bapucracy." Koestler, *The Lotus and The Robot* 156 (1960). (The word *Bapu* means Father : and Gandhi was often called the Father of the Nation). Mr. Koestler is generous with his tantalizing generalizations, but not so with his admonition to the reader that these are highly impressionistic. Only in the Preface to his book he says : "What emerged is a mixture of pedantic detail and sweeping generalizations." We agree.

On the impact of the Gandhian thought as *still* providing an "ideology" resource see the recent study of Morris-Jones, *supra* note 77, from where we have adopted the "reservoir" image.

81. Bayley's small book, see *supra* note 15, is perhaps the only noteworthy study; it deserves a wider readership in Indian law schools.

"veritable dustbin of sentiment . . . sufficiently resilent as to permit any individual of this House to ride his hobby horse into it."[82]

(a) *The Dustbin Approach*

And shocking though it may seem, the latter description is not entirely negatived by the directive principles as they finally emerged. For even a superficial reading of the principles will show (and this for reasons other than that the reading is superficial) that not *all* of them while declared to be "fundamental in the governance of the country" and thus imposing a "duty" on the state "to apply those principles in making laws" are either so fundamental as to be enshrined in the Constitution or such as their neglect will frustrate the constitutionally desired social order. Thus, for example, article 38 enjoining the state to strive "to promote welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life" and article 39 specifying certain modalities for its attainment are 'fundamental'; but with them march other directives ranging from prohibition of cow slaughter to obligation to provide "just and humane conditions of maternity relief" and from prohibition of liquor to protection of national monuments.[83]

Nor do we find as much conscientious drafting attention being given to the principles as to fundamental rights or any other vital provisions of the Constitution. In fact some of the directives are so broadly formulated that one can derive whatever policy guidance one wants from them.[84] Nor, further, is it possible to observe all these principles in formulating and implementing national policies. Thus, it can be argued, for example, that India's action in Goa violated article 51 exhorting "the settlement of international disputes by arbitra-

82. *Austin* 75-76. This observation reminds us of the admonition given by one of the comrades to the imprisoned Rubashov in Arthur Koestler's *Darkness at Noon* (1940), that one should not regard the world as a "metaphysical brothel" for one's sentiments. In a footnote Austin notes:

> Some two months after giving his speech, Krishnamachari became a member of the Drafting Committee and his criticism of the Draft's provisions became much less barbed.

83. See, for cow-slaughter, article 47; maternity relief, article 42; prohibition, article 46; and the protection of monuments and other objects of national importance, article 49.

84. This many well have been intended. Nonetheless, the language of some of the articles seems to be self-defeating, *e.g.*, article 41 pertaining to social security. How are we at any given time to know "the limits" of the state's "economic capacity" to which the implementation of the directive is explicitly subject? At any rate, the policy guidance (and this is what we are concerned with) is vastly reduced by the above mentioned caveat; because presuming the bona fides (as we always must) of the leadership, it can always be argued that the directive urges advertence to the economic capability of the state and in that sense does not impose any fundamental priority for promotion of social security measures, which it *prima facie* seems to command.

tion." The same in the full context of the article, with some justification, can also be said of the Kashmir dispute.

All this means that while the principles express certain important objectives of social policy, some objectives are more important than others and among these that are relatively less important, there are a few whose worthiness for enshrinement in the Constitution is open to question. This will become even more clear if we recall that some directives were merely expressions of compromises felt to be both necessary and expedient at that time. In other words, some of the principles can be said to fall within the "dustbin" approach. This would seem especially true of the two principles pertaining to prohibition of cow-killing and to prohibition of liquor.

As to cow-killing, Austin informs us that the directive was introduced for "a mixture of reasons," prominent among which were the "long-standing political ramifications" arising out of the fact that the cows "held a place of reverence in Hindu thought."[85] That this reverence had little to do with the general principle of sanctity of animal life or abhorrence of cruelty involved in their killing appeared clearly from the thinking of one of the ardent cow-protectionists. Thakur Das Bhargava acknowledged that (in Austin's words) "Hindus slaughtered cattle, too, . . . and in vastly greater number than did Muslims." Moreover, to quote at length from Austin :

> Indian Muslims killed cows both for food and as part of religious ceremonies. Hindus, of course, resented this; cow protection societies had existed for at least sixty years prior to the Assembly, and a religious difference had become a major political cause espoused by genuine believers and unscrupulous opportunists alike, for reasons both honourable and otherwise. In the days of the British Raj, many Hindu revivalists had promised themselves that with independence cow killing would stop. Those of this persuasion in the Assembly believed that the time for action was ripe and, as a result of agreement in the Congress Assembly Party meeting, the measure passed without opposition. No one would have quarrelled with the need to modernize agriculture, but many may have found the reference to cow-killing distasteful. There is good evidence that Nehru did. Generally speaking, however, Hindu feeling ran high on the subject, and one may surmise that those who opposed the anti-cow-killing cause bent with the wind, believing the issue not sufficiently important to warrant a firm stand against it. As various provisions of the Irish Constitution show that Ireland is a Roman Catholic nation, so Article 48 shows that Hindu sentiment predominated in the Constituent Assembly.[86]

With regard to prohibition, the communal tension was absent "Hindus relying on Gandhi's teaching and Muslims deriving their authority from the Koran"(82)—to the extent that the article in its present form enjoining prohibition of liquor and harmful drugs was (Austin informs us) moved by a Muslim and a Hindu. Besides the

> advocates of prohibition had both social and doctrinal strings to their bow, and they were supported by the Congress's decade-old official dedication to the cause of prohibition. (83).

85. *Austin* 82.
86. *Ibid.* (footnotes omitted).

The "liberal elements" in the Assembly argued on the basis of the "disastrous experience" of the United States and economic costs of prohibition, which entailed a substantial loss of revenue and considerable enforcement expenses. But the arguments for prohibition were not found to be "wholly unreasonable" in a general atmosphere where drinking was regarded *a priori* "a moral evil" and pre-sociological assumptions were lavishly made about the socially detrimental effects of drinking and the drinking habits of Indian people.[87]

Clearly then some directives embodied expedient intra-party compromises rather than fundamental principles of social policy. The Assembly had neither time nor inclination, it would seem, to deal with the anxieties and fears of a few about the advisability of incorporation of the two directives. These were tempered by the overwhelming need to offer what then seemed to be minor concessions in a hope that in future they would not present major obstacles.

These vignettes from the history of Constitution-making also alert us to the need for sensitivity in identifying some of the directives as expressive of indigenous social values. It is, indeed, an open question as to what extent the directives under discussion really represent cultural or social or religious values of India of past or present. At best, sociological or theological research in both these areas may yield formidable support to protagonists of both viewpoints, though our feeling is that it may even conclusively establish that it is erroneous to think of cow-preservation or prohibition as 'values' in any context.[88] And likewise, except in a very generalized context, it would be misleading to subsume the conflicts arising out of these in terms of either social renovation or political modernization.

We feel a brief discussion of the rationales behind both these directives to be here necessary. First, as to cow-protection, it must be acknowledged that article 48 while being a reluctant compromise is a clever one. It does *not* confer constitutional immunity on cows. It says :

> The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and other milch and draught cattle.

---

87. *Austin* 82-83.

88. We are here not inadvertent to Julius Stone's recent admonition that we should set aside the "rigid distinctions between 'values' and 'attitudes'." See Stone, *Soc. Dim.* 546-51. But later on Stone himself endorses and adopts the distinctions proposed by Jacob and Flink, in their pioneering study of "values," "beliefs" and "impulses," in his discussion of "rational and non-rational vectors of individual and social action (at 555-56)." This would then seem to mean that not all attitudes form a subjective dimension of values; and that some can be relegated either to the rubric "belief" or "impulse." And although we are not at home with the present classification, in terms thereof the cow-preservation behaviour would clearly fall within the "impulse" vector.
Also see, *infra* note 98.

The leading case which involved judicial commentation on this directive was *M. H. Quareshi* v. *State of Bihar*,[89] where Pandit Thakurdas Bhargava was permitted by the Supreme Court to appear as an *amicus curiae*. The decision makes a delightful reading and opens up a number of interesting questions all of which cannot be here explored. But there is not doubt that had legal scholarship in the country paid close and imaginative attention to this decision of 1958, we would have been in 1967 (a year of pro-cow mass agitations) surely able to provide sound policy guidance to the leadership and some help in creating a rational climate for discussion of the issues involved.

For the present purposes, it should suffice to draw attention to some aspects of the Supreme Court's decision. The Supreme Court held that the enactments passed by the States of Bihar, Uttar Pradesh, and Madhya Pradesh banning the slaughter of certain animals, including cows, were not invalid because they did not violate the fundamental rights of the Indian Muslims under article 25(1) of sacrificing cows and other animals on the Bakr Id day—a day of special religious significance for the Muslims. But the Court also held that in so far as the impugned state Acts totally prohibited the slaughter of "she-buffaloes, breeding bulls, and working bullocks without prescribing any test or requirement as to their age or usefulness" they offended against article 19(1) (g) which guarantees the right to "practice any profession, or to carry on any occupation, trade or business."

As to the first major contention of the petitioners that the impugned Acts violated the right to freedom of religion as guaranteed under article 25(1) of the Constitution, the Court did not find any warrant to say that the sacrifice of the cow on the Bakr Id day "is an obligatory overt act for a Mussalman to exhibit his religious belief and idea." The Court conceded that the "sacrifice established for one person is a goat and that for seven a cow or a camel;" but went on to say that it is "therefore optional for a Muslim to sacrifice a goat for one person or a cow or camel for seven persons." Since there was a clear option in this regard, the Court found it difficult to see an "obligatory duty" arising from religious prescriptions. To the contention of the petitioners that a "person with six other members of his family may afford to sacrifice a cow but may not be able to sacrifice seven goats" (or, if we may add, a camel instead) the Court was unsympathetic since this constituted an "economic" rather than a "religious" compulsion. The Court also pointed out that several Muslim emperors in the past had imposed bans on cow slaughter and that many Muslims today did not sacrifice cows and some Muslims (including those who served on a government committee leading to the Uttar Pradesh legislation) were in favour of such a ban.[89a]

89. A.I.R. 1958 S.C. 731-56.

89a. *Id.* at 740-41.

But when the Court addressed itself to the constitutional solicitude for cows, it was not as rigorous in its search for substantiation of the claim that cow had the alleged reverential position in the Indian religion. No doubt, the learned judge quoted at random from hymns of the Vedas (composed about two thousand years before Christ) and emphasized the evolution of the symbolic significance of cows, first as sacred animals and then as tokens of wealth. From this the Court proceeded to conclude :

> There can be no gainsaying the fact that the Hindus in general hold the cow in great reverence and the idea of the slaughter of cows for food is repugnant to their notions and this sentiment has in the past even led to communal riots. It is also a fact that after the recent partition of the country this agitation against the slaughter of cows has been further intensified. While we agree that the constitutional question before us cannot be decided on the grounds of mere sentiment, however passionate it may be, we, nevertheless, think that it has to be taken into consideration, though only as one of many elements, in arriving at a judicial verdict as to the reasonableness of the restrictions.[90]

It is easy to miscall this judicial awareness of the pro-cow "sentiment" a "sociological" awareness ; whereas on examination it will appear that the Court was merely yielding to a vague notion of what it considered to be a Hinduistic social value. One gets the impression that the rigorous methods employed by the Court for the ascertainment of the Islamic precept were *not* extended to the determination of the Hindu's reverence for the cows.[91] The Court prejudged the issue of existence of such a reverence by characterizing it as an indubitable "fact" and then indiscriminately lumped together what it thought to be the salient illustrations of this "fact." But it is extremely hazardous (as we will shortly see) to take "communal riots," "agitations," feelings of "repugnance" towards beef-eating, or a combination of all these factors, as substantiating the "fact" that Hindus "in general" hold cow in "great reverence."

Besides, by the Court's own methodology, if isolated examples can disprove, or at any rate impeach the validity of, a religious precept, such examples can also have a similar effect on the "fact" of a "popular

90. *Id.* at 745.

91. It may be contended that the Court did not have sufficient guidance from the petitioners in the exploration of the Islamic doctrines. But surely in itself this is no valid argument for a curt dismissal of a claim based on religious prescriptions of a minority group. Besides, the Court of its own motion sought out aspects of what it called "well-known history," as for example, that the Emperor Babar saw "the *wisdom* of prohibiting slaughter of cows as and by way of religious sacrifice and directed his son Humayun to follow this example" (at 740, emphasis ours). But surely, this *wisdom* may be economic rather than religious, to use the Court's dichotomy, and what Babar, or his progeny, did in this regard as monarchs of certain parts of India need not affect the Islamic precept. At any rate, the Court could have pursued this matter a little further.

We are making this point at such length to illustrate the complexities involved in any endeavour to substantiate a particular claim as religiously enjoined or valid. And this has special relevance to the cow-preservation issue discussed here.

sentiment." Thus, as against some Muslims who favour a ban on cow-slaughter, there would be many Hindus who strongly favour the lifting of such a ban. Likewise, if some Muslim emperors imposed a prohibition on cow-slaughter in the past, history may remind us of Hindu emperors who did not do so or were entirely indifferent to the issue. Nor, again, as a matter of fact, is repugnance towards beef universal among the Hindus. It is then possible for some to think, somewhat uncharitably, that the only drawback of the Muslims was that they had not agitated sufficiently to win either judicial sympathy or judicial cognition of their "sentiment" towards their religious precepts as providing "one of many elements" of the Court's "verdict."

These considerations cannot be met by a legalistic argument that the "issue" before the Court was merely that of ascertaining the validity of the impugned Acts in the light of petitioner's contention that their fundamental right to religion was infringed thereby. Such an argument overlooks the simple fact that the Court candidly recognized the role of "popular sentiment" in assessing the validity of the Acts and in arriving at the conclusion of the reasonableness of the restrictions on the rights.

The second aspect relevant here is the Court's elaborate analysis of the economics of cow-protection. The Court after a remarkably detailed study of the various uses of cattle in Indian agriculture came to to the conclusion that the cow and her progeny are "the back-bone of Indian agriculture," endorsing Lord Linlithgow's remark that the "cow and the working bullock have on their patient back the whole structure of Indian agriculture." The Court said that the cow and her progeny

> sustain the health of the nation by giving them the life giving milk which is so essential an item in a scientifically balanced diet. The working bullocks are indispensable for our agriculture, for they supply power more than any other animal. Good breeding bulls are necessary to improve the breed so that the quality and stamina of future cows and working bullocks may increase and the production of food and milk may improve and be in abundance. The dung of the animal is cheaper than the artificial manures and is extremely useful .... If we are to attain sufficiency in the production of food, if we are to maintain the nation's health, the efficiency and the breed of our Cattle population must be considerably improved ....[92]

At the same time the Court also recognized that although our "cattle wealth" is the "highest in the world" the "milk production is perhaps the lowest" that if "milk yielding capacity were the only consideration the comparatively smaller number of female buffaloes which produce 54% of the total milk supply of our country would obviously have deserved a far greater preference over the cows in our estimation;" but that, from the viewpoint of increase in food production the Indian agriculturists, perhaps, from "age-old experience," prefer a

92. *Supra* note 89 at 748.

"cow bullock to a buffalo bullock;" and finally that notwithstanding the artificial insemination methods, we are in "short supply" of the ordinary breeding bulls. Another consideration (and here, perhaps, all animals are uniformly alike) was that according to the First Five Year Plan figures available to the Court, "80,00,00,000 tons of dung," used in almost equal proportion for fuel and manure, were produced per annum. The Court also noted that the cattle urine is useful "for nitrogen, phosphates and potash contents in it" and that in terms of money the cattle urine and dung will "account for a large portion of agricultural income in India." In this, one feels, the Court was influenced by Pandit Thakurdas Bhargava's claim that cattle dung and urine contributed "Rs. 63,00,00,000 per year" to the national income.

The Court was advertent to other considerations, such as that beef may form part of the non-Hindu diet or that of the "poor people." It also carefully analyzed the various schemes of *Gosadans* and characterized them as "concentration camps" for cows where they die for want of food in slow degrees and the associated problems of soil-erosion, epidemic diseases, human nutrition versus animal nutrition, and of the total national drain involved in the maintenance of these institutions.[93]

Finally, the interpretation of the directive suggested by the Supreme Court should also be noted. The main argument of the petitioners was that:

> the prohibition of the slaughter of animals specified in the last part of Art. 48 is only ancillary to the principal directions for preservation, protection and improvement of stock, which is what is meant by organising agriculture and animal husbandry.

The respondents, and Pandit Thakurdas Bhargava, on the other hand, argued that the article contains three distinct and separate directions, each of which, should "be implemented independently and as a separate charge." The Court did not feel it "necessary" to pronounce a "final opinion on this question" but instead observed that:

> there is no conflict between the different parts of this article and indeed the two last directives for preserving and improving the breeds and for prohibition of slaughter of certain specified animals represent, as is indicated by the words "in particular," two special aspects of the preceding general directive for organising agriculture and animal husbandry on modern and scientific lines.[94]

Looking at the entire judgment, it seems clear that the Supreme Court did not consider the interpretation placed by the respondents as

93. *Id.* at 749-55. The Court clearly recognized that the presence of a "large number of useless and inefficient cattle" adversely affects Indian agriculture. One wonders why the opportunity thus opened was not seized to expunge from the text of the Constitution the specific reference to the cows. The judgment could have at that time been read to strengthen the hands of the executive.

94. *Id.* at 736.

valid, though a literalist adherence to the decision may produce the impression that the Court has not yet "finally" pronounced thereon.

What emerges from the judgment of the Supreme Court is that the problems here involved are far greater than those present in the relationship between the fundamental rights and the directive principles, important though they are. The problems involved in the implementation of this article relate to what has properly been called India's "agricultural puzzle."[95] Planned progress in agriculture since 1958 may also have the effect of rendering obsolete the economic bases of the Supreme Court's thinking in the present judgment. The trends of planned development are increasingly likely to require certain revisions in the present article, pre-eminent among which should be a clarification, on the lines of the judgment, that the article does not contain *three* separate directions or charges—a view which still adds fuel to the agitational fire on the issue of cow-protection.

And yet it is tragic that considerations of rational policy should be allowed to be clouded (as they did to some extent even in the Court's judgment) by the so-called "popular sentiment" in favour of cow-protection. No doubt, the agitations and threats of martyrdom are real. One cannot however help wondering whether the "sentiment" behind these is equally real, or at any rate exclusively cow-centric.

First, it is clear that the principle of sanctity of life—animal or human—is not at stake here. If it were, however, from the perspectives of a rational ethic, discrimination among animals is scarcely justified, least of all the enshrinement in a constitution of a protective discrimination in favour of cows.

Second, it is also clear that the principle of avoidance of cruelty to animals is not involved in the pro-cow agitations. It will be difficult to establish a moral abhorrence to such cruelty as a peculiar Hindu trait or as a cultural orientation. If, however, the idea is to limit cruelty to cows, and not to other animals, because the cows enjoy a Hinduistic privilege that other animals do not (which, as we will see, is very doubtful) then the question has to be faced : is killing of cows necessarily cruel ? Is it any less cruel to leave them to die by slow starvation in the cow "concentration camps?" And even presuming the state treats cows as its sacred wards, attending to their welfare from birth to death, would not this by the very reason of the huge expenditure involved in such a venture, raise the equally (if not more) formidable question of prevention of resultant cruelty to rational animals ? For there is no doubt that the available resources are meagre even in terms of meeting adequately the needs of bare subsistence of the Indian populace. We are not here prejudging the issue of whether in such a situation religiously privileged animals (or animals *per se*) ought or

95. See John P. Lewis, *Quiet Crisis In India* 148-180 (Anchor Books, 1964).

ought not to take precedence over the rational animals. This presents a fine point of discussion in moral philosophy but for elected policy-makers, perhaps, there are more rough and ready answers to this aspect of the problem.

And, finally, it is extremely doubtful if scrupulous research in Hindu religious traditions (in the same manner as the Supreme Court investigated the contention of the Muslims that they were enjoined by their religion to offer the sacrifice of the cows on their holy day) will endorse the view that cow-killing is prohibited by these traditions.[95a] Even if it so emerges (and this is most unlikely) there will be a related question as to whether this precept would apply to individuals or to states. In the extremely unlikely event of this precept emerging as absolute and applying to states as well as individuals (leaving aside the conflict then arising with the idea of a secular state) there is the question of providing a good life for the sacred animal, above posed, unless of course the theological thesis requires only the availability of a symbol which can be worshipped by the devotees, at their will, in stables or streets. In this sense, the only thing sacred about a cow will be the opportunity it provides by being an instrumentality of religious self-gratification for its human worshippers. Cows may then be thought of (even by devout Hindus) as both *merit - yielding* and *milk - yielding* animals. Empirically, of course, an investigation is bound to demonstrate that Hindu values are anomalous, if not cow-neutral. Many Hindus eat beef; are employed in the butchering profession, and sell cows for slaughtering. Even the states which banned the slaughter of cows allowed importation of beef from other states.

We may then have to conclude that the present pro-cow agitations belong to the realm of what Vilfredo Pareto called the "non-rational" aspects of social life.[96] And of course with that realization the task of explaining it for us is transferred to social psychology.[97] But in so doing we must here pause to pursue some fascinating and formidable paradoxes.

95a. See the formidable diversity of scriptural and doctrinal opinions on this matter in 2 Kane, *History of Dharmaśāstra* 770-82 at 776-77 (1941).

96. See for a succint exposition of Pareto's thought in the jurisprudential context, Stone, *Soc. Dim.* 551-56.

97. *Not* entirely. We must here commend the seminal efforts of Professor Ehrenzweig to inaugurate a "psychoanalytical jurisprudence" aimed at increasing, through psychoanalysis, our "understanding and reform of legal rules, . . . our grasp of law and justice." See Ehrenzweig, "Psychoanalytical Jurisprudence: A Common Language for Babylon," 65 *Colum. L. Rev.* 1331 (1965), "A Psychoanalysis of Negligence," 47 *Nw. U.L. Rev.* 855 (1953), "A Psychoanalysis of the Insanity Plea . . .," 73 *Yale L.J.* 425 (1964); and more recently his stirring call for extension of these insights to the field of conflict of laws, Ehrenzweig, "A Counter-Revolution in Conflicts Law? From Beals to Cavers'," 80 *Harv. L. Rev.* 378 esp. at 395-97 (1966). To this must be added Franz Bienenfeld's *Ms* "Prolegomena of a Psychoanalysis of Law and Justice" in (pts. 1-2), 53 *Calif. L. Rev.* 957 (1965).

The present pro-cow agitations, with the associated "martyrdom syndrome," would be found *not* to manifest what has been called "socio-ethical conviction."[98] And this we say without the benefit of an empirical sociological investigation (which does not necessarily mean that it is said in an *a priori* manner) in view of the many obvious anamolies in Hindu thought and practice as also in view of the patterns of the past and present pro-cow agitations. Here then we have a situation where demands are made by a group of people on lawmakers to enact a law prohibiting cow-slaughter, the enactment of such a law in its turn raising the probability of the creation of a socio-ethical conviction. We are here confronted with a scene where rational policy-making is invoked to institutionalize the "non-logical," and the undesirable, a "sentiment", which has a vague location in some consciousnesses, whose general sharing is as yet minimal and indeed may not grow unprompted by legal machinery. What is more, recourse to civil disobedience and other coercive means of protest is here made to usher in a desired goal through the machinery of law. In other words, in a society where the high prevalence of extra-legal methods should generally foster a disrespect of the legal system, the very same methods are used with the obvious hope and faith that the law—and nothing less than the law—will provide the fullest satisfaction of such demands. Both, the objective sought and the techniques used to attain that objective imply a dedication to the legal system as the ameliorating agency for the supposed social evils; but both at the same time proceed from premises which imply a lack of knowledge about the law's working and an abundant disrespect to its procedures and institutions. Here then is to be found one of the many beginnings of the sociology of the Indian law.[99]

98. We feel that any attempts at *precisely* indentifying the existence of a socio-ethical conviction are foredoomed to failure, not merely because of the slow progress of social and individual psychology or the allied problems of quantification but because of the ultimate phenomenological base, the uniqueness of each existent consciousness. This last factor, in our thinking, presents a limit-situation for the human cognition as such.

With this in mind, an approach to Stone's recent analysis (*Soc. Dim.* 546-586) reveals a justifiable equivocation. Socio-ethical conviction seems to be, on the one hand, an *analytic* construct with which to understand social realities and, on the other, a part and parcel of social reality itself.

We are tempted to take almost an easy way out of the problematics of socio-ethical conviction by transposing Stone's various power-spectrums as rough-and-ready devices with which to delineate the progression of these convictions. Thus, on a rough analogy we can say that the present cow-agitation or "impulse" manifestation ranks lowest on both the Head Count and the Ethical Component Spectrums and a trifle higher in the Time Count Spectrum. But it would seem to rank higher in the Coercion Spectrum, simply because the modality of its expression is one of coercive protests. Coercion, in this context, arises from the ethical conviction end rather than the power end (between which law mediates according to Stone).

When we say that there is no socio-ethical conviction in the pro-cow movement we have in mind the rating on all these spectrums.

99. The writer is presently engaged in a monographic study of this subject which appears not to have been studied at all so far.

The directive on prohibition is also, as we have seen, an uneasy compromise. We there find the same ambiguity in drafting as the judgment of the Supreme Court disclosed in article 48 relating to the cow-slaughter. Article 47 says :

> The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and drugs which are injurious to health.

Once again the case law is confined to illustrating the "reasonableness" of the restrictions on the fundamental rights arising out of prohibition of drinks. Although this directive, in so far as it prescribes prohibition of liquor, shares the same perplexities and compromises in its constitutional origin as the cow-slaughter directive, the absence, so far, of any significant agitation against the policy of prohibition appears to have, paradoxically, immunised it from socio-legal analysis. We have noticed earlier that a swift and smooth passage of this directive occurred primarily out of a Hindu-Muslim accord on its desirability and also in view of the commitment of the Congress Party to the programme of prohibition. The only anxiety arose out of the loss of revenue involved in introduction of prohibition but that was sought to be mitigated by reference to the great moral evil that drinking undoubtedly was.

But a series of objections arise to this part of the directive and its fundamentalness. It is doubtful that it is morally evil to drink, despite the fact that such a precept can be distilled from teachings of Gandhi and the *Koran*. It is questionable that a socio-historical or a theological study would yield the conclusion that involuntary abstinence legally imposed is a virtue or moral good of any other kind. It is even open to question whether theological studies would reveal that the Hindu religion (or for that matter any other, including Islam) unequivocally forbids drinking at both the levels of private and public morality. Commending temperance, it has not been unfortunately realized, is not the same as enjoining prohibition.

On a sociological level, it has yet to be established (as the Constitution-makers presupposed) that a large number of Indians do not drink; but were it so, it would argue against the imposition of prohibition. Similarly, despite the several Commissions which have examined the issue under embarrassingly limited terms of reference, we have little evidence to show that drinking presents a menace to public health or particularly proves detrimental to the working class as was argued at the time of the incorporation of this article. Nor, of course, can it be said without equivocation, that in the states religiously enforcing prohibition laws, prohibition has been a causative factor in improvement of the standard of public health. Nor further have we any significant studies from the economic standpoint of the overall financial implications of either total or graduated prohibition policies. Juristic

scholarship in India has also been hitherto oblivious of the serious jurisprudential problems arising from these prestigious legislative ventures.

There is no doubt that sociological, economic, and juristic studies will seriously challenge the sanctity and fundamentalness accorded to prohibition : though so far it would seem that the directive has implemented a scholarly prohibition far more effectively than the prohibition of alcholic drinks. It is not unlikely, given the present state of affairs, that the growing pressure on leadership to illustrate their obeisance to this directive, among others, will lead to a progressive nation-wide prohibition, thus giving the stage to the agitational furies always waiting in the wings.

We are *not* assailing the merits of prohibition (though the policy is most vulnerable), but only its enshrinement (like the cow slaughter) as a directive principle "fundamental" in the governance of the country. For Indian jurists, this entrenchment of a constitutional compromise assumes a special significance. Prohibition laws create a new class of offenders. Inefficient administration of such laws not merely increases the social costs of an allegedly beneficial legislation but seriously threatens the popular respect towards the legal system as a whole. The poorer sections of the community in some parts of the "dry" states are unable to invoke police protection when exploited by the manufacturers of illicit liquour, thus involuntarily promoting its abundance. To many an ill-administered prohibition law may seem infinitely worse than a managable minority of drunkards.

And behind the viccisitudes of the limits of effective enforcement of prohibition laws lurk the problematics of what Roscoe Pound called, in a memorable phrase, "the limits of effective legal action."[100] Prohibition laws provide a neat illustration of these limits. And recently Robert Merton, reinforcing Pound's juristic insight from sociological perspectives, has warned us that such legislative ventures are often exercises in "social ritual" rather than "social engineering."[101] Indeed, so universal appear to be these limits of effective legal action that it would be a grave error to think that enforcement of prohibition laws in the Indian milieu, for that reason or any other, renders the problem either peculiarly indigenous or atypical so that either the Western legal experimentation in this area or the social learning arising therefrom becomes irrelevant for the Indian policy-makers.

In fact, there is one factor that reinforces the imperative need to avail ourselves of this learning. In India today an effective legal

100. See, for a recent exposition, Stone, *Soc.Dim.* 50-54 and the Project Note at 84-85.

101. Merton, R. K., *Social Theory and Social Structure* 79-82 (rev. and enlarged ed. 1957). Merton observes (at 81) :

> *To seek social change, without due recognition of the manifest and latent functions performed by the social organization undergoing change, is to indulge in social ritual rather than social engineering.* (Emphasis in original).

culture has yet to be established and overwhelming and transparent inadequacies of law as an instrument of social control (manifest in attempts to impose prohibition) would adversely affect, if we may so call it, the socialization of the legal system.[102] An awareness of this very real probability in itself should be sufficient to have a sobering effect even on those intoxicated with the idea of a nation-wide prohibition. But this awareness will also have salutary repurcussions on the talismanic use of law now made by the Indian leaders. It will help them to realize more fully then at present, that law, while undoubtedly an important instrument of social change and social control, is but one such instrument; and in such areas, where the limits of effective legal action are clearly manifest, the use of other modalities of social control might prove far more effective.[103]

It must, further, be remembered in this context that traumatic initiatives to scholarly enquiry, provided by nation-wide agitations, often offset the gains of learning arising therefrom by the social costs they involve. And without succumbing to the illusion that "knowledge is action" we can still say that such costs can be avoided, to some degree at least, by an early scholarly occupation of the field.

(b) *The Social Revolution Approach*

Turning away from the dustbin approach, it has to be acknowledged that Austin is correct in saying that the directive principles as a whole evolved in the Assembly in the atmosphere of social revolution and that some of them represent its precepts. To this important extent, they were consciously intended to remind the succeeding generations of

---

102. By this uncommon notion, which also forms a part of our projected study of the sociology of the Indian law, we mean something quite different from Roscoe Pound's "socialization of law." Pound's phrase indicates one of the stages of the historical development of law in the Western societies and indeed this is the very last stage in his classification. See for a succint statement, with illustrative materials, Pound, *Outlines of Jurisprudence* 43-49 (5th ed. 1943); and Stone, *Soc. Dim.* 151-53, restating briefly the principal signs of the new orientation which accompanies law in this stage of development.

On the other hand, the socialization of legal system will involve the general acceptance by people of a relatively well-developed legal system which, crudely speaking, has been "imported" as a part of the colonial acculturation process, and whose workings elude the "cognitive grasp" of a large mass of people. An absence of law-consciousness (not to be identified with lawlessness) thus persists giving rise to what has sometimes been called a multi-legal culture and accentuating the dichotomy between the living law (not quite again in the sense of Ehrlich) and the lawyers' law. *Cf.* Baxi, "Patterns of Advanced Legal Education and Legal Research," 4 *Jaipur L.J.* 187-88 (1964).

103. This again forms a part of our projected explorations in the sociology of the Indian Law. For an general orientation on problems of law as a means of social control, see Stone, *Soc. Dim.* 743-98. Also see for a perceptive analysis of law and social control in the Indian context, despite a title unsuggestive of this, Blacksheild, "Secularism and Social Control in the West: The Material and the Etheral" in *Secularism: Its Implications For Law and Life in India* 65-85 (Sharma, ed. 1966).

self-governing Indians that with freedom secured, their task had just begun.

Demands for "social justice" and social reconstruction formed an important aspect of the freedom struggle. Austin tells us that the "roots of the Directive Principles may be traced back to the 1931 Karachi Resolution, or farther, and to the two streams of socialist and nationalist sentiment in India that had been flowing ever faster since the late twenties (76)." Moreover, Assembly members and "especially the select group in the Fundamental Rights Sub-Committee" found that the most characteristic feature of the European Constitutions, after the First World War was, (in the words of Agnes Hedlam-Morley),

> the recognition of the fact that one of the chief functions of the State must be to secure the social well-being of the citizens and the industrial prosperity of the nation.[104]

Austin also suggests that the "Congress's long-standing affinity" with the Irish Nationalist Movement may have made the example of

> the constitutional socialism expressed in the Irish Directive Principles of Social Policy especially attractive to a wide range of Assembly Members (76).

No doubt, "Nehru and other Assembly members at times referred to the ancient roots of Indian socialism." But these references, Austin assures us, were not oriented to base either the "Socialist aims" or the drafting of the directives on "a religious ethic exhumed from almost mythical past" and "were made more for the sake of form than from historical conviction (77)."

This, however, does not inhibit Austin in thinking that in India's past, state had always played a pre-eminent role for the welfare of the people. Thus, he says :

> It is not unreasonable to conjecture also that the placing on the government of a major responsibility for the welfare of the mass of Indians had an even deeper grounding in Indian history. Under a petty ruler, a Mogul emperor, or the British Raj, responsibility for both initiation and execution of efforts to improve the lot of the people had lain with the government. What the government did not do, or see done, usually was not done. The masses had, generally speaking, looked to the ruler for dispensations both evil and good. Heir to this tradition, Assembly members believed that the impetus for bringing about the social revolution continued to rest with the government (76).

This, like many of Austin's courageous generalizations, appears to this writer to be an invitation to sociological or historical research rather than a statement of conclusions emerging from such researches.

Be that as it may, the drafters, while almost unanimous about the need and desirability of the incorporation of the precepts, faced rather difficult problems when they addressed themselves to the contents, formulation and, above all, the justiciability of the precepts. As against

104. Cited in *Austin* at 76, n.6.

the British, social revolution merged with demands for freedom and inalienable human rights; but the task of disentangling the precepts which should find expression in the Constitution from the host of demands made on the foreign rulers was difficult. It gave rise to a *shuffling process* between justiciable precepts, beginning then to emerge as fundamental rights, and those not so justiciable, even though dear to the Constitution-makers. Thus, for example, the right to primary education was transferred from the chapter on rights to that on directives; and likewise the all important right to equality before law had to be transposed from the list of the principles and made justiciable as a fundamental right. In the process, some principles were altogether dropped and found no place either in the rights or the directives. Thus, an interesting directive, emulating a relevant provision of the Japanese Constitution, stipulated that "marriage should be based on mutual consent;"[105] but this was later dropped, perhaps, also by mutual consent!

While the study of the proposed directives, like the above, unceremoniously dropped, would furnish a welcome literature within the dustbin perspective, the entire shuffling process dramatically highlights the equivocal relationship between the fundamental rights and the directive principles, which even haunts the Indian constitutional development today. In this connection, it is worthwhile to revive several suggestions made on the floor of the Assembly. B. N. Rau (who initially, Austin informs us, unlike some "British-trained lawyers" approached "the question of fundamental rights . . . with a certain scepticism") at one stage proposed that careful consideration should be given "whether the Constitution might not expressly provide that no law made and no action taken by the State in the discharge of its duties" under the directive principles "shall be invalid merely by reason of its contravening" the fundamental rights. This had considerable support but "those who disliked mere precepts" ultimately supported them "in the belief that half a loaf was better than none(78)." But K. T. Shah (a member of the Assembly) further wanted to make sure that the half loaf thus offered was edible : he suggested that there must be a specified time limit within which "all" the directives must be made justiciable. Otherwise, he said, in words we can use well, they would remain mere "pious wishes" and a "window-dressing for social revolution."[106]

The equivocation is also reflected in the criticism made by certain Assembly members who felt that the directives "did not go far enough in encouraging a socialist society(83)". Thus Amendment 894, proposed by V. D. Tripathi, read that "the profit-motive in production (should be) entirely eliminated in due course of time." Amendment

105. See *Austin* 75-81.

106. The last phrase seems to have been paraphrased from Shah's remarks by Austin. See *Austin* 79, esp. n.9.

866, submitted by A. R. Shastri, wanted to ensure for "the workers in the fields and factories effective control of the administrative machinery of the State." In rejecting or persuading withdrawal of such amendments it was the feeling of the majority that the principles should be kept "general," leaving " 'enough room for people of different ways of thinking' to reach the goal of economic democracy (83)."

It is also noteworthy that most Assembly members assumed that though the directives were not justiciable, they will still be effective. Munshi thought the directives would form "the basis of protest against arbitrary legislation." Ambedkar felt sure that the party in power will have "to answer for them before the electorate at election time." A. K. Ayyar, who had initially some doubts about the role of the precepts, later felt that the constitutionally desired social order would evolve from their incorporation in the Constitution because "it was 'idle to suggest' that any-freely elected legislature would ignore the sense of the Directive Principles."

(c) *A Suggested Approach*

In no other area of constitutional scholarship, the need to ascend from the planet of platitudes to an analytic paradise is more compelling than in the study of the directive principles. For excepting some recent notable efforts,[107] constitutional scholarship has been hitherto content with reiteration of time-worn truisms about the directives—that they are inherently non-justiciable, though they have been subjected to judicial cognizance in the context of assessment of reasonableness of restrictions on the fundamental rights, or that their value has been merely inspirational. Now and them there is a suggestion, doomed in the very act of its articulation, that the directives should somehow be made justiciable. Obviously, we need to proceed beyond this, if only in an attempt to understand and clarify this under-studied aspect of the Indian Constitution.

Out of the interaction of what we have here called the dustbin and the social revolution approaches, emerge both a design for research (though research here may seem to some to be a euphemism for exploration in the obvious) seeking to assess the present social and political efficacy of the directives and to provide some new orientations for future thinking about them.

---

107. See G. S. Sharma, "Concept of Leadership Implicit in the Directive Principles of State Policy in the Indian Constitution," 7 *J.I.L.I.* 173-88 (1965).

See also Markandan, *Directive Principles in the Indian Constitution* (1966), a massive study of the origins, evolution, and implementation of the principles. But even this valuable study seems overconcerned to refute Sir Ivor Jenning's lapidary observation (see *infra* note 116) and to demonstrate the indigenousness, or at any rate the Indianisation, of the ideology implicit in the directives. Consequently, there is also a ready acquiescence in the view that some directives (such as the prohibition directive) embody Indian values.

First, as to research, there is a clear need to undertake a survey of state and national legislation initiated in pursuit of the directives. This may be difficult with regard to the all encompassing directives (like article 38) but not so with regard to many other articles which are relatively more specific. A statistical checklist (even without the benefit of the computers) of the national and state government documents—such as five year plans—which contain a specific reference to the directives needs to be prepared. Election manifestoes of various political parties and their various programmes should be likewise scrutinized. Such surveys must also be advertent to the fact that the expression "state" in the directive principles includes, by virtue of article 12, local and "other" authorities, thus extending the scope of policy guidance to virtually every government agency.

Out of these surveys will emerge some raw data which will enable us to roughly assess the extent of obeisance paid to the directives by the leadership. We would be able to have a fair idea of the under-implemented or un-implemented directives. We will also learn something about the varying interpretations placed by different states on some of the directives. This is particularly important as the judicial interpretation of the directives is bound to remain peripheral.

Second, we need specialized studies of the relevance of the directives to judical policy-making at the levels of state judiciary as well as the Supreme Court. From this will emerge, among other valuable conclusions, a picture of the evolution of judicial responsiveness to the constitutionally desired social order, and the extent of mitigation of the inherent non-justiciability of the directives thus implied.[108] As to orientations for future thinking on directives, it is necessary to avoid a general approach which overlooks the important distinctions among the directives. It has to be realized that some directives, like George Orwell's animals, are more fundamental than others. To attain requisite clarity in thinking about the directives, their classification from various perspectives is necessary. While commending Gyan Sharma's classification of the directives in terms of their value-orientations,[109] we would suggest that the precepts be classified into two categories: fundamental and transitional. The "fundamental" directives will include those which promulgate the constitutionally desired social order in general terms and to which continual policy

108. Dr. Sharma, *supra* note 107, offers numerous illustrations where the courts have shown sensitivity to the directive principles in interpreting the Constitution in general and fundamental rights in particular. The question then rightly emerges as one of the extent of the evolution of judicial responsiveness to the directives rather than of the non-justiciability of the directives, which is a constitutional fact.

109. *Id.* at 175-76.

advertence is constitutionally mandatory.[110] In a sense, these directives provide the image, if not the identity, of India and their desuetude or demise would involve also the downfall of India as constitutionally conceived. The "transitional" directives would include those which are clearly attainable over specific period of time and once attained will cease to be "fundamental" in any meaningful sense of the term. Their attainment will in a sense create a gap in the overall constitutional policy guidance. The directives can be called "transitional" also because by their very specificity they invite immediate policy action and inadvertence to them may deplete correspondingly their efficacy as policy-orientating devices.

This classification has the obvious merit of providing some guidelines for a sensitive discrimination among the directives. It would also seem to be loyal to the history of Indian Constitution-making. Through it we may be able to glimpse the real dynamics of the directive principles which are judicially, but not otherwise, changeless. And by orientating us to the possible gaps arising from their fulfilment (in varying degrees), the present classification also invites us to a consideration of such emerging precepts as merit the constitutional benediction.

And this brings us to the very last submission, most important of all, based on the realization of the dynamics of the directive principles, that some thought should be given to the extension of amending process to this area. There is no reason why the directive principles should not be open to amendment when this is considered both necessary and desirable; but by a strange irony unless we create some hospitable climate for their amendment, the need and desirability of amendment will scarcely be perceived.[111]

---

110. It is in this context, that we should take into account the strange thesis of Mr. Jagat Narain that from a "juridical viewpoint . . . it makes sense to say that the "Directive Principles" do constitute part of Indian constitutional law and that they *are in no way subordinate to the "Fundamental Rights."* Narain urges that this is so because article 37 lays down in a language that "could not have been more explicit," that the directives shall be fundamental in the governance of the country. Moreover, the directives are *"law in the real sense of the term"* because "most of them have been followed and practised by the Government since the inception of the Constitution" and such directives as have not been followed so far are still in some sense "rules of law" since they remain in the text of the Constitution and cannot be deprived of their legal character save by an amendment. All through his discussion, Narain relies heavily on the analogy between rules of international law and the directives. See Jagat Narain "Equal Protection Guarantee And the Right of Property Under the Indian Constitution," 15 *Int. & Comp. L.Q.* 199-230, at 206-07 (1966). (Emphasis added).

The whole thesis is so strained that to state it afresh is almost to answer it. Whether or not Narain's thesis makes sense "juridically," it is clear that the learned writer has preferred to overlook both the constitutional history and the decisional law on the subject and has let his enthusiasm to infuse life in the directive principles (which we share) import meanings into the text of the Constitution that it cannot bear. Besides, state practice does not make law in the municipal sphere if anywhere; and the analogy between the directives and rules of international law is infirm and proceeds on a basic misunderstanding of both.

111. The only directive that seems to have received some amending attention pertains to preservation of national monuments etc. In the present context, the amendment would seem as inconsequential as the directive amended.

We feel that such aspects of the relevant directives which affect cow-slaughter and engender prohibition should be expunged from the Constitution. We hope we have shown the desirability of such a course of action. Their elimination is surely justifiable both in terms of their constitutional origin as intra-party compromises which have outlived their utility and in terms of the need *now*, irrespective of their constitutional origins, of doing away with their constitutionally privileged position since they affect pursuit of such policies as are now felt both necessary and desirable. It is doubtful, to put it mildly, that their elimination will adversely affect the constitutionally desired social order. In fact, their presence in the Constitution may have this effect by ironically fulfilling Mr. K. M. Munshi's hope that they will provide "a body of doctrines to which the public opinion may rally(78)."

But the amending process implies possibilities of addition of new directives and the elimination of the existing ones. And here it may be found desirable, as stressed earlier, to incorporate such new directives as are seen now emerging from experience. Even when the amendment moves fail, the initiation of amendments and the debates surrounding them will focus public attention on the directives. Thus, at last an official monopoly of their espousal will come to an end: and at least a step would have been taken to invest the directives with greater social and political efficacy. Heightened political and public responsiveness to the destiny of the directives may also assist the "powerisation" of the dedication motif urged earlier.

In this sense then some would say, with the obvious risk of oversimplification, that the task of the Indian constitutional scholarship is to salvage the social revolution from the dustbin.

V. Fundamental Rights : "Conscience" or "Playthings" ?

(A) *The Right to Property and Constitution-making in the Fifties*

While we have urged in the context of directive principles that the fundamentalness of some of them needs a re-examination, such a re-examination is somewhat paradoxically taking place with regard to the fundamentalness of fundamental rights. The agonizing reappraisal has occurred mainly in the context of three constitutional amendments to the right to property. For a better appreciation of the changing destiny of that right, and of fundamental rights in general, it is necessary to seek to understand with Austin the following aspects of the Bill of Rights : (1) The *raison d' être* of the incorporation of a written bill of rights in the Constitution ; (2) the elimination of the "due process" phraseology in the rights to property ; and (3) the ambivalence of the Constitution-makers towards the institution of property. To an appreciable extent, the saying that those who do not understand the past are doomed to repeat it seems to have been fulfilled in the still continuing

dialogue between the Indian judiciary and the Parliament on the fundamental right to property.

(i) Some Good Reasons for having a Bill of Rights

Austin feels that the rights and the principles concretize, as it were, the aims of "national renascence." The rights and principles had "their roots in the struggle for Independence" and "were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India." They "thus connect India's future, present, and past adding greatly to the significance of their inclusion in Constitution and giving strength to the pursuit of social revolution in India." In a vivid phrase, Austin calls the rights and the principles the "conscience" of the Constitution.[112]

We should here recall that the rights, like the directives, did not come full-blown to the Assembly on the eve of the Constitution-making. The ideas behind them and indeed some of the verbal formulations evolved through "sixty years of growth" and both the types of rights "had developed as a common demand, products of the national and social revolutions, of their almost inseparable interwining, and of the character of Indian politics itself(52)." For the fascinating story of how the initially anti-colonial demands became gradually stamped with the content of liberal democratic ideas, and matured into a quest for fundamental rights, one should go to Austin's account itself. But even as one does so, it should be realized that a study in the history of evolution of the rights over almost a century is required if one is to lay at rest a whole variety of "cultural" generalizations, now current, emphasizing that the traditional Indian culture fosters a consciousness of *duties* rather than an assertion of *rights* and suggesting, for this reason, that the fundamental rights, being *essentially* Western, and thus alien to the Indian culture, usher in or are a part of the conflict between "tradition" and "modernity."[113]

---

112. *Austin* 50-51. The use of the term "conscience" cannot be anything but metaphorical. On the problematics of conscience in ethical theory see Peter Fuss, "Conscience," 74 *Ethics* 111-20 (1963-64); and A. J. Bahm, "Theories of Conscience," 75 *Ethics* 128-131 (1964-65).

Mr. Chief Justice Subba Rao (as he then was) quoted Austin's observations with approval in the recent case of *Golak Nath* v. *State of Punjab*, Writ Petitions Nos. 153, 202, and 205 of 1966, as yet unreported. Citations herein correspond to the cyclostyled copy of the judgments (in quarto size) procured from the Supreme Court. The judgments delivered in the case were as follows: (1) Mr. Chief Justice Subba Rao, speaking also for his bretheren Shah, Sikri, Shelat and Vaidialingam JJ.: (2) concurring separate opinion by Mr. Justice Hidayatullah; (3) dissenting opinion by Mr. Justice Wanchoo (now Chief Justice) speaking for his bretheren Bhargava and Mitter JJ. and (4) dissenting separate opinions by Mr. Justice Bachawat and Mr. Justice Ramaswami.

For a discussion of some aspects of this decision in the context of Austin's study see section (B) of this part *infra*. The judgment will be hereafter simply referred to as *Golak Nath*.

113. See part VI of this article for a study in the problematics of kindered stock-in-the-trade generalizations about India. Historically, it may well be true that what we know now as rights pertaining to civil liberties did not prevail in a manner which we could easily recognize in a pre-colonial, and perhaps in the colonial, India. But to suggest from this, as is often done, that the declarations and actual exercise of these rights by people is something alien or uninternalisable in modern India is both notionally and empirically adventurous.

Be that as it may, dedicated pursuit of fundamental rights became an integral feature of the struggle for Independence. Partly, the vociferous demands for these rights arose out of the British attitude, which while based on their own constitutional experience was nurtured by a typical colonial logic. The Joint Parliamentary Committee had thus refused to consider favourably the suggestion that some fundamental rights be incorporated in the Government of India Act, 1935, endorsing the Statutory Commission's exhortation that "Abstract declarations are useless, unless there exists a will and the means to make them effective." To this the Committee felt impelled to add its own advice in the form of the following dilemma :

> ... either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or other of the rights so declared.[114]

This attitude, coupled with the appeal of Dicey's thought, must have no doubt generated some reservations in India about the wisdom of incorporation of fundamental rights in a free India's Constitution.[115] But on the whole the above advice was tainted, in the minds of most national leaders, by the "scoffing attitude of the imperial government toward such rights (59)" and further by (in Sardar Patel's blunt words) "a bogus claim, a false claim," that Britain had "a special obligation to protect the minorities, because Indians could not find justice at the hands of other Indians (59)." Besides, "the decade of 1940's generally was marked by a resurgence of interest in human rights" and the "very winds of social and political thought" within and outside India created a wholesome climate for the inclusion of rights in the Constitution.[116]

---

114. *Austin* 58 esp. n. 30.

115. The eloquent pleading on the eve of Constitution-making for the embodiment of rights reinforces our feelling. See M. Ramaswamy, *Fundamental Rights* (1946); and *Austin* even as to B. N. Rau's scepticism on fundamental rights, at 77.

116. *Ausin* 52. Austin also tells us at 59-60 that "the very winds of social and political thought" brought to India by 1947 "the ideas of Marx, T. H. Green, Laski, the Webbs and many others." But he regards as oversimplified (and rightly so) Sir Ivor Jennings' view that "the ghosts of Sidney and Beatrice Webb stalk through the pages of the text" (of directive principles). Austin also mentions the impact of some Indian thinkers such as, Swami Vivekananda, R. C. Dutt, and M. Visvesvaraya.

But the somewhat unfortunate tendency to accentuate the indebtedness of Indian thinkers to their western counterparts still persists. See the astonishing one-dimensional analysis of modern Indian political thought in Ganesh Prasad, "Whiggism in India" 81 *Political Science Quarterly* 412 (1966). The learned author there concludes:

> ...The Indian revolution was inspired by Burkean thought. The metamorphosed thought became India's legacy to the struggling countries of Afro-Asia and to the world. In this sense, modern India internationalized and universalized, 'the system of an international, extra-territorial universal whig'. (at 431).

But this complex of reasons only partly illuminates the genuine commitment of the Indian leaders to a bill of rights. It is a distinctive feature of Austin's study that he emphasizes through his differentiation between "positive" and "negative" rights their social and cultural matrix.[117] Drawing on the materials of the Forty-Third Annual Session of the Congress in Madras in 1927, and the Motilal Nehru report, Austin emphasizes the fact that, as then conceived, India was to be "a federation of minorities" and a bill of rights was seen to be essential as providing "tangible safeguards against oppression" by minorities in power. But the concern for minorities, like the ideological commitments involved in the liquidation of an alien rule, was but a chapter in the story. The Congress Session at Karachi in 1931 infused in the demands for rights the norms of "social revolution." From now on concern with economic and social change was to be coeval with minority safeguards and political freedoms.[118] And the Sapru Report in 1945, while reaffirming these goals, was to provide valuable mechanics for their realization namely, the distinction between "justiciable" and "non-justiciable" rights, the former appearing finally in the Constitution as the fundamental rights and the latter as the directive principles.[119]

Thus on the eve of the Constitution-making not merely was the commitment to a bill of rights irrevocable but had also within it a latent differentiation in the nature of rights. In this sense, Austin is quite right in saying that "history had done much of members' work for them" and that in formulations of most rights there was "some disagreement on techniques" though "little on principles."[120] And the principle of bifurcation between justiciable and non-justiciable rights advocated by the Sapru Report, made the Irish device of directive principles more attractive to the Constitution-makers. The fact that

117. Austin attaches the label "negative" to one aspect of Sir Isaiah Berlin's *Two Concepts of Liberty* (1961). Sir Isaiah would call "freedom of collective self-direction" a "positive" freedom. Austin, in addition, would describe "demand for equality of rights and self-government" as expressive of desires for both positive and negative freedoms *Austin* 51, 53.

But of course Austin's uncritical adoption of Sir Isaiah's thesis should be understood purely as a use of a convenient descriptual device not betokening an analytical allegiance. There are altogether too many difficulties in *any* straightforward exposition of the idea of freedom. See, *e.g.*, Bay, *The Structure of Freedom* (1958); and Oppenheim, *Dimensions of Freedom* (1961).

118. The Report of the 45th Indian National Congress, 139-41 (1931) cited in *Austin* 56. One of the main objectives of the Resolution was "to end the exploitation of the masses" to accomplish which "political freedom must include the real economic freedom of the starving millions."

119. Mr. Justice Hidayatullah in his concurring opinion in *Golak Nath* cited some aspects of these materials but to merely illustrate his conception of the right to property in the Indian Constitution, see pp. 7-8, 53-55 of his judgment.

120. *Austin* 63; and see 61-75 for a vivid account of the remarkable ease and swiftness with which most fundamental rights were formulated.

this distinction is now a constitutional reality should not be allowed to obscure the more important fact that the directive principles and fundamental rights are both originally rooted in a vision of a new India. And though many writers on constitutional law have been led to draw a radical and sharp distinction between rights and principles, it is heartening that judicial decision-making has not failed to maintain the awareness of their basic unity.[121]

In summation, therefore, we must emphasize that the rationale of incorporation of a bill of rights in the Indian Constitution should not be viewed solely in terms of the favourite antithesis between individual freedom and social control but should rather be regarded in the light of progress towards the constitutionally proclaimed social order of an independent India.

(*ii*) *Processing Due Process* : *Legislative Wisdom* v. *Judicial Fiat*

The charisma of the American "due process" clause had apparently dominated the early phase in the drafting of the fundamental rights : but on the sensitive issues of personal freedom and the property right the luxurious ambiguity of that phrase was relentlessly brought to the attention of the drafters. For related but distinct reasons the two highly influential leaders, Pandit Pant and Rau, opposed formulation of these provisions in terms of due process. Pant had no objection to due process in what he considered to be the procedural sense but he fought against inclusion of the substantive aspects of this notion vigorously. In the context of property rights he clearly preferred that the future of the country be "determined by the collective wisdom of the representatives" and not by "fiats of those elevated to the judiciary." And as to the due process aspect of right to personal freedom his claim that to "fetter the discretion of the Legislature" would "lead to anarchy" indeed did have much merit in the then prevalent communal strife.[122]

Rau voiced equally strong apprehensions, suggesting elimination of "due process" altogether. While admitting that due process provides safeguards against "predatory legislation" he warned that it may also obstruct "beneficient social legislation." He adduced the constitutional experience of the United States in this regard and commended the device of the Irish Constitution which subjected the exercise of certain rights to legislation by "the principles of social justice."[123] Rau's approach was more theoretical than Pant's, being

121. See generally part IV of this paper.

122. *Austin* 84-86.

123. One may wonder whether this change would have been superior to a "due process" phraseology.

In emphasizing the hazards of due process, Rau was much influenced by Mr. Justice Frankfurter. See *Austin* 87, n. 12. We may add one more instance of high admiration in which each man viewed the other. Thus Frankfurter recalled Rau as "one of the most penetrating legal minds of our time." See Frankfurter, "John Marshall and the Judicial Function," *Government Under Law* 24 (Sutherland ed. 1956).

based on analysis of comparative constitutional law, but in their assault on the due process both men were united.

It must be noted at this stage that Austin's account provides a valuable corrective to the general impression that the national leaders were biased against the judiciary. It appears quite clear that there was an even distribution of suspicions of bad faith on all agencies of the state. No doubt the apprehension that the courts by following the black letter rules of the fundamental law might negate social welfare legislation was frequently voiced. But the proclamation of superiority of "legislative wisdom" by Pant also brought out clearly the fears of "legislative extravagance" and the lack of "sense of fair play" on the part of legislatures.[124] In fact, this very feeling led to an express provision in article 31, as it finally emerged, requiring all state legislation dealing with compulsory acquisition of property to be placed before the President of India for his consent—an unusual procedure which serves to safeguard individual right to property even at the expense of federalism.[125]

It was ultimately the suggestion of K. M. Pannikkar that marked the first breakthrough in the debate over due process. Recognizing that the judiciary "should be the guardian, the upholders, and the champion of the rights of the individual," Pannikkar ambivalently argued that it "should not be entrusted with powers restricting the legislative powers of the Union *except to the barest extent possible* and solely for the purpose of resisting the encroachments of the State on the liberty of the individual."[126]

The obvious implication of this position was to provide the legislatures with the task of ensuring economic reconstruction of the country, with their good faith as a basic safeguard against an undue infringement of the property right. But the courts were to be the custodians of individual's right to life and liberty, where neither the past nor the then recent political history of the world seemed to provide through executive and legislative good faith a viable enough safeguard. Although the differentiation proposed by Panikkar lacked

124. See for the views of Ambedkar and Munshi, *Austin* 85, 95. K. M. Munshi at this stage also argued, if the manner of compensation could be made non-justiciable, its payment may be made over a century. This approach has now particular relevance in understanding the meaning of the property right. See *infra* section B of this part. As we shall there stress again, the peripheral public-relations aspects of institutional kinship between the courts and the legislatures, and *our* evaluations thereof based on *mere* verbal behaviour on both sides, ought not to be central to any constitutional policy-making.

See also generally Austin's survey of the constitutional debates surrounding the provisions pertaining to the executive and legislature, at *Austin* 116-39 and 144-63.

125. See article 31(3) of the Ind. Const.

126. See *Austin* 86, esp. 6. (Emphasis added).

a "clear relation to Indian Constitutional precedent (86)," and the distinction between property and liberty thus envisaged was later substantially modified (indeed to the point of its disappearance),[127] the bewilderment caused by it ironically arises afresh even today. Pant could not agree to this kind of exception to his "legislative wisdom" but decided to "keep quiet(86)." For sixteen long years the Supreme Court did likewise, both in relation to the heavily circumscribed right to life and liberty[128] and three substantial amendments to the property right. Now that the majority of the Court in the *Golak Nath* has broken that silence with resounding eloquence we will have, while welcoming it, ironically to urge readoption of some variant of Pant's silence.[129]

For the time being let us note that in thus processing the due process, and in asserting the superiority of "legislative wisdom" over "judicial fiat" in this area, the Constitution-makers sought to accomplish a division of labour between judiciary and legislature as regards the burdens of decision making relative to the major economic aspects of future social order of a free India. This they may have done inadequately and ambivalently : but surely no generation of men can be asked to satisfactorily solve the antinomies of democracy and economic development for all time to come. In their own limited ways the makers of the Constitution engaged in an institutional distribution of functions, hoping that the future generations of Indians will recall the baffling and agonizing complexities of the task that they had but inadequately performed. Austin feels that by the "decision of the Advisory Committee to remove from private property the protection of due process the Legislature had gained in power at the expense of the Judiciary and perhaps of abstract justice (86)." Later, kaleidoscopically surveying the salient amendments to the Constitution, Austin observes that so far as property is concerned due process is "dead(101)." But such judgments, particularly when they suggest

127. Much though we wish to retrace the disappearance of "due process" in relation to the right to life and liberty, the scope of the present analysis simply does not permit it. One must go to Austin's lively account (at 101-15) for this.

128. The Supreme Court has in *A. K. Gopalan* v. *The State of Madras*, A.I.R. 1950 S.C. 27 acquiesced in the express wording of article 21 ("No person shall be deprived of his life or personal liberty except according to procedure established by law") so as to hold that the judiciary shall not overrule legislative determination of situations in which a "law" might deprive persons of this basic right. See, for a most perceptive analysis of this judgment, McWhinney, *Judicial Review in the English-Speaking World* 126, 130-38, (3d ed. 1965). But the narrow interpretation given to the expression "personal liberty" has recently been exposed happily to a broader construction. See *Kharak Singh* v. *The State of Uttar Pradesh* [1964] 1 S.C.R. 352 ; and the illuminating; though brief, comments on it by Joshi, *Aspects of Indian Constitutional Law* 106-07 (1965). See also Setalvad, *The Indian Constitution : 1950-65*, 61-66 (1967) for a fine correlation of decisions pertaining to identification of "law" as "*valid law*" and the heartening discernment of the expanding scope of personal liberty.

129. See *infra* section B of this part.

that "abstract justice" was sacrificed for the expedient good must be regarded (when so easily and boldly made) as emotive rather than fully rational. For as we shall see, judgments of justice are not so easy to make in an era of transition where democratic ordering enhances, while seeking to eliminate, social deprivation arising from a monopoly of affluence by the few.

(iii) *Ambivalence Towards Property Right*

There is no doubt that the issue of limitation on right to hold property and that of governmental expropriation, with or without just compensation, was primarily oriented towards abolition of zamindari system. This general attitude is well summarized by Austin:

> Zamindars were subjected to such intense criticism partly because they were popularly associated with support for the British Raj, a belief that had some justification in fact, and partly because they had, generally speaking, rarely improved the land and had rack-rented their tenants for generations. In some areas anti-zamindari sentiment also had a communal aspect; in parts of Bihar and the United Provinces, for example, many Hindu peasants had Muslim landlords, a situation easy to exploit politically, particularly at this time (89).

United though the vocal majority was against the existence of zamindars in an independent India, the question of property rights assumed different and vaster proportions as the debates on the text of the article proceeded. In part the debates focused on the meaning of the term 'compensation.'[130] But greater agonizing occurred on the question: whose determinations shall be final in matters relative to the 'justness' of compensation — the court's or the legislature's? At one extreme was the view of Pandit Pant who favoured the legislatures as the final arbiters of the compensation to be provided for deprivation of property.[131]

At the other extreme, perhaps as a result of too far reaching consequences of Pant's attitude, were protagonists of "just" compensation.

130. On the issue of compensation one also finds marked ambivalence. The Election Manifesto of the Congress Party, 1945, boldly declared the party's desire for increasing state ownership as well as the removal of intermediaries "between the peasant and the state." But in a landmark resolution on industrial policy, the Government of India in 1948 pledged itself not merely to an adherence to the guarantees of fundamental rights but also to awarding of compensation on "a fair and equitable basis." The Drafting Committee was asked to incorporate, by the members of the Assembly, and also by certain union ministries to incorporate some adjective (such as 'fair' 'reasonable', 'just') before 'compensation' in the draft article guaranteeing the property right. See *Austin* 90-91. It would seem that finally it was Rau's interpretation that the "noun 'compensation', standing by itself, carries the idea of an equivalent" prevailed.

131. Pant moved an amendment leaving "the mode and the manner of compensation entirely to the discretion of the legislatures concerned." This extreme proposal caused considerable consternation in the minds of Pant's colleagues. For the details see *Austin* 91-92. This proposal, contrary to what finally emerged, would have resulted in an expansion of state governments' power and discretion at the cost of individual freedom.

Patel is reported to have observed, Austin tells us, that "compensation in *all* cases should be made justiciable."[132] To Pant's definition of "fairness" of fair compensation — which would have beside the market-value also included "the circumstances and the paying capacity of the state" and the purpose of the acquisition of the property — Ayyar's reaction was that this construction swallowed the right. Some members, especially John Matthai and T. T. Krishnamachari, attempted to infuse complex economic considerations in the discussions on the property right. Krishnamachari took the view that sufficient safeguards to property should be developed to attract foreign investment.[133] Implied in these claims for a full compensation was the necessary requirement that determinations of "justness" of the compensation shall ultimately lie with the judiciary. For it would make insubstantial the above stated claims to suggest, somewhat illogically, that they aimed to secure a verbal safeguard concealing the ultimacy of legislative determination of the justness of compensation.

We are inclined to think with Austin that it was, above all, Sardar Patel's middle-of-the-road policy that ultimately led to the formulation of the right to property as finally adopted in article 31. Patel was no doubt committed to abolition of Zamindari but at the same time he did not favour expropriation without compensation. Patel here relied on his own administration of the Bombay Forfeited Land Restoration Act of 1938 of which he was also an architect. This legislation, Austin tells us, was concerned with the restoration of land confiscated by the pre-Congress government of Bombay on the basis of non-payment of land tax by nationalist landowners who risked their landholdings in non-cooperation movements. The legislation laid down elaborate principles for evaluating the payable compensation consistent with section 299 of the 1935 Act (under which the Bombay legislation was possible) requiring that principles of compensation be specified. But the principles were so well formulated that in most cases the compensation, even when being substantial, would not be commensurate with the actual market value of the confiscated land.[134]

Patel reckoned on the basis of this experience that a solution to two extremes of *full* compensation and *no* compensation can be found in *principled* compensation. To the extent an enactment embodied principles of compensation, judicial review will present no menace to

132. *Austin* 93 (emphasis added). Patel, Austin reminds us, "has also been described as being 'against any sort of violent expropriation, which he always described as choree (theft) or daka (dacoity).' "

133. *Austin* 95. Nehru's response to this was that a special provision could be made with regard to foreign investment. He also emphasized that it was 'impractical' to suggest payment of compensation in cash when there "wasn't enough cash" significantly adding that "it just means red revolution and nothing else."

134. *Austin* 93-94.

land reform legislation. But at the same time a procedure was made available for the aggrieved and the courts to mitigate injustice flowing from legislative absolutism.

Ultimately it was this approach that crystallized in the Constitution. The alternative to grant complete judicial review over expropriation with a *specific* proviso exempting landlords did not succeed.[135] The right to compensation was secured but the compensation was to follow principles laid down by the legislature. Nehru made it most clear that the justice of compensation was a double-edged justice. It comprised reference to both individual and social or "community" justice. The principles of social justice were as important, if indeed not more, as those of individual justice. The implication was that the directive principles, providing policy guidance to *all* organs of state also provide the basic content of the social justice.[136]

It is clear that commitment to a liberal democratic ideology did not permit the Constitution-makers to do away with the property right altogether; nor, for complex economic reasons, would such a doing away have been considered by them as desirable.[137] But it is equally clear that had they found it feasible, the Constitution-makers would have either for a limited period of time or for all times bestowed on the legislature a complete authority to abridge property right when so required by the needs of economic development. Negating either of these alternatives, the Constitution-makers institutionalized their ambivalence toards property rights through article 31 of the Constitution.[138]

It is therefore doubtful if any systematization which ignores the pro-property and anti-property tendencies leading to the formulation of article 31 can ever yield a total picture of what the Constitution-makers desired to do. They would not have, for example, fully endorsed Mr. Justice Hidayatullah's view, in his concurring opinion in *Golak Nath*, that it was an "error" to place the right to property in the chapter of fundamental rights while (as the debates show) they would have agreed with him that "of all the fundamental rights it is the weakest."[139] Nor, however, would they have agreed with the learned Justice's view that they adopted the Grotian theory of property without simultaneously adopting its safeguards. (Could they have been more Grotian than Grotius?) Mr. Justice Hidayatullah observed

135. *Austin* 96-97. The formula before the party meeting would have provided for compensation with judicial review for all cases of expropriation *save* those involving "the transference to public ownership or the extinguishment or modification of rights in land intermediate between those of the cultivator and the state, including rights in respect of land revenue."

136. See Nehru's remarks quoted in *Austin* at 99.

137. See *supra* note 133; and for a general orientation Stone, *Soc. Dim.* 243-48, 341-47.

138. See the thought-provoking analysis by R. Merton and E. Barber, "Sociological Ambivalence" in *Sociological Theory, Values and Sociocultural Change* (E. Tiryakian ed. 1963).

139. *Golak Nath*, concurring opinion of Mr. Justice Hidayatullah at 53 (emphasis added).

> Our Constitutional theory treated property rights as inviolable except through law for public good and on payment of compensation. Our Constitution saw the matter in the way of Grotius but *overlooked the possibility that just compensation may not be possible.* It follows almost literally the German jurist Ulrich Zasius (except in one respect): *Princeps non potest auferre mihi rem meam sive iure gentium, sive civile sit facta mea.*[140]

It is hazardous to take any one view as embodying *the* constitutional "theory" of property in *any* constitution, simply on the basis of the original text of the right to property.[141] In the present context an enterprise of this kind would involve reference to the directive principles as well without seeking to establish superordination-subordination relationship between rights and principles; and also to the full range of Constituent Assembly materials including the debates on the amending article.[142] But such an enterprise becomes unnecessary when we perceive

---

140. *Ibid.* But see *contra* the observations of Mr. Justice S. R. Das (dissenting) in *The State of West Bengal* v. *Subodh Gopal Bose* A.I.R. 1954 S.C. 92 at 113:

> It is futile to cling to our notions of absolute sanctity of individual liberty or private property and to wishfully think that our Constitution-makers have enshrined in our Constitution the notions of individual liberty and private property that prevailed in the 16th century when Hugo Grotius flourished or in the 18th century when Blackstone wrote his Commentaries and when the Federal Constitution of United States of America was framed. We must reconcile ourselves to the plain truth that the emphasis has now unmistakably shifted from the individual to the community. We cannot overlook that the avowed purpose of our Constitution is to set up a welfare state by subordinating the social interest in individual liberty or property to the larger social interest in the rights of the community.

141. See the notable endeavour of Charles Beard, *An Economic Interpretation of the Constitution of the United States* (1913); and the recent critiques of Beard in R. Brown, *Charles Beard and The Constitution* (1956) and F. McDonald, *W The People: The Economic Origins of the Constitution* 3-18, 349-417 (1948), McDonald's study stands as a model of the type of enquiries we may have to undertake in what he rightly urges to be a "pluralistic study of the Constitution."

142. *Austin* 255-64. We had to omit for reasons of space our analysis of Austin's narration of the Constituent Assembly's work on the amending article. In view, however, of the opinion of the *Golak Nath* majority that the article merely prescribes the procedure and does not bestow the power to amend the Constitution (which must be found in other provisions), it must here be noted that from the early stages of the drafting process, the focus of attention, for the minority of the Assembly who took active interest in the amending process, was on the *choice* among various techniques of amendment yielded by comparative constitutional history of federal polities. It seems to have been assumed all through that the Constituent Assembly had the *authority* to delegate *power* of amendment of the Constitution to the Parliament. In an important sense, their concern for the procedure of participation by the federating units in the federal complex of the provisions was also an expression of their preoccupation with the locus of amending power. The procedure for amendment would represent allocations of decision-making power with regard to constitutional changes between the union and the federating units. Not for a moment did the Constituent Assembly reflect on the threshold question as to whether it had the *authority* to delegate this power in this manner. The Constitution was its creation and its authority was legitimated by the people who adopted this Constitution. This means that any effort to reduce article 368 to a *mere statement of procedure* for amendment and to thus divorce it of any association with the amending power would be an effort at rewriting rather than reading the Constitution.

the agonizing ambivalence and consequently realize that the text of the Constitution merely embodies, rather than solves, the antinomies between property as an individual's right and property as a social institution. To these, and related matters, we now turn.

(B) *The Right to Property: Supreme Court as a Constitution-maker in 1967*[142a]

In *Golak Nath* v. *State of Punjab*[143] the full bench of the Indian Supreme Court was asked to declare the Constitution (Seventeenth Amendment) Act, 1964, invalid on the grounds, *inter alia*, that it takes away or abridges the fundamental rights guaranteed by part III of the Indian Constitution and thus violates the following specific restriction on law-making prescribed by article 13(2) of that part.

> The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

The seventeenth amendment was latest in the series of amendments to the rights guaranteed by article 31, which while certainly not the last straw, at least added to the cumulative burden of restrictions on the property right.

The orignal article 31 guaranteed that no person shall be deprived of property save by authority of law and provided further that in cases of acquisitioning or "taking" of property such a law shall either specify the compensationin payable or prescribe principles and modes of determination and payment of compensation.[144] This article was amended in 1951, 1955 and 1964. The first amendment to the Constitution in 1951 added two new articles — articles 31A and 31B — and a new schedule

142a. In the article as originally planned, an extensive discussion of the property right was not envisaged, but a more general evaluation of Austin's two chapters on fundamental rights was intended. The Supreme Court's decision in the *Golak Nath* case came to hand just when the article was in its pre-final draft. Not to acknowledge and partially discuss this momentous decision, while writing on Indian constitutional law, would have been as evasive and meaningless as substituting Othello for Hamlet while writing the *Hamlet*. Next best to not transgressing the structural canons of a tolerably good article, was to limit the extent of such transgression, which I have tried to do. See *infra* note 167.

143. See *supra* note 112.

144. The relevant part of article 31 read as under:

> (1) No person shall be deprived of his property save by authority of law.
>
> (2) No property, moveable or immoveable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(the ninth schedule) — to the Constitution.[145] Generally the effect of these amendments was to protect legislation relating to acquisition by the state of any estate or rights thercin and to define the terms "estate" and "rights" in relation to an estate. Article 31B in addition enacted that the legislative enactments mentioned in the new ninth schedule of the Constitution shall be deemed to be valid and in force, notwithstanding the judicial decisions to the contrary or their infringing the fundamental rights. The Indian Supreme Court upheld the validity of this amendment in *Shankari Prasad Singh Deo* v. *Union of India*[146] where it was urged that the power to amend the Constitution was vested in the two Houses of Parliament and that the then existing provisional Parliament (with only one House) cannot by itself enact a law amending the Constitution. The fourth amendment to the Constitution followed the decision in the now famous case of *State of West Bengal* v. *Mrs. Bella Banerjee*[147] where the Supreme Court held that the term

145. The text of the First Amendment, relevant here, reads :

31A (1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part :

Provided that where such law is a law made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) In this article—

(a) The expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant ;

(b) the expression "rights" in relation to an estate, shall include any rights vesting in proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.

31B. Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by any provision of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

146. A.I.R. 1951 S.C. 458. For some rather trenchant comments on this decision, see Blackshield " 'Fundamental Rights' and the Institutional Viability of the Supreme Court," 8 *J.I.L.I.* 139, 140-47 (1966). (This article will be hereafter referred to as Blackshield, *Fundamental Rights*).

147. *State of West Bengal* v. *Mrs. Bella Banerjee*, A.I.R. 1954 S.C. 170 affirming the High Court decision in *West Bengal Settlement Kannugoe Co-operative Credit Society* v. *Mrs. Bella Banerjee*, A.I.R. 1951 Cal. 111. The decisions in the following cases also provoked this amendment: *State of West Bengal* v. *Subodh Gopal Bose*, A.I.R. 1954 S.C. 92; *Dwarkadas Srinivas* v. *Sholapur Spinning and Weaving Co. Ltd.*, A.I.R. 1954 S.C. 119, *Sagir Ahmed* v. *State of Uttar Pradesh*, A.I.R. 1954 S.C. 728.

"compensation" in article 31(2) meant "a just equivalent of what the owner has been deprived of."[148] The fourth amendment enacted that the adequacy of compensation shall not be reviewed by the courts. The amendment, *inter alia*, also provided that:

> Notwithstanding anything contained in Article 13, no law providing for: (a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights .... shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31.[149]

Notwithstanding this amendment several state enactments were declared invalid by the Supreme Court as not falling within the meaning given to "estates" and also as violative of article 14 of the Constitution, which grants equal protection of laws.[150]

---

148. See the reiteration of these principles by Subba Rao, J., in *Vajravelu* case, later in the present text, *infra* at 392.

149. The relevant text of the Fourth Amendment reads:

31(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

31A. (1) Notwithstanding anything contained in Article 13, no law providing for—

(*a*) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(*b*) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(*c*) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(*d*) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(*e*) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or Article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

150. *E.g.*, *K. Kunhikoman* v. *State of Kerala*, A.I.R. 1962 S.C. 723; *Krishnaswami* v. *The State of Madras*, A.I.R. 1964 S.C. 1515.

Partly as a result of these decisions, and partly to provide for certain new situations, the Constitution (Seventeenth Amendment) Bill was introduced in 1964. For reasons not carefully studied by the Indian jurisprudents so far, a majority of the Parliament was unwilling to legitimate it, and the bill was *not* passed. A subsequent amendment bill dealing with suspension of fundamental rights during the constitutionally declared existence of a state of emergency met with a similar fate. The Seventeenth Amendment Bill was subsequently reintroduced (as the Nineteenth Amendment Bill) and duly enacted into a law in May, 1964, at a special session of the House.[151] Both the preceding defunct bills are crucial for a better appreciation of the amending process, as we shall seek to emphasize later.

The Seventeenth (Constitution Amendment) Act, 1964, consists of three sections, the first giving the short title thereof. Section 2(i) adds yet another proviso to article 31A(i) reading :

> Provided further that where any law makes any provisions for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.[152]

The act further substitutes sub-clause (a) of article 31A(2) and provides a wider definition of the term "estate;"[153] and finally adds 44 legislative enactments to the ninth schedule, either validating them contrary to previous judicial decisions or immunising them from judicial review.[154]

---

151. On this see a brief general account in Chanda, *Federalism in India* 312-16 (1965).

152. Note that this reinstates justiciability of compensation in this class of cases for obviously if the legislative determination of market value can be shown to fall short of such value, the courts can invalidate the legislative measure. The proviso itself lays down the principle on which compensation is to be paid in these cases as required under article 31(2); therefore, any departure from it would result in a "fraud on the constitution." Judicial determinations here will not involve "adequacy" which is still expressly barred by the fourth amendment but only whether the law satisfies the requirements of this proviso.

153. The new definition of "estate" now reads—

> the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—
>
> (i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of Madras and Kerala, any *janmam* right ;
>
> (ii) any land held under ryotwari settlement ;
>
> (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans....

154. See for a general description of the Ninth Schedule till Seventeenth Amendment Errabbi "Constitutional Developments Pertaining to Property and the Seventeenth Amendment Act," 6 *J.I.L.I.* 196 at 210-11 (1964).

This act was challenged in *Sajjan Singh* v. *State of Rajasthan*,[155] where the arguments were not directly based on the amendability or otherwise of the fundamental rights as such but on the more narrow base as to whether the amendment reduced the scope of judicial powers of redress guaranteed under articles 32 and 226 of the Constitution. If so, it was alleged that the impugned amendment had not been properly passed, it being a requirement of the amending article (article 368) that when certain provisions of this nature are affected, ratification by a prescribed number of states would be a prerequisite for a valid amendment. The Court upheld the amendment.

In *Golak Nath*, however, for the first time in constitutional history, the issue was boldly presented requiring the Court to decide whether the Parliament had the power to amend the fundamental rights, notwithstanding the express prohibition contained in article 13(2) of the Constitution. In a 6-5 decision, the full Court (speaking through Mr. Chief Justice Subba Rao) held that Parliament did not have this power to amend the Constitution so as to abridge or take away fundamental rights; but in view of the fact that the amendments were accepted as valid by earlier Supreme Court decisions, and were generally so regarded, they would not be invalidated but sustained by the technique of prospective overrruling. The main bases of the majority decision were: (1) a constitutional amendment is a "law" within the meaning of article 13(2), and therefore not valid to the extent of contravention; and (2) the power to amend the Constitution does not lie in the amending article (article 368) which merely prescribes the procedure but is to be found in articles 245, 246 and 248.[156] The concurring

155. A.I.R. 1965 S.C. 845; see for an illuminating analysis, Blackshield, *Fundamental Rights*.

156. Mr. Chief Justice Subba Rao summarized the decision in the following propositions (at 66-68 of his judgment in *Golak Nath*).

(1) The power of the Parliament to amend the Constitution is derived from Arts. 245, 246 and 248 of the Constitution and not from Art. 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of Art. 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

(4) On the application of the doctrine of 'prospective over-ruling', as explained by us earlier, our decision will have only prospective operation and, therefore, the said amendments will continue to be valid.

(5) We declare that the Parliament will have no power from the date of this decision to amend any of the provisions of Part III of the Constitution, so as to take away or abridge the fundamental rights enshrined therein.

(6) As the Constitution (Seventeenth Amendment) Act holds the field, the validity of the two impugned Acts, namely, the Punjab Security of Land Tenures Act X of 1953, and Mysore Land Reforms Act X of 1962, as amended by Act XIV of 1965, cannot be questioned on the ground that they offend Arts. 13, 14 or 31 of the Constitution.

opinion of Mr. Justice Hidayatullah drawing interesting, if debatable, distinctions between government and state, and adopting acquiescence rather than prospective overruling as a technique of validating the existing amendments, goes a step further in suggesting that "for abridging or taking away fundamental rights, a Constituent body will have to be convoked."[157] The five dissenting judges in three separate opinions consider a constitutional amendment as being distinct from an ordinary legislation, regard the power to amend the Constitution as being derived from article 368 and therefore validate not merely the seventeenth and all the previous amendments but further imply that the Constitution presents little or no obstacle to an amendment, even abridging or eliminating fundamental rights, so long as the prescribed procedure is followed.[158] Although the majority opinion ends with six categorical propositions stating the "holding" of the case, it will be possible to find in future certain leeways for judicial choice in the two majority opinions of the Court.[159] With these we are here not

157. Mr. Justice Hidayatullah arrived at the following propositions (at 77-78 of his opinion):

(i) that the Fundamental Rights are outside the amendatory process if the amendment seeks to *abridge or take away* any of the rights;

(ii) that *Shankari Prasad's* case (and *Sajjan Singh's* case which followed it) conceded the power of amendment over Part III of the Constitution on an erroneous view of Arts. 13(2) and 368;

(iii) that the First, Fourth and Seventh Amendments being part of the Constitution by acquiescence for a long time, cannot now be challenged and they contain authority for the Seventeenth Amendment;

(iv) that this Court having now laid down that Fundamental Rights cannot be abridged or taken away by the exercise of amendatory process in Art. 368, any further inroad into these rights as they exist today will be illegal and unconstitutional unless it complies with Part III in general and Art. 13(2) in particular;

(v) that for abridging or taking away Fundamental Rights, a Constituent body will have to be convoked; and

(vi) that the two impugned Acts, namely, the Punjab Security of Land Tenures Act, 1953 (X of 1953), and the Mysore Land Reforms Act, 1953 (X of 1953) [*sic*], as amended by Act XIV of 1955 [*sic*] are valid under the Constitution not because they are included in Schedule 9 of the Constitution but because they are protected by Art. 31-A, and the President's assent. (Emphasis in original).

158. See the opinions of Wanchoo, Ramaswami and Bachawat, JJ.

159. See *supra* note 156 and 157. Mr. Chief Justice Subba Rao expressly saved from the ambit of the decision the following matters:

> In this case we do not propose to express our opinion on the question of the scope of the amendability of the provisions of the Constitution other than the fundamental rights, as it does not arise for consideration before us. Nor are we called upon to express our opinion on the question regarding the scope of the amendability of Part III of the Constitution otherwise than by taking away or abridging fundamental rights. We will not also indicate our view one way or other whether any of the Acts questioned can be sustained under the provisions of the Constitution without the aid of Arts. 31A, 31B and the ninth Schedule.
>
> *Golak Nath*, at 66.

From jurisprudential perspectives, a close study of the various opinions would disclose many areas which could be explored in future cases. See Stone, *Legal System and Lawyers' Reasonings* 235-300 (1964) and the material there cited.

much concerned. We are concerned to note the categorical and definitive pronouncements and their implications. It is clear that no law, including a constitutional amendment, abridging or taking away fundamental rights shall be constitutionally valid. The Parliament has no power under the Indian Constitution to enact such a law. The application of the "prospective overruling" technique however results in the holding that not merely all the amendments to the Constitution hitherto shall be valid but that they shall continue to be so in future. This then saves important amendments to the property right but at the same time greatly inhibits the future development of the ninth schedule. At least in the present view, nothing that the Parliament can do will extend constitutional protection to any law which either by a presumption of legislature or determination by courts abridges or takes away fundamental rights.[160] And although the fourth amendment proclaiming compensation "non-justiciable" will continue to be operative, certain post-fourth amendment decisions appear to have resurrected the *Bella Banerjee* principles which *may* enable the courts to go beyond determinations of "fraud on the Constitution" to "colourable exercise of legislative power" and thus to adjudge the justness of compensation.[161]

Some promising avenues seem to have been left open to the Parliament. Certain observations in Mr. Justice Hidayatullah's fascinating opinion point to the possibility that redefinition of "estate" or "rights in estate" by a constitutional amendment, given the validity of existing amendments (as is the case), shall not be deemed as

160. This at least for two reasons: (1) In situations where the courts have invalidated a statute on the ground that it infringes fundamental rights, an amendment simply reviving it would also revive the infringement; and (2) in situations where the statute has not at all been presented to the courts for scrutiny on the ground of its infringing fundamental rights, any amendment immunised it from judicial scrutiny (and bringing it within the ninth schedule) on this ground could be challenged as violative of fundamental rights. Of course this does not exclude the possibility of different legislative tactics. Thus, in situation (1) above, studying the grounds of the Court's decision, a *new* legislation can be enacted; and in situation (2) an entirely new amendment can be introduced which is not an indirect declaration of legislative supremacy (as is the ninth schedule) but a statement of a social policy, perhaps directive-oriented, in pursuance of which the legislative *claims* power to pass laws. Both these modes of action will of course be subject to the judicial scrutiny: but in view of the methodology suggested later in this section of the article, these may provide the courts with better legal materials wherewith to develop decisional law. It seems that in part, the flagrant wording of 31B has provoked the *Golak Nath* majority decision. Surely, legislative ingenuity could devise less outrageous modalities of abridging the property right. As we shall later show abridgement is simply unavoidable: the question is one of minimising its scope and according due deference to the Supreme Court as a co-ordinate branch of government.

161. See *infra* note 194 (*Vajravelu*); and also see *Kamlabai* v. *Desai* A.I.R. 1966 Bom. 37; *Union of India* v. *Metal Corporation of India*, A.I.R. 1967 S.C. 637.

abridgement or taking away of the property right.[162] It also seems that the existing amendments, and such amendments as on the above suggestion redefine "right" and "estate", shall not be held invalid on the plea that they deplete the judicial power under article 226 to try certain class of suits and therefore require the special procedure of state ratification required under the amending article.[163] Finally, there is always a possibility that in keeping with the more socially sensitive aspects of its tradition, the Indian Supreme Court will acquiesce in the legislative determinations of the justness of compensation, thus resisting the tendency to substitute its own determinations over the legislative ones.[164] It is further to be hoped that instead of wholly abdicating the field, the judiciary will in specific situations properly develop the techniques of "fraud" and "colourable exercise," thus respecting the solicitude for individual freedoms that the makers of the Constitution[165] *and* of the fourth amendment[166] sincerely felt. But this we must emphasize, is merely a hope, not a prognosis. The scope of the present paper, however, does not permit a full analysis of the majority and minority opinions in *Golak Nath*, though they beckon

162. Hidayatullah opinion, at 72 in *Golak Nath*. The learned Judge after acknowledging that article 31A(1) (a) as already amended holds valid, proceeded to say:

> ...[T]the Seventeenth Amendment when it gives a new definition of the word 'estate' cannot be questioned *by the reason of the Constitution as it exists*. The new definition of estate introduced by the amendment is beyond the reach of the courts not because it is not law but because it is 'law' and falls within that word in Art. 31(1)(2)(2A) and Art. 31A(1). (Emphasis added).

163. In *K. K. Kochuni* v. *State of Madras*, A.I.R. 1960 S.C. 1080 (hereinafter referred to as *Kochuni*) the dissenting justices Imam and Sarkar rejected the argument that the Act impugned there or article 31B involves "an exercise of judicial function by the legislature." (1107-08). A similar view was also expressed in the *Sajjan Singh* case, above cited.

164. See cases cited *infra* note 195.

165. See K. M. Munshi's speech on the occasion of presenting article 31 to the Assembly. We quote in full from Austin:

> The import of the clauses, Munshi told the members, was that the Parliament would be the sole judge of two matters: 'the propriety of principles laid down, so long as they are principles' and that the 'principles may vary as regards different classes of property and different objects for which they are acquired.' If the legislature lays down genuine principles for compensation 'the court will not substitute their own sense of fairness for that of Parliament', Munshi assured the Assembly; 'they will not judge the adequacy of compensation from the standard of market value, they will not question the judgement of Parliament unless the inadequacy *is so gross as to be tantamount to a fraud on the fundamental right to own property*.'

Austin at 98-99 (emphasis added).

166. During the debates on the fourth amendment, some members fearing that the "sanctity of property is lost, unjust compensation is legalised and totalitarian trends encouraged under the cover of the doctrine of parliamentary supremacy" asked why the emaciated property right was retained in the Constitution. The Home Minister's response in part was that the courts could intervene where the law providing for compensation was "a fraud on the constitution." See M. V. Pylee, *Constitutional Government in India* 302-03 (2d. rev. ed. 1965).

us with fascinating problems of political and legal theory.[167] Such elaboration on the decision as will be offered here will be governed by the perspectives already presented in the earlier parts of this paper, namely the need for accommodation between institutionalization of democracy and economic development.

From this viewpoint, one major drawback of judicial reasoning in *Golak Nath* for which students of the Court's earlier decisions must also share some responsibility,[168] is the astonishing indifference to economic, as distinct from political, aspects of the decision. While the learned judges no doubt showed a Marshallian awareness that it was a *constitution* that they were expounding, they showed little or no awareness that simultaneously it was the right to property, in a mid-twentieth century subsistence-economy, that they were also expounding. It must be said, with respect, that in thus being abstractly preoccupied with "democracy" and "fundamental rights" the decision results in a disservice to both.

To be sure, the Court cannot decline to consider the thesis that if fundamental rights can be abridged or taken away, *all* rights alike are exposed to such change, and conversely that if they cannot be so amended, *no* right can be subjected to such an exposure. So long as this neat, and logically satisfying, "either-or" framework persists, considerations of the kind we will shortly advance with regard to the property right, may seem precluded. But it is our central submission that these two extremes merely suggest the outer limits of what the courts can do, rather than what they ought to or should do. These limits do not exhaust decisional possibilities : indeed so astonishing are the possible results that they impel the wisdom of adopting a middle course.

In valiantly confronting the seemingly inescapable bi-polarization of decisional possibilities no doubt the learned judges avoided

167. *E.g.*, the exact implications of the use of "prospective overruling" device particularly in view of article 13(2) of the Constitution (and of "acquiescence" adopted by Hidayatullah, J.); the unavoidable "natural rights" implications of the majority attitude towards fundamental rights; the jurisprudential significance of majority obliteration of the crucial distinction between "legislative" and "constituent" power, and the divergent conceptions of the locus of "sovereignty" involved; Mr. Justice Hidayatullah's distinction between "right" and its "exercise" and more importantly between "state" and "government" (on the general problematics, and special vicissitudies of this distinction in international law, see Baxi, "Law of Treaties in the Contemporary Practice of India," 14 *The Indian Yearbook of Int. Affairs* 137, at 156-62 (1965)).

168. Mr. Blackshield in his critique of *Sajjan Singh* decision does advert to some economic aspects, especially in his valuable Appendix and on pages 181-182 where he dwells on the "dangers of dynamism." Unfortunately, the learned writer is too deeply involved with the "threats to the uncertain relations between legislature and judiciary" (181) and the "tenuous hold of judicial review in the Indian polity," both rather accentuated, to give due weight to factors with which we are here most concerned. Of course, for minds deeply responsive to liberatrian values any encroachment on fundamental rights, and any instance of the judicial surrender to such incursions, will be overwhelming.

"policy-making in the dark."[169] At the same time it must be said that excess of half-light here proved blinding to the vision.

In so exceptional a situation as *Golak Nath*, obviously much more is at stake than self-luminous judicial policy making. What is at stake can, perhaps oversimply (but not erroneously), be stated in one phrase: the economic development of India. Reorganization and rationalization of agriculture in a predominantly agrarian society require, among other things, elimination of feudal-type land tenures, restructuring of land-holdings oriented towards maximisation of output, and incidental state initiative in organizing agricultural credit and farm produce markets and providing minimal economic incentives to the tiller of the land.[170] These processes involve social uplift of a large part of India's populace and through the promise of prosperity heighten individual's awareness of the importance of discriminating discharge of his political responsibilities.[171] In this sense, economic development lays foundations for internalisation of the democratic culture.[172] Maintenance of right to

---

169.

> The essential weakness of the pure positivist position in this respect, of course, is its failure to recognize that a choice is to be made, not between judicial policy-making and absence of judicial policy-making, but between policy-making based on a full investigation of the alternatives and policy-making in the dark.

E. McWhinney, *Judicial Review in English-Speaking World* 77 (3d ed. 1965).

170. See for general orientation Venkatasubbia, *Indian Economy Since Independence* 51-78 (1958); Lewis, *Quiet Crisis in India* 1-52, 148-80 (Anchor Books 1964); Segal, *The Crisis of India* 172-227 (1965); Taylor, et. al, *India's Roots of Democray* 121-43, 227-29 (1965); and Brainbanti and Spengler (ed.) *Administration and Economic Development in India* (1963). The submission in the text assumes the need for a consensus on basic development stratagies and policies between legislatures and courts as co-ordinate centres of power. See *infra* note 224.

171. See the pioneering and massive study on the intertwining of law, economics, and national development in Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin (1836-1915)* (1964). Most pertinent to our context are the following seminal observations with which Professor Hurst introduces his study:

> The relations men establish among themselves to make land productive go far to determine the quality, reach and the tempo of their lives. Their relation to the land poses basic issues of social organization because it involves the physical basis of life. For more subtle reasons, also, the relation is one of those which fix the framework of society. The terms of access to the land affect the practical power of decision which some men enjoy over the lives of others; access to the land inevitably becomes a prize of power and an object of ambition ... Since it is the distinctive function of law to sanction the ultimate distribution of power in society, the law must be deeply involved in so basic a relation as that of man, land, and organization for the use of land. Against the challenge inherent in the ordering of a relation thus elemental, we can but measure the values embodied in a legal system and the efficiency with which it implements its values.

172. Professor Stone in the context of "Democratic Planning" and "*De Facto* Demands in Developing Countries" referring to the "demands of hundreds of millions" most of whom "are at any rate illiterate and innocent of civic ambitions" observes that:

> Even down to the level of attention to the stagnant puddle in the village lane, the Indian picture remains, fifteen years after independence, one of legislative striving to stimulate and even create a structure of de facto human demands.

See his, *Human Law and Human Justice* 285 (1966). Prescinding the problematics of relations between "literacy" and "civic ambition" on the one hand and of these with the emergence and the structure of de facto demands on the other, as also the consideration of the whole range of political "interest groups" thriving on universal adult suffrage and fostering what we have earlier called professionalisation of politics, we must here stress that the "legislative striving" should be matched by judicial striving as well, if the tasks of social justice are to become more within human reach in India in the next few decades.

property, either in its liberal-ideological purity or in its constitutional chastity, may well prove dysfunctional for the viability of a constitutional regime which the laws and its upholders, the courts, are dedicated to promote, and as we shall shortly see have been so far instrumental in promoting.

And in this context, one may expect (without invoking the much-maligned doctrine of judicial self-restraint)[173] the *Golak Nath* Court would have conceded the central proposition that judicial deference to co-ordinate decision-making authorities is a necessary (though not by any means a sufficient) condition of planned economic development at a requisite rate of growth. Our dismay therefore deepens when we find that far from conceding this proposition, the majority opinion betrays only a peripheral awareness of it. Mr. Chief Justice Subba Rao, referring to the laws passed on the assumption that agrarian reform legislation infringing the property right was constitutionally valid, acknowledges that

> The agrarian structure of our country has been revolutionised on the basis of the said laws.[174]

But the learned judge is concerned to declare the inviolability of fundamental rights, and in so doing only incidentally to preserve the reforms accomplished so far. He observes :

> Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the *said consequences*,[175] Parliament has power to take away fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule. Learned counsels for the petitioners as well as those for the respondents placed us on the horns of this dilemma, for they have taken extreme positions—learned counsel for the petitioners want us to reach the logical position by holding that all the said laws are void and the learned counsel for the respondents persuade us to hold that Parliament has unlimited power and, if it so choses, it can do away with fundamental rights. We do not think that this Court is so helpless. As the highest Court in the land we must evolve some reasonable principle to meet this extraordinary situation.[176]

The "reasonable principle" evolved by the court was the doctrine of "prospective overruling." No doubt this leaves intact the existing

---

173. Stone has, however, correctly pointed out that the bitterness surrounding the "use of 'judicial restraint'" stems not from "mere personalities" involved in argumentative clashes but from the central failure of the use of this technique in meeting the requirements of substantive justice among litigants.

> When courts with the power of judicial review seek to exercise it while foreclosing themselves from attention to the merits of the substantial issue between the parties, justice *inter partes*, even justice according to law, may simply not be reached.

Stone, *Soc. Dim.* 667-70 at 668, and see the relevant literature there discussed.

174. *Golak Nath*, Subba Rao judgment, at 53-54.

175. Note that the consequences here emphasized relate to the past. (Emphasis added).

176. See *supra* note 174.

amendments to property right, and saves the country from a counter-revolution to the agrarian revolution so far accomplished, but it is unenlightening as to how future economic growth in this direction is to occur with such meagre co-operation as judiciary now seems willing to offer. For so long as the present judicial philosophy of property right holds, the requisite rate of growth may be inhibited by varied judicial policy-making. The Court has by resorting to the "prospective over-ruling" device acted, as it were, to rescue a drowning man: but, perhaps, only to leave him on the shores at the mercy of another tidal wave. Likewise none of the five dissenting judges dwell in any depth over the economic costs of the majority decision though one would think that preoccupation with this very issue would characterize their opinions. The dialogue between the majority and the dissent proceeded mainly on the bipolarization of the issue of amendability of fundamental rights and is therefore replete with arguments which would be a delight of a political theorist and jurisprudent but a despair of an economist or a planner. It is not suggested that the political aspect of the decision was not important. The question is: Was its economic aspect *so* inconsequential?

Among the dissenting judges, only Mr. Justice Ramaswami attempted to advance the more recent (at least when compared to Grotius) view that economic and political freedom conflict within the conception of fundamental rights:

> In modern democratic thought there are two main trends—the liberal idea of individual rights protecting the individual and the democratic idea proper proclaiming the equality of rights and popular sovereignty. The gradual extension of the idea of equality from political to economic and social fields in the modern State has led to the problems of social security, economic planning, and industrial welfare legislation. The implementation and harmonisation of these somewhat conflicting principles is a dynamic task.[177]

A little later, after an analysis of limitations on fundamental rights contained in part III itself, the learned judge observed:

> Today at a time when absolutes are discredited, it must not be too readily assumed that there are basic features of the Constitution which shackle the amending power and which take precedence over the general welfare of the nation and the need for agrarian and social reform.[178]

And towards the conclusion of his opinion, Mr. Justice Ramaswami quoted at length from the Draft Outline of the Fourth Five Year Plan

177. *Golak Nath*, Ramaswami judgment, at 15.

178. *Id.* at 18. But for a radically contrasting position see the quotation on p. 386 *infra* from Mr. Justice Hidayatullah's opinion. The invocation of basic human rights developed through instrumentalities of international law in constitutional policy-making in the municipal courts makes possible analytically the extension of the "enclaves" metaphor in dealing with concepts of international justice. On the 'enclaves' notion, see Stone, *Human Law and Human Justice* 344-55 (1965); but Stone himself would not unhesitatingly extend this notion to the sphere of international justice. See, Stone, "Approaches to the Notion of International Justice, in 1 *Future of International Legal Order* (Falk & Black ed. *forthcoming*)

of India to indicate the extent of agrarian reform so far attained by the government.[179] The perceptive concurring opinion of Mr. Justice Hidayatullah does show signs of struggle against the simple bipolarization of decisional possibilities, notably in his initial candid acknowledgement of the "weakness" of property rights, and his clause-by-clause analysis of the seventeenth amendment. He does acknowledge that the amendment by its second clause provides for market value compensation for deprivation of lands under a ceiling fixed by law and under personal cultivation but allows this recognition to be disfigured by a suspicion that legislature may lower the ceiling wantonly.[180] The overwhelming concern with preservation of individual freedoms in general as the core of democratic process leads him away, with his learned brethren, from the specific aspects of the right to property which he has dimly but definitely discerned. From a judge, whose sensitivity to the complexities of life and law commands respect, this surrender to political theory comes as a shock. More so, when it is accompanied by a harsh reproach to those who urge equality of consideration to both the political and economic aspects of constitutionally desired social order. For such men, the learned judge has only this to say :

> While the world is anxious to secure Fundamental Rights internationally, it is a little surprising that some intellectuals in our country, whom we may call "*classe non classe*" after Hegel, think of the Directive Principles in our Constitution as if they were superior to Fundamental Rights. As a modern philospher [Benedetto Croce] said such people 'do lip service' to freedom thinking all the time in terms of social justice "with 'freedom' as a by-product." Therefore, in their scheme of things Fundamental Rights become only an *epitheton ornans*. One does not know whether they believe in the Communistic millenieum of Marx or individualistic Utopia of Bastiat.[181]

Those who unthinkingly assert the primacy of the directive principles over fundamental rights, thus aggravating difficulties of the judicial tasks, justly deserve this censure. This reproach may be well-directed to very naive or soulfully committed Marxist thinkers who would seek fundamental *institutional* changes hearlding the demise of the constitutional regime as we know it as a *sine qua non* of economic development. But surely when directed against those agonized by the conflict between constitutional democracy and economic development, and consequently committed to an intelligent accommodation between them, these strictures are exceptionally harsh and unmerited. These men who urge wise accommodation between declared freedoms and endowment

179. *Golak Nath*, Ramaswami opinion, at 34-35.

180. *Id.*, Hidyatullah opinion, at 71. Referring to the proviso added to article 31A(1) by the seventeenth amendment, the learned judge observed:

> This may prove to be an illusory protection. The ceiling may be lowered by legislation. The State may leave the person an owner in name and acquire all his other rights.

181. *Id.* at 23.

of economic resources to large masses of people to enable them to exercise and enjoy these very freedoms need neither look to "communistic millenium" nor to an "individualistic Utopia". Still less, if at all, need they subscribe to the nebulous view that freedom is a by-product of social justice (whatever this may mean).

What then should the *Golak Nath* Court have done? When we seek to answer this question we should recall that a mere post-mortem of the decision is unhelpful. When we analyse so momentous a judicial decision as *Golak Nath*, our labours should not resemble those of a police surgeon performing an autopsy in the city morgue with a view to ascertain the time and the cause of the victim's death; but should rather approximate the efforts of a physiologist whose somewhat similar activity is directed to advance knowledge relevant to future therapy. And, therefore, our following remarks, while made in the context of the Supreme Court's decision, and subject to the contingency of a future litigation involving issues here raised, are oriented (even if presumptuously) to what the Court can still do.

The *Golak Nath* Court should have carefully defined the issues before it and refrained from *categorical* pronouncements on problems that did not require its direct involvement. The basic problem before the Court was that certain statutes protected from judicial scrutiny under the ninth schedule, which derived its validity from the first amendment, took away or abridged petitioners' right to property as guaranteed by part III of the Constitution. In adjudicating this issue the Court must ask and answer two preliminary questions: (1) What does the right allegedly abridged or eliminated mean?; and (2) Do the amendments (or laws) involved abridge or eliminate the right so understood? Unless determinations of both these matters are first made, the constitutional validity of an amendment or a law cannot simply be judged.[182] Even if a constitutional amendment is a law within the contemplation of article 13(2), it must abridge or eliminate the rights in part III to be invalid. Very little turns indeed on whether an amendment is a law or not; so much, however, depends on what its impact is on the rights.

The question as to whether Parliament has any "power" to amend so as to abridge or eliminate a fundamental right should only be asked after determinations of the meaning of the right and the nature of the infringement have first been made. And even when a response to

182. This method is closely related to methods often used in the interpretation of fundamental rights. Thus, for example, in the *Kochuni* case, Mr. Justice Subba Rao recalled the maxims of Lord Coke in order to gain a "correct appreciation of the amended clauses of Art. 31". The maxims were cited as follows (at 1090):

(i) What was the law before the Act was passed;
(ii) What was the mischief or the defect for which the law had not provided;
(iii) What remedy Parliament has appointed; and
(iv) the reason of the remedy.

that question is thus reached, the judicial verdict will of necessity be limited to the reach of parliamentary power in relation to the particular right involved. Any general pronouncement embracing determin ations of parliamentary power in relation to *all* fundamental rights would otherwise have to presuppose the adverse exercise of this power in relation to the rights, treating their meaning in a changing under-developed society as immutable and self-evident. And to do this will be to evade the hard tasks that wise policy-making must resolutely face.[183] Pronouncements on "power" of legislature in the abstract, unless so painstaking, are vain and empty exercises by which good men can do a lot of harm.[184]

In the three amendments to the right to property, as we have seen, that right and incidentally the right to equality (article 14) and right to freedom (article 19) were allegedly abridged. Our perplexing and burdensome task is then to understand what the right to property means and what the other rights mentioned above mean in relation to the property right. We can approach this matter at least at two distinct. though related, levels: (1) constitutional law, and (2) political and social philosophy. In doing this we hope to highlight some remarkable achievements of judicial policy-making in the area of property rights, which instead of being represented, refined and consolidated in *Golak Nath*, appear to be now on the verge of oblivion.

When we refer to the constitutional materials, we undertake a merry-go-round excursion. For the Constitution does not make decisions for us: it either facilitates or frustrates, depending on our view of it, a particular course of decision. With this in mind, let us, first, seek to understand what guidelines the document offers for determining the meaning of the notion of property. Article 19(1)(*f*) guarantees, that all citizens shall have the right to "acquire, hold, and dispose of property" subject however to (a) any *existing* law and (b) any

183. See on the complexity of the decision-making process the literature cited *infra* in part VI of this article. And see also from perspectives of moral theory a fine study by Raymond Jaffe, *The Pragmatic Conception of Justice* (Vol. 34, University of California Publications in Philosophy, 1960).

184. Unless the moral dilemmas in a rational resolution of conflict (See Jaffe, *supra*) are perceived, inhibitions to such omnibus pronouncements will scarcely arise. Howsoever well-meant the effort to protect the individual freedoms as subjectively understood and valued by a decision-maker may be, to seek to protect them against *all* future exercises of legislative authority (beyond of course the constitutionally sanctioned abridgements of fundamental rights) is to seek to do the impossible. Such attempts, even when attended by tentatively binding outcomes for the present, could deflect the entire course of constitutional development for weal or woe. The focus of anxiety in post-*Golak Nath* India is no longer so much on the fundamental rights or even social and economic progress but rather on the constitutional balance of power between the Parliament and the Judiciary—a balance that can only be maintained by avoiding ultimate questions of political and constitutional theory which anyone can raise but no one could definitively answer.

future enactment imposing reasonable restrictions" on the "exercise" of the right, either in the "interests of general public or for the protection of the interests of any Scheduled Tribe."[185] Article 39, a directive principle, refers to the "material resources of the community," including self-evidently the individual and state property in its ambit. The material resources of the community are to be "so distributed as best to subserve the common good." Some indications of what constitutes "common good" are offered, *inter alia*, by the same directive as securing "the right to an adequate means of livelihood", safeguarding that "the operation of economic system does not result in the concentration of wealth and means of production to the common detriment" and securing "equal pay for equal work for both men and women."[186] Article 265 of part XII prescribes "no tax shall be levied or collected except by authority of law."

By taxation, it would be agreed, some portion of individual property is transmuted into "material resources of community" to be used for realizing the aims of the directive principles. There is no doubt that lawful taxation "deprives" citizen of his property and that progressive income taxation, to take but one illustration, discriminates among citizens. The Supreme Court has agreed that a tax law does not fall within article 13(2) even when it may be construed as "deprivation",[187] nor does (it has been held) discrimination in taxation amount to infringement of the right to equality (article 14)[188] so long as

185. Article 19(5) reads—

Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

186. Article 39 reads :

The State shall, in particular, direct its policy towards securing—

(*a*) that the citizens, men and women equally, have the right to an adequate means of livelihood ;

(*b*) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good ;

(*c*) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment ;

(*d*) that there is equal pay for equal work for both men and women ;

(*e*) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength ;

(*f*) that childhood and youth are protected against exploitation and against moral and material abandonment.

187. *See Ramjilal* v. *Income Tax Officer*, A.I.R. 1951 S.C. 97. And see Rama Rao, "Chief Justice Sinha and Property Rights" 6 *J.I.L.I.* 153, 159-66 (1964).

188. *Moopil Nair* v. *State of Kerala*, A.I.R. 1961 S.C. 552 and the subsequent reinterpretation thereof in *Khyerbari Tea Co.* v. *State of Assam*, A.I.R. 1964 S.C. 925, 941 and *Raja Jaganath Baksh Singh* v. *State of U.P.*, A.I.R. 1962 S.C. 1563, 1572. See Rama Rao, *supra*, for an evaluation of these decisions.

there is a "reasonable classification." In judging reasonableness of classification, the Supreme Court has generally acted on the presumption of constitutional validity of legislative enactments.[189]

Further, the right to "acquire, hold and dispose of property" (article 19(1)(*f*)), subject to the imposition of "reasonable restrictions' in the "interests of general public" (article 19(5)), was not considered to be relevant to article 31 in any way since the latter dealt with "deprivation" or "acquisition and requisition" of property. In a leading pre-fourth amendment decision[190] the Supreme Court ruled that the right to acquire, hold and dispose of property presupposes the existence of property and if that has been expropriated by the state under article 31(1) and (2) this guarantee simply does not come into the picture. Whenever a law dealt with deprivation of "property," article 31 applied: "deprivation" did not amount to "restriction." After the passage of the fourth amendment, article 31(1) is regarded as subject to article 19(1)(*f*). Unless the law depriving a citizen of property amounts to a "reasonable restriction" in the interests of general public under article 19(5), it shall not be valid. This ruling in *K. K. Kochuni* v. *State of Madras*,[191] recently a subject of needless controversy,[192] when read with another judgment preceding *Kochuni* by five months holding that the term "restriction" includes "prohibition" and "deprivation" as well in its ambit,[193] reserves to the courts a wide scope for exercising judicial review over property right.

---

189. See Jain, *Indian Constitutional Law* 617-18 (1962); and Joshi, *Aspects of Indian Constitutional Law* 77-84 (1965).

190. *State of Bombay* v. *Bhanji Munji*, A.I.R. 1955 S.C. 41. See the perceptive analysis of this and related decisions in Merillat, "Chief Justice Das: A Decade of Decisions on Right to Property" 2 *J.I.L.I.* 183 (1959-60).

191. *Supra* note 163. Mr. Justice Subba Rao (as he then was) delivered the majority judgment with concurrence of Sinha C.J. and Shah J. Immam and Sarkar JJ. dissented.

192. See Narain, "Deprivation of Property and the Right to Hold Property Under the Indian Constitution: A Study of *Kochuni* Decision" 6 *J.I.L.I.* 410 (1964); and Rekhi, "The *Kochuni* Decision; A Rejoinder" 8 *J.I.L.I.* 111 (1966). The controversy is here characterized as "needless" only in the sense that as Mr. Rekhi has demonstrated Mr. Narain had not fully availed himself of the decisional law on the subject while offering his critique. With respect to both my colleagues, I must also say that the "controversy" between them has been so structured as not to allow the proper significance of the case, as understood here, to emerge.

193. *Narendra Kumar* v. *Union of India*, A.I.R. 1960 S.C. 430. This unanimous judgment of a five-judge's bench was delivered on 3 December, 1959, the *Kochuni* decision following it on 4 May, 1960. This holding pertained to both articles 19(5) and and 19(6) and we must note that the court also observed (at 436):

> It is undoubtedly correct...that when, as in the present case, the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court.

Even by this "strict scrutiny" the Court found part of the impugned Non-ferrous Metal Control Order, 1958, whose operation resulted in elimination of "dealers" from the traders and involved a classification between "dealers" and "manufacturers" to be valid.

But this is not all. In interpreting article 31A the Supreme Court, while following its interpretation offered in the *Kochuni* case to the effect that it deals with "agrarian reform,"[194] has consistently rejected the accompanying narrow interpretation of that article as pertaining to "tenures as such."[195] In *Ranjit Singh* v. *State of Punjab*,[196] five judges of the Supreme Court, in a unanimous decision delivered by Mr. Justice Hidayatullah, approved a state enactment transferring certain portions of lands owned by proprietors to the village panchayat for common use and to some non-proprietors, even though the act did not provide for compensation. In so doing the learned judge made some of the most illuminating observations, rarely quoted by the writers who periodically

194. See the *Kochuni* decision, at 1086-87, where Mr. Justice Subba Rao, speaking for the majority, held that the objective of the Fourth Amendment, and especially of article 31A(1)(*a*), is to achieve agrarian reform and therefore, legislation unrelated to this purpose is not thereby protected. The dissenting justices (Imamm and Sarkar) rejected this interpretation partly for the reasons, first, the statement of objects and reasons of the amendment bill should not be taken into account in construing the provision and, second, on the face of it, the provision does not refer to agrarian reform. This reasoning, with respect, appears somewhat dogmatic as no cogent reasons are advanced in support or by way of persuasion save that the statement of objects and reasons shall not be determinative, a proposition conceded by the majority.

Whatever may be the historical rationale supporting exclusion of this material from judicial cognizance, this rule of interpretation in its present operation is baffling. It is not suggested that legislative declaration of policies and intentions relating to a particular enactment be taken as *the* determining factor; but their exclusion, even when impossible to practice rigorously, from judicial consideration deprives courts of important policy guidance in the task of interpretation, especially in an area where they have to adjudge the "reasonableness" of the restrictions to the right. It is distressing that the courts while invoking this material and deriving inspiration from it should at the same time be compelled by a "rule of interpretation" to deny that they are so doing.

Nor does the use of such materials condition the courts to acquiesce in the legislation as is skillfully demonstrated by Mr. Justice Subba Rao, in *Vajravelu* v. *Sp. Dy. Collector*, A.I.R. 1965 S.C. 1017 at 1021. (This case will be hereafter simply referred to as *Vajravelu*). The counsel there criticized *Kochuni* majority for basing its interpretation of 31A(1)(*a*) as relating only to agrarian reforms on the ground that a part of the "objects and reasons" dealing, *inter alia*, with "slum clearance" (involved in *Vajravelu*) was omitted from consideration. When thus confronted Mr. Justice Subba Rao, in *Vajravelu*, asserted that since the "commonplace" statutory rule of interpretation excluded use of such materials, the *Kochuni* judgment "in effect, held that Art. 31-A(1)(a) *should be confined to an agrarian reform* and not for acquiring property for the purpose of giving it to another." (Emphasis added).

Thus the so-called "rule" of statutory interpretation only aids and abets obfuscation of *what* and *why* of a given decision—perhaps a comfortable but hardly an illuminating enterprise.

195. See, generally, *Gangadhar Rao* v. *State of Bombay*, A.I.R. 1961 S.C. 2888; *Sri Ram Ram Narain Medhi* v. *State of Bombay*, A.I.R. 1959 S.C. 459; *Sonapur Tea Co. Ltd.* v. *Deputy Commissioner and Collector of Kamrup*, A.I.R. 1962 S.C. 137; *State of Bihar* v. *Rameshwar Pratap Narain Singh*, A.I.R. 1961 S.C. 1649; and *State of Bihar* v. *Umesh Jha*, A.I.R. 1962 S.C. 50.

196. A.I.R. 1965 S.C. 632.

urge the Court to take "socio-economic considerations" into account. These will therefore be here quoted at some length :

> The scheme of rural development today envisages not only equitable distribution of land so that there is no undue imbalance in society resulting in a landless class on the one hand and a concentration of land in the hands of a few, on the other, but envisages also the raising of the economic standards and bettering rural health and social conditions....If agrarian reforms are to succeed, mere distribution of land to the landless is not enough. There must be a proper planning of rural economy and conditions and a body like the village Panchayat is best designed to promote rural welfare than individual owners of small portions of land....
> ...It is a trite saying that India lives in villages and a scheme to make villages self-sufficient cannot but be regarded as a part of the larger reforms which consolidation of holdings, fixing of ceiling on lands, distribution of surplus lands, and utilising of vacant and waste lands contemplate....[197]

We must further note that in *Vajravelu* v. *Special Deputy Collector*,[198] again a five-Judge Bench, led by Mr. Justice Subba Rao, reiterated the view that so long as a particular law is related to agrarian reform, in narrow or the wider sense, the judiciary will not interfere so as to negate it.

The implication of this attitude is that, contrary to some of its early restrictive pronouncements on the meaning of the word "estate" and associated phrases in article 31A, the Court is now willing to affirm legislative decisions related to agrarian reform. Non-agrarian reform legislation would however seem to be subject to the requirements of article 31(1) and (2), as hitherto construed.

Vajravelu is a landmark decision, however, on the question of compensation also. The Court there, no doubt, endorsed the view expressed in *Bella Banerjee* that :

> (i) the compensation under Article 31(2) shall be a "just equivalent" of what the owner has been deprived of; (ii) the principles which the legislature can prescribe are only principles for ascertaining a "just equivalent" of what the owner has been deprived of; and (iii) if the compensation fixed was not a "just equivalent" of what the owner has been deprived of or if the principles did not take into account all relevant elements or took into account irrelevant elements for arriving at the just equivalent, the question as regard thereto is a justiciable issue.[199]

And, thus notwithstanding the so-called non-justiciability of compensation for expropriated property under article 31(2), the Supreme Court, again ironically fulfilling the intentions of the makers of the fourth amendment, laid down the broad principles pertaining to "fraud" on the Constitution :

> It [the Legislature] can ... only make a law of acquisition or requisition by providing for "compensation" in the manner prescribed by Article 31(2) of the Constitution. If the Legislature, though ex facie purports to provide for

197. *Id.* at 638.
198. *Op. cit.* note 195.
199. *Vajravelu*, at 1023.

> compensation or indicates the principles for ascertaining the same but in effect and substance takes away a property without paying compensation for it, it will be exercising power it does not possess. If the Legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not relate to the property acquired or the value of such property at or within a reasonable proximity of the date of acquisition, or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the Legislature made the law in fraud of its power.[200]

Commentators who have merely taken note of the above aspects of the decision have allowed themselves to be unduly alarmed by the feeling that the Court has thus nullified the fourth amendment by a "legalistic" approach.[201] But this is simply incorrect. For the Court also clearly acknowledged :

> The argument that the word "compensation" means a just equivalent for the property acquired and, therefore, the Court can ascertain whether it is a "just equivalent" or not, makes the amendment of the Constitution nugatory. It will be arguing in a circle. Therefore, a more reasonable interpretation is that neither the principles prescribing the "just equivalent" nor the "just equivalent" can be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles.... The application of different principles may lead to different results....But nonetheless they are principles on which and the manner in which compensation is determined. The Court cannot obviously say that the law should have adopted one principle and not the other, for it relates only to the question of adequacy.[202]

Obviously, some difficulties inhere in this task of determining whether the compensation provided for by the law (either by designated amount or prescribed principles) falls in the zone of "inadequacy" which is non-justiciable or in the zone of "fraud" on the right to property. But the presence of such difficulties in abstract is no cause for alarm : it always attends the judicial task. And in the instant

---

200. *Id.* at 1025.

201. This seems to be the refrain of two recent comments on the decision. See Nayak, "The Right to Property : A New Perspective" and Ghouse, "The Right to Property and the Supreme Court" in 8 *J.I.L.I.* at 262 and 274 respectively.

202. *Vajravelu*, at 1024. The learned judge in the same para proceeded to give a few illustrations.

Mr. Nayak's exhortations, *supra* note 201, that the "judiciary should not usurp the place of the legislature" (270) or that "The policy orientation should be in consonance with the macro-sociological realities of the country" (273) and his fears that the present tendency may lead to further amendments do not seem to us well-founded. Nor does the view of Mr. Ghouse (at 279) that illusoriness of compensation will lead the courts to review its "adequacy" in a "disguised form" appear to us as anything more than a bold prognosis. The existing decisional material no doubt shows that the courts, and particularly the Supreme Court, have as yet to evolve a consistent policy in this area but then the variety of legislative techniques in evolving the principles of compensation may be such as to forbid a uniform trend in the decisional law. Our study makes us bold (if we are after all to indulge in futurisings) to discern a more socially sensitive approach by the courts on this issue.

case, it is noteworthy that even when the Court held that the compensation herein was not protected by article 31A,[203] and that it omitted an important principle (viz. the potential value of land) from amongst the prescribed principles,[204] the impugned statute did *not* constitute a "fraud" on the Constitution. If the Court wanted to invalidate the statute on the ground of inadequate compensation under the *Bella Banerjee* principles, and thus negative the fourth amendment, it seems it could have most easily done so. But it was invalidated on the ground that it offended article 14.[205]

The infringement of the canons of "reasonable classification" under article 14, of which the Court here complained, consisted in the fact that the Amending Act would give lesser value of the land to the claimant than the original Act.[206] Obviously when "discrimination is

203. *Vajravelu*, at 1022.

204. *Id.* at 1026. See the judicial meaning of the term "potential value." Mr. Justice Subba Rao observed in this connection :

> In awarding compensation if the potential value of the land is excluded, it cannot be said that the compensation awarded is the just equivalent of what the owner has been deprived of. But such an exclusion only pertains to the method of ascertaining the compensation. One of the elements that should properly be taken into account in fixing the compensation is omitted: *it results in the inadequacy of the compensation but that in itself does not constitute fraud on power*, as we have explained earlier. We, therefore, hold that the Amending Act, does not offend Article 31(2) of the Constitution. (Emphasis added).

The Court also rejected the argument, suggesting fraud, that while the ostensible purpose of the law was to provide for housing schemes, its real purpose was to provide revenue for the state. In rejecting this view (at 1026-27) the Court recognized the *bona fides* of the legislative purpose, adverting to the "socio-economic" considerations. More recently, in *Union of India* v. *Metal Corporation of India*, A.I.R. 1967 S.C. 637, Mr. Justice Subba Rao while denying the constitutional validity of the Metal Corporation of India (Acquisition of Undertaking) Act, 1965, further expounded the *Vajravelu* principles (at 643) :

> If the two concepts, namely, "compensation" and the jurisdiction of the Court are kept apart, the meaning of the provisions is clear. The law to justify itself has to provide for the payment of a "just equivalent" to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product cannot be questioned in a court of law. The validity of these principles, judged by the above tests, falls within the judicial scrutiny, and if they stand the tests, the adequacy of the product falls outside its jurisdiction. Judged by the said tests, it is manifest that the two principles laid down in Cl. (b) of para II of the Schedule to the Act, namely, (i) compensation equated to the cost price in the case of unused machinery in good condition and (ii) written down value as understood in the Income-tax law is (*sic*) the value of the used machinery, are irrelevant to the fixation of the value of the said machinery as on the date of the acquisition.

205. *Vajravelu*, 1027-28.

206. *Ibid.* The Court found "discrimination writ large" on the impugned Act and held it did not satisfy requirements of "reasonable classification" under article 14. This was so because the impugned Act, The Land Acquisition (Madras Amendment) Act, 1961, empowered "the State to acquire land for housing schemes at a price lower than that the State has to pay if the same was acquired under the Principal Act." Moreover, the differentials between persons whose lands are acquired for housing schemes and those whose lands were acquired for other purposes were found not to be reasonably related to the object of the Amending Act.

writ large" on the face of the legislation involved, even the most "progressive" judges may be justified in wanting to invalidate it. Exhorting them to take "socio-economic" considerations even in this situation would be almost asking them to forsake the interpretative structures of "reasonable classification" which they have painstakingly evolved, and which more often than not serve social and economic reform.[207]

Let us also realize that the Court has introduced in the authoritative legal materials a seminal technique of managably handling "the socio-economic considerations," glibly urged by many, by distinguishing between agrarian reform legislation and the non-agrarian economic legislation. The effect of this distinction seems to be to give dispensation from strict judicial scrutiny to the legislation falling within the former class and to supervise acquisitions in the latter class in the interests of justice. We should not infer that because the Court retains powers of this kind of supervision, invalidation is more likely to result than not. It would seem on the contrary from (for example) interpretations given to the terms "public purpose,"[208] "reasonable restriction,"[209] and others, that the Court will as far as possible serve what appears to it as a valid exercise of the constitutional legislative power of the Parliament. Critics of the Court's above classification suggest that slum clearance and urban development are important aspects of social welfare and therefore article 31A should be construed to confer immunity from judicial scrutiny to such legislation. But we must here seek to weigh the social costs and gains from judicial supervision against the power-entitlements of the legislatures. Obviously the slumlord is a cousin to the landlord, and the disappearance of both may be a part of the so-called "socio-economic" reform. But also, as obviously, restructuring of the agrarian economy and abolition of the slums in the urban areas are tasks of differing magnitude, involving different priorities and values, and having different social consequences.[210] Judicial supervision over

207. See for a comprehensive survey of case law, Basu, *Shorter Constitution of India* 24-58 (5th ed. 1967).

208. See for a review of relevant case law, Narain, "The Concept of 'Public Purpose' in Article 31(2) of the Constitution of India," 6 *J.I.L.I.* 175 (1964). This study, however, is based on a discernment of "a tendency on the part of the Court which on some future occasion might well lead it to take a narrow view of the concept of public purpose enshrined in the Constitution (at 179)." However, the extreme liberality with which the Indian courts have interpreted "public purpose" (and to which Narain's study itself testifies) would seem to render such a future rather improbable.

209. See Basu, *op. cit.* note 207 at 112-17.

210. Of course, it would be myopic to view the problem of agrarian development (as also of general economic development) as separate from and unrelated to the problems of urbanisation. Such differences as we here stress, however, involve the general role of the judiciary with relation to legitimation of occasional infringement of constitutional individual liberties and rights. For a general orientation, see the valuable studies on urbanisation in Turner, *India's Urban Future* (1962) which unfortunately do not take into account the constitutional context and judicial policy-making aspects of urbanisation in India. Studies from these perspectives are also essential.

the issue of compensation and the constitutional propriety of governmental action in the exercise of "police power" and the eminent domain powers, exclusive of agrarian reform, may indeed be a social good, for a number of reasons. It may help ensure solicitude for constitutional proprieties in the making and formulation of laws. Obviously, the statute involved in *Vajravelu* with "discrimination writ large" on it or a definition of "estate" in article 31A designed to provide specific guidance as to the land tenures there contemplated but omitting to mention, for example, *ryotwari* lands almost invite judicial invalidation.

Such invalidation should be regarded as an opportunity to provide the courts with more well-drafted laws, which take into account the difficulties of the judicial task and aspire to assist the courts to evolve suitable policies without the embarrassment caused by myopic or astigmatic drafting. Obviously, if the judiciary is to cooperate with the legislature in certain areas of economic legislation, such painstaking legislative drafting is indispensable.[211]

Further, such judicial supervision over strictly non-developmental[212] economic legislation may also enable courts to properly regulate the exercise of state's eminent domain and "police power" in the broad context of constitutional guarantees of fundamental rights. And this would also involve lawyers and judges in their rightful participation in helping to mould and effectuate some aspects of economic policy-making. We will return briefly to this theme again towards the end of this section: but let us stress at this point that if some of these advantages may prove dysfunctional in the realm of agrarian developmental tasks, they may still be thought of as worthwhile in certain other areas in the above suggested manner.

What do, then, the authoritative legal materials tell us about the problem of transmutation of "private property" into the "material resources of the community?" Save the natural resources, *res communes*, some existing nationalised assets, taxation and allied measures of revenue, such transmutation can possibly only occur through "lawful" deprivation or "lawful" requisitioning or acquisition of private property. The existing decisional law provides us with some criteria for

211. Legislative drafting becomes a self-defeating exercise when it is inadvertent to evolving judicial norms. When sufficient imaginative efforts are lacking to avoid a collision with constitutional provisions, judicial invalidation of an enactment is relatively easy to invoke. Specialist studies in legislative drafting, based on the premise that a judgment of a court is, besides being a binding decision on the parties and declaration of rules of law, a communication to the legislative draftsmen are necessary. Indifference to this subject by juristic scholarship may well over a period of time contribute to the precariousness of the constitutional regime in India.

212. Non-developmental in the sense of not being crucially related to the declared priorities of Indian planning.

determining the "lawfulness," which may be broadly stated in the following set of propositions :[213]

(1) "Deprivation" under article 31(1), being after the fourth amendment an incident of the general legislative power of the state, is subject to "reasonable restriction" requirement of article 19(5).

(2) Acquisition or requisitioning of any "estate" or rights thereunder shall be legitimated by the courts even when *no* compensation is paid if the legislative purpose is to further agrarian economic reform, the latter phrase being construed in its widest amplitude.

(3) For acquisition or requisitioning of any other property under article 31(2) read with (2A), the "just equivalent" formula of *Bella Banerjee* survives the fourth amendment; but the effect of the latter is that the courts will not judge the "adequacy" of compensation or principles laid down for arriving at such compensation save when these result in an illusory compensation or a fraud on the Constitution.

(4) The existing decisional law, though meagre, warrants the proposition that laws made under article 31A(1)(*b*) to (*e*) will be legitimated.[214]

(5) The laws made under all the above categories excepting (2) above, shall be subject to the requirements of "reasonable classification" under article 14.

We hope that the courts in India will continue benignly to invoke these principles in adjudications involving developmental legislation, recognizing that these principles have emerged as a result of their own efforts at finding solutions to the problems here under discussion and notwithstanding the unfortunate diversion to the ultimate constitutional issues in the *Golak Nath*.

But it must be admitted that no reference to decisional law principles, which are after all tools for the use by the courts, will solve for us our second problem—of understanding the meaning of the institution of "property" in the Indian conditions. Revival of antiquated philosophies of property and the right to property in the *Golak Nath* threaten, furthermore, such guidance towards this task that we may otherwise derive from the above principles. It therefore becomes all the more imperative to emphasize that even with this set of discerning

213. This statement does not purport to be an exhaustive formulation of the relevant criteria. It is hoped however that it indicates the salient trends in the decisional law.

214. See, *e.g.*, *Sailendra Nath Chandra* v. *State*, A.I.R. 1967 Patna 68 at 71, with regard to the constitutional validity of Mines and Minerals (Regulation and Development) Act, 1957, under article 31 A(1)(*e*); *Burraker Coal Co. Ltd.* v. *Union of India*, A.I.R. 1961 S.C. 954. Also see the dissenting opinion of Mr. Justice Bachawat and Mr. Justice Hidayatullah (the majority not having dealt with the issue) on the broad interpretation of the term "winning" in the above act and article 31A(1)(*e*) of the Constitution, in *Bihar Mines Ltd.* v. *Union of India*, A.I.R. 1967 S.C. 887, at 891-92.

principles, the courts operating with antiquated notions of "property" may come to some results which may cumulatively be so anti-developmental as to render judicial experimentation in constitutional policy-making in this area exorbitant.

Before we embark on the search for the meaning of property, we must stress that the above-mentioned principles of decisional law already provide us with important judicial safeguards for preservation of fundamental right to property, howsoever understood. But these are not the only safeguards we have.[215] In a responsible parliamentary form of constitutional democracy, the political processes which law-making involves also function as important checks on the exercise of legislative power. These may be described, if you will, as "the political process safeguards." As lawyers and judges we too often take it for granted that a numerical majority in a legislative chamber, coupled with the theoretically vast legislative power, facilitates law-making on important constitutional and sensitive public matters to the point of automatic accomplishment. But this is not so. Just as there are limits of effective legal action, there are also limits of effective *law-making* action. And almost every important legislation is a calculated risk. Opposition parties can make a political capital through such occasions. Political costs of a proposed legislation are always taken into account, so much so that a morally imperative legislation may often have to be kept out of the statute book. And political costs will be catastrophic if the Parliament too often disposes what the government proposes. Even the whips, not unlike Tennyson's "little systems", have their day and cease to be. A whipped consensus may all too often bring in its wake disintegrative dissensus. Exposure to these hazards, and viability in continual confrontations with them, renew and expand even as they periclitate political power.

When we move from the ordinary law-making activity to constitutional amendments, be they howsoever procedurally easy, these hazards become even greater. The political magic of serving the spirit of the Constitution, even while mutiliating its body, requires organized necromancy of a kind which would seem to lie beyond the resources of routine democratic leadership. The very image of a constitution being amended intensifies the pressures emanating from the various interest-groups including the "fourth estate." So high indeed may be the emotional commitments or political stakes of elected law-makers on the issues of the kind which may be involved in a constitutional amendment that the risk of open conflict between members of the majority party itself may arise.

215. *E.g.*, for all governmental actions, whether by way of "deprivation" or acquisitioning and requisitioning, authority of law is mandatory. Pure executive action in this regard will be *ultra vires*. Again, state legislation in this regard (*i.e.* under article 31(2), requires by virtue of article 31(3) consideration by and assent of the President of India.

To ignore or to de-emphasize these political process safeguards to the exercise of power, whether legislative or constituent, is to take the royal road to hallucinations about the demise of democracy in India, and to succumb, when so little effort will save us, to the "argument of fear."[216] It may be that "one may smile, and smile, and yet be a villain." It is exceedingly doubtful that in modern India one may amend and abridge and eliminate fundamental rights and yet retain political power.

Lest these political process safeguards seem insubstantial, we may recall that even prior to the radical redistribution of political power in the country following the Fourth General Elections, two proposed amendments to the Constitution (one affecting the property right and the other aiming at reviving *status quo ante* with regard to the effect of a state of constitutionally declared emergency on the fundamental rights and the governmental actions thereunder) had to be withdrawn from the floor of the Parliament in view of general dismay and opposition they evoked.[217] We must therefore avoid underestimating the potency of these safeguards, which is now enhanced by the new configurations of political power.[218]

This also leads us to re-evaluate, even at the risk of some digression, some current thinking about the dangers to judicial review which most of us see arising from the supposed narrowing of the property right. The preservation of fundamental freedoms is intimately related to that of the judicial review: but these two interests, deeply intertwined in the *Golak Nath* decision, should not be regarded, as, for that reason, *identical*.

---

216. An apt characterization by the dissenting justices in *Golak Nath* of the apprehension by their majority brethern that abridgement of fundamental rights, if permitted, will be fatal to democracy and the rule of law. The "argument of fear," despite the sobering issues which lie behind it, comes very close to the argument of "slippery slope" so characterized and forcefully rebutted by Sidney Hook in *The Paradoxes of Freedom* at 47 (1962). Professor Hook in this chapter entitled "Intelligence and Human Rights" suggests that those who argue that power to limit basic human rights carries with it the danger of such an abuse as will obliterate the rights resembles the argument that the authority to introduce flouride (a poison) into drinking water may be feared lest it might be abused to infuse cynaide as well.

217. See Chanda, *op. cit.* note 151. We need a specialized study of these and other amendments of the Constitution from the perspectives of legislative and political theories. There have been four additional amendments (not directly related to fundamental rights) since the seventeenth, bringing the total number of amendments to twenty-one. An amendment seeking to declare the *power* of the Parliament to amend *any* part of the Constitution is now under the consideration of a select committee of both the Houses. The study urged here should be focused on official amendments which failed to pass as also on numerous private members' bills.

218. Recently the Congress Party which ruled the country virtually without substantial opposition lost elections in eight out of sixteen states in India where it was reduced to the role of an opposition party. See for a full analysis the symposium in 94 *Seminar*: *Election Outcome* (June 1967: New Delhi, India).

Judicial review is a very extensive notion and is bound up with the judicial function in numerous ways. We are here concerned mainly with the constitutional judicial review, one in which the courts, including the Supreme Court, are asked to pronounce on the constitutional validity of statutes (and even constitutional amendments). In the Indian Constitution this kind of judicial review is guaranteed as a fundamental right by article 32.[219] In order to substantiate a claim that this kind of judicial review is endangered by ordinary laws or constitutional amendments, one should be able to show that this article is directly impugned so as to narrow (or eliminate) the scope of the Court's power to try cases coming before it. Both in *Sajjan Singh* and in *Golak Nath* most of the learned justices agreed that this was not the case under existing amendments, though correctly the Court saved the issue from any definite pronouncements.[220] The Supreme Court in these cases even recognized that such amendments to fundamental rights which altogether bar the justiciability of compensation as an aspect of property right could not be said to deplete its power of judicial review.[221] The Supreme Court in addition, as we have seen above, has sufficient effective power of judicial supervision over laws affecting property rights. One has therefore to be wary in relating the effect of the amendments to the Constitution on the judicial powers guaranteed by it.[222]

We could then say that in the *Golak Nath* situation, on either of the above grounds among others, judicial review was not directly in jeopardy. Judicious policy-making should then avoid apprehensions arising either out of facile prognoses or morbid anxieties about the future of judicial review.

What, however, seems to have been the paramount concern, both among the jurisprudents and the Bench, is the relationship between the judiciary and Parliament in India since Independence. To be sure, one gets the impression that the Parliament, overconscious of its

219. Article 32 guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the provisions of part III of the Constitution, specifies the power of the Supreme Court to issue writs, expressly states the exercise of Parliamentary authority to empower lower courts to exercise a similar jurisdiction and finally provides against its suspension save by the modalities which are specified in the Constitution.

220. This issue was summarily dismissed in the *Shankri Prasad* case (see *supra* note 146). In *Sajjan Singh* the effect of the property amendments on article 226 was considered merely incidental, *supra* note 155 at 851-53. This also remained the view of the learned justices in *Golak Nath*. See also *supra* note 182.

221. See *supra* note 220; and Blackshield, *Fundamental Rights* at 147-52.

222. See Blackshield, *Fundamental Rights*, who despite a sensitive consideration of the difficulties attending any prognosis about "progressive emasculation" of judicial review nonetheless ambivalently urges us "to do what we can to buttress democracy's safeguards (at 187)." See also *infra* note 227.

strength and fully aware of the easy amendability of unentrenched provisions of the Constitution, has moved with an unholy haste to amend the Constitution in response to either an actual or anticipated course of judicial behaviour. In this, it may also appear, the Parliament has failed to accord sufficient deference to a co-ordinate branch of government and to some extent thus forfeited its goodwill and guidance. Conversely, one may well get an equally general impression that on some issues, such as compensation, judicial policy-making, given a wide margin for trial and error, is somewhat out of tune with the orchestration of contemporary Indian social realities. There is room for criticism that the Supreme Court has often failed to accord due deference to legislative determinations of what constitutes, in certain decisional situations, a social good.

But if we were to draw a balance-sheet of our impressions, fairness will compel us to acknowledge both the legislatures and the judiciary are in part eligible for criticism and praise. More important than this is to fully realize that it is the balance-sheet of our *impressions* and not of facts. Our impressions about prevalent facts may be derived from them; but they are *not* those facts, despite the notorius difficulties involved in psychological and philosophical aspects of "perception" of "reality."[223] The real issue in any case, lies outside the verbal behaviour of the legislatures or the judges, dwelling rather in what they *do*. And at this level, we have not reached even the beginnings of a responsible empirical analysis.[223a] As Mr. Justice Ramaswami emphasized, the achievements in agrarian reforms through the amendments to the Constitution are impressive.[224] And as we have partly here sought to emphasize, judicial policy-making has reached a stage of socially sensitive tradition which is equally impressive, and this notwithstanding its beclouding by *Golak Nath*.

The purpose of these observations is not to perform the Manichean rite of apportioning praise and blame between the legislature and the courts, who together make the constitutional universe of India. We rather want to emphasize the fact that the tensions and conflicts (both

223. See for a lucid summation of divergent views, Russell, *History of Western Philosophy* 163-72; 464-65; 760-61, 763-64, 623-24; 629-30; 688-89 (1946, 1961).

223a. See, however, the valuable study by P.K. Irani, "The Courts and Legislatures in India," 14 *Int. Comp. L.Q.* 950 (1965) which highlights the sources of inter-institutional discord.

224. See text accompanying note 179, *supra*. It is regrettable that even in scholarly writings on this aspect, one often reads that progress in agrarian reform has been slow notwithstanding judicial acquiescence in constitutional policies. What seems to have been not adequately appreciated is the fact that while the lack of judicial approval will certainly retard such development (even to the extreme point of rendering it impossible), such approval would be just one factor, albeit major, in attainment of requisite developmental goals. Besides, the criticism generally overlooks the crucial distinction between policy and its implementation. Consensus between the judiciary and the legislature on basic policies is a necessary but by no means a sufficient condition of overall desired progress.

imaginary and real) between the two represent, as it were, the growing pains of a democratic polity. Without elevating such conflict to the status of inevitability we would still suggest that it is not alien to democratic political culture.[225] Institutional relations between co-ordinate authorities often exhibit the same kind and degree of ambivalence that an individual displays in relation to society.

But all this (and this is the point) does not sanction mutual reprisals and recriminations to *decisively* enter into constitutional policy-making whether by the courts or the legislatures. If the Parliament were to legislate an amendment validating certain enactments which have been declared null and void by the Supreme Court, it should have better and weightier reasons than those furnished by the mere fact of the Court's adverse holdings. And correspondingly if the Supreme Court is to declare the Parliament powerless to act in a certain manner, it too should have reasons that transcend the mere irritations caused by indiscriminate attitudes and outspoken utterances of certain elected policy-makers. The duty to look beyond the immediate and the ulterior lies even more heavily on the Supreme Court than on the Parliament for the simple reason that the latter has greater facilities of undoing what it realizes it should not have done in the first place. A court cannot repeal or amend its judgment, no matter how great be the realization of its error: it can, and often does, distinguish and overrule. But by their very institutionality, the courts are dependent upon chance factors of litigation. Such policy-making as is assured to them comes from contingency and not, as with the legislature, by necessity.

It appears to the present writer that the image of worsening inter-institutional relations has been noticeably influential in the Supreme Court's verdict in *Golak Nath*; and to this extent the decision is regrettable. Both in the majority judgment of the Supreme Court and in the concurring opinion of Mr. Justice Hidayatullah, one finds expressions lamenting that the judiciary had not been allowed the opportunities to evolve suitable policies and all too often the intention of constitutional amendments was to "silence" the Court rather than to facilitate social welfare. To the extent that this has been so, at least in the opinion of the Court, it would seem perfectly legitimate for the judges to negative those aspects of the legislation infringing judicial power. To this we will return shortly, as one of the elements providing for a better decision in *Golak Nath*. But we may note incidentally that even Mr. Justice Hidayatullah, while conveying his indignation at the lack of deference to the Court, found himself unable to assert that

225. As to the United States, see, "Note: Congressional Reversal of Supreme Court Decisions: 1945-57," 71 *Harv. L. Rev.* 1324 (1958); Pritchett, *Congress versus the Supreme Court: 1957-1960* (1961); and W. F. Murphy, *Congress and the Court* (1962). And see also the recent Parliamentary reversal of the House of Lords' celebrated decision in *Burmah Oil* v. *Lord Advocate*, (1965) A.C. 75 discussed in "Note: The Burmah Oil Affair," 79 *Harv. L. Rev.* 614 (1965-66).

a legislative measure lowering the ceiling of landholding under the seventeenth amendment was liable to be construed judicially as a fraud on the Constitution.[226] This itself exemplifies not merely the obvious limits of the doctrine of "fraud" but also difficulties involving a *responsible* proclamation of Parliamentary *mala fides*, when it is acting within its declared constitutional competence.

The public relations aspects of the institutional kinship between the judiciary and the legislature, and specifically between the Parliament and the Supreme Court, and the emotional involvement with the institutional prestige of either, should then not be considered of any but marginal relevance either to the preservation of judicial review or of fundamental freedoms.[227] The Court will continue to have its friends and foes in the Parliament and the latter its friends and foes on the Bench. Let us hope that at some time the friends in each would outnumber the foes: but let us also keep in mind that constitutional policy-making should not blossom and wither according to the springs and autumns of such friendship and enmity. For such policy-making is essentially a search for constitutional ways of accelerating the economic development of free India, an aspect of dedicated leadership which we are seeking to save from the flood-tides of professionalisation.

This excursus enables us now to discount the purely subjective and emotional elements which permeate *Golak Nath* and generally enter in the authoritative legal materials. We also find from the analysis of the hard core of constitutional law, that while certain interpretative

226. See Hidayatullah judgment in *Golak Nath* at 71.

The learned Justice observes, with regard to second proviso to article 31A(1):

> The ceiling may be lowered by legislation. The State may leave the person an owner in name and acquire all his other rights. The latter question came before this Court in two cases—*Ajit Singh* v. *State of Punjab* [Civil Appeal No. 1018 of 1966] and *B.Ram and Ors.* v. *State of Punjab and Ors.* [Writ Petition No. 125 of 1966] decided on December 2, 1966. My brother Shelat and I described the device as a fraud upon this proviso but it is obvious that a law lowering the ceiling to almost nothing cannot be declared a fraud on the Constitution. In other words, agricultural land-holders hold land as tenants-at-will.

For a critical analysis of these decisions, see Hooker, "Acquisition in Agrarian Reform: Implied Powers and Forms of Relief," 9 *J.I.L.I.* 107 (1967).

227. *Cf.* Blackshield, *Fundamental Rights* 182-85. But this awareness is stifled by a survey of "imponderables" indicative of the precariousness of democratic regime in India. The "imponderables" discussed by the learned author were very much in the minds of the makers of the Indian Constitution (see part V(A), *supra*). At the level of ultimate questions about "future threats that may arise to Indian democracy (187)," no doubt reiteration of the "continuing enigma" could be the only right response. But exploration of this enigma, destined also to lead to enigmatic pronouncements, should not blur the relevance of our present submission in the text. No doubt the uncertainties of the future should be kept fully in view. But has a full case been made out for tendencies towards legislative absolutism in India? Are the judiciary and the fundamental freedoms so acutely in danger as to be pre-eminent factors shaping judicial decision-making?

structures are now established with regard to fundamental rights in general and the property right in particular, the meaning of the latter (as of the rights in general which however does not concern us here) has not even emerged, let alone established. What varied aspects of the property right should then become a part of Indian judicial decision-making tradition? In answering this question, there seems no escape from the heroic tasks (which we can do no more than indicate here) of understanding, and utilising, the rich heritage of social and political thought.

We have, therefore, to ask, and answer, two allied questions: (1) What does right to property mean in mid-twentieth century world?; and (2) How shall we relate this general meaning to an economically underdeveloped and democratically committed country like India? In answer to (1) it can safely be said that the right does not mean "possessive individualism" of the eighteenth century thinkers;[228] nor also the simple *laissez faire* dogma of the succeeding century.[229] Roscoe Pound, after a masterly survey of theories about private property from juristic perspectives, tells us:

> In civilized society men must be able to assume that they may control for purposes beneficial to themselves what they have discovered and appropriated to their own use, what they have created by their own labor *and what they have acquired under the existing social and economic order.* This is a jural postulate of civilized society as we know it.[230]

The central ambiguity of the phrase emphasized in this formulation will emerge menacingly if we consider what the constitutional amendments have sought to accomplish relative to land reform in India. Obviously "the existing social and economic order" cannot for our purposes refer to the order prevalent in the British India. The Constitution of India projects a new social and economic order. To uphold as sacrosanct the old order in relation to property would be to simply maintain the *status quo*. This jural postulate while presumably valid for economically developed Western societies cannot obviously apply in its fullness to a developing country which seeks a transition from a pre-existing to a new order.[231]

Even the liberal thinkers at the beginning of this century clearly recognized both the social origins and functions of property,[232] to which

228. See the outstanding study by Professor Macpherson, *The Political Theory of Possessive Individualism* 46-49, 87-106 (Hobbes), 194-202, 251-62 (Locke), and 263-78 (1962).

229. On this see generally Stone, *Soc. Dim.* 339-41, 759-87 and the literature cited therein.

230. 3 Pound, *Jurisprudence* 101-54 at 103-04 (emphasis added).

231. *Cf.* Stone, *Human Law and Human Justice* 277-84 (1965) where the final positions of the Pound-Stone dialogue on the jural postulates in the context of transitional societies are stated. This point in the text comes closer to Stone's general positions than Pound's, though neither of them was engaged in a consideration of the applicability of this particular jural postulate to developing societies.

232. See *e.g.*, Hobhouse's classic tract *Liberalism* 88-109 (1911: Galaxy Books repr. 1964).

the majority in *Golak Nath* does not appear too willing to subscribe. A recent restatement of these ideas, emphasizing also the social power that accompanies property, has been offered by Professor Morris Ginsberg :

> The root of the difficulty....is that in most of the discussions the notion of private property is used too vaguely. It is necessary to distinguish at least three forms of private property : (i) property in durable and non-durable consumer's goods; (ii) property in the means of production worked by their owners; (iii) property in the means of production not worked or directly managed by their owners, especially the accumulation of masses of property of this kind in the hands of a relatively narrow class. While the first two forms of property can be justified as necessary conditions of a free and purposeful life, the third cannot. For this type of property gives power not only over things, but through things over persons. It is open to the charge made by socialists again and again that any form of property which gives man power over man is not an instrument of freedom but of servitude.[233]

Despite some intellectual uneasiness that the categorical nature of the above formulation brings with it,[234] it must be acknowledged that some such orientation towards property comes closer to the makers and the re-makers of a mid-twentieth century Asian constitution than that suggested by the invocation of the Grotian theory of property.

The problematics of property lead us also to reconsider the proposition that compensation in all cases of expropriation is a requirement of justice. Even a modest acquaintance with political philosophy will educate us that *justification* of private property, and the associated requirement of compensation, pose very uncomfortable and almost insoluble problems.[235] A similar acquaintance with social and economic history of the West would show that neither the passing of feudalism nor the attainment of the First Industrial Revolution were accompanied by compensation for confiscation.[236] Nor is even today the ultimacy of judicial determination of the quantum of compensation a cardinal tenent of liberal democratic thought[237] or practice.[238] It is not advocated

233. M. Ginsberg, *Justice in Society* 101 (1965).

234. The problematics of what constitutes "free and purposeful life" and of the power accompanying property as an "instrument" of "servitude" are still intellectually agonizing and philosophically debatable. See, however, Karl Renner, *The Institutions of Private Law and their Social Functions* (1949) a highly original and thought-provoking work from the perspectives of a "Marxist system of sociology."

235. See Pound, *supra* note 229, and the thoughtful selections in Cohen & Cohen, *Readings in Jurisprudence and Legal Philosophy* 5-99 (1951). M. Cohen (at 32) suggests that "no absolute principle of justice requires it (compensation)" and poses the riddle of the idea compensation by asking whether compensation should be obligatory in cases where abolition of slavery results in loss of 'property' to the slaveowners. This question above all brings into sharp focus the uncertainties surrounding the idea of just compensation in societies where basic structural changes are sought.

236. See for a succinct exposition R. Schlatter,—*Private Property: The History of An Idea* 77-161 (1951).

237. See the literature cited *supra* note 235; and more recently F. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 *Harv. L. Rev.* 1165 (1966-67).

238. See *supra* note 225, and McCloskey cited *infra* note 242.

that we in India to-day revert to pre-democratic methods of transforming socio-economic structures or forfeit the exercise of our judgment while availing ourselves of the rich experience of democratic constitutionalism in the most recent past. But in seeking to evolve a concept of property in a transitional economic and social order the judges must be advertent to these considerations. We must recall that a deep and wide study of world constitutionalism led to an enlightened eclecticism in Indian Constitution-making; those who now rule and reconstruct free India's life on the basis of the document must — be they legislators or judges — display a similar eclecticism in social learning. Only then can we preserve what we so proudly inherit.

When the courts seek to apply with severity constitutional limitations on legislative power (be it characterized as legislative or constituent power) on the basis that the possible exercise of this power represents a danger to democracy, the need to avail of such learning becomes all the more imperative. Predicting the demise of democracy, on the basis of a few (alleged or real) abridgments of the property right or for any other reason, is a very responsible task — more so when we allow our decisions to be influenced by such predictions. It is doubtful, to say the least, that a few abridgments of a vaguely absolutistic property right, herald a transition from an open to a closed society. It is rather when mutual suspicions and reprisals permeate decision-making, embittering the relations between the co-ordinate branches of government, that such a transition may seem near.

At any rate, the *Golak Nath* Court should have availed itself of all the relevant material relating to the actua limplementation of expropriation legislation in view of the gravity of the issues involved and further contrasted state expropriation under article 31 in India with similar measures in totalitarian or communistic countries to realize the difference between the two modalities and thus to diminish the haunting fear. But a reasoned and informed approach was, it seems, surrendered to an indulgence to intuition about the destiny of democracy in India.

The basic issue in the *Golak Nath* situation is simply one of adjusting ideals to realities. There is no doubt that fundamental rights are guaranteed and that in clear words the Constitution forbids their abridgment or elimination. On the other hand, in the very nature of things, *all* fundamental rights cannot be secured to *all* individuals at the same time. The state, in performing its welfare functions, and in discharging its duties under the directives, does and will continue to find it necessary to abridge, with or without taking away for all times, certain guaranteed freedoms. And this need may continue despite the fact that the Constitution itself provides for certain situations where the rights of the individual are subordinated to the needs of the society. These restrictions on the rights only make it more difficult for the Parliament to *justify* addition of further restrictions, abridging some funda-

mental rights, even to the point of taking them away. But the need shall not be denied : unless Canute-like one is to find oneself disposed to command the waves.[239]

So the net result of the present approach can be summarized as follows, in an ambitious advocacy of a methodology of legitimation of unavoidable "abridgments" to fundamental rights :

(a) Abstract questions as to whether legislature has power to amend so as to abridge or take away fundamental rights are academic and will not be *authoritatively* answered by the courts.

(b) The only situation in which such a pronouncement will be required of courts is one in which the legislature has attempted to abridge or take away *all* the fundamental rights. In this hypothetical situation, (presuming of course that the courts still function as a co-ordinate branch of government) it shall be held that Parliament has no power to embark on this course of action for the simple reason that it transfigures the constitutional regime thereby.

(c) The Parliament may pass laws abridging or taking away some specific right in the part III but such laws, notwithstanding whether they expressly bar judicial scrutiny, may be brought before the courts for adjudication of their validity. In a constitutional regime, decision-making power on such ultimate issues will be shared by co-ordinate authorities.

(d) In considering the constitutional validity of an impugned law or amendment, the courts will make at least three kinds of determinations :

(*a*) the meaning of the constitutional right involved ;

(*b*) the meaning of the law impugned ;

(*c*) whether thus construed, the impugned law abridges or takes away the right under consideration.

(e) Finally, in view of the gravity of any decision in the above situation, the courts will inform themselves of *all* aspects of the matter and consider in this light the benefits and costs of alternative courses of decision. While a *perfect* decision is a will-o'-wisp, such decision as the court feels best it can offer should be given.

239. In the context of the controversy on judicial "absolutism" and the Bill of Rights in the American Constitution this would seem to be the main position of Professor Sidney Hook in his book The *Paradoxes of Freedom* (1962), as also of the "preferred freedoms" doctrine (see *infra* note 247).

It is submitted that any other methodology of decision not adverting to the above crucial factors results in an evasion of judicial responsibilities which thus seen lie not in an all or nothing decision but rather in the agonizing about what and how much of, and on what principles, the bill of rights will remain open to change.[240] The either-or approach resembles too much the tossing of a constitutional coin to determine who is tentatively right. The momentous nature of the issues involved and the far reaching impact of any course of decision on the constitutional polity of India confront decision-makers with awesome responsibilities which require them to perform the almost superhuman task of transcending their personal individual philosophies and emotional commitments. Failure to do so tragically transforms the labour of a Hercules into that of a Sisyphus.

It may over a period of time so happen, as a result of the above methodology, that some fundamental rights may become more fundamental than others. If this seems astonishing, we have to recall the present holding in *Golak Nath*. Is it not more astonishing, rather than less, to be told by the minority that the entire Bill of Rights can be amended out of existence by a parliament so disposed and by the majority that not merely the Parliament, but presumably the entire people of India, cannot further amend so as to abridge or take away the rights unless they give to themselves a new Constitution? Do we have to necessarily flounder on the Scylla of an impotent Parliament or the Charybdis of an omnipotent judiciary?

The capacity to be astonished, remarked Max Weber in the context of sociology of religion, is the source of religious innovation :[241] it may well be true also of judicial innovation. If so, we should enhance, and not fear, our capacity for astonishment.

We of course do not rely here only on astonishment as the mother of innovation. Comparative studies in judicial policy-making in economically developed Western democracies show that a high degree of judicial self-restraint is exercised in dealing with the legitimacy of legislative decisions relative to economic matters. In the United States substantive economic due process is dead, and attempts to revive it seem to lead instead to its reburial.[242] In matters involving civil rights

240. My friend and colleague Mr. Blackshield (whose stimulating criticisms of an early draft of this section generated some reformulations in the text) in *his* analysis of *Golak Nath* advocates a set of twelve propositions which could or *ought* to be derived from the decision. Although he would disagree with some aspects of my set of propositions, his Twelve Tables (as I call them) on *Golak Nath* do take into account the main features of the methodology presented in the text. See Blackshield, "Fundamental Rights and the Economic Viability of India" (*forthcoming*).

241. See generally M. Weber, *The Sociology of Religion* (Fischoff transl. 1963); R. Bendix, *Max Weber : An Intellectual Portrait* 269 (Anchor Books 1962).

242. See R. McCloskey "Economic Due Process and the Supreme Court: An Exhumation and Reburial," 1962 *Sup. Ct. Rev.* 34; and recently Struve, "The Less Restrictive Alternative Principle and Economic Due Process," 80 *Harv. L. Rev.* 1463 (1966-67).

the American Supreme Court has accomplished a revolution and indeed viewed legislation adversely affecting them with almost an iconoclastic fury. The adoption of this "double standard," as Professor Freund characterizes them,[243] bristles with philosophic difficulties of *justification* and indeed the rationale behind it, as McCloskey suggests, might be such as to "support withdrawal from both fields" but not adequate to "justify the discrimination between them."[244]

When to the problem of justification are added the probabilities of induration of judicial restraint into judicial abdication, appeal for adaptation of double standards by the Indian courts may appear misguided. For in the Indian context, if nascent democratic order demands vigilant judicial protection for political rights, its subsistence economy equally forbids judicial demotion of economic rights to a "lowly constitutional status."

The unique corelation of a developing democratic political order and a developing economy requires of judicial policy-makers an *equal* sensitivity to both. Within limits of their institutionality, the courts have the most agonizing and difficult task of safeguarding both political and economic pluralism. For these are most intimately related in an economically underdeveloped democracy.

As the scope of the centrally planned economy expands, the state becomes the biggest economic actor. The regime of economic controls, which accompanies planned economy, may often inadvertenly impinge on the economic rights of the individual as guaranteed by the Constitution. And while at this stage of history the open societies cannot escape becoming regulated societies,[245] in nascent democratic regimes the thin line of demarcation between economically over-regulated society and politically closed society must not be allowed to be transgressed. In this sense, eternal vigilance is certainly the price of liberty and the Supreme Court is, as much as the other co-ordinate branches of government, committed to this vigil. Moreover, economic legislation in various states of India, under political parties of differing ideologies, may impinge on economic pluralism.[246] These are the

243. See P. Freund, "The Supreme Court and Fundamental Freedoms," in *Judicial Review and the Supreme Court* 124 (Levy ed. 1967).

244. McCloskey, *op. cit. supra* 242 at 45. McCloskey confines this observation merely to the "written opinions" of the U.S. Supreme Court.

245. See G. Myrdal, *Beyond The Welfare State* 61-74 (1960).

246. Different political parties in the states may well impose restrictions, not *prima facie* unconstitutional, on certain individual or group economic activities in pursuit of their ideologies. The state as the largest economic entrepreneur may aspire to preempt many sectors of economic activity. Whatever be the ultimate outcome in terms of economic development (and this may not be easy to foresee) the constitutionally desired social order requires safeguarding of economic pluralism—a task whose fulfilment entails judicial participation.

risks of a democratic order which the courts are to confine within the zones of constitutionality. Advocacy or eventual emergence of a double standard approach by the Indian courts has to be governed by these considerations.

Thus, we may have to differentiate between various rights involved in the broad formulations under article 19(1)(*f*) and (*g*) and article 31. Freedom from expropriation with justiciable compensation is only one of the rights here involved.[247] If the recent pre-*Golak Nath* judicial performance is a good guide, asking the courts to legitimate legislative determinations of "just compensation" would not be asking for too much. But it becomes also necessary to solicit from our judges a greater awareness of the complexities of the conception of "fundamental rights" and in particular the meaning of property. For reasons of social policy, if not of philosophy, we must advance a discerning double standard approach by which the Indian courts will seek to safeguard the institutionalization of democracy and also serve the economic development of the country. They will accept the somewhat rude fact that the angelic task of preserving fundamental freedoms as originally embodied in the text of the Constitution is not solely theirs; and even if it were so, it is better served piecemeal and by painstaking understanding of what is at stake.

If eventually a discerning double standard approach is thus a necessary evil, it is still less of an evil than the *carte blanche* power to the legislature to modify fundamental rights or erection of a Himalyan

247. The crucial distinction between "economic rights" and the right to hold property in the sense specified in the text needs to be imaginatively employed as a decisional tool. In the context of the decisional law of the U.S. Supreme Court, the latter has been designated as "hard-core" property rights. See the perceptive study by Hyman and Newhouse, "Standards for Preferred Freedoms: Beyond the First," 60 *Nw. Uni. L. Rev.* 1, 58-78 (1965). See also the general discussion from perspectives of social and moral philosophy, M. Ginsberg, *On Justice in Society* 94-115 (1965).

In Indian constitutional law this distinction is more clearly marked by article 19(1)(*g*) as also by the judicial history of the interaction between articles 19(1)(*f*) and 31. It is regrettable that this cardinal distinction was not canvassed before the *Golak Nath* Court as (we submit) it might have been instrumental in dispelling the majority judges' apprehension about the future of individual freedoms.

The plea made to the U.S. Supreme Court not to abdicate its responsibilities in the area of "economic due process" under the so-called "double standard" or "preferred freedoms" doctrine may perhaps not be necessary in the Indian context. In *Sakal Papers (P.) Ltd.* v. *Union of India* A.I.R. 1962 S.C. 305, Mr. Justice Mudholkar speaking for the Court said (at 313):

> [T]he scheme of article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and everyone of the freedoms together and clause (1) *does not prefer one freedom to another*. That is the plain meaning of the clause. (Emphasis added).

Continual judicial advertence to this view may well usher in decision-making the discerning double standard approach urged in the text.

barrier in the way of such modification when it becomes unavoidable. In the midtwentieth century it is somewhat anachronistic to think of fundamental rights solely in terms of restrictions against the governmental powers.[248] The state needs as much freedom from restrictions in its pursuit of the constitutionally desired social order, as much as the individuals need fundamental rights in pursuit of their well-being. The poignancy of this stale antithesis increases when we recall that an average individual's pursuit of well-being in India depends less on his freedom to exercise fundamental rights and more on the state's freedom from restrictions.

Only when the courts show a consistent tendency to accommodate, through the wise use of authoritative legal materials, the legislative strivings to fulfil the constitutionally desired social order that both the rule of law and (in the lamented J. Nehru's memorable phrase) "the rule of life"[249] will be served. Only then the Supreme Court, while preventing the fundamental rights from being the "playthings" of a special legislative majority[250] will be able to prevent them from becoming the playthings of its own majority.

---

248. The following observations of Prof. Hook deserve our attention :

> There are two generic ways of preventing abuse of power. One is to see that it is not used, or that it is used as little as possible. The other, and much more difficult way, is to devise institutional safeguards against abuse while using it. Where the state is clearly the enemy...it is better to prevent it from using power. The less government, the better for the freedoms of all. But now the state responds to democratic controls in many ways with which historical developments in America and Western Europe [and we may legitimately add India] have made us familiar. It is no longer merely an uneasy servant that bears watching lest it reach out for mastery. It must be encouraged to action against *other* potential enemies of freedom that have appeared on the scene and grown to giant size when the state was the chief object of national distrust... The state must exercise, not restrain, its power to prevent the pauperization and social degradation of its citizens—evils which if unchecked are likely to erode its free political institutions.....The more the state reaches out to sustain the economic welfare and health of all its citizens, the less it can be reasonably viewed as *inherently* an enemy.

Hook, *op. cit. supra* note 216 at 59-60. (Parenthesis added).

249.

> [T]he Rule of Law, which is so important, must run closely to the Rule of Life. It cannot go off at a tangent from life's problems and be an answer to problems which existed yesterday and are not so important today. It has to deal with today's problems. And yet law, by the very fact that it represents something basic and fundamental, has a tendency to be static. That is the difficulty. It has to maintain that basic and fundamental character but it must not be static, as nothing can be static in a changing world.

Nehru, "Inaugural Address," *The Rule of Law in a Free Society* (A Report on the International Congress of Jurists, New Delhi, India) 41 (Marsh, ed. 1959).

250. Mr. Justice Hidayatullah observed in the *Sajjan Singh* case (at 862):

> The Constitution gives so many assurances in Part III that it would be difficult to think that they were the play things of a special majority.

VI. CONCLUSION: SOME COMMENTS ON AUSTIN'S COMMENTS ON A "SUCCESSFUL" CONSTITUTION

(a) Success of the Constitution

After a very able and comprehensive survey of Constitution-making in India, Austin offers us views on the "success" of the Indian Constitution and what he considers to be the "original contribution of India" to the "art of Constitution-making." One turns to this chapter with great hopes and though ably educated by then in eulogistics of Indian achievements, one does look forward to a responsible and objective assessment of the strength and the weakness of the Constitution. On a superficial reading, the concluding chapter of Austin's book seems to reasonably fulfil these hopes: but on a second and an analytical reading, one's disappointment grows deeper at almost each page. In this concluding part of the article, we will concern ourselves as much with the illusion of fulfilment as with the reality of deprivation.

At the outset, however, we will do well to recall the clarification urged by Austin in the preface that the book is offered as a study in political history rather than as a "legalistic" analysis. It would, therefore, be inappropriate to assess the over-all significance of Austin's conclusions by criteria arising from contemporary constitutional developments.

Austin commences his concluding chapter with an appropriate awareness of what the very adoption of a written Constitution signified, though some would express this in less glowing terms:

> With the adoption of the Constitution by the members of the Constituent Assembly on 26 November 1949, India became the largest democracy in the world. By this act of strength and will, Assembly members began what was perhaps the greatest political venture since that originated in Philadelphia in 1787. A huge land with the second largest population in the world, socially and economically retarded, culturally diverse, and, for the first time in 150 years responsible for its own future, was to attempt to achieve administrative and political unity and an economic and social revolution under a democratic constitution. The nation was to do this, moreover, under a constitution whose provisions and principles, although compatible with Indian thought and recent history, were nevertheless almost entirely of non-Indian origin, coming as they had largely from the former colonial power (308).

And he further observes:

> In the years since its inauguration, the Indian Constitution has worked well; the Assembly's faith in its creation and in the nation has been warranted. Although the safety of democracy is never assured, the gamble never finally won, and although the social revolution is only slowly being achieved, the evidence in India bears out Percival Spear's judgement that the Constitution 'must on the whole be pronounced a signal success (308).'

The awareness of this "signal success" needs wider diffusion and this not merely as a morale-raising device. For the very destiny of

Indian constitutionalism depends in great measure, on national and international recognition, of the continual sustenance to democratic culture that the Constitution continues to provide.[251]

And after this triumph is acknowledged, questions arise as to the criteria by which the "success" of the Indian Constitution is to be judged. But Austin's criteria are so diffused and indeterminate that one gets the uneasy impression that the Constitution might have achieved a triumph without success. This impression is of course far removed from Austin's own intentions as from the reality of Indian constitutionalism.

Much of the confusion arises from what Austin *says* he is judging and what he actually judges. And this confusion owes much to inadvertance to a fundamental distinction between a constitution and constitutionalism. To these categories of distinction I will add another, namely, constitutionally desired social order. To be sure, the distinction between constitutionalism and constitutionally desired social order, like kindred distinctions, is relative and cannot be too sharply drawn: but we cannot reject it on this ground.

A constitution as a written document can be evaluated on itself in isolation, or in the light of other written constitutions. The threshold criteria for evaluation are provided by the norms of constitutional craftsmanship and, to a limited extent, by norms of good legislative draftsmanship. A second set of criteria emanates from the relation between intention and attainment, aim and accomplishment. Have the draftsmen of a constitution been able to provide well-formulated norms in pursuit of the goals that had set before themselves? Are the procedures and institutions outlined in the constitutional provisions sufficiently close to the type of political ordering they wished to provide?

Constitutionalism, on the other hand, involves questions of greater complexity. Though definitions of constitutionalism vary, the concept bears two frames of reference formal and substantive. In its formal aspect, we may say with Professor de Smith that it signifies the principle that "the exercise of political power shall be bounded by rules"[252] conformity with which is determinative of the validity of the exercise of that power. In its substantive signification, constitutionalism means the extent to which these rules prevail in reality. Are the prescriptions and proscriptions of

251. There is considerable interaction between Indian constitutionalism and international aid for the developmental plans of India, and consequently a further incentive to constitutional modes of acquisition and exercise of political power arises. At the same time, domestic policy-makers of the affluent Western countries have not been known for their keen appreciation of India's efforts, thus increasing the burdens on the leadership of their countries. For this reason again Austin's eulogies may well be instructive for the political elite of the aiding nations, specially in relation to the achievement of Indian constitutionalism.

252. de Smith, "Constitutionalism in the Commonwealth Today," 4 *Malaya Law Review* 205 (1962).

the Constitution actually operative on the power-weilders? Do the rules regulate the relationship between individual and the state? The formal aspect may be relatively easy to ascertain and evaluate; manifold problems arise in dealing with the substantive aspect.[253]

The third category of distinction which we have found necessary to introduce involves still greater complexities. Constitutionalism in the political sense at both formal and substantive level may well prevail: but students of modern constitutional regimes can scarcely stop at that determination. Constitutions of newly independent countries invariably proclaim a desired social order and neither the excellence of a written constitution nor mere exercise of political power in consonance with the common concepts of constitutionalism will be adequate to fully serve attainment of the proclaimed social order. One should, therefore, be careful in extending one's judgment of the "success" of a constitution and, to some extent of constitutionalism to the ultimate ideals of social reconstruction which both these serve. At this level of analysis, one has to consider important questions of political sociology pertaining, for example, to the legitimation of the constitutionally proclaimed social order.[254]

Sensitivity to these three levels of analysis is necessary not merely for the evaluation of a constitutional regime but also for its understanding. Austin shows some degree of sensitivity to the first level of analysis. Some of his observations, if purged of ambiguities, and unified in a series of propositions, do indeed present us with a picture of a successful constitution.[255]

We have ample substantiation of the prevalence of formal aspect of constitutionalism, our second category of distinction, both in the working of the Indian Constitution and even in Austin's narration of its making.[256] Austin further observes:

> The Constitution has been accepted as the charter of Indian unity. Within its limits are held the negotiations over the working of the federal system. The realignment of state boundaries on linguistic lines was done within its definition of Indian nationalism. The question of the Official Language has been debated in Parliament within the framework of a compromise

253. See, for example, the recent brilliant study by Vile, *Constitutionalism and the Separation of Powers* esp. 263-350 (1967); and the rich historical study by Professor Sutherland, *Constitutionalism in America* (1965).

254. Problems in this area have been partly dealt with in part II of this paper; for a further study see materials cited *supra* notes 31, 35, 37, 41, 45, 64 and 67.

255. *Austin* at 309. He mentions there as "a primary example of effectiveness" of the Constitution the smooth succession to Nehru. Other examples include infrequency, and vacation on restoration of proper conditions, of the President's rule in the states and the constitutional course taken by the institutional conflict between the legislature and the judiciary over the privileges issue.

256. In fact, the limited experience of self-government prior to the Independence, combined with the "internal democratisation" of the Congress Party may well be viewed as laying the foundation of Indian constitutionalism in its broad sense. See *supra* notes 71, 72, 77.

> designed to preserve national unity. The Constitution has established the accepted norms of 'national' behaviour (309).

Discounting the ambitious assumption implicit in the first sentence, and delimiting the last sentence as a reference to political behaviour, we have here a good testimony from a sympathetic observer about the achievement of the substantive aspect of constitutionalism.

On the third category of analysis, namely, the constitutionally desired social order, the following lengthy quote would show that in Austin's estimate the "success" of the Constitution extends to this aspect as well. Says Austin :

> There are not only the Fundamental Rights and the Directive Principles and the structure of national planning, there is the direct electoral system. This has been widely accepted as a means for bringing the pressure to bear on government—as the key bye elections even more than the three mammoth general elections show—and has charged India's traditional, hierarchical society with new energy. *The Constitution has thus created another norm, one of democratic political behaviour based on the belief that man can shape his own destiny.* This is not to claim that there is no more apathy in India or that Indian life, political and social, is completely democratic or that democracy has no enemies in India. But it is to say that a strong, positive counterforce to political and social authoritarianism has been established. The Constitution has so far been a success because both the ends it has proclaimed and the means it has laid down for achieving them have been popularly accepted and have already worked beneficial changes in Indian society.[257]

This is indeed a very insightful statement unfortunately marred at keypoints by overstating, purposively or otherwise, the following matters : (1) "a strong, positive, counterforce to political and social authoritarianism has been established;" (2) the direct electoral system has "charged India's traditional, hierarchical society with a new energy;"(3) a norm of democratic political behaviour involving the belief that man can change his destiny has been "created" by the Constitution, and, finally that (4) "beneficial changes" have been occurring as a result of all these. The empirical validity of these propositions is hardly self-evident. Nor are these propositions in any sense substantiated by the preceding chapters of Austin's book since they mainly deal with the Constitution-making past rather than the Constitution-imbued present of India. It is of course not denied that in some sense all these statements present an aspect of social and political reality of contemporary India : but what we are concerned to know (in view of what is being said) is a total, or at any rate less partial, picture.

There also appears here an evasionary blend of political and social elements. Thus, for example, infinite degrees lie between voting behaviour of a citizen and his behaviour as a social being. No doubt, key bye elections, and now even the results of the Fourth General

257. *Austin* at 310 (emphasis added), prefaced by remarks fully quoted later in this section, see text accompanying note 259, *infra*.

Elections, may manifest a new "energy" in the "traditional, hierarchical society." But that these have had such significant and profound impact on the belief systems of average Indian citizen (*i.e.*, "the belief that man can shape his own destiny") and that they have a substantial impact on the direction and speed of social change are conclusions not readily apparent. In fact, these are the type of corelations which fall within the domain of sociology to advance and establish. Assuming the existence of such vexed hypotheses as self-evidently valid could only result in comfortable generalizations beyond the ambit of proof or disproof.

But so overpowering the assumptions are to Austin that he eschews all contrary data and is explicitly led to think that :

> the absence of comment about the constitutional situation in India is a mark of the Constitution's effective working.[258]

This surrender of scholarly objectivity was scarcely necessary to stress the historical uniqueness of Indian constitutionalism. But in addition Austin further inflates its distinctiveness by a still vaster assumption when he says :

> The Constitution's greatest success, however, lies below the surface of government. It has provided a framework for social and political development, *a rational, institutional basis* for political behaviour. It not only establishes the national ideals, more importantly it lays down rational, institutional manner by which they are to be pursued—*a gigantic step for a people previously committed largely to irrational means of achieving other-worldly goals.*[259]

The disturbing assumption here lies in the key generalization about the other-worldliness of Indian people. It would be out of place here to dwell in great depth on the genesis, evolution and continued vitality of this generalization that has become in fact a part of the climate of thought about India. Explanation of this would form a fascinating and fruitful chapter in the sociology of human knowledge. All that we will point out here is that this belief—variously couched in terms of irrationality, other-worldliness, devaluation of the empirical world, asocial, and often anti-social pursuit of individual salvation—is pre-scientific even when presented with such majestic sociological

---

258. The full passage in which the quoted sentence occurs is as follows :

> Finally, it must be said that the success of a constitution is neither so easy to document nor so spectacular as its failure. So, in one sense, the absence of comment about the constitutional situation in India is a mark of the Constitution's effective working. It has been accepted as the basis of democracy in India in the matter of fact way that a family presumes the soundness of the foundations of the house in which it lives. (*Austin* 310).

Austin seems to be saying here that there have been as yet no significant demands for a new constitution and that this must mean that the present Constitution is acceptable to the people. In this rudimentary sense, of course the Constitution has been a "success". But the second sentence above, even with the full benefit of the context, seems to indicate quite a different judgment, which is indeed very partisan, namely, that there has been no critical comment on India's "constitutional situation". This is simply incorrect, even prior to the *Golak Nath* decision.

259. *Austin* 309-10. (Emphasis added).

credentials as provided by Weber's studies in the sociology of religion. In fact, inasmuch as they are so presented, they proceed on a pseudo-Weberianism. Sensitive students of Weber have been at pains to point out that he not merely operated with over-simplifications in discussing religion and society of India and China, his main purpose being to illustrate the impact of Judaism on the West through these comparisons, but that he was himself conscious of these simplifications.[260] Furthermore, they also point out, without at all detracting from Weber's achievements, that he never "quite came to grips with the question of how to assess the influence of religious ideas on mundane activities, and especially on the economic behaviour, of the believers."[261] Nor, we should add, was this germane to the tasks he had set for himself.

In taking Weber's account of the sociology of religion as a definitive starting point of enquiries, it is also frequently forgotten that he was speaking ideal-typically and not as a historian (*i.e.*, real-typically). The chief task of the post-Weberian sociology of religion has, therefore, been rightly seen to lie in further refinement and extension, both theoretical and empirical, of Weber's contributions[262] and not merely in the continued (and often misguided) reassertion of his generalizations which can only block this desired progress and thus be an ironic form of tribute to his pioneering work, on the eve of birth centennial homage to his achievements.

---

260. Bendix, *Max Weber : An Intellectual Portrait* 267-68 (Anchor Books : 1962.)

261. *Id.* at 275; and also see, E. Fischoff, "The Protestant Ethic and the Spirit of Capitalism—The History of A Controversy," 11 *Social Research* 73 (1944).

262. I have in mind here the superb work being done by social anthropologists. Oscar Lewis, *Village Life in Northern India* 45-47 (1958), finds that neither type of generalization, one stressing the other-worldly orientation of the Hindus, and the other stressing the pragmatic aspects of the religion, stands fully confirmed by his research. But he adds significantly that his data "incline" more towards the "practical" orientation of Hinduism. Similar conclusions emerge from the studies by Beals, *Gopalpur: A South Indian Village* 45-58 (1962); and P. Kolenda, "Religious Anxiety and Hindu Fate," in 23 *Jl. of Asian Studies* 71-82 (1964). See also Marriott (ed.), *Village India : Studies in the Little Community* (1955) and specially studies therein by Professor Marriott (universalization/parochialization) and Mandelbaum (world-view) providing much needed analytical refinements for our present problem. The same must be said about the above-cited special number of the *Journal of the Asian Studies* devoted to the study of religion in South Asia. The perceptive introduction by Mandelbaum canvassing transcendental/pragmatic complexes as providing perspectives for studies of the relation between belief and behaviour (or cultural orientation and social action) holds promise for middle range generalizations and theories in this area. For our present purposes it is sufficient to note that the shift is from grand generalizations to empirically managable and heuristically fruitful ones, and that it is getting progressively formidable to justify an overall attribution of other-wordly orientation to the rank and file of the Hindu society.

It is regrettable, in this context, that even T. Parsons in his recent work still follows substantially the exposition of Hinduism offered by Max Weber. See Parsons, *Societies : Evolutionary and Comparative Perspectives* 77-82 (1966).

It simply does not advance our understanding even at the more limited scale of constitutional history to say that in some undefined, and possibly undefinable, sense the era of constitutionalism has ushered in rational or more rational modes of behaviour and orientations in India and that this contrasts with the conveniently labelled "traditional Indian ways." The gigantic step that Austin, and other constitutional historians, should be stressing is the step of an infant giant which consists in the emergence of a unified India and her viability as such till now. And, to some this viability may seem precarious even now, thus leading us to explore the dysfunctional aspects of the so-called "success" in establishment of a constitutional regime.[263]

(b) Consensus

In searching for an "explanation" of the Constitution's "success," Austin suggests that it would lie "principally in its having been framed by Indians, and in the excellence of the framing process itself (310)." Part of this "excellence" emanated from the efficacious employment of the

> two wholly Indian concepts, consensus and accommodation. Accommodation was applied to the principles to be embodied in the Constitution. Consensus was the aim of the decision-making process....(310-11).

These two constitute India's "original contribution" to constitution-making, and, therefore, merit discussion.

After a succinct exposition of the meaning of decision-making by consensus (311), Austin analyzes the actual operation of this principle in the Constituent Assembly decisions. He prefaces this analysis by the following observations :

> Consensus has deep roots in India. Village panchayats traditionally reached decisions in this way, and even if the process was in practice often manipulated by the more powerful members the ideal was still there—as it continues to be today.... Certainly, Indians prefer lengthy discussion of problems to moving quickly to arbitrary decisions. Consensus thus had a general appeal in the Assembly: to the leadership as an ethical and effective way of reaching lasting agreement and to the rank and file as an indigenous institution that suited the framing of an 'Indian' constitution (311).

We find it extremely difficult to understand or accept the oft-repeated generalization that consensus in decision-making has "deep roots in India." And, these difficulties are further aggravated when it is responsibly suggested, as here, that this is an Indian contribution to the art of constitutional decision-making. No doubt, it is possible to show with Professor Susanne Rudolph that the Indians show a "philosophical distrust of power" and seek social and political ordering not through power conflicts but through consensual harmony. But the problem, as she also recognizes, is one of establishing co-relation

263. *Cf.* H. Wolfsohn, "Aspects of the Social Structure of Underdeveloped Countries with Special Reference to India," in *Constitutionalism in Asia* 92-105 (Spann ed. 1963).

between this cultural orientation and socio-political reality.[264] Such co-relations can only be validly established by sufficient ethnological and sociological research. And when we prefer to speak of a *tradition*, such research has to extend to the history of decision-making in pre-colonial and colonial India. To be sure, random accounts of decision-making may be available to us to illustrate this hypothesis.[265] But attempts to generalize them so as to give credence to a "tradition" are of questionable propriety.

Furthermore, a detailed study in this direction will have to take into account a host of basic distinctions. For example, we will have to identify the decision-making structures involved,[266] and the types of decisions relevant to the hypothesis of consensus;[267] to study the availability

264. See S. Rudolph, "Consensus and Conflict in Indian Politics." 13 *World Politics* 385, 390 (1960-61). This perceptive analysis seems to be marred at keypoints by lack of differentiation of the levels at which conflict should replace consensus. Thus we agree (with reservations as to "destruction") that "the destruction of the traditional moral order has not typically been followed by the establishment of a political community capable of such (*i.e.* concerning "who and what is legitimate in politics") a new consensus(397)." We also agree that this problem is further "compounded" by the "scarcity economy" which provides the background for social change. We also share the author's disdain for "a romantic evocation of traditional consensus" though for the reason that the tradition there involved is hypothetical. But it is doubtful if this problem (*i.e.* of attaining legitimation) can be solved even when "there are meaningful decisions to be made and resources to allocate." Allocation of resources may well continually fall short of the requisite level to make decisions meaningful particularly in a polity of scarcity. And at any rate, legitimation of a constitutionally desired social order has to *precede* rather than follow establishment of democratic "political community" at the village level. For so long as there is no consensus on constitutional equalitarianism (*i.e.* irrelevance of caste-differential to political decision-making), it is doubtful whether introduction of "conflict in the process of establishing liberty, democracy and social justice (398)" will serve to provide that consensus. So that the demand by national policy makers for a consensus of village leaders, and the manifestation of a desire for such a consensus on the part of the latter, may well be the first and basic step towards acceptance of the propositions of the constitutionally desired social order. The "conflict" advocated by the learned writer may well be appropriate for what Buchanan and Tullock call "operational" as distinct from "constitutional" processes of decision-making. See *infra* note 267.

265. See, *e.g.*, Ralph Retzlaff, *Village Government in India* (1962); and *id.*, "A Case Study of Panchayats in a North Indian Village," Centre for South Asia studies, Institute of International studies, University of California at Berkeley, California, (mimeographed) discussed by S. Rudolph *supra* note 264.

266. Paul Diesing has introduced this useful notion. According to him, a decision-making structure involves: (1) "Discussion relationships;" (2) a set of "beliefs and values, more or less held in common by participating members" and (3) "the commitments already accepted by a group, and the courses of action in which it is already engaged." See Diesing, *Reason in Society: Five Types of Decisions and Their Social Conditions* 171-176 (1962).

267. Typologies of decision-making differ with the theorists. Paul Diesing, *supra*, differentiates among technical, economic, social, legal and political types of decisions; J. Buchanan and G. Tullock, concentrate (we think) mainly on "constitutional" and "operational" types. See, *id.*, *The Calculus of Consent* (1962). Closer to the present hypothesis is the typology offered by Heinz Eulau, "Rationality in unanimous Decision Making," in VII *Nomos: The Rational Decision* 26-54 (Fredrich ed. 1964). Richard Wasserstorm's *The Judicial Decision: Toward a Theory of Legal Justification* (1961) belongs in a way to the current tradition of theorisings on decision-making; but is more concerned with "justification" of judicial decision-making, and its "procedures" than with typology of judicial decision-making and with the relationship of judicial decision-making with other types of decision-making. But see the perceptive studies, focusing on themes here relevant, in 58 *Northwestern Uni. L. Rev.* 731-805 (1963-64) being a full report on a symposium on "Philosophy from Law: Compromise and Decision Making In The Resolution of Controversies": and especially, Coons, "Approaches to Court Imposed Compromise — The Uses of Doubt and Reason," 750 at 779-87.

of alternative modes of decision-making, and related to these the environmental and structural constraints involved in various decision-making situations. If this enterprise appears too forbidding, we may alternatively think in terms of a theory of decision-making. Such theories as have been recently offered, however, confront us with the thesis that in analytically given decisional situations both consensual and non-consensual modes may prevail.[268]

But at this level of abstraction, it must be conceded that specified decisional situations or types of decision may be common to many, if not all, human societies. There is no justification (except such as provided by dogmatism) for assuming that consensus-demanding situations or consensual decision-making occurred exclusively, or preponderently, in India as compared to the rest of human societies. Such assumptions, if they are to advance knowledge, must be validated by empirical studies or help us establish analytically significant relationships which may in turn be so validated. Reiteration of cherished opinions (including the one under discussion) does not either advance knowledge or add to our information. And when collective acknowledgment of such opinions bestows them with the status of "reality," or social "tradition," a precious territory is inadvertently but irrevocably ceded to the empire of nescience.

When this is grasped, and the resultant problematic (if not mythical) nature of the alleged "tradition" of consensus is realized, one would begin to question the view that consensual decision-making is inimical to development of a democratic culture or political modernization or economic growth. One also becomes more receptive to the view advanced by some decision theorists, and notably by Heinz Eulau, that except for extreme situations involving "false" or "projected" unanimity, consensual decision making is also "rational."[269] Moreover, it cannot be gainsaid that contrary to the general assumption that democratic decision-making involves conflict rather than consensus, the former supposedly ensuring maximal rationality, the reality of decision-making in modern stable Western democratic societies testifies to a greater use of consensual modality.[270]

268. Eulau *supra* note 267, perceives the conflict between assumptions about the irrationality of unanimous decision-making and the reality of political life where such a decisional modality prevails, as a "problem in political theory" requiring investigation. This investigation leads him to formulate degrees of rationality in decision-making by unanimity and to analyze several types of unanimity. Studies by Buchanan and Tullock, and Diesing, above cited, also appear to confirm this view, though of course from different analytical bases.

Morris Cohen, approaching legislative decision-making process from a functionalist standpoint, had likewise observed in 1936 that "ordinary legislation" should be viewed "as treaties of peace between the warring interests of the community" M. Cohen, *Reason and Law* 111 (Collier edn. 1961.)

269. See Eulau, *supra* note 267, at 41-48.

270. *Id.* 26-29.

And indeed moving to the present day political decision-making in India at the national and state levels where efficient progress towards attainment of developmental projects is hampered by dissensus, we must search for ways of reclaiming decision-making to consensualism.[271] Perhaps even at the level of 'villages'[272] where it is commonly urged that consensus should be replaced by conflict, or by specific assertion of interests, we should allow our misgivings to be tampered by the findings of the decision theorists about the rationality and actual prevalence of consensus in democratic societies. Above all, dispensing with these convenient rubrics of "consensus" and "conflict," our assessment of decision-making at the level of these communities should be oriented functionally *i.e.* both the functional and dysfunctional aspects of the types of decision-making procedures should be carefully studied.

Finally, in the context of constitution-making, consensual decision-making is a familiar feature of the world constitutional history.[273] Democratic constitution-making situations characteristically involve establishment of specific and basic procedures and institutions as well as the proclamation of a desired social order. This very situation

271. I am mindful of the criticism voiced by Susanne Rudolph that:

> The rationality of the bureaucratic Platonists and ideologues is politically aprioristic: they resent and tend to reject the consequences of political liberty and democracy, the somewhat untidy proximate solutions which the interaction and accommodation of group and individual purpose and interest can produce.

See S. Rudolph *op. cit.* at note 264, at 395. But the views here advanced come closer to those of Mr. Ashok Mehta discussed by Professor Rudolph. Mehta's proposal that areas of agreement and disagreement pertaining respectively to "nation-building" activities and "partisan politics" be demarcated, may as Prof. Rudolph suggests, be a "difficult path for any opposition to discern, much less to follow." But then what is hard to discern, and still harder to follow, is precisely a paramount demand on Indian leadership (discussed partly in part II of this article). And the hardships also appear overstated. The leadership could, for example, arrive at an agreement that attempts to coerce decision-making through recourse to extra-constitutional methods on allocation of sites for major industrial projects in one's own state in *preference to any other*, irrespective of rational economic considerations, shall be minimised, if not eliminated altogether.

But Professor Rudolph is right to question the three alternatives suggested by Mehta to insure national economic development against "conflict inherent in partisan politics" viz. (a) a national representative government; (b) popular authoritarianism or (c) a rigid authoritarianism leaning towards totalitarianism. Indeed, any deep going institutional reorganization in governmental structure may be a remedy far worse than the disease.

272. Continued advertence to Professor Dumont's caution that "India, sociologically speaking, is not made of villages" seems necessary, even when the term "village", as here, is used for reasons of convenience in preference to term "indigenous little communities." See Dumont, "For a Sociology of India" and "Village studies" *Contributions to Indian Sociology* at 18, 25-6, respectively (1957).

273. See, *e.g.*, William Andrews (ed.), *Constitutions and Constitutionalism* 9-12 (1961), And for a comprehensive analysis of the various aspects see Friedrich, *Man and His Government*, esp. chapters 22 ("Founding the Political Order" 389-405) and 32 ("Federalism: Consensual World Order" 584-612) (1963).

preordains, as it were, unanimity or near-unanimity as the functional requirement of success and emergence of highly specific group and individual interests may well prove abortive to the task at hand. Legitimation of this enterprise also favours a consensual mode of decision-making. In the historical perspective, therefore, Constitution-making in India through preponderent use of consensual method only furnishes a contemporary instance of a none too unusual constitutional process. If nonetheless one desires to explore the distinctiveness of the use of this method in the Indian Constitution-making context, the analysis has to begin with wholesale denial rather than enchanting acknowledgment *á la* Austin, of generalizations about Indian traditions of consensual decision-making as something novel or unique.

Thus, for a better appreciation of the processes involved, one has to reorganize Austin's material and supplement it with certain acceptable aspects of decision theories. This will well enable us to appreciate the peculiar situational features which promoted consensus. The reorganization may assume the following schematic form :

(1) Decision-making Structures :

a. Assembly Party, a large and fluid group, including non-Congress "resource" persons, which discussed almost all constitutional provisions in "frank and searching debate" and whose "approval was in fact as important as that of the Assembly itself (312)."
b. The "Canning Lane Group" consisting of certain members of the Assembly who made "more or less constant contributions" to the formulation of the Constitution (317).
c. The Oligarchy and the Experts : From whom most basic decisions emanated, the Oligarchy providing "political power and experience in government" and the experts providing knowledge of law.
d. The Oligarchy : constituting "the focus of power (315)." "On occasion(s) the Oligarchy made its will known and was obeyed (314)."
e. The Dyarchy within the Oligarchy : By this I mean the "core" of the Oligarchy, consisting of Nehru and Patel, mutually depending on each other, ("Nehru on Patel perhaps more than Patel on Nehru 315)." Agreement between the two in most cases ensured, and in some facilitated, the general consensus whereas disagreement had the effect of factionalising supporters.

(2) The Ways of Decision Handling :[273a]

a. *Informal* : covering the categories (b) to (e) and, involving what Diesing would identify as "problem-solving, persuasion, bargaining, and politicking".[274]
b. *Formal* : Mostly at the Assembly level (in (*1*) as above) involving Whips (313-316) and amendments and counter-amendments (not sufficiently discussed by Austin).

273a. For this category, see Eulau, *supra* note 267 at 33-36.

274. Adaptation of the decision-making structures to these four "processes" is one of the important aspects of political rationality according to Diesing, see *supra* note 266 at 195-98.

(3) Special Situational Features :[275]

a. the Constitution-making situation itself ;
b. "spontaneous sense of national purpose (314)" arising from freedom struggle against the British ;
c. unifying power and influence of the Oligarchy ;
d. preparatory technical work done by the experts ;
e. charisma of Nehru.

The emergence of the Constitution by general acclamation is thus to be seen as a complex combination of the decision-making structures, ways of decision-handling, and the special situational features. Decision-making here involved a vast variety of factors and unanimity or near-unanimity was the outcome of problem-solving, persuasion, bargaining, politicking, as well as of numerous constraints arising out of previous ideological commitments, world historical factors, and the then prevalent situation of imminent disorder, crying out for quick and effective action based on unity on fundamental policies.[276] In terms of the illuminating typology of unanimous decisions offered by Heinz Eulau we can find in this complex process bargained, functional, injunctive and even false and ancestral unanimity. Corresponding to these, we will find that decisions may have varied in their degrees of

275. It is interesting to note the existence of (what we here call) some special situational features which characterized decision-making in the first and second successions, following the sad demise of Nehru and Shastri, for the office of the Prime Minister. Michael Brecher's *Succession In India — A study in Decision-Making* (1966) contains illuminating information and analysis of the role of consensus and conflict in decision-making (with reference to the Congress Party). In the first succession, unanimity in the choice of candidate was keenly sought and obtained; in the second succession an open contest resulted. Brecher analyzes the decision process in terms of (1) special situational features, (2) "change in the set of rules and in the decision-process"; (3) change in the "power centres through whom the decision had to pass before it was consummated"; (4) "forces at play" (*i.e.* regionalism, state parochialism, caste identity, factionalism) ; (5) the role of institutional interest groups ; (6) strategy and tactics employed by principal actors (7) behaviour of "lesser players" (226-41).

The great advance that Brecher represents is made possible because he has simply negated the common assumption about the role of consensus in the Indian decision-making tradition. Instead proceeding on the belief that "The succession to Nehru may be likened to a vault with a complex combination," he is able to focus on "the peaceful competition among various interest groups" as determinative of the final outcome—viz. selection of Shastri by consensus as the Prime Minister. And thus, even when he attempts to seek "the ultimate justification" for this election, he resorts to a "deeper meaning to the consensus, objectively perceived". This meaning, according to Brecher, lay in the desire of the Indian people "for the continuation of the main features of Nehru's policy—Democracy, Secularism, Planning and Non-alignment" and the image of Shastri as "the person who best symbolized these values and goals" (at 89-90).

276. Not that Austin is not aware of these. It is one of the highlights of his study that he recurrently emphasizes these constraints. But strangely enough in dealing with the consensus principle he does not attach much significance to these. The reason (I suspect) is the distorting focus provided by indulgence in the common assumption of a deep rooted tradition of consensualism in India.

rationality though the obvious slightness of the last two types would warrant an assumption that on the whole maximal rationality, inhering in the decision-making through consensus, has been attained.[277] Seen in this light, invocation of a hypothetical, if not imaginary, Indian tradition of consensus, is unnecessary and obstructs a clear understanding of Constitution-making decisional processes—a task of manifest importance for the nascent Indian constitutionalism.

(*c*) *Accommodation*

The other "original contribution" of India to constitution-making is the principle of accommodation. This principle has at least two aspects. First, it seems to consist in the

> ability to reconcile, to harmonize, and to make work without changing their content, apparently incompatible concepts—at least concepts that appear conflicting to the non-Indian, and especially to the European or American observer (317-18).

But, second, accommodation is not compromise. Compromise involves a settlement on an issue "by mutual concession" or "a search for a mutually agreeable middle way." The principle of accomodation leaves "concepts and viewpoints, although seemingly imcompatible" virtually "intact." Thus, according to Austin, the language provisions in the Constitution were a compromise but not any of the four instances of 'accommodation' considered hereafter.

The distinction sought to be made by Austin between "compromise" and "accommodation" is problematic;[278] but prescinding this, let us

---

277. And this despite the collective charisma of the Oligarchy which would generally be conductive of "false" or "ancestral" unanimity. On this see generally part II of this article and *Austin* 21-25.

278. Austin makes little or no effort at an analytical clarification of those two key notions This is all that he has to say about these :

> Accommodation is not compromise. Accommodation is a belief or an attitude; compromise is a technique. To eompromise is to settle an issue by mutual concession, each party giving up the portion of its desired end that conflicts with the interests of the other parties. It is the search for a mutually agreeable middle way. The provisions of the language chapter of the Constitution are a compromise.
>
> With accommodation, concepts and viewpoints, although seemingly incompatible, stand intact. They are not whittled away by compromise but are worked simultaneously.

Austin 318. Insofar as Austin's "principle of accommodation" corresponds to, what may be identifiable in terms of contemporary sociology as a part of "system of orientation" his distinction may have some analytical significance. But as our analysis of the salient examples of the operation of this principle will show, "accommodation" appears to be no more than a convenient verbal label for collocation of some aspects of the Constitution-making. The above quote from Austin also fails to divulge the full rationale of the proposed distinction with the result, for example, that it is difficult to understand why the language provisions are more in the nature of a compromise than accommodation. (In fact, one looks in vain, from this perspective, in Austin's interesting narration of the formulation of these provisions at 265-307). Nor do the purposes which this distinction is supposed to serve emerge very clearly.

follow our author in what he considers to be the eminent examples of the operation of the principle of accommodation.

First, the Indian Constitution "accommodates" federal and unitary systems of government which according to Austin are "apparently incompatible." Indian Constitution is both unitary and federal "depending on the circumstances (317-18)." So are, we may add, in theory (that is at the level of constitutional structures) the Constitutions of Pakistan (1956, 1962), Malaya (1957, 1963) and Nigeria (1954, 1960, 1963).[279] Since Austin does not advert to any of these, though he could have, the question as to the manner in which the so-called principle of accommodation is unique or original in India does not arise for him.

Second, Austin notes that India, in consonance with the principle of accommodation, even on declaring herself a Republic, preferred to remain in the Commonwealth whereas Ireland severed this tie on becoming a Republic. The constitutional history of the Irish Free State from 1937 to 1949, retaining both allegiance to the British monarch and to a national President, is not noted, though so radical are the differences between India and Ireland that our author is compelled to note that the latter proclaimed "itself a republic in reaction, primarily, to the unpleasant symbol of monarchy (319)." But this is a very vague and indirect indication of the differences between the two situations. India was able to display "accommodation" only because in 1949 the newly emerging concept of the Commonwealth no longer demanded common allegiance to the Crown which was once "the inexorable basis of the association."[280] If India displayed "accommodation" so did Britain, Australia, New Zealand, Canada and South Africa, the then members of the Commonwealth, in agreeing to redefine the concept of the Commonwealth. Furthermore, Pakistan, Ghana, Cyprus, Tanzania, Nigeria and Kenya (to mention a few salient examples) all became republics and simultaneously sought and attained Commonwealth membership.[281] Did they not also show "accommodation?" How is the Indian situation different? Austin simply ignores these vital questions.

Third, Austin suggests that both centralization (at the union-states level) and decentralization ("below the level of provincial government" (319)) consciously adopted to provide for village Panchayats also

279. We are here concerned not with the efficacy or viability of federalism in these countries in general or vis-á-vis India but with the more limited point that the unitary-federal structures are to be found in most constitutions of the newly independent countries.

280. See Nwabueze, *Constitutional Law of the Nigerian Republic* 94-98 (1964).

281. On the changing concept of Commonwealth see Underhill, *The British Commonwealth; An Experiment in Co-operation Among Nations* (1956); Miller, *The Commonwealth in the World* (1958); and more recently Z. Cowen, *The British Commonwealth of Nations in a Changing World* (Rev. Australian edn. 1965).

represent "accommodation" of "incompatibles." To be sure, the problem of Panchayats in this context is peculiar to India. But in relation to its own indigenous peculiarities Uganda, for example, has also reconciled similar "apparent incompatibles" in her Constitution.[282] In which sense then is the "accommodation" of the Indian Constitution different from, and similar to, other Afro-Asian Constitutions ?

Finally, Austin asks :

> Feeling deeply the importance of being Indian, how could the members of the Constituent Assembly be satisfied with a Constitution whose political principles, and very provisions, were almost entirely European or American in origin ? The majority of members could do so for the astoundingly simple reason that they saw no incompatibility between the two.[283]

What is the underlying cultural basis of this inability to perceive, or ability to synthesise, the apparent incompatibilities? Austin's answer lies in the characteristic generalization, distressingly familiar to the students of Indian culture and civilization. We are told :

> The roots of accommodation rest in the soil of Indian thought—thought that is characterized by its lack of dogmatism. What Spear has called 'the absorbtive and syncretistic features of Hinduism', attributes that could flourish only in an undogmatic atmosphere, have become the basis of Indian (Indian-Muslim as well as Hindu) approach to life.[284]

Austin however, shows a footnote awareness that this syncretism is not limitless. Anticipating the objection that the whole concept of

---

282. See the discussion of fascinating complexities of the Constitution of Uganda of 1962, and in particular the status of Buganda, in Morris and Read, 13 *The British Commonwealth* : *Uganda* (1966). The authors observe (at 125) :

> The present Constitution of Buganda and the constitutional provisions for the other states, annexed as schedules to the Constitution of Uganda, represent a modern form of democratic government but combine elements of traditional governmental systems in the respective areas: the traditional concepts and methods often shine through the modern cloak of constitutional order.

283. *Austin* 320. This is an impressive formulation but the problem behind it is a pseudo-problem. Austin commences his observations by specifically referring to the "incompatibilities" apparent to the "non-Indian and especially to the European or American observer (318)" and further designates these as "*apparent* incompatibilities". But then (as in the statement quoted in the text) he assumes these incompatibilities as real not merely for the Western observers but also for Indians. In the process, he himself overlooks his earlier point (discussed in chap. 2) that the political elite which secured India's freedom and shaped its Constitution had so adequately internalised the norms and structures of Western democratic regimes as even to reject without much ado the Gandhian "alternative". Furthermore, as Austin tells us it was the "art of selection and modification" (321-25) and the imaginative employment of comparative constitutional precedents which contributed to the Indian Constitution's success. This then would reduce the hypothetical "incompatibilities". And, finally, to assume that ideas and principles in question were Western "in origin", and by implication to suggest that such origins condition gravely their employment in different milieux, is to assume away the very imponderables of the sociology of knowledge and the history of ideas. This is the very apex of apriorism.

284. *Austin* 320-21. Note that in the above quote Austin moves unwarily from "Indian thought" through "Hinduism" to "Indian approach to life".

accommodation has been invalidated by Hindu India's inability to prevent a partition of the country, Austin states that there are two possible explanations. One, "the separateness of Muslim in India, resulting in final cultural and political divorce of Partition;" and second, the historical process of acommodation inaugurated in the times of Akbar which would have mitigated the separateness but for its reversal by Aurangzeb, and later by the British.[285] The fact that the author deals with this important issue summarily in a footnote would justify an inference that this objection though important does not detract from the principle of accommodation that he sees fully operative in the Constitution-making.

The "whence and wither" of this generalization are a perfect mystery to us. The difficulties of comprehension reside not only in the meaning of their term "syncretism," formidable as these are. The difficulties also lie in the breath-taking comprehensiveness and baffling intractability of this generalization. The resultant gross distortion of focus also creates pseudo-problems. Thus, the problem of explaining "partition" of the sub-continent arises, in the present context, because of the initial basic assumption about the syncretic nature of Indian culture as an operative reality. But perceptive students of Indian history and culture have not hesitated to characterize Hindu-Muslim co-existence as a kind of symbiosis rather than a synthesis, the latter a function of the so-called syncretism.[286] Thus when one uses "accommodation" as an important principle in the Constitution-making of India, one is also constrained (as is Austin) to adopt the syncretism generalization somewhat uncritically. As a result, comparative aspects of the matter, which we have here tried to emphasize, are neglected. Surely, the principle of "accommodation" has been operative in many other Afro-Asian Constitutions in recent times. In fact, one does not hear often about the African syncretism, though intermingling of cultural traditions has been more acute there.

At any rate, in Austin's own context, it may be that the belief in Indian syncretism was analytically a part of the 'system of orientation'[287] of *some* members of the Constituent Assembly; but from this to offer a generalization enveloping all members, and Indian people as a whole, is hazardous and also misleading.

The above analysis may seem less than charitable to Austin particularly because he has revivified and preserved for us some very important aspects of the Constitution-making which passage of time tends to obscure. But the analysis becomes necessary if only to show

285. *Austin* 321, n. 26. These two reasons are cumulatively responsible in Austin's view for the "failure" of "accommodation".

286. See L. Dumont, "Nationalism and Communalism," VII *Contributions To Indian Sociology* 30, esp. 52-70 (1964) and the material there cited and discussed.

287. *Cf.* T. Parsons, *The Social System* 139-50 (1951); and the recent general restatement in *Id., Societies: Evolutionary And Comparative Perspectives* 5-29 (1966).

the misleading effects of vast cultural generalizations, which can neither be wholly affirmed or denied, and which when unthinkingly accepted as starting-points of enquiry lead to the retardation of knowledge.

(*d*) *Epilogue*: *Some Generalizations About Generalizations*

Throughout the last section we have assailed certain stock generalizations about Indian culture and society. We will now try to indicate the nature of our misgivings and sources of our anxiety.

Methodologically, the status and utility of holistic socio-cultural generalizations have been a subject of relentless debate in social sciences.[287a] While the controversies will continue, one of the commonly accepted criteria is that making or adopting such a generalization should be guided by heuristic values. That is to say, irrespective of the fact that such generalizations may be beyond proof or disproof, they would serve as general sociological orientations influencing, though not determining, the ends of enquiry.

As Merton explains "they involve broad postulates which indicate *types* of variables which are somehow to be taken into account rather than specifying determinate relationships between particular variables," their "chief function" being to provide "a general context for inquiry" and to "facilitate the process of arriving at determinate hypotheses."[288] Thus Weber's generalizations about oriental religions and specially Hinduism, we may say, partake of the nature of the general orientations; though undoubtedly they are also much more.[289]

Clearly the value of such orientations lies in facilitating and furthering ends of enquiry. When the latter are nebulous or non-existent, as is often the case, the orientations are erroneously identified with the results of enquiry. This is particularly true in the case where isolated holistic cultural generalizations are employed (as by Austin) to substantiate, illustrate or adorn a point. When thus used, not merely clear contexts of enquiry are lacking but the accrual of such contexts is also inhibited. Other-worldliness, consensus and syncretism then enshroud rather than enlighten the culture and society of India. Here the isolated cultural generalizations betray their Midas' touch: one has possession of precious insight but astigma is not cured. Water becomes gold, but for all its value, we die of thirst.

But graver anxieties confront us on matters of substance. There is, first of all *the* great question of relation of cultural ideas to social

287a. For a fine survey of the problems involved see Nagel, *The Structure of Science* 447-546 (1961); and in the jurisprudential context, see the philosophical introduction *par excellence* in Hart and Honoré, *Causation in The Law* esp. 41-47 (1959).

288. Merton, *Social Theory and Social Structure* 89-93 at 88 (Rev. and enlarged edn. 1957).

289. On the significance of Weber's generalizations see the brilliant exposition in R. Bendix, *op. cit. supra* note 241, at 269-81.

behaviour and the function of these ideas as important societal "determinant". Beginning with Max Weber, modern sociological theory has witnessed much analytical progress in this direction, notably in the works of Pritrim Sorokin[290] and Talcott Parsons.[291] And in some respects, the empirical work by Sorokin and the prototypical functionalist investigations by Robert Merton reveal the problematic nature of the subject, even while stressing the promise of accomplishment implicit in modern sociological theories.[292] On so baffling and complex a matter the least one can do is to keep channels of enquiry open by resisting the temptations of advancing massive holistic socio-cultural generalizations of the type here under scrutiny.

From this perspective, second, particularly in studies taking off from Weber and dealing with Hinduism as providing a "societal environment"[293] there remain considerable difficulties, both theoretical and practical. The former concern the general question: what shall we regard as Hinduism? Obviously, it would be a grave error to fully accept Weberian Hinduism as *the* Hinduism, since as stressed earlier, both his methodology (rational ideal type) and the ends of his enquiry (comparative generalizations) involve a selective reconstruction of doctrinal Hinduism. But alternative constructions modifying Weber's interpretations at the level of doctrinal Hinduism are surely possible.[294] On the empirical side, fine studies by social anthropologists viewing Hinduism as both a system of action and belief may yield subtle refinements to a purely textual and literary study of Hinduism.[295]

Nor, third, will the Weberian approach, howsoever loyally or creatively used, in itself yield some of the answers which we clearly need today. In an ex-colonial nation, studies which treat politics as an independent variable (just as Weber treated religion as such a variable for his purposes) are equally necessary. Weber himself recognized the relative and partial autonomy of politics and society: but a political sociology of pre-colonial and colonial India has yet to be developed.[296] This, in turn, while taking Weberian contributions into account (both

290. Sorokin, *Society, Culture, and Personality* (1947); and *Sociological Theories of Today* (1966).

291. See *supra* note 287: and also Parsons and Shils, *Working Papers in the Theory of Action* (1953) and especially, *Essays in Sociological Theory* 19-33 (rev. ed. 1954).

292. See *op. cit. supra* note 288.

293. This phrase is derived from Parsons, *op. cit. supra* note 262 at 10, where he discusses the societal community and its environments.

294. See Professor Dumont's illuminating study "World Renunciation in Indian Religion," IV *Contributions to Indian Sociology* 33 (1960).

295. See the material cited in *supra* note 262.

296 See on this aspect some comments in Baxi, "Kautilyan Principles and Law of Nations," a paper submitted to the Australian Society of Legal Philosophy and the Grotian Society (Australian Group) on 23 May, 1967 (ALSP/IVR/35a, 1967: Mimeographed); and also the pioneering work by Eisenstadt, *The Political Systems of Empires* (1963).

his sociology of religion and sociology of politics) may also deepen our understanding of development of Hinduism as providing a societal environment. Studies in political sociology of India may greatly help us to better understand the milieu of "Westernisation" of politics in contemporary India and provide, for example, a possibility for ascertaining with greater knowledge than we now possess the oft-pointed dysfunctionality seen inhering in "Western" democratic processes in India.

Sociology of Indian law cannot (at any rate as I conceive it) make even a most modest beginning unless it dispenses with vast holistic generalizations and proceeds from advertence to current post-Weberian work being done both in sociology of Hinduism and political sociology of India. While we may learn from purely analytical and, therefore, universally applicable, social theories and also from comparative socio-cultural studies, especially in relation to the Third World countries, the focus of our enquiries has to be specifically narrowed to Indian society if we are to radically alter the climate generated by the mass of isolated vast holistic generalizations. And the tasks of juristic scholarship simply cannot be done unless the threshold perception of the many issues here discussed prevails. In this then the Indian constitutionalism, as well Austin's study of it, merely represent the little (or rather infinitesimal) done. The vast undone is, and perhaps shall ever be, with us.