"Law and Order" and Protection of the Rights of the Accused in the United States and in India: A General Framework for Comparison

K. M. Sharma
University of New South Wales

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview
Part of the Comparative and Foreign Law Commons, Constitutional Law Commons, and the Human Rights Law Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol21/iss2/8

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
"LAW AND ORDER" AND PROTECTION OF THE RIGHTS OF THE ACCUSED IN THE UNITED STATES AND IN INDIA: A GENERAL FRAMEWORK FOR COMPARISON

K. M. SHARMA*

I. THE COMMON MOTIF: THE PROBLEM OF "LAW AND ORDER"1

A. The American Scene: Crime Control v. Due Process

Mr. Justice Frankfurter once observed: "The history of American freedom is, in no small measure, the history of procedure."2 The emphasis on the procedural rights of one accused of a criminal act mirrors the value structure of the accusing society, for the arbitrary administration of justice in a free society is both an indignity to the claims of humanity and a damaging reproach to its legal order. Two operational norms, which Herbert Packer has termed "criminal control" and "due process,"3 dominate the administration of the criminal law, and they have very little in common.4


The author gratefully acknowledges the guidance of Professor Livingston Hall of Harvard Law School in the preparation of this article.


4. But see Griffiths, Ideology in Criminal Procedure, or A Third Model of the Criminal Process, 79 YALE L.J. 859 (1970), which assails Packer's two models and says that they really constitute one model which Griffiths terms the "Battle Model." The author suggests another model—the "Family Model"—in which the rehabilitative ideal predominates. Actually, all these models represent different ideational approaches to the criminal process in any given criminal justice system. Griffiths' model is somewhat analogous to the in fames patriae approach, the efficacy of which was questioned by the Supreme Court in In re Gault, 387 U.S. 1 (1967). See also Griffiths, Review, 79 YALE L.J. 1388 (1970), reviewing H. PACKER, supra note 3.
In the former the basic aims are speed and finality and the preservation of order is valued as a paramount objective: the manner of achieving these ends is necessarily secondary. Once the police and prosecutor are convinced of the suspect's guilt, he should be brought to account as expeditiously as possible. Thus, in the "crime control" model there is seen a direct relationship between the rate at which we mete out convictions and the attainment of "domestic tranquility" and "the general welfare." The model is thus characterized by the overriding importance of repression of deviant behavior.

The "due process" model is altogether and irreconcilably different. Here, formality in the fact-finding process is stressed and an impartial tribunal is relied upon to assess the respective claims of state and suspect: a fair trial of an accused is considered to be more important than the conviction of the guilty. Advocates of the "due process" model are distrustful of the entire criminal process itself and seek to correct abuses through mechanisms of the system (the courts) at the sacrifice of efficiency. A society employing this model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual.

Packer thinks that recently the trend has been away from the "crime control" model and towards the "due process" model. This increased concern for the rights of the accused may have

5. Inbau, Law Enforcement, the Courts, and Individual Civil Liberties, in CRIMINAL JUSTICE IN OUR TIME 99, 134 (Howard ed. 1965) (quoting the preamble to the Constitution).
6. However, in view of President Nixon's avowed purpose of appointing "strict constructionists" to the Court, we may well observe in the near future a reversal of the pendulum. Friendly, TIME AND TIDE IN THE SUPREME COURT, 2 CONN. L. REV. 213 (1969). With the appointment of only two Justices, the President has already helped to blunt the judicial revolution particularly in the area of the criminal law. And, now, in the resignations of the late Justices Black and Harlan, the President has found a sudden opportunity to appoint two more justices in his first term in office and, thus, to impose his own philosophy on the Court.

The Court watchers have sensed the shift in recent months. By dismissing strong language in some Warren Court rulings as mere dicta, the new Court has snipped away at due process precedents. The shift became palpable in the case of Harris v. New York, 401 U.S. 222 (1971), where at issue was whether statements made by an unwarned suspect could be used to impeach his testimony at trial. By a vote of five to four, the new Court answered in the affirmative (provided there is no evidence of police coercion). It thereby brushed aside language in Miranda v. Arizona, 384 U.S. 436 (1966), that appeared to bar uncounseled statements for any purpose. That language, observed Mr. Chief Justice Burger for the majority, "was not at all necessary to the Court's holding and cannot be regarded as controlling." Harris v. New York, supra at 224. The shield provided by Miranda, said the Chief Justice, "cannot be perverted into a license to use perjury by way of a
reached its zenith during the era of the Warren Court. In fostering what is popularly known as the “criminal law revolution,” the Warren Court placed itself and the entire judicial system in the spotlight of a “law and order” reaction. Curiously, this concern converges with an increase in crime and public awareness of it. The recognition of basic procedural rights is not new in the United States, yet it is safe to say that at no previous time in American history has the process of constitutional interpretation been so devoted to the expanded protection of these basic rights as in recent years. The enlarged protection is defense.” *Id.* at 226. *Miranda* was not really toppled; it was merely cut down to size. Since the new Court is far more restrained than its activist predecessor, it is not likely outrightly to upset the decisions of the Warren Court. See Bishop, *The Warren Court Is Not Likely to be Overruled,* N.Y. Times, Sept. 7, 1969, § 8 (Magazine), at 31.


Sol Rubin rightly observes that the Warren Court, in its concentration on the litigation and pretrial phases of criminal justice, neglected correctional law, and that, “[i]t is hard to see how the Burger Court can do less for correction than the Warren Court did. It may well do more.” Rubin, Book Review, 16 *CRIME & DELIN.* 112, 114 (1970), reviewing A. COX, *THE WARREN COURT—CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968), and *THE WARREN COURT—A CRITICAL ANALYSIS* (R. Sayler, B. Boyer & R. Gooding eds. 1969). The new Chief Justice has perceptively lamented the overemphasis which under the American adversary system is placed on protecting the accused all through the trial and appeal, to the exclusion of developing appropriate measures in rehabilitating him after his imprisonment. Burger, *“No Man Is an Island,”* 56 A.B.A.J. 325 (1970).


9. *Why Streets are Not Safe—Special Report on Crime,* U.S. NEWS & WORLD REPORT, Mar. 16, 1970, at 15. Crime in the streets, as three presidential commissions—the Crime Commission, the Riot Commission, and the Violence Commission—have demonstrated, has been part of the American social scene throughout its history and, in some earlier periods, there may have been more unlawful behavior per capita than at present. Yet, it is quite probable that, until fairly recently, criminal violence did not affect the lives of a great many Americans and did not seriously influence their thinking. Packer, *Law and Order in the Seventies,* THE NEW REPUBLIC, Jan. 10, 1970, at 12. Stuart, *A Citizen’s View of the Im-
the culmination of a constitutional\textsuperscript{10} (as distinguished from a common law\textsuperscript{11}) approach to balancing the rights of the accused against the social interest in effective law enforcement.

The constitutional approach is marked by a recognition of, and concern for, the dignity of the individual and the inviolability of his rights. Under this approach at least two policies are sought to be effectuated. First is the protection of judicial integrity: permitting a conviction obtained through unconstitutional means to stand, it is believed, is tantamount to a moral sanction by the court of illegal official conduct.\textsuperscript{12} Therefore, when law enforcement officials have acted in a manner inconsistent with what the judiciary considers constitutionally permissible, reversals of convictions and the exclusion of unconstitutionally obtained evidence seek to discourage future conduct of this nature.\textsuperscript{13} Second, the judiciary insures that the individual accused is tried through fair and impartial procedures.

This mounting solicitude for the accused has primarily been expressed in Supreme Court decisions reviewing state court convictions and affects the full range of the criminal process, from arrest and interrogation to eventual trial and possible conviction.\textsuperscript{14} As an apparent bulwark against this so-called excessive federalizing and constitutionalizing of the judicial system—reflected in the expansion of the procedural requirements imposed

\textit{pact of Crime}, 15 CRIME \& DELIN. 323, 324 (1969). However, the near hysteria over seeming increases in crime and lawlessness may be largely unwarranted in that it fails to take account of improved detection and reporting techniques. Ohlin, The Effect of Social Change on Crime and Law Enforcement, 43 NOTRE DAME LAW. 834, 836 (1968); Vorenberg, Is the Court Handcuffing the Cops?, N.Y. Times, May 11, 1969, § 6 (Magazine), at 32. See generally R. CLARK, CRIME IN AMERICA (1970); R. HARRIS, JUSTICE: THE CRISIS OF LAW, ORDER, AND FREEDOM IN AMERICA (1970).


11. The "common law" approach is perceptively described in Neasey, The Rights of the Accused and the Interests of the Community, 45 AUSL. L.J. 482 (1969). Under the common law, the major function of due process is the punishment of the guilty and the protection of the innocent from false verdicts and criminal molestation. Thus, the primary consideration is achievement of a true verdict. "Despite the preferred values reflected in the Bill of Rights, the criminal trial was viewed solely as a truth-seeking process . . . ." Pye, The Warren Court and Criminal Procedure, 67 MICH. L. REV. 249, 253 (1968), in THE WARREN COURT—A CRITICAL ANALYSIS, 58, 62 (R. Sayler, B. Boyer \& R. Gooding eds. 1969).


14. This revolution has been aimed at restricting the states from infringing upon most of the specific guarantees of the Bill of Rights through the medium of the due process clause of the fourteenth amendment. See note 122, infra, and the accompanying discussion.
upon the states' administration of criminal justice by the fourteenth amendment—judicial procrastination in many states is still evident. For, this increasing and liberalizing regulation of state criminal procedure by the Court—in a society pervaded by political assassinations, terror in the streets, urban guerrilla warfare, and teenage gang violence—is commonly regarded by a frustrated public as encouraging a corresponding loss of respect for law and order. Characteristic of the pressure to subordinate individual rights to other social interests are the attempts to establish a causal relationship between a rising crime rate and the current judicial tendency to refine and extend constitutional protections to criminal suspects. If there is a real relationship between the incidence of crime and the rights of the accused, then judges are confronted with a situation in which law may be magnified to such a degree that disorder is countenanced as a result. Judges must then make the difficult choice between two values that are normally linked together.

Indeed, of late it has become almost fashionable to regard the guarantees of personal liberty embodied in the Bill of Rights as mere technicalities, the violation of which must be ignored if the forces of crime are to be successfully combated. Document-


There exists in many American minds a hitherto suppressed but now more and more unavoidable fear that the peaceful and proud America which everyone has known up to the present day may have lost its way. This fear reveals itself in a variety of ways—the most visible and vehement of which is the continued cry for a return to law and order.


18. A majority of the Senate Judiciary Committee not only found the existence of a causal relationship between the recent procedural reforms and the escalating crime rate but also concluded that they have impeded the efforts of law enforcement. See S. Rep. No. 1097, 90th Cong., 2d Sess. 37–41 (1967).

19. Id. For instance, Miranda v. Arizona, 384 U.S. 436 (1966), in which the Supreme Court held that a defendant’s pretrial statements were inadmissible at his trial, unless he had been properly informed of his constitutional right to remain silent and to be represented by
ation for this is lacking, but the underlying tension between protection of individual rights and deterrence of wrongdoing leads critics to believe that a narrowing of the rights of the accused will be one of the most efficacious methods of coping with the problem of rising crime rates and congested trial courts. This is the assumption—that rights of the accused are obstacles to the legitimate execution of police duties—which led to the passing of the Omnibus Crime Bill, an act seeking to vitiate by legislation several judicially imposed procedural reforms in the criminal process in federal courts. Even more ominous are the various chilling instrumentalities which purport to readjust the Bill of Rights in order to restore law and order, ranging from the amendment of the privilege against self-incrimination, to pro-

an attorney, has frequently been cited for its adverse effect upon efficient law enforcement. In Philadelphia, for example, it is contended that compliance with the Miranda warnings by the police caused the percentage of persons, arrested for serious offenses, who refused to make a pretrial statement, to soar from 10% in 1964 to 59% in 1967. See Inbau, Misconceptions Regarding Lawlessness and Law Enforcement, 35 TENN. L. REV. 571, 576 (1968), in 42 POLICE J. 458 (1969) (delivered as the fifth Frank Newsum Memorial Lecture). Review of hundreds of major crime cases in the Pittsburgh Bureau’s Detective Branch revealed that the percentage of investigations producing confessions, which was 54% before instituting the full Miranda warnings, dropped afterwards to 37%, not to zero. See Burger & Wettick, “Miranda” in Pittsburgh—A Statistical Study, 29 U. PITT. L. REV. 1 (1967).


22. See, e.g., Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. CIN. L. REV. 671 (1968). For an analysis of Judge Friendly’s proposal that the fifth amendment’s self-incrimination clause, “nor shall [any person] be compelled in any criminal case to be a witness against himself,” be amended to bring current Supreme Court doctrine more nearly into line with the words, history, and policy of the privilege against self-incrimination, see Thompson, Judge Friendly’s Amendment to the Fifth Amendment: A Comment on a Recent Criticism of the Supreme Court, 38 U. CIN. L. REV. 488 (1969). Judge Friendly would now “not at all regret having [his] proposal
viding "no-knock" legislation,23 to preventive detention.24

One need hardly emphasize that substitution of expedition for procedural protection should not be engrafted on the criminal process, because it seems somewhat Orwellian to place the public convenience above the most fundamental of all individual

for a constitutional amendment placed on the back burner until we see what the Burger Court will do." Friendly, Time and Tide in the Supreme Court, 2 CONN. L. REV. 213, 220 (1969). Judge Friendly is rightly of the view that the "[Burger] Court has many other available means for changing course without being false to either the letter or the spirit of what has been [on matters of criminal procedure]." Id. at 219. See also Richards, Chief Justice Burger: Whither Now the Supreme Court, 15 S.D.L. REV. 41 (1970).


24. The provision amending the Bail Reform Act of 1966, would, inter alia, permit the federal courts to detain up to sixty days prior to trial certain types of dangerous defendants. For a discussion of the constitutionality and wisdom of this provision, see Allington, Preventive Detention of the Accused Before Trial, 19 U. KAN. L. REV. 109 (1970); Hruska, Preventive Detention: The Constitution and the Congress, 3 CREIGHTON L. REV. 35 (1969); Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 VA. L. REV. 1223 (1969); Portman, "To Detain or Not to Detain"—A Review of the Background, Current Proposals, and Debate on Preventive Detention, 10 SANTA CLARA L. REV. 224 (1970); Comment, Preventive Detention and the Proposed Amendment to the Bail Reform Act of 1966, 11 Wm. & MARY L. REV. 525 (1969).


In Dobrovir, Preventive Detention: The Lesson of Civil Disorders, 15 VILL. L. REV. 313 (1970), "the facts respecting judicial preventive detention in the context of civil disorders are set out and evaluated to see what light they shed upon the wisdom, necessity, and efficacy of preventive detention legislation." Id. at 316. The author concludes that the "evidence appearing from study of preventive detention as applied in recent civil disorders demonstrates the unwisdom of the device. Judges are ill-equipped to predict accurately whether any one is likely to commit a new offense if released." Id. at 330. See also Comment, Pretrial Detention in the District of Columbia: A Common Law Approach, 62 J. CRIM. L.C. & P.S. 194 (1971); Note, The Costs of Preventive Detention, 79 YALE L.J. 926 (1970); Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 YALE L.J. 941 (1970).
rights—the right to exist as a free man. Although pragmatic considerations certainly must play a role in all constitutional adjudication, to argue that highly important rights must be forgotten because their vindication will result in some crimes not being punished is to ignore the traditional role of the judiciary in the American system. This is, however, not to suggest that the Supreme Court, in advocating its conception of rights, has necessarily reached the proper results. Neither is it to suggest that the Court’s interpretation may not be questioned as manifestations of an excessive zeal for constitutional rights at the expense of other public interests also served by the constitutional order.25

The point of emphasis is, rather, that the protection of rights of the accused now occupies a central place in the Court’s role as protector of the constitutional system and that the abdication of such role would do more fundamental damage to quintessential social values than a certain amount of unrequited “crime in the streets.”

25. The most publicized decisions may have favored the accused, but contrary to popular assumptions, the Court has not been a “criminal’s court” (Kamisar, Do Police Sometimes Practice “Civil Disobedience” Too?, TRIAL, Oct./Nov. 1968, at 15), but has in recent decisions acted very favorably toward law enforcement in the investigative area. Thus, for example, in Terry v. Ohio, 392 U.S. 1 (1968), the Court approved the police’s zealously sought power to “stop and frisk” a suspect on less than probable cause. In Hoffa v. United States, 385 U.S. 293 (1966), it upheld the right of police to plant an informant in a suspect’s quarters, and in Osborn v. United States, 385 U.S. 323 (1966), it allowed such an informant to tape record a private conversation. Moreover, the Court has protected the “anonymity of an informer” (McCray v. Illinois, 386 U.S. 300 (1967)) and the right of the police to extract blood samples over a suspect’s protest (Schmerber v. California, 384 U.S. 757 (1966)), or from an unconscious person (Breithaupt v. Abram, 352 U.S. 432 (1957)). Finally, in Warden v. Hayden, 387 U.S. 294 (1967), the Court reversed a long-standing proscription against the seizure of “mere evidence.” Many of the landmark decisions were denied retroactive effect (see, e.g., Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965)). See also United States v. O’Brien, 391 U.S. 367 (1968); Walker v. Birmingham, 388 U.S. 307 (1967); Adderley v. Florida, 385 U.S. 39 (1966). All these practices entail serious invasions of civil liberties, but the need for effective law enforcement was thought by the Court to be more important.

B. The Indian Scene: Political Complexion of Growing Lawlessness

Turning to the Indian scene, in the absence of a comprehensive publication of nationwide criminal statistics for administrative and operational use of law enforcement agencies, it is difficult to make a sophisticated criminological assessment of the real magnitude of general crime conditions. As one scholar has ably demonstrated, it would be unrealistic to construct an accurate picture solely from the annual reports of crime prepared by the Ministry of Home Affairs, Government of India, because they seem to overlook factors like the variables associated with demographic changes, improved crime reporting procedures, and the statistical skill and resources in reporting agencies of various states. For instance, during the 1960-1965 period, the report showed a nearly twenty-four percent increase in cognizable offenses, although this period had also witnessed a general population rise of nearly thirteen percent. It is unclear from the statistics if at least some percentage of the increase in crime could be attributed to this increase in population.

Although there is no empirical study questioning the reporting practices of Indian citizens of crimes which might otherwise be processed but are not officially known to the police, it seems quite probable in light of the Indian tradition of mediation, cultural unwillingness to report crimes of rape and adultery for fear of societal stigma, and the research done by the President's Crime Commission in the United States that the amount of...
crime reported represents only a fraction of that which has actually occurred. Comparison of the incredible disproportion of about three million index crimes in the United States for one year—1965—as against a mere 628,713 cognizable offenses for a society with a population over twice the size of the United States lends some support to the existence of this suspected discrepancy.32

Notwithstanding the unavailability of reliable statistics, it is common knowledge, at least over the period of the last ten years, that there has been a phenomenal increase in both crimes of violence (homicide, kidnapping, abduction, rape, adultery, dacoity and robbery) as well as in crimes of property (housebreaking, theft, misappropriation, cheating, and counterfeiting). For instance, more recently, the incidence of crime in Delhi and in other Union Territories showed an upward trend in 1970 compared to 1969, according to the Home Ministry’s annual report for 1970-1971.33 The report said that a special squad had been formed in the Central Intelligence Department Crime Branch of Delhi Police to investigate matters regarding organized gangs of criminals.

This traditional problem of crime has now become all the more telling, because of its political complexion. The newspapers of the past three years or so have been littered with stories concerning the gheraos of various industrial units,34 the restlessness among educated youth,35 the growing accent on anti-authoritarianism in the political culture of India,36 and, of course, sense-

32. Penegar, supra note 26, at 367.
33. The Indian Express (New Delhi), June 16, 1971, at 3, cols. 3-5 (city ed.).
34. “Gherao literally means ‘encircle’ or ‘surround.’ A gherao occurs when the workmen, in order to force an employer to accept their demands, surround his office or residence, or that of his executive. They block ingress and egress. They sometimes cut off electricity, telephones, even food and water. A gherao is usually short; but may be long.” INDIAN LAW INSTITUTE, LABOUR LAW AND LABOUR RELATIONS 260 (1968). See also A. AGARWAL, GHERAOS AND INDUSTRIAL RELATIONS (1968); V. ARYA, STRIKES, LOCK-OUTS AND GHERAOS 61-65 (1967).

See Christian Science Monitor, Boston, Jan. 16, 1970, at 7, col. 5: “Law and order in West Bengal have broken down; various industries have been hit by strikes and disorders inspired by the communist state government.”

The Law Commission has recently suggested a drastic overhaul of the Indian Penal Code to provide, among other things, rigorous punishment for gheraos. The Hindustan Times (New Delhi), June 7, 1971, at 1, cols. 1-3.
35. See, e.g., Shanti Swarup, Student Unrest in India, in PROTEST AND DISSENT 151 (B. Crick & W. Robson eds. 1970).
less brutal political murders and communal atrocities. An editorial of a leading daily newspaper observed:

The seeds of violence and lawlessness in West Bengal, laid during the rule of the CPM-led coalition, continue, but nothing illustrates the present state of law and order there better than the fact that the efforts to restore normalcy in railway operations in the region have not met with much success. Naxalite activities have created a feeling of insecurity. The trains are a favourite target of anti-social elements, and disruption of train traffic is adversely affecting the country's economy by hindering the movement of industrial raw materials and goods.

Interestingly, this kind of growing lawlessness and the persistent trend of senseless violence in the country's political style, particularly in West Bengal, and in the activities of Shiv Sena, figured as one of the major issues in the recent mid-term elections of the Indian Parliament. Reminiscent of the 1968 American presidential campaign style, one of the planks of Mrs. Indira Gandhi's party's election manifesto was to preserve

---

37. Indians are now much more concerned about this than they used to be, and a recent book on the subject begins: "This book... is concerned with the growth of violence in the country which has taken a turn for the worse since the death of Lal Bahadur Shastri." The Politics of Mass Violence in India 15 (S. Aiyar ed. 1967). See also the symposium issue on violence in Seminar (No. 116, April 1969).

38. While the Constitution has committed India to the ideal of a secular state, the country has yet to become a secular society. Nothing perhaps bears this out more than the ever-recurring tale of communal riots even after twenty-three years of independence. The story of communal violence in Bhiwandi near Bombay is one of the tragic cases in point. One may recall here the question which a Congress member, Krishna Kant, asked the then Home Minister, Y. B. Chavan, in the Council of States:

Is it not a fact that the arson took place in Jalgoan after the procession passed off peacefully after two hours? Is it also not a fact that the marriage party of a Muslim family was bolted and burnt in a small hut where four children—9 years, 7 years, 5 years, and 3 years—were there and their widowed mother came running and she wept: "I beg of you please at least give me one of my sons. I will convert him to Hinduism"?

Chavan replied in a subdued voice,

Sir, it must be admitted that it was a very merciless brutal attack on the Muslim families. It is a fact that a marriage party was burnt in one house. It is also a true story of a widowed mother that he mentioned. I met her. The picture I saw of that mother will haunt me throughout my life.


39. The Indian Express (New Delhi), June 18, 1971, at 6, col. 1 (city ed.).

40. For a fine description of the Naxalite movement, see Ghosh, The Naxalite Struggle in West Bengal, 4 South Asian Rev. 99 (1971).

41. The Indian Express (New Delhi), June 18, 1971, at 6, col. 1 (city ed.).

42. "Shiv Sena," which means "the Army of Shivaji" a seventeenth century Mahratta warrior, is a kind of militant organization—in some respects comparable to the Black Panthers in the United States—which has the objective of having the state of Maharashtra
law and order so that all citizens could live in peace and harmony. After her party’s landslide victory, the new government, precisely in pursuance of its election manifesto of combating forces of lawlessness, successfully piloted through the Parliament the Maintenance of Internal Security Bill. Defending the bill, in the Lok Sabha, Mr. K. C. Pant, Minister for Home Affairs, catalogued the circumstances, which had compelled the government to come forward with the unpalatable bill, providing for preventive detention. Political violence, increasing lawlessness on the railways, attempts at disrupting secularism, elements seeking inspiration from across the border, infiltration of Pakistani spies along with the massive influx of refugees from Bangla Desh, terrorization and killings and the reluctance of eye witnesses of daylight murders to testify in the courts for fear of reprisals—were, he said, facts of life. Since these factors tended to glamorize violence and destroy cherished values, Mr. Pant urged the members not to be obsessed with academic concepts of liberty but adopt a realistic approach. Mr. Pant, however, assured everybody that this law would not be used to suppress the legitimate movements of workers and farmers. It would be used as sparingly as possible, and certainly not against political adversaries. However, Mr. Pant urged all political parties to abjure violence and to abide by the “rules of the game” within the framework of the nation’s liberal Constitution.

only for Maharashtrians. Strongly parochial, the organization resents any kind of participation—economic, political, social—in Maharashtra by non-Maharashtrians. It believes that non-Maharashtrians ought to leave Maharashtra, and if they decline to do so, they ought to be made to leave. This simplistic but satisfying idea appealed to the Mahrrattas who, very shortly thereafter, started to act on it. See generally Joshi, The Shiv Sena: A Movement in Search of Legitimacy, 10 Asian Survey 967 (1970).

43. Lower House of Parliament, similar to England’s House of Commons.

44. The Indian Express (New Delhi), June 18, 1971, at 1, cols. 1-4.

45. For example, the Sealdah division of the Eastern Railway has the dubious distinction of being in the forefront in the matter of alarm-chain pulling as well as in other forms of anti-social and criminal activities connected with the railways. Menon, Lawlessness on the Suburban Railway, The Hindustan Times (New Delhi), June 22, 1971, at 5, cols. 1-2 (city ed.).

46. The Times of India (New Delhi), June 19, 1971, at 1, col. 1 (city ed.). These assurances were reiterated by Mr. Pant in the Rajya Sabha also. The Hindustan Times (New Delhi), June 25, 1971, at 1, cols. 2-3.
C. A Comparative Excursus: Relevance of American Experience for India

Mr. Pant’s account of the state of affairs in India evidences the strong move of many Indian political leaders towards a “crime control” view of the problem of law and order. Thus, as in the United States, some of the constitutional protections available to the accused are also under attack as obstacles to effective law enforcement. However, the response to this similar movement in both countries should be tempered by the cultural and institutional differences of the two societies.

In the United States today because of the perceived need on the part of many to dramatize civil rights, to underscore individual liberties, and to mobilize sentiment against the Vietnam War, employing civil disobedience techniques or engaging in other extralegal activities does not seem to entail the disapprobation it once did. In fact, among young militants and certain portions of the intelligentsia, there seems to be a bias against law and order qua law and order. The growth of this sentiment, without stressing the means to bring “change,” “flexibility,” and “social alteration” has perhaps obscured the fact that one prerequisite for evolutionary and lasting political and social development is the maintenance of at least a semi-stable public order; for total flux and turmoil are as detrimental to progress as a stultifying status quo. The United States and other highly developed nations, unlike India, may have the institutional frame-

47. The Indian press has also reacted favorably toward a “crime control” view of the problem of lawlessness. For example, to quote from an editorial of a leading daily:

A preventive detention law no doubt carries the risk that a few innocent persons may at times be held without trial. But the [Maintenance of Internal Security Bill] provides for a review of each case by an independent board consisting of three persons all of whom have held the position of a judge or are qualified to hold it. There is no reason to assume that all these men will agree to be subservient tools of the Government. . . . [N]o democratic regime can ever allow any party to use murder as a political weapon. The situation in West Bengal where political murders have become a daily routine has already become impossible. The parties responsible for this will have only themselves to blame if the new law is also used to curb the activities of those who plan to abuse democratic liberties to subvert the democratic system.

The Times of India (New Delhi), June 21, 1971, at 6, col. 1 (city ed.).


work to permit some extralegal activities and to provide for highly charged demand pressures. Political systems like that of India, however, lack these institutional buffers, and the police force and legal framework may be the only forces standing between powerful pressure groups and the maintenance of a viable political system. Agitational politics has now become for many people a substitute for institutional means of exercising influence and of seeking redress of grievances. As such, the problem of conflict between individual freedom and the practical necessity of maintaining order assumes even more importance in a mammoth and extremely complex society like India than in the United States. The incidence of social violence has affected the police—the government's primary agency of social control—in marked ways: apart from financial stringency, the threat of violence is the single most important formative element shaping the police in modern India. The over-arching responsibility of the police in their own minds and in the minds of civil officials is to quell civil disorders and preserve "law and order." Although the police are primarily responsible for preventing individual crimes and apprehending common criminals, they are aware that careers are made and broken by the single issue of law and order.

Although the literature relating to the problems of law and order vis-à-vis the rights of the accused in India is very sparse, this should not induce one to surmise that there are no constitutional and statutory provisions in India which guarantee substantive and procedural safeguards to a suspect or an accused. The personal liberties, inviolate under Anglo-American law, are contained in a number of pre-Constitution provisions embodied in the Code of Criminal Procedure, 1898, Indian Evidence Act, 


51. This fact is reflected by a perusal of the seminal papers presented at the Northwestern University School of Law's International Conference on Criminal Law Administration in 1960. These papers, first published in four parts by the Journal of Criminal Law, Criminology and Police Science, are collected in Police Power and Individual Freedom (C. Sowle ed. 1962). These studies, dealing with four areas—arrest and detention, search and seizure, police interrogation, and self-incrimination—in Canada, England, France, Germany, Israel, Japan and Norway, do not investigate Indian jurisprudence despite the voluminous body of relevant case law which has been adjudicated there. Likewise, a very recent British Institute of International and Comparative Law Study, surveying the "rights of the accused" in many countries—England, France, Scotland, United States, Northern Ireland, New Zealand, Malaysia, Israel, South Africa, Germany, Poland and the U.S.S.R.—dispenses with its analysis of Indian jurisprudence in about one paragraph. The Accused—A Comparative Study (J. Coutts ed. 1966).
1872, and other enactments. These safeguards, some of which are also enshrined in the Constitution in the chapter on fundamental rights, are: presumption of innocence;\(^5\) freedom from illegal arrest and detention;\(^5\) right to be produced before a magistrate within twenty-four hours;\(^4\) right of bail;\(^5\) right to have notice of charge;\(^6\) right to counsel;\(^5\) right to public trial in the accused's presence;\(^6\) right to produce and examine defense witnesses and cross-examine prosecution witnesses;\(^9\) right to discovery of statements;\(^0\) immunity from testimonial compulsion,\(^6\) double jeopardy,\(^6\) and retroactive operation of criminal law,\(^6\) right of appeal;\(^4\) etc.

An examination of the scope and relative degree of importance given to these rights of the suspect (or accused), which constitute the ingredients of a "fair trial"\(^6\) "implicit in the concept of ordered liberty,"\(^6\) would offer an insight into the process of criminal justice as it operates in a given context. The mere presence of these rights in a statute or constitution does not mean that their content is also the same everywhere. For example, although India has adopted guarantees similar to those of the fifth and sixth amendments of the United States Constitution, the interpretation and application of these provisions governing

---

52. Indian Evidence Act, 1872, §§ 102, 105. See also Sharma, Defence of Insanity in Indian Criminal Law, 7 J. IND. L. INST. 325, 367-71 (1965).
53. INDIA CONST. arts. 22 (1) & (2) (1950); Code of Criminal Procedure, 1898, §§ 60, 61, 64, 167, 344.
54. INDIA CONST. art. 22 (1) (1950); Code of Criminal Procedure, 1898, § 61.
56. INDIA CONST. art. 22 (1) (1950); Code of Criminal Procedure, 1898, § 173 (4).
57. INDIA CONST. art. 22 (1); Code of Criminal Procedure, 1898, § 340 (1).
59. Indian Evidence Act, 1872, §§ 137, 138, 143; Code of Criminal Procedure, 1898, §§ 207 (5) & (9), 208 (2), 244, 251 (A) (8) & (9), 256 (1), 257 (1), 286, 290, 291.
61. INDIA CONST. art. 20 (3) (1950); Code of Criminal Procedure, 1898, §§ 342 (2), 342 A.
62. INDIA CONST. art. 20 (2) (1950); Code of Criminal Procedure, 1898, § 403 (1).
63. INDIA CONST. art. 20 (1) (1950).
64. Code of Criminal Procedure, 1898, § 371 (5).
65. In fact, the right to a fair trial has figured prominently in the efforts made in recent years to guarantee human rights at an international level. See generally Harris, The Right to a Fair Trial in Criminal Proceedings as a Human Right, 16 INT'L & COMP. L.Q. 352, 364-67 (1967).
criminal prosecutions differ between the two systems in many respects because of differing historical backgrounds and societal needs. Despite the disparate historical and political backgrounds of both countries, the American and Indian systems, both the outgrowth of the same mother lode of the English common law, offer many similarities. Both share similar expectations and ideals about the role of justice under law in a democratic society. India shares the American heritage of gaining independence from the British Empire and then adopting a written constitution with a bill of rights, patterned in large part after the American document. An insight into the legislative and judicial responses of the United States, would help one extrapolate (through a comparative analysis) techniques of improving Indian legal rules and the methods of criminal-constitutional adjudication. The “already mature American experience” is particularly instructive concerning the role of the independent judiciary, not only in the protection of constitutional rights of the suspect or accused but also in the creative interpretation and extension of these rights and, indeed, in the creation of new rights. In the exercise of its power of judicial review, the Supreme Court of the United States has acquired a prestige and exerts an influence probably unparalleled in history. The Indian courts, perhaps more than the courts of any other country, have avidly looked to American constitutional law precedents for guidance. The opinion in practically every important case is liberally sprinkled with references to American decisions and authors, as are the standard Indian texts on constitutional law.

70. H. Seervai, Constitutional Law of India 33-36 (1967), has, however, cautioned against the use of American doctrines of “police power” and “eminent domain” and other concepts in interpreting the various provisions of the Indian Constitution.
"LAW AND ORDER"

Our focus is upon the relevance of the American experience to India, not merely because its system has been the most widely emulated, but also because many of the alterations in the judicial system of other countries, including India, have been adopted for the express purpose of evading the defects, real or hypothetical, of the American system. However, if such a comparison is to be more than superficial, it must be attempted in light of divergencies of tradition, forms of government, differing legal frameworks, and social environments. 71

II. Some Institutional Differences in Comparative Contexts

While the experience of a foreign country is rarely transferable in full to another legal system, suggestive ideas can be derived from it to assist in the more rational jurisprudential development of the potential transferee. It would be instructive, then, to look to the key institutional differences—federal structure, due process, jury trial, etc.—deriving from the distinctive histories of the two countries under discussion, before examining the viability of the adaptation by India of the judicial approach developed by American jurists. In this process we can sort out those developments peculiarly conditioned by history and those

71. Cf. von Mehren, Roscoe Pound and Comparative Law, 13 Am. J. Comp. L. 507, 514-15 (1964): Comparative study of non-Western systems ordinarily will not be rewarding with respect to specific problems of rule and institution because of divergencies between relevant social values and practices. However, illumination can be cast by comparative work on pervasive questions underlying the entire legal order: How specific or universal is the Western idea of law? What premises are basic to Western thinking about the manner in which disputes are to be resolved and about the proper content of norms regulating conduct? How universally are these premises shared? What moral assumptions, cultural traditions, historic experience, and economic considerations are reflected in a given society's attitude toward problems of social control? Finally, what can be said about the various forms that generalized social control—which we in the West have entrusted so largely to the legal order—takes in different societies and cultures?

. . . Comparative-law scholarship—unlike certain kinds of domestic-law scholarship—can never be content with a largely informational presentation. If its work is to have significance, comparative scholarship must always seek insight at one level or another—practice, procedure, judicial and governmental structure, substance—into the operation of the legal systems under investigation. The comparatist's concern with structure and detail is with a view to understanding processes of growth and development and habits of thought.
which inhere in some underlying conception of fairness and justice founded on the worth and dignity of the person.

Some notions of rights are historically conditioned. The limitations stated in the American Bill of Rights that troops may not be quartered in houses without the consent of the owner and that the right to keep and bear arms shall not be infringed cannot be understood except in relation to the American colonial experience. They cannot be extolled as basic universal rights for importation.

A. Differentiation in Federal Structures

Neither system can be understood without a pragmatic understanding of its federal structure, particularly in a study of those problems which concern "law and order." India and the United States both have federal constitutions, though "the historical, political and economic needs which create the urge to federalism were completely absent" in India. The Indian federation, unlike the American, did not arise out of a pact between several sovereign states, which knitted themselves together, surrendering some of their sovereign or autonomous powers to the general government. It came into being as an expedient whereby states, heterogeneous in themselves, might be joined in a nation-

72. P. Freund, Federalism in America 5, 14 (Perspectives U.S.A. No. 10, 1955): There is no better insight into American pragmatism than American Federalion. The neglect of law by philosophers has been unfortunate for both disciplines. . . . At all events, a study of the operation of federalism through the judicial opinions of Justices Holmes and Brandeis, Hughes and Stone, might be a more pragmatic exercise than the reading of William James on Pragmatism. Such a study would at least help to dispel the notion that no judge in terms of consequences is to abandon ideals and moral norms. So to judge in the maintenance of federalism is to bring the ideals of the constitutional order to bear on the jarring lives of men and states.

73. An excellent bibliographical essay on Indian federalism is available in Leonard, Federalism in India, in Federalism in the Commonwealth: A Bibliographical Commentary 87-145 (W. Livingstone ed. 1963).


75. For an examination of the "multiple forces and influences which shaped the nature of Indian federalism," see A. Ray, Inter-Governmental Relations in India—A Study of Indian Federalism 9-20, 45 (1960). The federal institutions grafted upon the Indian milieu are not the prototype of the constitutional structure of the United States, which is believed to comport with traditionalists' set of criteria. M. Franda, West Bengal and the Federalizing Process in India 179 (1968): "While federalism is not mentioned specifically in the Indian Constitution, it is clear that India's constitution-makers envisaged a series of federal institutions that would be appropriate to their political environment." For an appraisal of the nature of the Indian federalism, see generally B. Ray, Evolution of Federalism in India (1967).
al union. Before 1950, the Indian provinces were units formed on the basis of administrative convenience with negligible autonomy of their own. The Constitution-makers had to create simultaneously, as did the framers of the Government of India Act of 1935, a general government with constituent regional units. While the Constitution of the United States served simply as the constitution of the national government, leaving it in main to the states to continue to preserve their own constitutions by a convention (or in the case of new admissions—to draw up their own constitutions by a convention) or to amend them, the Indian Constitution (like that of Canada) serves both as the composite constitution of the federation (the Union of India) and of each of the constituent states. The Indian Constitution defines the powers of both the state and federal legislatures over the whole field of actual and potential law-making. The American Constitution, on the other hand, defines the relationship between the Congress and the various state legislatures and in the absence of any specific enumeration of state powers, any power not specifically set out in the federal Constitution is reserved to the states.

Similarly, though India has a federal constitution, she has an almost entirely unitary system of courts. An integrated single judiciary (as in Canada and in Australia), administering both federal and state laws, avoids the jurisdictional problems arising out of the concurrent systems of federal and state courts. Thus, there is no dichotomy of federal and state questions as in the United States. Also, the single hierarchy of the Indian judicial system would seem to grant more powers to the Supreme Court

79. U.S. Const. amend. X.
81. See Kelman, Federal Habeas Corpus as a Source of New Constitutional Requirements for State Criminal Procedure, 28 Ohio St. L.J. 46 (1967):

It is a unique characteristic of American federalism that within each territorial jurisdiction there exists a dual system of courts, each having a part in enforcing the laws of the other authority. Federal courts apply state law in the exercise of their diversity and pendent jurisdictions, and state courts apply federal law, including the United States Constitution, in a kaleidoscopic variety
over inferior courts than in the United States, although, in practice, the Supreme Court of the United States has exercised sweeping powers over state courts. There is a provision in the Indian Constitution empowering Parliament to create additional courts for the better administration of federal laws, but no such court has yet been established. Moreover, instituting any separate system of federal courts for the administration of federal laws as a regular feature of the judicial administration seems quite unlikely.

India's unitary judicial system evolved out of the operational legal establishment of British-ruled India, and no change was suggested when a federal scheme was first planned by the framers of the Government of India Act of 1935. The experience of the unified system was too deeply-rooted to be disturbed. Not only is the judicial organization under the Indian Constitution unified, but the control over the judiciary is also unified or centralized, for although "administration of justice" is a state subject, in view of the duality of functions, the judges of the state high of cases. Not only do local courts apply national law and vice versa, but as a general matter litigation begins and ends in the same system of courts. When a question of state law arises in a federal court action, its determination, with some exceptions, is in the hands of that tribunal and there is no opportunity for review by a state court, even though it is conceded that the state appellate courts speak with ultimate authority on matters of state law. Similarly, when an issue of federal law arises in state court litigation, its final resolution more often than not is left to the local courts.

Id. At the apex of the Indian judicature stands the Supreme Court which is the only federal court in the Indian judicial system. The Court has a fully comprehensive jurisdiction and its decisions are binding on other Indian courts; however, the Supreme Court has more than once declared that it is not bound by the rule of stare decisis in constitutional cases. See generally Saxena, The Doctrine of Precedent in India: A Study of Some of Its Aspects, 3 JAIPUR, L.J. 188 (1963), in ESSAYS IN INDIAN JURISPRUDENCE 110 (G. Sharma ed. 1964). High courts stand at the head of the judicial administrations in the states. The structure of subordinate courts, subject to minor local variations, is more or less uniform throughout the country. A state is divided into sessions divisions, in each of which there is a sessions judge who tries the more serious crimes. There are also magistrates under the control of the district magistrate, who try the less serious offenses. Under the Constitution there is no dual system of administration of justice; the courts administer both federal and state laws with the Supreme Court as the final appellate court. INDIA CONST. arts. 132-36 (1950). 

82. INDIA CONST. art. 247 (1950).

83. GOVERNMENT OF INDIA, THE ADMINISTRATIVE REFORMS COMMISSION, REPORT ON CENTRE-STATE RELATIONSHIPS (1969), did not favor even as a temporary measure the "establishing [of] alternative machinery [of federal courts] for ensuring compliance with the Central Government's orders by the State Government or for the running of its writ without resorting to or making use of the State Government's machinery. . . ." Id. at 38. The reason for this reluctance lay not only in the enormous increase in expenditure entailed in such a course of action, but also in the risk that such courts would act as a constant irritant between the central and state authorities.

84. INDIA CONST. state list, entry 3 (1950).
courts are to be appointed and removed by the central government in the same manner as justices of the Supreme Court. Similarly, as the state legal apparatus is used for administering union laws, article 256 of the Indian Constitution confers on the union the right to issue directions to implement those laws.

Furthermore, the Indian Constitution lacks an equivalent of the American ninth and tenth amendments, reserving to the states unspecified "powers," not delegated to the federal government or prohibited to the states or the people. As contrasted to the United States, whose constitutional scheme vests a broad discretion in the states to enact and enforce laws for their governance, provided they do not violate the principle of "fundamental fairness" envisioned by the prophylactic due process clause of the fourteenth amendment, general residuum authority under the Indian Constitution is vested in the union government.

B. The American “Due Process” Clause Versus the Indian “Procedure Established by Law” Provision

The nature of Indian federalism partly explains the relative absence of judicial activism—so characteristic of the Supreme Court of the United States—on problems relating to the criminal process. Especially significant is the absence of the handy legal formula of a due process clause in the Indian Constitution; for this concept, which has been employed by the Supreme Court

85. INDIA CONST. art. 217 (1950).
86. See notes 204-230, infra, and the accompanying discussion.
87. U.S. CONST. amend. X. Under the Indian Constitution, no individual can claim a fundamental right against the state outside the chapter on fundamental rights. This precludes the chance of the Indian courts from inquiring about any fundamental right that is not enumerated in the Constitution. This again is a restriction on the scope of judicial review in India as against that in the United States where, under the guise of a theory of natural rights, the judges may enlarge the scope of interpretation to whatever extent they choose. See generally E. McWHINNEY, JUDICIAL REVIEW 126-55 (4th ed. 1969), originally entitled JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD.
88. INDIA CONST. art. 248 (1950). In giving reserved powers to the central government, the Indian Constitution follows the Canadian model.
89. The Indian Constitution contains express provisions for judicial review of legislation (articles 32 and 226) as to its conformity with the Constitution, whereas in the United States the Supreme Court has assumed extensive power of reviewing legislative acts under the cover of the "due process" clause. U.S. CONST. amend. V: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . ." (emphasis supplied). Originally, the Bill of Rights was applicable only in the federal courts. Mr. Chief Justice Marshall stated in Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833): "These [eight] Amendments contain no expression indicating an intention
of the United States as a constitutional reservoir of values,\textsuperscript{99} has become an instrument of judicial activism, particularly in the federalizing of the American criminal process.

Due process has been defined in terms of "general rules which govern society,"\textsuperscript{91} and are "derived from considerations that are fused in the whole nature of . . . [American] judicial process\textsuperscript{92} to insure "fair play."\textsuperscript{93} The crux of these attempts to define "due process," tailored to the individual type of proceeding to which it is applied, seems to be an attempt to find a system designed to prevent arbitrary encroachments, both substantive and procedural, on fundamental rights.\textsuperscript{94} It is not only a limitation on the federal government through the fifth amendment, but also on various state governments through the fourteenth amendment.

Whether specific state action must meet the sometimes amorphous requirements of due process depends on the particular theory used to test the activity in question. The absorption theory incorporates the Bill of Rights—all of it, nothing more and nothing less—into the fourteenth amendment.\textsuperscript{95} It is a theory much


\textsuperscript{91} Owens v. Battenfield, 33 F.2d 753, 756 (8th Cir.), cert. denied, 280 U.S. 605 (1929).

\textsuperscript{92} Rochin v. California, 342 U.S. 165, 170 (1952).


\textsuperscript{95} Duncan v. Louisiana, 391 U.S. 145, 163 (1968) (Black, J., concurring); Adamson v. California, 332 U.S. 46, 71-72, 89 (1947) (Black & Douglas, JJ., dissenting). Late Mr. Justice Black's views were systematically developed in his Carpentier Lectures at the
"LAW AND ORDER"

criticized. Of those now on the Court, only Mr. Justice Douglas joined the late Mr. Justice Black in this uncompromising view of incorporation. However, Mr. Justice Black had been content that, in practical effect, his position had prevailed through the Court's application of what it calls "selective incorporation." This doctrine, of recent origin, purportedly adheres to the Palko v. Connecticut formulation; while not recognizing that an entire Bill of Rights' guarantee is essential, the Twining v. New Jersey and Columbia Law School. H. BLACK, A CONSTITUTIONAL FAITH (1968). There is considerable irony in the history of the Black-Douglas "incorporation" doctrine. The doctrine originated in reaction against the Supreme Court's use of substantive due process concepts, under both the fifth and fourteenth amendments, to invalidate economic and social legislation of both the states and Congress (see Ribnik v. McBridge, 277 U.S. 350 (1928); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Lochner v. New York, 198 U.S. 45 (1905)); thus its contemporary significance as a liberalizing element in the judicial system is an astounding tour de force in the field of procedural due process.

66. While the late Mr. Justice Black had attempted to demonstrate that it was the intention of the drafters of the fourteenth amendment to make the Bill of Rights apply to the states, to cope with the imprecision of constitutional language, he at times resorted to historical fictions or to verbal renderings which have appeared strained or overparticularized to critics. See T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 6, 12 (1969); Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5 (1949); Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119; Mendelson, Mr. Justice Black's Fourteenth Amendment, 53 MINN. L. REV. 711 (1969); Mykkeltvedt, Justice Black and the Intentions of the Framers of the Fourteenth Amendment's First Section: The Bill of Rights and the States, 20 MERCER L. REV. 432 (1969); Mykkeltvedt, The Judicial Development of the Fourteenth Amendment's Due Process Clause—Prelude to the Selective Incorporation of the Bill of Rights, 22 MERCER L. REV. 533 (1971). But see Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. CHI. L. REV. 1 (1954); and Fairman's rebuttal, A Reply to Professor Crosskey, id. at 144. This Fairman-Crosskey debate is ably analyzed and the latter's defense of Justice Black's dissent is supported with additional evidence in Avins, Incorporation of the Bill of Rights: The Crosskey-Fairman Debate Revisited, 6 HARV. J. LEGIS. 1 (1968). See also C. FAIRMAN & S. MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY (1970), which traces the development of the incorporation theory by following it through two cases, Adamson v. California, 332 U.S. 46 (1949) and Duncan v. Louisiana, 391 U.S. 145 (1968), and the Stanford Law Review article written in 1949, and cited supra; C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

97. The process is analyzed in Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 YALE L.J. 74 (1963), written just before the Court made its major breakthrough under the new doctrine in Malloy v. Hogan, 378 U.S. 1 (1964); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965).


99. 211 U.S. 78 (1908). The Court concluded that the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by the fourteenth amendment against abridgment by the states. The Court reasoned that in order for a guarantee to be essential and to be included within the due process

383
Palko standards\(^{100}\) enabled the Court to utilize a technique which allowed it to particularize state infringements upon a specific right.\(^ {101}\)

Commencing from a "natural-law-due process" base, the fractionalization of specific Bill of Rights' protections was made subject to the individual prejudices and predilections of different justices and their evolving concepts of what rights are "fundamental" in different periods of history.\(^ {102}\) The Bill of Rights does provide a concrete positive basis for the rights protected under the Constitution, but it should not obscure the fact that a number of the formulations set forth in the first eight amendments to the Constitution are generally indeterminate and thus encourage great latitude for judicial subjectivity in their construction. This subjective method of interpreting due process, elusive in itself, has not only prevented total-incorporation\(^ {103}\) but has resulted in

---

\(^{100}\) "standards"

\(^{101}\) "technique which allowed it to particularize state infringements upon a specific right"

\(^{102}\) "natural-law-due process"

\(^{103}\) "fractionalization of specific Bill of Rights' protections was made subject to the individual prejudices and predilections of different justices and their evolving concepts of what rights are "fundamental" in different periods of history.

---

\(^{100}\) The Twining doctrine that none of the Bill of Rights provisions were incorporated into the fourteenth amendment was modified by dicta in Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), overruled, Benton v. Maryland, 395 U.S. 784, 794 (1969). In delineating the rights which should be incorporated into the fourteenth amendment, the Court differentiated between rights which are fundamental to individual liberty when weighed against the mandates of the Constitution, and those which are not. Under the Palko doctrine, by a selective process of absorption, certain privileges and immunities from the earlier articles of the federal Bill of Rights have been brought within the fourteenth amendment because of the belief that neither liberty nor justice would exist if they were sacrificed. Id. Any right given under the Bill of Rights cannot and should not be mandatory upon the states unless they are "of the very essence of a scheme of ordered liberty." Id. at 325. The Court went on to say that to "abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id.

\(^{101}\) The Palko doctrine, by a selective process of absorption, certain privileges and immunities from the earlier articles of the federal Bill of Rights have been brought within the fourteenth amendment because of the belief that neither liberty nor justice would exist if they were sacrificed. Id. Any right given under the Bill of Rights cannot and should not be mandatory upon the states unless they are "of the very essence of a scheme of ordered liberty." Id. at 325. The Court went on to say that to "abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id.

\(^{102}\) "Twining doctrine that none of the Bill of Rights provisions were incorporated into the fourteenth amendment was modified by dicta in Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), overruled, Benton v. Maryland, 395 U.S. 784, 794 (1969). In delineating the rights which should be incorporated into the fourteenth amendment, the Court differentiated between rights which are fundamental to individual liberty when weighed against the mandates of the Constitution, and those which are not. Under the Palko doctrine, by a selective process of absorption, certain privileges and immunities from the earlier articles of the federal Bill of Rights have been brought within the fourteenth amendment because of the belief that neither liberty nor justice would exist if they were sacrificed. Id. Any right given under the Bill of Rights cannot and should not be mandatory upon the states unless they are "of the very essence of a scheme of ordered liberty." Id. at 325. The Court went on to say that to "abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id.

\(^{103}\) "The Twining doctrine that none of the Bill of Rights provisions were incorporated into the fourteenth amendment was modified by dicta in Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), overruled, Benton v. Maryland, 395 U.S. 784, 794 (1969). In delineating the rights which should be incorporated into the fourteenth amendment, the Court differentiated between rights which are fundamental to individual liberty when weighed against the mandates of the Constitution, and those which are not. Under the Palko doctrine, by a selective process of absorption, certain privileges and immunities from the earlier articles of the federal Bill of Rights have been brought within the fourteenth amendment because of the belief that neither liberty nor justice would exist if they were sacrificed. Id. Any right given under the Bill of Rights cannot and should not be mandatory upon the states unless they are "of the very essence of a scheme of ordered liberty." Id. at 325. The Court went on to say that to "abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id.

---

\(^{100}\) If the choice must be between the selective process of the Palko decision applying some of the Bill of Rights to the States, or the Twining rule applying none of them, I would choose the Palko selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all people of the nation the complete protection of the Bill of Rights. Id. at 89 (Black, J., dissenting).

\(^{101}\) "It is becoming increasingly apparent . . . that the judicial concept of due process, like beauty, 'is in the eyes of the beholder.'" United States ex rel. Butler v. Maroney, 319 F.2d 622, 629 (3d Cir. 1963) (dissenting opinion).

\(^{102}\) Duncan v. Louisiana, 391 U.S. 145, 174 (1968)
the fractionalization of specific rights. Within the Supreme Court today, there exists continuing dissent on selective incorporation. The opponents do not want any form of absorption or incorporation, believing that the fourteenth amendment does not incorporate any of the Bill of Rights. Increasingly liberal standards have emerged from this interplay of thought.

Another theory, even more alert to governmental transgressions on individual freedoms, stipulates that, in addition to what is specifically guaranteed by the Bill of Rights, individual states cannot infringe rights that fall within the "penumbras, formed by emanations from those guarantees that help give them life and substance."

Perhaps, tempted by this evolutionary potential of the fourteenth amendment's due process clause protecting manifold rights of the accused in the United States, the framers of India's new Constitution of 1950 tried to implant this clause in an article reading: "No person shall be deprived of his life, or liberty, without due process of law..." While most of the members of the Constituent Assembly favored the proposal of the Advisory

(Harlan & Stewart, JJ., dissenting). The most accurate characterization of the Court's actual approach is perhaps that summarized by Justice White—that in developing the procedural due process requirements of the fourteenth amendment, "the Court has looked increasingly to the Bill of Rights for guidance..." Id. at 148. See Richter, One Hundred Years of Controversy: The Fourteenth Amendment and the Bill of Rights, 15 LOYOLA L. REV. 281 (1969).

A formidable opponent of Mr. Justice Black's theory of full incorporation, Mr. Justice Harlan states:

"Selective" incorporation or "absorption" amounts to little more than a diluted form of the full incorporation theory. Whereas it rejects full incorporation because of recognition that not all of the guarantees of the Bill of Rights should be deemed "fundamental," it at the same time ignores the possibility that not all phases of any given guaranty described in the Bill of Rights are necessarily fundamental. Pointer v. Texas, 380 U.S. 400, 409 (1965) (Harlan, J., concurring). In Duncan v. Louisiana, 391 U.S. 145 (1968) (dealing with a right to trial by jury), Justice Harlan further critiqued selective incorporation. See generally The Evolution of a Judicial Philosophy—Selected Opinions and Papers of Justice John M. Harlan (D. Shapiro ed. 1969); Ledbetter, Mr. Justice Harlan: Due Process and Civil Liberties, 20 S.C.L. REV. 389 (1968).

See note 122 infra, and the accompanying discussion.


3 CONSTITUENT ASSEMBLY DEBATES 426 (1947) [hereinafter cited as C.A.D.].
Committee on Fundamental Rights,\textsuperscript{108} certain members vehemently opposed its adoption.\textsuperscript{109} In this context, it is a relatively obscure fact that it was Mr. Justice Frankfurter's advice which was responsible for the absence of a due process clause in the Indian Constitution.\textsuperscript{110} Sir Benegal N. Rau, deputized by the President of the Constituent Assembly, visited the United States, Canada, Eire and England in the early months following independence for personal discussions with prominent constitutionalists and jurists about the trouble-brewing features of India's draft Constitution. Immediately after his conversations with Mr. Justice Frankfurter, who opposed the inclusion of a due process clause on the ground that that rubric had been used in America to defeat social legislation, Sir Rau rushed a letter to the President of the Constituent Assembly urging the elimination of the clause.\textsuperscript{111} Sir Rau’s idealizing espousal of Mr. Justice Frankfurter-

\textsuperscript{108} An excursion into the Constituent Assembly Debates discloses acrimonious debate over the wisdom of the adoption of this clause. 7 C.A.D. 842-59, 999-1001. See generally D. Banerjee, Our Fundamental Rights 210-14 (2d rev. ed. 1968).

\textsuperscript{109} One of the most prominent Constitution-makers, Sir Alladi Krishnaswamy Aiyer remarked in the Constituent Assembly that the Drafting Committee thought that the adoption of the Japanese “procedure established by law” instead of the American clause would afford protection “against judicial vagaries.” 2 C.A.D. 209.

\textsuperscript{110} Surprisingly, even a most searching work by Justice William O. Douglas, Bill of Rights, Due Process, and Federalism in India, 40 Minn. L. Rev. 1, 13-14 (1955), has missed the unusually significant contribution of his learned colleague. Frankfurter’s scepticism over the “due process” clause is neatly summed up by an Israeli scholar: [W]hen teaching at Harvard, Frankfurter used to insist that the due process clause was meant originally as a purely procedural safeguard and that the substantive meanings given to it by successive generations of lawyers lacked justification. His real attitude toward the clause came out during a visit which this writer paid him, a few years before his retirement from the Supreme Court. “Do you have a due process clause in Israel?” asked the Justice. Upon my explaining that, in the absence of a formal constitution, Israel has no constitutional provision of that import, but that Israel’s judges try to read into their country’s statutes and regulations some restraints akin to “due process” which they attribute to the common law or to natural justice, Frankfurter replied with feeling: “Well, when you write a constitution, for God’s sake don’t put into it a due process clause!”


\textsuperscript{111} See B. Rau, India’s Constitution in the Making (2d rev. ed., B. Shiva Rao ed. 1963): Justice Frankfurter considered that the power of judicial review implied in the due process clause, of which there is a qualified version in . . . India’s draft Constitution, is not only undemocratic (because it gives a few judges the power of vetoing legislation enacted by the representatives of the nation) but also throws an unfair burden on the judiciary . . . .

\textit{Id.} at 328-29. K. M. Munshi, one of the chief architects of India’s Constitution, also recounts the influence of Justice Frankfurter toward the elimination of “due process” clause in 1 K. Munshi, Indian Constitutional Documents—Pilgrimage to Freedom 298-99 (1967).
er's constitutional common sense\textsuperscript{112} induced the Drafting Committee to reopen the dialogue. They substituted the Japanese expression “procedure established by law” for the words “due process of law,” calling the former more specific as opposed to the infinite reservoir of values embodied in the latter.\textsuperscript{113}

Notwithstanding this historical background of the Constituent Assembly's deliberate rejection of the due process language, it was contended in \textit{Gopalan v. Madras}\textsuperscript{114} that the Indian Constitution gives the same protection to every person in India as the United States Constitution gives to persons in America with the exception being that, while in the United States “due process of law” was construed by the Supreme Court to cover both substantive and procedural law, only the protection of procedural law is guaranteed in India. In other words, the expression “procedure established by law,” appearing in article 21,\textsuperscript{115} was but a paraphrase of the procedural “due process of law” in the Constitution of the United States. The Indian Supreme Court (majority) ruled that the term “law” was used here in the sense of statute law. This was not equivalent to “law” in the abstract or general sense, embodying principles of natural justice recognized by

\begin{itemize}
  \item \textsuperscript{112} There can be no better evidence to corroborate this change than the comment made by the self-effacing Frankfurter himself in his \textit{Of Law and Life & Other Things That Matter} 128 (1965): “There is no such provision [due process of law] in the Indian Constitution, which was the product of careful study by that very distinguished jurist of India, Sir Benegal Rau, who . . . [studied] how our [American] scheme of things works, and then recommended against inclusion of such a restriction upon the states of India.” A similar reference occurs in an earlier writing of Frankfurter:

    Much as the constitution makers of other countries have drawn upon our experience, it is precisely because they have drawn upon it that they have, one and all, abstained from including a “due process” clause. They have rejected it in conspicuous instances after thorough consideration of our judicial history of “due process.” . . . It is particularly noteworthy that such was the course of events in framing the constitution of India. Sir B. N. Rau, one of the most penetrating legal minds of our time, had a major share in its drafting, and for the purpose he made a deep study of the workings of the Due Process Clause during an extensive stay here.


  \item \textsuperscript{113} 7 C.A.D. 844. The Drafting Committee also qualified the word “liberty” by adding “personal,” presumably to make it clear that the fundamental rights of freedom of movement in article 19(1) (d) and of personal liberty in article 21 should be separately treated.

  \item \textsuperscript{114} All India Rptr. [1950] S.C. 27.

  \item \textsuperscript{115} \textit{India Const.} art. 21 (1950): “No person shall be deprived of his life or personal liberty except according to procedure established by law.”
\end{itemize}
civilized systems of jurisprudence through which the Court was to test procedural requirements. It guaranteed only that whatever procedure was prescribed by a legislature must be properly observed. So long as procedural rights—the manner and form of enforcing the law—are kept within the framework of permissible legislation, they cannot be declared invalid on the grounds of unreasonableness.

Mr. Justice Fazl-i-Ali, dissenting, held that the principle "that no person can be condemned without a hearing by an impartial tribunal which is well-recognized in all modern civilized systems of law and which Halsbury puts on a par with well-recognized fundamental right" is implicit in the language of article 21. "[P]rocedure established by law' must include this principle, whatever else it may or may not include." The learned Justice explained that "on account of the very elastic meaning given to [the American expression due process of law], the Indian Constituent Assembly preferred to use the words 'according to procedure established by law' which occur in the Japanese Constitution framed in 1946." The history and background of Japan's new Constitution convinced the learned Justice that the phrase "procedure established by law' was there meant to guarantee "what is expressed by certain American writers by the somewhat quaint but useful expression 'procedural due process.'" "Procedural due process," then, he argued should be read into article 21 of the Indian Constitution. Justice Fazl-i-Ali further recognized that the line between procedural and substantive due process was at best tenuous.

The then Justice Patanjali Sastri, while agreeing with the majority that the principles of natural justice were too elusive to be susceptible of precise judicial formulation and that the use of the word "established" in article 21—implying some degree of firmness, permanence and general acceptance—would indicate that the framers of the Indian Constitution did not intend to leave the right so vague, did not rule that "procedure estab-

117. All India Rptr. [1950] S.C. at 60.
118. Id.
119. Id. at 57.
120. Id.
lished by law" would mean any procedure whatsoever laid down by state-made law. In an effort to strike a rapprochement between the two extreme positions, the learned Justice interpreted the article as guaranteeing "the ordinary and well-established criminal procedure," that is to say, those settled usages and normal modes of proceeding sanctioned by the Criminal Procedure Code . . . in the country." This construction reads into the words "procedure established by law" the words "existing procedure under the Criminal Procedure Code." Since the legislature has the power to amend or abrogate the Code, however, the mesne interpretation appears untenable. To the objections that his view of article 21 provided only ephemeral protection, Justice Patanjali Sastri replied that although an ad hoc procedure could not be devised by a special law, the fundamental principles underlying the Code could be abrogated altogether for the trial of all offenses. Such a conclusion, it is submitted, is neither supported by the text of article 21 nor by any principle of construction.

Thus, while over the years the Supreme Court of the United States has been developing a criminal jurisprudence of sophisticated and exacting requirements, from the fourteenth amendment's broad guarantee of due process, the Indian expression,
"procedure established by law," has not offered a parallel mechanism\textsuperscript{122} for the steady growth of such penumbral values—not suggested by the language of the Constitution—necessary to reflect changing needs, concerns and aspirations. The Indian Constitution, in setting forth not merely a set of rights comparable to the first eight amendments to the Constitution of the United States but in enumerating with detail much that the United States document left unwritten, has encouraged stricter construction. During the first twenty-one years of the working of the Constitution, the Indian courts while readily interfering in proper cases and granting relief, have, on the whole, not been very creative in balancing the interest of the individual against that of the state.

It should be pointed out that Gopalan's interpretation, that all article 21 requires is that there should be a law justifying governmental deprivation of the individual's life or liberty, is unduly procrustean, giving rise to such "jurid" misgivings as that this article permits boiling or torturing a person to death and that trial by battle or ordeal can be constitutionally prescribed by the legislatures in India.\textsuperscript{4} If that were so, then, as Professor P. K. Tripathi has perceptively argued,\textsuperscript{125} the article should have read: "No person shall be deprived of his life or personal liberty except according to law." Instead, the article reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law." The difference is crucial. Article 21, understood in its natural and grammatical sense, requires two conditions: first, there must be a law prescribing a procedure; and, second, the procedure so prescribed must be followed. True, the requirement of a procedure is not co-

\textsuperscript{122} The due process clause in the fourteenth amendment has been given a broad definition at least in part because there is no long list of specific prohibitions upon the states as in the first eight amendments vis-à-vis the federal government. Qualifications such as "reasonableness" regarding constitutional provisions, have in some instances provided judges with considerable room to exercise their discretion. In the Indian Constitution, the attempt has been to weave into the provisions relating to "Right to Freedom," the whole of American law regarding "police powers" and "due process" with suitable modification for Indian conditions, instead of leaving judges free to make decisions according to their own personal notions of what is just and reasonable at the moment. See G. Joshi, Aspects of Indian Constitutional Law 95-98 (1965). See also Grossman, Freedom of Expression in India, 4 U.C.L.A. Rev. 64, 65 (1956).

\textsuperscript{124} See, e.g., A. Gledhill, Fundamental Rights in India 83 (1956).

\textsuperscript{125} Tripathi, Mr. Justice Gajendragadkar and Constitutional Interpretation, 8 J. Ind. L. Inst. 479, 502-03 (1969), in Spotlights on Constitutional Interpretation 1, 22-23 (1971).
extensive with any elaborate or even *just* procedure. However, it is by no means semantic suicide to argue that what is required must be procedure and not something like the exercise of authority by a victorious military commander over a vanquished territory.

The *Gopalan* Court in scrutinizing the phrase "procedure established by law" did not fully appreciate that the substitution of this more specific phrase for the American analogue, "due process of law," was made with the intention of delimiting the judiciary's subjective standard of review rather than with the purpose of permitting the legislature to disregard the meaning of the word "procedure" as defined through the centuries of development of the Indian common law. The history of personal liberty is "largely . . . the history of . . . procedural safeguards," and the framers of the Indian Constitution could have hardly desired to dispense, in article 21, with fundamental procedural protections which are "of the indispensable essence of liberty." The constitutional requirement as to the minimum safeguards the procedure must embody, is, in fact, to be found in article 22, both for normal situations of social life and for those extraordinary situations where normal procedure could be regarded as inadequate to combat lawlessness. The words "right to consult and be defended by a legal practitioner of his choice," appearing in article 22 (1), are broad enough to comprehend necessary protections—in an adversary system—that an accused may need during the course of procedures for punitive or preventive detention. No democratic society can endure if oppressive measures are justified by pleading the worthiness of the ends sought. To

128. *India Const.* art. 22 (1950):

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.
construe "procedure" to include revolting, brutalized atrocities is to subvert the right to life and personal liberty; so construed, article 21 would confer on the state a fundamental right to take away life or liberty. Further, it is common sense that one provision of the Constitution would not authorize the circumvention of the others. True, it is neither likely that Parliament would enact such monstrous laws nor, in the ultimate analysis, would an intelligent electorate tolerate such perverse tyranny. Nonetheless, the ideal underlying fundamental rights is that there is in India a government with limited powers. Thus, the guarantees of articles 14 (equal protection), 19 (freedom of speech, etc.), 20 (protection against ex post facto laws, double jeopardy, self-incrimination) and 22 (protection against arrest and detention) must be considered to be subsumed within the meaning of procedure in article 21. If the legislature can conceive of a "trial by battle or ordeal" in which the accused is provided with counsel, the privilege against self-incrimination and the right of confrontation, etc., let them construct such a system. But it is submitted that the term "procedure" has assumed connotations in India which extend beyond the minimum guarantees of the fund-

(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);
amental rights and which would vitiate the legislative creation
of such a farcical facade.\textsuperscript{129} Therefore, procedure, in article 21
cannot mean a procedure which runs counter to the Indian ju-
risprudential tradition. Otherwise, since the procedural safe-
guards contained in article 22 will be available only in cases
of preventive and punitive detention, the right to life, the right
to privacy and the right to travel will not be protected by any
procedural safeguard.\textsuperscript{130}

(b) the maximum period for which any person may in any class or
classes of cases be detained under any law providing for preventive
detention; and
(c) the procedure to be followed by an Advisory Board in an inquiry
under sub-clause (a) of clause (d).

\textsuperscript{129} But see A. Gledhill, supra note 124.

\textsuperscript{130} However, since the Gopalan case in 1960, the Court’s attitude has gradually
changed relating both to the scope and content of the expression “personal liberty” and to
the view that “personal liberty” could be taken away or abridged by any law passed
by a legislature, however arbitrary or unreasonable. The majority of the Court in
Kharak Singh v. State, All India Rptr. [1963] S.C. 1295, construed the expression “per-
sonal liberty” as a “compendious term to include within itself all the varieties of rights
which go to make up the . . . several clauses of Art. 19 (1).” Id. at 1302. The Court
was dealing with a case of intrusion into the privacy of a person’s home by the government.

The Court displayed remarkable creativity by reading into “personal liberty” the
right to privacy, which the Constituent Assembly had expressly refused to protect by
rejecting an amendment to the effect that “the right of the people to be secure in their
persons, homes, papers and effects against unreasonable searches and seizures shall not be
violated . . . .” 7 C.A.D. 842. The Court noted that, unlike the American Constitution, the
Indian Constitution does not guarantee the right to privacy. All India Rptr. [1963] S.C. at
1302. And yet, relying on Munn v. Illinois, 94 U.S. 113, 142 (1876), the Court held that
an unauthorized intrusion into a person’s home and the disturbance caused to
him thereby, is as it were the violation of a common law right of a man—an
ultimate essential of ordered liberty, if not of the very concept of civilization.
An English common law maxim asserts that ‘every man’s house is his castle’
and in Semayne’s case . . . where this was applied, it was stated that ‘the house
of everyone is to him as his castle and fortress as well as for his defence against
injury and violence as for his repose.’

All India Rptr. [1963] S.C. at 1302. See also Satwant Singh Sawhney v. Assistant

But, however wide the connotation given to the words “personal liberty,” how would
it avail the citizen if it was to be open to the legislature by any arbitrary or
unreasonable law to deprive him of it? The subjection of personal liberty to the tyranny
of the legislature brought about by the early decision of the Supreme Court still remains.
However, later decisions have tended to remedy this erosion of the individual’s rights by
taking the view that the word “law” in article 21 must mean a valid law or a law
which in all manner conforms to the provisions of the Constitution. A law would not
be a valid law if it imposes restrictions on personal liberty which are not reasonable
or in the public interest. All lovers of personal liberty hope that the Supreme Court
will at no distant date authoritatively adopt this view. As the law would seem to
stand at present, the precious rights of life and personal liberty, though safeguarded
against the vagaries of the executive branch, are entirely at the mercy of the legislature.
C. The Sacrosanctity of the Jury Trial

Trial by jury, one of the most sacred concepts of British\textsuperscript{131} and American\textsuperscript{132} law, has been abandoned in India as a failure. Although, in recent years, a number of scholarly studies\textsuperscript{133} have seriously questioned the efficacy of jury trials, the jury is a part of the \textit{credo} of the American legal system. The remarkable acclimatization and flourishing of the jury system in the United States\textsuperscript{134} must be viewed against the historical background of its importation.\textsuperscript{135}

---


\textsuperscript{132} The United States is now the established leader in objective studies of the jury system. All earlier investigations have now been dwarfed by the researches of the Chicago Jury Project. For fifteen years a team of lawyers, psychologists and sociologists at the University of Chicago has been working with judges and court officials throughout the United States on a number of different studies. Their series of projects will, when finally reported in full, provide a body of knowledge quite unparalleled in scale and depth. For a complete bibliography of the publications setting out Jury Project findings as of March, 1966, see H. Kalven & H. Zeisel, \textit{The American Jury} 541-45 (1966). \textit{See also} Erlanger, \textit{Jury Research in America: Its Past and Future}, 4 \textit{Law & Soc. Rev.} 345 (1970); Zeisel, \textit{Dr. Spock and the Case of the Vanishing Women Jurors}, 37 U. Chi. L. Rev. 1 (1969).

\textsuperscript{133} J. Frank, \textit{Courts on Trial} chs. 8-9 (1963); G. Williams, \textit{The Proof of Guilt} ch. 10 (3d ed. 1963). For a summary of the debate over the strengths and weaknesses of the jury system, see H. Kalven & H. Zeisel, supra note 132 at 7-11. The authors, cognizant of the debate over the jury system, disclaim making any value judgment. Rather, they attempt to provide some facts and conclusions in a limited area to enable debaters to move from the level of emotion, speculation, and \textit{a priori} guesses to a level of fact. "[The Book's] single purpose is to attempt to answer the question when do trial by judge and trial by jury lead to divergent results." \textit{Id.} at 9-10. \textit{See also} Broeder, \textit{The Functions of the Jury}, 21 U. Chi. L. Rev. 385, 390 (1954); R. Simon, \textit{The Jury and the Defense of Insanity} 4-8 (1967).

\textsuperscript{134} "Juries are ... used much more frequently in America than in England. ... [It has recently been estimated that some 80 percent of all criminal jury trials in the world take place in the United States.]" W. Cornish, \textit{supra} note 131, at 16.

\textsuperscript{135} \textit{See generally} A. Howard, \textit{The Road From Runnymede: Magna Carta and Constitutionalism in America} (1968); White, \textit{Origin and Development of Trial by Jury}, 29 Tenn. L. Rev. 8 (1961). In support of its ruling in Duncan v. Louisiana, 391 U.S. 145 (1968), that trial by jury is protected by the fourteenth amendment against state deprivation in any case that would come within the sixth amendment's guarantee if tried in a federal court, the Court remarked that the impressive credentials of jury trial in criminal cases have been traced "by many" to the Magna Carta, but added, "Historians no longer accept this pedigree." \textit{Id.} at 151 n.16. The Magna Carta as the talismanic symbol of the liberty of the individual has always been considered to be more than what it really was. Yet the Court would have been more accurate if it had added that although the famous "judgment of peers" clause of the document of 1215, chapter thirty-nine, did not originally mean trial by jury, its meaning has evolved to require precisely that. \textit{See also} Sources of Our Liberties 270 (R. Perry ed. 1959).
To the English colonists who migrated to America the right to trial by jury was the safest and surest bulwark against the tyranny of the sovereign state, for they won independence at a time when the jury system was being generally acclaimed as a fundamental guarantee of individual liberty. Prominent in their list of grievances against King George III, as set forth in the Declaration of Independence, was the fact that they were being deprived of this right of trial by jury. The battle of the so-called common man, who had suffered for centuries under the tyranny of despotic kings, to secure the protection of his individual rights to life, liberty and property had been dearly fought. It was understandable, then, that he should cling to these precious rights after fighting a war to secure them.

When the American Revolutionary War was over, trial by jury in all criminal matters was thus enshrined as a constitutional right: the right is guaranteed in the federal courts by article III of the Constitution and reinforced by the sixth amendment. Not only is trial by jury guaranteed in the constitutions of the federation and the states, but various important changes have been made in the system itself, most of which are designed to limit the powers of the judge and thus to retain the vitality of this cherished right. The scope of the right was originally the same as that found in England in 1789 but has since been periodically expanded by the Supreme Court. It was only in 1968 that the Court declared that the sixth amendment right to a jury trial is fundamental and extended it to the states, presumably with the entire crust of interpretation developed in federal cases. And, in 1970, in Baldwin v. New York, the Court

136. U.S. CONST. art. III, § 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . ." U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

137. American juries differ substantially in their constitution and duties from their English counterparts. F. Busch, LAW AND TACTICS IN JURY TRIALS (1949); Hood, Recent Developments: Trial by Jury, 20 ALA. L. REV. 76 (1967).


expanded the right to a trial by jury to all those accused of "petty" offenses, where the penalty may be more than six months imprisonment. But the scope of the right in the state courts is far from standardized, although its existence is universally recognized among them. Notwithstanding minor modifications and limitations by the states, Americans have continued to regard jury trials in criminal cases as the great bulwark of the liberty of the citizen.

The exportation of the right to jury trial was not a significant factor in the development of the legal systems in other British colonies like India. Traces of the jury trial in India are available as early as 1672 or even before, as one scholar has

141. The states limit the right in a number of ways; e.g., five-man juries, no requirement of unanimity. See generally ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 8 (Tent. Draft 1968).

142. In the ancient judicial system of India trial by jury existed but not in the same form as it is understood now. In the court scene of Mrichchhakaatika (an Indian play), which according to Jayaswal is the product of the third century, jury is mentioned. K. JAYASWAL, HINDU POLITY 54 (1953). Certain people could claim to be tried by their peers or at least by a jury. See generally 3 P. KANE, HISTORY OF DHARMASASTRA 284 (1916). These members of the community were merely the examiners of the cause of conflict and assisted the presiding judge in the administration of justice.

Before the advent of the British, the institution of panchayat, similar in certain respects to that of a jury, was in vogue. It consisted of five members nominated by both the disputing parties, each party nominating two, and the four so nominated appointing a fifth who roughly corresponded to the foreman. The belief was that a decision of five men was as good as the decision of the Almighty—and so was infallible. However, jury and the panchayat differed fundamentally in origin and character. The former developed from the Royal inquest which was a mode of obtaining information required by the king or his government. The panchayat, on the other hand, was a people's institution, serving local needs including the administration of justice and the policing of the village.

143. Surprisingly, no mention is made of trial by jury in India by Seagle in his otherwise excellent seminal survey of Jury: Other Countries, 8 ENCYC. SOC. SCI. 498 (1937).

144. Until 1661, when Bombay became British territory by cession under Charles II's marriage treaty with Portugal, responsibility for the administration of justice to Indians was not contemplated. The charter of Charles II in 1668, leasing Bombay to the East India Company, empowered the Company, inter alia, to make laws and set up law courts in the newly-acquired British possession "consonant to reason, and not repugnant to, but as near as might be agreeable to the laws of England." W. MORLEY, THE ADMINISTRATION OF JUSTICE IN BRITISH INDIA 5-6 (1856); Sharma, Civil Law in India, 1969 WASH. U.L.Q. 1, 3. There is scant information about the administration of criminal justice during this period. But the correspondence between Bombay and Surat, where the factory of the Company was situated and where the Governor resided, contains references to the trial by jury of crimes like theft, murder and mutiny. The Governor's instructions dealing with a case of mutiny by soldiers are interesting: For the tryall of those notorious mutiners that tore the proclamation and opposed the execution of justice on the wench you caused to be shaved and sett on an ass, lett a jury be empannelled whom if they find guilty of mutiny,
suggested,\textsuperscript{145} but it was only with the enactment of the Code of Criminal Procedure that statutory recognition was given to trial by jury.\textsuperscript{146} The right was confined to presidency towns where the high courts exercised original criminal jurisdiction, and it depended entirely on the government of each province to decide in what areas of the province and for what offenses trial by jury should be introduced.

When the Constitution was framed in 1950, the Constitu-
tion-makers did not think it appropriate to confer on the citizen in the Bill of Rights a fundamental right to trial by jury. A Law Commission survey of the legal system revealed that jury trial had not been adopted in much of the country, that its utilization even in areas where it had been adopted was limited to certain classes of offenses, and that some sectors of the country originally providing jury trials had decided to discontinue doing so.\textsuperscript{147} And, in the latter areas, there had been few public complaints when trial by jury was eliminated by state legislatures. The Com-
mision concluded that,

though the system of trial by jury was introduced in some parts of the country over a hundred years ago, the system has never become a recognized feature of the administration of criminal justice. Trial by jury in India to the extent it exists today is but a transplantation of a practice prevailing in England which has failed to grow and take root in this country.\textsuperscript{148}

\begin{footnotes}
\item[145] Let them be sentenced, condemned, and executed according to the 3rd Article of the Hon. Company's laws for the preservation of the peace and suppression of mutiny, sedition and Rebellion.
\item[146] Surat letter of 16 May 1672, reproduced by P. Malabari, \textit{Bombay in the Making} 250 (1910). A more interesting case is that of the trial of a wizard who "was by a jury of 12 men found guilty both of witchcraft and murder. . . . To the last we intended to have hanged him; only it was generally advised that burning would be far the greater terror, as also that a single wizard deserving hanging, whereas he had now murdered 5 men in 6 months and had bin twice banished before for a wizard, soe we burnt him." I05 F.R. Surat 172. \textit{See generally} C. Fawcett, \textit{The First Century of British Justice in India} (1934).
\item[147] V. Kulshreshtha, \textit{Landmarks in Indian Legal History and Constitutional History} 46 (2d rev. ed. 1968), mentions a 1665 jury trial in Madras although most of the standard works on Indian legal history are of the view that jury trial in Madras began sometime in 1678.
\item[148] Code of Criminal Procedure, 1862. For a description of several Regulations before the Code, introducing jury trial in various parts of the country, see T. Banerjee, \textit{Background to Indian Criminal Law} 268-77 (1969).
\item[147] \textit{Law Comm'n of India, Rep't No. 14, Reform of Judicial Administration} 864-73 (1958). There is a mass of opinion and evidence in the \textit{Report on the System of Trial by Jury in Courts of Session in the Mofassal} (Home Department Publication No. CCCLXVI at Calcutta in 1899). Pages 229-55 contain the report of a commission appointed to inquire into jury trial in Bengal.
\item[148] \textit{Law Comm'n of India, supra} note 147, at 866; Gill, \textit{Abolish Jury System}, All Indian Rptr. [1959] Journal Section 140.
\end{footnotes}
The Commission recommended the abandonment of juries on an all-India basis, concluding that because, among other things, bribery of jurors was so widespread the jury system had become a time-consuming and expensive failure. For all intents and purposes, since 1955 Indian cases have been tried exclusively by the judiciary except in the three urban areas of Bombay, Calcutta, and Madras where the jury system remains in partial operation due to unexplained local public support. This use of a virtually jury-free trial system takes on added significance when it is remembered that the legal system in India was, like the American system, strongly influenced by British common law principles.

As a result of the general disuse of the jury system, several problems usually associated with jury trials, especially in the area of the protection of the rights of the defendant, are happily absent in the Indian legal system—problems which transcend some of the unique safeguards which the jury system provides. In the United States, many jurors readily admit in posttrial interviews that they were unable to remember adequately the evidence presented or to comprehend sufficiently the instructions of the court. Particularly damaging to defendants is the failure of many jurors to understand general instructions regarding the prosecutor’s burden of proof. A question arises as to whether the implementation of a nonjury system in the United States would improve the effectiveness of her legal system. Although this change would bury a long-held tradition of a “trial by peers,” it would also eliminate the time and expense involved in voir dire examinations and jury sequestrations as well as in retrials due to

149. Law Comm’n of India, supra note 147, at 873. See also, M. Gleisyer, Juries and Justice 57-58 (1968); Mawer, Juries and Assessors in Criminal Trials in Some Commonwealth Countries, 10 INT’L & COMP. L.Q. 892 (1961).


151. Smith, Orthodoxy v. Reformation in the Jury System—A Resolution, 51 JUDICATURE 344, 345 (1968). The jurors often complain that charges are unnecessarily long, repetitious, and full of technical legal terms and Latinate expressions. Id.

152. Walsh, Testimony of William F. Walsh Before the Sub-Committee on Improvements in the Judicial Machinery of the United States Senate Committee on the Judiciary, 5 AM. CRIM. L.Q. 193 (1967).
hung juries and in cases remanded for jury prejudice. The general attitude of reverence toward the jury system in the United States, if sound, is not based on any universal conception of basic rights or on the belief that a jury is essential to some intrinsic notion of a fair trial but rather because it is rooted deeply in American historical tradition.  

III. A Random Illustration for Comparison:

The Privilege Against Self-Incrimination

In assessing the relevance of the American constitutional-criminal procedure as a guidepost for India’s jurisprudential development, these three fundamental and historically-grounded institutional distinctions between the legal systems of the two nations—the differing structures of federalism, the interpretation of “due process” as it defines the judicial role, and the relative importance of the jury trial—must constantly be kept in mind, if the trap of mindless imitation, which would benefit no one, is to be avoided. These differences, operating as limitations upon the efficacy of the comparative technique, account for the fact that though the constitutions of both the countries provide certain rights the degree and scope of protection accorded by each is not the same.

To take an example: article 20(3) of the Indian Constitution, providing that “[n]o person accused of any offence shall be compelled to be a witness against himself,” obviously copies the language of the fifth amendment to the United States Constitution that “no person shall be compelled in any criminal case to be a witness against himself.” Notwithstanding this semantic semblance, the interpretational divergence in both the countries has been striking. Thus, while courts in the United States have

153. See supra notes 131, 132, 135 and accompanying discussion.

154. The validity of the preceding framework for comparison can be illustrated through several examples of rights of an accused; limitations of space has prevented us from embarking upon such an ambitious undertaking.

accorded the privilege a liberal construction, indicating that its scope is as broad "as the mischief against which it seeks to guard," Indian courts have interpreted the right narrowly.

The technological and general sophistication of organized crime and the wide range of criminal activities in the United States have stirred frequent attacks upon the scope given the right, because it often conflicts with government's legitimate inquiries into unlawful, disruptive and antisocial activity. Perhaps this debate in the United States, concerning the infirmities of the privilege against self-incrimination, induced the Indian Supreme Court in the very first case before it, *M. P. Sharma v. Satish Chandra*, to construe article 20 (3) relatively narrowly:

"[T]here is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognized doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention."

Thus, while in the United States the privilege, notwithstanding the words "criminal case" in the fifth amendment, has been held to extend to incriminating statements in both criminal and civil proceedings (including grand jury, legislative, and administrative investigations), the words "accused of an offence" in

158. See, e.g., L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? (1959) (general attack upon the privilege).
159. All India Rptr. [1954] S.C. 300.
160. Id. at 303. The Indian Supreme Court specifically cites 8 J. Wigmore, EVIDENCE 314, 315 (3d ed. 1940), to show that this privilege "has an undesirable effect on social interest . . . in the detection of crime" and "has become a hiding place of crime and has outlived its usefulness. . . ." Id. at 303.
161. See, e.g., In re Gault, 387 U.S. 1 (1967): "It is . . . clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil, or administrative proceed-
article 20 (3) of the Indian Constitution have been interpreted to mean that the privilege is confined to an accused person in a criminal proceeding. Thus, in *Narayan Lal v. M. P. Mistry*, the petitioners contended that section 240 of the Indian Companies Act of 1913—which empowered the Inspector of Companies to issue *supeona deuces tecum*—offended the constitutional right guaranteed by article 20 (3). The trial court and the appellate court rejected this contention and the Supreme Court affirmed. Relying on several American decisions, it was urged before the Supreme Court that the words “person accused of any offence” in article 20 (3) should be given as wide and liberal construction as in *Boyd v. United States*:

> [A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government... It is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

... . . .

... Illegitimate and unconstitutional practices get their first footing... by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.
Mr. Justice Gajendragadkar's answer to "this eloquent statement of the law"[167] which presented an "attractive"[168] argument was two-fold. First, under the English law, the protection against self-incrimination had not been extended to company and bankruptcy law.[169] Second, since article 20 had been the subject matter of some previous decisions[170] of the Court—showing that article 20 (3) should be read in the context of the two preceding clauses—it had to be interpreted in light of those decisions. In one opinion,[171] involving the interpretation of article 20 (2) only, the Court discussed the scope of article 20 generally, examining the interrelation of the relevant terms used in the three clauses:

The very wording of article 20 and the words used therein—convicted, commission of the act charged as an offence, be subjected to a penalty, commission of the offence, prosecuted and punished, accused of any offence—would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.[172]

Those decisions also showed that "the character of the . . . proceedings as well as the character of the forum before which the proceedings are initiated or conducted are decisive in the matter."[173] Applying these principles, the Court held that the investigation by an inspector appointed under the Indian Companies Act was no more than the work of a "fact-finding commission," the object being to examine the management of the affairs of the company to find out whether or not any irregularities have been committed. Admittedly, as a result of the inspector's report, the government might sanction a criminal prosecution, but that possible result did not change the complexion of the

168. Id.
172. Id. at 738-39.

402
inspector’s investigation. Throughout that investigation “there [was] no accused person, no accuser and no accusation against anyone that he had committed an offence.”

For the same reasons it has been held that the protection did not apply to departmental inquiries against a railway servant, as there was no accusation of any offense within the meaning of article 20(3). Nor did the privilege attach to proceedings instituted by customs authorities other than those instituted before a magistrate. Thus, it has been held that a person questioned under section 171-A of the Sea Customs Act of 1878, did not become an accused person, and the fact that as a result of his statement he became an accused person was insufficient to attract the protection of article 20(3). The proceeding in which the constitutional immunity may be invoked must be one before a court of law or judicial tribunal where a person has been “accused” or has been charged with committing an offense, punishable under the Indian Penal Code of 1860, or any other special or local statute imposing criminal sanctions. Unlike the situation in the United States, where to quote the then Judge Cardozo, “[i]t is enough to wake the privilege into life that there is a reasonable

174. Id. at 39. This case was followed in K. Joseph v. Narayanan, All India Rptr. [1964] S.C. 1552:

If a person who is not accused of any offence, is compelled to give evidence, and evidence taken from him under compulsion ultimately leads to an accusation against him, that would not be a case which would attract the provisions of Art. 20(8). The main object of Art. 20(8) is to give protection to an accused person not to be compelled to incriminate himself and that is in consonance with the basic principle of criminal law accepted in our country that an accused person is entitled to rely on the presumption of innocence in his favour and cannot be compelled to swear against himself. Therefore, unless it is shown that a person ordered to be publicly examined under S. 45G is, before, or at the time when the order for examining him publicly is passed, an accused person, Art. 20(3) will not apply.

Id. at 1556. See also Peoples Insurance Co. v. Sardul Singh, All India Rptr. [1962] Punj. 101, 108-10, which held that section 185 of the Companies Act did not violate article 20(3), because there was neither an accusation of an offense nor was the respondent compelled to be a witness against himself.

175. Srikant Upadhyay v. India, All India Rptr. [1963] Pat. 38.

176. Laxman Padma v. State, All India Rptr. [1965] Bom. 195. In view of the decisions of the Supreme Court, Shankerlal v. Collector, Central Excise, All India Rptr. [1960] Mad. 225 and Basant Kumar v. Collector, Land Customs, All India Rptr. [1961] Cal. 86, 91 (both cases holding that a person appearing in answer to a notice under section 171-A, Sea Customs Act of 1878, is entitled to the protection of article 20(3)) and Allen Berry and Co. v. Vivian Bose, All India Rptr. [1960] Punj. 86-98 (holding that as section 6, Commission of Inquiry Act of 1952, did not confer an immunity coextensive with that under article 20(3), the protection of that article could be invoked in proceedings before a Commission) are no longer good law.
possibility of prosecution,”¹⁷⁷ in India the privilege does not apply to civil proceedings, even though a criminal prosecution may arise out of such proceedings. And, even in a criminal proceeding the protection of article 20(3) is available only “to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution.”¹⁷⁸ In the United States, on the other hand, the emphasis has been more on the possibly incriminating nature of the information sought, and less on the type of proceeding in which such an inquiry takes place.¹⁷⁹

While in the United States¹⁸⁰ and in England,¹⁸¹ both the accused and the witness in a proceeding are protected from answering incriminating questions, a mere witness has no constitutional protection under article 20(3) of the Indian Constitution.¹⁸² An American judge is not permitted to ask a defendant for any explanation when he is confronted with government evidence of guilt and he may not draw any adverse inference from

¹⁷⁸. M. P. Sharma v. Satish Chandra, All India Rptr. [1954] S.C. 300, 304 (emphasis added). The Court, however, did not explain the words “formal accusation.” Nor are these words defined in either the Constitution or in the Code of Criminal Procedure. The Court merely observed that the protection was available to a person “against whom a First Information Report has been recorded as accused therein.” Id. Obviously, formal accusation does not require the issuance of process against the person as an accused. The crucial question is whether the protection extends to any period earlier than the first information report or to earlier statements, for example, in the proceedings for investigation of that offense for which the person is accused subsequently. Does it make any material difference, because, instead of acting upon a first information report, the police started the investigation and arrested the person upon a reasonable suspicion that he had committed the offense? To take the strict view, there is no accusation unless either a first information report or a complaint or a police report is made charging the person with an offense before an officer or a court entitled to take cognizance of the offense and to proceed upon the information. Further clarification by the Supreme Court is, therefore, needed as to the moment of time when a person may be said to be “accused of an offence” within the meaning of article 20(3), because in M. P. Sharma the Court did not close the doors against the use of a “substantial” accusation test.
¹⁷⁹. See supra notes 161 and 177.
¹⁸⁰. See, e.g., McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).
¹⁸¹. P. TAYLOR, EVIDENCE § 1453 (1887).
¹⁸². Under section 132 of the Indian Evidence Act of 1872, no witness was excused from answering any question on the ground that it would subject him to criminal liability or penalty or forfeiture; but at the same time, the law gave him immunity from any criminal liability for such evidence except for perjury. The privilege conferred by article 20(3) did not touch the existing law relating to a witness. M. P. Sharma v. Satish Chandra, All India Rptr. [1954] S.C. 300.
his silence. Both the Indian and American self-incrimination provisions are limited to protection from testimonial compulsion, but the American privilege is reinforced by the additional protection of the due process clause and the fourth amendment guarantee against unreasonable searches and seizures. In the Indian Constitution there is no guarantee to any fundamental right to privacy analogous to the fourth amendment of the United States Constitution and the Indian Supreme Court has refused to import any prohibition against search and seizure of a person's premises and effects, without his consent, by refusing to adopt a liberal interpretation of article 20 (3).

These diverse developments in the two countries—sketchily drawn here as a common sense illustration—can be better appraised and developed against the backdrop of historically-grounded institutional differences, delineated earlier. Although the embodiment of the privilege against self-incrimination in the fifth amendment of the United States Constitution has been characterized as "one of the great landmarks in man's long struggle to make himself civilized," in India it was only in 1950 for the first time that a limited protection by the Constitution, under article 20 (3), was conferred upon an accused by affording him protection against testimonial compulsion. However, many courts in India (including the Indian Supreme Court) have assumed that article 20 (3) "does not create any new right fundamental or otherwise. Even before the Constitution, no accused person in India could be compelled to be a witness against himself [and] this clause simply repeats what the law was before the Constitution." After an historical survey of Indian traditions regarding self-incrimination, the Supreme Court, in the leading case of M. P. Sharma v. Satish Chandra, concluded:

---

So far as the Indian law is concerned it may be taken that the protection against self-incrimination continues more or less as in the English common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence.191

A demonstration that this observation is inaccurate is beyond the scope of this article; however, it is appropriate to mention here that the privilege does not apply to civil proceedings or to proceedings which may involve the imposition of penalties or forfeitures.192 One reason for the difference in the nature and scope of the privilege against self-incrimination in the United States and India may be found in the differing historical frameworks in which the privilege originated.

The Indian Evidence Act, 1872, and the Code of Criminal Procedure, 1898, were enacted at a time when the primary aim of the government was to maintain law and order. The legislature was merely a branch of the executive government, and hence was, by its very nature, not necessarily concerned with the liberty of the individual. The British rulers of that time, therefore, did not incorporate in the Indian legal system every principle of the English common law concerning individual liberties.

On the other hand, the colonial Americans, who framed the Bill of Rights, looked to the common law for the protection of their liberties (in much the same way as Sir Edward Coke had looked to the Magna Carta).193 Nearly all of the state constitutions followed the memorable language of Virginia's Declaration of Rights. The founding fathers, Mason and Madison in particular, within the historical framework, shaped the right against self-incrim-

191. Id. at 303 (emphasis added).

192. Statutory provisions have been made which compel a person to produce information or evidence in proceedings which may involve imposition of penalties against him. Under the Banking Companies Act, 1949, §§ 45-G, 45-L, as amended by Act 62, 1953, provision has been made for public examination of persons against whom an inquiry is made. Likewise, the Indian Companies Act, 1913, § 140; the Companies Act, 1956, § 240; the Foreign Exchange Regulations, 1947, § 19 (2); the Sea Customs Act, 1878, § 54A; the Medicinal and Toilet Preparations Act, 1955, § 10; the Indian Official Secrets Act, 1923, § 8; the Petroleum Act, 1934, § 27; the Public Gambling Act, 1867, § 7; the Representation of the People Act, 1951, § 95 (1)—to mention only a few statutes—compel persons to furnish information which may be incriminatory or expose them to penalties.

193. See generally Stoebuck, Reception of English Common Law in the American Colonies, 10 Wm. & MARY L. REV. 395 (1968).
invention and embodied it in the fifth amendment to the Constitution of the United States— in language that appears either verbatim, or with immaterial substitutions of synonymous words, in almost all the state constitutions. The variety of phraseology in various state constitutions did not affect the basic core of the principle against self-incrimination; nevertheless (and here the relevance of federal structure differentiation will become apparent) after the adoption of the fourteenth amendment in 1868, the United States Supreme Court had to face the problems relative to the applicability of the fifth amendment to the state proceedings. Since all states provided a privilege against self-incrimination, the real issue now was not whether there was a privilege available in state proceedings, but rather, what constituted compulsory self-incrimination.

For example, the right to comment to the jury (an institution virtually missing in India) upon a defendant’s failure to testify was held not to be self-incrimination in New Mexico by the rules of court procedure; the same result was reached by judicial decisions in Connecticut, Iowa and New Jersey; and under state constitutions in California and Ohio. But such comment was held to be prohibited by the fifth amendment in federal proceedings. Therefore, to achieve uniformity, in a long process of judicial dynamism from Twining v. New Jersey to Adamson v. California to Malloy v. Hogan, the Supreme Court, through the due process clause of the fourteenth amendment, had to struggle to bring federal standards to state proceedings. The applicability of the guarantee to both state and federal governments by one constitutional document in India accounts for the absence of such social

194. A number of scholars have attempted to trace the development of the privilege from its English common law origins to its inclusion in the fifth amendment of the United States Constitution; these earlier studies have now been dwarfed by the seminal work of L. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968). See also Levy & Leder, "Exotic Fruit": The Right Against Compulsory Self-Incrimation in Colonial New York, 20 WM. & MARY Q. 3 (1965).


198. 211 U.S. 78 (1908).

199. 332 U.S. 46 (1947).

engineering to neutralize the "incongruity [which lies] at the heart of [the American] federal system"—even though the former copies the guarantee from the United States Constitution.

IV. **The Government as Lawbreaker: An Emerging Paradox in India and a Suggested Approach**

The controversy rages today in the United States as to whether the "crime control" or the "due process" model shall set the tenor of the administration of justice. Although order and public security are essential to the evolutionary development of a democracy, fairness of procedure used in obtaining those ends cannot be dispensed with. When a government becomes a lawbreaker, there can be no respect for its laws; when a government depends upon an adversary system to apply the sanction of the law, that system must adhere to its predefined and impartial procedures of application, or the system loses its justification and that which makes it functional—the acquiescence of the accused to its processes.

One major problem in the realm of the protection of the rights of the accused—nay the problem of crime itself—in India concerns the center-state relationship. The distinctive concept of Indian federalism—that the marked central bias of the Indian Constitution indicates that the Indian states have a lesser degree of autonomy than the American states—has undergone significant change by the general elections of 1967 which terminated the hegemony of the Congress party and cast the center-state relations in a different and more complex mold. Federal conflicts had been largely avoided in the past because the will of the Congress ruled the country, and the center and states worked harmoniously; but with the changed conditions in that the Congress party is no longer securely entrenched in power in states, a number of com-

---

201. *Id.* at 27 (Harlan, J.).

202. The author desires to thank Mr. Ram Niwas Mirdha, State Minister for Home Affairs, Government of India, for his encouragement in the preparation of this section of the paper. However, neither Mr. Mirdha nor the Government of India are in any way responsible for the views expressed herein.

203. Many of the Indian states have been plagued by political instability and frequent changes of government, maintained since the 1967 elections. For an admirable account of this phenomenon see Palmer, *India's Fourth General Election*, 7 ASIAN SURVEY 275-91 (1967); Singh, *Political Development or Political Decay in India*, 44 PACIFIC AFFAIRS 65, 66-72 (1971). See also S. Kochanek, *The Congress Party of India: The Dynamics of One-Party Democracy* (1968); *State Politics in India* (M. Weiner ed. 1968).
plex problems have arisen, particularly in the field of the judicial remedies and administration of justice. The problem of “law and order” is one such issue which has generated acute controversy in recent months.

**A. The Constitutional Scheme and Waning Public Order**

A summary reference to the legislative distribution of powers between the center and the states is, perhaps, appropriate to appreciate this problem in its correct perspective. The ambit of and limitations on their powers are found in article 246 read with article 245, and the three lists of schedule VII.204 Entry 1 of the union list provides for the defense of India and of every part thereof, and entry 2 authorizes the use of naval, military and air forces and any other forces of the union for that purpose. Entry 1 of the state list deals with public order but excludes the use of naval, military or air force or any other forces of the union, in aid of the civil power.205 Entry 2 provides for the establishment and maintenance of police forces including railway and village police.206 Entry 4 empowers the states to establish prisons, reformatories, Borstal institutions207 and the like and to detain persons in them and to make arrangements with other states for the use of prisons and other institutions. Entry 1 of the concurrent list provides for criminal law including all matters included in the

---

204. Three lists of powers are included in the Constitution: the union list, comprising ninety-seven subjects confided exclusively to the central government; the state list, comprising sixty-six subjects confided exclusively to the states; and the concurrent list, comprising forty-seven subjects confided to both central and state governments. See Freund, *A Supreme Court in a Federation: Some Lessons from Legal History*, 53 Colum. L. Rev. 597, 603, 611 n.56 (1953).

205. *India Const.* state list, entry 1 (1950). Government of India Act, 1935, list I, item 1, had a similar provision: “Public order (but not including the use of His Majesty's naval, military or air forces in aid of civil power) . . . .” For helpful annotations on judicial decisions concerning “public order” under this entry see 5 D. Basu, *Commentary on the Constitution of India* 210-11 (5th rev. ed. 1970).

206. *India Const.* state list, entry 2 (1950). This entry is identical to Government of India Act, 1935, list II, item 3. See D. Basu, supra note 205, at 211.

207. Named after Borstal, a village in Kent, Borstal institutions are reform schools for delinquents between the ages of 16 and 23. These schools follow a system stressing occupational training, special attention to the individual, and highly organized supervision after dismissal. (Incidentally, as an interesting sidelight, a novel question was recently canvassed by the House of Lords in Home Office v. Dorset Yacht Co., [1970] 2 All E.R. 294 (H.L.): Is the state under any civil liability for the damages perpetrated by Borstal boys who through the negligence of its officers have escaped custody? In a move almost unprecedented in British legal history, the aggrieved company successfully sought to recover in tort from the Home Office.)

409
Indian Penal Code at the commencement of the Constitution but excluding, *inter alia*, the use of naval, military or air forces or any other forces of the union, in aid of the civil power. Entry 2 provides for criminal procedure including all matters included in the Code of Criminal Procedure at the commencement of the Constitution. (While in the United States the legislative and administrative jurisdiction over ordinary criminal justice is reserved to the states, in India the Indian Penal Code, 1860, and the Code of Criminal Procedure, 1898, form the lex loci for the entire nation. There is no uniform standard for criminal justice across the United States. Each state has its own idiosyncrasies, which either are arbitrarily based upon the authority of antiquity or else purposefully exist to satisfy a particular cultural need.) Under entry 9 of the union list, the Parliament is, and under entry 3 of the concurrent list, both Parliament and the state legislatures are, empowered to make laws for preventive detention for reasons connected with the several matters specified in the respective entries. Entry 9 of the union list mentions reasons connected with defense, foreign affairs and security of India, while entry 3 of the concurrent list speaks of reasons connected with the security of a state, the maintenance of public order and the maintenance of supplies and services essential to the community.208

This overall constitutional scheme invests the states with exclusive authority to legislate in the realm of public order, police, and administration of justice. The underlying premise for such authority is that Indian federalism seeks national uniformity only for matters that do not lend themselves to local diversity. While the state list is based upon local interests and the union list on national interest, the concurrent list includes matters which involve varying degrees of both. In view of the states' exclusive concern with public order and police, the highly tenable argument has been advanced that, upon a breakdown of "law and order" in any

---

208. The subject of "preventive detention" has been one of the hotly debated issues in India. For fuller treatment of this subject see generally D. Bayley, *Preventive Detention in India* (1962); Tripathi, *Preventive Detention: The Indian Experience*, 9 Am. J. Comp. L. 219 (1960), in *American Journal of Comparative Law Reader* 83 (II. Yentema ed. 1966).
state, it is the state's responsibility, without assistance from the central government, to restore normal conditions.\textsuperscript{210} Some instances of waning public order in the states should be mentioned. Recently, the non-Congress governments in the states, particularly the communists in Kerala and West Bengal, determined to decimate or weaken the center, showed calculated indifference to the student community's agitations, violence, and threats of violence which were in fact, aided, abetted and excited by their party.\textsuperscript{211} They instructed the police not to intervene and, to make things worse, a government minister went to the extent of saying that he would give rifles to pro-communist students in order to destroy another group, supposed to be against communism.\textsuperscript{212} Likewise, the police of Calcutta gave no protection to the unfortunate persons who had been surrounded by communist workers in the gheraos of various industrial units.\textsuperscript{213} After the leader of Shiv Sena, a para-military group, had recently announced that no minister of the central government would enter Bombay, the state government was reluctant to thwart the enforcement of this threat, permitting the ransoming of even a metropolitan city like Bombay. The extent of this growing lawlessness climaxed recently in the unprecedented communal holocaust in Bhiwandi, where hundreds of Muslims were brutally massacred by Hindu fanatics.\textsuperscript{214} It is stated that for months past weapons such as bows and arrows, daggers, knives, spears and steel tipped lathis (sticks) were being supplied to the volunteers of the Jan Sangh, Hindu Mahasabha and Rashtriya Swayam Sevak Sangh in preparation for the carnage against Muslims. The intensely right-wing Congress

\textsuperscript{209} Such assistance would be channeled through Central Reserve Police Force, governed by the Central Reserve Police Force Act, 1949. The act—a mere replacement of the pre-Independence statute, Crown Representative's Police Force Law, 1939—seeks to aid Indian states in the maintenance of law and order during periods of lawlessness and disorder. The legislative competence of this legislation falls within the ambit of entry 2 of the union list, enabling the Parliament to enact laws concerning "[n]aval, military and air forces [or] any other armed forces of the Union," and is coextensive with the union's executive power under article 73.

\textsuperscript{210} See A. Ray, Tension Areas in the India's Federal System 57 (1970). See also id. at 53-54.

\textsuperscript{211} Shanti Swarup, Student Unrest in India, in Protest and Discontent 151, 158 (B. Crick & W. Robson eds. 1970).

\textsuperscript{212} Id.

\textsuperscript{213} 1 K. Munshi, Indian Constitutional Documents—Pilgrimage to Freedom 343 (1967).

\textsuperscript{214} See supra note 38, and the accompanying discussion.
ministry in Gujarat, it is alleged, was perhaps aware of the undercurrent of preparations for the genocide of Muslims but hardly did anything to halt its momentum.

B. Federal Powers of Intervention

Because police and the maintenance of law and order are exclusively state subjects, the federal government in such instances finds it difficult to intervene to check mob rule and hooliganism, except by calling in the armed forces.\textsuperscript{215} In so doing, it may or may not, however, declare martial law, the power being secreted under entries 1 and 2 of the union list. But if a rebellion or revolt in a place—"internal disturbance"—can be put down by the use of armed forces, without declaring an emergency under article 352—which is tantamount to a declaration of martial law—there is no constitutional requirement for such proclamation. The reason is apparent. Before the machinery of issuing such a proclamation can be activated, grave and irreparable damage may be done if, in an emergency, prompt action is not immediately taken. Article 355 requires that "[i]t shall be the duty of the Union to protect every state against external aggression and internal disturbance and to ensure that the government of every state is carried on in accordance with the provisions of the Constitution."\textsuperscript{216} When this article

\textsuperscript{215} Entry 2 of the concurrent list, providing for criminal procedure including all matters included in the Code of Criminal Procedure at the commencement of the Constitution, does not exclude the use of the forces of the union in aid of states to restore order. The Code of Criminal Procedure contains provisions enabling magistrates to call for military assistance to put down a riot; the 1962 amendment of the Code, substituting the assistance of the "Armed Forces" in place of military assistance, would suggest that it is a subject of concurrent legislative power.

However, the maintenance of public order which requires the assistance of the "Armed Forces" is expressly beyond the legislative competence of the state legislature and therefore of the state executive. As entry 1 of state list and entry 1 of concurrent list expressly exclude the use of the "Armed Forces" in aid of civil authority, it is unlikely that the President would assent to an amendment of the Code of Criminal Procedure by the state legislatures, which would provide for a use of the "Armed Forces" different from that provided by parliamentary law.

\textsuperscript{216} This article does not require the consent of the state to the discharge of the duty there imposed. In this respect article 355 may be contrasted with the Commonwealth of Australia Act, 1900, § 119: "[T]he Commonwealth shall protect every state against invasion and, on the application of the executive government of the state, against domestic violence." Article 355 thus obviates the necessity for the refined distinctions which have been made in Australian cases on the limited nature of the incidental power of the Commonwealth to maintain peace, order and good government. In Australia, the position appears to be that the Commonwealth cannot intervene to protect the state from internal violence against its will, unless the violence is of such a nature that it prevents the Commonwealth from exercising the functions and the powers which belong to it under the Constitution.
"LAW AND ORDER"

is read in conjunction with entries 1 and 2 of the union list and entry 1 of the state list (read with article 73), there is ample justification for the federal government to put down rebellion or quell a state of riot by the use of "armed forces" including the Central Reserve Police Force and the Border Security Force.217

However, as a practical matter, the federal government obviously cannot use the "armed forces" to quell day-to-day civic disturbances, except in really grave situations. The existence of a proclamation of emergency,218 an agreement between or among some states to transfer a particular subject to Parliament,219 and the breakdown of constitutional apparatus in a state220 are clear-cut situations in which Parliament can legislate on a state subject. Also, article 249 provides that if the upper house of the federal legislature, called the Council of States, passes by two-thirds vote a resolution declaring it "necessary or expedient in the national interest" that Parliament should make laws concerning any matter constitutionally within the exclusive legislative competence of the states, the Parliament acquires competence to enact such laws221 for the states, operative for not more than one year. The currency of such legislation may, however, be enlarged for additional periods of one year at a time by resolutions of the Council of States. A parliamentary law made in exercise of this power, insofar as it

217. There has been a sharp controversy between the center and the states about the deployment of central reserve police force in the states. For example, the states of Kerala (during the strike of central government employees in September 1968) and West Bengal (Durgapur and Cossipore episodes in March and April 1969, respectively, involving violent agitations at two industrial units) took serious exception to the unilateral decision of the Government of India in deploying some units of central reserve police force in their states without their prior consent or even tacit approval. Doubtlessly, the central government's power to deploy such forces for the protection of federal property and its own officers in states would not require their consent. The Kerala incident is nicely analyzed in Kumar, The Kerala Crisis: 1968, 20 LAW REVIEW 176 (1968). For Durgapur and Cossipore incidents in West Bengal see the debates in the Indian Parliament during March and April 1969.

218. INDIA CONST. art. 250 (1950).

219. INDIA CONST. art. 252 (1950). Cf. Commonwealth of Australia Act, 1900, § 51. Clause (2) of article 252 contemplates that if there is any repugnancy between state law concerning the subject matter of the resolution (of the requesting states) and the parliamentary legislation enacted in pursuance of the resolution, the state law shall become void. See, e.g., R.M.D.C. (Mysore) Private, Ltd. v. State of Mysore, All India Rtrpr. [1962] S.C. 594.


221. That such laws are temporary will be evident by some laws passed by the Council of States. For example, Essential Supplies (Temporary Powers) Amendment Act, 1950; Supply and Prices of Goods Act, 1950; Evacuee Interest (Separation) Act, 1951.
exceeds the normal competency of Parliament, ceases to have effect six months after the resolution ceases to be in force. Obviously, though useful, article 249, as its terms show, is meant to deal only with temporary situations. 222

C. Should “Public Order” Be an Exclusive State Subject?

That the concern for maintaining “law and order,” a concern which ought to be essentially apolitical, should become enmeshed in the ideological wrangles of diverse political parties in the states raises questions of far-reaching constitutional and practical significance about the wisdom of leaving these subjects exclusively with the states. True, flexibility is provided in certain situations by the constitutional admonition to the states to execute the federal laws and to carry out their functions so as not to injure union interests. 223 An example of the operation of this provision can be seen in the matter of the policing of the railways. While railways are a union subject, 224 the responsibility for policing them rests with the state governments. Accordingly, article 257 empowers the union government to give directives for insuring that the effective administration of railways does not suffer through the inadequacy or inefficiency of state railway police. (Such provision for federal directives is foreign to the American constitutional scheme.) Non-implementation of the directives of the union concerning railways

222. Professors Jessup and Dowling, in a conference with Sir Benegal Rau, regarded this article very important. 3 THE FRAMING OF INDIA’S CONSTITUTION 2221-222 (B. Shiva Rao ed. 1967). This article has, however, been severely criticized by A. CHANDA, FEDERALISM IN INDIA 89-91 (1965), among others. The arguments against it may be marshalled as follows: First, only a constitutional amendment can readjust the distribution of powers between the federation and its units. Second, it has to be remembered that the representation of states in the Council of States is very unequal (e.g., Uttar Pradesh 34 and Assam 7). As a result, a minority of states in the Council commanding a majority of seats can, with the connivance or support of the center, altogether overrule the viewpoint of the states with minority representation. Not even the federation of the British times established by the Government of India Act of 1935 envisaged such bestowal of high authority on the center. The danger in this regard will be greater with one party dominating the center and alternative parties holding power in small states. In the contemporary political situation in India, this danger is potentially acute.

223. INDIA CONSt. arts. 256-57 (1950).

224. INDIA CONSt. union list, entry 22 (1950). It should be noted that at the time of the drafting of the Indian Constitution, the central government had only railways as its major property. It is only in recent years that the government-owned industrial units have multiplied in several states, giving rise to the increased role of central Reserve Police Force in several states.
“LAW AND ORDER”

would enable the President to declare that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the Constitution, thereby permitting temporary supersession of the state government by central assumption of its powers.

But it is unlikely that the refusal of a state government to adhere to a federal directive, which had been issued beyond the doubtful constitutional power of the center, would activate the mechanism whereby the union would assume the governance of the state. Since a state has exclusive executive powers over matters in the state list, it could legitimately ignore directives of the federal government in the areas of “police” and “public order” if this action clearly did not militate against other particular parliamentary legislation. Thus, it would seem that the assumption by the center of the powers of a state government could only follow a refusal to effectuate a federal directive designed to implement matters on the union list. An exception to this rule, however, might be found in the issuance of a directive pursuant to the Indian Penal Code and the Code of Criminal Procedure—matters on the concurrent list but over which federal parliamentary legislation exercises preemptive control. Since these codes are utterly dependent upon the state police for their enforcement, central directives to secure their objectives would seem constitutional. Such a tack, though it, in itself, could do nothing to curb the state’s prosecutorial discretion, might prove a useful union strategy in dealing with the state’s dereliction in maintaining “law and order” referred to above.

Notwithstanding these powers, their use to neutralize the recalcitrance of a state cannot be a regular feature, for the states have primary responsibility for the maintenance of public order through their own police militia. The recent report of the Administrative Reforms Commission, in its painfully miniscule treatment of law and order, is cognizant of this agonizing dilemma, but in a very ambivalent manner:

225. INDIA Const. art. 365 (1950).
226. INDIA Const. art. 356 (1950).
227. INDIA Const. art. 162 (1950).
228. GOVERNMENT OF INDIA, THE ADMINISTRATIVE REFORMS COMMISSION, REPORT ON CENTRE-STATE RELATIONSHIP 37-38 (1969). While the Commission had study-team reports on all aspects of the problems concerning center-state relationships prepared, surprisingly, no such report was prepared on “law and order.” The Commission’s treatment of the problem is thus in no way a depth analysis of the subject.
The issue of direction by the Centre to a State is ... an extreme step and should be taken only in cases of absolute necessity, when no other means of securing the objectives are available. The assumption of governance by the President is a drastic medicine prescribed in the Constitution as a last resort, which cannot be administered as daily food as a matter of course. Short of the use of the extreme measure of issuing directions, other suitable remedies should be devised for achieving the purpose.229

What are these suitable remedies? They are not even suggested by the Commission, which, in fact, skirts the whole problem. It is not inconceivable that in years to come occasions of conflict due to differences in ideology and program may become so frequent that the federal government will have to establish alternative machinery for insuring compliance with its orders.230 However, it would be precipitous to think in terms of drastically changing the prevailing federal system. We have to avoid two extremes. Extreme centralization will cause overstrain and friction, leading perhaps to frustration and growth of fissiparous tendencies. On the other hand, allowing each state to tread its own way without recognizing the fact of interdependence, will be equally ruinous to the basic unity of India.

The present state of affairs is so totally without clear structure and so lacking in guidance as to when federal intervention is appropriate or permissible that some action is urgently needed to clarify the instances in which the federal government can act to resolve broad problems of "law and order" within the states. Occurrences such as the Bhiwandi massacre must not be susceptible to governmental approval, whether overt or tacit. It is a canard to talk of protecting the rights of the accused when instances of governmental lawbreaking can, with impunity, obliterate the most fundamental human right that individuals possess.

Precipitous and unwise as it is to seek major constitutional change without some consensus among the various parties in the Indian body politic, it would be pragmatic to devise solutions for these problems within the existing constitutional framework. Mea-

229. Id. at 37.
230. The Administrative Reforms Commission, however, did not recommend the dual machinery for the execution of federal machineries. The execution of federal power by the state officials under the supervision of the center is practised, for instance, in German and Swiss federations. Frederick & Guttman, The Federal Executive, in Studies in Federalism 63, 69 (R. Bowie and C. Friedrich eds. 1954).
sures which are feasible and might readily be accepted and which involve minimal change in the present constitutional structure should be explored. The suggestions that all state and concurrent lists may altogether be scrapped and that all the powers of legislation be entrusted to the union which would delegate such powers of legislation as may be appropriate to the states is, to say the least, fraught with despairing implications. Such reaction may well be the natural response of those deeply disturbed by the perplexities in establishing a well-balanced federalism. Such an extreme step is unnecessary. The states’ cavalier attitude in maintaining law and order could perhaps be significantly impaired by transferring “public order” and “police” to the concurrent list. Such a change would deprive the states of their exclusive legislative aegis which has heretofore legitimized their calculated indifference, for Parliament would then be competent beyond any doubt to pass legislation in matters concerning law and order.

In this regard, it is perhaps not without significance that when the Draft Constitution was being discussed in the Constituent Assembly, Mr. Brajeshwar Prasad had moved an amendment to transfer “public order” \(^2\) and “police” \(^2\) to the union list, but on a point of order proposed to move them to the concurrent list. Though unadopted, the arguments he presented in support of the amendment have much contemporary relevance:

> [T]he administration of public order in the provinces has not been of a satisfactory character. They have not the resources to maintain an efficient system of administration. Seventy-two percent of the budget of Assam goes in the form of salary bills. The other twenty-eight percent is left for managing a large number of subjects. The result has been deterioration in the efficiency of the administration. There are also some states and provinces on the borders of foreign states. Is it the opinion of the House that it is not risky, it is wise to leave the question of public order entirely in the hands of the provincial governments? In a state like Assam and East Punjab . . . [which] are on the borders of foreign states . . . it is necessary that the power to maintain public order should remain in the hands of the central Government. With the limited resources at their disposal, it will not be possible for these states to maintain public order.

\(^2\) The amendment was not adopted.  
\(^3\) Id. at 867. The amendment was withdrawn. Id. at 868.
The [partitioned] provinces of West Bengal and East Punjab . . . are suffering from the problem of relief and rehabilitation, from the problem of migration of population, and there has also been infiltration of subversive elements in the services of the other provinces. I do not say that the services of the other provinces are sage; there has been infiltration in the services of the other provinces also . . . . The machinery of law and order has been considerably weakened. Lawlessness prevails in many provinces. The pursuit of power politics by provincial ministers and the growth of caste feelings have shattered all semblance of civilized administration. I, therefore, strongly feel that public order should become a Central subject. There are dangers within and dangers without, and we cannot depend upon the loyalty of the provincial administration in times of crises.233

Now, it would, perhaps, be only appropriate to give recognition to the prophetic words of Brajeshwar Prasad and establish the legislative competence of Parliament vis-à-vis problems of law and order beyond the pale of any doubt.

Unlike the role of the Supreme Court of the United States, the Indian Supreme Court's role is such that it would be unrealistic to expect it to transform the Indian federal system with its division of powers between the states on the one hand and the central government on the other, into a unitary government with all powers concerning "law and order" centralized in New Delhi, and administered in part through subordinate states.234 What the Supreme Court of the United States has accomplished in federalizing and constitutionalizing the American criminal law through the fourteenth amendment will not be possible in India because of the absence of a due process clause in its Constitution. However, in the ultimate analysis, the dogma of federalism will not help to solve the problems of law and order any more than the dogma of

233. Id. at 864-65.
234. The question can be restated with different emphasis: By breaching their duties to govern responsibly, to what extent have the states forced the Supreme Court to expand the sphere of the federal government's control in insuring the political, economic and social well-being of all its citizens.
"LAW AND ORDER"

"states'" rights. Accommodation, cooperation, thorough perception of problems, balance—it is these that enable federalism to be a house of many mansions. And these by-products can, perhaps, be most readily appurtenant to the legislative process.