CHAPTER - II
The ideal of liberty has made its appeal to man in all ages; and in the name of Liberty have been performed great acts of heroism as well as despicable acts of crime. Even today there are very few ideals, which can move men more readily than the idea of liberty. Liberty is the essential quality of human life\textsuperscript{1}.

Liberty is considered as the greatest possession of man. Even among animals there is an urge to live freely and a captive bird or animal attempts to shatter the cage or chains which captivates it in order to live in an atmosphere of its own liking. Among human beings, the urge to acquire freedom from restraint artificially imposed has been the commonest feature of the long history of the human race\textsuperscript{2}. The inner urge for freedom is a natural phenomenon of human society.

Man loves that to which he has become habituated, respect for the life, liberty and property of everyman is not today not merely a norm for decision or a policy of the state but

\begin{footnotes}
\item[\textsuperscript{1}] E.Asirvatham, Political Theory, p-168, Tenth Ed.
\end{footnotes}
has actually become a principle of the living law. Liberty is one of the most essential requirements of the modern man. It is said to be delicate fruit of a future civilization.

The individual cannot attain to the highest in him unless he is in possession of certain liberties, which leave him as it were to breathe and expand. Moreover, freedom is as necessary to man as bread and air. Liberty of life and personal freedom are the focal points of civil liberty. The liberty sustains other liberties because without liberty of life and personal freedom no other civil liberty is possible. Life and personal freedoms are the prized assets of an individual, which are basic and primary.

Liberty and Individualism:

The concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the state. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the state can

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5 B.Mishra, Civil Liberties and Indian National Congress Introduction, P.VI.
reach their goal of perfection. The stage exists for the benefit of the individual⁶.

This concept is entirely opposed to the ideas, which have led to the growth and rise of fascists and dictatorial states. The fascist doctrine preaches the supreme importance of the state. There the individual and his activities have significance only in so far as they assist the existence, the needs and the activities of the state. It would not be an exaggeration to state that civil liberties as understood in an experiment with ourselves, think differently from neighbours without danger to our happiness being involved there in. We are not free unless we can form our plan of conduct to suit our own character without social penalties⁷.

Liberty may also be defined as the affirmation by an individual or group of his or its own essence. It seeks to require the presence of three factors, a certain harmonious balance of personality; it requires on the negative side the absence of restraint upon the exercise of that affirmation and it demands on the positive side, the organization of opportunities for the exercise of a continuous initiative. The problem of liberty also

⁶ Paras Diwan, "Does our Constitution need a Second Look" p.68.
been the prevention of those restraints upon the one hand that men at any given period of time are not prepared to tolerate and on the other hand the organization of those opportunities the denial of which resulted in that sense of frustration which when widely felt leads to imminent or actual disorder\(^8\).

For John Stuart Mill, "all restraint, qua restraint is an evil"\(^9\). Harold J. Laaski takes the same line and argues that Liberty is essentially an absence of restraint\(^10\). According to Locke, the idea of Liberty is idea of a power in any person to do or forbear any particular action according to the determination or thoughts of the mind\(^11\). According to Jonathan Edwards, "The plain and obvious meaning of the words, 'Freedom' and 'Liberty' in common speech is power, opportunity or advantage that any one has to do as he pleases or in other words his being free from hindrance or impediment in the way of doing or conducting in any respect as he wills. And the contrary to Liberty whatever name we call that by is a person's being hindered or unable to conduct as he will or being necessitated to do otherwise.

\(^{11}\) Locke, "An Essay Concerning Human Understanding", pp.7-8.
Those who hold that an individual’s Freedom lies in his ability to do as he pleases, look upon the coercive regulation of conduct by government as curtailments of individual Liberty. Those who hold that a person’s freedom lies in his ability to will as he ought, they regard the obligations imposed by law as no infringement of liberty12.

What seems to be of the permanent essence of freedom is that the personality of each individual should be so unhampered in its development, whether by authority or by custom, that it can make for itself a satisfactory harmonization of its impulses13. Restraint is felt as evil when it frustrates the life of spiritual enrichment14. Freedoms are opportunities which history has shown to be essential to the development of personality15.

Liberty always demands a limitation on political authority; power as such when uncontrolled is always the natural enemy of freedom16. The broader the discretion, the greater the chance of its abuse. Where discretion is absolute man has always suffered. Absolute discretion is more destructive of freedom

13 Adler “Idea of Freedom”, p.244.
14 Ibid., p.143.
15 Ibid, p.144.
than any of man’s other inventions. And also absolute discretion, like corruption makes the beginning of the end of liberty\textsuperscript{17}.

According to Lord Justice Denning, Liberty means Freedom of every law abiding citizen to think, what he will, to say that he will and to go where he will on his lawful occasions without let or hindrance from any other person. It must be matched; of course, with social security by which he meant the peace and good order of the community in which he lives\textsuperscript{18}.

Kinds of Liberty:

There are certain things which a person wants to do and if there is no restraint on such doing, that is liberty enough for him. If all men are free to express the opinion they cherish, that is liberty of speech and expression. If all men are to worship their God, that is religious liberty. Thus to each person it means something different\textsuperscript{19}.

There are various kinds of liberty like, negative liberty, positive liberty, moral liberty, legal liberty, civil liberty or liberty

\textsuperscript{17} V.K.Bansal, “Right to Life and Liberty”, p.15.
\textsuperscript{18} Freedom Under the Law (1949), p.5.
\textsuperscript{19} Bruno Lioni, “Freedom Under the Law”, p.42.
against the government and political liberty or liberty for government\textsuperscript{20}.

**Negative Liberty :**

Negative Liberty means the absence of external obstacle. In social relations, the obstacles commonly takes the form of a threat. What the individual desires to do is penalized. When men aspire to the management of there own affairs, they will covet liberty from a tyrannical state; when they are ambitious to rise in the economy scale, negative liberty will mean escape from the limitations imposed by the existing industrial hierarchy, Negative plays a small role in the lives of apathetic men and will take a high place in the code of men whose desires and ambitions are strong and who feel the impact of the obstacle with a proportional intensity\textsuperscript{21}.

**Positive Liberty :**

Positive Liberty means that the externally unimpeded interest is capable of proceedings towards its realization. A man is not positively at liberty to walk unless he has sound limbs, or

\textsuperscript{20} Prof. Palph Barton Perry, "Freedom – Its Meaning", p.265.
\textsuperscript{21} Prof. Palph Barton Perry, "Freedom – Its Meaning", p.265.
to travel unless he has the fare, even enough nothing prevents him and nobody forbids him.

Positive liberty means the absence of restraints upon the existence of those social conditions which in modern civilization are the necessary guarantees of individual happiness. Absence of restraints implies power to expand the choice by the individual of his own way of life, without imposed prohibitions from without.

If in any state, there is a body of men who posses unlimited political power, those over whom they rule can never be free, because uncontrolled power is invariably poisonous to those who possess it. They are always tempted to impose their canon of good upon others, and in the end they assume that the good of the community depends upon the continuance of their power. Liberty always demands limitation of political authority.\(^{22}\)

According to the idealist school, liberty is not a more negative thing like absence of restraint. It is rather a positive self determination of the will which each of us, seeks the fulfillment of rational purpose as this lies behind, and gives

unified meaning to, the diversified choice of purposes in each of us. We desire freedom, that is to say, in order that we may be ourselves at our best\textsuperscript{23}. We are not free unless we can form our plan of conduct to suit our own character without social penalties\textsuperscript{24}.

**Moral Liberty:**

Liberty is not only good in the material sense, as possessing a claim to moral consideration but may itself possess the form of moral goodness intrinsically. When it does possess this form, whether personal or social, it may be termed moral liberty. Moral liberty in the personal sense is liberty internally regulated by reason and conscience. It appears upon that level of integration in which the individual's several appetites have been centered and unified by a reflective will. It is part of the purpose of the democratic state that individuals should be allowed and encouraged to exercise the prerogatives of personality.

In social sense, liberty is moralized when it assumes the form of a sentiment, which moves the individual to approve and to seek the enjoyment of liberty by all. Love of liberty, in this

\textsuperscript{23} Harold J. Laski, "Liberty in the Modern State", p.56.
\textsuperscript{24} Ibid., p.64.
sense, is tested by the attitude towards another’s liberty. Moral liberty, in the social sense, is also possessed by what may be called cultural liberty. The use of truth by one individual is compatible with its use by others\textsuperscript{25}.

**Legal Liberty:**

The primitive man had a number or numberless of freedoms which no civilized man can ever have, “Though, in theory, he had all possible and conceivable freedoms, but in the primitive society these freedoms had no meaning, no relevance. Freedoms and liberty in an unorganized society are in wilderness”. The fact of the matter is that in that society, the social need for liberty and freedom did not exist\textsuperscript{26}.

In a democracy an individual is guaranteed certain freedoms or liberties which it is the duty of the state not only to refrain from infringing but to protect and enforce. These reservation being made, it is, now, in order to affirm that no high degree of liberty is normally possible without the protection of the state\textsuperscript{27}.

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\textsuperscript{26} Prof. Palph Barton Perry, "Freedom – Its Meaning, Liberty in a Democratic State", p.268.

\textsuperscript{27} Dr. Paras Diwan, “Does our Constitution need a Second Look”, p.41.
It is the duty of government to promote the liberty of every individual, this function must be extended to embrace positive as well as negative liberty. The most ancient persistent and oppressive enemies of liberty are not external hindrances, but poverty and ignorance. What government does in the way of education, health housing increased wages or redistribution of wealth may be as much a service of liberty as is its protection of men against interference from one another or from itself.

Civil Liberty:

Civil Liberty is a multi-dimensional concept. It has its historical, philosophical, political, sociological, psychological, ethical and analytical dimensions. It is not a static concept; it is dynamic. Its mainspring is in the conscience and vigilance of a disciplined and enlightened people and in the courts and litigations, which can only act as best as second auxiliary. It moves with time and place and is relative thereto. The issue of civil liberty is the survival of the individual man in a political state.

According to Justice Mukherji, “The origin of the expression, Civil Liberties is illogical. All liberties are civil

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28 Prof. Palph Barton Perry, "Freedom its Meaning", p.41,
There are no species of liberties which are not civil. There are no criminal liberties. Primarily, the civil liberty is the liberty of the individual. Secondly it includes certain collective liberties of groups, minorities, associations and parties, whether political or social or economic or religious or cultural. Thirdly, it raises the question whether civil liberties are available only to the citizens but again some equally important civil liberties such as of life and personal freedom are available for he aliens also\(^{30}\).

Civil Liberty is relative to time and place. The passion that gives burning character to the problem of civil liberty in every age is the undying members of the recurring conflict between individual freedom and social control. As methods and expressions of Individual liberty and social control change for from time to time, the manifestations and impacts of civil liberty also change\(^{31}\).

**Political Liberty:**

Political liberty is to be found only in those countries which believe in and practice democracy. It is there, only when there is no abuse of power, but constant experience shows that

\(^{30}\) Ibid., p.269.

every man invested with power is apt to abuse it, and to carry his authority as far as it will go. It is not strange, though true; to say that virtue itself has need of limits. A Government may be so constituted as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits.

There are certain liberties which are justified not as a protection of the individual against the Government but as indispensable to the functioning of the government. Any civil liberty when so justified becomes a political liberty. It is not easy to circumscribe the liberties which should be here included. There is no doubt, however, regarding those liberties which enables the individual to form judgments for himself, and communicate them to his fellow men. Among those liberties are the liberties of speech, press, assembly, etc., which are conceived as essential to the process of political democracy\textsuperscript{32}.

The political liberty has both the negative and positive aspects. Its 'negative sense' is involved in the answer to the questions "what is the area within which the subject - a person or a group of persons - is or should be left to do or be what he wants to do or be, without interference, by other persons?" Its

\textsuperscript{32} P.B.Perry, "Liberty in a Democratic State", p.272.
positive sense is involved in the answer to the question "what or who or the source of control or interference, that can determine someone to do or be, one thing rather than another?

The questions are clearly different even though the answer to them may overlap. One normally said to be free to the degree to which no human being interferes with his activity. Political liberty in this sense is simply the area within which a man does what he wants. If one is prevented by other persons from doing what one wants to that degree he is unfree; and if the area within which he can do what he wants is contracted by other men beyond a certain minimum, he can be described as being coerced or enslaved. One lacks political liberty only if one is prevented from attaining one's goal by human beings. Mere to attain one's goal is not lack of political liberty. This is brought out by the use of such modern expression as "economic freedom"33.

Political liberty also implies Security, at least in the opinion that we enjoy security, it is on the goodness of the criminal laws, that the liberty of the subject principally depends.

33 Isaiah Berlin, "Two Concepts of Liberty", pp.7-9
Sometimes a distinction is made between the rights which relate to the protection and enjoyment of life and liberty by the individual and regarded as essential to civilized existence and thus known as civil rights, and those rights by virtue of which he becomes entitled and participates in the government of his country, such as right to vote or stand for election or to hold public offices or the right to resist or criticize the government which are regarded as political rights. Civil and Political rights often infiltrate and are intermixed. Many civil rights can be used for political rights, all political rights are not civil rights\textsuperscript{34}.

**Economic Liberty:**

A welfare state, though firm in its adherence to the democratic ideal of individual liberty, is also dedicated to the cause of the common citizens, and the establishment of socio-economic justice is its avowed objective. If democracy is to mean anything it must have respect for the common man and his reasonable wants and not use him cynically as a pawn in the political game\textsuperscript{35}.

Liberty needs an expanding economy as its primary condition; for where this obtains, men feel that they have hope,

\textsuperscript{34} P.B.Mukherji, "Civil Liberties", p.3.
and hope is, perhaps the vital condition for the respect of law.\textsuperscript{36} When economic conditions in a society are unsatisfactory, the danger to liberty is likely to arise. A hungry man will not respect the liberty of others. The competence of the rulers to govern and manage the affairs of the country, particularly economic, are subject to serious doubts which ultimately pose threat to their position in power. The people demand better economic facilities and when they are not forthcoming, opposition becomes manifest. The rulers to protect their own position, resort to repression, which ultimately results in the negation of liberty. The chaos and confusion thus prevailing in the society, sometimes, may attract hostile neighboring powers, which would not only further result in greater repression but also legalize it in the time of emergency, which in the modern times is confined neither in terms of areas nor times rather is allowed to continue beyond actual requirements.

Economic sufficiency and leisure for thought are the primary conditions of the freeman. But economic sufficiency, comes when the productive capacity of the society is so

organized that the freeman has continuous access to those two conditions.\textsuperscript{37}

In most countries of the present time, it has become impossible to satisfy demand without extracting from the masses, who live by the sale of their labour-power alone. Most of them, accordingly, have been driven to some kind of planned economy, in order, not merely to preserve social peace; but to improve the productivity capacity at their disposal.\textsuperscript{38}

\textbf{Liberty and Socio Economic Planning :}

The basic question is whether socio-economic planning is inconsistent with individual freedom and liberty.

After the first world war, Soviet rule in Russia showed what economic results can be achieved by ruthless planning. It is true that the economic planning practised by soviets, at least in the early stage, was achieved at the cost of individual freedom and liberty and that is repugnant to the basic democratic concept. The nexus between liberty or democratic values and the economic planning becomes significant\textsuperscript{39}.

\textsuperscript{37} Isaiah, Berlin, "Two Concepts of Liberty", p.18.
\textsuperscript{38} \textit{Ibid.}, p.18.
\textsuperscript{39} V.K.Bansal, "Right to Life and Personal Liberty", p.37.
To ensure fullest development of human personality, and quality of opportunity for all to participate in such development, a welfare state adopts economic planning, which is no longer the monopoly of the communist but has infiltrated into some other countries also. Without regulations of individual liberty, socio-economic justice can not be achieved. Individual liberty on one hand and the obligation of the individual citizen to the rest of the community on the other are both important considerations.

The primary function of welfare state is to solve the problem of poverty. All attempts made by democratic legislatures to meet the challenge of poverty constitute attempts to give it to the citizens of the state economic justice. Equality of opportunity to all citizens to develop their individual personalities and to participate in the pleasures and happiness of life is the goal of economic justice. The problem of social justice is also as urgent and important as the problem of economic justice, due to backwardness and caste-based social structure.

Right to social justice is a bundle of rights, a balancing wheel between haves and have-nots. It is armed to uplift the
backward sections of the society without unduly and unreasonably affecting the interests of advanced sections. Social justice on the economic front means that every citizen shall have the basic necessities of life.40

In a democratic welfare state the claims of social justice must be treated as permanent and primary and if the liberty of the individuals need to be regulated, of course, not abrogated, in order to achieve social and economic justice, that regulation is a part of the price which the citizen would have to pay in order to sustain the democratic way of life.

The constitution of India has solemnly promised to all its citizens justice-social, economic and political, liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all, fraternity assuring the dignity of the individual and the unity and integrity of the nation.41

Article 19[1][g] and Article 301 which deal with right to freedom of trade and commerce contemplate restrictions in the larger public interest. Article 39[b] and[c] provide for the distribution of ownership and control of the material resources

41 Preamble of the Constitution of India.
to best serve the common good and that the economic system must not result in the concentration of wealth and means of production to the common detriment; Article 36 requires, state to strive to promote the welfare of the people; Article 43 provides for Securing living wages to the workers. These directive principles contain our ideal of economic democracy⁴².

Various other provisions in the form of fundamental Rights and Directive Principles of the state policy, clearly lay down the constitutional mandate which implies socio-economic planning in the country which must be harmoniously reconciled with the individual liberty, So as to promote socio-economic justice.⁴³

Liberty and Democracy:

The aim of government is not to rule nor to restrain by fear, nor to extract obedience but contrary wise, to free everyman from fear, that he may live in possible security; in other words to strengthen his natural right to exist and to work without injury to himself or others. In fact the true aim of

⁴² Dr.B.R.Ambadkar, Constituent Assembly Debate, Vol. vii, p.450.
⁴³ V.K.Bansal, "Right to Life and Personal Liberty in India", p.40.
government is liberty to be enjoyed by each and every individual in the country.\textsuperscript{44}

In every type of modern society, a body politic or a government which does not give a minimum guarantee or a promise for the honour of a liberty is not acceptable\textsuperscript{45}.

In a democratic country, the democratic spirit gives a great importance to the individual. There must be constant readiness to permit everyone to experiment with his own life and to work his own way of salvation\textsuperscript{46}. Everyman wants to think his own thoughts, dream his own dreams and do his own needs. The main function of the democratic government is to safeguard liberty.\textsuperscript{47} Which should not be controlled unless its exercise becomes antisocial or undermines the security of the state.\textsuperscript{48} In fact, the greatest heritage of democracy to mankind is the right to personal liberty.\textsuperscript{49} If the liberty of an individual or a section of the people is sacrificed the majority can not remain unaffected. Every time there is trespass up in the citadel of freedom, its very foundation is weakened and more and more

\textsuperscript{44} Baruch Spinoza, - Konritz's Constitutions and Civil Rights, p.40.
\textsuperscript{45} R.L.Bhatt, “Personal Liberty”, A Conceptual Analysis”, Vol.v, p.11.
\textsuperscript{46} M.C.Setelvad, "War and Civil Liberties", p.4.
\textsuperscript{47} Ibid., p.16.
\textsuperscript{48} Ibid., p.18.
\textsuperscript{49} Dr.Paras Diwan, “Abrogation of 42th Amendment – Does our Constitution need a Second Look”, p.68.
such trespass are tolerated, weaker becomes the whole edifice, till one day it collapses giving place to dictatorship fascism and democracy lies in ruins\textsuperscript{50}.

As such the concept of personal liberty has been secured to all the people residing within the country in accordance with the spirit of Indian democracy. Of course, not only the Indian democracy, virtually almost all the democratic countries of the world provide in the provisions of their constitutions recognizing, encouraging and emphasizing on the protection of personal liberty of the people. As a result of which the ultimate goal of such democracies, the welfare of the nation, will be established. Now we can discuss the relevant provision of personal liberty of the different constitutions of the world in the following sub-headings.

\textbf{A. United Kingdom :}

England is treated to be the mother of democracy. Magna Carta was the seed which subsequently flowered in that country, which made every English House a castle. The statute of west minister brings all provisions for Liberating of London”. Magna Carta, 1215 was followed by the petition of Rights in

1628; Habeas Corpus Acts of 1640 and 1679; and then by Bill of Rights in 1689, which declared the Rights and Liberties of the people.

The expressions "Law of the land" as used in Magna Carta and "due process of Law" finding place in the Statute of Westminster, however, simply mean the absence of any arbitrary power of the executive; the same has not fettered in any way the power of the Parliament. The guarantee of fundamental rights in the English constitution lies "in the good sense of the people and in the system of representative and reasonable government which has been evolved". A great change took place, when Britain accepted the European Convention for Protection of Human Rights and Fundamental Freedom, 1953 in as much as this convention is enforceable by the European Court.

In England, "it is not open to a court to invalidate a law on the ground that it seeks to deprive a person of his life or liberty contrary to court's notions of justice or due process".
For the most authoritative pronouncement on this question in recent years, we must refer to Lord Wrights observation in Liversidge v. Anderson51.

“All the courts today and not least this House, are as jealous as they have ever been an upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute”.

As to how personal freedom is maintained in England against the executive, the words of Magna Carta are clear enough, viz., that no man can be deprived of his personal freedom save “by the law of the land”. Though there is no constitutional guarantee safeguarding the freedom, it is safeguarded by the ordinary law itself, which means the common law itself. Thus, most of the safeguards which are included in the American guarantee ... of “due process’ as will appear from the pages hereafter, are ensured in England by common law. But if the legislature alters or modifies these common law principles, as it has, in many respects, the individual cannot challenge the constitutionality of such legislation before a court of law. These broad common law safeguards of personal liberty in England may now be noticed.

51 1942. A.C. 206 (260)
If anybody's personal freedom is interfered-with without lawful justification, he can—

(a) regain his freedom through the ordinary courts by means of the writ of 'habeas corpus';

(b) sue the person (whether a public or not) who has arrested to detain him unlawfully, for damages for false imprisonment, or prosecute him criminally for assault. To such an action brought by a citizen, 'Act of State' is no defence.\(^{52}\)

The courts can, however, interfere only on the ground of absence, excess or abuse of authority, but can not revise decisions lawfully taken by the Executive, on the ground that the judges are of a different opinion. Of course, in order to make an executive action lawful, it must be in conformity not only with the substantial provisions but also with the procedural requirements laid down by the law, again, when the executive action is something more than an administrative action and simulates a judicial decision (which is called quasi-judicial) must be arrived at in compliance with the principles of natural justice.

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\(^{52}\) Entick v. Carrington, (1765) 19 St Tr. 1030.
Again, though a law can not be invalidated in England on the ground that it violates 'due process', the concept of fairness involved in 'due process' is applied by the courts in interpreting the law itself, so that an individual may escape from executive encroachment upon his liberty or property even though the executive action may be apparently supported by a law.

Thus, as will appear shortly –

(a) In construing statutes depriving a person of his liberty or property, the courts habitually lean in favour of the individual and would not support the executive action unless the terms of the statute authorizing the action are clear and explicit\(^53\).

(b) No person can be punished for an alleged crime unless the terms of the statute which creates the offence are reasonable certain\(^54\).

(c) The court leans strongly against an interpretation of a statute which deprives the subject of rights of property without compensation\(^55\) and such intention is not imputed to the legislature unless the intention is

\(^{53}\) L & N.E. Ry v. Berriman, (1946) 1 All E.R. 268 (H.L.)
\(^{54}\) Elderton v. Totalisater Co. (1945) 2 All E.R. 624 (C.A.)
\(^{55}\) Wheeler v. Greon (1946) 1. All E.R. 63(66), C.A.
expressed in unequivocal terms\textsuperscript{56}. The presumption is, of course, weakened, in times of national emergency\textsuperscript{57}.

(d) At a criminal trial, the accused is entitled to a presumption of innocence, and the prosecution is bound to prove all the ingredients of the charge beyond reasonable doubt\textsuperscript{58}, subject, of course, to statutory exceptions, relating to special cases\textsuperscript{59}.

From this principle it has been deduced that even when the accused confesses his guilt, he can not be convicted on such confession, so long as the prosecution does not show that it was not obtain from him under any threat or promise\textsuperscript{60}. Even apart from this, in criminal cases, the judge has a discretion to exclude evidence which, though legally relevant, would "operate unfairly against the defendant"\textsuperscript{61}.

\textbf{B. United States of America :}

Article 21, under the Indian constitution has been greatly inspired by the American constitution, the 5\textsuperscript{th} amendment (1791) to which constitution states, "No person shall be

\textsuperscript{56} Central Control Board v. Cannon Brewery (1919) A.C. 744(752)
\textsuperscript{57} Edgington v. Swindon Borough council (1938) 4 A11 E.R.57.
\textsuperscript{58} Woolmighton D.P.P. (1935) A.C.(462)
\textsuperscript{60} D.P.P. v. Ping Lin (1975) 3. Al E.R. 175 (H.L.)
\textsuperscript{61} Callis v. Gunn (1966) 3. Al E.R. 677 (680)
deprived of his life, liberty or property, without due process of Law"62. Similar is the expression used in the 14th amendment. These two provisions are conveniently referred to as the 'due process clauses'. Under the above clauses the American judiciary claims to declare a law as bad, if it is not in accord with 'due process', even though the legislation may be within the competence of the legislature concerned.

While in England, all the Parliament enacts is 'Law of the land', a legislative enactment, in the U.S.A., is not 'law' unless it is in conformity with 'due process'63.

Our constituent Assembly did not favour the use of the expression 'due process of law', and instead, used the expression "in accordance with the procedures established by law". As to why this has been done has also been explained – the basic reason for the same being the meaning attributed to the expression 'due process' by the American Supreme Court. The American judges first read procedural reasonableness and then substantive reasonableness and ultimately the position which prevailed was that, the law passed the test of these amendments which according to the judges of the Supreme

62 The due process "Clause has been Adopted in Sec.1(a) of p-5 the Canadian Bill of Rights Act, 1960.
Court was in accordance with the "Fundamental Principles of liberty and justice", which having no defined connotation meant what the judges said in each case. It is because of this that Justice Frank Further advised B.N. Ray, the constitutional advisor to the Constituent Assembly, who had been met by Ray in Washington sometime in late 1947 by stating that due process clause was "not only undemocratic (because it gave a few judges a power of vetoing legislation enacted by the representatives of the nation) but also threw unfair burden on the judiciary".

The US constitution as enacted, it had no Bill of Right because it was felt that if the powers that were conferred on the Government did not authorize to do something, for example, depriving the subject of any fundamental right, it was unnecessary to restrain its hand from assuming such powers. No less a voice than that of Mr. Hamilton was heard to speak in favour of such an argument. But contrary opinion was held by Mr. Jefferson, the spiritual father of the Bill of Right through Congress. They recognized the risk of tyranny by the majority but had confidence in popular rule and in a Bill of Right as a restraint on "the tyranny of the Legislature" and as an aid to
the judiciary in preventing encroachment on the liberty of the citizens\textsuperscript{64}.

In Pacific Life Insurance Company V. M/s. Cleopatra Haslip\textsuperscript{65} case the US Supreme Court delivered a good judgement on “due process” clause. It upheld award of punitive damages against an Insurance Company (Pacific Mutual) in favour of one Mr. Haslip who had to meet personally hospital and medical charges incurred during the period covered by the policy, because due to the fraud (non-remittance of Premiums collected) of the agent of the company, the policy stood lapsed.

Judgment of Justice Anthony Scalia in the above case has been regarded by Senior Advocates Nariman in his article on “Due process of Law”, as published at pp.1 to 8 of the Indian Advocate (Vol.xxiv; 1992) (January – June) as of special interest to our research as it was held that awarding of punitive and exemplary damages had long been prevalent in the common law system which was firmly rooted in American legal history, which by itself was dis-positive of the argument that the award violated “due process”, for which purpose, Justice Scalia relied upon the historical background of procedural due process and

\textsuperscript{64} Willam O. Douglas – “The Right of the People”.
\textsuperscript{65} 59 Law Week 4157.
made a searching analysis of the phrase "due process of law", which shows the tortuous transformation of the phrase from meaning no more than "process according to law", slowly evolving into and being equated with "fundamental principles of liberty and justice" Not compared to merely procedural safeguards against executive usurpation, but in course of time becoming "an effective bulwark even against arbitrary legislation".

C. Japan:

The expression, "in accordance with the procedure established by law, has been taken by our constitution - makers from Japanese Constitution of 1946, whose Article XXXI reads as, "No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed except according to the procedure established by law".

Article 21 of our constitution, however, has not brought criminal penalty such as fine or forfeiture within its ambit. The debate in the constituent Assembly shows that the Japanese constitution had been framed when it was under occupation by America and American constitutional expert had prepared the same.
D. Canada:

Section 1 (1) of the Canadian Bill of Rights Act, 1960, has adopted the "Due Process" clause from the American constitution. But the difference in the Canadian set-up is due to the fact that this Act is not a constitutional instrument to impose a direct limitation on the Legislature but only a statute for interpretation of Canadian Statutes, which again, can be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian parliament itself (Sec. 2).

The Canadian Supreme Court has held\textsuperscript{66} that the Canadian Court would not import "Substantive reasonableness" in to Sec.1(a) because of the un-salutary experience of substantive due process in the U.S.A.; and that as to "procedural reasonableness, S.I.(a) of the Bill of Rights Act only referred to" the legal process recognized by Parliament and the courts in Canada. The result has been that in Canada, the 'due process clause' has lost its utility as an instrument of judicial review of legislation and it has come to mean practically the something as whatever the legislature prescribed, much the same as "procedure established by law" in Article 21 of the

\footnote{66 Curr v. R (1972) SCR 889.}
constitution of India, as interpreted by A.K.Gopalan V. State of Madras67.

E. Nepal:

Article 11(1) of the constitution of Nepal, 1962 corresponds to the present Article of our constitution: “No person shall be deprived of his life or personal liberty save in accordance with law”.

Immunity from exile, on the other hand, is provided by Article 12: “No citizen shall be exiled”.

International Charters:

A. Universal Declaration, 1948 – Art. 3 of the universal Declaration says “Everyone has the right to life, liberty and security of persons”.

Art. 9 provides –

“No one shall be subjected to arbitrary arrest, detention or exile”.

Clause 10 says – “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial

67 (1950) SCR 88.
tribunal. In the determination of his rights and obligations and of any criminal charge against him”.


Art. 9 (1) of the United Nations covenant on Civil and Political Rights, says -

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

C. European convention on Human Rights, 1950 – This convention contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion, in various articles.

Art. 2(1) Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary.

(a) In defence of any person from unlawful violence.

(b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained.

(c) In action lawfully taken for the purpose of quelling a riot or insurrection.

Art.3 – No one shall be subjected to torture or to inhuman or degrading treatment or punishment.\textsuperscript{68}

Art. 5 – (1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) The lawful detention of a person after conviction by a competent court.

\textsuperscript{68} Year Book of European Convention on Human Rights, 385; Year Book, 256.
(b) The lawful arrest or detention of a person for non-compliance with the lawful order of a court.

Article 21 is not intended to be a constitutional limitation upon the powers of the Legislature otherwise conferred by the constitution. Its object is simply to serve as a restraint upon the executive so that it may not proceed against the life of personal liberty of the individual saves under the authority of some law and in conformity with the procedure laid therein.

Article 21, read with Art.22, contains the entire provision relating to deprivation of life or personal liberty, as distinguished from 'restriction' of the right to move freely through out the territory of India, which is dealt with in Art.19(1)(d) and (5).

Before a person is deprived of his life or personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected.

To sum up, in this chapter, a discussion has been made on the conceptual frame work of liberty with particular

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reference to liberty and individualism, kinds of liberty, liberty and socio-economic planning and liberty and democracy as experienced in England, United States of America, Japan, Canada and Nepal. The provisions of the International Charters, that of Universal Declaration of 1948, Covenant on Civil and Political Rights of 1966 and European Convention on Human Rights, 1950 have been taken into consideration for the purpose. However, to have a clear grip over the subject of personal liberty, the conceptual framework is not sufficient but there is, no doubt that, the scope of personal liberty has its importance. How, personal liberty is neither vague nor meaningless but a guarantee against the oppressive laws, is the subject matter of the next chapter.