CHAPTER-II

HISTORICAL PERSPECTIVE

The concept of liberty is, no doubt, a modern political concept. The liberty has always been defined differently in different lines, at different places and by different school of thought. The reason for different meaning of liberty in different times is definitely due to varied types of Government and their varied relation with their subjects.

The meaning of liberty has two dimensions negative and positive. In a negative sense, it implies the absence of restraints as far as possible. A classic defender of this argument like John Stuart Mill says that 'all restraints quo restraints is an evil leaving people to themselves is always better than controlling them'.

The meaning of liberty in its positive aspect is a contribution of T.H. Green. He defines it as a positive power of doing or enjoying something that is worth doing or worth enjoying in common with others.

It follows that the real meaning of liberty has its negative and positive dimensions. While, the negative view disfavours the case of restraints on the liberty of man as far as possible, the positive view appreciates the system of reasonable restraints in the name of public good. If Mill and Hayek subscribe to the former view, Green and Strauss do the same for the latter.

Life dictionary means state of functional activity and continual change peculiar to organized matter change peculiar to organized matter and especially to the portion of its constituting an animal or plant before death animate existence being alive. But as used in Constitution it may not be mere existence.

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Life begins in a natural way, it evolves and happiness expends. Life is not meant to be lived in dullness, illness and suffering. Life is dynamic and not static. It is energetic, progressing, evolving and developing through activity and multiplying itself.

**Right to Life and Personal Liberty-its jurisprudential foundations**

Doctrine of rights is a product of natural law theory, evolved since ancient times, which paved the way for recognition of individual identity and autonomy. Advancement of civilizations and progress of societies was required to keep pace with the changing time and therefore, the doctrine of rights has also been changed and transformed with the changing time. Majority of natural lawyers did incorporate rights as an integral part of their theory. Natural law theory though underwent a change but few principles of it remain constant, inter alia inalienable rights of individual.

Jurisprudential underpinnings or foundations of rights are well reflected in the writings of a natural lawyer Prof. John Locke and has been incorporated positively in the American Constitution. The 5th amendment of it contains the provision that no person shall be deprived of his right to life, personal liberty and estate without due process of law. The categorical, concrete and positive insertion of this provision in the Constitution of USA is an express instance of positive incorporation of natural law theory in to a positive and supreme law or a positivisation of natural law. The beauty of the 5th amendment lies not only in inclusion of right to life and personal liberty but, it lies in the words of 'due process'. It signifies naturality of rationality and its positive incorporation in the Supreme document. The fundamental tenet of the inclusion of the term stipulation or limitation upon the exercise of a power in an arbitrary or unreasonable manner by the sovereign authority.

Jurisprudential underpinnings of right to life are also visible in Prof. Finni's natural law theory. His description of basic common goods as an essential and necessary component of a legal system and along with them,
basic methodological requirements furnishes a foolproof theoretical structure of right to life. According to him these basic common goods are so essential that no legal system could remain immune from their incorporation or legal system would not be a legal. They are so basic or fundamental that their legality or validity could not be determined on the basis of any other external authority or touchstone. It meant, they are self-evident. In other words basic common goods including life, impose certain limitations or restrictions upon the competent sovereign legislative body, not to either take away or abrogate them. The fundamental value rooted inherently in these goods enables individual not only to exercise or enjoy his freedom of life but make his life more meaningful and prosperous. Though these goods are not placed in a hierarchical order, but primacy is attached or conferred on the basic goods of life.

It would be quite out of place to undertake a whole jurisprudential scrutiny of doctrine of right here, but as it is pointed out earlier, that the transformation of the doctrine from natural to fundamental and fundamental to human, is a matter of intrinsic value, significance and utility attached with it.

Prof. John Rawls says that human rights do not depend on any particular comprehensive moral doctrine, they express a minimum standard of well ordered political institutions for all peoples, who belong, as members in good standing, to a just political society of people. Human Rights are a special class of rights designed to play a special role in a reasonable law of peoples for the present age. They are thus distinct from other kinds of rights that belong to certain political institutions both individualist and associator. They are a special class of universal application and hardly controversial in their general intention. According to him human rights have three roles to perform:

1. They are necessary conditions of a regime's legitimacy and of the decency of its legal order.

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3 Prof. Finnis has described seven basic common goods and inter alia life.
2. They are also sufficient to exclude justified and forceful intervention by other people's say by economic sanctions, or in grave cases, by military force.

3. They set a limit on pluralism among peoples\(^5\)

Those roles of human rights outlined by Prof. Rawls demonstrates an intrinsic and basis value of them. The first two roles to be played or performed by human rights are closer to version of natural law and basic common goods. Otherwise, human rights are essential conditions, which are necessary for all human beings. The similarity between the two approaches espoused by two different jurists depicts or connote and accord new dimension to the doctrine of rights or human rights inter alia right to life and personal liberty. Role to be played by human rights negatives interference, if any, on the part of the State, and makes a life of individual more autonomous or dignified. Thus, right to life and personal liberty has become quintessential for all positive legal orders and moreover to liberal democratic societies. These jurisprudential foundations are sufficed to initiate a further enquiry of right to life as guaranteed under Article 21 of the Indian Constitution, and interpreted by the Supreme Court.

The human person possesses rights because of the very fact that it is a person, and accordingly he, "has the right to be respected."\(^6\) A study of scriptural literature reveals that the concept of human rights in India has consistently and gradually developed in various stages. Vardachariar observed that:

No unbiased student of the Smriti literature can assert that the system whose beginning and developments are traceable from stage to stage was wholly imaginary. The rules laid down are so detailed and practical and their development is so natural that

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\(^5\) Ibid.

\(^6\) Jacques Maritain, The Rights of Man, (1944) at 37.
they must have been the result of actual experience in the daily administration of justice.\textsuperscript{7}

The above is also borne out from Sanskrit literature which is illustrative of the salient features of the justice system and depicts the same minute details of an actual trial.\textsuperscript{8}

The study of the administration of criminal justice in Hindu period may, conveniently, be sub-divided.

**Concept of Right to Life and Personal Liberty Ancient India**

The concepts of 'Right to Life' and 'Personal Liberty' are as old as man kind. The nature creates the life and right to it is essentially natural. In pre-legal stage man was living more or less like an animal and the jungle law applied which meant 'might is right'. The survival of the stronger was the order of the society but in legal stage when the process of civilization began, a human being became conscious of his rights, particularly his right to exist. The most important fact of the society is the interdependence of men. In the present day society man exists by its membership of the society. Each man cannot manufacture and procure the necessities of life himself. The realization of interdependence culminated in to his living as a responsible member of the group of human beings called society.\textsuperscript{9}

The origin of these concepts may be treated in ancient Greek civilization. Greeks distinguished between the liberty of the group and the liberty of the individual.\textsuperscript{10} In the oration of pericles, the first Athenian statesman, delivered the funeral of country men, who died in the Peloponnese war of 431 B.E., it was described that the concept of liberty was the me-cum of two notions; first protection of groups from attack, second, the ambition of the

\textsuperscript{7} Vardachariar, S., *The Hindu Judicial System*, (1946) at 238.

\textsuperscript{8} See Shudraka’s *Mrichhakatikam*, Act IX.


group to realize itself as fully as possible through the self-realization of individuals by way of human reasons. Further, to the Greeks, State was living reality to which they assigned the duty of protecting their liberties.

It would not be proper to hold the view that India knew no liberty before the British advent and that concept of life and liberty is derived in India from the West. The ancient Vedas proclaimed liberty of body (Tana), dwelling house (Skridhi) and life (Jibasi). The Santi Parva in the Mahabharata also described the civil liberty of the individual in a political State. In Mahabharata, Bhishma expressed the view that there was no law and no administration before the advent of the State. The Matsya Naya figuratively described the state of nature as the rule of the fish, the big one eating the small ones. Meaning there by that might was right. Bhishma further described the political State as the out come of the desire of man for security and social order in which man can live in peace and grow and gather the fruits of his labour. Later Manu Smriti has very succinctly stated and amply demonstrated about the existence of the democratic form of Government, where ruler was democratically elected and people enjoyed freedom.

According to Manu 'justice keeps awake, while all are asleep'. The wise man knows that 'danda' must equate with 'dharma'. The people are made happy only by the proper administration of justice. The legal philosophy of life and personal liberty in India had its basis in metaphysics which attributed four dimensions in the form of Artha (desire), Kama (interest), Dharma (ethical value) and Moksha (absolute liberation i.e. annihilations of all limitations).

The legal philosophy embodied these dimensions in the law codes of ancient India. These aims of life also affected the social system, the political

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13 Rig Veda 8 : 38:12, quoted in P. V. Mukharjee, Civil Liberties, (1968), p.22.
system and consequently, the judicial system. *Dharma* regulated the civil and political rights. *Dharma* was not religion in the technical sense but a code of conduct which regulated the whole expression of life. Further, the concept of *Dharma* can safely be equated to 'Rule of law'.\(^{17}\) Under *Dharma* there are many schools of political thoughts.\(^{18}\) The first is the *Kautilyas Arthashastra*, the second is the *Brihaspati* School represented by the 'Kamandaka niti Sara', the third is the *Ausana* school embodied in the 'Suka Niti Sara' and the fourth school is represented by the Mahabharata. Incidentally *Sukra* is the most radical among Indian thinkers. It was he who preached that the sovereign was the servant of the people should not act without discussion and advice from his ministers.

*Kautilya* in his *Arthashastra* described political power as the combination of three forces of *shakties*, (i) the *Mantra Shakti*, (ii) the *Prabhu Shakti*, and (iii) the *Utsaha Shakti*, as the fundamental governing principles of the State. *Mantra Shakti* involved the civil liberty of the freedom of expression and participation in the process and policy of Governmental decisions. *Prabhu Shakti* was the balance between civil liberty and administrative control. *Utsaha Shakti* involved the civil liberty of equality before laws and access to and share in public offices and administration. It is, therefore crystal clear from the study of *Artha Shastra* that the State in India from its earliest times had an impression content which included appreciation of the problems of civil liberty.\(^{19}\)

*Kautilya* also conceded three kinds of rights, namely, civil, economic and legal in his treatise. Similarly, *Dr. Bhaskar Anand Saletore* has discussed different types of civil rights, civil liberties in ancient India mentioning in particular the rights which Kautilya expressly discussed (i) Rights of women including right of divorce (ii) right to property ownership and possession (iii) right to travel and move (iv) right to state relief (v) right to medical relief (vi)

\(^{18}\) Ibid., p.25.
\(^{19}\) Ibid., p.23.
right of prisoners to regain freedom and (vii) such other rights as (a) economic rights of sale and purchase, right to wages (b) legal right like right to have recourse of justice, right to fair trial, right to freedom from arrest, right to inheritance etc.\textsuperscript{20}

In the fourth century B.C, there was in existence Republican form of Government and \emph{Megath} had an elected king and written Constitution. The rise of Hindu republics and the term for these republics in post vedic institutions like \emph{Gana} and \emph{Sangha} indicate many materials relevant for civil liberty. Further, the republican States like Lichhavika and Vaishali, had been established and there were properly administered Constitutions and persons to run the Government were elected citizens. \textit{Dr.K.P.Jayaswal}\textsuperscript{21} has given a graphic account of the administration of justice. According to him, in Vaishali, the rights and liberty of the people were protected by the State.

It is further, revealed that the rise of Buddhism and Jainism were certainly a reaction against the deterioration of the moral order existing in the post vedic period as against the rights of the privileged class. A close examination of the concept of human rights in Buddhist polity discloses that it was more human and liberal and repudiated caste distinctions. Dr. \textit{Jayaswal's} views are also shared by \textit{Dr. B.M. Sharma}\textsuperscript{22} who has very emphatically expressed that great Ashoka himself was a great protector of human rights. After the death of Buddha, Ashoka secured and protected the most precious of human rights particularly, the right to equality, fraternity, liberty and happiness.

He successfully established a welfare State and made provisions for securing freedoms like freedoms from hunger. Health care, educational facilities and certain other social amenities in Ashoka's empire were perhaps initial efforts in the direction of the realization of social, economic and cultural

\textsuperscript{20} Bhaskar Anand Saletore, \textit{Ancient Indian Political Thoughts and Institution}, (1963), p. 249.
rights. Ashoka was the champion of civil liberties. Even forest folk in its domain enjoyed security of life, peace of mind and were enjoying their life on par with other people in the society. The study of 'Mudra-Raksha' shows that dispensation of justice was considered as one of the important duties of the rulers. No leniency was shown to criminals and the whole system worked so efficiently that Magasthenese says, 'kings employed spies not only to detect violators of human rights but gathered public opinion on various important matters'. Vaisakha Dutta in his 'Mudra Raksha' has depicted Chandragupta as a deity conning right from heaven to save his country men. King Ashoka in Kalinga Edict 2 inscribes, 'All men are my children and just I desire for my children that they may enjoy every kind of prosperity and happiness both in the world and in the next so also as I desire the same for all men.

Harsha Vardhana was the last Emperor of Hindu India. His reign marks the culmination of Hindu culture. He never forgot that the aim of the Government was the welfare of the governed. He provided food and drinks and stationed physicians with medicines for the poor persons without any cost. He devoted his whole time to promote the welfare of his people. Men of merit and ability were patronized irrespective of their castes, colour and creed. It is for his commitment towards his people that he is often compared with Akbar and Ashoka. After the break of his empire that whole India was split up. The society too in general had degenerated. The philosophy of human right lost sight. The downfall of Rajput gave rise to the advent of Muslim rule in India. It was under Muizz-ud-Din that Muslim Empire was founded in India.

24 Ibid.
(i) The Vedic Period

The Rigveda, one amongst the four Vedas, throws a considerable light on the structure of the society and social and political institutions existing in that age. In this period law, religion and justice were closely inter-connected and there was no clear cut demarcation in the above fields. According to the information contained in Rigveda, the life of the early Aryan was mainly pastoral and they depended upon agriculture as the main source of livelihood. The social structure was mainly rural and the joint family system was a common feature. The people were composed of tribes Janas. The territory in which a group of villages possessing a common tie was situated came to be known as Janapada. The gotra was an aggregate of number of families Kulas and the goshti, an aggregate of number of gotras. A number of goshties together formed a grama and the head of the village was gramani. Gramani, the village headman, represented the people before the king whose office became hereditary in later times. There was absence of central control of organized Government in the modern sense. The entire territory was divided into small kingdoms ruled over by a king, as head of the State, not of the society. He was symbolic head of the society because of lack of direct control over the people who felt bound by their own social order developed by them in a community life.

Among the bodies which regulated the community life we find mention in the Vedic literature that national life and activities in the earliest times on record were expressed through popular assemblies and institutions. The three most important and popular bodies were Parishad, Samiti and Sabha. The Parishad was an advisory body on religious matters but is also discharged some judicial functions. The Samiti was the body for general deliberations of all kinds of policy matters and discharged legislative and judicial functions also. The Sabha was a body of selected men under the authority of the Samiti
and was the national judicature. The law was considered of divine origin and eternal. Every person including the king was bound by such a law.

This period is the golden era of Hindu Law in that law propounded by the Smriti writers was more systematic and comprehensive in nature and laid down certain set principles to be followed by the people and the king alike.

During Sutra and Smriti periods, the Royal Court Sabha staffed by experienced Councilors advised the king on the point of law in accordance with law laid down in the sacred text books and local customs. The other tribunals also discharged judicial functions.

(ii) Post-Smriti Period

The celebrated work of Kautilya or Chanakya was compiled somewhere about 300 B.C. Arthashastra of Kautilya is a treatment of entirely different branch of law as he deals with the rights, duties and responsibility of the kind in the administration of the State including judicial administration. The Nibandhas and Tikas (commentaries) played a significant past in the development of Hindu Law. Among the commentator in the later period Vijvaneswara's commentary on Yajnavalkya Smriti is known as (Mitakshara).

The aim of every judicial administration is just, honest and make available speedy remedy to the aggrieved persons. The same was the case with the Hindu Judicial system existing in ancient India. The entire judicial administration functioned under the supervision of the king and the Courts derived their authority from him. The king was the dispenser of justice, as a last resort, in case, justice was denied to a person by the king's tribunals. He discharged his judicial functions with the aid and assistance of his ministers, purohit and sabhyas.

While deciding the disputes himself, the king though required to consult the learned persons but was not bound by the advice tendered to him. As an

27 Jayaswal, K.P., Manu and Yainavalkyau (1917) at 61-62.
appellate authority, the king had a special position. He had to see that justice was done at any cost. Where miscarriage of justice was alleged to have taken place before a Court, the king had threefold responsibility (a) he had to look into the matter himself and give redress to the aggrieved party (b) he had to punish the officers and Sabhyas responsible for miscarriage of justice and (c) if a suitor made an unfounded allegation that justice had not been done to him, the king must punish him.28

The Courts in ancient India were not bound by any technical procedure for doing justice to the aggrieved persons. The basic considerations were upholding *dharma* and to avoid needless and vexatious litigation. It was not necessary, in all cases, that the complaint was to be filed by the party actually aggrieved, the Courts could themselves initiate proceedings on their own initiative, if the circumstances so warranted. The trial was conducted by the Courts with the help of witnesses and the documents adduced in support of claim. The veracity of the witness was tested by subjecting the witness to various ordeals, namely ordeal by balance, ordeal of fire, ordeal of water and ordeal of poison etc. the procedure took every possible precaution, consistent with the conditions of knowledge of the time, to secure the discovery of truth.29 In the earlier times it was the duty of the parties concerned to produce the witnesses but later on the judges could compel the party to make their appearance in the Courts.30

In ancient India the conception of justice was the upholding the principles of *dharma*, a path of virtue to be followed by all alike. Any deviation from the virtuous path was made punishable by law.

B. Under Muslim Legal System

During Mughal rule over India, many significant changes were introduced by Muslims in the Indian Legal system from time to time, the

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28 Supra note 2.
29 Supra note 2 at 150.
Islamic jurisprudence was imported into India by Muslim Sultans and later on adopted by the Mughals with certain modifications to suit the circumstances of the age and to satisfy the needs of the people of the time.

The Muslim concept of the administration of justice is based on the tenets and injunctions of *Holy Quran* which may be described as the supreme legislative code of Islam which laid down basic rules of justice. The study of the administration of criminal justice during Muslim's rule in India's can be divided into four periods:

I. The period of conquest and military occupation (712-998 AD).

II. The period of successive invasions (999-1206 AD)

III. The period of settled Government with judicial tribunals (1206-1555).

IV. The period of well established Government with extensive judicial machinery (1556-1765 AD)

1. The period of conquest and military occupation commenced from 712 AD when the famous Arab General, Mohammud-Bin-Quasim defeated Rai Dabir and annexed Sindh and Multan with Arab. There was no Muslim Government in the proper sense of the term. The administration of criminal justice was carried on by the Hindu officials without any interference by the conqueror. During this period all offences were dealt with by the Hindus according to *Sastras*. The Muslim law applied only to military personnel.

II. The period of successive invasions and turmoil began from the time of *subktigin* (991 AD) and lasted till the permanent conquest of India by Muhammad Ghori. Records of the Muslim administration of justice in India relating to this period are not traceable.

III. The period of settled Government commenced from the slave dynasty (1206-1290 AD) and continued during the reigns of Khilji dynasty, the Tughlaq dynasty, the Lodhi Dynasty and the Sur dynasty. Permanent
Governments were constituted during this period. Judicial machineries for better working of the Government were, however, set up.

The administration of criminal justice of Muhammad Tughlaq is noteworthy. Al-Badayuni says:

"The Sultan used to keep four Muftis to whom he allotted quarters in the precincts of his own palace so that when anyone was arrested upon any charge, he might in the first place argue with the Muftis about his due punishment. He used to say 'be careful that you do not fail in the slightest degree by defect in speaking that which you consider right because if anyone should be put to death wrongfully the blood of that man will be upon your head.'"

Sher-Shah improved his judicial system by appointing different officials i.e. Shiqdar for the administration of criminal justice and Munsifs for the administration of Civil Justice.

**Muslim Era**

The concept of human rights got lost on its way in the dark and narrow alleys of the middle ages. In the Medieval period of the philosophical and ideal speculation, were replaced by new idea of chivalry, war and others heroic traditions which led to confusion and uncertainty. With the invasion of India by the Muslim created new situation where In Muslims rulers or Sultans followed a policy of discrimination against the Hindus. So the significance of Muslim rule in India was counter productive to harmony, justice and equality.

The advent of Muslim rule led to systems and ideals totally different from Hindu view of society and life. Muslim conquerors-especially Mahmud Ghazanavi and others made frontal attacks on Ancient way of life and religion. The destruction of temples, idols, and large scale conversion to Islam

31 Ranbin, G.S., (Trs.), AI-Badavuni. (1884) at 317.
32 Ibid.
alienated the masses. It was however, at a later stage that Muslim state in India became considerably modified in its form. The Mughal rulers especially with Akbar a new era began in Mughal history of India in the field of rights, with his policy of universal reconciliation and tolerance. He was earnestly concerned with the welfare of his subjects. At one place, Akbar went to the extent of saying that if he was guilty of an unjust act, he would rise in judgment against himself. His justice loving tradition was followed by his son Jehangir too. There was a popular legend that Jehangir arranged a chain with bells to be hanged outside the palace in order to enable petitioners to approach him for the redressal of their grievances. Strictly speaking, it was an easily accessible individual petition system in comparison to our modern lengthy and expensive writ petition system.34

The trend initiated by Akbar came to be reversed by Aurangzeb, though the Marathas and Sikhs opposed and fought the fanatism of Aurengzeb and his successors. The sheer indifference to Human rights gave rise to Bhakti movements in India. It revived and regenerated the old Indian value of truth righteousness, justice and morality. Great saints like Shankara, Ramanuja, Madhva, Tulsidas, Kabir, Guru Nanak and others reinterpreted the Vedic Dharma to re-establish the supremacy of Indian Vedic values over aliens ideals and philosophy. The philosophy of these social reformers and leaders was nothing but a reinstatement of natural law with religious story of India reveals that the glorious Hindu period was subjected to intermittent invasions by the Muslims and the beginning was made by Mohammed-bin-Quasim in 712 A.D. with the assumptions of sovereign power by the Muslim Rulers, the Muslim system of Government came to be established in several parts of India.35

It is true that under Muslim Law, there were no specific provisions regulating the Constitution and organization of the State. However, the fundamental concepts underlying Muslim Law, like the Hindu law was the

authority of the king, who was subordinated to that of law. It is imperative to mention here that the Muslim ruler did not interfere with the law of the Hindus and the Hindus continued to be governed by their own laws in personal matters. The judicial system of Muslim was modeled after that of the Caliphate of Baghdad and Egypt with such modifications as were necessary on account of the age and conditions in India.\textsuperscript{36}

The entire State machinery had nothing to do with the welfare of the masses but was meant to perpetuate that the existence of the Empire. Further under the Muslim Law, non-Muslim did not enjoy all the rights and privileges which the Muslim did. However Aurangzeb did care for the subjects and issued instructions for compliance. He made it a rule that no one was to be detained in jail except on authority of a \textit{Qazi}. He further directed that no warrant of arrest should be issued unless there was prima-facie case against the person in question. After arrest, he should be produced before the Court within the shortest possible time and his case quickly decided, indefinite detention without trial or conviction were frowned upon and prohibited. He also framed laws regarding release of persons on bail.\textsuperscript{37}

The general policy of the rulers was to keep the masses in utter subjugation and the very act of conceiving the idea of liberty of the individual and the freedom of human spirit could be a blasphemy punishable with death. In addition to the despotic rule, the policy of conversion to Islam was officially patronized and \textit{Iswari Prasad} has observed that those who embraced Islam were exempted from slavery. There was no respect for human dignity and terror was the order of those days. Another scholar, Jadunath Sarkar, also made comments that the main aim of the Government was just materialistic and so did and the ruler did not care for the prosperity of the subjects. Hidayatulla in his book has surveyed the entire period and has come to the conclusion that

\textsuperscript{36} \textit{Ibid.}, p. 4.
neither in ancient India nor in the medieval period, there was any trace of rule of law.\textsuperscript{38}

(i) \textbf{Mughal Period:}

The Mughal period is considered as the most important period of the Muslim rule in India.

The idea of justice of Akbar, the-Great, has been quoted by Vincent Smith from the 'Ayin-I-Akbari' the saying of Akbar, 'If I were guilty of an unjust act, I would rise in judgment against myself'.\textsuperscript{39}

Akbar was the first among Muslim monarchs to adopt trial by ordeals. He abolished the sentence of flaying alive.\textsuperscript{40} Jahangir interdicted the cutting of noses and ears, and no death sentence could be inflicted without his permission and confirmation. In order to afford easy and free access to justice, a box was kept at the door of the Courthouse for the purpose of lodging the complaints and key of the box used to remain with the collector himself. The French traveler Tavernier speaks of the reign of Shahjahan like that of a father over his family. He himself heard the petitions and fixed Wednesday as the day for the administration of justice. He abolished a regular system of appeals.

During the reign of Aurangzeb, the justice was made less cumbersome but more expeditious than in the former reigns. Corruption in judiciary was made a crime. Any delay in justice resulting loss the party could be compensated by the judge himself. The capital punishment was almost totally unknown.

The \textit{Shahi Farmans}\textsuperscript{41} issued in 1772 to the Diwan of Gujarat throws a lot of light on his idea of criminal justice. Prof. Sarkar has translated the \textit{Farman} from which the following extracts are taken:

\begin{footnotesize}
\begin{enumerate}
\item Smith, Vincent, A. \textit{Akbar the Great Mughal.} (1918) at 344.
\item \textit{Ibid.}
\item This Farman is to be found in \textit{Mirat-I-Ahmadi} at 293-99.
\end{enumerate}
\end{footnotesize}
The emperor has learnt that local officers delay in dispensing the cases of those who are lodged into prison on any charge.

When a man is brought to the Chabutra (altar) of the Kotwal (Head of the city police) under arrest by the Kotwals' man or revenue collectors, or an accusation by the private complaint the Kotwal should personally investigate the charge against him. If he is found innocent release him immediately. If anybody has a suit against him, tell the former to resort to a Court. If there is any case of the crown land revenue Department against him, report the fact to the Subahdar, take a sanad as suggested by Subahdar and act accordingly. If a Qazi sends a man for detention take the Qazi's signed order for his authority and keep the man in prison, if the Qazi fixes a date for trial, sent the prisoner to the Adalat on that day otherwise send him there every day so that his case may be quickly decided.42

The above extracts show that it was the right of the accused that he be not condemned by lodging in the prison before this trial concluded. Secondly, there should not be delay and laches on the part of the officers.

The Muslim criminal law was divided into two portions:

(1) The portion of the Islamic canon law dealing with religious infringement was applied to Muslims only; such as drinking, marrying within the prohibited degree, apostasy etc.

(2) The portion of the Islamic law punishing the acts which constitute crimes in the estimation of all nations, was applied to Muslims and non-Muslims alike e.g. adultery, murder, theft, robbery, assault etc.

The mode of trial was very simple. The complainant could either lodge a written complaint or explain wrongs done to him verbally. In the case of accused's confessing the guilt, the case ended without any trial. In the case of accused's denying the charge on oath, the prosecutor was asked to lead

42 Sarkar J.N., Mughal Administration (1920) at 122-130.
evidence against the accused and the accused was given an opportunity to lead
evidence of his witnesses. The witnesses were examined separately so that one
might not know the statements of the other. The cross-examination was
allowed.\textsuperscript{43}

A judgment of the Court was pronounced by the Presiding Officer in the
open Court in the presence of the parties.

The emphasis was laid on the trial of cases on the spot, if possible.

(ii) **Rights of the Accused:**

The rights of the accused in some forms existed under the Muslim
criminal jurisprudence and thus ways and means were devised to ensure fair
trail to a person accused of crime.

A brief survey of these rights is discussed herein:-

Refer the point of law to *Quazi-ul-Quzat* (the Chief Justice's bench) or
cause an additional evidence to be recorded. The appellate Court could also try
witnesses for perjury as Emperor Jahangir ordered in a *Muslim Woman v.
Rajput*\textsuperscript{44} and the accused in such cases could run the risk of sentence to death.
Appeals could abate on the death of the appellant. It is still in practice in
criminal cases. Revision and review were also made.

**Administration of justice during later Mughals**

Within five decades after the death of Aurangzeb and the grant of
Diwani to the East India Company in 1765 the grandeur of the Mughal empires
crumbled down. There was internal war by the Marathas, the Sikhs, and the
Rohillas and some of the provincial Viceroyals became independent. The French
and the English appeared on the scene. Central Government became distracted
and weak. Consequently, judicial administration was disturbed and
disorganized. Although pre-existing tribunals performed their usual functions,
but the quality of justice and the prestige of judiciary suffered. Seven years after the acquisition of the Diwani, the Company's Government took the first step towards improving the administration of justice. Under the regulations of the 15th August, 1772, two Courts, a Diwani or Civil Court and a Foujdari or Criminal Court were instituted. For sometime, Mohanlmadan law was administered with some modifications. In the trial of the Criminal cases the Qazi and Mufti of the District along with two Moulvis sat in the criminal Court to determine the guilt of the accused under the supervision of the collector. The Islamic law was not superseded immediately after the grant of Diwani. Gradual changes were made in the penal code without suppression of the Islamic concept of criminal justice.

British Era

With the passage of time, the Britishers who entered Indian through East India Company for the purpose of trading later transformed themselves into political interests. Thus on 31st December, 1600, Queen Elizabeth granted a Charter authorizing the East India Company with the exclusive right of trades between (British) India and other countries including United Kingdom. Over the next one hundred and fifty years, through a succession of charters, this trade adventure blossomed into political power. The Charter of 1611 empowered the East India Company to regulate its affairs. The Charter of 1661 extended the powers of the company to include administration of justice in the settlements. In India, the national movement and process of evolution of liberty went side by side during British era. In other words, the concept of civil liberty struck its roots in India during this era of administration. The growing powers of the company and the abuse of its authority, raised eyebrows in England. Commencing from the Regulating Act of 1773, the British power began to increase exercise its control over India affairs. The 1857 mutiny was the proverbial last straw which broke the Camel's back. On November 1, 1858 the
queen of England declared Crowning assumption of Government in India. For the next sixty years, British crown and the parliament directly governed India.\textsuperscript{45}

The Indian National Movement during the British administration heralds the dawn of modern civil liberty and freedom. Indians were anxious that their civil liberty and basic human rights must be arrested as part of the movement to get rid of the foreign rule. The Indian National congress, the Indian National Association and many other organizations grew up to fight for the cause of civil liberty and to secure basic human rights for all individuals. The demand for civil rights and equality of status were included in the Constitution of India Bill, 1895 and other Congress resolution adopted from 1917 to 1919. The Indian National Congress at its special session held in Bombay in 1918 and there it made a demand for writing in to the Government of India Bill, a declaration of right of the people of India as British citizens, including there in among other things guarantees in regard to equality before law, protection in respect of liberty life and properly. But instead of complying with this demand, the British Government enacted the Rowlett Act in 1919. Mahatma Gandhi described this Act as unjust, subversive of justice and liberty and destructive of Individual rights. Due to this reason, he asked the people to disobey it.\textsuperscript{46}

One further major development was the drafting of Mrs. Annie Besant's Common Wealth of India Bill, 1925. This Bill contained seven fundamental rights which were similar to those contained in the Constitution of India Bill 1895. With in two years of the printing of Besant's Bill, 1925, came the announcement that a statutory Commission under the chairmanship of Simon would undertake a study of possible Constitution reforms in India.\textsuperscript{47}

In 1928, a Committee was appointed and Moti Lal Nehru was appointed as the chairman. The Constitution was drafted in the shape of Nehru Report which was submitted in August 1928. Demand for the fundamental rights was

\textsuperscript{46} \textit{Ibid.}
made, this committee laid down in its report that no person shall be deprived of his life nor shall his dwelling or property be entered, sequestered or confiscated save in accordance with law.\(^{48}\) The committee demanded that fundamental rights should not be withdrawn in any case. But the reaction of British Government was not favourable. Neither the Montague Chelmsford's report of 1918 nor the Simon Commission report of 1919 expressed any favour towards granting of fundamental rights in the future Constitution of India. Further, Karachi session of congress in 1931 adopted a detailed program of Fundamental Rights and Duties.\(^{49}\) The Report of the Third Round Table conference, held from November 17 to December 24, 1932 recorded that the Government had not in anyway failed to realize and take into account the great importance which had been attached in so many quarters to the idea of making a chapter of fundamental rights in the new Constitution as a solvent of difficulties and as a source of confidence.

The request for securing fundamental rights was pressed upon, in the joint parliamentary committee, and as a result of the discussion at Round Table conference, the British Government drafted proposal for Indian Constitution Reforms in March 1933. In the introduction of the proposals for Indian Constitutional Reform, the views of British Government on fundamental rights published in the white paper on Indian Constitutional Reforms, 1931 was duly recorded that the question of including in the Constitution Act a series of declarations, formally described as a statement of 'Fundamental Rights', which would be design to secure either to the community in general or to specified sections of it, rights or immunities to which importance was attached, had been much discussed during the proceeding of the Round Table conference. His Majesty Government saw serious objections to giving statutory express to any large number of declarations of this character, but they were satisfied that certain provisions of this kind, such, for instance as the respect due to personal

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liberty and the rights of property and the eligibility of all for public office, regardless of difference of caste and religion etc. could appropriately find a place in the Constitution. The British Prime Minister Ramsay MacDonald favour the Bill of Rights but the Joint Parliamentary Committee of 1935 did not favour the Bill of Rights and it did not become part of the Government of India Act, 1935. The Act was criticized for negation of liberties of people. It created much to the disappointment of Indian leaders and a deprived the people of India of their freedom and brought economic, spiritual and cultural ruin for them. In other words more repressive measures were adopted to crush the liberties of the people of India.\(^{50}\)

In 1945, the Sapru Committee made recommendation for incorporating fundamental rights in the future Constitution of India. The proposals made by the Sapru Committee were recognized and rights were divided into justiciable and non justiciable rights. In 1946, the General Elections were held and the Congress promised to secure to the people of India fundamental rights including the protection of life and liberty. It was for the first time that the British Government through cabinet mission conceded the demands for a Bill of Rights. Its proposal for constituting a Constituent Assembly for framing the Indian Constitution also included recommendations for a Bill of Rights. As is known after a great fight, India attained independence in 1947 before which the cabinet plan had been accepted in 1946, which set out in detail the procedure regarding elections to constituent Assembly which took place in July, 1946. Further a survey of right to life and personal liberty leads us to following conclusions:

Firstly, the concept of liberties in this era was colonial concept of liberty. Frankly speaking, the right to liberty was the gift of Government and the Law must be determinant of what in fact is liberty and not liberty which determines what is Law and secondly, the law during this period also reveals that the

British Government in India not only deprived the Indian people of their Right of personal liberty, but according to Pt. Jawaharlal Nehru it has ruined India Economically, Politically, Culturally and Spiritually.\textsuperscript{51}

C. Under British India

(i) Application of English Common Law

The common law of England with its statutory modifications and the principles of Courts of equity commenced its application in the 17\textsuperscript{th} century to British subjects in small areas of certain parts known as company's factory. These factories thus became the nurseries of the English law in India. The influence of the English law has largely been because of the fall of Muslim rule. The Britishers shrewd rulers as they were, never attempted nor pretended to interfere with the sovereignty of the Mohammadan rulers for some centuries after their settlement for trade in India. They gradually brought law as well as the sovereignty of their own State. As a result, present Indian jurisprudence has a close affinity with that of English jurisprudence and it may be no exaggeration if the former is termed as mother jurisprudence of England. The British traders, apart from bringing common law, also brought their traditions, outlook and technique in establishing, maintaining and developing the judicial system, it commenced with the formation of the East India Company in 1600 during the reign of Queen Elizabeth I.

(ii) Criminal Law before the Criminal Procedure Code:

With the advent of the British rule in India, the common law principles of England were gradually transplanted in the Indian sub-continent if found applicable to the conditions and circumstances suited to the Indian Society. In several cases the Courts refused to apply the rules of English law on ground of their inapplicability to Indian sub-continent. Thus, the Indian law was supplanted and supplemented by the common and statute law of England.

without in the least affecting the Indian Common law and without giving an opportunity to the Indians to realize that the foreign law was being imposed on them.\footnote{Supra note 19.}

After the grant of Diwani in 1765 when the company took the administration of criminal justice it continued to administer criminal justice according to Mohammadan criminal law which had till then been applied by the Nazims. It was applied in Bengal and Madras and later on the other parts of India though not in Bombay to Hindus as well as Muslims. Gradually the company made attempts to alter and reform the criminal law. In 1793, the Cornwallis code was enacted but it only amended the Mohammadan Criminal Procedure. The Charter of 1833 introduced a single legislation for the whole of British India. The second half of the 19th century may be described as statutory period in which many enactment's and legislation's were made. Between 1860 and 1898 many repeals and replacements were made in the criminal procedure until the Code was made exhaustive by the Code of Criminal Procedure, 1898. The Code of 1898 has too been repealed and replaced by the Code of 1973.

The Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1898 laid down many procedural rights and privileges of the accused; the salient amongst them are the right of being presumed innocent throughout the trial,\footnote{Sections 102 and 105, India, an Evidence Act, 1872.} right of defence,\footnote{Sections 251-252,257, Cr. P.C, 1898: sections 240,243,247 Cr. P.C, 1973.} right of being produced before a magistrate,\footnote{Sections 60,61 Cr. P.C., 1898: Sections 56, 57 Cr. P.C., 1973.} right to know grounds,\footnote{Section 173 (4) and 251A(I) Cr. P.C., 1898: Sections 50, 173 Cr. P.C., 1973.} right to counsel,\footnote{Section 340 (I) Cr. P.C., 1898: Section 303 Cr. P.C., 1973.} right to public trials,\footnote{Section 352, Cr. P.C., 1898: Section 327 Cr. P.C., 1973.} right to trial in his presence,\footnote{Section 353, Cr. P.C. Section 273, Cr. P.C., 1973.} right to produce and examine defence witnesses,\footnote{Supra note 29.} right to cross-examine prosecution witnesses,\footnote{Sections 137, 138, 143, 145, Indian Evidence Act, 1872.} right to examine his own hostile witnesses.\footnote{Sections 154, Evidence Act, 1872.}
right to discovery of statements, right against testimonial compulsion, right against double jeopardy, right of sanction for prosecution, right of bail, and right of appeal etc.

We may also mention here a brief summary of the procedural protections to the accused in the pre-constitution India. These existing provisions of the pre-constitution India even continue to govern the criminal procedure in the post-constitution India except that some of them have been doubly guaranteed and made inviolable by the Constitution.

The idea of basic rights and its incorporation in the Constitution of India is said to be the legacy of the British rule over India for roughly two centuries. The British rule without adversely affecting the Indian Social and Cultural heritage left its own influence on the Indian sub-continent. The freedom struggle commencing during the British rule is traced back immediately after, the first half of the 19 century. The freedom movement gained momentum and formed the Indian National Congress in 1885 which started agitation for the recognition of civil rights and liberties. The Constitutional recognition of fundamental rights commenced with the Constitution of India Bill, 1895 which by its' Article 16, amongst other rights, proposed for the inclusion of right to free state education and imprisonment by competent authority.

The demand for the recognition of civil rights by adopting various resolutions was revived by the Indian National Congress. The appointment of the Simon Commission on November, 8, 1927 impelled the Congress to set up a Committee for the drafting of a Swaraj Constitution. The Moti Lal Nehru Committee suggested for the inclusion of fundamental rights in the future Constitution of India. This demand was also repeated by several individuals,

63 Sections 161, 162, 173 (4), 207-A(3), Cr. P.C., 1898.
64 Sections 342(2) and 342-A, Cr. P.C, 1898; Sections 313 and 315 (1), Cr. P.C. 1973,
65 Section 403, P.C, 1898: Section 300 Cr. P.C, 1973
66 Section 195, 196, 197 and 197A, Cr. P.C, 1898.
68 Supra note 19.
organizations and Committees formed in the provinces. The Congress resolved that in order to end the exploitation of the political freedom must include the real economic freedom of the starving millions. In all the three sessions of the Round Table Conferences, the Indian leaders made concerted efforts for the inclusion of a Bill of Rights in the proposed Constitution Act of 1935. Many personalities like Raja Narendra Nath, B. Shiva Rao and Dr. B.R. Ambedkar stressed the need for inclusion of sanctions in the Constitution for the enforcement of fundamental rights including the rights of redress in case of their violations. Memoranda submitted by Khan Bahadur Nafiz Hidayat Hussaini and Dr. Shafa' at Ahmed Khan and also separately submitted by Sir Taj Bahadur Sapru and M.R. Jayakar on December, 27, 1932 stressed the need for the inclusion of those rights which could not be embodied in the instrument of instructions for the Constitution Act. Consequently certain concessions providing for new rights were incorporated in the Indian Act of 1935. The next state in the evolution of fundamental rights was the publication of the Sapra Committee Report 1945, which envisaged for justifiable and non justifiable rights and recommended that the declaration of fundamental rights and norms of conduct for the legislature, Government and the Courts were absolutely necessary. The first step towards framing the provisions relating to the fundamental rights in the present Constitution is the appointment of an Advisory Committee consequent upon the adoption of a resolution moved by the Pandit Govind Ballabh Pant in the Constituent Assembly on January 24, 1947. The first meeting of the sub Committee on Fundamental Rights was held on February 27, 1947 in which Acharya J.B. Kriplani was elected its Chairman on being proposed and seconded by K.M. Munshi and Sardar Harnam Singh respectively. At this meeting Sir Alladi Krishnaswami Ayyar, Prof. K.T. Shah, K.M. Munshi and M.R. Masani expressed their views about the fundamental rights. Before the next meeting which met on March 24, 1947,

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members formulated their own proposals and submitted notes. Sir Alladi Krishnaswami Ayyar submitted two notes—one on 'Fundamental Rights' and another on 'Justifiable and Non-justiciable rights' and stressed the need for making a distinction between them. The sub committee in its draft report, submitted by Sir BNL Rao, recommended for the aforesaid distinction and accordingly the Fundamental Rights Committee made this distinction. The report of the Fundamental Rights sub-Committee was considered by the Advisory Committee which submitted its interim report to the President of the Constituent Assembly on April 29, 1947 and the Constituent Assembly adopted the Report of the Advisory Committee on Fundamental Rights, minorities etc., on August 30, 1947. The Drafting Committee took the task of considering the Draft Constitution on October 27, 1947 and on October 30, 1947 it was decided that the Directive Principles of State Policy should be transferred from Part III to a new part and subsequently the original draft together with the amendment was considered by a special committee which prepared the Final Draft Constitution under the sole guidance and Chairmanship of Dr. B.R. Ambedkar. By November 26, 1949 the Constitution in its final form was adopted and enacted. But it came into force only on January 26, 1950 which was the 20th century of the day on which the Indian National Congress adopted the resolution on 'Purna Swaraj' complete political independence. Fundamental rights incorporated in Part III of the Constitution of India, 1950 are the embodiment of aspirations and lofty high ideals of the people for Constitutional recognition of civil rights and liberties. The fundamental rights of the Constitution expressly seek to strike a balance between a written guarantee of individual rights and the collective interests of the community.

From the foregoing, it is seen that the Hindu and Muslim legal systems had been founded on divine revelations. Both the systems laid emphasis on the trial of cases by the ruler himself and a duty to select learned men to act as

70 Ibid.
judges. During Hindu period, the accused could not be condemned without hearing. He had the opportunity of cross-examining his witnesses. The legal system recognized the right of the accused to the public trial. Human right to counsel and human right to appeal were available. A number of human rights were available during the Muslim period also. Human right to bail, speedy trial, equal protection of laws and benefit of doubt may be mentioned here.

With the commencement of the East India Company and its Government the common law principles of England were gradually imported and applied along with the common law of the country in the administration of criminal justice without disturbing the existing judicial tribunal. The English were clever enough to anglicize the existing system of criminal justice slowly and steadily. During British India, the Criminal Procedure Code, 1898 and the Indian Evidence Act, 1872 were enacted. Both these Acts enshrined many procedural human rights of the accused.

A few of them may be mentioned here-the right of being presumed innocent throughout the trial, right of being produced before a Magistrate, right to know grounds, right to counsel, right against testimonial compulsion, right against double jeopardy. The framers of the Constitution of India deemed it necessary to doubly protect these rights by enshrining them in the Constitution so that these may become inviolable and the human person and his dignity may be secured. Accordingly many of the procedural rights have been constitutionally recognized and sanctioned by the India Constitution.

The Constitutional rights in the context of criminal jurisprudence are contained in Articles 20 and 22 read with Articles 14, 19 and 21 and rights of appeal under Articles 132, 134 and 136 of the Constitution of India. The ensuing chapters will contain a discussion on these rights.

**Legislative History of Article 21 of Indian Constitution Background**:

Article 21 was not written on a clean slate. Its birth in the world history can be traced back to 1215, if not earlier, as it was in that year that Magna
Carta saw the light of the day. Lest it is understood that concern for liberty was shown for the first time in 1215, it may be stated that the history of the origin and development of the concept of personal liberty can even be found in Greek civilization. Magna Carta of 1215 of course, is the immediate precursor, as it was in that year that king John granted the charter of liberties under threat of civil war. The charter was reissued with omissions and alterations in 1216 and again with further changes in 1217 and it is this great charter which is known as Magna Carta of English Law. This charter consists of a preamble and sixty three clauses.\footnote{Ibid., p.31.} The one which is important for our purpose reads:

\begin{quote}
No free man shall be taken or imprisoned, or dis seized or outlawed or exiled or in any way destroyed nor shall we go upon him nor send upon him but by the lawful judgment of his peers and by the law of the land.
\end{quote}

Magna Carta was followed by 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 subjects. The next importance was reached in 1776 when the American Declaration of Independence was proclaimed. The Declaration stated that the creator had conferred some unalienable rights, among which are life, liberty and the pursuit of happiness. The American Constitution was framed thereafter which stated as its object 'Establishment of Justice' and 'Securing of Liberty'. The Bill of Rights, however, came to be enacted in 1791 when 10 amendments were made to the Constitution of which the fifth is important for our purpose which declares:

\begin{quote}
No person shall be deprived of his life, liberty or property without due process of law.\footnote{Ibid.}
\end{quote}

This apart, the fourth amendment provided protection against "unreasonable arrests, searches and seizures". The fourteenth amendment, which
came in 1868, imposed limitation like that of the fifth Amendment on the States -the need for this amendment arose because the fifth Amendment was taken as a command to the Federal authorities. The French Declaration of the Rights of Men and Citizens came in 1789. That Declaration stated that the purpose of all civil associations is the preservation of natural and imperceptibly rights of men liberty, property and resistance to operation. As to liberty, the Declaration states that it consists in the power of doing whatever does not injure another and these limits are determinable only by the law.\textsuperscript{74}

**Pre-constitutional Concept**

In so far as our country is concerned, the efforts at Constitution making started in 1889 when the Home Rule Scheme was framed by the Indian National Congress in the session of that year held in Bombay. The first non-official attempt at drafting a Constitution for India took place in 1895 when a document named 'The Constitution of India Bill' came into existence, which contained many provisions relating to rights of a citizen, including freedom of expression, inviolability of house, non-imprisonment without proving special crime, non-sentencing except by competent authority.\textsuperscript{75}

Thereafter, various bills, testaments, schemes, reports and resolutions came which expressed the wishes of people of India. The father of the nation, Gandhi ji expressed his thoughts on this matter from time to time. Reference may also be made to the Congress Resolution on 'Swaraj Constitution' adopted on December 28, 1927, in which among other things, a demand for drafting a 'Swaraj Constitution' on the basis of declaration of rights was made and it was stated: 'Our first case should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances'.\textsuperscript{76} The Nehru report of August, 1928 prepared afterwards contains a chapter on Fundamental Rights, in which paragraph 4.2 reads:

\textsuperscript{74} \textit{Ibid.}, p. 34.
\textsuperscript{76} \textit{Ibid.}, p.6.
No person shall be deprived of his liberty, nor shall his dwelling or property be entered, sequestered or confiscated, save in accordance with law. It is this report which was in later years taken as a beacon light for the type of Constitution which the people of India aspired for.

Constituent Assembly: Article 21

Right to life and personal liberty guaranteed under Article 21 of the Indian Constitution came to be incorporated in it after detailed debate took place in the Constituent Assembly. The constitutional frames have rejected the United States concept of 'due process' as a part of Article 21 of the Indian Constitution. The debates and allegation of the drafting committee and advisory committee reveals that there are two divergent views surfaced that whether to incorporate due process in Article 21 of the Constitution. Framers were deeply concerned with the possibility of the interference and nullification of social welfare legislations by the judiciary, if the term due process was to be included.

Drafts on fundamental rights prepared by Dr. Ambedkar and K.M. Munshi, in March, 1947 both contained a provision to the effect that no person shall be deprived of life, liberty or property without due process of law. The Sub Committee on fundamental rights in its report of 16th April, 1947, contained the following clause:

No person shall be deprived of his life, liberty or property without due process of law, nor shall any person be denied the equal treatment of the laws within the territories of the union. Provided that nothing herein contained shall prevent the union legislature from legislating in respect of foreigners.

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77 "No person shall be deprived of his life and personal liberty except according to the procedure established by law"
The clause was very much adopted from the 5th and 14th amendment of the US Constitution. The aforementioned clause was debated in the constituent assembly and the assembly was almost divided in two groups for the use of the words ‘due process’ clause. It was debated by B.N. Rao and he drew attention to the plethora of litigation in United States generated only by the clause ‘due process of law’. In the advisory committee also, Justice Krishna Iyer pointed out the serious difficulties the term ‘due process’ caused in the United States as judges have given different interpretation from time to time. G.P. Pant also expressed his opposition to the use of the phrase ‘due process of law’, as per his views, it was ambiguous and amenable to different interpretations. Also it would mean the future of the country was to be determined not by the representatives of the people in the legislatures, but by ‘the whims and vagarious of lawyers elevated to the judiciary.’ He was particularly concerned about the adverse effect of clause on social legislation and land reforms, Zamindari abolition, acquisition of property etc. As a way out, K.M. Pannikkar suggested the omission of ‘right to property’ from the clause. Pannikkar's suggestion was finally accepted and the report of the advisory committee reproduced the amended clause as its clause 9, which reads as under:

No person shall be deprived of his life or liberty without the due process of law nor shall any person be denied the equal treatment of laws within the territories of the union.

Provided that nothing herein contained shall prevent the union legislature from legislating in respect of foreigners.

The provision was adopted by the Constituent assembly on 13th April, 1947 after some debate but without any amendment being moved.79

Drafts Constitution produced by the constitutional Advisors of October 1947 draft reproduced it in its clause 60 with addition of the word 'personal'

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before 'liberty' and the draft committee accepted the amendment. Constitutional advisor B.N. Rao met Justice Felix Frankfurter of U.S. Supreme Court for advise in the drafting of Indian Constitution. Who told him that he considered the power of judicial review implied in the due process clause both undemocratic because of few judges negate legislation enacted by the representative of the nations and also burdensome to the judiciary. Rao proposed and amendment to the draft Constitution to eliminate the due process of law clause, it favour of the expression, according to procedure established by law.

In February 1948, Draft Constitution prepared by Drafting Committee, the words 'without due process of law' were substituted by the words 'except according to procedure established by law'. The later phrase was borrowed from the Constitution of Japan. Draft Article 15 reads as follows:

No person shall be deprived of his life or personal liberty except according to procedure established by law nor shall any person be denied equality before the law or the equal protection of law within territory of India.

The draft Article came for consideration of the Constituent Assembly in December, 1948 there was powerful protagonist of both the competing expressions. Their respective merits and demerits came to be discussed in depth. K.M. Munshi, supported by Syed Karimuddin, Mebboob AM Beg and Z.H. Lari, defended the 'due process of law,' Munshi thought that with the omission of property and adding of 'personal' before liberty, the clause had become un-exceptionalable and no more prone to creating difficulties it had done in the United States. Munshi was afraid of the legislative majorities, passing legislation in haste to establish social control over individual liberty by giving sweeping powers to the executive and the police. He wanted the Courts
to have the power to determine whether a law infringed personal liberty of the individual.\(^{80}\)

On the other hand, Alladi Krishnaswami Iyer said that 3 or 5 gentlemen sitting as a Court of law and deciding what the due process of law in each case was could not be regarded as more democratic than the expressed wishes of the representatives of the people in their legislature. Alladi appealed to the House in the name of ‘the future progress of India, the well being and security of the State, the necessity of maintaining a minimum of liberty, the need for the coordinating social control and personal liberty.’\(^{81}\)

There was strong disagreement in the Constituent Assembly for the use of these two phrases and the house was divided and the consideration of the draft article was deferred. It was taken up again on 13.12.1948, when Dr. Ambedkar referred to sharply divergent views and said that the controversy largely centered round the question, whether the legislature could be trusted not to make laws, tampering the personal liberties of the individual. He added:

> For myself I cannot altogether omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles, effecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylia and I therefore would not say anything.\(^{82}\)

When the amendments - about 20 of them - seeking substitution of the words ‘except in accordance with law’ by ‘without due process of law’ or some


such expression were put to vote they were all negatived by the assembly and draft Article 15 as proposed on behalf of drafting committee was adopted to stand part of the Constitution. Although even thereafter the debate and the controversy continued, the basic text of the draft Article 15 with the ‘in accordance with law’ expression survive. However, as a corrective or compromise another provision providing protection to personal liberty against arbitrary arrest and detention was later added as Article 22 of the Constitution.

The Article further came at the revision stage and the words legal equality part of the draft Article 15 was separated and made into a separate provision (which became Article 14 of the Constitution of India) and draft Article 15 was renumbered as Article 21 of the Constitution, which finally read as under:

Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Article as it was finally framed has very broad sweep. It does not have exceptions and is not subject to any provision, unlike the freedoms mentioned in Article 19. It takes care of every person living in India, no matter whether he is a citizen or not, unlike Article 19. It opens with an emphatic ‘No.’ The use of the words ‘shall’ and ‘except’ makes the command of ‘the people’ of India, the sovereign, absolute. It is absolutely fundamental to the governance of the country for all times. (The 44th Amendment to the Constitution has seen that it is not made non-functional even during emergencies).

However, this right is available only against State and not against private individuals. It was held by the Supreme Court in Sabeeha Faikage v. Union of India83, while reiterating the ratio of P.D. Shamdasani v. Central Bank of India Limited84.

83 (2013) 1 SCC 262
84 AIR 1952 SC 59