INTRODUCTION

No society can possibly be built on a denial of individual freedom. If an organic society is to grow up its institutions should embody the respect for the individual and his rights. The creative impulse of man should be promoted by the political and social institutions. As Bertrand Russell\(^1\) has put it, 'liberation of creativeness ought to be the principle of reform both in politics and in economics'. To be consistent with this principle of reform, any useful political theory must seek to incorporate into it two important principles: First, the growth and vitality of individuals and communities is to be promoted as far as possible; second, the growth of one individual or community is to be as little as possible at the expense of another. According to Bertrand Russell this principle it social reconstruction as applied impersonally in politics, is the principle of liberty.\(^2\) Thus liberty in itself, he says, is

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2. Ibid., at pp. 101, 157.
a negative principle. It tells us not to interfere. It condemn all avoidable interferences with freedom.

But a society can hardly aspire to enjoy the individual freedoms and liberties under an exploitative political order imposed upon it by an alien rule. Disaffection towards such an established order is a natural offspring of unjust and arbitrary deprivation of the human rights and liberties of a whole people. Liberty, then, becomes a passionate and positive urge to liberate the whole people from such an unjust political order—an urge for self-government and democracy. Liberty, in this sense, becomes essentially the right to participate in public affairs and to determine who shall exercise control over them. It is


4. The concept of liberty in this sense was basic to the ancient Greek political thought. William Ebenstein, Modern Political Thought, The Great Issues, second edn., Oxford IBH Publishing Co., New Delhi, p. 148. See, also Laski, Encyclopaedia of Social Sciences, Vol.1X, p.442; Crains, Legal Philosophy from Plato to Hegal, pp. 28 et seq.
this aspect of liberty which Isiah Berlin\(^5\) has described as the positive concept of liberty.

The facts of history teach us that we cannot assume that we have outgrown the fear of oppression by government merely by virtue of achieving national independence and self-government. As cautioned by de Tocqueville,\(^6\) 'distrust of absolute majority or absolute plurality is as just, in reason and in experience, as distrust of the absolute personal ruler. Indeed, the latter may be given a pause by fear of an uprising which an entrenched majority need not fear'. Thus the principle of liberty in the sense of 'absence of restraint' became increasingly relevant even in a democracy. The nationalist cry of "give me liberty or give me death", raised by the Americans in 1775; and the assertions they made in the Declaration of Independence of 1776 reflected the simultaneous urge for both the positive and negative concepts of liberty\(^7\) - i.e., for a right to determine 'who shall control', and 'how much control' shall be there on their life and liberty. The Declaration of Independence and


the adoption of a Bill of Rights in the Constitution of the United States were motivated by the basic political concept that the State exists for man and not man for the State. The Declaration proclaimed the rights of a people to abolish a government that failed to secure the people's 'inalienable rights', among which were "life, liberty and the pursuit of happiness". And as Roscoe Pound said, the liberty guaranteed by the American Bill of Rights "is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust relations and order conduct, and so are able to apply the force of that society to individuals". The protection for individual freedom from arbitrary and unreasonable exercise of power and authority of the state was sought to be secured by the constitutional command that 'no personal shall be deprived of his liberty without due process of law'. And the scope and content of the requirements of 'due process of law' as determined by the apex court, armed with the power of

8. See the text of the Declaration of Independence, 1776.
10. See the Fifth Amendent to the U.S. Constitution.
judicial review, through the process of constitutional adjudication had come to be the measure of protection for the liberty of the individual against the authority of the State.

Logically and historically, the adoption of a Bill of Rights in order to secure the protection of individual liberty against the authority of the State by the political order in India through its new Constitution of 1950 had also been akin to that of the United States. The pledge for the national independence adopted by the Indian National Congress in 1930 reflected the sentiments of an oppressed people in the same manner as voiced by the American people earlier. Thus declared the Congress in 1930:

"... We believe that it is the inalienable right of the Indian people, as of any other people, to have freedom, and to enjoy the fruits of their toil and have necessities of life, so they may have all opportunities of growth. We believe also that if any government deprives a people of these rights

11. See, Ivor Jennings, Some Characteristics of the Indian Constitution, London, (1953), p.85. As regards the adoption of the Bill of Rights he comments that it is true that "the Indian reaction, like the American reaction, is a product of British rule".
and oppresses them, the people have a further right
to alter or abolish it.... "12

Naturally, therefore, when the National leaders
assembled to draft a new Constitution for Free India, they
did not have any hesitation in guaranteeing a Bill of Rights
to the Indian people. The guarantee of liberty in the
constitutional law of a nation, as observed by Cardozo, 13
"... is the guarantee that claims and immunities conceived
of at any given stage of civilization as primary and basic
shall be preserved against destruction or enchroachment by
the agencies of the government". Confronted with the basic
political problem of securing an efficient and responsible
government with ultimate authority in the Legislature
representing the people but at the same time placing the
liberties of the people beyond arbitrary interference from
the government, the Framers of the Indian Constitution, like
their American counterparts, attempted to resolve that
problem by making the defined liberties of the people
inviolable either by the legislature or the executive and
bringing their sanctity under the protection of an
independent judiciary equipped with the power of judicial
review.

12. See, Banerji, Indian Constitutional Documents, Vol.III,
p.219.
Among the rights which are declared as fundamental in Part III of the Constitution, the right to personal liberty which is, perhaps, basic to all other individual rights and freedoms, evoked a high degree of interest and anxiety in the Constituent Assembly. Like property, liberty too is a subject which, in its framing, had been considerably influenced by the concern with the immediate. Originally, in the Constituent Assembly, liberty was proposed to be guaranteed along with life and property and none of them could be taken away without due process of law. Though it had been welcomed by almost the entire Assembly, the original proposal underwent drastic changes at the instance of the prominent members of the Assembly who were also (significantly enough) at the helm of affairs and seriously concerned with the immediate problems posed by the them existing socio-political exigencies. The preoccupation with the massive programmes of land reforms and other social welfare measures and the grave law and order situation, threatening the very security and unity of the country had all been fully reflected in the final shape which the Articles dealing with liberty and property took. Thus, property was delinked from liberty; liberty itself was qualified by 'personal' in order to narrow down the scope and amplitude of the concept; and the expression "procedure established by law" was substituted for the 'due process'
clause in order to curtail the scope of judicial review in the field of personal liberty. As a result we have Art.21 of the Constitution in the present form according to which "No person shall be deprived of his life or personal liberty except according to the procedure established by law". And the rest of the tale of personal liberty in India was destined to be determined by judicial process.

The nature and extent of protection secured to personal liberty has been a subject matter of great controversy and debate. The expression "procedure established by law" as a standard of protection for personal liberty has been looked upon as highly unsatisfactory and inadequate. For, unlike the specific attributes of liberty that are separately guaranteed under Art.19, 'personal liberty' as guaranteed by Art.21 does not obligate the Legislature to comply with the requirements of justice and reasonableness as and when it enochroaches upon that right. Though the concept of 'personal liberty' has received an evolutive and expansive meaning through judicial process, the standard of protection which the judicial process could secure to personal liberty through the interpretation of Art.21 has been far from satisfactory Even after four decades of judicial process in the interpretation of Art.21

14. For the detailed analysis of the framing of Art.21, see chapter II infra.
the problem of evolving a just and adequate standard of protection for personal liberty in that Article continues to be a crucial constitutional issue, craving for a satisfactory solution. And the present study is a humble attempt to unravel this problem and to search for a reasonable solution.

Though the subject of right to personal liberty as a constitutional guarantee is very vast and multi-dimensional, the scope of the present study is confined to the inquiry as to the precise nature and extent of protection which Art.21 secures to that right as against the legislative authority of the State. And that inquiry is made with particular reference to judicial process. Judicial process, though by itself is a wide and abstract concept, in the context of this study implies (refers to) only the judicial interpretation of 'personal liberty' as well as the standard of protection secured to 'personal liberty' by Art.21. And here too the reference is mostly confined to the constitutional adjudications under Art.21 at the level of Supreme Court of India.

Methodologically, the present study is theoretical in nature. It is mainly based on the critical analysis of the materials drawn from the original sources such as the Constituent Assembly Debates the texts of the Constitution
and other relevant statutes, and the relevant cases decided by the Supreme Court. Other secondary sources such as books and Articles are also used.

Part I of this study deals with the emergence of the right to personal liberty as a constitutional guarantee in its historical perspective. The first chapter in this part gives a historical account of the development of personal liberty as a constitutional value in the United Kingdom and as a constitutionally guaranteed right in the United States. An attempt has been made in this chapter to clarify and emphasise the historical fact that liberty and justice are inextricably inter-linked and that the development of personal liberty as a constitutional guarantee has really been the development of the standard of 'due process of law' as a projection for personal liberty. The chapter also refers to the recognition of the requirements of 'due process of law' as a protection for the liberty of the individual by the international legal order.

In the second chapter an attempt has been made to inquire whether the India of the past and her ancient systems of political thought and culture have anything to offer to solve the present problems of liberty and justice. The chapter also briefly refers to the urge for justice and liberty during the freedom struggle; and to the negation of
rule of law and the deprivation of life and personal liberty of the people without 'due process of law' during the British regime in India. Also it elaborately deals with the framing of Article 21 of the Constitution of India in the Constituent Assembly with a view to ascertain the real intention of the Constituent Assembly on the issue of securing the protection of 'due process of law' for personal liberty.

Parts II and III of this study discuss and evaluate the judicial process in the interpretation of Art. 21. Part II, which deals with the judicial process during the period from Gopalan to Shivakant Shukla, consists of the third, fourth and fifth chapters.

The third chapter deals with the concept of personal liberty in Art. 21 and its meaning and content as evolved through the judicial process.

In the fourth chapter the judicial attitude towards the protection of personal liberty has been discussed elaborately and critically. The decisions indicating a persistent refusal to interpret the standard of protection for personal liberty in Art. 21 as 'due process of

law' have been analysed. The restrictive interpretation of the expression 'procedure established by law' by the Supreme Court in *Gopalan* and the techniques and arguments adopted by the Court in defending its denial of 'due process' in Art.21 have been considered. The impact of the legacy of *Gopalan* on the protection of personal liberty has been evaluated with reference to the post-*Gopalan* cases.

The fifth chapter deals with a peculiar dilemma of the Court in the field of protection of personal liberty - the Court's obsession with the expression 'due process of law' on the one hand and its awareness as to the gross inadequacy of the standard of protection for personal liberty in Art.21, as determined by *Gopalan*, on the other. The chapter refers to the attempt that has been made by the Court in this regard to gather the elements of 'due process' from without Art.21 through a process of inter-linking Art.21 with Arts.14 and 19. This judicial attempt is termed in this study as the 'alternate strategy'.

Part III of this study, consisting of the sixth and seventh chapters, deals with the judicial process and personal liberty with reference to *Maneka*¹⁷ and the post-*Maneka* decisions.

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In the sixth chapter a detailed analysis of the decision in Maneka has been undertaken, especially in view of the claim made in many quarters that Maneka has inducted the 'due process' clause into Art.21. The Court's failure to interpret the expression 'procedure established by law' as embodying the requirements of 'due process of law'; and its adoption of the 'alternate strategy' to evolve the 'just, fair and reasonable procedure' formula - the Maneka version of 'due process' - are closely examined. An attempt has also been made to show that the theoretical foundation of the 'alternate strategy' is not sound and stable; and that the 'just, fair and reasonable procedure' formula, based on such an unsound strategy, is only a poor substitute for a 'due process' clause in Art.21 as a protection for personal liberty.

In the seventh chapter a survey has been made of the post-Maneka cases wherein the Court seems to have displayed an unprecedented activism and creativity, presumably, proceeding on the assumption as to the existence of a 'due process' clause in Art.21 after Maneka. The survey also refers to the new rights and contents poured into Art.21 by the Court during this spell of due process dynamism. The chapter further points out the Court's failure to articulate and strengthen the theoretical
foundation for a 'due process' clause in Art.21, while reading into that Article the new rights and liberties. The second line of the post- Maneka decisions such as Bachan Singh\textsuperscript{18} and A.K. Roy\textsuperscript{19}, indicating the dwindling of 'due process' dynamism in the Court, have also been analysed.

Then, in conclusion the inferences drawn from the foregoing chapters are put together; and a few suggestions are also made in view of those inferences.

\textsuperscript{18} Bachan Singh V. State of Punjab, AIR 1980 SC 898.

\textsuperscript{19} A.K. Roy V. Union of India, AIR 1982 SC 710.
PART I

PERSONAL LIBERTY AS A CONSTITUTIONAL GUARANTEE: A HISTORICAL PERSPECTIVE