CHAPTER I

DEVELOPMENT OF PERSONAL LIBERTY AS A CONSTITUTIONAL GUARANTEE

General:

Protection of individual liberty has been considered to be one of the fundamental duties of the State in many civilizations. That notion of duty is as old as the concept of the State itself. But the active protection of the liberty of the individual against the arbitrary interference by the State seems to be a later development. The further refinements in the means and methods of such protection leading to the emergence of constitutional guarantee as a device to protect individual liberty against the State is certainly, still more modern.\(^1\) The very idea of a 'guarantee' of liberty suggests the existence of some power above the ordinary law of the land to insure liberty as a special privilege.\(^2\) The expression 'constitutional


guarantee', in its modern sense - the sense in which it is used in this study - presupposes, a written constitution, embodying a declaration of certain basic rights and liberties and providing for judicial review of legislative actions.\(^3\) It is the protection of liberty by the constitution as against legislative action that constitutes the essence of a constitutional guarantee. The earliest example of constitutional guarantee of liberty in this sense can be found in the American Constitution of 1787 with the first ten Amendments - the Bill of Rights - added thereto in 1791.\(^4\) Many constitutions coming into existence thereafter, including that of India, followed this American example.\(^5\)

It should not however be assumed that the ideal of personal liberty as a constitutional guarantee was developed indigenously in the United States by any abrupt or isolated process. The Americans had accomplished this idea to a very great extent as a result of and on the basis of the long and eventful history of constitutional developments and experiences in the United Kingdom.\(^6\) It is true that the idea of liberty as a constitutional guarantee can not have much scope today in England because of the supremacy of


\(^{4}\) Yardley, *op.cit.*, p.89.

\(^{5}\) O. Hood Phillips, *op.cit.*, p.446.

\(^{6}\) *Ibid.*, at p.16

16
Parliament and the absence of a written constitution with entrenched provisions. But it is also true that 'no country in history has made a greater contribution than Britain to the recognition of the rights of the individuals and their protection by an independent judiciary against government authorities.' Hence it seems appropriate to allude briefly to the constitutional developments pertaining to personal liberty in the United Kingdom as a prelude to our discussion of this subject.

**Personal Liberty under the English Constitutional System**

From Magna Carta to Modern Times - A Historical Overview. Though there does not exist any one document which can be described as the British Constitution, there exists a body of law - consisting of a series of organic pieces of legislation judicially evolved rules and well-established conventions - which can legitimately be treated as the constitutional law of England. A close scrutiny of the historical process through which this body of law had evolved would bring out, inter alia, two important factors which are particularly relevant to the present study. First, the value of personal liberty seems to be deeply

7. Ibid., at p.438; Dicey, op.cit., p.207.
entrenched in the constitutional law of England. There exists a series of documents of constitutional importance, containing formal declarations of the guarantee of personal liberty, limiting thereby the absolute powers of the King. Secondly, judicial protection of personal liberty through the effective means of habeas corpus has received a high degree of constitutional importance, demonstrating thereby the efficacy of the judicial process and the due process of law in the area of personal liberty.

Now let us consider these two specific aspects of the British constitutional developments in some detail.

**Personal Liberty and Magna Carta**

When king John began exercising his powers arbitrarily, disregarding the principles of justice and liberty, the royal arbitrariness evoked a strong opposition from the powerful baronage. Then arose the 'basic constitutional problem' of how the King could be kept tied down to the letter of the law. The best solution which that generation could offer to that problem was contained in the 'Great Charter' of liberties obtained from King John in 1215.11


The most outstanding feature of the Charter came to be that part of it which dealt with the individual liberty and justice. Chapter 39 of the Charter declared:

"No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land". And chapter 40 ensured:

"To no one will we sell, to no one will we deny or delay right or justice".

The Charter as re-issued in 1225 had re-enacted the above chapters 39 and 40 as chapter 29. Thereafter chapter 29 turned out to be the focal point of Magna Carta which has been resorted to and relied upon in subsequent centuries whenever state absolutism raised its head in English constitutional history.


14. The Charter of 1215 was re-issued with amendments in 1216, 217 and in 1225 See Holt, *ibid.*, at p.1.

The guarantee of liberty in chapter 29 appears to have been aimed against purely arbitrary actions of the Crown such as arbitrary disseisin\(^\text{16}\) at the will of the King or against arrest and imprisonment on an administrative order;\(^\text{17}\) and has proved to have been "full of future law".\(^\text{18}\)

Of course it is true that in 1215 the barons were mainly responsible for obtaining the Charter from the king; and it may be argued that the crucial clause 39 was a partisan instrument extorted from the King for the benefit of the feudal claims and privileges 'inimical alike to the Crown and to the growth of really popular liberties'.\(^\text{19}\) Yet, as Prof. Lauterpacht\(^\text{20}\) observes, 'the fact remains that in the history of fundamental rights no event ranks higher than that charter of concessions which the nobles wrested from King John'. The historical importance of the Charter lies more in the principles on which it was based rather

---


than in the specific provisions which it embodied. The Charter not only declared the rights and liberties of the subjects, but it also embodied another equally important principle that if the King would not regard those rights he may be compelled by force, by insurrection against him, to do so. 'It is upon these two principles', as Adams argues, 'henceforth inseparable, that the building of the constitution rested. It was through them that Magna Carta accomplished its great work for free government in the world'. It was no wonder, therefore, that Maitland writing in 1895 extolled this Great Charter of liberties thus: 'this document becomes and rightly becomes a sacred text, the nearest approach to an irrepealable fundamental statute that England has ever had'; and to him this document


22. See Chapter 61 of the Charter, 1215 under which a committee of 25 barons was to be established and authorised to distrain the king if he disregarded the Charter.


24. Pollock and Maitland, *The History of English Law*, Vol.I, (1968) p.173; See also Adams, ibid at p.128. He describes the Charter as 'the most important constitutional document of all human history'.
established the most important of all constitutional principles that 'the king is and shall be below law'.

It is significant that the first formal declaration of personal liberty is to be found in such a great document of constitutional importance; and it is no less significant that the most prominent and enduring part of that document turned out to be that which deals with personal liberty.

Personal liberty as embodied in the Charter has not remained an idle declaration; it has become a functional part of English law, to be confirmed and interpreted in parliament and enforced in courts of law.

Parliamentary interpretations of Magna Carta and Personal Liberty:-

The Political disturbances of the 14th Century in England led to further developments of liberty as declared in the Great Charter. During this period the principle of personal liberty in chapter 29 was subjected to many parliamentary interpretations which strengthened the spirit

25. Pollack and Maitland, *ibid* at p.173
27. *Ibid*.
and widened the scope of the guarantee of liberty and justice in the Magna Carta.

The most important of these statutory interpretations, as summed up by Holt, are:29 First, the phrase 'lawful judgement of peers' was interpreted to mean trial by peers and therefore trial by jury. Secondly, the "law of the land" was defined in terms of yet another potent and durable phrase, 'due process of law'. Thirdly, the words, 'no free man' were so altered that the Charter's formal terms became socially inclusive. In 1354 in the statute of Edward III, which referred for the first time to 'due process of law', 'no free man' became 'no man of whatever estate or condition he may be'.30

These statutory interpretations have, thus 'accomplished a remarkable transformation in the form and content of the guarantee of personal liberty in chapter 29 of the Charter. If one may put chapter 29 in modern constitutional terms, it can be said to have laid down that 'no person shall be deprived of his life, liberty or property without due process of law'.31

29. Ibid.

30. Ibid. See also Fath Thompson, Magna Carta, Its Role in the Making of the English Constitution, 1300-1629 (1948), p.92.

The succeeding generations have taken these statutes not merely to be an explanation of the words of Magna Carta, but as the very words of the statute of Magna Carta. The 17th Century constitutional developments in England along with the juristic interpretations of Magna Carta as laid down by Chief Justice Coke have led to many more strides in the development of personal liberty as a constitutional value.

The 17th Century Developments and Personal Liberty

Chief Justice Coke's interpretation of chapter 29 of Magna Carta added further dimensions to the already extended range of parliamentary interpretations of the 14th century. Coke found in the Charter the principal grounds of the fundamental laws of England and an affirmation of the liberty of the subject. Coke openly asserted that chapter 29 of the Charter applied to villains. He also expanded that word 'liberties' so that it became synonyms with 'individual liberty'.

32. See the arguments of Seldon in Darnel's Case (1627) to this effect. Fath Thompson, op.cit., p.332; see also J.C. Holt, Magna Carta, p.10.

33. J.C. Holt, ibid., at p.3.

34. Ibid, at p.10. A harsh Criticism of Coke's 'common law interpretation of Magna Carta was made by Brady, Introduction to Old English History, (1684), p.76.
The worth and efficacy of Magna Carta and the guarantee of liberty contained therein along with its extensive interpretations were brought to light by the political events under the Stuart absolutism of the 17th century. The absolutist reign of James I and Charles I, characterised by abuse of royal proclamations, dissolutions of parliament and arbitrary arrests and detentions, had spread resentment and opposition among the subjects and in Parliament. The high watermark of the clash between the royal absolutism and the liberties of the subjects was amply illustrated by the Darnel's Case in 1627. Darnel's Case, 1627: Charles I had resorted to arbitrary arrests and detention of a number of subjects who refused to contribute to a forced loan demanded by him without parliamentary sanctions. Of those detained five Knights sought their freedom by way of habeas corpus.

The central issue posed by the case was whether the King did possess a power which superseded the 'law of the land' - the common law adjudicatory process - or was he always subject to a supervisory judicial power to inquire whether his actions complied with the law.

36. Or The Five Knights Case 1627 (3st. Tr.I).
38. Ibid, at p.10.
The arguments of the counsel for the prisoners in the case illustrate the extent of importance given by the lawyers of the 17th Century to chapter 29 of Magna Carta and its statutory interpretations of the 14th century. The defending counsel Seldon placed great reliance on Magna Carta and the Statutes of Edward III. The imprisonment was challenged as illegal and unjustified in the light of chapter 29 of the Great Charter since the detentions were not in accordance with the 'law of the land' or the 'due process of law'.

But the court, under the pressure of the political circumstances, decided the case in favour of the King and refused to bail the prisoners. 41

Having failed to secure the supremacy of law and the personal liberty of the prisoners through courts as against the royal pre-rogatives, once again the English people were left with the problem of how far may the law restrain the King in the exercise of his powers. 42

39. Ibid, at p.10; see also J.C. Holt, Magna Carta, p.10.

40. It was in the Statutes of Edward III the 'law of the land' in Cap.29 of Magna Carta was interpreted for the first time to mean as the 'Due Process of Law' See, Fath Thompson, supra, f.n.30.

41. The decision is also suggestive of the danger that if the judiciary is not independent it may not be possible for it to uphold the supremacy of law and the liberty of the subjects without fear or favour.

time an immediate solution to this problem came from a
determined Parliament which met and presented to Charles I a
'Petition' which he accepted in 1628.

**The Petition of Rights, 1628:**

The petition of Rights, under the effective
guidance of Coke\(^43\) who typified the 17th century
interpretations of the Magna Carta, re-asserted the
principle that 'the King is and shall be under the law'. It
dealt with the main grievances\(^44\) of the day against
Charles I. Clause Five of the Petition set out the
grievance about the arrest and imprisonment of persons by
the special command of the King, signified by the privy
council, without being charged with anything to which they
might make answer according to law in a writ of *habeas
corpus*. The operative part of Clause Eight simply provides
that 'no free man in any such manner as is before mentioned
be imprisoned or detained'. Thus the Petition of Rights
appears to have reaffirmed the principle that the Personal

\(^{43}\) During the debate on the Petition, Cap.29 of Magna
Carta and the Statutes of Edward III were invoked and
relied upon to a great extent. See Fath Thompson,
*Magna Carta, Its Role in the Making of the English

\(^{44}\) The grievances of arbitrary taxation, abuses through
martial law and arbitrary arrest and imprisonment See
3. For the text of the Petition of Rights, see
Annexure II, *infra.*
liberty of the subjects could not be deprived of except according to the 'law of the land' or 'the due process of law'.

Another major document of constitutional importance, containing an affirmation of individual liberty, is the Bill of Rights which followed the Glorious Revolution of 1688.

The Bill of Rights, 1689

The Bill of Rights - "An Act declaring the rights and liberties of the subject, and settling the succession of the throne" dealt with the specific grievances the realm had suffered under King James II and declared all those arbitrary exercise of powers as illegal. The objects of the Bill, as it explicitly set out, were to undo 'all which

45. The Petition not only insisted the principle 'no arrest without cause shown', but also it associated this principles with habeas corpus. See Fath Thompson, op.cit., p.325; J.C. Holt, Magna Carta p.11.

46. The revolution which ended the Stuart absolutism has established once for ever that the sovereignty in the realm is vested not in the King but in Parliament; and has ushered into a new era in the constitutional history of England. See L.B.Curzons, English Legal History, pp.40 et.seq.


48. Ibid, at p.358. The most prominent among those grievances during this period too appears to have been the arbitrary arrests and detentions of the subjects.
are utterly and directly contrary to the known laws and statutes and freedoms of the realm'; and to 'ordain such an establishment that their religion, laws and liberties might not again be in danger of being subverted'. 49 Another significant fact was that Parliament considered the passing of the Bill as 'the best means' for attaining the aforesaid ends and for vindicating and asserting its 'anciènt rights and liberties'. 50 The Bill which is declaratory of the 'Known laws, statutes and liberties of the Kingdom', also specifically provided, inter alia, that 'excessive bail ought not to be required, excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted'. 51

The Bill of Rights gathered the results of the Revolution into a constitutional form, embodied in a formal document, and made them binding upon all future Kings. 52 In this sense the Bill of Rights is most nearly of the nature of a written constitution; and as such it affirmed in more specific language that the King had no right to violate the fundamental laws and liberties of the Kingdom 53 — a

49. Ibid, at p.489.
50. Ibid.
51. Ibid.
53. Ibid.
principle asserted as early as in 1215 by Magna Carta and reasserted in 1628 by the Petition of Rights.

Thus in this long history of constitutional development from Magna Carta to Bill of Rights in England one can observe a parallel development of the principle of personal liberty as a constitutional norm. The degree of importance attached to the principle of personal liberty during this period is not only reflected in the formal declarations in the 'constitutional documents'; but also in the fascinating development of the most effective means to secure personal liberty - the writ of habeas corpus.

**Habeas Corpus - Its Development and Personal Liberty**

To begin with, in the early parts of the 13th century, the expression 'habeas corpus' only meant a command issued by courts to have the defendant in civil action or the accused of a crime, as the case may be, before them. 54 Habeas corpus, thus, seems to have begun as a process to ensure the physical presence of a person in court on a certain day. 55 Besides, though the expression 'habeas corpus' during this early stage was not connected with the


55. Ibid., at p.2. See also Fox, "The Process of Imprisonment at Common Law" (1960) 39 L.Q.R., 46.
idea of liberty, it can be reasonably assumed that the process involved an element of the concept of due process of law in so far as it mirrored the refusal of the courts to decide a matter without having the defendant present. 56

An opportunity for further development of habeas corpus was, then, created by the jurisdictional conflicts between the central courts of the crown and the local courts. Both the Common Law and the Chancery Courts in their attempt to centralise administration of justice used to direct this writ of habeas corpus against the local courts of inferior jurisdictions. 57 During this period, as Sharpe says, 'habeas corpus was becoming less and less an ancillary procedure, and more and more a remedy to secure release from imprisonment; and also, significantly enough, the writ came to be associated with the idea of testing the legality of cause'. 58

The struggle between the Courts of Common Law and the Equity Courts had also contributed towards the growth of habeas corpus. Whereas the Equity Courts used the device of injunction to control common law litigation, habeas corpus

56. Sharpe, ibid., at p.2; also see Walker, The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty, (1960) at p.16.
57. Sharpe, ibid., at pp.4-5.
58. Sharpe, ibid., at p.5.
became the principal weapon in the hands of King's Bench to release a suitor, committed for breach of such a injunction of the Chancery Court.59

Another significant development in the law of habeas corpus came with its use, in the 16th century, to test the validity of executive committals. The writ was used to release or to bail the persons detained by order of the privy council.60 During this period the practice of using habeas corpus to secure the liberty of persons became so common and sufficiently trouble-some to the council to warrant a request that the judges state the principles upon which such prisoners were to be released.61 As a response to this request came the Resolution of Judges in 1592. Though this Resolution acknowledged the power of the King and the Council to commit persons pending trial, it catagorically asserted the power of the judges to bail or discharge the prisoners on habeas corpus if the cause be not specified.62

Thus at the dawn of the 17th century, one finds that habeas corpus was generally accepted as available to

59. See Pound and plucknett, Reading on the History and System of the Common Law, 3rd edn. (1927), p.197; also see Sharpe, ibid., at p.6.
60. Sharpe, ibid., at p.7.
61. Sharpe, ibid., at p.7.
test the legality of imprisonment and that the writ became an essential aspect of common law.

But this common law remedy of habeas corpus lost much of its glory when it came under the cloud of the Stuart absolutism. The courts began to show a certain lack of confidence in their treatment of challenges to executive or prerogative power. But, ironically, the political events of this period, as mirrored by the conflicts between the royal prerogative and the common law; and between the King and Parliament, seem to have provided momentous opportunities for further development of habeas corpus as a constitutional remedy for the protection of personal liberty of the individual.

The common law remedy of habeas corpus was raised as a constitutional question before the court in the Five Knights' Case. This case which involved the clash between the Royal prerogative and the common law illustrates precisely the extent of significance which habeas corpus had assumed by the early 17th century. The fact that such a dispute could be raised on habeas corpus shows that it had

63. Ibid.

64. The constitutional conflicts of the 17th century were carried on in the courts as well as in Parliament. See Ivor Jennigs, The Queen's Government, p.153.

65. Or Darnel's Case, see f.n.36, supra.
truly become, as argued by Seldon, 'the highest remedy in law for any man that is imprisoned'. Further, the reliance placed during the argument of the case on chapter 29 of the Magna Carta and on the statutes of Edward III which defined the concept of 'due process of law' clearly suggests the close link established between 'personal liberty', 'due process of law' and habeas corpus. Of course, the court's decision in the case sustained the action of the Crown. But irrespective of the actual decision of the court and its correctness or otherwise the real importance of the case lies in the arguments of the lawyers and in the impact of the case on the subsequent development of habeas corpus.

Despite Parliament's valiant attempts to curb the arbitrary powers of the King through the Petition of Rights, (1628) which provided, inter alia, that 'no freeman be imprisoned without the due process of law, nor detained by the King's command without being charged with anything to which they might make answer according to law', events

67. There is no unanimity on whether the court came to the correct conclusion on the basis of authorities. See, Sharpe, ibid., at p.12.
69. Gardiner, Documents, pp.66-70.
proved as early as 1629 that Charles I was able to evade the effects of the Petition. Having realised the limitations of mere declarations of liberty and the inadequacies of the common law remedy of habeas corpus, Parliament met in 1640 and passed the Habeas Corpus Act with a view to curtailing the prerogative claim for the power of detention.

The Habeas Corpus Act, 1640 abolished all the prerogative courts, including the Star Chamber. It provided that anyone imprisoned by order of the King-in-council should have his right to habeas corpus and be brought before the court without delay with the cause of his imprisonment shown. Besides, the judges were required to pronounce upon the legality of the detention within 3 days and to bail, discharge or remand the prisoner accordingly. A judge or any other officer who failed to act in compliance with the statute was made subject to heavy fines and liable in damages to the party aggrieved.

70. For instance, Seldon and several other members of Parliament were committed on the King's warrant, without expressing any specific charge upon which the prisoners could be tried - a situation just as in Darnel's Case and quite contrary to the Petition of Rights. See, Sharpe, ibid., at p.14.

71. Ibid., at p.15.

72. See ibid., at p.15; also L.B.Curzon, English Legal History.

73. Sec.6 of the Act, see Sharpe, ibid., at p.15.

74. Secs.4 and 5, see ibid.
But, in spite of the Act of 1640 there were instances of executive committals without any specific charges being made against the prisoners. Moreover the Act itself was found to be wanting and procedurally defective on certain crucial matters such as the question whether or not the writ could be issued in vacation; the power of the common pleas to grant the writ in ordinary criminal cases; the practice of moving the prisoners from gaol to gaol making it impossible to serve the proper gaoler with the writ; and the practice of re-arrest of prisoners who were successful in their applications for the writ of habeas corpus.

The Habeas Corpus Act, 1679, passed by Parliament dealt with the subject of habeas corpus in minute details, rectifying many of the defects of the common law.

75. For eg: Lilburne's Case, 1653 (5 st.77.371); Cony's Case, 1655 (5 St. Tr.935) - a case in which the Judges, threatened with loss of office by Cromwell, refused to bail the prisoner on habeas corpus. Thus executive excesses were found not only under Charles I, but also under the Commonwealth of the Cromwellian era. See. Sharpe, ibid., at pp.15-16.

76. Sharpe, ibid., at p.17.

77. "An Act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas" - the preamble of Act, as quoted by L.B. Curzon, English Legal History, p.44.

and of the Act of 1640. The Act of 1679 attempted to ensure that the relief of the prisoner would not be thwarted by procedural inadequacies. It enabled the prisoner to obtain the writ at any time of the year, i.e., even during vacation,\textsuperscript{79} from any of the courts or judges at West Minster.\textsuperscript{80} The Act provided that the gaoler would obey the writ immediately,\textsuperscript{81} that the judges would come to a speedy determination,\textsuperscript{82} and that, if released, the prisoner would not be re-arrested for the same cause.\textsuperscript{83} It further provided that prisoners would not be taken to places beyond the reach of the writ,\textsuperscript{84} and that the gaoler would provide the prisoner with a copy of the warrant so that he could know the grounds for his detention and would be able to decide whether he should apply for the writ in the first place.\textsuperscript{85} The Act also tried to ensure that even where a prisoner was not entitled to immediate release he would be brought to trial with as little delay as possible.\textsuperscript{86} The

\textsuperscript{79} The Habeas Corpus Act, 1679, Sec.9
80. \textit{Ibid.}, Sec.2.
81. \textit{Ibid.}, Sec.1.
82. \textit{Ibid.}, Sec.s.
83. \textit{Ibid.}, Sec.5.
84. \textit{Ibid.}, Sec.11.
85. \textit{Ibid.}, Sec.4.
86. \textit{Ibid.}, Secs.6, 17 & 18.
Parliament even went to the extent of providing in the Act that the judges would be personally liable for punitive damages in the event of their unduly denying the writ in vacation.87

The Act of 1679, thus virtually transformed the common law remedy of *habeas corpus* into a constitutional remedy to secure the personal liberty of the individual. The writ could gain a permanent place not only in the constitution, but also in the popular conception as a fundamental guarantee of liberty. The Act also amply demonstrated that abuses with respect to *habeas corpus* would not be tolerated.88

The efficacy of this writ and so also the liberty of the subjects was further strengthened by securing the independence of judges through the Act of Settlement, 1701 — "An Act for further Limitation of the Crown and better securing the Rights and Liberties of the subject".89 The Act declared: "Judges' commissions shall be made quamdiu se

87. Ibid., Sec.10.
88. Sharpe, ibid., at pp.18-19. He maintains that with the Act of 1679 writ of *habeas corpus* took its modern form at least, so far the substance of the guarantee is concerned. Adams also opines that the 17th century became the 'great age of perfection' of the writ of *habeas corpus*. See Adams, *Constitutional History of England*, p.269.
bene gesserint (i.e. dependent on their good behaviour) and their salaries ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them". 90 Since then the independence of judges - a sine qua non for the protection of the rights and liberties of the subjects - has been looked upon as an essential aspect of the English constitutional system. 91

This brief historical survey shows that the liberty and security of the individual has been the focal point throughout the constitutional developments in England. Right to personal liberty has been recognized with great enthusiasm in the basic constitutional documents such as Magna Carta, Petition of Rights and Bill of Rights. These formal declarations have been further fortified by the common law remedy of habeas corpus, which later on emerged as a 'great constitutional weapon for the protection of liberty of the subject'. 92 Yet another vital aspect which

90. Ibid. This provision has since been embodied in Sec.12 of The Supreme Court of Judicature (Consolidations) Act, 1925.

91. The want of judicial independence and the horrifying consequences thereof were experienced by the English people during the reign of James I and Charles I. The tenure of judges, then, was dependent not on good behaviour but on the pleasure of the King. The dismissals of Coke and Walter are only illustrative examples of that era.

this survey brings to light is the dominant role of judicial process and the significance of judicial independence in protecting the personal liberty of the individual. Thus right to personal liberty, the deprivation of which would be illegal unless it conforms to the 'due process of law', can be said to have clearly emerged as a basic postulate of the English constitutional system by the latter half of the 17th century.

Of Course, in spite of all that has been said above, one should not lose sight of the fact that these declarations of liberty in the constitutional documents; the guarantee of 'due process of law' and the habeas corpus; and the blessings of an independent judiciary are all available only against the executive and not against Parliament whose powers are legally unlimited. The Glorious Revolution of 1688 made parliament supreme. It is to be noticed that this supremacy was not only over the King; but also over the Common Law. Thus the guarantee of 'the law of the land' - the bulwark of personal liberty - also incidentally happened to be placed at the mercy of Parliament which can make or unmake any law. (The 'law of the land' has no longer the might and majesty of the common law:) Right to personal liberty...

93. What happens to personal liberty of the individual when the judges take their orders from the executive was amply illustrated by the Darnel's Case - "a disgrace to King's Bench" as Lord Denning puts it in Freedom Under Law, p.7.
liberty, therefore, could not emerge as a constitutional guarantee in England, for it could impose no limitation on the powers of Parliament.

To have a correct assessment of this situation of supremacy of Parliament vis-à-vis the liberty of the subjects we should try to understand it in the light of the peculiar historical circumstance in England. It is not that during the 17th century the people could not, on principle, conceive of any limitations on Parliament. But it was the sheer historical circumstances that led (or compelled), the English people to acquiesce in and to accept the supremacy of Parliament as the cornerstone of their constitutional system.

As we have seen earlier, the very genesis of liberty in England shows that it was against the royal absolutism that the people revolted demanding their rights and liberties. In the struggle between the royal absolutism and popular will, Parliament came to be an ally of the people. In the course of history the struggle between the King and the people became the struggle between the King and Parliament. It was Parliament that zealously fought for the liberties of the people and passed the Habeas Corpus Acts.

94. See the views held by Coke in Bonhams Case and in Foster's Case. Also the views of Cromewell, see Sir Leslie Scarman, English Law - The New Dimension. The Hamlyn Lectures (1974), p.17.
Bill of Rights and Act of settlement - all intended to curb effectively the arbitrary powers of the king. In such a historical context it was but natural that the people had no suspicion whatsoever about their Parliament being a possible and potential danger to their rights and liberties. Thus when the Revolution of 1688 finally settled the Crown - Parliament conflict and Parliament emerged triumphant over the King, there was absolutely nothing to limit the powers of Parliament - either legal or political. The sovereignty of Parliament became an accomplished fact, the supremacy of Parliament a constitutional axiom. And the succeeding generations, being proud of their genius and traditions were complacent about their constitutional virtues.95

But of late there appears to have begun a re-thinking on the wisdom and propriety of having a Parliament of unlimited powers vis-a-vis the personal liberty and fundamental freedoms of the individual.96 There seems to be a growing realisation that while the Glorious Revolution made Parliament supreme, it was also rendering the common law -- the practical genius of which was responsible for enriching the 'law of the land' and for building up a body of procedural guarantees and principles as encompassed by

95. See A.V. Dicey, op.cit.

96. A significant contribution has been made in this regard by Scarman through his Hamlyn Law Lectures of 1974.
the writ of *habeas corpus* which 'protects the personal liberty more securely than any other system of law that the world has ever seen',97 — weak and vulnerable. This aspect has been forcefully brought out by Lord Scarman in his 1974 Hamlyn Law Lectures. He says:

"When times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But when times are abnormally alive with fear and prejudice, the common law is at a disadvantage: it can not resist the will, however frightened and prejudiced it may be, of Parliament".98

Further, it may be true that the judges in England 'no longer take their orders from the executive'; but the fact remains that still they take their orders from Parliament.99 This new shift in the thinking of English people is also influenced, in no small measure, by their impression about the virtues of liberty as a constitutional guarantee in

99. Regulation 18(b); *Liversidge V Anderson*, (1942) A.C.106, a case dealing directly with personal liberty; and the inability of the court to correct the retrospective effect of the Immigration Act are all clearly illustrative of this aspect. See Scarman, *ibid.*, at p.15.
America, and by the compulsions which they feel from the tremendous growth, both in volume and importance, of human rights at the international level. Thus it is increasingly being felt in England that the helplessness of the common law in the face of legislative sovereignty of Parliament makes it difficult for the legal system to accommodate the concepts of fundamental and inviolable human rights. It is felt that it would no longer be enough to say with Magna Carta that no free man would be deprived of his liberty except by the 'law of the land'; but the legal system must ensure that the law of the land will itself meet the standards of human rights declared by international instruments, to which the United Kingdom is a party. This argument, in effect, calls for an entrenched Bill of Rights in a written constitution which it is the duty of the courts to protect even against the powers of Parliament. There seems to exist in England today an increasing demand to adopt a written Bill of Rights as a limitation on the powers of Parliament and to have the power of judicial review to enforce that limitation. To wit, the demand is to make liberty as a constitutional guarantee - a judicially enforceable limitation on the powers of Parliament.

It is a paradox that in England - a country which has made perhaps the greatest contributions to the world as

100. See Scarman, ibid., at p.15.
regards the basic constitutional principles and philosophies and especially as regards the recognition of individual liberties and their protection by an independent judiciary against governmental authorities — this ideal of liberty as a constitutional guarantee still remains only as an aspiration, a demand. But it was in the American soil, for the first time in constitutional history, that the concept of liberty emerged as a constitutional guarantee.

**Liberty as A Constitutional Guarantee in The United States**

Liberty as a constitutional guarantee is distinctively American, as Prof. Corwin would claim.  But, the very idea of securing the liberties of the individual against the government and the means and techniques by which they could be secured as well as the substance of those liberties have all been derived by the American people from a variety of sources such as: the traditional common law rights of Englishmen; the great English documents of constitutional importance; the assertions of Coke, theories of Locke and commentaries of Blackstone; and of course, the post-Revolution Constitutions of the American States and the lessons of the American

colonial experience. A brief account of the historical process through which this 'juridical concept' has evolved in the United States seems to be appropriate at this juncture.

The Colonies and the Common Law Liberties

The American colonies were established, as proclaimed in their charters, with a view to extend and enlarge the boundaries of the British Empire, as forming part of the mother country. Those colonies were intended to be governed by the same laws and entitled to the same rights.102 Even according to the jurisprudence of the common law, the colonists were supposed to have carried with them all the laws of England applicable to their situation, and not repugnant to the local and political circumstances, in which they are placed.103 This position was reinforced invariably by the charters, expressly declaring that 'all subjects and their children inhabiting those colonies shall be deemed natural born subjects, and shall enjoy all the privileges and immunities thereof'.104 Thus the common law


104. Storey, ibid., at p.139.
rights and liberties of the Englishmen, especially the rules of protection from personal injuries, the rights secured by Magna Carta, the habeas corpus and other remedial courses in the administration of justice were considered by the colonists as their 'birth-rights'.

But the common law could protect these 'birth-rights' only against the King and not against Parliament. Another peculiar situation was that unlike the people of England, the American colonists were exposed not only to the arbitrary powers of the British Crown, but also to the legislative tyranny of the British Parliament. As a matter of fact, apart from being indifferent towards the denials of the common law liberties to the colonists by the Crown, Parliament itself had been indulging in legislative encroachments on the liberties of the inhabitants of the colonies. The colonists, therefore, realised that in order to safeguard their common law liberties they had to fight against both the King and Parliament. Thus, the necessity of limiting the powers of the legislative branch of government was felt by the people of the colonies from very early times. They became acquainted with this idea due

105. Storey, ibid., at p.138.

106. This double standard adopted by British Parliament towards the colonists was mainly responsible for the colonial resistance to the authority of Parliament and ultimately for the Revolution.
common sufferings had made them acute as well as
indignant in the vindication of their privileges.
Thus the struggle was maintained on each side with
unabated zeal, until the American Revolution". 112

Paradoxically enough, it was to the traditional
English sources 113 they looked for inspiration and guidance
during this great struggle of the colonists against the
British, in their search for a constitutional and
philosophical basis for claiming protection of their
liberties against the powers of Parliament. The Americans
found in Magna Carta and in the 'common right and reason', 114
an idea of a 'Higher Law' to resist the pretensions of
Parliament. 115 The idea of certain fundamental principles
underlying and controlling government was thought to be
expressed in Magna Carta. 116 The Great Charter was looked
upon as symbolising the subordination of political authority
to law. 117 The colonists were very much inspired by the

112. Ibid.

113. Such as Magna Casta, Bill of Rights, the Habeas Corpus
Acts, the arguments of Coke and the theories of Locke.

114. As asserted by Chief Justice Coke in Dr. Bonham's Case
(1609) 8 Co.Rep. 107, 188.

115. Robert K. Carr, The Supreme Court and Judicial Review,

116. E.S. Corwin, The Doctrine of Judicial Review,
Gloucester, Mass—Peter Smith, 1963, p. 27.

117. Corwin, ibid., at p. 27.

49
arguments of Coke in Dr. Bonham's Case that "when an Act of Parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such Act to be void". They saw in this argument not only an idea of a 'Higher Law', but also the elements of judicial power to interpret and enforce the fundamental law against all authorities including Parliament.

These 'acquired' ideas of the colonists found their first ever concrete expression in the history of American constitutional developments through the celebrated arguments of James Otis in the Writs of Assistance Case, 1761.

In order to do away with the difficulties experienced by the British officials in enforcing the various Stamp Acts in the colonies, Parliament authorised the colonial courts to issue "writs of assistance" enabling the officers of the Crown to make house to house searches in their efforts to detect smuggling. Opposing the issuance of such writs by, Massachusetts Court, Otis referred to the

118. See, Corwin, ibid., at pp.41-42; also see T.F.T. Plucknett, "Bonham's case and Judicial Review" 40 Harv. L.Rev. (1926) 30.

119. See, ibid.

existence of a fundamental law which knew no master, and argued that if Parliament transgressed it the courts should not follow such legislation. Taking the cue from Coke, Otis urged that any Act of Parliament authorising such writs was necessarily void as it was "against the constitution" and against "natural equity". Then again Coke's dictum was resorted to in challenging the Stamp Act arguing that such legislation was contrary to 'Higher Law'.

Besides the influence of Magna Carta and Chief Justice Coke, the American lawyers of those revolutionary days were also familiar with John Locke's theories of natural law and social contract and his idea of certain 'inalienable rights' of man against government. The extent to which Locke's ideas got currency among the

121. This argument reminds Coke's statement that, "Magna Carta is such a fellow that he will have no sovereign". See Corwin, ibid., at p.28.


123. Carr, op.cit., p.42.


125. As Prof. Corwin says: "Locke's is the last great name in the tradition of liberty against government that is common to our country and England". See Corwin, Liberty Against Government, p.51. In the same book at p.44 he further states: John Locke's Second Treatise on Civil Government of 1691, which is justifying one Revolution laid the idealogical groundwork for another. 'In this treatment of natural law, that concept transformed into the natural rights of Individual -the rights of "life, liberty and estate".
colonists during that period was, again, reflected by the arguments of James Otis. A few years after the 
Writs of Assistance Case, Otis in a pamphlet entitled "The Rights of
the British Colonies Asserted and Proved," set forth an argument of enormous influence, convincing the colonists that, as Englishmen, they possessed certain inalienable rights which had been challenged by the recent enactments of Parliament. He said "The Supreme legislature cannot justly assume power of ruling by ex—tempore arbitrary decrees, but is bound to dispense justice by known settled rules, and by duly authorised independent judges.... These are their bounds, which by God and nature are fixed".

Thus on the eve of the Declaration of Independence the American colonists became convinced that there were certain inalienable rights possessed by an individual, which no government had the power to infringe and that the only effective means to secure those rights lay in a written constitution, defining the fundamental law which would limit the powers of every branch of government, more particularly the legislative branch.

127. See Moschzisker, ibid., at p.25. See also Barna Horvath, "Rights of Man - Due Process of Law and Excis de Pouvoir", 4 American Journal of Comparative Law (1955) p,539.
In 1776 the American colonies had emerged triumphant in their great struggle against the British Crown and Parliament. They freed themselves from the yoke of the British Empire. The Declaration of Independence, through the famous phrases of Jefferson, eloquently reflected the convictions of the American people. Soon thereafter, those convictions were given effect to by the colonies through adopting written constitutions, declaring their 'inalienable rights' and liberties. These state constitutions were looked upon as defining the fundamental or 'Higher Law', limiting the powers of all political authorities; and as providing the legal basis for state courts to invalidate legislations which showed clear violations of the fundamental law.

In the decade separating the beginning of American Revolution from the Philadelphia Convention of 1787 there appears to have taken place in the colonies a fascinating synthesis of the liberties of Englishmen as declared in the Magna Carta and the 'inalienable rights' of individual as deduced from the theory of natural law. In England the two had been inimical. But in America they worked hand in hand. For instance, to cite only one example the Virginia Bill of

129. For the text of the Declaration, see Annexure IV, infra.

130. Moschziskor, ibid., at p.30. There were as many instances of judicial review of legislations by state courts.
Rights of 1776 called on Locke to assert in Chapter I that 'all men are by nature equally free and independent, and have certain inherent rights... namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety'. It also, in the same vein, called on Magna Carta in Chapter VIII to lay down that no man was to be deprived of his liberty 'except by the law of the land or judgement of his peers'.131

And it was in this setting that the colonies had come together and eventually evolved as a nation under a new constitution. Thus, when the delegates from thirteen colonies - the Founding Fathers of the American Constitution - met at Philadelphia in 1787, they seemed to have brought with them a rich variety of ideas and experiences such as: the idea of a fundamental law binding all political authorities; theories of certain inalienable and natural rights of individuals which were to be given primacy over government; the notions of judicial review; and, of course, their experiences and precedents which they had in their colonies both before and after the Declaration of Independence. Those sentiments and beliefs which were

131. As J.C.Holt points out, ch.29 of Magna Carta had become a convenient formulation of natural right and that chapter had been embodied in the Bill of Rights of state after state and was carried on from the 18th to 20th Century. See Magna Carta, op.cit., p.15.
brought from various sources to the Convention, as they were discussed and developed, had become a body of principles, some of them being written down as the letters of the Constitution and others necessarily implied as essential to the carrying out the provisions expressed.\footnote{132}

Paradoxical though it may seem, the Constitution as finally adopted by the Convention did not contain either a Bill of Rights or any express provisions regarding judicial review - the two aspects without which the American Constitution would have become a poor and shrunken thing.

As regards judicial review, one should not forget, as Prof. Corwin points out, the historical background of the Philadelphia Convention and the contemporary ideas in which the framers had come to believe. The idea of a 'Higher Law' and the court's authority to declare a legislative act, repugnant to that 'Higher-Law' as void were the "common properties\footnote{133} during the period when the constitution was established. The assertions of Coke in \textbf{Bonham's Case} and the arguments of Otis in \textbf{Writs of Assistance Case} were still fresh in the minds of the makers of the Constitution.\footnote{134}

\footnotetext[132]{Moschzisker, \textit{op.cit.}, p.41.}
\footnotetext[133]{Corwin, \textit{The Doctrine of Judicial Review, op.cit.}, p.2.}
\footnotetext[134]{\textit{Ibid.}, at pp.28-29; Carr, \textit{op.cit.}, p.42.}

55
Besides these revolutionary ideas the framers were quite familiar with the practice of judicial scrutiny of colonial legislations for compliance with English law by the Privy Council in London. They were also presumably aware of a few cases in which the courts, under the newly established State constitutions after the Declaration of Independence, had invalidated state legislations on the ground that they were violative of the state constitutional provisions.

Even in the Convention of 1787, though the issue of judicial review as such was not discussed, considerable attention was given to a proposal that a Council of Revision be created with authority to veto acts of Congress. The proposal was defeated; but it is interesting to note that the proposal was opposed by many of the delegates on the ground that the judiciary would then gain a double check over legislation. It seems, those members had assumed that the courts would exercise the power of judicial review as part of normal judicial function, and so they refused to

135. Carr, ibid., at p.43.
136. Ibid.

For eg. See Trevett V. Weeden, in which a Rhode Island Court in 1786 declared an act of the state legislature as null and void; Holmes V. Waltons a New Jersey Case of 1780; the Virginia Case of Commonwealth V. Caton. These cases are cited in Moschzisker, op.cit.,pp.31-33.
137. Carr, ibid., at p.45.
confer any further power of similar character upon the judiciary. Many scholars of American constitutional history also hold the view that a great many of the delegates intended that the courts should exercise such power. The function of judicial review was almost invariably related by the members of the Convention to the power of the judges as "expositors of the law". Such an attitude was prevalent during the state ratification conventions as well. Perhaps the most comprehensive and satisfactory answer to this issue can be found in the argument of Alexander Hamilton in the Federalist:

"The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body, and, in case of irreconcilable difference

138. Ibid.
139. Ibid.
141. John Marshall, as delegate to Virginia Convention expressed the same idea as to judicial review as forming part of normal judicial function; also Oliver Ellsworth in Connecticut Convention expressed the same view. See Carr, op.cit., p.52.
between the two, to prefer the will of the people declared in the constitution to that of the legislature as expressed in statute". 142

As Prof. Corwin says, 'Hamilton was here, as at other points, endeavouring to reproduce the matured conclusions of the Convention itself.' 143 Thus, to quote Prof. Corwin again, 'we are driven to the conclusion that judicial review was rested by the framers of the Constitution upon certain general principles which in their estimation made specific provision for it unnecessary. 144 The power of judicial review, therefore, seems to have been recognised by the framers as implicit in the Constitution as they adopted in 1787. And what was implicit in the constitution was made explicit in 1803 when Chief Justice Marshall had assumed and exercised the power of judicial review in Marbury V. Madison. 145 Eversince 1803 the power of judicial review has been treated as an essential feature of the American Constitution.

142. Federalist 78, as quoted by Corwin, Judicial Review, op.cit., p.44.
143. Corwin, ibid., at p.44.
144. Ibid., at p.17.
145. Cr.137 (1803) Marshall's reasoning in this case has striking resemblance with Hamilton's argument in Federalist-78.
Let us now consider the issue of want of a distinct Bill of Rights in the Constitution, 1787. Unlike the case of judicial review, the matter of Bill of Rights was specifically discussed in the Convention. There were many members in the convention who felt that the concept of inalienable rights needed more specific definition. As a matter of fact, Elbridge Gerry of Massachusetts, prompted by George Mason of Virginia, moved that a Bill of Rights be drafted. But most of his friends did not agree to that proposal in the belief that the State declarations of rights were sufficient to guarantee the fundamental liberties.

But during the state ratification conventions, as Joseph Storey observes, 'among the defects which were enumerated none attracted more attention or were urged with more zeal than the want of a distinct Bill of Rights which should recognize the fundamental principles of a free republican government and the right of the people to the enjoyment of life, liberty, property and the pursuit of happiness.' On the other hand, the Federalists offered two justifications to adopt the Constitution even without a Bill of Rights. First, it was maintained that there were


various provisions in the Constitution in favour of particular privileges and rights which in substance would amount to a Bill of Rights. Second, it was claimed that the Constitution had adopted, in its full extent, the common and statute law of Great Britain and hence many other rights, not expressed in the Constitution, were equally secured. Hamilton argued: "The truth is that... the constitution is itself, in every rational sense and to every useful purpose, a bill of rights. The several bills of rights in Great Britain form its constitution, and conversely the constitution of each state is its bill of rights. And the proposed constitution, if adopted, will be the bill of rights of the Union".

The Federalists nevertheless, could not succeed in their attempt to get support for the Constitution without a Bill of Rights. The spirited arguments in the States in favour of a Bill of Rights, finally compelled the Federalist

148. In this regard Hamilton referred to Art.I 3.3 c1.7; Art.I S.9, cl.2;cl.3;cl.7;Art.III S.2 cl.3; Art.III, S.3 etc.
150. Ibid., at p.195.
151. Seven out of thirteen States went on record as favouring a Bill of Rights. See ibid., at pp.136-7.
leaders to admit that ratification could probably not be secured unless the delegates endorsed certain amendments 'to remove the apprehensions of many of the good people of the commonwealth'. By a clever device the resolution of ratification became simultaneously a demand for subsequent amendment also, creating some sort of a 'moral obligation' which the new federal government promptly accepted.

The First Congress under the new Constitution had before it more than one hundred and twenty proposed amendments. They were seriously considered and finally twelve of them were accepted. By December 15, 1791 the first ten amendments were duly ratified by the States. And those ten amendments became the historic Bill of Rights in the Constitution of the United States. Among the proposals which the Congress did not approve, there was one that James Madison regarded as an appropriate preamble to the Bill of Rights. It merits quoting, for, it encompassed the real spirit in which the American Bill of Rights was adopted. Here is the excerpt from that Resolution:

"All power is originally vested in and consequently derived from the people... Government is

---


153. Ibid., at p.137.
instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property and generally of pursuing and obtaining happiness and safety. There are certain natural rights of which, men, when they form a Social Compact, cannot deprive of or divest their posterity, among which are the enjoyment of life and liberty".  

Once it was decided to adopt a distinct Bill of Rights, there was little doubt about the primary sources from which those rights could be formulated. Prominent among the sources were the Magna Carta, the Petition of Rights, the Bill of Rights and the common law guarantees of civil liberty, besides the immediate precedents of the 'inalienable rights' as contained in the Declaration of Independence and the various bills of rights as contained in the state constitutions. The extent to which the American Bill of Rights owes to the English legal tradition has been brought out succintly by Prof. Albert Abel thus:

154. As quoted in ibid., at p.137.

155. Ibid., at p.138. See also C.H. Mc Ilwain, "Due Process of Law in Magna Carta" (1914) 14 Colum.L.Rev. 26; and Mr. Justice Johnson in Bank of Columbia v. Okely, 4 Wheat. (1819) 235, 244.
"The substantial portion of the (U.S) Bill of Rights was a "restatement of the law" rested on venerable... ancient English precedent. It is this which makes the grand documents of English constitutional history to American lawyers no less a part of their legal tradition than of England's. That Fifth Amendment's due process of law was a direct descendant of the lex terrae of Magna Carta was clearly established. Other provisions such as the "speedy... trial" provisions of the Sixth Amendment, and the jury trial provisions of that and the Seventh Amendment are also foreshadowed by phrases in Magna Carta. It may be that Magna Carta has been over-romanticized and was at its inception a cruder piece of class legislation than later ages have supposed, but in any event it was, and indeed still continues to be, for Americans a main strand in their constitutional fabric. The classic documents which issued from the constitutional struggle of the seventeenth century - the Petition of Rights, the Habeas Corpus Acts, the Bill of Rights - were also reflected in the American constitutional provisions. While they have not been elevated - or reduced - to the status of a charm, as the more ancient instrument has, they were familiar to and cherished by the
generation which drafted the American Bill of Rights. Besides the *habeas corpus* guarantee, the provisions regarding excessive fines and bail, cruel and unusual punishment, quartering of troops and the right to petition are among those having clear antecedents in these documents. All these were rights of identifiable provenance".156

And the other common law liberties such as the freedoms of religion, speech, press, assembly and associations were also secured by the Bill of Rights.157

Thus, the rights and liberties secured by 'the common and statute law of Great Britain', which were held by Hamilton158 as implied in the Constitution of 1787, were made explicit constitutional guarantees by the Bill of Rights in 1791. In the context of a Bill of Rights, the strategic significance of judicial review also appears to have been envisioned by the framers. On the question whether the Bill of Rights offered any special basis for judicial review, James Madison, piloting the proposals which


157. See the First Amendment to the U.S. Constitution

158. See *Federalist: 84*. For the text of the Bill of Rights, see Annexure V, *infra.*
eventually became the first ten Amendments in the House of Representatives, urged that the Bill of Rights would implicate the judges in the defence of individual rights. He said:

"If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights".159

The adoption of the Bill of Rights in the American Constitution, thus, marked the culmination of a continuous process of development of liberty against authority - a process which began with Magna Carta in 1215.160 Among the rights guaranteed by the Constitution, perhaps the most prominent place is occupied by the right to personal liberty


160. Both in Magna Carta and in the Bill of Rights the central theme is same; i.e. both are concerned with specific potential threats to human liberty and with the practical means of thwarting them. See Corwin, ibid., at p.28.
and security of the individual. The extent of importance attributed to liberty and security of the individual becomes evident from two factors. First, even in the absence of a Bill of Rights, various provisions were provided for in the Constitution of 1787 itself, securing the personal freedom of the individual. For instance, the privilege of the writ of habeas corpus was ensured; Bills of Attainder and ex-post facto laws were expressly prohibited fair and open trial and trial by jury were also secured. As claimed by Hamilton, these provisions securing the particular privileges and rights of individuals themselves were thought of as amounting to Bill of Rights. Secondly, even in the Bill of Rights, as was subsequently adopted in 1791 one finds that most of the first ten amendments dealt only with various procedural guarantees which were intended to safeguard the liberty and security of the individual, right to speedy trial, right to know the nature and cause of the accusation, right to cross-examine and to obtain witnesses, and right to have legal assistance have all been guaranteed, to the accused in all prosecutions. Trial by

161. The Constitution of the United States, Art I, s.9 cl.2.
162. Ibid., cl.3.
163. Ibid., Art.III, S.2, cl.3.
165. The Constitution of the United States, VI Amendment.
jury is ensured in all cases. Also provisions were made against 'double jeopardy' and self-incrimination. The right of the individuals to be secure in their persons, houses, papers and effects; and the freedom from unreasonable searches and seizures were guaranteed. Quartering of troops in houses also is prohibited. Thus, of the first eight amendments, barring the First Amendment, all others were meant only to deal with one or other particular aspect of personal liberty and security.

And having dealt with the various particular attributes of personal freedom, the Bill of Rights proceeds to guarantee, perhaps the most comprehensive formulation of liberty, as it came down to the framers from chapter twenty nine of the Magna Carta. This chapter of the Great

166. Ibid., VI and VII Amendment.
167. Ibid., VIII Amendment.
168. Ibid., V Amendment.
169. Ibid., IV Amendment.
170. Ibid., III Amendment.
171. Prof. Corwin says: 'for the history of American constitutional law and theory no part of Magna Carta can compare in importance with chapter twenty nine', Liberty Against Government, pp.23-24; See also Blackstone, Commentaries on Laws of England, 424. He says, 'Ch.29 of Magna Carta alone would have merited the title it bears, of the Great Charter'.
Charter, which secured every freeman in the undisturbed enjoyment of his life, his liberty and his property unless forfeited by the judgement of his peers or the law of the land, appeared to the Americans as a convenient embodiment of Locke's 'inalienable rights' of man against government. Not surprisingly, therefore, the guarantee of 'due process of law' of Magna Carta and the 'inalienable' rights to life, liberty and property were integrated and incorporated in the Bill of Rights through the Fifth Amendment in the following words: "No person shall be... deprived of life, liberty or property without due process of law".

Thus, as a result of centuries of continuous process of evolution liberty has emerged as a constitutional guarantee, i.e., as a judicially enforceable value against all authorities, including the legislative branch of government, — a 'juridical concept' which is distinctively American, indeed. The development of liberty as a constitutional guarantee in the United States heralded a new epoch in the constitutional history of the world. The extent of influence which this 'distinctively American' concept of liberty has exerted in shaping the destinies of mankind in different parts of the world is remarkable. This American example has served as a source of inspiration and impetus not only to many of the modern national constitutions, including that of India, which valued liberty
and rule of law; but also to the international legal order in its efforts to develop and protect the 'human rights'.

Personal Liberty In International Legal Order: A Human Rights Perspective

Human right is a twentieth century name for what had been traditionally known as natural rights or, in a more exhilarating phrase, the rights of man'.172 They are not rights which derive from a particular station; they are rights which belong to a man simply because he is a man.173 The very term "rights of man" is of American origin.174 But before the formulation as 'rights of man' in America, the history of human rights, as Prof.Baran Horvath sums up, was a "progressive discovery of inarticulate major premises, of changes in meaning.... Thus the feudal rights of English barons, expressed in the Magna Carta in 1215, became in due time the rights of Englishmen, as defined in the Habeas Corpus Act in 1629, the Petition of Rights in 1627, the Bill of Rights in 1688, the Act of Settlement in 1700, which in turn evolved into the 'rights of man' formulated in the

Virginia Bill of Rights on June 12, 1776, in the American Declaration of Independence on July 4, 1776, and in the French Declaration of Rights of Man and Citizen, on August 20, 1789. This process of historical evolution of the rights of man assumed a revolutionary phase when the U.S. Constitution of 1787 with the concurrent amendments of 1791 - the Bill of Rights - had categorically proclaimed the primacy of right of man over government and had defined these rights in greater detail. This American example had marked the beginning of a new era of the formal incorporation of these basic rights as part of the constitutional law of States and the possibility of their consequent protection not only against the tyranny of kings but also against the intolerance of democratic majorities. And in the 19th and 20th centuries the recognition of the fundamental rights of man in the constitutions of states became a general principle of the Constitutional law of civilised States. But, in spite of the 'guarantees' of these historic rights of man as the constitutional rights of the inhabitants in many countries, quite often the missing factor has been enforcement. If any particular government chooses not to enforce rights which it

175. Ibid.


177. Ibid., at p. 89.
is obliged to uphold under its own constitution what is there to be done about it? If a man is deprived of his rights by his rulers, to whom can he appeal? These questions loomed large in the minds of mankind when it was faced with the cruel realities of the World War II — the despair of the victims of totalitarianism, the total denial and deprivation of the worth and dignity of the individual, his life, liberty and security — a total negation of the human rights.\footnote{It was in that context the late Judge Lauterpacht argued, just after the World War II, that the protection of human rights depended largely on the institution of a new international body with this specific purpose. See \textit{ibid.}, at p.124.} An answer to this question was found by the world community in establishing an international organisation — the United Nations — to 'save succeeding generations from the scourge of war; to 'maintain international peace and security; and to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person'.\footnote{See the Preamble to the U.N. Charter.} The awareness of the international community as to the essentiality of respect for human rights for maintaining world peace and security finds adequate reflection in the U.N. Charter. Apart from the Preamble, Article 55 of the Charter stipulates that the U.N. shall promote 'respect for, and observance of human rights and fundamental freedoms'; and Art 56 requires that 'all members

...
pledge themselves to take 'joint and separate action in co-
operation with the Organization for the achievement of the
purposes set forth in Art.55'.

The human rights and fundamental freedoms' were
defined, elaborated and catalogued by the historic
"Universal Declaration of Human Rights", which was adopted
by the U.N. General Assembly on December 10, 1948 -- a
Declaration which was hailed, as Mr.Roosevelt, chairman of
the Commission on Human Rights did, as "the international
Magna Carta of all mankind".181 For the first time in
world's history the organised community of nations agreed on
a declaration of human rights, setting forth what those
nations conceive to be the inherent rights of every
individual in the world.182 The Universal Declaration of
Human Rights, to which all member nations subscribe, sets
forth a "common standard of achievement for all peoples and
all nations",183 and enumerates those rights which we call
human.

180. See Arts.55 and 56 of the U.N. Charter.

181. The Declaration was adopted by 48 out of the 58 members
of the United Nations; 8 nations abstained from voting
and 2 nations were absent in the Assembly; and none
opposed. See, Great Expression of the Human Rights,
ed. by Mc Ilvain, p.201.

182. See, Lauterpacht, International Law and Human Rights,
(1968) p.394.

183. See the Preamble to the U.D.H.R.

72
The Universal Declaration, in its first 21 Articles deals with the traditional 'civil and political rights'; and in the later Articles (Articles 22 to 28) deals with the so called 'social, economic and cultural rights'. Since our immediate concern is only with the concept of personal liberty as a human right, let us focus our attention on those rights which pertain to the liberty and security of the individual.

In order to uphold the "inherent dignity and worth of the human person" Article 3 of the Declaration proclaims that 'everyone has the right to life, liberty and security of person'; and the various (specific) attributes of personal liberty and security of the individual have then been elaborated by the subsequent Articles. Thus, the Declaration spells out freedom from 'arbitrary arrest, detention or exile'; right to a fair and public trial by an impartial tribunal if accused of any crime; and right

184. The text of the Declaration is given in Annexure VI, infra.

185. We are not at present concerned with the conceptual dichotomy between these two classes of rights, i.e. the 'negative liberty' and 'positive liberty'. But the emerging trend is to the effect that both these classes of rights are interdependent and complementary to each other.

186. The U.D.H.R. see Annexure VI.

187. Ibid., Art.9.

188. Ibid., Art.10
to be presumed innocent until proved guilty\textsuperscript{189} accused of 
any crime; and right not be subjected to \textit{ex-post facto} 
laws.\textsuperscript{190} The Declaration prohibits slavery or servitude;\textsuperscript{191} 
torture; and cruel, inhuman or degrading treatment or 
punishment.\textsuperscript{192} It also recognises the right to privacy;\textsuperscript{193} 
and right to freedom of movement both within the state\textsuperscript{194} 
and abroad.\textsuperscript{195} Besides it also names right to equality,\textsuperscript{196} 
right to own property,\textsuperscript{197} right to marry,\textsuperscript{198} right to 
religious freedom,\textsuperscript{199} speech,\textsuperscript{200} assembly,\textsuperscript{201} and asylum.\textsuperscript{202} 

The foregoing list of rights shows clearly the 
importance attached to personal liberty as a human right in

\begin{enumerate}
\item \textsuperscript{189} Ibid., Art.11(1)
\item \textsuperscript{190} Ibid., Art. 11(2)
\item \textsuperscript{191} Ibid., Art.4
\item \textsuperscript{192} Ibid., Art.5
\item \textsuperscript{193} Ibid., Art.12
\item \textsuperscript{194} Ibid., Art.13(1)
\item \textsuperscript{195} Ibid., Art.13(2)
\item \textsuperscript{196} Ibid., Art.17
\item \textsuperscript{197} Ibid., Art.17(1)
\item \textsuperscript{198} Ibid., Art.16
\item \textsuperscript{199} Ibid., Art.18
\item \textsuperscript{200} Ibid., Art.19
\item \textsuperscript{201} Ibid., Art.20
\item \textsuperscript{202} Ibid., Art.14(1)
\end{enumerate}
the Universal Declaration. The various aspects of personal liberty as well as the due process requirements for their protection have been articulated and reinforced by the numerous subsequent International Instruments as well. Following Art. 3 of the Universal Declaration, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention, and the African Charter all declare that 'everyone has the right to liberty and security of person'. These subsequent documents, intended from the start to be legal documents, constitute a 'precise code' for what is and is not legitimate in the field of personal liberty and security of the individual. Especially the Civil and Political Rights Covenant, which entered into force on March 23, 1976, elaborates the 'liberty and security' of person in greater detail and makes the respect for the right to liberty and security as an absolute and immediate obligation

203. Art. 9(1) The text of the Covenant is given in Annexure VII, infra.


on the states which are parties to the treaty. The Covenant recognises the right of everyone to 'liberty and security of person'; and the right not to be subjected to 'arbitrary arrest or detention.' And it declares that 'no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. Further, when anyone is arrested, he must be told why; he must then be brought 'promptly' before a judicial officer, and either released or tried within a reasonable time; and he must always be entitled to test the legality of his detention before a court. The Covenant also provides that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. Even in cases of persons who are deprived of their liberty, the Covenant provides that they 'shall be treated with humanity and with respect for the inherent dignity of the human person'. The Covenant also outlaws

208. International Covenant on Civil and Political Rights was adopted in 1966 and entered into force in 1976. 77 countries are parties to the treaty, including India.

209. Civil and Political Rights Covenant, Art.9(1).

210. Ibid.

211. Ibid.

212. Ibid., Art.9(2).

213. Ibid., Art.9(3).

214. Ibid., Art.9(4).

215. Ibid., Art.9(5).

216. Ibid., Art.10(1).
slavery and servitude in all their forms; torture, and cruel, inhuman or degrading treatment or punishment. It also specifically provides for the due process requirements which are to be followed in the determination of any criminal charge against a person. Of the right of the accused the Covenant names, inter alia, the right to fair and public trial by a competent and impartial tribunal; the right to be presumed innocent until proved guilty; the right to know the nature and cause of the charge; right to reasonable opportunity to prepare his defence; right to speedy trial; right to be present in his trial and to defend himself and the right to legal assistance and even free legal aid in deserving cases; right to cross-examine witnesses against him and to examine his own witnesses; right not to be compelled to testify against

217. Ibid., Art.8(1) and (2).
218. Ibid., Art.7.
220. Ibid., Art.14(1).
221. Ibid., Art.14(2).
222. Ibid., Art.14(3), (a).
223. Ibid., Art.14(3), (b).
224. Ibid., Art.14(3), (c).
225. Ibid., Art.14(3), (d).
226. Ibid., Art.14(3), (e).
himself or to confess guilt227 (i.e., right against self-incrimination); right against 'double jeopardy;'228 and right against ex-post facto laws.229 The Covenant also recognises the right to freedom of movement,230 both within the individual states and abroad, right to marry;231 and right to privacy232 as deriving from 'the inherent dignity of the human person;233 and protects individuals from arbitrary state interference.

Thus one finds that the personal liberty and security of the individual occupy a pivotal position in the entire scheme of human rights as have been defined and catalogued by the human rights instruments starting with the Universal Declaration. Personal liberty and security appears to have been treated as basic to all other human rights. Thus observes Thomas Bue-rgenthal:

"In my opinion, an international consensus on core rights is to be found in the concept of "gross

227. Ibid., Art.14(3), (g).
228. Ibid., Art.14(7).
229. Ibid., Art.15(1).
230. Ibid., Art.12.
231. Ibid., Art.23(2).
232. Ibid., Art.17(1).
233. Ibid., See The Preamble.
violation of human rights and in the roster of rights subsumed under it. That is to say, agreement today exists that genocide, apartheid, torture, mass killings and massive arbitrary deprivations of liberty are gross violations". 234

In a similar vein, emphasising on this 'core' of human rights the U.S. Secretary of State Cyrus Vance stated in April 1977 thus:

"First, there is the right to be free from governmental violation of the integrity of the person. Such violations include torture; cruel, inhuman or degrading treatment or punishment; and arbitrary arrest or imprisonment. And they include denial of fair public trial and invasion of the home". 235

Personal liberty and security constitute a core value of human rights which has been recognized—or at least not denied—by all nations. 236 As Robert B. Mckay 237 maintains,  


236. Prof. Buergental recognises the ideological neutrality of these rights as one of the reasons for their universal acceptance as a core value., see Buergental, op.cit., p.18.

even the domestic jurisdiction clause of the U.N. Charter does not immunize the nations guilty of gross violations of these basic and primary human rights. No state, therefore, can any longer assert, as it could before World War II, that the manner in which it treats its own nationals is a matter within its domestic jurisdiction and that it is free from international scrutiny. This is really what is called 'the internationalization of human rights'. Thus as a result of the continuous process of development of human rights jurisprudence, starting with the Universal Declaration of 1948, the right to personal liberty and security has emerged as a core 'value' of 'internationalized' human rights.

Of course, it is true that human rights may still be violated in many countries; and problems and difficulties may still be experienced in the full realization and effective implementation of these human rights. Nevertheless, apart from the legal obligations which human rights violations impose on the states, the very notion of human rights had served and still continues to serve as a

238. Article 7(2) of the U.N. Charter.
239. For the recognition of the primary of these rights to liberty and security of the individual, see also Paul Sieghart, The Lawful Rights of Mankind (1985) p.107.
catalyst in legal and constitutional developments in national systems, inspiring national efforts to live up to the principles so universally acclaimed by the collective conscience of mankind.

Indeed, the Indian Constitution is itself a standing testimony to this catalytic effect of the concept of human rights. It is interesting to note that the Universal Declaration of Human Rights was adopted by the U.N. General Assembly at a time when the framing of India's Constitution was in its final stage of completion. It was a historical coincidence that the Indian Constitution happened to be the first major national constitution which incorporated the human rights and fundamental freedoms embodied in the Universal Declaration of Human Rights. Thus the internaitonalised human right to personal liberty and security has become the fundamental right to personal liberty which the Indian Constitution guarantees to all persons in India.


Let us now turn to the Constitution of India and see how the right to personal liberty has emerged as a constitutional guarantee therein.