CHAPTER II

PERSONAL LIBERTY IN THE INDIAN CONSTITUTION -
THE FRAMING OF ARTICLE 21

Personal Liberty In Indian Thought:

Liberty in Ancient India was essentially an integral concept, embodying a natural harmony of spirit, mind and body.¹ The dignity and freedom of the individual, liberty in its widest sense, was valued very high in our ancient political system.² Freedom from physical and social constraints in pursuing the Purusharthas³ - the legitimate goals or objectives of life - was the essence of individual liberty. And the protection of liberty in this comprehensive sense was the most fundamental duty enjoined


2. As the Mahabharata tells us 'there is nothing higher than man - na manusat srestha - taram hi kincit'. See, Dr.Radhakrishnan, Occasional Speeches and Writings, Third Series, p.309.

3. The four values which are recognised as the Purusharthas or legitimate goals of life in Hindu Philosophy are Artha, Kama, Dharma and Moksha. For a detailed analysis of the Purusharthas see S. Gopalan, Hindu Social Philosophy, Wiley Eastern Limited, Delhi, 1979.
upon the king by Dharma, the Supreme Law.4 Dharma was considered a greater sovereign than the king and was held to be binding both on the ruled and the ruler alike.5 The king in Indian political thought was only the guardian, executor and servant of the Dharma.6 This subjection of the king (the sovereign power) to the supremacy of the sacred law was well brought out by the Coronation Oath7 which emphasises not only the duty of the king to the people but also the dedication of his life to the service of the State.8 The king was required to take the oath that he would protect the moral, spiritual and material well-being of the people entrusted to his care.9 Further, among all the dharmas Rajadharma appears to have been given the utmost importance


9. Bhagwan Das, ibid.; also see Gajendragadkar, op.cit., p.422.
in the scared texts. Rajadharma is said to be the 'root of or the quintessence of all dharmas', because, in view of the Hindu thought, the fulfilment of their duties and responsibilities by rulers was of paramount importance to the stability and orderly development of society and to the happiness of the individuals in the State. And among the Rajadharmas (the duties of the king) the first and foremost seems to have been 'paripalana'—the protection of the subjects. Shantiparva as well as Manusmriti describe 'protection of the individuals as the highest dharma of the king. The sacred texts state clearly that the subjects require protection against the king's officers, thieves, enemies of the king, royal favourites (like the queen and the princess) and the greed of the king himself. The king was also dutybound to create conditions under which people can freely pursue the 'Purushartas' and can thus be at real state of liberty. The upholding of justice was also

10. P.V.Kane, History of Dharmasastra, Vol.III, 2nd edn., (1973), p.3. Santiparva (63.25) in the Mahabharata states: 'know that all dharmas are merged in rajadharma; that rajadharmas are at the head of all dharmas'.

11. See P.V.Kane, ibid., at p.56. 'Protection is the highest dharma of the king'. See Santiparva, 68-1-4; Manusmriti VII-144.

12. Ibid.

13. Ibid., at p.58.

14. K.M.Panikkar, op.cit., p.23, See Barhaspatya - Sutra (II.43); Sukranitisara (IV-4.39); P.V.Kane, op.cit., p.240.
considered an equally important duty of the king. In Hindu thought 'justice is what binds society together, and is the great protective principle. Economic prosperity, moral welfare and cultural advancement are dependent on justice. Justice is the basis on which society exists and evolves and eternal vigilance is enjoined on the king as his own righteousness is dependent on the maintenance of justice. The emphasis in the ancient system was on the duties prescribed by the sacred laws. It was on the due performance of duties by all that the happiness, good order and welfare of society depended. The king had to execute the laws and enforce the duties among the subjects. In turn, the king himself was obliged to perform his own Dharma and uphold the law. If the king disregards Dharma there is a political sanction. According to the Texts such as Mahabharata, Sukranitisara and Manusmriti, if the king ceased to be a faithful executor of the Dharma he is liable to be removed, and even be killed in extreme cases of royal cruelty and oppression. The sovereign commands obedience of the subjects only so long as he faithfully performs his duty of 'paripalana'. In Indian political thought

15. Ibid., at p.56.
16. Ibid., at p.58. For reference to Manu's view on Justice, see, pp.57 and 59.
17. P.V.Kane, op.cit., p.26, see also Bhagwan Das, op.cit., pp.891-93 and 937.
'protection' is the very purpose of and hence a limitation on, sovereignty. The concepts of, 'absolute sovereignty' and 'autocracy' are alien to our tradition.

Thus it follows from what we have stated above that the concept of liberty that existed in ancient India was a very comprehensive and compendious one, consisting of all aspects of human life such as physical and material values (Artha), emotional values (Kama), ethical values (Dharma) and spiritual values (Moksha). The Protection of individual liberty in this comprehensive sense was enjoined upon the king as his fundamental duty by Dharma, the Supreme Law which limited and regulated the powers of king and the state.

But it should also be remembered, as cautioned by many scholars, that the above observations must not be misconceived as amounting or equivalent to the notion of a 'constitutional monarchy' or a 'guaranteed right to personal liberty' as it developed in the West. Any attempt to read

18. K.M.Panikkar, op.cit., p.37 and pp.54-5.
19. Ibid., at pp.67-68; see also P.V.Kane, op.cit., p.62; Sri Aurobindo, op.cit., p.350.
20. P.V.Kane, op.cit., p.15. He criticises both the Western Writers who under-rated the contributions of Indian thought to Political Science as well the Indian Writers who attempted to describe the Indian Polity as a sort of 'constitutional monarchy' in its Western sense. See also Sri Aurobindo, op.cit., p.341; and K.M.Panikkar, op.cit., p.8.
such modern concepts of western thought into the ideas and precepts of the Indian thought would be 'unhistorical' and an 'ill-judged' one.  

The concept of a 'constitutional monarchy' implies that the monarch's powers are absolute unless defined and limited by convention or statute. The essence of the theory is the original unlimited character of king's powers which has come to be limited in law, whether through conventions or through written constitutions. But in every case it is a limitation on the presumed absolute sovereignty of the king. History shows that the claims of state absolutism, which still holds sway in different forms in Europe, arose, in a way, as a challenge to theocratic absolutism. The autocracy of the king in Europe developed as a rival claim to the church's vicegerency of God. As against the Pope the Emperor claimed to be the agent of God for mundane affairs. Both the church and the state were united in holding that absolute power as derived from God existed in some authority either in the Emperor or in the Pope. They could not conceive of a society in which the absolute power did not exist somewhere. The exclusion of the church from temporal matters only transferred these claims to the

21. Ibid.


23. Ibid., at pp.66-7.
secular state. Even Hobbes, Bodin, Austin and others are thus the direct descendents in spirit of this concept of State. The State in Europe is supreme, it is not bound by any will other than its own and no conception of moral right (or duty) restricts its activity.

By contrast, the Hindu thought never recognised such a concept of state autocracy. The theory epitomised in Louis XIV's statement, "I am the State", never found support in Indian thought. The king, in India, was only one of the seven 'prakrities' (constituent elements) of the body politic and the State had essentially an administering character. This composite conception of body politic and the idea of the king being only one of the seven 'angas' (limbs) and not the embodiment of the whole, as in Western thought, stood in the way of a theory of autocracy.

24. Ibid., at p.66.

25. Ibid.

26. Ibid., at the p.70; Kamanda-kiya-nitisara (IV-1-2), Manu (ix.296-297) Santiparva and Arthasastra are all of the view that 'State is an organism of seven limbs: The "swami" (or the Soverign); the 'amatya (officialdom); the territory (rashtre); the Kosa (treasury); the fort; the army; and the ally. See P.V.Kane, op.cit., pp.18-19.

27. The administering State had an immense organisation which was divided in 18 Departments, as described in the Rajatarangini (first Taranga V.120) See ibid., at p.67. Kautilya also despicts an administering state in the Arthasastra.

28. Ibid., at p.68.
Another feature in the ancient system was the clear separation between the state and the religion and the consequential secular nature of Indian kingship. It was possible because religion in India was personal (individual) and not institutional and so it did not lead to an organised church. Thus, unlike in the West, the absence of an organised church backed by a powerful social hierarchy left the monarchy in India unperturbed by any centre of effective countervailing power raising rival claims to social obedience. Such a situation, in turn, rendered the claim for autocracy or absolutism by the king uncalled for even as a political necessity.

Further, the essential idea underlying the autocratic state is that there is nothing beyond its legal competence. On this count also it is noteworthy that in India kingship never involved plenary sovereignty. It was, by its nature, limited by Dharma; and the king did not have the power or (right) to legislate. And it was impossible for the king to develop a theory of supreme authority in the absence of legislative power. Thus even the most powerful king could not make himself the combination of all the powers because such an idea was not only against Rajadharma

29. Ibid., at p.78.
30. Ibid., at p.65.
but against the organisational character of the state. The king was admittedly the sovereign and the protector of the people. But sovereignty, as Sukranitisara says, is merely the form and authority, only the method by which the king may protect and serve the people. The king is not the creator, but only the servant and protector of Dharma—Dharma is always above the king.

Similarly, as regards the notion of a 'guaranteed right to personal liberty also, a close study of the ancient system would reveal that such a notion in its modern sense was virtually non-existent in Indian thought. The Hindu theory does not seem to confer any right on the individual as different from the community. It is the principle of 'protection' that is emphasised and as a result the subject in relation to the ruler has no legal rights beyond that of rebellion. The restrictions on the king were ethical and based on Dharma. Of course, a ruler cannot override the laws of Dharma; but the fact remains that the individual cannot claim protection on the basis of a duty which the king is morally obliged to follow.

31. Ibid., at p.68,69 and 79.
32. Ibid., at p.82.
33. Ibid., at p.75; See also Sri Aurobindo, op.cit., p.364.
34. See f.n. 11, supra.
35. K.M.Panikkar, op.cit., p.76.
 liberty as a legal right in a state can only be maintained and upheld either by courts of law or other similar institutions, and not by mere ethical injunctions. Though the ideal of liberty in its most comprehensive sense was given the highest place in Indian thought, liberty was not recognised as an individual right that could be enforced against the king. The Hindu state organisation did not leave any institutional remedy for the individual to prevent a bad king from ignoring his rights. Of course, systematic oppression can be remedied politically by rebellion or by resistance; but the concept of liberty involves not merely the vindication of public rights when violated on a large scale, but also when violated in the case of the poorest and the meanest individual. That principle was unknown to Hindu theorists, and thus liberty as a 'juridical concept' to borrow the expression from E.S. Corwin, 'was virtually non-existent in Indian thought'. Thus it is clear, from

36. This aspect has been referred to earlier in this section.

37. K.M. Panikkar, ibid., pp.77-78.

38. Probably such a political conception of liberty could not have developed in Ancient India in view of the concepts of State, sovereignty, and Dharma as we have seen earlier. It is noteworthy that the ideal of personal liberty as developed in Europe was the outcome of long-drawn struggle between state' autocracy and royal absolutism on the one hand and the powerful baronage supported by the church on the other. Magna Carta itself was what the nobles with the support of the church extracted from the King. In India the guarantee of liberty was implicit in the very conception of state.
what we have stated above, that any attempt to project the western ideas such as the theory of 'constitutional monarchy' or the notion of a 'guaranteed right to personal liberty' into Indian thought would be unrealistic and misleading. Even without indulging in such an 'ill-judged' exercise, one can always, with pride and honour, expound and emphasise the valuable contributions of Indian thought which are still relevant to our constitutional jurisprudence.

But it is an irony of history that in spite of the rich and liberal traditions, the Hindu political thought became stagnant with the advent of Muslim invasion.\textsuperscript{39} Even the short-lived Hindu political revivals as represented by Vijayanagar and Maratha states did not result in any real intellectual ferment. Then came the British occupation which, introduced, with still greater vigour and impact, western ideas, precepts and premises into the Indian political thought.\textsuperscript{40} In the British period, significantly enough, the Hindu idea of kingship underwent curious changes. The importation of the European theory of state omnipotence by the British gave to the Indian monarchy a conception of autocracy totally opposed to Hindu ideas. The Indian king had come to possess not only the powers given to


\textsuperscript{40} D.M. Brown, \textit{ibid.}; also see K.M. Panikkar, \textit{op.cit.}, pp.98-99.
him by the Nitisaras, but also what the western logists had formulated in Europe. Thus centuries of subjection of the Indian people to the foreign powers and their cultures did undoubtedly arrest, if not annihilate, the growth of Indian thought.

Paradoxical though it may seem, even when India became free from the foreign yoke and became independent to shape her own destiny as a nation, the new Republic of India took most of its forms no less than its ideals from the political thought and experience of the western nations and not from the doctrines of Bhishma, Kautilya, Manu and Sukra. In fact all the major aspects of India's constitutional system are adopted from the West. Of course, as Sri. Aurobindo has observed,

"It is unreasonable to expect the Independent India to fall back upon the ancient traditions and conceptions of state and social and political structures ignoring completely the intervening

41. K.M.Panikkar, ibid., at p.99.
42. Ibid., p.102. The author observes that the Indian thought ceased to grow after the 13th century as it did not have new political experience of its own to guide it.
43. For instance, the federal structure, Parliamentary form, the cabinet system, the guarantee of fundamental rights, the instrumentality of judicial review etc.
44. Sri Aurobindo, op.cit., at pp.363-64.
political and legal experiences which it had during the British regime and claiming total immunity from the currents of thought that gazed the world around her. Experiences always enrich growth and in any process of growth and evolution from within there is bound to be a constant interaction between what is within and the experiences gained from outside - a constant process of acceptance and assimilation.  

Thus instead of the Hindu conception of state as envisaged in the sacred Texts, India adopted in her new constitution a concept of constitutional government as it developed in the western political thought. And in the place of the conception of personal liberty as being implicit in the conception of state itself, unsupported by any institutional remedy but leaving it to the moral duty of the king, India adopted the concept of personal liberty in the Constitution as an individual right that could be enforced against the state through institutional remedies. That is to say, the right to personal liberty was conceived as an enforceable limitation on the State. Thus, in a way,

45. For a detailed discussion of this aspect, see Sri. Aurobindo op. cit.

46. Reference to this aspect has been made earlier in this section.
the right to personal liberty, for the first time in the
history of Indian political thought, has emerged as a
constitutional guarantee in its modern sense as it developed
in the West. It is, therefore, obvious and inevitable
that any meaningful discussion of the right to personal
liberty as guaranteed in the Indian Constitution can be made
today only in terms of the premises, precepts and
conceptions of the western legal and political thought and
not in terms of the traditions and conceptions of the
ancient Indian thought.

But, again, this is not to say that Indian
political thought has no value and relevance today or that
India of the past has nothing to offer to us in the field of
political and constitutional thinking and practice. It
would be rather unreasonable to expect a system of thought
and values which had dominated a people's ideas so long
would totally disappear as a result of the acceptance and
adaptation of new ideas and forms from abroad. Despite
the adoption of many western ideas and models in the Indian

47. For the explanation of liberty as 'constitutional
guarantee' in its modern sense, see O. Hood Phillips,
Constitutional Law and Administrative Law, 6th edn.,
p.438, Yardly, Introduction to British Constitutional
Law, 6th edn., p.89, E S. Corwin, Liberty Against
Government.

48. For a similar view, see Subhash C. Kashyap, Human Rights

49. K.M. Panikkar, op.cit., p.104.
Constitution, one can also find in it certain obvious and important remnants of ancient Indian political thinking and experience.\textsuperscript{50} A special emphasis on those aspects of Indian thought which are particularly relevant to personal liberty may not be out of place here.

Indian political thought can not be isolated from the main body of Hindu philosophy. The great works of Indian polity are only one facet of a vast and integrated system of reasoning which poses and interprets the very problem of human existence.\textsuperscript{51} Both in Indian philosophy and in political thought the central concern has been the individual.\textsuperscript{52} It is the fundamental belief of Hinduism that every human being has in him a spark of the divine, that it is in the nature of man that he can, by right conduct and by right knowledge, attain illumination and reach Godhead directly.\textsuperscript{53} This conception of man — the doctrine of divinity of man — seems to have certain social and political

\textsuperscript{50} A few instances are: the administering state, with a nation-wide bureaucracy as an integral part of it; the comprehensive economic activities of state, suggestive of Welfare State; the system of Panchayatiraj, dignity of the individual etc., see ibid., at pp.105-6.

\textsuperscript{51} D.Mackenzie Brown, \textit{op.cit.}, p.6.

\textsuperscript{52} See f.n.2, supra.

\textsuperscript{53} Each, individual is a spark of the Divine, 'deho devalayo nama', see Dr. Radhakrishnan, \textit{op.cit.}, p.286; see also K.M.Panikkar, \textit{Essential Features of Indian culture}, p.11 See also Sri Aurobindo, \textit{op.cit.}, pp.98-99.
consequences which are of very great importance. As a matter of fact, the conception of state in Indian thought, as discussed earlier, can be appreciated better only with an understanding of this Hindu conception of man. The belief that every individual is a spark of the divine can be said to be the origin of the conception of the inalienable worth of the individual and its corollary of the limitation of the absolutism of external forces. The individual is not merely an insignificant unit in a larger whole, whether that larger unit is called community, the church or the state. The community or the church or the state exists for his benefit. If it is accepted that the individual, however lowly and insignificant in himself, has over-riding rights by virtue of his personality, then it is the denial of those rights if the State or the church or the community compels his obedience in matters affecting his conscience or his beliefs.\(^5\) This conception of man and the highest respect given to the worth and dignity of the individual seems to be a profound and lasting contribution which the Indian thought has to offer to us.

Equally important is the concept of personal liberty which the Indian thought presents to us. Having considered 'personality' as unique, personal liberty was conceived as the freedom of the individual to pursue true

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54. K.M. Panikkar, *ibid.*, at p.11.
happiness. True happiness of man, according to Hindu view of life, lies in the finding and maintenance of a natural harmony of spirit, mind and body.\textsuperscript{55} Personal liberty was thus regarded as the most comprehensive and compendious concept the essence of which seems to be the freedom of the individual from physical and social constraints and from the undue interference by any external force including the state in the pursuit of the legitimate goals or objectives of life - the 'Purusharthas'.\textsuperscript{56} Thus the legal philosophy of India having its basis in metaphysics has attributed four dimensions to personal liberty in the form of four cherished objects of human life. Personal liberty was thus regarded as a composite concept consisting of physical and material values (Artha); mental and emotional values (Kama) ethical values (Dharma); and spiritual values (Moksha). In fact, as opined by an eminent jurist,\textsuperscript{57} if an objective and rational inquiry is made to ascertain the true nature of this complex concept of personal liberty a distinct sense and value of

\textsuperscript{55} Sri Aurobindo, \textit{The Foundations of Indian Culture}, p.2.

\textsuperscript{56} i.e. Artha, Kama, Dharma and Moksha. See, for a detailed analysis, Gopalan, \textit{Hindu Social Philosophy}, \textit{op.cit.}

\textsuperscript{57} G.S.Sharma, "The Concept of Personal Liberty in Ancient Indian Legal Theory: Its Relevance in Modern Times", 4. Kurukshetra Law Journal (1978) 95, at. p.97. See also Sri Aurobindo, \textit{op.cit.}, p.98 where he says: "The dignity given to human existence by the Vedantic thought and by the thought of classical sages of Indian Culture exceeded anything conceived by the Western idea of humanity".
the concept in question will be revealed which would still be foreign to the legal culture of the world. In Indian thought the socio-legal aspects were never dissociated from the ethico-spiritual aspects. The concept of personal liberty could never mean mere 'freedom from bodily restraint' as understood in Common Law'. Such a narrow concept of personal liberty, ignoring the ethico-spiritual aspects, would be not only non-Indian in nature but also incomplete and inadequate as it would not satisfy the aspirations of the people and would fail to give them guidance in making life worth living, distinct from crude animal existence. Spiritual liberation and perfection of individual personality have been the ultimate end of Indian culture of which the legal culture is only a department.\textsuperscript{58}

Another fundamental aspect of Indian thought which is worthy of emphasis here is the Hindu conception of state which guarantees, though implicitly, personal liberty in the above broad sense.\textsuperscript{59} As noted earlier, the very purpose and the justification of the Hindu state was to reinforce the

\textsuperscript{58} See, G.S.Sharma, ibid., at p.98. The author also asserts in this context that the 'fateful' decision in Habeas Corpus Case would never have occurred had the judiciary in Gopalan's case kept in mind the true Indian ethico-spiritual traditions while dealing with the most sensitive concept of personal liberty.

\textsuperscript{59} The characteristic features of the Hindu conception of State and the implicit nature of the guarantee of liberty therein were discussed earlier in this section.
moral codes of society and to insure justice among men, ensuring thereby free opportunity for the individual to develop himself within the framework and recognised goals as set out by Dharma. Of course, it is true that this ancient notion of State as such and the implicit and informal mode of guarantee of liberty therein may appear to be no longer relevant to us, for, those notions are totally different from what we have adopted in the Indian Constitution, following the western examples. Yet, one can derive from the Hindu conception of state two important values which are and will continue to be valid and relevant to us. They are: one, the subjection of the sovereign to the supremacy of law (Dharma), law being the king of kings. This, essentially, implies the value of Rule of Law and the negation of state absolutism. Second, perhaps more important than the first, the 'role-morality' of the ruler or the king. Indeed, the moral behaviour of the ruler may be taken as the cornerstone of Indian thought. The Hindu Law codes always stressed the ultimate importance of individual political morality, and emphasised the prime necessity for the ruler and his ministers of conquering


61. Ibid., at p.24. The author likens the individual political morality as insisted in Indian thought with the Confucian political ethic in China and with the Platonic in ancient Greece.
personal desires for pleasure or power and holding on to the duties imposed by office and law. 62

These fundamental values of Indian political thought, which are given emphasis in the preceding paragraphs, seem transcendental in nature and are as valid today as they were in the past. Those values do not cease to be relevant with the advent of the new constitution of Independent India. After all, the constitution of a country is not merely a documentation of political structures and institutional frameworks, it is also a value document. 63

It is both valuational and institutional. When we look at the institutional aspects, it is true that the Constitution has adopted most of its political models and institutional structures from the West. But when the Constitution is looked upon as a value document, one can perceive that most of the value choices made in the Constitution are essentially indigenous in nature, having their deep roots in

62. Kautilya summs up this aspect thus: "The whole of the science (of politics) consists in mastery (of the temptations) of the five senses", See Arthasastra I, 6: shyamasastry, Kautilya's Arthasastra, p.10.


102
the culture and ethos of the Indian people. That might have happened so, perhaps, as a natural process of growth and evolution, for in politics and philosophy as well as in literature and arts, nothing that is not evolved from within and is not in harmony with inherited as well as individual traditions will be regarded as characteristic or essentially fit to live. Therefore, while we shall do well, as we have done in our history, ever to be tolerant and hospitable

64. Whether it be the principle of rule of law or supremacy of constitution; or the principle of democracy or of one man one vote; or the principle of equality, liberty or of social and economic justice - all this can be traced back and be explained in terms of the fundamental conceptions of 'man' and 'man in society' in Hindu thought. See Dr.S.RadhaKrishnan, Occasional Speeches and Writings, Second series February 1956 - February 1957, pp.284-294. According to him ethical basis of democracy is the sacredness of human personality and respect for the individual (pp.284, 286). Democracy is a faith in the spiritual possibilities of man (p.285): "If we compromise with the essential freedom of spirit", he says, "all other liberties will disappear" (p.285). He quotes Apasthamba which declares: Atmalabhan na param vidyate, atmarthe prthivim tyajet (for the sake of soul even the whole world can be sacrificed) - Dharma Sutra, I, 72 (p.285). He also says that to realise freedom of spirit, liberty from physical, material and social constraints is essential (p.294); To him, whereas the fundamental rights are limitation on government for the protection of the citizens, the directive principles are our national dharma, all having a common goal of securing the full development of the peculiar and spiritual interest of the individuals - abhyudaya and nisreyata (pp.290-2). Regarding equality and adult suffrage, he says "we thus affirm the equality of all human beings. This principle is part of our heritage. Each individual is a spark of the divine (p.286).

to fresh views and receptive to modern ideas and institutions, we must also be alive to the need for assimilating them into our own culture and value systems. Such a process of assimilation and synthesis alone would enable an orderly and healthy growth from within; unlike any lifeless attempt on our part to imitate and reproduce with a servile fidelity the ideals and forms of the West'. 66

In view of what has been discussed so far, we may develop a perception of the Constitution as a value document, an understanding of the nature and character of the values which the Constitution embodies, an awareness as to the fundamentals of Indian philosophy and political thoughts in which those constitutional values are deeply rooted. And finally we may make a conscious effort to assimilate what we have learned and accepted from outside into the values which we have inherited and are ingrained in us. They are all vital and essential prerequisites for developing a constitutional jurisprudence of our own, especially in an area like right to personal liberty. The fundamental values of Indian thought, which are given special emphasis here, 67 seem to offer profound and


67. The Hindu conception of 'Man'; the concepts of 'Personal liberty'; the conception of 'State'; the role morality of the Ruler etc.
constructive help in expounding the proper meaning and scope of personal liberty and in evolving a just and flexible normative concept to regulate personal liberty - something which the system is still craving for. A proper perception of those values and a conscious effort to realise them seem to have tremendous potential for guiding mankind in their endeavour to establish a legal order in which the dignity of the individual and the sacredness of personality become the working principles.

As one of the industrious sons of modern India, Sri Aurobindo has prophesied: "India of the ages is not dead nor has she spoken her last creative word; She lives and has still something to do for herself and the human peoples..."68

The Freedom Struggle and The Urge For Personal Liberty - A Colonial Experience

Though the spirit of democracy and Rule of Law and an instinctive urge to respect, protect and preserve the dignity of human personality and its absolute worth are fundamental and not alien to Indian culture and tradition,69


69. This aspect has been discussed earlier while dealing with Personal Liberty in Indian Thought.
it has to be conceded that the concept of fundamental rights in the sense of personal and civil liberties with their modern attributes and overtones are a development more or less parallel to the growth of constitutional government and parliamentry institutions from the time of British rule in India. It is a truism that at every stage in the development of a people there are certain norms of living that fix the terms upon which men would be willing to associate and live together and endure a given order. As long as society meets these terms its members will go peaceably about their business, but if these norms are not met and the fundamental habits of living and acting of the people are interfered with, they rebel and demand their rights, which are fundamental in essence. What those fundamental rights are is determined by the interaction of human nature with the customs and expectations of the society the complex of which may be termed as its culture. That is why in recent times, fundamental rights have been traced, not exclusively to natural law, but to the age-old


72. The philosophers and jurists in Europe who developed the concept of a natural law were as much concerned with the supremacy of parliament against the arbitrariness of the executive as with the vindication of the rights of man against parliament itself. See H. Lauterpacht, International Law and Human Rights, London, (1950), p.135.
struggle of mankind through history. The genesis of the right to personal liberty in the Constitution of India is, therefore, to be traced not only to its cultural values but also to its national movements and independence struggle against the British rule. Hence it seems appropriate to consider briefly the historical developments immediately preceding to the commencement of constitution - making by the Constituent Assembly.

Pre-Independent Political Scenario

The impetus for the demand for personal freedom and civil liberties in India came in the wake of the popular resistance to the British which resorted to oppressive and arbitrary acts such as brutal assaults on unarmed people, internments, deportations, arbitrary arrest and detention without trial. The immediate result of all this was the emergence of the nationalist movement and the formation of Indian National Congress. The freedom movement and the


74. This aspect is briefly discussed in the previous section.

75. See Granville Austin, Indian Constitution. Cornerstone of a Nation, (1972), p.50. Per Austin, 'Fundamental Rights and Directive Principles had their roots deep in the struggle for independence.'
harsh repressive measures of the British encouraged the fight for liberty and the demand for constitutional guarantee of some fundamental rights. As early as 1885 the Indians demanded the same rights that their British rulers enjoyed in their own country.76 As a matter of fact the declared objective of several movements, including the Indian National Congress, in the beginning was only to secure some civil liberties and human rights. The first concrete demand for fundamental rights appeared in the Constitution of India Bill, 1886 (known also as the Home Rule Bill). The Bill sought to guarantee to the people certain basic human rights such as freedom of speech, inviolability of one's house, freedom from arbitrary arrest and imprisonment, equality before law etc.77 Between 1917 and 1919, the Indian National Congress (INC) passed a series of resolutions demanding civil rights and equality of status with Englishmen. Following the Montague-Chelmsford Report in 1918, the INC made a demand at its special session in August that year held in Bombay, for including in the Government of India Bill then on the anvil "a declaration of the rights of the people of India as British citizens".78

The demand included, among other things, protection in

76. Ibid., at p.53.


78. See, Subhash C. Kashyap, op.cit., p.20 et. seq.
respect of liberty, life and property, freedom of speech and press, equality before law etc. In another significant resolution passed at its Delhi Session in December, 1918, the Congress claimed the right to self-determination and appealed to the British Government to repeal immediately oppressive laws, regulations and ordinances which empowered the executive to arrest, detain, intern, extern or imprison and which denied the basic civil liberties to the people. 79

The experience of the World War I, the disappointment following the Montague-Chelmsford Report, the support of President Wilson to the principle of self-determination and Gandhiji's advent in India brought about "an agressive awareness of Indianness" which culminated in the Independence Movement. 80

The next stride in the demand for fundamental rights was Mrs. Anne Besant's Commonwealth of India Bill, 1925, which embodied a specific "declaration of rights". The first among other 'fundamental rights' declared in the Bill was 'liberty of person and security of his dwelling and property. 81 The Bill also referred to freedom of

79. Ibid., at p.21.


81. Commonwealth of India Bill, clause 8 (g). The 'declaration of rights' in the Bill was really inspired by the Constitution of the Irish Free State of 1921, which included a list of fundamental rights. See Subhash C. Kashyap, op.cit., p.21.
conscience, freedom of speech, assembly and equality before law. Right to free elementary education and the right of all to use roads, courts of justice and other places of public resort were also declared.\textsuperscript{82} Thus the Bill presaged an interesting combinations of the future Rights as well as Directive Principles.

Then came the Simon Commission which undertook a study of possible constitutional reforms in India. In response to this the Madras Session of Congress, 1927 resolved that the basis of any future constitution for the country must be a declaration of fundamental rights.\textsuperscript{83} The Motilal Nehru Committee appointed in 1928 in pursuance of the 1927 Madras Congress Resolution, in its Report\textsuperscript{84} (called as the Nehru Report, 1928) recommended a comprehensive list of fundamental rights, which was really a "close precursor of the Fundamental Rights of the Constitution".\textsuperscript{85} The Report, besides other civil liberties and socio-economic rights,\textsuperscript{86} contained the following rights pertaining to

\begin{itemize}
\item \textsuperscript{82} Ibid., Clause 8 (d)
\item \textsuperscript{83} Chakrabarty and Bhattacharya \textit{Congress in Evolution}, (1940) p.27.
\item \textsuperscript{84} For a fuller details of the recommendations of the Nehru Report see B.Shiva Rao and others, \textit{The Framing of India's Constitution, Select Documents, Vol.I, New Delhi} (1986), pp.59-75.
\item \textsuperscript{85} See G. Austin, \textit{op.cit.}, p.55.
\item \textsuperscript{86} Here also no distinction is made between justiciable and non-justiciable rights.
\end{itemize}

110
personal liberty and security: (i) personal liberty and inviolability of dwelling place and property, (ii) the right of every citizen to writ of habeas corpus, and (iii) protection in respect of punishment under ex-post facto laws.  

The attitude of the British rulers towards these consistent demands of the Indian people was negative and different, and was fully reflected by the statement of the Simon Commissions, 1930. The Commission said:

"We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective".  

Thus the national leaders, by now, had come to realise that without achievement of national independence enjoyment of any of the other basic human rights and liberties would be impossible. Hence, the Lahore Session of Congress in 1931 declared the "inalienable rights of the

89. See, Chakrabarty and Bhattacharya, op.cit., p.27.
Indian people as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth".

Another significant event in this evolutionary process was the famous Karachi Resolution of 1931 on "Fundamental Rights and Economic and Social change", which stated in unambiguous terms that 'in order to end the exploitation of the masses, political freedom must include (emphasis added) the real economic freedom of the starving millions'. The fundamental rights in the Resolution were mostly derived from the Nehru Report. Some important additions were: the right to adult suffrage, abolition of capital punishment and right to freedom of movement throughout India. Right to property was conspicuous by its absence in the list. And the elaborate list of socio-economic rights of the Resolution did in fact become 'the spiritual antecedents of the Directive Principles'.

90. Ibid., at p.28.
91. Ibid.
92. G. Austin, op.cit., p.56. The Resolution demanded social and economic rights like those of free primary education, a living wage and healthy conditions of work for labour, protection against old age, sickness and unemployment, protection of women workers, protection against childlabour etc. It also referred to state control of key industries. Virtually the Resolution was 'both a declaration of rights and a humanitarian socialist manifesto'.
Karachi Resolution, thus, manifested a growing realisation that the demand should no longer be confined to the negative rights (or State's negative obligations) but it should also emphasize the State's positive obligations to provide its people with the economic and social conditions in which their negative rights would have actual meaning. 93

There was no change in the British attitude. The Joint Select Committee of the British Parliament on the Government of India Bill of 1934 also rejected the Indian demand to include a list of fundamental rights in the constitutional document. Though certain rights were included in the Government of India Act, 1935, they were only poor substitutes - both in form and in content - for what India had demanded. 94

Another major document which contained a code of fundamental rights was the Sapru Committee Report, 1945. This Report conceived the rights which it declared as 'a standard of conduct for the legislatures, government and the courts'. 95

93. See, ibid.
94. See the Government of India Act, 1935, ss.275 and 297-300. While the Act was silent as to personal liberty and other civil liberties, it was anxious to secure the right to property.
95. See G. Anstin, op.cit., p.57.

113
During this period, another significant development was also taking place parallel to the growing demand for the inclusion of a list of fundamental rights in the constitutional documents made for India. Having realised the futility of these demands in the absence of political freedom, the Congress, as noted earlier, declared its resolve to achieve complete independence. Quite in tune with the concept of 'Swaraj' as envisioned by Gandhiji in 1922, the Indian National Congress made the demand for a Constituent Assembly as part of its official policy in 1934. Pandit Nehru's proposal of a Constituent Assembly was for the first time formally accepted by the Congress in June 1934. Rejecting the British Government's White Paper, for it did not express 'the will of the people of India, the Congress Working Committee resolved:

"The only satisfactory alternative to the White Paper is a constitution drawn up by a Constituent Assembly elected on the basis of adult suffrage or as near it as possible, with the power, if necessary, to the important minorities to have

96. Lohore Session of Congress, 1921, See, Chakrabarty and Bhattacharya, op.cit, p.27.
97. The proposal for Indian Constitutional Reform, 1933.

114
their representatives elected exclusively by the
electors belonging to such minorities".98

The election manifesto of the Congress Party
adopted at Bombay in July, 1934 reiterated the demand for a
Constituent Assembly; and thenceforth that demand was
repeated by the Congress more forcefully and frequently.99

Though the Cripps Mission, 1942 had failed for a
variety of reasons, the British had accepted for the first
time the idea that an elected body of Indians should frame
the Indian Constitution.100 Following the failure of
Cripp's Mission, the historic 'Quit India' resolution was
adopted by the All India Congress Committee at its Bombay
Session in August, 1942. The resolutions, among other
things, demanded the immediate end of British rule in India
and said that the provisional government of free India would
evolve a scheme of a Constituent Assembly which would
prepare a Constitution acceptable to all sections of the
people.101 During the World War II the mood of the Indian

98. See, B. Shiva Rao, V.K.N. Menon, Subhash C. Kashyap and
Others (Ed.), The Framing of India's Constitution -
Select Documents, Vol.I, pp.77-78.

99. See, Subhash C.Kashyap, Jawaharlal Nehru and the

100. See G. Austin, op.cit., p.3.

101. For the text of the Resolution, See Shiva Rao and
others, op.cit., pp.132-35.
people became increasingly one of self-assertion, of a readiness to take its destiny into its own hands. And by the end of the War India was ready for a Constituent Assembly and her leaders were demanding one. 102

Eventually the British Government had sent to India, first, a parliamentary delegation (which reported that tide of independence was running high), and then a cabinet-level mission with the object of assisting 'the Viceroy in setting up in India the machinery by which Indians can devise their own constitution', and of mediating between the Congress and the Muslim League to create a constitutionally united India. 103 The Mission announced its Plan on 16th May 1946. 104 The announcement Cabinet Mission Plan, thus, marked the culmination (formal recognition by the British) of the two important demands that had been made consistently by the national leaders - one, the demand for a declaration of rights as a basis for any constitutional document; two, the demand for a Constituent Assembly to frame their own constitution. The Constituent Assembly was

103. Ibid., at p.3.
104. For the text of Cabinet Mission Plan, See M.Gwyer and A.Appadorai, Speeches and Documents on the Indian Constitution, pp.577-84.
elected under the terms of the Cabinet Mission Plan and was convened in December, 1946. The Plan in para.19 (iv) envisaged a preliminary meeting of the Constituent Assembly at which an Advisory Committee would be set up to prepare fundamental and minority rights. Thus for the first time, during the struggle for freedom, the British Government recognised the justification of the Indian plea for a declaration of fundamental rights as being an integral part of India's Constitution.

The demand for a declaration of rights was largely the result of the historical grievances and the suspicion against the uncontrolled powers of the State engendered by the colonial rule for nearly a century and a half. In that regard 'the Indian reaction, like the American reaction, is the product of British rule'. And it is also true that to a certain extent the American Constitution and the political philosophy underlying the Declarations of 1776 had inspired the national leaders and influenced the minds of the makers of the Indian Constitution. Besides, there

105. Para.18 of the Plan. See, ibid. When the Indian Independence Act, 1947 came into force on 15, August 1947, the Constituent Assembly legally attained the status of a completely independent and sovereign body.

106. See, Gwyer and Appadorai, op.cit., pp. 577-84.

also existed a fundamental belief that independence meant liberty and the diverse freedoms which flowed from it and that those freedoms must, as a necessary sequence of independence, be expressly declared in the Constitutional Charter. Such a belief was reinforced by the fall of Fascism and Nazism which had decried the human liberties and by the resurgence of interest in human rights reflected in the Atlantic Charter and the Declaration of Human Rights by the United Nations.

It was against such a wide spectrum of historical setting the Constituent Assembly, which 'derived from the people... all power and authority, set out to draft free India's Constitution.

Now, before we deal with the actual framing of Art 21 which guarantees the right to personal liberty in the Indian Constitution, let us also consider briefly the right to personal liberty as it existed under the British regime.

For any colonial government, the easiest way to repress dissent and resistance to their rule had been either to put to death or to shut up in jails those who dissent and resist. The British Government in India was in no way an exception to this. The repressive measures which that government ruthlessly let loose against the Indian people during the freedom struggle make the British period the darkest in the history of personal liberty in India.

The British Government had resorted to three important strategies to curtail the personal liberty of the people and to put down the popular resistance to its rule: They were: 1) Preventive Detention 2) Special Courts; and 3) Martial Law.

Preventive Detention

The common law remedy of habeas corpus to test the legality of arrest and detentions was statutorily introduced in India through Section 491 of the Criminal Procedure Code.

Faced with intense political activities of the Independence Movement, the British Government sought to make the remedy of habeas corpus as provided under Sec.491 of Cr.P.C. inapplicable in cases of arrests and detentions for political reasons. The earliest instances of such laws
authorising detentions of persons without trial for political reasons can be found in the Bengal State Prisoners Regulation, 1818\textsuperscript{111} and the similar Madras Regulations, 1819\textsuperscript{112} and Bombay Regulations, 1827.\textsuperscript{113} Subsequently, these Regulations were supplemented by the State Prisoner's Act, 1850 and similar Acts of 1858 and 1871. In all these cases what the courts could do was to determine whether the provision of these Regulations and Acts were applicable to a given case; and once it was found to be so, a writ in the nature of habeas corpus under the provisions of S.491 of the Cr.P.C. could not issue in favour of the detenue.\textsuperscript{114} The provision in these Regulations and Acts were further reinforced by Ordinances\textsuperscript{115} and Acts\textsuperscript{116} in the early 1930's, strengthening the executive with more powers of preventive detention.

By the time the Government of India Act 1935 was passed, preventive detention had come to stay as a permanent feature of the British regime in India. The Government of

\begin{enumerate}
\item Regulation 3 of 1818 (7th April, 1818).
\item Regulation 2 of 1819 (4th March, 1819).
\item Regulation 25 of 1827 (1st January 1827).
\item Ex-Rana Birpal Singh V. The King Emperor, 1946 9 F.L.J.1; see also Ameer Khan (RC) 1870, 6 B.L.R.392.
\item Ordinance X of 1932.
\item Act XXIII of 1932, passed by Indian Legislature.
\end{enumerate}
India Act, 1935 empowered the Indian Legislature to pass such laws.\textsuperscript{117} Thus when World War II started, the Central Legislature, at the instance of the Government of India, passed the Defence of India Act, 1939\textsuperscript{118} - a comprehensive legislation, on the pattern of the Emergency Powers (Defence) Act, 1939 passed by the British Parliament.

The Defence of India Act authorised the Central Government to frame rules for the purpose of detaining any person reasonably suspected of being involved in any act prejudicial to the interest of the defence of British India and the successful prosecution of the war to do so.\textsuperscript{119} And the Government of India framed comprehensive rules, \textit{inter alia}, to provide for preventive detention.\textsuperscript{120} Under Rule 26, it was enough that the Central or Provincial Government was satisfied with respect to any particular person that his detention was necessary to prevent him from acting in certain specified ways. To top it all, the orders passed under this Act would not be enquired into by any court of

\begin{itemize}
\item \textsuperscript{117} See, Government of India Act, 1935, Entry No.1, List I of the VII Schedule: Preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with the Indian States.
\item \textsuperscript{118} The Defence of India Act (Act XXV) of 1939.
\item \textsuperscript{119} See, para X of sub sec.2 of Sec 2 of the Defence of India Act, 1939.
\item \textsuperscript{120} See, Defence of India Rules 26 and 29.
\end{itemize}
Though Rule 26 was held *ultra vires* the Act and so invalid by the Federal Court, the Governor-General, through an Ordinance validated both Rule 26 as well as the detentions made under that rule with retrospective effect. But Ordinance of the Governor-General was subsequently amended by another Ordinance of 1944. This Ordinance of 1944 was intended to confer the power of detention by the Ordinance itself, instead of by rules framed under the Defence of India Act; and to enact a presumption in the Ordinance itself in favour of detention orders to preclude their being questioned in courts of law and to take away or limit the powers of the High Court to make orders under Sec.491 of the Cr.P.C in such cases.

Here, again even on the face of this Ordinance, the Federal Court ruled: 'The court is and will be still at liberty to investigate whether an order purporting to have been made under Rule 26 and now deemed to be made under Ordinance 3 was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance'.

121. See, Sec.16 of The Defence of India Act, 1939.

122. *Keshav Talpade v. Emperor*, 1943 6 F.L.J. 29, at p.46. In this case the court also held see.16 of the Act, which excluded the jurisdiction of courts as inoperative.

123. The Defence of India (Amendment) Ordinance, 1943.

124. Ordinance 3 of 1944.

These preventive detention measures resulted in a serious impairment of the right to personal liberty of the people. Unbridled discretions of the executive to detain any person for political reasons was the order of the day during this period.

Special Courts

Another weapon in the quiver of the colonial government to further stifle the personal liberty to the individual was the mechanism of special courts, which greatly affected the jurisdictions of ordinary criminal courts.126 In December, 1942, the Governor General passed an Ordinance,127 authorising the constitution of special courts by the Provincial Governments as and when they would think it necessary to do so. Further, it was left to the discretion of the Provincial Government to direct the trial of such cases by these courts as they though fit to do.128 Under the Ordinance, these courts could dispense with public and open trials129 and even the presence of the accused person during the trial could be avoided.130

127. Ordinance No.2 of 1942.
128. Ibid., ss.5, 10 and 16.
129. Ibid., s.26.
130. Ibid., s.22.
general procedure and rules of evidence followed in criminal trials were made inapplicable or drastically altered to the serious disadvantage of the accused; and even the revisionary powers of the High Court and the power to issue the writ of habeas corpus were abrogated.131

Though these draconian provisions in the Ordinance were held as ultra vires the Government of India Act, 1935 by both the Calcutta High Court132 and the Federal Court,133 unfortunately these provisions were given the stamp of judicial approval by the Privy Council.134 To the Privy Council, the questions whether the Ordinance was intra vires or ultra vires was 'a question of policy and not law'.135

Martial Law

The expression connotes the imposition of military government by which the ordinary laws of the land are suspended,136 resulting in complete negation of peoples

131. Ibid.
133. 1943 6 F.L.J. 79.
134. 1945 8 F.L.J. 7.
135. Ibid.
136. As a matter of fact innumerable persons were tried and convicted by these special courts, and in some cases the persons were even sentenced to death and executed – at the askance of the government.
liberty in all its facets. The British Government adopted this martial law as yet another effective means to deal with situations of emergencies — real and fancied — created as a result of growing demands for freedom and independence.

The earliest law during this period under which the government could proclaim martial law was the Bengal Regulation X of 1804. The Government of India Act, 1915 contained express provisions authorising proclamation of martial law. While martial was proclaimed by the government in Lahore and Amristar in 1919, the Governor General promulgated the Martial Law Ordinance. This Ordinance provided for the trial of martial law offences by a Commission to be appointed by the Local Government instead of Court-martial. The Commission was authorised to exercise the powers of the Court-Martial under the Indian Army Act. The findings and the sentences of the Commissions were not subject to confirmation by the military authorities. And by another order passed by the G.G.-in-Council under the 1804 Regulation, the government suspended the functions of the ordinary criminal courts in those districts in so far as the offences arising out of the

137. The Regulation is known as Martial Law Regulation.

138. S.72. This section was retained in the Government of India Act 1919, also.

139. The Indian Army Act 1911 provided for only Court-Martial.
Ordinance of 1919. Though the procedures under martial law and the denial of the right of trial before the ordinary courts of law were challenged, the Privy Council held that the deprivation of such rights by the Ordinance was lawful. 140

In 1921 martial law was proclaimed in Malabar to put down the 'Moplah Rebellion' under an Ordinance passed by the Governor-General. 141 Then in 1930, in the wake of the Civil Disobedience Movement, martial law was imposed in Sholpaur, through a Martial Law Ordinance of 1930.

Institution of Commissions, to be appointed by the local governments to try the martial law offences; the finality of the Commission's decisions without being subjected to any appeal; ousting of the jurisdiction of ordinary criminal courts; total exclusion of the procedures in the Criminal Procedures Code; and the abrogation of the writ of habeas corpus were the characteristic features of all these Martial Law Ordinances. 142 Still worse, was the indifferent and positivistic attitude of the judiciary towards this reign of terror and the total and arbitrary


141. This Ordinance of 1921 was issued under s.72 of the Government of India Act, 1919.

142. See, for instance, Ss.6 and 16 of the Ordinance of 1921; and similar provisions in the Ordinance of 1930.
deprivation of the right to personal liberty of the individuals during the martial law. All these draconian provisions contained in these Ordinances were held lawful by the Court. 143 The judiciary refused to interfere even on the ground that the Commissions which tried the petitioners were not properly constituted. And the court maintained categorically that the sentences passed by the Commissions were not justiciable. 144

From this brief account, one can see the grim picture of people's right to personal liberty that existed in the pre-Independence period. Under the preventive detention measures the government could detain any person for any period without trial. Through the special courts the government could secure the trial and conviction of any person at its own pleasure. And by invoking martial law in 'emergencies', the government could try, convict and even sentence to death any person on any ground through some Commission that could be set up by local governments. All these inhuman measures were marked by, certain common features such as unlimited and unguided executive discretion; exclusion of the jurisdiction of rules of

143. See in re Kochuni Elaya Nair, 45 Mad.41; and In re Govindan Nair, 45 Mad.922 (FB) in which the Ordinance of 1921 was questioned. Also see Chanappa Shantirappa and other V. Emperor AIR 1931 Bom., 57 in which the Ordinance of 1930 was questioned.

144. In re Govindan Nair, AIR 1931 Bomb., 57, at p.60.
evidence; the ordinary courts and of the general rules of criminal procedure and barring of rights of appeal and revision; and the suspension of the remedy of habeas corpus. A deep distrust of the colonial government — for that matter any authoritarian regime — in the judiciary is strikingly manifest in all these measures which were adopted to curtail the personal liberty of the people. But unfortunately even the judicial attitude towards these serious invasions of personal liberty during this period had been, by and large passive and positivistic. Any rules framed by the executive under any law or ordinance could satisfy the courts as a justification for the deprivation of personal liberty of the individuals. All inconvenient questions were dubbed as questions of policy and not of law and so were outside the concern of courts.

There is another important aspect to be emphasised at this juncture, in the context of the political struggle for freedom and the repressive measures adopted by the British regime, as detailed above, the right to personal liberty, naturally, came to be understood, first and foremost, as the right to be free from being arrested or detained or imprisoned arbitrarily. Evidently, in this notion of personal liberty the (only) protection for the individual could be some standard or principle, inbuilt in the legal system, to ensure the absence of arbitrariness in
such cases of arrest or detention or imprisonment. - i.e. a just and reasonable protective norm. Unfortunately, a curious combination of the colonial attitude of the British regime and a matching judicial positivism had rendered the protective norm for personal liberty, in the pre-Independence era, bereft of fairness and justice. A semblance of procedure laid down by a semblance of law -- a 'procedure established by law'? -- is all what was required to deprive a person of his personal liberty.

It was against this background of harsh colonial experience of denial and deprivation of personal liberty that the people fought valiantly for their freedom and for a declaration of rights, including the right to personal liberty, as an integral part of their future constitution. Their demand for freedom was not a demand for mere change of rulers. The demand was for a new political and legal order; for a new system of values. It can, therefore, be reasonably assumed that their demand for right to personal liberty as a fundamental right was a demand for a new and broad concept of personal liberty; and for a new and just protective norm for personal liberty so that no future government under the new constitution would ever have recourse to those colonial measures to stifle the personal liberty of the individual in free India. The demand in substance, was for 'due process of law, as a guaranteed protection for their personal liberty.

129
Let us now consider the framing of Art.21 by the Constituent Assembly.

**Personal Liberty And The Constituent Assembly — The Framing of Article 21**

As envisaged in the Cabinet Mission Plan, the Constituent Assembly on January 24, 1947 elected an Advisory Committee for reporting on minorities, fundamental rights and on the tribal and excluded areas. Then on February 27, 1947 the Advisory Committee constituted a Sub-Committee on Fundamental Rights. The Sub-Committee before formulating the list of fundamental rights, considered the various drafts submitted by its members. In the draft list of fundamental rights, both K.M. Munshi and Dr. Ambedkar included the 'due process' clause as necessary protection to life, liberty and property. Munishi's draft provided:

145. See, Paragraphs 19 and 20 of the Cabinet Mission Plan 1946.


148. The most prominent of such drafts were that of B.N. Rau, Alladi Krishnaswami Ayyar, K.M. Munshi and of Ambedkar See, B. Siva Rao, *op.cit.*, p.176.


130
"No person shall be deprived of his life, liberty or property without due process of law".

The other provisions in the draft, which in effect elucidated the 'due process' clause, had guaranteed to every person the right to be informed, within twenty four hours of his deprivation of liberty, by what authority and on what grounds the action was being taken. Further, they provided that no person would be subjected to prolonged detention preceding trial, to excessive bail or unreasonable refusal of bail, to inhuman or cruel punishment or to denial of adequate safeguards and proper procedure. Munshi attached great importance to the 'due process' clause, for, its basic concept, according to him, was: 'every citizen is entitled to fair treatment at the hand of the Executive and the Legislature, and the Judiciary should have the power to see that it is given'. To him this is at the heart of democracy. Ambedkar's draft also provided that the State should not deprive any person of life, liberty or property without the 'due process of law'.

150. Munshi's draft, Articles V (1) (e) and V (4) and Article XII(3), Select Documents II, 4 (ii), pp.75, 79.
152. Ambedkar's draft, Article II (1) (2), Select Documents II, 4 (ii) (d), p.86.
The Sub-Committee on Fundamental Rights discussed the subject on March 25, 26 and 29 1947, and included in its draft Report two clauses, 11 and 29:

11. No person shall be deprived of life, liberty or property without due process of law.

29. No person shall be subjected to prolonged detention preceding trial, to excessive bail, or unreasonable refusal thereof, or to inhuman or cruel punishment.¹⁵³

In clause 29, it may be noticed, the provision regarding the right to be informed of the authority and ground of deprivation of one's liberty within twenty four hours, as originally proposed by Munshi, was omitted in view of the 'due process of law' provisions in cl.11.¹⁵⁴

B.N. Rau -- whose influence was the single largest cause for the eventual exit of the 'due process' clause from the Constitution¹⁵⁵ -- in his comments on the draft Report pointed out how a substantive interpretation of 'due


¹⁵⁴ B. Shiva Rao, ibid.

¹⁵⁵ See. G. Austin, op.cit., p.102.
process' might interfere with legislation for social purposes and might result in a vast flood of litigation. 156

The Sub-Committee again met on April 14 and 15, 1947 to consider the draft Report in the light of the comments received. But it reaffirmed its proposal for incorporating both clauses 11 and 29 in the Constitution, and thus reproduced them as clauses 12 and 28 in the final Report.

The clauses, then, came up before the Advisory Committee for consideration on April 21 and 22, 1947. Here, again, clause 28 was deleted by the Advisory Committee without any discussion, 157 'presumably because the Committee felt that the expression "due process of law" was wide enough to cover within its scope the contents of clause 28. 158

Commenting on clause 12, A.K. Ayyar explained the uncertainties of the judicial interpretations of the phrase 'due process of law', referring to the American experience. He also pointed out that the aim of 'due process' was to limit legislative power; and the clause might endanger

156. B. Shiva Rao, A study, pp.232-33.


158. B. Shiva Rao, A study, p.233.
property, tenancy and other legislations. But he concluded his comments by saying 'personally, I am for the retention of the clause'.  

The most forceful criticism of the 'due process' clause in the Advisory Committee came from G.B.Pant. He argued that to fetter the discretion of the legislature would lead to anarchy. He maintained that legislatures should retain the power to pass laws for empowering the executive to detain persons for short periods, and for the acquisitions of private property for public purposes without being obliged to pay compensation at market rates.  

Ambedkar and Munshi defended the 'due process' clause. According to Ambedkar there is no need to give carte blanche to the government to detain with a 'facile provision', Munshi replied to Pant that no provision prohibiting detention had been put in the clause so as not to fetter government action. But, he said, 'due process' prevented legislative extravagance, and there should be no fear that judges would replace the legislatures. 

159. See, ibid., at pp.233-34; also G.Austin op.cit., p.85.  
160. Ibid.  
161. G.Austin, ibid., at p.85.  
162. Ibid.
As B. Shiva Rao observed, Pant's view in regard to limiting the right to liberty did not find many sympathisers; but there was considerable support for his arguments regarding legislation dealing with property and tenancy.163

At this stage, as a possible way out of the practical difficulties created by coupling property along with 'life and liberty', K.M. Panikkar suggested that life and liberty should be separated from property. In his view, the courts should guard our life and liberty and there should be no detention; but property must be subjected to legislation.164 Patel also agreed that 'property' should be separately dealt with. The Committee adopted this course; and the 'due process' provision was incorporated in clause 9 of the Report submitted to the Constituent Assembly which read: "No person shall be deprived of life or liberty without due process of law."165

When this clause came up before the Constituent Assembly for consideration on April 30, 1947, the provision was adopted without any amendment being moved.166 Thus the

163. Shiva Rao, A study, p.234.
164. G. Austin, op.cit., p.86.
'due process' clause was supported by the entire Constituent Assembly as a protective norm for the liberty of the individual.

And the Constitutional Advisor, B.N.Rau reproduced this provision in clause 16 of his Draft Constitution published in October 1947. But in doing so, by another stroke, he restricted the scope of the expression "liberty" by adding the word "personal" before it.\textsuperscript{167} His justification for the change was that the word "liberty" by itself might be construed widely so as to include even freedom of contract unless it was qualified by the word "personal".\textsuperscript{168} And this change was also approved by the Drafting Committee at its meeting on October 31, 1947.\textsuperscript{169}

Yet another stroke to this clause was in the offing when B.N.Rau undertook his trip to the United States, and other countries for consultations and study about the framing of the Constitution. During that visit Rau had discussions with Justice Frankfurter of the United States Supreme Court who was of the opinion that the power

\textsuperscript{167} Rau, Draft Constitution, Cl.6. This change narrowed the scope and meaning of liberty considerably. See, Alexendrowicz, Constitutional Developments in India, (1957), pp.11-13.

\textsuperscript{168} Select Documents III, 1(ii), p.199.

\textsuperscript{169} See, Draft Constitution, February 1948, f.n. to Article 15; also see Rau, Indian Constitution, (Ed) by B.Shiva Rao, p.303.
of judicial review implied in the 'due process' clause was both undemocratic -- because a few judges could veto legislation enacted by the representatives of the people -- and burdensome to the Judiciary. This view was communicated by B.N.Rau to the Drafting Committee; \(^{170}\) and later he suggested specifically that the 'due process' clause be eliminated in favour of the phrase 'according to the procedure established by law', a phrase borrowed from Article 31 of the Japanese Constitution.

The Drafting Committee took up the matter again during its meetings in January 1948; and on 19th January the members decided to omit 'due process', after giving a deceptively simple reason that the expression 'procedure established by law' was "more specific" -- a fatal blow, indeed, to personal liberty in free India. The text of the provision, thus recast by the Drafting Committee, was incorporated in Article 15 of the Draft Constitution:

"No person shall be deprived of his life or personal liberty except according to the procedure established by law..."\(^{171}\)


171. Draft Constitution, February 1948, Article 15, see f.n. to the article. _Select Documents_, III 6, p.523.
Commenting on the decision of the Drafting Committee, Granville Austin observed: "It was Rau's enthusiastic espousal of Frankfurter's views that originally caused the Drafting Committee to reconsider the issue".\textsuperscript{172} But it is still unbelievable — and mysterious too — how the Drafting Committee could have surrendered abjectly to the will of B.N. Rau, ignoring the will and collective wisdom of the entire Constituent Assembly, as expressed on April 30 1947 by voluntary and unanimous adoption of the 'due process' clause as a protection for liberty — a cause for which the people of India had fought valiantly and rallied behind the national leaders during the freedom struggle. After making a painstaking study, Austin himself conceded that 'it was not clear precisely what happened'\textsuperscript{173} in the Drafting Committee. As regards B.N. Rau's influence as a causative factor for the elimination of "due process" clause, one may agree with the remarks made by

\textsuperscript{172} G.Austin, \textit{op.cit.}, p.104.

\textsuperscript{173} Austin, who attempted to reconstruct the events, indicates that of the seven members of the Drafting Committee at least four — Munshi, Ambedkar, Ayyar and M.Saadulla — were known supporters of the 'due process' clause; and of these four, except Munshi, all others might have changed sides; Ayyar more openly than Ambedkar or Saadulla. He also refers to Rau's influence on Ayyar; and to the increasing conviction of others as to the indispensability of preventive detention to meet the political turbulence created by the communal violence during that period. See Austin, \textit{ibid.}, at p.104.
K.M. Munshi -- an uncompromising champion of that clause. He says: "If Justice Black of the Supreme Court of the U.S.A., had been consulted, possibly he would have given an opinion contrary to Justice Frankfurter's." Perhaps, could then the "due process" clause have been retained in the Draft Constitution?

The draft Article 15 was debated in the Constituent Assembly on 6 and 13 December, 1948. By that time the disapproval of the Drafting Committee's action became evident in the amendments to the draft submitted by Assembly members. There were not less than twenty amendments sponsored by the members. Of them, twelve would have reintroduced 'due process', and the remaining eight would have replaced 'procedure established by law' by 'save in accordance with law', an expression which would have made the right to personal liberty justiciable. The entire debate centred on the controversy about 'due process'; and in the debates all the members who spoke,

174. Ibid.

175. K.M. Munshi. Pilgrimage to Freedom, p.298. However, Justice Frankfurter's opinion carried weight with Alladi and B.B. Rau.

176. See, B. Shiva Rao, A study, p.236; also G. Austin, op.cit., p.104.

177. Ibid.

except an ambivalent Ayyar and an apologetic Ambedkar, favoured the restoration of 'due process of law' as a protection for personal liberty. Besides, each one of those speeches in support of 'due process' was marked by wisdom, reason and feeling.

On December 6, 1948 Kazi Syed Karimuddin moved an amendment to the draft Article 15: "No person shall be deprived of his life or liberty without due process of law". Speaking on the amendment, both Karimuddin and Mahboob Ali Baig pointed out that the use of the phrase "procedure established by law" stripped a court of the power to go into the merits and demerits of the grounds on which a person was deprived of his life or liberty; a court could not look into the injustice of any law or of a capricious provision in any law since its function would come to end the moment it was statisfied that the "procedure established by law" had been complied with. Further M.A. Baig exposed the unsoundness of the Drafting Committee's claim about the Japanese Constitution as its precedent for using the phrase "procedure established by law". Referring to Articles 32,34 and 35 of the Japanese Constitution, Baig

181. See, Draft Constitution, Article 15 f.n. This clause is taken from Article 31 of the Japanese Constitution, 1946.
pointed out that in that Constitution several fundamental rights endangered by the omission of due process had been separately guaranteed. For instance, the right of a person not to be detained except on adequate cause, and unless at once informed of the charges against him, the right to counsel and to an immediate hearing in open court, and the right of a person to be secured against entry, search etc., except on a warrant,\textsuperscript{182} were found expression in that constitution. And, he said, if those rights were also incorporated along with the 'procedure established by law' of Art.31 of the Japanese Constitution in the draft that would have been a complete safeguard of the personal liberty; but 'Article 15 of the Draft Constitution was devoid of all this'.\textsuperscript{183}

Pandit Thakur Dass Bhargava, supporting Karimuddin's Amendment, explained that if the phrase 'due process of law' was used, the courts could go into the question of substantive as well as procedural law; i.e., the courts would have the right to go into the question whether a particular law enacted by Parliament was just or unjust, and whether or not, as a matter of fact, it protected the liberties of the people; and if the Supreme Court came to

\textsuperscript{182} C.A. Deb Vol.VII, pp.844-45.
\textsuperscript{183} Ibid.
the conclusion that any law was unreasonable or unjust such a law would be held to be unconstitutional.\textsuperscript{184} To allay the misgivings about the power of courts implicit in 'due process', he reminded the members that the House had already accepted the word "reasonable"\textsuperscript{185} in Article 13, an expression which essentially conferred the same kind of powers on the courts as the 'due process', and that 'in a democracy the courts were the ultimate refuge of the citizens for the vindication of their rights and liberties'. Regarding the argument that the 'due process' clause would weaken the administration due to uncertainties, he said: "But our liberties will be certain, though the particular law which may be reviewed by the Court may become uncertain. Administration will not be weakened; but, of course, administration will not have its way". Expressing the mood of most of the members, he added: "But we want to have a government which will respect the liberties of the citizens of India".\textsuperscript{186}

\textsuperscript{184} Ibid., at p.846; C.C. Shah also expressed the same view, see ibid., at p.848.

\textsuperscript{185} Ibid., at p.847. When the draft Article 13 was taken up for debate on December 1, 1948. T.D. Bhargava moved an amendment to insert the word 'reasonable' before the word 'restriction' as used in the sub-clauses of that article. The House accepted the amendment. See, C.A. Deb., Vol.III, pp.736-39.

\textsuperscript{186} C.A. Deb., Vol.VII, p.848.
K.C. Sharma, in his speech, supporting the 'due process' clause maintained that this clause did not laydown a specific rule of law, but it implied a fundamental principle of justice, as 'a necessary limitation on the powers of the State, both executive and legislative'.

C.C. Shah, speaking on the Amendment No.528, favoured the "due process" clause as a protection for personal liberty, which according to him, was 'the most fundamental of the Fundamental Rights without which all other rights would be meaningless'. To dispel the apprehension entertained in some quarters as to the substantive interpretations of 'due process' and the consequent controversies and uncertainties as they occurred in the American context, C.C. Shah said:

"But the article in our Constitution is in two respects entirely different from the article in the United States Constitution. There the words (due process of law) were used in connection with life, liberty and property. Here we have omitted

187. Ibid., at p.850.
188. Ibid., at p.848.
189. As we have noted earlier, this aspect was the main thrust in the arguments of B.N. Rau and Alladi for the removal of 'due process' from Article 15.
the word "property", because it is in connection
with this word, there has been a good deal of
litigation and uncertainty. There has been
practically no uncertainty as regards the
interpretation of the 'due process' clause as
applied to life and liberty. Secondly, 'liberty'
has been qualified by adding the word "personal"
to make it clear that this article did not refer
to any kind of liberty of contract or similar
rights".\(^{190}\)

K.M. Munshi, in support of the Amendment, pleaded
that in a democracy there must be some independent agency to
strike a balance between social control and individual
liberty, and that the 'due process' clause was the only
deterrent to irresponsible legislation.\(^{191}\) He also
emphasised that with the omission of the word "property" and
the addition of the word "personal" before "liberty", the
'due process of law' provison had become unexceptional and
no longer vulnerable to the difficulties of interpretation
to which the 'due process' clause in the U.S. Constitution
was subject.\(^{192}\) He explained that the 'due process' clause


\(^{191}\) Ibid., at p.852.

\(^{192}\) Ibid., On this point K.M. Munshi agreed with the views
of C.C. Shah.
would enable the courts to examine not only the procedural but also the substantive law. In other words, the courts would examine whether the law, authorising the deprivation of personal liberty was required by the exigencies of the case and that will strike a balance between individual liberty and social control. 193 Expressing his anxiety over possible legislative vagaries, he said:

"We have, unfortunately in this country legislatures with large majorities, facing very severe problems, and naturally, there is a tendency to pass legislation in hurry which may give sweeping powers to the executive and the police. Now there will be no deterrent if these legislations are not examined by court of law". 194

Referring to the conditions prevailing at that time, Munshi said:

"Our emergency at the moment has perhaps led us to forget that if we do not give... it (the individual liberty) the protection of the courts, we will create a tradition which will ultimately destroy

193. Ibid.
194. Ibid.
even whatever little of personal liberty which exists in this country. I, therefore, submit, Sir, that this amendment should be accepted". 195

L.H. Lari, strongly supporting the "due process" clause, stressed the importance of the right which that clause intended to protect. He said: "We all know that the state, these days, is all powerful. Its coercive processes extend to the utmost limits, but still there is a phase of life which must be above the processes of Executive Government, and that is individual liberty". 196 He opined that the essence of the "due process of law" provision was two-fold. First, there would be an enquiry before a man was condemned, and then there would be a judgement after trial. On the other hand, if the words "procedure established by law" were adopted, it would mean that the legislature was all-powerful. 197 According to him, the risk is much more in the context of a Parliamentary Government in which the legislature is controlled by a cabinet, which means by the executive. 198 Referring to the instances of legislation in

195. Ibid., p.853.
196. Ibid., p.855.
197. Ibid. He referred to the Human Rights Documents and to the clause therein which states that nobody should be subjected to arbitrary detention.
198. Ibid., at p.856 H.V. Pataskar, who favoured the 'due process' clause, also shared these views. See, ibid., at p.851.
the British period, of rights which were curtailed, and of innocent persons jailed, he cautioned the House thus: "...every legislature and every government is liable to do such things which the British Government did. You can not excuse the excesses of law simply because those excesses are committed by a popularly elected legislature". As to the stability and security of the State, he said that there were sufficient provisions in the Constitution enabling the government to deal with them. He also explained, referring to the experience of others, that the words "due process of law" could exist without jeopardising the existence of the State; and that, not only here, but throughout the world, every assembly was likely to misuse its power. He appealed to the House not to be carried away by the argument that there seems to be some germ of disruption in the 'due process' clause. Expressing his anguish, he said:

"If this clause is not accepted then the whole Constitution becomes lifeless. The Article (15), as it stands, is lifeless and it makes also the whole Constitution lifeless. Unless you accept

199. Ibid.
200. Ibid.
201. Ibid., at p.857.
this Amendment, you would not earn the gratitude of future generations".  

Alladi Krishnaswami Ayyar, raising his 'lone voice' in support of the retention of the expression "procedure established by law" as against the "due process" provision, argued that the verdict of three or five judges on what exactly was the "due process" according to them in a particular case could not be treated as more democratic than the expressed wishes of the legislature or the action of an executive responsible to the legislature. He also referred to the lack of uniformity in the judicial interpretation of the phrase in the United States. Referring to the procedural importance of "due process" he said:

"The expression 'due process' itself as interpreted by the English Judges connoted merely the due course of legal proceeding according to the rules and forms established for the protection of rights, and a fair trial in a court of justice according to the modes of proceeding applicable to the case. Possibly, if the expression has been understood

202. Ibid.

203. B.Shiva Rao, A study, p.237.

according to its original content and according to the interpretations of English Judges, there might be no difficulty at all."  

But he could not accept that clause in the Indian Constitution because 'the expression as developed in the United States Supreme Court had acquired a different meaning and import'. And he justified the Drafting Committee's decision to exclude the 'due process' clause on the ground that its substantive interpretation might impede social legislation.  

The stand taken by A.K. Ayyar in the Assembly seems to be very strange for more than one reason. First of all, only on the face of these identical arguments he supported the 'due process' clause in the Advisory Committee in its meeting on April 21, 1947. In spite of the possibility of substantive interpretations, he was willing to accept the 'due process' clause because of its procedural importance in the context of personal liberty. But now in the Assembly he took just the opposite view. Secondly, he could not put forward any new argument in support of his

205. Ibid.
206. Ibid.
207. See, the proceedings of the Advisory Committee meeting 21 April 1947.
changed position. And finally, he never explained in his speech why he had changed his position. All this boils down to this fallacy: To Ayyar the grounds and arguments were the same both for accepting as well as for rejecting the 'due process' clause. It was really one of the "sorriest performances ever put on by the Assembly leadership".

Despite the fact that A.K. Ayyar had upheld the Drafting Committee's decision to drop the 'due process' clause, his ambivalence on the issue was still manifest in his speech in the Assembly. He said:

"The support which the Amendment (No.528) has received reveals the great faith which the Legislature and the Constitution makers have in the Judiciary. The Drafting Committee in suggesting "procedure" for "due process of law" was possibly guilty of being apprehensive of judicial vagaries in the moulding of law. The Drafting Committee has made the suggestion and it is ultimately for the House to come to the conclusion whether that is correct, taking into consideration the security of the State, the need for liberty of the individual and the harmony between the two. I am still open

208. G. Austin, op.cit., p.106.

150
to conviction and if any other arguments are forthcoming I might be influenced to come to a different conclusion".209

In view of the trend of opinion in the Assembly, further consideration of the draft Article was postponed, as suggested by Ambedkar.210

After a week, the Article was again taken up for debate on December 13, 1948. Dr. Ambedkar was called up to reply. Ambedkar opened his reply in an apologetic tone thus: "I must confess that I am somewhat in a difficult position with regard to Article 15 and the amendment moved by my friend Pandit Bhargava for the deletion of the words "procedure established by law" and the substitution of the words 'due process'".211 He then proceeded to explain the implications of "due process". According to him 'the question of 'due process' raised the question of the relationship between the legislature and the judiciary'. Under the 'due process' clause, the judiciary would be endowed with authority to question the law passed by legislature not merely on the ground whether it was in excess of the authority of the legislature, but also on the

210. See, ibid., at p.859.
211. Ibid., at p.999.
ground whether that law violated certain fundamental principles relating to the rights of the individual. And the question would be whether the judiciary should be given this additional power of review. On this question he succinctly placed before the Assembly the two sharply divergent points of view and the difficulties implicit in each of them: one view was that the legislature could be trusted not to make any law which would abrogate the fundamental rights applicable to every individual. The other view was that it was not possible to trust the legislature; the legislature was likely to err, to be led away by passion, by party prejudice, and might make a law abrogating the fundamental rights of a citizen. Admitting that it was difficult to take any definite conclusion, for, there were dangers on both sides, Ambedkar said:

"For myself I can not altogether omit the possibility of a Legislature packed by partymen making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining

212. Ibid., at p.1000.
213. Ibid.
laws made by the Legislature and by dint of their own individual conscience, or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefore would not say anything. I would leave it to the House to decide in anyway it likes."\(^{214}\)

Thus, Ambedkar' torn between his belief in 'due process' and his official duty to uphold his Committee's decision, remained on the fence'.\(^{215}\)

All the amendments for replacing the words "procedure established by law" by the words "due process of law" or other similar expressions were defeated, and on 13 December, 1948 Article 15, without the 'due process' clause was adopted.\(^{216}\) This Article 15 was reproduced in the Constitution of India as Article 21 in its present form:

"No person shall be deprived of his life or personal liberty except according to the procedure established by law".\(^{217}\)

\(^{214}\) Ibid., at pp.1000-01.

\(^{215}\) G. Austin, op.cit., p.106.


\(^{217}\) The Constitution of India, Art.21.
From this brief history of the framing of Article 21, which makes the right to personal liberty as a constitutional guarantee in India, one can legitimately draw certain inferences which may have far-reaching consequences.

Though the draft Article 15, in the present form was adopted by the members of the Constituent Assembly on that day, it appears that in so doing the members had obeyed the whip; and not the dictates of their conscience and reason or their conviction. The wording of Article 21 (the draft Art.15) miserably failed to reflect the will and intention of the members of the Constituent Assembly as well as the aspirations of the people. The intense feeling of dissatisfaction as to the wording of the article was acknowledged by none other than Dr.Ambedkar himself. Ambedkar noted that Article 15 had been violently criticized by the Indian public; and he said: 'a large part of the House, including myself, were greatly dissatisfied with the wording of the Article'. The controversy and discontent over the exclusion of 'due process' in the Article had been widespread. Even A.K. Ayyar recognised that 'a good number

219. See, the sequence of events in the Constituent Assembly and the views expressed by the Members.
220. See, the brief history of the peoples' demands for freedom and liberty as discussed earlier.
of members in this House' favoured the retention of 'due process'. And public reaction to the omission of 'due process' during 1949 was most unfavourable. In Ambedkar's own words: "No part of our Draft Constitution... has been so violently criticized by the public outside as Article 15". Thus it appears that the intention of the members of the Constituent Assembly was to guarantee the 'due process of law' and not the 'procedure established by law' as a protection to personal liberty and that Article 21 as it was framed had failed to give effect to that intention. This point can further be substantiated by a brief reference to the subsequent conduct of members in the Constituent Assembly during the debate on the newly introduced Article 15 A, dealing with safeguards for persons under arrest and detention.

Though Article 15 was adopted in December 1948, the vote of the Assembly did not finally set the controversy at rest. In the absence of 'due process' people, both within and outside the Constituent Assembly were apprehensive of executive excesses and legislative vagaries as a potential threat to personal liberty. It was widely felt that draft Article 15 gave to Parliament a carte blanche to provide for the arrest of any person under any

In May 1949 the Assembly members, with a determination to restore at least some safeguards for personal freedom, had moved certain significant amendments in order to curtail the executive's power to detain. It was as a tangible result of the mounting pressure of the Assembly members on its leaders, Dr. Ambedkar introduced a new Article 15 A in the Constituent Assembly on 15 September 1949. So the introduction of this new article itself is suggestive of the conviction of the members as to the 'due process' protection.

Article 15 A provided that any arrested person must be produced before a magistrate within twenty-four hours of his arrest, informed of the grounds of arrest, and detained further only on the authority of the magistrate. The arrested person should not be denied counsel. But these provisions were not to apply to persons held under preventive detention laws. An individual so held could not be detained longer than three months unless an Advisory

224. Dr. Ambedkar also shared this view in his speech while introducing Article 15A. C.A Deb., Vol.IX, p.1497; also see, G.Austin, op.cit., p.109; B.Shiva Rao, A study, p.238.


Board supported further detention, and unless laws permitting greater periods of detention were in existence. Parliament could by law prescribe: "The circumstances under which and the class or classes of cases in which a person who is arrested under any law providing for preventive detention may be detained for a period longer than three months and also the maximum period for which any such person may be detained".  

Introducing this Article in the Assembly, Ambedkar observed that they were "making, if I may say so, compensation for what was done then in passing Article 15". "In other words", he said, "we are providing for the substance of the law of "due process" by the introduction of Article 15 A". What is important to us, for the moment, is not whether this new Article really amounted to a 'compensation' for the loss of 'due process' in Article 15, as Ambedkar claimed; but the fact that this statement of Ambedkar further fortifies our conclusion that it was not the intention of the Constituent Assembly to do away with "due process" as a protection to personal liberty; and still the intention was to restore the "substance of the law of


due process". This new Article as well as its projection as a 'compensation for 'due process', however, did not allay the apprehensions of the members. 229 It was followed by a long and spirited debate, which once again brought to light the anguish and disappointment of the members over the omission of 'due process' in Article 15. And most of the members were of the view that the new Article 15 A could never be a 'compensation' for the 'due process clause'; and that the safeguards against arbitrary arrest and detentions provided in the Article were highly inadequate or even illusory. Many amendments were also moved in this regard.

Pandit Thakur Das Bhargava, in his Amendment, pleaded for certain very important safeguards such as right to access to courts and to be defended by counsel in all proceedings and trials; right not be a subjected to unreasonable restraints and searches of person and property; right to speedy and public trial, to cross-examine and to produce his defence, to at least one appeal; right of the detained persons not to be subjected to hard labour or unnecessary restrictions; freedom from torture etc. 230 Here also, he maintained that the "due process" clause should be there in Article 15, and that Article 15 A could not be a

229. B. Shiva Rao, A Study, p. 239.

Reflections of the Assembly, he said:

"... it is most unfortunate to this country that we have not been able to pass this 'due process' clause .... The first casualty in this Constitution is justice. After all what is a fundamental right? A fundamental right is a limitation of the powers of the executive and legislature.... Article 15 is the crown of our failures, because by virtue of article 15 we have given the executive and the legislature power to do as they like with the people of this country so far as procedure is concerned".  

In this context he had also accused the Drafting Committee for its 'failure to carry out the will of this House' and he said: "It has succumbed to extraneous influences from other authorities".  

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231. Ibid., at p.1501.

232. Ibid.

233. Apart from the Drafting Committee's omission of 'due process' in Art.15, Bhargava referred to the way in which an amendment moved by Karimuddin, seeking 'the right of the people to be secure in the persons, houses, papers and effects against unreasonable search and seizures, was treated. The amendment was accepted by Ambedkar; the Vice-President said twice that the amendment was accepted. Then the question was again raised and ultimately it was negatived. See ibid., at p.1506.
significant aspect which came to surface during the debates on Article 15 A. Many others in the Assembly also referred to this aspect.

Dr.P.S. Deshmukh, in his speech, said that Article 15 A was not a real and adequate remedy and it was better to omit it, leaving personal liberty to Article 15. Expressing his anguish, he further said:

"The situation is grave. Our respect for law is certainly decreasing. We are ruling our people in a manner much less generous than the aliens did... If you want to safeguard the freedom of the people and their liberty, there should be a more radical provision in the constitution than what has been proposed".234

H.V. Kamath suggested that it should be clarified that the jurisdiction of the Supreme Court and the High Courts, especially in regard to their power to issue writ of habeas corpus, was not sought to be barred in cases of preventive detentions,235 and that the constitution should specifically guarantee that no detinue will be subjected to physical and mental ill-treatment.236 In view of

235. Ibid., at pp.1517-18.
236. Ibid., at p.1517.
Parliament's power to prescribe the maximum period of detention, as proposed in cl.(4) of Article 15 A, Kamath argued: "... there must be the courts of justice to go into every case and decide as to whether every person detained under that law has been justly detained, has been fairly detained and has been detained for longer than is absolutely necessary".237

H.V. Pataskar also lamented the failure of the Assembly to retain the 'due process' clause; and maintained that Article 15 A was not a compensation for that clause.238

Dr. Bakshi Tek Chand, in his cogent and powerful speech, pointed out that the provisions contained in Article 15 A were no better than those contained in the various Public safety Acts, Rules under the Defence of India Act, and the notorious Rowlatt Act (1919);239 and said: 'I consider article 15 A as the most reactionary article that has been placed by the Drafting Committee before the House, and therefore I would ask the House to reject it altogether and not allow it to form part of the Constitution'.240 No written constitution in the world provided for detention

237. Ibid., at p.1519.
238. Ibid., at pp.1527-8.
239. Ibid., at p.1527.
240. Ibid., at p.1529.
without trial in this manner in normal times. 'It is not to be found even in the Japanese Constitution, which the Drafting Committee purports to follow. Article 15 A does not give any fundamental right to the people. In fact it is a charter for denial of liberties'. Referring succinctly to the entire history of Articles 15 and 15 A, he remarked: "It is strange, indeed, how the members of the Drafting Committee have drifted from the position which they had originally taken to the submission of the present article 15 A".

A.K. Ayyar defended both Article 15 without the 'due process' clause and Article 15 A as introduced by Ambedkar.

Jaspath Roy Kapoor described Article 15 A as 'one more illustration of the conservatism which characterises the Chapter on Fundamental rights', and called that Chapter as 'Limitation on Fundamental Rights'. He also pointed out, as a defect, that under clause (4) of Article 15 A, it was not obligatory on Parliament to prescribe the maximum period.

241. Ibid.
242. See ibid., at pp.1529-32.
243. Ibid., at p.1529.
244. Ibid., at p.1536.
245. Ibid., at p.1541.
Ananthasayanam Ayyangar 'would have very much liked to retain the words "due process of law" in the original Article itself'.

And Mahavir Tyagi said that Article 15 A would only 'enable the future governments to detain people and deprive their liberty rather than guarantee it'.

Dr. P.K. Sen supported the views expressed by Bhargava and Tek Chand on the 'due process' clause. He also referred to "extraneous forces", influencing the decisions of the Chairman, Dr. Ambedkar. Pandit H.N. Kunzru also expressed dissatisfaction over the adequacy of safeguards provided by Article 15 A.

B.P. Gupta described Article 15 A as 'an attempt to rescue something out of fire that eliminated that phrase "due process of law". He said:

"Article 15 concerns the most vital of all the Fundamental Rights, viz., the right to life and personal liberty. Those of us who advocated the

246. Ibid., at p.1544.

247. Ibid., at p.1547.

248. Ibid., at p.1550 Shri B.p.Gupta also alleged such influence of 'those who occupied seats of authority and responsibility', at p.1554.

249. Ibid., at p.1551.
adoption of that phrase wanted to give that right the essence of Fundamental Right. And what is the essence of Fundamental Right? In the small field of basic needs of the civilized man, the limitation on the sovereignty of the legislature and to that extent the supremacy of the judiciary, are the essence of the Fundamental Rights. Unfortunately we were defeated".250

He pointed out that Article 15 A did not in any way seek to restore that supremacy, for, the 'carte blanche' given by Article 15 to the Parliament for the arrest of any person under circumstances that Parliament might think fit' was very much there; and that power of Parliament was not substantially restricted by the proposed Article 15 A. 251

Sensing the mood of the Assembly from the spirited arguments and expositions presented by the members regarding the protection of personal liberty, Dr. Ambedkar, said, in his reply to the debate:

"As I said, I myself and a large majority of the Drafting Committee as well as the public feel that

250. Ibid., at p.1553.
251. Ibid.
in view of the language of article 15, viz., that arrest may be made in accordance with a procedure laid down by the law, we had not given sufficient attention to the safety and security of individual freedom. Ever since that article was adopted I and my friends had been trying in some way to restore the content of due procedure in its fundamentals without us the words 'due process'.\textsuperscript{252}

Then he explained the implication of each clause in Article 15 A, and appealed to the members to accept Article 15 A in good spirit.\textsuperscript{253} And that Article was, finally, passed by the Assembly on 16 September, 1949\textsuperscript{254} and was reproduced as Article 22 of the constitution.

But the issue was not yet settled. The executive, at the instance of the Home Ministry, was determined to have its way. As a matter of fact, even prior to the introduction of Article 15A in the Assembly, the Home Affairs Ministry took 'very strong objections' to the powers provided for Advisory Boards.\textsuperscript{255} The Government

\textsuperscript{252} C.A. Deb., Vol.IX p.1556.

\textsuperscript{253} Ibid., at pp.1557-59.

\textsuperscript{254} Ibid., at p.1559.

\textsuperscript{255} See, Letter from S.N. Mukerji (Assembly Secretary) to H.V.R. Iyengar, Home Secretary, dated 16 August, 1949, and the reply to it. Letter from H.V.R. Iyengar to S.N. Mukerji, dated 19-20 August, 1949, Law Ministry Archives. See G. Austin, \textit{op.cit.}, p.110.
categorically stated in its letter to the Assembly Secretariat that 'it would not be possible for the executive to surrender their judgement to an Advisory Board as a matter of constitutional compulsion'; and the Ministry wanted the details of detention to be left to the legislatures. It was on the face of this objection of the Home Ministry, Ambedkar introduced in the Assembly Article 15 A, which was eventually passed by the members with all the reservations they had.

Soon after that, on 15 November 1949, T.T. Krishnamachari moved an Amendment in the Assembly, apparently embodying the avowed view of the Home Ministry that 'there was to be no interference with executive actions in detention cases'. The Amendment conferred on Parliament the power to prescribe the maximum period of detention, the power to prescribe the categories of cases in which a person could be detained for longer periods than three months 'without obtaining the opinion of an Advisory Board', and the power to lay down the procedure to be followed by Advisory Boards. Pushing through the Amendment Krishnamachari said that a number of members had seen it and

256. Ibid.
257. Ibid.
258. G. Austin, ibid., at p.111.
agreed with its terms', and also tried to convince the members by pointing out that by this Amendment 'indefinite detentions had been made impossible'. But, as remarked by Granville Austin, he failed to point out that this Amendment made it possible for Parliament to make laws providing for detention unscrutinized by Advisory Boards and could so circumscribe Advisory Board's procedure as to make it useless as protections of personal liberty. A helpless Ambedkar had to defend it by saying, perhaps with great inner struggle, that the amendment lessened the 'harshness' of Article 15 A. And the Assembly had to accept (or acquiesce in?) the Amendment, which subsequently became part of clause (7) of Article 22 of the Constitution.

Thus whatever little safeguard was there in Ambedkar's Article 15 A had found its exit through Krishnamachari's Amendment, which in fact made the 'compensation' for the 'due process' clause in Article 15 A not only inadequate but illusory. Parliament still continued to have the 'carte blanche' to provide for the arrest of any person under any circumstance it deemed fit'.

259. For the text of the Amendment and Krishnamachari's defence of it see, C.A. Deb., Vol.XI, p.531.

260. G. Austin, op.cit., p.112.

Ambedkar's effort 'to restore the substance of the law of due process' as a protection to personal liberty fell to ground.

This brief resume of the proceedings and debates on Article 15 A in the Assembly, subsequent to the adoption of Article 15, further strengthens our inference, as has already been drawn, that the intention of the Constituent Assembly was to guarantee the protection of "the due process of law" to personal liberty, and that the language of Article 21 (Draft Article 15) did not give effect to that intention. Ambedkar himself acknowledged, in his reply, this aberration that occurred in the framing of Article 21. Precisely for that reason, 'ever since that Article was adopted, he 'had been trying in some way to restore the contents of the 'due process of law'. But, his attempts to restore the substance of the law of 'due process' without using that word 'due process' did not appear to have ever succeeded.

Thus the Constituent Assembly could not secure a just protective norm for personal liberty. It could not succeed in its attempts to restore even the contents of 'due process' and thereby to 'compensate' the omission of 'due process' in Article 21, much to the dissatisfaction of the people and quite contrary to the intentions of the substantial majority of the members of the Assembly. The
right to personal liberty in Art. 21 of the Indian Constitution was thus left with the protection only of 'a procedure established by law' – the same old colonial standard.

Though the members of the Assembly fought although, first, for the retention of 'due process' in Article 21, and then for the restoration of the substance of 'due process' through Article 22, in the end they seemed to have "pinned their faith upon the mercy of the legislature and the good character of their leaders" and perhaps more possibly upon the wisdom of the judiciary and the dynamics of its interpretative process for the protection of the right to personal liberty of the people.

Let us, therefore, turn to the Supreme Court of India, which, the Constitution, recognises as the protector and guarantor of the liberty of the individual and as the ultimate authority to interpret the Constitution.
PART II

PERSONAL LIBERTY AND JUDICIAL PROCESS:
THE GOPALAN ERA