I. INTRODUCTION
CHAPTER I

INTRODUCTION

1.1 "Our Constitution is a unique document. It is not a mere pedantic legal text, but it embodies certain human values cherished principles and spiritual norms; and recognises and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material moral and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty, all powerful machine of the State, but places him at the centre of the constitutional scheme and focuses on the fullest development of his personality". (1)

The above mentioned are the words of Justice Bhagwati and these words are nothing, but the essence in brief of the concept of 'liberty'.

1.2 This liberty has been emphatically described by the Late Shri Chimanlal Chakkubhai Shah a member of Constituent Assembly with regard to Article 21 of our Constitution in the following words:

"The right conferred by Article 15 (i.e. Article 21) is the most fundamental of the Fundamental Rights in this Chapter, because it is the right which relates to life and personal liberty without which all other rights will be meaningless. Therefore, it is necessary that in defining this right, we must make it clear and explicit as to what it is that we want to confer and not put any restrictions upon the exercise of that right which make it useless or nugatory". (2)

In fact Shri Shah has highlighted the concept of liberty in its entirety and
1.3 Liberty is cherished by the people all over the world, since the dawn of civilisation. On 'Liberty' depends the all round development of mankind. Scholars through the ages have eulogized liberty to be the main ingredient of happiness and existence of human beings.

1.4 Cicero observed, "other nations may submit to slavery; liberty is inalienable possession of the Roman people". He further stated, "we are all slaves of the law, so that we may be free. Were it not for the restrictions imposed by the law, every one could do as he liked and the result would be the destruction of freedom through excess."\(^{(3)}\) Rousseau the great French Champion of liberty stated "to renounce liberty is to renounce being the man". He also pointed out that "Man is born free but every where he is in chains."\(^{(4)}\)

1.5 Man, therefore, prizes his liberty more than anything else in the world, because it is indispensable for all the development of human personality and his happiness. And happiness the ultimate goal of all mankind, cannot be fully and easily achieved without personal liberty, which is as necessary for a man as bread and air. From the time a person is born till the time of his death, liberty plays a very important role. Liberty is life and life without liberty is death.

1.6 The right to live with human dignity is enshrined in Article 21 of our Constitution and it derives its life breath from the Preamble and Directive Principles of State Policy and it is the principle of rule of law which invests these provisions with life and force.
1.7 The rule of law is the antithesis of arbitrariness and, therefore, every facet of law which seeks or attempts to deprive a person of his life and personal liberty would have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21.

1.8 The rule of law has greater significance in our country than in United Kingdom where there is no written Constitution. In United Kingdom the Parliament is supreme and it may be difficult to hold a law to be invalid on the ground that it is arbitrary and irrational and hence violative of an essential element of the rule of law.

1.9 In India because of the written Constitution and because of the fundamental rights and also because of the powers conferred on the Courts to enforce them not only against the Executive, but also against the Legislature the rule of law is protected.

1.10 Article 21 is perhaps a most concise Article of our Constitution and it is modelled on the famous lines of Magna Carta which can be traced back to the days of King John when the barons wrung their charter from him in the year 1215. In Chapter 39 of the Charter it was demanded that:

"No free man shall be taken, or imprisoned, disseised or outlawed, exiled or in any way destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgement of his peers or by the law of the land".\(^{(5)}\)

1.11 This demand was reiterated in the petition of Grievances, 1610 and also in the Petition of Rights, 1628 and it was since that time the principle of the rule of law was established. All the laws that may be
made are subject to the relevant principle that no man shall be convicted and no man shall be deprived of his liberty without a chance being given to him to prove that he is innocent.

1.12 In the United Kingdom, there is no written Constitution and there is no Bill of Rights, "the so-called liberties of the subject are really implications drawn from the two principles that a subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others". (6)

1.13 Even though rooted in foundations so slender individual liberty in all its phases is more valued and receives greater protection in that country than in many others with written constitutions incorporating Bill of Rights. Apart from the force of public opinion, the liberties of the subject in the United Kingdom owe their main protection to certain actions and writs, particularly the writ of Habeas Corpus provided by the common law and statute law. Among the most important liberties which have been created and elaborated in that country is "the right of personal freedom or immunity from a wrongful detention or confinement, which is ensured by the action of false imprisonment and by the writ of habeas corpus reinforced by the Habeas Corpus Acts". (7) With this is closely associated the right to freedom of speech or discussion and the right to the freedom of conscience. The right of public meeting and the right of association are also regarded as well accepted liberties of the subject. (8)

1.14 The Fifth and the Fourteenth Amendments of the United States Constitution provide that the State shall not deprive "any person of life, liberty or property, without due process of law". This language is said
to have furnished in part the base for Article 21 of our Constitution. Armed with the wide powers conferred on it by the due process clause, the Supreme Court of the United States has enlarged the concept of liberty of the person in the Fourteenth Amendment so as to include in it freedom of speech and of the press, and religious liberty, protection against ex-post facto laws, self-incrimination, and double jeopardy and a variety of other subjects impinging on the physical or intellectual freedom of the citizen. (9)

1.15 The Supreme Court of the United States has described the various phases of 'liberty' in the Fourteenth Amendment as under:

"The liberty mentioned in that amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the engagement of all his faculties, to be free to use them in all lawful ways, to live and work where he will to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful, conclusion the purposes above mentioned." (10)

1.16 In yet another decision the United States Supreme Court has added into the dimensions of liberty in addition to what has been said in the above paragraph:

"While this Court has not attempted, to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from
bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognised at common law as essential to the orderly pursuit of happiness by free man." (11)

1.17 Unlike the Fifth and Fourteenth Amendment of the United States Constitution, our Constitution gives personal freedoms under Article 19 and 21 which are specific and elaborate. But to-day these articles are given liberal interpretation by our Supreme Court so that the citizens may enjoy all aspects of individual freedom so greatly valued in modern civilisation. All the rights which are not specifically enumerated in Part III of our Constitution can now be read within the purview of Article 21 of the Constitution as per the latest trend of Supreme Court decisions. (12)

1.18 The right to liberty is popular all over the political spectrum operated on or by franchise. In modern society a body politic or any form of government in its manifesto, which does not give a minimum guarantee or a promise for the honour of liberty, is not acceptable. The constitutions of different countries, now as a principle protect the liberties of the people and in fact the way in which the liberties of the people are protected determines the form of government.

1.19 The sacred slogan of liberty has created a magical effect upon the mankind in every society. It has stirred people not only to throw away the domination of the cultures and rules alien to them under the sway of nationalism, but also to reject, to strive against and to replace the tyrannical
reign of a minority, thereby setting forth the basic concepts which form basis of the rule of law and democracy.

1.20 The father of the Indian Freedom Movement, the Late Lokmanya Tilak declared that 'freedom is our birth right'. The freedom struggle, supported and carried on by a host of other freedom fighters, gave a tough time to the British Rulers. The Congress Party started in 1885 was the major organisation, which under the stewardship of Mahatma Gandhi carried on the non-violent struggle for freedom. The election manifesto of the Indian National Congress issued on the eve of the First Election under the Government of India Act, 1935 proclaimed that Congress would take all possible steps to end various Regulations, Ordinances and Acts, which oppress the Indian People and grant them meaningful liberty. It further declared that their elected representatives would work for the establishment of civil liberties.

1.21 Through the sacrifices of freedom fighters, India achieved independence. In order to consolidate the gains of our non-violent victory against a foreign rule, the founding fathers enacted, adopted and gave unto ourselves a Republican form of Government under a Democratic Constitution. Apart from Justice, Equality and Fraternity, the Liberty of thought, expression and belief were embodied in Part III as Fundamental Rights. With regard to Fundamental Rights, India has followed the example of U.S.A. in preference to that of England by adopting for a fulfledged Bill of Rights. The Chapter of Fundamental Rights in the Constitution of India is one of the greatest Chapters of liberty that has made our Constitution sublime. A number of rights which are vital for the all round development of human race and well being of society are guaranteed against State interference and elevated
to the pedestal of sacrosanct right, enjoying special constitutional protection.

1.22 While framing the Constitution of India, the framers referred to the provisions of personal liberty in the Constitutions of various countries. They also looked into the judicial interpretation of 'liberty' and 'due process of law' given by the highest Courts of the United Kingdom and the United States of America. When Indian Constitution was being discussed in the Constitutional Assembly, national security was being threatened by infiltrators and invaders at the borders and by reactionaries from within. These conditions were perhaps responsible for inclusion of fundamental liberties along with the provisions of preventive detention in our Constitution.

1.23 The term 'personal liberty' has its root deep in the elevation of human existence. The term liberty and its interpretation has faced a difficult situation in front of the socio-economic outlook in the present democratic States. In such States the situation is really difficult on how to reconcile the needs of the society to be executed by an effective government with the preservation of the rights of individuals. On one side rights are inherent, inalienable and inviolable under the Constitutions of various States, while on the other side the States have to protect the socio-economic values of the society. To execute and balance these ends the responsibility rests upon the Executive. When the Executives do what they like, a situation of tyranny and arbitrariness is created. It is in this context that the quest for liberty acquires significance.

1.24 Citizens have a constitutional right to the State's protection of their personal liberty and equally a personal right to be free from the State interference and it is necessary for the Government to ameliorate these
two valuable rights.

1.25 A Government may be justified in abridging the personal liberty of its citizens to the minimal in an emergency for a majority cause, or when a great loss may be prevented, or perhaps when some major benefit for the people or the country can clearly be secured. If the nation is at war a policy of censorship may be justified even though it invades the right to say what one thinks on matters of political controversy. But the emergency as well as the measure have not to be a pretext. It was just thirteen years ago that in our country emergency provisions were misapplied and misused for doubtful ends.

1.26 Article 21 of our Constitution provides as under:

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

The term 'life' is the raison d'être of the Universe and its peaceful existence. The right to live is the sole basis of the existence of human race.

1.27 It is difficult to provide a comprehensive definition of 'liberty'. 'Personal Liberty' has been characterised as the 'sacrosanct' and as 'inviolable right'. These two terms have since passed through a thorough judicial examination and legalistic interpretations to find their real meaning.

1.28 It is not possible to have concept, description or definition of light in the absence of darkness, both being interrelated for their existence. In the same manner concept of liberty can also not be defined or described in any positive terms. The most beautiful and short and simple definition of liberty is given by Harold J. Laski, the great political thinker, namely:
"Liberty is essentially an absence of restraint." \(^{(15)}\)

But in his 'Grammar of Politics', he states:

"Liberty therefore is a positive thing it does not merely mean absence of restraint." \(^{(16)}\)

1.29 One can easily conceive the predicament of Laski and scores of other great political thinkers. On the one hand, we have perceived, we have sensed and we have felt that Liberty is a positive thing and yet, it has not been defined in positive language to do justice to its meaning, to its existence or to its reality.

1.30 Naturally, "absence of restraint", or absence of "all those negative conditions" which bring into play "restraints" are the paradoxical words through which Liberty can be described.

1.31 Lord Lloyd of Hampstead in his book 'Introduction to Jurisprudence' has observed as under:

"It has been pointed out that there are two kinds of freedom, positive and negative. Positive freedom is a spiritual concept concerned, in its social context, with attaining an order of society which allows the fullest possible development of the powers of selfrealisation of every human being. Negative freedom, on the other hand, has the more limited goal of achieving a society, where as large a sphere of individual autonomy is left as is compatible with public welfare. Restraints and limitations on individual freedoms are thus recognised as inevitable, but these are to be minimised in the interests of free choice. The scheme of values enshrined in a bill of human rights is clearly aimed at negative freedom in this sense." \(^{(17)}\)
1.32 The human race whether primitive or civilised is endowed by nature with an element within him which keeps on creating an urge and a quest in him for liberty. Just as we have not been able to understand as to what causes within the human self the desire to love or to be loved or the sexual urge in man and animals, in a similar manner what causes man to yearn for liberty has remained undecipherable. But empirically and historically it is true that this yearning to remain free or to overcome restraints have caused gigantic strifes and sacrifices and the human race has not relented in its struggle until it has achieved the condition of liberty.

1.33 The human race is borne with restraints. Nature has imposed the restraint or gravity which does not let human beings fly like birds or to escape out of the earth. These restraints from nature were overcome by devising aeroplanes and rockets and the human race attained freedom from the forces of gravity. Other adverse forces to Liberty are social, political, economic and legislative. The concept of Democracy also developed from the urge for liberty.

1.34 According to John Stuart Mill:

"Liberty consists in doing what one desires. But the liberty of the individual must be thus far limited - he must not make himself a nuisance to others." (18)

1.35 Man as a rational being, desires to do many things but in a civilised society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Liberty has, therefore, to be limited in order to be effectively possessed.
1.36 According to Blackstone:

"Personal liberty consists in the power of locomotion, of changing situation or removing one's person to whatever place one's inclination may direct, without imprisonment or restraint, unless by due course of law." (19)

1.37 Prof. Diecy, the greatest English exponent of the rule of law explained:

"Personal liberty means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification." (20)

1.38 In fact Diecy's point of view is more concerned with the negative aspect of personal liberty i.e. with the kind of restraints which take away personal freedom. At the same time the Blackstonian definition is marked by its difference with that of Diecy. To Blackstone, personal liberty is a 'positive aspect' and is an essential element of the existence of a person. While Blackstone's emphasis is on the freedom of locomotion, according to Diecy, if a restriction does not amount to imprisonment, arrest or coercion the liberty of a person is not affected.

1.39 Lord Hewart also followed Diecy's definition when he observed that the right of personal liberty is the right not to be arrested or detained or otherwise subjected to physical restraint except in accordance with the law.

1.40 But Lord Denning has given another dimension to the liberty of person:

"(By) Personal freedom I mean the freedom of every
law-abiding citizen to think what he will, to say what he will, to go where he will, on his lawful occasion without hindrance from any person..... It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live." (21)

1.41 In the words of Justice Khanna liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body.

1.42 After deeply analysing the concept of liberty we arrive at an inevitable conclusion that under the impact of history as well as evolving political systems, there has been a desire as well as emphasis on the part of the intellectuals to minimise restraints than to give a very positive definition of liberty. In other words minimisation of restraints means liberty.

1.43 Liberty is a dynamic concept with many aspects and dimensions. In this thesis an indepth study has been made to find out what are the liberties of the Indian people and what they mean. The method chosen is an account of the leading decisions of the Supreme Court of India and some important High Court judgements which interpret and apply Article 21 of the Constitution. This method has been chosen because under our system, Supreme Court is the ultimate arbiter and interpreter of our liberties and an examination of its major decisions is therefore a convenient way to obtain an understanding of these liberties.

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NOTES. Chapter One.

3. Cicero, Pro Cnutor, 146.
4. Rousseau, Social contract, 1712 (Everyman), I.
7. Ibid.
8. Ibid.
10. Allgeyer v. Louisiana 166 U.S. 578 (1897)
12. Please see the following cases:
13. The methods of Satyagraha, civil disobedience and non-violent non-cooperation were devised as methods to fight an alien government by Mahatma Gandhi. He wanted Purna Swaraj for Indian people. "Swaraj meant more than independence from the British. It meant both throwing off foreign ways as well as foreign rule, so that Indians could emerge as masters of their own souls as well as of their political future" (Granville Austin - The Indian Constitution Corner Stone of a Nation on p. 1).
14. History of Fundamental Rights which project 'liberty' can be analysed in the following series of consequences:
   The demand for certain Fundamental Rights was specifically made in the Commonwealth of India Bill which was framed by Annie Besant and certain nationalists in 1925. The rights enunciated in this Bill included the right of free speech, free assembly, equality before the law and the right to free education. In this bill, what was claimed was not merely the negative liberties, such as the freedom of speech, but also positive liberties, such as the right to have free education, which right could only be enforced if the state played a positive role in the life of the community.
   In 1927 the British Government announced the formation of the Simon Commission to make recommendations as to the constitutional reforms and Congress set up a Committee "to draft a Swaraj Constitution for India on the basis of a declaration of rights". This Committee produced the Motilal Nehru Report in 1928 and it laid greater emphasis on the importance of the Fundamental Rights including the rights of the minorities. The Report states, "It is obvious that our first care should be to have our Fundamental Rights guaranteed in a manner which will not permit their withdrawal under any circumstances....Another reason why great importance attaches to a Declaration of Rights is the unfortunate existence of communal differences in the country. Certain safeguards are necessary to create and establish a sense of security among those who look upon each other with distrust and suspicion.
   In 1931 the Karachi congress adopted a resolution of Fundamental Rights and Economic Policy. The resolution envisaged that a social revolution must follow or accompany political freedom and it stated that "in order to end the exploitation of the masses, political freedom must include the real economic freedom of the suffering millions."
   That part of the resolution which dealt with positive rights was drafted by Jawaharlal Nehru. The Sapru Report (1945) also emphasised the need for certain fundamental rights including those for protection of the minorities". (Please see: Political Ideas and Movements in India - Sankar Ghose on p. 233-234).
15. 'Liberty in the Modern State' at p. 42.