CHAPTER III

HISTORICAL PERSPECTIVE OF LIBERTY AND RIGHTS

1.1. GENERAL:

When we write about right to freedom it becomes necessary to see what rights are and how the concept of liberty or freedom evolved. Basically the concept of liberty or freedom and notions about rights were confined to the theological or spiritual and philosophical realm. They further occupied place of nucleus of political thinking. At present these concepts find place in most constitutional documents of democratic systems. These concepts and notions have passed through philosophical and political transformation and have found place in legal jurisprudence. As a result, there is an incorporation of right to freedom in legal documents like constitutions.

Historical perspective of the transformation of the concept of liberty or freedom and notions about rights is to be studied independently. Its historical, philosophical and political evolution has varied from time to time, age to age and with conditions of life in the respective periods. In order to understand the basic postulate underlaying these concepts, views and works of Philosophers and Jurists are to be considered at their respective period. Therefore, it is in itself a different
subject of study, which requires detailed analysis. Therefore, a broad outline of these concepts which has a reference to freedom of thought, opinion, expression, etc., is discussed here.

1.2. CONCEPT OF LIBERTY OF FREEDOM:

Freedom is an indispensable condition for the full development of human personality. Freedom in the formation and expression of opinions and freedom to receive and communicate knowledge are the foundations of democracy. Freedom can be conceived in both, negative and positive terms. In negative sense it is freedom from restraints, unless such restraints are necessary to maintain the freedom of others. Freedom in the positive sense means opportunities for full development and expression of one's being. Malinowski defines freedom as:

"The conditions necessary and sufficient for the formation of a purpose its translation into effective action through organised cultural instrumentalities and the full enjoyment of the results of such activity". ¹

The concept of freedom has been discussed, agitated, and debated over thousands of years and great thinkers and jurists, public men and politicians. But, no clear answer could be furnished. The contributions of the great European and English thinkers to the concept of freedom
and liberty are well-known and widely known. The famous Jewish philosopher of Seventeenth Century Benedict Spinoza, in his book "Ethics"² says that —

"He is a free man who lives according to the dictates of reason alone".

Freedom to act without being answerable to anybody is essentially an absence of restraint. The range of freedom expand with the expansion of human activity with the choices by the individuals of his own way of life without imposed prohibitions.

"Liberty", says John Stuart Mill "the sacred concept means the right enjoyed by the individuals against the power of Government as a representative of society". Further Mill says about social liberty as "Nature and limit of the power which can be legitimately exercised by the society over the individuals"³.

Liberty is a concept. It is pure. Being a concept it is not changing or relative. Its forms may change. It cannot be given or guaranteed by some one or by statute. But it exists. Freedom is an expression or form of extent of accepted liberty. Freedom can be provided, guaranteed, recognized, regulated, limited, by statute or some one, i.e., authority. Thus, so far as definition and meaning is concerned there is no difference in the terms liberty
and freedom. Therefore, liberty is wider in its connotation so as to include freedom in itself viz., under Indian Constitution Art.21 deals with conceptual aspect of freedom while Art.22 with regulated freedom. So also Magna Carta, Bill of Rights are the freedoms that is to say expressions of liberty.

Early in the history of the evolution of concept of liberty, it may be said that where one section of the people who did not have freedom to follow their own way of life and were prosecuted by another larger section of the same people, the attendant conflict and confrontation invariably resulted into negation of freedom and liberty. Thus, the concept has its roots in the remote past. Nearly over four thousands years ago, Urukagina introduced the word "freedom" for the first time in man's recorded history. Urukagina of Lagash was the ruler of summer. He brought in sweeping reforms to maximise choice and established a rule of law that protected the rights of individual and prevented the abuse of power. He swept away the oppressive bureaucracy, established honest weights and measures including a reformed currency. Contemporary chroniclers, of Urukagina described this in the following words:

"Where as before the advent of Urukagina, 'the rich, the big men, and the supervisors were
getting richer at the expense of the less fortunate citizens, while from one end of the land to the other were tax collectors', 'after his reforms' 'from one end of the land to the others....there were no tax collectors.'

Urukagina brought the reforms as above when he felt very much of being heir to an abnoxious and tyrannial bureaucracy practised by previous ruler. The order of the day which was high taxation confiscation of property, every conceivable infringement of personal right and minimised individual choice made Urukagina to bring reforms as above. It may be mentioned here that under the Indian Political Philosophy in the period, of 400 to 500 B.C., the thoughts regarding freedom and against taxation were firmly put forth by the Indian Political Philosopher Charwak, the author on writings about the social system, political system, so as to harmonise the relations between the individuals interse and the society. It has been mentioned by Charwak that:

"र्थमाध्यान्तात्मां कृषित "
[सर्व धर्म संग्रह पृ.१५]
धर्म व जर्म असे काळी नाही.

(There is nothing as religion and non-religion)

Further he says that:
"भारतीय बंधन: स्वातंत्र्य मोक्ष: "
[वर्तमान निलंबन - अक्षमाद दर्शन]6
[भारतीय महानेत्र स्वतन्त्र, स्वातंत्र्य मोक्ष]
(Freedom is Moksha)

Here "Moksha" indicates the maximum happiness of individuals. Other thoughts of Charwak, in his writings in Sanskrit Language, are also enlightening. He says that for a harmonious social order there is no alternative than a political system in power governed by law. He also felt, it is an injustice, like Urukagina, that the rich, the big men or the persons in power are getting richer at the expense of poor people. Charwak describes such tyrannical bureaucracy or power in the words -
"अधूरी राजसत्ता तिथं होगः",
Unfortunately this Sanskrit writing of Charwak could not be preserved properly in the subsequent period.

The civilisation and religious philosophy of Jews, Romans and Greeks evolved thinking regarding freedom. In Jews there were prophets whose "God could free men from the ancient obsession with fertility". However prophets never actually wrote any charters of human freedom. But there was idea that ultimate value resides in the individual, occurs in the hebrew account of Adam (meaning humanity) being created by God in his image, which implies the essential equality of all human beings.
Louis Henkin says⁷:

"The Hebrew language did not have an authentic word for rights... Judaism knows not rights but duties are to God."

Romans are the greatest masters of every form of organised human endeavour i.e., it is of law, of Government, of morals etc. Ancient period of Romans was prominently governed by stoics (340-265 B.C.), the sect established by Zeno of Citum. Roman Empire claimed to rule by divine rights, and early thinkers did not conceive the concept of liberty of conscience which was subsequently controlled by Western European thinking arising out of religious intolerance. By liberty of conscience is meant the right to hold and profess what principles were chosen and to live in accordance with them subject to this right not impinging on the right of others to do so, or it may be said that not to deprive others of their right in this regard. In the ancient period in general it was claimed by both the Church and the Emperor that they were Supreme in their spheres and there was no room for liberty or freedom or individual rights. People were expected to give their unquestioning obedience to both of them. Subsequently absolutism made heavy inroads and there was no scope for individual freedom. The king became the State. The liberty of the subject lay only in those
things, which in regulating their actions, the sovereign had permitted.

Prophets claimed to rule by divine rights and could not conceive idea of individual liberty. However, the Roman concept of natural rights can be traced back as early as Tullius Cicero who said that right is founded not in opinion but in nature and there is true law right reason agreeing with nature and diffused among all, unchanging, everlasting. Cicero was follower of ancient stoics academy but he shaped and reshaped the established divine Principles to moral and natural form. Further in the Institutes of Justinian I, it has been asserted by the jurists that "By natural law, all men are born free." Equality of man so far as natural rights are concerned is emphasised in Ulpian's Digest. Romans by adoption of word 'Jus' implied that the citizen possessed individual rights. Greeks were the first people in the history of mankind to supersede entirely the monarchy as a constitutional form. They formed free states. It was in Greece that the first political parties were formed. It was here that the political freedom first raised its head. It was the Athens of Greece where democracy as a form of Government was innovated first. Onwards 7th Century B.C. Greeks fought the first defensive war of liberation in world history, fought for their freedom, as a human right and to them God and reason alike starve
for justice and not force freedom and slavery. As has been said by Schneider in "The history of world civilization"\textsuperscript{11} that "All the principle notions in this struggle were new and created by the Greeks; 'fatherland' and 'human rights', "freedom and honour" together with their opposites "dishonourable servitude without fatherland or rights' 'tyranny unworthy of human beings' 'Hitherto there had been stubborn savages who fought for their strip of land, and pious, wealthy citizens who fought for their wealth". All this was the result of Greek political thinking.

The contribution of Greeks to these concepts is the foundation they laid to establish justice, individual freedom and equality of men. They were the authors of individualism, rationalism and humanism\textsuperscript{12}.

Apart from these determined trends Greeks faced slavery as anti-thesis, Plato and Aristotle accepted slavery as inevitable part of the natural order of things. And a state of affairs without slavery could not be envisaged. However, Plato and Aristotle impressed the human thought by their views about private property. real crusader for individual freedom was Heraclitus (536 to 470 B.C.) who was a philosopher and thinker. He reflected the basic conditions and the costs of Greek adventure in freedom. We do not find any evidence of guarantee of fundamental rights or human rights in the
democracy of Athens. Trends in favour of human freedom set by the Greeks gave rise to the growth of freedom in the West.

Justice Jagan Mohan Reddy has mentioned that the kind of freedom we know today significantly has European origin. Man in his evolution and progress to civilisation become aware or conscious about the individuality, the right to freedom or need for an independent spirit was not in true sense realised until the 6th Century B.C. which may be said to be the Century of great individuals of the status of Gautam Budha in India, Zoraster in Iran, Confusius and Laotse Tung in China, Amos, Jeremiah, Isaiah, and a Host of others in Palestine, Solon the great law giver, Plato Aristotle, Archylus, Socrates in Greece. The era of these great thinkers and philosophers provided standards by which all previous societies could be judged. Contribution of these great individuals was evolution of higher religions which were primarily centered on spiritual welfare of man which signified growth of rationality. As philosophical emancipation mythus no longer governed and elevation and enlightenment of man became objective, righteousness rather than rites, the ideal and not the idol was being insisted on. In further period the concept passed from theological or religious or spiritual philosophy to a
political philosophy and the political thinkers from Romans, Greeks, French, Europeans, Englishmen, Americans, etc., contributed the concepts as to become sole of the modern democracy.

As early as in Fourteenth Century Lucas de Penna, an Italian Judge wrote a commentary on the 'Tres Libri Condicis' which assumed great importance and esteem in the Sixteenth Century. According to Lucas there is nothing on earth more precious than civil liberty and there is nothing detestable than slavery. According to him a just ruler will uphold and guarantee individual freedom and will further the cause of freedom by interfering as little as possible. The ruler who without just cause restricts the freedom of citizens, is a tyrant whose tyranny consists essentially in the misuse of the mandate and of the powers trusted to the Ruler by God. The Ruler's disrespect for the liberty of his subject leads to an enslavement of his people. The Tyrant governs not by the laws and decrees based on justice and equity, but by violence and oppression the idea of law, the idea of justice and righteousness are alien to him. While deprivation of liberty by proper authority that is by officials who have the power to imprison such as bailiffs, Magistrates and Governors of the provinces, may be lawful no private citizens, according to Lucas, is authorised under any circumstances to take another
private citizen into custody or otherwise to deprive him of his liberty.\textsuperscript{14}

Thus, it is evident that the idea of liberty with its limitations or deprivation and the limits to which the Rulers can go were propagated by eminent writers like Lucas. English thought during Fourteenth to Sixteenth Century was concerned with the power of the King vis-a-vis the parliament and the courts. Chief Justice Coke asserted the independence of the courts as against the kings that is James I, and Parliament. Therefore, during this period Justice Coke set up the common Law as the fundamental Law of the realm and embodiment of reason which is technical and can be comprehensible only by the lawyers and Judges. In Coke's views, common law assigned to the king, his powers, to each of the courts of the realm the proper jurisdiction and indeed to every Englishman, the rights and privileges of his station. The common law, therefore, would include all that was considered as the constitution and fundamental rights of the subjects which according to Coke's contemplation were unchangable.

It is during this period that a literary writer, poet Milton raised voice for liberty and against licensing in his speech addressed to the Parliament of England for unlicensed printing on November 1644 which is popularly known as Areopagitica by Milton.\textsuperscript{15}
"While things are yet not constituted in religion, that freedom of writing should restrained...to shut us up all again into the breast of licenser, must needs give cause of doubt and discouragement to all learned and religious men. Who cannot but discern the fitness of this politic drift... that while Bishops were to be baited down, then all presses might be open it was the people's birth right and privilege in time of parliament, it was breaking forth of light."

Blackstone a Jurist and early exponent of English common law in 1769 made a call for freedom and against licensing in his commentaries¹⁶, (it is discussed in detail in the later part of this thesis). About more than three countries ago Tomas Hobbes¹⁷ observed that "political liberty is political power", and also that freedom is political power divided into small fragments. Hobbes who contributed to the liberalism said that liberty is a negative idea and what is claimed under that name is not liberty but dominion.

Widely known Nineteenth Century English philosopher is John Stuart Mill. He fought for the cause of liberty. Theory of Stuart Mill and his thoughts regarding individualism and utelitesianism had to face criticism as that of Jeremy Bentham. But thoughts of Mill regarding liberty received wide popularity. His essay "On Liberty"
received recognition from almost all corners of the world and is famously quoted. Mill's essay in 1859 with his familiar passage:

"The subject of this essay is not the so-called liberty of the will, so unfortunately opposed to the misnamed doctrine of philosophical necessity, but civil or social liberty, the nature and limits of the power which can be legitimately exercised by society over individuals. The question seldom stated, and hardly ever discussed, in general terms, but profoundly influences the practical controversies of the age by its latent presence, and is likely soon to make itself recognised as the vital question of the future. It is so far from being new, that in a certain sense, it has divided mankind, almost from the remotest ages; but in the stage of progress into which the more civilised portion of the species have now entered, it presents itself under new conditions and requires a different and more fundamental treatment."¹⁸

The question of the different stages of progress of mankind is still relevant and may be posed again. Thus, by the end of Seventeenth Century onwards the thought of liberty, struggle for freedom was defended, upheld and
evolved by different thinkers to put forth their own theories. Prominent amongst them are Devid Hume (Scotland), John Locke (England), Rousseau J.J. (France), Immanuel Kant (England), G.W.F. Hegel (Germany). These thinkers have contributed to the cause of value of freedom.

1.3 DOCTRINE OF RIGHTS:

1.3.1 What Constitutes right?

The word right in its ordinary sense means to make claim and to assert in making that claim that one is entitled and justified to do so. Such entitlement along with its jurisdiction for a human being is human right. When such entitlement, he claims to be a "just entitlement", carries one's claim morally to do so, which is recognised by natural law and can be said to be a moral right. When such entitlement one claims to be "legal entitlement" carries one's claim to do so as a legal right as per the mandates of positive law. Therefore, called as positive rights.

Human rights is a twentieth century name for what has been traditionally known as natural rights or the rights of man. The concept of fundamental guarantee or human rights as the former was developed long after the advent of later. Further, ascertainment of natural rights and recognition of human rights or fundamental rights has faced a long historical struggle against tyranny and
absolutism. There are various theories and philosophies which contributed to the advent of this century.

Recognizing natural rights is an ancient as well as a living concept. In Eighteenth Century eminent Jurist William Blackstone endorses Natural Law in following words:

"Natural law is binding all over the globe, no human laws have any validity if contrary to it."

The Universal Declaration of Human Rights Adopted and proclaimed by General Assembly of UNO Resolution 217 A(III) of 10 December, 1948 starts with its preamble as under:

"Whereas, recognition of the inherent dignity and of the inalienable rights of all members of the human family is the foundation of freedom justice and peace....".

Here words inherent, dignity and inalienable rights represent natural rights.

The Supreme Court of India in Golak Nath's case has observed with affirmation as under:

"Fundamental rights are the modern name for what have been traditionally known as natural rights."

1.3.ii. Natural Rights:

The doctrine of rights of human being originated when man started living in the society from that of
living in clans and tribes. Natural instincts of man in respect of his own behaviour as well as regarding behaviour of others and his perceptions regarding what is right and what is wrong are called as rights and obligations. These perceptions being founded on primary or natural instincts of man are called as natural rights. Thus, doctrine of natural rights is offshoot of natural law and since rules of natural law are of universal application, natural rights also inhere in all human beings, in all ages and at all places.

Natural rights being as a claim which every one naturally makes. The political implication of theory of natural rights is that these rights being inherent in each individual human being existed prior to the birth of the state itself and cannot therefore be violated by the state. However, growth of state itself puts limitations upon the natural rights of every individual in the interest of collective existence. Natural rights are inalienable rights and they cannot be taken away by the society. Though the scope of existence of natural rights became circumscribed as a result of the growth of political society, there are natural rights which man did not surrender to the state. The theory of natural rights implies certain rights which exist since prior to the birth of the state and are thus distinguished from
civil rights which are recognised by the State. Such natural rights existing prior to the birth of the state are the inviolable rights which put limitation on power of state.

1.3.iii. Ancient Concept of Right:

The concept of natural rights (Jus Naturale) as being from natural law (Lex Naturalis) may be traced from Cicero who said:

"Rights is founded not in opinion but in nature. There is indeed a true law, right reason agreeing with nature and diffused among all, unchanging, everlasting."

This concept was given more concrete shape in the writing of Roman Jurists who asserted that by natural law, all men are born free, so far as pertains to natural rights all men are equal.

In ancient Grice the notion that there is natural law different from the law of earthly rulers and also higher and more compelling than the edicts of princes or courts can be traced. This is believed by very popularly cited quotation from the play of Sophocles' written 422 B.C. making a case for Antigona, a character in the play, which tries to reply to King Greon. She says to the king that:
"Nor did I deem that thou, a mortal man, coluld'st by a breath annual and override, the immutable, unwritten laws of heaven: They were not born today nor yesterday; they die not, and nor knoweth where they sprang." Antigone further says to the King:

"All your strength is weakness itself against the immortal, unrecorded laws of God, she invokes the higher law, the natural rights of man."

This has been relied upon in the International Legal Protection for Human Rights while tracing the origin of Human Rights of man.

1.3.iv. Concept in Medieval Ages:

The question arises then "What is law which is higher than positive law" and the popular answer by the philosophers and jurists is 'natural law'. Wherein they contemplate those elementary principles of justice which were for them apparent to the 'eye of reason' alone.

In medieval ages, religious support was often given to the natural law and natural law came to be identified with the law of God and the Church. The political theory of medieval christendom put even greater stress on natural law, which was understood as being part of the law of God.
1.3.v. **Concept in Middle Ages:**

In the middle ages the most fundamental aspect of political thought was the principle that all political authority was the expression of justice; as some jurists put it, all civil and positive laws flow from justice, as a stream flows from its source or to say in other words is that there is behind positive law of the state a greater and more august law, the Law of Nature. This law of nature may indeed have been in some points modified by the transitions, from the state of nature to the conventional order of society, but in its proper character it is divine and unchangeable, and cannot be abrogated by positive law. Gratian, the first great systematic canonist, sets out in his Decretum in the middle of twelfth century the principles that mankind is ruled by natural law, or by custom; and all positive law is to him custom. Thus, he says laws are established when they are promulgated, but they must be confirmed by the custom of those who live under them. A little later Gratian Bracton in England said that while other countries used written law, England alone used unwritten law and custom. At the same time Beaumanoir in France said that "All pleas are determined by the custom... the king is bound to keep and to cause to be kept, the customs of the country."
In middle ages from Seventh Century to the end of the Sixteenth, political thinking runs to distinguish between the king and the tyrant which was found in the actions of the men. In its practical sense the principle that the king ruled according to law and tyrant was one who violated or ignored the laws. Therefore, the constitutional doctrine arose in European countries that the king cannot take any action against the person or property of any of his subjects except by process of law. This doctrine finds place in the famous clause of Magna Carta. Thus, doctrine of natural rights passed into realm of practical reality by declaration of Magna Carta. By this declaration as early in 1215 Barons were able to force King John an absolute Monarch to sign the Magna Carta, bill of individual rights. It was in the world's recorded history as first declaration which acknowledged that there are certain rights of subjects which could not be violated even by a sovereign in whom all power was religiously or legally vested.

This movement further continued. In Leon in 1188 Alfonso IX of Spain swore that he would not take action against any man except by judgement of the court, and in the courts of Valladolid in 1299 it was decreed that no one was to be killed deprived of his property till his case had been heard by fuero and Law. This was also constitutional law of France as testified by Gerson in
the fifteenth century, and by De Seyssel and Machiavelli in the sixteenth; cases between the king of France and a private person were subject to the jurisdiction of the Parliament.  

1.4  THEORIES OF SOCIAL CONTRACT:

Doctrine of natural law and natural rights received further insight by the theorists of social contract. Locke's essays on the "Law of Nature" furnish his rationalistic doctrine of 'natural law'. In seventeenth century Sir Robert Filmer's position is that "Men are not naturally free" and upon this foundation his absolute monarchy stands. Robert Filmer presented his doctrine of absolute monarchy in his 'Patriarcha' which was published in 1680 that men are not born free and therefore could never have liberty to choose either governors or form of Government; princes have their power absolute and by Divine Right, for slaves could never have right to compact or consent; Adam was an absolute Monarch, and so are all princes ever since.

John Locke describes this as false principles and as against this seventeenth century hypothesis of natural rights of fatherhood or positive donation from God, John Locke putsforth his theory of political power which is derived from the consideration of natural estate in which all men are and that is state of perfect
freedom to order the actions of men and to dispose of possessions and persons of men as they think fit within the bounds of the law of Nature, without asking leave or depending upon the will of any other man. A state of equality wherein all the power and jurisdiction is reciprocal no one having more than another, there being nothing more evident than that creatures of the same species and rank promiscuously born to all the same advantages of nature and the use of the same faculties should also be equal one amongst other, without subordination or subjection unless the Lord and the Master of them all should, be any manifest declaration of his will set one above another and confer on him by an evident and clear appointment, an undoubted right to dominion and sovereignty.

This equality of men by nature is judicious. Another political thinker Hooker looks upon it as so evident in itself and beyond all question that he makes it the foundation of that obligation to mutual love amongst men on which he builds duties they owe one another and from thence he says maxims of justice and charity is derived.

Impact of Locke's political doctrine in England and its contribution to English Constitutional Law at the close of seventeenth century was immense, and the
principles of the American Revolution were in large part an acknowledged adoption of ideas it contained.

Locke grasped the idea that political power exists and is exercised only for the public good. The basis of government is consent and the powers which are wielded by princes and rulers inhere in them not by any absolute right founded on grant, covenant or otherwise, but on conditions in the nature of a trust, and under liability to forfeiture if the conditions are not fulfilled.

The doctrine of natural rights had imputes from these theorists of social contract. Another theorist Rousseau sought to trace the genesis of political society and government in an agreement into which individuals entered to form a collective society to ensure their general interests, but at the same time without interfering with their natural rights which already belong to them as human beings.

In social contract theory Locke come with equation that man was governed by law of nature but for sake of better safety, he joined in a political society by means of a social contract for the mutual presentation of life, liberty and property. The government so set for naturally one of limited powers and was bound to the community by the guarantee that the people's natural rights would be preserved. The legislature was thus limited by natural
law, and any law made by the legislature contrary to the law of nature or violative of the natural rights of the individuals was invalid. The distinct contribution of Locke to the philosophy of fundamental rights was that he did not rest with the assertion of the natural rights against Royal arbitrariness, but he held them against legislature as well, even though the supreme power in the commonwealth might belong to the legislature.

The purpose of Locke was to justify the English Revolution of 1668. The Two Treatises of Government, which were published in 1690, not only confute the doctrine of absolute monarchy founded on divine right but also envisage political system in conformity with the innovations of the conventions of parliament. Locke sought, as he said -

"to establish the throne of our great Restorer, our present King William, and make good his title in the consent of the people".

In the achievement of his object, he formulated a democracy in which government by consent and with the goodwill of the governed is the ideal.

Contribution of the social contract theorists is that they have played a role of immense importance to support the Civil War in 1642 and the execution of Charles I in 1649. So also in attempting the Instrument
of government of 1653 which was exhibiting all the marks of a constitution as we understand it today. Had the Commonwealth continued, there is no doubt that there would have been a British Constitution embodying the fundamental principles of government as they had emerged from the conflicts of the Civil War. However, this process remained dormant and Charles II returned to the throne and there occurred Restoration rather than limiting the Government and than having certain views on the proper relation of executive and legislature and rights of subject. However, as the instinct was continued in 1688 there was Revolution and Bill of Rights came forward dealing with the constitutional matters. It had particular concern with limiting the powers of the king and safeguarding certain rights of the subject. But it makes no attempt to limit the powers of parliament. Indeed a consequence of the Revolution of 1688 was the development of complete supremacy or sovereignty of parliament as a matter of Law in the English system of Government. Thus, in England repeated confirmations of Magna Carta 1215, petition of right 1628, culminated in the Bill of Rights 1689 which was enacted in the parliamentary statue. The contribution of petition of rights as an instrument towards the development of fundamental rights is evident in its concluding words:
"... It may be declared and enacted, that all and singular the rights and liberties asserted and claimed in the said declaration are the true ancient and undoubtable rights and liberties of the people of this kingdom."

1.5 DOCTRINE OF RIGHTS IN REALITY:

1.5.1 British Pattern:

It has been discussed in length in the previous pages that with the Magna Carta (1215 A.D.) had come the idea that men could not be deprived of their life, liberty or property except in accordance with the law. Further, the petition of rights, the Bill of Rights and the Habeas Corpus Act recognised the basic rights of Englishmen. These written documents with declaration of rights of Man became symbols to which men could appeal in later generations and could claim higher law tradition. In England there is no written constitution, therefore, constitutional guarantees are not specifically stated. It might be because of the protagonists' belief that to state in writing such rights is to limit them or to entrench them reservations.

In liversidge V. Anderson Lord Wright observed:

"In the constitution of this country there are no guaranteed or fundamental rights, The safeguard
of British liberty is in the good sense of the people and in the representative and responsible government.

A.V. Dicey put it that the right to individual freedom is a part of the constitution, because it is inherent in the ordinary law of England.

It may be stated that the rights or liberties of Englishmen are neither defined nor guaranteed, but they are guaranteed by their tradition and common law. Individuals in England have right to do anything subject to ordinary law or common law. There is no code of fundamental rights is secured by judicial decisions determining the rights of individuals in particular cases brought before the Courts, which protect the rights by issuing appropriate remedies. Thus judiciary is the guardian of individual rights. However, a fundamental difference may be stated; that the courts in England have fullest power to protect the rights of individuals as against executive tyranny. But the Courts are powerless as against the legislative encroachment upon individual rights. Thus it may be said there is sovereignty of the Parliament and supremacy of law in England. Doctrine of sovereignty of parliament is covered in detail in the other chapter of this work i.e., under judicial review. It denotes that parliament is the sovereign law making body and laws once made by the parliament cannot be changed except by the parliament
itself and such laws as ordinary laws of England, or common law. It may be because Englishmen in their struggle against arbitrary power of the king and inroads by the king on the rights of individuals like right to liberty, equality and property which were asserted since 1215 A.D. periodically, relied on the common law and not on abstract rights of man. To put it in another words will be that the Englishmen relied not on natural right which were identical to the traditional charters as people think that they ought to have are just. These rights which they have by tradition of having once possessed. Blackstone put this in his commentaries as "absolute rights of Englishmen such as personal security, personal liberty, private property are also the rights of mankind." Therefore, in England individual rights are founded on the ordinary laws of England. Hence they can be changed by Parliament. Further there are no fundamental rights as against the legislature. The courts in England are guardians of individual liberty as against executive. Therefore, as has been already mentioned, the Magna Carta, Bill of rights are the written documents in the form of charters and in the nature of declaration of rights in common law, which were aimed at to be brought out against the executive and not against Parliament of legislature.
1.5.ii. Declaration of Independence in United States:

The theory of natural rights entered into the realm of constitutional realism with two revolutionary documents namely Declaration of Independence in United States and French Declaration of Rights of Man which asserted that there were certain rights which were inalienable and for which it was the duty of the State and its organs to maintain the same. So far as the Declaration of Independence in United States is concerned, the colonies in America subsequently became United States. They took with them in the beginning common law of England and the ideas of liberty, equality and property. The people of colonies resented the kings of England trampling on those rights while governing those colonies, when the dispute between colonies and the Kings of England came to head apart from several charters granted to the colonies. Colonists were aware that the political take over of the concept of the law of nature embodying therein the natural equality and freedom of men can be put as a concrete demand upon the State to be embodied in legislative document. By that time colonies became clear with two ideas. Doctrine of rights of man and the need to limit legislative power by a written constitution. These ideas of Americans were rather strange to the concept of traditional rights and English legal notions of common law. The political agitation
American colonies was spirited and aimed at the realisation of the concept of liberty and equality as qualities inherent in man's nature as a rational being and further to claim the same as inviolable fundamental rights, which are sanctioned by law of nature even within the state and to demand the recognition and protection of positive law for the said fundamental rights. The beginning of which can be found in virginian declaration of rights in 1776 and its success in the Declaration of American Independence. History of incorporation of first amendment guarantees and drawing up of Bill of Rights various points of time, they pledged to secure these freedoms in the written constitution of free India.  

Even before India gained independence in 1947, the Constituent Assembly had begun its deliberations and adopted the historic objectives Revolution moved by Pandit Nehru. This formed the basis not only of the various provisions of the Constitution but of its preamble also. The Assembly declared in the resolution its firm resolve to draw up a constitution guaranteeing inter alia, freedom of thought and expression. The discussions on this subject in the Constituent Assembly Debates and incorporation of right to freedom of speech and expression under the Constitution has been discussed in detail in later part of the thesis.
REFERENCES

1. Malinowski: 'Freedom and Civilization'.


3. Quoted by John Stuart Mill 'On Liberty'.

4. Cf., P. Jagan Mohan Reddy,
   'Liberty Equality And the Constitution'
   Asutosh Lectures for 1978 Calculatta University).

5. Marathi Encyclopedia of Philosophy; 1974,

6. Ibid, Note No.5.

7. Judaism and Human Rights in Judaism;
   A quarterly Journal of Jewish life and thoughts.


13. See Supra Note No.4 at page 6 and 8.

14. Supra at Note No.4 at page 35 and 36.


16. 4 Blackstones Commentaries, 80 Wendel Ed.,1854.


20. Ulpian: Digest: I 17, 32.


26. Ibid.

27. John Locke: Two Treatises of Government, p. 4 and 5.


33. Blackstone: Commentaries; p.128.


35. Ibid, at 42, 43, 45, 46, 49.


...