CHAPTER 2

HISTORICAL PERSPECTIVE OF MEDIA
FREEDOM AND RIGHT TO PRIVACY

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2.1 Meaning and Development of Freedom of Media-

As soon as printing was invented in the 15th century, obstacles were
set up in order to prevent the new invention from influencing public
opinion through the free circulation of news and ideas. In the English-
speaking world, Henry VIII introduced press licensing in 1536. Printers
and writers were the first to fight for the simple right to printing and the
press in England was the first in Europe to fight for its freedom.
Newspapers and gazettes became part of the English political spectrum
with the setting up of modern political institutions in the 17th century.
Parliament gradually gave up enforcing the Licensing Act as from 1679,
and it was finally abolished in 1694. Newspapers no longer needed state
approval and no longer needed authorization to be published, a major
landmark - in this respect England can be seen as the cradle of press
freedom.

It was in the United States that the freedom of press registered its
greatest triumph when it was incorporated into the Constitutional Bill of
Rights in 1791, through the First Amendment. However, the exact ambit
of this right has been the subject of much debate in the United States.
Because of its common law traditions, it was only natural that the framers
of the US Constitution understood the right as it had been understood in
Britain.
The importance of media arises from the importance of information, from the need of the human beings to stay informed. In India, the first recorded discussion of dissemination news can be traced back to Kautilya’s *Arthasastra*. In the 16\textsuperscript{th} century, the Christian missionaries brought the printing press to India. By 1780, India had its first newspaper when James Augustus Hicky, an ex-employee of the trading firm East India Company in Kolkata, brought out the ‘Bengal Gazette’\textsuperscript{1}. Later on in the far end of the 19\textsuperscript{th} century and on the advent of the 20\textsuperscript{th} century, newspapers became proponents of India’s ongoing freedom struggle. From the early newspapers to cable television, news channels media has assumed an even bigger role. It now acts as a bridge for dissemination of information, news, trends across the world.

2.1.1. *Historical Development of Freedom of Press*

2.1.1.1 Development of Freedom of Press in England

Historically, the origin of the concept of freedom of the Press took place in England. From the earliest times,\textsuperscript{2} in the West, persecution for the expression of opinion even in matters relating to science or philosophy was resorted to by both the Church and the State, to suppress alleged heresy, corruption of the youth or sedition. Such restraints, through licensing and censorship, came to be accentuated after the invention of printing towards the latter part of the fifteenth century, and the appearance of newspapers in the seventeenth century,-- which demonstrated how powerful the Press was as a medium of expression.


\textsuperscript{2} Thayer, *Legal Control of the Press* (1962), pp. 5-7, 2 (45-132/77).
Shortly after their emergence, newspapers came to take up the cause of the Opposition against monarchical absolutism, which in turn, led to different methods of suppression. It is in protest to such governmental interference that the freedom of the Press was built up in England. Opposition to governmental interference, which had been brewing on for some time, was supported by logical arguments by Milton in his _Areopagitica_ (1644), for instance, that free men must have the ‘liberty to know, to utter, and to argue freely according to conscience, above all liberties’. Any form of censorship was intolerable, whether imposed by a royal decree or by legislation.

Since there is neither written Constitution nor any guarantee of fundamental rights in England, the concept of freedom of the Press, like the wider concept of freedom of expression, has been basically negative. In the oft-quoted words of Dicey, it simply means that:

“Writers in the Press....stand in substantially the same position as letter-writers....”

And that a person has-

“the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written”.  

Dicey also quoted Lord Mansfield’s statement in the _Dean of St. Asaph’ case_.

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3 E.g. Royal Proclamations, Prohibitions, Licence and Monopoly, Decrees of the Star Chamber.


5 _R. v. Dean of St. Asaph_, (1784) 3 T.R. 428.
"The liberty of the press consists in printing without any previous licence, subject to the consequences of law" and observed "no such thing is known with us as a licence to print, or a censorship either of the press or political newspapers."  

In other words, freedom of the Press, in England, means the right to print and publish anything which is not prohibited by law or made an offence, such as sedition, contempt of court, obscenity, defamation, blasphemy.  

This negative perspective was nicely expressed by the French commentator De Lonme:

"Liberty of the press consists in this: that neither courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed."

2.1.1.2 Development of Freedom of Press in America-

The struggle for freedom of press is one of the greatest triumph when it came to be guaranteed by a written Constitution, as a fundamental right. In 1776, the Virginia Bill of Rights asserted-  

"Freedom of press is one of the great bulwarks of liberty, and can never be restrained but by despotic government."

This was followed by Federal Bill of rights, incorporated into the constitution of the United States by the First Amendment  

\[ ^6 \text{Lovell v. Griffin, (1938) 303 U.S. 444 (451).} \]

\[ ^7 \text{D. D. Basu, Law of the Press, (Prentice Hall of India, New Delhi}^{2\text{nd}}\text{ ed. 1980), p 20.} \]

\[ ^8 \text{Congress shall make no law .... abridging the freedom....of press. 1791.} \]
The Constitution did not elaborate what was meant by ‘freedom of press’, but since the United States imported the common law from England, it is natural that the fathers of the bill of Rights understood it in the Blackstonian sense of absence of prior restraint,\(^9\) and that is evident from the very text of the First amendment which was drafted in the negative sense, as a prohibition on legislative power.

Social and economic developments in the U.S.A., in modern times, have added a ‘positive’ content to the initial negative approach of freedom of press. Thus it has come to include not only absence of prior restraint of any form, as distinguished from subsequent punishment for an unlawful publication; but also a freedom from control as to what may be published though the press and from any restraint which may even indirectly hamper that freedom.\(^10\)

In the U.S.A., this broader aspect of the freedom of press has been formulated judiciously in these words-

“the guarantee of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential.”\(^11\)

It is now fairly established that no governmental agency can dictate to a newspaper in advance what it can print and what it cannot.\(^12\)

It is now firmly established in the U. S. A., that democracy cannot thrive on ‘standardization of ideas either by legislatures, courtsor

\(^9\) Patterson v. Colorado, (1906) 205 U. S. 454 (462)

\(^10\) Cf. Express Newspapers v. Union of India, casebook (1), 207 (para. 36)

\(^11\) Bigelow v. Virginia, (1875) 44 L. Ed. 2\textsuperscript{nd} 600.

dominant political or community groups.'\textsuperscript{13} On the other hand it rests on a competition of ideas on public issues and even provocative and controversial views which strike at prejudices and pre-conceptions.\textsuperscript{14}

As Cooley pointed out, mere absence of previous restraints was not enough. Subsequent punishment might also be odious, unless it was subject to constitutional limitations.

2.1.1.3 Development of Freedom of Press in India-

Since there were no fundamental rights in India prior to Independence, there was no guarantee of the freedom of expression or of the Press. The footing of the Press was explained by the Privy Council\textsuperscript{15} to be the same as in England, namely, that of an ordinary citizen so that it had no privileges nor any special liabilities, apart from statute law.

The Constitution of India guarantee [in Art. 19(1) (a) ] the fundamental right of freedom of expression, and the Supreme Court lost no time in declaring that the freedom of the Press was included in that guarantee.\textsuperscript{16} The result was that the Press could not be subjected to any restrictions by making a law unless that law itself was constitutionally valid, i.e., consistent with Cl. (2) of Art. 19. The immediate gain under the Constitution, in short, was that while in England, the Press could not claim any right or privilege that was denied by any statute, in India, the validity of that statute itself became open to challenge. Even subsequent punishment has been brought under constitutional check and judicial

\textsuperscript{13} Terminiello v. Chicago, (1949) 337 U.S. 376.

\textsuperscript{14} Cooley, Constitutional Limitations, II, xii, 883.

\textsuperscript{15} Arnold v. Emp., AIR 1914 P.C. 116.

review,—which is clearly absent in the U.K. To this extent, we have departed from the English precedent and advanced towards the American.

Then arose the question as to the contents of this Freedom of the Press which was derived from Art. 19(1) (a). It must be noted that from the beginning, the Supreme Court came to be influenced by the American decisions in the matter of interpreting Art. 19(1) (a) even though while interpreting other provisions of the Constitution the Court expressed reluctance in importing American case-law.

In the result, the positive trend of American decisions, just stated, has been followed by our Supreme Court from the 1958 decision in the Express Newspapers case down to Bennett Coleman. In the earlier case, the scope of freedom of the Press was, on a review of American decisions, summarized thus:

“....the freedom of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public;...

The purpose of such a guarantee is to prevent public authorities from assuming the guardianship of the public mind and freedom of press involves freedom of employment or non employment of the necessary

17 Express Newspapers v. Union of India, (1950) S.C.R. 12 (121); Case-book (I), 207 (para. 34).

18 Id.


20 Express Newspapers v. Union of India, (1950) S.C.R. 12 (121); Case-book (I), 207 (para. 34).
means of exercising this right or in other words, freedom from restriction in respect of employment in the editorial force."

Anything which indirectly affects the independence of the editorial authority of a newspaper would also constitute an interference with the freedom of the Press.

2.2 Right to Privacy has its Roots in Natural Law-

The right to privacy has its foundation in the instinct of nature. It is recognized intuitively, consciousness being witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual is instinctively resents an encroachment by the public upon his right which are of a private nature as he does the withdrawal of these rights which are of a public nature. A right to privacy in matters purely private is therefore derived from natural law.

Right to Privacy has its foundation in ‘Natural Law’, which with the ages groomed in the form of Human Rights. The history of origin and development of human rights is very fascinating. The origin of human rights is traced, by some scholars, back to the times of ancient Greeks. The fact that the human rights were recognized as natural rights of man is illustrated by a Greek play Antigone. In this play Sophocles describes that

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21 Id.


22 The term Human Rights seems to be used for the first time by Henry David Threau in his treatise Civil Disobedienece, which influenced the individuals like, Tolstoy, Mahatma Gandhi and Martin Luthar King. http://www.rweb.org/history.gitmail, 2.9.2007.
Antigone’s brother, while he was rebelling against the king, was killed and his burial was prohibited by the King Creon. In defiance of the order Antigone buried her brother. When she was arrested for violation of the order she pleaded that she had acted in accordance with the “immutable, unwritten laws of the heaven” which even the king could not override.\textsuperscript{24}

As described by Fawcett, “Human Rights are sometimes called fundamental rights or basic rights or natural rights. As fundamental or basic rights are the rights which can not, rather must not, be taken away by any legislature or any Act of the government and which are often set out in a constitution. As natural right they are seen as belonging to men and women by their very nature. They may also be described as ‘common rights, for they are rights which all men and women in the world would share, just as the common law in England, for example, was the body of rules and customs which, unlike local customs, governed the whole country.\textsuperscript{25}

In ancient period there was link between natural law and natural rights. Natural rights were found in the Greek and Roman Stoics, Hugo Grotius, the founder of modern International Law, and of John Milton and John Locke, the ideological architects of English revolution of the 17\textsuperscript{th} century. John Locke classically presents the ideology of natural law as early as 1689 in his essay on “Civil Government”. He stressed on providing everyone an entitlement of defending his right to life, freedom and property. In medieval times the church and the German emperor in their fight against each other supported their cases by ‘natural law’. After the French Revolution the rights of individuals given in the Constitution as ‘inalienable’ were said to be based on ‘natural law’. The American Constitution also incorporates many principles of ‘natural law’. American

\textsuperscript{24} Sophocles: Antigone, The Unwritten Unchanging Law of Gods.
Judges, in the name of ‘natural law’ principles, resisted social legislation. In fact, the theories about natural law have not been evolved to explain any given legal system, but rather to serve an ulterior end, namely, the fulfillment of the social need of the age.

Here it would not be out of context to discuss the evolution of idea of Natural law’ through the windows of different ages-

2.3 Ancient Theories and the Evolution of Natural Justice –

2.3.1 Greek Thought-

In Greece political conditions caused the birth of ‘natural law idea. The Greek thinkers developed the idea of ‘natural law, and laid down its essential features. Heraclitus pointed out that the reason is one of the essentials of beings. The instability of political institutions and frequent changes in law and government in small city states of Greece made some jurists to think that law was for the purpose of serving the interests of the strong and was a matter of expediency. But the same conditions made some jurists to think on different lines against changing governments, arbitrariness and tyranny. Philosophers started thinking of some immutable and universal principles. This gave them the idea of ‘Natural Law’. We find a very systematic and logical expression of the idea.

Socrates said that like natural physical law there is a natural law. Man possesses ‘insight’ and this ‘insight’ reveals to him the goodness and badness of things and makes him know the absolute and eternal moral rules. This human law is not in conformity with moral law it would be disobeyed. According to him, it was rather the appeal of the ‘insight’ to obey it, and perhaps that was why he preferred to drink poison in

obedience to law than to run away from the prison. His theory was a plea for security and stability, which was one of the principal needs of the age.

His pupil Plato supported the same theory. According to him, Gods gave to all men in equal measure a sense of justice and of ethical reverence so that in the struggle of life they may be able to form permanent unions for mutual preservation. In the ideal state of Plato, each individual is given that role for which he is best fitted by reason of his capacities.28

But it is Aristotle that we find a proper and logical elaboration of the theory. According to Aristotle, man is a part of nature in two ways; first, he is the part of the creatures of the God, and, second, he possesses active reason by which he can shape his will. By being the part of the nature, the law discovered by reason is called ‘natural justice’. Aristotle defined ‘natural justice as “that which everywhere has the same force and does not exist by the people thinking this or that.” So far as its relation with positive law or legal justice is concerned, he said that “legal justice is that which is originally indifferent but when it has been laid down is not indifferent; e.g. that a prisoner’s ransom shall be a mina or that a got and not two sheep shall be sacrificed and again all the laws that are passed for particular cases”29 ” In this way, ‘natural law’, as opposed to ‘positive law’, has invariable contents. Positive law should try to incorporate in itself the rules of ‘natural law’. But even it is deficient or falls short of the ‘natural law’ standard or principles, it should be obeyed. The law should be reformed rather than be broken. He argued that slaves must accept their lot for slavery was a ‘natural’ institution. Aristotle gave ‘natural law’ a very solid ground to stand upon. The fullest elaboration of ‘natural law’, in Greek legal philosophy, was made by Aristotle. His

29 Aristotle, Book 5, Chap. 7,1134b.
thesis has inspired great philosophers even in modern times. Philosophers like Kant, Hegel, Kelsen and Stammler owe much to him.

2.3.2 Roman Thought-

In Rome, Stoics built up on the theory of Aristotle but transformed it into an ethical theory. According to them, the entire universe is governed by ‘reason’. Man’s reason is a part of the ‘universal reason’. Therefore, when he lives according to reason, he lives according to nature or lives ‘naturally’. It is the moral duty of man to subject him to the ‘law of nature’. The laws of nature are of universal application and are binding on all men. Positive law must conform to the ‘natural law’.

2.3.3 Natural Law Affected Legal Development in Rome-

2.3.3.1. The stoic Law of Nature-

“The Stoic school philosophy was founded by a thinker of Semitic origin by the name of Zeno (350-260 B. C.) Zeno and his followers placed the concept of “nature” in the center of their philosophical system. By nature they understood the ruling principle which pervades the whole universe and which, in a pantheistic manner they identified with God\(^{30}\)........ The law of nature was to him identical with the law of reason. .......The Stoics taught that man should order all his faculties in a rational manner....Reason, as a universal force pervading the whole cosmos, was considered by the Stoics as the basis of law and justice.\(^{31}\)

The theory of Stoics exercised great influence upon the jurists during Republican Period and some of them paid high esteem to ‘natural law’. But in Roman system the theory of ‘natural law’ did not remain

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\(^{31}\) Ibid.
confined only to theoretical discussions. Roman were very practical people. They used ‘natural law’ to transform their narrow and rigid system into a cosmopolitan one. In this way natural law exercised a very constructive influence on the Roman law. In ancient Roman Jurists we find three divisions of law: ‘Jus civile’; ‘Jus gentium’; and ‘Jus naturale’. Roman civil law or ‘jus civile’ was only for Roman citizens, but on ‘natural law’ principle Roman magistrates applied those rules which were common with foreign laws to foreign citizens also. The body of law which grew up in this way was also called; ‘jus gentium’ and it became a part of the Roman law. It represented the good sense and the universal legal principles and, therefore, conformed to ‘natural law’. Later, on ‘jus civile’ and ‘jus gentium’ became one when Roman citizenship was extended to all except only a few classes of people. But still there existed a conception of ‘natural law’ to which the new transformation did not conform because slaves were still deprived of the benefits of the new law. Roman lawyers did not bother themselves with the problem of conflict between ‘positive law’ and ‘natural law’. Though there were some jurists who considered ‘natural law’ superior to ‘positive law’ may be disregarded, majority of the jurists did not enter into this question. Here is a reference from De Re Publica32, Was Jus naturale for the Romans a higher law by which the validity of positive law was measured? For Cicero33 it emphatically has that function: “It is not allowable to neither alter this law nor deviate from it, nor can we be released from this law, either by the Senate or by the people.

2.3.4 Indian System and Natural Rights –

32 De Re Publica, Book 3, 22.
33 Cicero (106-43 B.C.), the great Roman Lawyer and statesman were strongly influenced by the ideas of the Stoic philosophers, supra.
Hindu legal system is perhaps the most ancient legal system of the world. They developed a very logical and comprehensive body of law at very early times. A sense of ‘justice’ pervades the whole body of law. But the frequent changes in the political system and government and numerous foreign invasion, one after the other prevented its systematic and natural growth. Under the foreign rule no proper attention could be paid to the study of this legal system. Many theories and principles of it are still unknown, uninvestigated. Whether these was any conception of ‘natural law’ (in the sense in which the term is understood in modern times) or not, and if there was any, what was its authority and its relation with ‘positive law’ are the questions which cannot be answered with great certainty. However, some principles and provisions can be pointed out in this respect. According to the Hindu view, law owes its existence to God.\(^{34}\)

### 2.4 Dark Ages and Natural Rights -

During Dark Ages, the early Christian Fathers expressed view on the ‘law of nature’ from a theological base. Important of them is St. Augustine. According to him, the union with divine is the end of law. To attain this end the physical instincts of the body should be suppressed. Nature misleads and corrupts man, and therefore, it should be overcome and destroyed. The institution of man, such as government, or property, etc. is the products of sin. If human laws are contrary to the law of God, they are to be disregarded. This approach is completely in contrast to the theories we have discussed earlier. Later on, in medieval time, Christian

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\(^{34}\) Law is given in ‘Shruti’ (that which is heard known as Vedas) and ‘Smrities’ . The king is simply to execute that law and he himself is bound by it and if goes against this law he should be disobeyed. Puranas are full of instances where the king were dethroned and beheaded when they went against the established law.
Fathers modified this approach and gave a respectable place to ‘natural law’.

2.5 Medieval Theories-

During the dark and long period between the collapse of ancient civilization and the emergence of the medieval order, the Fathers of the Church, of whom Ambrose, Augustine and Gregory are the most notable, preserved the continuity of the idea of natural law and, at the same time, began to give it a different meaning and foundation.35

Catholic philosophers and theologians of the middle Ages gave a new theory of ‘natural law’. Though they too gave it theological basis, they departed from the orthodoxy of early Christian Fathers. Their views are more logical and systematic. Thomas Acquina’s views may be taken as representative of the new theory. His views about society are similar to that of Aristotle. Social organization and state are natural phenomena. He defined law as ‘an ordinance of reason for the common good made by him who has the care of the community and promulgated. “He divided law into four categories: (a) Law of God, (b) Natural Law, which is revealed through the reason of man, (c) Law of Scriptures or Divine Law, and (d) Human Laws. Natural law is apart of divine law. It is that part which reveals itself in natural reason. This part is applied by human being to govern their affairs and relation. This human law or ‘positive law’, therefore, must remain within the limits of that of which it is a part. It means that positive law must conform to the law of the scriptures. Positive law is valid only to the extent to which it is compatible with ‘natural law’ and thus in conformity with ‘eternal law’. Church is the authoritative interpreter of the law in scriptures. Therefore, it has the authority to give verdict upon the goodness of positive law also. Thomas

justified possession of individual property, which was considered sinful by the early Christian Fathers.

Acquinas’ approach has its merits. He attached sanctity to social and political organizations and pleaded hard for preserving social stability. He defines law as “an ordinance of reason for the common good made by him who has the care of the community and promulgated.”36 Though he said that human law is valid only in so far as it is in conformity with ‘natural’ or ‘eternal law’, he added that man should obey it even if it unjust. It is necessary “in order to avoid scandal or disturbance….. A man should even yield his right”. He identified ‘natural law’ with reason, although this ‘reason’ was the reason of the Catholic Church. Later on, the theological garb was shaken off and ‘reason’ became the basis of the new secularized ‘natural law’ theories. Catholic jurists of modern times have built upon the theory of Acquinas but have modified it considerably which was necessary under the changed conditions.

2.6 Rationalism and other New Ideas and Developments –

This period marks a general awakening and resurgence of new ideas in all the fields of knowledge. New and developed branches of knowledge and discoveries of science shattered the foundation of established values. ‘Rationalism’ became the creed of the age. Secondly, the development in the field of commerce created new classes in the society which wanted more protection from the state. “The rising commercial middle class wanted protection of its rapidly increasing property interests. They all appealed to general principles of natural in justification of their claims.”37 Colonization caused a rivalry among the States. It gave birth to the

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37 sup. at p. 114.
conception of nationalism. One implication of this conception was that the state must have full sovereign powers. These factors, combined together, created forces to overthrow the dominance of the Church. New theories supporting the sovereignty of the state were propounded. ‘Reason’ is the foundation-stone of all these theories but it is secularized ‘reason’ and not the theological ‘reason’. The ‘natural law’ theories of this age have also the same characteristic. These theories proceed from the supposition that a ‘social contract’ is the basis of society.

2.7 Social Contract Theories and Individual Freedoms -

Though ‘social contract’ is mentioned in Plato’s Republic\(^3\) also, it is with Italian Marsiliius of Padua, who lived in the first half of the 14\(^{th}\) century, that we find it in the form of a concept. The concept, in brief, is that in the beginning man lived in the natural state. They had neither any government nor any law. This state has been described by some as hardship and oppression, and by others as of bliss and joy. (The former theory came to support the absolute power and the latter the freedom of the individual). The men entered into an agreement (known as pactum unionis) for the protection of their lives and property. Thus, society came into existence. They undertook to respect each other and live in peace. Then they entered in a second agreement (known as pactum subjectionis) by which the people, who had united together earlier, undertook to obey an authority and surrendered the whole or a part of their freedom and rights and the authority on its part guaranteed every one of them the

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17. Therefore when men act unjustly towards one another, and thus experience both the doing and the suffering, those amongst them who are unable to compass the one and escape the other, come to this opinion: that it is more profitable that they should mutually agree neither to inflict injustice nor to suffer it. Hence men began to establish laws and covenants with one another, and they called what the law prescribed lawful and just. (Plato’s Republic, Book 2, 358 Lindsay Tran.)
protection of his life property and to a certain extent liberty. Thus ‘Government’ or ‘Sovereign’ or ‘Ruler’ came into being\textsuperscript{39}.

It was Hugo Grotius who gave classical expression to the new foundations of natural law as well as to the principles of modern international law in his celebrated work, \textit{De Jure Belle ac Pacis} (1623-25)\textsuperscript{40}. Grotius built his legal theory on ‘social contract’. His view, in brief, is that political society rests on a, social contract’. It is the duty of the sovereign to safeguard the citizens because the former was given power only for that purpose. The sovereign is bound by ‘natural law’. The law of nature is discoverable by man’s ‘reason’. It should be carefully noted that the ‘reason’ of Grotius is not the ‘reason’ of Thomas. It is self-supporting ‘reason’ of the man. Now the question may arise: Should the ruler be disobeyed if he does not act in conformity with the ‘natural law’? Grotius says that however bad the ruler may be, it is the duty of the subject to obey him. He has no right to repudiate the agreement or to take away the power. This view of Grotius creates an inconsistency in this theory. On the one hand, he says that the ruler is bound by the ‘natural law’, and on the other hand, he expresses the view that he should, in no case be disobeyed. The reason of this inconsistency is that Grotius theory was propounded to serve some other ends also. His main concern was the stability of the political order. It was essential for establishing international peace and order of which he was a sincere advocate.

\footnote{39 The implications of the ‘social contract’ theory are many and far reaching but two of them are very important: first, that the people are the source of political power, and second, that the concept of society of these philosophers is individualistic.}

\footnote{40 Grotius could build on the work of distinguished forerunners, in particular Gentilis’ \textit{De Jure Belli} (1598) as quoted by Friedmann, \textit{sup}.}
On this theory Grotius\textsuperscript{41} laid the foundations of International law. From the ‘social contract’ theory he deduced a number of principles in this regards: First that the governments are equal; second, that the governments in their foreign relations are perfectly free; Third, that the promises made between the governments are of a binding nature because to fulfill a promise is a principle of ‘natural law’.


\textit{Hobbes’} theory also proceeds from the ‘social contract’. Before the ‘social contract’, man lived in a chaotic state. According to him, man’s life in a state of nature was one of fear and selfishness. It was ‘solitary, poor nasty, brutish and short’. The idea of self-preservation and avoiding misery and pain are inherent in his nature. He desires society also. These natural inclinations induced him to enter into a contract and surrender his freedom and power to some authority. The law of nature can be discovered has a natural desire for security and order. This can be achieved only by establishing a superior authority which must command obedience. “\textsuperscript{42}The chief principle of natural law for Hobbes is the natural right of self preservation. This is connected with his view of the state of nature in which- ‘men live without a common power to keep them all in awe, they are that condition which is called Warre; and such warre, as if of every man, against every man.”\textsuperscript{43}

It can also be assessed from his theory that, Hobbes is a supporter of absolution. Subject has no rights against the sovereign. Though he makes a suggestion that the sovereign should be bound by ‘natural law’, it is not more than a moral obligation. Hobbes theory of ‘natural law’ is a

\textsuperscript{20} Hugo Grotius (1583-1645), a great Dutch Jurist and thinker, was not only one of the fathers-if not the father-of modern international law, but also the author of an influential natural law philosophy. \textit{supra}, at p. 35.

\textsuperscript{41} As quoted by \textit{Friedmann}, \textit{id}, \textit{supra}, at p. 120.

\textsuperscript{42} \textit{Leviathan}, Part 1, Chap. 13. (As quoted by \textit{Friedmann}, \textit{id}, \textit{supra}, at p. 120.)
plea to support the absolute authority of the sovereign. He advocated for an established order.\textsuperscript{44}

It has been pointed out earlier that during the Middle Ages the Church remained supreme. Then arrival Renaissance and the changed conditions and the new political theories strongly advocated for the sovereignty of the state. Now the state emerged very powerful. It went to undermine the importance of the individual. But the subsequent developments made the individual to desire some freedom. A new interpretation of ‘natural law’ was necessary in order to support the individual against the power of the sovereign. Locke championed this cause. He interpreted the ‘natural law’ and the ‘social contract’ in a new way. “Locke assumed that the natural state of man was a state of perfect freedom, in which men were in a position to determine their actions and dispose of their persons and possessions as they saw fit, and that it was, furthermore, a state of equality, in the sense that no man in this state was subject to the will or authority of any other man. This state of nature was governed by a law of nature which, looking toward the peace and preservation of mankind, taught men that, all persons being equal and independent, no one ought to harm another in his life, health, liberty or possessions.”\textsuperscript{45} According to Locke, the state of nature was a golden age, only the property was insecure. It was for the purpose of protection of property that men entered into the ‘social contract’. Man, under this contract, did not surrender all his rights but only a part of them, namely, to maintain order and to enforce the law of nature. His natural rights as the rights to life, liberty and property he retained with himself. The purpose of government and law is to uphold and protect the natural rights.

\textsuperscript{44} During the Civil War in Britain, his theory came to support the monarch. In fact, it stood for stable and secure government. Individualism, materialism, utilitarianism and absolutism all are interwoven in the theory of Hobbes.

\textsuperscript{45} Locke, \textit{Of Civil Government} (Everyman’s library ed., 1924), Bk. II, Ch. ii, secs. 4 and 6. (As quoted by Bodenheimer, \textit{supra}, at p. 45.)
So long as the government fulfils this purpose, the laws given by it are valid and binding but when it ceases to do that, its laws have no validity and the government may be overthrown.

Locke exercised great influence and his writings commanded almost scriptural respect in the 18th century. It led to parliamentary democracy. His ‘inalienable rights’ of the individual came to be embodied in many constitutions and were guaranteed to the individual.46 “Thus Locke became essentially the great opponent of Hobbes, to whose theory of absolutism he opposed his theory of the individual’s inalienable rights. The struggle between their opposite ideals-authority and liberty- has been a dominant theme of political history ever since.”47

‘Social contract’ and ‘natural law’ received a new interpretation from Rousseau. According to him, ‘social contract’ is not a historical fact but a hypothetical construction of reason. Before this contract, man was happy and free and there was equality among men. By the ‘social contract’ men united for the preservation of their rights of freedom and equality, for this they surrendered their rights not to a single individual-sovereign, but to the community to which Rousseau gives the name of ‘general will’. “In order to achieve this goal, each individual by a social contract alienate all his natural rights without reservation to the whole community.”48

It is the duty of every individual to obey the ‘general will’ because in doing so he directly obey his own will. The existence of the State is for the protection of freedom and equality. The state, and the laws made by it both are subject to ‘general will’ which creates the state. If the

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46 The 19th century’s ‘laissez faire’ theory in economics derived inspiration from his views.
47 supra.
government and law do not conform to ‘general will’ they are to be overthrew. In brief, Rousseau lays emphasis on the community and departs from Locke who laid emphasis on the individual. He is in favour of people’s sovereignty. His ‘natural law’ theory stands for the freedom and equality of men.49

2.8 Modern Theories-

“From the middle of the nineteenth century to the beginning of the twentieth the theory of natural law was at low ebb in most of the countries of Western civilization. It was largely displaced by historical-evolutionary interpretations of law and by legal positivism.”.......

“Inquiries concerning the ends and ideals of legal regulation tended to vanish from jurisprudence and legal philosophy, and at the close of the nineteenth century the philosophical search for the ultimate values of legal ordering had practically come to a halt.”50

In the nineteenth century, the popularity of natural law theories suffered a decline. The ‘natural law’ theories reflected, more or less, the great social, economic and political changes which had taken place in Europe. ‘Reason’ or rationalism was the spirit of the eighteenth century thought. A reaction against this abstract thought was overdue. The problem created by the new changes and developments demanded practical and concrete solution. The excessive individualism gave way to a collectivist outlook. Modern skepticism preached that there are no absolute and unchangeable principles. A Priori method of the natural law philosophers was unacceptable in the emerging age of science. On the

49 Rousseau’s theory’s influence was great. It inspired French and American Revolutions and gave impetus to nationalism. His ‘general will’ was glorified by later jurists and some philosophers such as Fichte and Hegel defied it. Thus his theory prepared ground for new theories of government and law to come.
other hand, the historical researches disclosed that the ‘social contract’ was a myth. The forces, thus generated, inflicted blows after blows to the edifice of ‘natural law’ and shattered its foundations. The historical and analytical approaches to the study of law were more realistic and attracted jurists. The nineteenth century was, in general, hostile to the ‘natural law’ theories.

2.8.1 Revival of ‘Natural Law’

Towards the end of the nineteenth century, a revival of the ‘natural law’ theories took place. It was due to many reasons: First, a reaction against nineteenth century legal theories which had exaggerated the importance of ‘positive law’ was due; second, it was realized that abstract thinking or a priori assumptions were not completely futile. The pure positivist approach failed to solve the problems created by the changed social conditions. The material progress and its effect on the society made the thinkers to look for some values and standards and the World Wars the twentieth century and a general moral degeneration which the world is facing in modern times obliged the people to recognize them. The emergence of ideologies such as Fascism and Marxism caused development of counter ideologies and thus contributing to the revival of ‘natural law’ theories.

However, the new ‘natural law’ theories have taken stock of the various approaches to law during the past and the present centuries (analytical, historical, and sociological). They have sought guidance also from the contemporary theories in other branches of knowledge. The modern jurists have given their theories of ‘natural law’ in this background. Now ‘natural law’ is relative and not abstract and

unchangeable. The new approach is concerned with practical problems and not with abstract ideas. It attempts to harmonize the ‘natural law’ with the variability human ideals and takes into account the new legal theories putting emphasis on society. To distinguish this approach to ‘natural law’ from the old theories, the former has been called ‘natural law with a variable content’. A pioneering attempt to create a modernized natural law philosophy based on a priori reasoning was made in Germany by Rudolf Stammler. He distinguished the idea of law from the concept of law.

H.L.A. Hart stated that there were certain substantive rules which were essential if human beings were to live continuously together in close proximity. “These simple facts constitute a core of indisputable truth in the doctrines of natural law”. Hart places primary emphasis on an assumption of survival as a principal human goal. We are concerned with social arrangements for continues existence. There are, therefore, certain rules which any social organization must contain; and it is these facts of human nature which afford a reason for postulating a “minimum content” of natural law. In his words “It is in this form that we should reply to the positivist thesis ‘law may have any content’.”

According to Finnis, “natural law” is “the set of principles of practical reasonableness in ordering human life and human community”. He sets up the proposition that there are certain basic goods for human being. The basic principles of natural law are premoral. These basic goods are objective values in the sense that every reasonable person must assent to their value as objects of human striving. Finis lists seven-

\[\text{\textsuperscript{52}}\text{Among the philosophers who have given their theories in the present century, Stammler and J. Kohler hold important place.}\]  
\[\text{\textsuperscript{53} Ibid.}\]  
\[\text{\textsuperscript{54} Lloyd’s Introduction to Jurisprudence (6th ed., Sweet and Maxwell, 1994), p. 119.}\]
knowledge, play, aesthetic experience, sociability, practical reasonableness and religion.

2.8.2 Natural Law Principles Weaved by Natural Law Theories-

This brief survey of the theories of ‘natural law’ reveals that its concept has been changing from time to time. It has been used to support almost any ideology-theocracy, absolutism, individualism and has inspired revolutions and bloodshed also. “Natural law” provided a firm ground for theorizing and voicing the ideas and thoughts of a particular age. It has greatly influenced the positive law and has modified it. As the law is an instrument not only of social control but of social progress as well, it must have certain ends. A study of law would not be complete unless it extends to this aspect also. The ‘natural law’ theories have essentially been the theories regarding the ends of law. The jurists like Kalsen and Duguit whose subject-matter of study was only the positive law, could not keep the ‘natural law’ away from their theories. The ‘natural law’ principles have been embodied in legal rules in various legal systems and have become their golden principles. Numerous instances from the English, American and Indian law can be cited.

2.8.3 Development of Natural Law in Common Law Countries-

“The use of natural law ideas in the development of English law revolves around two problems: the idea of supremacy of law, and, in particular, the struggle between common law judges and Parliament for legislative supremacy ……..and justice between man and man”\(^{55}\) Coke as Chief Justice, vigorously asserted the supremacy of common law over Acts of Parliament in his famous dictum in Bonham’s case.\(^{56}\) In England, where ‘natural law’ never flourished in the form of a theory, its principles

\(^{55}\) See Friedmann, supr. at p. 133.

\(^{56}\) (1610) 8 Co. C. p. 114a.
found their place in the body of law. The judicial control of administrative tribunals, recognition of foreign judgments, and application of foreign law in case of conflict of laws are founded on the principle of natural justice. ‘Reasonableness’ in tort and elsewhere is an outcome of ‘natural law’ ideas. Many concepts of the English law such as quasi-contract, unjust enrichment etc. are based on ‘natural law’ principles. ‘Justice, equality and good conscience’ which has exercised a great formative influence on the English law is founded on ‘natural law’ ideas.

In America, the ‘natural law’ theories have effected a great legal development. In no other legal system the principle of natural justice has no much moulding and creative effect as in America. The Supreme Court since 1803 has asserted its right under the Constitution, to test validity of any administrative or legislative act in the light of Constitution.\(^{57}\)

The ‘Declaration of Independence’, 1776, reflects a great influence of the ideas of Locke and Rousseau on it. It says that the rights of life, liberty and the pursuit of happiness are the inalienable rights of men. In America, the power of legislation is limited by the principle of natural justice and the Supreme Court has the power of judicial review of the legislation. In determining the validity of enactments, the principle of natural justice plays a very important part.

2.8.4 Development in India-

In India, number of legal principles and concept has been borrowed from England, and as pointed out earlier, many of them are based on ‘natural law’ principles, such as, ‘quasi-contract’, ‘reasonableness in tort’, ‘justice, equality and good conscience’. The Indian constitution

\(^{57}\) *Marbury v. Madison*, 1 Cranch 137 (1803)
embodies a number of principles of ‘natural law’.\textsuperscript{58} It guarantees certain basic liberties i.e., Fundamental Rights to citizens. It empowers the High Courts and Supreme Court to exercise control over the administrative and quasi-judicial tribunals and one of the grounds on which orders passed by the latter may be set aside is the violation of the principles of ‘natural justice’. The principle of natural justice have been incorporated in Article 311 which says that no civil servant can be dismissed, or removed or reduced in rank until he has been given reasonable opportunity of showing cause against the action proposed to be taken against him. The ingredients of the principle of natural justice and its scope and applicability have been laid down by the Supreme Court in a number of cases.\textsuperscript{59}

Going through the analysis of the above description of natural law theories it is established that the germs of rights of individuals germinated by now. John Locke classically presents the ideology of natural law as early as 1689 in his essay on “Civil Government”. He states that the providing everyone an entitlement of defending his right to life freedom and property. Even though the concept of natural law was rejected by Edmund Burke and Jeremy Bentham, it was applied in 1945 at Nuremberg for the trial of the offenders of the Second World War. Ancient laws have failed to recognize any areas of individual freedom from the state interference and the codification of the rights have not been recognized.

2.9 Human Rights and Right to Privacy-

Broadly speaking human rights may be regarded as those fundamental and inalienable rights which are essential for life as human

\textsuperscript{58} Article 14 as interpreted by Supreme Court in \textit{Maneka Gandhi’s case}, see infra.

being. Human rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex etc., simply because he or she is a human being. Human rights are thus those rights which are inherent in our nature and without which we can not live as human beings. Human rights and fundamental freedoms allows us to fully develop and use our human qualities, our intelligence, our talents, and our conscience and to satisfy our physical, spiritual and other needs.\textsuperscript{60} Lexicon meaning of the term ‘Human rights’ is: “Claims asserted or those which should be or sometimes stated to be those which are legally recognized and protected to secure for each individual the fullest and freest development or personality and spiritual, moral and other independence.”\textsuperscript{61} The Protection of Human Rights Act, 1993 defines Human Rights as “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.”\textsuperscript{62}

\textbf{2.9.1 First Codification-}

One of the early attempts at codification of something like a catalogue of rights can be seen in 1188 A.D. when King Alfonso IV of the Kingdom of Leonso and confirme a series of rights including the right of the accused to a regular trial and the right to inviolability of life, honour, home and property, on his lords, conferred on the feudal assembly of the Kingdom of Leon. In the Godden Bull of King Andrew-II of Hungary (1222), the King guaranteed among other things, that no noble would be arrested, without first convicted in conformity with the judicial procedure. It is applied only to the nobles.

\textsuperscript{62} Sec. 2(d) The Protection of Human Rights Act, 1993.
2.9.2 Magna Carta\textsuperscript{63} (1215 A.D.)-

The English King John at Runnymede accepted to grant certain of rights to a particular section of his people. Its famous clause 39 stating that – “No freeman shall be taken or imprisoned or dispossessed or outlawed, or banished or in any way destroyed, nor will we go upon him, nor send’ upon him, except by the lawful judgment of his peers or by the law of the land”. It has been termed as symbol of individual liberty for centuries to come.

2.9.3 Modern Origin of Human Rights-

The modern legal concept of human right is however the product of a specific period of history. In Europe, it emerged under the umbrella of the philosophical, political and legal values which gained ground from the Renaissance, when man or the king himself came to be recognized as an identity with an individuality of his own. The renaissance, the reformation, the puritan revolt, the glorious revolution and the American Revolution all gave new meaning of the concept of human rights. Radical by the standards of the age in which they occurred, but not radical enough to succeeding generations. In the 17\textsuperscript{th} century, in England the immediate rights of the English man were successfully secured through such land marks as the English petition of rights in 1628 and the English Bill of Rights in 1689\textsuperscript{64}. These ideas then traveled widely across the seas securing grounds in the few colonies, found their flowering on the American Declaration of Independence (1776), The Virginia Declaration of Rights (1776) and the American Bill of Rights (1791). Jefferson’s famous words at the declaration of American Independence are ominous.

\textsuperscript{63} It is also called Magna Charta, the original Carta was in Latin which consisted 70 clauses.

\textsuperscript{64} British Bills of Rights of, 1689, established the idea of representative government formally and became a charter of liberty for England.
“We hold these truths to be self evident – that all new are created equal, that they are endowed with certain inalienable rights; that among these one life, liberty and pursuit of happiness”\textsuperscript{65}.

The trident of equality, liberty and fraternity found its ‘most’ emphatic expression in human history in 1789, when the French Assembly declared the rights of man and the citizen decreed by the French National Assembly on 20-26 August, 1789. The French Declaration of the Rights of man and of the citizen in this Article-I stated,

“Men are born and remain free and equal in rights; social distinctions can be based only upon public utility”.

The government in the opinion, of the writers, who were apparently influenced by the teachings of Rousseau, must preserve and safeguard these rights and if it fails to do so it has no right to remain in existence.\textsuperscript{66}

The American Declaration of Independence (1776), the Virginia Declaration of Rights (1776), and American Bill of Rights (1791) carried not only the ideas of the earlier English documents but in some case their very text as well. Nor was it only English that exported its doctrine of Rights: the powerful influence of the French philosophers of the enlightenment is visible among all the American Revolutionaries. If the French philosophers had helped provide one colonies with an ideology, the revolution of the colonies, in its turn, gave the French an example to follow and had an enormous impact on the events in France. The French

\textsuperscript{65} Document of Declaration of Independence, July 4, 1776 was drafted by Thomas Jefferson.

\textsuperscript{66} Ferguson and Brun, \textit{A Survey of European Civilization}, pp. 565-612, Martin, \textit{French Liberal Thought in the 18\textsuperscript{th} Century}. 
Declaration of the Rights of Man and of the Citizen (1789) was directly inspired by earlier American examples.

The term human rights were introduced for the first time in the United State Declaration of Independence in 1776 and the US constitution embodied a Bill of Rights. During the 19th and 20th centuries, this message of liberty, equality and fraternity, guaranteeing individual liberties, set forth by the English, the American and the French, was followed on the entire continent of Europe and also swept over the American, the Asia, Africa and Caribbean. While the Great Britain, following the tradition of its unwritten constitution, did not enact any constitutional guarantees, the Mexican Constitution of 1917, the Weimar Constitution of Germany of 1919, and the Constitution of Republic of Spain in 1931, granted traditional political and civil rights to all its citizens.

The Russian Revolution of 1917, however, provided a radically different meaning to civil and political rights, even though it followed the American and the French precedent while the western ideas of individual freedom were designed to prevent interference with the fundamental rights, mainly by public authorities, the Soviet concept ignored this aspect and promised to make available all technical facilities without promising freedom in the choice of the purpose for which they were to be used.

67 It led other European countries to include provisions in their laws for the protection of human rights, Sweden in 1809, Spain in 1812, Norway in 1814, Belgium in 1831, Denmark in 1849. Prussia in 1850 and Switzerland in 1874 made the provision for the fundamental right of men.

68 The term Human rights seems to be used for the first time by Henry David Thoreau in his treatise Civil Disobedience, which influenced the individual like, Leo Tolstoy, Mahatma Gandhi and Martin Luther King. Available at http://www.hrweb.org/history.html.
Human right is a twentieth century name for what has been traditionally known as ‘natural rights’ or the ‘rights of man’.  

The Charter of the United Nations, in its Preamble declared,

“We, the People of the United Nations determined...

To reaffirm faith in the fundamental human rights, in
dignity and worth of human person, in equal right of
men and women, and of the Nations large and small...”  

2.10 Development and Growth of Privacy Right\textsuperscript{71} and the United Nations-

2.10.1 Establishing the Systems (1945-48)-

The Charter of United Nations signed in San Francisco on 26\textsuperscript{th} June 1945 is the first international treaty whose aims are expressly based on universal respect for human right. The principal organs of the United Nations with regards to human rights are the General Assembly, the Security Council, The Economic and Social Council, The International Court of Justice and The Secretariat. The specialized bodies are—

1. The commission on Human Rights.

2. The Commission on the Status of Women.


\textsuperscript{70} Preamble of the Charter of the United Nations.

\textsuperscript{71} The reference can be made here of the instrument in which attempt has been made to enunciate human rights standard, “The protection of right to privacy to a certain extent by the Guidelines Governing the protection of privacy and the Trans- Border Flows of Personal Data, adopted in 1980 in the form of a recommendation by the Council of the Organization for Economic Co-operation and Development (OECD) in Paris.” See Shearer, sup., at p. 337.
3. Sub-commission on prevention of discrimination against minorities.

4. Sub-commission on information and press. It was disbanded in March 1952.

5. The ILO.\textsuperscript{72}

6. The UNESCO.\textsuperscript{73}

\textbf{2.10. 2 Improving the System (1949-66)-}

The UNO has passed several conventions on different human rights for the benefit of different types of persons-


2. Supplementary Convention against Slavery (1953),

3. Convention on the Political Rights of Women (1952),


5. Convention on Consent of Marriage, Minimum Age For Marriage, and Registration of Marriage (1962),

6. The Human Rights of persons deprived of their liberty were the subject of the Standard Minimum Rules for the Treatment of prisoners, adopted by the First United Nations Congress on The Prevention of Crime and Treatment of Offenders (1955). The Congress was to be held every five years.

7. Convention Relating to the Status of Refugees (1951),


\textsuperscript{72} International Labour Organization.

\textsuperscript{73} United Nations Educational Social and Cultural Organisation.

10. International Convention on the Elimination of All Forms of Racial Discrimination (1965). This was adopted on 21 December, 1965 and was the first United Nations Human Rights’ Instrument to set up an international monitoring system particularly, the procedure for complaints from individuals.

11. On 20 November, 1959, the United Nations adopted the Declaration of the Rights of the Child,

12. The Two International Covenants on Human Rights, one on the Economic, Social and Cultural Rights and other on The Civil and the Political Rights were adopted in 1966 and entered into force in 1976. More than 120 States, on all continents, are today parties to these two most significant Covenants.

13. The Optional Protocol to the Covenant on Civil and Political Rights was adopted by the United Nations General Assembly in 1966. This deals with the system of monitoring its implementation.

2.10.3 Operating the System (1967-93) -

The two International Covenants on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights came into force on January 3 and March 23, 1976, respectively, nearly 10 years after the General Assembly opened these Covenants for signature, ratification and accession. As the legal expression of the moral principles underlying the Universal Declaration of Human Rights, these two covenants were seen as instruments that would encourage States to give greater impetus to their human rights commitments. In the sense that they emanated from the

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Universal Declaration, these Covenants constitute the corner-stone of the legal protection of human rights recognized by the United Nations. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights, aware of the importance of their activities in establishing this legal protection on solid grounds, acted as role models for other UN organs created under more specialized instruments. They created an elaborate dynamic process of considering reports by States or individuals. Six of the seven major international human right instruments drawn up by the United Nations provide for the establishment of a monitoring and follow up mechanism. Only in the case of the covenant for the Economic, Social and Cultural Rights the monitoring mechanism similar to those of other covenants was adopted by a separate resolution of the Economic and Social Council. The most extensive body of case law arises from the Human Rights Committee, which was set up in 1976 to examine communications from individuals who claim violations of their rights as set out in the International Covenant on Civil and Political Rights.

On 6 June 1967, the Economic and Social Council adopted a resolution which established the procedures for examining the human rights violations. It authorized the Commission to “examine information relevant to gross violations of human rights and fundamental freedoms” and to make a thorough study of situations which reveal a consistent pattern of violation of Human Rights as exemplified by the situation in the Republic of South Africa, the Territory of South West Africa and Southern Rhodesia. The first case examined was that of Chile following the violent overthrow in September 1973 of the constitutional Government of President Salvador Allende. The United Nations Centre for Human


76 Later a working group, and then a Special Rappoteur were appointed whose mandate lasted till 1990, on the establishment of a democratically elected government.
Rights also played an important role in the framework of monitoring the respect for human rights. It has been the principal instrument of the Secretariat in the field of human rights since 1982.77

2.10.4. Expanding the System (1993-95)

The most important event in this phase was the Vienna World Conference on Human Rights and its follow up. The World Conference on Human Rights in Vienna from 14 to 25th June 1993 provided an opportunity to reaffirm the equality and interdependence of human rights. It emphasized that an action for promotion and protection of economic, social and cultural rights is an important as civil and political rights. The United Nations Human Rights programme, clearly establishes a link between development, democracy and all the different categories of Social, Economic, Cultural Political and Civil Rights. It has created a post of the United Nations High Commission for human rights.

2.10.5 International Bill of Rights-

On the recommendation of the Third Committee, the General Assembly unanimously adopted two International Covenant79, namely, The International Covenant on Civil and Political Rights and International Covenant of Economic, Social and Cultural Rights on December, 16, 1966. While the Covenant on Civil and Political Rights, 1966 was adopted by 106 votes to nil, the International Covenant on Economic, Social and Political Rights was adopted by 105 votes to nil. The General Assembly also adopted an optional protocol to the International Covenant on Civil

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77 In 1993, an Assistant Secretary General was appointed Director of the Centre for Human Rights.
78 Vienna Conference adopted a two part Vienna Declaration and a six-part 150 paragraph Programme of action. The declaration consists of 16 preambular paragraphs and 39 operative paragraphs. See S.K. Kapoor, sup. at p. 848.
79 The key stone of the Covenants was the Universal Declaration of Human Rights. See, Agarwal, sup. at p. 736.
and Political Rights, 1966, by 66 votes to 2 with 38 abstentions. After, 23 years, i.e. in December, 1989, the General assembly adopted yet another Protocol i.e. Second Optional Protocol to the International Covenant on Civil and Political Rights, on December 15, 1989.

2.10.6 Composition of the International Bill of Human Rights-

The International Bill of the Human Rights comprises of the following:

(1) The Universal Declaration of Human Rights, 1948,

(2) The International Covenant on Civil and Political Rights, 1966,

(3) The International Covenant on Economic, Social and Cultural Rights, 1966,


The keystone of two covenants is the Universal Declaration of Human Rights which was adopted by the General Assembly on 10 December 1948. The Covenants generally elaborate on the rights set forth in the Universal Declaration of Human Rights, 1948.

2.11 Right to Privacy and International Law-

'Privacy' is concerned with a man's dignity and liberty. It is a fundamental human right guaranteed by international laws. It has been an inalienable and integral part of human life since long. Initially, it had a very narrower scope as such thought to be included only 'right to be let alone'. Later, the increasing maturity levels of the democratic systems, rapid strides in science and technology, made its scope wider. Now the right to privacy covers many aspects such as, freedom of thought, control
over one's body, identity, solitude in one's home, control over self information, freedom from surveillance, protection of one's reputation, and freedom from searches and seizures etc. The USA is the motherland of right to privacy. Privacy's origin can be traced back to an article written by Warren and Brandeis\textsuperscript{80} published in 'Harvard Law Review' in 1890, in which the concept of Right to Privacy was discussed in detail for the first time. The popular, pioneer cases on the Right to Privacy i.e., \textit{Plessey v. Fergusson} -1896\textsuperscript{81} and \textit{Paolo Pavesich v. New England Mutual Life Insurance company}-1905\textsuperscript{82} of the USA reflect the nascent stage and represent the foundations of right to privacy.

There are strong legal bases for the right to privacy in international law. Article 12 of the Universal Declaration of Human Rights 1948, Article 14 of the International Covenant on Civil and Political Rights 1966, Article 16 of Convention on Rights of the Child of the United Nations 1989, Article 14 of the United Nation's Convention on Migrant workers 1990 speak about the Right to Privacy. In addition to this, a number of regional legal instruments also recognized the Right to Privacy. They are, Article 8 of the European Convention, Articles 11 and 14 of the American Convention on Human Rights 1978, Articles V, IX and X of the American Declaration on Rights and Duties of Mankind. The Organisation for Economic Co-operation and Development (OECD) framed certain guidelines pertaining to privacy protection and transnational transmission of personal information. The European Union Council too made some minor efforts through its data protection directives to establish data protection regulations.\textsuperscript{83}

\textsuperscript{80} Warren and Brandis "Right to Privacy", HLR Vol IV December 15, p.193 (1890).
\textsuperscript{81} 163 U.S. 537 (1896).
\textsuperscript{82} 122 Ga. 190, 50 S.E. 68 (1905).
\textsuperscript{83} For detailed discussion see chapter 6.
Since 1983 there have been a great variety of decisions of the court.\(^\text{84}\)

### 2.12 Right to Privacy in Ancient India-

India has essentially been gregarious society wherein cooperation and not competition, society and not solitude have been dominant themes of its culture and civilization. Hence sometimes it is doubted whether privacy is a value of human relation in India. Certainly it is wrong to suppose that the concept of privacy is alien to Indian culture.\(^\text{85}\)

There has been an advocacy of the concept of human rights leading to right to privacy, in the modern world, through various declarations in England, France and America, the Universal Declarations Human Rights and various Covenants by the United Nations. This has created an impression that the concept of right to privacy is modern and Western in origin. Far from being so, the concept is neither entirely western nor so modern, as may be seen from the following review of growth of the concept in our country. The truth is what the West has discovered about human rights now, India had in its deep rooted traditions since time immemorial. The philosophy of human rights in the modern sense took shape in India during the course of the British rule.

It will be useful to study the status of the concept of privacy rights as it existed and progressed from ancient to medieval and modern times up to the British rule in India.

#### 2.12.1 The Hindu Tradition and Right to Privacy-

The ancient law givers of India declares,

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“Sarvas swe swe grihe Raja”

Meaning thereby, every man is a king of his own house. The king was bound to uphold Dharma and to respect the privacy of citizens.⁸⁶

A deep look into our ancient Indian heritage of the sacred Vedas shows that the Rig-Veda cites three civil rights, that of Tana (body), Skridhi (dwelling place), and Jbhasi (life). But the Vedas are pre-historic; they offer guidance, inter alia, on religious and social obligations. The idea of equality was germane to the Vedas. In Rig-Veda the equality of all was declared in the following words,

“Ajyeshtaso Ak Nishtas Aitasa Bhratraona Vraghu Somagaya”

“Samano mantrah samiti samanamanah” and “samani vah akuti”. “Let us all live” together, eat tighter without any feeling of animosity was the tenets of the Rig-Veda. It has taken centuries in the history before this concept could effloresce in the elaboration of the Fundamental Rights of the Indian constitution.⁸⁷

Long before Hobbes, the epic Mahabharata described the civil liberty of the Individual in a political state. Even before the 2nd century BC, we find mention of elective kingship and the laws of nature, which even kings had to obey on pain of deposition. Also, the kings were required to take a pledge never to be arbitrary and always to act according to, “whatever law there is and whatever is dictated by ethics and not opposed to politics”. Our ancient Indian system was a duty-based society.

Ancient Indian theory of knowledge based on Upanishad which suggested mediation or upasana. Its aim is gradually to withdraw the aspirant’s mind from external things and direct it inward- to make him


⁸⁷ Part III of Indian Constitution.
more and more introspective so that he may get rid of his dependence on the objective world.  

One ought to build such house which may sustain and protect the inmates in all seasons and be comfortable. The passerby may not see the inmates not the inmates see them.  

Further the Ghiha Sutras elaborately contain the rules for the construction of house. The main door of the house was not supposed to face the door of another house. The house holder should not to be seen by unholy persons while performing religious rites, while dining in the house and passerby should not be able to see valuables.  

The best known ancient Indian Treatise, Arthastra, on the subject of the principles of law and government, treats of the “duties” of a king towards his subjects rather than of divine “prerogatives”.  

Kautilya’s Arthastra not only affirmed and elaborated the civil and legal rights first formulated by Manu but also added a number of economic rights. He states that “the king shall provide the orphan, the aged, the infirm, the afflicted and the helpless with maintenance; he shall also provide subsistence to helpless expectant mothers and also to the children they give birth to”.  

The Shantiparva of the great epic, the Mahabharata, dwells at length on the importance of the freedoms of the individual (civil liberties) in a state.

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89 Rigveda, Mandal 7, Sukta 55, Hymn 6.
90 See V.M. Apte, Social and Religious Life in Griha Sutras, p. 142.
91 By Kautilya (326-291 B.C.)
During historical times, we have a rock edict by the Mauryan King Ashoka the Great, which clearly lays down the high ideals of a perfect relationship between the king and his subjects. It says, “All men are my children. Just as I wish for my children that they should become endowed with all good and happiness of this world, and of the other world, so I wish for all men”.

Ashoka\(^ {92} \) sums up his intentions by saying that he wants the maintenance, governance, happiness and protection of the people to be regulated by dharma, and the people to follow day by day in their dependence on dharma and devotion to dharma (dhammena palana, dhammena vidhane...). The dharma preached by him is thus another name for the moral and virtuous life and takes its stand upon the good of all religions.

\subsection{2.12.2. The Buddhist Tradition and Right to privacy-}

Regard for human dignity is the basic social message of Budhism. Every person is enjoined upon to treat others as he or she has a love & attachment for himself or herself:

\textit{Attanam upanam katvan, na haneyanna ghataye II.} \(^ {93} \)

Buddhist thought has a comparatively wider spectrum regarding the concept of human dignity and rights than what the modern notion of human rights claims. Rules and norms professed by the Buddha are highly rational. The Buddha himself advised people not to accept his words simply because they are the Buddha,s words, but only after duly examining them with reason. Thus it provided freedom of thought & expression to the people.

\(^{92}\) Pillar Edict I.

\(^{93}\) Suttanipata, ed. and tr. Bhikshu Dharmarakhita, (Motilal Banarsidass, Delhi, 1977), p. 26
2.12.3 The Islamic Tradition and Right to Privacy-

Islamic law is a divinely ordained comprehensive system regulating public and personal matters as well. It is called Shariah which means the right path. The word Islam itself means total submission and surrender to God alone. Islamic law has developed by the immense, rich researchers of the qualified Muslim scholars and jurists based on the fundamental sources so as to keep with the requirements of the society. Islamic law explicitly protects privacy of home. The home derives its importance as a sanctuary for the family and carries with its associations and meanings which make it particularly important. The reference of privacy of home can be found in verse of Quran,

O ye, who believe, enter not houses other than yours own without first announcing your presence and invoking peace upon the people therein. That is better for you, that you will be heedful....and if you find no one therein, still enter not until permission hath been given, and if it to said unto; go away, for it is purer for you, Allah knoweth what you do.

The morality of Islam is based on the concept of Haya and Pardah. Haya implies shyness which a wrongdoer feels before God and his conscience. The Quran asserts that the urge to clothe oneself and conceal one’s shameful parts is inmate within man. Right to freedom from unreasonable intrusions extends under the Islamic law to one’s clothing is that no one is authorised to inspect the clothing of another person to determine what they be concealed therein without a reasonable cause.

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95 Quran xxiv: 27,28 quoted in Medani Abdel, Id.

96 Id.

97 Id.
person’s correspondence is also inviolable. As prophet Mohammed says, ‘He who reads a letter of his brother without his permission, will read it in hell’\(^{98}\). The ruler was prohibited to intervene in the private affairs of the citizens.

During the era of the Mughal rulers, particularly that of Akbar, that the administrative policy based on human rights principles of universal reconciliation and tolerance ushered in a new era. Even this policy was reversed by the later Mughals. Islamic authority relies more on human conscience than on public force. Islam contends that the civilization of peace must be, above all, a society of moral conscience.

Thus it is revealed from the foregoing discussion that Islamic society developed great practice of respect for privacy of home, of correspondence and of person, that is reflected through their cultural practices also.

2.13 Right to privacy in Modern India-

2.13.1 The British Rule and Right to Privacy-

When the British ruled India, resistance to foreign rule manifested itself in the form of the demand for the fundamental freedoms and civil and political rights for the people. The first reflection was witnessed in the first war of Indian Independence (1857), and later, when the Indian National Congress, which was in the vanguard of the freedom struggle, took lead in the matter.

As far back as 1895, within a decade of its establishment, the Indian National Congress prepared the 1895 Constitution of India Bill, also known as the Home Rule Bill. The bill envisaged a free India, a constitution guaranteeing every citizen basic human rights like freedom of expression, the inviolability of one’s own home, the right to property and equality before the law.

In its special session in Bombay\(^9\), the Indian national Congress demanded he incorporation of a declaration of the rights of the people of India as British citizens. It demanded guarantees of equality before the law; protection of liberty, life and property; freedom of speech and the press; and the right to form associations. The Indian National also included the principle of self determination as one of the basic rights\(^{100}\).

The constitution of free Irish State, which included a list of fundamental rights, had a profound influence on the thinking of the Indian national congress, which finalized a draft of the Commonwealth of India Bill in 1925, embodying a specific “Declaration of rights” containing seven fundamental rights.

The Madras session of the Indian national congress\(^{101}\) passed a resolution declaring that the basis for any future Constitution of India must be the Declaration of Fundamental Rights. In pursuance to the Madras Session resolution, an All Parties Conference appointed a committee under Shri Motilal Nehru. Reporting in 1928, this committee declared that the first concern of the people of India was to secure Fundamental Rights. As such this can be said to be the first effective demand of fundamental rights on the part of the subjected Indian people to taste the fruits of civil and political liberty. Interestingly, the

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\(^{9}\) Held on August 29, 1918, under the presidency of Hasan Imam.  
\(^{100}\) December 1918, Delhi Session.  
\(^{101}\) 1927.
constitution of the Indian Republic, enacted in 1950, incorporated ten of the 19 rights enumerated in the Motilal Nehru Committee Report.

The rights emphasized in the motilal Nehru Committee Report were:

1. The right to personal liberty, inviolability of dwelling place and property;

2. Freedom of conscience and profession and practice of religion subject to public order and morality;

3. The right of free expression of opinion and to assemble peaceably and without arms and to form associations and unions subject to public order and morality;

4. The right of free elementary education and of admission into any education institution maintained or aided by the state without distinction of caste or creed;

5. Equality of all citizens before the law and in civil rights;

6. The right of every citizen to the writ of habeas corpus;

7. Protection in respect of punishment under ex post facto law;

8. No discrimination against any person on grounds of religion, caste or creed in the matter of public employment, office or power or honour and in the exercise of any trade or calling;

9. The equality of right to all citizens in the matter of access to, and use of, public roads, wells and other places of public resort;

10. Freedom of combination and association for the maintenance and implementation of labour and economic conditions;
11. The right to keep and bear arms in accordance with regulations; and

12. The equality of the rights of men and women as citizens.

The Lahore Congress (1930) declared freedom from foreign rule as a fundamental right. The Karachi Congress (1931) passed a resolution on fundamental rights and social change in three parts:

(a) Fundamental Rights and Duties;

(b) Labor; and

(c) Economic and Social Programmes.

The question of a Bill of Rights for the Indian people came up before the Round Table Conferences, especially during the first and the third sessions, and was vigorously championed by Dr. B. R. Ambedkar, among others, for inclusion in the proposed constitution for India. But after expression lip service to these demands, they were rejected in the third session of the conference, on the alleged grounds that it was difficult to enforce such rights.

The Government of India Act of 1935 was passed without any Bill of Rights. It provided for only a few rights and privileges under sections 275, 297, 298, 299 and 300. Section 298 of the Act aimed at preventing discrimination against citizens in matter relating to holding, acquiring and disposing of property and carrying on trade in British India, on grounds of race religion or place of birth. Section 299 provided that no person shall be deprived of his property in British India, save by authority of the law.

The inauguration of the Federal Court of India in 1935, as an integral part of the Act of 1935, and as the highest interpreter of the constitution, initiated an era of judicial review unprecedented in the
history of India. Displaying a remarkable independence in pronouncing its decisions, the Federal Court showed a liberal attitude towards the provinces, it acted as an ardent protector of the civil liberties of citizens, and thus became a champion of social reforms and progress.

In 1937, the Indian National Congress Government, after being in office for some time in a few provinces, again voiced its demand for fundamental rights at its Calcutta Session in 1937. Pt. Jawahar Lal Nehru repeatedly made it clear that the goal of the national movement continued to be the end of all exploitation and the establishment of a just, social and economic order on attaining political freedom.

The decade of the 1940s generally marked a resurgence of interest in human rights. The denial of liberties under the German and the Russian systems and the activities of the UN Human Rights Commission set off currents to which assembly members were sensitive.

The British Cabinet Mission of 1946 accepted the soundness of the view, and recommended the constitution of an advisory committee of the Constituent Assembly to frame the constitution for an independent India. The Constituent Assembly adopted a resolution on January 22, 1947, solemnly pledging itself to incorporate, in India’s future constitution, lofty ideals of justice, equality and freedom, which have become the principal fibers of the preamble to the constitution. it is significant to mention that this assembly was highly inspired and influenced by the marked resurgence of interest in human rights during the 1940’s by the ideas and ideals of the Atlantic Charter and the UN Charter, and by the activities of the United Nations Human Rights Commission.

The Advisory Committee on Fundamental Rights, consisting of 54 members with Sadar Vallabh Bhai Patel as Chairman, presented an
interim and a supplementary report before the Constituent Assembly. In line with the Irish model, the Fundamental Rights Committee recommended the division of the rights in two parts. One part consisted of judicial rights in the same mould as the directive principles of the social policy of The Irish Constitution, which, though not cognizable in any court of law, should be regarded as fundamental in the governance of the country. The recommendation was duly accepted, and the decision of the assembly was incorporated by the drafting committee in Part Three of the draft constitution. Under the chairmanship of Dr. B. R. Ambedkar, the drafting committee prepared a draft of the constitution and presented it to the Constituent Assembly on November 4, 1948.

2.13.2 Right to Privacy- Post Independence-

Thus many basic rights, now considered important human rights, have been recognized as fundamental rights and incorporated in the Indian Constitution. The makers of our constitution had two alternatives – either to follow the British pattern wherein there is a system of auto limitation on state powers, or to follow the American pattern of incorporating the Bill of Rights in the constitution itself. They preferred the American pattern and included a number of human rights in Part III of the constitution, dealing specially with Fundamental Rights.

In India, though this right is not explicitly mentioned in the constitution, it is interpreted by the Supreme Court to be implied in the Article 21 (right to life) of the Indian Constitution. This has been repeatedly reiterated in a number of cases such as Kharak Singh vs. State of Uttar Pradesh (1963)\textsuperscript{102}, Gobind vs. State of Madhya Pradesh (1975)\textsuperscript{103}, R. Rajgopal vs. State of Tamilnadu (1994)\textsuperscript{104} and Peoples Union of Civil

\textsuperscript{102} AIR 1963 SC 1295.
\textsuperscript{103} (1975) 2 SCC 148.
\textsuperscript{104} “Auto Shankar” case, (1994) 6 SCC 632.
Liberties vs. the Union of India - 1997 (telephone tapping case)\textsuperscript{105}. The Apex court acknowledged the privacy infringements in these cases.

The 'Right to Privacy' has assumed much importance with the emergence of internet, bio-banks (gene bank etc.,) business process outsourcing, knowledge process out sourcing, development of software industries, enactment of antiterrorist laws, deterioration of the law and order situation, rising levels of crime rates (theft and fraud cases etc.) These developments led to the rampant privacy invasions. Despite its legal guarantee as a basic human right, it is invaded incessantly by the individuals and institutions. The 'internet' has penetrated into every sphere of human activity. It is intricately and inextricably connected with the day-to-day life of the present day Netizens. Modern man's life has been changed drastically and all his transactions have become more internet-based, internet-dependent in this global village. Personal information of an individual in this internet age is not just confined to four walls, or in our traditional desk, but is connected to the vast networked internet system. This is leading to privacy invasions. Most of our day-to-day transactions (financial, medical, school/college etc.,) are no more secure now. Our personal information is tracked, stored and later mis-utilized in the manner we do not wish often without our knowledge or consent. The law enforcing authorities too, under the veil of combating terrorism are infringing the innocent individual's Right to Privacy through their acts such as, phone tapping, surveillance of private lives and searches and seizures without complying necessary legal formalities etc.

The basic philosophy of this Right to Privacy is that every individual has a legal right to enjoy privacy over his person, property, territory and information so long it do not come in the way of the larger

\textsuperscript{105} (1997) 1 SCC 301
interests of the society. Nobody should disturb his privacy even the
governments, unless warranted by law. Even in inevitable interferences,
observance of certain norms, taking due care is a must in situations where
the acts of the State are likely to invade the privacy of the individuals. In
other words, striking a harmonious balance between the individual's Right
to Privacy and collective interests of the society at large such as nation's
security, law and order maintenance is crucial and vital.

2.14 Emergence of Need for Limitation on Freedom of Press
in Relation to Privacy-

The press is such a useful and indispensible instrument for
information and exchange of views and opinions in a modern democracy.
Now there is a relevant question as to the need of any form of regulation
or control. As we know that no liberty is absolute, so is the freedom of
press. The need for balancing these two competing interests has been
explained by Lord Denning in these words-

“The freedom of press is extolled as one of the great bulwarks of
liberty. It is entrenched in the constitutions of the world. But it is often
misunderstood.....it does not mean that the press is free to ruin a
reputation or to break a confidence or to pollute the course of justice or to
do anything that is unlawful ....”

Once the need for restriction is acknowledged, the inquiry would be
how much of restriction would be reasonable in the public interest. The
reasoning is,

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“Freedom carries with it responsibility even for press; freedom of the press is not a freedom from responsibility for its exercise...”\textsuperscript{107}

The press is not entitled to any absolute immunity\textsuperscript{108} from unlawful conduct anymore than any other individual.

This responsibility is to the society itself which has other public interests to maintain, apart from the freedom of expression. This is reason why not only freedom of the press, no constitutional right is absolute.

Rights are dependent upon the existence of the State and the maintenance of order so that the rights may be ensured and enforced. Hence, no right or freedom can be allowed to exercised in such manner as would jeopardized the very existence the state\textsuperscript{109} or the maintenance of public order, or undermine public morality, or a fair and impartial administration of justice\textsuperscript{110} which are essential for a civilized existence. Again, since a precondition of the enforcement of individual right is that the corresponding rights of other persons of should be similarly safeguarded, the freedom of expression cannot be so exercised as to undermine the reputation of any member of the public\textsuperscript{111}

\textsuperscript{107} \textit{Pennekamp v. Florida},(1946) 328 U.S. 331 (356), per Frankfurter, J.


\textsuperscript{109} \textit{Frohwerk v. U.S.} (1919) 249 U. S. 204 (206)


\textsuperscript{111} \textit{Time v. Firestone}, (1976) 44 U. S. 448.