

**FUNDAMENTAL FREEDOM AND HUMAN RIGHTS  
IN SOUTH ASIA: RIGHT TO LIFE, RIGHT AGAINST  
ARBITRARY ARREST AND DETENTION, FREEDOM  
OF SPEECH, THOUGHTS, OPINIONS, CONSCIENCE,  
EXPRESSION, OF THE PRESS AND FREEDOM OF  
RELIGION**

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**Preliminary**

**Overture:** Before beginning this paper an overture is required, because, the whole objective of this paper is to analyse the fundamental human rights which are constitutionally and legally guaranteed to the people of the South Asian family which consists of (in alphabetical orders): (1) Bangladesh, (2) Bhutan, (3) India, (4) Maldives (5) Nepal, (6) Pakistan and (7) Sri Lanka to which we all belong.

A question may, however, arise in the context of our respective countries and the question is, to what extent the above rights which are most basic and most fundamental to the existence of all human persons without distinction to live with honour and dignity are, in practice, preserved, protected, promoted and secured to us, all members of our South Asian family, although these are guaranteed in the supreme law of almost all these countries, their respective constitutions? I shall not give any answer to this question. After I analyse the contents of this paper, you yourselves find out the answer.

**The Subject-Matters of the Paper**

Although there are numerous facets of fundamental rights and human rights of every individual inhabiting mother earth, this paper will be, for time constraint, confined to only: (1) Right to life, (2) Right against arbitrary arrest and detention, (3) Right to Freedom of speech, expression and of the press, and (4) Right to freedom of religion.

**What are Human Rights or Fundamental Rights?**

“Human rights are those minimal rights which every individual must have against the State or other public authority by virtue of his being a 'member of the human family,' irrespective of any other considerations.”<sup>1</sup>

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<sup>1</sup> Basu, Durga Das; *Human Rights in Constitutional Law*, 1994, p. 5.

When human rights are guaranteed in a written constitution, they are called "fundamental rights". This is because a constitution is the fundamental law or supreme law of the country, the legality of all other laws being subject to it. Any law which is in conflict with this fundamental law of the country is ultra-vires and unenforceable. All other rights secured by the legislature in any law other than the constitution are, provided they are not in conflict with any provision of the constitution, therefore, called 'statutory rights' - they are not called "fundamental rights".

So, in a word, "fundamental rights" are the species of the genus, "human rights".

The concept of what is to-day called human rights is not at all a new concept although the expression itself is of recent origin, say, since the adoption of the United Nations Charter in San Francisco on 25 June, 1945, when the Second World War, the most devastating war that mankind had ever experienced, was coming to a close with Allied victory against the Axis Powers. The term, "human rights", found documentary expression in international jurisprudence and in constitutional history for the first time in the U.N. Charter.<sup>2</sup>

### **The Quest for Human Rights**

**The Genesis:** Ever since the beginning of human civilization and particularly, the beginning of political society, the tyranny of the ruling class has led men to the quest for a superior order which could treat all human beings living within the realm with equal justice. So, they tried to conceive of a Divine Law which could not even be violated by the sovereign and under which law the sovereign and the subjects would be equally subject. The early thinkers conceived that the rights guaranteed by such Divine Law could not be violated even by sovereign dictate and as sovereign it would be his primary duty to protect such Divine Law and Divine Rights as the Representative of the Divine Being.

**Sophocles and Natural Right:** About 400 years before the birth of Christ the Greek philosopher, poet and dramatist, Sophocles<sup>3</sup> developed the ideal of natural law and natural rights, which were synonymous with Divine Law and Divine Rights.

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<sup>2</sup> *The Charter of the United Nations Organization*, Preamble and Article 1, June 25, 1945.

<sup>3</sup> Sophocles was born in 496 BC in Coonus Hippins, now in Athens and was the son of an armoured maker. Among his more than 100 dramatic plays, Electra, Ajax, Trcehinial, Philoctites, Oedipur at Colones, Antigone. Dedipur or Oedipur Tyrannus are famous. The tyranny of the Greek kings of his time moved him so much that as a solution of such kingly tyranny he tried to develop the concept of Natural Law and Natural Right, which he considered as superior to any man-made law. He also performed military duties. He died in 406 BC at the age of 90.

But, the idea could never take any solid form and continued as a nebula in inspiring political thinkers from age to age until the English jurist John Locke propounded that natural law was (1632-1704) superior to man-made law.

**John Locke:** John Locke in his "Two Treatises of Government" published in 1690 attacked the theory of divine right of kings and the nature of the state conceived by another English Philosopher, Thomas Hobbes who had propounded that the sovereign alone had the divine right to rule and the subjects are bound by divine law to be ruled by the king and the king alone. Lock's attack on the theory of absolutism of the king thus propounded revolutionized not only the contemporary political philosophy but has been inspiring each and every oppressed who longed for liberation from bondage of autocracy. Locke argued that sovereignty did not rest with the state but with the people, and that the state was supreme, but only if it was bound by civil and what he called "natural law". Locke went further and held that revolution was not only a right but also an obligation, and he advocated a system of checks and balances in government. He also believed in freedom of religion and in the separation of church and state.

**Hugo Grotius:** In the meantime, contemporary with John Hobbes a Dutch philosopher, Hugo Grotius, who is called the father of international law, propounded a revolutionary theory reiterating that the sovereign had no right to violate the natural rights of his subjects and the sovereign who trampled these natural rights had no right to rule. He also propounded that in such circumstances the neighbouring states had the right to intervene and overthrow the oppressive sovereign. Grotius was three centuries ahead of his time. What he had conceived more than three hundred years ago is now being translated into practice by the United Nations Organisation when it takes collective action against gross violation of human rights in any country.

**Rousseau:** Meanwhile, the tyrannical rule of the French monarchy and the French aristocracy crossed the last limit of oppression of the common on people and at this juncture, influenced by Locke, the French philosopher, Jean Jacques Rousseau published his "Discourse on the Origin and Foundation of Inequality Among Mankind" in 1755. He expounded the view that sciences, art and social institutions have corrupted human kind and that the natural or primitive state was morally superior to the so-called "civilized" state. He had to flee Paris in 1756.