

Jurisprudence of Non-Derogable Rights

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Abstract:

The main objective behind writing this research paper was to know what are the legal norms of human rights which any individual can justify during a time of war or emergency.

The surrounding of any legal methodology has mainly consisted of a viewpoint of social welfare as well as integrity for all. The concept of Human Rights is one of the best legal ways regarding the practicality of social norms. This research paper Titled: “Jurisprudence of Non-Derogable Rights” is a piece of framework subjected towards non-other than Human Rights. This paper consists of the other shadow of some human rights in the name Non-Derogable Rights.

As we are aware that human rights are not absolute in the major of democratic nations due to which the governments get some excessive powers at the time of emergency which perhaps dignifies humanity. Many democratic nations started the provisions of Non- Derogable Rights which will be considered absolute and may not be subjected to any derogation from any individual during an emergency or a period of war.

This research paper helps in recognition of the non-derogable rights at the international as well as state levels, this paper also empowers the role of the American Covenant over spreading the awareness of these non- derogable rights.

Keywords: Human Rights, Non-Derogable Rights, Right to Life, Right against Torture, Right to legal recognition

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Introduction:

The word 'rights' is considered one of the most powerful words today, just because of its direct relation to humanity. The importance of rights can be justified for the adequate development of human personality and peaceful life. Exactly and properly, human rights can be defined as those fundamental rights to which every person inhabiting any part of the world should be deemed entitled, merely under having been born a human being. Due to some important observations by the scholars, this concept initiated, several kinds of deprivations followed up on the inferior. A human requires the applicability of diverse values as well as capabilities just to uplift their normal life that can be whether moral or legal.

Today many of us are aware of the word 'human rights' but somehow are not enlightened by the sole purpose of such a powerful word. At present, many organizations are working at their best to serve everyone with what they deserve but if we observe our past, the concept of human rights doesn't align with the philosophers and scholars¹. Society is following the law from the Ancient Period, at that period based on dharma and the epics, especially concerning the four Vedas. In one way it was made to follow the advancement of every creature, Buddha's teaching also enlightens the valuable rights of humans which are inherited by the Vedas.

Some rights can't be suspended in a state of emergency thus the International Covenant on Civil and Political Rights under the Article 4(2) enhances this idea. The concept of non-derogable rights was introduced by the ICCPR just in the favour of basic rights and fundamental rights. In maximum charters, the state consists of the right to suspend the rights but after the working of the covenant it included the provision during the threat towards the nation, some of the laws must be followed up and there should not any kind of discrimination in providing the rights.

There are some Human Rights Committees other than ICCPR which allocate the citizens to enjoy non-derogable rights under certain circumstances².

The efficiency of Non-Derogable Rights:

On a primary basis, these rights are non-conventional rather than progress to certain treaties which are held concerning Human Rights at certain levels. Several clauses are maintained to be used in useful situations and thus they are further referred just to derogate some of the human rights. Further in this, some clauses have been codified at the international level to protect human rights in certain situations, those clauses are –

Article 4(1) of the International Covenant on Civil and Political Rights

¹ Saksham Khunger, Non-Derogable Rights - Indian Law Portal Indian Law Portal (2021), <https://indianlawportal.co.in/non-derogable-rights/>

² Gazala Parveen, Protection of mankind through non derogable rights - human rights iPleaders (2021), <https://blog.iplayers.in/protection-mankind-through-non-derogable-human-rights/>

Article 15(1) of the European Convention on Human Rights
Article 27(1) of the American Convention on Human Rights³
Observing the Indian Constitution, Part 3 of the Indian Constitution i.e. from Article 12 to Article 35 deals with fundamental rights. Since a maximum of the rights are not absolute but have been granted protection through the law of Writ by the Supreme Court under Article 32 of the Indian Constitution. During the situation of emergency as defined under Article 359(1) of the Indian Constitution, the president was having the power to declare all the fundamental rights as null-and-void but after the Fourth-Fourth Constitutional Amendment, Article 20 and Article 21 of the Indian Constitution were declared as non-derogable rights. Hence in case of emergency Article 20 and Article 21 can't be suspended. The objection sometimes rises that the doctrine of treaties can be legalized in that manner where there are provisions of some written laws, so in that regarding Article 38 of the Vienna Convention on the Law of Treaties at different levels accepts that nothing prohibits the application of rules foreseen in a treaty which may extend further through the way of international custom.⁴

Non-Derogable Human Rights at International Level:

As already described above there are non-derogable rights at different levels which are eight in number that are referred to by several laws. It is very mandatory to focus that what are these rights and under which laws they come or are referred. These non-derogable rights are the following:

1. Right to Life –

This provision establishes a positive obligation to make adequate provisions in their law for the protection of human rights.

• International Covenant on Civil and Political Rights:

It is considered one of the most important non-derogable rights that comes under Article 6 of the International Covenant on Civil and Political Rights. The importance of this right reflects as a matter that the CP Covenant described this right as "inherent" for every human being. Some circumstances led to being differentiated by the General Assembly and the same discussions were held on Article 6(1) of the CP Covenant. Hence the delegates of the USA and the UK contended that these must be realistic and in certain circumstances, only this right must be justified.

Another aspect that came out was the face of the scope of rights as well as their limitations, also some exceptions were offered which would not violate this right such as – the execution of the death sentence proposed following the law or killing in self-defense, and some other obligations.

³ (2021), <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights>

⁴ Saksham Khunger, Non-Derogable Rights - Indian Law Portal Indian Law Portal (2021), <https://indianlawportal.co.in/non-derogable-rights/>

The next aspect was the use of the word 'arbitrarily' in the clause as it may criticize the Commission on the ground that it was vague and certain other options were opened under it. An argument was also raised on the issue of abortion and regarding the same an amendment came but only some countries preferred it on a legal basis⁵.

- **European Convention for The Protection of Human Rights and Fundamental Freedoms:**

The right to life comes under Article 2 of the European Convention. This emphasizes the power and law of the State concerning the right to protect life. In case of a person enforces this law, the executive must investigate all possibilities under it. In the case of McCann, Farrell, and Savage Vs UK, it was held that to claim the law of 'right to life' the matter of procedural aspect has also been made mandatory. Under this also, the issue of the right of an unborn child has arisen but in the case of Paton Vs the UK, the Commission clarified it also.

The Commission suggested some exceptions under which the law can take someone's life and except for these four exceptions, this right prohibits the actual taking of life. These four exceptions are as follows:

- (a) Death Penalty
- (b) In defense of any person from unlawful violence
- (c) To effect a lawful arrest or to prevent the escape of a person lawfully detained
- (d) In action lawfully taken to quell a riot or insurrection⁶

- **American Convention on Human Rights:**

Article 4 of the American Convention consists of the right to life and under the American Convention, another right of 'juridical personality is also considered under non-derogable rights. This law presents potential difficulties under State law which have been legalized under certain circumstances. As with other clauses here also there are some exceptions given as per the provision of law, also the right to apply for pardon or commutation of a sentence of death is guaranteed⁷.

- **African Commission on Human and People's Rights:**

Article 4 of the African Charter guarantees the right to life as supreme and non-derogable. Under this charter, any right is non mentioned as non-derogable but it

⁵ [Tbinternet.ohchr.org](https://tbinternet.ohchr.org) (2021),

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_878_5_E.pdf

⁶ The right to life under Article 2 of the European Convention on Human Rights: twenty years of legal developments since McCann v. the United Kingdom - Biddle Law Library - University of Pennsylvania Law School, [Link.law.upenn.edu](http://link.law.upenn.edu) (2021), <http://link.law.upenn.edu/portal/The-right-to-life-under-Article-2-of-the-European/ci0ciwn06qM/>

⁷ [Cartercenter.org](https://www.cartercenter.org) (2021),

https://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf

is assumed that a real and practical significance when the right has been violated with impunity⁸.

2. Right against Torture:

The prohibition of torture and cruel, or any kind of degrading and medical inhuman treatment without the person's consent is a concern by the international community.

- **International Covenant on Civil and Political Rights:**

Article 7 of the CP Covenant describes the right against torture which is non-derogable as per the charter. The purpose behind this article to declare as non-derogatory is to protect the integrity and dignity of every individual. This right is justifiable for a common man as well as for the imprisoned ones including the person of medical institutions. The prohibition on medical and scientific experimentation was the next issue, but with the idea of 'free consent,' all such issues were resolved⁹.

- **European Convention for the Protection of Human Rights and Fundamental Freedoms:**

Article 3 of the European Convention deals with the issue of torture stipulates and that it is considered absolute in the term that no derogation can be made from the same. The European Commission has also defined the terms "Torture" as well as the term "Degrading Treatment"¹⁰.

- **American Convention on Human Rights:**

Article 5 of the Convention enhances the idea of "The Right to Humane Treatment", it has six subsections that provide the consideration in different ways. Section 1 of the article states that every person possesses the right to have physical, moral, and mental integrity. There is also a provision for minors as to how to be adjudicated rather than adults. As per this article, any kind of punishment must be given with the aim of reformation of the prisoner, as it can be further the best way to utilize our law¹¹.

- **The International Legal Standard:**

The United Nations Convention Against Torture defines it as the combined way of physical as well as mental distress. The committee of United Nations Human Rights has worked on several cases under the protocol of the CP Covenant that has identified the matter of physical as well as mental torture. With regarding the

⁸ (2021), <https://achpr.org/resources>

⁹ The Legal Prohibition Against Torture, Human Rights Watch (2021), <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>

¹⁰ The Legal Prohibition Against Torture, Human Rights Watch (2021), <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>

¹¹ Gokul Ravi, Rights Against Torture, Cruel, Inhuman Treatment And Degrading Punishment Academia.edu (2021), https://www.academia.edu/14342545/Rights_Against_Torture_Cruel_Inhuman_Treatment_And_Degrading_Punishment

issue of granting punishment the Human Rights Committee has included corporal punishment as a disciplinary measure under several circumstances¹².

3. Prohibition of Slavery and Servitude:

• International Covenant on Civil and Political Rights:

Some human values such as liberty, equality, and several other rights are considered the minimum requirements for a dignified life, hence the practice of slavery and servitude are also prohibited under maximum provisions of law. Article 8 of the Covenant enhance the idea to prohibit both of these inhuman treatment i.e. slavery and servitude. Under the CP Covenant, it has been declared as non-derogatory, it not only prohibits slavery but also focuses on every kind of slave trade.

Article 4 of the Universal Declaration of Human Rights also provides the law that "no one shall be held in slavery or servitude". The International Labour Convention on forced or Compulsory Labour has included the provision of 'minor communal service'¹³.

• European Convention for the protection of Human Rights and Fundamental Freedoms:

Article 4 of the European Convention states the right that 'no one shall be held in slavery and servitude', it has three subsections. The importance is that the right can't be derogated at the time of war or during any kind of public emergency. There are some exceptions where the work can be enforced under Article 4(3) but it will not be considered a violation of law, but the work should be in the course of legal detention. The limitation of the article exacted that the service in case of any emergency or threatening the life or well-being of the community shall not be regarded as forced or compulsory labor within the provision of the convention¹⁴.

• American Convention on Human Rights:

Article 6 of the American Covenant enhances the idea of freedom from slavery. This article has been drafted following Article 4 of the Human Rights prepared by the Inter-American Council of Jurists as well as concerning Article 7 of the Chilean draft and finally with Article 8 of the Convention on Civil and Political Rights. It is the third non-derogate right under the American Covenant and the only which prohibits the trafficking of women.

It also has certain limitations which will not constitute forced or compulsory labor, but the work must be as per the course of legal detention or any kind of passed provision under Article 6(3)(a)¹⁵.

¹² Un.org (2021), <https://www.un.org/ruleoflaw/files/training9chapter8en.pdf>

¹³ Customary IHL - Rule 94. Slavery and Slave Trade, [ihl-databases.icrc.org \(2021\), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule94](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule94)

¹⁴ Echr.coe.int (2021), https://echr.coe.int/Documents/Guide_Art_4_ENG.pdf

¹⁵ Elibrary.law.psu.edu (2021), <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1662&context=psilr>

4. Freedom from Retroactive Criminal Offences and Punishments

- **International Covenant on Civil and Political Rights:**

Article 15 of the CP Covenant provides the provision regarding the law of 'freedom from retroactive criminal offenses and punishment', which has no derogation. The article ensures that no one can escape the punishment for any criminal offense under international law by pleading that this act was legal under his law as the legal system prohibits 'ex-post facto offenses'. This principle was further confirmed by the Tribunal after the Second World War just to possess an idea of the positive principle under the legal world¹⁶.

- **European Convention for the Protection of the Rights and Fundamental Freedoms:**

Two clauses of Article 7 of the European Convention enhanced the provision of 'freedom from retroactive criminal offenses and punishment'. It is the last non-derogable human right under the European Convention. The article prohibits the retroactive aspect of criminal law as well as confirms the principle of the statutory nature of offenses and punishments.

The rule of 'nullum crimen sine lege certa' has been recognized as a fundamental principle by many democratic nations to protect their rights¹⁷.

- **American Convention on Human Rights:**

Article 9 of the American Convention provides the legal provision on 'freedom from ex-post-facto law'. This article has also been drafted on the principle of Article 7 of the Inter-American Council of Jurists as well as on the principle of 'nullum crimen sine lege certa'. Since the article prohibits the ex-post-facto law, it ensures that if the penalty imposed by law is reduced after the commitment of a crime, in that case, the new law will temper the benefits of the guilty one¹⁸.

5. Prohibition of Imprisonment for Non-Fulfilment of Contractual Obligation

- **International Covenant on Civil and Political Rights:**

Article 11 of the CP Covenant stipulates that "no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation". This article also covers many of the contractual obligations such as payment of debts, the performance of services, or the delivery of goods. In that way, practically if any person is able but unwilling to fulfill contractual obligations then they might be

¹⁶ Protections from statutory encroachment | ALRC, ALRC (2021), <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/13-retrospective-laws/protections-from-statutory-encroachment-32/>

¹⁷ Corteidh.or.cr (2021), <https://www.corteidh.or.cr/tablas/29134.pdf>

¹⁸ American Convention Human Rights, Thirdworldtraveler.com (2021), https://thirdworldtraveler.com/Human%20Rights%20Documents/AmerConven_HumanRights.html

punished by imprisonment. Since it was civil order, it might cover the issue of taxation cases or other non-compliance cases with the court orders. Hence to accept an amendment that may restrict the scope of this provision will be undesirable¹⁹.

The provision has clarified the issue obligates on the circumstances where the failure to fulfill the contractual obligation may be legitimate to constitute a criminal offense. This right is further continued in the American Convention as well as in the European Convention but in both cases the rights were derogable. All of the charter of Human Rights contains this provision but only CP Covenant has declared it as a non-derogable right²⁰.

6. Right to Legal Recognition

• International Covenant on Civil and Political Rights:

As per Article 16 of the CP Covenant, "Everyone shall have the right to recognition everywhere as a person before the law". This provision is based on the law under the Universal Declaration of Human Rights. The law under Article 16 was intended to deal with the issue of the person's legal capacity to act which might be restricted for several reasons²¹.

• The American Covenant:

The American Covenant deals with the right to legal personality in the following ways:

(a) Right to Juridical Personality-

Article 3 of the American Covenant states that "every person has the right to recognition as a person before the law". It is the first non-derogable right under the American Covenant. This provision of law includes the right to life, physical integrity, health, and freedom of movement²².

(b) Right to a name:

Article 18 of the American Covenant provides a right to a given name and surname of his parents. The CP Covenant recognizes the same law due to the attribution of legal personality but not as a non-derogable right²³.

(c) Right to Nationality:

Article 20 of the American Covenant provides that every person has a right to nationality of the State in whose territory he was born if he does not have the right

¹⁹ Article 11 ICCPR & India, Freelegalessays.blogspot.com (2021),

<https://freelegalessays.blogspot.com/2008/08/article-11-iccpr-india.html>

²⁰ Treaties.un.org (2021), https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf

²¹ Chiark.greenend.org.uk (2021),

https://www.chiark.greenend.org.uk/~chrisj/Right_to_Recognition.pdf

²² OHCHR | International Covenant on Civil and Political Rights, Ohchr.org (2021),

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

²³ Cartercenter.org (2021),

https://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf

to any other nationality. This provision of the law was enhanced from Article 24 of the CP Covenant, it is not possible to deprive any person's nationality due to the person's political idea²⁴.

(d) Right of the family:

Article 17 of the American Covenant provides five sub-clauses that enhance the idea of the right of the family. This provision of law recognizes the family as the neutral and fundamental group unit of society so it compromises both state and society. Section 2 of the Article clarifies the right to marry and raise a family regarding which the age factor is also mentioned. Section 4 of the Article interprets the legal rights of husband and wife. This provision also explains the equality among the rights of both husband and wife as well as their parental authority²⁵.

(e) Right of the Child:

Article 19 of the American Covenant provides the right concern of the minor that 'every minor has the right to the measures of protection required by his condition as a minor on the part of his family, society and State. The provision must reform the laws relating to minors²⁶.

7. Freedom of Thought Conscience and Religion

• International Covenant on Civil and Political Rights:

Article 18 of the CP Covenant including four sections derives that every person must have the right to freedom of thought, conscience, and religion. The reason behind declaring this right as a non - derogable is to protect the theistic, non-theistic, and atheistic beliefs including the idea of not professing any particular religion. Further, this article distinguishes the provision for freedom of thought, conscience, and religion from the idea of freedom towards the manifest religion. Section 2 of this article states that no one is compelled to reveal his thoughts toward any religion whereas Section 1 states that the freedom to manifest religion may be exercised.

Article 18(2) bans a ban to threatening or use of physical force to compel any individual to convert or recant any type of ritual belief. Section 3 of this article is a type of restriction for the freedom to manifest religion wherever there is the prescription of law under some guided circumstances. This article doesn't indicate any type of restriction for the discriminatory purpose to adopt a moral guardian or religious parents.

²⁴ League of Nations - The Covenant, Encyclopedia Britannica (2021), <https://www.britannica.com/topic/League-of-Nations/The-Covenant>

²⁵ Cartercenter.org (2021), https://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf

²⁶ Cartercenter.org (2021), https://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf

Section 4 of this article permits institutions to ensure the guardians that their children are getting religious, ethical, and moral education as a subject in conformity with their convictions²⁷.

- **American Covenant:**

Article 4 of the American Covenant consists of four sections that also cover the provision of freedom of conscience and religion. This article provides freedom to change one's religion either individually or in a group. Section 2 of this Article imposes some restrictions where the change of religion is restricted. Section 3 of the article talks about the restrictions that the law has prescribed regarding the freedom of the same. Section 1 provides the right to guardians under which they can provide religious and moral education to their child following their conviction²⁸.

8. Right to Participate in Government

American Covenant:

Article 23 of the American Covenant enhances the idea that every citizen must participate in government activities. It is the last non-derogable right under the American Covenant and is more active in democratic nations under which the government is exercised directly by the people. Hence, if each citizen forms a sovereign power, then the individual must have the right to participate in the government's organization.

In a general way, this article provides the opportunity to be a part of public affairs either on a direct basis or through someone's support²⁹.

²⁷ International Human Rights Standards: Selected Provisions on Freedom of Thought, Conscience, and Religion or Belief, USCIRF (2021), <https://www.uscirf.gov/international-human-rights-standards-selected-provisions-freedom-thought-conscience-and-religion-or>

²⁸ The Charter - American Charter, American Charter (2021), <http://www.americancharter.org/the-charter/>

²⁹ Digitalcommons.law.yale.edu (2021), <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1600&context=yjil>

Conclusion:

After observing various section of non-derogable rights as well as the organizations which guarantees the same, it can be concluded that American Covenant is somehow best in providing the services which have covered a maximum of civil and political rights. Several non-derogable rights have not been provided by the other organization but they are somehow valuable in human life. Within the concern of protection of these rights, the American Covenant had mentioned the prohibition of the 'judicial guarantees essential for the protection of the right'.

In India, there are only two non-derogable rights but there are certain organizations constituted within the provision to upgrade this idea and are concerned more about the non-derogable rights. Every nation must understand the value of rights and especially the non-derogable ones, as rights are the most essential thing any government or any justice system can provide. Hence, every country must understand the value of rights in human life and must initiate the upgrading of the provisions regarding non-derogable rights.

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