

Analyzing the enforceability of the Provisions of ICCPR Case Study Non-Derogable rights in the Public Emergency

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Abstract

Effective enforcement of non-derogable rights during a state of emergency requires adherence to legal framework, proportionality, dedicated commitment to human dignity and the rule of law. Although emergency might justify certain limitations, the protection of non-derogable rights is the fundamental goal of the ICCPR. To effectively enforce the non derogable rights during emergency the state party has to take all the actions but if the state is reluctant to do so the grave violations of human rights can be expected, to avoid such violations, it is necessary to follow the international obligation during emergency to eradicate maximum violations before even they have occurred. State party should coordinate with the committee, other state parties and the third party observing the international protocols before the derogations and after the termination of such derogation.

Keywords: Human rights, Public Emergency, executive, non-derogable, ICCPR

Introduction

During crises, human rights are often among the initial casualties. Governments confronted with armed conflicts, civil wars, insurrections, severe economic shocks, natural disasters, and similar threats often experience overwhelming pressures to limit individual liberties. International legal scholars have emphasized that a state's response to a public emergency is a crucial indicator of its dedication to effectively implementing human rights. Almost all constitutions are designed to cope with uncertain times and events, therefore, emergency provisions are highly important. In constitutional terms, an emergency is a situation which includes 'some imminent danger to the life of the nation, requiring some immediate action' by the government to preserve the prevailing constitutional order. However, the various conditions curtail the powers of state in case of emergency. In comprehensive context, the political philosophy, political science, and different legal theories lays down three key-limitations on emergency laws to prevent misuse of exceptional powers: (i) these must be employed only as last resort (ii) Emergency must be expressly time- bound (iii) and the objective is to reinstate and uphold the

original constitutional order after the emergency has lapsed². Amongst other things, emergency measures include suspension of enforceable constitutional rights; takeover of the legislative and executive authority of the states or provinces by the central government; and ousting of the jurisdiction of court with regards to certain emergency actions of the government³. The exercise of these exceptional powers is aimed at protecting the constitutional order and upholding Fundamental Rights within a state. The International covenant on civil and political Rights (ICCPR) recognizes this in the separate and extensive provision it makes for emergencies in its Article 4. The rules for the derogation in times of emergency are laid down in this article, it sets limitations on such derogations, and also identifies the basic inherent rights which may not be derogated even in times of emergency. The mechanism to make effective enforcement of the non-derogable rights under this article is possible by adopting the various principles including those enshrined there in.

Origin and Background

The concept of non-derogable rights has its roots in international human rights law. The recognition of fundamental human rights gained prominence after World War II with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR laid the foundation for recognizing inherent rights and freedoms. While it doesn't explicitly mention non-derogable rights, its principles influenced subsequent legal instruments. As the world faced various crises, including wars and emergencies, the need arose to balance security concerns with the protection of individual liberties. International Covenant on Civil and Political Rights (ICCPR) Adopted in 1966, the ICCPR is an important treaty that outlines civil and political rights. It addresses the conditions under which states may derogate from certain human rights obligations during emergencies. Article 4 of the ICCPR allows states to temporarily suspend certain rights during exceptional situations. However, it emphasizes that some rights are non-derogable and must be upheld without exception. Non-Derogable Rights includes Absolute protection against unlawful deprivation of life, No exceptions for torture or degrading treatment, Freedom from slavery cannot be compromised, Certain rights subject to strict safeguards (e.g., not being tried twice for the same offense). Constitutions of African countries, such as Ethiopia and Mozambique, also provide for derogation clauses and lists of non-derogable rights. The purpose of non-derogable rights is to maintain human dignity, uphold the rule of law, and prevent arbitrary infringements. Balancing security needs with rights enforcement remains a challenge. Judicial oversight, awareness among legal professionals, and adherence to principles of necessity and proportionality are crucial. The enforcement of non-derogable rights serves as a moral compass, emphasizing their inviolability even in times of crisis. Non derogable Rights Temporary Suspension of

Rights during Emergencies is mentioned in Article 4 of the ICCPR is of paramount importance for the system of protection for human rights under the ICCPR. It specifies the circumstances in which derogation from the obligations enshrined in the ICCPR is permitted by state parties and also lists the rights that are non-derogable. According to Article 4(1), in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the ICCPR may take measures derogating from their obligations under the ICCPR to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin. These rights are fundamental and must be upheld without exception, even during emergencies.

Significance

Non-derogable rights are a set of fundamental human rights that remain in force and must be respected at all times, including during states of emergency or other exceptional circumstances. These rights are considered so vital to human dignity and liberty that they cannot be suspended or limited, regardless of the situation. Public unrest, terrorist attacks, natural disasters, and events of equal severity have in recent years prompted states to declare a state of emergency. Sometimes, the proclamation of a public emergency is necessary or at least defensible, for example, a natural disaster may call for special measures which could not be taken with full respect for all the obligations under human rights treaties. These rights are enshrined in various international treaties, such as the International Covenant on Civil and Political Rights (ICCPR), and are deemed essential for the protection of human dignity even in the direst of times. They include, but are not limited to, the right to life, freedom from torture and inhuman or degrading treatment, freedom from slavery, and the prohibition of retroactive criminal laws.

Research Methodology

This research adopts a comprehensive and multifaceted methodology to investigate the concept of nationality as a human right under international law, with a specific focus on its application within the legal framework of Pakistan. The methodology encompasses both qualitative and quantitative research approaches to provide a thorough analysis of the subject matter. Qualitative research methods are employed to explore the nuanced aspects of civil and political rights, including individual experiences, perceptions, and legal interpretations. The qualitative research component includes the following methods: Document Analysis: This method involves a thorough examination of relevant legal documents, including international treaties, conventions, domestic legislation, constitutional provisions, case law, and policy documents related to non-derogable rights. Document analysis

enables the researcher to identify key legal principles, interpretations, and trends in the application of such laws at international level.

Non-derogable Rights & ICCPR

The article 4 of the ICCPR is of utmost significance for the system of protection of human rights under the covenant. On the one hand, it allows state parties to derogate from its obligations under the covenant. Conversely, this measure of derogation and its consequences from obligations is safeguarded by the article 4. The predominant objective of a state party derogating from its obligations under the covenant is just restoration of state of normalcy where the full respect of covenant can again be secured. The reasons of the derogation from the provisions of the covenant must be temporary as well as of exceptional nature. In order to invoke the article 4 the state following fundamental conditions must be met: (i) the situation amount to the public emergency which threatens the life of the nation, (ii) the official proclamation of state of emergency (iii) the derogating measures shall be taken to the extent strictly required by the exigencies of the situation (iv) provided that such measures are not inconsistent with their obligations under the international law. When the state party proclaimed the public emergency of such nature that engendered the derogation of any provision of the covenant, the states must act within their laws and constitutional provisions that regulate and govern the proclamation of such emergency powers. It is the duty of the Human rights committee to monitor such emergency laws that they enable or secure compliance with article 4.7 Paragraph 2, article 4, of the ICCPR explicitly states that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). As only some of the provisions of covenant are listed in the paragraph. 2 of the article 4, as not being subject to derogation does not mean that other articles of the covenant may subject to derogation at will, even when there exist a threat to the life of nation exists. It is the established duty both for state parties and for the committee to narrow down all derogations to those extents strictly required by the exigencies of the situation and conduct a careful objective assessment of the actual situation under each article of the covenant.

Derogation clauses incorporated in various Human Rights Instruments

International Human Rights conventions foresee the derogation clauses that allows the states to derogate to suspend the rights protected therein. Legal scholars claim that these derogation clauses played a crucial role for convincing states to ratify the conventions. Additionally, these clauses offer legal certainty, as the populace knows in advance that state may derogate from its obligations, and also that these provide a cushion from challenging these rights restrictive policies if the government had adopted the same policies without derogating . In contrast some scholars criticized these clauses and asserted that: when the obligations under the treaty are most at the risk of being undermined, these clauses deliberately accept the deviation from the commitments that and they weaken the fundamental purpose (raison d'être) of human rights treaties. Among the nine "core" instruments of the UN system, two have explicitly incorporated such clauses the International Covenant on Civil and Political Rights (ICCPR) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). As regards the European regional system, particular focus should be given to the European convention on Human Rights (ECHR) which can be considered as equivalent instrument to the ICCPR within that framework. The wording of these clauses is notably similar, likely due to their concurrent drafting. However, one may observe certain differences. The ICCPR states that "a public emergency which threatens the life of nation and existence of which is officially proclaimed," while the ECHR refers to the "time of war or other public emergency threatening life of nation." The various terms may be used by states, such as, state of emergency, state of siege, martial law, state of exception, etc., to denote exceptional situations.

Want of Article 9 & 14 in non-derogable rights

The soul of the observation and remedial discourse lies in the judicial organ of the state. And the courts shall retain their jurisdiction during the time of public emergency to adjudicate any complaints regarding violation of non-derogable rights.¹⁵ Every individual possesses the fundamental entitlement to be adjudicated through a fair and fair trial within an impartial tribunal. It serves as a cornerstone of justice and upholds the principles of due process and the rule of law. A fair trial ensures that individuals are treated equitably, with their rights respected and upheld. Article 9 deals with the protection against arbitrary arrest and detention. In case of emergency, the disappearances of persons and being imprisoned for unknown reason is the sheer violation of article 9. Therefore, in order to ensure the basic rights in time of emergency, the sub- commission on Prevention of Discrimination and protection of minorities proposed the adoption of Third Optional Protocol for the elevation of articles 9 and 14 to the level of non-

derogability. The proposal was duly considered but no member of committee welcomed it.

The leading treaties of human rights permit and authorizes the states to derogate from their obligations and suspend certain civil and political liberties of the people, amid the period of emergencies. The drafters of these treaties anticipated that international constraints on these derogations, together with the international notification and monitoring mechanisms would restrict the suspension of these rights during the public emergencies. The Human rights derogation is rationalized as the temporary mechanism for coping with the national crisis, rather than as the tool for the national authorities for promoting their own interests in ways that undermine the protection of human rights. The paper scrutinizes emergency provisions which empower the executive authority swiftly address the national crisis, often resulting in the suspension and violations of fundamental rights of citizens. This paper also argues on the range of mechanisms that must be adopted to comply with the inherent human rights and provide recommendations for the effective enforcement of the non-derogable rights outlined in the International Covenant on Civil and Political Rights (ICCPR).

Recommendations related to the duties of Human rights committee UN bodies

The states are bound to submit the periodic reports under the Article 40, 41 and Optional Protocol II to Human Rights Committee, there is no special requirement regarding the special progress reports in the times of emergency except the clause 3 of Article 4 which pertains to informing the other state parties to the covenant about non-implementation of certain rights being suspended due to the reason of emergency. And in order to further enabling the HRC to perform more efficiently its fact-finding functions. The committee must develop its mechanisms or procedures under the optional protocol regarding the oral submissions also including the visits to those state parties who are alleged to be in violation of the obligation under the covenant. The UN commission on the Human Rights and its subcommissions must follow the method of appointing the special rapporteurs and investigators and various fact-bodies in relation to the prolonged public emergencies.

Conclusion

The International Covenant on the Civil and Political Rights (ICCPR) recognizes that these rights stem from the inherent dignity of a person. And in accordance with the Universal declaration of Human Rights the ideal of human beings is to enjoy freedoms i.e. civil and political freedom and freedom from fear, this want can only be achieved by securing the civil, political, social, economic, cultural rights¹⁸. The ICCPR secures the basic civil and political rights and provides a mechanism to secure these rights in time of public emergencies. The strict implementation of these nonderogable

rights requires to follow the recommendations given under the name of siracusa principles, and state parties must follow these *stricto sensu*. The effective enforcement of these non-derogable rights requires a body like Strasbourg court along with the strict judicial interpretation contrary to the liberal notion which depends mostly upon the state's version which itself is deviating from the course. In addition, the inclusion of article 9 and 14 would have paved way for the individuals to seek the remedy as well also to be subjected to the requisites of fair trial. All the aforementioned recommendations and measures can collectively enable the effective enforcement of non-derogable rights.

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11. The CCPR General Comment No. 20 specifically discusses Article 7 and provides guidance on its interpretation3 .
12. Encyclopedia.com also summarizes Article 7, emphasizing the prohibition against torture and the right to be free from degrading treatment or punishment4 .
13. The ICCPR itself contains the text of Article 7, emphasizing the protection of individuals from torture and inhumane treatment5 .
14. OHCHR (Office of the United Nations High Commissioner for Human Rights) provides the full text of the ICCPR, including Article 8(1)1 .
15. For further insights, you can explore the Simple Guide on The International Covenant on Civil and Political Rights, which offers an easy-to-read commentary on various articles, including Article 82 .
16. Additionally, the Principles on Limitation & Derogation Provisions in ICCPR emphasize that limitations should not jeopardize the essence of the right concerned3 .
17. The OHCHR (Office of the United Nations High Commissioner for Human Rights) provides the full text of the ICCPR, including Article 151 .

17. In-depth commentary on Article 15 can be found in the book titled “A Commentary on the International Covenant on Civil and Political Rights” by Paul M. Taylor².

18. The UN Human Rights Committee’s Monitoring of ICCPR Rights also discusses various aspects of the Covenant, including Article 15³.