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EXERCISE - NON-DEROGABLE RIGHTS (2/2 points)

The derogation clauses found in Article 4 ICCPR, Article 27 ACHR and Article 15 ECHR, each include a reference to a set of rights that cannot be derogated from, i.e., the enjoyment of which cannot be "suspended", even in times of war or in the face of an emergency threatening the life of the nation. Consider the rights that are listed as non-derogable. Then try to answer the following questions :

1. What, if anything, do the rights listed as "non-derogable" have in common?

- ☐ All the rights listed as 'non-derogable' are at the core of the notion of human dignity;
- ☐ All the rights listed as 'non-derogable' are particularly at risk in times of war or civil strife;
- ☒ The human rights listed as 'non-derogable' are catalogued thus for a variety of reasons, and present no common characteristic. ✓

EXPLANATION

The "non-derogable" rights are protected from derogation for a variety of reasons, and therefore they have nothing that intrinsically unites them. Of course, some rights are of fundamental importance, as are rights relating to the integrity of the individual (the right to life or the protection from torture or inhuman or degrading treatment or punishment): in these cases the non-derogable nature of the rights reflects their paramount importance to the individual. But other rights do not have quite the same weight, yet they too, nevertheless, cannot be suspended in any circumstance. For instance, under the American Convention on Human Rights, the list of non-derogable rights and freedoms includes freedom of conscience and religion (Art. 12); the rights of the family (Art. 17); the right to a name (Art. 18); the rights of the child (Art. 19); the right to nationality (Art. 20); and the right to participate in government (Art. 23). This is because it would be difficult to defend suspending these rights in times of emergency: one would find it very difficult to provide a rational explanation why, for instance, restricting freedom of religion or depriving a person from her name would be an answer to a threat facing the nation. Such restrictions would be presumptively suspect, and it is therefore understandable that they are insulated from being derogated from.

The Human Rights Committee made the following comments (/c4x/LouvainX/Louv2.01x/asset/_Materials_Non_derogable_rights.pdf) in this regard.

2. In contrast with the ICCPR and the ECHR, the American Convention on Human Rights prohibits the suspension of the judicial guarantees essential for the protection of (non-derogable) rights'. What is the rationale for including this

safeguard? Under the ICCPR and the ECHR, is the non-inclusion of the right to an effective remedy among the non-derogable rights justifiable?

- ☒ The right to an effective remedy is essential to the enjoyment of all human rights, and therefore it is implicit that it cannot be derogated from; ✓
- ☐ The American Convention on Human Rights goes further than both the ICCPR and the ECHR, without justification: it may be necessary in times of crisis to suspend the right of access to judicial remedies;
- ☐ Since the derogation regime allows States to suspend human rights, it would be of no value to the individual to have access to judicial remedies anyway.

EXPLANATION

The Inter-American Court of Human Rights explained the continued relevance of the right to judicial protection of non-derogable rights in an Advisory Opinion it delivered in 1987: "... in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that 'the judicial guarantees essential for (their) protection' remain in force. Article 27(2) does not link these judicial guarantees to any specific provision of the Convention, which indicates that what is important is that these judicial remedies have the character of being essential to ensure the protection of those rights" (Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) *American Convention on Human Rights*), Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 24).

The Human Rights Committee has taken the view that access to judicial protection of non-derogable rights is required at all times, and cannot be derogated from, since the risk otherwise would be that the protection of certain rights from derogation would be made meaningless. It stated in General Comment No. 29, Derogations during a State of Emergency (Art. 4), adopted in 2001, that: "It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 (right to life) of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 (rights of defence) and 15 (principle of legality of incriminations: *nullum crimen, nulla poena sine lege*)"

Check

Hide Answer(s)





Exercise - Non-derogable rights | 2.3 | Situation

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