

Non Derogable Human Rights: A Comparative Study of Indian Constitution and International, Regional Instruments

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I. Introduction:

Man lives for some values. Among the values, which a man cherishes, the most important are some rights, which he can enjoy as an individual. These rights are essential for all the individuals as they are consonant with their freedom and their dignity and are conducive to their physical, moral, social and spiritual welfare. These basic rights are inalienable because the enlightened conscience of the community would not permit the surrender of these rights by any person even of his own volition. These rights are inviolable because they are not only vital for the development of human personality and for preserving its dignity, but also because without them men would be reduced to the level of animals.

However, the expression 'Human Rights' embraces the rights of men both as individual and as a member of society. Its aim is to promote individual welfare as well as social welfare also. Therefore the concept of Human Rights in form of rights has to be construed in the individual-social context. Here comes the genuine problem regarding what are the nature and extent of the rights? Whether they are absolute or with some limitation in this way the concept of Non derogable rights becomes very important in the context of absolute rights and rights with limitation. Non derogable Human Rights basically partakes the character of absolute rights to some extent with exception inherent in the nature of rights itself. Therefore, it becomes important to analyze the concept and content of non derogable human rights in different regional and international regime.

II. Concept and Justification for Non-Derogable Human Rights:

The theoretical and philosophical basis of non derogable rights can be inferred from the natural law theory. Cicero said that law of nature applies to all man equally. If we had not been influenced by bad habits and customs no one would be so like his own self as all men would be like others. Since everyone everywhere has been subjected to customs and laws of varying degrees of imperfection therefore there is different concept and understanding of right, but basic right is same everywhere. Because the essential property of man is that they have reason. Because of having this specific and natural characteristic of being rational that men resemble each other and differ from the brutes². Because of this rational

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2 H.L.A. Hart, "Are there any Natural Rights?" in Jeremy Waldron(ed), *Theories of Rights* 26(1984).

characteristic every man has certain rights with regard to the nature of man as a rational and social being and on this basis certain rights of individual are non-derogable. Cicero said, “A true law is right reason in accordance with nature, which applies to all men and is unchangeable and eternal”³. Therefore, a law or state has to protect certain rights, which are inherent to all men, and is unchangeable and eternal.

The foundation of non-derogable rights is based on the beliefs about justice that we hold these right, not because we have deduced or inferred them from other beliefs, but on very foundation of human dignity and existence. The very premise of non derogable rights is based on the assumption that they are not created by men or societies but are rather discovered by them⁴. The very foundation and birth of state depends on the protection of these rights⁵. Therefore, state treats the protection of these non derogable rights as fundamental and not as subordinate and these rights can’t be derogated. These rights are natural which postulates that these rights are not only derived from legislation or social custom but are also independent grounds for judging legislation and custom⁶. Non derogable rights specified a level beneath which we may not permit ourselves to fall. It rests on a particular substantive account of the minimum requirement of a life of dignity.

The concept of non-derogable rights can be found in John Locke’s claim that we have certain natural rights because we have been made by God to last during his not our own pleasure⁷. Locke while giving his theory of social contract and natural rights theory emphasized that because a man is rational, he is subject to the law of nature even before the establishment of civil society. Because of the right of the law of nature men lived in a state of freedom and equality. Civil society is formed by compact that natural rights may be better preserved. Man does not enter in society to become worse than he was before surrendering his natural rights but only to have them better secured. His natural rights are the foundation of all his civil rights. Locke held that man by nature endowed with enough freedom to become a man in conformity with law. He held that state of nature is one of peace, goodwill, mutual assistance and preservation and on this ground law of nature provides complete equipment for protection of certain rights⁸. But the defect of the state of nature lies merely in the fact that it has no organization to give

3 Julius Stone, *The Province and function of law* 26(2000).

4 See Michael Freeman, “The Philosophical Foundation of Human Rights”, 16 *Human Rights Quarterly*, 499 (1994).

5 The whole social contract theory of natural law of Hobbes, Locke and Rousseau starts on this very premise that state has been created to protect basic rights.

6 *Supra*, note 6 at 500.

7 John Locke, “The second Treatise of government” in Thomas P. Peardon (ed.) (6)1952. The United nations in proclaiming its UDHR, did not however refer to god but such as reason nature to justify them as inalienable rights.

8 *Supra* note 2 at 445.

effect to the rules of rights. Therefore, to protect these natural rights state is created. Locke also set up the proposition that moral rights and duties are intrinsic that morality makes law and not law makes morality, and therefore government have to give effect to what is naturally right prior to its enactment⁹. He says that law in shape of reason obliges every man and also state to preserve life and liberty to everyone. He said that there are certain rights which can never justly be set aside, since society itself exists to protect them, they can be regulated only to the extent that is necessary to give them effective protection¹⁰. These concepts of Locke provide the justification for the concept of non derogable rights.

This natural law theory through the virtue of reason and natural right attached to every man certain rights as non derogable rights. These rights he carries with him from one society to another. He can't lose them without losing himself. "Men are born free and equal"¹¹ said the French assembly in respect of their natural rights of liberty, property, security and resistance of oppression. The framers of the American Declaration of Independence declare as self-evident truths that all men are created equal, that they are endowed by their creator with certain inalienable rights among which are life, liberty and pursuit of happiness and government are instituted to secure these rights. The free people of Virginia proclaimed that the right with which men enter into society, they can't by any concept deprive themselves or their posterity¹². Society grants him nothing. Every man is a proprietor in society and draws on the capital as a matter of right. Some rights indeed could not be subordinated to government even if the people wished because these rights are inalienable. Indeed to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed. If government becomes destructive to this end, it is the right of the

9 *Supra* note 2 at 446.

10 *Supra* note 2 at 447.

11 Georges Lefebvre, *The coming of French Revolution* 221 (1947).

12 The declaration further says that all power is vested in and consequently derived from the people, that magistrates are their trustees and servants and at all times amenable to them. The individual was autonomous, sovereign before government was established and he and other individuals taken together "the people" remain sovereign under any government for their sovereignty is inalienable and government is only by the consent of the governed. The people gave up some of their autonomy to government for limited purposes, retaining the rest as rights and freedoms under government rights originates with and are retained by the people, they are not granted to them. The Ninth Amendment to the United States Constitution clearly adopted this philosophy as, "the enumeration in the constitution" of certain rights, shall not be construed to deny or disparage others retained by the people." Explicit provision of the Bill of rights also reflect the view that rights are not bestowed by the constitution but are antecedent to it, the bill of rights only commands the government to respect those antecedent rights e.g. "congress shall make no law... abridging the freedom of speech or of the press". The right of the people to be secure ... shall not be violated.

people to alter or abolish it and to institute new government¹³. These declarations clearly provide strong justification of non derogable rights.

III. Non Derogable Rights under Different Domestic, International and Regional Instruments:

There is common understanding that human rights are inter-dependent, interrelated and indivisible. The Vienna Declaration and Programme of Action of 1993 had affirmed this basic characteristic of human rights. It was said that for the effective realization of human rights, all rights should be protected on equal footing. However taking notice of practical situations in state of emergency it was argued that during emergency most rights can be suspended or derogated for the same purpose of protecting the rights. However there are some basic rights which can't be suspended or even taken away in emergency also. These rights can be said as non derogable rights which permit no derogation¹⁴. In this background, in both universal and regional human rights instruments, there are some rights which are non-derogable.

III. I European Convention for the Protection of Human Rights and Fundamental Freedoms and Non Derogable Rights:

Article 15 (2)¹⁵ of European Convention provides for non derogable rights. The right to life is the first non derogable right under the European Convention. The first sentence of Article 2 (1) states that "everyone's right to life shall be protected by law". This provision establishes a positive obligation on States to make adequate provision in their law for the protection of human life. The European Commission held that obligation to protect life includes a 'procedural aspect' which includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny. Article 15 which allows the suspension of some rights in times of war or public emergency does not apply to Article 2. However there are four exceptions to the right to life contained in Article 2¹⁶. Further Article 3 of European Convention

13 David G. Ritchie, *Natural Rights; A Criticism of some Political and ethical conception* 9-11 (1984).

14 O Gross, "Once more into the breach : The Systematic failure of applying the European Convention on Human Rights to entrenched emergencies", 23 *Yale Journal of International Law*, 437 (1998).

15 Art. 15 (2) provides, "No derogation from Art.2 except in respect of death resulting from lawful acts of war, or from Article 3, 4 (para 1) and 7 shall be made under this provision.

16 These are capital punishment allowed by Article 2(1) and Article 2(2) provides three other situations in which the taking of life by the state is valid. These are –

- (a) in defence of any person from unlawful violence
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.
- (c) in action lawfully taken from the purpose of quelling a riot or insurrection.

which deals with torture stipulates, “No one shall be subjected to torture or punishment or to inhuman or degrading treatment.” This provision prohibits in absolute terms inhuman and degrading treatment or punishment, irrespective of the victims conduct. Further Article 4(1) of the convention prohibits slavery or servitude. The importance of Article 4 is underlined by the fact that it can’t be derogated in times of war or public emergency. The last enumerated non derogable Human Rights in European Convention is freedom from retroactive criminal offences and punishment under Article 7(1). Article 7(1) not only prohibits retroactive application of the criminal law to the detriment of accused except as provided in Article 2 but also conforms in a more general way the principle of the statutory nature of offences and punishment.

III. II Non Derogable Rights in American Convention on Human Rights:

Article 4 of American Convention regards right to life as non derogable¹⁷. It does not abolish capital punishment. Further, this Article provides that life shall be respected and protected in general from the moment of conception. Article 5 of American Convention recognizes the right to humane treatment as non-derogable right. Article 5 (1) says that every person has the right to have his physical, mental and moral integrity respect. Article 5 (2) ‘says that no one shall be subjected to torture or to cruel inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. Article 6 of American Convention prohibits slavery, involuntary servitude, the slave trade or traffic in women. This Article 6 corresponds to Article 4 of the Draft Convention on Human Rights prepared by the Inter American Council of Jurists. Its principle appears also in Article 7 of the Chilean Draft and Article 8 of the CP Covenant¹⁸. American Convention is the only convention which categorically prohibits traffic in women. Other two conventions¹⁹ do not explicitly refer to prohibition in traffic of women. Article 9 of the American Convention also recognizes the freedom from *ex-post facto* law as non derogable rights. This Article apart from freedom from *ex-post facto* law, also provides that if penalties imposed by law are reduced after a crime is committed, the new law will incur to the benefit of the guilty person. The American Convention recognizes the right to legal recognition as non derogable rights most elaborately in the following aspects–

- (a) The right to a juridical personality (Article 3)
- (b) The right to nationality (Article 20)
- (c) The rights to the family (Article 17)

17 Art. 4(1) “Every person has the right have his life respected. This right shall be protected by law in general from the moment of conception. No one shall be arbitrarily deprived of his life.”

18 Macro Gerado Manroy Cabra, “Rights and duties established by the American Convention on Human Rights”, 30 *American University Law Review* 32 (1980).

19 ICCPR and European Convention of Human Rights.

(d) The rights of the Child (Article 19)

Further Article 12 of the American Convention recognizes freedom of conscience and religion as non derogable rights. Article 12 (1) encompasses freedom of conscience and of religion. This right also provides freedom to maintain or to change one's religion or beliefs either individually or together with others in both public or in private. Article 23 of the American Convention recognizes the right to participate in government as non derogable right. Historically, democracy as a form of government is considered to be direct when the political power is exercised directly by representatives elected by the people and indirect when sovereignty is delegated to the legislative. Generally this Article 23 provides for the right to take part in the conduct of public affairs, directly or through freely chosen representatives. Article 23 (1) (b) recognizes the right to vote and to be elected in genuine periodic elections and it shall be by universal and equal suffrage and by secret ballot that guarantees the free expressions of the will of votes. In spite of this 'longer list' of non derogable rights of the American Convention it has been observed that this however, permits derogation in emergencies which are much less serious than those envisaged by the other instruments, and to that extent an expanded list of non derogable rights is more justified²⁰.

III. III. Non-Drogable Rights and the African Charter on Human and People's Rights:

The African charter on Human and People's Rights contains no derogation clause. Instead of opting for a non derogable provision, the African Charter preferred to qualify certain rights as absolute rights²¹. Thus absolute character of certain rights under the charter is tantamount to the non derogable character of other human rights treaties. Some authors also have suggested that the absence of a derogation clause entails that all rights under ACHPR are non derogable even at times of war. Although this suggestion seems the best way to safeguard HRs under any emergencies, derogable of rights is, however, inevitable in times of real crisis. Therefore, African commission in Amnesty International Case²² recognizes only some rights as non derogable. It stated that especially derogation is not allowed for what is generally referred to as non derogable rights. Thus with regard to non derogable rights under ACHPR, it can be concluded that the African Commission is of the opinion that all the rights under the ACHPR are non derogable. However, the commission has in particular given emphasis to those rights 'generally recognized as non derogable rights'.

20 Thomas Buergenthal, "The Inter American System for the protection of Human Rights", in Theodore Meron (ed.), *Human Rights in International Law : Legal and Policy Issues* 450 (1984).

21 O. Umzurike, "The African Charter on Human and Peoples' Rights", 77 *American Journal of International law*, 9 (1983).

22 Amnesty international and others v. Sudan (2000). AHRLR 297 para 42.

IV. Non Derogable Human Rights in Indian Constitution:

There are only two fundamental rights under the Indian Constitution which have acquired the status of non derogable human rights. These rights are contained in Article 20 and 21²³. Article 20 gives right against ex post facto law and right against self incrimination which is also recognized as non derogable under ICCPR and ACHR. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Initially both these rights were not regarded as non derogable. Because before 44th Amendment under Article 359 all fundamental rights in Part III could be suspended during emergency²⁴. In *A.D.M. Jabalpur v. S. Shukla*²⁵, the Supreme Court held that in case of emergency no person had any locus standi to move any petition before court under Article 226 for a writ of habeas corpus or any other writ to challenge the legality of a detention order on any ground whatsoever. The court also held that Article 21 was the sole repository of the rights to life and personal liberty against the state. Any claim to a writ of habeas corpus to challenge detention on any ground amounted to enforcement of the right of personal liberty under Article 21, the enforcement of which had been suspended. The suspension of right to enforce Fundamental Rights has the effect that the emergency provisions are by themselves the rule of law during the continuance of emergency²⁶.

However Khanna, J., in his dissenting opinion said that even in the absence of Article 21 the state has no power to deprive a person of his life or liberty without the authority of law. This is the essential postulate and basic assumption of the rule of law and not of man in all civilized nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. The right not to be deprived of one's liberty or life without the authority of law was not the creation of the Constitution, such right existed before the Constitution came into force. The fact that the framers of the constitution made an aspect of such right a part of the fundamental rights did not have the effect of exterminating the independent identity of such right and

23 Article 20(1) stipulates that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the Law in force at the time of the commission of the offence. Article 20(2) says no person shall be prosecuted and punished for the same offence more than one and clause (3) says that no person accused of any offence shall be compelled to be witness against himself.

24 Under Article 359 as it stood prior to 1978 the enforcement of all fundamental rights (other than Article 19 which is the subject matter of Article 358) could be suspended during an emergency by an executive order when proclamation of emergency was in operation.

25 AIR 1976 SC 1254.

26 K.D. Gaur, "Personal Liberty and National Emergency – a critical appraisal," 4 *Krurukshehra Law Journal* 29 (1978).

of making Article 21 to be the sole repository of that right. Recognition as Fundamental Rights of one aspect of the pre- constitutional right can't have the effect of making things less favorable so far as the sanctity of life and personal liberty is concerned compared to the position if an aspect of such right had not been recognized²⁷. The majority view in Shivakant Shukla case was much criticized. It was argued that ultimate justification for an emergency in a democratic state is to enable it to preserve vital values of a democratic society temporarily endangered on account of unexpected situations of exceptional gravity. An emergency can't be declared for undermining the basis of democracy²⁸. In the absence of the rule of law, lawlessness predominates, especially government lawlessness when there is no authority to question government's action, no mechanism to control it and no institution to make it accountable and to check its excesses.

Therefore to curb the consequences of Shukla ruling and restore the sanctity of right to life and personal liberty Article 359 has been amended by the 44th amendment of the constitution. By this amendment the scope of Article 359 was restricted so as to provide the presidential power to suspend the right to move the court for the enforcement of Fundamental Rights cannot be exercised in respect of the fundamental rights guaranteed by Article 20 and 21. Thus it is no longer possible to suspend the right to life and personal liberty guaranteed by Article 21 and right to protection in respect of conviction for offences guaranteed by Article 20. Thus after 44th amendment Article 20 and 21 are made non derogable.

IV. I. Right to Life as Non-Derogable and Due Process:

The concept of due process for the protection of right to life has a significant effect on making right to life as non derogable²⁹. Before Meneka Gandhi case, Supreme Court was of opinion that the expression 'procedure established by law' in Article 21 does not contain 'due process' as synonymous with the American concept of 'procedural due process'. In constitutional assembly debate it was most debatable issue. First time the expression 'due process' in constitutional assembly debate was reflected in K.M. Munshi's draft in its chapter on rights to freedom which provided that 'no person shall be deprived of his life, liberty or property without due process of law'³⁰. B.R. Ambedkar not only strongly supported

27 Khanna J. in *ADM Jabalpur v S. Shukla*, AIR 1976 SC 1256 .

28 H.M. Seervai, *Constitutional Law of India*, 1020 (1983).

29 The word due process has two aspects. Substantive due process and procedural due process. Substantive due process envisages that the substantive provisions of a law should be reasonable and not arbitrary Procedural due process envisages a reasonable procedure, i.e. the person affected should have fair right of hearing which includes four elements (i) notice (ii) opportunity to be heard (iii) an impartial tribunal and an orderly procedure. The word 'due process' clause has been used by the U.S. Supreme Court to extend both procedural and substantive safeguards to 'life, liberty and property.

30 Munshi's draft Art. V(1) and V(4) and Art. XII (3) in B. Shiva Rao, *the framing of India's Constitution, select documents*, vol. 2, 75 (1967).

this view in his draft Article but also included a provision that the state should not deprive any person of life, liberty or property without 'due process of law'. However, during his visit to the United States of America, B.N. Rao had discussion with Justice Frankfurter of the United State's Supreme Court who was of the opinion that the power of review implied in the 'due process' clause was not only undemocratic because it gave a few judges the power of legislation enacted by the representative of the nation but also threw an unfair burden on the judiciary. In fact this view was communicated by the B.N. Rao to the drafting committee which introduced a far reaching change in the clause by replacing the expression 'without due process of law' by the expression 'except according to procedure established by law'. The text of the provision, thus redrafted by the committee, was incorporated in Article 15 of Draft constitution, "No person shall be deprived of his life or personal liberty except according to procedure established by Law"³¹.

The Draft Article 15 evoked a keen controversy regarding the respective merits of expression 'due process of law' and procedure established by law. Kazi Syed Karimuddin³² strongly opposed the redrafted Article containing 'procedure established by law' and said that if the words "according to procedure established by law" are enacted there will be a great injustice to the law courts in the country, because as soon as a procedure according to law is complied with by a court there will be an end to the duties of the court and if the court is satisfied that the procedure has been complied with, then judges can't interfere with any law which might have been capricious, unjust or iniquitous. The word 'procedure established by law' will place the 'right to life' at the mercy of legislature. Therefore, to guarantee to individual inalienable rights in such a way that the political parties that come into power can't extend their jurisdiction in curtailing and invalidating the fundamental rights laid down in this constitution. If the word 'procedure established by law' are kept then it will not be open to the courts to look into the injustice of law or into a capricious provision in a law. As soon as procedure is complied with there will be an end to everything and the judges will be only spectators.³³

However Alladi Krishnaswami Ayyer³⁴ in support of expression 'procedure established by law' as against the 'due process' provision argued that the expression 'due process' itself as interpreted by the English judges connoted merely the due course of legal proceeding according to the rules and forms established for protection of rights and a fair trial in a court of justice according to the modes of proceeding applicable to the case. Possibly, if the expression has been understood according to its original content and according to the interpretation of English judges, there might be no difficulty. But the problem is against the verdict of three or five gentlemen sitting as a court of law on what exactly was 'due process' according

31 Ambedkar's draft Art. (11)(2), in B. Shiva Rao, p. 86.

32 Member of Constitutional Assembly (C.P. and Berar, Muslim).

33 Constitutional Assembly debates (official Report), vol. VII.p. 842 6th Dec., 1948, Arti. 15

34 (Madras : General)

to them in particular case could not be regarded as more democratic than the expressed wishes of the legislature or the action of an executive responsible to the legislature. He expressed his fear that the clause 'due process of law' might prove to be a great handicap for all social legislation, for the ultimate relationship between the employer and the labourer, for the protection of children and for the protection of women³⁵. However, finally constitution assembly agreed to incorporation of expression 'procedure established by law' as appears in present Article 21 of the constitution.

After coming into force of constitution, the Supreme Court ruled in *Gopalan* case³⁶ that the expression 'procedure established by law' meant the procedure as laid down in the law as enacted by the legislature and nothing more. A person could be deprived of his 'life' or 'personal' liberty in accordance with the procedure laid down in the relevant law. Courts view was that it was concerned with the procedure as laid down in the statute. Whether procedure was fair or reasonable or according to natural justice or not was not the concern of the court. This interpretation of Article 21 by court was criticized by characterizing as the 'high water mark of legal positivism'³⁷. As per interpretation in *Gopalan*, Article 21 provided no protection or immunity against competent legislative action. It gave final say to the legislature to determine what was going to be the procedure to curtail the personal liberty of a person in a given situation and what procedural safeguard he would enjoy.

In *Maneka Gandhi v. Union of India*³⁸ the Supreme Court re-interpreted Article 21 and practically overruled *Gopalan*, and reinterpreted the expression, 'procedure established by law' used in Article 21. Krishna Iyer, J. said that procedure in Article 21 means fair, not formal procedure. Law is reasonable and not any enacted piece. This makes the words "procedure established by law" by and large synonymous with the 'procedural due process' in the USA³⁹. Bhagwati J. said that procedure in Article 21 must be right, just and fair and not arbitrary, fanciful or oppressive otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied⁴⁰. Krishna Iyer J. said the spirit of man is at the root of Article 21, personal liberty makes for the worth of the human person and therefore Article 21 would no longer meant that law could prescribe some semblance of procedure, however arbitrary or fanciful, to deprive a person of his personal liberty. It is therefore, necessary that the procedure must satisfy certain requisites in the sense of being fair and reasonable. The concept of reasonableness

35 *Supra* note 83 at 853.

36 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

37 See Allen Gledhill, "Life and Liberty in Republican India", 2 *Journal of Indian Law Institute*, 241 (1960).

38 AIR 1978 SC 597.

39 *Id* at 1164.

40 *Id* at 1165.

must be projected contemplated by Article 21.

This Maneka Gandhi case made the protection of right to life as non derogable in essence by interpreting procedure established by law for due process. Since then the Supreme Court has shown great sensitivity to the protection of personal liberty. In this case by giving an expansive interpretation, the court emphasized that the expression 'personal liberty' is of the 'widest amplitude' covering a variety of rights which go to constitute the personal liberty of man. Its deprivation shall only be as per the relevant procedure prescribed in the relevant law, but the procedure has to be fair, just and reasonable.

Many of the rights which are recognized as non derogable under ICCPR, ACHR, ECHR are not recognized expressly non derogable in Indian Constitution⁴¹. But Supreme Court by expending the reach and ambit of Article 21 and through dynamic interpretation has made these rights as non derogable.

IV. II. Martial Law and Non Derogable Human Rights:

Although after 44th amendment of Indian constitution Art. 20 and 21 are made as non derogable by exempting it from the ambit of Act 359. But even now under Art.34 of the constitution which is related to martial law⁴² these Art. 20 and Act 21 can be suspended. Art 34 provides that, notwithstanding the guarantee of fundamental Rights and the right to move the SC for their enforcement, parliament may pass a law indemnifying any government servant or other person in respect of any act done by him in connection with the maintenance or restoration of order in an area within the territory of India where martial law was in force, or validate any sentence passed, punishment inflicted or forfeiture ordered or other act done under martial law in such area.

Article 34 thus enables parliament to enact an Act of indemnity to protect government and military officers from any liability for action taken by them for restoration of order during the martial law period. Such an act can't be questioned on the ground of infringement of fundamental rights of a person. Under Art 34 any of the fundamental rights can be violated during martial law in connection with the maintenance or restoration of order. Thus in the period of a martial law the military authorities, may exercise abnormal powers outside the ordinary law. During this period if the military authorities find it necessary to interfere with the actions, life

41 e.g. Right against torture, Right against imprisonment on the ground of inability to fulfill a contractual obligation.

42 Martial Law is the action of the military authorities when, in order to deal with a situation amounting to insurrection or war within the country, they impose restrictions and regulations on civilians. The basis of the power of the military in such a situation is the rule that every citizen whether a soldier or not is under a duty to assist in the suppression of riotous assemblies and insurrections, in the maintenance of order and in repelling invaders. This clothes the military with an authority to repel force by force and take all necessary steps to preserve order. For more detail see, A.V. Dicey, Law of the Constitution, Macmillan London, p. 248, (1950).

and liberty of the civilians, they can do it. Further military may enforce obedience to these orders by punishing the civilians and in exceptional circumstances may even condemn them to death. For the action of authorities for any action done in response to martial law, or issue any writ against them or take cognizance of sentences passed by them. What action is necessary to meet the situation is primarily a matter for the direction of the military authorities, and no judicial control can be exercised on them⁴³.

Thus Indian constitution by recognizing the martial law and making provision to indemnify the action of authorities during martial law under Article 34 opens the door to suspend and violate all the fundamental Rights. It is axiomatic that as soon as martial law situation arises, civil courts power to interfere with military action automatically comes to an end for the duration of the period of martial law, and during martial law courts will not enforce fundamental rights so as to interfere with discharge of its duties by the military in the actual area of operation. Thus it can be said that no right is non derogable under Indian constitution. If Article 20 and Article 21 are non derogable, they are only to extent within the ambit of ordinary law and in emergency provision but in martial law regime they are not non derogable human rights.

V. Conclusion:

Thus it can be said that although certain rights are regarded as non-derogable Human Rights in different, international, regional and domestic instruments but they are not absolute. Because as regard to the non derogability of certain Human Rights it must be considered in the light of the status of these rights as principles of social life and as a provision of just Human Community. Because from the observation of non derogable rights in different instrument and in the context of emergency provision it appears that these rights are non derogable only where peace is possible. Because there are circumstances in which social or community existence is impossible. In such circumstances, according to all the instruments, these non derogable rights can be violated. Because there are some exceptions. These exceptions are provided under relevant provisions of non derogable rights, when these rights can't be treated as non derogable. Because every right may be overridden if this is required in order to avoid certain catastrophes such as when torture alone will enable the authorities to ascertain where a terrorist has hidden a fused charge of dynamite. In such case one non derogable right – the right not to be tortured is overridden by another right – the right to life of many potential victims of the explosion.

Further as regard to universal standard of non derogable rights under different instruments it can be said that there is no universal standard regarding the context and nature of non derogable rights. Further only few rights are non

43 Keir, David Lindsay and Lawson, *Cases in Constitutional Law* 228 (1967).

derogable under all the instruments, e.g. right to life, right against notto be subject to torture, Right against ex-post-facto law, are only rights which are non derogable in all the instruments. Further these rights are non derogable only in peace time and to some extent in emergency. But where the very existence of nations is in danger or in case of martial law there are not any non derogable rights. For example in India although Article 20, Article 21 are non derogable in case of emergency. But when martial law is in force, there is no non – derogable right. Thus it can be said that there are non derogable rights in concept and within the frame work of rule of law but they are not absolute.