

PERMISSIBLE LIMITATIONS ON HUMAN RIGHTS AND DEROGATIONS FROM LEGAL OBLIGATIONS DURING MARTIAL LAW

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Owing to the nature of human rights everyone is entitled to equal and inalienable human rights as human being. Human rights are centred, indeed built, on the granting of rights to the individual. Main human rights, their implementation mechanism and the obligations of state parties in this regard are enshrined in different international human rights instruments. The main duties of states are to respect, to fulfill and to protect human rights. In compliance with the principle of *pacta sunt servanda* states parties to these documents undertake to ensure and secure human rights of all within its jurisdiction without discrimination on the basis of sex, race, color, language, religion, political or other opinion, national or social origin, property, birth or other status. States are required to strictly follow their obligations and they are held responsible for violation of human rights even where they were unintentional.

Many states at some stage be confronted with serious crisis situations, such as wars or other kinds of serious societal upheavals, and that in such situations they may consider it necessary, in order to restore peace and order, to limit the enjoyment of individual rights and freedoms and possibly even to suspend their enjoyment altogether. In crisis situations various terms may be applied by states to the special legal order introduced such as “state of exception”, “state of emergency”, “state of alarm”, “state of siege”, “martial law” and so forth.

Martial law is a special legal regime applied in certain cases. Martial law is a law administered by the military rather than a civilian government. It may be declared in an emergency or in response to a crisis, or in order to control occupied territory. It becomes a viable way to regain control of a region or state, when martial law is issued in an actual crisis and carried out the way it was

originally intended to be. Though it can be twisted and misused in ways that are against the rights of the human species in general if it is not kept under a watchful eye of a moral government.

As mentioned above during martial law some human rights can be limited. It should be noted that some legal norms such as prohibition of slavery may be considered to be so fundamental that they are called peremptory norms of international law. No derogation is allowed in any case from protection of the right to life, the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, the right to freedom from slavery, the slave-trade and servitude, the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation, the prohibition of *ex post facto* laws, the right to legal personality and, lastly, the right to freedom of thought, conscience and religion. But it can't be concluded that any right is not listed as non - derogable right, it can necessarily be derogated from.

States may refrain from the implementation of many rights such as the right to freedom of expression, association and assembly for certain legitimate purposes. During martial law prohibition or restriction of meetings, rallies, street marches, demonstrations and pickets, as well as other mass events is applied.

This kind of limitations can be imposed permanently in normal times, so they are called “ordinary” limitations. On the other hand so-called derogations are designed for particularly serious crisis situations that require the introduction of extraordinary measures. The right to derogate is a flexible instrument designed in order to help governments to overcome exceptional crisis situations. The right to derogate does not mean that the derogating State can escape its treaty obligations at will.

Under international human rights law, derogation allows certain human rights to be temporarily suspended in the light of national emergency situations and martial law which may include armed conflicts. Such

derogation provisions can be found in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. They seem to reflect the idea of a defence of necessity in international law and transpose it into human rights law. In contrast to the American and European Conventions on Human Rights, the African Charter on Human and Peoples' Rights contain no derogation provision. According to the African Charter it is not allowed for states parties to derogate from their treaty obligations during emergency situations, martial law or other crisis situations. Even a civil war cannot be used as an excuse by the state for violating or permitting violations of rights in the African Charter. As well as like the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child contains no derogation provision, and it can therefore be concluded that the Convention was intended to be applied in its entirety even in exceptional crisis situations. It can hardly be argued that the absence of a derogation provision in human rights treaties expresses the will of the state parties that all those rights are derogable.

Under human rights law, a number of conditions for and limitations of derogation need to be examined. Limitations on the exercise of human rights are the result of a careful balance between the individual's interest and the general interest, and must, in order to be lawful:

- be defined by law;
- be imposed for one or more specific legitimate purposes;
- be necessary for one or more of these purposes in a democratic society (proportionality).

In order to be appropriate, both the general and the individual circumstances need to be met with clearly defined social needs. It is not sufficient that the limitation is desired or simply democratic activity of the constitution is not harmed.

If there is martial law and measures should be taken, following circumstances must be met: 1. proof of a situation requiring derogation; 2. Information concerning the exact measures taken. It should be noted that a general declaration of a state of siege or of martial law

would not be sufficient. This information should not only be accompanied by the relevant legislative texts but also by a detailed account of the measures actually taken; 3. Concrete time limits for all measures should be determined; 4. Biannual reports concerning the continued necessity of the derogation, detailing any relaxations or expansions of the emergency measures.

According to the Article 4 of International Covenant on Civil and Political Rights the issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party's obligations under the Covenant must be limited "to the extent strictly required by the exigencies of the situation". This requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation.

The existence of martial law which threatens the life of the nation must be officially proclaimed in order to prevent States from derogating arbitrarily from their obligations.

In order to avail itself of the right of derogation, a State party must notify international community by immediately submitting a notification of derogation to the other States parties through the Secretary-General. In this notification it must describe the provisions from which it has derogated and the reasons by which it was actuated. A second notification must be submitted on the date on which it terminates such derogation.

The making of derogation need not be a concession that the State will not be able to guarantee the rights contained in the European Convention on Human Rights. When lodging derogation practice has been for the Contracting State to state that the measures it is taking may involve derogation from the Convention. For this reason, in any case where an applicant complains that his or her Convention rights were violated during a period of derogation, the European Court will first examine whether the measures taken can be justified under the substantive articles of the Convention. Derogation thus means that even derogated human rights may continue to apply, in a modified manner. Furthermore, the procedural and judicial guarantees which are essential in order to give effect to the protected non-derogable rights may never be subject to measures which would, in effect, circumvent the pro-

tection of such non-derogable rights.

It should be noted that the martial law with ensuing limitations on the enjoyment of human rights can only lawfully remain in force for as long as the situation so warrants. When the situation ceases to constitute a threat to the life of the nation, the derogations must be terminated. Martial law and derogations from international human rights obligations cannot lawfully be maintained for so long that they become a permanent or quasi-permanent part of a country's internal legal system.

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