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*Milica V. Matijević**
*Ana M. Zdravković***

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SOME REFLECTIONS ON THE NON–DEROGABLE CHARACTER OF FREEDOM OF THOUGHT, CONSCIOUS AND RELIGION AND THE CONCEPT OF ABSOLUTE HUMAN RIGHTS

Summary

Certain human rights are considered to be of an absolute nature because the interests they protect reflect the core values of human society. For many scholars, the outstanding importance of absolute rights is epitomised in their non–derogability, which is taken to be the main formal criterion for their delineation from other human rights. However, there are also views that non–derogability is not necessarily a manifestation of the fundamental importance of a right but that it can also ensue from its other characteristics. An illustration of this is typically found in the freedom of thought, conscious and religion, as laid down in Article 18 of the ICCPR. In the paper, the authors analyse possible reasons that may justify the non–derogable status of Article 18, as a way to gain further insights in the relationship between non–derogability and the concept of absolute rights. The outcome of the analysis provides arguments in favour of the thesis that non–derogability is closely related to the fundamental importance of a right and, as such, should remain among the key criteria for definition of absolute rights.

* Research Fellow, Institute of Comparative Law (Belgrade, Serbia), m.matijevic@iup.*rs*; ORCID: 0000–0002–2459–9201 This paper is a result of the research conducted by the Institute of Comparative Law financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia under the Contract on realisation and financing of scientific research of SRO in 2023 registered under no. 451–03–47/2023–01/200049.

** Research Assistant at the Institute of Comparative Law (Belgrade, Serbia) and Researcher of the Center for Legal Fundamentals at the Faculty of Law of the University of Belgrade, a.zdravkovic@iup.rs; ORCID: 0000–0001–7514–8892 The part of the research conducted by A. M. Zdravković was part of the Horizon Twinning project "Advancing Cooperation on The Foundations of Law – ALF" (project no. 101079177). ALF is coordinated by the Faculty of Law of the University of Belgrade (coordinators Miodrag Jovanović and Bojan Spaić) in partnership with University of Genova (coordinator Andrej Kristan), University of Lisbon (coordinator David Duarte), University of Surrey (coordinator Hrafn Asgeirson). The project is financed by the European Union.

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1. Introduction

There are certain human rights which are regarded as having an absolute nature for the outstanding importance of the interests safeguarded by them. Their fundamental importance for preserving core values of our societies, hence, is the main substantive criterion for their delineation from other human rights.[1] That criterion alone, as could be easily assumed, is not enough for an operative definition, nor offers a unified view on which rights should be regarded as absolute.

That means as well that no agreement on the formal attributes of these rights exists. Given that they protect very important societal interests, they are, as the very term implies, supposed to be absolutely protected. In other words, it is only logical to expect that absolute rights should be shielded from restrictions of which a state can avail itself *vis–à–vis* other rights or considerations. That is the reason why some scholars tie their property of absoluteness in the first place to their non–derogability and the absence of the limitation clause.[2] The derogation is an *ultima ratio* measure, the type of human rights restrictions which is allowed only exceptionally, in extraordinary circumstances. Since only a finite number of rights can never be subject to derogation, scholars usually conclude that non–derogability is closely related to the need to preserve fundamental interests.[3] In that way,

[1] The traces of hierarchy among the human rights norms can be found in the case law of international judicial and quasi–judicial bodies. See, for instance, *the Barcelona Traction case of the International Court of Justice (Case Concerning the Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), Judgment, ICJ Reports 1970, para. 34.) On this and some other relevant ICJ case law see M. Reljanović, V. Ćorić, M. Matijević, *Međunarodni sud pravde I – organizacija, postupak, slučajevi*, Institut za uporedno pravo, 2007. At the same time, the concept of absolute rights stands at odds to today's dominant view of human rights as an indivisible, interdependent and interrelated system of norms. More on this contemporary cannon of human rights: D. Whelan, *Indivisible Human Rights: A History*, University of Pennsylvania Press, 2010. For the empirical analysis of interdependency and interrelatedness of human rights see: L. Minkler, S. Sweeney, "On the Indivisibility and Interdependence of Basic Rights in Developing Countries", *Human Rights Quarterly* 33/2, 2011, 351–96; J. Essink *at al*., "The Indivisibility of Human Rights: An Empirical Analysis", *Human Rights Law Review* 23/3, 2023, 1–18.

[2] See Chapter 4.

[3] The non–derogable human rights play an important role in the constitutionalisation of international law, which is commonly understood as a process of creation of the unified and hierarchically organized international system of norms representing restrictions on

non–derogability becomes a proxy for absolute rights and an essential element of their definition, and should the right also be formulated in a way that leaves no possibility for its limitations, its absolute nature can hardly be disputed.

Yet, to use non–derogability trait as a criterion for defining absolute human rights is not without obstacles since not all rights typically understood as absolute are explicitly non–derogable, while the absolute nature of some non–derogable rights is questioned in both theory and practice. Moreover, different human rights instruments include different lists of non–derogable rights. The paradigmatic example of the latter case is the right to freedom of thought, conscious and religion or belief.[4] This right is derogable in the European Convention on Human Rights (Art. 9)[5] and non–derogable in the International Covenant on Civil and Political Rights (Art. 18)[6]. Article 18 is also an interesting case as it is the only one, among the explicitly non–derogable ICCPR rights, which includes a limitation clause.

There is also another, less analysed but for this inquiry particularly important segment of a discussion about the non–derogable character of freedom of thought, conscious and religion. It is not rare that non–derogability of Article 18 is explained by some practical reasons and not by the fundamental importance of the interest it protects. Such view, which we could call the "factual impossibility" argument, explains the non–derogable character of Article 18 through the specific nature of this right. The freedom of thought, conscious and religion is to be primarily realised in the inner world of an individual for the reasons of which, according to the proponents of this view, its violation is factually impossible, or at least beyond our epistemological reach. The views of the UN Human Rights Committee[7] on that matter and *en general* on the nature of absolute rights leave as well

the arbitrary exercise of power by states and other relevant international actors (as defined in : E. De Wet, "The Constitutionalization of Public International Law", in: *The Oxford Handbook of Comparative Constitutional Law* (eds. M. Rosenfeld, A. Sajó), Oxford University Press, 2012, 1213; For a different view, where constitutionalisation is seen as a response to the erosion of power of states in the domestic and international spheres see M. V. Matijević, "Some Critical Reflections on the Broad Human Rights Constitutionalisation", *Constitutio Lex Superioris: Sećanja na profesora Pavla Nikolića* (ur. Oliver Nikolić, Vladimir Čolović), Institut za uporedno pravo, 2021, 155–172.

[4] Further "freedom of thought, conscious and religion".

[5] Further "ECHR". Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

[6] Further "ICCPR". UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171.

[7] Further "Human Rights Committee" or "HRC".

some space for a question whether non–derogability of Article 18 ICCPR ensues from the fundamental importance of the interest it protects.

The present research examines the reasons for non–derogability of Article 18 by analysing the "factual impossibility" argument in the context of certain Human Rights Committee statements on the topic. The relevance of the analysis follows from the fact that a closer understanding of the reasons for the explicitly non–derogable nature of Article 18, that is of the freedom of thought, conscious and religion as laid down in the ICCPR, could help us discern to what extent non–derogability determines the concept of absolute rights. The paper studies the relationship between fundamental interests, non–derogability and the concept of absolute rights in the scholarly works and in the comments of the Human Rights Committee and other relevant UN treaty bodies. As such, its scope remains confined to the examination of how the matter is regulated under the ICCPR, with only sporadic references to the position of the freedom within the other international instruments.[8]

The structure of the paper reflects the intention to preserve the clarity of the analysis despite the conceptual complexity of its subject matter. For that reason, the first two chapters are dedicated to setting the stage for the ensuing analysis. In the first chapter, a brief overview of the content and scope of freedom of thought, conscious and religion, as laid down in the ICCPR, is provided. The second chapter brings terminological and conceptual clarifications of the types of human rights restrictions relevant for the analysis. The third chapter represents a short glance at the existing attempts to define absolute rights. The main analysis takes place in the fourth chapter, where the reasons for the non–derogable character of Article 18 and their relevance for the concept of absolute rights are investigated. In the conclusion we sum up the results of the inquiry.

2. A Brief Overview of Article 18 of the ICCPR

Freedom of thought, conscience and religion is guaranteed under Article 18 of the ICCPR. Although often referred to as "religious freedom" its scope is not limited to religious matters. Article 18 encompasses freedom of thought *en general*, thus also protecting political, scientific and philosophical thoughts and beliefs.[9] As noted by Kevin Boyle and Sangeeta Shah,

[8] For a comparison of the normative status, content and scope of the right to freedom of thought, conscious and religion under the ICCPR and the ECHR see P. M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice*, Cambridge University Press, 2005.

[9] See, for instance, *Kang v. Republic of Korea*, a case in which the distribution of communist leaflets was qualified by the Human Rights Committee as the manifestation of

the mere usage of the words "religion or belief" shows the drafter's intention to protect all beliefs and not just those of religious character.[10] Apart from the right to adopt and change theistic, non–theistic, and atheistic beliefs, Article 18 also guarantees the right not to profess any religion or belief, as well as the right to engage in critical thinking about a religion or belief.[11]

Article 18 does not protect religion or belief itself but the right of an individual to profess a religion or belief of his or her choice and live in accordance with the freely adopted convictions. Such a focus on "believers rather than beliefs" is not only a logical consequence of the notorious fact that the right–holder of a human right is a human being,[12] but also a necessity given the number of religions and beliefs existing today and the sometimes irreconcilable differences between them.[13] The individual, as tacitly expressed by the Special Rapporteur on Freedom of Religion or Belief, is "the only common denominator identifiable within such vast diversity" of religions or beliefs.[14] For that reason, the interpretations of Article 18 which confine its scope to traditional religions or religions and beliefs with institutional characteristics or practices analogous to those of traditional religions, betray its meaning.[15]

a belief in the sense of Art. 18, para. 1. Human Rights Committee, *Yong–Joo Kang v. Republic of Korea*, adopted on 16 July 2003, CCPR/C/78/D/878/1999.

[10] K. Boyle, S. Shah, "Thought, Expression, Association, and Assembly", in: *International Human Rights Law* (eds. Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran), Oxford University Press, 220.

[11] Human Rights Committee, *CCPR General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 2. See, also the 3rd commitment under the Beirut Declaration on Faith for Rights, which calls for the creation of a social ambient in which "the critical thinking and debate on religious matters should not only be tolerated but rather encouraged as a requirement for enlightened religious interpretations in a globalized world composed of increasingly multi–cultural and multi–religious societies that are constantly facing evolving challenges". Special Rapporteur on Freedom of Religion or Belief, Report on Freedom of Religion and Belief, Annex II:18 commitments on "Faith for Rights", of 5 March 2019, A/HRC/40/58, para. III.

[12] Human beings as rights holders may exercise these freedoms as individuals and in community with others.

[13] Special Rapporteur on Freedom of Religion or Belief, Interim Report: Elimination of all forms of religious intolerance, 2 August 2016, A/71/269, para. 11.

[14] *Ibid*., para. 12.

[15] Any discrimination, especially towards adherents to other religions or the non–believers in the states with an official religion or a traditional religion that assembles most of the population, is inconsistent with Article 18. In that sense, the HRC places strong emphases on safeguarding the freedom of religious minorities and sees Article 18 as pivotal in that regard. HRC, General Comment No. 22, para. 9. In relation to this, Heiner Bielefeldt observes that this freedom often remains confined to a firmly fixed list of religious options, for the reason of which members of less known, new or alternative religious communities

This is a multifaceted right, with three of its distinct realms explicitly regulated in the text of Article 18. Freedom of thought, conscience and religion represents the so–called *forum internum* realm of the right, referring to "person's inner sanctum (mind) where mental faculties are developed, exercised and defined".[16] As an expression of the special protection assigned to the *forum internum* dimension of the right, Article 18, in its paragraph 2, prohibits the use of coercion aimed at impairing one's freedom to have or to adopt a religion or belief of own choice. The freedom to manifest one's religion or belief, individually or in community with others, and in public or private, in worship, observance, practice and teaching, represents the *forum externum* aspect of the right.[17] The last paragraph of Article 18 (para. 4) protects the right to intergenerational transmission of religion or belief by placing a duty on the State Parties to respect the liberty of parents to ensure that the religious and moral education of their children is in conformity with their own convictions.

A delineation of the *forum internum* and *forum externum* realms of freedom of thought, conscience and religion is important, as only the latter may be subject to restrictions. Article 18 is in its entirety exempted from derogations, *i.e.,* cannot be subject to the measures by which the State Parties can temporarily restrict the enjoyment of the rights guaranteed under the ICCPR in times of public emergency (Art. 4, para. 2). However, only its *forum internum* aspect enjoys unlimited protection. As noted, the second paragraph of Article 18 lays down an unqualified protection against coercion that would impair freedom to have or to adopt a religion or belief of one's choice. Importantly, its scope has been interpreted by the Human Rights Committee as to also include the freedom from being forced to reveal own thoughts or adherence to a religion or belief.[18] The protection against

are usually excluded or discriminated against. H. Bielefeldt, "Freedom of Religion or Belief – A Human Right under Pressure", *Oxford Journal of Law and Religion*, 2012, 20.

[16] Special Rapporteur on Freedom of Religion or Belief, Report on freedom of thought, 5 October 2021, A/76/380, para. 2.

[17] The 1981 Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief in its Article 6 provides a detailed account of different forms of manifestation of religion or belief. UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55.

[18] HRC, General Comment No. 22, para. 3. However, while examining state reports, the relevant UN human rights bodies have dealt with the issue of compulsory religious oaths and the religious affiliation stated in the identity card mostly in relation to the protection against discrimination in the context of religious freedoms. See, for instance, Report of the Human Rights Committee, 7 October 1993, A/48/40 (Part I), para. 607; Human Rights Committee Special Rapporteur, Report on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion

coercion encompasses both its direct and indirect forms. The existing case law shows that the latter often materialises as a limited access to important public goods, such as education, medical care or employment, or limitations on the enjoyment of family law rights, such as custody of children.[19] In its General Comment No. 22, the Human Rights Committee adopted a broader interpretation of the absolute protection guarantees contained in Article 18, to include the liberty of parents to ensure that their children receive a religious and moral education in conformity with their own convictions.[20]

On the other hand, the *forum externum* dimension, the freedom to manifest one's religion or belief as laid down in Art. 18, para. 3, may be subject to limitations that are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others. That balancing exercise, as it will be explained in the next chapter, can be undertaken both in time of emergency and in regular times, and it concerns the type of human rights restrictions which is clearly distinct from derogations.

3. Non–derogable Rights

Before proceeding with the analysis, we should first point out the pronounced terminological inconsistency characterising the main notions which are used for different types of restrictions placed by states on the enjoyment of human rights. A good example of this are the terms "restrictions" and "limitations". They are used interchangeably throughout the ICCPR[21], which

or Belief, 6 January 1993, E/CN.4/1993/62, para. 81; Human Rights Committee Special Rapporteur, Report on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 7 November 1996, A/51/542/Add.1, para. 136. On the European Court of Human Rights approach to these issues see: ECtHR, *Alexandridis v Greece*, App. No. 19516/06, Judgment of 21 February 2008; ECtHR, *Sinan Isik v Turkey*, App. No. 21924/05, Judgment of 2 February 2010; See also K. Boyle, S. Shah, 223.

[19] HRC, General Comment No. 22, para. 5.

[20] HRC, General Comment No. 22, para. 8. In that sense, the HRC underlined that public education which includes instructions in a particular religion or belief is inconsistent with Article 18, except if provision is made for non–discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians (See, HRC, General Comment No. 22, para. 6).

[21] See, for instance, Articles 11, 19, 21 as compared to Article 18. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* reflect this, for the reason of which its text contains a note which points to the use of the term "limitations" in a way that includes the term "restrictions" as used in the Covenant. American Association for the International Commission of Jurists, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, U.N. Doc. E/CN.4/1985/4, footnote.

renders rather difficult their definition per genus proximum et differentiam specificam. The same problem is also reflected in the academic literature,[22] which is why certain terminological clarifications must be made.

In the paper, the term "human rights restrictions" (or "restrictions") is consistently used as a general notion which refers to the class of legal mechanisms by which the state can lawfully interfere with an individual's enjoyment of human rights. The term "limitations" here has a narrower meaning and denotes a distinct type of restrictions, *i.e.,* a specific legal mechanism through which, under certain conditions, an individual's enjoyment of human rights can be limited. Limitations are enabled by the so–called "limitation clause" that may be included in a provision guaranteeing a certain right. When such a limitation clause exists, governments are allowed to partially limit the enjoyment of a right, but only in the pursuit of a therein listed legitimate aim, such as the protection of national security, public order, public health and morals, and rights and freedoms of others, insofar as necessary in a democratic society.[23]

Another type of human rights restrictions is derogation. Derogation of a human right or of one of its aspects "is its complete or partial elimination as an international obligation", of which a state can avail itself only during public emergency.[24] To say that a certain right is derogated is to say that it is suspended for a limited period of time because a state, due to a public emergency, becomes unable to guarantee all the conditions necessary for the realisation of that right. In this situation, the non–compliance, which would normally amount to a violation, is not considered as such. In other words, the derogation mechanism enables states − provided they meet the prescribed requirements − to officially proclaim that they cannot fulfil some of their human rights obligations and in that way gain some space for a manoeuvre in order to overcome as soon as possible the state of emergency. An important difference between the derogation mechanism and limitations is that the latter can be applied during both regular and irregular times, while derogations are strictly related to public emergences.

Not only were the drafters of the ICCPR aware that sometimes, in extraordinary circumstances, the State Parties might need to depart from

[22] See, for instance: J. M. Ross, "Limitations on Human Rights in International Law: Their Relevance to the Canadian Charter of Rights and Freedoms", *Human Rights Quarterly* 6/2, 1984, 180–223; O. M. Garibaldi, "General Limitations on Human Rights: The Principle of Legality", *Harvard International Law Journal* 17/3, 1976, 503–558.

[23] For instance, such limitation clauses can be found in Art. 12, para. 3, Art. 18, para. 3, Art. 19, para. 3 of the ICCPR.

[24] D. McGoldrick, "The Interface Between Public Emergency Powers and International Law", *International Journal of Constitutional Law* 2/2, 2004, 383.

their treaty obligations, but they were also aware that this mechanism can be misused. To prevent potential abuses and secure an adequate level of legal certainty, the first paragraph of Article 4 lays down strict conditions for a derogation to be lawful. There must be an officially proclaimed public emergency which threatens the life of the nation, for instance, war, rebellion, terrorist attack, or natural disaster. The derogating measures must be undertaken only to the extent strictly required by the exigencies of the situation and must not be discriminatory or inconsistent with other international obligations of the State Party in question.[25] Article 4 also prescribes a set of procedural conditions, which establish a duty to immediately inform the UN Secretary–General about the provisions that will be derogated and state relevant reasons for such measures, as well as to provide additional communication on the date of termination of derogations.[26]

Certain rights are non–derogable. As an exception to the general rule established in para. 1, the second paragraph of Article 4 provides a list of the ICCPR rights which cannot be suspended even during a state of emergency.[27] The list is similar but not identical to the lists of non–derogable

[25] Art. 4, para. 1 of the ICCPR.

[26] For the view that every notification on derogations must contain explanation and reasoning for imposing a particular emergency measure, see A. M. Zdravković, "The Affair of "State of Emergency" – Was 70 Years of European Convention on Human Rights Enough to Prepare Member States for COVID–19 Crisis?", *Iustunianus Primus Law Review* 2020, 9–11. For a critical evaluation of the existing system of human rights treaty derogations see: L. Helfer, "Rethinking Derogations from Human Rights Treaties", *American Journal of International Law* 115/1, 2021, 20–40.

[27] According to ICCPR Article 4, non–derogable are the right to life, freedom from torture, cruel, inhuman, degrading treatment or punishment, freedom from slavery or servitude, the right not to be imprisoned for contractual debt, freedom from retroactive criminal punishment, right to recognition as a person before the law and freedom of thought, conscience, and religion, while non–derogability of the prohibition of the death penalty is prescribed under the Second Optional Protocol to the ICCPR (UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, A/RES/44/128). However, in the General Comment No. 29, the HRC stated that the given list should not be seen exhaustive and interpreted it to include several other, not explicitly mentioned segments of the rights guaranteed by the ICCPR. According to the HRC, illustrative examples of the provisions that cannot be subject to lawful derogation are: the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (Art. 10); the prohibitions against taking of hostages, abductions or unacknowledged detention; elements of the international protection of the rights of persons belonging to minorities; the prohibition of the deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present (which constitutes a crime against humanity);

rights contained in the derogation clauses of other human rights instruments, with each later drafted treaty expanding the list of non–derogable rights. Freedom of thought, conscience and religion is qualified as non–derogable in the ICCPR, whereas under the ECHR, adopted 16 years earlier, it does not enjoy the same status.[28] Be that as it may, the practical implications of this difference are rather limited since all Member States of the ECHR are also State Parties to the ICCPR and must respect obligations under both treaties. Given that those obligations which are more stringent prevail, the states must respect the right to thought, conscience and religion as a non–derogable right. Since only three international human rights treaties – the ICCPR, the ECHR and the American Convention on Human Rights – contain derogation clauses, only a handful of human rights are explicitly exempted from derogation.[29]

Non–derogability of some human rights is taken to be an important characteristic of the contemporary system of international human rights norms. Firstly, it is an element for determination of the norms of peremptory character, given that only norms which are exempted from derogation can become peremptory norms of general international law.[30] The International Law Commission sees in non–derogability the formal expression of their special status: "[t]he idea that peremptory norms of general international law (*jus cogens*) are universally applicable, like that of their

provision requiring that any propaganda for war shall be prohibited by law, as well as that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law (Art. 20); the obligation to provide effective remedy for violations of the provisions of the Covenant (Art. 2, para. 3); provisions of the Covenant, including Article 4, relating to procedural safeguards and guarantees; certain elements of the right to a fair trial that are explicitly guaranteed under international humanitarian law during armed conflict, including that only a court of law may try and convict a person for a criminal offence, the presumption of innocence and the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, in order to protect non–derogable rights. See HRC, *General Comment No. 29,* paras. 13–15.

[28] Article 15 of the ECHR.

[29] Apart from Article 15 of the ECHR, a similar derogation mechanism is also found in Article 27 of the American Convention on Human Rights (Organization of American States, *American Convention on Human Rights*, *"Pact of San Jose", Costa Rica*, 22 November 1969). African Charter on Human and Peoples' Rights is the only regional human rights instrument which does not contain a derogation clause (Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58).

[30] As defined in Article 53 of the Vienna Convention on the Law of Treaties. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331.

hierarchical superiority, flows from non–derogability".[31] Non–derogability is, in that sense, seen as a direct consequence of the fundamental interest that the right exempted from derogations protects.[32] As such, it represents an important element of the attempts to define absolute rights.

4. Defining Absolute Rights

A closer look at the derogation as a distinct type of human rights restriction was needed for the ensuing analysis of the non–derogability of Article 18 and its relevance for the definition of absolute rights. But, before venturing into that complex inquiry, we need to gain at least a basic idea of what the concept of absolute rights is about. As already observed, neither theory nor practice has yet arrived at a commonly accepted definition of absolute rights, even though the term is present in the academic literature and the case–law of international and national courts.

On the international plane, the notion is often found in the decisions of the European Court of Human Rights,[33] as well as in the general comments of the HRC, but it can also be identified in the jurisprudence of other international courts and quasi–judicial bodies.[34] However, these bodies define it rarely, if ever, and rather use it as a self–referential term. In other words, they assign to the concept a certain meaning without giving an account of its content and scope.[35] As far as academia is concerned, the matter is not much

[31] UN General Assembly, Report of the International Law Commission on its Seventy–first session (29 April–7 June and 8 July–9 August 2019), A/74/10, 155.

[32] R. Pisillo Mazzeschi, A. Viviani, "General Principles of International Law: From Rules to Values?", in: *Global Justice, Human Rights and the Modernization of International Law* (eds. R. Pisillo Mazzeschu, P. De Sena), 2018, Springer, 143.

[33] This is primarily true with respect to Art. 3 of the ECHR. See, for instance, ECtHR, *Soering v. the United Kingdom*, App. No. 14038/88, Judgment of 7 July 1989, para. 88; ECtHR, *Chahal v. the United Kingdom*, App. No. 22414/93, Judgment of 15 November 1996, para. 79–80; ECtHR, *Gäfgen v. Germany*, App. No. 22978/05, Judgment of 1 June 2010, paras. 87, 107. As a matter of fact, on the official webpage of the Council of Europe the differentiation between qualified and unqualified rights can be found within the category "Definitions". "Unqualified rights are rights which cannot be balanced against the needs of other individuals or against any general public interest. They may be subject to specific exceptions, e.g. the right not to be deprived of liberty, Article 5; or to none at all, when they are called absolute rights, e.g. freedom from torture, Article 3.", *https://www.coe.int/en/web/echr–toolkit/definitions* 10. 6. 2023.

[34] UN Committee against Torture, *Report of the Committee against Torture on its Forty–third session (2–20 November 2000) and on its Forty–fourth session (26 April–14 May 2010)*, Suppl. No. 44 (A/65/44), para. 17; ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 2000, paras. 26, 29.

[35] For example, in the General Comment No. 36 on the right to life, the HRC simply pointed out that this right is not absolute. Human Rights Committee, CCPR General

clearer since different authors in different way define or otherwise determine the key elements of the concept of absolute rights.[36] While analysing the European Court of Human Rights reasoning with regards to Article 3 of the ECHR, as the paradigmatic example of an absolute right, Natasa Mavronicola identified three elements of the right's absoluteness, namely that it does not contain a limitation clause, that it is non–derogable, and that it applies irrespective of one's conduct, that is to say, even if the right–bearer was a criminal or a terrorist.[37] According to her, the main structural implication of the absolute nature of a right is that the obligations it encompasses cannot be lawfully displaced by the consequentialist concerns.[38] For some other authors, non–derogability represents the essential determinant of the absolute nature of a right. According to Dinah Shelton and Patricia Roberts Harris, the fact that non–derogable rights cannot be subject to suspensions, reservations,

Comment No. 36 on Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para. 10.

[36] For more on absolute rights see, for instance: M. Paunović, B. Krivokapić, I. Krstić, *Međunarodna ljudska prava*, Pravni fakultet Univerziteta u Beogradu, 2014, 66; E. Klein, "On Limits and Restrictions of Human Rights: A Systematic Attempt", in: *Strengthening Human Rights Protections in Geneva, Israel, the West Bank and Beyond* (eds. J. David *et al*.), Cambridge University Press, 25; C. K. Wouters, "International Refugee and Human Rights Law: Partners in Ensuring International Protection and Asylum", in: *Routledge Handbook of International Human Rights Law* (eds. S. Sheeran, Sir N. Rodley), Routledge, 2013, 234–235; A. M. Zdravković, „Pravo na život sagledano kroz prizmu apsolutnih ljudskih prava", *Pravni život* 12/2019, 339–340.

[37] Especially controversial in this regard is the ECtHR's case *Gäfgen v. Germany*, App. No. 22978/05, Judgment of 3 June 2010. Natasa Mavronicola, "What is an 'Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights", *Human Rights Law Review* 12/2012, 737.

[38] Natasa Mavronicola, "Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context", *Human Rights Law Review* 15/2012, 724. The two opposed ethical theories – deontological and teleological theory – are particularly important for theorizing absolute rights, since authors advocating for the existence of absolute human rights accept absolutism, a categorical (or deontological) theory that considers certain acts as intrinsically wrong, irrespective of their effects and, hence, those acts must be avoided at all costs. The consequences of these acts for them have no ethical relevance. (See D. McNaughton, "Deontological Ethics", in: *Concise Routledge Encyclopedia of Philosophy* (ed. Edward Craig), Routledge, 1999, 202; T. Nagel, "War and Massacre", in *Consequentialism and its Critics* (ed. Samuel Scheffler), Oxford University Press, 1988, 60). In contrast, the opponents of absolute human rights mostly derive their positions from the consequentialist (or teleological) theory, which evaluates the morality of an action by reference to its consequences. In that sense, they are willing to balance every right against any consideration. Most of the criticism of deontology is based on its inflexibility, which led to the conceptualization of a third approach, the so–called "threshold deontology". This approach argues that rules should always be obeyed unless there is an emergency situation, in which one should revert to consequentialism. (See L. Alexander, M. Moore, "Deontological Ethics", *Stanford Encyclopaedia of Philosophy*, October 30, 2020.

or denunciations, brings them close to being absolute in nature.[39] Sara Joseph notes that most of the absolute rights are non–derogable.[40]

Others perceive absolute rights as those that do not allow for any limitations. For instance, Martin Sheinin takes the view that absolute rights are a separate category from non–derogable rights, as some absolute rights have not been explicitly exempted from derogations and, conversely, some non–derogable rights may permit "exceptions" during normal times but do not allow for an additional layer of exceptions through the introduction of derogations during a state of emergency.[41] In relation to this, he refers to General Comment No. 29, especially its part pointing to Article 18 of the ICCPR as the non–derogable provision that includes a limitations clause. Olivier De Schutter highlights that absolute rights allow no limitations,[42] whereas Kai Möller sees them as those that cannot be subjected to the proportionality test.[43]

5. Non–derogability and Absolute Human Rights

In this chapter, we will examine the HRC's view on the matter. We will start our inquiry with General Comment No. 29, more specifically, its

[39] D. Shelton, P. Roberts Harris, Report "Are There Differentiations Among Human Rights? Jus Cogens, Core Human Rights, Obligations Erga Omnes and Non–derogability", UniDem Seminar *The Status of International Treaties on Human Rights* (Coimbra (Portugal), 7–8 October 2005), 21.

[40] S. Joseph, M. Castan, *The International Covenant on Civil and Political Rights – Cases, Materials and Political Rights*, Oxford University Press, 2013, 30.

[41] M. Sheinin, "Core Rights and Obligations", in: *The Oxford Handbook of International Human Rights Law* (ed. Dinah Shelton), Oxford University Press, 2013, 532.

[42] Considering above–explained terminological inconsistences that pervade this field, the exact meaning of various terms used by different authors can only be assumed. In that regard, it is not entirely clear whether De Shutter uses the term "limitations" in the sense of "restrictions" as understood in this paper or as a narrow category granted by the limitation clause. O. De Shutter, *International Human Rights Law*, Cambridge University Press, 2010, 257.

[43] This opinion of Möller is indirectly deduced from his statement that "while it is true that some rights are absolute, [...] most rights — including the rights to life, physical integrity, privacy, property, freedom of religion, expression, assembly, and association — can generally be limited in line with the proportionality test, at the core of which is a balancing exercise where the right is balanced against a competing right or public interest.", K. Möller, *The Global Model of Constitutional Rights*, Oxford University Press, 2012, 13. The most direct definition of absolute rights that he offered is "the rights which must never be interfered with", K. Möller, "The Right to Life Between Absolute and Proportional Protection", *LSE Law, Society and Economy Working Papers* 13/2010, 2. A similar determination of absolute rights is also found in A. Takahashi, Yutaka, "Proportionality", in: *The Oxford Handbook of International Human Rights Law* (ed. Dinah Shelton), Oxford University Publishing 2013, 467. For the opposite view see M. Borowski, "Absolute Rights and Proportionality", *German Yearbook of International Law* 56, 2013, 385–424.

parts in which the HRC interprets the exemption from derogation found in Article 4, paragraph 2. There the HRC states that the given provision should as well embrace elements of several other, not explicitly mentioned ICCPR rights, and that the absolute nature of some of these rights "is justified by their status as norms of general international law".[44] The given statement is rather curious, hence, it deserves a short analysis.

To begin with, it is important to note that the HRC connects the absoluteness of a right with its non–derogable character − by interpreting the prohibition of derogation from Art. 4, para. 2, as also to apply to some other rights because of their absolute nature − though it remains unclear whether for the HRC the non–derogability of a right automatically leads to it being characterised as absolute. A second, equally interesting point, is the HRC's reference to the notion of "general international law". Given that there is no agreement on the exact meaning of this notion,[45] as confirmed by the Study Group on Fragmentation of International Law established by the International Law Commission,[46] the point of linking the absolute character of certain norms to their status of norms belonging to "general international law" is unclear and raises several questions. Certainly, not all norms of general international law can be considered absolute; hence, this cannot be the right explanation. However, only a norm belonging to general international law can become a peremptory norm of international law (*jus cogens*). According to Article 53 of the Vienna Convention on the Law of Treaties, "a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent

[44] For the sake of clarity and for the ease of further analysis this is the exact wording of the relevant provisions found in paragraph 13 the General Comment No. 29: "13. In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below. […] (b) The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. *The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law* (italic added)." HRC, *General Comment No. 29,* para. 13(b).

[45] Josef L. Kunz insists that general international law can be created solely by a custom, Kunz, "General International Law and the Law of International Organizations", *American Journal of International Law*, 1953, 457. Contrary to this view, Grigory Tunkin is convinced that general international law comprises both customary and conventional rules. G. Tunkin, "Is General International Law Customary Law Only?", *European Journal of International Law* 4/1993, 541. For more see A. M. Zdravković, "Finding the Core of International Law – *Jus Cogens* in the Work of the International Law Commission", *South Eastern Europe and the European Union – Legal Issues*, 5/2019, 141–158.

[46] As cited in International Law Commission, Second report on jus cogens by Dire Tladi, Special Rapporteur, 16 March 2017, A/CN.4/706, para. 41.

norm of general international law having the same character". Simply put, to become peremptory, a norm must belong to the corpus of general international law; secondly, it must be accepted and recognized by the international community of states as non–derogable. As a reminder, in General Comment No. 29, the HRC stated that certain provisions should be considered non–derogable because of their absolute nature, which is derived from them being a part of general international law.[47] Well, as previously explained, there is a notion in international law which denotes to such norm, but that notion is generally avoided. International bodies are traditionally reluctant to qualify a norm as a peremptory, *jus cogens* norm, and that seems to be as well the case with this HRC argument. Here, the HRC could have stated that the justification of the non–derogability of the relevant provisions lays in their peremptory status, but it preferred not to. Instead, it resorted to the absolute nature of these norms and offered some kind of mixture of concepts that only added to the confusion over these already overlapping terms.

To leave no stone unturned, the HRC did clarify that the enumeration of non–derogable rights "is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law".[48] What is more, it added that "the proclamation of certain provisions of the Covenant as being of a non–derogable nature in article 4, paragraph 2, is to be partly seen as recognition of the peremptory nature of some fundamental rights", but that "some other provisions of the Covenant were included in the list of non–derogable provisions *because it can never become necessary to derogate from these rights during a state of emergency* (italics added)".[49] As an illustration of norms which are to be considered non–derogable "because it can never become necessary to derogate from these rights during a state of emergency" and not because they could be qualified as peremptory norms, the HRC pointed out the prohibition of imprisonment for inability to fulfil a contract (Art. 11) and the freedom of thought, conscious and religion (Art. 18).[50]

[47] See, footnote no. 43.

[48] HRC, *General Comment No. 29,* para. 11. Similarly, in para. 13 (c) the HRC claimed non–derogability of certain elements of the rights of persons belonging to minorities, *inter alia*, on the basis of "the *non–derogable nature* of article 18 (italic added)".

[49] *Ibid*. On the basis of this, the HRC also concluded that the freedom to hold opinion without interference (Art. 19, para. 1) belongs to those rights. The non–derogable nature of Article 19, para. 1 was also stated in the General Comment No. 34, where the HRC said that although the freedom of opinion is not in the list of non–derogable rights found in Art. 4, para. 2, it permits no derogation "since it can never become necessary to derogate from it during a state of emergency". Human Rights Committee, CCPR *General Comment No. 34,* 12 September 2011, CCPR/C/GC/34, para. 9.

[50] HRC, *General Comment No. 29,* para. 11.

That, however, provokes another important question. How to understand this view of the HRC given that several years earlier, in General Comment No. 22, the same body expressed what seems to be an opposite view, when affirming the "fundamental character" of freedom of thought, conscious and religion that is "reflected in the fact that this provision cannot be derogated from, even in time of public emergency"?[51] In other words, it remains unclear whether the freedom of thought, conscious and religion is non–derogable owing to its fundamental importance or simply because it would never be necessary to derogate from it. A closer scrutiny of the possible reasons for its inclusion in the list of non–derogable norms might provide valuable insights about the concept of absolute rights *per se*.

5.1. The Non–derogable Character of Freedom of Thought, Conscious and Religion

In the academic literature and practice of the UN treaty bodies, it is not rare to come across the view that the *forum internum* realm of Article 18 is inviolable because interference with this freedom is factually impossible or at least beyond our epistemological grasp.[52] This opinion is mostly based on the argument that the *forum internum* entitlements are related to the inner act of believing.[53] Hence, according to such a view, they can be neither derogated nor limited. An often–cited reference for that is found in the study of discrimination in the matter of religious rights and practices, where the Special Rapporteur Krishnaswami stated that "[f]reedom to maintain or to change religion or belief falls primarily within the domain of the inner faith and conscience of an individual", and that "[v]iewed from this angle, one would assume that any intervention from out–side is not only illegitimate but impossible."

If further developed, such an interpretation of the content of the *forum internum* freedoms could be a logical reason for the non–derogable character of at least this dimension of Article 18.[54] And what about the *forum externum* aspect of Article 18? If we push the same argument further,

[51] HRC, *General Comment No. 22*, para. 1.

[52] For a view that freedom of conscience is non–derogable because its limitation would be impossible see M. Jovanović, I. Krstić, "Human Rights and the Constitutionalization of International Law", in: *Human Rights in the 21st Century* (eds. Tibor Várady, Miodrag Jovanović), Eleven International Publishing, 2020, 29.

[53] See also O. Nikolić, *Država, crkva i sloboda veroispovesti*, Institut za uporedno pravo, 2022, 52.

[54] Special Rapporteur of the Sub–Commission on Prevention of Discrimination and Protection of Minorities, Study of Discrimination in the Matter of Religious Rights and Practices, UN Doc. E/CN.4/Sub.2/200/Rev.1, UN Sales No. 60. XIV.2.

we could say that neither the right to derogate from the *forum externum* is needed − although it certainly does not belong to the inner realm of an individual's existence − given that it can be subject to lawful limitations. As noted earlier, Art. 18, para. 3, contains a limitation clause which allows a state to interfere with its enjoyment both in times of normalcy and during public emergencies. To go back to the dilemma raised in the previous chapter, according to this reasoning, the words of the HRC should be read as pointing to the factual impossibility to restrict Article 18 freedoms as the *ratio legis* for its inclusion in the list of non–derogable rights from Art. 4, para. 2. Furthermore, these arguments could also become the basis of a claim that – given that not all non–derogable rights are non–derogable because of their fundamental character – the definition of absolute rights need not imply the nexus between the fundamental importance of a certain norm and its non–derogable nature.

On the other hand, this reasoning could be challenged on at least two grounds. The most basic argument goes as follows: if it were factually impossible to interfere with *forum internum* rights, the prohibition of coercion laid down in Art. 18, para. 2 would be redundant. Although *forum internum* denotes the inner nucleus of a person's religious, moral, or other conviction, this provision clearly protects it against violations which, as we have seen earlier, can be a consequence of direct and indirect forms of coercion, as well as other interferences resulting in a compulsion to act contrary to one's beliefs. Not only that the ICCPR provisions postulate unconditional protection of the *forum internum* freedoms, but during the last seventy years, the scope of the Article 18 *forum internum* has been expanded in a way which now makes it even easier to argue that it is factually possible to violate it. We have seen in the previous chapters that *forum internum* today includes rights which can be easily interfered with by a state, such as the right not to reveal one's thoughts or adherence to a religion or belief illustrated in cases concerning the inclusion of data on religious affiliation in identity cards. Yet another example is a state inquiry into the reasons for adopting certain belief, or the requirement of advance notice or prior permission, that has surfaced in several cases in relation to the anti–conversion measures and has been characterised as a practice that may easily lead to an unlawful interference with the *forum internum*.[55] Secondly, the argument that the *forum externum* freedoms can never become necessary to derogate from – given that they are already subject to limitations – can be challenged by recalling that limitations and derogation are two distinct types of human

[55] Special Rapporteur on Freedom of Religion or Belief, Report and Addendum: Mission to India, 26 January 2009, A/HRC/10/8/Add.3, para. 49.

rights restrictions. While there are many similarities between the two, the obvious difference is that much more is needed to lawfully derogate from a right, since the officially proclaimed public emergencies do not take place every day.[56] At the same time, the more significant interferences with a right are more likely to be proven justified under derogations, provided that the formal requirements are met, than under limitation clauses.[57]

Seen this way, the above developed line of reasoning which derives the non–derogable character of Article 18 from a factual impossibility, taken in a literal sense, to derogate from its provisions, cannot provide a consistent answer to the question of why Article 18 was included in the list of non–derogable rights. Nevertheless, if we abandon the literal reading of the "factual impossibility" argument, we can try to give it a new one through a somewhat more creative interpretation of the relevant HRC sentence. The HRC statement that some provisions of the Covenant, Article 18 being among them, are found in the list of non–derogable provisions "because it can never become necessary to derogate from these rights during a state of emergency" could be read as referring to the fact that there can be no imaginable and legitimate reasons to suspend the freedom to have or to adopt a religion or belief of one's choice, or to be free from coercion which would impair this freedom.[58] In other words, a state could suspend application of the *forum internum* rights, but it would never be able to fulfil the substantive criteria, *i.e.*, meet the proportionality test laid down in Art. 4, para. 1, so to make of that suspension a lawful derogation.

If we embraced this view on the non–derogable nature of Article 18, we would arrive at the conclusion that the HRC statement that it can never become necessary to derogate from this right, in effect, points to its fundamental character. In theory, the fundamental character of Article 18 is often derived from its importance for preserving the dignity of a person. According to the Special Rapporteur on Freedom of Religion or Belief, the importance of the *forum internum* freedoms for the individual's "inner

[56] For the view that derogations produce more serious consequences regarding the enjoyment of human rights than those arising from the limitation of rights, see V. Đurić, V. Marković, „Sloboda veroispovesti i mere za suzbijanje epidemije virusa KOVID 19 – novi pristup, domaća iskustva i uporedna rešenja", u: *Pandemija kovida 19: pravni izazovi i odgovori* (ur. Vladimir Đurić, Mirjana Glintić), Institut za uporedno pravo, 2021, 41.

[57] This statement is based on the simple assumption that situations which require derogations are usually much more serious, such as war, pandemic or natural disasters, compared to those in which limitation clauses are invoked. It goes without saying that this is far from being a rule, thus the interest would be weighed on the case–by–case basis.

[58] Similar approach to the fundamental importance of the right as being an underlying reason for its non–derogability can be found in D. Đukić, "Vera, zdravlje, pravo: ograničenja slobode veroispovesti u uslovima pandemije", *Harmonius* 2021, 85.

faculty of forming, holding or changing, *inter alia*, opinions, ideas, conscientious positions, religious and non–religious convictions" and, hence, developing and preserving "a stable sense of self–respect", warrants an interpretation "in close analogy to the unconditional prohibition of slavery and the equally unconditional prohibition of torture".[59] Similarly, Malcom D. Evans makes an analogy between the importance of freedom of thought, conscious and religion and the importance of the prohibition of torture for securing the basic well–being of an individual, as the reason why the two are granted "elevated status which ought not to be subject to restriction". According to him, if vital aspects of physical well–being were protected by the unconditional prohibition of torture than "it is at least arguable that essential aspects of intellectual autonomy should be similarly protected".[60] D. M. El–Rashed follows the same line of reasoning when she derives the absolute status of some rights from the fact that even in the most serious emergencies there are still rights that cannot be derogated "on the grounds that they are inherently too fundamental to ever be infringed upon" and, subsequently, there is "no justifiable State objective to be sought in their curtailment".[61] According to these views, the proposition that Article 18 is exempted from derogation because it can never become necessary to derogate from it eventually comes down to the fundamental importance of freedom of thought, conscious and religion as the explanation of its explicitly non–derogable character. The drafters of the Siracusa Principles, though in relation to some other ICCPR provisions, point to the same logic when they observe that "the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency".[62]

To go back to our main question, that is, whether the non–derogable status of a right could be taken as a proxy for its absolute character, it seems that our analysis provides arguments which support such an approach to the concept of absolute rights. It was shown that the non–derogable character of freedom of thought, conscience and religion could be considered as indication of its fundamental importance, which is a view that has its

[59] Special Rapporteur on Freedom of Religion or Belief, Report of 23 December 2015, A/HRC/31/18, para. 19. Here, the Special Rapporteur refers to both Article 18 (para. 2) and Article 19 (para. 1).

[60] M. Evans, *Religious Liberty and International Law in Europe*, Cambridge University Press, 1997, 317.

[61] D. M. El–Rashed, "Derogation in Time of Emergency: An Analysis of Counter–Terrorism Measures in France and Their Impact on Human Rights", *Florida Journal of International Law* 30(1), 2018, 14–15.

[62] American Association for the International Commission of Jurists, *The Siracusa Principles*, para. 70.

supporters in both theory and practice. According to the Special Rapporteur on Freedom of Religion or Belief, the non–derogable character of Article 18 "underlines the importance of the freedom of thought, conscience and religion".[63] Evans, goes a step further when he claims that due to the non–derogable character of Article 18, freedom of thought, conscience and religion should be considered an absolute right.[64] In effect, the assumption that non–derogable rights are exempted from derogations because of their fundamental importance brings us to the concept of absolute rights. They are seen as rights the importance of which overrides any possible benefit that their suspension might bring to a state facing a threat to its security or survival. As John H. Knox, expressed it, non–derogable rights are "like "trumps," in Ronald Dworkin's phrase, that outweigh other societal interests, no matter how pressing and important".[65]

That brings us to the conclusion, with which we are closing our inquiry, that if there were no exception to the rule that the explicit prohibition of derogation ensues from the fundamental interest a right protects, then the nexus between the non–derogability and the fundamental importance could remain among the key elements of the definition of absolute rights.[66]

6. Conclusion

The goal of this paper was to provide further insights – by analysing different interpretations of the non–derogable character of Article 18 – on the relationship between non–derogability and absolute rights. After providing the basic terminological and conceptual clarifications and a brief overview of the main attempts to define absolute rights, we have analysed several statements of the Human Rights Committee which reflect its view of non–derogability and the concept of absolute rights. There we have observed that the HRC clearly links exemption from derogation with the absolute character of a right and is of the opinion that such a link, which

[63] Special Rapporteur on Freedom of Religion or Belief, Report: Civil and Political Rights, Including the Question of Religious Intolerance, of 9 January 2006, E/CN.4/2006/5, para. 42.

[64] M. Evans, 200, 221.

[65] J. H. Knox, "Horizontal Human Rights Law", *The American Journal of International Law* 102/1, 2008, 13.

[66] That, however, does not answer a myriad of other questions, such as whether the catalogue of non–derogable rights should be confined only to those explicitly proclaimed as such, whether the scope of absolute protection should embrace the entire right or only some of its aspects, and many other similar issues which will hopefully become a subject of some future academic inquiries.

ensues from the fundamental nature of the interest a right protects, is not confined to peremptory norms of international law. For the HRC there is a causal relationship between non–derogability and the absolute nature of a right. However, the HRC also points to the existence of norms which are non–derogable because it can never become necessary to derogate from them during a state of emergency. To illustrate this, it refers to the non–derogable nature of freedom of thought, conscious and religion. In legal scholarship, it is sometimes also claimed that the exemption from derogation of Article 18 ensues from the fact that this right, more specifically, its *forum internum* aspect, is factually impossible to restrict.

The given claim turns the examination of the reasons for the explicit non–derogability of Article 18 into an interesting path for investigating the relationship between the prohibition of derogation and absolute rights. Namely, if not all non–derogable rights were non–derogable because of their fundamental character, that would mean that non–derogability does not always and necessarily imply the fundamental importance of a right. As such, the non–derogable status of a right could not be considered as firm indication of its absolute nature. In other words, the nexus between the fundamental importance of a certain norm and its non–derogable character would not figure anymore as the key element of the concept of absolute rights as it does in many of the existing attempts to define it.

In the paper, we first investigated the view that the *forum internum* realm of Article 18 is inviolable because, as certain authors claim, it is factually impossible to restrict it. We further developed the given view by extending it to the *forum externum* aspect of the freedom. Then we challenged it by providing arguments against such an understanding of the non–derogable character of Article 18. Eventually, we offered an alternative reading of the HRC statement that some provisions of the Covenant, Article 18 being among them, are exempted from derogation "because it can never become necessary to derogate from these rights during a state of emergency". We showed that the contentious HRC statement could be interpreted as referring to the fact that there can be no imaginable and legitimate reasons to suspend the freedom to have or to adopt a religion or belief of one's choice, or to be free from coercion which would impair this freedom. In other words, that it is possible for a state to suspend application of the *forum internum* rights in practice, but it would never be able to fulfil the substantive criteria, *i.e.*, meet the proportionality test laid down in Art. 4, para. 1, as to make of such a suspension a lawful derogation. If embraced, that interpretation of the non–derogable character of Article 18 eventually comes down to the fundamental importance of freedom of thought,

conscious and religion as the key explanation of its explicitly non–derogable character. This, in turn, provides one more argument for the view that the nexus between non–derogability and the fundamental significance of the interest a right protects should remain an important criterion for the identification of absolute rights.

Милица В. Матијевић
Научна сарадница Института за упоредно право
Ана М. Здравковић
Истраживачица сарадница Института за упоредно право

НЕКОЛИКО ЦРТИЦА О НЕДЕРОГАТИВНОМ КАРАКТЕРУ СЛОБОДЕ МИСЛИ, САВЕСТИ И ВЕРОИСПОВЕСТИ И КОНЦЕПТУ АПСОЛУТНИХ ЉУДСКИХ ПРАВА

Сажетак

Поједина људска права се називају апсолутним правима, јер се сматра да интереси које штите одражавају основне вредности људског друштва. За многе ауторе, изузетан значај ових права потврђен је немогућношћу њихове дерогације, што их одваја од других, дерогативних људских права. Међутим, постоје и ставови да недерогативност није нужно манифестација фундаменталне важности конкретног људског права, већ да проистиче из његових других карактеристика. Као пример обично се наводи право на слободу мисли, савести и вероисповести, гарантовано одредбом члана 18. Пакта о грађанским и политичким правима. У раду аутори анализирају могуће разлоге због којих ово право ужива недерогативни статус, а у циљу стицања детаљнијег увида у однос између недерогативности и концепта апсолутних права. Резултати анализе пружају аргументе у прилог тези да је недерогативност уско повезана са фундаменталним значајем права и да као таква треба да остане међу кључним критеријумима за дефинисање апсолутних права.

Кључне речи: апсолутна људска права, ограничења људских права, дерогација, фундаментални значај, слобода мисли, савести и вероисповести; члан 18. Пакта о грађанским и политичким правима, члан 4. Пакта о грађанским и политичким правима.

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