

In human rights there is no right which is more fundamental than others. Discuss.

Human rights can generally be defined as “*those rights, which are inherent in our nature and without which we cannot live as human beings.*”¹ However, such a general definition poses a number of questions regarding whose 'nature' is to be used as a yardstick in establishing a list of such rights.

It is likely that human rights find their origin in natural law. Natural law theorists had developed the idea that human beings are endowed with certain inalienable rights. According to “[t]his theory a natural order exists in the universe ... [e]verything has its own qualities and is subject to the rules of nature to achieve its full potential.”² Hence, anything that prevents a person from achieving his full potential is contrary to this higher order.

Today human rights are largely protected through national constitutions and through various international conventions, treaties, charters, and declarations.

The brief for this assignment calls for an examination on whether there exist any distinguishing criteria between human rights. I propose to base my discussion, in the main, on the text of the Convention for the Protection of Human Rights and Fundamental Freedoms, that is the European Convention on Human Rights (ECHR)³.

One frequently reads that all rights are equal or interdependent. Thus, it appears that “*in modern human rights thinking the indivisibility of human rights and fundamental freedoms is prevalent.*”⁴ Ideas of indivisibility presuppose that human rights are not capable of being ranked in some form of hierarchical scale. Although this may be true, one may still bring strong arguments in favour of distinguishing certain fundamental human rights from other human rights.

Such arguments in favour of a hierarchy between human rights stem from the notion that certain rights are so fundamental that they can never be derogated from without threatening the dignity of the human

1 Retrieved on 23rd April 2010, from <http://www.unhcr.org/46937d1f2.html>.

2 *The World Book*. (1993). (Vol. 4, pp. 41).

3 A copy of the ECHR may be found at <http://www.hri.org/docs/ECHR50.html>.

4 Steiner, H. J., Alston, P., Goodman, R. (2008). *International Human Rights in Context*. Oxford Press.

being. In fact upon on a close reading of Article 15 sub-Article 2 of the ECHR one will realize that the Convention elevates four Articles to the status of 'absolute rights'. Or in other words, rights from which their can be “[n]o derogation”⁵. This category of rights cannot be infringed under any circumstance, not even in times of war. This category is made up of Article 2, which protects the right of every person to their life; Article 3, which prohibits torture or “*inhuman or degrading treatment or punishment*.”; Article 4 sub-Article 1 which prohibits “*slavery or servitude*”; and Article 7 which prohibits the retrospective criminalization of acts and omissions.

However, it is pertinent to point out that although there can be no derogation from the the right to life, found in Article 2, it would be more correct to describe this right as 'limited', and not 'absolute'. The term 'limited' is employed in the sense that the right to life in Article 2, similarly to other rights in the Convention are qualified. That is, in the particular situations expressly provided for by the ECHR the right in question may not be invoked. For example, in regard to the right to life in Article 2, the ECHR lays down that a human being may “*be deprived of his life intentionally ... in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*.” Nevertheless, with the introduction of Protocol 13 to the ECHR capital punishment has been abolished, however protocol 13 is not mandatory on all signatories to the ECHR and only applies within those states that have specifically ratified the said Protocol.

Other rights which may be described as 'limited' under the ECHR include; the protection from forced and compulsory labour in Article 4(2); the right to liberty and security of person in Article 5; the limitation regarding the exclusion of public from all or part of a trial in the interest of morals, public order or national security in Article 6(1). Such rights, although 'limited' are, nevertheless, subject to a strict interpretation. The Convention institutions, specifically in *Sunday Times v. The United Kingdom* (1979), in an effort to limit abuse, established a rule of strict interpretation in regard to limiting clauses.

Certain rights may be described as 'substantively qualified rights'. These rights include those in Article 8, which protects the right to respect for a human beings private life and family life; Article 9, which protects the right to freedom of thought, conscience and religion; Article 10, which protects the right to freedom of expression; and Article 11 which protects the right to freedom of peaceful assembly and to

5 Article 15(2) of the ECHR.

freedom of association.

Such rights may be categorized as 'substantively qualified rights' because the Convention, usually after setting out the right in the first paragraph, goes on to lay down conditions under which the interference with the right in question would not constitute a violation of the Convention.

Moreover, other rights, example Article 12, which protects the right to marry; Article 1 of Protocol 1, which establishes the right of enjoyment of one's possessions; Article 2 which provides for the right to education; and Article 3 which sets out the obligation to hold free elections, may be described as 'rights with inherent restrictions'. That is, the rights in these Articles are restricted by their own formulation.

Thus, it appears possible, from the formulation of the Convention itself, to distinguish between the various rights it establishes. Moreover, it is submitted, that these same rights may be 'categorized' into a four-tier classification. With the proposed classification placing rights in one of the four categories; specifically that of 'absolute rights'; that of 'limited rights'; that of 'substantively qualified rights'; and that of 'rights with inherent restrictions'.

Therefore, it is fair to say that these distinctions between the various rights as set out in the provisions of the ECHR may be construed as establishing one right as 'more fundamental' than the other. I will now turn to an examination into whether a distinction or hierarchy between the rights can be founded on a more practical basis.

It is submitted that if one were to adopt a system of classification based on individual or subjective criteria it would be possible to successfully argue that any particular right is more fundamental than the other. For if one hinges the criteria by which such a distinction, or 'ranking' of rights, is made on factors which are largely personal, the multitude of opinions, convictions and situations each person may find himself in would result in an immeasurable number of variations in this 'ranking'.

For this reason, at this juncture it is essential to point out that the distinction being sought is not one based on cultural relativism. Cultural relativism is the assertion that human values are far from being universal, and in fact vary largely and depend on different cultural perspectives.

Generally it is the right to life, enshrined in Article 2 of the ECHR, that is touted as the right which is 'more fundamental' than all other rights. This is usually asserted because life “*is the necessary condition for any form of enjoyment of the other fundamental rights and freedoms.*”⁶

However, although it is true that life is the essential character required for the enjoyment of the other rights. It is not entirely correct to assert that it is the most important. That is, although life makes it possible to enjoy the rights which a human being is endowed with it is not the right to life which guarantees the effective enjoyment of the other rights.

Therefore, one must ask whether the 'most fundamental' right is to be that right that merely makes the enjoyment of the other rights possible, or on the other hand, if the 'most fundamental' right should be that right which guarantees the enjoyment of rights, or at least makes their enjoyment more probable. The latter right, that is, the right which guarantees the effective enjoyment of all rights, is undoubtedly the right to an effective remedy as established under Article 13 of the ECHR.

Article 13 of the ECHR establishes that “*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*”

Thus, it appears clear that if one were to seek a right which rests above all other rights it is a mistake to consider the right to life as preeminent. On the other hand, Article 13, or the right to an effective remedy before a national authority, may be more accurately defined as the most important or fundamental right. Since, as has already been stated, it is this right which once the possibility of enjoyment of human rights materializes, through life, actually guarantees their *effective* enjoyment.

Nevertheless, and by way of conclusion, it would be callous to get carried away with notions of one right being of greater fundamental importance than another. For it is widely recognized that human rights are universal, indivisible and interdependent. By universal one simply means that rights belong

6 Henrard, K. (2000). *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-determination*. Kluwer Law.

to, and are to be enjoyed by, all human beings without any distinction between them. Whilst it is said that human rights are indivisible and interdependent because they are intrinsically interrelated and are co-equal in importance. That is, human rights form an indivisible whole, and it is only if each of these rights is guaranteed that the dignity of a human being may be protected.

Moreover, one must be cautious in elaborating any form of hierarchy or 'ranking' between human rights because such a ranking could potentially spell the beginning of the end of the human rights legal order as a whole. In the sense that the 'lower ranked' rights may slowly come to be considered less important, or expandable. This state of affairs could result in derogations from certain 'lower' rights not only becoming more frequent but in time even becoming accepted.

However, it is important to keep in mind the basic and longstanding tenet that a right without a remedy cannot be regarded as a real right, or in other words that “[w]ithout remedy, a right remains only on the paper.”⁷ This argument is encapsulated in the Latin maxim *ubi ius ibi remedium ubi remedium ibi ius*, literally meaning *where there is a right there is a remedy and where there is a remedy there is a right*.

This maxim does in fact give some weight to the argument that the right enshrined under Article 13 of the ECHR may be considered as 'more fundamental than others'. Nevertheless, owing to the pitfalls that such an argument would present it is far more responsible to describe the right to an effective remedy as expressed in Article 13 of the ECHR as merely a 'first among equals'.

⁷ Thune, G.H. (1993). *The Right to an Effective Remedy in Domestic Law: Article 13 of the European Convention on Human Rights*.