

The Right to Liberty under International Human Rights Law: An Analysis

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ABSTRACT

Liberal theory has a strong commitment to individual liberty. Every human being has human rights naturally setting limits to the legitimate action of states and others. It is therefore imperative that any deprivation of liberty must be in accordance with the law. Some form of proportionality assessment must be put in place in order to prevent arbitrariness in the detention of individuals. This is the reason for the human right to liberty. Even if a state has legitimate reasons for detaining someone, it still has obligations towards that person. The article explored the fact that individuals do not lose the protections provided by human rights and in particular right to liberty as a result of detention. These protections pave the way for the respect of human dignity and so individuals are not to be ill-treated by their captors as a result of detention. These protections provide one of the bases for the proper administration of justice.

INTRODUCTION

In an ideal situation no one should be deprived of their liberty even though there may be legitimate reasons for putting people in custody. For example, convicted criminals could be detained if they pose a threat to the community in which they live. Nevertheless human rights activists have it is basically recognised that restrictions on liberty always maintained that capricious use of detention powers by oppressive governments should not be exercised with a view to subduing their opponents. On the whole however, it is basically recognised that restrictions on liberty are permitted and may even be necessary. However, even where there are justifiable grounds for detention, detainees should not be subjected to torture or ill-treated by their captors or by reason of the bad conditions in which they are kept. It is for these reasons that the right to liberty is concerned. It encompasses protections, which on the overall seeks to prevent the arbitrary use of detention powers by putting in place safeguards for the purpose of eradicating ill-treatment or 'disappearance' from instances of permitted detention¹. In this article we shall endeavour to discuss and analyse the sources of the right to freedom from arbitrary detention, how they have been applied and how these aims are realised.

SOURCES

Article 9 UDHR provides that: 'No one shall be subjected to arbitrary arrest, detention or exile'. This provision is similar to Article 9 International Covenant on Civil and Political Rights (ICCPR). The right to liberty has been articulated by the Human Rights Committee². Thus the right has been guaranteed in other UN human rights treaties and declarations such as Convention on the Protection of the Rights of Migrant Workers (Article 16), the Convention on the Rights of Indigenous Peoples (Article 7). This right is also guaranteed in regional human rights instruments³. It is well established that Freedom from arbitrary detention is a rule of Customary International Law and the Human Rights Committee sees it as peremptory in nature and thus it is *jus cogens* norm⁴.

It is also noteworthy that there are some non-binding instruments that elaborate upon the necessary implications of the rights. Examples include UN Standard Minimum Rules for the Treatment of Prisoners⁵, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁶, UN Basic Rules for the Treatment of Prisoners⁷, UN Rules for the Protection of Juveniles Deprived of their Liberty⁸, the Council of Europe Minimum Rules for the Treatment of Prisoners⁹

¹ For further reading on the introductory background understanding of the Right to liberty refer to Rodley and Pollard, *The Treatment of Prisoners Under International Law*, (Oxford University Press, 2009) chapters 8, 9, 11; Donald-Beck and Kolb (eds), 'Judicial Process and Human Rights: UN, European, American and African Systems: Texts and Summaries of International Case-Law', (Engel, 2004); Treschel A, 'Why Must Trial be Fair?', (1977) 31 *Israel LR* 94.

² HRC, General Comment 8, HRI/GEN/1/Rev. 9 (vol 1) 179.

³ ECHR, Art5; European Charter of Fundamental Rights, Art 6; ADHR, Art 1; ACHR, Art 7; ACHPR, Art; Arab Charter on Human Rights, Art 14. This right forms part of what John Rawls regards as proper human rights.

⁴ HCR General Comment 29, HRI/GEN/1/Rev. 9 (vol. 1) 234, para11.

⁵ ECOSOC Res 663 (XXIV) (31 July 1957)

⁶ GA Res 43/173 (9 December 1988).

⁷ GA Res 45/111 (14 December 1990).

⁸ GA Res 45/113 (14th December 1990).

⁹ Committee of Ministers Res (73) 5 (19 January 1973).

and the Inter- American Commission of Human Rights' Principles and Best Practices on the Protection of Persons Deprived of liberty in the Americas¹.

It has been universally recognised that arbitrary detention is of great importance and that is why the UN Commission on Human Rights in 1991 had to create a Working Group on Arbitrary Detention². The mandate given this Commission was renewed by the UN Human Rights Council³. The Working Group has the responsibility of receiving and investigating communications with regard to possible cases of arbitrary detention, including also issuing its own general comment: 'deliberations', on issues that have to do with arbitrary detention⁴.

SCOPE

What constitute deprivation of liberty?

Even though the issues that have direct bearing on the right to liberty have to do in most cases with the arrest and detention of an individual within the purview of criminal proceedings, but these are not all the protections afforded. This is because, the Human Rights Committee has emphasised in its general comment on Article 9 ICCPR that the provision is applicable to 'all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control etc'⁵.

It should be noted that this is not an exhaustive list as other situations could be interpreted to amount to deprivation of liberty. It is therefore important in the circumstances to note the limits of the scope of right to liberty provisions. Examples include house arrest⁶. However, it has been held that, restrictions upon movement which confined an individual to his home during non-working hours was not a deprivation of liberty but a restriction upon the right to freedom of movement⁷. In the same vein, restrictions upon movement within a state, a city, or even parts of a city have been held to be restrictions on freedom of movement and not deprivations of liberty⁸. 'Provisions on the right to liberty are mainly concerned with narrow notions of detention involving the imposition of severe restrictions upon a person's physical being'⁹. 'However, this does not mean that short periods of detention are excluded'¹⁰. Detention for a period of 55 minutes has been held to be part of Article 5, which covers the arbitrary detention provision, of the European Convention on Human Rights (ECHR)¹¹.

GROUNDS FOR PERMISSIBLE DEPRIVATION OF LIBERTY

Having considered what constitutes a deprivation of liberty, in the previous section it is also apposite to consider situations where deprivation of liberty are permissible. It is not all deprivations of liberty will constitute a violation of a citizen's right to liberty. Article 9 (1) ICCPR provides that: 'No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'. This provision therefore simply presupposes that only where such alleged deprivation of liberty is unlawful or arbitrary will it constitute a violation of Article 9 (1). Other international treaties are in pari materia on arbitrary detention¹².

The ECHR employs a more restrictive approach to detention. Article 5 (1) ECHR not only provides for the protection of individuals against illegal and/ or arbitrary detention, it also provides an exhaustive list of grounds upon which detention is justified. These are:

1. Execution of a sentence after conviction by a competent court;
2. Non-compliance with a lawful court order or legal obligation;
3. Reasonable suspicion of having committed an offence, to prevent flight having done so, or to prevent the commission of an offence where the ultimate aim is to bring the person before a competent court;
4. Educational supervision in the case of minors;
5. Prevention of the spread of infectious diseases;
6. Where persons are of unsound mind, alcoholics, drug addicts, or vagrants; and
7. Prevention of unauthorised entry into the state or where action is being taken with a view to deportation or extradition.

¹ OEA/Ser/L/V/11. 31 doc. 26 (March 2008).

² CHR Res 1991/42 (March 1991).

³ CHR Res 1991/42 (March 1991).

⁴ Daniel Woeckli, et al, (eds), David Harris, (Consultant Editor), *International Human Rights Law*, (Oxford: Oxford University Press 2010) Chapter 18.

⁵ HRC, General Comment 8, HR1/GEN/1/Rev. 9 (vol. 1 179. Para. 1.

⁶ See *Madani v Algeria*, CCPR/C/89/D/1172/2003 (21 June 2007).

⁷ *Trijonis v Lithuania*, Application no 2333/02 (March 2005).

⁸ *Celepli v Sweden*, CCPR/C/51/D/456/9 (18 July 1994); *Karker v France*, CCPR/C/70/D/833/98 (26 October 2000).

⁹ Daniel Woeckli, et al, (eds), David Harris, (Consultant Editor), *International Human Rights Law*, (Oxford: Oxford University Press 2010) Chapter 18 p.307.

¹⁰ Daniel Woeckli, et al, (eds), David Harris, (Consultant Editor), *International Human Rights Law*, (Oxford: Oxford University Press 2010) Chapter 18 p.307

¹¹ *Novotka v Slovakia*, Application no 47244/99 (4 November 2003).

¹² Examples, ACHR. Art 7, ACHPR, Art 6.

Detention on grounds other than those listed is not permissible under the ECHR. This has been stated in the wake of the attacks of 11 September 2001, where the European Court of Human Rights held that the detention measures put in place were not measures taken with a view to deportation as there was no prospect that the detained individuals could be removed from the UK¹.

Legality

For an individual to be deprived of liberty, it must be pursuant to domestic law. Not only that, it must also be sanctioned and legally be in conformity with any procedural requirements set out in national legislation. For example, it has been pointed out that a psychiatric patient can only be detained in secure hospital where there is a legal basis to do so. In the same manner, where arrest warrants are required as mandatory for a person to be arrested, if one takes place without fulfilling the requirement, then in such a situation it will amount to a violation of the right to liberty². ‘For example, in an attempt to arrest former President Garcia, the Peruvian army arrested his wife and children. As the army lacked constitutional authority to arrest individuals and the arrests were not based upon a court order, the Inter-American Commission of Human Rights held that the arrests were unlawful and thus in violation of the arbitrary detention provisions of the American Convention on Human Rights (ACHR)’³.

Arbitrariness

Inappropriateness, injustice and lack of predictability and also ‘unreasonableness are the issues to be considered when discussing arbitrariness’⁴. It has been held that detention is arbitrary where ‘it is not necessary in all circumstance of the case and it is desirable that some form of proportionality must done’⁵. In the same vein Australian policy which allows for compulsory detention of asylum-seekers until their status is finally determined was also held to be disproportionate and in the circumstances arbitrary⁶.

In a situation where the detention of an individual would invariably or by necessary implication lead to a violation of another human right which the person is entitled to as the right to a fair trial, it will of course be considered arbitrary. For example, where individuals were arrested for their political views it has been held to be in violation of Article 9 (1) ICCPR in contravention of Article 19 ICCPR⁷.

In the same vein any detention based on ethnic origin alone will also be deemed arbitrary⁸. Therefore any one arrested based on racial profiling without additional evidence is prohibited⁹.

Having discussed the situations which could be regarded as unreasonable, and arbitrary concerning detention of individuals, in the sections following, we shall be examining the guarantees accorded to those deprived of their liberty.

There are circumstances whereby the state could be justified in depriving someone of their liberty. Even then the state has to fulfil its obligations regarding that individual. In a nutshell individuals do not lose their human rights simply because they become detained. In addition, there are other specific guarantees of treatment that detainees must be accorded even if pursuant to a criminal charge. Some of the safeguards are applied generally in all situations. These are discussed below.

Rights of all Detainees

(a) Right to be informed of reasons for detention

Article 9 (2) ICCPR provides that ‘anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest’. This provision is also similar to Article 5 (2) ECHR and Article 7 (4) ACHR. This provision is very important and also necessary as it enables individuals to know why they are detained and it also gives them the opportunity to challenge the reasons for their detention. It also makes it possible for the detainees to have the detailed information to know why they are being incarcerated. Thus when individuals were told that they were in breach of state security, without no further details were given to them, the Human Rights Committee held that Article 9 (2) ICCPR had

¹ See the case of *A and others v UK* (2009) 49 EHRR 29.

² *Gangaram Panday v Suriname* IACtHR Series CNO16(21 January 1994).

³ Case 11.006, IACommHR Report No 1/95. See Daniel Moekli et al op. cit. p.308

⁴ Daniel Moeklic et al op. cit.

⁵ *A v Australia*, CCPR/C/59/D/560/93 (3 April 1997) para 9.2. See also *Garcia v Peru* Case 11.006, 1A Comm HR Report No 1/95. See also Case 9903, *Rafael/Ferrer-Mazorra et al. v United States*, IACommHR Report No 51/01 where the USA in 1980 was criticised by the Inter- American Commission of Human Rights over the administrative detention of Cuban citizens seeking refuge in 1980.

⁶ *A V Australia*, CCPR/C/59/D/560/93 (3 April 1997) para 9. 2; *C v Australia*, CCPR/C/76/D/900/1999 (28 October 2002); *Baban v Australia* CCPR/C/78/D/1014/2001 (6 August 2003).

⁷ *Mukong v Cameroon*, CCPR/C/51/D/458/1991 (21 July 1994; *Kanana v Zaire*, CCPR/C/49/D/366/1989 (2 November 1993).

⁸ 27/89, 46/91, 49/91, and 99/93, *Organisation Mondiale Contre La Torture v Rwanda*, 10th Annual Activity Report of the ACommHPR (1997).

⁹ CERD Committee, General Recommendation XXXI, HRI/GEN/1/Rev.9(vol 11) 306, para 20.

been violated¹. It is required that the reason for the arrest must be communicated promptly to the detainees although this may not be at the time of arrest. A delay of seven days has been held to be too long², but a period of seven hours has been considered as satisfactory³. Similarly where there was an overnight delay due to the need to have an interpreter, it was considered acceptable⁴.

(b) Right to humane treatment

Article 10 (1) ICCPR provides that all detainees, regardless of the reason for their detention, must be 'treated with humanity and with respect for their inherent dignity'. This is also provided in ACHR, Article 5 (2). The implication of this provision is that detainees should not be ill-treated or tortured as required by Article 7 ICCPR. Thus states are under obligation to protect all individuals from 'any hardship or constraint other than that resulting from the deprivation of liberty'⁵. It is noteworthy that the Committee found a violation of Article 10 (1) ICCPR in *Wanza v Trinidad and Tabago*⁶ where the author was detained in a windowless cell, ventilated by an 18x18 inch opening, for between 22 and 23 hours a day, whilst on weekends or holidays, when the number of prison staff was too low, he was not permitted to leave the cell at all.

Therefore, the above case indicates that the minimum standards for human dignity in detention cells should be adequately provided for by the state. The state must ensure that the conditions of detention are appropriate in order to meet the legally required minimum standard for human dignity.

(c) Right to challenge legality of detention

This guarantee is about the right to bring *habeas corpus* proceedings; it means detainees should be given the opportunity to challenge the legality of their detention and where their detention is considered unlawful, they should be released. This is in line with ICCPR Article, 9 (4); ECHR, Art 5 (4), ACHR, Art 7 (6).

In the next section, we shall be discussing and analysing the remedies available for unlawful detention.

Remedies for unlawful detention

Two specific remedies have been provided for where detention is found to be unlawful. According to Articles 9 (4) and 9(5) ICCPR the detainee is entitled to release and compensation. Similar rights have been provided for in Article 10 ACHR and Article 5 (5) ECHR. It is mandatory that National courts must have the power to order release and award compensation as well.

Remedies available to those detained on a criminal charge

It is well established that prevention and punishment of crimes form the bedrock upon which states may ground detention. However, human rights law also provides specific protections to individuals who are detained in pursuance of a criminal offence. In this line all individuals who are arrested in pursuance of a criminal charge must be brought promptly before a judge or other officer authorised to exercise judicial powers in accordance to ICCPR, Article 9 (3); ACHR, Art 7(5); ECHR, Art 5 (3). In addition to the right to human treatment and in order to protect the presumption of innocence, individuals held in pre-trial detention should be kept separated from convicted criminals in accordance to Article 10 (2) (a) ICCPR. At this stage individuals are treated as innocent until proven guilty of an offence. Article 10 (2) (b) ICCPR also goes on to provide that 'accused juveniles shall be separated from adults and brought as speedily as possible for adjudication'. Consequently, where release is not possible, the trial of the accused must take place within a reasonable period of time. As to what is considered as reasonable will be determined on the basis of the facts of individual cases taking into consideration facts such as complexity of the case, the conduct of the accused among so many other factors⁷.

On the whole Article 10 (3) ICCPR places obligation on states to ensure that the aim of detention following conviction for a criminal offence is for the purpose of reforming and social rehabilitation of offenders, and not simply to punish. So in line with this obligation in *Kang v Republic of Korea*⁸ the Human Rights Committee found a violation of this provision where the author had been held in solitary confinement for thirteen years because he refused to abandon his political views.

Emergency Detention Powers

'The right to liberty has been the subject of much derogation by states from their human rights obligations'⁹. This is particularly seen in the fight against terrorism¹.

¹ *Ilongbe and Shandwe v Democratic Republic of Congo* CCPR/C/86/D/1177/2003 (17 March 2006).

² *Grant v Jamaica*, CCPR/C/56/D/597/1994 (22 March 1996) para 8.1

³ *Fox, Campbell and Hartley v UK* (1991) 13 EHRR 157, para 42.

⁴ *Hill and Hill v Spain*, CCPR/C/59/D/526/1993 (2 APRIL 1997) para 12.2.

⁵ HRC, General Comment 21, HR1/GEN/1/Rev.9 (vol 1) 202, para 3.

⁶ CCPR/C/74/D/683/1996 (26 March 2002).

⁷ See the case of *Fillastre and Bizouarn v Bolivia*, CCPR/C/43/D/336/1988 (5 November 1991) para 6.5.

⁸ CCPR/C/78/D/879/1999 (15 July 2003).

⁹ Daniel Woeckli, et al, (eds), David Harris, (Consultant Editor), *International Human Rights Law*, (Oxford: Oxford University Press 2010) Chapter 18 p. 313.

From the discussions and analysis of the cases considered and the human rights principles so far, there is no doubt that positive effects of the right to liberty have been recognised by human rights bodies. Therefore they have stated that the procedural safeguards as we have earlier on discussed above, including judicial oversight of arrests and the right to *habeas corpus* proceedings, must remain in place during times of emergency. For example, the Human Rights Committee has confirmed that 'it is inherent in the protection of rights explicitly recognised as a non-derogable..... that they must be secured by procedural guarantees, including, often, judicial guarantees' and so 'right to take proceedings before a court to decide without delay on the lawfulness of detention must not be diminished by a state party's decision to derogate from the ICCPR'².

Enforced Disappearance

The most notable violation of the right to liberty is seen in cases of 'enforced disappearance', which encompasses the secret deprivation of a person's liberty by state agents who refuse to inform anyone of the arrest³.

There are two conventions which have been put in place for the purpose of eradication of the practice. These are the Inter-American Convention on Forced Disappearance of Persons (1994) and the UN Convention for the Protection of All Persons against Enforced Disappearance (2006). These treaties place obligation on state parties to criminalise the practice of enforced disappearance and to also take legal administrative measures in addition to those already put in place against arbitrary detention. This is done for the purpose of ending the practice of 'secret detention'.

Security of the person

The protection of the security of the person forms part of the treaty provisions on the right to liberty where positive obligation is placed on the state to investigate threats to the person from both state and non-state actors and to provide protection for such individuals where such threats are credible. Thus the Human Rights Committee deemed it fit to extend the protections beyond the detention context. This is seen in its statement as follows: 'It cannot be the case that, as a matter of law, states can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained'⁴. Consequently therefore, it has found violations of the right to security where there was a failure to investigate credible death threats⁵.

The Right to a fair trial

The right to a fair trial is 'aimed at the proper administration of justice'⁶. In general, 'fair trial guarantees are not primarily concerned with the outcome of judicial proceedings, but rather the process by which the outcome is achieved. Fairness of outcome is not guaranteed'⁷. Generally, fair trial guarantees applicable are also provided in ICCPR Article 14 and 14(1). ICCPR Article 9 (4) provides that detainees have the right to have the legality of their detention determined by a court. Failure will lead to violation of ICCPR Article 14(1). This right is also guaranteed in ECHR Article 6 (1); ACHR Article 8 (1). The right to a fair trial encompasses natural justice to which every person is entitled.

Conclusion

It has been established that it is essential and mandatory that individuals are entitled to the right to liberty except where it is legally necessary for them to be detained. Even where detention is necessary, the right to liberty provides safeguards against ill-treatment of those detained. Thus this right amongst many other rights seeks to prevent arbitrary use of executive powers. These protective measures have been put in place with the objective of realising and enjoying human rights in order to uphold human dignity and on the overall for the proper administration of justice.

¹ See for example the UK's derogation from ICCPR and ECHR communicated to the relevant authorities on 18 December 2001. Both derogations were withdrawn on March 16 2005.

² General Comment 29, HRI/GEN/1/Rev.9/ (vol!) 234, paras 15-16,

³ See the Convention for the Protection of All Persons against Disappearance Art 2; Inter-American Convention on Forced Disappearance of Persons ArtII; Rome Statute of the International Criminal Court Art 77 (2) (i).

⁴ *Delgado Paez v Columbia*, CCPR/C/39/D/195/1985 (12 July 1990) para 5.5.

⁵ *Jayawardena v Sri Lanka* CCPR/C/75/D/916/2000 (22 July 2002).

⁶ HRC, General Comment 13, HR1/GEN/Rev.9 (vol 1)184, para.1.

⁷ Daniel Woeckli, et al, (eds), David Harris, (Consultant Editor), *International Human Rights Law*, (Oxford: Oxford University Press 2010) Chapter 18 p. 315.

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