

Is Public Morality Able to Restrict Human Rights?

Nurhidayatuloh¹, Febrian², Akhmad Idris³, Rd. Muhammad Ihksan⁴, Helena Primadianti⁴, Fatimatuz Zuhro⁵,
Irawati Handayani⁶, Kukuh Tejomurti⁷
^{1,2,3,4,5} Universitas Sriwijaya, Palembang – Indonesia
⁶ Universitas Padjadjaran, Bandung - Indonesia
⁷ Universitas Sebelas Maret, Surakarta - Indonesia
nurhidayatuloh@fh.unsri.ac.id

Abstract-Public morality is directly mentioned in several international and regional legal instruments from Universal Declaration of Human Rights (UDHR) to the European Convention of Human Rights (ECHR). It is intended through public morality reasons a country can restrict the implementation of human rights in its jurisdiction. However, some concerns arise when a state implement these public morality reason, there will be a tendency to benefit the dominant and marginalizing minority parties so that they assume that public morality should not be included as a restriction. UDHR and ECHR use this term in their article. All of these international and regional law instruments stipulate this concept and national authorities use this as the foundation of their claim that there is no universal morality. So their public morality in each country can be the reason to implement these restrictions. Moreover, in some international provisions, it is stated that international or regional mechanisms are only complementary to domestic mechanisms. There are two questions that will be the focus of this research. The first is about whether public morals can be used as a reason for limitation, and the second is about who determines public moral standards as the basis for the limitation. The results of this study are that the protection of public morals can be used as a basis by the state to limit individual rights. Then, because there are no public morals that are universal, which means that public morals in each country are different, the state can issue policies in the form of legal provisions to determine an individual or group of people's actions are not in accordance with or in line with the public morals prevailing in their territory.

Keywords-Public Morality, Human Rights Law, Restriction, ECHR, UDHR

I. INTRODUCTION

The concept of public morality clauses to limit human rights has not been much discussed deeply, especially with regard to the implementation of this concept, which has different standards in each region. In addition, this concept is closely related to the concept of margin of appreciation in which this principle gives authority to the authorities to make policies in order to balance individual rights with national interests owned by a country [1]. This discussion is crucial because this clause is contained in the Universal Human Rights Declaration, UN General Assembly Resolution [2], as an umbrella of international human rights law norms and European Convention of Human Rights. Article 29 of the UDHR states that:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and

respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

Provisions on public morals are then passed on to other international agreements, both regional and international in nature. The first international agreement, in the sense of an agreement involving many countries, to adopt this provision was the Convention for the Protection of Human Rights and Fundamental Freedoms which is now known as the European Convention on Human Rights (ECHR).

In the ECHR this provision on public morals is stated six times to emphasize that a certain right can be limited by reason of maintaining public morals.[3] As stated in Article 9 of the ECHR:

“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others [3].”

In this article it is stated that the freedom to practice religion and belief can be limited by the state on the grounds that such limitation must be based on applicable legislation, in a democratic society and to maintain public order, health and maintain public morals or protect the rights and freedoms of people other. This means that for this reason the state can impose restrictions for these reasons.

There are several articles discussing the issues of public morality related to human rights. Görentaş's work entitled "the effects of margin of appreciation doctrine on the European court of human rights: upholding public morality over fundamental rights" discusses specifically about the controversy of the European Court of Human Rights (ECtHR) which in its decision built the concept of the principle of margin of appreciation that in its implementation it is interpreted as "judicial discretion granted to Contracting States on issues directly related to States' public policies or public interests." In this case ECtHR received several criticisms about the meaning of the doctrine regarding articles 9 and 10 concerning freedom of thought, belief, religion and freedom of expression regarding the absence of standards to use the doctrine. The article indirectly relates to public moral

issues and directly relates to a country's public policies [4].

Catherine Shanahan Renshaw in her article entitled "the ASEAN Human Rights Declaration 2012" provides several explanations about AHRD compared to UDHR and other similar human rights declarations such as the 1993 Vienna World Declaration and Program of Action, Bangkok Declaration and the 1993 Kuala Lumpur Declaration. In her discussion she explained a separate sub-chapter about the limitations contained in the AHRD. She explained that there is no fundamental difference between the UDHR and the AHRD explaining the issue of limitation based on public morals, public order, and public welfare in a democratic society. However, he explained several objections from Civil Society Organizations, Western countries and the UN High Commissioner for Human Rights where the provisions on limitation are placed in the 'General Principles' which means that limitations can be applied to all rights contained in this declaration including non-derogable rights in international law [4].

Onder Bakircioglu [1] in his article "the application of the margin of appreciation doctrine in freedom of expression and public morality cases" discussed the issue of the doctrine of "Margin of appreciation" where ECtHR argues that the state has the authority to judge whether the factual circumstances of an event require the application of the principle. This article also questions the issue of whether Strasbourg organs have established criteria for the use of these principles in the context of freedom of opinion and public morality. In addition, Amrei Muller's article,[5] entitled Limitations to and Derogations from Economic, Social and Cultural Rights, discusses the differences and overlapping concepts of limitation and derogation, and the issue of derogation in ICESCR. In his article, he focuses primarily on the limitations and derogations contained in the first two international human rights covenants but only slightly touches on public moral issues. The literature provides an illustration that the issue of public morals in the context of human rights is a crucial discussion and requires an in-depth and ongoing study because it relates to its dependence on the space and time where these values are located.

After further exploration, there have been no published articles that discuss what is meant by public morality (public morality) contained in the UDHR as an initial international instrument until the ECHR. This is a crucial issue because the flow of international instruments needs to be traced from the UDHR which is universal to the ECHR, which applies to the European region. Furthermore, this study also aims to explain what is meant by public morality contained in the UDHR as an initial international instrument up to the ECHR. This is important to know because this instrument is used as the basis for the implementation of public moral standards and whether the implementation of public moral concepts is different or not from one region to another in relation to

the application of limitations by the state with public morality as the reason.

II. RESEARCH METHOD

The approach used in this research is the normative [6] or doctrinal [7] approach. this approach aims to examine certain concepts in international and regional human rights instruments. In this context the concept to be explored is the concept of Public morality contained in the UDHR and its practice in the European Court of Human Rights. All sources of legal materials, both primary and secondary legal material sources related to international treaties and regional human rights instruments in Europe, were analyzed with the orientation of descriptive-analytical writing using qualitative data analysis.

III. FINDINGS AND DISCUSSION

The concept of public morals can also be found in the International Covenant on Civil and Political Rights (ICCPR) which is mentioned six times regarding the limitations on public moral reasons. As explained in Article 12 (3):

"The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

In this article it is stated explicitly that in the case of a country exercising limitations on a right, public morals can be used as an excuse for that country to restrict certain rights regulated in the ICCPR.

Similar to the ICCPR, the ECHR also stipulates similar provisions. As stated in Article 9 of the ECHR, that, for example, in the case of freedom to manifest religion and beliefs, a person can be limited by the state as long as such restrictions must be regulated by law and are also needed in a democratic society in order to maintain public security, and protection for order, health and public morals or to protect the rights and freedoms of others. It was also explained in the provision that the restriction carried out for public moral reasons must also be regulated through law.

It should be understood, as mentioned above, that public morality in the UDHR and ECHR is one of the reasons for a country to limit the protection and respect for human rights. The subject, on the one hand, is state officials who have the authority to impose the limitation. On the other hand, the policy to apply this restriction is called discretion. Thus, state official uses the margin of appreciation principle as the justification for discretion.

The doctrine of margin of appreciation originates from the French *Conseil d'Etat jurisprudence* and in the administrative law of civil law jurisdictions. At the

international level, the doctrine was first used at the European Convention and this concept continues to develop through the European Court of Human Rights. In addition, this doctrine has been used by several international organs such as the United Nations Human Rights Committee as in the case of *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* in which in this case the Committee stated directly that "... the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions." [1] This doctrine became even more developed when in practice it is used by the two regional human rights courts having the most influence in upholding human rights in the world, namely the Inter-American Court of Human Rights and the European Court of Human Rights.

As this doctrine is used both in the articles of UDHR and ECHR and in practice in the European Court of Human Rights, the concept of public morality is also growing. How to measure public morals and how practices in the field must be seen by several court practices such as in the European Court of Human Rights. In the decision of the *Handyside* case stated that:

"It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject." [8][9]

In this decree, it is stated that the uniformity of concepts in moral matters is impossible to find in States parties to the European Human Rights Convention because moral concepts develop over time. [9] Then the differences in space or place also have an influence on the moral concepts they have. Therefore it can be concluded that the concept of moral morals, especially in terms of practice cannot be generalized depending on the time and space.

Concerns arose from several groups regarding the implementation of public morals as a reason for restrictions on human rights. Like the Asia Pacific Forum on Women, Law and Development (APFWLD) states that the word 'morality' reflects a dominant culture that has a tendency to side with certain groups of groups such as privileging men and marginalizing others [10]. They argue that these events often occur in Southeast Asian countries where politics and religion have a very close position with morals and can be used as a tool to marginalize women in the presence of men. Such as the prohibition of women to become leaders and put aside the voices of women in the decisionmaking process in society. Therefore, they want the provisions regarding public morals as a basis for restrictions on human rights can be abolished.

When there is a legal vacuum regarding who has the authority to determine public moral standards, whether state or regional, the European Court of Human Rights provides a way out by giving the state more authority to make policies in determining public moral standards. It is also related to the nature and position of international or regional mechanisms which is used as a subsidiary system when the national system does not work as it should. Therefore, in addressing the issue of public morals, it is the national authority which has the role in adjusting these moral standards. The European Court of Human Rights in the case of *Handyside* states that:

"By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of [the limitations required to protect morals] as well as on the necessity of a restriction or penalty intended to meet them." [11][8]

In this judgment, the judge stated that public morals do not have the same standard from one country to another. Thus, the absence of a uniform concept of public morality makes it clear that each country has the authority to implement a fairly wide margin of appreciation. With the reason that the state has direct access and can measure the level of security and order in their area, then in principle the state authority has a better position than international court judges in making policies regarding any standards that can be categorized as protection of public morals.

Although in practice the state has the authority to determine public moral standards to implement limitations on human rights, the state does not necessarily have unlimited authority in determining public moral standards. As stated in the case of *Ireland versus the United Kingdom* in 1978, the judge in his ruling stated that "Nevertheless, the States do not enjoy unlimited power, the domestic margin of appreciation is thus accompanied by a European supervision." [12] Therefore, in the margin of appreciation doctrine that can be used by a country to determine public moral standards, it must also be accompanied by supervision conducted by the European Union.

IV. CONCLUSION

From the above discussion, it can be concluded that public morals can be used as a reason to limit individual rights such as the right to freedom of expression and the right to freedom to manifest religion. However, with regard to who has the authority to determine public moral standards. Initially it was debated whether the state or regional institution is more authorized to determine it. In this case, the decision of the European court has determined that the state has a better position to determine the public moral standard than judges in international or regional courts. However, this does not mean that the state has unlimited authority in determining public moral standards through the doctrine of margin of appreciation.

Limitation of state authority in determining public moral standards is the supervision carried out by the European Union.

REFERENCES

- [1] O. Bakircioglu, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases," *Ger. Law J.*, vol. 8, no. 7, pp. 711–734, 2007.
- [2] R. Burke, "Emotional Diplomacy and Human Rights at the United Nations," *Hum. Rights Q.*, vol. 39, no. 2, pp. 273–295, 2017.
- [3] C. of Europe, *Annual Report 2018 of the European Court of Human Rights, Council of Europe*. Council of Europe – European Court of Human Rights, 2019.
- [4] I. Aladağ Görentaş, "The Effects of Margin of Appreciation Doctrine on the European Court of Human Rights: Upholding Public Morality over Fundamental Rights," *Akad. İncelemeler Derg.*, vol. 11, no. 2, pp. 197–216, 2016.
- [5] A. Müller, "Limitations to and derogations from economic, social and cultural rights," *Hum. Rights Law Rev.*, vol. 9, no. 4, pp. 557–601, 2009.
- [6] S. Soekanto, *Penelitian Hukum Normatif*. Jakarta: Rajawali Press, 2013.
- [7] B. Sunggono, *Metode Penelitian Hukum*. Jakarta: Rajawali Pers, 1997.
- [8] E. C. of H. Rights, "Case of Handyside v. The United Kingdom," 1976, pp. 1–33.
- [9] T. A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights," *Hum. Rights Q.*, vol. 4, no. 4, pp. 474–496, 2006.
- [10] C. S. Renshaw, "The ASEAN Human Rights Declaration 2012," *Hum. Rights Law Rev.*, vol. 13, no. 3, pp. 557–579, 2013.
- [11] M. R. Hutchinson, "The margin of appreciation doctrine in the european court of human rights," *Int. Comp. Law Q.*, vol. 48, no. 3, pp. 638–650, 1999.
- [12] European Court of Human Rights, "Ireland v. the United Kingdom," 1978, pp. 1–128.