



Criminalization Based on the Principle of Human Rights Limitation

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Abstract

Introduction to The Problem: The use of criminal law to limit the freedom of citizens' civil rights must be done with caution since it intimately links to the infringement of such rights.

Purpose/Objective Study: The present study aims to explore the criteria of criminalization based on the principle of limitations of human rights.

Design/Methodology/Approach: This study employed doctrinal legal research using both conceptual and statutory approaches

Findings: In the policy formation of illegal acts, the legislator frequently formulates rights constraints. The criminalization criteria specified in the human rights limitation can be used to apply this restriction. Restriction-containing offenses determined by the legislature must be by law, legitimate aim, and necessity in a democratic society. A consistent model of criteria for democratic society demands does not exist. This last criterion is linked to both the proportionality principle in human rights and the concept of criminal law as a last resort.

Paper Type: Research Article

Keywords: Criminalization; Human rights; Limitation; Proportionality

Introduction

Violations of citizens' civil rights are strongly linked to the empowerment of criminal law. Criminalization-related punishment is usually the most severe violation of human rights (Jareborg, 2005). Regardless of how many sanctions are used in the criminalization process, it is still ultimately a denial of basic human rights (Tulkens, 2011). The restriction of civil liberties through criminal law by the legislature needs the conformity with human rights principles (Treichsel, 2000). It is required to ensure that criminalization does not lead to arbitrary decisions that hurt citizens (Persak, 2007).

Criminalization is a policy that converts an act that was not previously a criminal offense and has not been convicted into a criminal offense punishable by criminal sanction. Criminalization is simply a designating an act as a criminal offense

(Wilennmann, 2019). The state's criminalization process must be carried out within the criminal law framework. In this context, criminal law is merely a minor portion or sub-system of the social control required to address all the complicated crime issues. The criminal approach isn't the only way to keep people's social behavior. Other legal orderly uses, such as administrative law, civil law, litigation must be used in advance to prevent public infringement (Arief, 2013).

Criminal law should be self-contained and should not, at the very least, conflict with other legal spheres. Using criminal law to govern an act that other areas of law may effectively regulate should be avoided. Criminalization can be justified to achieve the function of criminal law if punishment is the only option to convey recriminalization (Husak, 2005). The premise is that if means other than criminal law can prevent crime, criminalization should be avoided. Acts can only be criminalized if no other options are available (Ali & Setiawan, 2021). Abandoning this concept could theoretically cause problems, particularly in terms of core human rights standards.

Previous research in this area has attempted to estimate how criminal law should be used in conformity with human rights principles rather than explaining the theoretical difficulty. The purpose is to ensure that the criminalization principle developed in the arena of criminal law theory does not create such a large area for civil rights breaches. The harsh nature of criminal law, as well as its coercive features, has the potential to exaggerate the high number of convictions, allowing for abuses of citizens' human rights. This does not mean that criminalization should be prohibited, but rather that it should be used as a tool of state control in conformity with the standards of criminal law and human rights (Nowak, 2003).

Much research on criminalization and human rights has been conducted, although comprehensive studies on both subjects were uncommon. Rizal focused on the criminalization policies on consuming alcoholic beverages in Indonesia. It is required to hold legal updates connected to Indonesia's policy of criminalizing the consumption of alcoholic beverages based on philosophical, juridical, and social factors. The continuation of Indonesia's policy of criminalizing the consumption of alcoholic beverages demonstrates that the government has ensured a wealthy existence based on inner peace, shelter, and a safe and healthy living environment. All these are human necessities that become human rights that the state or government must respect and fulfill to preserve the lives of all Indonesians (Rizal, 2018).

Handoko limited the scope of the research on the legal politics of criminalization and decriminalization in copyright. It was argued that the justification for criminalization could be examined from two perspectives: pure criminalization and non-pure criminalization. The decriminalization process is justified by the fact that criminals are not prosecuted for copyright infringement that has little commercial value. When it comes to reacting to copyright concerns, the government should continue to educate innovators and copyright holders (Handoko, 2019). Widayati used the moral



theory to explore the criminalization of decency in the Criminal Code Bill. According to moral philosophy, the Criminal Code Bill's policy of criminalizing particular acts that are thought to offend decency fits the conditions for criminalization, namely that the act is immoral and detrimental to individuals and society. Furthermore, criminalizing activities that are considered deplorable is antithetical to the cultural and religious values of most Indonesians (Widayati, 2018).

This study differs from earlier research. In this study, the criminalization or determination of a criminal act is not exclusively assessed using criminal law criteria as in prior studies. There are parallels in the research of criminalization in terms of requiring limitations and rational grounds for criminalizing an act as a punishment. However, this study focuses on investigating a criminal offence's determination based on human rights principles. Thus, the present study aims to explore the criteria of criminalization based on the principle of limitations of human rights.

Methodology

This study is doctrinal legal research. The research centred on criminalization theory and the principle of human rights limitation. The significance of this research is that the problem of criminalization must be tested in accordance with criminal law standards from the outset. Both the statute and the conceptual approaches were used (Sonata, 2014). The former deals with the limitations in human rights instruments, while the latter relates to the point of view of problem analysis and employs important aspects of the fundamental principles of law. The 1945 Constitution, the Law Number 12 of 2005 on the Ratification of International Covenant on Civil and Political Rights, and Law No. 39 of 1999 on Human Rights are among the most authoritative primary legal sources. Secondary legal sources in this study refer to the Siracusa Principle, 1985, the Universal Declaration of Human Rights, 1948, books, and scientific journals that expressly explore criminalization and constraints on human rights. The legal sources for this study were gathered through a literature study, while descriptive and qualitative analyses were performed.

Results and Discussion

Principle of Human Rights Limitation

Criminalization policy is a subset of the political study of criminal law, which examines policy lines to determine how far applicable criminal laws need to be amended or updated, what may be done to prevent criminal activities, and how criminal law is implemented (Amrani, 2019). Criminalization is especially mentioned in this context as part of criminal policy development, which is closely linked to legislative policy or the formulation of laws and regulations (Rasyidi, 2021). Parts of the formulation of the offenses attributed to the principle of human rights are discussed in this paper. One of the state's attempts to influence people's behavior is criminalization. Acts that were not previously prohibited were recast as criminal offenses, with criminal penalties. The decision to criminalize or not criminalize an act



is based on the legislative policy in shaping the criminal law's political direction (Alhakim, 2022). Given the importance of criminalization policy in limiting a person's rights, criminalization initiatives must consider the parameters or criteria for human rights limits (Weisberg, 2016).

Limitation of rights is a type of state action that restricts the fulfilment, protection, and respect of human rights. Rights might be limited to their realization under specific circumstances (derogable rights) (Marwandianto & Nasution, 2020). The restriction should not be applied arbitrarily or in a discriminatory manner. Restrictions must be implemented in conformity with the preconditions set forth in the human rights regulations. Life, freedom of thought, belief, and religion, freedom from torture and enslavement, and the right to be free of retroactive prosecution are all special rights. Non-derogable rights cannot be the only ones that are fulfilled (Matompo, 2014). The limitation is distinct from derogation, which refers to the state's ability to neglect its commitment to fulfill, respect, and protect human rights in times of national emergency. Limitations can be imposed (in the absence of an emergency) while adhering to certain principles, such as the reason for the restriction must be clearly defined, not in the context of reducing the substance of respect for rights; the application of restrictions must not be arbitrary or discriminatory; and restrictions must be carried out in accordance with the prerequisites established by human rights regulations (Nataruddin, 2017).

The state bears the duty of enforcing limits, so it is the state that must demonstrate and justify why the restrictions are necessary and legal. States must also be able to explain the circumstances to control or restrict the situation. The terms of this restriction are also found in Article 29 paragraph (2) of the Universal Declaration of Human Rights, Article 12 paragraph (3) of the International Covenant on Civil and Political Rights, Article 28 J paragraph (2) of the 1945 Constitution, and Article 70 of Law No. 39 of 1999 on Human Rights, in addition to the Siracusa Principle. Article 29 paragraph (2) of the Universal Declaration of Human Rights stipulates that in exercising his rights and freedoms, everyone shall submit only to the restrictions imposed by law, whose sole purpose is to ensure the proper recognition and respect for the rights and freedoms of others and to meet the just conditions of decency, order, and the general welfare in a democratic society. It is also promulgated in Article 12 paragraph (3) that the above rights shall not be subject to any restrictions except those prescribed by law to protect national security and public order, the health or morals of the people, or the rights and freedoms of others, and which are in accordance with the Covenant on Civil and Political Rights. Article 28J paragraph (2) of the Constitution stipulates that everyone must submit to the restrictions imposed by law when exercising his or her rights and freedoms for the sole purpose of ensuring the recognition and respect for the rights and freedoms of others, as well as meeting fair demands in accordance with moral, security, and public order considerations in a democratic society. Meanwhile, Article 70 of Law No. 39 of 1999 on Human Rights states that in exercising his rights and freedoms, everyone shall submit to the



restrictions set by law with a view to ensuring the recognition and respect for the rights and freedoms of others and to meeting fair demands in accordance with moral considerations, security, and public order in a democratic society.

Criminalization Based on the Principle of Human Rights Limitations

Based on the provisions of several important human rights instruments mentioned earlier, it can be formulated into three conditions of limitation or restriction of rights in the framework of the formulation of criminal offenses. First, such rights must be limited in accordance with the law (by law). According to Lon Fuller, the law must be general, regulations must be published, must not be retroactive, must be plain and understandable, must not be contrary to other laws, must not exceed its capabilities, must be long and constant, and there must be congruence between law in theory and practice (Marwan, 2016). The Siracusa Principle also has the following legal requirements:

“Prescribed by law: (i) no limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied; (ii) laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable; (iii) legal rules limiting the exercise of human rights shall be clear and accessible to everyone; and (iv) adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.”

States that intend to restrict rights through criminalization must do so through national legislation that is democratically drafted. Because only these two rules can contain human rights limits based on the premise of no law without a representative, this law relates to written rules in the form of local laws and regulations. The limitation must be enacted through legislation because the material restriction must be approved by the public (the people's will), which is represented by politicians. Criminalization governed by legislation must not have any limitations but just operational or technical implementation of the activities committed. This is to avoid possible executive limitations. According to this principle, human rights limits can only be applied to local laws or regulations produced by legislative institutions. Government regulations, presidential regulations, ministerial regulations, governor's regulations, regent's regulations, or mayor's regulations shall not include entitlement limits. This notion is in line with the *trias politica* principle, which entails the legislature's legislative authority, the executive's implementation of laws, and the judiciary's capacity to defend the law (Umboh, 2020).

Criminalization should not be invented and applied haphazardly. This has to do with the formative and material stages of law and regulation formation. The formal stage involves the process of enacting laws to offer procedural legitimacy, whereas the material stage is concerned with the substance of the laws and regulations (Aziz, 2009). Offense determination is a material process that should not be carried out randomly but rather on the basis of acceptable philosophical, social, and legal

rationale. The formal stage is concerned with the process of developing regulations, which includes planning, preparation, discussion, endorsement, and promulgation. This step of distribution refers to the necessity that the rule of law is made publicly accessible and/or read by the public. The establishment of the constraints must be announced for the advantage of the state. Openness is necessary for democratically adopted legal constraints imposed by criminalization, in order for them to be managed directly by the community at every stage of the drafting process ([Abdullah, 2004](#)). Publication in a state gazette or state news, as well as efforts to disseminate information through the media, are all possible options. The state is expected to provide a means for the public to file complaints if the legal product is unsatisfactory. According to Nils Jareborg, given that criminalization efforts are strongly linked to citizen civil rights breaches, the ability to file a complaint through rule review is critical ([Jareborg, 2005](#)).

Second, only a legitimate reason can be used to restrict rights. In this sense, criminalization indicates that restrictions must be based on various reasons or aims that are legally defensible within the context of human rights restrictions. Public order, public health, public morals, other people's rights and freedoms, national security, and public safety are among these causes. The following provisions of the Siracusa Principle explain the grounds for each of these lawful purposes. The term "public order" refers to a system of norms that ensure the smooth operation of society, making it seem comfortable, safe, and well-organized. It has to do with the responsibilities and powers of governmental agencies or institutions in particular matters. Parliament, the courts, and other independent bodies must have oversight over the state apparatus in charge of maintaining public order. The Inspectorate, National Commission of Human Rights, legislative institutions, and Ombudsman, for example, oversee public order enforcement by police services. There are no universal limitations to public order. In accordance with the Siracusa principle, it limits the use of public order in connection to criminality that infringes on human rights, in this case, law enforcement forces ([Onibala, 2013](#)).

The state's authority to impose restrictions on human rights is also supported by the need to protect public health. A person's rights may be limited for causes or objectives such as preventing the spread of a virus, infectious disease spread, and medical treatment for the sick and injured, which completely conforms to the World Health Organization's regulations (WHO). This health reason can also be used to limit a person's or corporation's rights in the face of poisonous substances or waste resulting from industrial and other damaging operations ([Aisah, 2020](#)). Limitations based on human rights might also be based on public morality. According to Fatmawati, moral provisions must vary by region. Therefore, they are frequently understood within the context of specific locales based on religion, politics, and social factors ([Fatmawati, 2011](#)). Limits based on public morals can be imposed on certain regions via democratically enacted local ordinances, as long as they are only intended for the local population. If a state imposes restrictions on human rights based on national public



morals, the restrictions must be clearly stated with the people's or parliament's permission.

In order to defend the nation's existence, geographical integrity, or political independence from violence or threats of violence, national security might be a basis for restrictions. National security cannot be used as a justification for arbitrary limitations. The primary justification for restricting rights based on national security is to protect the nation's and state's interests against intervention from within and outside the country. Restrictions on human rights are also predicated on the need to ensure public safety. States may impose restrictions on people's rights in order to protect them from dangers that endanger their safety, life, or physical integrity or cause substantial property damage. The impact of the risk of death, injury, or damage to individuals or items is evaluated in this safety. This danger emerges as a result of an unsafe condition or conduct. This situation necessitates a sense of safety for the general public or a large audience, whether physically, socially, spiritually, financially, emotionally, at work, psychologically, or in other ways related to the threat.

Third, human rights restrictions might be justified by the need to protect others' rights and freedoms, as well as their reputation. This indicates that a person's reputation or good name can be invoked as justifications for restricting rights. Nonetheless, the grounds for protecting others' reputations should not be utilized to shield government leaders from societal ideas and criticisms. As supporters of a democratic system that guarantees the preservation of freedom of expression, the government should make every effort to preserve such freedom. If a state is willing to give sufficient protection to the concept of opinion spending, it is regarded as really democratic ([Rahmawati, 2021](#)).

Rights are restricted for the sake of a necessity in a democratic society. Limitations on rights must be made in order to keep democracy running properly, and not to threaten and undermine democracy. Restrictions carried out in ways and objectives that undermine democracy, such as acts of coercion, arbitrariness, and discrimination committed in a democratic society must be declared invalid. Manfred Nowak considers that there is no single model for the size of the needs of a democratic society. The extent of the definition can be interpreted according to the standards of each country with reference to national values and traditions as long as it can be taken into account in efforts to maintain public order or democracy ([Nowak, 2003](#)).

The last criterion is related to the proportionality concept in human rights law and the *ultimum remedium* principle in criminal law ([Ali, 2020](#)). This principle states that criminal law should be utilized as a last resort in controlling social behavior if many avenues to conflict settlement outside of criminal law have been considered ([Anindyajati, 2015](#)). It is argued that criminal law is not the only final means of avoiding crime. Because criminal law has limitations, its application must be tailored to the law's ability to combat crime. The factors generating complicated crimes that



go beyond criminal law scope have influenced these restrictions. Put another way, criminal law does not treat the cause of disease or the treatment of the cause of disease but simply treats the symptoms, also known as symptomatic treatment. In such a case where other mechanisms other than criminal law can successfully regulate it, criminalization should not be employed as an option. An act can be criminalised if there is no alternative to a degree of germs comparable to or better than criminal consequences. If criminal law is the sole means of expressing regret, it is also the only means of achieving criminal law's function. The use of this notion should, in general, begin during the policy formulation stage. Since the legislature formed the law, the criminalization process must be ensured to be legally accurate and based on the rules of criminal law. The legitimacy of this process is critical because if policy formation is difficult, policy implementation may be as well.

The third criteria also necessitate proportionality or the preservation of a suitable ratio between two components. The equivalent of a word is the insertion of a word that has the same meaning as proportionality. Reasonable actions must be proportionate. When a specific action does not make sense, it must also be disproportionate. Illegality and/or procedural impropriety can also be interpreted as proportionality (Ali, 2018). In terms of the definition in the context of human rights law, proportionality is defined as a term that implies a proportional link between the desired outcomes and the actions taken and their effects. Although state restrictions on human rights are necessary, the state is only entitled to take them if they are proportional (Stone, 2020).

According to Manfred Nowak, governments that wish to intervene in individuals' rights and freedoms directly must not only offer a legally sufficient explanation for their activities but also prove that their intervention is required to protect important interests (Nowak, 2003). The criteria for evaluating the principle of proportionality are as follows: (i) the means by which citizens' human rights are restricted must be logically related to the goals to be accomplished; (ii) In order to achieve the aim, rights must be decreased as little as feasible; and (iii) there must be a balance between the impact of limits on rights and the goals to be reached through restrictions (Flores, 2013). This includes an assessment of whether the violation of rights resulting from the legislative process is no more than required to fulfill the legislation's objectives. If there are still other, less effective ways to achieve the same aim, but legislative action is still done, this premise is broken (Meagher, 2013). Governments that wish to intervene with people's rights must not only give legal reasons but also demonstrate that government involvement is necessary to defend the interests of the parties involved (Nampewo, Mike, & Wolff, 2022).

Conclusion

The legislature usually formulates rights limitations in the policy formulation of criminal activities. This restriction can be implemented by adhering to the criminalization criteria outlined in the human rights limitation. The determination of



restriction-containing offenses must be based on legal reasons by legislature, restrictions based on both justifiable aims and the necessary in a democratic society. There is no uniform model of criteria for the demands of a democratic society. The criteria are related to both the human rights norm of proportionality. This study is limited to the criteria of criminalization according to the limitation of human rights. Hence, it is strongly recommended to explore further the application of human rights limitations in various criminal legislation.

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