

Interpreting Non-Derogable Rights in Indonesia's Human Rights Protection Framework

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Abstrak: Hak asasi manusia merupakan salah satu fondasi utama negara hukum yang menempatkan perlindungan terhadap hak-hak fundamental sebagai bagian penting dari penyelenggaraan kehidupan bernegara. Dalam sistem perlindungan hak asasi manusia, terdapat hak-hak tertentu yang memiliki karakter khusus karena tidak dapat dikurangi dalam keadaan apa pun. Permasalahan muncul ketika kedudukan hak tersebut berhadapan dengan kewenangan negara untuk melakukan pembatasan hak asasi manusia, khususnya dalam keadaan tertentu yang memungkinkan adanya pembatasan atau pengurangan hak. Kondisi tersebut menimbulkan persoalan mengenai batas perlindungan terhadap hak yang bersifat tidak dapat dikurangi serta hubungan antara prinsip non-derogable rights dengan kewenangan pembatasan hak. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan perundang-undangan, konseptual, dan perbandingan. Penelitian ini berargumen bahwa non-derogable rights harus ditempatkan sebagai kategori hak yang memiliki perlindungan konstitusional khusus sehingga tidak dapat dijadikan objek pengurangan berdasarkan kewenangan pembatasan hak secara umum. Hasil penelitian menunjukkan bahwa pembedaan secara tegas antara pembatasan hak (*limitation*) dan pengurangan atau penangguhan hak (*derogation*) merupakan elemen penting dalam menentukan ruang perlindungan terhadap non-derogable rights. Pembedaan tersebut sekaligus menegaskan bahwa kewenangan negara dalam membatasi hak asasi manusia tetap memiliki batas dan tidak dapat digunakan untuk mengurangi hak-hak yang secara fundamental bersifat tidak dapat dikurangi.

Kata Kunci: Hak; Asasi Manusia; Konstitusi.

Abstract: Human rights constitute one of the fundamental foundations of the rule of law, placing the protection of fundamental rights as an essential element in the administration of the state. Within the human rights protection framework, certain rights possess a special character because they may not be diminished under any circumstances. The problem arises when the protection of such rights intersects with the state's authority to impose limitations on human rights, particularly under circumstances that may justify restrictions or derogation. This situation raises questions concerning the scope of protection afforded to non-derogable rights and the relationship between the principle of non-derogable rights and the state's authority to limit human rights. This research employs a normative legal research method using statutory, conceptual, and comparative approaches. This study argues that non-derogable rights must be recognized as a category of rights receiving special constitutional protection and, therefore, cannot be subjected to reduction through general limitation powers. The findings demonstrate that a clear distinction between limitation and derogation is essential in determining the scope of protection afforded to non-derogable rights.

This distinction further affirms that the state's authority to restrict human rights remains subject to legal boundaries and cannot be exercised to diminish rights that are fundamentally non-derogable.

Keywords: Rights; Human; Constitution.



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A. INTRODUCTION

Human rights constitute a fundamental component of a constitutional state governed by the rule of law. The constitutional recognition of human rights places the protection of human dignity and individual freedoms beyond the realm of ordinary state policy and establishes them as legal commitments binding upon public authorities. In Indonesia, the constitutional protection of human rights was significantly strengthened through the amendments to the 1945 Constitution of the Republic of Indonesia, particularly through the incorporation of a dedicated chapter on human rights, namely Chapter XA. This constitutional development reflects the principle that the exercise of state power cannot be unlimited, as certain fundamental rights must be respected, protected, and fulfilled by the state. One of the most significant provisions within Indonesia's constitutional framework for human rights protection is Article 28I paragraph (1) of the 1945 Constitution. The provision recognizes the right to life, the right to freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, the right to recognition as a person before the law, and the right not to be prosecuted under retroactive laws as rights that may not be diminished under any circumstances. This formulation establishes a category of rights that receives a particularly strong form of constitutional protection and is commonly associated with the concept of non-derogable rights in international human rights discourse. The significance of this category lies in the fact that, although the state may exercise extraordinary powers under certain circumstances, such powers cannot automatically justify the reduction of constitutionally protected rights.[1]

The constitutional issue becomes more complex when Article 28I paragraph (1) is examined together with Article 28J of the 1945 Constitution. Article 28J provides a constitutional basis for restricting the exercise of rights and freedoms, particularly where such restrictions are intended to respect the rights of others and to address considerations of morality, religious values, security, and public order within a democratic society. The Indonesian Constitution therefore adopts a dual structure: on the one hand, it provides enhanced protection for certain rights that may not be diminished under any circumstances; on the other hand, it recognizes the possibility of restricting the exercise of rights and freedoms. This arrangement raises an important interpretive question concerning the boundary between rights that possess non-derogable status and rights whose exercise may legitimately be restricted. The issue cannot be adequately resolved by examining Article 28I and Article 28J separately. Rather, both

provisions must be interpreted as interconnected elements of a coherent constitutional system of human rights protection.[2]

From the perspective of international human rights law, the concept of non-derogable rights is closely connected with the doctrine of derogation. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) permits states, under strictly defined circumstances, to derogate from certain obligations when an exceptional emergency threatens the life of the nation. Such authority, however, is subject to substantive and procedural safeguards. Indonesia ratified the ICCPR through Law Number 12 of 2005, making the principles contained in the Covenant an important reference for understanding the development and implementation of human rights protection within the Indonesian legal system. The Human Rights Committee, through General Comment No. 29, emphasizes that derogation is an exceptional and temporary measure that may only be invoked under circumstances meeting the requirements established by international law. Any derogating measure must remain strictly limited to what is required by the exigencies of the situation. The Committee also distinguishes derogation in a state of emergency from ordinary restrictions or limitations that may be permissible with respect to certain rights under normal circumstances. This distinction is significant because the existence of an emergency does not confer unrestricted authority upon the state to diminish human rights. Recent Indonesian legal scholarship indicates that the relationship between limitation and derogation remains an area requiring further examination,[3] for example, demonstrate that the reasoning employed by the Indonesian Constitutional Court has encountered difficulties in consistently distinguishing between human rights limitations and derogation. Their study identifies instances in which limitation clauses have been employed in addressing rights that, from the perspective of international human rights law, fall within the category of non-derogable rights. This finding indicates that the issue of non-derogable rights extends beyond merely identifying which rights cannot be diminished. It also concerns the legal methodology and standards used to assess state measures affecting constitutionally protected rights.[4]

A related issue can be observed in contemporary discussions of constitutional emergency law. Demonstrate that states of emergency create a difficult balance between the state's responsibility to maintain security and its continuing obligation to protect human rights. Under such circumstances, restrictions on rights must remain connected to the requirements of necessity and proportionality and cannot be employed as a means of disregarding rights that possess non-derogable status. Consequently, emergency situations highlight rather than diminish the importance of constitutional limitations on state power. These developments demonstrate that the study of non-derogable rights under Article 28I paragraph (1) of the 1945 Constitution should not be limited to identifying the seven categories of rights expressly listed in the provision.[5] A more fundamental issue concerns the legal character of those rights and their position when they come into tension with the state's authority to restrict rights under particular circumstances. The phrase "may not be diminished under any circumstances" therefore needs to be understood within the broader relationship between constitutional rights protection, state authority, human rights limitations, and the principle of the rule of law. The study of non-derogable rights also reveals a conceptual distinction that requires careful consideration. Not

every restriction imposed on the exercise of a right constitutes derogation. Derogation concerns a temporary departure from certain state obligations under exceptional circumstances that satisfy specific legal requirements, whereas limitation concerns restrictions on the exercise of rights that are permitted by law under defined conditions. The Human Rights Committee recognizes that these two concepts have different legal foundations, purposes, and requirements. Failure to distinguish between them may result in an overly broad interpretation of state authority and potentially undermine the constitutional protection afforded to fundamental rights.[6]

This distinction has particular relevance in Indonesia because Article 28I paragraph (1) employs unequivocal language, while Article 28J provides a constitutional framework for restricting rights and freedoms. The relationship between non-derogable rights and limitation clauses has also emerged in the jurisprudence of the Indonesian Constitutional Court. Constitutional Court Decision Number 110/PUU-XX/2022, for instance, addresses the distinction between non-derogable and derogable rights in connection with the limitation clause contained in Article 28J of the 1945 Constitution. This development demonstrates that the issue of non-derogable rights is directly relevant to constitutional adjudication and the judicial interpretation of human rights in Indonesia. More recent scholarship further indicates that the legal implications of non-derogable rights remain an evolving subject within Indonesian legal discourse. Pribadi (2025), for example, examines freedom of religion as a right falling within the category of non-derogable rights by examining its relationship with the Indonesian constitutional framework and international human rights law. Meanwhile, identify a normative tension between the right to life as a non-derogable right and the continued existence of capital punishment within Indonesian legislation. These studies demonstrate that non-derogable rights remain open to further examination, particularly with respect to the broader constitutional construction of Article 28I paragraph (1) and its relationship with the human rights limitation mechanism established under Article 28J.

Against this background, the present study does not merely seek to restate the categories of rights classified as non-derogable rights. Instead, it examines the constitutional meaning of the phrase “may not be diminished under any circumstances” as formulated in Article 28I paragraph (1) of the 1945 Constitution. The central concern is how these rights should be positioned within Indonesia's constitutional system of human rights protection and how Article 28I paragraph (1) should be understood in conjunction with Article 28J so that the limitation of human rights does not become a means of diminishing rights that have been granted special constitutional protection. Such an approach is necessary to establish a clearer boundary between the state's authority to regulate the exercise of human rights and its obligation to preserve rights that the Constitution expressly protects from diminution. Accordingly, this study aims to examine the meaning of non-derogable rights under Article 28I paragraph (1) of the 1945 Constitution and to analyze the relationship between that provision and the constitutional framework for human rights limitations under Article 28J. The study is expected to contribute to the development of constitutional and human rights law, particularly by clarifying the limits of state authority when it comes into contact with constitutional rights that enjoy non-derogable protection.

B. METHOD

This study employs a normative legal research method, which approaches law primarily as a body of legal norms used to identify, interpret, and assess the legal issues under investigation. The normative approach was selected because the study focuses on the constitutional meaning of non-derogable rights under Article 28I paragraph (1) of the 1945 Constitution of the Republic of Indonesia and its relationship with the constitutional framework governing human rights limitations under Article 28J. Normative legal research is appropriate for examining the coherence of legal norms, principles, concepts, and legal reasoning within a particular legal system (Negara, 2023; Wulandari, 2026). A similar approach has also been employed in recent studies examining the position of non-derogable rights within Indonesian law [7]

C. DISCUSSION

1. The Position of Non-Derogable Rights under Article 28I of the 1945 Constitution.

The constitutionalization of human rights through the amendments to the 1945 Constitution marked a fundamental transformation in the relationship between the state and the individual. Human rights are no longer regarded merely as moral values or political aspirations, but have become part of the constitutional framework that legally binds state institutions and public authorities. Consequently, the exercise of state power must be conducted within a framework that respects fundamental human rights. In this context, the state's responsibility extends beyond refraining from conduct that violates human rights. It also encompasses the establishment of legal and institutional mechanisms capable of preventing violations, addressing abuses, and providing effective remedies for victims. The human rights framework established by the 1945 Constitution is relatively comprehensive, encompassing civil and political rights, economic, social, and cultural rights, as well as the obligation to respect the rights of others. Within this framework, Article 28I paragraph (1) occupies a distinctive position.[8] The provision constitutionally protects seven categories of rights: the right to life; the right to freedom from torture; freedom of thought and conscience; freedom of religion; the right to freedom from enslavement; the right to be recognized as a person before the law; and the right not to be prosecuted on the basis of retroactive laws. The Constitution expressly places these rights within the category of rights that may not be diminished under any circumstances.[9]

This constitutional formulation produces legal consequences that differ from those applicable to rights whose exercise may be subject to restrictions under the Constitution. The phrase “may not be diminished under any circumstances” indicates that the Constitution affords these rights a heightened form of protection. Within international human rights law, this characteristic is generally associated with the concept of non-derogable rights. The National Human Rights Commission of Indonesia. Similarly identifies the rights referred to in Article 4 paragraph (2) of the ICCPR as rights that may not be derogated from under any circumstances, including during war, armed conflict, or a state of emergency. Nevertheless, non-derogable rights should not be understood merely as a list of rights expressly enumerated in the Constitution. The concept is also closely related to the limits imposed on state authority during exceptional circumstances. Under certain conditions, governments may exercise extraordinary powers to respond to threats to public safety or the continuity of the state. Such

powers, however, do not extinguish the state's continuing obligation to respect rights that are legally recognized as non-derogable. Accordingly, a state of emergency cannot be construed as a legal vacuum in which governmental authority operates without constitutional constraints.[10]

This understanding is consistent with the international human rights framework established under Article 4 of the ICCPR. Although the provision permits states to derogate from certain obligations during a public emergency threatening the life of the nation, such authority does not extend to all human rights. The ICCPR expressly excludes particular rights from derogation. The doctrine of derogation, therefore, is premised upon the recognition that state power remains subject to legal constraints even in times of crisis. Within the Indonesian constitutional context, the position of non-derogable rights must also be understood in light of the principle of the rule of law. A constitutional state requires the exercise of public power to be grounded in law and subject to legally defined limits. Accordingly, when the Constitution declares that particular rights may not be diminished under any circumstances, that declaration simultaneously operates as a constitutional restriction on state power. These rights function as constitutional boundaries that cannot legitimately be crossed by the legislature or other organs of the state. This perspective is relevant to Faisal's (2019) study concerning the existence of the Human Rights Court within the Indonesian judicial system. That study places human rights adjudication within the broader effort to provide legal certainty in addressing human rights violations. emphasized that state responsibility for human rights encompasses the obligations to respect, protect, uphold, and promote human rights. When these arguments are considered together with Article 28I paragraph (1), the recognition of non-derogable rights entails not only a negative obligation requiring the state to refrain from violating such rights, but also positive obligations to establish effective protection and remedial mechanisms when violations occur.

Accordingly, the constitutional position of non-derogable rights under Article 28I paragraph (1) may be understood through three interconnected dimensions. First, they constitute a constitutional guarantee, because these rights receive direct protection from the Constitution. Second, they serve as a limitation on state power, because extraordinary circumstances cannot legitimately be invoked as a basis for diminishing such rights. Third, they constitute a foundation for state responsibility, requiring the state to establish effective legal and institutional mechanisms to ensure that these rights are genuinely protected and enforceable

2. Distinguishing Non-Derogable Rights, Derogation, and Limitation.

A proper understanding of Article 28I paragraph (1) of the 1945 Constitution requires a clear distinction between non-derogable rights, derogation, and limitation. Although these three concepts are frequently discussed within the broader framework of restrictions on human rights, they are not interchangeable. Each carries a distinct conceptual meaning and produces different legal consequences. Non-derogable rights refer to rights that may not be suspended or reduced through a derogation mechanism, including in circumstances in which a state is confronted with an exceptional or emergency situation. Derogation, by contrast, constitutes a legally recognized mechanism through which a state may temporarily depart from certain human rights obligations under extraordinary circumstances, provided that the applicable

legal requirements are satisfied. Limitation, meanwhile, concerns restrictions imposed on the exercise of a particular right in accordance with conditions and standards established by law.[11]

This distinction is particularly significant within the Indonesian constitutional framework because Article 28I paragraph (1) and Article 28J are situated within the same constitutional chapter but perform different normative functions. Article 28I paragraph (1) affords special protection to certain rights that cannot be reduced under any circumstances, whereas Article 28J establishes the constitutional framework under which the exercise of rights and freedoms may be subject to specific restrictions. Accordingly, Article 28J should not be interpreted as an automatic exception to the protection guaranteed by Article 28I paragraph (1). The two provisions should instead be interpreted in a mutually consistent manner. Article 28J may provide a constitutional basis for regulating rights whose exercise is expressly open to limitation.[12] It cannot, however, be invoked as a legal instrument to eliminate the distinctive constitutional status of rights that are expressly recognized as non-derogable. This issue becomes increasingly significant when examined in light of the jurisprudence of the Constitutional Court. demonstrate that the Constitutional Court has not always maintained a consistent distinction between limitation and derogation. Their study indicates that, in several cases, the Court has relied upon limitation clauses when assessing issues involving rights generally classified as non-derogable rights. This development reveals a conceptual challenge within constitutional adjudication concerning the boundary between permissible restrictions on the exercise of rights and measures that effectively reduce the protection afforded to those rights.[13]

The finding is particularly relevant to this study because the distinction between non-derogable rights, limitation, and derogation is not merely terminological. Mischaracterizing a derogation as an ordinary limitation may directly affect the level of constitutional protection afforded to a particular right. If every form of state interference is treated simply as a limitation that may be justified under Article 28J, there is a risk that rights intended to receive heightened constitutional protection could ultimately be subjected to ordinary restriction mechanisms. From this perspective, a fundamental distinction must be drawn between regulating the manner in which a right is exercised and diminishing the substantive content of the right itself. In certain circumstances, the exercise of a freedom may legitimately be subject to procedural or regulatory requirements. Such regulation, however, should not operate in a manner that effectively deprives the right of its essential substance. Distinguishing between the external conditions governing the exercise of a right and the substantive core of the right is therefore essential to prevent disproportionate restrictions.[14]

A similar issue arises in relation to freedom of religion. Identifies freedom of religion as a right that receives protection as a non-derogable right under the constitutional construction of Article 28I of the 1945 Constitution and the broader international human rights framework. The study further demonstrates that the normative guarantee of religious freedom continues to encounter practical challenges, including regulatory arrangements with exclusionary effects and bureaucratic practices that may result in discriminatory treatment. Within this framework, it is important to distinguish between an individual's internal freedom to hold a particular religion or belief and the external manifestation of that belief. The different legal treatment of these two dimensions illustrates why the concept of non-derogability must be

approached with precision. The classification of a right as non-derogable does not necessarily mean that every act claimed to constitute an exercise of that right is beyond the reach of legal regulation. What is constitutionally impermissible is the use of ordinary limitation mechanisms to eliminate, substantially diminish, or otherwise undermine the essential substance of a right that has been accorded absolute protection.[15]

The relationship between Article 28I paragraph (1) and Article 28J of the 1945 Constitution should therefore be understood through the principle of constitutional harmonization. Article 28J establishes the framework for restricting the exercise of rights that are constitutionally subject to limitation, while Article 28I paragraph (1) simultaneously places substantive boundaries on the state's authority to impose such restrictions. This interpretation prevents Article 28J from being construed so broadly that it would undermine the special constitutional protection expressly guaranteed by Article 28I paragraph (1). The phrase “non-derogable under any circumstances” constitutes a central element in understanding the constitutional conception of non-derogable rights under Article 28I paragraph (1) of the 1945 Constitution. From a textual perspective, the formulation is deliberately stringent, as it does not establish an exception based on the particular circumstances confronting the state. Consequently, an emergency, armed conflict, security threat, or other extraordinary situation cannot, by itself, serve as a constitutional justification for reducing the rights expressly protected under Article 28I paragraph (1).

This constitutional arrangement demonstrates that Indonesia's constitutional system does not regard a state of emergency as a condition that automatically suspends human rights protection. Rather, the expansion of state authority during exceptional circumstances makes constitutional restraints on that authority even more significant. Such an approach reflects the fundamental principle of a constitutional state, in which the exercise of public power remains subject to legal and constitutional control. An emergency situation may legitimately alter the manner in which governmental powers are exercised. Such changes, however, should not undermine the fundamental proposition that the state remains bound by the Constitution. Within this framework, non-derogable rights operate as an important safeguard against the possibility that extraordinary circumstances could be invoked to justify excessive or uncontrolled exercises of governmental power. This understanding is reinforced by contemporary scholarship concerning the nature and scope of non-derogable rights. For instance, emphasizes the significance of these rights in safeguarding human dignity, particularly because their protection remains applicable even when a state is confronted with an emergency situation.[16] The study further highlights the need to distinguish rights expressly recognized as non-derogable from other rights that may be closely connected to, or instrumental to, the enjoyment of those rights.

This distinction is relevant to the interpretation of the rights enumerated in Article 28I paragraph (1), which possess a distinctive constitutional status. The state cannot unilaterally expand the meaning of an emergency in order to justify measures that diminish such rights. Instead, any governmental measure that potentially affects a non-derogable right should be subjected to a particularly rigorous constitutional assessment. [17]The right to life provides an important illustration of this complexity, particularly when considered in relation to criminal policies that retain the death penalty. The continuing debate over capital punishment reflects a tension between the constitutional recognition of the right to life as a non-derogable

right and the state's authority to formulate criminal justice policy. demonstrate that this issue remains a significant normative debate within Indonesian law, particularly concerning the relationship between the constitutional status of the right to life and the continued existence of capital punishment. Their analysis suggests that the implications of the non-derogable classification extend beyond emergency situations and also concern the manner in which the state formulates and implements legal policies affecting fundamental rights.[18]

This issue indicates that non-derogable rights should not merely function as labels attached to particular categories of rights. Their constitutional classification must produce tangible consequences throughout the processes of law-making, law enforcement, and constitutional review. Once a right has been recognized as non-derogable, governmental policies affecting that right must take its distinctive constitutional status into account. Where a conflict arises between state policy and a non-derogable right, the protection of the right should constitute a primary consideration in determining the legitimacy of state action assumes particular relevance. The state bears obligations to respect, protect, fulfil, and promote human rights. Accordingly, the constitutional recognition of non-derogable rights must be accompanied by institutional mechanisms capable of providing meaningful protection to individuals when violations occur. research concerning the Human Rights Court likewise highlights the significance of institutional mechanisms in establishing legal certainty and accountability in cases involving serious human rights violations.

The phrase “non-derogable under any circumstances” should therefore not be understood merely as a formal prohibition directed at the state. It carries at least three interrelated consequences. First, the state is prohibited from adopting measures that directly diminish the protected right. Second, the state has a positive obligation to prevent third parties from violating that right. Third, the state must establish and maintain effective legal remedies through which violations can be addressed and the affected rights restored. Taken together, these obligations demonstrate that the constitutional status of non-derogable rights is inseparable from the broader principle of state responsibility for the protection of human rights.

D. CONCLUSION

The findings demonstrate that non-derogable rights under Article 28I paragraph (1) of the 1945 Constitution constitute constitutional rights subject to special and absolute protection, thereby limiting the exercise of state power even under emergency conditions, national security considerations, or public interest claims. Article 28J should therefore be interpreted systematically as permitting limitations on the exercise of certain rights only within constitutional parameters, without authorizing the reduction of rights classified as non-derogable. A clear distinction between limitation and derogation is essential to prevent the limitation clause from undermining substantive human rights protection. Accordingly, Articles 28I paragraph (1) and 28J should be applied consistently by legislators and judicial institutions through clear constitutional parameters, while strengthening the state's obligations to protect, fulfill, enforce, and remedy non-derogable rights as an integral element of the rule of law and the constitutional limitation of public power.

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