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**CONTENTS**

# THE PUBLIC MORALS EXCEPTION: A FAILING BY THE HUMAN RIGHTS COMMITTEE AND A THREAT TO INTERNATIONAL HUMAN RIGHTS LAW

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*By way of its construction, the public morals exception located in the International Covenant on Civil and Political Rights is a function of international law which allows for restrictions on the most fundamental of our human rights. However, despite these implications, this justifying ground remains severely understudied and unexplained. This paper seeks to discuss the jurisprudence which surrounds the public morals exception from two angles: first, the requirements for 'legitimacy' of such exceptions and second, the broader interpretation of what is meant by the term 'public morals' in international human rights law. After analysing the work of the Human Rights Committee on these two concepts, the paper asserts that the level of clarity which has been provided by the body in terms of its discussions on the requirements of human rights exceptions has not been reflected in the Committee's limited guidance concerning the larger concept of public morality — a complex yet vital part of the discussion surrounding the public morals exception. Due to this lack of clarity by the Human Rights Committee, the paper finds that the international recognition of human rights faces two major issues — a vacuous idea of 'morality' which often allows for excessive State discretion, and an overwhelming number of claims under the public morals exception which are clearly unlawful.*

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## I INTRODUCTION

Located in the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[1] the protection of 'public morals' is listed as a valid reason for departing from the mandatory recognition of individual liberties in international human rights law.[2] Unfortunately, while other exceptions such as protections of public health, public safety, and public order have been extensively studied, the protection of public morals remains 'the least clear and most controversial of all the legitimating grounds for justifying restrictions'.[3]

[1] See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) 999 UNTS 171 arts 12, 18, 19, 21, 22 ('*ICCPR*').
[2] Ibid Preamble paras 2, 6.
[3] Manfred Nowak and Tanja Vospernik, 'Permissible Restrictions on Freedom of Religion or Belief' in Tore Lindholm, W Cole Durham, Jr. and Bahia G Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Springer 2004) 159.

With this state of affairs in mind, this paper seeks to discuss the jurisprudence which governs the public morals exception and its use. Overall, this discussion will include an analysis of the *ICCPR*, as well as the relevant communications which have been published by the United Nations Human Rights Committee ('Committee'), the treaty body charged with monitoring the implementation of the *ICCPR*.[4] Firstly, this article will summarise the requirements for validity which govern the legitimating grounds as a whole, including the public morals exception. Secondly, this article will outline the evolution of the term 'public morals' throughout the history of the Committee. Finally, the paper will assess how the continuing ambiguity resulting from the absence of guidance regarding the public morals exception, presents a threat to the recognition of human rights in international law.

## II REQUIREMENTS FOR A VALID PUBLIC MORALS EXCEPTION

Since its inception, the aim of the *ICCPR* has been to ensure the 'recognition… of the equal and inalienable rights of all members of the human family'.[5] However, from the moment of its enactment in 1966, the *ICCPR* has allowed for numerous grounds upon which States could restrict human rights, provided that these restrictions satisfy certain requirements for legitimacy. Relevant to this paper, the public morals exception constitutes one of these justifying grounds.

Overall, this section will address the legitimacy requirements which States must satisfy to carry out restrictions to human rights. These include the requirements of 'necessity' and 'provision by law' which are expressly stated in the *ICCPR*.[6] Further, this section will discuss the requirements of 'non-discrimination' and 'universality', terms that have always been implied by the *ICCPR* but have now been cemented via the jurisprudence of the Committee.[7] Note that while the Committee has recently suggested that public morals be assessed in light of 'pluralism',[8] no further discussion concerning this potential

[4] 'What are Treaty Bodies?', *United Nations* (Web Page) <https://www.ohchr.org/en/treaty-bodies#:~:text=What%20are%20the%20treaty%20bodies,set%20out%20in%20the%20treaty>. See also *ICCPR* (n 1) art 28.
[5] *ICCPR* (n 1) Preamble.
[6] See, eg, *ICCPR* (n 1) arts 12(3), 18(3), 19(3).
[7] Human Rights Committee, *General Comment 34: Article 19,* 102nd sess, UN Doc CCPR/C/GC/34 (29 July 2011) [18], [26] ('*General Comment 34*').
[8] See Human Rights Committee, *General Comment No 37: Right of Peaceful Assembly*, 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) [46] ('*General Comment 37*').

requirement has occurred. As a result, this article will not analyse the concept of pluralism in depth.

### A *Legitimacy According to the ICCPR*

When addressing possible restrictions on human rights, the *ICCPR* demands that any such limitations be 'provided by law' and be 'necessary' for the protection of an enumerated ground such as public health, public order, or public morals.[9] In terms of being provided by law, the Committee has made clear that this may include statutes concerning parliamentary privilege or contempt of court.[10] However, any restrictions that are 'enshrined in traditional, religious or other such customary laws' will not satisfy this requirement.[11] Further, laws which purport to restrict human rights without sufficient precision for individuals to regulate their conduct accordingly, will also fall foul of this prerequisite.[12] This is because, laws may never confer 'unfettered discretion',[13] and cannot impair the 'essence' of the human right which they are limiting by reversing 'the relation between right and restriction, between norm and exception…'.[14] In terms of being necessary for the protection of public morals, the Committee has opined that there must be a 'direct and immediate connection' between the restricted conduct and the [moral] threat'.[15] In addition, the requirement of necessity includes the principle of proportionality, meaning that the restriction 'must be appropriate… must be the least intrusive instrument amongst those which might achieve the desired result; and must be proportionate to the interest protected'.[16] As a result, restrictions can only be employed in temporary circumstances, they cannot be permanent nor indefinite bars to the

[9] See, eg, *ICCPR* (n 1) arts 12(3), 18(3), 19(3).
[10] *General Comment 34* (n 7) 9 [32], [24].
[11] Ibid.
[12] Ibid [25]. See also Human Rights Committee, *General Comment 27: Article 12,* 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [13] ('*General Comment 27*').
[13] *General Comment 34* (n 7) [25]; *General Comment 27* (n 12) [13].
[14] *General Comment 27* (n 12) [13].
[15] *General Comment 34* (n 7) [27].
[16] *General Comment 27* (n 12) [14]. See also *General Comment 34* (n 7) [34]; Human Rights Committee, *General Comment 22: Article 18*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 1 (30 July 1993) 37 [8] ('*General Comment 22*').

enjoyment of *ICCPR* rights.[17] Further, limitations cannot be overly broad and must be individualised to a particular threat.[18]

Through these interpretations of the *ICCPR*, the Committee has worked extensively to prevent the undue expansion of State power in terms of restricting human rights.[19] As will be shown below, the Committee has also engaged further jurisprudence beyond the interpretation of these provisions with aims towards this goal.

### B *Non-Discrimination*

Since its issuing of *General Comment 22*, the Committee has maintained that States must always 'proceed from the need to protect the rights guaranteed under the *ICCPR*'.[20] As the term 'rights' in this context extends to concepts such as article 2(1)'s principle of non-discrimination,[21] any employment of the public morals exception must always start from the point of preventing discriminatory restrictions on human rights (in addition to satisfying the requirements discussed above).

Recent jurisprudence of the Committee has only strengthened the importance of non-discrimination in the context of human rights exceptions.[22] In terms of public morals specifically, multiple concluding observations by the Committee have made clear that the maintenance of 'cultural diversity and moral principles… [must] always remain subordinate to the principle… of non-discrimination'.[23] Consequently, non-discrimination is no longer the starting point against which the protections of public morals should be weighed, but rather a consideration which functions as an absolute bar to the legitimacy of any such exceptions.[24] However, while non-discrimination has now crystalised as a doctrine of paramount importance in the context of the public morals exception, not all distinctions between persons will be considered discriminatory. For

[17] Alfred de Zayas and Áurea Martín, 'Freedom of Opinion and Freedom of Expression: Some Reflections on General Comment No. 34 of the UN Human Rights Committee,' (2012) 59(3) *Netherlands International Law Review* 425, 430, 440.
[18] Ibid 430.
[19] Ibid.
[20] See *General Comment 22* (n 16) [8].
[21] Ibid.
[22] See, e.g,, *General Comment 34* (n 7) [18].
[23] Human Rights Committee, *Concluding Observations on the Initial Report of Mauritania,* UN Doc CCPR/C/MRT/CO/1 (2013) [8]. See also Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Iraq*, UN Doc CCPR/C/IRQ/CO/5 (2015) [11].
[24] See *General Comment 34* (n 7) [26], [32]. See also *General Comment 27* (n 12) [18].

instance, where differentiation of treatment is justified on 'reasonable and objective' grounds and 'the aim is to achieve a purpose which is legitimate under the [*ICCPR*]', a restriction on human rights may be valid.[25] Therefore, where protections of public morality are a 'legitimate aim', as maintained by the Committee, such exceptions may not be barred by the principle of non-discrimination.[26]

### C *Universality*

As shown above, the Committee has emphasised that States prioritise the protection of rights and freedoms guaranteed by the *ICCPR*.[27] However, the Committee has also opined that human rights exceptions must be consistent with both the operative sections of the *ICCPR* as well as its overall aims and objectives.[28] According to *General Comment 34*, this requirement includes the recognition of the *ICCPR*'s overarching principle of the universality of human rights.[29]

In recent years, the pre-eminence of universality has been confirmed by the Committee in both its general comments as well as its communications on individual complaints.[30] For example, in the recent case of *Kirill Nepomnyashchiy v Russia*[31], the Committee found that an administrative prohibition on gay propaganda in the city of Arkhangelsk violated this principle despite Russia's claim that the restriction protected public morals.[32] The Committee also noted that the provisions were far too ambiguous, and were unnecessary for Russia's argued aim of protecting the welfare of minors.[33] However, it is clear that universality was a significant factor in the Committee's findings.

According to Vincent Vleugel, the Committee's emphasis on the doctrine of universality indicates that 'where there is a tension between morals and traditions, which are closely

[25] See *General Comment 18* (n 8) [13].
[26] See Ignatius Yordan Nugraha, 'From "Margin of Discretion" to the Principles of Universality and Non-Discrimination: A Critical Assessment of the "Public Morals" Jurisprudence of the Human Rights Committee' (2021) 39(3) *Nordic Journal of Human Rights* 243, 244.
[27] See Part II(A)-(B). See also *General Comment 22* (n 16) [8].
[28] See *General Comment 34* (n 7) [26]. See also *General Comment 27* (n 12) [21].
[29] *General Comment 34* (n 7) [32].
[30] See, eg, Human Rights Committee, *Views: Communication No 1932/2010,* 106th sess, UN Doc CCPR/C/106/D/1932/2010 (2 November 2012) ('*Fedotova v Russia*'). See also, eg, Human Rights Committee, *Views: Communication No 2318/2013*, UN Doc CCPR/C/123/D/2318/2013 (5 October 2013) [7.8] ('*Kirill Nepomnyashchiy v Russia*').
[31] *Kirill Nepomnyashchiy v Russia* (n 30).
[32] Ibid.
[33] Ibid [7.7], [7.8].

linked to culture and the universality of human rights, the latter must prevail'.[34] As a result, this overarching principle represents another requirement with which the public morals exception must comply.

## III PUBLIC MORALS AS A TERM IN THE *ICCPR*

As discussed above, the requirements which surround the legitimacy of any public morals exception have become increasingly clear over time. However, while these limitations are implied or explicit in the *ICCPR*, neither the treaty nor any of its preparatory works define what is actually meant by the phrase 'public morals'.[35] As a result, the interpretive work of the Committee is the primary source of jurisprudence on this concept.

### A *First Look: Public Morals as a 'Matter of Discretion'*

In 1979, Leo Hertzberg brought the first individual petition to the Committee which considered the issue of public morals.[36] In terms of substance, the petition focused on chapter 20 of the Finnish Penal Code which prohibited 'public encouragement of indecent behaviour between persons of the same sex'.[37] While Hertzberg claimed that this restriction violated the right to freedom of expression enshrined in article 19(2) of the *ICCPR*, the Finnish Government's defence was that the purpose of the law 'reflect[ed] the prevailing moral conceptions in Finland as interpreted by the Parliament and by large groups of the population'.[38] Thus, the member State claimed that the law was a valid restriction as allowed by article 19(3) of the *ICCPR*.[39]

In its views communicated on 2 April 1982, the Committee found that because 'public morals differ widely' no 'universally applicable common standard' could be applied to the meaning of the term.[40] As a result, the Committee maintained that a 'margin of discretion'

[34] Vincent Willem Vleugel, *Culture in the State Reporting Procedure of the UN Human Rights Treaty Bodies: How the HRC, the CESCR and the CEDAWCee Use Human Rights as a Sword to Protect and Promote Culture, and as a Shield to Protect against Harmful Culture* (Intersentia, 2020) 166.
[35] See Nugraha (n 26) 255.
[36] See Human Rights Committee, *Views: Communication No 61/1979*, 50th sess, UN Doc CCPR/C/OP/1 (2 April 1982) (*'Leo Hertzberg et al v Finland'*). See also Nugraha (n 26) 245.
[37] See *Leo Hertzberg et al v Finland* (n 36) [2.1]–[2.6].
[38] Ibid [6.1].
[39] Ibid [6.3].
[40] Ibid [10.3].

should be allowed for national authorities concerning such topics.[41] Because the Finnish Government was within its discretion to pass chapter 20 of its Penal Code, the Committee found that there was no violation of article 19(2) in this instance.[42] Through this communication, the Committee made clear that member States would be allowed to define public morals in their own way.[43] In addition, the Committee's position on the lack of a universal morality indicates that the body was unwilling to impose its own thoughts or constraints on such an amorphous and subjective concept.

### B *Recent Guidance: Public Morals as a Matter of International Concern*

Because of its approach in *Leo Hertzberg et al v Finland* ('*Hertzberg'*), the Committee was briefly able to avoid prolonged discussion concerning the concept of public morality as well as the potential applications of the term across the diverse cultural environments of the international community. However, any avoidance of these difficult considerations was short lived as the Committee soon began to address the meaning of public morality more directly.

In 1993, the Committee issued *General Comment 22*, which focused on the freedom of thought guaranteed by article 18 of the *ICCPR*.[44] As article 18 references the possibility of a 'public morals exception',[45] the Committee took the opportunity to clarify that no valid restriction to the *ICCPR* could coerce a person into adopting a particular religion or belief.[46] In addition, the Committee departed from its views in *Hertzberg* by imposing a restriction on the public morals discretion of States, indicating that '[such] limitations… must be based on principles not deriving exclusively from a single tradition'.[47] Around the same time, the Committee was also preoccupied with a second individual petition concerning public morality: *Toonen v Australia* ('*Toonen*').[48] In *Toonen,* the state of Tasmania defended its criminalisation of homosexual acts on the basis of the public

[41] Ibid.
[42] Ibid [10.4], [11].
[43] See Nugraha (n 26) 245.
[44] *General Comment 22* (n 16) [8].
[45] See *ICCPR* (n 1) art 18(3).
[46] *General Comment 22* (n 16) [8].
[47] Ibid.
[48] Human Rights Committee*, Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (25 December 1991) ('*Toonen v Australia*').

morals exception.[49] In response, the Committee found that the prohibitions by the Tasmanian government were not necessary for the protection of public morals citing the widespread decriminalisation of homosexual acts throughout Australia, a lack of consensus in Tasmania as to the relevant criminal sections, and the absence of prosecutions by Tasmanian authorities for homosexual acts.[50] More generally, the Committee also opined that public morals should not be 'exclusively a matter of domestic concern'.[51]

On its own, *General Comment 22* marks a significant change in the Committee's jurisprudence. However, when the views of the Committee expressed in *General Comment 22* are combined with the implications of the *Toonen* complaint, it is clear that at this point in its history the Committee dismissed the notion of cultural relativism which had guided its views on the moral issues in *Hertzberg*.[52] Beyond this implication, the communications of *General Comment 22* and the *Toonen* complaint also represent an introduction by the Committee of its own opinions into how the phrase 'public morals' should be applied.[53] Thus, it seems clear that the Committee considers the meaning of public morals to be an interpretive exercise within its purview as a treaty body.

### C *A Lack of Clarity: The State of Jurisprudence on the Concept of Public Morals*

Given the changing jurisprudence outlined above, it might be assumed that the Committee has continued to shed light on how the phrase 'public morals' is meant to be understood since the turn of the century. Unfortunately, while the Committee has reiterated certain positions in more recent communications,[54] the comments above holistically represent the efforts by the Committee to define public morals. As a result, there remains a large gap in the Committee's jurisprudence concerning what is meant by public morals as a term — an understandable omission given the complexity of the topic, but a glaring oversight given the importance of the concept for understanding the public morals exception.

[49] Ibid [6.5], [6.8].
[50] Ibid [8.6].
[51] Ibid.
[52] Holning Lau, 'Sexual Orientation: Testing the Universality of International Human Rights Law' (2004) 71 *The University of Chicago Law Review* 1689, 1700.
[53] General Comment 22 (n 16). See also *Toonen v Australia* (n 48).
[54] See *General Comment 34* (n 7) [32], [36].

## IV THE ISSUES WITH AMBIGUITY IN THE PUBLIC MORALS EXCEPTION

As shown above, there has been a significant amount of discussion by the Committee concerning what a legitimate public morals exception should *not* be (unnecessary, unprescribed by law, discriminatory, etc.). However, there has been little clarity provided by the Committee in terms of what a public morals exception *should be*. This means, that the sources of these traditions, when they should be prioritised, and even what beliefs should be captured by the term 'public morals,' are ideas that remain unexplored. Overall, this lack of jurisprudence results in two main issues for the employment of the public morals exception: a vacuum around the meaning of morality and continued use of the exception where it is obviously unlawful.

### A *Issue 1: What is Morality?*

In *Toonen*, the Committee dismissed the idea of cultural relativism because of the lack of scrutiny which would occur if States were free to determine moral issues on their own.[55] However, while the Committee's views on this complaint clearly acknowledge the threat which excessive State discretion poses to human rights,[56] the body has, to this day, neglected to propose any universal standards by which the concept of public morality could be measured. Do public morals require a majority level of support? How does one define a single tradition for the purposes of the term? Must public morality reflect only the predominant beliefs within a single community, or should such values be accepted by the global community as a whole? These questions remain unanswered by the jurisprudence of the Committee.[57] As a result, State discretion remains the sole device by which a determination of morality can start for the purposes of the public morals exception.

As demonstrated in Part I, the Committee can issue detailed opinions when it comes to the human rights exceptions.[58] In fact, the precise guidance concerning the requirements of these justifying grounds indicates that the Committee will enact firm stances against

[55] Ibid; *Toonen v Australia* (n 48) [8.6].
[56] *Toonen v Australia* (n 48) [8.6]. See also Nugraha (n 26) 248.
[57] Nugraha (n 26) 249.
[58] See above Part I.

the undue expansion of State power if it deems so appropriate.[59] Where then, is the Committee's corresponding effort to elucidate the very meaning of the term upon which the legitimating ground of public morals based?[60] For all of its insistence against State discretion, the Committee's lack of practical guidance concerning the concept of public morality leaves only State discretion to guide the employment of the public morals exception.[61] As a result, the Committee's jurisprudence does little work when it comes to preventing State abuse of this justifying ground.

### B *Issue 2: Unlawful Public Morals Exceptions*

As shown above, the lack of jurisprudence surrounding the meaning of public morals results in a tremendous amount of legal uncertainty concerning the public morals exception.[62] While it is possible that some States may avoid this justifying ground due to this lack of certainty, an assessment of forums such as the Universal Periodic Review ('UPR') demonstrates that member States are actively exploiting the ambiguity as a way to violate human rights with impunity even where their claims to exception are plainly unnecessary or unlawful.[63] In addition, forums like the UPR make it clear that while the Committee reserves the power to assess particular exceptions as they appear,[64] this power has been insufficient to confine State use of the public morals ground in the absence of clear constraints on their interpretation of morality.

By way of example, when Ethiopia was asked to indicate whether it had plans to repeal articles criminalising 'homosexual and other indecent acts' in order to comply with its obligations under the *ICCPR*, the member State claimed that the public morals exception was relevant in its decision to maintain these laws.[65] In response, the Committee made clear that the State had presented no connection between the protection of public morals and the present situation.[66] In addition, the Committee stated that '[t]he protection of morals used by the State party… was an unacceptable argument, not least because article 17 of the *ICCPR* did not provide for restriction of the right to respect for privacy on moral

[59] See above Part I. See also de Zayas and Martín (n 17) 430.
[60] See de Zayas and Martín (n 17) 442.
[61] See de Zayas and Martín (n 17) 440–2.
[62] See Nugraha (n 26) 250.
[63] See Vleugel (n 34) Ch 6.
[64] See *General Comment 34* (n 7) [36]. See also de Zayas and Martín (n 17) 440.
[65] Human Rights Committee, *Replies of Ethiopia to the list of issues*, CCPR/C/ETH/Q/1/ADD.1 (2011) [25].
[66] See Human Rights Committee, *Summary Record of the 2804th meeting*, CCPR/C/SR.2804 (2011) [17].

grounds'.[67] In response to the Committee's comments, Ethiopia merely cited that no complaints concerning these laws had been brought before the Committee.[68] Further, despite the Committee's concerns, same-sex sexual activity remains a criminal offence within the State,[69] and the Government has recently announced a severe crackdown 'against institutions where homosexual acts are carried out'.[70]

Unfortunately, the example above as well as the periodic reports more generally demonstrate the prevalence of State use of the public morals exception despite its irrelevance to the particular rights involved, the clearly unlawful nature of the legislation in question, and the 'concerns' which may be raised by the Committee.[71] Thus, while the current jurisprudence of the Committee attempts to confine the risks of abuse posed by the public morals exception,[72] these efforts have thus far failed to ensure the recognition of 'inalienable rights … [for] all members of the human family'.[73]

## IV CONCLUSION

By way of its construction, the public morals exception is a device which prioritises the collective ethics of a community over the rights of individuals, rights which are supposedly 'inalienable' under international law.[74] Unfortunately, the jurisprudence of the Committee on the topic remains a lacuna of uncertainty where the lack of guidance on the phrase 'public morals' is allowing for unlawful employments of the human rights exception. In some ways, this larger discussion concerning the role of morality in our modern world may feel disconnected from the issues faced by individuals in their everyday lives.[75] However, as the Special Rapporteur in the field of cultural rights recently stated, our polarised world 'need[s] a sophisticated multi-directional stance' on

[67] See ibid [27].
[68] See ibid [61].
[69] See Human Dignity Trust, 'Ethiopia,' *Human Dignity Trust* (Web Page) <https://www.humandignitytrust.org/country-profile/ethiopia/>.
[70] Ibid.
[71] See Vleugel (n 34) 293–302.
[72] See Nowak and Vospernik (n 3) 159.
[73] *ICCPR* (n 1) Preamble.
[74] Ibid.
[75] See Vleugel (n 34) 5.

morality now more than ever — one which can defend the universality of human rights while also respecting cultural diversity where its principles come under attack'.[76]

If the jurisprudence of the Committee is to have any weight on the future balancing of public morals versus individual human rights, the body must employ a clear, universally applicable moral yardstick.[77] Otherwise, the opinions of the Committee on the public morals will remain 'a meaningless platitude reflecting the obvious point that there are a multitude of different sources from which any individual State might draw morality.'[78]

[76] See ibid 5-6. See also Report of the Special Rapporteur in the field of cultural rights, *Universality, cultural diversity and cultural rights*, A/73/227, 25 (July 2018) [69].
[77] See Nugraha (n 26) 250. See also Neville Cox, 'Justifying Blasphemy Laws: Freedom of Expression, Public Morals, and International Human Rights Law' (2020) 35 *Journal of Law and Religion* 33, 47.
[78] Ibid.

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