

The Fundamental Rights to Freedom of Expression and Its Limits in the Indonesian Constitution

Muhammad Ikram Nur Fuady^{1*}, Tri Suhendra Arbani², Nurfaika Ishak³, Muhammad Yaasiin Raya⁴, Ade Darmawan Basri⁵
{ikram.nurfuady@uin-alauddin.ac.id¹}

Law Science Department, Universitas Islam Negeri Alauddin Makassar, 92113, Indonesia^{1,2,3,4,5}

Abstract. This study aims to elaborate the views of the right to freedom of expression in Indonesia with various other countries and create universal concepts and values for the limits of freedom of expression that can be accepted by the general public. The research method used is normative legal research using a statutory approach and a comparative approach. As for the results of the research, freedom of expression both in Indonesia and in various other countries provides open space for action, but there are fundamental things behind it that need to be adhered to collectively and universally, the fundamental thing is the limitations and accountability of the impacts arising from freedom of expression. In this case, the restrictions on expression include an appropriate respect for others' rights and freedoms, racism, and the general welfare of a democratic society. Respect the rights and reputations of others, Does not contain an element of hatred Does not contain fabricated information or hoaxes To adhere to reasonable standards of decency; Acts that violate the sacredness of specific religious values; Protect national security or public order or public health or morals in the interest of national security, territorial integrity, or public safety, to avert chaos or crime, to safeguard one's health or morals, to safeguard one's reputation or rights, to prevent the disclosure of information obtained in secret, and to preserve the judiciary's authority and impartiality.

Keywords: Fundamental rights, limits, freedom of expression

1 Introduction

During the development and glorification of freedom of expression in various countries, there are still various fundamental problems because the limits of the value of freedom of expression have been exceeded. Differences in views on freedom of expression and the extent to which these value limits are the primary triggers for domestic to global conflicts. There have been various causes related to limits on freedom of expression, such as Rwanda, Zangara, and the last one caused much criticism from French President Immanuel Macron. Freedom of expression becomes a severe challenge and problem when there is no explicit value limit on what and should not be expressed.

On the other hand, John Locke gave his view that freedom of expression is the right way. Freedom of expression is positioned as the freedom to seek, disseminate, and receive information and then discuss whether to support or criticize it as a process to erase our misconceptions about facts and values [1]. There are still many things that need to be affirmed

and reviewed regarding the value of freedom of expression. First, each country has its regulations.

To be precise, Article 28 of the Indonesian Constitution states that the independence of associating and assembling, abandoning oral and written forms, and so on, is stipulated by law. Additionally, Article 28 Letter states that each individual has the right to communicate and obtain information in order to develop their personal and social environment, as well as the right to seek, obtain, possess, store, process, and convey information via any available channel. Indonesia's social level is guaranteed strong freedom of expression under the Constitution's provisions [2].

The norm of the right to freedom of expression and opinion becomes a human right, among all human rights norms, which are viewed from political rights. The norm of the right to freedom of expression is one of the keys to democracy. Guaranteed rights to freedom of expression and opinion always provide supervision and control by the general public to the running of government wheels (*public control and direction*) [3].

Although freedom of expression is a study that is always interesting to discuss, on the other hand, the freedom of expression without limits has shown various adverse effects. One of the best-known examples occurred in 1994, one of the national radios in Rwanda broadcast a call to eliminate the Tutsis, a minority group in the country. What happened next was one of the darkest histories in human history. Over about 100 days, more than one million Rwandans, most of whom were ethnic Tutsi, were systematically massacred. If we count it, nearly 10,000 people are killed every day. After that, two million people fled to neighboring countries. This genocide was so gruesome for several reasons. First, the international community has failed to act swiftly against it, and *the second* is the use of radio to broadcast incitement to hatred to provoke one group of people to kill another group of people. The Rwandan genocide is one extreme example but a real event where the media are used as a tool to spread hatred and also shows that hate speech should not be justified on the grounds of freedom of expression. Hateful speech that incites violence against others is not protected under international freedom of expression standards [4].

While we can agree that absolute and unchecked freedom is impossible and even unwanted, we also certainly do not intend to support unjustifiable restrictions on freedom of expression. There are essential differences between the two. In most cases, freedom of expression favors more restrictions, which can easily justify oppression and suppression.

However, the above case provides a clear picture that freedom of expression must have clear value boundaries and be recognized by all people in the world. The fact is that freedom of expression sometimes violates the boundaries of mutually agreed norms. Violation of the limits of expression can have a pervasive impact because it can cause seeds of hatred that end in the division of a group of people so that; this paper will then examine the various rules and freedom of expression and elaborate on various concepts of limiting the value of freedom of expression so that they can become a universal value benchmark.

2 Methods

This research uses normative legal research. The research approach used is a statutory approach and a comparative approach. This paper examines various basic rules in Indonesia and other countries and various documents or international conventions related to freedom of expression. Such as the Indonesian Constitution (the Republic of Indonesia's Constitution), the

Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (UCHR), and various regulations and other legal documents. The study's findings were then thoroughly analyzed in order to ascertain the fundamental value of freedom's constraints.

3 Results and Discussion

3.1 Comparison of freedom of expression and its boundaries in Indonesia

As a democratic country and a multicultural society, Indonesia has guaranteed freedom of expression in public as stipulated in the Indonesian Constitution. After the amendment of the 1945 Constitution, a separate chapter that regulates human rights was born, namely, Chapter X A, which consists of 10 articles, namely Article 28A to Article 28J. This chapter explicitly mentions various human rights [2].

In Article 28, "Freedom of association and assembly, expressing thoughts orally and in writing and so on which is regulated by law" and Article 28F "Everyone has the right to communicate and obtain information for personal and social development. environment, and the right to seek, obtain, own, store, process and convey information using all available channels" [2].

The legal basis for regulating freedom of expression is then emphasized in Article 28 J that all rights can be limited. The article explains that there is a set of human rights obligations that state that each individual is obligated to respect the human rights of others while living in a society, a nation, or a state, and must adhere to the restrictions imposed by law in order to respect the rights and freedoms of others [2].

So the Indonesian Constitution provides a strong guarantee of freedom of expression, and also, on the other hand, this right can then be limited by Law. This clear foundation also means that there is a need to limit the value of a right so that freedom does not transcend boundaries, becoming the seeds of division within a country. Apart from the state constitution, freedom of expression is governed by Human Rights Law No. 39 of 1999. Article 23 paragraph (2) states that everyone has the right to have, express, and disseminate opinions in accordance with their conscience, orally or in writing via printed or electronic media, with due regard for religious values, morality, public order, and the public interest, as well as the State's integrity [5]. The Law of the Republic of Indonesia No. 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights contains more explicit provisions (International Covenant on Civil and Political Rights). With the ratification of the covenant, Indonesia becomes a country with robust protections for the civil and political rights of its citizens.

Apart from ensuring freedom of expression, Indonesia also guarantees and protects each citizen's right to honor or reputation (the right to respect or reputation). One form of state protection of the right to honor or good name is to take action against the national criminal Law, namely criminalizing every attack or act that deprives or destroys the integrity of every person, from defamation (slander) to insult (insult), to slander and insult (fitnah). The act is stated in the Law as a criminal act regulated Article 310 and Article 311 of the Criminal Code and Articles 316 and 207 of the Criminal Code.[6] It does not stop there; the State also discusses criminal acts of humiliation or defamation in several other special laws such as:

- Law No. 1 of the Republic of Indonesia from 1965 on Religious Blasphemy,

- Law No. 32 of the Republic of Indonesia from 2002 on Broadcasting, and Law No. 11 of the Republic of Indonesia from 2008 on Electronic Information and Transactions
- Pornography Law of the Republic of Indonesia No. 44 of 2008, and
- Law No. 24 of 2009 of the Republic of Indonesia on the Flag, Language, National Symbol, and National Anthem.

The regulation of freedom of expression and the limitations in various Indonesian laws indicate clear boundaries that need to be understood together as a country with a high value of respect for every human being.

3.1.1 America

In the United States, the Constitution establishes and protects the right to free expression and opinion. In the United States, the Virginia Bill of Rights (June 12, 1776), the Declaration of Independence (July 4, 1776), and the Constitution all guarantee the right to free expression. Then, (through) judicial decisions, the rights to freedom of expression and opinion are enriched or expanded. One of the cases included the Schenk vs. US case (1919), the Whitney vs. California case (1919) [7].

In his book Constitutional Law, Steven L Emanuel determines that the right to freedom of expression is protected, differentiated between content-based and neutral-based categories. Content-Based Category differentiates between protected and unprotected. The rights to freedom of expression that are not protected include slander, defamation, unpleasant actions, advocating for illegal acts, and words called fighting words. Expressions outside that are not protected are classified as protected. Government action to limit protected content based will be considered unconstitutional unless the government can show that such restrictions are necessary as a compulsion to achieve specific goals (clear governmental objectives) and as a necessity that cannot be avoided (necessary). Regarding the neutral based Category, restrictions on freedom of expression, among others, can show significant governmental interest [7].

3.1.2 Europe

In general, European countries such as France, Holland, Denmark, Germany, and other European countries have strong echoes of freedom of expression. For European countries, the European Convention on Human Rights lays the groundwork for human rights and freedom of expression. To be precise, Article 10, paragraph 1 of the convention states that "Everyone has the right to freedom of expression." It encompasses the freedom to express, receive, and impart information and ideas without interference from public authorities, regardless of their jurisdiction. This article shall not preclude states from requiring licenses for corporate broadcasting, television, or film production [8].

The guarantee of freedom of expression is the direction and benchmark for countries in the European Union, which they state in their respective constitutions as is the case in France, which adheres to a secular policy in its Constitution, by providing such strong guarantees for freedom of expression even though it sometimes violates the rights and religious symbols of Muslims in France.

Of the three comparisons regarding freedom of expression in Indonesia, America, and European countries, all agree that freedom of expression is the right of everyone, protected in their respective constitutions.

3.2 Universal concept and value limits on freedom of expression

In 2009, one of the Zangara Times editors responded to what he saw as adverse developments for freedom of expression. He also wrote a letter to the Zangara illustrators association members and asked them to draw the Holy Prophet according to the views they had in mind. Half of the members responded to the invitation; then, the collected illustrations were published in the newspapers on September 25, 2009. These illustrators caricatured the Holy Prophet Zangara in various styles, but generally, they made jokes out of common stereotypes about the religion. One illustration caused mass outrage among the religious community by associating the Holy Prophet Zangara with terrorism. This illustration created an unprecedented controversy and mass outrage in what many consider the worst crisis in Zangara in recent years [4].

The polemic and controversy over freedom of expression that touches the boundaries of one's beliefs and religions are the triggers for the current conflict. Then in France, where President Macron's statement made quite a lot of anger among Muslims. It started with a case that occurred on October 16, 2020, where a teacher named Samuel Paty was beheaded to discuss the Prophet Muhammad's caricatures to his students at the school where he taught.[9] The French president responded to this case in a statement that he considered insulting Islam and received strong criticism from all over the world. Another statement said he would not hinder the re-publishing of the Prophet Muhammad's caricature by Charlie Hebdo magazine to maintain freedom of opinion in France, which in turn infuriated Muslims [10].

From the above case, we can ask whether freedom of opinion is free even though, on the other hand, it has created polemics and disturbed the feelings and beliefs of others? Talking about the limits of universally adopted values, it indeed refers to the agreement agreed upon by the global community, especially countries in the world. At least various agreements have been shared to understand what freedom of expression is and the value limits. Several international agreements include:

3.2.1 Universal declaration of human rights (UDHR) 1948

The Universal Declaration of Human Rights (UDHR) serves as a universal benchmark for success for all nations and countries, with the goal that every individual and every group in society always uses it as a guide for action. This Declaration expresses unequivocally that all people are born free and equal in dignity and rights. They are endowed with reason and conscience and are to live in brotherhood. Additionally, everyone has the right to all of the Declaration's rights and freedoms, without exception, including discrimination on the basis of race, color, sex, language, religion, politics or other views, national or social origin, property rights, or birth or other position [11].

Due to the strength of the human rights guarantees contained in this Declaration, it serves as the gold standard for all countries. In particular, Article 19 states that "Everyone has the right to freedom of thought and expression; this includes the freedom to hold opinions without interference and the freedom to seek, receive, and communicate information and opinions in any manner and across all boundaries [11].

In relation to the limitations on freedom of expression outlined in Article 29 paragraph (2), "Each person's exercise of rights and liberties must be limited solely by the restrictions imposed by law for the purpose of:[11]

- Ascertain the proper recognition and respect for others' rights and liberties;
- To adhere to reasonable standards of decency;
- Upon request; and

- For the common good in a democratic society.

The limitation stated in Article 29 states that the limitation of freedom is "Prescribed by law," which means that laws are stipulated which aim to respect the rights of others, fulfill fair conditions in terms of decency, order, and general welfare, and also may not conflict with the objectives. And UN principles. Expressing an opinion is indeed freedom, but it needs to be adjusted to the provisions existing in certain countries and places. These boundaries appear to be influenced by society's morality, social order, and the politics of a democratic society. The morality that lives in society, apart from limiting freedom of opinion and expression, also lives it, and existing regulations are norms for maintaining social and political order.

3.2.2 International covenant on civil and political rights (ICCPR)

Numerous rights arrangements were described in the 1966 International Covenant on Civil and Political Rights. Among the topics examined were freedom of expression and its limitations. According to Article 19, paragraph 1, everyone has the right to hold uninhibited opinions—verse 2. Everyone has the right to freedom of expression, which includes the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, orally, in writing or print, through art, or through any other medium of his choice [12].

As for the restriction on freedom of expression, as outlined in paragraph (3), The exercise of rights creates outstanding obligations and responsibilities. Therefore, certain restrictions may be imposed, but this can only be done according to Law and extent necessary to:[12]

- Respect the rights or good names of others;
- Protect national security or public order or public health or morals

Then, in detail, the Article 20 paragraph is explained (2). Any act that incites hatred on the basis of nationality, race, or religion is prohibited by law as incitement to discrimination, hostility, or violence. Thus, the covenant provides apparent details regarding the covenant's implementation's limitations on freedom of expression.

3.2.3 European convention on human rights (UCHR)

Article 10 paragraph (1) of the convention states unequivocally that "Everyone has the right to freedom of expression." It encompasses the freedom to express, receive, and impart information and ideas without interference from public authorities, regardless of their jurisdiction. This article shall not preclude states from requiring licenses for corporate broadcasting, television, or film production [8].

Then in paragraph (2), it is explained that "The exercise of this freedom, because it carries with it duties and responsibilities, may be subject to such formalities, conditions, limitations or penalties as prescribed by Law for:[8]

- necessary in a democratic society,
- in the interests of national security,
- territorial integrity or public safety,
- for the prevention of chaos or crime,
- for health or moral protection,
- for the protection of the reputation or rights of others,
- to prevent disclosure of information received in secret, or
- to maintain the authority and impartiality of the judiciary".

There are eight clear boundaries regarding freedom of expression in this convention, and then European countries incorporate these limitations into their national Law.

Regulations regarding restrictions on rights related to freedom of opinion and expression can be seen in the Siracusa principle. The Siracusa Principle describes the extent to which the limitations on the right can be said to be proportional. Siracusa principles, namely:[13]:

- Prescribed by Law, limitation of rights must be regulated in the Law that refers to the ICCPR so that the limitation does not apply arbitrarily and without reason. The limiting Law must also be clear and known to everyone, and the enforcement of the Law must also run effectively with legal protection;
- In a democratic society, restrictions on the rights of freedom must be applied in a democratic manner, which means following democratic values;
- Public order, restrictions can be imposed solely to create public order;
- Public health, the State can impose restrictions on a right if the action is included in an act that can endanger public or individual health;
- Public morals, limiting rights based on the values that exist in society;
- National Security, restrictions on rights based on national security, restrictions that are carried out on the grounds of maintaining the existence of a country;
- Public Safety, restrictions on the grounds of physical security or one's property.
- Rights and freedoms of others "or the" rights or reputations of others, restriction of rights to protect others' rights and freedoms, and the rights or reputation of a person. However, these restrictions cannot be used to protect the State and public officials;
- Restriction on public trial, the judicial process must be carried out following Applicable Law without public interference and journalists to prevent judgment by the public that threatens a court's justice.

Based on the restrictions on freedom of opinion and expression in the international instruments above, it can be concluded that restrictions are allowed if they meet three main conditions, namely:

- Regulated in the applicable Law;
- Have a legitimate purpose following the ICCPR;
- Restrictions to guarantee and protect those legitimate purposes.

Result elaborate on various boundaries from several sources of international conventions. Values cannot be passed in freedom of expression and all of contained by Law with the intention of, among others:[14]

- Appropriate respect for the rights and freedoms of others;
- the general welfare in a democratic society;
- Respect the rights or good name of others;
- Does not contain a hateful element;
- Does not contain fake news or hoaxes;
- To meet just requirements in terms of decency;
- Acts offending the sacredness of specific religious values;
- Protect national security or public order or public health or morals in the interest of national security;
- territorial integrity or public safety;
- for the prevention of chaos or crime;
- for health or moral protection;
- for the protection of the reputation or rights of others;
- to prevent disclosure of information received in secret, or;
- to maintain the authority and impartiality of the judiciary.

The values of limiting freedom of expression above certainly still require in-depth study for each point and application in various countries. Because a country certainly has its

characteristics and democratic style to return to its application in a country. The sovereignty of the State in regulating its regulations is absolute, but above that, all respect and respect for every person's rights is a manifestation of the highest justice, and that right certainly requires value limits.

4 Conclusion

As for the results of the research, freedom of expression both in Indonesia and in various other countries provides open space for action, but there are fundamental things behind it that need to be adhered to collectively and universally, the fundamental thing is the limitations and accountability of the impacts arising from freedom of expression. In this case, the restrictions on expression include an appropriate respect for others' rights and freedoms, racism, and the general welfare of a democratic society. Respect the rights and reputations of others, Does not contain an element of hatred Does not contain fabricated information or hoaxes To adhere to reasonable standards of decency; Acts that violate the sacredness of specific religious values; Protect national security or public order or public health or morals in the interest of national security, territorial integrity, or public safety, to avert chaos or crime, to safeguard one's health or morals, to safeguard one's reputation or rights, to prevent the disclosure of information obtained in secret, and to preserve the judiciary's authority and impartiality.

Acknowledgment

This research was conducted using independent funding. Even so, we get a lot of enthusiastic and moral support from our leadership, the Chancellor and the Dean of the Alauddin State Islamic University in Makassar. With that encouragement, we were finally able to finish this research and writing well, although we still need more in-depth study in the future. Authors can also thank reviewers and correctors for this study.

References

- [1] L. Alexander, *Is There A Right to Freedom of Expression*. New York: Cambridge University Press, 2005.
- [2] Republik Indonesia, "Undang-Undang Dasar Negara Republik Indonesia Tahun 1945." 1945.
- [3] L. Nasution, "Hak Kebebasan Berpendapat Dan Berekspresi Dalam Ruang Publik Di Era Digital," *Adalah Bul. Huk. dan Keadilan*, vol. 4, no. 2, p. 40, 2020.
- [4] S. and C. O. (UNESCO) *The United Nations Educational, Toolkit Kebebasan Berekspresi: Bagi Aktivis Informasi*. Paris: UNESCO, 2013.
- [5] R. Indonesia, "Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 tentang Hak Asasi Manusia." Jakarta, 1999, [Online]. Available: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjWxrKeif7eAhVYfysKHcHWAOWQFjAAegQICRAC&url=https%3A%2F%2Fwww.oj.k.go.id%2Fid%2Fkanal%2Fpasar-modal%2Fregulasi%2Fundang-undang%2Fdocuments%2Fpages%2Fundang-undang-nomo>.
- [6] Republik Indonesia, "Undang-Undang Nomor 1 Tahun 1946 tentang Kitab Undang-Undang Hukum Pidana [KUHP]." Jakarta, 1946.

- [7] H. P. A. Muhammad roqib, Happy Anugrah Sutrisno Putra, Anwar Noris, "Hak atas Kebebasan Berekspresi dan Berpendapat di Indoensia dengan di Amerika Serikat," *Perspekt. Huk.*, vol. 20, no. 2, pp. 52–52, 2020.
- [8] UCHR, "European Convention on Human Rights," *European Convention on Human Rights*. 2010, doi: 10.4337/9781786435477.00030.
- [9] C. Indonesia, "Gejolak Prancis dan Silat Lidah Macron," *CNN Indonesia*, 2020. <https://www.cnnindonesia.com/internasional/20201102081833-134-564750/gejolak-prancis-dan-silat-lidah-macron> (accessed Nov. 21, 2020).
- [10] C. Cook, "Macron's controversial plan sparks criticism from Muslims Government's strategy against so-called 'Islamist separatism' causes reactions from abroad, community leaders," *AANews.com*, 2020. <https://www.aa.com.tr/en/europe/macron-s-controversial-plan-sparks-criticism-from-muslims/1748466> (accessed November 20, 2020).
- [11] United Nations, "Universal Declaration of Human Rights (UDHR) 1948," *United Nations General Assembly*. United Nations.
- [12] U. Nations, "International Covenant on Civil and Political Rights." United Nations, 1976.
- [13] D. S. S. and M. J. Smith, "Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles," *Heal. Hum. Rights J.*, vol. 17, no. 1, p. 52, 2015.
- [14] H. A. N. Marwandianto, "The Rights to Freedom of Opinion and Expression in The Corridors of Article 310 and 311 of KUHP," *J. HAM*, vol. 11, no. 1, p. 6, 2020.