

RESTRICTIONS ON FREEDOM OF EXPRESSION IN INDONESIA FROM A HUMAN RIGHTS PERSPECTIVE

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ABSTRACT

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This research focuses on the concept of restrictions on freedom of opinion applied in Indonesia and its comparison with restrictions on freedom of opinion applied in Liberalist countries, namely the United States and Germany. Aiming to maintain public order in society, the restriction is not done arbitrarily because it must be in accordance with laws and regulations and other moral values, decency, and other public values in society and aims to protect the basic rights of others. This research is a Normative legal research. The results of the study are, First, a comparison of restrictions on freedom between countries that adhere to liberal ideas (the United States and Germany) with the State of Indonesia found that there are differences in terms of regulation, where America does not include restrictions on the right to freedom of opinion in its constitution but only based on Jurisprudence, while Indonesia and Germany include restrictions on the right to freedom of expression in their respective countries' constitutions. This is because not all countries can adhere to the universal concept of human rights. Second, the forms of restrictions on freedom of opinion are regulated in laws and regulations including Article 28 J paragraph (2) of the NRI Constitution of 1945 and Article 73 of Law No. 39 of 1999 concerning Human Rights. Where the restrictions on the right to freedom of opinion applied in Indonesia are in accordance with these rules and do not violate human rights because the form of restrictions applied alone aims to protect the rights and freedoms of others, and to remain based on moral values, decency, and public order as well as restrictions carried out in the common interest of the nation.

INTRODUCTION

The Republic of Indonesia highly upholds human values. As a form of state respect for humanity, the constitution has guaranteed human rights to guarantee every community in carrying out their lives as citizens. The State clearly regulates human rights in Article 28 of the Constitution of the Republic of Indonesia Year 1945 hereinafter referred to as the NRI Constitution Year 1945. Therefore, the State of the Republic of Indonesia as a State of law and democracy is authorized to regulate and protect its implementation.

One of the rights recognized in international principles and also in the NRI Constitution of 1945 is the right to freedom of opinion and expression which is part of human rights. The freedom of thought and expression of opinion is regulated in the fourth amendment to the Constitution of

the Republic of Indonesia Year 1945 Article 28 E paragraph (3) "Everyone has the right to freedom of association, assembly, and expression". Freedom of expression, including freedom of opinion, is one of the most basic rights in state life (Buhoy, 2013).

Indonesia as a country that adheres to democracy as stated in Article 1 paragraph 3 of the Constitution of the Republic of Indonesia Year 1945, has implications for the responsibility of the state in guaranteeing the right to freedom of opinion. Community participation in expressing opinions can increase social control and transparency from the public to the government. Where the right to freedom of opinion is one that is owned equally by every individual as a citizen and is protected as a pure human right.

The exercise of human rights itself is not absolute and independent, but occurs with social prerequisites, namely that individual freedom always means respect for the freedom of others. Therefore, a clear limitation of these prerequisites is needed so that the freedom possessed by individuals does not violate the freedom of other individuals. These individual rights and freedoms can only be limited by and under the provisions of the Act (Buhoy, 2013).

When viewed from a human rights perspective, Article 27 of Law No. 19 of 2016 concerning amendments to Law number 11 of 2008 concerning Electronic information and transactions is very contrary to human rights, the Universal Declaration of Human Rights recalls Article 19 of the general declaration of human rights promulgated by the United Nations on December 10, 1948 that "everyone has the right to freedom of opinion and expression and this right includes the freedom to have opinions without interference and to seek, receive and share information and ideas through any medium and without regard to national borders." This warning is important, given the many defamation, blasphemy and contempt charges in court over the past few years using criminal law articles (Melina, 2018).

In fact, often freedom of speech backfires to ensnare someone who expresses his opinion or protest against another person or an agency. Although the guarantee of freedom of opinion has been regulated in the 1945 Constitution, the Indonesian legal system also applies restrictions on the implementation of these rights, one of which is regulated in the Electronic Transaction Law (UU ITE), since its promulgation in 2008, the Electronic Transactions Law (UU ITE) has been used plurally by law enforcement to crack down on misuse of information technology, especially through internet media (Razqi & Hananto Widodo, 2022).

There is an assumption in society that freedom of opinion which is part of human rights seems to be restrained by the state, people seem to be limited in their space to express opinions. So there needs to be legal certainty that will be a guide in expressing opinions in the protection of their right to free opinion responsibly. Because often countries that have the authority to run the government do not have clear restrictions in limiting freedom of opinion. So the question that arises is the extent to which the regulation of state authority in restricting the freedom of opinion of its citizens.

METHOD

This research focuses on Normative legal research. In this study, the author in addition to referring to legal theory, legal principles and principles, doctrines of jurists and scientific journals, also sees the synchronization of one rule and another related to the Restriction of Freedom of Opinion.

In this study, the author examines the object of research using three problem approaches, namely the statutory approach (*statue approach*), conceptual approach (*conceptual approach*), and comparative legal approach. This *statutory approach (statute approach)* is carried out by examining the provisions of laws and regulations related to freedom of opinion to examine the legal construction both material and formal. This approach is a research that prioritizes legal materials in the form of laws and regulations as basic reference materials in conducting research (Irwansyah, 2020). In the conceptual approach, the author uses three conceptual approaches, namely, the concept of democracy, the concept of the rule of law and the concept of Human Rights where the three approaches are interrelated which will later help the author in analyzing problems related to restrictions on freedom of opinion in Indonesia from the perspective of human rights. Meanwhile, the Comparative Law Approach this approach is carried out in order to compare a rule of law between one country and another to analyze and identify the similarities and differences in law. In this study, the author compares legal arrangements related to freedom of expression between Indonesia and liberalist countries.

RESULTS AND DISCUSSION

State Authority in Restricting Freedom of Expression in Indonesia and Liberalist States

1. Restrictions on Freedom of Expression from the Perspective of the State of Law

The principle of the rule of law should ideally be built and developed alongside the principles of democracy or popular sovereignty (*demokratische rechtsstaat*). So that the law in question is not made, established, interpreted and enforced with an iron fist based on mere power. Therefore, the principle of the rule of law must not be enforced by ignoring the democratic principles stipulated in the Basic Law. The pinnacle of legal power is placed on the constitution which is essentially a document of agreement on the highest system of statehood (Abdul Wahid et al., 2022).

The relationship between democracy and the rule of law can be reflected in the elaboration that what can constitutionally guarantee the implementation of a democratic government is the existence of laws that overshadow it. In other words, democracy is under the *Rule of Law*. Article 1 of the NRI Constitution of 1945 has affirmed that Indonesia is a democratic state of law. The idea of the rule of law and the rationale of democracy must run in a balanced manner, because law and democracy are like two sides of a coin. Therefore democracy must be protected by law, so as not to be trapped in anarchism, while law must be based on democracy so as not to fall into authoritarianism or absolutism (Roqib et al., 2020).

Government based on law will give birth to guarantees of protection of the basic rights of the community so that the side of interests between the government that exercises state power and

the people as subjects of state owners can always be compatible or in line. Therefore, the submission of the concept of the rule of law as one of the foundations of governance law plays a very important role not only as a corridor (limitation) of government actions or actions, but also serves as a basic reference and benchmark for assessment in government administration (Nugroho, 2013).

The State of Pancasila Law recognizes humans as individuals who have rights and freedoms, but at the same time recognizes that humans are also social creatures who cannot become human if they do not live with other humans. In such a concept of balance, Pancasila is not an adherent of the concept of individualism that absolutizes individual rights and freedoms, but also not an adherent of the concept of collectivism that wants to equate all humans without respecting individual rights and freedoms (Muhlashin, 2021).

Freedom of expression is the most important basic right of every citizen in a democratic country. A democratic state is a form of government organization originating from the people, for the people, and by the people, so that the provision of guarantees of freedom of opinion to every citizen is a form of people's control over the state and also as a form of supervision of the course of government. So that guarantees and protection of the right to freedom of expression for every citizen are needed in a democratic country based on applicable law.

Freedom of opinion in essence must not conflict with the freedom of others, harm the interests of others or harm the interests of many people. Therefore, in legal and political science is known the concept of "*collective morality*". This principle of collective morality teaches that in acting human beings must remain in a common morality, meaning in accordance with moral principles that are mutually recognized by society and apply in that society. This concept of collective morality is an elaboration of the concept of "*collective humanity*." Therefore, based on this principle of collective morality, which must be considered by the members of society, not only their own freedom or personal interests but also the interests of others in the society, so as to form a common interest among them that must always be safeguarded and upheld (Fuady & Gunarsa, 2010).

One of the signs against freedom of speech is whether freedom of speech can pass after the *balancing test* is applied, which must be measured which is more severe between the consequences arising from prohibitions or restrictions on freedom of speech, compared to the negative consequences arising from the use of freedom of speech. In this case, the ban on freedom of speech by the government, for example, is an unjustified interference after the balance test is applied (Dewi, 2021).

In democratic and legal theory, what is called "presumption of innocence" is known as a provision that states that if there is a government or legislative action that is with the freedom of speech and assembly of the people, it must be consumed in favor of that freedom of speech and assembly. That is, it must be assumed that the people are right, unless the government/parliament can show its *compelling state interest* (Zaini, 2020).

Therefore, this balance test again uses the principle that only in "exceptional" circumstances can freedom of speech be restricted or prohibited. So to pass this balance test, a restraint on free speech can only be justified, if it can be proven (by the government) that there is a government interest or a very "fundamental" public interest that is prohibited.

Lines must also be drawn to determine when freedom of speech is within the scope of constitutionally protected freedom of speech, but when freedom of speech is considered too far to enter the realm of defamation of others, or insult or slander of others, whether civil or criminal.

Laws in various countries regulate it variously, ranging from the ideal that freedom of speech is protected as much as possible, so it is not easy to accuse someone of defamation, insult or slander (civil or criminal), to the non-ideal, which is less protective of human freedom, so it is easy to accuse someone of defamation or insult (civil or criminal). It should be emphasized in this case that even if the law governs it, the regulation must be as clear and detailed as possible. The use of legislation articles that are too elastic, abstract, or too vague, or too general in nature (rubber articles) to restrict freedom of speech clearly violates democratic principles.

2. Comparison of the Right to Freedom of Expression in Indonesia and Liberalist Countries

In its development, human rights are no longer seen as just a manifestation of individualism and liberalism as before. Human rights are better understood as rights that are inherent to the dignity and essence of our humanity, regardless of race, ethnicity, religion, color, gender, age or occupation. This view means that if in the past human rights were seen as merely a manifestation of individualism and liberalism, now human rights are understood as rights inherent in humans without distinction (Zaini, 2020).

Liberalism itself is an ideology or understanding that prioritizes and upholds individual freedom and the rights of each individual in various aspects of life, both religious, political, economic, social, and various other aspects. According to this understanding, the central point in this life is the individual because the individual blessings of society can be organized and the individual blessings of the state can be formed. Society or state must be protected freedom and independence of the individual. Every individual must have freedom and independence in the political, economic, and state fields (Nugroho, 2013).

Understanding and implementation of Human Rights in countries that embrace liberalism, where liberalism is defined as freedom to act, opinion, freedom to embrace religion, and various forms of freedom related to the fulfillment of human rights demands. Liberalism views humans as free beings, where humans are free to do whatever they want. In addition, liberalism also argues that submission to authority is very contrary to the freedom of human rights. So that liberalism gives freedom to its people as freely as possible. So, here the role of the Government is very small in regulating the lives of its people (SAPUTRA, 2013).

The understanding and implementation of human rights in countries that embrace liberalism is of course different from the understanding and implementation of human rights in Indonesia

which adheres to Pancasila democracy. Indonesia adheres to the democratic understanding of Pancasila where all values and norms are derived from the personality and philosophy of life of the Indonesian nation as stated in the NRI Constitution of 1945 and Pancasila.

Therefore, for more details, the following author will present a comparison of the right to freedom of opinion in Indonesia with two liberal countries, namely the United States and Germany.

a. United States

Freedom of speech in the United States is recognized through one of the amendments *to the "Bill of rights"* in the first amendment to its constitution, which reads: "*congress shall make no law... abridging the freedom of speech* " (Parliament must not make laws that undermine freedom of speech) (Fuady & Gunarsa, 2010). Documents related to the norms of the right to freedom of expression and opinion in the United States include: (Roqib et al., 2020).

1) *Virginia Bill Of Rights* (12 Juni 1776).

In this declaration there is a statement as the basis for freedom of expression and opinion, especially freedom of the press. Article 12 states: "*That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic government.* ").

2) *Declaration of independence* (4 Juli 1776)

In the "*Declaration of independent*" there is no direct guarantee of freedom of expression and opinion. In contrast to the Virginia Statement which expressively lists the guarantee of freedom of the press, as an inseparable part of the right to freedom of expression and opinion.

Matters relating to freedom (including freedom of expression and opinion), implied in the Second Aline include: "*we hold these truths to be self evident, that all men are created equal, that they are endowed by the Creator with certain inalienable rights; that among these, are life, liberty, and the pursuit of happines*" (We believe in the truth (mentioned above), that all people are created equal, that by the Creator they are endowed with various inseparable or inherent rights, among them the right to life, liberty, and happiness.

In the United States, the guarantee and protection of the right to freedom of expression and opinion is stipulated in the constitution. Then, the right to freedom of expression and opinion was enriched or expanded by (through) the judge's ruling. Thus, the constitution of the United States does not clearly state the restriction of freedom of expression in its constitution, the restriction of freedom of speech in the United States is based on a Court decision.

b. German

Human rights in Germany are extensively protected by the German Constitution or commonly called *Grundgesetz* or *in full is Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany). The *Grundgesetz* entered into force on 8 May 1949 in Bonn as amended by the Unification Treaty of 31 August 1990 and the Federal Statute of 23 September 1990 which placed particular emphasis on human rights. The first

sentence of the *Grundgesetz* is "Human Dignity is Inviolable" which is then interpreted as an instrument to protect a number of human rights (Roqib et al., 2020).

Such provisions are considered "perpetual clauses" and cannot be changed. Therefore, the influence of the phrase *Human Dignity is Inviolable* is very large on judicial practice in Germany, because it has always been a reference in the handing down of decisions, especially the German Constitutional Court or also called *Bundesverfassungsgericht (BverfG)*. *Grundgesetz* guarantees all human rights set out in the UDHR with the exception of the right to asylum.

Articles in the German constitution that provide for restrictions on the right to freedom include:

1) Pasal 2 Personal Freedom

- Pasal 2 ayat (1) states that, "Everyone has the right to the free development of his personality insofar as it does not violate the rights of others or deviate from the rules of the constitution or moral rules"
- Pasal 2 ayat (2) states that, "Everyone has the right to live and inviolably himself. Individual freedom is inviolable. These rights can only be reduced based on UU".

2) Pasal 5 Freedom of Expression

- Pasal 5 ayat (1) states that, "Everyone has the right to express and disseminate freely his opinion by speaking, writing and drawing and freely to obtain information for himself from publicly accessible sources. Freedom of the press and freedom of radio and moving image reportage are protected. None of that should be censored"
- Pasal 5 ayat (2) states that, "Such rights are limited by the provisions of the Act of a general nature, the provisions of the Act for the protection of young people and by the inviolable right of personal honour.
- Pasal 5 ayat (3) states that, "Arts and sciences, research and teaching are free. Freedom of teaching does not exempt people from loyalty to the constitution".

In addition to its constitution, the German state also has several laws and regulations related to regulating and limiting the right to freedom of opinion, especially hate speech. The regulations are spread over criminal, administrative and civil law. These regulations, among others:

- 1) Section 14, §§ 185 to 200 of the German Federal Penal Code (*Strafgesetzbuch/StGB*) is a provision sanctioning the actions of a person or group who commit defamation or defamation (*Beleidigungsdelikte* atau *Delikte gegen die persönliche Here*).
- 2) Violations of hate speech acts are also regulated in administrative law. For example, violations of the right to assembly in Article 8 of the *Basic Law*. Gatherings or gatherings may be prohibited when a political party that has been declared unconstitutional hosts the event as provided for in the provisions of the General Meeting Act or *Versammlungsgesetz*.
- 3) In *The German Civil Code / Bürgerliches Gesetzbuch* or Civil Code, especially Article 823

(2) of the Civil Code with 185 etc. which regulates the protection of other rights such as the right to a person's personality (*allgemeines Persönlichkeitsrecht*) that is violated and a kind of remedy or compensation is applied for violations of the rights of others.

According to the German Constitutional Court, the provisions restricting the right to freedom of speech or opinion in the law are valid and justified because in German *Basic Law* there are provisions limiting personal rights to protect the dignity of a person (*right to personal honour*), protection of youth (*the protection of young persons*) and the statutory provisions themselves as contained in the provisions of Article 5 paragraph (2) of the German Constitution (*Basic Law*).

a. Indonesia

The regulation of freedom of expression in the Indonesian Constitution is regulated in the following articles:

Pasal 28 E ayat (3) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 which reads: *Setiap orang berhak atas kebebasan berserikat, berkumpul, dan mengeluarkan pendapat.*

Pasal 28 F Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 which reads: “*Setiap orang berhak untuk berkomunikasi dan memperoleh informasi untuk mengembangkan pribadi dan lingkungan sosialnya serta untuk mencari, memperoleh, memiliki, menyimpan, mengolah, dan menyampaikan informasi dengan menggunakan segala jenis saluran yang tersedia*”.

But keep in mind, that the freedoms and rights of citizens here are not without limitations, the regulation of human rights in the Indonesian constitution regulates between the rights and obligations of citizens given a balanced portion. Restrictions on the exercise of human rights may only be established by law for the sole purpose and purpose of ensuring recognition and respect for the rights and freedoms of others and to meet just demands in accordance with considerations of morals, religious values, security, and public order in a democratic society.

Pasal 28 J Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 affirms that:

- (1) *Setiap Orang wajib menghormati Hak Asasi Manusia orang lain dalam tertib kehidupan bermasyarakat, berbangsa dan bernegara*
- (2) *Dalam menjalankan hak dan Kebebasannya, setiap orang wajib tunduk kepada pembatasan yang ditetapkan dengan undang-undang dengan maksud semata-mata untuk menjamin pengakuan serta penghormatan atas hak kebebasan orang lain dan untuk memenuhi tuntutan yang adil sesuai dengan pertimbangan moral, nilai-nilai agama, keamanan dan ketertiban umum dalam suatu masyarakat demokratis*

Analysis:

Based on the description above, the author finds that any country basically upholds human rights. Each country will certainly provide legal certainty for the protection of the human rights of its citizens by including it in the country's constitution. The right to freedom of opinion and

expression, which is one part of human rights, must of course be given a legal umbrella to underlie its enforcement. When viewed from the description above, each country both Indonesia, the United States, and Germany both regulate the right to freedom of opinion in their respective constitutions.

The difference between the three countries is in terms of regulating restrictions on freedom of opinion. In Indonesia, the regulation regarding the restriction of human rights is clearly stated in several laws and regulations. One example is in Article 28J Paragraph (2) of the NRI Constitution of 1945 where the article applies to all categories of human rights contained in the NRI Constitution of 1945 including the right to freedom of opinion. This means that human rights can be limited provided that by law and their limitations by law must be for the sole purpose of ensuring recognition and respect for the rights and freedoms of others, and of fulfilling just demands in accordance with considerations of morals, religious values, security, and public order in a democratic society. While in the United States, the guarantee and protection of human rights, in the United States constitution does not clearly stipulate restrictions on the right to freedom of opinion, restrictions on freedom of expression can be limited by referring to jurisprudence (judges' rulings) such as hate speech and slander.

In Germany itself, although it is a country that adheres to liberal ideas like the United States, but Germany does not follow the American style that gives the right to freedom of expression and opinion as freely as possible to its citizens. In the United States, freedom of speech is generally applied, while the German Constitutional Court applies it case by case depending on the significance of the impact of free speech. This refers to German jurisprudence which holds that restrictions on the right to freedom of expression are actually aimed at protecting constitutional interests.

Furthermore, when referring to the Todung Mulya Lubis Theory, there is a universal theory and a theory of cultural relativity. Where freedom of opinion which is part of human rights cannot be applied universally. The restrictions applied in the United States, Germany, and Indonesia are different because in America and Germany consider that the concept of human rights is universal so that the restrictions are different from Indonesia which emphasizes equal rights and obligations. Indonesia itself adheres to cultural relativity / culture because the concept of Human Rights in Indonesia takes from the culture of the Indonesian nation itself, so that the restrictions also consider religious values, consciousness, and moral values of the Indonesian nation.

Forms of Restrictions on Freedom of Expression in Indonesia from a Human Rights Perspective

1. Restrictions on freedom of expression in Indonesian laws and regulations

Freedom of expression and opinion is one of the main human rights even though it falls into the category of *Derogable Rights*, it is based on one of the oldest *Human Rights documents* "The Declaration of the Rights of Man and of *the Citizen*" of 1789 which considers that freedom of expression and opinion is the core of human rights in social and political dimensions (Razqi & Hananto Widodo, 2022).

Since Indonesia's independence in 1945, the constitution affirms freedom of opinion in Article 28, and is affirmed in article 28 and article 28E paragraph (3) of the Constitution of the Republic of Indonesia Year 1945 (UUD NRI 1945), which states "everyone has the right to freedom of association, assembly and expression". Regulation of freedom of expression is not only in national human rights instruments but also in international human rights instruments.

In international human rights instruments, documentation of the legality of freedom of expression is contained in the contents of the UDHR which affirms that everyone has the right to freedom of opinion and expression of opinion; This right also includes the freedom to hold on to an opinion without interference and is aimed at seeking, receiving and conveying information and ideas through any media and regardless of territorial boundaries.

In addition, the provision of guarantees for freedom of opinion by the international community is also contained in the KIHSP. KIHSP guarantees that everyone has the right to opinion without interference and has the right to freedom of expression, this right includes the freedom to seek, receive and impart any information and thoughts, regardless of restrictions orally, in writing or in print, artwork, or through other media of his choice. The guarantee of the right to freedom of expression in KIHSP is also accompanied by the emergence of special obligations and responsibilities. There are also certain restrictions that may be imposed in accordance with the law to the extent necessary for the purpose of respecting the rights or good name of others and protecting national security or public order or public health or morals.

The Convention on the Rights of the Child also guarantees that the right to freedom of expression includes the freedom to seek, receive and impart all kinds of information and ideas, regardless of territorial borders whether orally, in writing or in print, in the form of works of art, or through any other medium of the child's choosing. The exercise of such rights is subject to certain restrictions as stated by law and where necessary in order to respect the rights or reputation of others and to protect national security or public order, public health and morals.

In addition to international instruments, in formal National Legal Instruments, Indonesia has recognized the existence of the right to freedom of opinion by regulating it in various regulations. Pasal 28E ayat (2) Undang-Undang Dasar 1945 which reads "*Setiap orang berhak atas kebebasan meyakini kepercayaan, menyatakan pikiran dan sikap, sesuai dengan hati nuraninya*". Selanjutnya dalam ayat (3) dinyatakan pula bahwa "*setiap orang berhak atas kebebasan berserikat, berkumpul, dan mengeluarkan pendapat*".

Freedom of expression is also regulated in Undang-Undang No. 9 Tahun 1998 on Freedom to Express Opinions in Public. Pasal 1 ayat (1) affirm that every citizen has the right to express thoughts orally and in writing freely and responsibly in accordance with the provisions of applicable laws and regulations. Then, Pasal 5 guarantee freedom and legal protection to all citizens in the event of free expression in public (Razqi & Hananto Widodo, 2022).

Pasal 22 ayat (3) Undang-Undang No. 39 Tahun 1999 Human Rights also guarantees that everyone has the freedom to have, express and disseminate opinions according to their conscience, orally and or in writing through print and electronic media with due regard to religious values, decency, order, public interest, and the integrity of the nation (Razqi & Hananto Widodo, 2022).

In addition, there are also TAP MPR No. XVII/MPR/1998 about Hak Asasi Manusia. Ordinances MPR No. XVII/MPR/1998 mandate that the Indonesian nation as part of the world community should respect human rights contained in DUHAM as well as various other international instruments on human rights. Ordinances MPR This guarantees freedom of

expression, including freedom of association, assembly, and expression of opinion (Razqi & Hananto Widodo, 2022).

Freedom of expression has responsibilities and is limited by law necessary for respect for the rights and reputation of others, protection of state security, public health and morals. Conditions Pasal 19 (3) ICCPR *“The exercise of the rights Provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefor be subject to certain restrictions, but these shall only be such as are provided by law and are necessary; (a) For respect of the rights of reputations of others. (b) For the protection national security or of publik order (order publik) , or of publik health or morals (Rouf, 2021).*

Conditions on Pasal 20 (2) ICCPR become a barrier to freedom of expression and opinion *“any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination or violence shall be prohibited by law”*. This is in line with preventing freedom of expression in the form of writing, images, or audio that contains propaganda, hate speech on the basis of race, religion or other acts of discrimination.

In its application, restrictions on the right to freedom of expression and opinion to protect national security and public order, must meet the following conditions:

- (1) Restrictions on information justified on grounds of national security and public order must serve a real purpose and the implementer of the law must be able to demonstrate the impact on the protection of national security and public order.
- (2) Restricted expression and information constitute a serious threat to national security and public order.
- (3) The form of restriction imposed by the State Party is the minimum possible means of restriction to protect national security and public order in the sense that the restriction is implemented proportionately and not excessively, and
- (4) Restrictions correlate with democratic principles.

In addition to in ICCPR, Pasal 28 J Ayat (2) UUD NRI Tahun 1945 also regulates restrictions HAM which states that *“Dalam menjalankan hak dan kebebasannya, setiap orang wajib tunduk kepada pembatasan yang ditetapkan dengan undang-undang dengan maksud untuk menjamin pegakuan serta penghormatan atas hak kebebasan orang lain dan untuk memenuhi tuntutan yang adil sesuai dengan pertimbangan moral, nilai-nilai agama, keamanan, dan ketertiban umum dalam suatu masyarakat demokratis”*.

If it follows the construction of the formula Pasal 28 J Ayat (2) UUD NRI Tahun 1945 aforementioned, then at least there is 3 (tiga) Aspects of requirements related to the constitutionality of restrictions HAM, that is: (Mujaddidi, 2021).

- 1) The legality aspect, in this case the pouring of human rights restrictions must be poured into the law, not other legal instruments.
- 2) Aspects of the aims and objectives of the restriction of rights, namely: Solely to respect and protect the rights and freedoms of others and to meet just demands in a democratic society.
- 3) Aspects of reasons and considerations in carrying out rights restrictions which include :
 - a) Moral considerations.
 - b) Religious values.

- c) Security.
- d) Public order.

In addition, in Pasal 73 UU No. 39 Tahun 1999 About HAM also states that the rights and freedoms are set forth in Undang-undang HAM can only be limited by and by law, solely to ensure recognition and respect for the human rights and fundamental freedoms of others, decency, public order, and the interests of the nation.

Deep RUU KUHP which has just been passed into Undang-Undang in Meetings Paripurna DPR date 06 December 2022, even contains some pasal which is considered to threaten the right to freedom of opinion, including Pasal 218,240,241,351,352 RUU KUHP, which Pasal 351 & Pasal 352 is a complaint offense. In addition to in KUHP and RUU KUHP Pasal which is often considered a form of restriction on freedom of opinion, namely: pasal karet deep UU ITE that is Pasal 27 Ayat (3) About defamation.

2. Restrictions on freedom of expression in Indonesian laws and regulations

Deep Undang-undang No. 39 Tahun 1999 About Hak Asasi Manusia Pasal 1 It is mentioned that: “Hak Asasi Manusia adalah seperangkat hak yang melekat pada hakikat dan keberadaan manusia sebagai makhluk Tuhan Yang Maha Esa dan merupakan Anugrah-Nya yang wajib dihormati, dijunjung tinggi, dan dilindungi oleh negara, hukum, pemerintah dan setiap orang demi kehormatan serta perlindungan harkat dan martabat manusia.

In line with that, it is also mentioned that human rights are basic rights possessed by every human being as a gift of God Almighty that cannot be violated by its existence. These rights have been carried from birth and are inherent in man as a divine creature (Jurdi, 2019).

Freedom of expression (and opinion) is one of the main categories of human rights. This right falls into the first category of human rights, rights with a civil-political dimension. This category of rights, for example, can be found in one of the documents HAM the oldest references, such as *French Declaration of The Rights of Man and Citizen of 1789*. Although the right to expression is considered 'no' as fundamental as the right to life, the right to religion and belief, the right to be free from torture, and it is still possible to derogate, this right has always been the primary guardian of basic human rights (Melina, 2018).

Contextually, in the understanding of human rights there is a term *Derogable* dan *Non Derogable Right* that is, human rights are basic rights inherent from birth. These rights apply to every human being without regard to discriminating factors such as religion, race, ethnicity, gender or nationality. Human rights are supra-legal, meaning that they do not depend on a state or constitution, have the authority to act higher and are independent of the government and belong to every human being (Dewi, 2021).

Based on this, the right to freedom of opinion is categorized as a *derogable right* or a right that can be limited. Although the right to freedom of opinion is included in the category of *derogable right*, the restriction cannot be done arbitrarily and without basis. Restrictions on the right to freedom of expression must be carried out on the basis of laws and regulations solely for the fulfillment of the protection of the rights of others and public order and other moral values.

Restrictions on the right to freedom of expression themselves are listed in Pasal 28 J Ayat (2) UUD NRI Tahun 1945.

By pasal it has been explained that human rights can basically be limited but the restrictions must be in accordance with laws and regulations with the aim of protecting the rights of others in general, not for personal or political reasons. The reason is because everyone has their own human rights which of course also need to be protected and upheld, so that the word free in the right to freedom of opinion cannot be interpreted as free as freely uncontrolled, but free there is meant as free responsible in the sense that it does not intersect with the rights of others, moral values of society, religious values, public order, and national security. In addition to in Pasal 28J Ayat (2) UUD NRI Tahun 1945, restriction Human Rights is also set in Pasal 73 UU No. 39 Tahun 1999 About Human Rights.

In limiting human rights in Indonesia itself, the State has established several rules that are spread across several laws and regulations such as in UUD NRI Tahun 1945, Book Undang-Undang Hukum Pidana, Undang-Undang Electronic Information and Transactions, and Undang-Undang Pers. The restriction of the right to freedom of opinion in Indonesia according to the author conceptually does not violate human rights because human rights in Indonesia basically emphasize rights and obligations, where the government has a role in protecting the rights of every citizen regardless of race, religion, ethnicity, political position, and so on, therefore it is necessary to limit the right to freedom with the sole purpose of protecting the public interest and The restriction is not without basis, but based on laws and regulations.

This is in line with the Social Contract Theory presented by J.J. Rosseau. The essence of Rosseau's Social Contract Theory is that each individual bestows all his individual rights on the community as a whole. Thus, all natural rights, including complete freedom to do as one pleases move into the community, or in other words, coexistence naturally demands that each person's freedom be limited to the same great rights and freedoms of others, as well as by common demands. This means that one's freedom will be limited by the freedom of others (Ruslan, 2013). This is in line with the purpose of limiting human rights based on the law solely carried out by the State to protect other human rights that both need to be protected and upheld by the State as stakeholders.

Although restrictions on freedom of opinion according to the author do not violate HAM, However, according to the author, there are specific rules related to freedom of opinion that need to be improved in substance, because in the substance of the law does not explain or emphasize a clear line between criticism and what is defined as a criminal offense in the regulation so that it is often called the Rubber Article. Due to the unclear boundaries between criticism and criminal acts referred to by the Law, resulting in criticism delivered based on facts by the community for the progress of the nation and state, it is sometimes constrained by trapping rules that cause people to feel that their right to freedom of opinion is violated and do not feel provided with a clear forum so that their opinions seem to be constrained by elastic rules.

Pasal which often takes victims, one example is Pasal 27 Ayat (3) Jo. Pasal 45 Ayat (3) UU No. 19 Tahun 2016 About the above changes undang-undang No. 11 Tahun 2008 on Electronic Information and Transactions. Often, the article is used as a boomerang for people who try to express criticism or views regarding the government or state because of the lack of understanding related to the ethics of expressing opinions and not explaining anything that can be considered a form of defamation according to the Law. Therefore, according to the author, related to restrictions on freedom of opinion in Indonesia actually do not violate human rights, but there needs to be some kind of more detailed elaboration related to some articles that are considered elastic so that clear limits related to the forms of criticism that are allowed and not allowed so that no one is entangled in criminal cases due to Pasal rubber.

CONCLUSION

Comparison of restrictions on freedom between countries that embrace liberal ideas (the United States and Germany) with the State of Indonesia found differences in terms of regulation, where America does not include restrictions on the right to freedom of expression in its constitution but only based on Jurisprudence, while Indonesia and Germany include restrictions on the right to freedom of expression in their respective countries' constitutions. This is because not all countries can adhere to the universal concept of human rights.

The forms of restriction of freedom of expression are set out in the Regulation Perundang-Undangan Among them in Pasal 28 J ayat (2) UUD NRI tahun 1945 and Pasal 73 UU No. 39 Tahun 1999 On Human rights. Where the restrictions on the right to freedom of opinion applied in Indonesia are in accordance with these rules and do not violate human rights because the form of restrictions applied alone aims to protect the rights and freedoms of others, and to remain based on moral values, decency, and public order as well as restrictions carried out in the common interest of the nation.

BIBLIOGRAPHY

- Anindyajati, Titin dan Helmi Kasim, 2021. "*Pengaturan Hak Kebebasan Berpendapat Dalam Konstitusi*", Laporan Penelitian dan Pengelolaan Perpustakaan Mahkamah Konstitusi Republik Indonesia.
- Bakhtiar, Nur Yusriyah, dkk. 2020, "Pemenuhan Hak Kebebasan Berpendapat Undang-Undang Nomor 9 Tahun 1999 Tentang Kebebasan Menyampaikan Pendapat Dimuka Umum" *Journal Of Lexn Theory*, Volume 1 Nomor 1. Makassar: Magister Ilmu Hukum Universitas Muslim Indonesia
- Detiknews, 2019, "Kebebasan Berpendapat Di Internet Dan Hukum Pidana", <https://news.detik.com/kolom/d-4647796/kebebasan-berpendapat-di-internet-dan-hukum-pidana>, Diakses pada tanggal 23 Maret 2022, pukul 21.18 WITA

- Dewi, Cokorde Istri Dian Laksmi. 2021. “Aspek Hukum Kebebasan Berpendapat dan Berekspresi” *Jurnal Yustitia* Volume 15 Nomor 1, Bali : Magister Ilmu Hukum Universitas Ngurah Rai
- Dewi, Ersyana Candra. 2015, “HAM dalam Perspektif Demokrasi Pancasila dan Liberal”, <https://kompasiana.com/ersayanacandra/555469206523bda51d4aef68/ham-dalam-perspektif-demokrasi-pancasila-dan-liberal> , diakses pada tanggal 06 Juni 2023 pukul 23:14 WITA
- Fuadi, Munir, 2010, *Konsep Negara Demokrasi*, Bandung: Refika Aditama
- Ian Parma Saputra, Tesis, “Kajian Tentang Informasi Elektronik Terhadap Kebebasan Berpendapat Ditinjau dari Perspektif HAM” (Makassar: Unhas, 2013).
- Ilmar, Aminuddin. 2018. *Hukum Tata Pemerintahan*. Jakarta: Prenadamedia Grup
- Irwansyah. 2021. *Penelitian Hukum Pilihan Metode dan Praktik Penulisan Artikel*, Yogyakarta: Mirra Buana Media
- Jurdi, Fajlurrahman. 2019. *Hukum Tata Negara Indonesia*, Jakarta : Kencana
- Komnas HAM, 2022, “Standar Norma dan Pengaturan Hak atas Kebebasan Berpendapat dan Berekspresi”, https://www.komnasham.go.id/files/1604630519snp-kebebasan-berekspresi-dan--%24SF7YZ0Z.pdf&ved=2ahUKEwjqltP5jfn7AhUnSWwGHYSFAN0QFnoECBAQAAQ&usq=AOvVaw1zreEsuZzfo_F92KoeuCq0 Diakses pada tanggal 12 Desember 2022 pukul 19.45 WITA
- Muhlashin Ias, 2021, “Negara Hukum, Demokrasi, dan Penegakan Hukum di Indonesia”. *Jurnal Al-Qadau* Volume 8 Nomor 1, Yogyakarta : Magister Ilmu Syariah UIN Sunan Kalijaga
- Mujaddidi, Siphotulloh. 2021, “Konstitusionalitas Pembatasan Hak Asasi Manusia dalam Putusan Mahkamah Konstitusi”, *Jurnal Konstitusi* Vol. 18 No. 3, Yogyakarta : Magister Hukum Kenegaraan, Universitas Gadjah Mada.
- Nugraha, Setyo Adi. 2021. “Sejarah Pemikiran Modern; kumpulan artikel”, Yogyakarta : Magister Pendidikan Sejarah Fakultas Ilmu Sosial Universitas Negeri Yogyakarta
- Razqi, Afrizal dan Hananto Widodo. 2020. “Pembatasan Kebebasan Berekspresi dan Berpendapat Menurut Undang-Undang Nomor 12 Tahun 2005 Tentang Pengesahan *International Covenant on Civil and Political Rights*”, *Jurnal Ilmu Hukum*, Surabaya : Fakultas Ilmu Sosial dan Hukum, Universitas Negeri Surabaya.
- Ridlwan, Main. 2012. “Sejarah Hukum Indonesia Kebalikan *Nachtwachterstaat*”, *Fiat Justitia Jurnal Ilmu Hukum*, Volume 5 Nomor 2, Lampung: Fakultas Hukum Universitas Lampung
- Riska, Andi. 2021, “Pembatasan Kebebasan Berpendapat di Era Digital”, *Jurnal Ilmu Hukum, Pare-Pare : Sekolah Tinggi Ilmu Hukum Amsir*

Ruslan, Idrus. 2013. “Pemikiran “Kontrak Sosial” Jean Jacques Rosseau dan Masa Depan Umat Beragama”, Jurnal Al-AdYan Volume VIII Nomor 2, Padang : UIN Imam Bonjol

Roqib, Muhammad dkk. 2020, “Hak Atas Kebebasan Berekspresi dan Berpendapat di Indonesia dengan di Amerika Serikat” Jurnal Perspektif Hukum Volume 20 Nomor 1 2020, Surabaya: Universitas Airlangga

Selian, Della Luysky dan Cairin Melina. 2018, “Kebebasan Bereskpresi di Era Demokrasi : Catatan Penegakan Hak Asasi Manusia”, Jurnal *Lex Scientia Law Review* Volume 2 No. 2, Semarang : Fakultas Hukum Universitas Negeri Semarang.

Zaini, Ahmad, 2020, “Negara Hukum, Demokrasi dan HAM”, Al Qithas;Jurnal Hukum dan Politik Volume 11 Nomor 1, Banten : Fakultas Syariah Banten



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