

FREEDOM OF SPEECH WITHOUT A DIRECTION: Criticism of the Promotion of Freedom of Speech in Indonesia

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Abstract: The attempt to equate freedom of speech with other rights, such as freedom of expression or opinion, is misguided because these rights have distinct realms concerning their promotion and resolution of legal violations. In practice, this misconception persists in Indonesia, where there is no specific law dedicated to regulating freedom of speech. Therefore, this study explored the factors that lead to legal vacuum for freedom of speech and provided solutions to overcome this vacuum. This study also assessed the various legal frameworks and practices concerning the promotion of freedom of speech in Indonesia after the 1998 Reform Era using a normative juridical approach. The result showed that legal vacuum in promoting the right to freedom of speech attributed to the conflicting priorities of human rights and the ambiguity surrounding the understanding of freedom of expression. It is important to synchronize laws and regulations regarding the rights belonging to freedom of expression and strengthen the associated regulation that specifically contain definitions, limitations, and ways of resolving violations of the law. This process provided a detailed legal direction or umbrella for efforts to promote freedom of speech.

Keywords: Freedom of Speech, Legal Vacuum, Synchronization, Strengthening Regulations

Abstrak: Upaya untuk menyamakan kebebasan berbicara dengan hak-hak lain, seperti kebebasan berekspresi atau berpendapat, adalah salah kaprah karena hak-hak tersebut memiliki ranah yang berbeda dalam pemajuan dan penyelesaian pelanggaran hukum. Dalam praktiknya, miskonsepsi ini masih terjadi di Indonesia, di mana tidak ada undang-undang khusus yang mengatur kebebasan berbicara. Oleh karena itu, penelitian ini menggali faktor-faktor yang menyebabkan terjadinya kekosongan hukum kebebasan berpendapat dan memberikan solusi untuk mengatasi kekosongan tersebut. Kajian ini juga mengkaji berbagai kerangka dan praktik hukum tentang pemajuan kebebasan berbicara di Indonesia pasca Era Reformasi 1998 dengan menggunakan pendekatan yuridis normatif. Hasil penelitian menunjukkan bahwa kekosongan hukum dalam mempromosikan hak

atas kebebasan berbicara dikaitkan dengan konflik prioritas hak asasi manusia dan ambiguitas seputar pemahaman kebebasan berekspresi. Sinkronisasi peraturan perundang-undangan tentang hak-hak yang termasuk dalam kebebasan berekspresi menjadi penting dan memperkuat peraturan terkait yang secara khusus memuat definisi, batasan, dan cara penyelesaian pelanggaran hukum. Proses ini memberikan arahan atau payung hukum yang terperinci untuk upaya mempromosikan kebebasan berbicara.

Kata Kunci: Kebebasan Berbicara, Kekosongan Hukum, Sinkronisasi, Penguatan Regulasi

Introduction

Freedom of speech is a universal right that grants individuals the liberty to express themselves without constraints.¹ F. Stjernfelt and AM Lauritzen define it as the ability to articulate oneself freely.² As an indispensable aspect, freedom of speech is protected by constitutional rights,³ and plays a pivotal role in upholding democracy in a country.⁴ However, despite being a constitutional right, freedom of speech is not without limitations. According to Peiroll Gerard Notanubun, one of the restrictions is in the form of a ban to spread hatred.⁵ This indicates that freedom of speech can be subject to limitations, but these restrictions are designed to preserve and enhance the essence of constitutional rights.⁶

The restrictions imposed on freedom of speech are not wielded in the form of state authoritarianism, rather these are established

through legal means, such as regulations (rechtsvorming) or court decisions (rechtsvinding). Regulations governing freedom of speech, are present at both the international and national levels, with particular relevance to Indonesia. Internationally, the 1948 Universal Declaration of Human Rights (UDHR), explicitly upholds freedom of speech as the right to express opinions and ideas freely (Article 19). Similarly, the 1966 International Covenant on Civil and Political Rights (ICCPR) recognizes the right to seek, receive and impart information and ideas, through oral, written, or printed means (Article 19 (2)). The First Amendment to the United States Constitution, dating back to 1791, strongly emphasizes freedom of speech, by preventing Congress from regulating or restricting

¹ Syafriadi and Heni Susanti, "Conception and Implementation of Freedom of Speech and Expression in Indonesian Legal Studies," *International Journal of Innovation, Creativity and Change*, Volume 10, Issue 4, 2019, 239; John W. Johnson, "The Role of Free Media," Office of International Information Programs US Department of States, 2001, 53.

² F. Stjernfelt and AM Lauritzen, "What Is Freedom of Speech?," Chapter 1, 2020, https://doi.org/10.1007/978-3-030-25968-6_1_7.

³ Alon Harel, "Freedom of Speech," <https://www.researchgate.net/publication/228321980>, 28 May 2014, accessed 10 January 2023; F. Stjernfelt and AM Lauritzen, "What Is Freedom of Speech?," 8.

⁴ John Shattuck and Mathias Risse, "Reimagining Rights & Responsibilities in the United States: Freedom of Speech and Media," Carr Center for Human Rights Policy Harvard Kennedy School, Harvard University, 2021, 2.

⁵ Peiroll Gerard Notanubun, "Juridical Review of Freedom of Speech in the Provisions of Article 27 paragraph (3) of Law Number 11 of 2008 concerning ITE in Relation to Article 28 of the 1945 Constitution," Platform for Justice, Journal of Legal Studies, Edition: May-November 2014, 12.

⁶ Titis Anindyajati, "Limitation of the Right to Freedom of Speech on The Indonesian Constitutional Court Consideration," *Indonesian Law Journal*, Volume 14 No. 1, July 2021, 19.

certain liberties.⁷ In Indonesia, regulations promoting freedom of speech are enshrined in the 1945 Constitution. According to Article 28F of the Constitution, freedom of speech is regarded as a fundamental right, allowing individuals to communicate and develop their personalities and social environments. Law (UU) No. 39 of 1999 concerning Human Rights reinforces this protection in Article 14 paragraph (1).

In Indonesia, even though freedom of speech is stated in both the 1945 Constitution and Law No. 39 of 1999, there is no dedicated law that specifically regulates this right. Instead, certain aspects of freedom of expression are governed by separate laws. For example, freedom of electronic information, press, opinion and organisation are regulated by UU No. 19 of 2016, Law No. 40 of 1999, Law No. 9 of 1998, and Law No. 17 of 2003, respectively. However, there is still no comprehensive law that directly regulates freedom of speech. As a result, the formulation of freedom of speech in the 1945 Constitution lacks further specific regulations.

The lack of specific regulations or a comprehensive legal framework for freedom of speech has left it without clear directives, or detailed references. As a consequence, the handling of law violations related to the practice of freedom of speech has become a

pressing concern, with a significant increase in cases. Referring to data from the National Human Rights Commission (Komnas HAM), 44 cases of violations occurred between 2020 to 2021. All these cases fell under the category of legal violations of the right to freedom of expression. These violations occurred in various contexts, with 52% in the digital space, 19% in journalistic works, 17% in public settings, 10% in scientific discussions, and even 2% when giving testimony in court.⁸

Legal violations related to freedom of expression have been addressed primarily based on three laws, namely Law No. 19 of 2016, Law No. 1 of 1996 concerning criminal law regulations, and the Criminal Code (KUHP). For example, the lecture delivered by Munarman on the Shooting Case of the Islamic Defenders Front (FPI) soldiers, allegedly violated Law No. 19 of 2016, Law No. 1 of 1996, and Article 160 of the Criminal Code. Similarly, the lecture by Haikal Hasan in the Case of a Dream of Meeting the Messenger of Allah led to accusations of violating Law No. 19 of 2016, Law No. 1 of 1996, and Article 156 letter of the Criminal Code.⁹ Munarman conveyed this speech directly at a press conference held at the Central Jakarta FPI Headquarters¹⁰, while Haikal Hasan, shared personal views during a lecture at the funeral of the FPI Troops in Megamendung, Bogor.¹¹

⁷ Constitution of the United States of America, 1791; Paul Sturges, "Limits to Freedom of Expression? Considerations Arising from The Danish Cartoons Affair," *IFLA Journal*, 32 (2006), 187-188.

⁸ Komnas HAM RI, "Komnas HAM: Violations of Freedom of Expression and Opinion Occur in Digital Space," <https://www.komnasham.go.id/index.php/news/2022/1/17/2065/komnas-ham-pelanggaran-kebebasan-berekspresi-dan-berpendapat-terjadi-di-ruang-digi-tal.html>, access January 3, 2023.

⁹ CNN Indonesia, "Those snared by the ITE Law in 2020: Said Didu to Munarman," <https://www.cnnindonesia.com/nasional/202012>

[24150640-12-586053/they-yang-dijerat-uu-ite-di-2020-said-didu-til-munarman](https://www.cnnindonesia.com/nasional/20201224150640-12-586053/they-yang-dijerat-uu-ite-di-2020-said-didu-til-munarman), December 24, 2020, access January 8, 2023.

¹⁰ CNN Indonesia, "Munarman FPI about 6 Soldiers Killed: That's Extra Judicial Killing," <https://www.cnnindonesia.com/nasional/20201207174707-12-579047/munarman-fpi-soal-6-laskar-tewas-itu-extra-judicial-killing>, 7 December 2020, access 8 January 2023.

¹¹ Detiknews, "Explanation by Haikal Hassan about the dream of meeting the Prophet," <https://news.detik.com/berita/d-5829011/penhasilan-haikal-hassan-soal-mimpi-bertemu-rasulullah>, 26 November 2021, access 7 February 2023.

When considering the implications of the 1945 Constitution, the two cases involving lectures delivered by Munarman and Haikal Hasan may not necessarily be charged under the Law on freedom of expression (UU No. 9 of 1998) or the Law on information and electronic transactions (UU No. 19 of 2016). This is because, in the context of Article 28F of the 1945 Constitution, their lectures could be perceived as an exercise of the right to communicate and speak for personal development. However, in reality, the situation differs due to a lack of clear direction, a comprehensive legal framework, or more detailed references to freedom of speech. As a result, they are suspected of violating criminal provisions, and regulations, particularly regarding the intentional dissemination of fake news (UU No. 19 of 2016, Articles 45 and 45A). It becomes essential to thoroughly review and address these issues to ensure a proper understanding and application of freedom of speech in such cases.

Various studies have explored freedom of speech, with some specifically examining its correlation with freedom of the press. The article written by Clara Staples sheds more light on the weak legal protection for freedom of speech in the press during the New Order era.¹² Putri Tanjung Sari reported that freedom of speech, as governed by press laws, can intersect with the independence of others.¹³ The articles written by Grandis

Ayuning Priyanto and Martinus Sardi stated that restrictions on this regulations through the electronic information and transaction (ITE) law still have multiple interpretations, thereby creating fear among citizens.¹⁴ On the other hand, studies on freedom of speech have been linked to that of expression. For example, Zico Junius Fernando (et.al), published an article highlighting the subjectivity of regulations of freedom of expression in the ITE Law, which could potentially suppress freedom of expression.¹⁵ Marwandianto, Hilmi Ardani Nasution, and M. Lutfi Chakim also stated that the penalties applied to limit freedom of opinion and expression under Articles 310 and 311 of the Criminal Code, should be proportional and not excessive.¹⁶ It is important to pinpoint that no specific study delves into freedom of speech as a distinct aspect separate from freedom of expression in general, or opinion in other domains. This gap contribute to difficulties in effectively resolving legal violations in cases related to the promotion of freedom of speech, leading to significant impacts.

Method

This study adopted a normative juridical approach, to examine various regulations, cases, and decisions,¹⁷ concerning the promotion of freedom of speech. This approach aids to identify the reasons behind

¹² Clara Staples, "Freedom of Speech In Indonesian Press: International Human Rights Perspective," *Brawijaya Law Journal*, v.3 n.1, 2016, 41.

¹³ Putri Tunjung Sari, "The implementation of Freedom of Speech Principles in Indonesian Press Regulations," *International Journal of Communication and Society*, Vol. 2, No. 1, June 2020, 20.

¹⁴ Grandis Ayuning Priyanto and Martinus Sardi, "The Urgency of Protecting Netizens in Freedom of Speech on Social Media," *Media of Law and Sharia*, Volume 2, Number 1, 2020, 76.

¹⁵ Zico Junius Fernando, Pujiyono, Umi Rozah and Nur Rochaeti, "The Freedom of Expression in

Indonesia," *Research Article Law, Criminology & Criminal Justice, Cogent Social Sciences*, July 2022, 1.

¹⁶ Marwandianto and Hilmi Ardani Nasution, "The Rights to Freedom of Opinion and Expression in The Corridors of Article 310 and 311 of the Criminal Code," *Jurnal HAM*, Volume 11, No. 1, Apr. 2020, 1; M. Lutfi Chakim, "Freedom of Speech and The Role of Constitutional Courts: The Cases of Indonesia and South Korea," *Indonesia Law Review* (2020) 2, 191.

¹⁷ Amiruddin & Zainal Asikin, *Introduction to Legal Research Methods*, Jakarta: Raja Grafindo Persada, 2018, 24; Peter Mahmud Marzuki, *Legal Research*, Jakarta: Kencana Prenada Media Group, 2011, 35.

the existing legal vacuum in this area. However, solely relying on juridical data is insufficient to completely understand the causes and solutions for the challenges in promoting freedom of speech. It becomes necessary to complement juridical data with additional information from library study, expert opinions, and other relevant documents. This comprehensive approach ensures a more holistic and informed analysis of the issue.

The present study primarily investigated legal products, decision-making practices, and policies aimed at promoting freedom of speech in Indonesia, after the 1998 Reformation Era. Therefore, to ensure a comprehensive analysis, data from previous eras, including regulations, documents, articles, and results of preceding investigations were used. The main focus of this study was to examine the data related to legal developments and decision-making practices regarding the promotion of freedom of speech in the specified time frame. It also critically analyzed the existing legal vacuum concerning the promotion of freedom of speech as its main subject of inquiry.

Causes of Legal Vacuum for Freedom of Speech

1. *Tug-of-war on the Importance of Human Rights Promotion*

The debates among the founding fathers of Indonesia during the formulation of the 1945 Constitution revolved around the importance of promoting human rights. Two opposing camps emerged at that time, namely Moh. Yamin and Moh. Hatta was on one side, while

Soekarno and Soepomo, were on the other.¹⁸ Soekarno and Soepomo rejected the inclusion of human rights in the Constitution, arguing that it could lead to an ideology of individualism conflicting with the identity of Indonesia as a close-knit society. In contrast, Moh. Yamin and Moh. Hatta insisted on including human rights in the Constitution, believing it would minimize the arbitrary actions of the state against the people.¹⁹ After a prolonged debate, a compromise was reached, resulting in the inclusion of a limited number of human rights in the 1945 Constitution, specifically Articles 27, 28, 29, 31, and 34. These were not explicitly labelled as dedicated chapters or articles on human rights.

The incomplete formulation of human rights in the Constitution highlights the absence of a unified agreement among state authorities concerning its promotion in Indonesia. This lack of consensus is reflected in the divergent policies observed during different ruling regimes, including the Old, and New Order regimes and the Reformation Era.

a. *Old Order*

During the Old Order era, President Soekarno was not in support of incorporating human rights into the Constitution. Despite extensive debates to implement a new Constitution in the Constituent Assembly,²⁰ Soekarno issued a Presidential Decree on July 5, 1959. The decree reaffirmed the implementation of the 1945 Constitution in its original form,²¹ thereby maintaining the incomplete formulation of human rights in the Constitution under the Old Order regime.

¹⁸ Serlika Aprita and Yonani Hasyim, *Law and Human Rights*, First Edition, Jakarta: Mitra Wacana Media, 2020, 321.

¹⁹ Muhammad Yamin, *Preparatory Text to the 1945 Constitution*, Jakarta: Siguntang, 1971, 80.

²⁰ Himawan Indrajat, "Guided Democracy A Conception of Soekarno's Thoughts About

Democracy," *Journal of Sociology*, Vol. 18, no. 1, 2016, 59.

²¹ Pan Mohamad Faiz, "The Protection of Civil and Political Rights By The Constitutional Court of Indonesia," *Indonesia Law Review* (2016) 2, 162.

Apart from that, the Old Order regime also issued regulations, such as the Guided Democracy policy which imposed restrictions on human rights. The rationale for implementing this policy was based on the perceived government instability experienced under the previous Parliamentary Democracy system.²² However, the centralization of state decision-making in the hands of President Soekarno led to the ability to secure a dominant position. As a result, any opposition to this leadership was swiftly removed.²³ This practice of suppressing dissenting political wills showed a lack of respect for the political rights of others, and disregard for human rights during this regime.

b. The New Order

Under the leadership of President Soeharto in the New Order era from 1966, no substantial efforts were made to promote human rights. Similar to Soekarno, Soeharto emphasized the strict and unwavering implementation of the 1945 Constitution. Soeharto even proposed the idea to sanctify the Constitution to prevent any amendments.²⁴ To implement the concept of sanctifying the 1945 Constitution, Suharto sponsored the issuance of the Decree of the People Consultative Assembly (MPR) No. I of 1978 to MPR Decree No. I of 1998. The significant point in this

decree was the agreement not to alter the 1945 Constitution. Additionally, Suharto introduced UU No. 5 of 1985 concerning Referendums, a law that imposed strict requirements for any attempts to amend the Constitution. These actions showed Soeharto's lack of emphasis on promoting human rights during that regime.

During the New Order regime, the 1945 Constitution remained unamended, and as a result, the incomplete formulation of human rights within it did not change. The lack of an adequate constitutional framework led to the suboptimal promotion of human rights. This concern was later proven to be true, when the New Order regime took certain actions, such as revoking the licenses of several mass media outlets,²⁵ and arresting human rights activists²⁶. These actions showed efforts to suppress human rights and silence dissenting voices.

c. Reform Era

The birth of the Reform Era in 1998 brought great expectations for the promotion of human rights in Indonesia. This was followed by two previous regimes that failed to prioritize this policy, namely the amendment of the Constitution and the recognition of human rights. These two agendas succeeded in bringing about a huge breakthrough in the Indonesian constitution,²⁷ specifically in

²² Himawan Indrajat, "Guided Democracy A Conception ...," 57.

²³ Ketut Sedana Arta, "Indonesian Politics in the Guided Democracy Period 1959-1966," *Candra Sangkala Journal*, Vol 4, No 1, March 2022, 2.

²⁴ Harry Setya Nugraha, "The Idea of Re-Amending the 1945 Constitution of the Republic of Indonesia," *Lex Renaissance*, No. 1 Vol. 3, Jan. 2018, 67; Lili Romli, "New Format of the House of Representatives After the Amendment to the 1945 Constitution," *Politica*, Vol. 3, No. 2, Nov. 2012, 203-204.

²⁵ Satrio Saptohadi, "The Ebb and Down of Press Freedom in Indonesia," *Journal of Legal Dynamics*, Vol. 11 No. 1, January 2011, 138.

²⁶ Syamsuddin Radjab, "Differences between human rights regimes and criminal regimes," *Al-Daulah*, Vol. 3, No. 2, December 2014, 161-162.

²⁷ Zen Zanzibar, "The Indonesian Constitutional System in the Post Amendment of the 1945 Constitution," *Sriwijaya Law Review*, Vol. 2 Issue 1, January (2018), 45; Harisman, "Protection of Human Rights in the Amendment of the 1945 Constitution of The Republic of Indonesia," *Proceedings of the 1st International Conference on Law and Human Rights*, 2020, 384; Leli Tibaka & Rosdian, "The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of the Republic of Indonesia," *Fiat Justitia*, Volume 11 Number 3, July-September 2017, 266.

advancing human rights. As a result, in Amendment II of 2000, the MPR agreed to set forth the principles of protecting, promoting, and upholding human rights, by not only adding articles but also a special chapter on this policy.²⁸ This chapter included 10 articles, namely Articles 28A to 28J, specifically in Chapter XA of the amended 1945 Constitution. The commitment to advancing human rights was further showed through the creation of various laws and regulations both before and after the constitutional amendment.²⁹ Examples of these laws are MPR Decree No. XVII/MPR/1998 concerning Human Rights, Law no. 9 of 1998 concerning Freedom of Expressing Opinions in Public, Law no. 39 on human rights, UU no. 40 of 1999 concerning the Press, and Law no. 26 of 2000 concerning the Human Rights Court. Unfortunately, the positive trajectory took a setback after more than a decade into the Reformation Era, counterproductive policies emerged that hindered the promotion of human rights. Among these policies, was the formation of Law No.11 of 2008 concerning Electronic Information and Transactions (ITE), which was later replaced by Law No. 19 of 2016 and Law No. 1 of 2023 on the Criminal Code (KUHP).

The idea of establishing a new Criminal Code to replace the outdated one is a positive step towards aligning it with Indonesian values.³⁰ This revision was necessitated due to the shortcomings of the old Criminal Code, such as the discrepancy between general and special punishments³¹ and the neglect of objectives and guidelines.³² However, a notable concern with the new Criminal Code lies in the inclusion of certain articles that could potentially impede the promotion of human rights. For example, according to Ni Made Martini the contents of the articles related to defamation of the president (Articles 218 paragraphs (1), 219, 220, and 240), have been criticized for possibly restricting freedom of expression.³³ These articles also have the potential to counter democratic principles, posing a risk to the commitment of the country to uphold human rights values.³⁴ Then assuming a country forsakes these principles, the obstacles to promoting freedom of expression would inevitably become more evident. It is critical to strike a balance between modernizing the Criminal Code as well as safeguarding fundamental human rights and democratic principles. This enabled the new Criminal Code to effectively reflect Indonesian values

²⁸ Ida Bagus Subrahmaniam Saitya, "Organization of Human Rights in Indonesia," *SINTESA: Journal of Social and Political Sciences*, Volume 8, Number 2, September 2017, 82; Ahmad Tholabi Kharlie, "Human Rights in Indonesian Constitutional Amendments," *Journal of Cita Hukum*, Vol. I No. June 1, 2013, 151.

²⁹ Serlika Aprit and Yonani Hasyim, *Law and Human Rights*, 324; Muladi, *Human Rights, Nature, Concepts and Implications*, Bandung: Rafika Aditama, 2005, 51.

³⁰ Printer Jaya Hairri, "Contradictions to the Arrangement of "Law that Lives in Society" as Part of the Legality Principles of Indonesian Criminal Law, *Rule of Law*, Vol. 7, No. 1, June 2016, 89.

³¹ Sulistyanta, "Implications of Criminal Acts Outside the Criminal Code in Criminal Procedure Law (Case Studies at the Synchronization Level)," *Journal of Legal Dynamics*, Vol. 13 No. May 2, 2013, 195.

³² Noveria Devy Irmawanti and Barda Nawawi Arief, "Urgency of Goals and Guidelines for Criminal Justice in the Context of Updating the Criminal Law Criminal System," *Journal of Indonesian Legal Development*, Master of Law Study Program, Volume 3, Number 2, Year 2021, 217.

³³ Ni Made Martini, "The Impact of Ratifying the Draft Criminal Code (RUU KUHP) on Women and Vulnerable Groups," Material Presented at the 2022 National Penal Code Reform Consultation, Department of Criminology, FISIP, University of Indonesia, 22-23 June 2022.

³⁴ Ahmad Syaifudin Anwar and Lilik Agus Saputro, "Questioning the Article on Insulting the President in the Criminal Code: Between the Proportionality of the Primus Interpares Principle or the Setback of Democracy," *Wicarana Journal of Law and Human Rights*, Volume 2, Number 1, March 2023, 14.

while promoting and protecting human rights within a democratic society.

Before the formation of the new Criminal Code, obstacles encountered during the promotion of freedom of expression also existed during the implementation of UU no. 11 of 2008. This law has been a cause for alarm,³⁵ particularly concerning freedom of expression. Articles 27, 28, and 29 of this law, which pertain to offences such as insults, hate speech, and defamation, have been consistently used as a means to suppress individual freedom of expression.³⁶ Additionally, the ITE Law is also perceived as pragmatically limiting freedom of journalists.³⁷ The presence of these laws has negatively impacted the promotion of freedom of expression in Indonesia.

The enactment of the two laws put the government regime of the Reformation Era in an unfavourable position regarding the promotion of human rights. In 2018, the Commission for Missing Persons and Victims of Violence (Kontras), reported that freedom of expression index in the Reform Era regime, particularly President Joko Widodo, was quite low, scoring 55, and the police ranked even lower at 79.³⁸ The Executive Director of Amnesty International Indonesia, Usman Hamid further criticized the government of Joko Widodo, giving it a red report due to its use of repressive punishment articles, such as treason, blasphemy, and defamation, which

have curtailed activities related to freedom of expression.³⁹ This shows that, like the Old and New Order regimes, the Reformation Era government has also provided limited space for efforts to promote human rights.

The three government regimes hindered the promotion of human rights by implementing policies that were counterproductive to such efforts. These policies limited the space for advocating human rights and posed challenges to their advancement as shown in attached table 1.

The birth of these policies indicates a lack of agreement, or ongoing power struggles among the three government regimes regarding the promotion of human rights, particularly freedom of expression which is This is because the government was worried about the development of individualism-liberalism in a family state.⁴⁰ Despite their claims, the practical implementation of these policies has led to a shift towards totalitarianism and even authoritarianism from one regime to another. This authoritarian trend is evident through measures aimed at limiting freedom of expression, as reported by the Indonesian Legal Aid Foundation (YLBHI).⁴¹ As a result, there is a tug-of-war over the importance of promoting human rights, especially the right to freedom of speech. The reason for this struggle lies in the fear that advocating human rights, particularly freedom of

³⁵ Ni Made Martini, "The Impact of Draft Ratification..."; Sufiana Julianja, "Restrictions on Freedom of Expression in Social Media: Evaluation of the Electronic Information and Transaction Law in the Perspective of Human Rights," *Padjadjaran Law Review*, Volume 6, December 2018, 27-28.

³⁶ Zaka Firma Aditya & Sholahuddin Al-Fatih, "Indonesian Constitutional Rights: Expressing and Purposing Opinions on the Internet," *The International Journal of Human Rights*, Oct 2020, 1.

³⁷ Clara Staples, "Freedom of Speech in Indonesian Press...", 55.

³⁸ Contrast, 4-Year Evaluation Record of the Performance of the Government of Joko Widodo-Jusuf Kalla Indonesian Cabinet Work, Human

Rights Sector, Human Rights is Not a Priority, Jakarta: Kontras, 2018, 20.

³⁹ Mahathir Muhammad Iqbal, "Quo Vadis Upholding Human Rights in Indonesia," *Al-Himayah Journal*, Volume 3 Number 1 March 2019, 11.

⁴⁰ Andi Pradikta Alvat, "Politics of Law Human Rights Protection In Indonesia," *Daulat Hukum Journal*, Volume 2 Issue 4, December 2019, 518-519.

⁴¹ YLBHI, "One Year of Jokowi-Ma'ruf: Trampling Law and Human Rights." <https://ylbhi.or.id/formasi/siaran-pers/satu-tahun-jokowi-maruf-menginjak-injak-Hukum-dan-hak-asasi-human>, October 2020, access March 4, 2023.

expression, might challenge the prevailing spirit of totalitarianism in the country. The people in power seek to minimize such potential disruptions as much as possible.

2. The Ambiguity of Understanding of Freedom of Expression

Legal vacuum concerning the promotion of freedom of speech is partly attributed to the ambiguity surrounding its understanding. Occasionally, freedom of speech is used interchangeably with freedom of expression, opinion, and even to seek or receive information, leading to confusion and inconsistency in legal frameworks and policies.⁴² This interchangeable use of terms can be traced to the initial formulation of the Universal Declaration of Human Rights (UDHR) in 1948.

Article 19 of the UDHR established the right to freedom of opinion and expression, encompassing freedom to seek, receive, and convey information and ideas through various media. However, several opinions equate the right to freedom of expression, opinion, and speech.⁴³ Bagir Manan is one such advocate who supports this viewpoint. According to Manan, these expressions hold identical meanings,⁴⁴ leading to the conclusion that there is no need for differentiation between them. This perspective implies that analyzing freedom of opinion inherently encompasses discussions about freedom of expression and speech, and vice versa.

Both Articles 19 of the UDHR and 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) focus on the right to freedom of expression, reflecting a shared

intent and meaning. However, there are subtle differences in their formulations. While both articles emphasize the right to freedom of expression, Article 19(2) of the ICCPR provides a more comprehensive scope compared to the UDHR. According to the ICCPR, this right includes freedom to seek, receive and impart information and ideas, through various mediums, such as speech, writing, print, works of art, or any other form of media. In essence, both documents firmly uphold the fundamental right to freedom of expression, albeit with some distinctions in their descriptions and contexts.

Article 19 (2) of the ICCPR provides a comprehensive perspective on freedom of expression, encompassing various forms of communication. The common term used in this context is an expression, defined in the Big Indonesian Dictionary (KBBI) as the act of disclosing or stating something.⁴⁵ This definition implies that expression involves revealing, or conveying information through different mediums, such as spoken words (oral), opinions (oral or written), printed or electronic data, publications (books, magazines, or journals), artistic works (films, poetry or dance), or other forms of media (gestures). In essence, freedom of expression can be understood as a collection of rights that allow individuals to engage in the activity of disclosing their thoughts, opinions, and information through diverse means of communication.

Freedom of expression is a comprehensive right that encompasses more than just the right to express opinions. It includes freedom to seek, receive and disseminate information or ideas, through various mediums like

⁴² Alan Sears, "Protecting Freedom of Expression over the Internet: An International Approach," *Notre Dame Journal of International & Comparative Law*, Vol. 5, 2015, 172; Peiroll Gerard Notanubun, "Juridical Review...", 12.

⁴³ Muhammad Roqib, Happy Anugraha Sutrisno Putra, Anwar Noris and Hotma Parlindungan

Ambarita, "The Right to Freedom of Expression and Opinion in Indonesia and in the United States," *Legal Perspectives*, Vol 20 No. May 1, 2020, 43.

⁴⁴ Bagir Manan, *Public Politics of the Press*, Jakarta: Press Council, 2014, 37.

⁴⁵ KBBI, <https://kbbi.web.id/ekspresi>, accessed March 7, 2023.

printed, and artistic works, as well as other forms of media.⁴⁶ This right extends to the pursuit of truth and knowledge,⁴⁷ and enables individuals to criticize public policies,⁴⁸ as well as participate in decision-making processes, fostering open discourse.⁴⁹ Moreover, freedom of expression serves as a foundational right that supports the enjoyment of the others, such as the right to freedom of association, assembly, and even to vote and be voted for.⁵⁰

The ambiguity in understanding the rights incorporated in freedom of expression remains evident in several laws and regulations in Indonesia. This lack of clarity is reflected in the attached table 2.

The table shows that some legal formulations combine multiple rights into one, such as Articles 1 of Law No. 9 of 1998 and 28 paragraph (1) of Law No. 11 of 2008. In addition, some formulations equate several rights into one, namely Articles 14 and 23 of Law No. 39 of 1999. Certain formulations intend to regulate a specific right but inadvertently become part of another one. For example, public meetings (Article 9 of Law No. 9 of 1998) are not a right to freedom of expression but are part of freedom of assembly. Fake news (Article 28 paragraph (1) of Law No. 11 of 2008) differs from false speech because it imposes limitations on the right to freedom of speech. The hate speech or hostility (Article 28 paragraph (2) Law no. pertains to a distinct aspect highlighting the prohibition of disseminating information that incites hatred or hostility based on specific characteristics.

The National Legislative Body has shown little interest in addressing the ambiguity surrounding regulations on freedom of expression, specifically that of speech. It is believed that there are no significant problems in regulating these rights, leading them to disregard the need for a specific law on freedom of speech. The policy to formulate such a law was not included in the 2020 to 2024 National Legislation Program (DPR RI Decree No. 8/DPR RI/II/2021-2022). However, Article 28 of the 1945 Constitution grants the authority to enact laws related to freedom of expression, and speech.

Efforts to Strengthen the Promotion of Freedom of Speech

1. Synchronization of Regulations on Freedom of Speech

To strengthen the promotion of freedom of speech, the primary focus should be on harmonizing and synchronizing laws and regulations, especially those related to that expression. As previously explained, it is essential to understand the notions that all rights included in freedom of expression are synonymous. Freedom of expression encompasses various aspects, such as the right to freedom of opinion, speech, press, information, and thought. Therefore, ensuring legal certainty requires aligning and coordinating these rights with one another.

Synchronization of laws and regulations is a vital feature of a well-organized legal system within a country. Its main objective is to prevent conflicts and contradictions between different types of regulations and

⁴⁶ Marwandianto and Hilmi Ardani Nasution, "The Rights to Freedom...", 2.

⁴⁷ Larry Alexander, *Is There A Right to Freedom of Expression*, New York: Cambridge University Press, 2005, 128.

⁴⁸ Lawson and Schermers, "Leading Cases of the European Court of Human Rights," *Ars Aequi Libri*, Nijmegen, 1997, 76.

⁴⁹ UNESCO, *Toolkit on Freedom of Opinion and Expression for Information Activists*, Paris: UNESCO, 2003, 17.

⁵⁰ Human Rights Committee, "Freedoms of Opinion and Expression," 102nd Session, Geneva, 11-29 July 2011, 1.

rules.⁵¹ Such conflicts tend to occur when statutory regulations are enacted at certain times by different bodies or institutions. According to Soerjono Soekanto and Sri Mamuji, to ensure the integrity of legal framework, it is essential to identify and resolve any conflicting contents, both vertically (between higher and lower regulations) and horizontally (between newly issued and old regulations).⁵² This process of verification and evaluation is essential to maintain consistency and avoid contradictions. Soerjono Soekanto and Sri Mamuji emphasized the need for vertical synchronization, which involves evaluating the content of regulations at various hierarchical levels. Peter Mahmud Marzuki uses the term harmonization when verifying the contents of specific and more general regulations.⁵³ Regardless of the terminology used, the significant point is to ensure that no contradictory or conflicting elements exist between different regulations. When conflicts do arise, certain principles guide the resolution, for instance, higher hierarchical regulations take precedence over lower ones, newly issued regulations supersede old ones, and specific policies override general ones. By adhering to these principles, legal framework maintains coherence and clarity.

The concept of synchronizing regulations to promote freedom of speech involves aligning and adjusting its formulation with other rights categorized under that of expression. This synchronization applies both vertically and horizontally. Vertically, Article 28F of the 1945 Constitution provides a clear definition of the right to freedom of speech or communication, as the privilege of every person to speak or communicate, fostering personal development and a conducive social environment. This definition must remain

consistent across all regulations under the Constitution. Therefore, it is essential to avoid any form of confusion between the right to speak or communicate and other related privileges, such as the right to think, have an opinion, or express oneself. Horizontally, specific laws have been enacted for various rights within freedom of expression. For instance, the right to freedom of opinion, the press, and information have dedicated policies, namely Law No. 9 of 1998, Law No. 40 of 1999, and Law No. 19 of 2016, respectively. However, notably missing is a dedicated law for freedom of speech. To address this gap, it is imperative to formulate a specific law on freedom of speech. This measure would not only provide legal clarity but also prevent any overlap or confusion in the administration of these rights.

2. *Strengthening Regulations on Freedom of Speech*

To effectively promote human rights, especially freedom of speech, it is important to enact specific laws that address three essential aspects, namely clear definition, limitations, and resolution of violations. By addressing these three significant aspects in the formation of laws, a clear distinction can be made between the full profile of freedom of speech and other rights encompassed within that of expression, fostering a robust legal framework for the promotion and protection of human rights.

a. *The Definition of Freedom of Speech is Different from Other Rights*

The definition of freedom of speech should stay true to its essence as a form of verbal expression. Etymologically, speaking is synonymous with talking or communicating

⁵¹ Syahlan S., "Effective and Efficient Synchronization in Harmonization of Indonesian Regulations," *Journal of Human Rights, Culture and Legal System*, 1(1), 2021, 59.

⁵² Soekanto and Sri Mamuji, *Normative Legal Research, A Brief Overview*, Jakarta: Rajawali Press, 1990, 85.

⁵³ Peter Mahmud Marzuki, *Legal Research*, 99.

orally.⁵⁴ While "said" means giving birth to the contents of the heart with words.⁵⁵ In contrast, opinion involves the act of conveying thoughts, assumptions, estimations or conclusions.⁵⁶ It is important to distinguish between the simplicity of speaking and the more complex nature of expressing an opinion, as they have different meanings and implications.

Asides from defining speaking, it is equally essential to establish a clear definition of the term public within which this activity occurs. The language dictionary defines the public as a setting involving many people or the general population.⁵⁷ This formulation indicates the existence of public spaces and domains,⁵⁸ that are accessible and open to numerous individuals.⁵⁹ It also distinguishes these public areas from private ones.⁶⁰ With this distinction, it can be understood that an activity or process falls under the category of free speech, in circumstances where it is carried out in a public space.

Based on the elements of speak and public, freedom of speech is defined as the right of every individual to express themselves freely and responsibly in public spaces, fostering personal growth and contributing to the environment, while adhering to the applicable regulations. This meaning clearly distinguishes it from the definitions of freedom of expression, the press and electronic information. Freedom of opinion is defined as the right of every person to freely and responsibly express their viewpoints in

public, whether through oral, or written means, in accordance with applicable regulations.⁶¹ Meanwhile, freedom of the press grants everyone the right to seek, obtain, possess, store, process and disseminate information in various forms, such as writing, sound, images, data and graphics, using print and electronic media as well as other available channels, responsibly and in compliance with relevant regulations (UU No. 40 of 1999). Freedom of information is defined as the right of every individual to seek, obtain, possess, store, process and convey information through various available channels, freely and responsibly (Article 28F of the 1945 Constitution).

The differences between freedom of speech and expression are shown in the attached table 3.

The content of freedom of speech is distinct from the categories of freedom of opinion, the press, and electronic information. The classification of rights delivery depends on the form of communication. For instance, assuming rights are conveyed through demonstrations or free speech involving a large number of people, it is categorized as freedom of expression. On the other hand, supposing rights are conveyed through writing or reporting in mass media, it is categorized as freedom of the press. Assuming the delivery of rights involves various forms of writing, sound, pictures, maps, plans, photographs, electronic data interchange, and mails, telegram, telex,

⁵⁴ KBBI, <https://kbbi.web.id/spoke>, accessed March 11, 2023.

⁵⁵ KBBI, <https://kbbi.web.id/kata>, accessed March 11, 2023.

⁵⁶ KBBI, <https://kbbi.web.id/dapat>, accessed March 11, 2023.

⁵⁷ KBBI, <https://kbbi.web.id/public>, accessed March 11, 2023.

⁵⁸ Dewi Parliana, "Dichotomy of Public and Private Spaces in Urban Communities (2002 Literature Study)," *Research, National Institute of Technology*, November 2002, 2.

⁵⁹ Yudi Purnomo, Mira S. Lubis, M. Nurhamasyah and Mustikawati, "The Concept of Student Public Open Space as a Liaison between Units at Tanjungpura University," *Langkau Betang*, Vol. 1/No. 1/2014, 3.

⁶⁰ Rahil Muhammad Hasbi, "The Role of Public and Private Spaces in Producing and Consuming Social Space, Case Study of Burgazada Island, Istanbul, Turkey," *Vitruvian: Journal of Architecture, Building & Environment*, Vol. 5, No. 1, 2015, 17.

⁶¹ Sayuti, *Freedom of Opinion According to the Indonesian Law State*, Yogyakarta: Gading, 2021, 193.

telecopy or letters, signs, numbers, access codes, symbols or processed perforations like analogous, digital, electromagnetic, optical etc, which can be seen, heard and understood through electronic media (UU No. 19 of 2016), it is considered as electronic freedom of information. When rights are directly presented through spoken words or speech in public spaces, without fitting into the aforementioned categories of demonstration, free speech, writing or reporting in mass or electronic-based media, it is referred to as freedom of speech.

b. Concrete Restrictions on Freedom of Speech

The scope of freedom of speech does not need an explicit definition, as it is a natural aspect of human expression. However, what needs to be formulated are the boundaries and limitations regarding speech, conversation or communication allowed in public spaces. These limitations should adhere to the general principles that apply to human rights, including freedom of speech.

The ICCPR1966 (International Covenant on Civil and Political Rights) lays down specific limitations that apply to human rights. These limitations include 1. the obligation to respect the rights or reputation of others, 2. protect national security, 3. maintain public order, 4. protect public health, and 5. respect moral values. Similarly, the Syracuse Principle echoes these limitations, but it further distinguishes between public order and safety, and introduces an additional form of restriction, namely limitation on public trial.⁶² While the 1945 Constitution excludes protection for

public health, it includes an additional limitation, such as respect for religious values, alongside the aforementioned points. This inclusion is understandable considering the foundation of Indonesia is based on the Pancasila, which places significant emphasis on the principle of divinity in the life of the nation and state.

The restrictions on human rights as defined in the ICCPR 1966, the 1945 Constitution and the Siracusa Principles, are automatically applicable to freedom of speech. These restrictions serve to balance and protect the rights of individuals and society as a whole. However, a significant challenge arises in determining the precise magnitude or severity of violations concerning these restrictions. Concrete and standardized criteria are essential to gauge the extent of these violations accurately. There is a pressing need to develop specific guidelines and parameters to ensure a fair and consistent approach in concretely assessing and addressing the magnitude of such infringements.

The concrete assessment of violations of obligations in protecting national security, maintaining public security and order, safeguarding public health, and upholding the principles of justice, should rely on universally applicable principles, rather than being exposed to the subjective interpretation of officials in the field. For example, during times of emergency or war, certain restrictions on individual actions are deemed necessary,⁶³ and detaining suspected perpetrators of terrorism may be essential in maintaining public order.⁶⁴ Similarly,

⁶² Diego Steven Silva and Maxwell 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," *Health and Human Rights Journal*, 17, No. 12015, 53-54.

⁶³ Osgar S. Matompo, "Restrictions on Human Rights in the Perspective of an Emergency Situation," *Journal of Media Hukum*, Vol. 21 No.1 June 2014, 71.

⁶⁴ Arief Rianto Kurniawan and Yuliana Primawardani, "Proportionality of Human Rights Restrictions in Article 28 of the Law on the Eradication of Criminal Acts of Terrorism," *Journal*

restrictions on travelling during the pandemic can be justified to safeguard public health.⁶⁵ The prohibition of the court by the accused, attorneys, or visitors is another example of implementing measures to uphold the principles of justice.⁶⁶ These general principles help ensure a fair and consistent approach when concretely assessing and addressing the magnitude of violations in various contexts.

To ensure respect for the rights and reputation of others, as well as adherence to moral and religious values, clarity is essential in identifying aggrieved parties and the specific part harmed, either based on their moral (social, cultural, customs, or manners) or religious values. For example in terms of losses based on defamation, such cases have experienced a sharp increase. Even the Directorate of Cyber Criminal Investigation of the Republic of Indonesia Police stated that 1,451 reports were filed in 2017.⁶⁷ However, it is critical to establish that the aggrieved party feels humiliated,⁶⁸ as well as evidence of character assassination with⁶⁹ malicious intent⁷⁰ in a public space.⁷¹ This specificity is

important not only to protect the rights of the concerned individual but also to prevent any manipulation of political interests. When the individual is not addressed directly, due to lack of evidence on malicious intent in a public space, the expression cannot be categorized as an act of defamation. It is necessary to concretely define measures of acts that violate certain moral and religious values. The aggrieved party should be someone who adheres to a specific system of moral or religious values, and it must be proven that the act was carried out with malicious intent in a public space. It is important to differentiate this from defamation cases, as the criteria may vary based on the nature of the violation.

Lack of clear and concrete measures to assess the extent of humiliation of the rights or reputation of others, as well as the defamation of moral and religious values, could lead to a disproportionate and excessively subjective application of the law.⁷² This in turn tends to position the government as being against criticism,⁷³ and create a repressive environment,⁷⁴ with

of Indonesian Legislation, Vol. 16 No.1 March 2019, 25; Mirza Satria Buana, Wahyudi Djafar and Ellisa Vikalista, "Problems and Construction of Regulatory Norms for Restricting Freedom of Association in Indonesia," *Journal of Law IUS QUIA IUSTUM*, No. 3 Vols. 28, Sept. 2021, 592.

⁶⁵ Ari Wirya Dinata and M. Yusuf Akbar, "Restrictions on the Right to Move Through Entry Prohibitions and Travel Restrictions During the Spread of the Covid-19 Virus According to International Law and Indonesian Law," *Journal of HAM*, Volume 12, Number 2, August 2021, 305.

⁶⁶ Sofyan Sitompul, "Maintaining the Authority and Dignity of the Judiciary Through Trial and Security Protocols,"

<https://www.mahkamahagung.go.id/id/artikel/4475>, access April 15, 2023.

⁶⁷ Marwandianto and Hilmi Ardani Nasution, "The Rights to Freedom...", 3.

⁶⁸ Marwandianto and Hilmi Ardani Nasution, "The Rights to Freedom...", 8.

⁶⁹ Kirana Apsari, "Harmonization of the Right to Freedom of Opinion and Expression and Individual

Rights to Reputation in a Human Rights Perspective," *Journal of Kertha Negara*, Vol. 9 No. 10 of 2021, 786.

⁷⁰ Mahrus Ali, "Defamation Through Information Facilities and Electronic Transactions (Study of MK Decision No. 2/PUU-VII/2009)," *Journal of the Constitution*, Volume 7, Number 6, December 2010, 144.

⁷¹ Saepul Rochman, Haerul Akmal and Yaffi Jananta Andriansyah, "Defamation Through Social Media: Comparison of Positive and Islamic Criminal Law," *Dictum: Journal of Sharia and Law*, Volume 19 Number 1 July 2021, 35.

⁷² Marwandianto and Hilmi Ardani Nasution, "The Rights to Freedom...", 23. Sufiana Julianja, "Restrictions on Freedom of Expression...", 16.

⁷³ Latipah Nasution, "The Right to Freedom of Opinion and Expression in Public Spaces in the Digital Age," *Is the Law and Justice Bulletin*, Volume 4 Number 3, 2020, 39.

⁷⁴ Alon Harel, "Freedom of Speech."

political nuances.⁷⁵ As an analogy, two cases were used for this illustration. For example, Husein reported Haikal Hasan concerning the Lecture Case on Dreams of Meeting the Prophet Muhammad. The reports, filed with the Metro Jaya Regional Police under Registration Number TBL/7433/XII/YAN. 2.5/2020/SPKT PMJ dated December 14, 2020, accused Haikal Hasan of violating the prohibition on disseminating information containing hostility based on religion by the ITE Law. However, in this case, there are at least two unclear aspects of the violation: First, what caused Husein (the complainant) to feel aggrieved is unclear, considering that the dream case is a personal experience of the dreamer and cannot be scientifically proven, although it is recognized in Islam. Second, the reason for charging Haikal Hasan under the ITE Law remains ambiguous, especially when the information was conveyed directly during the lecture.

In another case, Edy Mulyadi faced reports filed by various parties to the North Sulawesi Regional Police, East Kalimantan Regional Police and the Republic of Indonesia Police in Jakarta. The case pertained to the statements made by Mulyadi in The New State Capital Is a Place for Jin Throwing Children. Edy Mulyadi was suspected of violating the prohibition on spreading hate speech based on the ITE Law. But a critical issue emerges, is the reporter an individual or group of persons who feel directly harmed by the statements? This aspect requires clarification because anyone could be reported on the grounds of allegedly exceeding the prohibition limit on freedom of speech, even

though the reporter is not personally or directly affected. Clarity is essential to prevent the misuse of reporting and protect the fair exercise of freedom of speech.

These measures are integral to defining the limitations of freedom of speech, and must be explicitly stated in regulations,⁷⁶ based on Pancasila values (the living law) and the principles of international human rights protection. This regulations is in the form of law or government policies, providing a clear framework to avoid misinterpretations,⁷⁷ and prevent the misuse of freedom of speech for momentary political interests.⁷⁸ By having specific regulations, a comprehensive and consistent approach was established to ensure that the restrictions on freedom of speech are well-defined, justifiable, and align with fundamental values. This helps safeguard the fair and responsible exercise of freedom of speech while upholding the principles of Pancasila and international human rights standards.

c. Settlement of Law Violations Through Ways Out of Court

The resolution of human rights violations, with a particular focus on freedom of speech, should prioritize non-procedural persuasive approaches.⁷⁹ In this context, the principles embodied in Pancasila hold the utmost significance and need to be prioritized. Precept IV of Pancasila emphasizes the value of reaching a consensus through open deliberation, underscoring the importance of constructive dialogue to address conflicts effectively.⁸⁰ It is crucial to comprehend that

⁷⁵ Gehan Gunatilleke, "Justifying Limitations on the Freedom of Expression," *Human Rights Review*, 22, 2021, 106.

⁷⁶ Fatmawati, "Protection of the Right to Freedom of Religion and Worship in the Indonesian Law State," *Journal of the Constitution*, Volume 8, Number 4, August 2011, 490; Diego Steven Silva and Maxwell J. Smith, "Limiting Rights and Freedoms...", 56.

⁷⁷ Zico Junius Fernando, Pujiyono, Umi Rozah, and Nur Rochaeti, "The Freedom of Expression...", 9.

⁷⁸ Ismail Hasani, and Halili, "Human Rights and Constitutionality Issues of Blasphemy Law in Indonesia," *Journal of the Constitution*, Volume 19, Number 2, June 2022, 426.

⁷⁹ Sayuti, *Freedom of Opinion...*, 221.

⁸⁰ Read Yusdiyanto, "The Philosophical Meaning of the Fourth Precepts of Pancasila in the Democratic

cases involving freedom of speech often revolve around individuals or groups advocating for their rights and expressing their viewpoints. These actions do not necessarily involve general criminal acts but are driven by the pursuit of asserting and standing up for their rights and beliefs.

The non-procedural persuasive form of settlement involves resolving legal violations outside the court, through approaches such as out-of-court settlement often associated with Integrative Law Theory,⁸¹ or restorative justice.⁸² This approach requires a high level of awareness from both the suspect and law enforcement officials. For the alleged party, awareness represents an acknowledgment of the violation committed, aimed at preventing its recurrence in the future. Similarly, law enforcement officials, especially the police, must be aware of their role as protectors of society.⁸³ This perspective ensures that individuals engaging in free speech activities are not treated as enemies but as fellow citizens deserving protection.

Despite the emphasis on high awareness in addressing law violations, the promotion of freedom of speech has been plagued by numerous peculiar incidents. Cases involving defamation, treason, blasphemy, hate speech or fake news, have frequently been cited as reasons for arresting individuals exercising their right to free speech.⁸⁴ For example, in 2019 Saiful Mahdi was found guilty by the Banda Aceh District Court, resulting in a three-month prison sentence and a fine of IDR

10,000,000.00 for a criminal act of defamation. In 2017, Himma Dewiyani Lubis was found guilty by the Medan High Court and sentenced to one year in imprisonment and a fine of IDR 10,000,000.00 in a hate speech case. Additionally, in 2016, Basuki Tjahja Purnama was found guilty by the North Jakarta District Court, leading to a two-year prison sentence in a blasphemy case.⁸⁵ These examples show that a significant portion of verdicts in free speech activities is decided by the courts. The prevalence of such cases raises concerns about the true extent of freedom of expression in practice, and it underscores the need for a more balanced approach to protecting this fundamental right.

The failure to employ out-of-court settlement approaches in cases concerning violations of freedom of speech raises concerns about the application of Pancasila values at the national level and the principles of promoting human rights globally. In Indonesia, Sila II of Pancasila emphasizes human dignity and worth, while Sila IV forms the basis for resolving state and humanitarian issues through deliberation. The profound respect for human values was evident when the founding fathers of Indonesia included it in the opening paragraph of the 1945 Constitution, followed by articles on the promotion of human rights, especially after subsequent amendments. Moreover, Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution provides a basis for resolving

System in Indonesia", *Fiat Justicia Journal of Law*, Volume 10 Issue 2, April-June 2016, 259; Also read Efendi Susanto, "The Fourth Precept of Pancasila and the Current Indonesian Democratic Climate," *Legal Issues*, Volume 50 No.1, January 2021, 84.

⁸¹ Romli Atmasasmita, *Integrative Law Theory*, Yogyakarta: Genta Publishing, 2012, 101.

⁸² Josephin Mareta, "Application of Restorative Justice Through Fulfillment of Restitution for Victims of Child Crime," *Journal of Indonesian Legislation*, Vol 15 No.4 - December 2018, 312-313.

⁸³ Andy Aydın-Aitchison and Ceren Mermutluoğlu, "Mapping Human Rights to Democratic Policing Through the ECHR," *Security and Human Rights*, 30, 2019, 72; Kitsuron Sangsuvan, "Balancing Freedom of Speech on the Internet Under International Law," *North Carolina Journal of International Law and Commercial Regulation*, 39, 2014, 701.

⁸⁴ Peiroll Gerard Notanubun, "Juridical Review...", 119; Mahathir Muhammad Iqbal, "Quo Vadis Upholding Human Rights...", 11-12.

⁸⁵ Zaka Firma Aditya & Sholahuddin Al-Fatih, "Indonesian Constitutional Rights...", 19.

violations through means outside the court, such as consultations, negotiations, mediation, conciliation, and expert judgment. Given these considerations, prioritizing out-of-court settlements in freedom of speech cases is not excessive, rather it aligns with the spirit of promoting human rights and upholding the values enshrined in Pancasila.

When out-of-court settlement approaches cannot be reached, resorting to procedural means in court becomes the last option. However, in applying procedural law in court, it is important to maintain proportionality and avoid excessive measures.⁸⁶ Decisions should not solely rely on the Criminal Code but must consider the broader context and implications of Decisions.⁸⁷ Furthermore, the independence and impartiality of the judge are essential factors in ensuring fair judgments.⁸⁸ While a verdict may be established, the sentence should not cause harm or silence efforts to promote freedom of speech. Striking a balance between upholding the law and safeguarding the right to free expression is paramount to preserving a just and democratic society.

Conclusion

In conclusion, legal vacuum concerning the promotion of freedom of speech in Indonesia is caused by two main factors namely the existence of tug-of-war over the importance of promoting human rights, and the persistent ambiguity in the understanding of freedom of expression. Even under the leadership of President Joko Widodo, the conflicting views on the significance of promoting human rights persisted. The

desire to establish a family state was hindered by the influence of totalitarianism. Additionally, the ambiguity surrounding the interpretation of freedom of expression continues to be a challenge. For instance, the Joko Widodo government did not see the urgent need for a specific law on the promotion of freedom of speech, as they considered existing regulations, such as the laws on freedom of expression and information, to be sufficient for addressing issues related to that of speech. This stance further contributes to the existing legal vacuum in safeguarding and promoting freedom of speech in Indonesia.

It is imperative to undertake two significant actions, namely synchronization of regulations and reinforcement of specific laws to increase the promotion of freedom of speech. Synchronization entails the careful alignment of freedom of speech with other rights within the broader scope of freedom of expression, ensuring consistency both vertically and horizontally. The enactment of temporary strengthened regulations through the formulation of specific laws is essential. These laws should encompass clear definitions of freedom of speech, distinct restrictions that are well-defined, and a focus on utilizing out-of-court approaches as a top priority for resolving legal violations related to freedom of speech. By implementing these measures, a more coherent and robust framework for the promotion and protection of freedom of speech can be achieved.

⁸⁶ Marwandianto and Hilmi Ardani Nasution, "The Rights to Freedom...", 23.

⁸⁷ Bambang Heri Supriyanto, "Law Enforcement Regarding Human Rights (HAM) According to Positive Law in Indonesia," *Journal of AL-AZHAR*

INDONESIA SERIES OF SOCIAL PRANATA, Vol . 2, No. 3, March 2014, 151.

⁸⁸ Muhammad Amin Putra, "Existence of State Institutions in the Enforcement of Human Rights in Indonesia," *Fiat Justicia Journal of Legal Studies*, Volume 9 No. 3, July-September 2015, 257

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Table 1. Forms of Government Regime Policies in Indonesia that are Counterproductive to the Promotion of Human Rights

No	Government Regime	Form Policy	The Core of Counterproductive Policies
1	Old Order	Presidential Decree July 5, 1959	The implementation of the 1945 Constitution was marred by an incomplete formulation of human rights
		Guided democracy	Centralizing power during the tenure of President Soekarno by limiting political freedom
2	New Order	Tap MPR No. I of 1978 to MPR Decree No. I of 1998	Defending the 1945 Constitution becomes challenging due to its incomplete formulation of human rights
		UU no. 5 of 1985 concerning Referendums	The incomplete formulation of human rights in the 1945 Constitution made it difficult to amend
3	Reform Era	UU no. 1 of 2023 concerning the Criminal Code	The article on insulting the president restricts freedom of expression by criminalizing criticism or negative remarks about the president
		UU no.11 of 2008-UU No. 19 of 2016 concerning ITE	Repressive punishment articles were used to restrict freedom of expression by imposing severe penalties on those who criticized the government or its policies

Table 2. Ambiguity of the Formulation of the Right to Freedom of Expression in Legislation

No	Regulation	Formula	Grouped	Should
1	Law No. 9 of 1998	Conveying thoughts orally and in writing (Article 1)	Freedom of opinion	It is necessary to distinguish between conveying thoughts in public places, through mass, and electronic media
		General meeting (Article 9)	Form of freedom of expression	This right is part of freedom of assembly
2	Law No.11 of 2008	Spread of fake news (Article 28 paragraph 1)	Electronic freedom of information	Fake news and words or talk are distinct concepts that should not be confused
		Dissemination of information that promotes hatred or hostility based on ethnicity, religion, race or class (Article 28 paragraph 2)	Freedom electronically informed	Do not confuse electronic information dissemination with casual conversation
3	Law No. 39 of 1999	The right to communicate and obtain information (Article 14)	Unified freedom of communication and information	The right to communicate and be informed are distinct
		Issuing and disseminating opinions verbally and or in writing through print or electronic media (Article 23)	Unified freedom of opinion, press, and electronic information	Distinguished between freedom of opinion, press, and electronic information

Table 3. Differences in Content Definition and Place of Implementation between Freedom of Speech and other Freedom of Expression

No	Kind of Freedom Expression	Definition Load	Place of Exercise of Rights
1	Freedom of speech	The right to speak or express oneself	Public area
2	Freedom of opinion	Right to opinion	Public space
3	Press freedom	The right to seek, obtain, possess, store, process and convey information, whether in the form of writing, sound and images, as well as data and graphics	Print or electronic media
4	Freedom of electronic information	The right to seek, obtain, possess, store, process and convey information	Electronic media