PUBLIC DEBATE AND ARTISTIC EXPRESSION: A JURISPRUDENTIAL ANALYSIS OF FREEDOM OF EXPRESSION IN EUROPE AND INDONESIA

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ABSTRACT

Objective: This research aims to critically analyze various decisions of the European Court of Human Rights and the Supreme Court of the Republic of Indonesia regarding freedom of expression in the context of public and artistic debates, which, in practice, lack a clear demarcation line to decipher the abstract theme of freedom of expression.

Methodology: The author conducted an in-depth review of the court decisions and critically analyzed them, supported by various international, European, and Indonesian legal instruments. Therefore, a qualitative approach predominates in this research.

Results and Conclusions: This article concludes that the abstract theme of freedom of expression inherent in human rights is determined by the knowledge and preferences of the judges, leading to a lack of consistency in their decisions. On the other hand, various international, European, and Indonesian legal instruments have guaranteed freedom of expression for every individual, but these guarantees are not always adhered to by the European Court of Human Rights and the Supreme Court of the Republic of Indonesia.

Originality/value: This research contributes by identifying the issues arising from various judicial decisions, providing guidance for judges adjudicating cases related to freedom of expression. This can enrich the discourse on freedom of expression and help prevent judges from falling into the scenarios created by their predecessors.

Keywords: jurisprudence, freedom of expression, European Court of Human Rights, Supreme Court of the Republic of Indonesia, public debate, artistic expression

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DEBATE PÚBLICO E EXPRESSÃO ARTÍSTICA: ANÁLISE JURISPRUDENCIAL DA LIBERDADE DE EXPRESSÃO NA EUROPA E NA INDONÉSIA

RESUMO

Objetivo: Esta investigação visa analisar criticamente várias decisões do Tribunal Europeu dosDireitos do Homem e do Supremo Tribunal da República da Indonésia relativas à liberdade deexpressão no contexto de debates públicos e artísticos, que, na prática, não têm uma linha de demarcação clara para decifrar o tema abstrato da liberdade de expressão.

Metodologia: O autor realizou uma revisão aprofundada das decisões judiciais e analisou-as criticamente, apoiada por vários instrumentos jurídicos internacionais, europeus e indonésios. Portanto, predomina uma abordagem qualitativa nesta pesquisa.

Resultados e Conclusões: Este artigo conclui que o tema abstrato da liberdade de expressão inerente aos direitos humanos é determinado pelo conhecimento e preferências dos juízes, levando a uma falta de consistência em suas decisões. Por outro lado, vários instrumentos jurídicos internacionais, europeus e indonésios têm garantido a liberdade de expressão para todos os indivíduos, mas essas garantias nem sempre são respeitadas pelo Tribunal Europeu dosDireitos do Homem e pelo Supremo Tribunal da República da Indonésia.

Originalidade/valor: Esta pesquisa contribui identificando as questões decorrentes de várias decisões judiciais, fornecendo orientação para juízes que julgam casos relacionados à liberdade de expressão. Isto pode enriquecer o discurso sobre a liberdade de expressão e ajudar a evitar que os juízes caiam nos cenários criados pelos seus antecessores.

Palavras-chave: jurisprudência, liberdade de expressão, tribunal europeu dos direitos humanos, supremo tribunal da república da indonésia, debate público, expressão artística.

1 INTRODUCTION

The pro and con factions concerning hate speech regulations have sparked a contentious debate among scholars, activists, and government officials (Helm & Nasu, 2021; Paz et al., 2020). This debate has arisen due to regulatory responses that include provisions penalizing freedom of expression (Helm & Nasu, 2021). In general, both those in support and those opposed to these regulations share a commitment to the right to freedom of expression, which serves as a cornerstone of democracy (Mchangama & Alkiviadou, 2022). In fact, the affirmation of freedom of expression acts as a yardstick and the foundation upon which a nation can be labeled as democratic (Balkin, 2017; Emerson, 1964; Voorhoof & Cannie, 2010). This consensus mandates the existence of
freedom of expression in various forms, which is a fundamental aspect of state governance (Dahl, 2005; Scanlon, 1972; Strauss, 1991).

Support for freedom of expression also arises from the United Nations Human Rights Council, based on the premise that it is a fundamental right for individuals to hold their own opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers (Aswad, 2018). Furthermore, through General Comment No. 34, the United Nations Human Rights Committee declared that “freedom of opinion and freedom of expression are indispensable conditions for the full development of the person” (United Nations, 2011) and Article 19 of the Universal Declaration of Human Rights (UDHR) protected freedom of opinion and expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (United Nations, 1948).

One of these concepts is referenced by various countries worldwide to actively support the ratification of the UDHR (Messer, 1993) in order to uphold freedom of expression. Moreover, in 1976, through the case of Handyside v. The United Kingdom, the European Court of Human Rights (ECtHR) legitimized, depicted, and provided a broader paradigm that freedom of expression encompasses not only ideas that can be “well-received” but also ideas that are “shock, offend and disturb” (Handyside v. The United Kingdom, 1976). Fundamentally, it is these demands for pluralism, tolerance, and freedom of thought without which there can be no democratic society (Handyside v. The United Kingdom, 1976).

In a socio-historical context, freedom of expression is an inherent human right (Morsink, 1999) recognized worldwide and has become an integral part of states. Even for over two centuries, through the Déclaration des Droits de l'Homme et du Citoyen (Declaration of the Rights of Man and of the Citizen) in France, it was established that 'free communication of ideas and opinions is one of the most precious of human rights,' and during the same period, 'freedom of speech and of the press' was also guaranteed by the First Amendment to the U.S. Constitution (1791), which prohibited Congress from restricting this freedom (Voorhoof & Cannie, 2010) because it is considered the most fundamental human right in democratic societies. In line with this, Matthew H. Kramer
(2021) asserts that every morally upright system of governance is obliged to refrain from punishing communicative activities related to freedom of expression.

However, in practice, it has been noted by Sullivan and Transue (1999), that this right depends on the configuration and political psychology within a country. Even in global trends, including Western democracies, the condition of freedom of expression is assessed as entering a concerning state. This condition places the judiciary in a central position to safeguard freedom of expression from being castrated. This argument aligns with the doctrine of “discretionary power,” which, according to the definition, serves as a means to support the judiciary in exercising judgment freedom - allowing for potential manipulation in the cases they handle (Flauss, 2009). However, as Jean-Francois Flauss (2009), points out, the construction of “discretionary power” is subject to the issues at hand and also depends on the personality of the judges involved.

Furthermore, at regional and national levels, legislation related to freedom of expression has also been enacted (Howie, 2018). However, the choice to uphold procedural standards in the field of freedom of expression has faced criticism (Flauss, 2009). The lack of consistency in judicial decisions regarding freedom of expression has also garnered attention (Mchangama & Alkiviadou, 2021). This reality raises concerns regarding the fundamental right to freedom of expression, which is always a central topic in democratic nations.

Freedom of expression, which often resides in a gray area and tends to lack certainty in legal norms, thus requiring the wisdom and extensive knowledge of judges in interpreting this right, whether it falls within the realm of freedom of expression or not, is where the reflection on this research begins.

With this background, this paper will critically assess freedom of expression in law, considering its limitations as established by the Courts in both Europe and Indonesia. Given the complexity of freedom of expression, which is highly dependent on jurisprudence (Flauss, 2009) and the lack of adequate coordination and systematic harmonization to consistently achieve a level of jurisprudential coherence in interpreting the 'abstract' theme of inherent freedom of expression within human rights, the question arises as to whether it falls into the category of freedom of expression or hate speech.
2 METHODOLOGY

This research employs a normative legal research methodology, which is inherently intriguing. It can be characterized as a literature review or document study that specifically and exclusively delves into various legal documents and materials related to the core issues. Additionally, to complement the complexity of the issues addressed, the research cannot do without a comparative legal research approach, as its nature explicitly attempts to examine various judicial decisions in both Europe and Indonesia that decide cases directly related to freedom of expression.

3 RESULTS AND DISCUSSION

3.1 THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention on Human Rights (ECHR), as stated in Article 10, has affirmed that everyone has the right to freedom of expression, and “this right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority.” In connection with this, in the case of Stoll v. Switzerland (2007) the ECtHR complements Article 10 by stating that “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.” Thus, it is clear that the right to freedom of expression encompasses all forms of expression, both oral and written, including journalistic freedom in print or online formats and all forms of artistic work (Benedek & C. Kettemann, 2013, p. 23).

Article 10 is the only provision within the ECHR whose implementation is accompanied by “duties and responsibilities” regarding the exercise of this right. Consequently, this freedom is not absolute (Voorhoof & Cannie, 2010), Article 10 which contains limitation clauses, obliges individuals who have the right to freedom of speech and freedom of expression to consider the “duties and responsibilities” outlined in Article 10. Based on this, freedom of expression is restricted to protect interests such as security, territorial sovereignty, the preservation of power, public interest, public morals, reputation, or the rights of others necessary in a democratic society. The difficulty, according to Dirk Voorhoof and Hannes Cannie (2010) lies in determining restrictions that strike a balance between rights and obligations that benefit democracy, and this occurs in the complex jurisprudence of the ECtHR (Benedek & C. Kettemann, 2013, p. 23).
3.2 PUBLIC DEBATE EXPRESSION

However, when examining various cases of freedom of expression in the ECtHR, there are several characteristics, including freedom of expression within the realm of public debate (Voorhoof & Cannie, 2010). For example, the case of Romanenko and others v. Russia (2009) reflects the aspect of expression in public debate. In this case, the applicants initially published an article titled “All Power Comes from the Forest” in their newspaper dated January 24-30, 2002. The article quoted an open letter stating, “All these irregularities have clearly been on the rise since the town's police department (timber purchasing quota of 4,500 cubic metres) and the courts' management department of the Supreme Court of the Russian Federation (timber purchasing quota of 3,000 cubic metres) became the forest operators.” This quote was printed in bold, and the source was clearly identified, signed by seventeen individuals including the head of the Dalnerechensk municipal council and his first deputy, the deputy head of the town police, the deputy head of the local department of the Federal Security Service, the deputy head of the tax police, a senior State tax inspector, the deputy head of the department for environmental resources, two directors of regional forest operators, and others (Romanenko and others v. Russia, 2009).

Subsequently, on March 28, 2002, the courts’ management department of the Primorskiy Region filed a civil lawsuit against the applicants as the founders of the newspaper, alleging that the publication had damaged the professional reputation of the department and the authority of the judiciary and the entire judicial system. As a result, the applicants published the letter in its entirety in the newspaper under the title “Ghost Companies and Courts' Management Department at Timber Yards” in response to the civil lawsuit brought against them. This publication also triggered a new defamation lawsuit from Mr. Shulga and the director of the courts' management department of the Primorskiy Region. On June 14, 2002, the Arsenyev Town Court of the Primorskiy Region ruled in favor of Mr. Shulga's action against the applicants.

However, in the assessment of the ECtHR, following the rationale of the Handyside v. The United Kingdom case (1976) and Jersild v. Denmark (1994), a violation of Article 10 has occurred. The ECtHR reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. It is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that...
offend, shock, or disturb. Such are the demands of pluralism, tolerance, and broadmindedness, without which there is no “democratic society.” In conclusion:

The Court finds that the Russian authorities did not adjudicate the defamation claims in compliance with the Convention standards and did not adduce relevant and sufficient reasons for the interference with the applicants' right to freedom of expression. Accordingly, the interference complained of was not “necessary in a democratic society” within the meaning of Article 10 § 2 of the Convention (Romanenko and others v. Russia, 2009 at para.49).

Furthermore, freedom of expression in various forms, especially when it carries criticism, is not solely directed at the government and executive bodies but encompasses a wide range of entities, including members of parliament, public authorities, community leaders, and others who must be prepared to receive sharp criticism (Voorhoof & Cannie, 2010), whether it is conveyed positively or negatively. Judges are also not exempt from scrutiny by the public or the press, which is one of the channels for the exercise of freedom of expression protected by the ECHR.

An example of such a case is the De Haes and Gijsels v. Belgium (1997) case, involving Leo De Haes and Hugo Gijsels, who were also the editors and journalists of the weekly magazine Humo. They extensively criticized the judges of the Antwerp Court of Appeal using harsh language for granting custody of the children to a father who worked as a notary in a divorce case. Previously, in 1984, the notary's wife and mother-in-law had filed criminal complaints accusing him of incest and child abuse, but it was decided that there was no case to answer. Subsequently, three judges and the attorney general of the Antwerp Court of Appeal filed a claim for damages due to the statements made by Leo De Haes and Hugo Gijsels, which were described as severely damaging their reputation. The Brussels Court of First Instance then ordered Leo De Haes and Hugo Gijsels to each pay one franc to each plaintiff for non-monetary damages and ordered the publication of the entire court decision in Humo. Even at the Brussels Court of Appeal level, the judgment stated that Leo De Haes and Hugo Gijsels had “besmirched the honour of magistrats.”

In contrast to the court's judgment, the ECtHR found in the case of De Haes and Gijsels v. Belgium that there had been a violation of Article 10. It was even stated that:

The Court reiterates that the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and
ideas on all matters of public interest, including those relating to the functioning of the judiciary (De Haes and Gijssels v. Belgium, 1997 at para.37).

The route of the case above closely parallels the Case of Colombani and Others v. France (2002), involving two French nationals, Jean-Marie Colombani and Eric Incyan, and the company Le Monde. Initially, the European Commission decided and required precise information regarding the issue of cannabis production in Morocco to consider Morocco's application for European Union membership. They requested the Observatoire géopolitique des drogues (OGD–Geopolitical Drugs Observatory) to conduct an investigation and prepare a report on the production and trafficking of drugs in Morocco. The report contained the names of individuals involved in the drug trade in Morocco. A revised version of the report, with some names removed at the Commission's request, was published in a book and marketed. Based on this report, the Le Monde newspaper published an article referencing the book. However, the original version of the report, initially kept confidential, “leaked” and depicted a tenfold increase in the land area historically used for cannabis production. The current production levels were even considered to position “he, sharif kingdom a serious contender for the title of the world’s leading exporter of cannabis.'

Based on this, Le Monde also published an article based on the details provided by Incyan, with the front page of the newspaper titled “Morocco, world's leading exporter of cannabis,” and a sub-heading: “King Hassan II's entourage implicated by confidential report.” Another article also appeared on page two with the title “Moroccan government implicated in cannabis trafficking according to confidential report,” and a sub-heading: “The report, which was commissioned by the European Union from the Geopolitical Drugs Observatory, says Morocco is the world's leading exporter and the European market's main supplier. It points to the direct responsibility of the sharif authorities in these lucrative activities.”

With the article containing the report, King Hassan II of Morocco submitted an official request to the French Minister of Foreign Affairs to initiate criminal proceedings. Colombani, as the editor-in-chief of Le Monde, and Incyan, the author of the article, were summoned to appear in the Criminal Court of Paris on charges of insulting a foreign head of state and were found guilty. They were each fined 5,000 French francs (FRF) and ordered to pay King Hassan II FRF 1 in damages, along with an additional fine of FRF
10,000. Furthermore, the Court of Appeals also mandated Le Monde to produce a detailed report on the punishment.

Differing from court decisions, to establish a violation of Article 10, ECtHR follows a similar logic as in the case of De Haes and Gijsels v. Belgium (1997). While ECtHR acknowledges that the reasons presented by the respondent state are relevant regarding the national authorities' recognition of foreign heads of state to provide them with a special status, protect them from criticism, and grant them privileges, it deems that there is no reasonable proportional relationship between the restriction of freedom of expression, thus constituting a violation of Article 10 ECHR.

This demonstrates that freedom of expression in any form is well protected by the ECtHR. In fact, several new European democracies have also taken steps to prohibit government bodies from claiming damages for defamation (Romanenko and others v. Russian, 2009).

Therefore, even though the ECtHR has repeatedly affirmed that freedom of expression includes the right to express “shock, offend and disturb” ideas, as seen in various of its judgments, in the Case of Standard Verlags Gmbh v. Austria (No. 2) (2009), the ECtHR acknowledged the findings of the Austrian courts and justified the exercise of freedom of expression, including the convence of ideas in any form. Furthermore, it recognized the right of others to protect their private lives, thereby finding no violation of Article 10. This is evident in several cases, including the Von Hannover v. Germany (No. 2) case (2012).

Thus, it can be observed that the role of the ECtHR in upholding freedom of expression within the realm of public debate does not extend beyond information of public concern. Consequently, safeguarding private life, as construed by the ECtHR, does not fall under violations of Article 10.”

3.3 ARTISTIC EXPRESSION

In addition to the forms of expression described above, in ECtHR judgments, artistic expression also plays a significant role. Article 10, which has such a broad scope, ensures that freedom of expression is not limited solely to public debate. Artistic expression encompasses the act of creating, presenting, or exhibiting, as well as distributing works of art in any form, contributing to a democratic society.
In the case of Vereinigung Bildender Künstler v. Austria (2007), the applicants, an association of artists, organized an exhibition entitled “Das Jahrhundert künstlerischer Freiheit [The Century of Artistic Freedom],” featuring, among other works, a satirical painting titled “Apocalypse.” The painting depicted a collage of various figures, including Mother Teresa, Austrian Cardinal Hermann Groer, and former leader of the Freedom Party of Austria, Jörg Haider, in sexual poses. One of the politicians portrayed in the painting filed a lawsuit against the association that had organized the exhibition. The applicants were fined and prohibited from displaying the painting by the national courts. However, the ECtHR came to a different conclusion than the previous rulings and found a violation of Article 10. Furthermore, the ECtHR stated that the painting was a caricature containing elements of satire. The ECtHR emphasized that “satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.” Referring to Lingens v. Austria (1986), the ECtHR also reminded that, in their capacity as plaintiffs and politicians, individuals should display broad tolerance towards criticism.

Similar to the aforementioned case, a similar situation occurred in the case of Alves Da Silva v. Portugal (2009). Afonso Abrantes, the Mayor of Mortágua, filed a defamation lawsuit against the applicant. The applicant was found guilty and sentenced for parading around the town during a carnival with a puppet featuring symbols of corruption and repeatedly playing a recording containing satirical messages. However, the ECtHR found a violation of Article 10 and stated that the expression performed by the applicant constituted a form of artistic expression containing elements of satire and served as a social commentary.

Indeed, in some cases, such as EON v. France (2013), as well as the cases mentioned above, the ECtHR consistently asserts that “satire is a form of artistic expression and social commentary which, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate.”

While freedom of expression in the form of artistic expression (especially satire) is protected as seen in the cases mentioned above, it did not apply in the case of Palomo Sánchez and Others v. Spain (2011). The ECtHR took a different route compared to the previously discussed cases. Initially, the applicants were delivery personnel for a company who initiated several labor court proceedings seeking recognition as “salaried
workers.” In 2001, the applicants formed a labor union to advocate for their interests. In 2002, the labor union published a monthly bulletin featuring a cover caricature depicting two employees waiting in line to provide sexual favors to and satisfy the human resources manager. Earlier, these two employees had testified against the labor union in labor court. The applicants were dismissed on grounds of serious misconduct for tarnishing the company's reputation through the publication of a cartoon and two articles that were insulting and demeaning. The applicants contested this decision up to the ECtHR, which ultimately found no violation of Article 10 and supported the national court’s judgment.

In this case, the ECtHR completely disregarded its role as a guardian of freedom of expression. The scope of freedom of expression for ideas that are “shock, offend and disturb” was not taken into consideration in finding a violation. The Court also appeared to overlook the arguments made by the applicants, stating:

The cartoon on the cover of the trade-union newsletter, like the two impugned articles, was intended to be critical and to provide information about the salary demands before the employment tribunal and about the conduct of the members of the association of non-salaried delivery men. The use of a satirical drawing and expressions, which might have been regarded as crude or shocking, had in no way referred to the personal or private sphere of the persons in question, but to their role in the dispute at issue (Palomo Sánchez and Others v. Spain, 2011 at para.37).

Additionally, the ECtHR only focused on and highlighted the offensive nature of the cartoons and text in the monthly bulletin of the labor union and did not consider it as satire and a form of artistic expression, deeming the cartoon to be not satirical expression but rather an offensive attack on personal dignity. Only in the dissenting opinions of some judges, the ECtHR was reminded of the nature of the case, which stated:

As regards the cartoon on the newsletter’s cover, it is a caricature, which, while being vulgar and tasteless in nature, should be taken for what it is – a satirical representation. In other cases, the Court has recognised the satirical nature of an expression, publication or caricature. In refusing to take that nature into account in the present case, the judgment gives the curious impression of placing trade-union freedom of expression at a lower level than that of artistic freedom and of treating it more restrictively (Joint dissenting opinion of Tulkens, Björgvinsson, Jočienė, Popović, Vučinić, 2011 at para.11).

Based on the descriptions of the cases above, although the ECtHR has repeatedly emphasized in its judgments that freedom of expression encompasses not only positive expressions but also those that are “shock, offend and disturb” in some cases, particularly expressions related to public debate, artistic expressions, and possibly other forms of
expression, the ECtHR tends to defer to national courts and finds no violation of Article 10 or a non-violation.

3.4 CONSTITUTIONAL AMENDMENTS IN INDONESIA

Before discussing court decisions, it is important to understand the position of freedom of expression in Indonesia to make a comparison with legal cases in the ECtHR and Indonesia. There are numerous cases with specific contexts and characteristics, such as defamation or 'defamation of character,' blasphemy, sexual harassment, and many more that directly relate to freedom of expression. The possibility of this discussion is to provide an initial interesting insight in this research to be adapted for its comparative analysis.

It is important to note that, following Indonesia's declaration of independence, the nation's founding fathers explicitly enshrined freedom of expression in the constitution with a broad scope. Article 28 of the Indonesian constitution states, “the freedom to associate and to assemble, to express thought verbally and in writing and else shall be stipulated by laws.” While the initial phrase of this Article carries a broad meaning, the constitution also imposes limitations towards the end of the same Article. These limitations became apparent during the rule of both the Old Order regime (1945-1965) and subsequently the New Order regime (1966-1998) in Indonesia. In practice, both of these regimes imposed restrictions on freedom of expression, impacting both the general public and the press through various legal policies.

After the fall of the New Order regime, the Indonesian constitution underwent amendments, and regulations on freedom of expression were added to the Indonesian constitution under a separate chapter, which is manifested in the Human Rights Chapter. This signifies Indonesia's recognition of freedom of expression as an inherent part of human rights. The most prominent provisions regarding freedom of expression guaranteed by the Indonesian constitution can be found in Article 28, additionally, in Articles 28E and 28F, the constitution follows the same pattern as the preceding Article by declaring every person shall be entitled to freedom to express thought and attitude in accordance with his/her conscience, shall be entitled to freedom to associate, to assemble, and of expression; every person is entitled to communicate and to obtain information for the development of his/her personality and social environment, as well as be entitled to seek, to obtain, to own, to store, to process, and to convey information by means of all
kinds of available channels. Furthermore, Article 28 of the Indonesian Constitution as a whole clearly articulates and mandates the state to ensure the right to freedom of expression of every individual as part of human rights, which shall not be diminished in any form.

However, on a global and Asian scale, there is no precise definition of freedom of expression, and the task of defining the boundaries of freedom of expression is entirely entrusted to the judiciary (Stone, 2019). Similar to other countries, Indonesia does not have a standardized definition of freedom of expression. Although in Article 28J of the Indonesian Constitution, it is limited to “every person shall respect human rights of the others in the order of life of the society, nation, and state,” and in the following paragraph, it states, “in the exercise of his/her rights and freedoms, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society.” Therefore, judges' knowledge and interpretation are essential in assessing whether an expression falls under the category of freedom of expression or not. For the purpose of facilitating comparative analysis, we will use the characteristics of jurisprudence in the context of public debate and artistic expression, as discussed earlier.

3.5 PUBLIC DEBATE EXPRESSION IN INDONESIA

As a starting point for the analysis of jurisprudence in Indonesia, the case involving Eddy Sumarsono, Novianda, PT. Norida Lestari vs. Ismeth Abdullah and Lembaga Advokasi Reformasi Indonesia [the Indonesian Institute for Reform Advocacy] (2009) is one of the cases worth examining in the context of freedom of expression in public debate. Ismeth Abdullah, who was then the Governor of the Riau Islands Province (KEPRI), filed a lawsuit against Eddy Sumarsono, the editor-in-chief of the “Investigasi” tabloid, and associates over the August 2006 edition titled “Warisan Korupsi Ismeth di Otorita Batam [Ismeth's Corruption Legacy in Batam Authority].”

Ismeth Abdullah denied the allegations by stating that the tabloid's reporting was untrue and baseless. He argued that such reporting was not a product of the press. According to him, “Tabloid Investigasi” was not a press company as defined in Law No. 40 of 1999 on the Press, which is bound by legal provisions and journalistic codes of
ethics. He claimed that the reporting had tarnished his reputation, dignity, and honor, as well as constituted defamation and insult. Based on these grounds, Ismeth Abdullah filed a lawsuit against Eddy Sumarsono and his associates.

The lawsuit was granted by the lower court, ordering them to pay non-material losses of IDR 100,000,000,000 (one hundred billion Indonesian Rupiah) and material losses of IDR 100,000,000 (one hundred million Indonesian Rupiah). Additionally, they were required to publish a formal apology in three nationally circulated newspapers.

However, the Supreme Court of the Republic of Indonesia took a different stance. Through decision No. 2266 K/Pdt/2009, the Supreme Court annulled the previous court's decision that had granted Ismeth Abdullah's lawsuit. They declared that the court had misapplied the law and ruled that “Tabloid Investigasi” was indeed a press company as defined by the Law on the Press. Furthermore, the Supreme Court Justices emphasized the importance of a free press as a means to realize freedom of expression and opinion, as well as a medium for control, communication, and education.

Another case involving Hutomo Mandala Putra vs. Indo Multi Media, Garuda Indonesia, and others (2013) followed a similar path to the cases mentioned above. Hutomo Mandala Putra, also known as Tommy Soeharto and the son of Indonesia's second President, Soeharto, filed a lawsuit over a note from an article titled 'A New Destination to Enjoy in Bali,' published in the Magazine of Garuda Indonesia's December 2009 edition. The note read, 'Tommy Soeharto: The owner of this complex is a convicted murderer.' The inclusion of this note in the article was based on Tommy Soeharto's ongoing conviction. Unfortunately, the district court and the appellate court did not consider this, resulting in a victory for Tommy Soeharto and a penalty for Indo Multi Media, Garuda Indonesia, and others. They were ordered to pay material compensation of IDR 13,710,580 (thirteen million seven hundred ten thousand five hundred eighty Rupiahs) and immaterial compensation of IDR 12,500,000,000 (twelve billion five hundred million Rupiahs). When the case reached the Supreme Court, the Supreme Court had a different assessment. Through Decision No. 2450 K/Pdt/2013, the Supreme Court stated that what had been conveyed by the Magazine of Garuda Indonesia in the note on the article was no longer defamation and character defamation but was already known to the public and had legal force. Therefore, Tommy Soeharto's lawsuit was unfounded, and the Supreme Court's decision also annulled the previous judgments of the judges.
Some cases involving expressions in public debate, as previously mentioned, show that the Supreme Court consistently favors freedom of expression. However, the reality of other cases suggests that the Supreme Court is not consistent in supporting freedom of expression. For example, the case of Dipo Alam vs. Elman Saragih and Saur Hutabarat (2014) is one of the interesting cases to examine in terms of freedom of expression. At that time, Dipo Alam held the position of Minister of State in the Republic of Indonesia during the 2009-2014 government period and issued a surprising statement that challenged freedom of expression, especially in the media, which is one of the pillars of democracy. On February 21, 2011, Dipo Alam called on all government agencies to boycott tendentious mass media that portrayed the government in a negative light. Among those accused were Metro TV, whose editor-in-chief was Elman Saragih, and Saur Hutabarat, who oversaw Harian Media Indonesia [Media Indonesia Daily]. The controversy did not end there; on February 23, 2011, Dipo Alam, in a meeting with the House of Representatives of the Republic of Indonesia, urged all public relations divisions in the government to ignore media outlets that tended to be critical of the government. These statements were challenged by various media outlets in Indonesia, especially those affiliated with Elman Saragih and Saur Hutabarat, leading to a legal notice against Dipo Alam to publicly apologize to the public.

However, Dipo Alam showed no intention of resolving the issue, leading Elman Saragih and Saur Hutabarat to file a lawsuit for wrongful acts. The lower court ruled that Dipo Alam had committed an unlawful act, but this decision was overturned by the Supreme Court. In front of the Supreme Court judges, all previous decisions were annulled, and Dipo Alam's cassation request was granted, absolving him of any charges related to his statements. Additionally, Elman Saragih and Saur Hutabarat were found guilty as respondents.

In this case, the Supreme Court completely disregarded its position as a protector of freedom of expression. The scope of freedom of expression ideas presented by Elman Saragih and Saur Hutabarat did not become the focus of consideration either. Various academic and constitutional arguments were presented by the respondents but the cassation request of Dipo Alam was still granted. For example, the respondents clearly expressed their stance by paraphrasing what was stated by Francois-Marie Arouet, or better known as Voltaire, who expressed his view and stance that even though “I do not
agree with what you say, but I will defend to the death your right to say it.” In addition, the respondents also quoted what was expressed by George Washington:

The importance of freedom of speech is also expressed by the first President of the United States, George Washington (1732-1799), who stated, “If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter” (Dipo Alam vs Elman Suragih dan Saur Hutabara, 2014, p. 3).

Furthermore, the constitutional arguments presented by the respondent, citing Article 28 of the Indonesian Constitution, which encompasses various provisions of Human Rights, such as the freedom of expression considered inherent in Human Rights, were not taken into consideration by the Supreme Court. On the contrary, in its decision, the Supreme Court held that the high court had misapplied the law in convicting Dipo Alam and believed that the petitioner's cassation request had legal grounds for approval.

3.6 ARTISTIC EXPRESSION IN INDONESIA

In addition to its role in public debate, artistic expression has also played a significant role in shaping judgments in Indonesia, with one notable case being H.M. Soeharto vs. Time Inc Asia and others. This case garnered attention not only within Indonesia but also on the international stage.

This attention is warranted because the case involves the former Second President of the Republic of Indonesia, H.M. Soeharto, who held the presidential office for approximately 32 years. He served not only as the plaintiff/complainant but also as the respondent in the Supreme Court. The case originated from the May 24, 1999 edition of Time Magazine, which featured a picture of Soeharto embracing an image of a house, accompanied by the headline, “SUHARTO INC. How Indonesia’s longtime boss built a family fortune.” Simultaneously, Time Magazine released various reports related to the corruption of the former President of the Republic of Indonesia. These reports included allegations of substantial sums of money held by Soeharto in Swiss banks, which had been transferred to Bank Austria. Additionally, there were reports concerning various companies owned by Soeharto that had not fulfilled their tax obligations to the state.

Soeharto perceived the text and images as tendentious, insinuative, and provocative, containing inaccurate information that insulted and defamed his reputation. By citing the objective criteria of the Convention on the Freedom of Information, which reveals that press freedom is not absolute but has limitations concerning national security
and public order; expression of war or national, racial, or religious hatred; incitement to violence and crime; attacks on founders of religion; public health and morals; rights, honour, and reputation of others; and the fair administration of justice, the petitioner argues that the respondents have violated his fundamental rights. The petitioner also appears to apply legal reasoning from the jurisprudence of the Djokosoetoeno vs. Syamsudin Lubis et al. case with judgment number 1264 K/Pdt/1984, which ruled that “the publication of news containing articulatively onrechmatigedaad [In a broad sense, it is clearly understood as an act of defamation] is a publication that violates or exceeds the bounds of propriety.”

In this case, the Central Jakarta District Court, through its decision Number 338/PDT.G/1999/PN.JKT.PST, dismissed all of the Plaintiff’s claims on the grounds that Time Magazine’s reporting did not meet the elements of an unlawful act. Following this decision, the Plaintiff pursued a legal appeal; however, the High Court, through its decision Number 551/PDT/2000/PT.DKI, upheld the District Court’s ruling. Unfortunately, the Supreme Court, in its decision numbered 3215 K/PDT/2001, had a different assessment than the previous judgments and granted Soeharto's petition while also imposing a fine of IDR 1,000,000,000,000 (one trillion Indonesian Rupiah) on the Defendants. The Supreme Court ordered the Defendants to issue a public apology to be published in national newspapers, national magazines, and TIME magazines' Asia, Europe, and Atlanta (United States) editions. The Supreme Court deemed and expressed that the reporting:

Has exceeded the bounds of propriety, accuracy, and due diligence, thereby constituting an unlawful act that defames the reputation and honor of the Plaintiff as a retired General of the Indonesian National Armed Forces (TNI) and Former President of the Republic of Indonesia. Consequently, the civil liability demanded by the Plaintiff from the Defendants in the petitum of the lawsuit can be granted (H.M. Soeharto vs. Time Inc Asia and others, 2001, p. 33).

Certainly, with the existence of that verdict, there was a distortion of constitutional reality that undermined the right to freedom of expression. In fact, the decision was seen as a backward step for freedom of expression and raised concerns about the state of press freedom in Indonesia (Dzulfaroh, 2020). The Committee to Protect Journalists (CPJ) also regarded the decision as illogical, casting doubt on Indonesia's legal system's reputation (Pathoni, 2007). Several years after the Supreme Court's Cassation ruling, the decision was overturned through the final legal recourse, a Reconsideration. In Decision Number
273 PK/PDT/2008, the Supreme Court ruled that the defamation lawsuit was premature. This prematurity was justified by the concurrent ongoing criminal case against Soeharto. Under Indonesia's legal system, a case cannot be tried simultaneously and must await the resolution of another case with binding legal force before it can be prosecuted. Furthermore, the Supreme Court emphasized TIME Magazine's social control position; the actions of TIME Magazine and the Cassation Defendants cannot be definitively categorized as unlawful acts, as TIME Magazine's reporting still operates within the journalistic framework, fulfilling its role in social control to protect the nation's wealth and national interests in a general sense (H.M. Soeharto vs. Time Inc Asia and others, 2008, p. 86).

Under the pretext of releases from the United Nations and the World Bank, the Supreme Court revealed Soeharto's position, which ranked him as the world's number one corrupt leader, and TIME Magazine's reporting was considered part of the public interest of the Indonesian nation (H.M. Soeharto vs. Time Inc Asia and others, 2008, p. 44). As a result, the Review of the previously granted lawsuit became relevant for annulment.

The Supreme Court's position in Indonesia's judicial system is indeed established as the apex of judicial authority over the four jurisdictions of the judiciary: general jurisdiction (which adjudicates civil and criminal cases), Religious Courts, Administrative Courts, and Military Courts (Mahkamah Agung RI, n.d.). This position simultaneously serves as the guardian of freedom of expression. Furthermore, the decision to approve the review of the case is a form of screening out bad precedents resulting from Decision Number 3215 K/PDT/2001 while also restoring the dignity of freedom of expression, which has its constitutional guarantees.

In another case involving freedom of expression, it relates to a sexual harassment case depicted in the form of artistic expression. This case involves Soemardi Hartono Wonohito, Badan Penerbit Kedaulatan Rakyat [the Body of the People's Sovereignty Publisher], Surat Kabar Harian Kedaulatan Rakyat [the People's Sovereignty Daily Newspaper] vs. Jawa Pos, Jogja Intermedia Pres, Surat Kabar Radar Jogja [Radar Jogja Newspaper], Pemimpin Umum Surat Kabar Radar Jogja [the Editor-in-Chief of Radar Jogja Newspaper], and Kartunis Surat Kabar Radar Jogja [the Cartoonist of Radar Jogja Newspaper]. Interestingly, this case involves fellow media institutions that should ideally serve as social control entities within the framework of a democratic state.

At the outset, when the Radar Jogja Newspaper, as the defendant, published a cartoon in its “Selasa Wage” edition on May 28, 2002. The cartoon depicted a young and
beautiful woman who was about to be harassed by an elderly, overweight man with his pants already undone. The man appeared to be lustful while the woman seemed frightened. Behind the man was a director's desk with the inscription “Boss Koran [Newspaper Boss],” and in the window of the Director's office, a man could be seen peeking and saying, “Ijo mana Boss..... lihat wanita atau duit.... [Where's the money, Boss... see the woman or the money....].”

It didn't stop there; the cartoon also appeared in the following edition on June 2, 2002, titled “MACHOman,” depicting an elderly bespectacled man while imagining embracing a young woman with her bosom exposed. The series of newspaper publications continued from its inception in May-July 2002. It was deemed that the cartoon was a personal portrayal of Soemardi Hartono Wonohito, the Chief Editor of the Kedaulatan Rakyat newspaper. In this case, the Supreme Court, in its decision numbered 1225 K/PDT/2006, firmly rejected the Cassation attempt made by the Plaintiff, deeming the case not contrary to the law. On the other hand, in the Reconsideration effort initiated by Jawa Pos, Jogja Intermedia Pres, Radar Jogja Newspaper, Chief Editor of Radar Jogja Newspaper, and the Editor-in-Chief of Radar Jogja Newspaper, the Supreme Court, through its decision numbered 158 PK/Pdt/2016, granted the Reconsideration request, which was the final legal recourse, and imposed penalties on Soemardi Hartono Wonohito, the Body of the People's Sovereignty Publisher, and the People's Sovereignty Daily Newspaper. Thus, it becomes clear that the Supreme Court positions itself as the guardian of freedom of expression. Furthermore, in its release, the Supreme Court explained

The cartoon appeared after and/or was related to a specific news event, or in other words, the cartoon did not stand alone but had a connection to the substance of the news. The writing of the news and the cartoon regarding the case faced by the Third Plaintiff (Soemardi Hartono Wonohito) was based on the Police Report Number PolLP/05DN/2002/Pamapta dated May 3, 2002, as well as several other news sources, from which the Third Plaintiff was identified as a suspect (The Supreme Court of the Republic of Indonesia, 2017).

Apart from the aforementioned cases, freedom of expression in various forms, especially when it involves critical content, is not solely directed at the government and the executive branch. It encompasses all sectors, including members of parliament, public authorities, community leaders, and others who should be prepared to accept sharp criticism. The cases previously elucidated shed light on how the Supreme Court takes a
supportive stance towards freedom of expression. However, in the course of several cases directly related to freedom of expression, the Supreme Court has taken a different route. For instance, the case involving Yunus bin Akhmad Baraba as the defendant, based on a report from Husen Afif claiming to have been defamed.

Initially, the defendant, along with a group of young individuals, planned a demonstration at the office of Al Irsyad Al Islamiah, which was still under the control of Husen Afif and his associates. The purpose was to compel Husen Afif to return all the assets of the Al Irsyad Al Islamiah organization under his control to the legitimate organization's management. The demonstration was accompanied by various writings that directly attacked Husen Afif and caricatures depicting Husen Afif in handcuffs with iron chains. By the prosecutor, these actions were deemed as defamation through written statements, and Yunus bin Akhmad Baraba was charged under Article 310 paragraph (2) in conjunction with Article 56 of the Penal Code of Indonesia, carrying a prison sentence of 4 (four) months. This demand was higher than the verdict of the District Court, which sentenced the defendant to 2 (two) months in prison.

In this case, the Supreme Court followed the logic of the previous decision by stating that the defendant had been proven to have defamed Husen Afif, as explained in Decision Number 166 K/PID/2011. Judges at the trial court, appellate level, and even at the Supreme Court disregarded and did not grasp the defendant's freedom of expression, which is guaranteed by the constitution. The personal attack mobilized by the defendant was not without reason but was related to Husen Afif's control of the assets of Al Irsyad Al Islamiah, which should have been returned to the legitimate management of Al Irsyad Al Islamiah. Unfortunately, the Supreme Court completely ignored its position, which in various decisions had sided with freedom of expression. The judges of the previous trial and the Supreme Court only focused on the offensive nature of the text and demonstration caricature. The Supreme Court also disregarded the defendant's arguments, which clearly revealed that the young individuals who participated in the demonstration were never heard as witnesses during the trial. Although, Law Number 8 of 1981 on The Law of Criminal Procedure (KUHAP), through Article 253 paragraph (3), granted the Supreme Court the authority to hear witness testimony if deemed necessary.

Indeed, it is recognized and needs to be understood that the legal framework in Indonesia, through Article 253 paragraph (1) of the KUHAP, the Supreme Court, in exercising its authority, only examines the logic of previous judicial decisions to
determine whether they are in accordance with the applicable legal rules or not. When based on Case Number 166 K/PID/2011, the Supreme Court did not have the competence to tamper with that decision. However, when considering the constitutional reality in Indonesia, which serves as the reference for the applicable laws in Indonesia, the constitution clearly and unequivocally guarantees freedom of expression for every individual. Therefore, the Supreme Court should adhere to the Indonesian constitution and should not be in direct contradiction with it.

4 CONCLUSION

In simple terms, we do not all have the same perception of freedom of expression. In fact, there is no uniform definition of freedom of expression among experts, so the application of freedom of expression can lead to diverse interpretations of that expression, some may be offended, and some may not. Unfortunately, at the ECtHR level, in some cases, no violation of Article 10 is found, even though the Handyside v. The United Kingdom case (1976) placed freedom of expression as a broad concept that not only can be “well-received” but also encompasses ideas that are “shock, offend and disturb.”

The reality in Indonesia when it comes to applying the expanded meaning established in the Handyside v. The United Kingdom case is not something that can be readily implemented. Cultural, political, legal text, and jurisprudential norm differences will significantly influence the patterns of court decisions (Bleich, 2014). Furthermore, the crucial variable is the judges' knowledge range and, most importantly, their preferences, which significantly influence the court's rulings, ultimately serving as the last resort to determine whether an expression can be categorized as freedom of expression or not. This is where the pivotal role of judges comes into play, as they are essential in interpreting and navigating the intricate web of conceptual threads of freedom of expression. The challenge becomes even greater for judges operating within jurisdictions characterized by diverse ethnicities, religions, races, and various socio-cultural backgrounds.

At a broader comparative level, both Europe and Indonesia consistently support freedom of expression. Europe enshrines this freedom within the ECHR, while Indonesia places it in the Constitution as its highest legal reference. However, this fundamental freedom, despite having legal legitimacy and being recognized as an inherent human right
promoting pluralism and openness, is not always adhered to by the ECtHR and the Supreme Court of Indonesia.
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