



Contextualizing Mill's Idea on Freedom of Expression in The Indonesian Law on Prohibition of Hate Speech

Diah Imaningrum Susanti

Law Department, Faculty of Law,
Universitas Katolik Widya Karya

ABSTRACT

This paper examines John Stuart Mill's thoughts on freedom of expression as a part of human rights, especially to the extent it is limited by the prohibition of hate speech. Although this right is justified for philosophical, political, and individual reasons, it will be contextualized from Indonesia's regulations perspectives. Tracing the background to the emergence of freedom of expression and the emergence of hate speech from developed countries such as Europe and America, the background for regulating hate speech is different from that of Indonesia, where hate speech is still regulated and prohibited in various regulations and subject to criminal sanctions. Freedom of expression initiated by John Stuart Mill is not absolute freedom as opinions lose their immunity when the opinions expressed become positive incentives for harmful actions.

Keywords: John Stuart Mill, Freedom of Expression, Hate Speech, Indonesian Law.

INTRODUCTION

Human life is inseparable from communication and it often expresses itself through language. From this point of view, reason and expression are synonymous, for both are the products of Greek thought that have coined the idea of "logos", a term meaning mind and language. Language always presupposes something other than language, where language shows and directs our attention.¹ Speaking, saying, or communicating is a human right. Through speech and action, modern democracies embody all kinds of values, even values that may conflict. The use of language, from this perspective, is not just a reflection of reality, but actively constructs how people perceive and understand events, even causing the danger of violent escalation is larger.² So, delivering a speech, even though it contains hatred and intolerance, is considered the exercise of freedom of speech or freedom of expression, which is a manifestation of human rights³

¹ Marcel Danesi, *Messages, Signs, and Meanings; A Basic Textbook in Semiotics and Communication Theory*, ed. Marcel Danesi, 3rd ed. (Toronto: Canadian Scholars' Press Inc, 2004), <https://doi.org/10.1017/CBO9781107415324.004>.

² Antoine Buyse, "Words of Violence : ' Fear Speech ,' or How Violent Conflict Escalation Relates to the Freedom of Expression," *Human Rights Quarterly* 36, no. 4 (2018): 779–97.

³ C Edwin Baker, "Hate Speech," in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, ed. Michael Herz and Peter Molner (Columbia: Cambridge University Press, 2017), 57–80.

Dealing with the freedom of speech in online media, the presence of online media inevitably accelerates the spread of fake news/hoaxes ⁴ and hate speech. Hate speech is a nickname for utterances aimed at insulting and stigmatizing other people based on race, gender, sexual orientation, or other forms of any group membership. In online media, haters can communicate and publish illegal content anonymously or pseudonymously, and this allows the wide dissemination of illegal hate speech. ⁵ In Indonesia, hate speech seems to symbolize the evolution of freedom of expression considering that so many hate speeches are carried out openly. ⁶

The thought on freedom of speech is a highly contestable area. Although many explanations of the underlying virtues have been proposed, the main justifications are those that focus on individual autonomy, political participation, the validation of different ways of life, and the free competition of ideas. ⁷ The prohibition of hate speech has been criticized by jurists and practitioners for stifling freedom of speech, undermining individual autonomy, paralyzing the path to finding truth and knowledge, limiting self-fulfillment, being antithetical to free participation in openly forming opinions, threatening state legitimacy, and being ineffective, and is a difficult law with no legal certainty. ⁸ However, its proponents argue that hate speech laws can, among other things, help to prevent harm to people's health (psychological and physical), guarantee autonomy, reduce discomfort, equalize people, bulwark against oppression, strengthen human dignity, protect and provide public guarantees of public dignity, ensuring the recognition of cultural identity, facilitating intercultural dialogue, and providing real access to take a part in public opinion of a democratic society.

The various harms and dangers can be caused by hate speech to the speech target. History has taught us lessons about how hate speech needs to be seriously considered, especially hate speech stemming from prejudice against certain groups or races. ⁹ That's why the rules regarding hate speech have become the object of study from various perspectives and debates. The problem is, to what extent the existence of hate speech can be allowed without interference based on freedom of expression? Or to what extent is freedom of expression limited by a legal prohibition on hate speech?

⁴Cindy Bella Devina et al., "Hukum Kriminalisasi Penyebaran Berita Hoax Atas Covid 19 Dan Penolakan Omnibus Law [The Law of Criminalizing the Spread of Hoax News on Covid 19 and the Rejection of the Omnibus Law]," *Jurnal Surya Kencana Satu: Dinamika Masalah Hukum Dan Keadilan* 12, no. 1 (2021): 31–46.

⁵ Ioannis Iglezakis, "The Legal Regulation of Hate Speech on the Internet and Its Conflict with Freedom of Expression," no. 2008 (2013): 233–39.

⁶Ferry Irawan Febriansyah and Halda Septiana Purwinarto, "Pertanggungjawaban Pidana Bagi Pelaku Ujaran Kebencian Di Media Sosial [Criminal Liability for Hate Speech Perpetrators on Social Media]," *Jurnal Penelitian Hukum De Jure* 20, no. 2 (2020): 177, <https://doi.org/10.30641/dejure.2020.v20.177-188>.

⁷Philippe Yves Kuhn, "Reforming the Approach to Racial and Religious Hate Speech Under Article 10 of the European Convention on Human Rights," *Human Rights Law Review* 19, no. February (2019): 119–47, <https://doi.org/10.1093/hrlr/ngz001>.

⁸ Harry Melkonian, *Freedom of Speech and Society: A Social Approach to Freedom of Expression* (New York: Cambria Press, 2012).

⁹ Richard Moon, "When Religious Groups Are the Target of Hate Speech: Islamophobia and the Muslim Tide," in *Putting Faith in Hate: When Religion Is the Source or Target of Hate Speech* (New York: Cambridge University Press, 2018), 61–89.

From the background that has been described, this article will discuss the problem with perspective that originates from Mill's idea, to what extent the existence of hate speech can be allowed without interference based on freedom of expression? Or to what extent is freedom of expression limited by a legal prohibition on hate speech?

RESEARCH METHOD

The material object of this study is the prohibition of hate speech concerning to freedom of expression. The formal object of study is the philosophical ideas from a thinking pioneer on freedom of expression as a human right, John Stuart Mill.¹⁰ While the research method used content analysis, a research tool used to determine meaning given by qualitative data (text, descriptive text and prescriptive texts).

ANALYSIS AND DISCUSSIONS

Why is freedom of expression a form of human right? John Stuart Mill put forward several reasons, namely those that are philosophical, political, and individual.¹¹

Freedom of Expression as Human Rights Manifestation

As a form of human rights, freedom of expression should be understood as a "right". It was Hohfeld, the philosopher who first created a framework for the concept of rights, namely rights as opposed to claims rights, privileges, immunity, and power. Hohfeld's concept emphasizes that rights are not only interpreted as the opposite of obligations – which requires the state as a party that has obligations – but must be interpreted as privileges, powers, and immunities possessed by the holders of rights.¹² As the holder of the right to freedom of expression, an individual naturally has privileges, powers, and immunity to freedom of expression. This has implications for the enactment of the basic principle of the state's obligation to protect the right to freedom of expression, by preventing, protecting, punishing, and compensating for such violations through effective policies, legislation, regulations, and court decisions.¹³

However, what kind of freedom of expression is appropriate in the context of Indonesia's legal state, and what series of activities will be protected by this human right? Following Hohfeld's framework above, as a moral right, "right" in the sense of "against obligation contains obligations from other parties, namely obligations that are negative or positive. Negative in nature means the obligation to prevent actions that hinder the protection of that moral right. This obligation essentially implies that the government does not punish the exercise of freedom of expression. Positive in nature means obligations that require people to perform or provide goods or services for the implementation of these moral rights.

¹⁰ George Bromwich, David and Kateb, ed., *On Liberty John Stuart Mill, Rethinking the Western Tradition* (New Haven and London: Yale University Press, 2003), <https://doi.org/10.12987/9780300210699-024>.

¹¹ John Stuart Mill, *On Liberty* (New Zealand: Floating Press, 1909). See also: Harry Melkonian, *Freedom of Speech and Society: A Social Approach to Freedom of Expression* (Cambria Press, New York, 2012), p. 101.

¹² Raymond Wacks, *Philosophy of Law, A Very Short Introduction* (Oxford: Oxford University Press, 2006), p. 53-55.

¹³ United Nations Human Rights, Office of High Commissioner, *Guiding Principles on Business and Human Rights, Implementing the United Nations, Protect, Respect, and Remedy" Framework*, (United Nations 2011).

Philosophical, Political, and Individual Reasons

Why freedom of expression is a fundamental right and essential for a civilized society has been discussed for centuries. In the days of the Ancient Greeks and Immanuel Kant, freedom of expression was considered an intrinsic good that led to self-fulfillment.¹⁴ The modern concept of freedom of expression finds its roots more clearly in the Protestant Reformation, Martin Luther, who in the 16th century openly opposed the teachings of the Catholic church which at that time opposed the view that the church was punishable by death.¹⁵

John Stuart Mill stressed the importance of freedom of speech because, through this right, the search for truth will be made possible.¹⁶ The most widely cited argument is that of John Stuart Mill, which states that freedom of speech is needed because it leads humans to find the truth.¹⁷

Philosophical Reasons:

Mill's theory asserts that free and open discussion is fundamental to arriving at the truth. Discussions like these allow people to argue for freedom based on the truth.¹⁸ It is the duty of the government and citizens, to form the truest opinion that they can strive for.¹⁹ The premise is that the absence of barriers to speech will facilitate the discovery of truth. This theory of truth was restated by the United States Supreme Court in terms of the "marketplace of ideas".²⁰ It seems that Mill derived his theory from *Aeropagitica: A Speech for the Liberty of Unlicensed Printing*, by John Milton which appeared in 1644. This theory of truth and the marketplace of ideas was very influential in the development of all theories about freedom of expression. This is the history of why copyright began to be recognized in England.

In 1859, Mill's seminal work "On Liberty" was published, and in this book, Mill's conceptual position on freedom of expression is clear, namely: individual freedom is important unless the act of individual freedom violates the rights of others.²¹ Mill's argument about freedom of speech can be filtered into 4 (four) points as follows:²²

1. If the utterances that are suppressed/prohibited contain truth, then the truth itself will be suppressed.
2. If the utterances that are permitted and those that are suppressed each contain elements of truth or falsity, only through advocating for both positions, the essential truth can be ascertained.
3. If the permitted utterances contain absolute truth and all prohibited utterances are false, here the truth is still threatened, because it cannot be tested against alternative hypotheses.

¹⁴A. Brown, *Hate Speech Law A Philosophical Examination* (New York: Routledge, 2015).

¹⁵ John C Knechtle, "Blasphemy, Defamation of Religion and Religious Hate Speech: Is There a Difference That Makes a Difference?," in *Blasphemy and Freedom of Expression Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (New York: Cambridge University Press, 2018), 194–222.

¹⁶Baker, "Hate Speech."

¹⁷ Bromwich, David and Kateb, *On Liberty John Stuart Mill*.

¹⁸ John Stuart Mill, *On Liberty* (New Zealand: Floating Press, 1909) 33.

¹⁹ John Stuart Mill, *Ibid*.

²⁰ *Ibid*.

²¹ C.L. Ten, *Mill's On Liberty, A Critical Guide*, ed. C.L. Ten (Cambridge: Cambridge University Press, 2009).

²² John Stuart Mill, *Op. Cit.*, p. 29-36.

4. Ideas that cannot be challenged/debated/discussed that will tend to lead to prejudice, not facts, will eventually lose their vitality.²³

Based on all of these points put forward by Mill, the idea is that freedom of speech will eventually move toward determining the truth. Consequently, restrictions or prohibitions on hate speech as a limitation on freedom of expression must be carried out to find the truth so that if hate speech is continued, it is not the truth that is found, but misguidance.

Political Reasons:

The political rationale for freedom of expression is that this freedom is essential for a democratic government to function properly. Speeches can be political when they relate to issues of public concern. Political reasoning is the clearest example of an instrumental justification because the relationship between free speech and democracy seems to be more direct than philosophical reasoning which seeks truth. This political rationale is supported by a democratic theory which holds that freedom of speech is fundamental to collective decision-making and promotes citizen participation in government.²⁴ This political reason also shows that the speech act has a "social" or political character because it "affects other people."²⁵

Mill's notion of freedom of expression is based on the notion that society requires rules of conduct that govern the speech of political society. In other words, speech is indeed free. Everyone is free to speak until the utterance harms others.²⁶ Based on this political reason, freedom of speech is a very important right that is recognized by the Constitution. It facilitates collective decision-making and promotes citizen participation in government.

The relationship between freedom of speech/expression and democracy is very close because it is impossible to understand democracy without understanding freedom of speech. Symbiosis or correlative, the two cooperate in several ways: (1) facilitating citizens in public affairs; (2) promoting the discovery of truth in politics; (3) allowing the formation of majority rule; (4) free exchange of ideas to reduce corruption; and (5) promote stability. In other words, freedom of speech empowers citizens to control and hold elected officials accountable.

This political rationale reinforces the reality that government exists through an agreement between the governed and the authority conferred by the governed. If people are sovereign and have the right to institute, change and abolish government, then they must be able to communicate because no one person can exercise power alone.

Individual Reasons:

Individual reasons are reasons that defend freedom of expression because of respect for individual dignity and the right to self-fulfillment. Individual reasons link the benefits of free

²³*Ibid.*

²⁴ Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016). (Oxford: Oxford University Press, 2016).

²⁵ Jonathan Riley, "J. S. Mill's Doctrine of Freedom of Expression," *Utilitas* 17, no. 2 (2015): 147–79, <https://doi.org/10.1017/S0953820805001500>.

²⁶ A Aramyan, "Freedom of Expression and Its Limitations: Certain Theoretical and Practical Aspects," *21st Century* 2, no. 18 (2015): 89–101.

speech to the emotional or psychological benefits that individuals who enjoy the right to freedom of expression are aware of. Mill emphasized that individual dignity, even respect, comes from purely human origins, humanity, not part of religion or education.²⁷

These individual reasons were espoused by Immanuel Kant, and in the modern era, articulated by legal philosophers such as Frederick Schauer, Ronald Dworkin, and many others. According to Kant, a legitimate government can only be respected when its citizens are equal and autonomous, and freedom of expression plays an important role in it. Kant's vision of autonomy is also related to human dignity as a theory that supports freedom of expression.²⁸

Ronald Dworkin, a figure in legal interpretation, became a leading exponent of the importance of the dignity of the individual human being as the basis for freedom of expression. He believes that everyone should be treated with the same dignity and respect and that independently, he is valuable. Thus, individuals have the right to choose and that choice should be respected.²⁹ If the individual is respected, regardless of whether what he says is beneficial or not, then those words, which reflect his thoughts, must also be respected. When the state suppresses the thoughts reflected in individual speech, the dignity of that individual will be harmed.³⁰ For democracy to function, individual freedom of speech must be maintained and not subject to repression, even when the majority does not want those views to be expressed.

Although Mill defends freedom of expression out of respect for human dignity, Mill identifies three areas that are areas of proper individual freedom.³¹ First, is the area of inner awareness. Individual freedom demands freedom of conscience in the most comprehensive sense. Second, individual freedom demands freedom from a sense of seeking the truth by considering the consequences, meaning that freedom can be justified when the actions taken do not harm other people. Third, individuals can unite for any purpose that does not harm others

Mill's proposition regarding freedom of expression shows the principle he adheres to, namely that Mill supports freedom of expression; the principle that only what harms others can defeat support for freedom of expression; and the detriment of others is not enough to justify the forcible curtailment of freedom of expression. He admits that the government can be wrong when it interferes with the behavior of individuals which is not harmful. Everyone who receives protection must accept the consequences, namely compliance with restrictions on behavior that does not harm the essential interests of others.

²⁷ John Stuart Mill, *Op.Cit.*, p. 84.

²⁸ J. Everet Green, *Kant's Copernican Revolution: The Transcendental Horizon*, Choice Reviews Online (Boston: University Press of America, 1998), <https://doi.org/10.5860/choice.36-0249>.

²⁹ Ronald Dworkin, *Is Democracy Possible Here: Principles for a New Political Debate*, Princeton and Oxford (New Jersey: Princeton University Press, 2006).

³⁰ *Ibid.*, p. 33-36.

³¹ John Stuart Mill, *Op.Cit.*, p. 22-23. Lihat juga: *Mill's On Liberty, A Critical Guide*, ed. C.L. Ten (Cambridge: Cambridge University Press, 2009),

https://www.researchgate.net/publication/269107473_What_is_governance/link/548173090cf22525dcb61443/download http://www.econ.upf.edu/~reynal/Civil_wars_12December2010.pdf <https://think-asia.org/handle/11540/8282>. <https://www.jstor.org/stable/41857625>, p. 17.

Hate Speech Laws in Indonesia: A Comparative Study

The problem of hate speech seems to be a worldwide problem, as evidenced by the many regulations on it in other countries. European Commission against Racism and Intolerance defines it as "Advocacy, promotion or incitement, in whatever form, humiliation, hatred or slander against a person or group of persons, as well as any harassment, humiliation, negative stereotyping, stigmatization, or threats against that person or group of people and the justification of all types of expression, based on race, color, ancestry, national or ethnic origin, age, disability, language, religion or belief, sex, identity, gender, language, religion or belief, gender, gender identity, sexual orientation, and other personal characteristics."³²

In Europe and Canada, there are many laws, particularly since the 1980s, to punish behaviors that violate laws against hate speech prohibitions. This can be seen in the legislation in industrialized countries, anti-discrimination provisions, and court decisions against discriminatory behavior by the government, in the regulation of racist speech and hate speech.³³

Following international rules, the USA makes a regulation that delivering hate speech based on race is a criminal violation of human rights. The International Convention on the Elimination of All Forms of Racial Discrimination requires signatory countries to declare as a punishable offense all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to commit such acts against race or other groups of people of color, as well as the provision of assistance against the racist activity, including its funding.³⁴

On the one hand, hate speech can be seen as a realization of freedom of expression.³⁵ This right is expressed in Article 19 of the Universal Declaration of Human Rights which emphasizes that also includes freedom to hold opinions without interference and is directed to seek, receive and impart information and ideas through any media and regardless of frontiers.

The International Covenant on Civil and Political Rights guarantees the right to hold opinions without interference (article 19 paragraphs 1 and 2), including the right to seek, receive and impart information and ideas of any kind, regardless of restrictions orally, in writing, or printed form, artwork, or through other media according to their choice.³⁶ The same right is also recognized in regional human rights instruments, namely the ASEAN Human Rights Declaration.

Since 1945 Indonesia has recognized the right to freedom of expression, emphasized again in the 1945 Constitution of the Republic of Indonesia, especially article 28 F that "Everyone has the right to communicate and obtain information to develop his personality and social

³²European Commission against Racism and Intolerance, General Policy Recommendation No. 15, on Combating Hate Speech, CRI(2016) 15, Recital, 3.

³³Allison Harell, "The Limits of Tolerance in Diverse Societies : Hate Speech and Political Tolerance Norms Among Youth," *Canadian Journal Of Political Science* 2 (2010): 407–32.

³⁴International Convention on the Elimination of All Forms of Racial Discrimination, 1966.

³⁵Raphael Cohen-Almagor, "Balancing Freedom of Expression and Social Responsibility on the Internet," *Philosophia* December, no. 2015 (2017), <https://doi.org/10.1007/s11406-017-9856-6>. *Philosophia*, 17 May 2017.

³⁶<https://icjr.or.id/mengenal-kovenan-internasional-hak-sipil-dan-politik/>, diakses pada tanggal 4 Agustus 2022.

environment, and has the right to seek, obtain, possess, store, process and convey information using all kinds of available channels.”; Article 28E paragraph (2) of the 1945 Constitution of the Republic of Indonesia, "Everyone has the right to freedom of belief, express thoughts and attitudes, according to his conscience" and paragraph (3), "everyone has the right to freedom of association, assembly and expression of opinion".

Article 23 paragraph (2) of the Republic of Indonesia Law Number 39 of 1999 concerning Human Rights guarantees that everyone has the freedom to have, express, and disseminate opinions according to his conscience, orally and or in writing through print and electronic media with due observance of the values religion, decency, order, public interest, and the integrity of the nation. The limits of freedom of expression on human rights in Indonesia are religious values, decency, order, public interest, and national integrity. This means that freedom of expression, even though it is a human right, cannot violate these boundaries.

Abuse of freedom of expression and arbitrariness in expressing oneself and using freedom of expression to express hatred can make people trapped in actions called hate speech. This action can be carried out in the form of campaigns, in the form of oral speech, spreading banners, spreading fake news on social media networks, vilifying someone in public, or directly in the form of opinions (demonstrations). Hate Speech can lead to collective intense dislike, exclusion, prejudicial treatment, ferocity, and even at the most horrific level, ethnic massacres or genocide against groups, all of which will eliminate self-fulfillment as human beings with dignity.

Indonesia has long cared about this problem, as evidenced by the inclusion of legal sanctions for hate speech in the Indonesian Penal Code (*Kitab Undang-Undang Hukum Pidana*), Law Number 11 of 2008 on Information and Electronic Transaction (*Informasi dan Transaksi Elektronik*), Law No. 19 of 2016 on Amendments to Law Number 11 of 2008 on Information and Electronic Transactions (*Amandemen UU No. 11/2008 tentang Informasi dan Transaksi Elektronik*), Law Number 40 of 2008 on the Elimination of Racial and Ethnic Discrimination (*UU tentang Penghapusan Diskriminasi Ras dan Etnik*), and Circular of the Chief of Police Number SE/06/X/2015 on Hate Speech (*Surat Edaran Kapolri No. SE/06/X/2015 tentang Ujaran Kebencian*).³⁷

Indonesian law also prohibits various acts that can be carried out under the pretext of religious expression, for example, the prohibition against hostility, hatred, and insults based on race, religion, or class. Article 156 of the Criminal Code and Article 157 of the Criminal Code regulate punishment for acts that express hostility, hatred, or contempt for certain groups in Indonesia. Article 156 of the Criminal Code defines "groups" as sections of society that differ in race, country of origin, religion, place, origin, ancestry, nationality, or position according to constitutional law. Through the same article, every person who in public expresses feelings of hostility, hatred, or contempt for one or several groups of Indonesian people. While Article 157 of the Criminal Code states that anyone broadcasting, showing, or posting writing or painting in public, containing statements of feelings of warfare, opposition, intense dislike, or insults

³⁷ Risky Mase, Vanny A. Wongkar, and Christine S Tooy, "Sanksi Hukum Terhadap Ujaran Kebencian Suku, Agama, Ras, Dan Antargolongan Menurut Pasal 28 Ayat 2 Undang-Undang Informasi Dan Transaksi Elektronik Nomor 19 Tahun 2016," *Lex Crimen X*, no. 9 (2021).

between or against groups of the Indonesian people, with the intention that the contents are known or better known by the public.

Hate speech regulation through the Criminal Code is the first legislation in Indonesia that regulates the prohibition of hate speech. This provision is a legacy of the Dutch colonial era. Furthermore, this provision is regulated in Article 156 and Article 157 Paragraph (1) regarding the prohibition of spreading hatred between groups of the population. In the Criminal Code, the prohibition of hate speech is categorized as an offense aimed at maintaining peace and public order among the population so as not to expose the population to various incitement that may cause chaos and division, using speeches, writing, and pictures in public or newspapers.³⁸

Furthermore, Article 156a is an addition to regulating hate speech against religion, which penalizes acts that express hostility, hatred, and contempt for groups of Indonesian people, and in this case, the term "group" includes race, country of origin, place of origin, descent, nationality, or position according to constitutional law. In the elucidation of this article, it is stated that the criminal act referred to here is solely (in essence) aimed at the intention of making enemies or insulting. People who commit these crimes here, apart from disturbing religious peace, basically totally betray the first precepts of the state, because it is only fitting that those actions be punished.

From its historical perspective, Article 156a originates from Law no. 1/PNPS/1965 concerning the Prevention of Misuse and/or Blasphemy of Religion which in Article 4 of the law directly orders that the above provisions be included in the Criminal Code. Law No. 1/PNPS/1965 explicitly states the prohibition to solicit public support and to make interpretations of religion. The prohibition is contained in Article 1, which: "Every person is prohibited from knowingly in the public telling, advocating or seeking public support to carry out an interpretation of the main religion in Indonesia or carry out religious activities that resemble those religious activities, interpreting and which activities deviate from the main teachings of that religion". Meanwhile, the provisions of Article 156a are included in Chapter V of the Criminal Code concerning Crimes against Public Order which regulates the act of expressing feelings of hostility, hatred, or contempt towards another person or group in public, also against people or groups of different ethnicities, religion, descent and so on. These articles can be interpreted as an elaboration of the principle of anti-discrimination and to protect minorities from the authority of the majority group.

The legal arguments for the inclusion of Article 156a into the Criminal Code include that Law Number 1/PNPS/1965 was made to protect the state and society, the ideals of revolution and national development where the abuse or blasphemy of religion is seen as a threat to revolution; the emergence of various mystical sects or organizations/community beliefs that are considered contrary to religious teachings and laws; and to prevent the religious teachings from being distorted which are considered as the main teachings by the scholars of the religion concerned; and this rule protects religious peace from desecration/humiliation and teachings not to embrace a religion based on Belief in the One and Only God.

³⁸ Inhan Cuang, Frans Maramis, and Grace Yunico Bawole, "Penerapan Sanksi Pidana Bagi Penyebar Ujaran Kebencian (Hate Speech) Melalui Media Sosial Ditinjau Dari UU Nomor 11 Tahun 2008 Jo. UU Nomor 19 Tahun 2016 Tentang Informasi Dan Transaksi Elektronik," *Lex Et Societatis* VIII, no. 4 (2020): 203–10.

More specifically, Law Number 40 of 2008 concerning the Elimination of Racial and Ethnic Discrimination also prohibits racial discrimination. This law was motivated by the reality of racial and ethnic discrimination that had occurred and experienced by Indonesian people since before independence, with the policy of dividing Indonesian society into 4 (four) groups, namely European groups; the Indo group; the Eastern Foreign group, and the Bumiputera group. This shows that the European group has a higher position than colored skin, especially the Bumiputera group, and of course influences aspects of heredity, employment, and education.³⁹

Related to the context of the era at the time the law was promulgated, Article 16 of this law strictly provides criminal sanctions for people who act discriminatively by referring to its Article 4, which details the actions in question, namely: (i) making writing or drawing to placed, pasted, or disseminated in public places or other places that can be seen or read by other people; (ii) giving speeches, expressing, or uttering certain words in public places or other places that can be heard by other people; or (iii) wearing something on himself in the form of objects, words, or pictures in public places or other places that can be read by other people.

The commitment of the Indonesian state to prohibit acts that violate human rights is also reflected in the prohibition of acts of genocide as stipulated in Law No. 26 of 2000 concerning the Human Rights Court. The history of the judiciary in Indonesia records the formation of a human rights court for perpetrators of gross human rights violations with the establishment of a human rights court. And 2 (two) ad hoc human rights courts were formed to try gross human rights violations in the Tanjung Priok (1984) and East Timor (1999) incidents. The crime of genocide is defined as any act committed with the intent to destroy or annihilate all or part of a national, racial, ethnic, or religious group, through killing group members; causing serious physical or mental suffering to group members; creating living conditions for the group which will result in its physical destruction in whole or in part; imposing measures aimed at preventing births within the group, or forcibly transferring children from certain groups to other groups. Thus, all forms of religious expression aimed at committing genocide are prohibited.

"Respect" for expressions that "hate" or "don't hate" as a form of equality between citizens is realized by the state, not through repressive actions, but through the state's expressive role. The state's expressive role can be in the form of expressing restrictions on freedom of expression, censorship,⁴⁰ or setting guidelines/standards on freedom of expression. Related to this standard, the National Commission on Human Rights has prepared guidelines for the application of freedom of expression that apply to state apparatus, individuals, community groups, and non-state actors to avoid actions that limit rights, in the form of Standard of Regulatory Norms (*Standar Norma Pengaturan/SNP*) Number 5 concerning the Right to

³⁹ R L Sinaulan, "Implementasi Pengawasan Penghapusan Diskriminasi Ras Dan Etnis Berdasarkan Undang-Undang No. 40 Tahun 2008," *Jurnal Pro Justitia (JPJ)* 2, no. 2 (2021): 59–76.

⁴⁰ Raphael Cohen-almagor, "Internet Architecture, Freedom of Expression and Social Responsibility : Critical Realism and Proposals for a Better Future," *Innovation: The European Journal of Social Science Research* 28, no. 2 (2015): 37–41, <https://doi.org/10.1080/13511610.2015.1025042>. See also: Richard A. Posner dan Chiang, Tun Jen, "Censorship Versus Freedom of Expression," in *Handbook of the Economics of Art and Culture Vol.1*, vol. 1 (Chicago: Elsevier B.V., 2006), [https://doi.org/10.1016/S1574-0676\(06\)01010-6](https://doi.org/10.1016/S1574-0676(06)01010-6).

Freedom of Opinion and Expression. The SNP was issued as a response to the massive phenomenon of suppressing freedom of opinion and expression in society. The SNP is expected to be a general rule or principle for several important points contained in the SNP, including political speech and expression, religious expression, artistic expression, symbolic expression, the right to protect private data, and freedom of the press.⁴¹

Standard of Regulatory Norms or *Standar Norma Pengaturan* (SNP) are interpretations, assessments, and guidelines for human rights principles and events that occur in society. Standard norms and regulations are documents that place international human rights principles and regulations and are compared with practices and conditions in Indonesia. The SNP is an elaboration of internationally accepted human rights norms at the national level without eliminating the principles and character of Indonesia itself. It also translates abstract concepts about freedom of expression into guidelines for reformulating that right. The spirit of freedom of expression that is channeled through the media, the press, for example, is one of the guarantees against a corrupt and tyrannical government.⁴² This is in line with Mill's assertion, that even an opinion loses its immunity when it is expressed in such a way as to become a positive impetus for some "evil" act.⁴³ This means that freedom of expression is not immune, there are always limits. This is evident when the SNP distinguishes freedom of opinion and expression, where freedom of opinion is personal freedom related to one's thoughts, while freedom of expression is related to responding to the public, because it is a freedom to express opinions that are related to the public or human relations, and relates to the freedom to seek, receive and impart information and ideas of any kind. In this regard, the scope of freedom of expression may include political discourse, own commentary on and on public affairs, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse, as well as commercial advertising. It can take the form of spoken language, writing and gestures, and non-verbal expressions such as pictures and art objects. Means of expression include books, newspapers, pamphlets, posters, banners, clothing, and legal complaints/appeals. Freedom also includes all forms of audio-visual as well as electronic and internet-based modes of expression.

Mill's Ideas on the Context of Spreading Hate Speech in Online Media

John Stuart Mill (1806–1873) lived during a time when England was recovering from the wars with Napoleonic France when people grew increasingly dissatisfied with an exclusive and elitist political system and an industrial system that emerged exposed to the uncertainties of trade and manufacture. He experienced living in an era of transition from a highly unequal society to a more egalitarian one. His ideas on freedom of expression and communication drew from European thought as well as from the traditions of the English and Scottish Enlightenment and contemporary debate and in his lifetime, he established himself as Britain's leading intellectual ancestor.⁴⁴

⁴¹Mimin Dwi Hartono et al., *Standar Norma Dan Pengaturan Nomor 5 Tentang Hak Atas Kebebasan Berpendapat Dan Berekspresi*, Komnas HAM, vol. 1 (Jakarta: Komisi Nasional Hak Asasi Manusia Republik Indonesia, 2021).

⁴²John Stuart Mill, *Op. Cit.*, p.28. See also: K.C. O'Rourke, *John Stuart Mill and Freedom of Expression: The Genesis of A Theory* (London: Routledge, 2001).

⁴³Jonathan Riley, "Racism, Blasphemy, and Free Speech", in C.L. Ten, *Op. Cit.*, p. 52.

⁴⁴Mark Philp, ed., *John Stuart Mill On Liberty, Utilitarianism and Other Essays* (Oxford: Oxford University Press, 2015).

Was the idea of J.S. Mill, which was put forward about a century and a half ago, is it still relevant to analyze the rules regarding hate speech in online media? Concerning this question, it is necessary to state the following notes.

First, the egalitarianism of society when Mill lived - through the increasingly widespread literacy of society - can be analogous to the egalitarianism of today's society, which communicates messages through an intermediary medium or media, namely the internet. New technologies have revolutionized the way of communication and the meaning of freedom of expression, as the internet increasingly presents a key tool for people to exercise freedom of expression. Thus, the legacy of his egalitarian thinking through freedom of expression that was poured a century and a half ago is still relevant today.

However, the internet and the abundance of online social networks have an impact on privacy, urging the need for a re-evaluation of the limits of the right to freedom of expression. This intermediary media thus is like a marketplace of ideas, which provides space for a diversity of values, views, and orientations, as well as the communicative realization of citizens' human rights. By providing means of communication, including hateful communications, intermediary media inevitably have the potential to increase hatred. Therefore, intermediary media should not only be seen as a space for social interaction, where the companies that operate them are immune to the law

Second, the use of social media to post hate speech is inevitable, considering that social media users in Indonesia reached 191.4 million people as of January 2022, or the equivalent of 68.9 percent of the total number of Indonesian citizens.⁴⁵ On the other hand, the number of criminal acts of hate speech has increased. From January to May 2022, the data from Indonesia police shows that the police have taken action on 33 cases of hate speech. The most prosecutions took place in January 2022, namely 10 cases.⁴⁶

Third, it needs to be emphasized again, that Mill is not an absolutist about freedom of expression since that right can be limited to the extent that it causes harm. Speech can be harmful when it is inflammatory, and it is permissible to have some control over such inflammatory speech. According to Mill, opinions lose their immunity when the opinions expressed become positive incentives for harmful actions.⁴⁷

Related to the absolute lack of freedom of expression, in electronic media, there are rules regarding restrictions on freedom of expression, especially hate speech uploaded on electronic media or in front of the Forum, namely the Chief of Police Circular Letter Number SE/6/X/2015 can take action against netizens who upload hate speech on their respective accounts or in electronic media, or forums. The aspects of loss that are emphasized are "encouraging collective hatred, exclusion, discrimination, and violence." Just starting from an upload, the worst impact has the potential to occur, for example, a massacre. Of course, this can damage the harmony,

⁴⁵ See: www.suara.com on the Research Result of Data Report, accessed on Sept 7, 2022.

⁴⁶ https://pusiknas.polri.go.id/detail_artikel/berani_unggah_ujaran_kebencian,_siap-siap_dihukum_6_tahun_penjara, downloaded on September 7, 2022.

⁴⁷ David O. Brink, "Mill's Liberal Principles and Freedom of Expression", in C.L. Ten, *Mill's On Liberty, A Critical Guide.*, *Op. Cit.*, p. 40-61.

unity, and integrity of the nation. In the Criminal Code, hate speech takes the form of insults, defamation, defamation, unpleasant acts, provoking, inciting, and spreading false news. Residents who feel they are victims can report this to the police. Investigators can apply the provisions in the Criminal Code Article 156, Article 157, Article 310, and Article 311. The maximum penalty for spreading hate speech is four years.

Indonesian law also has Law Number 11 of 2008 concerning Information and Electronic Transactions. In Article 28 *jo*. Article 45 paragraph (2), a person who spreads false, misleading news and creates feelings of hatred or hostility can be sentenced to a maximum of six years in prison. The National Police, in collaboration with various parties, seeks to maintain and create security and comfort for the Indonesian people. One of them is the convenience of expressing opinions and the use of social media. Don't let freedom of opinion lead to discomfort, riots, hatred, or even riot.

While today's intermediary media platforms greatly facilitate the spread of expression, the problem of hate speech that attacks or even harms a particular group should not be reduced to just a conflict between the speaker and the recipient of the speech. It is within this framework that the state's efforts to regulate intermediary media platforms should be placed. The state should regulate the rights and obligations of mediated media platforms, not only regulate how citizens use these platforms wisely.

CONCLUSION

The philosophical, political, and individual reasons are perspectives that could be an assessment to which freedom of expression is limited by the legal prohibition of hate speech. By tracing the background of the emergence of the right to freedom of expression and the emergence of hate speech from developed countries such as Europe and America, where the minority group (at least people of different races) is the target of speech, is of course, different from that of in Indonesia.

In Indonesia, hate speech is still covered by many regulations and is subject to penal sanctions. The limitations are the boundaries that cannot be violated, which is further explained in the publication of Standard of Regulatory Norms (*Standar Norma Pengaturan/ SNP*) Number 5 on the Right to Freedom of Opinion and Expression, which is expected to become a principle for several important points in the life of expression because it regulates speech and political expression, religious expression, artistic expression, symbolic expression, the right for the private data protection, as well as freedom of the press, which does not eliminate the principles and character of Indonesia itself. The SNP translates the abstract concepts of freedom of expression into guidelines for reformulating this right.

Freedom of expression initiated by John Stuart Mill is not absolute freedom. The limitation is on the extent to which freedom causes harm, namely when the speech is inciting, and it is permissible to regulate the speech that incites it. According to Mill, opinions lose their immunity when the opinions expressed become positive incentives for harmful actions.

More operationally, the absolute absence of freedom of expression expressed through electronic media is manifested in the Chief of Police Circular Letter (*Surat Edaran Kapolri*) Number SE/6/X/2015 concerning Handling Hate Speech, can take action against netizens who

upload hate speech on their respective accounts or in electronic media, or in front of forums. The Indonesian Criminal Code, particularly in Article 156, Article 157, and Articles 310 and 311 become a reference for investigators to take action against hate speech in the form of insults, defamation, defamation, unpleasant acts, provoking, inciting, and spreading fake news. In addition, Indonesian law also has Law Number 11 of 2008 concerning Information and Electronic Transactions. In Article 28 jo. Article 45 paragraph (2), a person who spreads false, misleading news and creates feelings of hatred or hostility can be sentenced to a maximum of six years in prison.

In the era of using the internet as an intermediary medium for freedom of expression, this media will inevitably facilitate the spread of expressions including hate speech. State regulation is needed not only regarding conflicts between speakers and recipients of speech but also regarding intermediary media platforms. The state should regulate the rights and obligations of mediated media platforms, not only regulate how citizens use these platforms wisely.

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