

# Reframing Freedom of Speech and Hate Speech Prohibition in a Democratic Indonesian Legal System

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## ABSTRACT

*This research analyzes the Indonesian legal system in regulating the balance between freedom of speech and protection against hate speech. Using a normative juridical approach and literature study, this research highlights the legal dilemmas that arise when freedom of expression intersects with the need to maintain public order and the honor of certain groups. The results of the study show that existing regulations, especially in the ITE Law and the Criminal Code, have not fully provided normative clarity, creating a risk of criminalization of legitimate expression. Law enforcement practices still show inconsistency and bias, especially against certain groups in society. This research concludes that the protection of hate speech must be done proportionally and through a human rights-based approach so as not to erode democratic values. The findings are expected to be a reference in the formulation of criminal legal policies that are more accountable, inclusive, and in accordance with the principles of justice.*

## INTRODUCTION

Freedom of speech is one of the human rights guaranteed in the Indonesian legal system. Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that everyone has the right to freedom of expression, including through speech and writing. This right is an important element in democratic life, as it enables citizens to actively participate in public oversight and decision-making. This freedom is not without limits (Roqib et al., 2020). In practice, the state has an obligation to limit certain expressions that can threaten public order, damage a person's honor, or cause hostility based on Ethnicity, Religion, Race, and Intergroup (SARA).

Indonesia, a culturally, religiously and ideologically plural country, has faced complex challenges in balancing freedom of speech with efforts to prevent the spread of hate speech. Hate speech can incite violence, intensify polarization, and undermine intercommunal harmony. Law Number 11 Year 2008 on Electronic Information and Transactions (ITE Law) as amended by Law Number 19 Year 2016 is one of the main legal instruments used to regulate expression in the digital public sphere. Implementation of the law often causes controversy because it is considered to contain rubber articles that open space for abuse.

One of the crucial problems faced is the vagueness in distinguishing between legitimate criticism of policies or individuals and hate speech. In some cases, criminal provisions have been used to silence political or ideological dissent, raising serious questions about the extent to which the state can restrict expression for protective reasons (Staples, 2016). According to Santosa (2008), legal regulations in Indonesia still do not provide sufficiently detailed standards regarding the boundaries of hate speech, so its implementation is highly dependent on the interpretation of legal enforcement officers, which can be subjective.

Regulations on hate speech ideally aimed at protecting the public from the threat of violence, discrimination and social disintegration are also often used unevenly. Certain groups feel more vulnerable to criminalization, while other groups that spread hatred in the name of ideology or the majority often escape sanctions. This suggests an imbalance in legal enforcement that can weaken the principles of justice and equality before the law. In a growing democratic landscape like Indonesia, this issue becomes even more urgent to critically analyze, given its impact not only on the legal sphere, but also on the quality of democracy itself (Kusuma & Lubis, 2016).

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Issues such as legal enforcement bias, imprecise norm formulation, and the tension between rights and public safety are central themes that need to be examined in Indonesian legal literature. The question is not simply whether freedom of speech and protection against hate speech can be compromised, but how they can be formulated in a balanced manner in a legal system that upholds democracy, justice and humanity. Overcoming this challenge requires a thoughtful approach to formulating adequate policies that balance individual freedom and social responsibility.

This research aims to analyze Indonesia's legal framework in regulating the balance between the right to freedom of speech and protection against hate speech. Through a review of regulations, judicial practices, and academic literature, this research is expected to provide a conceptual and juridical understanding of the challenges and possibilities of reformulating a fairer and more proportional legal approach in Indonesia.

## RESEARCH METHOD

This research uses a literature study approach with a normative juridical method. This method focuses on analyzing relevant primary and secondary legal materials to examine laws and regulations, court decisions, and legal doctrines governing freedom of speech and hate speech in Indonesia. Based on Soekanto and Mamudji (2001), the normative juridical approach is suitable for understanding law as a norm that lives in the community and is interpreted within the framework of the judicial system. This approach enables researchers to explore the relationship between normative provisions and legal enforcement practices that often lead to controversy.

The data sources in this research are obtained from the 1945 Constitution, Law Number 11 Year 2008 on Electronic Information and Transactions (ITE Law) and its amendments, the Criminal Code of Indonesia (KUHP), as well as various academic literature such as legal journals, reference books, and previous research results. The data analysis technique is carried out by examining the compatibility between legal norms and the principles of human rights protection in the context of democracy. The methodological reference also refers to the opinion of Marzuki (2005) who emphasizes the importance of normative interpretation in seeing substantive justice, not just formalistic. With this approach, it is hoped that this research can provide a complete picture of how the Indonesian legal system accommodates the tension between freedom of expression and its limits in the form of a ban on hate speech.

## RESULT AND DISCUSSION

Freedom of expression has long been a key indicator of the quality of democracy in a country. In Indonesia, this value grew alongside the transition from authoritarian rule to a more open and participatory political system. The right to speak, write and express views openly provides a space for citizens to participate in legal, social and cultural development. However, in a pluralistic society, such freedoms cannot be separated from the obligation to uphold respect for diversity (Astuti, 2016).

As a state of law, Indonesia regulates freedom of expression through a constitutional framework that does not stand in absolute terms. The constitution opens space for expression as part of civil rights, but at the same time provides provisions that this freedom has limits. These restrictions are not intended to curb freedom per se, but rather to maintain a balance between individual rights and collective interests in a common life. In certain situations, public expression can turn into a tool of provocation that destroys social order (Erdem, 2018).

Within the larger democratic space, there are also expressions that target the identity, beliefs and background of certain groups. Such expressions often contain hateful content, which if left unchecked, can erode trust between citizens and weaken national integration. Speech that dehumanizes minority groups, spreads stigma, or fosters collective fear is a serious challenge for the legal to respond to without suppressing fundamental freedoms (Irawaty, 2020).

The rule of legal governing hate speech is an important part of keeping public spaces inclusive and safe. In many countries, including Indonesia, the existence of norms regulating the limits of expression is based on considerations of social justice and conflict prevention. The legal is tasked with filtering which expressions are constructive and which have the potential to damage social relations. For this reason, legal instruments must be able to separate legitimate criticism from speech that damages human dignity (Amin, 2020).

The state's duty is to nurture freedom while protecting the public from the threat of hatred disguised as expression. The main challenge lies in how the law can uphold justice consistently, without becoming a tool of repression against different voices (Nasution, 2020). Therefore, an in-depth study is needed to understand the reasonable limits of freedom of speech within the national legal framework, as well as how protection of the public can be carried out fairly and proportionally.

The Indonesian legal system guarantees freedom of speech as part of human rights. This guarantee is enshrined in Article 28E (3) of the 1945 Constitution,

which grants every citizen the right to express thoughts and opinions. Article 28J paragraph (2) limits this freedom by stating that its exercise must be subject to restrictions stipulated by law to ensure recognition and respect for the rights of others and to meet the demands of justice and public order. This provision becomes the normative basis for the state to regulate expressions that can threaten social cohesion, including hate speech.

The ITE Law is one of the main legal instruments in limiting hate speech, especially in the digital space. Article 28 paragraph (2) of the ITE Law prohibits the dissemination of information aimed at causing hatred or hostility of individuals and/or groups based on ethnicity, religion, race, and intergroup. Although substantially aimed at maintaining order and harmony in society, the application of this article often raises criticism because it is considered to potentially curb legitimate freedom of expression and is used discriminatively against political criticism.

In the practice of legal enforcement, there is often a gap between norms and implementation. Legal enforcement officials show inconsistency in determining whether a statement is classified as hate speech or merely an expression of criticism. For example, in some cases, criticism of public officials is criminalized as hate speech, while discriminatory speech against minority groups is not prosecuted. This phenomenon indicates a serious problem in the application of fair and proportional legal standards.

Another major problem lies in the absence of a clear and unequivocal official definition of what constitutes hate speech. The Criminal Code of Indonesia, as the main criminal instrument, does not provide an explicit definition of hate speech. As a result, the interpretation of the elements of the offense is often subjective, depending on the views of investigators and judges. This vagueness opens room for discriminatory practices and inconsistencies in legal enforcement.

Non-criminal instruments are already available, such as the 2015 Joint Ministerial Regulation on Hate Speech Handling involving several state institutions. This regulation is not legally binding and is more administrative in nature. Implementation in the field is often inconsistent due to weak coordination between institutions. This reflects the need to strengthen norms and procedures in handling hate speech in a professional and measurable manner (Setyadi et al., 2016).

In the midst of these challenges, the Constitutional Court has a strategic role in emphasizing the constitutional boundaries between freedom of speech and hate speech. The Constitutional Court Decision Number 50/PUU-VI/2008 states that freedom of speech is not absolute and can be restricted as long as such restrictions fulfill the principles of legality,

proportionality, and accountability. This decision provides a strong juridical basis for the formation of policies that respect individual freedom while protecting public order.

The development of social media as the main channel of public expression adds a new dimension to the legal discourse on freedom of speech. Digital platforms enable the rapid dissemination of information but also amplify hate speech with greater impact. Indonesia's current positive law is not yet fully adaptive to these characteristics of digital communication, which often leads to confusion in legal enforcement in cyberspace.

The application of the principle of proportionality is key in creating a balance between rights and restrictions. Restrictions on freedom of speech must be carried out in a manner that is legal, based on the law, and proportional to the objectives to be achieved. In this context, legal enforcement officials and courts are required to conduct substantial due diligence on the expression in question so as not to cause a chilling effect on legitimate public expression (Wicaksono, 2018).

The Indonesian legal system faces challenges in protecting vulnerable groups, such as religious, sexual orientation, or ethnic minorities, from hate speech. Many cases of hate speech against these groups are not seriously followed up. Yulastini et al. (2018) emphasized this shows an imbalance in the application of the legal that has the potential to undermine the public's sense of justice and exacerbate social fragmentation.

Academic discourse shows that the Indonesian legal system has not fully adopted the principles of deliberative democracy in responding to freedom of expression. In deliberative democracy, public expression should be met with arguments and discussion, not legal repression. Unfortunately, some legal responses to public expression still reflect a repressive rather than dialogic security approach (Winarni et al., 2019).

Strengthening participatory mechanisms in drafting regulations and public policies on hate speech is urgent. The involvement of civil community, legal experts, journalists and vulnerable groups is needed to build an inclusive, accountable and fair legal framework. Without meaningful public participation, the resulting legal framework risks becoming a tool of power rather than a tool of justice (Mahardika et al., 2019).

Finally, it needs to be recognized that the legal system cannot stand alone in addressing the issue of hate speech. Public education, digital literacy, and democratic culture are essential for responsible freedom of speech. The legal system needs to be aligned with ongoing social and educational efforts, so that people can understand the limits of expression and uphold human dignity in every form of communication.

## CONCLUSION

The Indonesian legal system faces both a normative and practical dilemma in regulating the limits of freedom of speech amidst efforts to protect society from hate speech. The Constitution guarantees freedom of expression as a pillar of democratic life; on the other hand, the state is also obliged to maintain social harmony and protect vulnerable groups from verbal attacks that undermine human dignity. This tension shows that the legal system must be constantly updated with the principles of justice, proportionality, and respect for plurality as the foundation of state life.

The implications of these findings point to the importance of normative and institutional reform in Indonesia's legal framework. Hate speech must be defined clearly and precisely to prevent its misuse as a tool for repressing legitimate critical expressions. The existence of vague norms has the potential to create legal injustice and trigger inequality in the protection of citizens' rights. Legal enforcement must also be directed towards substantive justice by taking into account the social context and the possible real impact of the restricted expression.

As a suggestion, it is needed to reformulate laws and regulations related to hate speech by involving public participation and groups that have been vulnerable to becoming victims or perpetrators in practice. Legal enforcement officers must be equipped with clear and human rights-based guidelines to prevent abuse of authority. Legal education efforts to the wider community are also important to foster a culture of healthy, fair communication and respect for diversity in Indonesia.

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