

Regulation of Freedom of Opinion and the Handling of Hate Speech in Indonesian Positive Law

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ABSTRACT

This study analyzes the handling of hate speech in the Indonesian criminal justice system with a focus on the structural elements of criminal acts, the conception of hate speech, the constitutional foundation of freedom of speech, and regulatory challenges in the digital era. This normative juridical research employs statutory and conceptual approaches to examine various regulations governing hate speech and freedom of expression. The results of the study indicate that the subjective and objective elements of criminal acts provide a systematic analytical framework in handling hate speech cases. The conception of hate speech as a criminal act must be based on the offender's intent to cause detrimental influence. The constitutional foundation and regulations of freedom of speech have acknowledged necessary limitations to protect the human rights of others. Regulatory challenges in the digital era require proportional and adaptive limitations toward technological developments. This study recommends strengthening the capacity of law enforcement officials, formulating technical guidelines, conducting public outreach, and periodically evaluating regulations.

INTRODUCTION

Freedom of expression and opinion is a fundamental right guaranteed by the constitution and various international legal instruments. This right constitutes one of the crucial pillars in modern democratic life, enabling every citizen to openly express their thoughts, ideas, and attitudes. The development of information and communication technology has expanded the space for freedom of expression into the digital realm, unrestricted by geographical boundaries. The public can now express their opinions through various social media platforms with very broad reach and high speed (Zulkarnain & Al Hakim, 2023). The expected ideal condition is the creation of a productive digital public sphere where freedom of expression can go hand in hand with social responsibility. The balance between individual rights and public interest serves as a primary prerequisite for the realization of healthy communication in a digital society.

Freedom of expression, which should be used to convey constructive ideas, is often misused to spread hate speech containing insults, provocation, or incitement. Hate speech targeting certain groups based on ethnicity, religion, race, or inter-group

affiliation has the potential to damage social harmony and trigger horizontal conflict (Taib et al., 2024). The development of social media has accelerated the spread of hate speech, so its impact can be felt by the wider public within a short time. The misuse of social media can also erode mutual trust among individuals in society (Negara et al., 2022). The gap between guaranteed freedom and its misuse is a fundamental problem that requires appropriate and proportionate legal handling. Protecting human rights in the form of freedom of expression cannot be ignored, but the protection of other human rights must also be considered in a balanced manner (Udjari et al., 2022).

Hate speech as a communication phenomenon has characteristics that distinguish it from other forms of expression. Intent and the purpose of influencing others are important elements in determining whether a statement qualifies as hate speech or merely a statement containing hatred without a particular purpose (Vilar-Lluch, 2023). This distinction is crucial in law enforcement because it concerns whether an act has fulfilled the elements of a criminal offense. The complexity of hate speech lies in the need to prove the offender's malicious

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intent or deliberateness, which is often difficult to identify objectively. Proving fault in legal violations in the digital space indeed demands caution (Sutanto et al., 2023), because the offender's good faith or malicious intent is an important measure in assessing legal liability (Irfansyah et al., 2024). This problem requires analytical instruments that can clearly distinguish between legally protected expression of opinion and criminal acts that must be legally prosecuted. Accuracy in making this distinction will determine the quality of law enforcement and the protection of citizens' constitutional rights.

The identified problem relates to the structure of the elements of a criminal offense and their relevance in handling hate speech. Subjective and objective elements, as the two main categories that constitute a criminal offense, have different but complementary functions in determining the existence of a criminal act. The subjective elements inherent in the offender include intent, purpose, planning, and fear, which drive the criminal act. Psychological factors and social pressure can influence a person's motives for acting (Fajar et al., 2021). The objective elements include physical or verbal acts committed by the offender and prohibited by law. The first research question is how the structure of the elements of a criminal offense can be applied appropriately in handling hate speech cases to ensure legal certainty.

Another problem relates to the conception of hate speech as a criminal act and its social impact. Hate speech does not only affect victims individually but also has the potential to damage a harmonious social order. This impact may take the form of impaired psychological well-being among victims and damaged social relationships (Oluwatoshin & Darmawan, 2024). Hate speech also often stems from identity distinctions that place certain groups as different and separate parties (Aisyah & Mardikaningsih, 2023). The destructive nature of hate speech makes it a subject of strict legal regulation, both in conventional criminal law and in law governing the digital space. The fundamental difference between hate speech and hateful expression in general lies in the offender's will to bring about a particular influence. The second research question is how the conception of hate speech as a criminal act can be clearly formulated to protect society from harmful social impacts.

The constitution and various laws and regulations guarantee freedom of expression and opinion, but this freedom is not absolute and must be subject to restrictions set by law. Individual freedom needs to be balanced with shared responsibility (Saputra & Darmawan, 2021).

Restrictions on freedom of expression are necessary to protect the human rights of others and maintain public order. The state has an obligation to protect human rights, so restrictions on expression that harms others can be justified (Darmawan et al., 2024). Regulations in the digital space set clear limits on freedom of expression to prevent the misuse of electronic information. The third research question is how the constitutional foundations and regulations of freedom of opinion and its restrictions can be harmonized to ensure legal certainty.

The development of social media has given rise to new forms of crime such as cyber hate and cyber bullying that require adaptive legal handling (Muhammad et al., 2023). The characteristics of the digital space, which crosses territorial jurisdictional boundaries, add complexity to law enforcement. Legal protection for social media platform users also needs to be clearly guaranteed (Hutama et al., 2024). In addition, law enforcement that relies on automated systems needs to be supervised so that it remains unbiased and fair (Mardikaningsih & Oluwatoyin, 2023). Regulating social media is crucial to guarantee human rights in a digital space that is increasingly essential to people's lives. The fourth research question is how the challenges of regulating freedom of opinion in the digital era can be overcome through proportionate restrictions that do not disregard human rights.

Based on the formulation of the problem, this research aims to analyze the structural elements of criminal acts and their application in handling hate speech cases. This research aims to examine the conception of hate speech as a criminal act and the social impacts it causes for society. This research aims to evaluate the constitutional foundation and regulations of freedom of speech as well as its limitations within the Indonesian legal system. This research aims to formulate strategies for regulating freedom of expression in the digital era through proportional limitations that align with human rights principles.

RESEARCH METHOD

This research is conducted using a normative juridical research method that focuses on the examination of written legal norms related to hate speech and freedom of expression. The approach used in this research is the statutory approach, which examines various regulations governing hate speech and freedom of speech, as well as the conceptual approach, which reviews legal doctrines and theories relevant to the handling of hate speech

within the criminal justice system. The legal materials used consist of primary legal materials in the form of laws and regulations related to hate speech and freedom of speech, secondary legal materials in the form of legal literature, scientific journals, and academic works discussing related topics, and tertiary legal materials in the form of legal dictionaries and encyclopedias that provide explanations of technical terms used.

The collection of legal materials was conducted through library research, which includes tracing, collecting, and inventorying written legal materials in both print and digital forms. The collected legal materials were then classified based on topic and relevance to facilitate the analysis process. The analysis of legal materials was conducted qualitatively using deductive reasoning techniques, which begin the thought process from general premises in the form of applicable legal norms and theories to then draw specific conclusions regarding the handling of hate speech within the Indonesian criminal justice system. This technique allows researchers to examine the consistency between applicable legal norms and their implementation practices in the field, as well as to identify gaps that serve as obstacles in handling hate speech proportionally and fairly.

RESULT AND DISCUSSION

Structure of Elements of Criminal Acts and Their Relevance in Handling Hate Speech

The analysis of hate speech criminal acts requires a deep understanding of the elements that form an offense. Every formulation of a criminal act essentially originates from a human action committed by an individual. This action constitutes an act prohibited by law and threatened with criminal sanctions. The structure of an offense cannot be fully understood without first identifying the elements that compose it, because each element has a distinct function in forming the overall criminal act (Wijaya et al., 2022). The elements of a criminal act consist of two main categories, namely subjective elements and objective elements. The distinction between these two categories of elements serves as an essential analytical instrument in criminal law enforcement practice, particularly to determine whether a specific act has met all requirements to be penalized.

Unsur subjektif merupakan unsur yang melekat. The subjective element is an element inherent in the offender and relates to the offender's entire state of mind at the time of committing the act. This element covers various psychological aspects that drive the

criminal act. The offender's state of mind can be influenced by parenting and family norms (Fauzi & Khayru, 2025), values formed in the social environment (Kurniawan & Khayru, 2021), and views about social roles (Negara & Khayru, 2022). The presence of the subjective element is a fundamental distinction between an act that is criminal and one that cannot be punished due to the absence of malicious intent or deliberateness. Criminal law enforcement cannot ignore the subjective element because, without it, an act that objectively violates the law cannot necessarily be qualified as a criminal offense (Cahyono et al., 2024). The objective element includes intent as the most serious form of liability, the purpose of committing an attempt as referred to in Article 53 Paragraph (1) of the Criminal Code (KUHP), various kinds of purpose (oogmerk) contained in criminal acts such as theft, premeditation (voorbedachte raad) in murder as regulated in Article 340 of the KUHP, and the feeling of fear (vress) as mentioned in Article 306 of the KUHP. The separation between subjective and objective elements is an important foundation in systematic criminal law analysis. Without a clear separation between the two elements, the juridical analysis of a criminal act would lose its sharpness and objectivity. This systematic approach enables law enforcement officials to assess in layers whether an act has fulfilled all the required elements (Prabowo et al., 2024). Procedural certainty in legal processes also strengthens the legitimacy of law enforcement institutions (Khayru et al., 2024). Thus, identifying the elements of a criminal offense is a crucial first step before discussing particular forms of criminal acts, including hate speech. Accuracy in identifying these elements will determine the overall quality of law enforcement.

Hate speech as a form of criminal offense has its own complexity in applying the elements of a criminal offense. This act requires proof not only of a physical or verbal act but also of the offender's intent and purpose (Kurniawan et al., 2023). Changes in interaction patterns on social media make provocative statements spread more easily (da Cruz et al., 2024). The aspect of intent in hate speech often becomes the central point in examining a case, because without an intention to spread hatred or provoke, a statement may still fall within the corridor of freedom of opinion. A thorough understanding of subjective and objective elements is a prerequisite for law enforcers in distinguishing between criminal hate speech and legally protected expression of opinion. This understanding is important because stigma toward certain groups can give rise to

discriminatory treatment that must be prevented through legal protection (Zahid et al., 2022). The analytical framework built through the separation of the elements of a criminal offense provides legal certainty for society while protecting citizens' constitutional rights. Human rights protection is an obligation of the state (Darmawan et al., 2024), including the right to privacy in the process of proof (Issalillah & Hardyansah, 2024). Consistent application of these elements will prevent the criminalization of legitimate freedom of opinion.

Conception of Hate Speech as a Criminal Act and Its Social Impacts

Hate speech is an increasingly complex communication phenomenon within the legal and social realms. The development of information and communication technology has expanded the reach of hate speech from conventional public spaces to the digital realm, which is unrestricted by geographical boundaries (Pamuji, 2020). Hate speech is defined as a communicative act committed by an individual or group in the form of insults, provocation, or incitement directed at other individuals or groups based on various aspects such as skin color, ethnicity, race, gender, belief, and so forth. The primary characteristic that distinguishes hate speech from other forms of expression is the presence of content loaded with hatred directed at a group or individual based on specific identities. This act has the potential to damage harmonious social order and trigger horizontal conflicts within society.

From a legal perspective, hate speech encompasses spoken words, writing, behavior, or displays that are prohibited because they can encourage violence or prejudice on the part of both the perpetrator and the victim of the act. The destructive nature of hate speech makes it a subject of strict legal regulation, both in conventional criminal law and in law governing the digital space. The existence of websites that serve as platforms for spreading hate speech (hate sites) shows that this phenomenon has become organized and requires systematic handling (Flick, 2020). Social media also makes hate speech easily accessible, including to young people (Kurniawan et al., 2021). The legal approach to hate speech must continue to be examined so that it can respond to evolving social challenges. Comprehensive regulation is needed to balance the protection of freedom of expression with the prevention of the spread of hatred that harms society (Utama et al., 2024).

The fundamental difference between hate speech and hateful expression in general lies in the

offender's will or intent to bring about a particular influence, whether directly or indirectly. This will is a crucial distinguishing element because it shows that the offender is not merely expressing an opinion but intends to provoke or incite. The offender's intent can be influenced by internal as well as external drives (Vitrianingsih & Issalillah, 2021). If the speech inspires others to commit violence that can injure a person or a particular group of people, the hate speech can be said to have achieved its purpose (Fino, 2020). This success does not have to be measured by the occurrence of violence; the influence exerted on the listener's or reader's thoughts or attitudes is sufficient. This functional characteristic of hate speech distinguishes it from a mere statement containing hatred without the intention to influence others.

Hate speech is not included in the scope of freedom of expression and opinion guaranteed by the constitution. Every citizen indeed has the freedom to express opinions, whether orally or in writing, as regulated in the constitution, but this freedom has limits determined by law. Hate speech containing elements of ethnicity, religion, race, and inter-group affiliation constitutes a violation of human rights. The character of human rights violations in hate speech lies in its impact of degrading the dignity of others, causing material and non-material losses, giving rise to conflict or hostility, and potentially leading to the annihilation of a group or ethnicity. Treatment that degrades dignity in this way is a form of dehumanization that must be prevented (Darmawan, 2024). The danger of hate speech becomes more evident when viewed from its potential to trigger discrimination, labeling, stigma, exclusion, group violence, and even the collective annihilation of a particular ethnicity, religion, or group. Inclusive public communication that respects diversity can reduce hostility between groups (Mardikaningsih et al., 2024), and conflict-handling policies need to take Indonesia's societal diversity into account (Hariani & Halizah, 2024). Therefore, hate speech containing SARA elements must be regarded as a serious human rights violation that requires firm and proportionate legal handling.

Constitutional Foundation and Regulation of Freedom of Speech and Its Limitations

Indonesian law recognizes and guarantees the right to freedom of expression and opinion as a fundamental human right. In the 1945 Constitution of the Republic of Indonesia, it is stipulated that everyone has the right to express thoughts and attitudes according to their convictions, the right to

express opinions, including the right to seek, receive, and impart information in various available forms and channels. Article 28E Paragraph (2) of the 1945 Constitution explicitly states that everyone has the right to freedom of belief, expression of thoughts and attitudes, in accordance with their conscience. Article 28E Paragraph (3) of the 1945 Constitution further explains that everyone has the right to freedom of association, assembly, and expression. This constitutional guarantee is reinforced by various laws and regulations at the national level as well as international commitments ratified by Indonesia (Eddy & Medaline, 2022).

Freedom of expression and opinion is guaranteed by various legal provisions in Indonesia. Law Number 9 of 1998 on Freedom of Expressing Opinions in Public regulates the exercise of every citizen's right to express opinions freely and responsibly. Article 1 Paragraph (1), Article 2 Paragraph (1), and Article 5 of the law affirm citizens' right to express their thoughts freely and to obtain legal protection in expressing opinions. Law Number 39 of 1999 on Human Rights, particularly Article 23 Paragraph (2), also guarantees every person's right to express opinions freely. At the international level, Indonesia has ratified the International Covenant on Civil and Political Rights (ICCPR) through Law Number 12 of 2005, which in Article 19 Paragraph (2) regulates every person's right to express opinions without interference (Rachman, 2024). Thus, the guarantee of freedom of expression and opinion in Indonesia is multidimensional, encompassing constitutional, legislative, and international protection.

Although freedom of expression and opinion is guaranteed by regulations and the constitution, this does not make people free to express themselves and give opinions carelessly. This freedom must be exercised responsibly and in accordance with applicable rules. Exercising freedom responsibly also helps maintain harmony in a diverse society (Mardikaningsih, 2021). Article 28J of the 1945 Constitution stipulates that every person is obliged to respect the human rights of others in the orderly life of society, nation, and state (Pasaribu, 2024). This provision affirms that freedom is not absolute and must be subject to restrictions set by law. Restrictions on freedom of opinion are also regulated in Article 6 of Law Number 9 of 1998 on Freedom of Expressing Opinions in Public, which states that expressing opinions in public must be carried out in accordance with applicable provisions. In addition, Articles 70 and 73 of Law Number 39 of 1999 on Human Rights also regulate restrictions on rights in the context of

respecting the rights of others. The existence of these restrictions does not constitute a disregard of human rights, but rather a form of protection of society's own human rights.

Restrictions on freedom of expression in the digital space are specifically regulated in Law Number 19 of 2016 on the Amendment to Law Number 11 of 2008 on Electronic Information and Transactions (ITE Law). Article 27 Paragraph (1) of the ITE Law states that any person who intentionally and without right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents containing content that violates decency is subject to criminal penalty. Article 27 Paragraph (3) of the ITE Law prohibits any person from intentionally and without right distributing and/or transmitting and/or making accessible Electronic Information and/or Electronic Documents containing insults and/or defamation. Article 28 Paragraph (2) of the ITE Law prohibits any person from intentionally and without right spreading information intended to incite hatred or hostility toward certain individuals and/or groups of society based on ethnicity, religion, race, and inter-group affiliation (SARA). Article 29 of the ITE Law prohibits any person from intentionally and without right sending Electronic Information and/or Electronic Documents containing threats of violence or intimidation directed personally. These provisions set clear limits on freedom of expression in the digital space in order to prevent the misuse of electronic information that harms society and violates the law. Social media users with many followers have great influence, so the information they spread needs to be held accountable (Hariani & Mardikaningsih, 2022).

The handling of hate speech in Indonesia has also obtained a legal basis through the Chief of Police Circular Letter Number SE/06/X/2015 on the Handling of Hate Speech. The circular states that hate speech can take the form of acts formulated in the Criminal Code and other criminal provisions, including insult, defamation, blasphemy, unpleasant acts, provocation, incitement, and the spread of false news (Noija et al., 2024). This circular details the forms of hate speech that can be criminally punished in accordance with applicable provisions. The existence of this circular shows the seriousness of law enforcement officials in handling hate speech in a structured and systematic manner. However, the application of this circular must still observe human rights principles and legal certainty. A restorative

justice approach can serve as an alternative in resolving speech cases in the digital space without disregarding legal certainty (Darmawan & Negara, 2023). Thus, the regulatory basis for handling hate speech in Indonesia is adequately available, although its implementation still requires continuous supervision and evaluation.

Challenges of Regulating Freedom of Speech in the Digital Era and the Urgency of Proportional Limitations

The development of digital technology has opened up vast spaces for freedom of expression and opinion. Increasingly open access to information makes the freedom of opinion and expression increasingly tangible. The freedom of individuals to convey various opinions, particularly through social media, causes the exchange of information to take place at an unprecedented speed (Darmawan & Fajar, 2024). Social media has shifted conventional media as the primary means of conveying opinions quickly and freely. This phenomenon creates a new dynamic in the practice of freedom of speech, where every individual can become a producer as well as a consumer of information without passing through filters or verification from traditional media institutions. This ease of access brings serious consequences regarding the quality of circulating information and the potential misuse of freedom to spread detrimental content. The development of social media also shapes a new landscape in the practice of freedom of speech in the digital realm, which does not always align with existing legal principles.

The presence of social media also impacts freedom of expression with the emergence of new crimes generally known as cyber hate or hate crime. The term cyberbullying also arises as a form of online bullying that is increasingly prevalent. This phenomenon shows that technological advancement not only brings benefits but also gives birth to new forms of crime requiring adaptive legal handling (Purwanto et al., 2024). The characteristics of the digital space that transcend territorial jurisdictional boundaries add complexity to law enforcement. Social media as a platform facilitating online interaction through the exchange of information, opinions, and interests becomes a new arena for legal violations requiring comprehensive regulation (Silalahi et al., 2024). The regulation of social media in Indonesia becomes increasingly crucial to guarantee human rights in the digital space, which is increasingly essential for public life.

Sophisticated mobile phones serve as the

primary means of accessing social media alongside internet connections. Developments in digitally powered communication have given birth to various types of communication media that can be easily accessed by the general public. Telephone devices that become increasingly sophisticated along with the progression of technology are the devices most widely used to access social media. This ease is caused by the portability factor of telephone devices that can be carried while traveling as well as their ergonomic design for daily wear. Easy and inexpensive access to social media through mobile phones contributes to the increase in the volume of content circulating in the digital space. This condition requires high awareness from every user to utilize social media responsibly and not misuse such ease of access to disseminate content that violates the law (Latiefah et al., 2022).

More detailed regulations related to the provision and dissemination of information through social media are stipulated in Law Number 19 of 2016 concerning Information and Electronic Transactions. Such regulations are intended to govern use in the fields of information technology and electronic transactions, as well as specifically regulate the ins and outs of electronic transactions, protection of personal rights, formulation of acts contrary to the law, and provisions for criminal sanctions (Hasibuan & Hasibuan, 2024). The ITE Law is present as a legal foundation to ensure the protection of personal rights and law enforcement in online activities. In the ITE Law, there are various prohibited provisions, among others concerning decency materials, actions that insult or defame, content that can cause feelings of hatred or hostility between individuals or certain groups based on elements of SARA, as well as materials containing threats causing fear or anxiety addressed personally. Violations of such provisions can be subjected to criminal sanctions in accordance with applicable regulations. Thus, the ITE Law provides legal certainty for social media users while simultaneously serving as an instrument for preventing the misuse of freedom of expression in the digital space (Siswanto et al., 2024).

Freedom of expression and opinion on social media needs to be exercised with caution and responsibility. Although freedom of expression and opinion has been sheltered by laws, everyone needs to be careful in voicing opinions in the public sphere, especially through social media, so as not to harm others (Amanda, 2024). Freedom of expression and opinion must be subject to limitations determined by the state as its obligation and responsibility. Such limitations

should be formulated in legal instruments specifically to respect the rights and honor of others in the framework of protecting national security and order, health, as well as general ethics and morality. The existence of limitations on freedom of expression and opinion does not constitute a waiver of the respective human rights of the public in Indonesia (Baraja et al., 2023). Such limitations are highly necessary because they relate to the protection of the public's own human rights, wherein the state continues to provide broad opportunities in terms of conveying opinions while remaining responsible and law-abiding. The protection of such human rights solely aims to protect national unity and integrity as well as handle potential factors that can divide the nation on social media. The limitation of freedom of expression on social media through legal instruments aims to encourage responsibility for the impact of information conveyed and maintain a fair balance between individual rights and public interests.

CONCLUSION

The structure of elements of criminal acts, consisting of subjective elements and objective elements, provides a systematic analytical framework in handling hate speech cases. The consistent application of these two elements enables law enforcement officials to distinguish between criminal hate speech and expressions of opinion protected by law. The conception of hate speech as a criminal act must be based on the offender's intent or will to cause a specific detrimental effect on victims and society. The constitutional foundation and regulations of freedom of speech in Indonesia have recognized necessary limitations to protect the human rights of others and maintain public order. The challenge of regulating freedom of speech in the digital era requires proportional limitations that are adaptive to technological developments without ignoring the protection of human rights.

Public outreach regarding the boundaries of freedom of expression and the legal consequences of hate speech serves as a strategic preventive step. Social media regulations need to be continuously evaluated and adjusted to technological developments to ensure the effectiveness of handling hate speech in the digital realm. The balance between protecting freedom of expression and preventing hate speech must remain a primary concern in every law enforcement policy in Indonesia.

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