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Freedom of Expression on Social Media: A Legal Perspective and the Application of the ITE Law

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Abstract:

Advancements in information technology have established social media as a vital space for the public to express opinions, criticisms, ideas, and information. However, these developments also give rise to legal issues when freedom of expression clashes with the dissemination of false information, insults, defamation, and hate speech. This study aims to analyze the legal framework regarding the protection and restriction of freedom of expression on social media and to examine the application of the Electronic Information and Transactions (ITE) Law to digital expression. The research employs a normative-juridical method utilizing statutory, conceptual, and case-based approaches. Primary legal sources include the 1945 Constitution of the Republic of Indonesia, Law Number 39 of 1999 concerning Human Rights, Law Number 11 of 2008 concerning Electronic Information and Transactions (and its amendments), and relevant court rulings. The findings indicate that freedom of expression is a constitutional right under Article 28E paragraph (3) and Article 28F of the 1945 Constitution, yet it is subject to restriction under Article 28J. The application of the ITE Law to digital expression must take into account the elements of the criminal offense, the context of the statement, the communicative intent, and the principle of proportionality. Amendments introduced via Law Number 1 of 2024 reflect efforts to clarify digital norms and enhance legal certainty. Proportional law enforcement is essential to ensure that public protection does not devolve into excessive restrictions on freedom of expression.

Keywords:

Freedom of Expression; Human Rights; ITE Law; Law Enforcement; Social Media.



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1. Introduction

Indonesia is a state based on the rule of law, placing the law as the foundation for the conduct of societal and state life. This principle is affirmed in Article 1, Paragraph (3) of the 1945 Constitution of the Republic of Indonesia. In a democratic state governed by the rule of law, the protection of human rights is a crucial element, as it guarantees every individual the opportunity to participate in public life. One form of such participation is the freedom to express opinions, ideas, criticisms, and information. Freedom of opinion is constitutionally guaranteed under Article 28E, Paragraph (3) of the 1945 Constitution, while the right to communicate and obtain information is guaranteed under Article 28F. These provisions demonstrate that freedom of expression is an integral part of the democratic system and the rule of law.

Advancements in information technology have transformed how the public exercises these rights. Social media enables individuals to disseminate information and opinions rapidly and reach a vast audience. The digital space has thus evolved into a platform for public participation in public discourse, social oversight, and the voicing of criticism regarding policies. Research on freedom of expression via digital media indicates that while this freedom is grounded in the constitution and human rights regulations, its exercise remains subject to applicable legal boundaries (Wiranata et al., 2023). Given the open and rapid nature of social media, a statement can spread widely in a short time, potentially leading to significant legal and social consequences.

At the same time, the openness of the digital space gives rise to various issues. Social media can be used to disseminate false information, hate speech, insults, and defamatory content, or to share material that could trigger social conflict. This situation creates a need to strike a balance between protecting freedom of expression and safeguarding the rights and interests of others. Indriasari (2024) demonstrates that the implementation of the ITE Law has implications for freedom of expression and the public sphere; consequently, issues surrounding digital regulation concern not only content control but also the quality of democracy and the public's freedom to voice their opinions.

In this context, Law Number 11 of 2008 concerning Electronic Information and Transactions serves as a primary instrument for regulating public activity in the digital space. The ITE Law subsequently underwent amendments through Law Number 19 of 2016 and, later, Law Number 1 of 2024. These amendments reflect the legislature's efforts to align regulations with technological advancements and issues regarding the application of digital law. Law Number 1 of 2024 introduces changes to several provisions concerning insults, defamation, and the dissemination of information capable of inciting hatred or hostility.

A primary issue arises when the restrictive provisions of the ITE Law (Electronic Information and Transactions Law) clash with expressions that are critical, controversial, or opinion-based. Not every harsh or unpleasant statement can automatically be classified as a criminal offense. Therefore, legal enforcement must distinguish between protected criticism and expressions that meet the elements of a crime. Dunan and Mudjiyanto (2022) indicate that the ITE Law remains a subject of debate because several of its provisions are prone to multiple interpretations in practice. While digital regulations are necessary to foster a responsible communication environment, their implementation must uphold fairness and legal certainty.

Restrictions on freedom of expression must also be viewed within the framework of Article 28J of the 1945 Constitution of the Republic of Indonesia. This provision stipulates that the exercise of rights and freedoms may be restricted by law to respect the rights of others and to meet just demands based on morality, religious values,

security, and public order. Thus, the state's authority to restrict freedom is not absolute; restrictions must have a legal basis, serve a legitimate purpose, and be applied proportionately.

Research on freedom of expression under the ITE Law also reveals that the formulations regarding insult and defamation have been sources of contention due to their potential impact on the public's space for expression. These issues highlight the importance of consistent interpretation to prevent the excessive use of criminal provisions against expressions that ought to be legally protected. Consequently, the issue of freedom of opinion on social media concerns not only the existence of regulations but also how those norms are interpreted and applied in practice.

The amendment of the ITE Law via Law Number 1 of 2024 marks a significant development in the legal framework governing the digital realm. Recent research regarding the limits of freedom of expression under Law No. [Law] No. 1 of 2024 demonstrates that freedom of expression remains constitutionally guaranteed, while any restrictions thereon must adhere to the principles of legality, proportionality, human rights protection, and democracy. These regulatory changes indicate that the development of digital law must continue to aim for legal certainty while simultaneously preserving the space for freedom of expression.

Based on the foregoing, two research questions are identified. RQ1: What is the legal framework governing the protection and restriction of freedom of expression on social media under the 1945 Constitution of the Republic of Indonesia, Law No. 39 of 1999 on Human Rights, and the ITE Law? RQ2: How are the provisions of the ITE Law applied to freedom of expression in criminal cases involving digital expression, and to what extent does this application reflect the principles of proportionality and human rights protection?

2. Methods

This study employs a normative-juridical legal research method, which treats law as a set of norms or rules to analyze legal issues. This method was selected because the research focuses on the legal construction of freedom of opinion, the limits of freedom of expression, the regulation of digital expression under the ITE Law (Electronic Information and Transactions Law), and the application of these provisions in criminal cases. Normative legal research is utilized to examine positive law and connect various legal norms related to the protection of human rights and public activity in the digital space. A normative approach is also appropriate for research on freedom of expression via digital media that relies on literature review and qualitative-descriptive analysis (Wiranata et al., 2023).

The research utilizes three approaches: the statute approach, the conceptual approach, and the case approach. The statute approach is used to analyze the 1945 Constitution of the Republic of Indonesia specifically Articles 28E(3), 28F, and 28J as well as Law Number 39 of 1999 concerning Human Rights and Law Number 11 of 2008 concerning Electronic Information and Transactions (along with its amendments via Law Number 19 of 2016 and Law Number 1 of 2024). The conceptual approach is used to analyze concepts such as freedom of opinion, freedom of expression, human rights, hate speech, legal certainty, and proportionality. The case approach is used to analyze the application of ITE Law provisions in criminal cases involving digital expression, taking into account legal facts, applicable provisions, judicial considerations, and the **ratio decidendi**.

The research materials consist of both primary and secondary legal sources. Primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law Number 39 of 1999, Law Number 11 of 2008, Law Number 19 of 2016, Law Number 1 of 2024, and relevant court rulings. Secondary legal materials comprise scholarly journal articles, legal textbooks, research findings, and academic documents addressing freedom of expression, human rights, digital regulation, and

the ITE Law. Legal materials were gathered through a literature review involving the inventory, identification, classification, and analysis of relevant sources.

The analysis of legal materials was conducted using a descriptive-analytical method and qualitative reasoning. Each legal provision was compared against the concepts of freedom of expression and the principles of rights restriction, then examined in the context of its application to specific cases. The analysis aimed to determine the relationship between the guarantee of freedom of opinion and the state's authority to restrict digital expression. Assessment was based on four key parameters: legal certainty, legality, proportionality, and the protection of human rights. This approach was employed to formulate arguments regarding the limits of freedom of opinion and to determine whether the application of the ITE Law to digital expression aligns with the principles of the rule of law and democracy.

3. Results and Discussion

3.1. Legal Framework for the Protection and Restriction of Freedom of Opinion on Social Media

Research findings indicate that freedom of opinion on social media constitutes part of the constitutionally guaranteed freedom of expression. Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia guarantees the freedom of association, assembly, and expression of opinion. Meanwhile, Article 28F grants every person the right to communicate and obtain information through various available channels. These two provisions provide a constitutional basis for using social media as a means to convey ideas and participate in public life. This constitutional guarantee is reinforced by Law Number 39 of 1999 concerning Human Rights. Article 23 paragraph (2) grants every person the right to express and disseminate opinions in accordance with their conscience, whether orally or in writing, through print or electronic media. Thus, the use of electronic media to express opinions is part of the exercise of a right that enjoys legal protection. Research on freedom of expression via digital media also demonstrates that such freedom is grounded in the 1945 Constitution and the Human Rights Law, albeit subject to limitations imposed by statutory regulations (Wiranata et al., 2023).

However, freedom of opinion cannot be construed as an absolute right. Article 28J paragraph (2) of the 1945 Constitution provides a constitutional basis for restricting the exercise of rights and freedoms. Such restrictions aim to ensure respect for the rights and freedoms of others and to meet just demands based on considerations of morality, religious values, security, and public order within a democratic society. Therefore, the legal framework regarding freedom of opinion comprises two facets: the protection of the right and the restriction of its exercise. In the digital realm, these restrictions are implemented through various provisions within the ITE Law (Law on Electronic Information and Transactions). Prior to the 2024 amendments, Article 27, paragraph (3) of the ITE Law regulated the distribution, transmission, or making accessible of electronic information or documents containing material that constitutes an insult and/or defamation. Article 28, paragraph (2) regulated the dissemination of information intended to incite hatred or hostility against specific individuals or groups based on SARA (ethnicity, religion, race, and inter-group relations). These provisions demonstrate that the law draws a line where digital expression crosses into the realm of prohibited conduct.

Issues arise because expressions on social media are highly diverse in nature. Statements can take the form of criticism, personal opinions, satire, commentary, information, or expressions that attack others. Consequently, evaluating an expression cannot rely solely on whether the statement is deemed unpleasant or offensive. Law enforcement must examine the elements of a criminal offense as defined in applicable regulations. Research on Article 27 paragraph (3) indicates that

provisions regarding insult and defamation can indeed intersect with restrictions on freedom of expression; however, their application must be aligned with relevant criminal law frameworks. The issue of multiple interpretations poses a challenge in the implementation of the ITE Law. Dunan and Mudjiyanto (2022) demonstrate that while the ITE Law is considered essential for fostering a clean and responsible digital space, certain provisions have sparked public controversy due to interpretive ambiguities. This situation highlights that digital regulation requires more than just written norms; it also necessitates consistent mechanisms for interpretation and application.

From a human rights perspective, restrictions on freedom of expression must adhere to the principles of legality and proportionality. The principle of legality requires that restrictions have a clear legal basis, while the principle of proportionality mandates that restrictions be necessary and not exceed the intended objective. Recent research regarding limits on freedom of expression under Law No. 1 of 2024 also identifies legality, proportionality, human rights, and democracy as critical parameters for applying such restrictions. Amendments introduced by Law No. 1 of 2024 represent a significant development in the framework of digital regulation. These amendments provide new formulations for several provisions, including those governing attacks on honor or reputation and information that incites hatred or hostility (Julianja, 2021). Normatively, these changes aim to enhance legal certainty regarding the use of information technology. Thus, the regulatory changes can be understood as a response to the need to clarify the boundary between freedom of expression and actions subject to legal liability.

Based on the overall analysis, the legal framework governing freedom of opinion on social media can be divided into three layers. First, the layer of constitutional protection provided by Article 28E paragraph (3) and Article 28F of the 1945 Constitution of the Republic of Indonesia. Second, the layer of constitutional restriction established by Article 28J. Third, the layer of sectoral regulation through the ITE Law. These three layers must be applied harmoniously so that restrictions do not negate the substance of the protected right.

3.2. Application of the ITE Law to Digital Expression in Criminal Cases ***Research findings***

Analysis of criminal cases involving digital expression indicates that the application of the ITE Law must be based on the legal provisions in force at the time the act was committed. This principle is closely linked to the principle of legality, which dictates that an individual may only be held accountable under criminal laws that were already in effect when the act occurred. Consequently, changes in legal norms following the commission of an act cannot be applied retroactively to establish criminal liability. The cases analyzed in this study involve the use of social media to convey statements that were subsequently prosecuted under Article 28 paragraph (2) of the ITE Law, as it stood at the time of the act. This provision requires proof of an intentional and unauthorized act of disseminating information aimed at inciting hatred or hostility toward specific individuals and/or social groups based on SARA (ethnicity, religion, race, and inter-group relations). Thus, its application necessitates proving specific elements, rather than merely assessing whether a statement is controversial.

Research by Putera (2021) on the application of Article 28 paragraph (2) of the ITE Law highlights the importance of analyzing the provision's elements in criminal cases involving digital expression. The study demonstrates that applying the article regarding hate speech requires a legal framework connecting the act, the electronic information, the element of intent, the purpose of dissemination, and the nature of the hatred or hostility targeted by the legal norm. In this context, the distinction between criticism and hate speech becomes crucial. Criticism directed at institutions, policies, or public issues is, in principle, a form of civic participation in a democratic

state. Conversely, expressions that meet the elements of a criminal offense and are intended to incite hatred or hostility against protected groups may be subject to restrictions. Therefore, law enforcement officials must consider the overall context of a statement, including the intent, target, form of communication, and relevant legal elements.

This issue also relates to the potential for a "chilling effect" on freedom of expression. If the public perceives that any criticism or controversial opinion could lead to criminal proceedings, the space for public discourse may become increasingly restricted. Indriasari (2024) highlights the link between the enforcement of the ITE Law, pressure on the space for expression, and the quality of the democratic public sphere. Therefore, the application of criminal law in cases involving digital expression requires caution. The amendment of the ITE Law via Law Number 1 of 2024 introduces new developments regarding this issue. New provisions concerning attacks on honor or reputation, as well as the dissemination of information that could incite hatred or hostility, reflect an effort to clarify the boundaries of sanctionable conduct. However, these amendments apply only to acts committed after the new provisions took effect and cannot serve as a basis for retroactive criminal prosecution.

Conceptually, the application of the ITE Law must adhere to the principle of proportionality. Proportionality requires a balance between the interest of protecting the public and the interest of upholding individual freedom. Restrictions must not exceed the scope of the legal objective being pursued. If an expression falls within the realm of legitimate criticism or opinion, resorting to criminal law as the initial response risks imposing disproportionate restrictions. Research by Dunan and Mudjiyanto (2022) indicates that controversies surrounding the ITE Law stem from how its provisions are formulated and interpreted. Therefore, regulatory reform must be accompanied by improvements in the quality of law enforcement. Law enforcement officials need to objectively examine the elements of the alleged offense rather than basing legal proceedings solely on subjective objections to a statement.

Consequently, the application of the ITE Law to digital expression can be evaluated against four parameters. First, legal certainty specifically, the clarity of the legal provisions and the legal basis employed. Second, the principle of legality applying the law that was in effect at the time the act was committed. Third, proportionality balancing restrictions against the objective of legal protection. Fourth, the protection of human rights ensuring that law enforcement does not extinguish the constitutional right to freedom of expression. The research findings demonstrate that while the ITE Law plays a vital role in regulating the digital space, its application must be selective and contextual. Criticism, opinions, and statements of public interest cannot be automatically equated with hate speech or other criminal offenses. Conversely, if an expression is proven to meet all the elements of a criminal offense under applicable law, criminal liability may be imposed. Adopting this approach allows for law enforcement without compromising the principle of freedom of expression in a democratic state.

4. Conclusion

Freedom of expression via social media is a constitutional right guaranteed by Article 28E paragraph (3) and Article 28F of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) and reinforced by Law Number 39 of 1999 concerning Human Rights. However, this freedom is not an absolute right. Article 28J of the 1945 Constitution provides a constitutional basis for statutory restrictions aimed at respecting the rights of others and maintaining public security and order. In the digital realm, such restrictions are implemented through the ITE Law (Law on Electronic Information and Transactions) and its subsequent amendments.

The application of the ITE Law to digital expression must be based on the elements of the criminal offense and the law in force at the time the act was committed. Criticism, opinions, satire, and controversial statements cannot automatically be categorized as criminal offenses. Law enforcement must consider the context, intent, target, substance, and impact of a statement, linking these factors to the elements of the specific legal provision being applied. Amendments introduced via Law Number 1 of 2024 demonstrate an effort to enhance legal certainty and clarify certain provisions within digital regulations.

Thus, a balance between freedom of expression and law enforcement can only be achieved through the application of the principles of legality, legal certainty, proportionality, and the protection of human rights. The ITE Law should serve as an instrument to protect the public from the misuse of technology without becoming a tool for the excessive restriction of freedom of expression. Objective, selective, and contextual law enforcement is a prerequisite for ensuring the digital space continues to function as a venue for communication, public participation, and social oversight within a democratic state.

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The data that support the findings of this study are available from the corresponding author upon reasonable request.