

Protection of Freedom of Expression as a Human Right in the Framework of a Democratic State

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Abstract

Recognition of freedom to express and express opinions is part of human rights. The Universal Declaration of Human Rights states that everyone has the right to freedom of expression without interference and to seek, receive, and impart information and ideas through various media regardless of restrictions. The criminal provisions of the ITE Law contain multi-interpretations so that it is very prone to be misused to limit freedom of thought and expression of opinion which results in the loss of participation and critical thinking of the community on government administration. This research aims to discuss in depth the freedom of speech as a form of human rights that must be protected, comprehensively examining legal policies on the right to freedom of speech in a just democracy. This type of research is normative juridical with a descriptive-analytical approach to discuss existing legal symptoms and problems and test them based on legislation and legal norms. The results of this study indicate that freedom of speech is a human right that must be protected because it is universal and inherent in every individual and it is an obligation for the state to guarantee and fulfill that right. Legal policy towards the right to freedom of speech in a democratic country with justice requires limits in expressing opinions regulated in law as a guarantee and protection of the rights of others. Legal policies carried out in the form of a Joint Decree of the Minister of Communication and Information Technology, Attorney General, and Chief of Police to avoid abuse of the rule of law that silences freedom of speech, socialization, and understanding of the ITE Law and increasing public awareness to wisely use social media.

Keywords: *Democracy, Social Media, Freedom of Speech, Human Rights.*

INTRODUCTION

Indonesia guarantees everyone to express and express opinions as stipulated in Article 28 E paragraph (3) of the 1945 Constitution, namely, everyone has the right to freedom of association, assembly, and expression of opinion, and Article 28 F of the 1945 Constitution states that everyone has the right to communicate and obtain information to develop their personal and social environment, and has the right to seek, obtain, possess, store, manage and convey information using all available channels (Mara Ongku Hsb, 2021).

The basic norms of freedom of expression and expression of opinion stipulated in the 1945 Constitution are external laws or written rules that are general and binding (Zalfa Hania Alya, 2022). This basic provision is further accommodated through Law Number 9

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of 1998 Freedom to Express Opinions in Public jo Law Number: 39 of 1999 concerning Human Rights

In the global context, recognition of freedom to express and express opinions is part of the human rights stipulated in Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression, in this case including the freedom to have opinions without interference and to seek, receive and convey information and ideas through various media (Heins, 2008). Freedom of expression is a basic right of every person guaranteed and protected by the state (Sturges, 2016).

Human rights are inherent in every individual who is natural and fundamental as a gift of God that must be respected and protected (Famauri, 2019). The essence of human rights itself is an effort to maintain the safety of human existence as a whole by balancing the interests of individuals with public interests (Adygezalova et al., 2022). Efforts to respect, protect, and uphold human rights are obligations and shared responsibilities between individuals and states (Deane, 2016).

The development of information technology has a major influence on the pattern of community interaction. The birth of social media platforms such as Facebook, Twitter, Instagram, and so on, has penetrated the boundaries of distance, space, and time in the method of communication and expression of expressing opinions in cyberspace (Arafat & Kingdom, 2022). Based on a report by a British research institute, We Are Social in Indonesia in early 2020 there were 175.4 million active internet users, of which 160 million were social media users (detik.com).

In expressing opinions and expressions in public spaces, especially social media, there are limits or signs that must be obeyed by everyone, namely respecting the rights of others, and not disturbing public order and existing legal rules (Benvenisti, 2018). To express their freedom on social media, Indonesian people are subject to the provisions of Law Number 19 of 2016 Electronic Information and Transactions (ITE), as the rule of the game. Unfortunately, the provisions of this law cause polemics because they can be used as a tool to criminalize or limit everyone's freedom to express opinions (Febrianasari & Waluyo, 2022).

The criminal provisions of the ITE Law are often misused to limit people's interactions and views on social media (Bhatia & Wolkenstein, 2021). The political practices and dynamics of the digital era are filled with phenomena of oligarchic power, hate speech, and identity politics (Nasrudin & Nurdin, 2019). Based on data from the Ministry of Communication and Information Technology of the Republic of Indonesia, from 2018 to early 2021, there were 3,640 content containing ethnicity, religion, race, and inter-group (SARA) content on social media. Of those, the ministry has cut off access to 54 pieces of hateful and hostile content. Meanwhile, based on data from Robinopsnal Bareskrim Polri, in 2019 the Police had cracked down on as many as 104 cases of hate speech on social media (puskinas.polri.go.id).

Freedom of expression, communication, and information is a fundamental right of every citizen that must be guaranteed and protected (Sturges, 2016). However, this freedom is also limited by the rights of others and the law (Surbakti, 2016). Therefore, efforts are needed to prevent and overcome negative community interaction patterns that contain elements of defamation, insults, and hate speech, to create positive interaction patterns and maturity in social media to express and convey aspirations (Steuer, 2015).

LITERATURE REVIEW

A literature review is a description of the literature relevant to a particular topic area. The purpose of what is discussed in the research, hypotheses and supporting theories, as well

as the formulation of problems in the research. That this research uses Justice Theory and Legal Protection Theory. Justice theory is a view or thought about what is considered fair and how to achieve justice. According to Aristotle, justice is interpreted as a balance which is divided into two, namely the first distributive justice is justice that applies in the realm of public law, which focuses on the distribution of wealth and other goods obtained by the community. Secondly, corrective justice relates to correcting or justifying something that is wrong, providing compensation for the injured party or providing appropriate punishment for the perpetrator of the crime. (Adlhiyati & Achmad, 2020)

Legal Protection Theory is a view or thought about efforts to protect human rights and one's interests by allocating a human right by taking into account existing legal provisions. According to Satjipto Raharjo, legal protection is to provide protection for human rights (HAM) that are harmed by others and the protection is given to the community so that they can enjoy all the rights granted by law. Law can function to realise protection that is not only adaptive and flexible, but also predictive and anticipatory. (Tiawati & Pura, 2021)

METHODS

In accordance with the subject matter, the type of legal research carried out is normative juridical research or research that analyzes written law, jurisprudence, and norms that live in society. The analytical descriptive approach aims to collect systematic, factual and accurate data on a problem based on applicable laws and legal norms (Stanisz et al., 2022). Data collection techniques are carried out through literature studies, namely obtaining data by examining library materials or secondary data which include primary legal materials, secondary legal materials in the form of laws and regulations, books and other scientific works or journals and university legal materials such as dictionaries, magazines, newspapers and articles (Agustina & Purnomo, 2023).

DISCUSSION

1. Freedom of Expression as a Human Right to be Protected

As a democratic country, Indonesia upholds recognition of human rights while providing moral and legal guarantees to everyone to be free from various forms of oppression, dispossession, persecution, or obstacles that cause humans to be unable to live properly (Nikitha Suresh, 2021). In human rights, there are natural rights, namely the inherent right of every individual to escape from all restraints (Sudjana, 2018). Every human being has that right not because it was given to him but based on dignity as a human being, including:

- a. the right to life;
- b. the right to be free from torture or cruel, inhuman, or degrading treatment or laws;
- c. the right to be free from slavery;
- d. the right to be free from imprisonment for inability to fulfill the agreement;
- e. the right to be exempt from being found guilty of a criminal offense that was not yet legal at the time the act was committed;
- f. Right to freedom of opinion, confidence, and religion (Selian & Melina, 2018).

Freedom of expression is recognized by the world as a growing right, so international space and instruments are needed to regulate its development (Sturges, 2016). The recognition of this right is contained in international conventions recognized by the

United Nations, including the 1948 General Declaration of Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR) (Sari & Widyastuti, 2021).

Article 19 of the UDHR states that "Everyone has the right to freedom and expression, in this case including freedom of opinion without interference and to seek, receive, and express information and opinions in any way and regardless of boundaries"(Balabanova, 2018).

The ICCPR Covenant states on freedom of opinion and expression, namely: first everyone has the right to opinion without interference. Secondly, everyone has the right to freedom of expression, This right includes the freedom to seek, receive, and impart any information and thought, notwithstanding restrictions orally, in writing, print, artwork, or through any other medium of his choice (Situmeang, 2021).

The preamble to the 1945 Constitution recognizes that human rights are universal rights inherent in every person and the state must guarantee and fulfill these human rights (Putra, 2017). Indonesia as an active member of the United Nations supports the enforcement of human rights and has been realized in Law Number 39 of 1999 concerning Human Rights (Sari & Widyastuti, 2021). Indonesia has also ratified nine main international human rights instruments, including:

- 1) Convention on the Elimination of All Forms of Discrimination Against Women (Law Number 7 of 1984 ratifying the Convention on the Elimination of All Forms of Discrimination Against Women);
- 2) Convention on the Rights of the Child (Presidential Decree Number 36 of 1990 concerning the Ratification of the Convention on the Rights of Children);
- 3) Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Law Number 9 of 2012 concerning Ratification Optional Protocol to The Convention on The Rights of The Child on The Involvement of Children in Armed Conflict) dan Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Law Number 10 of 2012 concerning the Optional Protocol to the Convention on the Rights of the Child Concerning the Sale of Children and Child Pornography);
- 4) Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Law Number 5 of 1998 concerning the Ratification of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment);
- 5) International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (Law Number 29 of 1999 concerning the Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination);
- 6) International Covenant on Economic, Social, and Cultural Rights (Law Number 11 of 2005 concerning the ratification of the International Covenant on Economic, Social and Cultural Rights);
- 7) International Covenant on Civil and Political Rights (Law Number 12 of 2005 ratifying the International Covenant on Civil and Political Rights);
- 8) Convention on the Rights of Persons With Disabilities (Law Number 19 of 2011 Ratification of the Convention on the Rights of Persons with Disabilities);
- 9) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Law Number 6 of 2012 Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Their Family Members).

Based on the above considerations, the state must provide protection guarantees to every citizen in expressing opinions and expressing opinions in public spaces, including social

media (Steuer, 2015). This freedom of expression and expression is very important because:

- a. as a means to ensure self-fulfillment and also to reach one's maximum potential;
- b. for the search for truth and the advancement of science;
- c. so that people can participate in decision-making processes, especially in the political field;
- d. achieving stability of society and state (Zalfa Hania Alya, 2022).

Meanwhile, Toby Mendel explained that there are several reasons why freedom of expression is important because:

- a. as the basis of a democratic state;
- b. contribute to efforts to eradicate corruption;
- c. freedom of expression promotes accountability and openness;
- d. freedom of expression in society is believed to be the best way to discover the truth

Democracy allows everyone to enjoy the freedom he has proportionately because that freedom is limited by the rights of others. Freedom of expression is an important element in the course of democracy and public participation (Storgaard et al., 2023). Democratization is the application of rules or principles in every state policy, the goal is the formation of democratic political life (Zalfa Hania Alya, 2022).

The implementation of freedom of expression can be in the form of writing, books, discussions, and press activities, including expressing opinions using social media (Snijders & van Deursen, 2019). Express opinions on various issues, state, legal, and political issues, both in the form of public policies made by the government and other state institutions (Dunbar, 2021). Opinion or criticism of each policy is a form of control throughout government (Nasution, 2020).

A democratic country where people's sovereignty has a value that provides opportunities for people to participate directly and supervise the running of government (Jamhari & Testriono, 2021). The opportunity for the public to participate in government is fulfilled with the right to freedom of expression stipulated in the 1945 Constitution. Freedom of expression realizes healthy state administration through direct public participation, political parties, community organizations, non-governmental organizations, and so on (Danasastro, 2016).

Article 3 of Law Number 9 of 1998 concerning Freedom to Express Opinions in Public states that the principles in expressing aspirations must be based on the principle of balance between rights and obligations, the principle of deliberation and consensus, the principle of legal certainty and justice, the principle of proportionality and the principle of benefit.

Although freedom of expression or expression of opinion is a universal right, it is not without limitation and is exercised with a heart. The UN Human Rights Committee affirmed that restrictions on the right to expression can be imposed to respect and preserve the reputation of another person, namely someone who is individually part or a member of a community (Jeffrey Haynes, 2022). In addition, there is also the concept of margin of appreciation, namely that the state can be held nationally accountable to fulfill human rights obligations. However, often with the guarantee of the right to freedom of expression, some restrictions will follow that right (Suroso, 2019).

Article 73 of Law Number 39 of 1999 concerning Human Rights, states that the rights and freedoms stipulated in this law can only be limited by and based on the law, solely to ensure recognition and respect for human rights and fundamental freedoms of others,

decency, public order and the interests of the nation. Restrictions are carried out by the state as a duty bearer. The obligations carried by the state are the obligation to respect, the obligation to fulfill, and the obligation to protect (Rahayu, 2012).

Restrictions can also be carried out in the context of general welfare in a democratic society, or for national security, in a state of emergency that is officially proclaimed public emergencies that endanger the life of the nation. In its development, not all rights must be fulfilled absolutely, some rights can be limited in fulfillment and there are rights that cannot be limited in fulfillment even in emergencies (Bonython & Arnold, 2018).

The rights that can be limited in fulfillment in an emergency are derogable rights, which consist of the right to express opinions, the right to move, the right to assemble, and the right to speak. Absolute rights such as the right to life, freedom from torture, freedom from inhuman and degrading acts, freedom from slavery and servitude, and freedom of religion, should not be reduced even if the state is in a state of emergency (Osgar S, 2014).

2. Legal Policy on the Right to Freedom of Expression in a Democratic State of Justice

Community participation or involvement in political decision-making is a form of democracy so that every citizen has responsibility for government policies. Freedom of expression depends on policies set by the government (Miklaszewska, 2019). The extent to which limits the freedom of the individual to express himself and the state that guarantees freedom of expression without intervention. If people's freedoms are violated, then the government has acted authoritatively and there is abuse of power (Bonython & Arnold, 2018).

Data from the Cyber Directorate of Criminal Investigation of the National Police Headquarters states that criminal defamation through social media is the most handled by the police. Defamation cases dominate compared to other cybercrime cases. In 2017 there were 1,451 reports, and in the first three months of 2018, there were 338 defamation-related reports on social media (Mara Ongku Hsb, 2021).

Law Number 19 of 2016 concerning Electronic Information and Transactions Article 27 Paragraph (3) mentions any person who intentionally and without rights distributes, transmits, and makes accessible electronic information and electronic documents containing insults and defamation. This provision has become a rule that reaps many polemics because it limits people's freedom to express opinions, especially on social media (Gelber, 2019).

In addition, Article 45 paragraph (3) of the ITE Law states that everyone intentionally and without the right to distribute, transmit, and make accessible electronic information and electronic documents containing insults or defamation as referred to in Article 27 paragraph (3) shall be punished with a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp750,000,000.00 (seven hundred and fifty million rupiahs).

This article does not explicitly and definitively state the limits of what acts are classified as insult and/or defamation. Article 27 Paragraph 3 can cause multiple interpretations and is prone to misuse as a motive for revenge, silencing criticism resulting in loss of participation and a critical mindset of the community towards the administration of government (Gelber, 2019). Despite reaping polemics and rejections in the community, the Constitutional Court of the Republic of Indonesia in Decision Number 50 / PUU-VI / 2008 concluded that Article 27 paragraph (3) of the ITE Law does not violate democratic values, human rights, and the principles of the rule of law, because a person's good name and honor must be protected by applicable law.

Policy formulation must pay attention to harmonization with cultural, philosophical and religious values integrated with a rational policy-oriented approach. Things to note are as follows:

- a. The need for synchronization, harmonization and consistency between the development or renewal of national law with the values of socio-philosophical and socio-cultural aspirations (Filippov et al., 2016);
- b. The most dominant factor contributing to the increase in crime is that the legal system does not touch cultural values and is contrary to the will of society (Protosavitska et al., 2023);
- c. The inconsistency between the Law and the reality on the ground is a criminogenic factor. Development policies that ignore the moral and cultural values of society trigger criminogenic factors (Evertsson, 2017);
- d. The further the Act shifts from the sense of values that live in society, the greater the distrust of the enactment of the legal system (Ari Wibowo, 2011).

The legal policies in ensuring the fulfillment of freedom of expression and expressing opinions on social media that are fair include:

- 1) Joint Decree of the Minister of Communication and Information, Attorney General, and Chief of National Police Number: 229 of 2021 concerning Implementation Guidelines for Certain Articles in Law Number: 19 of 2016 concerning Information and Electronic Transactions

This guideline is a common reference for law enforcement agencies within the Kominfo, Prosecutor's Office, and the National Police in carrying out their duties and authorities, especially in handling criminal cases under Article 27 paragraph (3) of the ITE Law. With this collective agreement, law enforcement officials are expected to be more selective in distinguishing criticism aimed at building with insults that attack honor, so that there is no criminalization of freedom of expression and expressing aspirations on social media that have been recognized as part of human rights in the frame of a democratic country (Lakatos, 2023).

- 2) Socialization of Understanding of the ITE Law

The public must be given a sufficient understanding of the substance of the ITE Law both conceptually and materially. The most effective way to achieve this is through direct socialization to the community and law enforcement officials. The ITE Law is a legal umbrella that regulates cybercrime which is likely still not fully understood by law enforcement (Tobing, 2010).

Historically, the provisions of Article 27 paragraph (3) of the ITE Law refer to the provisions of insult or defamation regulated in the Criminal Code, especially Article 310 and Article 311 of the Criminal Code. Article 27 paragraph (3) jo Article 45 paragraph (1) of the ITE Law seems simpler than the insulting article in the more detailed Criminal Code. The formulation of Article 27 paragraph (3) jo Article 45 paragraph (1) of the ITE Law which seems simple is inversely proportional to criminal sanctions and heavier fines compared to criminal sanctions in the articles of contempt of the Criminal Code (Sari & Widyastuti, 2021).

To distinguish hate speech some indicators must be met so that a speech can be categorized as hate speech, namely:

- a. Malicious intent: meaning that it must be seen from the track record whether this is a momentary outpouring of disappointment or there has been a strong intention so far to hate certain countries or groups based on SARA continuously and seen from there is no causality between one post and another (Leiser, 2019).

- b. Informational: meaning that the text contains a whole idea marked by the presence of subject elements and predicates, for example, the word "monkey" is different from the word "monkey you" your monkey is informal but if monkey is not informal (Batyrgareieva et al., 2021).
- c. There is a clear target of hatred. This means that the target of hatred must be directed at whom, whether to individual people, to the state, or to certain groups based on SARA.
- d. The context of speech must be precise. This means that the content and form of the message as a whole can be recognized or concluded to be nuanced spreading hatred. Examples of the word "Pig" are differently pronounced by two people who are familiar with two people who are not familiar, but if it is pronounced by people who are not familiar it can be called an insult (Steuer, 2015);
- e. Hate speech reach. Reach from what is ordered or expected to reach a certain person, reach a certain group, a certain political group, or simply convey information solely (Ginting et al., 2022).

3) Increasing Public Understanding and Awareness

Given the importance of freedom to express opinions in building a democratic country with social justice and guaranteeing human rights, a safe, orderly, and peaceful atmosphere is needed. The ITE Law regulates that expressing opinions on social media must be carried out based on the principle of legal certainty, the principle of benefit, the principle of prudence, the principle of good faith, and the principle of freedom to choose technology (Hassanah, Hetty, 2021). Every community must prioritize ethics and act wisely in expressing opinions on social media to avoid being caught in the criminal trap of the ITE Law, including:

- a. wise in stating the opinion to be expressed;
- b. putting the public interest first;
- c. express opinions politely without insulting and hurting the feelings of others;
- d. does not impose the will.

To increase public awareness to be wise in using social media, the community must:

- a. Playing an active role in participating in the socialization of the ITE Law held, to create a culture of law-abiding and law-aware society;
- b. Participate in maintaining and anticipating various forms of deviations and violations of the ITE Law by certain parties;
- c. Establish an independent institution to assist the government in implementing the ITE Law in life (Verdinan, 2021).

CONCLUSION

That freedom of opinion as a human being must be protected because it is included in the universal rights inherent in every person and is an obligation for the state to guarantee and fulfill that right. Indonesia as a democratic country upholds recognition of human rights while providing moral and legal guarantees to humans to be free from all forms of servitude, oppression, deprivation, persecution, or oppression that cause humans to be unable to live properly. In addition, Indonesia has also ratified international human rights conventions such as UDHR and ICCPR as a form of commitment of the Indonesian nation to protect human rights as universal rights inherent in every person.

Legal policy on the right to freedom of expression in a just democratic country requires restrictions in expressing opinions regulated by law as a guarantee and protection of the

rights of others. Legal policies carried out such as the Joint Decree of the Minister of Communication and Information, the Attorney General, and the Chief of National Police Number: 229 of 2021 concerning Implementation Guidelines for Certain Articles in Law Number: 19 of 2016 concerning Electronic Information and Transactions to avoid abuse of legal rules that silence and criminalize freedom of opinion. In addition, socialization and understanding of the ITE Law are also needed and increase public awareness to wisely use of social media.

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