

Criminalization of Hate Speech in Indonesian Positive Law: A Proportionality Analysis of Restrictions on Freedom of Expression

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Abstract

The rapid development of information and communication technology has expanded freedom of expression while simultaneously increasing the dissemination of hate speech through digital media. This phenomenon has prompted the state to criminalize hate speech in order to protect public order, human dignity, and the rights of vulnerable groups. However, the regulation of hate speech in Indonesian positive law continues to raise concerns regarding legal certainty and the risk of excessive restrictions on freedom of expression. This study aims to analyze the regulation of hate speech criminalization in Indonesian positive law, examine the legitimacy of its restrictions within the constitutional framework, and assess its conformity with the principle of proportionality. This research employs normative legal research using statutory and conceptual approaches. Legal materials were analyzed qualitatively through the theories of the Rule of Law, freedom of expression, and proportionality. The findings indicate that the criminalization of hate speech possesses a legitimate constitutional basis under Article 28J paragraph (2) of the 1945 Constitution. Nevertheless, several provisions within the Electronic Information and Transactions Law and the Criminal Code contain vague formulations that may undermine legal certainty. Based on the proportionality test, Article 300 of the Criminal Code is considered more proportionate than Article 28 paragraph (2) and Article 29 of the Electronic Information and Transactions Law because it provides clearer limitations and greater protection for legitimate expressions.

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1. INTRODUCTION

Freedom of expression is a human right that holds a central position in a modern democratic system. This right allows every individual to express opinions, ideas, beliefs, criticism, and various other forms of expression as part of participation in social and political life. In the Indonesian legal system, freedom of expression is guaranteed through Article 28E paragraph (3) and Article 28F of the 1945 Constitution of the Republic of Indonesia, which grants everyone the right to express opinions, communicate, and obtain information. This recognition is in line with Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which places freedom of expression as a fundamental right in a democratic society (Zaporozhchenko et al., 2023). Therefore, freedom of expression is seen as an important instrument for realizing accountable governance, public participation, and protection of citizens' civil rights (Arvante et al., 2022).

However, freedom of expression is not an absolute right. In various international human rights instruments and national constitutions, states are given the authority to impose restrictions on freedom of expression as long as the restrictions are based on law, have a legitimate purpose, and are necessary in a democratic society (Sottiaux, 2022). In the Indonesian context, the constitutional basis for restrictions on rights can be found in Article 28J paragraph (2) of the 1945 Constitution, which states that the implementation of the rights and freedoms of every person must be subject to restrictions established by law to guarantee respect for the rights of others and meet just demands in accordance with considerations of morality, religious values, security, and public order. This provision indicates that freedom of expression must be placed within a framework of balance between individual rights and the interests of society at large (Lailam & Anggia, 2023).

The development of information and communication technology over the past two decades has significantly changed people's communication patterns. The presence of social media and various digital platforms allows individuals to become producers and disseminators of information on a much broader scale than before. This phenomenon has had a positive impact on the democratization of information, but at the same time, it has also increased the risk of spreading content containing hate speech. Various studies have shown that the digital space has become a primary medium for the spread of hate speech due to its rapid, massive, and relatively difficult-to-control characteristics (Ghozali et al., 2023). This situation has prompted many countries, including Indonesia, to strengthen regulations governing the boundaries of freedom of expression in the digital space.

Studies on digital space and the application of law in society have also been discussed in several relevant academic works. Habib examined the use of social media in relation to the implementation of the ITE Law and Islamic religious learning media during the recovery period of the Covid-19 pandemic, thus demonstrating that social media functions not only as a means of communication but also as a legal space that requires literacy, ethics, and normative regulation (Habib, 2023). Furthermore, studies on cyberbullying and digital citizenship also emphasize that freedom in the digital space must be accompanied by social responsibility from internet users to prevent behavior that harms others (Habib et al., 2026). In the context of legal protection for vulnerable groups, Aryono and Prastyanti point out that social media can become a space for violence against children and therefore requires adequate legal protection (Aryono Aryono, 2020). Therefore, the regulation of hate speech in the digital space needs to be placed within a framework of legal protection, digital responsibility, and a balance between freedom of expression and the protection of the rights of others.

Conceptually, hate speech is understood as a form of expression that attacks individuals or groups based on specific identities such as religion, race, ethnicity, nationality, gender, or other legally protected characteristics. Brown (2023) explains that hate speech relates not only to offensive expressions but also includes expressions that have the potential to incite discrimination, hostility, or violence against certain groups. In a pluralistic society like Indonesia, the impact of hate speech is even more serious because it can threaten social cohesion and increase the potential for horizontal conflict. Therefore, the state has a legitimate interest in legally intervening against forms of expression deemed harmful to communal life (Brown & Sinclair, 2023).

In response to this phenomenon, Indonesia regulates the criminalization of hate speech through various criminal law instruments. These regulations include Article 28 paragraph (2) and Article 29 of Law Number 1 of 2024 concerning the Second Amendment to the Electronic Information and Transactions Law, as well as Article 242 and Article 300 of Law Number 1 of 2023 concerning the Criminal Code. The presence of these various norms indicates the existence of a criminal policy aimed at protecting society from the

negative impacts of hate speech. However, the existence of several provisions that regulate similar objects also raises issues of legal harmonization and legal certainty. Some norms use subjective terms such as "causing hatred," "feelings of insult," and "frightening," which have the potential to give rise to multiple interpretations in law enforcement practices (Raz, 1979).

This issue is crucial because criminal law is essentially the most serious instrument of rights restriction in the legal system. According to Fuller (1969), good law must meet the principle of clarity to provide behavioral guidelines that are understandable to the public. When a norm is formulated vaguely and does not provide clear parameters regarding prohibited behavior, it has the potential to violate the principle of legality and reduce legal certainty. Joseph Raz (1979) even emphasized that one of the main requirements of the Rule of Law is the law's ability to provide predictability so that citizens can regulate their behavior rationally. Therefore, the quality of norms is a crucial aspect in assessing the legitimacy of criminalizing hate speech.

Various researchers have previously researched hate speech and freedom of expression. Some studies have focused on the effectiveness of law enforcement against hate speech in the digital space, while others have examined the relationship between freedom of expression and the protection of vulnerable groups. However, previous research has generally focused on normative analysis of specific regulations or on general human rights discussions. Studies specifically examining the criminalization of hate speech in the ITE Law and the New Criminal Code using a comprehensive proportionality framework are still relatively limited. Yet, the existence of the New Criminal Code has changed the regulatory landscape for hate speech and raised the need to reassess the suitability of these various norms to constitutional standards for rights restrictions.

Based on these conditions, there is a research gap in the absence of studies that systematically examine the criminalization of hate speech in Indonesia through the proportionality test, which includes substantive legality, legitimate aim, rational connection, necessity, and balancing. In fact, the proportionality framework has become a primary instrument in assessing the constitutionality of rights restrictions in various democratic countries (Barak & Kalir, 2012; Lailam & Anggia, 2023). Therefore, this research not only examines the formal existence of norms but also assesses the quality and legitimacy of the restrictions on freedom of expression that result from these norms.

This study aims to analyze the criminalization of hate speech in Indonesian positive law, examine the legitimate purpose of criminalization within the constitutional framework, and assess its compliance with the principle of proportionality as a standard for limiting rights in a democratic state governed by the rule of law. The results are expected to provide theoretical contributions to the development of criminal law and constitutional law studies, while also providing practical recommendations for legislators and law enforcement officials in formulating and implementing norms on hate speech that align with the principles of the rule of law and the protection of human rights.

2. THEORETICAL STUDY

2.1 Theory of Legal Authority and Rule of Law

The study of the criminalization of hate speech cannot be separated from discussions of legal authority and the concept of the Rule of Law. In a democratic state under the rule of law, the state's authority to restrict citizens' rights can only be justified if it is carried out through valid laws and meets the principles of the rule of law. Joseph Raz explains that the Rule of Law is not simply the existence of law, but rather a set of principles that ensure the law is able to fulfill its function as a predictable guide to

behavior for society (Raz, 1979). Therefore, the law is not only required to be formally valid but also must meet certain quality standards to be able to provide legal certainty.

According to Raz (1979), one of the main elements of the Rule of Law is that laws must be formulated clearly, understandably, and relatively stable. Norms that are vague or too dependent on official interpretation have the potential to create legal uncertainty and expand the scope for uncontrolled discretion. In the context of criminal law, clarity of norms is crucial because criminal law is an instrument that can directly limit individual freedom. Therefore, a criminal norm must be able to provide sufficient information to the public regarding what behavior is permitted and what is prohibited.

This perspective has strong relevance in regulating hate speech in Indonesia. Several criminal provisions governing hate speech use terms such as "inciting hatred," "feelings of insult," and "frightening." These terms are often questioned because they lack objective and measurable parameters. As a result, the public can have difficulty predicting whether a particular expression will be considered legitimate or classified as a criminal offense. This situation demonstrates the close relationship between the quality of norms and the protection of freedom of expression.

Besides Raz, Lon Fuller also emphasized the importance of internal legal morality as a prerequisite for the legitimacy of a legal system. Fuller (1969) proposed eight principles of legality that must be met for the law to function effectively. These include: the law must be made public, not retroactive, not contradictory, and clearly formulated. If the law fails to meet these principles, it loses its ability to guide human behavior. In the context of hate speech, the principle of clarity is crucial because it directly relates to the boundary between protected and criminalized expression.

The concept of the Rule of Law is also closely related to the protection of human rights. Dicey (1959) emphasized that one of the main characteristics of a state based on the rule of law is the supremacy of law, which limits government action from being arbitrary. In a democratic state based on the rule of law, restrictions on freedom of expression can only be imposed based on clear and constitutionally accountable laws. Therefore, analyzing hate speech norms is not sufficient from a purely formal perspective; it must also assess the normative quality of the regulations used as the basis for rights restrictions.

Based on this description, the theory of legal authority and the Rule of Law is used in this study to examine the quality of norms criminalizing hate speech. Through this perspective, the study assesses whether the norms used meet the principles of legal certainty, limit the discretion of law enforcement officers, and provide clear behavioral guidelines to the public. Therefore, this theory serves as an important foundation for assessing the substantive legality of various provisions governing hate speech in Indonesian positive law.

2.2 Freedom of Expression as a Constitutional Right

Freedom of expression is one of the most fundamental human rights in a democracy. This right allows individuals to express ideas, beliefs, criticism, information, and political views without fear of repression from the state. In modern democratic theory, freedom of expression is seen as a primary prerequisite for public participation, government accountability, and the open exchange of ideas (Arvante et al., 2022).

In the international legal system, freedom of expression is recognized through Article 19 of the UDHR and Article 19 of the ICCPR. Both instruments affirm that everyone has the right to seek, receive, and impart information through any media, regardless of frontiers. However, the ICCPR also recognizes that freedom of expression

may be restricted if necessary to protect the rights or reputations of others, national security, public order, public health, or public morals (Zaporozhchenko et al., 2023).

In the Indonesian context, freedom of expression is constitutionally protected through Article 28E paragraph (3) and Article 28F of the 1945 Constitution. These two provisions guarantee the right of every person to express opinions, communicate, and obtain information. This constitutional guarantee demonstrates that freedom of expression is an integral part of Indonesia's democratic system. However, like other human rights, freedom of expression is not absolute and can be limited through mechanisms determined by the constitution.

Article 28J paragraph (2) of the 1945 Constitution is the primary basis for limiting rights in the Indonesian legal system. This provision states that the exercise of rights and freedoms must be subject to restrictions established by law to guarantee respect for the rights of others and to meet just demands based on morality, religious values, security, and public order. Thus, the Indonesian constitution adopts a balanced approach between individual freedom and the interests of society.

Problems arise when restrictions on freedom of expression are imposed through criminal laws that are open to multiple interpretations. In such situations, there is a risk that the law no longer serves to protect the public but instead becomes a tool to excessively restrict public discussion. Therefore, any restrictions on freedom of expression must be tested against strict constitutional standards to ensure they remain in line with the principles of a democratic state based on the rule of law.

In the context of hate speech, the main debate lies in defining the boundary between protected expression and expression that is subject to criminal sanctions. Not all offensive or offensive statements can be categorized as hate speech. Therefore, clear criteria are needed to distinguish between criticism, satire, political expression, and incitement that have the potential to lead to discrimination or violence. These criteria are crucial for maintaining a balance between protecting vulnerable groups and protecting freedom of expression.

2.3 The Principle of Proportionality as a Standard for Limiting Rights

The principle of proportionality is one of the most widely used instruments in modern constitutional law to assess the legitimacy of restrictions on human rights. This principle has been widely developed in constitutional court practice in various countries and is used to determine whether a restriction on rights is justifiable in a democratic society (Barak & Kalir, 2012). In the context of this research, the principle of proportionality is used to assess whether the criminalization of hate speech constitutes a constitutionally acceptable form of restriction on freedom of expression.

According to Aharon Barak (2012), proportionality consists of several interrelated stages of testing. The first stage is legality, which ensures that the restriction is based on valid law and meets the standards of legal certainty. The second stage is a legitimate aim, which ensures that the restriction is implemented to protect constitutionally recognized interests. The third stage is rational connection, which assesses whether there is a logical connection between the means used and the desired goal.

The fourth stage is necessity. At this stage, the court must assess whether there are less restrictive alternatives that still achieve the same goal. If less restrictive and equally effective measures are available, the use of more severe measures is considered disproportionate. This stage is crucial in criminal law because imprisonment is the most serious form of restriction of rights.

The final stage is balancing, or proportionality, in the narrow sense. At this stage, the social benefits derived from restrictions are weighed against the harm caused to individual rights. Restrictions are only justified if the benefits outweigh the burdens

borne by the individual. Therefore, the principle of proportionality assesses not only the purpose of the restriction but also the actual impact of the restriction on citizens' freedoms.

In this study, the principle of proportionality is used as the primary framework for assessing various provisions governing hate speech in Indonesian positive law. By examining legality, legitimate purpose, rational connection, necessity, and balance, this study seeks to determine whether the criminalization of hate speech falls within acceptable limits in a democratic state governed by the rule of law.

3. RESEARCH METHODS

This research is normative legal research (doctrinal legal research) that focuses on the legal norms governing the criminalization of hate speech in the Indonesian legal system. Normative legal research positions law as norms written in legislation, court decisions, and legal doctrines developed in academic literature. The primary focus of this research is to identify, interpret, and evaluate legal norms related to restrictions on freedom of expression through criminal law instruments. Therefore, this research does not empirically examine public behavior or the effectiveness of the law, but rather examines the consistency, quality, and legitimacy of applicable legal norms.

The approaches used in this research consist of a statutory approach and a conceptual approach. The statutory approach is used to analyze various provisions governing hate speech in Indonesian positive law, particularly Article 28 paragraph (2) and Article 29 of Law Number 1 of 2024 concerning Electronic Information and Transactions, and Article 242 and Article 300 of Law Number 1 of 2023 concerning the Criminal Code. The conceptual approach is used to understand theoretical concepts related to the Rule of Law, freedom of expression, substantive legality, and the principle of proportionality as an instrument for testing rights restrictions.

The legal materials used consist of primary, secondary, and tertiary legal materials. Primary legal materials include the 1945 Constitution, the Electronic Information and Transactions Law (UU ITE), the National Criminal Code, and various relevant human rights instruments. Secondary legal materials include books, journal articles, research findings, and doctrines addressing hate speech, freedom of expression, and proportionality. Tertiary legal materials are used to aid understanding of the terms and concepts used in the research. All legal materials were collected through a literature review and analyzed qualitatively.

The data analysis technique used prescriptive legal analysis, interpreting the norms that were the object of the research and linking them to the theory used. The analysis was conducted in stages, examining substantive legality, legitimate aim, rational connection, necessity, and balancing. Through this approach, the research seeks to provide legal arguments regarding the appropriateness of criminalizing hate speech with the principle of proportionality in a democratic state governed by the rule of law.

4. RESULTS AND DISCUSSION

4.1 Regulations on the Criminalization of Hate Speech in Indonesian Positive Law

The criminalization of hate speech under Indonesian law has shown significant developments, along with the increasing use of digital technology and the complexity of social interactions in public spaces. Before the development of information technology, regulations regarding expressions that attacked specific groups were primarily contained in provisions on insults or hostility toward groups in the Criminal Code. However, the development of electronic media has prompted the government to develop legal instruments specifically regulating the dissemination of hateful information through

digital means. The introduction of the Electronic Information and Transactions (EITE) Law is one form of government response to this change.

Article 28, paragraph (2) of the ITE Law prohibits anyone who intentionally and without authority disseminates electronic information intended to incite hatred or hostility against individuals or certain community groups based on ethnicity, religion, race, or intergroup relations. This norm is one of the main instruments used in handling hate speech cases in the digital space. The main objective of this provision is to protect the public from the dissemination of content that can trigger horizontal conflict and disrupt social cohesion. From a criminal policy perspective, this article shows that the state views hate speech as a threat to public order and national unity.

However, this provision raises several normative issues. One of the most frequently discussed issues is the use of the phrase "inciting hatred or hostility." This phrase lacks clear parameters regarding the level of hatred that must be aroused for an action to be criminalized. Consequently, there is considerable room for interpretation in determining whether a particular expression meets the elements of a criminal offense. From a Rule of Law perspective, this condition can reduce legal certainty because society cannot accurately predict the boundary between legitimate expression and expression that is subject to criminal sanctions (Raz, 1979).

In addition to Article 28 paragraph (2), the ITE Law also regulates Article 29, which prohibits the sending of electronic information containing threats of violence or intimidation directed at individuals. This provision was originally intended to protect individuals from threats conveyed through electronic means. However, in practice, the use of the term "intimidation" often gives rise to interpretation problems. There is no objective measure as to when a statement can be considered a legally valid threat and when it is merely an emotional expression or a stern warning. This condition makes Article 29 one of the most debated norms from the perspective of legal certainty.

The enactment of the National Criminal Code brought significant changes to the regulation of hate speech. Article 242 of the Criminal Code prohibits public expressions of hostility, hatred, or contempt toward certain groups. Compared with previous provisions, this article seeks to clarify the object of protection by more specifically specifying the categories of protected groups. However, the use of the term "feelings of contempt" remains conceptually problematic, as it is difficult to distinguish from social criticism or expressions that are offensive but do not pose a real danger.

Article 300 of the Criminal Code regulates hate speech related to religion and belief. This provision prohibits acts of hostility, hatred, or incitement against a particular religion. Unlike some other provisions, Article 300 provides exceptions for statements made objectively, scientifically, or limited to certain settings for educational and scientific purposes. The presence of these exceptions demonstrates legislators' efforts to maintain a balance between protecting religious harmony and freedom of expression.

Table 1. Comparison of Hate Speech Regulations in Indonesian Positive Law

Provision	Protection Object	Main Elements	Criminal Threats
Article 28, paragraph (2) of the ITE Law	SARA-based groups	Causing hatred or hostility	6 years
Article 29 of the ITE Law	Individual	Threats of violence or intimidation	4 years
Article 242 of the Criminal Code	Population	Hostility, hatred, contempt	3 years

Article 300 of the Criminal Code	Religion or belief	Hostility, hatred, incitement	3 years
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Source: Adapted from Law No. 1 of 2024 and Law No. 1 of 2023.

Table 1 shows that Indonesia regulates hate speech through several norms with varying scopes. Article 28, paragraph (2) of the ITE Law focuses on the dissemination of hate speech based on ethnicity, religion, race, and intergroup relations (SARA) through electronic media, while Article 29 of the ITE Law emphasizes protecting individuals from threats through electronic means. Meanwhile, the National Criminal Code regulates insults against groups and religious-based hate speech within the general criminal law regime.

The existence of these various norms demonstrates that Indonesian positive law adopts a pluralistic approach to regulating hate speech. On the one hand, this approach allows for broader protection of various forms of expression that have the potential to cause social harm. However, on the other hand, the large number of norms governing relatively similar objects has the potential to lead to overlapping regulations. This situation can create disparities in law enforcement and increase the risk of selective use of articles by law enforcement officials.

The Rule of Law perspective requires that laws be formulated clearly, consistently, and without contradictions (Raz, 1979). Therefore, the existence of several norms with nearly identical protections needs to be evaluated to ensure that the legal system continues to provide certainty and predictability to society. In the context of hate speech, harmonization between the ITE Law and the Criminal Code is crucial to achieve the goal of public protection without sacrificing the principles of legality and legal certainty.

4.2 Legitimate Purpose of Criminalizing Hate Speech in the Constitutional Framework

Restrictions on freedom of expression can only be justified if they have a legitimate purpose within the constitutional system. In the Indonesian context, the constitutional basis for restricting rights can be found in Article 28J paragraph (2) of the 1945 Constitution. This provision authorizes the state to restrict rights and freedoms as long as the restrictions are carried out through law and are aimed at protecting the rights of others, morality, religious values, security, and public order. Therefore, the first step in assessing the legitimacy of criminalizing hate speech is to identify the objectives sought by the legislators.

In general, the primary objective of criminalizing hate speech is to protect society from the negative impacts of expressions that have the potential to incite discrimination, hostility, or violence against certain groups. In a pluralistic society like Indonesia, protecting groups based on religion, race, ethnicity, and other social identities is crucial. Conflicts fueled by identity sentiments not only harm the targeted groups but can also threaten social stability and national unity. Therefore, protecting social cohesion can be seen as a legitimate goal within the constitutional framework.

From a human rights perspective, protecting vulnerable groups is one of the reasons most frequently used to justify restrictions on freedom of expression. Hate speech not only attacks specific individuals but often targets the identities inherent in certain social groups. As a result, the impacts are not limited to the personal level, but can also affect the social standing, sense of security, and dignity of the targeted group. Therefore, restrictions on hate speech can be understood as an effort by the state to fulfill its constitutional obligation to protect citizens' rights from discrimination and degrading treatment. This view is in line with the provisions of Article 28I paragraph (2) of the 1945 Constitution, which guarantees the right of every person to be free from discriminatory treatment on any basis.

Another legitimate objective is the protection of human dignity. In many modern legal systems, human dignity is viewed as a fundamental value that underpins the protection of human rights. Hate speech that attacks the identity of a particular group often not only offends but also demeans the humanity of that group. Therefore, the criminalization of hate speech can be seen as an instrument for safeguarding human dignity in social life. This approach is clearly evident in Article 242 of the Criminal Code, which seeks to protect groups of the population from insulting or degrading expressions.

In addition to protecting human dignity, the state also has an interest in maintaining public order and national security. In a pluralistic society, identity-based hate speech has a greater potential to escalate into social conflict. History shows that various communal conflicts often begin with hate narratives that develop systematically in the public sphere. Therefore, restrictions on hate speech can be understood as a preventive measure to prevent greater social harm. In this context, the goal of criminalization is not only oriented towards punishing the perpetrator, but also towards protecting society as a whole.

However, legitimate objectives should not be formulated too generally. Using terms such as "security," "morality," or "public order" without clear definitions can potentially be used to justify excessive restrictions on freedom of expression. Therefore, any objective of the restriction must be concretely linked to the interests it seeks to protect. In the context of hate speech, the most compelling objectives are preventing discrimination, protecting human dignity, protecting vulnerable groups, and preventing social conflict. These objectives are directly linked to the values recognized in constitutions and human rights instruments.

Thus, it can be concluded that the criminalization of hate speech essentially has a legitimate purpose within the framework of the Indonesian constitution. However, this legitimacy does not automatically justify all forms of restrictions. Once a legitimate purpose is met, the next step is to examine whether the means used to achieve that goal comply with the principle of proportionality. Therefore, the analysis cannot stop at recognizing the purpose of the restrictions, but must proceed to assess the quality of the norms and restrictive mechanisms used.

4.3 Proportionality Analysis of the Criminalization of Hate Speech

a. Substantive Legality Test

The first step in testing proportionality is legality. In the context of a state governed by the rule of law, restrictions on human rights can only be imposed based on laws that meet legal standards. However, legality does not simply mean the formal existence of laws. Legality also has a substantive dimension that requires norms to be clearly formulated, understandable, and able to provide behavioral guidelines for society. Fuller (1969) asserted that unclear laws will lose their ability to direct human behavior. Similarly, Raz (1979) stated that laws must enable citizens to predict the legal consequences of their actions.

In regulating hate speech in Indonesia, the main problem lies in the quality of the norms. Article 28, paragraph (2) of the ITE Law uses the phrase "inciting hatred or hostility" without providing clear parameters regarding the level of hatred in question. There is no objective measure that can be used to distinguish between expressions that cause ordinary displeasure and expressions that truly incite hatred. As a result, the scope for interpretation by law enforcement officers is very broad. This situation has the potential to create legal uncertainty and increase the risk of inconsistent application of the law.

A similar issue is also found in Article 29 of the ITE Law. The phrase "scare" carries a high degree of subjectivity because fear is a psychological experience that varies from individual to individual. Without clear objective indicators, it is difficult to determine when a statement can be considered a criminal threat and when it is merely an emotional expression or a stern warning. Therefore, Article 29 faces serious challenges from a substantive legal perspective.

Table 2. Results of Substantive Legality Test

Chapter	Clarity of Norms	Risk of Multiple Interpretations	Rating
Article 28, paragraph (2) of the ITE Law	Low	High	Weak
Article 29 of the ITE Law	Low	High	Weak
Article 242 of the Criminal Code	Currently	Currently	Currently
Article 300 of the Criminal Code	Medium–High	Low	Good

Source: The author's analysis results based on Raz's Rule of Law theory and Fuller's legality.

Based on Table 2, the main weakness in the criminalization of hate speech in Indonesia lies in the quality of the norms. Article 28, paragraph (2), and Article 29 of the ITE Law still use terms that lack clear objective parameters. In contrast, Article 300 of the Criminal Code demonstrates a greater level of clarity because it includes exceptions for scientific and objective expressions.

Compared with the provisions of the ITE Law, Article 242 and Article 300 of the Criminal Code demonstrate a better effort to clarify the objects of protection. While still using subjective terms, both articles have a more specific and targeted scope. Furthermore, Article 300 of the Criminal Code provides exceptions for expressions made for scientific purposes, education, and objective discussion. The presence of these exceptions helps clarify the line between protected expression and criminalized expression.

Based on this analysis, it can be concluded that the quality of substantive legality varies across norms. Article 300 of the Criminal Code demonstrates relatively better quality, while Article 28 paragraph (2) and Article 29 of the ITE Law still face quite serious issues from a legal certainty perspective. Therefore, the legality stage indicates that not all hate speech norms have a sufficient level of clarity to legitimately restrict freedom of expression.

b. Rational Connection Test

Once a legitimate goal has been achieved, the next step is to examine whether there is a rational relationship between the means used and the desired goal. According to proportionality theory, a restriction of rights cannot be justified if the means used have no logical relationship to the desired goal. Therefore, every norm must demonstrate how criminalization can contribute to the protection of the interests it seeks to safeguard.

Article 28, paragraph (2) of the ITE Law clearly relates to the goal of protecting groups based on ethnicity, religion, race, and intergroup relations (SARA). The dissemination of information inciting hatred against certain groups has the potential to lead to discrimination and social conflict. Therefore, prohibiting the dissemination of such content is rationally linked to the goal of maintaining social cohesion.

However, this rationale weakens when the norm is applied to expressions that are still within the realm of legitimate political criticism or public discussion.

Article 242 of the Criminal Code also has a rational relationship with the goal of protecting the dignity of social groups. The prohibition against expressions that directly demean a group can be understood as an effort to prevent the development of discrimination and social segregation. However, because this article uses the concept of "feelings of insult," there is a risk that expressions that do not pose a real danger can still be subject to criminal sanctions. This situation suggests that even if a rational relationship exists, its effectiveness depends on how the norm is interpreted in practice.

Article 300 of the Criminal Code demonstrates a stronger rational relationship than other norms. The goal of protecting religious harmony is directly linked to the prohibition of acts that incite hatred or violence based on religion. Furthermore, the exceptions for scientific and objective expressions demonstrate that legislators are striving to ensure that criminal means are only used to address truly dangerous acts. Therefore, Article 300 has a relatively higher level of rationality than other norms.

c. Necessity Test

The third step in the proportionality principle is the necessity test. This step aims to assess whether the means used by the state are the most necessary to achieve a legitimate goal, or whether there are other, less severe, but equally effective alternatives. In the context of criminal law, the necessity test is crucial because criminal penalties, particularly imprisonment, constitute the most serious restriction on individual freedom. Therefore, the use of criminal law should be viewed as a last resort (*ultimum remedium*) after other means are deemed inadequate.

In the context of Article 28, paragraph (2) of the ITE Law, the state uses the threat of imprisonment and relatively heavy fines to control the spread of hate speech based on ethnicity, religion, race, and intergroup relations (SARA). From a social protection perspective, this choice is understandable because hate speech targeting group identities has the potential to trigger widespread horizontal conflict. However, the main question in the needs test is not whether the goal is important, but rather whether imprisonment is the only means available to achieve that goal. In practice, various other alternatives can be used, such as terminating access to content, deleting content by electronic system providers, administrative fines, or correction mechanisms, and the right to reply. These alternatives are often quicker to stop the spread of content than the lengthy criminal justice process.

From a proportionality perspective, the use of a six-year prison sentence for any form of dissemination of information deemed hateful has the potential to exceed the actual need. Not all hate speech is equally harmful. Some expressions may have only a very limited impact and lack the real potential to incite unrest or violence. Therefore, the automatic application of prison sentences to all categories of hate speech risks creating excessive restrictions on freedom of expression.

A more serious issue arises in Article 29 of the ITE Law. This provision regulates threats of violence and intimidation directed personally through electronic media. The goal of protecting individual security is indeed constitutionally justified. However, the use of imprisonment for all forms of communication deemed to incite fear requires stricter scrutiny. In many cases, the disputes are more closely related to interpersonal conflicts than threats to the broader public interest. Therefore, civil mechanisms, penal mediation, administrative warnings, or criminal supervision can

often be less stringent and still effective alternatives to achieving the goal of victim protection.

In contrast to the two articles in the ITE Law, Article 242 of the Criminal Code shows a more moderate tendency in terms of criminal penalties. In addition to lower criminal penalties, the Criminal Code also generally develops a more diverse approach to the criminal punishment system, including the use of fines and various other alternative forms of punishment. This condition provides greater room for judges to adjust sanctions to the level of culpability and social impact of the act committed. Therefore, from a needs perspective, Article 242 is relatively more proportional than Article 28 paragraph (2) and Article 29 of the ITE Law.

Article 300 of the Criminal Code best aligns with the needs test. In addition to establishing a clear protective objective, this provision also provides exceptions for expressions made in scientific, educational, artistic, and objective discussion contexts. The presence of these exceptions demonstrates that legislators are attempting to limit the use of criminal sanctions to situations that pose a genuine risk to religious harmony. Thus, Article 300 better reflects the principle that criminal sanctions are used as a last resort against behavior that poses a high level of social danger.

Based on this analysis, it can be concluded that not all norms criminalizing hate speech optimally meet the test of necessity. Article 28, paragraph (2), and Article 29 of the ITE Law still show a tendency to use relatively harsh criminal sanctions compared to other available alternatives. In contrast, Article 242 and especially Article 300 of the Criminal Code demonstrate an approach closer to the principle of *ultimum remedium* and are therefore more in line with modern standards of proportionality.

d. Balancing Test

The final step in the principle of proportionality is the balancing test. At this stage, the social benefits derived from restricting rights are weighed against the harm caused to individual freedoms. Restrictions are only justifiable if the benefits outweigh the resulting sacrifices. Therefore, the balancing test is a tool for determining whether a restriction is truly acceptable in a democratic society.

In the context of Article 28, paragraph (2) of the ITE Law, the social benefits to be achieved are protection for society from SARA-based conflicts and the maintenance of social cohesion in a pluralistic nation. These benefits have a very high value because they are directly related to social stability and national unity. However, the costs that must be borne are limited space for freedom of expression, especially in discussions on sensitive identity issues. The threat of relatively severe criminal penalties can also create a chilling effect, namely a situation where people choose not to express their opinions for fear of being punished. Therefore, the balance in Article 28 paragraph (2) can only be maintained if the norm is interpreted strictly and applied to cases that truly have the potential to cause real social harm.

Article 242 of the Criminal Code states that the intended social benefit is to protect the dignity of social groups from derogatory expressions. This goal is indeed important in a society that upholds equality and respect for human rights. However, the level of social harm posed by insulting statements is not always commensurate with the use of criminal law. In many cases, expressions that offend a particular group may not pose a real threat to public order. Therefore, the use of criminal law must be carried out carefully so as not to compromise the legitimate space for social criticism in a democratic society.

Article 300 of the Criminal Code demonstrates a better balance than other norms. On the one hand, the state benefits by protecting religious harmony and preventing religious-based conflicts, which have historically had significant social impacts. On the other hand, this norm still provides space for scientific expression, education, art, and objective discussion. With these exceptions, the costs of freedom of expression are less than the social benefits achieved. Therefore, Article 300 can be seen as an example of a norm that relatively successfully strikes a balance between protecting the public interest and protecting individual rights.

In contrast, Article 29 of the ITE Law demonstrates the weakest balance. The intended social benefit is indeed the protection of individual security. However, the social impacts of violating this article are generally private and do not threaten the broader public interest. Meanwhile, the severe criminal penalties and unclear norms have the potential to excessively restrict freedom of communication. Therefore, the costs borne by individual rights in many situations may outweigh the social benefits. This situation indicates that Article 29 faces serious challenges from a balancing perspective.

Table 3. Proportionality Test Results

Chapter	Legitimate Aim	Rational Connection	Necessity	Balancing
Article 28, paragraph (2) of the ITE Law	Of	Currently	Not enough	Conditional Balance
Article 29 of the ITE Law	Of	Weak	Inadequate	Unbalanced
Article 242 of the Criminal Code	Of	Currently	Currently	Unbalanced
Article 300 of the Criminal Code	Of	Strong	Adequate	Balanced

Source: Results of the author's analysis using Barak's proportionality theory.

Table 3 shows that not all hate speech norms have the same level of proportionality. Article 300 of the Criminal Code received the best rating because it meets most of the proportionality elements. Conversely, Article 29 of the ITE Law shows weaknesses in the aspects of rational relationship, necessity, and balance, potentially leading to disproportionate restrictions on freedom of expression.

A balancing test reveals that not all forms of criminalization of hate speech have the same level of legitimacy. Norms that are clearly formulated, have specific objectives, and provide protection for legitimate expression tend to be more easily defended constitutionally. Conversely, norms that are vague and open to overly broad interpretation risk creating disproportionate restrictions on freedom of expression.

4.4 Synthesis of Research Findings

Based on the overall analysis, this study found that the criminalization of hate speech in Indonesia has a legitimate constitutional basis. Article 28J paragraph (2) of the 1945 Constitution provides legitimacy for the state to restrict freedom of expression as long as such restrictions are aimed at protecting the rights of others, maintaining public order, and fulfilling just demands in a democratic society. Therefore, the existence of norms regulating hate speech does not conflict with the principles of the rule of law or the protection of human rights.

However, the legitimacy of objectives does not automatically make all hate speech norms compliant with the principle of proportionality. The main issue identified in this research is the quality of the norms. Several provisions, particularly in the ITE Law, still

use formulations that contain a high degree of subjectivity, potentially creating legal uncertainty. From a Rule of Law perspective, this situation can diminish the law's ability to provide clear behavioral guidelines to the public.

The results of the proportionality test indicate differences in the level of conformity between the norms. Article 300 of the Criminal Code is the norm that most closely meets the proportionality standard due to its clear purpose, strong rationale, more limited use of means, and exceptions that protect freedom of expression within a scientific and objective context. Conversely, Article 29 of the ITE Law demonstrates the greatest weakness due to the unclear formulation of the norm and the imbalance between social benefits and the resulting rights restrictions.

Table 4. Summary of Answers to Problem Formulation

Problem Formulation	Research Findings
How is the criminalization of hate speech regulated in Indonesian positive law?	Regulated in the ITE Law and the National Criminal Code with different scopes and objects of protection.
What is the legitimate purpose of criminalizing hate speech within the constitutional framework?	Protecting the rights of others, preventing discrimination, maintaining human dignity, public order, and social cohesion.
Does the criminalization of hate speech comply with the principle of proportionality?	Not all norms meet the principle of proportionality. Article 300 of the Criminal Code is the most proportional, while Article 29 of the ITE Law is the most problematic.

Table 4 shows that the study successfully addressed all of the research questions systematically. The main finding is that the criminalization of hate speech is essentially constitutionally justifiable, but the quality of the norms and their implementation still requires improvement to align with the principles of proportionality and a democratic rule of law.

These findings demonstrate that legal reform in the area of hate speech does not simply require the addition of new norms, but rather requires improving the quality of legislation. The formulation of clear norms, harmonization of the ITE Law and the Criminal Code, and the application of the *ultimum remedium* principle are crucial steps to ensure that public protection goes hand in hand with the protection of freedom of expression in a democratic state governed by the rule of law.

5. CONCLUSION

This research shows that the criminalization of hate speech in Indonesian positive law has a legitimate constitutional basis. Article 28J paragraph (2) of the 1945 Constitution authorizes the state to restrict the rights and freedoms of citizens as long as such restrictions are based on law and are aimed at protecting the rights of others, maintaining public order, and fulfilling just demands in a democratic society. In this context, the criminalization of hate speech can be understood as a legal instrument used to protect society from discrimination, hostility, violence, and various forms of social harm arising from the spread of identity-based hate expressions. Therefore, the existence of norms regulating hate speech does not conflict with the principles of the rule of law or the protection of human rights as long as they are implemented proportionally.

The research results also show that the regulation of the criminalization of hate speech in Indonesia is spread across several legal instruments, namely Article 28 paragraph (2) and Article 29 of the ITE Law, and Article 242 and Article 300 of the National Criminal Code. The existence of these various norms demonstrates the state's commitment to protecting society from the negative impacts of hate speech. However, the research found

problems with legal harmonization due to overlapping regulations and the use of terms that contain a high level of subjectivity. Phrases such as "causing feelings of hatred," "feelings of insult," and "scaring" have the potential to give rise to multiple interpretations that can reduce legal certainty. From a Rule of Law perspective, this condition indicates that the quality of norms remains a crucial issue in the policy of criminalizing hate speech in Indonesia.

Based on the proportionality test, the study found that the level of suitability of each norm was not the same. Article 300 of the Criminal Code is the provision that comes closest to the proportionality standard because it has a clear objective, a strong rational relationship with the protection objectives to be achieved, and provides exceptions for expressions carried out in scientific, educational, and objective discussion contexts. In contrast, Article 29 of the ITE Law shows the most significant weakness because the formulation of the norm is subjective and has the potential to cause disproportionate restrictions on freedom of expression. Meanwhile, Article 28 paragraph (2) of the ITE Law and Article 242 of the Criminal Code are in an intermediate position, namely having a legitimate objective but still requiring careful interpretation so as not to hinder the space for freedom of expression guaranteed by the constitution.

Overall, this study concludes that the criminalization of hate speech in Indonesia is constitutionally justifiable, but its legitimacy is conditional. Criminalization can only be upheld if the norms used comply with the principle of substantive legality, have a legitimate objective, use the necessary means, and create a proportional balance between protecting the public interest and protecting freedom of expression. Therefore, the quality of norms and law enforcement practices is a key factor in determining whether the criminalization of hate speech will serve as an instrument of public protection or become a means of excessively restricting rights.

6. SUGGESTION

Based on the research results, there are several recommendations that can be put forward to improve the regulation and implementation of hate speech norms in Indonesian positive law.

First, lawmakers need to harmonize the provisions of the ITE Law and the National Criminal Code. This harmonization is necessary to avoid overlapping regulations, reduce disparities in criminal penalties, and increase legal certainty. Normative formulation also needs to be improved by reducing the use of terms that are open to interpretation and providing more objective parameters regarding the elements of criminal hate speech. This step is crucial to ensure that the public clearly understands the boundaries between protected expression and expression that is subject to criminal sanctions.

Second, law enforcement officials need to adopt a restrictive and contextual interpretation approach when handling hate speech cases. Law enforcement must not focus solely on the words used by the perpetrator, but must also consider the context, purpose, medium of dissemination, and the potential for real harm caused by the expression. Therefore, criminal norms must not be used to silence criticism, academic discussion, satire, or other forms of expression that fall within the legitimate realm of freedom of expression.

Third, the application of criminal law must adhere to the principle of *ultimum remedium*. For forms of speech that pose a low level of social harm, the state can prioritize the use of non-criminal mechanisms such as content moderation, the right of reply, mediation, digital education, or administrative sanctions. This approach is not only more proportionate but also more appropriate to the rapidly evolving and dynamic nature of the

digital space. The use of imprisonment should be limited to cases that genuinely incite discrimination, hostility, or actual violence.

Fourth, further research can develop this study through an empirical or comparative legal approach. Empirical research can be used to examine how hate speech norms are applied by law enforcement officials and courts in practice. Meanwhile, comparative legal research can provide an overview of various models of hate speech regulation applied in other countries and their relevance to the Indonesian legal system. The development of this study is expected to enrich academic discourse on the relationship between freedom of expression, human rights protection, and criminal policy in a democratic state governed by the rule of law. Similarly, authors are also strongly encouraged to provide a review of the study's limitations and recommendations for future research.

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