

THE MISINTERPRETATION OF CRITICISM IN CRIMINAL LAW: ASSESSING JUDICIAL CAPACITY IN INDONESIA'S DIGITAL ERA

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Abstract

This study examines the boundaries of freedom of expression in Indonesia's digital space within the context of rapid technological development and the post-truth era. The expansion of social media has created new opportunities for public participation, while also increasing the risk of misuse in the form of defamation, hate speech, and disinformation. Using a normative juridical approach, this research analyzes the legal framework governing digital expression, particularly the Law on Electronic Information and Transactions and the Indonesian Criminal Code, in light of constitutional guarantees and international human rights standards. The findings reveal that ambiguous legal provisions, especially those related to defamation and hate speech, have led to overcriminalization and inconsistent law enforcement. In practice, criticism is often misinterpreted as a criminal act, creating a chilling effect on freedom of expression. However, a significant shift is observed in the KUHP, where certain provisions—such as those regulating demonstrations—adopt a material offense approach that focuses on harmful consequences rather than the act itself. This reflects a more balanced and just application of criminal law. The study also highlights the importance of distinguishing between legitimate criticism and unlawful expression, as well as the need to limit the use of criminal law as a last resort. In addition, low levels of digital literacy and inconsistent judicial interpretations further complicate the protection of freedom of expression. Therefore, a comprehensive approach is required, combining legal reform, judicial capacity building, and public education to ensure that freedom of expression is protected while maintaining public order and social responsibility.

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Introduction

The rapid advancement of information and communication technology has disrupted the way humans convey ideas, express opinions, and participate in the public sphere. Social media platforms such as Twitter, TikTok, and Instagram have become primary vehicles for expression and mobilization, effectively replacing many traditional spaces for discourse. This transformation has introduced new dilemmas regarding the boundary between digital expression as a fundamental human right and as actions that may be deemed unlawful (Fernando & others, 2022). On one hand, freedom of expression is a cornerstone of democracy; on the other hand, it is susceptible to misuse in the form of spreading hoaxes, hate speech, and violations of individual privacy (Susanto, 2019).

Many countries, including Indonesia, have responded to these challenges by enacting legal frameworks to govern cyberspace. Unfortunately, some of these provisions contain vague or overly broad clauses—commonly referred to as "rubber articles"—which carry the risk of criminalizing legitimate criticism or expression. (Fuady & others, 2020) Among the most controversial laws is Indonesia's Law on Electronic Information and Transactions (ITE Law), particularly Article 27(3), Article 28(2), and Article 45A, which are frequently used as legal grounds for reporting social media users who express opinions in digital spaces (Rannie, 2023).

Several prior studies have addressed similar issues. Some emphasize the urgency of protecting digital expression spaces, while others explore the misuse of legal instruments to silence critical voices (Hamanduna & Widjanarko, 2023). However, only a few have systematically examined the boundaries of freedom of expression in cyberspace from a human rights perspective by integrating normative legal analysis with contemporary developments in digital society (Rahayu et al., 2024). Digital crime is mixed with defamation, insults, blasphemy, privacy violations, and threats. The new Criminal Code is expected to be harmonious with the Electronic Information and Transaction Law (ITE), so that not just anyone can report each other to law enforcement officials in Indonesia, and must start focusing on cybercrime only (Suseno et al., 2025). The Indonesian state does not tolerate the spread of fake news, hoaxes, and other harmful digital content. The new Criminal Code aspires to protect the rights of every individual in Indonesia; it is necessary to involve digital forensics in identifying cybercrimes that are sure to harm the rights of others (Supanto et al., 2023). The new Criminal Code still raises controversy, especially if it is included in the meaning of substantive justice, as it may potentially threaten freedom of speech, especially for those who are critical of the ruling government. If freedom of speech is silenced, it can be considered a violation of human rights (Fatmawati et al., 2023). The Indonesian government still prioritizes criminal law in the face of reports from individuals who feel their rights are disturbed, especially related to feelings of alleged defamation, insult, and so on, while those who are suspected of harassing others feel that they have freedom of expression and are responsible for their actions and words. The new Criminal Code and the ITE Law must be able to be integrated properly so that they do not threaten democracy and human rights in Indonesia (Prahassacitta, 2023).

This study aims to critically explore the boundaries of freedom of opinion in cyberspace using a human rights framework and a normative juridical approach. The primary focus is on how the law can uphold digital expression as a fundamental right, while also providing regulatory frameworks for content that poses a threat to public order and digital safety. This research is expected to offer both theoretical and practical contributions to formulating regulatory approaches that are fair, balanced, and responsive to the dynamics of digital technological development.

Research Method

This research adopts a normative juridical approach, emphasizing the analysis of statutory norms and human rights principles that regulate freedom of expression in digital spaces. This approach is directed at examining the content of both national and international legal instruments as the basis for limiting expression in online media (Arvante et al., 2025; Salim & Nurbani, 2018; Zainuddin & Karina, 2023). Domestically, the primary object of analysis is Law No. 11 of 2008 on Electronic Information and Transactions, as amended by Law No. 1 of 2024, which serves as a legal framework for governing digital activity, including digital expression and opinion dissemination. Internationally, this study refers to Article 19 of the ICCPR, ratified through Law No. 12 of 2005, as the universal foundation for the right to freedom of expression in public digital space. The data used in this study were obtained through library research, which relies on primary legal materials such as statutes, international conventions, and jurisprudence, along with secondary legal sources including academic publications, legal commentaries, and institutional reports related to freedom of expression (Prasetyo & Barkatullah, 2020; Sukmawan & Damayanti, 2025). The research applies qualitative analysis, focusing on legal interpretation and the construction of normative arguments. This allows for a proportional evaluation between the constitutional protection of freedom of expression and the justification for limiting it in the name of public order and digital security.

Results and discussions

Legal Boundaries and Democratic Dilemmas in Digital Expression

Ambiguous regulations have led to a chilling effect and silenced critical voices on social media. According to findings presented by McAlister, the majority of internet users do not understand the legal boundaries when expressing themselves online, leading to high rates of digital-based criminalization (McAlister et al., 2024). In this context, the state has an obligation not only to enforce the law but also to ensure that the digital space remains open, fair, and capable of protecting citizens' constitutional rights.

Concrete cases such as the criminalization of Prita Mulyasari and Baiq Nuril have become symbolic of the weak legal protection for freedom of expression in Indonesia. In both cases, personal expressions aimed at reporting injustice were used as grounds for prosecution under vague legal provisions (Feka et al., 2025). This indicates a persistent failure to distinguish between defamation and legitimate criticism of public institutions or figures. Legal paradoxes also emerge in the tension between protecting individual expression and the state's efforts to restrict it in the name of national stability. In many cases, the phrase "public order" is often used as a justification to suppress political dissent or public opinion that challenges the official narrative (Lasonda et al., 2024). However, under international legal standards, restrictions on freedom of expression are only justified if they are conducted transparently, proportionately, and through legitimate legal mechanisms.

In a post-truth society, facts are frequently overshadowed by subjective beliefs and public emotions. Research shows that fake news or disinformation spreads more rapidly due to its provocative nature and susceptibility to belief (Serah et al., 2025). In this context, freedom of expression cannot be separated from the moral and ethical responsibility to share accurate and non-misleading information. The state and civil society must work together to foster a digital culture that promotes accountability and information literacy.

Efforts to mitigate the negative impacts of the post-truth era must include long-term strategies through education in digital literacy and media ethics. The state should not rely solely on repressive approaches but must also build partnerships with educational institutions, the media, and civil communities to strengthen the public's critical awareness of the information

they receive and disseminate (Vasist et al., 2023). In this way, digital spaces can evolve into deliberative media that support healthy participatory democracy.

Social media has fundamentally altered public communication patterns and the practice of freedom of expression. On one hand, digital platforms allow anyone to voice opinions broadly and without geographical limits; on the other hand, state involvement through regulations such as the ITE Law (Electronic Information and Transactions Law) has become an ambiguous instrument—protective yet potentially repressive. This creates a democratic dilemma, as constitutionally guaranteed freedom of speech is frequently curtailed by vaguely interpreted articles that can criminalize lawful expression (Lazarus, 2024). Research indicates that the majority of Indonesian social media users are adolescents and young adults who lack sufficient digital literacy, making them vulnerable to unintentionally violating legal norms (Prianti & Athique, 2025). In a democratic rule-of-law state, freedom of expression must be strategically positioned not just as rhetorical symbolism but as a participatory tool to oversee power.

As a legal instrument, the ITE Law is often criticized for containing overly broad and ambiguous provisions. Article 27(3), for example, prohibits the distribution of content deemed insulting or defamatory. In practice, however, this article is often used to prosecute criticism of public officials, which should be protected as a form of citizen expression (Wiratraman & Lafrance, 2021). This contradicts the spirit of constitutional democracy, which should guarantee citizens the freedom to monitor and critique public policy. When constructive criticism is treated as a crime, it results in a severe degradation of civic space and citizen participation in democratic governance.

The legal paradox is further evident in the contradiction between the protection of individual expression and the state's tendency to impose restrictions under the guise of national stability. In many cases, "public order" is invoked to justify limitations on political expression or criticism of authority (Lorenz et al., 2024). Yet under international law, such restrictions must be proportional, limited, and follow due legal process, satisfying principles of legitimate aim, necessity, and proportionality. Without clear legal foundations and strict limitations, the state risks slipping into digital authoritarianism that threatens democratic principles.

One of the most serious implications of restricting freedom of expression is the decline in public participation in policy discourse. When citizens fear expressing their views due to legal repercussions, the deliberative function of democracy is diminished. This directly affects public trust in democratic institutions and reinforces political apathy, particularly among younger generations (Masferrer, 2023).

The growing post-truth phenomenon in Indonesia further complicates the practice of freedom of expression. People tend to accept information that aligns with their beliefs and emotions, rather than factual validity (Rannie, 2023). This fosters an environment in which hoaxes and hate speech thrive, with social media as their main vehicle. In such a climate, freedom of speech deteriorates substantially, co-opted by political polarization and partisan interests. Research also reveals that low digital ethics awareness transforms potentially constructive expression into personal attacks and defamation. Therefore, it is essential to build strong media literacy and establish a legal protection system that is educational rather than repressive.

In today's digital era, social media has become the primary arena for the contestation of information, opinions, and public discourse. Unfortunately, unverified information often spreads faster than valid content. The Department of Information and Library Services (2020) notes that low digital literacy in Indonesian society causes many users to be easily influenced by emotionally charged, fact-free content (Muhammed & Mathew, 2022). This reinforces the "information bubble" effect, in which individuals are only exposed to perspectives that reinforce their existing beliefs. As a result, public dialogue becomes polarized and closed off to alternative

viewpoints, degrading the quality of democratic deliberation and increasing the risk of horizontal conflict driven by misinformation.

Efforts to reduce the negative effects of the post-truth era must be accompanied by continuous public education, both through regulations and digital literacy programs. The government must not rely solely on legal repression, but also promote collaboration with civil society and educational institutions to foster a healthy expression culture. In doing so, the digital space can become an inclusive deliberative medium—not only a platform for free expression but also a meeting ground for diverse perspectives in a spirit of mutual respect and civic dialogue (Lan & Tung, 2024). This digital transformation must be directed toward strengthening participatory democracy, rather than narrowing civic freedoms.

Digital transformation needs to be continuously directed toward strengthening participatory democracy while maintaining a healthy space for civil liberties. Amid the growing influence of algorithms and personalized content on social media platforms, users tend to exist within information environments that align with their preferences. This condition presents an opportunity to promote better digital literacy so that the digital space can continue to enrich perspectives, broaden dialogue, and support inclusive freedom of expression.

Amid the strong influence of algorithms and personalized content on social media platforms, users tend to be trapped in information echo chambers that reinforce their biases. This exacerbates challenges to freedom of expression, as the digital space no longer encourages dialogue but instead promotes information segregation (Huang & Liu, 2025). This reality calls for technology regulations that promote algorithmic transparency and platform accountability in managing the flow of information. The government, along with non-state actors, must push platforms to provide users with tools to understand content curation and control the types of information they consume (Ahmmad et al., 2025).

Another pressing issue is the rise of cancel culture, which, while intended as a form of social accountability, is often weaponized to silence dissenting opinions. This phenomenon places freedom of expression in tension between protecting vulnerable groups and safeguarding individual rights to express unpopular views (Foelster & Leon, 2024). Ethical and legal boundaries must be established to distinguish between constructive criticism and discriminatory speech. Regulation should not serve as a tool for silencing, but rather as a proportional and educational safeguard that upholds freedom of expression without compromising the dignity and safety of marginalized communities.

Legal paradoxes are also evident in the tension between the protection of individual expression and the state's inclination to limit it in the name of national stability. In many cases, the term "public order" is used as a justification to suppress political criticism or public opinion that contradicts the official narrative. Yet, according to international legal standards, restrictions on freedom of expression are only justifiable if conducted openly, proportionately, and through legitimate legal procedures (Gunatilleke, 2021).

In a post-truth society, facts are often eclipsed by subjective beliefs and public emotions. Research shows that false or misleading information spreads more rapidly due to its provocative nature and ease of consumption. Within this context, freedom of expression cannot be separated from the moral and ethical responsibility to disseminate accurate and truthful information (Beauvais, 2022). Therefore, both the state and civil society must collaborate in cultivating a digital culture that encourages accountability and information literacy.

Efforts to counter the negative impacts of the post-truth era must include long-term strategies, particularly in digital literacy and ethical media education. The state must go beyond repressive legal mechanisms and build meaningful partnerships with educational institutions, the media, and civil society to strengthen the public's critical thinking capacity regarding the information they receive and disseminate (Ghazali Saraan et al., 2025). In doing so, the digital realm can be developed into a deliberative space that fosters healthy participatory democracy.

Social media has fundamentally altered the landscape of public communication and the exercise of freedom of expression. On one hand, digital platforms allow individuals to express their opinions widely and beyond geographical boundaries (Fasel & Weerts, 2025). On the other hand, state interventions—such as the implementation of the Information and Electronic Transactions Law (ITE Law)—function as ambiguous instruments that simultaneously protect and restrict. This creates a democratic dilemma, as constitutionally guaranteed freedom of speech is frequently constrained by vaguely worded provisions that may criminalize legitimate expression. Studies indicate that most social media users in Indonesia are adolescents and young adults with limited digital literacy, making them vulnerable to unintentional legal violations. In a democratic rule-of-law state, freedom of expression must not be a mere rhetorical symbol but a participatory tool for holding power accountable.

The ITE Law, as a digital legal instrument, is often criticized for containing overly broad and ambiguous provisions. Article 27(3), for instance, prohibits the distribution of content deemed insulting or defamatory. In practice, however, this article has frequently been used to prosecute criticism of public officials—criticism that should be protected as an essential component of citizen expression. This application contradicts the spirit of constitutional democracy, which is meant to safeguard citizens' rights to critique and oversee public policy. When constructive criticism is criminalized, the result is a serious degradation of civic space and democratic participation.

Another legal paradox arises from the contradiction between protecting individual expression and the state's recurring imposition of restrictions under the pretext of maintaining national order. The term "public order" is frequently invoked to justify limitations on political speech or criticism of authorities (Bellamy & King, 2025). However, under international law, any restrictions on expression must be proportionate, limited, and based on lawful procedures. They must also meet the principles of legitimate aim, necessity, and proportionality. Without clear legal standards and narrowly defined limitations, the state risks descending into digital authoritarianism, which poses a significant threat to democratic governance.

One of the most serious consequences of suppressing freedom of expression is the reduction of public participation in policy discourse ("V Political Process: Public Opinion, Attitudes, Parties, Forces, Groups and Elections / Vie Politique: Opinion Publique, Attitudes, Partis, Forces, Groupes et Élections," 2024). When citizens fear expressing their views due to legal risks, the deliberative function of democracy is diminished. This undermines public trust in democratic institutions and fuels political apathy, especially among the younger generation.

The post-truth phenomenon in Indonesia further complicates the practice of freedom of expression. Citizens are more inclined to believe and share information that aligns with their emotions and beliefs, rather than factually accurate content. This environment fosters the proliferation of hoaxes and hate speech, using social media as the primary vehicle (Sharine & Sitorus, 2024). In this context, freedom of expression is substantively weakened, co-opted by political polarization and partisan interests. Research also shows that low ethical awareness in the digital space has transformed potentially constructive expression into personal attacks and defamation (Lim, 2025). Therefore, strengthening media literacy and shifting from repressive legal responses to educational and preventive approaches are crucial.

In the digital age, social media has become the main arena for the contestation of information, opinion, and public discourse. Unfortunately, unverified content often spreads faster than factual information (Surjatmodjo et al., 2024). The Department of Information and Library Services (2020) notes that low digital literacy among Indonesian users makes them particularly susceptible to emotionally charged, non-factual content. This contributes to the formation of information bubbles, where individuals are exposed only to viewpoints that reinforce their own, resulting in a polarized public discourse and reduced openness to alternative perspectives. This ultimately diminishes the quality of democratic deliberation and increases the likelihood of horizontal conflicts fueled by misinformation.

To address these challenges, public education initiatives must accompany digital regulation efforts. The government should move beyond repressive legal tactics and promote collaboration with civil society and educational institutions to cultivate a healthy expression culture. In this way, the digital space can evolve into an inclusive deliberative arena that facilitates respectful dialogue and civic engagement. A democratic digital ecosystem must prioritize openness, participation, and protection for civil liberties—not surveillance and suppression.

Freedom of Expression in the Post-Truth Era and the Challenges of Social Media

The rapid expansion of social media has transformed public expression into a space that is immediate, massive, and difficult to control through conventional legal frameworks. From a criminal law perspective, this transformation creates serious challenges in distinguishing between legitimate criticism and punishable conduct (Kholik & Sulastri, 2026). Many expressions that should be protected as political speech are instead classified as hate speech or defamation. This indicates an overextension of legal interpretation that risks suppressing democratic discourse (Pertiwi, 2025). Criminal law, which should function as a last resort, is often used prematurely to regulate expression. Such practices create legal uncertainty and open the door to arbitrary enforcement (Safitri, 2026).

The regulation under the ITE Law reflects a tendency toward the criminalization of digital expression. The element of “attacking honor” is frequently interpreted broadly without clear legal boundaries (Samsir, 2025). In practice, criticism of public policies can easily be framed as an attack on personal reputation. This contradicts the constitutional guarantee of freedom of expression. When criminal law is applied without strict limits, it shifts from being a protective mechanism to a repressive tool. As a result, the digital public sphere becomes increasingly restricted (Mulyono et al., 2025). A crucial shift appears in the Indonesian Criminal Code (KUHP Nasional), particularly in the regulation of demonstrations under Article 256 (Wahid et al., 2025).

A common misunderstanding is to assume that demonstrations themselves are prohibited. In reality, the provision focuses on the consequences of the act rather than the act itself. This makes it a material offense, where criminal liability depends on the occurrence of harmful outcomes. Demonstrations remain lawful as long as they do not disrupt public order or cause damage. This shift reflects a more just and balanced approach in criminal law.

The material nature of this offense has significant implications for law enforcement. Authorities cannot simply punish individuals for organizing demonstrations without prior notification (Samuji et al., 2025). There must be clear evidence of actual harm, such as disruption of public services or damage to public facilities. This approach moves away from rigid formalism toward a more substantive assessment of harm (Firmansyah et al., 2026). It strengthens the protection of freedom of expression in public spaces. At the same time, it prevents the misuse of criminal law against democratic participation (Rustamaji et al., 2025).

Further clarification is provided in the explanations of Articles 218 and 240 of the KUHP Nasional, which distinguish between criticism and insult. Criticism is recognized as a legitimate form of social control in a democratic society (Firdaus et al., 2025). In contrast, insult refers to actions that degrade or damage someone’s dignity through defamatory or degrading statements. This distinction is essential in determining criminal liability. However, in practice, the boundary between criticism and insult is often blurred. This creates broad interpretative discretion for law enforcement authorities (Sinaga et al., 2026).

The problem becomes more complex in the context of social media, where information spreads rapidly and widely. The element of distribution under the ITE Law extends criminal liability to those who disseminate content. Even individuals who merely repost content can be implicated in criminal offenses (Athirah et al., 2025). This demonstrates the expansive reach of criminal law in the digital sphere. Consequently, individuals become vulnerable to prosecution

even without clear malicious intent. This situation highlights the urgent need for stricter limitations on the use of criminal law in digital contexts.

Although Article 27A is categorized as a complaint-based offense, it does not fully prevent overcriminalization. In practice, legal complaints are often used strategically to silence dissent. When reports are filed by powerful individuals or institutions, law enforcement processes tend to proceed without sufficient contextual analysis. This creates an imbalance in the application of criminal law (Kandriana et al., 2025). Ideally, law enforcement authorities must carefully examine the fulfillment of all legal elements before proceeding. Without such scrutiny, criminal law risks losing its legitimacy as an instrument of justice.

Another major issue lies in the inconsistency between national legal standards and international human rights principles. International frameworks require that restrictions on expression be narrowly defined and strictly necessary. However, national practices often apply broader and less proportional limitations. This is evident in cases where individuals are prosecuted without demonstrating real harm (Aditya & Al-Fatih, 2025). As a result, criminal law functions more as a restrictive mechanism than a protective one. This undermines the fundamental principles of the rule of law.

Low levels of digital literacy further exacerbate the risk of criminal liability. Many social media users are unaware that their online activities may carry legal consequences. This lack of awareness often leads to unintentional violations of criminal law. However, relying solely on punitive measures is not an effective solution (Risma & Fachuda, 2025). Excessive criminal enforcement without education only increases the number of violations. Therefore, non-penal approaches must complement criminal law policies.

The judiciary plays a critical role in maintaining the balance between freedom of expression and legal protection. Judicial decisions should reflect a contextual understanding of digital communication. However, many rulings still rely on rigid textual interpretations of legal provisions. This results in decisions that fail to accommodate democratic values. Consequently, freedom of expression is often constrained by narrow legal reasoning. Strengthening judicial capacity is therefore essential.

The digital transformation requires a shift in how criminal law is applied to expression. The state cannot rely solely on surveillance and punishment to regulate digital spaces. A balanced approach that integrates protection, education, and accountability is necessary. Digital platforms must also bear responsibility for maintaining fair and transparent ecosystems. Without such measures, criminal law will remain ineffective in addressing digital conflicts. A more adaptive and proportional legal approach is essential to respond to these evolving challenges.

Conclusion

Freedom of expression in the digital era reflects a complex intersection between constitutional rights, criminal law enforcement, and the evolving dynamics of post-truth society, where legal ambiguity and overbroad interpretations—particularly under the ITE Law—have contributed to the criminalization of legitimate expression and the shrinking of democratic space. The shift within the Indonesian Criminal Code toward recognizing certain acts, such as demonstrations, as material offenses marks a more progressive and just approach by focusing on harmful consequences rather than mere actions, thereby reinforcing the protection of lawful expression. However, inconsistencies in legal interpretation, weak differentiation between criticism and defamation, and the expansive reach of digital liability continue to pose serious risks to civil liberties. These challenges are further exacerbated by low digital literacy, the rapid spread of misinformation, and the tendency to use criminal law as a primary regulatory tool rather than a last resort. Therefore, a balanced legal framework is essential—one that strictly limits the use of penal sanctions, strengthens judicial interpretation, and integrates educational and participatory approaches to ensure that freedom of expression is protected while

maintaining public order and individual dignity in an increasingly complex digital landscape.

Declaration of AI and AI-Assisted Technologies

During the preparation of this work, the author(s) used Gemini and Grammarly to improve English grammar, check sentence fluency, and assist with reference formatting. After using this tool/service, the author(s) reviewed and edited the content as needed and take full responsibility for the integrity, accuracy, and originality of the publication's final version.

CRedit Authorship Contribution Statement

- a. Imron Rosyadi: Conceptualization, Data Curation, Formal Analysis, Investigation, Writing – Original Draft, Methodology, and Writing – Review & Editing.
- b. Safaruddin Harefa: Supervision, Validation, Project Administration, Translation, and Resources.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Data Availability Statement

Data supporting the findings of this study are available upon reasonable request from the corresponding author at imrosyad@uinsa.ac.id.

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The authors confirm that this study adheres to ethical research standards.

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