

Normative Analysis of Freedom of Speech in Indonesia According to Positivism Theory Reviewed from the Perspective of Legal Philosophy

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Abstract

This study analyzes the implementation of freedom of speech in Indonesia within the framework of legal positivism theory, especially Hans Kelsen's perspective. Freedom of speech, which is guaranteed by the 1945 Constitution, is often limited by laws such as the Electronic Information and Transactions Law (UU ITE) and the Criminal Code (KUHP) which function to maintain public order and protect the rights of other individuals. This research method uses a normative legal approach with an analysis of laws and regulations, legal literature, and official documents. The results of the study show that the application of the positivism theory, which separates law from morality and emphasizes strict application of rules, often ignores the legal hierarchy that places the 1945 Constitution as the highest law. This results in law enforcement that tends to be rigid and less adaptive to dynamic social and political contexts, and can reduce the effectiveness of human rights protection, especially in the context of freedom of speech. This approach provides legal certainty but creates a mismatch between legal practice and constitutional principles and international standards.

1. Introduction

Freedom of speech is one of the most important human rights in a democratic country. This right allows every individual to express their opinions, ideas, or opinions without any pressure or obstacles from other parties, including the government (Dewi, 2021). Freedom of speech is the foundation for creating a democratic society, where every citizen has the right to participate in the decision-making process that affects their lives. Freedom of speech also acts as a mechanism of control over power, where citizens can openly criticize government policies or actions that are considered unfair or not in accordance with the public interest. This supports accountability and transparency in government. In addition, freedom of speech encourages innovation and social development, as it allows the exchange of new and diverse ideas that can inspire positive change in society. This right, although fundamental, is often faced with certain limitations that need to be considered to maintain a balance between individual freedom and the public interest, such as maintaining public order, national security, or other individual rights.

In the legal context, freedom of speech is guaranteed by a country's constitution (Hsb, 2021). In Indonesia, freedom of speech is regulated in Article 28E paragraph (3) of the 1945 Constitution which states that "Everyone has the right to freedom of association, assembly, and expression of opinion" and Article 23 paragraph (2) of Law Number 39 of 1999 concerning Human Rights (HAM Law) which reads "Everyone is free to have, express and disseminate opinions according to their conscience, verbally and/or in writing through print or electronic media while paying attention to religious values, morality, order, public interest, and the integrity of the state". This emphasizes that every individual in Indonesia has the right to express their ideas, views, or opinions without fear of retaliation or oppression, including from the government. This freedom of speech is part of the human rights protected by the constitution, which allows citizens to actively participate in social, political, and cultural life. In other words, everyone is free to express their thoughts either verbally, in writing, or through other media, and the state is responsible for protecting this right. Freedom of speech includes not only the right to express opinions, but also the right to seek, receive, and disseminate information or ideas without intervention. This means that a person can participate in public discussions, access various sources of information, and share their views with others. However, this freedom is not without limits, the law in Indonesia also stipulates that the use of freedom of speech must consider the public interest, such as national security, public order, and the rights and reputations of others. Therefore, although freedom of speech is guaranteed by the constitution, there are still regulations to ensure that this freedom is not misused and remains within the applicable legal corridor. This is stated in Article 28J paragraph 2 of



the 1945 Constitution which states that "In exercising their rights and freedoms, everyone is obliged to submit to the restrictions stipulated by law with the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with moral considerations, religious values, security, and public order in a democratic society."

In legal philosophy, there are various theories that try to explain the basics and principles of law, one of which is the theory of positivism (Asikin & SH, 2020). Legal Positivism is a school of thought that emphasizes the importance of strictly separating law and morality, and focuses on written law as the only legitimate source of law. This school of thought teaches that applicable law (*das sein*) and the law that should be (*das sollen*) are two different things, and there are no legal norms outside of positive law. Thus, Legal Positivism argues that all problems in society must be regulated through written law, without the interference of moral values that are not institutionalized in legal regulations. Definition of freedom of speech. Legal Positivism is rooted in the view that law must be objective and free from subjective values, including morality and ethics. By emphasizing written law, this school of thought assumes that legal certainty can only be achieved if the law is based on clear, concrete, and institutionalized rules through a legitimate legislative process. In the positivist view, the task of judges and law enforcers is to apply the law as written, without having to consider whether the law is just or not according to certain moral standards.

This view is often criticized for being too rigid and inflexible, especially when faced with situations where written law may be unjust or may not cover the entire social reality. However, in Legal Positivism, the order and certainty of law are more important than the subjectivity of moral judgments, which can vary from one individual to another (Simanjuntak, 2023). Thus, Legal Positivism plays an important role in the formation of the modern legal system, which relies on written rules to regulate social life in an orderly and predictable manner. In examining freedom of expression in Indonesia from the perspective of legal philosophy, it is very relevant to understand the role of the theory of legal positivism in forming and implementing laws related to this right. Freedom of expression, as one of the internationally recognized human rights and guaranteed by the Indonesian constitution, is a fundamental element in a democratic state. However, the application of this right within the Indonesian legal framework must be understood through the lens of the underlying legal theory, including legal positivism.

The theory of positivism emphasizes a strict separation between law and morality, saying that the applicable law must be written law produced through a formal legislative process (Rizal, 2015). This theory is influential in creating legal certainty, where each individual can know the legal consequences of their actions based on clear and concrete rules. In the context of freedom of speech, this includes protection of the right to express opinions, but there are also limitations regulated by law to maintain public order and protect the rights of

others.

One of the main topics of discussion in this study is the consistency of the application of laws related to freedom of speech in Indonesia within the framework of the theory of positivism. According to the author, this is quite important to analyze whether the law governing freedom of speech is applied consistently with the principles of positivism, or if there are inconsistencies that can lead to violations of individual rights. This includes examining whether written laws are applied properly or if there are elements of morality or subjective considerations that influence their application. In addition, it is necessary to explore how legal positivism, with a focus on written laws and objectivity, influences the application of freedom of speech, and evaluate whether this theory supports or limits the implementation of human rights in Indonesia.

2. Research methods

The type of research used to answer the formulation of the problem in this scientific work is normative legal research. This research focuses on the analysis of law as a normative rule, which is in the form of legislation. To support this analysis, secondary data is needed which includes three types of legal materials, namely primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include applicable laws and regulations, jurisprudence, and other relevant official documents. Secondary legal materials consist of literature, legal commentaries, journals, and expert views that support a deeper understanding of the issues being studied. Tertiary legal materials include encyclopedias, legal dictionaries, and other references that provide additional context.

After secondary data was collected, analysis was conducted using qualitative analysis methods, where data were analyzed in depth to understand legal concepts and their application in the context of freedom of speech in Indonesia. The approach used was deductive-inductive, where research starts from general legal theories or principles, then analyzed specifically against the case or issue being studied, and returns to general conclusions. The analysis process also involves legal interpretation, where the author interprets the provisions of applicable laws and legal practices, with the aim of exploring the consistency of their application and the influence of positivism theory on the law of freedom of speech in Indonesia. In the final stage, the author draws a conclusion that summarizes the core of the problems that have been analyzed, providing a comprehensive view of the issues discussed.

3. Results and Discussion

Consistency of Law Implementation Regarding Freedom of Speech in Indonesia Linked to Positivism Theory

Indonesia is known as one of the largest democracies in the world, characterized by regular general elections, the existence of various political parties, and freedom of the press and an active civil society. These democratic

principles are reflected in the Indonesian Constitution, the 1945 Constitution, which guarantees various basic rights and freedoms for its citizens, including freedom of opinion and expression.

Freedom of speech in Indonesia is a fundamental right that is recognized and protected by the state. Article 28E paragraph (3) of the 1945 Constitution states that "Everyone has the right to freedom of association, assembly, and expression of opinion." This shows Indonesia's commitment to democratic values that respect plurality of views and active participation of the community in the public decision-making process. Through freedom of speech, citizens can convey their aspirations, criticisms, and suggestions regarding government policies, and participate in constructive public discussions and debates (Kusuma, 2023) . Freedom of speech also plays an important role in encouraging government accountability and transparency. By providing space for the public to voice their opinions, the government can be more responsive to the needs and desires of the people, so that the democratic process can run more effectively and efficiently. In addition, freedom of speech also encourages the development of a healthy culture of criticism, innovation, and social progress through the free exchange of ideas and information.

However, as in many other democratic countries, freedom of speech in Indonesia is also limited by certain legal rules to maintain public order, national security, and protect the rights and reputations of others. These restrictions are regulated in various laws, such as the Electronic Information and Transactions Law (UU ITE) and the Criminal Code, which aim to prevent the spread of hate speech, slander, and provocation that can cause social conflict (Rahmawati et al., 2021) . It is important for every citizen to exercise their right to freedom of speech responsibly, by respecting applicable social norms and laws, so that this freedom can function optimally in supporting the process of democracy and social harmony in Indonesia.

The theory of legal positivism is a view in legal philosophy that asserts that law is a set of rules made by a legitimate authority, and that the law must be applied as is without the need to consider moral, ethical, or justice aspects outside the law itself. Legal positivism strictly separates law from morality, with the belief that good or bad law remains law if it has been established by the state or an authorized authority (Friedmann, 1990) . In this theory, law is seen as "positive" in the sense that it is established by humans and does not come from universal moral values or principles. Law must be obeyed because it is a product of legitimate power, and law enforcement does not depend on whether the law is fair or not from a moral perspective. One of the main figures in this theory is John Austin, who argued that law is an order from the ruler to society supported by the threat of sanctions.

The current state of freedom of speech in Indonesia is in a complex and dynamic situation. On the one hand, Indonesia as a democratic country provides space for its citizens to voice their opinions, both through

conventional media and social media. Public participation in political, social, and economic discussions is increasing, indicating public awareness of the importance of freedom of speech in maintaining government accountability and encouraging social change. However, on the other hand, freedom of speech also faces significant challenges. Several laws, such as the ITE Law, are often used to ensnare individuals who are considered to be spreading information that is detrimental to others or threatens public order. The use of articles on defamation, hate speech, and insults in the ITE Law and the Criminal Code are often criticized because they are considered to limit freedom of speech and have the potential to be used to silence criticism of the government or certain groups (Rahmawati et al., 2021) . In addition, threats against activists, journalists, and civil society who dare to voice critical opinions are also a concern. Many cases where criticism of government policies or other sensitive issues have resulted in lawsuits , arrests, or intimidation, indicating pressure on freedom of speech at the practical level.

The application of the theory of positivism in law can be seen from how laws and regulations are strictly applied to regulate the limitations of these freedoms. The theory of legal positivism emphasizes that law is a set of rules made and enforced by the state, and must be applied as is, regardless of moral or justice considerations outside the legal framework itself. The application of articles in the ITE Law and the Criminal Code that regulate insults, defamation, and hate speech reflects this positivist approach. The law is applied in accordance with the existing normative text, and law enforcement is carried out based on written provisions, without considering the social context or the impact that may be caused to freedom of expression. This approach can be seen in cases where criticism of the government or controversial opinions are often charged using these articles. Although these laws aim to maintain order and protect the rights of others, a strict positivist approach can sometimes ignore other aspects such as individual freedom and the right to express opinions, which are important pillars in a democratic country (Friedmann, 1994) .

According to the author's analysis, the theory of positivism should play its role while still respecting the hierarchy of legislation in Indonesia, where the 1945 Constitution (UUD) holds the highest hierarchy of legislation. There are seven hierarchies of legislation in Indonesia, namely the 1945 Constitution of the Republic of Indonesia, Decrees of the People's Consultative Assembly, Laws/Government Regulations in Lieu of Laws, Government Regulations, Presidential Regulations, Provincial Regulations and Regency/City Regulations. In the Indonesian legal system, every law and regulation under the UUD must be in line with the principles set out in this constitution. This principle is also reflected in the legal principle of *lex superiori derogate legi inferiori* , which means that higher legal regulations must override lower regulations if there is a conflict. Therefore, lower laws and regulations, such as statutes or

government regulations, must not conflict with the 1945 Constitution. This means that freedom of opinion as stated in Article 28E paragraph (3) of the 1945 Constitution guarantees this right as part of fundamental human rights.

Freedom of speech is not only recognized as a national community right, but also an internationally recognized right, as stated in the Universal Declaration of Human Rights issued by the UN in 1948. Article 19 of the declaration affirms that everyone has the right to freedom of opinion and expression, including the right to seek, receive and impart information and ideas through any media, regardless of frontiers. This means that freedom of speech has an internationally binding dimension, where countries that have recognized the declaration, including Indonesia, have a moral and legal obligation to guarantee this freedom within their national legal framework.

The application of the theory of positivism in Indonesian law should not only stop at formal enforcement of the rules, but also pay attention to international obligations that have been recognized by Indonesia. As a country committed to protecting human rights, national laws governing freedom of expression must be implemented by considering universally recognized international standards. Therefore, the theory of positivism needs to be implemented by considering that laws under the 1945 Constitution must not violate internationally recognized human rights principles, including freedom of expression (Marzuki & Sh, 2020) . Here, the principle of *lex superiori derogate legi inferiori* is relevant again, because it ensures that lower laws such as the ITE Law or the Criminal Code must not be applied in a manner that is contrary to the constitutional rights guaranteed by the 1945 Constitution.

Thus, according to the author's analysis, the application of the theory of positivism in law enforcement in Indonesia must always consider the legal hierarchy that places the 1945 Constitution as the highest law and Indonesia's international commitment to protecting freedom of expression. The principle of *lex superiori derogate legi inferiori* is a guideline in ensuring that laws and regulations under the 1945 Constitution are implemented in a manner that does not violate fundamental rights guaranteed by the constitution and international standards. The use of laws such as the ITE Law and the Criminal Code to limit freedom of expression must be in line with constitutional provisions and international standards, so as not to override basic rights guaranteed by national and international laws.

According to the author's analysis, the theory of positivism should be able to be the vanguard in upholding the highest hierarchy in Indonesia, namely the 1945 Constitution. As the highest law in the Indonesian legal system, the 1945 Constitution not only establishes the basic framework for governance, but also guarantees human rights, including freedom of expression as regulated in Article 28E paragraph (3). In the context of the theory of positivism, which emphasizes compliance with the rule of law as it is, all laws and regulations under the 1945 Constitution should be implemented in accordance with the

principles established by the constitution. However, in fact, there are often clashes between lower laws and the 1945 Constitution, especially in the context of freedom of expression. The Electronic Information and Transactions Law (UU ITE) and the Criminal Code (KUHP) are often used to limit freedom of expression, even though the 1945 Constitution expressly guarantees this right. Articles in the ITE Law and the Criminal Code that regulate insults, defamation, and hate speech are often applied without considering whether the application is in accordance with the constitutional rights of citizens guaranteed by the 1945 Constitution.

This shows that the implementation of the law on freedom of speech in Indonesia is still inconsistent when viewed from the perspective of the theory of legal positivism. In practice, the positivism adopted in Indonesia tends to implement all existing laws without explicitly considering the legal hierarchy that places the 1945 Constitution as the highest law. The principle of *lex superiori derogate legi inferiori*, which states that lower laws must not conflict with higher laws, is often ignored in the enforcement of laws such as the ITE Law and the Criminal Code. In other words, although the theory of positivism should encourage the implementation of laws that are consistent with the legal hierarchy, in practice there is an error where lower laws are used to limit rights guaranteed by the constitution. This reflects the misalignment between theory and practice, where lower laws are sometimes applied in a manner that is contrary to the basic principles stipulated in the 1945 Constitution. According to the author's analysis, this condition shows that the application of legal positivism in Indonesia needs to be more assertive in upholding the legal hierarchy, especially in the context of freedom of expression, so that there are no violations of human rights guaranteed by the constitution.

How Positivism Theory Affects the Implementation of Freedom of Speech Law in Indonesia

The positivist legal theory, according to Hans Kelsen, is not a more or less imperfect copy of transcendental ideas. This pure legal theory does not try to view law as a child of justice, but rather as a child of holy parents (Anwar, 2023). Legal theory seems to uphold a clear distinction between empirical law and transcendental justice by eliminating transcendental justice from its specific concerns. This theory does not see the manifestation of a supernatural authority in law, but rather examines a specific social technique based on human experience, pure legal theory refuses to be used as a metaphysical science of law. Basically, there is no essential difference between analytical legal science and pure legal theory. As for the difference, the two fields are different because pure legal theory seeks to continue the analytical legal method more consistently than Austin and his followers attempted. Kelsen's approach is considered a middle ground between the two previous schools, namely the natural law school and the positivist legal school. Kelsen argues

that law is not limited by moral considerations and legal interpretation is related to non-empirical norms.

This theory places more emphasis on a clear distinction between empirical law and transcendental justice by removing it from the scope of legal studies. This theory rejects becoming a metaphysical study of law. This theory seeks the basis of law as a basis for validity, not on meta-juridical principles, but through a juridical hypothesis, namely a basic norm built with logical analysis based on actual juristic thinking. Hans Kelsen took such an approach based on his review of traditional legal science that developed in the 19th and 20th centuries. According to him, legal theory in the 19th and 20th centuries was far from pure and legal science had been mixed with elements of psychology, sociology, ethics and political theory. According to Hans Kelsen, this is understandable because the fields of psychology, social and political theory discuss topics related to law.

The influence of Hans Kelsen's positivist legal theory on the enforcement of freedom of speech law in Indonesia can be seen from several prominent perspectives. This theory emphasizes the purity of law, namely understanding the law purely and independently from aspects of morality, transcendental justice, and other non-juridical elements (Fauzan, 2022) . In the context of freedom of speech in Indonesia, this principle means that law enforcement will focus on what is written in the laws and regulations without considering whether the rules are morally fair. Therefore, if the law in Indonesia explicitly limits freedom of speech for certain reasons, law enforcement officers will apply it in accordance with the legal text without debating the moral justice of the rules.

In addition, Kelsen's theory places great emphasis on legal certainty, meaning that the law must be predictable and applied consistently. In enforcing the law on freedom of speech, this principle can have implications for the application of strict rules in accordance with applicable positive law, without any room for interpretation influenced by non-juridical values. Although this approach provides stability, it can reduce flexibility in considering dynamic social and political contexts. Then, the concept of basic norms or *Grundnorm* introduced by Kelsen also influences the way the law is applied. In the context of freedom of speech, this basic norm may reflect the fundamental principles that are used as the basis for the entire legal system in Indonesia. If the applicable basic norms prioritize state stability or public order, law enforcement on freedom of speech may be stricter to maintain these norms.

Kelsen also criticized the mixture of non-juridical elements such as sociology, psychology, and ethics in legal science. If this approach is applied in enforcing the law on freedom of expression, then the law will be enforced based on existing legal rules without being influenced by social or political dynamics (Fauzan, 2022) . As a result, law enforcement may limit freedom of

expression in certain contexts, where law enforcers do not consider the social or political conditions underlying the expression of the opinion. The influence of Kelsen's positivist legal theory on the enforcement of the law on freedom of expression in Indonesia is likely to result in strict and structured enforcement, with a focus on the consistent application of positive law. However, this approach can also lead to a lack of flexibility in accommodating social dynamics and moral values relevant to freedom of expression.

4. Conclusion

Freedom of speech in Indonesia is a fundamental right guaranteed by the 1945 Constitution, but its implementation is often hampered by laws such as the ITE Law and the Criminal Code which tend to limit this right. In the context of the theory of legal positivism, which prioritizes the application of rules without considering moral aspects or justice outside the law, there is inconsistency in enforcing the law in Indonesia. The legal hierarchy that places the 1945 Constitution as the highest law is often ignored, resulting in the use of lower laws to limit freedom of speech guaranteed by the constitution. Therefore, the application of the theory of positivism must be more assertive in respecting the hierarchy of legislation and international commitments to protect freedom of speech as an important pillar of democracy. The positivist legal theory put forward by Hans Kelsen has a significant influence on the enforcement of freedom of speech law in Indonesia, by emphasizing the purity of law that is separate from morality and other non-juridical elements. This principle directs law enforcement to focus on the text of legislation strictly and consistently, which although it provides legal stability, can reduce flexibility in considering dynamic social and moral contexts, so that the enforcement of freedom of speech law tends to be rigid and less adaptive to social change.

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