

Freedom of Expression and Its Implications for Citizens' Constitutional Rights Following Constitutional Court Decision No. 36/PUU-XX/2022

Eza Tri Yandy^{1*}, M. Al Fathoni², Sayuti³, Tri Endah Karya Lestiyani⁴

¹ Faculty of Law, Universitas Islam Indonesia, Yogyakarta, Indonesia

^{2, 3, 4} Faculty of Law, Universitas Islam Negeri Sulthan Thaha Saifuddin, Jambi, Indonesia

* Corresponding author: 24932003@students.uii.ac.id

Received : 14 Jan 2026
Revised : 14 Mar 2026
Accepted : 20 Mar 2026

Citation : "Eza Tri Yandy, M. Al. Fathoni, Sayuti & Tri Endah Karya Lestiyani" (2026). "Freedom of Expression and Its Implications for Citizens' Constitutional Rights Following Constitutional Court Decision No. 36/PUU-XX/2022". *Journal of Legal Contemplation*, 2 (1), 22-35.

 : [10.63288/jlc.v2i1.17](https://doi.org/10.63288/jlc.v2i1.17)

Abstract: *The judicial review of Law No. 11 of 2008, as amended by Law No. 19 of 2016, to the Constitutional Court was filed by twenty-nine content creators as petitioners, who felt that their constitutional rights had been violated by the enactment of Article 27 paragraph 3 and Article 28 paragraph (2) of the Electronic Information and Transactions Law, as they often give rise to multiple interpretations and are not in accordance with democratic principles in the concept of the rule of law. The purpose of this study is to determine how freedom of expression is regulated in the Indonesian legal system and its implications following Constitutional Court Decision Number 36/PUU-XX/2022. The method used in this study is normative legal research with a case approach. After analyzing the data sources obtained, this study concludes that in the context of the rule of law, freedom of expression is a fundamental right possessed by every individual and recognized universally. In a constitutional state, this freedom is guaranteed by the Constitution, as stated in Article 28E paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Freedom of expression serves to monitor and criticize those in power, maintain accountability, and encourage innovation and social progress. In addition, the Constitutional Court's decision has caused harm and/or negative impacts on democracy in Indonesia, including a decline in the democracy index, legal uncertainty, and losses in implementation.*

Keywords: *Freedom of Expression, Constitutional Court Decision, Rule of Law.*

A. Introduction

Freedom is one of the fundamental rights possessed by every citizen and its continuity is guaranteed by the state. That every person is given the freedom of association, assembly, and expression. This provision emphasizes that every individual has the same right to express their thoughts, views, or aspirations, either individually or collectively, without threat or pressure from any party, as long as it does not conflict with applicable law.¹ In order to realize the principles of constitutional democracy, good governance can be achieved by granting every citizen the right to freedom of expression, inter-institutional oversight to ensure a balance in the exercise of each institution's authority, to prevent the restriction of power and

¹ Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Pasal 28E ayat 3.



to ensure that each state institution performs its functions in accordance with the limits set by the constitution. In addition, recognition of the rule of law, both normatively through legislation and factually in the practice of state administration.²

Freedom of expression is used to express views or opinions, both personally and collectively.³ In its development, freedom of expression has undergone an expansion of meaning or allocation of its respective fields of discussion. With the development of democracy, freedom of expression has also expanded in meaning. Freedom of expression is interpreted as freedom of information, freedom of the press, freedom of thought, freedom of speech, and some also associate it with the right or freedom of association and freedom of assembly.⁴

Freedom of expression is a defining feature of democracy, but in practice, this freedom faces challenges, challenges that arise from the enactment of the Electronic Information and Transactions Law.⁵ This has been evident since the filing of a petition to review the ITE Law, in which there were 29 petitioners, all of whom were content creators on the legalpoint.id and voicedlaw.id digital platforms, which focus on providing legal information to the public. However, the petitioners' efforts were unsuccessful, as in its decision No. 36/PUU-XX/2022, the Constitutional Court rejected the petitioners' request in its entirety.

The Constitutional Court argued that the provisions of Article 27(3) and Article 2 of the ITE Law provided legal protection to the public; in other words, these provisions guaranteed legal certainty and were not legally unreasonable. The spirit of testing the ITE Law is not without reason, but rather because the ambiguity of the law can cause harm to the public. Such is the case experienced by Haris and Fatia, who were accused of defaming Coordinating Minister Luhut Binsar Pandjaitan in a podcast on their YouTube channel. The above case is a clear example of the decline of democracy in Indonesia, particularly in relation to the freedom to express opinions and express oneself peacefully. This shows that the space to express views freely, without fear of threats or restrictions, is increasingly under threat in this country.⁶

It didn't stop there. It turns out that Article 27 paragraph 3 and Article 28 paragraph 2 of the ITE Law were also used as legal grounds to prosecute a junior high school student at SFA in Jambi City, who reported SFA for criticizing the work of the Jambi city government and expressing her concern about her grandmother's house being damaged by heavy vehicles that frequently passed by, through her social media account.... Ironically, however, the criticism was met with a different response from the city government, which reported SFA to the Jambi Regional Police.⁷

The two cases above illustrate that the ITE Law is often used as a tool by the government to restrict people's freedom of expression. Furthermore, restrictions on freedom of expression will have an impact on the development of democracy. According to research conducted by

² Nabitatus Sa'adah, "Mahkamah Konstitusi Sebagai Pengawal Demokrasi dan Konstitusi Khususnya Dalam Menjalankan Constitutional Review," *Administrative Law and Governance Journal* 2, no. 2 (2019): h.235-247. <https://doi.org/10.14710/alj.v2i2.235-247>

³ Latipah Nasution, "Hak Kebebasan Berpendapat Dan Berekspresi Dalam Ruang Publik di Era Digital," *'Adalah* 4, no. 3 (2020): 37-48, <https://doi.org/10.15408/adalah.v4i3.16200>.

⁴ Sayuti Una, *Freedom of Opinion Menurut Negara Hukum Indonesia* (Yogyakarta: Gading Publishing, 2021).

⁵ Undang-Undang Republik Indonesia Nomor 11 Tahun 2008 Pasal 27 Ayat 3.

⁶ <https://www.tempo.co/hukum/kasus-dugaan-pencemaran-nama-baik-luhut-fatia-maulidiyanti-saya-tidak-menyescal-115589> diakses 03 Agustus 2025.

⁷ <https://tirto.id/kasus-siswi-smp-jambi-mengapa-masih-ada-kriminalisasi-kritik-gLzR>

the Economist Intelligence Unit (EIU), Indonesia scored 6.71 on the 2022 Democracy Index, which is the same score as the previous year. This shows that there has been no significant improvement in democracy. This condition reflects stagnation in all aspects assessed, including political pluralism and electoral mechanisms, government effectiveness, levels of public political participation, and a political culture that supports democracy, as well as the protection of civil liberties. These results show the need for improvements in various areas so that the quality of democracy in Indonesia continues to improve.⁸

To strengthen this study, the author also examined several relevant studies as an originality review. *First*, this study explains that the Electronic Information and Transaction Law still contains a number of normative issues, particularly in the provisions governing defamation and hate speech, and has the potential to restrict freedom of expression as part of the constitutional rights of citizens.⁹ *Second*, Taufik explained that Constitutional Court Decision No. 105/PUU-XXII/2024 has implications for two things, namely the legal aspect and the law enforcement aspect.¹⁰ *Third*, the application of Article 27 Paragraph (3) of the Electronic Information and Transactions Law in cases of defamation directed at groups of people often causes problems, mainly due to the lack of clarity regarding the legal subjects that are targeted. This situation has led to this article being interpreted in various ways by law enforcement officials, thereby implying a failure to fulfill the principle of legal certainty.¹¹

Based on the description of the issues and relevant research presented above, this paper aims to analyze two main points, namely: *First*, it examines the concept of freedom of expression within the framework of the rule of law in Indonesia. *Second*, it examines freedom of expression and its implications for the constitutional rights of citizens after the Constitutional Court's ruling.

B. Methodology

The type of research used in this study is normative legal research using a case approach and a statute approach. Furthermore, this study uses primary and secondary legal sources. The primary legal materials in this study are the 1945 Constitution, Law Number 19 of 2016 concerning Electronic Information and Transactions, and Constitutional Court Decision Number 36/PUU-XX/2022. Meanwhile, the secondary legal materials used in this study are scientific works in the form of articles, books, expert interpretations, and other sources relevant to the focus of the study.

C. Results and Discussion

Freedom of Expression According to the Indonesian Legal System

Freedom of expression and opinion is closely related to the concept of the rule of law, which explains that the law is the main instrument used by the government in running the

⁸ Tempo merilis dalam *websitenya* pada Februari 2023, bahwa indeks demokrasi Indonesia menempati ranking 54 dari 167 negara di dunia.

⁹ Rahmazani, "Problematika Hukum Penerapan Undang-Undang Informasi Dan Transaksi Elektronik (UU ITE) Di Indonesia," *Mimbar Hukum Universitas Gadjah Mada* 34, no. 1 (2022): 161–85, <https://doi.org/10.22146/mh.v34i1.3078>.

¹⁰ Rahmazani, "Problematika Hukum Penerapan Undang-Undang Informasi Dan Transaksi Elektronik (UU ITE) Di Indonesia," *Mimbar Hukum Universitas Gadjah Mada* 34, no. 1 (2022): 161–85, <https://doi.org/10.22146/mh.v34i1.3078>.

¹¹ Rezkyta Pasca et al., "Application of Article 27 Paragraph (3) of the ITE Law in Cases of Defamation through Social Media against Groups of People," *Jurnal Fundamental* 3, no. 1 (2022): 19–35, <https://doi.org/10.30812/fundamental.v2i2.1796>.

country (Rule of Law not of Man). The law is understood as a hierarchical system of legal norms, with the constitution as the highest norm in that order. The constitution can be understood as a manifestation of a collective agreement made by members of society to determine the basis for regulating communal life. It is the result of a social contract, whereby individuals in a community agree to surrender some of their rights to a shared authority in order to create order, justice, and protection of basic rights.¹²

Freedom of expression is a fundamental right that every individual possesses and is universally recognized. In Indonesia's constitutional system, this freedom is guaranteed by the Constitution, specifically in Article 28E paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD 1945), which states that: "Every person shall have the right to freedom of expression and opinion in accordance with his conscience." This provision is further clarified by the phrase in Article 28F of the 1945 Constitution, which grants everyone the right to obtain information and communicate. As a constitutional state (*rechtsstaat*), Indonesia places freedom of expression within a framework that upholds the rule of law, recognizes human rights, and protects individual freedoms.

In fact, Article 19 paragraph 2 of Law Number 12 of 2015 concerning the ICCPR, which is the result of the ratification of the International Covenant on Civil and Political Rights, clearly states that everyone has the right to freedom of expression. If this phrase of the law is interpreted, it means that every member of society is given the freedom to express themselves as freely as possible. This right includes the freedom to seek, receive, and impart information and ideas in any form, as long as this freedom does not interfere with the rights or reputation of others.¹³ Freedom of expression is one of the key components that supports the sustainability of a democratic system. This right allows individuals to express their opinions, ideas, and views without fear or threat, thereby creating space for open and diverse discussion. In a democracy, freedom of expression not only strengthens public participation, but also serves as a mechanism for monitoring and criticizing those in power, maintaining accountability, and encouraging innovation and social progress. As stated by the United Nations in Resolution No. 59, "the right to information is a fundamental human right, and the standard by which all freedoms are measured."¹⁴

The characteristics of democracy in the concept of the rule of law can be seen in at least four aspects. First, the participation of the people in every policy-making/decision-making process. Second, the guarantee of human rights. Third, the realization of general elections. Fourth, respect for the rule of law. From a political perspective, freedom of expression is an important norm, as it is essential in a democracy for creating accountable government. Guaranteeing this freedom enables the public to monitor and control government activities in order to create good governance.¹⁵

¹² Jimly Asshiddiqie, *Hukum Tata Negara Dan Pilar-Pilar Demokrasi: Serpihan Pemikiran Hukum, Media dan HAM*, 2005.

¹³ Tri Rahmi Gettari, Wira Okta Viana, and Meydianto Mene, "Hak Asasi Manusia dan Kebebasan Berekspresi di Indonesia," *Ensiklopedia of Journal* 5, no. 2 (2023): h.232-236. <https://doi.org/10.33559/eoj.v5i2.1590>

¹⁴ Della Lusky Selian et al., "Freedom of Expression in the Era of Democracy: Records of Human Rights Enforcement Kebebasan Berekspresi di Era Demokrasi: Catatan Penegakan Hak Asasi Manusia" 2, no. 2 (2018): h.185-194. <https://doi.org/10.15294/lesrev.v2i2.27589>

¹⁵ Latipah Nasution, "Hak Kebebasan Berpendapat dan Berekspresi Dalam Ruang Publik di Era Digital," *Adalah* 4, no. 3 (2020): h.37-48. <https://doi.org/10.15408/adalah.v4i3.16200>

In the concept of human rights, freedom of expression is a fundamental concept that is not visible, and is understood as a right that is an integral part of every individual. However, even though the right to freedom of expression is guaranteed by law, in practice the law is often abused.¹⁶ In the concept of the rule of law and democracy, freedom of expression is a key norm. The freedoms and rights enjoyed by every citizen are reflected in various aspects of national and state life, as guaranteed by the principles of human rights law. These rights include the right to vote in elections, freedom to express opinions, freedom of the press without restriction by the authorities, freedom to embrace and practice religion according to one's beliefs, and the right to be free from arbitrary treatment by both the political and legal systems. In addition, citizens are also guaranteed the right to move, assemble, and associate without unlawful restrictions. All of these freedoms are an integral part of human rights protected by the law and the constitution of the state. The guarantee of human rights is a consequence of the concept of the rule of law in Indonesia, so it is important to realize this in order to create the democracy that is aspired to.¹⁷

As a democratic country, protecting, promoting, upholding, and ensuring the fulfillment of the right to freedom of opinion and expression is part of the state's responsibility to the people, as mandated by the constitution. The existence of this guarantee does not mean that the public is given unlimited freedom of expression, but rather that the freedom exercised must remain within the applicable limits.¹⁸

Since the Electronic Information and Transactions Law was passed in 2008, many parties have felt that the existence of this law restricts freedom of expression. Concerns about the law were then followed up with the creation of Electronic Information and Transactions Law guidelines in the form of a Joint Decree on the criteria for implementing Electronic Information and Transactions Law Number 19 of 2016, which amended Law Number 11 of 2008 on Electronic Information and Transactions. The Joint Decree was agreed upon by the Minister of Communication and Information Technology of the Republic of Indonesia, representatives from the Attorney General's Office and the Indonesian National Police, at the Coordinating Ministry for Political Affairs. The existence of the Joint Decree is a positive response from the government, as the Electronic Information and Transactions Law often harms the public.¹⁹

In practice, restrictions on freedom of expression in Indonesia are regulated in various laws and regulations. For example, Articles 310 and 311 of the Criminal Code regulate the prohibition of damaging a person's reputation or honor through the dissemination of false, misleading, or harmful information, which can cause people to be viewed negatively by society. In addition, Article 27 paragraph 3 also emphasizes the prohibition of distributing content that contains insults or damage to a person's reputation through digital media. However, these regulations are often criticized. One of the main criticisms is the potential for abuse of legal

¹⁶ Muhammad Roqib et al., "Hak Atas Kebebasan Berekspresi dan Berpendapat di Indonesia Dengan di Amerika Serikat," *Perspektif Hukum* 20, no. 1 (2020): 43. <https://doi.org/10.30649/phj.v20i1.238>

¹⁷ Muhamad Iqbal Susanto, "Kedudukan Hukum People Power Dan Relevansinya Dengan Hak Kebebasan Berpendapat Di Indonesia," *Volkgeist: Jurnal Ilmu Hukum Dan Konstitusi* 2, no. 2 (2019): h.225-237. <https://doi.org/10.24090/volkgeist.v2i2.2844>

¹⁸ Muh. Andri Alvian Syafa'at Anugrah Pradana, Rusdianto Sudirman, "Kemelitan Penegakan Hukum Terhadap Hak Kebebasan Berpendapat," *Jurnal Syariah Dan Hukum* 20 (2022): 156-168. <https://doi.org/10.35905/diktum.v20i1.2811>

¹⁹ Bima Guntara and Ayni Suwarni Herry, "Jurnal Pendidikan dan Konseling 'Hak Kebebasan Berpendapat di Media Sosial Dalam Perspektif Hak Asasi Manusia,'" *Jurnal Pendidikan Dan Konseling* 3, no. 1 (2022): h.4. <https://doi.org/10.56087/qawaninjih.v3i1.406>

norms to excessively restrict freedom of expression. The Electronic Information and Transactions Law, for example, is often considered to have articles that are open to interpretation, thereby opening up the possibility of criminalizing legitimate expression. This contradicts the principle of the rule of law, which requires legal certainty.

Frequent amendments to the Electronic Information and Transactions Law are a preventive measure to provide legal certainty regarding the freedoms enjoyed by the public. However, over time, the implementation of this law has been widely criticized and controversial, as it is often used by those in power as a tool to restrict freedom of expression, particularly on social media.²⁰ Legal certainty contained in legislation is very important for creating order and certainty in the legal system, so that the legal system can function optimally and in accordance with its intended purpose. With legal certainty, it is hoped that equitable justice will be created within society, which in turn can strengthen public trust in the existing legal system.

In the context of democracy, freedom of expression plays a central role as a pillar of openness and public accountability. Democratic states guarantee this freedom as a means of conveying criticism of government policies, voicing the aspirations of the people, and maintaining pluralism of thought.

Freedom of Expression Following Decision Number 36/PUU-XX/2022

The constitution, as the highest source of law, serves as the legal basis that governs all aspects of state life. As a fundamental social contract, the constitution is the highest agreement that binds all citizens who have sovereignty to live together within the framework of the state. The constitution is not only the highest law, but also the foundation that unites and regulates social life in a sovereign state. The constitution also regulates the mechanisms of relations between various institutions of power within the state, thereby providing certainty that the system of government can run well, efficiently, and in accordance with democratic principles.²¹

Restrictions on freedom of expression and opinion are issues that must be resolved. In this context, the government is the legitimate actor capable of guaranteeing human rights in accordance with applicable regulations.²² Furthermore, freedom of expression is also used as a check and balance on the exercise of power in Indonesian state institutions, as a solution to counteract the ego and authoritarianism of the government in carrying out its functions.²³ Because the fundamental orientation of the concept of separation of powers is balance.

SAFEnet recorded at least 271 reports filed by members of the public with the police as a result of the enactment of the Electronic Information and Transactions Law. In most cases, the reports cited losses under Article 27 paragraphs 1 and 3, Article 28 paragraph 2, and Article

²⁰ Radita Gora Musqith, Munadhil Abdul; Tayibnapis, "Ancaman Pidana Terhadap Kebebasan Berpendapat Sebagai Pelanggaran Hak Asasi Manusia Berdasarkan Undang- Undang Nomor 1 Tahun 2024 Tentang Perubahan Kedua Atas Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi Dan Transaksi Elektronik," *Jurnal Sosial Dan Budaya Syar-I* 9, no. 4 (2022): h.1307-1318. <https://doi.org/10.15408/sjsbs.v10i6.38412>

²¹ Bactiar, "Esensi Paham Konsep Konstitualisme Dalam Konteks Penyelenggaraan Sistem Ketatanegaraan," *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum Dan Keadilan* 6, no. 1 (2016): 122–138. <https://doi.org/10.31219/osf.io/9nwsn>

²² Rifka Chica Septia Ningsih, Crise Amelia, Putri Aisyah, Widya Ika Zahera, and Prasetya, "Hak Kebebasan Berpendapat Yang Semakin Menyempit Dan Memburuk," *Syntax Fusion : Jurnal Nasional Indonesia* 75, no. 17 (2021): 399–405. <https://doi.org/10.54543/fusion.v1i2.18>

²³ Eza Tri Yandy et al., "The Principle of Checks and Balances in Islamic State Administration Studies," *Jurnal Mediasas: Media Ilmu Syari'ah dan Ahwal Al-Syakhsyiyah* 7, no. 1 (2024): h.165–183. <https://doi.org/10.58824/mediasas.v7i1.118>

29, which refers to threats of violence.²⁴ The existence of restrictions on freedom of expression was also conveyed by the Deputy Chair of the Indonesian National Human Rights Commission, who stated that recently there has been a shift in the interpretation of the Electronic Information and Transactions Law, resulting in individuals or community groups feeling restricted in freely expressing their views, ideas, and opinions.²⁵ In order to maintain Indonesia's democracy index, the government should position itself as a representative of the people in protecting their rights to freedom, rather than using the Electronic Information and Transactions Law as a pretext to obstruct and/or restrict the freedom of every citizen.

Freedom of expression and opinion is closely related to the principles of democracy in a country. In fact, it can be said that democracy is born out of differences of opinion, or that a country is formed because of a mutual agreement among its citizens that arises from many previous differences. The freedom of the people to express their opinions is a right that is recognized in a democratic country, which is also the responsibility of the state to ensure that this right is respected and protected. Freedom will always face challenges as the political constellation in Indonesia develops, because through this process, rulers/leaders will emerge, each with their own way of exercising power. Good leaders will run the government democratically, while bad leaders will legitimize all their actions in the name of democracy.²⁶

The potential for abuse of power arises not only from the behavior of those in power, but also from the lack of clarity in the application of principles when drafting legislation, which can lead to ambiguity and multiple interpretations of the intent and purpose of a rule, thereby giving rise to abuse of power that infringes on the rights of the people. SAFEnet notes that defamation cases often elicit mixed reactions from the public because the Electronic Information and Transactions Law does not comprehensively explain what constitutes defamation. This uncertainty often allows the government to use it to curb the public's freedom to criticize and comment on the performance of those in power.²⁷

As long as the provisions in the Electronic Information and Transactions Law contain ambiguous narratives, commonly referred to as rubber articles, the public will continue to feel constrained in expressing their aspirations, opinions, and criticism, both directly and through social media. Not only is the general public disadvantaged, but certain professions also suffer losses, such as journalists, content creators, and others. This situation makes the public reluctant to comment when they see policies and behaviors of the government or society that deviate from the norm, because they are worried that their criticism will land them in legal trouble.²⁸ The law should not take sides or discriminate against anyone because it must be

²⁴ Yosephus Mainake and Luthvi Febryka Nola, "Dampak Pasal-Pasal Multitafsir Dalam Undang-Undang Tentang Informasi dan Transaksi Elektronik," *Jurnal Info Singkat* XII, no. 16 (2020): h.1-6. <https://jumas.ourhope.biz.id/ojs/index.php/JM/article/view/129>

²⁵ <https://amp.suara.com/news/2020/10/27/161354/komnas-ham-ruang-kebebasan-berpendapat-dan-berekspresikan-menyempit>, diakses pada 04 Agustus 2024

²⁶ M. Fajar Shodiq Ramadlan, "Kemunduran Demokrasi dan Kebebasan Pers di Asia Tenggara: Refleksi dari Enam Negara Democratic Decline and Freedom of the Press in Southeast Asia: A Reflection From Six Countries," *Jurnal Penelitian Politik* 18, no. 2 (2021): h.141–157. <https://doi.org/10.14203/jpp.v18i2.1028>

²⁷ Kendry Tan, "Analisa Pasal Karet Undang-Undang Informasi dan Transaksi Elektronik Terhadap Asas Kejelasan Rumusan," *Jurnal Hukum Samudra Keadilan* 17, no. 1 (2022): h.14-29. <https://doi.org/10.33059/jhsk.v17i1.3376>

²⁸ Siti Wulandari et al., "Dampak Pasal-Pasal Multitafsir dalam UU ITE Terhadap Penanggulangan Cyber di Indonesia," *Proceeding of Conference on Law and Social Studies* 4, no. 3 (2021): h.37-48. <https://scholar.google.com/scholar?q=+intitle:%22Dampak%20Pasal-Pasal%20Multitafsir%20Dalam%20Uu%20Ite%20Terhadap%20Penanggulangan%20Cyber%20Crime%20Di%20Indonesia%22>

neutral. The Electronic Information and Transaction Law, which has been the subject of much criticism, has sparked public enthusiasm for freedom and democracy, as mandated by the constitution, which states that the people have supreme sovereignty and that this must be implemented in accordance with applicable regulations in order to achieve common goals in the state. The submission of a judicial review petition to the Constitutional Court against the Electronic Information and Transactions Law is a form of the public's seriousness and enthusiasm in safeguarding freedom and democracy in Indonesia. However, in its decision No. 36/PUU-XX/2022, the Constitutional Court judges rejected the petition in its entirety.

As the guardian and interpreter of the constitution, the Constitutional Court's decisions are absolute, final, and binding (*erga omnes*). The author considers that the Constitutional Court's ruling on the Electronic Information and Transactions Law has violated democratic principles and deviated from the mandate of the constitution, as it has clearly caused harm to many parties due to several articles whose meanings are not detailed. In the concept of a state based on the rule of law, every action of the community must be based on the law as an instrument. The meaning of law can be underlined, that the characteristics of law must provide protection, be able to protect, and guarantee legal certainty for the community. As an institution that has judicial power, in deciding cases, the independence of judges is a fundamental principle that must be obeyed in order to produce benefits for everyone.²⁹

Judges must be thorough and free themselves from the shackles of intervention and influence from any party when deciding a case. The resulting decision must be oriented towards justice and benefit, especially when reviewing a law. Therefore, the judiciary is designed as a state control mechanism (checks and balances) to maintain the continuity, suitability, and certainty of the law. Sometimes not all judges' decisions are in line with the expectations of the petitioners, as in the case of Constitutional Court Decision Number 36/PUU-XX/2022, which caused losses and/or several impacts on democracy in Indonesia for the petitioners, including:

1. Declining Democracy Index

The Constitutional Court's ruling on the review of the Electronic Information and Transactions Law is the hope of the people in improving the democracy index in Indonesia. However, unfortunately, the panel of judges in their ruling rejected it entirely. This means that Indonesia will face increasingly difficult challenges. According to data from the Economist Intelligence Unit (EIU), Indonesia's democracy did not improve in 2022, with a democracy index score of 6.71 points, which caused Indonesia's global ranking to drop from 52nd to 54th.³⁰ The ambiguity of Article 27 paragraph 3 and Article 28 paragraph 2 is one indicator of the decline in the democracy index, because the phrases contained therein still cause a great deal of confusion. The multiple interpretations of these articles contradict Article 1 paragraphs 2 and 3 of the 1945 Constitution, thus creating fear among the public in criticizing and expressing their views on legal subjects that are considered to have deviated from the concept of good governance.

The democracy index is a tool for measuring a country's level of public participation in state affairs. The results of the democracy index assessment can be used as a

²⁹ Imam Anshori Saleh, *Konsep Pengawasan Kehakiman* (Malang: setara press, 2014). h.121.

³⁰ https://www.researchgate.net/figure/Indonesia-Democracy-Index-2012-2022-Source-Economist-Intelligence-Unit-EIU-Based-on_fig1376477415, diakses pada 30 Agustus 2024.

reference for those in power to make improvements. The government is required to identify the factors that influence the decline in the democracy index and then seek solutions to improve the quality of democracy in Indonesia. In Krisna's research, based on data obtained from the 2024 Democracy Report by the V-Dem Institute, it was revealed that the decline of democracy in Indonesia was influenced by three main factors, namely freedom of expression, the quality of elections, and the dominance of executive control.³¹

As a democratic country, freedom of expression serves to enable the government to function properly. In addition, freedom acts as external oversight outside the government structure, which in reality will highlight all government actions objectively. According to Hans Kelsen in Thalhah's writing, there are several characteristics of a country that adheres to democratic principles, one of which is the availability of space for individuals to express their opinions or ideas without restrictions, the independence of the media to convey information and opinions without intervention, and written legal guarantees of freedom of expression.³²

Freedom of expression is closely linked to democracy, because the concept of democracy cannot be understood without the freedom to express opinions.³³ Both support each other in various aspects, such as: first, providing convenience for the public in matters related to public interests; second, providing opportunities for the formation of power based on majority votes; third, open exchange of ideas to reduce corrupt practices. Fourth, promoting the creation of national stability. In other words, freedom of expression is an open delegation for every community to participate in controlling the authorities and the running of the government.³⁴

Freedom of expression is a fundamental element that cannot be separated from the existence and practice of democracy itself. In line with Robert Dahl's statement that the implementation of democracy on a large scale cannot be separated from the existence of fundamental elements. In addition to the implementation of free and fair elections, democracy also requires guarantees of freedom of expression for citizens, without fear of sanctions for criticism or views expressed against the government.³⁵ In this context, it is consistent with Dahl's view that Indonesia is a country with a large scale of democracy, so there should not be any restrictions that hinder freedom of expression, whether they originate from regulations or from the actions of authorities or officials.

The ambiguity of the substance of laws and regulations has the potential to cause harm to citizens, as the law is often misused to accommodate the interests of certain groups or factions. Similarly, freedom of expression will continue to be hindered if the regulations governing it are not immediately improved, because the implementation of the

³¹ Radians Krisna Febriandy and Umaimah Wahid, "Kemunduran Demokrasi di Indonesia: Analisis Laporan Varieties of Democracy (V-Dem) Institute 2024," *Kaganga: Jurnal Pendidikan Sejarah Dan Riset Sosial Humaniora* 7, no. 2 (2024): 1041–1050. <https://doi.org/10.31539/kaganga.v7i2.12392>

³² HM. Thalhah, "Teori Demokrasi Dalam Wacana Ketatanegaraan Perspektif Pemikiran Hans Kelsen," *Jurnal Hukum Ius Quia Iustum* 16, no. 3 (2009): 413–422. <https://doi.org/10.20885/iustum.vol16.iss3.art6>

³³ Amira Rahma Sabela, Dina Wahyu Pritaningtias, and Universitas Negeri Semarang, "Study of Freedom of Speech and Expression in Legal Protection for Demonstrants in Indonesia," *Lex Scientia Law Review* 1, no. 1 (2017): 81–92, <https://doi.org/10.15294/lesrev.v1i01.19484>.

³⁴ Diah Imaningrum Susanti, "Kebebasan Berekspresi dan Ujaran Kebencian: Kajian Filsafat Hukum Terapan," *Jurnal Sapientia et Virtus* 7, no. 2 (2022): h.17–42. <https://doi.org/10.37477/sev.v7i2.363>

³⁵ Rahadi Budi Prayitno and Arlis Prayugo, *Teori Demokrasi Memahami Teori Dan Praktik* (Sleman Yogyakarta: Grup Penerbitan CV Budi Utama, 2023).

law is not only highlighted in terms of its enforcement, but also in terms of its creation, which is an important aspect in creating good law/Lex semper debet remedium. The existence of several articles in the Electronic Information and Transaction Law that contain vague provisions will obscure Indonesia's character as a democratic country, because a country can be said to be democratic if it is able to guarantee the rights of its people as stipulated in Law Number 39 of 1999.

2. Causing Legal Uncertainty

Legal uncertainty refers to a condition in which applicable laws or norms do not provide sufficient clarity regarding the rights, obligations, and responsibilities of individuals or entities in certain situations. In this context, legal uncertainty can make it difficult to predict the outcome of a legal case and cause doubts in the implementation of the law by the authorities and the public. This can have a negative impact on justice, legal certainty, and the public interest. The emergence of legal uncertainty in the Electronic Information and Transactions Law is due to the ambiguity of several articles, such as Articles 27 and 28, which seem to deviate from the purpose of the law's creation, as stipulated in Article 4 of the law. The ambiguity of a rule, if enforced, has the potential to have a negative impact on anyone.

The Constitutional Court judges in their ruling were deemed to have ignored the principles of lawmaking in analyzing the petitioner's request. The Constitutional Court judges should have considered the provisions of Law No. 12 of 2011, which stipulates that in the formation of regulations, the principles of effectiveness and efficiency as well as clarity of formulation must be taken into account. The substance of Article 27 paragraph 3 and Article 28 paragraph 2 does not provide an explanation of what elements must be proven in cases as referred to in those articles, whereas in the formation of regulations, attention must be paid to the choice of words or terms, as well as clear and easily understandable legal language so as not to give rise to various interpretations in its implementation and to provide benefits in regulating society.

Multiple interpretations of several articles of the Electronic Information and Transactions Law, if left unresolved, will have a negative impact on its enforcement, because the law can be used as a shield by certain individuals. According to Friedman, the substance of the law must provide guidelines on what is and is not permitted, as well as the consequences of violating the rules. In addition, the substance of the law is not only about existing rules, but also how the rules function in society and can be implemented through the relevant institutions. Initially, the Electronic Information and Transactions Law did not contain provisions categorizing its articles as criminal offenses, but with the development of technology in Indonesia, the Electronic Information and Transactions Law was revised to include a specific provision stating that the Electronic Information and Transactions Law is part of criminal offenses. Unfortunately, this change was not accompanied by.³⁶

³⁶ Iman Amanda Permatasari and Junior Hendri Wijaya, "Implementasi Undang-Undang Informasi dan Transaksi Elektronik Dalam Penyelesaian Masalah Ujaran Kebencian Pada Media Sosial Implementation of Electronics Information and Transaction in Completion of the Problem of Hate Speech on Social Media," *Jurnal Penelitian Pers dan Komunikasi Pembangunan* 23, no. 1 (2019): h.1-16. <https://doi.org/10.46426/jp2kp.v23i1.101>

Legal uncertainty in the Electronic Information and Transactions Law is caused by the ambiguity of several articles, such as Articles 27 and 28, which are unclear about the elements that must be proven. This creates room for different interpretations and the potential for abuse. In drafting regulations, the legal substance must provide clear and easily understandable guidelines to avoid uncertainty and ensure that the law can be applied fairly and effectively.

3. Implementation Losses

The 2022 Constitutional Court ruling on the review of the Electronic Information and Transactions Law was a response to public concerns that their constitutional rights had been violated by the enactment of a law, even though in reality the judges rejected all of the petitions that had been filed. The ambiguity of the articles in the Electronic Information and Transactions Law has given rise to many interpretations, so that the implementation of this regulation could harm various elements of society, ranging from individuals who criticize the government's performance, journalists who work to provide information, and content creators on social media who often provide education on current cases.

The existence of various regulations in Indonesia is expected to achieve the objectives of law, namely justice, benefit, and legal certainty, rather than causing controversy among the public. Several cases have highlighted the ambiguity of the Electronic Information and Transactions Law. First, the case of Ahmad Dhani, who was sentenced to one year in prison for saying "idiot" in his vlog, which was deemed to be insulting and defamatory, based on Appeal Decision No. 58/Pid.Sus/2019/PT.DKI. This was then upheld by the Supreme Court's Cassation Decision No. 2048K/Pid.Sus/2019. The prosecutor charged Dhani with Article 45 paragraph 3 in conjunction with Article 27 paragraph 3 of the Electronic Information and Transactions Law. Second, the case of Saiful, a lecturer at Syiah Kuala University who criticized the dean of the engineering faculty regarding the recruitment process for engineering lecturers who were prospective civil servants through his WhatsApp group. Subsequently, Saiful was reported for his criticism.

According to the author, the result of Constitutional Court Decision Number 36/PUU-XX/2022 on the Electronic Information and Transactions Law has caused many losses in society. Article 27 paragraph 3 and Article 28 paragraph 2 contain various interpretations that are predominantly burdensome and stray from democratic principles. Re-examining the substance of the relevant articles is a solution to maintaining the quality of democracy in Indonesia. In addition, to avoid the above polemics, at least from a regulatory perspective, several conditions must be met, as stated by Rick Dickerson in his work entitled *Legal Drafting Theory*, that a legal product can be declared good if it meets three cumulative requirements, namely: first, it comprehensively regulates all aspects of the issue; second, it limits regulations related to the delegation of laws; and third, it avoids containing provisions that are ambiguous.³⁷

³⁷ Wijayanti Triesti, Punik and Dona Budi Kharisma, "Ite Ditinjau Dari Legal Drafting Theori Oleh Teori Formil Rick Dikerson," *Sovereignty: Jurnal Demokrasi Dan Ketahanan Nasional* 1, no. 4 (2022): 578-84. https://www.researchgate.net/publication/376407922_Penerapan_Uu_Ite_Terhadap_Penyebaran_Berita_Hoax_Di_Era_Digital_Dalam_Perspektif_Hukum_Telematika

D. Conclusion

In the context of the rule of law, freedom of opinion and expression is part of the state's responsibility. The public is given a special space to express their views, opinions, and even criticism of the government, but still within the applicable limits. This is because freedom of expression is part of the guaranteed human rights and plays a central role as a pillar of openness and public accountability. Meanwhile, the Constitutional Court's decision No. 36/PUU-XX/2022, which rejected the petition in its entirety, has the potential to impact democracy in Indonesia in the following ways: first, a decline in the democracy index; second, legal uncertainty; and third, implementation losses.

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