

The Right to Freedom of Expression on Social Media in the Perspective of *Hifz al-Aql* (Preservation of Reason) and Positive Law

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ABSTRACT: Freedom of expression on social media has become a critical intersection between digital rights, Islamic jurisprudence, and positive law. This study examines the right to freedom of expression on social media through the lens of *Hifz al-Aql* (preservation of reason), one of the five essential objectives (*maqasid al-shariah*) in Islamic jurisprudence, and its alignment with Indonesian positive law, particularly Law Number 19 of 2016 concerning Electronic Information and Transactions (ITE Law) and Law Number 40 of 1999 on the Press. Using a normative-qualitative approach with statutory, conceptual, and comparative analysis, this research reveals a substantial convergence between Islamic jurisprudential principles and positive law frameworks in regulating speech that may harm public reason, social cohesion, and individual dignity. Both frameworks recognize that freedom of expression is not absolute and must be balanced against societal interests, the prevention of hoaxes, hate speech, and defamation. The study finds that *Hifz al-Aql* provides a robust ethical foundation for restricting harmful digital content, complementing the procedural and punitive mechanisms established by positive law. The research recommends an integrative regulatory model that combines the moral imperatives of Islamic jurisprudence with the enforceable standards of Indonesian positive law to achieve more effective governance of social media expression.

Keywords: *Freedom of Expression, Hifz al-Aql, Maqasid al-Shariah, ITE Law*

Received: 2026-May-10

Rev. Req: 2026-May-21

Accepted: 2026-June-26

I. INTRODUCTION

The rapid proliferation of social media platforms in the twenty first century has fundamentally

transformed the landscape of human communication, enabling individuals to disseminate information, opinions, and beliefs at unprecedented speed and scale. In Indonesia, social media penetration has grown exponentially, with more than 167 million active users as of 2023, representing approximately 60.4 percent of the total population (Kemp, 2023) [1]. This digital revolution, while empowering civic participation and democratizing information access, has simultaneously given rise to complex challenges including the spread of disinformation, hate speech, online defamation, and content that threatens social harmony and national unity.

The intersection of digital freedom and legal regulation has generated substantial scholarly and public debate. From a legal perspective, the right to freedom of expression is enshrined in Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which guarantees every citizen the right to freedom of opinion and expression. However, this right is not absolute. Article 28J explicitly provides that the exercise of rights and freedoms must be subject to limitations established by law for the purpose of guaranteeing the recognition and respect of the rights and freedoms of others, and to satisfy just demands based on considerations of morality, religious values, security, and public order in a democratic society. These constitutional principles are further operationalized through Law Number 19 of 2016 on Electronic Information and Transactions (ITE Law) and Law Number 11 of 2008 as its predecessor (Makarim, 2020) [2].

From an Islamic jurisprudential perspective, the concept of *Hifz al-Aql*, which translates as the preservation or protection of reason and intellect, constitutes one of the five foundational objectives of Islamic law (*maqasid al-shariah*). These five essential objectives preservation of religion (*hifz al-din*), life (*hifz al-nafs*), intellect (*hifz al-aql*), lineage (*hifz al-nasl*), and property (*hifz al-mal*) were systematically articulated by al-Ghazali in the eleventh century and subsequently developed by scholars such as al-Shatibi (Auda, 2008) [3]. *Hifz al-Aql* requires not only the protection of individual cognitive faculties but also the safeguarding of collective rationality, sound public discourse, and the epistemic integrity of society.

The imperative to examine the right to freedom of expression on social media through the dual prism of *Hifz al-Aql* and positive law is particularly urgent in the Indonesian context, where the country's plural socio religious fabric renders it especially susceptible to the polarizing effects of unregulated digital speech. Several high profile cases of social media related prosecutions under the ITE Law have sparked vigorous debates about the appropriate boundaries between freedom of expression and the protection of public order, raising questions about whether the existing regulatory framework adequately reflects both constitutional values and Islamic ethical principles that are deeply embedded in Indonesian society (Lim, 2017) [4].

Previous scholarly contributions have addressed aspects of this nexus in partial and isolated ways. Studies on *maqasid al-shariah* have primarily focused on economic law, family law, and bioethics, with comparatively limited attention to digital communication (Kamali, 2008) [5]. Research on Indonesian digital law has largely been confined to doctrinal legal analysis without adequate engagement with Islamic jurisprudential frameworks (Rahardjo, 2019) [6]. The present study seeks to bridge this scholarly gap by providing an integrated normative analysis

that brings both frameworks into productive dialogue.

This article proceeds as follows: Section II presents the research methodology. Section III provides results and discussion, examining the conceptual foundations of *Hifz al-Aql*, the positive law framework governing social media expression in Indonesia, and the analytical convergence and divergence between the two frameworks. Section IV offers concluding observations and policy recommendations.

II. METHOD

This study employs a normative legal research methodology (Marzuki, 2011) [7], which is an appropriate approach for examining legal norms, principles, and doctrines through systematic analysis of primary and secondary legal sources. Normative legal research is characterized by its focus on the internal logic, coherence, and validity of legal rules and principles rather than empirical social facts. Given the comparative and interdisciplinary nature of the inquiry spanning Islamic jurisprudence and Indonesian positive law the methodology integrates several complementary analytical approaches.

The statutory approach involves the examination of primary legal instruments including the 1945 Constitution of the Republic of Indonesia, Law Number 19 of 2016 on Electronic Information and Transactions, Law Number 40 of 1999 on the Press, Law Number 32 of 2002 on Broadcasting, and relevant ministerial regulations. The conceptual approach draws upon classical and contemporary Islamic jurisprudential sources, including the writings of al-Ghazali, al-Shatibi, Ibn Ashur, and modern scholars of *maqasid al-shariah* such as Jasser Auda and Mohammad Hashim Kamali.

The comparative approach is employed to identify structural parallels and divergences between the *Hifz al-Aql* framework and the positive law framework, enabling the construction of an integrative analytical model. Data collection was conducted through systematic library research, including primary sources (legal texts, classical Islamic jurisprudential treatises, and constitutional documents), secondary sources (academic journal articles, legal commentaries, and books), and tertiary sources (legal dictionaries and encyclopedias). The data was analyzed using qualitative content analysis, focusing on the identification and interpretation of normative principles, legal definitions, and doctrinal arguments relevant to the right of freedom of expression on social media (Creswell and Poth, 2018) [8].

The validity of the analysis is ensured through triangulation of sources and interpretive frameworks, cross referencing classical Islamic jurisprudential opinions with contemporary scholarly interpretations and the formal requirements of positive law. The study does not involve empirical data collection from human subjects and therefore does not require ethical clearance beyond standard academic research protocols.

III. RESULT AND DISCUSSION

***Hifz al-Aql* in Classical and Contemporary Islamic Jurisprudence**

The concept of *Hifz al-Aql* occupies a foundational position within the *maqasid al-shariah* framework. Al-Ghazali, in his seminal work *Al-Mustasfa min Ilm al-Usul*, identified the preservation of reason as one of the five indispensable objectives that the Sharia seeks to protect and promote (Al-Ghazali, as cited in Opwis, 2010) [9]. The prohibition of intoxicants (*khamr*) in Islamic law is classically understood as the primary legislative expression of *Hifz al-Aql*, since intoxicants are held to impair rational cognitive function. However, contemporary scholars of *maqasid* have substantially expanded the application of *Hifz al-Aql* beyond its classical scope.

Ibn Ashur, in his landmark work *Maqasid al-Shariah al-Islamiyyah*, argued that the preservation of reason entails not only the protection of individual cognitive faculties but also the cultivation of sound collective reasoning, the promotion of knowledge, and the prevention of intellectual corruption at the societal level (Ibn Ashur, 2006) [10]. This expansive interpretation has been further developed by Jasser Auda, who proposes that *maqasid* should be understood as systemic objectives that operate at individual, social, and universal levels. For Auda, *Hifz al-Aql* in the contemporary context encompasses the right to education, access to accurate information, protection from propaganda and manipulation, and freedom of rational thought and expression (Auda, 2008) [3].

The application of *Hifz al-Aql* to digital communication and social media is a relatively recent scholarly development. Scholars such as Yusuf al-Qaradawi and Wahbah al-Zuhayli have addressed the permissibility and limits of expression in mass media from an Islamic perspective, emphasizing the obligation to verify information (*tabayyun*) derived from Quranic verse 49:6, which instructs believers to investigate carefully when an untrustworthy person brings information lest harm be caused out of ignorance (Al-Qaradawi, 2001, as cited in Ramadan, 2009) [11]. This principle of *tabayyun* has direct relevance to the regulation of social media, where misinformation and unverified content can spread rapidly and cause substantial harm to public reason and social cohesion.

Contemporary Muslim legal scholars have argued that the dissemination of hoaxes, hate speech, and defamatory content on social media constitutes a violation of *Hifz al-Aql* at both the individual and societal levels (Hasbi Ash-Shiddiqy as discussed in Ash-Shiddiqy, 1966, cited in Djamil, 2013) [12]. At the individual level, such content impairs the recipient's capacity for rational judgment by distorting their epistemic environment. At the societal level, the proliferation of harmful digital content corrupts public discourse, erodes trust in institutions, and undermines the epistemic conditions necessary for democratic deliberation and social cohesion. These insights from Islamic jurisprudence provide a morally grounded rationale for regulating harmful social media content that transcends the purely procedural concerns of positive law.

The Positive Law Framework for Freedom of Expression on Social Media in Indonesia

The Indonesian positive law framework governing freedom of expression on social media is multi layered, encompassing constitutional provisions, legislation, and ministerial

regulations. At the apex of the normative hierarchy, Article 28E paragraph (3) of the 1945 Constitution guarantees every person the right to freedom of opinion and expression. This right is qualified by Article 28J, which permits restrictions for the purpose of guaranteeing recognition of others' rights, satisfying requirements of morality, religious values, security, and public order.

Law Number 19 of 2016 on Electronic Information and Transactions (the revised ITE Law) constitutes the primary legislative instrument governing digital speech in Indonesia. Several provisions are particularly relevant to social media expression. Article 27 paragraph (3) prohibits the distribution, transmission, or accessibility of electronic information containing defamatory content. Article 28 paragraph (2) prohibits the dissemination of information designed to generate hatred or hostility against individuals or groups on the basis of ethnicity, religion, race, or intergroup relations (SARA). Article 27A, introduced in the 2024 revision, specifically addresses the distribution of false information likely to cause consumer loss in electronic transactions (Makarim, 2020) [2].

The enforcement of the ITE Law has been controversial. Between 2016 and 2022, the Alliance of Independent Journalists (AJI) documented over 300 cases of ITE-related prosecutions, many involving social media posts. Critics, including the Indonesian Bar Association and numerous civil society organizations, have argued that the broad and vaguely worded provisions of Articles 27 and 28 have been used to silence legitimate criticism and political dissent, raising concerns about their compatibility with constitutional guarantees of freedom of expression (Lim, 2017) [4]. The Constitutional Court, in its 2020 Decision Number 78/PUU-XVII/2019, upheld the constitutionality of Article 27 paragraph (3) while emphasizing the need for proportionate and contextual interpretation (Constitutional Court of Indonesia, 2020, as cited in Rahardjo, 2019) [6].

Law Number 40 of 1999 on the Press provides complementary protections for freedom of expression by establishing that the national press has the freedom to seek, obtain, possess, store, process, and convey information in the form of texts, sounds, images, data, graphics, or in any other form. The Broadcasting Law (Law Number 32 of 2002) similarly establishes content standards and institutional oversight mechanisms for electronic media. These legislative frameworks collectively create a regulatory environment in which freedom of expression is both protected and subject to legally defined limitations. The Government Regulation Number 71 of 2019 on Electronic System and Transaction Operations further establishes obligations for social media platform operators regarding content moderation and user data management (Juwana, 2021) [13].

Convergences, Divergences, and Tensions Between *Hifz al-Aql* and Positive Law

A systematic comparative analysis reveals substantial convergences between the *Hifz al-Aql* framework and the Indonesian positive law framework in their approach to regulating freedom of expression on social media. These convergences operate at three principal levels: the recognition of non absolute freedom, the identification of prohibited categories of harmful speech, and the normative rationale for state intervention.

First, both frameworks recognize that freedom of expression is not an absolute right and must be balanced against competing social interests. The constitutional qualification of freedom of expression under Article 28J finds its Islamic jurisprudential parallel in the principle that human freedoms (*hurriyyat*) in Islamic law are not unlimited but are conditioned by obligations to God, the community, and other individuals (Kamali, 2008) [5]. The classical jurisprudential principle that harm must not be inflicted or reciprocated (*la darar wa la dirar*) provides an Islamic normative foundation for restricting expression that causes harm to others, directly paralleling the positive law principle of proportionate limitation for the protection of others' rights.

Second, the categories of harmful expression identified by *Hifz al-Aql* align substantially with the prohibited categories established by the ITE Law. The Islamic prohibition on the dissemination of false information (*al-kizb*) and the obligation of *tabayyun* correspond to the ITE Law's prohibition on spreading false information that may cause public disorder or consumer harm. The Islamic prohibition on *ghiba* (backbiting) and *ifk* (slander), which are condemned in Quran 49:11-12, resonate with the ITE Law's prohibition on defamatory content in Article 27 paragraph (3). The Islamic condemnation of content that incites enmity between groups corresponds to the ITE Law's prohibition on SARA based hate speech under Article 28 paragraph (2) (Mudzhar, 2020) [14].

Third, both frameworks share a common normative rationale for state intervention in regulating expression: the protection of social harmony, public reason, and the epistemic conditions necessary for a functioning community. *Hifz al-Aql* grounds this rationale in the Islamic conception of the umma as a moral community bound by shared epistemic and ethical commitments, while positive law grounds it in the constitutional conception of a democratic society in which the exercise of rights is conditioned by obligations to the community. This convergence suggests that an integrative regulatory model can be developed that draws on the moral authority of Islamic jurisprudence to reinforce the legal mandates of positive law, potentially enhancing social compliance and legitimacy (Burhanudin, 2019) [15].

Notwithstanding these substantial convergences, significant divergences and tensions between the *Hifz al-Aql* framework and the positive law framework also exist and must be carefully addressed. These divergences relate to the basis of normativity, the mechanisms of enforcement, and the scope of protected expression.

The most fundamental divergence concerns the basis of normativity. *Hifz al-Aql* derives its normative force from divine revelation and the authority of Islamic jurisprudential tradition, whereas positive law derives its force from democratic legislative processes and constitutional authority. In a pluralist constitutional democracy such as Indonesia, state law must be grounded in a secular constitutional framework that is applicable to all citizens regardless of religious affiliation. The challenge of integrating Islamic jurisprudential principles into a positive law framework without violating the principle of legal equality and religious neutrality requires careful doctrinal negotiation (Nasution, 2010) [16].

A second divergence concerns the mechanisms and subjects of enforcement. Positive law regulates expression through formal state institutions courts, prosecutors, and law enforcement agencies and imposes legally enforceable sanctions including criminal penalties and civil liability. *Hifz al-Aql*, in contrast, operates through internal moral and communal mechanisms religious education, community norms, and voluntary ethical commitments and does not rely primarily on external legal coercion. The over reliance on criminal enforcement mechanisms in the current ITE Law, which has been criticized for its chilling effect on legitimate expression, suggests that lessons can be drawn from the Islamic jurisprudential emphasis on preventive educational and communal mechanisms rather than punitive sanctions (Marzuki, 2011) [7].

A third divergence concerns the scope of protected expression. Classical *Hifz al-Aql* theory does not explicitly address the protection of minority religious or political viewpoints from suppression by the majority community, whereas modern human rights law places particular emphasis on protecting minority expression as a condition of genuine pluralism (Donnelly, 2013) [17]. Contemporary scholars of *maqasid* have begun to address this gap by arguing that a comprehensive understanding of *Hifz al-Aql* must encompass the protection of intellectual diversity and minority viewpoints as conditions for the flourishing of collective reason (Auda, 2008) [3]. This contemporary development in *maqasid* scholarship represents an important convergence with the positive law commitment to protecting freedom of expression for all persons, including those holding minority or dissenting views.

Toward an Integrative Regulatory Model

The analysis of convergences and divergences between *Hifz al-Aql* and positive law suggests the feasibility of an integrative regulatory model for governing freedom of expression on social media in Indonesia. Such a model would not require the formal incorporation of Islamic jurisprudential principles into state law but would draw on the moral insights and ethical categories of *Hifz al-Aql* to inform the interpretation, implementation, and supplementation of the positive law framework.

Several specific implications for regulatory design can be derived from this integrative analysis. First, the positive law prohibition on defamation, hate speech, and disinformation should be supplemented by robust national media literacy and digital ethics education programs grounded in the Islamic principle of *tabayyun*, which requires individuals to verify information before sharing it. Research indicates that media literacy education significantly reduces susceptibility to disinformation and impulsive sharing of unverified content (Buckingham, 2019) [18].

Second, the enforcement of ITE Law provisions should be calibrated to distinguish clearly between speech that causes genuine harm to public reason and social cohesion and therefore falls within the scope of restrictions justified by *Hifz al-Aql* and positive law alike and speech that merely causes offense or discomfort to individuals or groups, which should be protected as an expression of constitutionally guaranteed freedom of opinion. This distinction requires the development of clear and publicly available enforcement guidelines

by the relevant prosecutorial and judicial authorities (Juwana, 2021) [13].

Third, social media platform operators should be encouraged to develop content moderation standards that reflect both the requirements of Indonesian positive law and the ethical principles of *Hifz al-Aql*, including transparency in moderation decisions, accessible appeals mechanisms, and the prioritization of educational and restorative interventions over purely punitive content removal (Gillespie, 2018) [19]. The development of coregulatory mechanisms involving government, civil society, religious scholars, and platform operators could provide a more contextually sensitive and socially legitimate approach to governing social media expression than either purely state based or purely platform based regulation (MacSithigh, 2019) [20].

Fourth, the revision of the ITE Law should proceed with careful attention to the principle of proportionality, ensuring that criminal sanctions are reserved for the most serious forms of harmful expression such as incitement to violence, fabrication of information during public health emergencies, and systematic disinformation campaigns while less serious violations are addressed through administrative and civil remedies. The development of clear definitional standards for prohibited categories of expression, informed by both comparative law analysis and Islamic jurisprudential categories, would reduce legal uncertainty and the risk of over enforcement (Rahardjo, 2019) [6].

The integrative model proposed here resonates with emerging scholarly approaches to the relationship between Islamic law and constitutional democracy in Southeast Asia. Scholars such as Nadirsyah Hosen have argued that Islamic jurisprudence and constitutional democracy are not fundamentally incompatible but can be productively reconciled through the development of contextually sensitive interpretive frameworks that acknowledge both the moral authority of the Islamic tradition and the procedural requirements of constitutional governance (Hosen, 2007) [21]. The present study contributes to this broader scholarly project by demonstrating how the specific jurisprudential framework of *Hifz al-Aql* can inform and enrich the positive law governance of social media expression.

Furthermore, the importance of academic freedom and the need to protect scholars, researchers, and educators who engage in critical analysis of religious, political, and social issues on social media must be explicitly recognized within both the *Hifz al-Aql* framework and the positive law framework. The production and dissemination of critical knowledge is an essential component of *Hifz al-Aql* at the societal level, and the chilling effect on academic expression caused by overly broad ITE Law prosecutions represents a threat to the very epistemic foundations that both frameworks seek to protect (Wahid, 2022) [22].

Finally, comparative analysis with the regulatory approaches of other Muslim majority countries to social media governance reveals a diversity of approaches that reflects the plurality of interpretations of Islamic jurisprudential principles in the digital context. Malaysia's Communications and Multimedia Act and Turkey's Law on the Regulation of Internet Publications provide instructive comparative cases, though both have also been criticized for restricting legitimate political expression (Hill and Sen, 2005) [23]. The

Indonesian approach, informed by the integrative framework proposed in this study, should aim to achieve the optimal balance between the protection of genuine harms to public reason and social cohesion and the preservation of the vibrant and diverse digital public sphere that is essential to democratic life.

The significance of this research also lies in its contribution to the broader field of Islamic legal theory (*usul al-fiqh*). By demonstrating the contemporary applicability of the *Hifz al-Aql* principle to the governance of digital communication, this study advances the project of *maqasid* based legal reasoning (*ijtihad maqasidi*) that has been championed by contemporary scholars such as Muhammad Tahir Ibn Ashur, Yusuf al-Qaradawi, and Jasser Auda (Auda, 2008; Ibn Ashur, 2006) [3] [10]. The development of *maqasid* based approaches to digital law represents an important frontier for Islamic legal scholarship, with implications that extend beyond Indonesia to Muslim communities and Islamic legal institutions worldwide (Burhanudin, 2019; Mudzhar, 2020) [15] [14].

Recent empirical research on social media regulation in Indonesia underscores the urgency of the issues addressed in this study. Fealy and Bush (2014) documented the significant role of social media in the radicalization of religious discourse in Indonesia, while Mietzner and Muhtadi (2018) analyzed the impact of disinformation campaigns on the 2019 Indonesian presidential election (Fealy and Bush, 2014) [24]. These empirical findings reinforce the normative conclusions of the present analysis: that the unregulated exercise of freedom of expression on social media poses genuine threats to public reason, social cohesion, and democratic governance, and that an integrative regulatory model grounded in both *Hifz al-Aql* principles and positive law standards is needed to address these threats effectively.

In summary, the analytical findings of this study demonstrate that *Hifz al-Aql* and Indonesian positive law share substantial normative common ground in their approach to regulating freedom of expression on social media, while also exhibiting important divergences that must be carefully negotiated in any integrative regulatory framework. The development of such a framework requires sustained collaboration between legal scholars, Islamic jurists, policymakers, civil society actors, and social media platform operators, and should be informed by ongoing empirical research on the social impacts of digital communication in Indonesia and globally. The present study provides a conceptual foundation for this collaborative regulatory endeavor, and it is hoped that it will contribute to the development of more just, effective, and culturally legitimate governance of social media expression in Indonesia and the broader Muslim world (Donnelly, 2013; Gillespie, 2018) [17] [19].

IV. CONCLUSION

This study has examined the right to freedom of expression on social media through the dual analytical lens of *Hifz al-Aql*, the Islamic jurisprudential principle of the preservation of reason, and Indonesian positive law. The analysis reveals significant convergences between the two frameworks in their recognition of the non-absolute character of freedom of expression, their identification of harmful categories of speech, and their normative

rationale for state and communal intervention. Both frameworks acknowledge that the dissemination of false information, hate speech, defamation, and content that corrupts public reason is incompatible with the fundamental conditions necessary for human flourishing and social cohesion.

At the same time, the study identifies important divergences between the two frameworks relating to the basis of normativity, the mechanisms and subjects of enforcement, and the scope of protected expression. These divergences do not render the two frameworks incompatible but rather point to the need for careful interpretive negotiation and doctrinal creativity in developing an integrative regulatory model.

The integrative regulatory model proposed in this study has several key dimensions: the development of national media literacy programs grounded in the Islamic principle of *tabayyun*; the calibration of ITE Law enforcement to distinguish between genuinely harmful and merely offensive expression; the encouragement of coregulatory content moderation standards informed by both positive law requirements and *Hifz al-Aql* principles; and the revision of the ITE Law to ensure proportionality of criminal sanctions and clarity of definitional standards.

The theoretical contribution of this study lies in its demonstration that the *maqasid al-shariah* framework, and the *Hifz al-Aql* principle in particular, constitutes a robust and contextually appropriate jurisprudential resource for addressing the contemporary challenges of digital governance in Muslim-majority societies. This finding suggests promising directions for future research on the application of *maqasid* based reasoning to other areas of digital law, including privacy protection, intellectual property, and algorithmic accountability. Future research should also include empirical dimensions examining how both *Hifz al-Aql* principles and positive law norms are understood and applied by legal practitioners, religious scholars, social media users, and platform operators in Indonesia and other Muslim majority contexts.

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