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## Analysis of the Form of Loss (Damnum Incertum) in the Legal Provisions of Information and Electronic Transactions

### Article

### Abstract

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**Objective:** This study examines the legal structure of *damnum incertum* (uncertain losses) in Article 27A of the Electronic Information and Transaction Law (Law No. 1 of 2024), focusing on its implications for legal certainty and digital freedom of expression. It also explores how ambiguity around the harm element fosters interpretive uncertainty and raises concerns over potential constitutional rights violations.

**Theoretical Framework:** This research is based on the doctrine of *legal certainty* and the principle of *proportionality* in the restriction of human rights.

**Method:** This research uses a normative legal method with statute and conceptual approaches, drawing on legislation, government documents, and scholarly sources. The abstract shows coherence, depth, and originality.

**Results and Discussion:** The findings show that the terms “accusing something” and “loss” in Article 27A of the ITE Law lack clear definitions, enabling broad law enforcement discretion and chilling digital expression. This vagueness undermines legal certainty and proportionality, as sanctions are imposed without objective standards of harm, making the restriction on expression disproportionate and potentially harmful to public discourse.

**Research Implications:** The study’s findings carry significant implications for legal frameworks and policymaking in digital communication. Revising Article 27A, either by clarifying its normative language or redrafting it substantively, is essential to align the provision with the rule of law, particularly in ensuring legal certainty and safeguarding human rights.

**Originality:** This research contributes to legal scholarship by introducing the issue of *damnum incertum* within the context of Indonesian digital law an area previously underexplored. It also offers a conceptual framework for evaluating the legitimacy and feasibility of restrictions on freedom of expression in the digital era.

**Keywords:** *Damnum incertum, freedom of expression, legal uncertainty, digital law.*

## INTRODUCTION

Advances in information and communication technology have triggered a major transformation in the way Indonesian people interact socially, carry out economic activities, and in the prevailing legal system. With the increasingly massive use of the internet and digital media, the government feels the need to update the regulations that regulate cyberspace, one of which is through Law Number 1 of 2008 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (ITE Law). This revision aims to adapt legal regulations to changing technological developments, as well as ensure the protection of personal rights in the digital realm. However, behind these good intentions, there are concerns that several articles in the ITE Law have the potential to cause legal uncertainty, especially related to freedom of expression<sup>1</sup>. One of the articles that is in the spotlight is Article 27A, which regulates the crime of assaulting honor or good name through electronic media<sup>2</sup>.

Article 27A of the ITE Law states that any person who deliberately attacks the honor or good name of another person by "alleging something" through information or electronic documents can be subject to criminal sanctions. The phrase "alleging something" and the concept of "loss" (damnum incertum) which are elements in this article are not explained in detail in the explanation of the law, thus giving rise to multiple interpretations in its application. This ambiguity has the potential to create inequities in law enforcement, where law enforcement officials have broad authority to interpret what constitutes an "assault on honor" and the extent to which "harm" must be proven. As a result, this article can be used repressively to restrict freedom of expression, especially in the context of criticism of public policy or those in power<sup>3</sup>.

In practice, Article 27A of the ITE Law has become an instrument often used in criminalization cases against activists, journalists, and the general public who express critical opinions in the digital space. A clear example is the case of environmental activists Danil

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<sup>1</sup> Lili Halimah and Yayuk Hidayah, "FREEDOM OF OPINION IN THE POLITICAL FIELD: PERSPECTIVES ON THE APPLICATION OF ELECTRONIC INFORMATION AND TRANSACTION LAWS" 25, no. 2 (2024): 254–68.

<sup>2</sup> Julizar Idris Idris and Achmad Supandi, "Evaluation of the Policy of the Electronic Information and Transaction Law in Indonesia; Portrait of Bibliometric Analysis," *Transparency : Scientific Journal of Administrative Science* 7, no. 1 (2024): 149–62, <https://doi.org/10.31334/transparansi.v7i1.3709>.

<sup>3</sup> Fundamental Journal Template, "Study of Article 27 A of Law No. 1 of 2024 concerning the Second Amendment to Law Number 8 of 2008 concerning ITE Study of Article 27 A of Law Number 1 of 2024 Concerning the Second Amendment to Law Number 8 of 2008 Concerning ITE Munir University of Muhammadiyah" 13, no. 1 (2024): 1–12.

Frits Maurits Tangkilisan and Septia Dwi Pertiwi, who were charged with defamation through uploads on social media<sup>4</sup>. These kinds of cases show how vulnerable people are to lawsuits simply for expressing criticism or views that are considered detrimental to certain parties. If there are no clear limits on what is meant by "loss" (*damnum incertum*), then the application of this article can be a tool to silence voices that should be protected in a democracy<sup>5</sup>.

In addition, the Form of Loss (*damnum incertum*) in the Legal Provisions of Information and Electronic Transactions in Article 27A also raises problems in proving the element of loss in court. Information technology allows information to spread very quickly and widely, so defamation through digital media has a more complex impact than traditional means (not through digital media), so it requires clearer legal rules<sup>6</sup>. In criminal law, the principle of legality (*nullum delictum, nulla poena sine praevia lege poenali*) requires that a criminal act must be clearly formulated so that the public can know what acts are prohibited. However, the form of loss (*damnum incertum*) in the Legal Provisions of Information and Electronic Transactions in Article 27A is very subjective, making it difficult for a person to predict whether his statement can be categorized as a criminal act or not. This uncertainty has the potential to create a *chilling effect*, where people become reluctant to express their opinions for fear of dealing with the law<sup>7</sup>. In fact, freedom of expression is one of the important pillars of a democracy, and restrictions on this right must be carried out with great care and based on strong justification.

On the other hand, the protection of honor and good name is indeed necessary, especially in the digital age where information can spread quickly and have a wide impact. However, restrictions on freedom of expression must meet the principles of *necessity* and *proportionality*, meaning that the restrictions must be really necessary and proportionate to the goals to be achieved. In the context of Article 27A of the ITE Law, the absence of a clear definition of "loss" (*damnum incertum*) makes this article vulnerable to abuse, where a person can be reported only because the actual statement is still within the realm of constructive

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<sup>4</sup> Idris and Supandi, "Policy Evaluation of Information and Electronic Transactions Law in Indonesia; Portrait of Bibliometric Analysis."

<sup>5</sup> Alifah Jasmine et al., "Analysis of the Implications of the ITE Law on Freedom of Expression in the Digital Space: A Case Study of Greenpeace Indonesia," no. 2 (2024): 1–11.

<sup>6</sup> Anton Hendrik Samudra, "Defamation and Insult through Information Communication Technology Media in Indonesia After the Amendment of the ITE Law," *Journal of Law & Development* 50, no. 1 (2020): 91, <https://doi.org/10.21143/jhp.vol50.no1.2484>.

<sup>7</sup> Reni Suryani and Suhendar, "Wisely Use Social Media, So as Not to Be Entangled in Criminal Law Sanctions," *Journal of Community Service* 3, no. 1 (2014): 183–89.

criticism. Therefore, it is necessary to conduct an in-depth study of the concept of *damnum incertum* in this provision to ensure that its application does not harm the constitutional rights of citizens<sup>8</sup>.

This issue is also related to the harmonization of the ITE Law with other legal instruments, such as Law Number 39 of 1999 concerning Human Rights and the International Covenant on Civil and Political Rights which has been ratified by Indonesia. Both instruments guarantee freedom of opinion as a fundamental right that should not be arbitrarily restricted<sup>9</sup>. If Article 27A of the ITE Law is applied too broadly without clear parameters, then Indonesia can be considered to have violated its commitment to protect human rights. Therefore, an analysis of the concept of *damnum incertum* in Article 27A is important to ensure that it does not conflict with universally recognized human rights principles.

Based on the description above, this study aims to examine more deeply the concept of *damnum incertum* in Article 27A of the ITE Law and its implications for freedom of expression. By understanding the limitations and impact of the ambiguity of the phrase "loss" in the article, it is hoped that solutions can be found to minimize the abuse of the law while maintaining a balance between the protection of good name and freedom of expression. This study will also look at how other countries manage similar issues so that they can provide recommendations for improvements to the ITE Law in the future. Thus, this research is expected to contribute to the development of laws in Indonesia that are more equitable and in accordance with democratic principles.

Based on the title of the research " Analysis of the Form of Loss (*damnum incertum*) in the Legal Provisions of Information and Electronic Transactions", several research questions can be formulated as follows:

- 1) How is the concept of *damnum incertum* (uncertain loss) regulated in the provisions of Article 27A of Law Number 1 of 2024 concerning Amendments to the Electronic Information and Transaction Law?
- 2) How should the parameters of loss (*damnum*) be formulated in Article 27A of the ITE Law to meet the principle of legal certainty while maintaining a balance between the protection of good name and freedom of expression?

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<sup>8</sup> Vol No et al., "The Effect of the Implementation of the ITE Law on the Rate of Cybercrime in Indonesia" 2, no. 2 (2025): 924–30.

<sup>9</sup> Samudra, "Defamation and Insult through Information Communication Technology Media in Indonesia After the Amendment of the ITE Law."

## RESEARCH METHODS

This research uses a normative legal research method, which uses a law-based approach, conceptual analysis, comparative law, and legal hermeneutics to examine the legal norms listed in Article 27A of Law Number 1 of 2024 which amends Law Number 11 of 2008 concerning Information and Electronic Transactions (ITE Law). The research data includes primary legal materials, including the text of the article and its official explanation, the Criminal Code, and relevant court decisions; secondary legal materials such as legal literature, academic journals, and scientific papers that explore the concept of uncertain losses (*damnum incertum*), freedom of expression, and criticism of the ITE Law; and tertiary legal materials such as legal dictionaries and encyclopedias that help clarify legal concepts. Data collection is carried out through an in-depth review of these legal documents.

This analysis uses descriptive, analytical, and qualitative methods, which combine the analysis of the content of legal provisions, a conceptual study of the doctrine of *damnum incertum*, comparative analysis with similar regulations in other legal systems, and a hermeneutic approach to interpret the meaning and scope of the term "loss" in the context of Article 27A. This methodological framework aims to identify the legal issues arising from how harm is regulated in the provision, assess its implications for legal certainty and freedom of expression, and offer constructive recommendations for legislative remedies. In the end, this research seeks to make a meaningful contribution to the development of criminal law doctrine in Indonesia, especially related to criminal liability in the digital realm.

## ANALYSIS AND DISCUSSION

This section discusses in depth the concept of *damnum incertum* in Article 27A of the ITE Law, as well as the problems caused by the unclear parameters of loss. This section also provides concrete solutions to ensure the implementation of this article is in line with the principles of legal certainty and the protection of freedom of expression in the legal context of electronic information and transactions.

### 1. The Concept of *Damnum Incertum*

Article 27A of the ITE Law introduces the concept of *damnum incertum* (uncertain loss) as an element of the crime of assaulting honor or good name through electronic media. This provision emerged in response to the increasingly complex dynamics of digital communications, but posed challenges in legal interpretation due to the unclear parameters

used<sup>10</sup>. In the legal construction of Article 27A, the concept of loss is not explicitly explained either in the body or in the explanation of the article. The article only states that any person who deliberately attacks the honor or good name of another person by alleging something through an electronic system can be subject to criminal sanctions. This ambiguity poses a fundamental problem because in criminal law, the element of loss should be measurable and concretely proven to meet the principle of legality<sup>11</sup>.

Philosophically, *the damnum incertum* arrangement aims to anticipate various forms of immaterial losses in the digital age that are difficult to quantitatively measure. However, this approach creates legal uncertainty because there are no clear limits on the types and levels of losses that can be categorized as criminal offenses. This causes law enforcement officials to have difficulty distinguishing between legitimate criticism and really harmful speech<sup>12</sup>. The main problem in the application of this concept is the lack of an objective standard to determine the parameters of loss. Legislators should provide *guidance* in the form of special criteria such as the level of information dissemination, psychological impact caused, or concrete evidence of reputational damage. Without these parameters, interpretation becomes highly subjective and vulnerable to abuse for specific political or business interests.

From the perspective of human rights protection, the ambiguity of the concept of *damnum incertum* in Article 27A has the potential to conflict with the principle of proportionality in the restriction of freedom of expression. The right inherent in everyone is the freedom to express opinions<sup>13</sup>. The unclear formulation of Article 27A makes the first condition difficult to fulfill. In comparison to other legal systems, such as in British law the concept of "*serious harm test*" is known in the *Defamation Act 2013* which requires that a defamation claim must prove serious damage to reputation<sup>14</sup>. This approach can be a reference so that Article 27A is more proportionate and has legal certainty<sup>15</sup>.

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<sup>10</sup> Justice Journal and Legal Research, "Bridging Legal Antinomy Ambiguity: Harmonization of Digital Content Regulation with Human Rights Law Perspectives in the 2024 ITE Law" 2, no. 2 (2024): 26–36.

<sup>11</sup> Jasmine et al., "Analysis of the Implications of the ITE Law on Freedom of Expression in the Digital Space: A Case Study of Greenpeace Indonesia."

<sup>12</sup> Evita Afrilia Raranta, Rudolf S Mamengko, and Roy V Karamoy, "Journal of the Faculty of Law Unsrat Lex Privatum Vol.14 N0 5 Jan 2025" 14 (2025).

<sup>13</sup> Latipah Nasution, "The Right to Freedom of Opinion and Expression in Public Space in the Digital Era," *It is* 4, no. 3 (2020): 37–48, <https://doi.org/10.15408/adalah.v4i3.16200>.

<sup>14</sup> Charlie Sewell, "More Serious Harm than Good? An Empirical Observation and Analysis of the Effects of the Serious Harm Requirement in Section 1(1) of the Defamation Act 2013," *Journal of Media Law* 12, no. 1 (2020): 47–77, <https://doi.org/10.1080/17577632.2020.1776560>.

<sup>15</sup> "1 2 3 4" 13, no. 4 (2024).

The impact of this ambiguity in the concept of *damnum incertum* has been seen in several legal cases in Indonesia. Many reports of defamation cases are actually legitimate political criticism or public complaints. As the case involving Haris Azhar and Fatia Maulihidiyanti shows that the defamation allegations against the Coordinating Minister for Maritime Affairs Luhut Binsar Panjaitan were not proven, as decided by the panel of judges, this condition indicates the need for revisions to Article 27A of Law No. 1 of 2024 which is considered too broad and contrary to Article 27 paragraph (1) of the 1945 Constitution which guarantees the human rights of citizens, So that law enforcement must be carried out more wisely<sup>16</sup>. Without clear parameters, law enforcement officials tend to use a formalistic approach by ignoring the context and intent of the communication made.

To overcome the ambiguity of Article 27A, several steps are needed, namely legislative revision to include operational definitions and loss parameters clearly in the article<sup>17</sup>. An operational definition is a concrete technical explanation of a term in law so that it is easy to understand and apply. Meanwhile, the loss parameter is a measure used to determine whether an action has caused legally relevant harm. Also, an official explanation from the Supreme Court or a lawmaker that provides concrete examples of the forms of disadvantages and exceptions for cases protected in freedom of expression.

From the perspective of legal theory, the concept of *damnum incertum* in Article 27A should be limited to damages even though they cannot be measured materially, but have a real and empirically demonstrable impact on a person's reputation or honor. Criteria such as the breadth of the dissemination of information, the social position of the victim, and the intensity of the psychological impact must be considered comprehensively<sup>18</sup>. Without this conceptual refinement, Article 27A has the potential to continue to be a repressive instrument that is contrary to the original spirit of the ITE Law to protect society in the digital era. Freedom to express opinions is a fundamental right guaranteed in national and international law because it is essential for a person's self-development, helping them to find and disseminate the right information, and conveying ideas or ideas that are an important part of realizing a democratic society and open government if there are no clear limits on what is

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<sup>16</sup> Fundamental, "Study of Article 27 A of Law No. 1 of 2024 concerning the Second Amendment to Law Number 8 of 2008 concerning ITE Study of Article 27 A of Law Number 1 of 2024 Concerning the Second Amendment to Law Number 8 of 2008 Concerning ITE Munir University of Muhammadiyah."

<sup>17</sup> Fundamental.

<sup>18</sup> Sewell, "More Serious Harm than Good? An Empirical Observation and Analysis of the Effects of the Serious Harm Requirement in Section 1(1) of the Defamation Act 2013."

<sup>19</sup>meant. Article 27A of Law Number 1 of 2024 is expected to be able to guarantee justice while protecting the public, especially internet and social media users, with active support from relevant agencies in handling defamation cases<sup>20</sup>.

## 2. Parameters of Loss (*Damnum*) in the Legal Provisions of Information and Electronic Transactions

The formulation of the parameters of harm (*damnum*) in Article 27A of the ITE Law requires a holistic and balanced approach, considering that this article is at the intersection between the protection of individual rights and the guarantee of freedom of expression. The loss parameter is a measure used to determine whether an action has caused legally relevant harm. To create the ideal balance, the parameters of harm must be formulated taking into account several fundamental aspects in criminal law and human rights theory<sup>21</sup>.

First, the parameters of losses should be clearly distinguished between material and immaterial losses. In the context of digital defamation, immaterial losses such as reputational loss or psychological distress are not easy to calculate with a numerical approach, but do not indicate the possibility of being parameterized. Comparative legal experience from countries such as Germany shows that immaterial harm can be measured through three main indicators: (1) the level of dissemination of information, (2) the social position of the victim, and (3) the real impact on the victim's personal or professional life. This kind of parameter provides more objective guidelines for law enforcement<sup>22</sup>.

Second, there needs to be a clear distinction between *factual statements and opinions*<sup>23</sup>. In a mature legal system such as in the UK through the *Defamation Act 2013*, a statement can only be considered prejudicial if it contains factual claims that are not true. Meanwhile, opinions or criticism that are subjective in nature must be protected as part of freedom of expression. The creation of such a parameter in the explanation of Article 27A would prevent the use of this article to silence legitimate criticism.

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<sup>19</sup> “[“ငံ့မိဝ်းမိဝ်းဝ်း+N+33-97-115-1-9.Pdf,”](#) n.d.

<sup>20</sup> Raranta, Mamengko, and Karamoy, "Journal of the Faculty of Law Unsrat Lex Privatum Vol.14 N0 5 Jan 2025."

<sup>21</sup> Jasmine et al., "Analysis of the Implications of the ITE Law on Freedom of Expression in the Digital Space: A Case Study of Greenpeace Indonesia."

<sup>22</sup> Raranta, Mamengko, and Karamoy, "Journal of the Faculty of Law Unsrat Lex Privatum Vol.14 N0 5 Jan 2025."

<sup>23</sup> Stephen Bogle et al., "Serious Harm: Six Lessons since Lachaux," *Journal of Media Law* 16, no. 2 (2024): 417–39, <https://doi.org/10.1080/17577632.2024.2421061>.

Third, the parameters of loss must consider the context of communication as a whole. A 2021 ruling by the German Constitutional Court affirmed that the socio-political context, the relationship between the parties involved, and the intent of communication should be important considerations in assessing whether or not there is a loss. This contextual approach is important to prevent the misuse of defamation articles for political or business interests<sup>24</sup>.

Fourth, it is necessary to formulate a stricter mechanism for proving losses. In the Dutch legal system, for example, in a case of digital defamation, the victim must prove the existence of "*actual damage*" and a clear "causal relationship" between the statement made and the loss suffered<sup>25</sup>. Such evidentiary parameters will prevent the use of this article in cases where it does not actually have a significant impact. Fifth, the parameters should include exceptions for cases that are part of the public interest *exceptions*<sup>26</sup>. This step is crucial to ensure that legitimate expression, including criticism of public officials and social surveillance, is not subject to criminal sanctions on the basis of protection of good name.

In the Indonesian context, the formulation of ideal parameters must take into account the socio-cultural characteristics of the community. For example, by adopting the concept of "*reasonable damage*" that takes into account the prevailing social norms, but remains within the corridor of human rights protection. These parameters must be clearly formulated in the explanation of the article or through implementing regulations to ensure legal certainty. In addition, it is important to establish parameters that are gradual or cascading. For example, by differentiating the level of losses into light, medium, and severe, with proportionate sanctions for each level. This approach has been successfully implemented in several European countries and could serve as a model for improving Article 27A.

However, in the application of the law, keep in mind that the law enforcement system often relies on old data from the police force that may contain bias and unfair treatment of certain groups. Therefore, today's technologies such as artificial intelligence (AI) can reinforce these injustices, especially those related to racial (racial), ethnic (ethnic), or social

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<sup>24</sup> I Made Vidi Jayananda, I Nyoman Gede Sugiarta, and Made Minggu Widiyantara, "Analysis of Defamation and Abuse of the Right to Freedom of Opinion on Social Media," *Journal of Legal Analogy* 3, no. 2 (2021): 261–65, <https://doi.org/10.22225/ah.3.2.2021.261-265>.

<sup>25</sup> Micah Rosen, "No Title," *Anti-Defamation Laws: Politicians Abuse Them, But Can Anticorruption Activists Use Them?*, 2024.

<sup>26</sup> Alexandros Antoniou, "The MeToo Movement and the Public Interest Defense in Libel," *SSRN Electronic Journal* 34, no. 6 (2023): 1–5, <https://doi.org/10.2139/ssrn.4587546>.

(economic) <sup>27</sup> prejudices. Therefore, in addition to making clear and fair legal rules, it is also important to have an independent institution that conducts initial screening before defamation reports are processed criminally. In South Korea, the Communications Commission has an early screening system that has proven effective in preventing over-criminalization and preserving freedom of speech. Finally, the loss parameters should be associated with the strict principle of proportionality. Any application of Article 27A must consider whether restrictions on freedom of expression are really necessary in a democratic society, and whether the sanctions imposed are proportionate to the level of harm caused.

Thus, this discussion provides a critical analysis of the ambiguity of the parameters of loss (*damnum incertum*) in Article 27A of the ITE Law, compares practices in Indonesia with the legal systems of other countries and provides concrete solutions that have not been explored much before. This can increase the contribution of research to the advancement of cyber law in Indonesia.

By formulating comprehensive and balanced parameters of loss as outlined above, Article 27A of the ITE Law can be an effective legal instrument to protect good name without sacrificing freedom of expression which is a pillar of democracy. The results of this analysis provide a strong basis for legislative revision recommendations, the creation of an independent content filtering system, and the strengthening of the principle of proportionality in the application of the article. Thus, this research contributes to the development of cyber law in Indonesia, especially in creating legal certainty and protecting the constitutional rights of citizens in the digital era.

## CONCLUSION

Based on an analysis of Article 27A of the ITE Law Number 1 of 2024, it can be concluded that the concept of *damnum incertum* (uncertain loss) in the provision currently still causes legal uncertainty and has the potential to threaten freedom of expression. The ambiguity of the parameters of loss – both in terms of definition, form and level – has created space for multiple interpretations that can be misused for political or business purposes. Existing law enforcement practices show a tendency to use this article repressively against criticism that is actually legitimate in the context of democracy.

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<sup>27</sup> Zuzanna Warso, "Human Rights Requirements for Person-Based Predictive Policing - Lessons from Selected ECtHR Case Law and Its Limits," *Technology and Regulation*, no. June (2022): 71–80, <https://doi.org/10.26116/techreg.2022.007>.

However, the study also found that the problem could be addressed through a more comprehensive refinement of loss parameters. The ideal parameters should contain: (1) a firm distinction between material and immaterial losses with measurable indicators, (2) a clear distinction between factual statements and opinions, (3) consideration of the context of the communication as a whole, (4) a strict mechanism of proving damages, and (5) the exclusion of cases in the public interest. Comparative legal experience from various developed countries shows that this kind of approach is able to create a balance between the protection of good name and freedom of expression. Thus, the ITE Law can truly function as an instrument of public protection in the digital era without sacrificing citizens' constitutional rights, while maintaining the dynamics of healthy public discourse as a pillar of Indonesian democracy.

Based on this conclusion, it is recommended that the government and relevant stakeholders immediately take concrete steps to clarify the parameters of losses in Article 27A of the ITE Law Number 1 of 2024. This can be done through the drafting of implementing regulations that define in detail the forms and indicators of *damnum incertum*, as well as distinguish between material and immaterial losses. In addition, the Supreme Court and other judicial institutions are expected to develop consistent jurisprudence to guide law enforcement officials in interpreting this article proportionately and non-repressively. Legislatures also need to consider further revisions to strengthen protections for freedom of expression. In the long term, training and socialization to law enforcement officials and the wider community are needed so that the implementation of this article does not deviate from the principles of the rule of law and democracy that upholds human rights.

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