

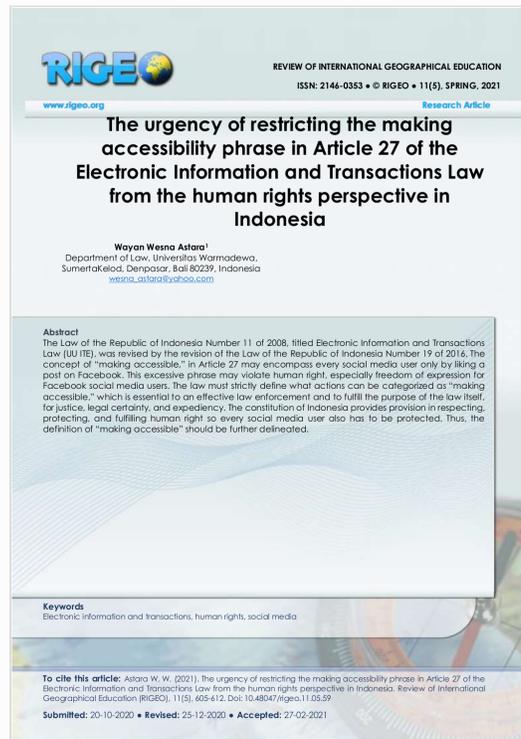


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The urgency of restricting the making accessibility phrase in Article 27 of the Electronic Information and Transactions Law from the human rights perspective in Indonesia

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Abstract

The Law of the Republic of Indonesia Number 11 of 2008, titled Electronic Information and Transactions Law (UU ITE), was revised by the revision of the Law of the Republic of Indonesia Number 19 of 2016. The concept of "making accessible," in Article 27 may encompass every social media user only by liking a post on Facebook. This excessive phrase may violate human right, especially freedom of expression for Facebook social media users. The law must strictly define what actions can be categorized as "making accessible," which is essential to an effective law enforcement and to fulfill the purpose of the law itself, for justice, legal certainty, and expediency. The constitution of Indonesia provides provision in respecting, protecting, and fulfilling human right so every social media user also has to be protected. Thus, the definition of "making accessible" should be further delineated.

Keywords

Electronic information and transactions, human rights, social media

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Introduction

List of Abbreviations

CEDAW	: Convention on the Elimination of All Forms of Discrimination Against Women
CRC	: Convention on the Right of the Child
ICCPR	: The International Covenant on Civil and Political Rights
ICERD	: The International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	: International Covenant on Economic, Social, and Cultural Rights
ITE	: Electronic Information and Transactions
ITE LAW	: Law of Electronic Information and Transactions; Law of the Republic of Indonesia Number 11 of 2008 and the changes Law of the Republic of Indonesia Number 19 of 2016
UUD NRI 1945	: The 1945 Constitution of the Republic of Indonesia
UDHR	: The Universal Declaration of Human Rights

On April 21, 2008, the government introduced Indonesia's first cyber law by issuing the Law of the Republic of Indonesia Number 11 of 2008, which dealt with Electronic Information and Transactions. However, on October 27, 2016, the law was changed to the Law of the Republic of Indonesia Number 19 of 2016 (ITE law). The ITE Law was a breath of fresh air for the people of Indonesia, especially in its focus on online legal protections. In practice, however, it is not uncommon for the ITE Law to become a trap for criminalizing individuals. In one such case, in 2019, every mass media in Indonesia reported a housewife in Sidoarjo was arrested for allegedly spreading information about a devastating earthquake measuring 9.5 on the Richter scale. She said that she only intended to remind friends, about the disaster. Many days after, another individual, Baiq Nuril, was sentenced to prison for recording the conversation of the supervisor who teased him at work. In June 2011, Prita Mulyasari was sentenced to six months in prison with one-year probation for writing and sending personal e-mails to a close friend containing complaints about the services at the Omni International Hospital. These cases demonstrate the need to revise the ITE Law so that this kind of victimization can no longer occur. The centerpiece of these cases is the online social network, Facebook, created by Mark Zuckerberg and launched in February 4, 2004. Facebook is a real-time social media platform. In March 2018 (based on annual digital report released by We Are Social and Hootsuite) the JakartaPost reported that Indonesia has the fourth highest number of Facebook users in the world. Facebook is conceived as an unlimited network that can spread the thoughts of its users. However, Facebook users are often subject to false information. Thus, if liking a post or comment on Facebook is akin to the legal definition of making it accessible, what are the legal consequences? If so, does it follow that the definition of the phrase has the potential to violate an individual's human rights? After all, it may be argued that it is every person's right to seek, obtain, possess, store, process, convey and, especially, to like something.

Materials and Methods

As a part of human right, freedom of expression gives us the freedom to express feelings, thoughts, or ideas. Both are defined (by independence, detachment, or non-intervention). "Expression" is encompassed by the individual's intentions, ideas, feelings, or opinions. The concept of freedom of expression does not apply exclusively to speech or creations or actions intended to convey intentions, ideas, feelings, and opinions. Freedom of expression is also typically linked to the principles and practices of democracy (Howie, 2018).¹ Some of the international conventions that guarantee freedom of expression are as follows:

- (1) The Universal Declaration of Human Rights (UDHR) of 1948, which consists of 30 articles that regulate the protection of the most important fundamental right namely, the protection of civil

¹ Emily Howie, 'Protecting the Human Right to Freedom of Expression in International Law' (2018) 20 IJSLP 12.

- Astara W. W. (2021). The urgency of restricting the making accessibility phrase in Article 27 of the
- and political rights, as well as economic, social, and cultural rights. The guarantee of freedom of expression is regulated by Article 19 of the UDHR 1948 in (United Nations, 2015),² which says: "Everyone has the right to freedom of opinion and expression. The right includes freedom to hold fast to an opinion without interference and to seek, receive, and impart information and ideas through any media and regardless of boundaries."
- (2) The International Covenant on Civil and Political Rights (ICCPR) of 1966³ encompasses human rights, including the right to the freedom of association, which intersects civil and political rights (Nowak, 2005).³ Freedom of expression in the ICCPR 1966 is explained more rigidly in Article 19, (United Nations, 1976), which reads as follows:⁴
- Everyone has the right to express opinions without interference.
 - Everyone has the right to freedom of expression. The right includes freedom to seek, receive, and impart any information and ideas, regardless of the medium, whether orally, in writing, or in printed, art, or through other media of his choice.
 - The exercise of the rights provided in the Article gives rise to outstanding obligations and responsibilities. Therefore, the rights are subject to certain restrictions. The restrictions are only permissible if they are regulated according to law and are necessary to respect the rights or reputation of others and protect national security or public order or public health or morals.
- The rule regarding freedom of expression is to protect all forms of subjective ideas and opinions that can be imparted or disseminated to others. Freedom of opinion is said to be a personal interest related to the absolute nature of thought, which cannot be limited by law or other powers.
- (3) The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1965. Article 5 (OHCHR, 1965),⁵ emphasizes the fundamental obligations of states as regulated in Article 2, including the obligations in Article 5 letter d part viii to ensure the practice of the right to freedom of opinion or expression.
- (4) The International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966. Although it does not explicitly regulate the right to freedom of expression, the covenant states that human rights are universal, inseparable, interdependent, and interrelated. This means that the enjoyment of the right to freedom of expression is inextricably bound to the enjoyment of economic, social, and cultural rights. For example (Claude & Weston, 2006),⁶ cultural protection includes respect for individual freedom to choose, express, and develop their culture.
- (5) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979. The provisions of Article 3 (OHCHR, 1979),⁷ emphasize the obligation of states to take all appropriate steps, especially by making laws and regulations in the political, social, economic, and cultural fields, to ensure the full development and advancement of women. The aim is to ensure that women exercise and enjoy human rights and fundamental freedoms on an equal basis with men.
- (6) Convention on the Right of the Child (CRC) of 1989. Article 13, OHCHR (1989)⁸ states that children have the right to freedom of expression, but with restrictions. Article 17, OHCHR (1989),⁹ affirms that children have access to information and material from a variety of national and international sources, particularly material information intended to advance their social, spiritual, and moral welfare, as well as their physical and mental health. The 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) guarantees freedom of expression as one of the individual rights of every citizen. This right must be upheld as an integral part of a democratic constitutional state, or inherent constitutional democracy. The principle of democracy has become the main goal for Indonesia since the collapse of the New Order regime in the Suharto era. The lessons of history

²United Nations (2015) UDHR Book: Universal Declaration of Human Rights (UN, 2015, illustrated by Yacine Ait Kaci) 40.

³ Nowak (2005), U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd edn N. P. Engel, Strasbourg 2005) 496.

⁴International Covenant on Civil and Political Rights (1976) 999 UNTS 178 (ICCPR).

⁵ OHCHR, 'International Convention on the Elimination of All Forms of Racial Discrimination' (New York 1965).

⁶ Richard Claude and Burns H Weston, Human Rights in the World Community: Issues and Action (3rd edn University of Pennsylvania Press, Philadelphia 2006).

⁷ OHCHR, 'Convention on the Elimination of All Forms of Discriminations against Women' (New York 1979).

⁸ OHCHR, 'Convention on the Rights of the Child' (New York 1989).

⁹ OHCHR [1989].

emphasize that democracy is the most appropriate principle to apply to all systems of political and social organization through the will of the people. At the beginning of the reform era, the enforcement of human rights was a legal issue that was continually ⁴⁰ed. Citizens demanded the right to express their opinions, which gave birth to a guarantee of freedom of expression. This is enshrined ¹⁷ the country's constitution as follows:

(1) The 1945 Constitution of the Republic of Indonesia, ¹⁵ guarantees the protection of freedom of expression. Article 28, [ConstitutionNet \(1945\)](#) ¹⁰ states that freedom of association and assembly, expressing thoughts orally and in writing and so on, is stipulated by law. Furthermore, Article 28E paragraph (3) states that everyone has the right to freedom of association ⁷, assembly, and expression. Going into more detail, Article 28F, [ConstitutionNet \(1945\)](#) ¹¹ states that everyone has the right to communicate and obtain information to develop their personal and social environment, as well as the right to seek, obtain, possess, store, process, and convey information using all available channels. ¹³

(2) Law of the Republic of Indonesia Number 9 of 1998, concerning Freedom to Express Opinions in Public, in the provisions of Article 1 Number 1, affirms that freedom to express opinions in oral and written form and so on is the right of every citizen and to be responsible following the provisions of the applicable laws and regulations. Article 2 paragraph (1) states that every citizen, individually or in ³⁸ free group, can express their opinion as a manifestation of the rights and responsibilities of democracy in the life of society, nation, and state. ²⁸

(3) Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights (Human Rights Law), which reference UDHR 1948, CEDAW 1979, CRC 19 ⁵⁴ and various other international covenants related to human rights, as a guideline, states in Article 14 paragraph (1) and paragraph (2) that: "Everyone has the right to communicate and obtain information necessary to develop his personality and social environment. Everyone has the right to seek, obtain, own, store, process, and convey information by using all available means." Another provision that even more concretely protects freedom of expression is Article 23 paragraph (2): "Everyone is free to have, issue and disseminate opinions according to their heart and conscience, orally and in writing through print and electronic media with due observance of religious values, morals, order, public interest ⁵ and the integrity of the country."

(4) Law of the Republic of Indonesia Number 12 of 2005, concerning Ratification of the International Covenant on Civil and Political Rights, Article 1 paragraph (2), confirms that the substance of the ICCPR is also the content of the law, and is an integral part of the law. The state has authority through the government to impose restrictions on human rights ⁴⁵ as a form of the control function. This limitation has been recognized in national law, through Article 28J paragraph (2) of the 1945 Constitution ⁸ conjunction with Article 70 of the Human Rights Law ([ConstitutionNet, 1945](#)), which states that: ¹² In exercising their rights and ¹⁰ freedoms, everyone is obliged to comply with the restrictions established by law. It is intended to guarantee recognition and respect for the rights and freedoms of others, and to fulfill just demands following considerations of morality, security, and public order in a democratic society. Freedom of expression is considered necessary because it is means to ensure one's self-fulfillment in achieving maximum potential. It is a right that requires tools to seek the truth to develop one's knowledge, avenues for public participation in decision-making (politics and law), and systems to achieve stability and adaptation between society and the state ([UNESCO, 2003](#)). ¹³ Concerning laws and human rights, every individual is a ³¹ rights holder, and the state through the government is a duty bearer. The government must respect, protect, and fulfill human rights, while each individual is obliged to not interfere with the rights and freedoms of others. In this context, it is not surprising that social media is used as a forum for citizens to convey public aspirations or exercise their freedom of expression. Expressions through social media still fall within the ambit of freedom of expression because the predicate is the same. The difference between expressing opinions in public or demonstrations is only a difference of means and methods. Audience generated social media users are individuals who collate or collect, consume, manage, and produce information into content, which is then distributed to the general public through social media. Product-sage practice is a form of freedom of expression

¹⁰ ConstitutionNet, 'The 1945 Constitution of the Republic of Indonesia' <<https://constitutionnet.org/vl/item/1945-constitution-republic-indonesia>> accessed DD Month YYYY.

¹¹ ConstitutionNet.

¹² ConstitutionNet.

¹³ UNESCO, Toolkit Freedom of Speech and Expression for Information Activist (UNESCO, Paris) 17.

often encountered on social media. This practice often contains negative elements that often encompass and lead to criminal acts of humiliation, defamation, or other criminal acts that can interfere with the rights and freedoms of others. Examples of negative social media creations are memes containing insults against state officials or the President or any form of electronic information that is contrary to statutory regulations, religious values, morals, order, public interest, and that is destructive to the integrity of the state. Freedom of expression must be balanced with the existence of restrictions through the law to protect community (morality), social order, and political order in a democratic society. However the regulation should be proportional. The restriction of the right to freedom of expression on social media has been mandated through the ITE law in the provisions of Chapter VIII on Prohibited Acts.

Results

One of the complex changes to the ITE Law is related to the provision of a definition in the explanation of Article 27 paragraph (1) of the ITE Law.¹⁴ Previously, it was not clearly what the mean of the word "distribute," or "transmit," or "making accessible." Now, these three words are described with revised ITE Law, can be seen in Table 1. Different concepts of distribute, transmit, and make accessible to Article 27 of the ITE law In contrast to the terms "distribute and transmit," the definition of the term "of making accessible" creates ambiguity because there is no clarity regarding the criteria and limitations (about what) can be categorized as "acts" (other than distributing and transmitting). Moreover, with the advancement of technology that provides convenience and sophistication to social media through various features, other actions can be used as tools fitting the definition of "making accessible." On the other hand, just the term itself can be manifested in the form of a deliberate omission so that other people can access Electronic Information and Electronic Documents, where the act refers to the provisions of Article 186 Paragraph (2) 2, Article 231 Paragraph (3), Article 232 Paragraph (2), Article 293 Paragraph (1), Article 304, Article 387 Paragraph (2), and Article 388 Paragraph (2) of the Criminal Code. Legal interpretation and legal reasoning of the provisions that contain the term "make accessible" are also needed to clarify existing but unclear precepts that, lacking written legal provisions, are understandable or deemed inadequate. "Understanding," in this sense, is a concept that is used as the primary basis for making propositions or statements that, based on logic, produce reasoning. In other words, reasoning must be interpreted through understanding the three forms, the concept, the proposition, and reasoning itself, simultaneously (Philpus & Tatiek, 2011).¹⁵ Through a conceptual approach to the provisions of Article 27 of the ITE Law, interpretation has been carried out using the (official explanation contained in the article) and semantics (which takes into account the structure of words or everyday grammar). However, this does not provide certainty regarding the meaning of actions other than distributing and transmitting. Another step to clear and certain understanding of the provisions of Article 27 of the ITE Law, particularly the meaning of the terms "making it accessible" and other acts besides distributing and transmitting, is by conducting a legal discovery, which is usually done by judges. In carrying out legal discovery, various methods of interpretation can be used, such as analogy interpretation (analogische interpretatie), reverse interpretation (argumentum a contrario), restrictive interpretation or legal refinement (restrictive interpretatie), extensive interpretation or extension of the law (extensieve interpretatie), comparative interpretation (comparative interpretatie), and interpretation futuristic (futuristic interpretatie). At the law enforcement stage, extensive interpretation is often to discover whether an act matches the "making accessible" element by expanding the meaning of words or terms contained in law so this law can be applied in a particular event or case.

Discussion

Relatedly, the term "other acts," although restricted by the phrase "distributing and transmitting," still creates a broad meaning. The formulation of norms for other acts besides distributing and transmitting is deemed appropriate for keeping pace with the rapid advancement of technology

¹⁵ Philipus M Hadjon and Tatiek Sri Djatmiati, Legal Argumentation/Legal Reasoning (Gajah Mada University Press, Yogyakarta, 2011) 14.

in line with the development of civilization, where various social media to provide features, convenience, and practicality through their features. For example, the Facebook platform provides "like" feature, symbolized by a thumbs-up image. So, when the account owner clicks the "Like" button, it means that someone likes the content. Thus, the "like" feature (including the share, comment, and reaction functions) is a simple method by which account owners can exercise their freedom of expression (Kaur et al., 2019).¹⁶ Clicking a Like button allows the account owner to share content with friends on Facebook. The content linked and will appear on the homepage or main page of a Facebook friend's account (Roosendaal, 2010).¹⁷ This feature can also show variety of "likes." Services that share liked content are instant personalization services and social plug-ins, providing a channel for sharing information between account holders with Facebook as the third party. The ease and practicality offered through the "like" feature is also reflected in the fact that the content that is shared (after being liked) can be read or viewed automatically without copying and pasting the full URL first (Roosendaal, 2010).¹⁸ Legal interpretation is the bridge between the phrase "making it accessible," the provisions of Article 27 of the ITE Law, and actions such as social media uploads of content that violate decency, gambling, insult and defamation, as well as extortion and threats. The extensive interpretation of "make accessible" in Article 27 of the ITE Law may exceed the limits set by the grammatical interpretation, but must not go outside the parameters of the original meaning of the provision (which is based on an official interpretation). Giving "likes" can be included in other acts apart from distributing and transmitting, which causes the access to or access of content (that has been liked by the account owner) by other people (i.e., friends on the Facebook platform) through the homepage or main page.

6 Criminal Liability for Violation of Article 27 of the ITE Law on Interpretation of the Phrase Making Accessibility for Facebook Social Media Users

The theory of criminal responsibility can be seen either through a monistic view or a dualistic view. The monistic view assumes that a criminal act (strafbaarfeit) is defined by the conditions required for the imposition of a criminal penalty. Here, the subjective element and objective element (in its entirety) must first be met, so that an act that is punishable by a sanction has been committed by the guilty party, hence making that individual responsible for his deeds. In the dualistic view, evidence of a criminal act (actus reus) must be proven first, be shown, after which it can be proven that there is a subjective error from the relevant party (schuld or mens rea). This seems to show that there is a separation between a criminal act and criminal liability. Based on these two perspectives, the essence of criminal liability is related to the conditions that are a prerequisite for the existence of punishment (subjective elements and objective elements) and the legal consequences of, such liability. The main focus is the emergence of legal consequences for the criminal act committed so that sanctions can be imposed. In sum, all these elements of the criminal process must be met to hold the individual responsible for a criminal act and impose punishment. Therefore, criminal law (including cyber law) is closely linked to the application of juridical methods. Thus, when a person violates a provision in social life, the functions contained in the law become effective. Violation of Article 27 of the ITE Law by making accessible Electronic Information and Electronic Documents with content that violate decency, gambling, which is insulting or defamatory, as well as extortion and threats, has legal consequences as regulated in the provisions of Article 45 paragraph (1), paragraph (2), paragraph (3), and (4) of the ITE Law for users of the Facebook, who press the Like button. The criminal responsibility of Facebook users who commit "likes" must first fulfill the elements in the formulation of Article 27 paragraph (1), (2), (3), or (4) of the ITE Law (which is adjusted to the nature of the object of prohibited acts). These elements can be described as follows:

¹⁶ Wandeeep Kaur and others, 'Liking, Sharing, Commenting, and Reacting on Facebook: User Behaviors' Impact on Sentiment Intensity' (2019) 39TI 25.

¹⁷ Arnold Roosendaal, 'Facebook Tracks and Traces Everyone: Like This' (2010) Triburg Law School Legal Studies Research Paper Series 2.

¹⁸ Roosendaal3.

Subjective elements

- every person, individuals, whether Indonesian citizens, foreign citizens, or legal entities,
- the offender must know that the act is a criminal act and that the act committed is against the law.

Objective elements

- an act that is prohibited, which can be interpreted as "liking" on the Facebook platform based on expansive interpretation.
 - the object, can be interpreted as the existence of an object in the form of uploads or "likes" of the content of the creator, which violates decency (Article 1), gambling (paragraph 2), insult or defamation (paragraph 3), or extortion or threat (Article 4).
- Through expansive interpretation, the phrase "making accessible" can be interpreted as "liking" by Facebook social media users, for specific content, which contains things that violate decency, gambling, insult or defamation, or extortion or threats, resulting in access to the content by their Facebook friends. The right to freedom of expression for Facebook social media users to show liking (pleasure; happiness; affection; love; sympathy; or agree), including the right to seek, obtain, possess, store, process and convey information is limited by the validity of the phrase "make accessible" in Article 27 of the ITE Law. The legal consequences of being trapped by Facebook social media users by Article 27 of the ITE Law are regulated in the provisions of Article 45, paragraphs (1), (2), (3), and (4) of the ITE Law. Criminal responsibility for the acts is also imposed if the elements of the criminal offense have been fulfilled until their formation, which can then be proven that there is also a subjective error by the offender (schuld or mensrea). A narrowing of the meaning needs to be done by the legislative body to classify what actions can be categorized according to the phrase "make them accessible." Thus, the objectives of law in the form of justice, legal certainty, and expediency can indeed be fulfilled through the formulation of fair laws and regulations. It also important to focus on the right to freedom of expression of each individual as a human right that has received juridical guarantees.

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Tables

Table 1.

Different concepts of distribute, transmit, and make accessible to Article 27 of the ITE law.

Distinguishing Qualifications	Distribute	Transmit	Make Accessible
Type of Deed	Send and distribute; channel; notify; or announce	Send; deliver	Other acts (other than distributing and transmitting);
Recipient's Subject	People; many parties; more than one person or group of people; group, group or community; general audience, everyone, society (plural)	One person or one particular party; individual, single person, or individual; private person (singular)	Plural and singular
Accessibility Characteristics	Publication for the public; public	Addressed individually; private or personal	Public and private (dualistic)
Concrete Example (Social Media)	Channel YouTube, Instagram stories, Facebook live streaming, and others	Personal chatting for WhatsApp, direct messenger Instagram, Facebook messenger, short message system, and others	Unlimited

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