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Press Freedom, Law and Politics in Indonesia

"Try not to become a man of success but rather to become a man of value"
[Albert Einstein, 1879-1955]

For those who continue the struggle for freedom
and human rights in Indonesia

Press Freedom, Law and Politics in Indonesia

A Socio-Legal Study

PROEFSCHRIFT

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Someone without a background in journalism will never experience what press freedom means as an editor in the newsroom or a reporter in the field will experience it. A dissertation on freedom of the press therefore is a challenge – it is not so much the dissecting and analysing of press law and its enforcement that creates the difficulties, but rather the attempt to imagine the psychological aspects and the obstacles involved. I have therefore greatly relied on those who were kind enough to share their experiences and I am extremely grateful to them.

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Hopefully, this socio-legal study of freedom of the press will contribute to the development of legal and socio-legal scholarship in Indonesia, and can be used as a tool to struggle for freedom, human rights and democracy in Indonesia. As I believe, "Freedom of the press is not merely a matter of democracy, but also a matter of human civilization in the manifestation of the nation and the state!" [Wuluhan, July 6, 2014].

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Glossary

Advies commissie zedelijkheidswetgeving	Advisory Commission on Decency Legislation (the Netherlands)
AJI	*Aliansi Jurnalis Independen* or Independent Journalists Alliance
Algemeen objectief begrip	General objective concept
ALM	*Anugerah Langkat Makmur* Inc.
Amicus curiae	Friends of the court
Ampera	*Amanat Penderitaan Rakyat* or the 'message of the people's suffering'
ARTICLE 19	London-based NGO for freedom of expression
Audi et alteram partem	Legal principle of hearing the other side or party
BFO	*Bijeenkomst voor Federaal Overleg*, the group of representatives of those provinces of the Netherlands-Indies who were not (yet) part of the Republic of Indonesia during the Revolution (1945-1959)
BL	Broadcasting Law (Law 32/2002)
BPHN	*Badan Pembinaan Hukum Nasional*, or National Law Development Agency, part of the Ministry of Law and Human Rights
BPS	*Badan Pendukung Soekarnoisme* or the Body for the Support/Diffusion of Soekarnoism
BPUPKI	*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*, or the Investigating Committee for Preparing Indonesia's Independence, a Japanese-organised committee, which was to support independence in Indonesia
BW	Burgerlijk Wetboek (Civil Code)
CPJ	The Committee to Protect Journalists, a US-based organisation for press freedom

CPM	Military Police Corps
CYMA Inc	*Cipta Yasa Multi Usaha Inc.*
Dekrit Presiden	The Presidential Decree of 5 July 1959
Dewan Pers	Press Council
DPD	*Dewan Perwakilan Daerah*, or Regional Representative Council
DPKN	*Djawatan Pengawas Keamanan Negara* or Intelligence Services under the Police Corps
DPKN-DKN	*Djawatan Kepolisian Negara Bagian Dinas Pengawasan Keselamatan Negara* or State Police Security Monitoring Agency
Dewan Perencanaan Nasional	National Planning Council
Dewan Stabilisasi Politik dan Keamanan	Council for Political and Security Stabilisation
EIT Law	Electronic Information and Transaction Law (Law 11/2008)
Elsam	*Lembaga Studi dan Advokasi Masyarakat*, a human rights NGO
Exceptie obscurum libellum	An objection that states that the plaintiff filed an unclear lawsuit
Exceptie iurium litis consortium	Exception on the basis of the plaintiff only addressing particular defendants
Exceptie error in persona	Exception on the basis of the lawsuit addressing the wrong defendants
FDR	*Front Demokrasi Rakyat* or the People's Democratic Front
Fitnah	Slander, also closely related to the general concept of defamation
FPI	*Front Pembela Islam*, or the Front of Defenders of Islam, a Muslim fundamentalist vigilante
GDPT	General Directorate of Post and Telecommunication
Grondrechten	Fundamental rights
Haatzaai-artikelen	Hatred sowing articles

Hak jawab	Right to reply
Hak koreksi	Right to correction
HGB	*Hak Guna Bangunan*, or a property status, entitlement to construct and to own buildings or other structures over the land
HPL	*Hak Pengelolaan*, or a property status, only granted to government institutions and state (national/local)-owned companies for developing public facilities
IPI	International Press Institute, based in Vienna
IPP	*Izin Penyelenggaraan Penyiaran*, Broadcasting Permit
ISR	*Ijin Stasiun Radio*, or Radio Station Permit
Judex facti	The authority to examine the facts and evidence of a particular case, in Indonesian law this is held by the District Court and the High Court
Judex juris	The authority to examine only the application of the law (in practice the Supreme Court in cassation)
Kabinet Ampera	*Kabinet Amanat Penderitaan Rakyat*, or Cabinet of The Message of the People's Suffering (Ampera Cabinet)
Kapolda	*Kepala Polisi Daerah*, Provincial Police Commander
Keppres	*Keputusan Presiden*, Presidential Decision
KJTKP	*Koalisi Jurnalis Tolak Kriminalisasi Pers,* Journalist Coalition Refusing Press Criminalisation
KNIP	*Komite Nasional Indonesia Pusat* or the Central National Indonesian Committee
Kode Etik Jurnalistik (KEJ)	Press Code of Ethics
Kodim	*Komando Daerah Militer*, Military Command Office at District Level
KOMDAK	*Komando Daerah Angkatan Kepolisian* or District Police Command Office

Konstituante	The Constitutional Council, was officially formed on 10 November 1956 and held meetings for almost two and a half years. As mandated by Article 134 of the 1950 Constitution, the *Konstituante* together with the government, were in charge of drafting a new constitution. It was elected at the same time as Parliament during the general elections of 1955.
KontraS	The Commission for Disappearances and Victims of Violence
Kopkamtib	*Komando Operasi Pemulihan Keamanan dan Ketertiban,* Command for the Restoration of Security and Order
KPI	*Komisi Penyiaran Indonesia,* or Indonesian Broadcasting Commission; at the regional level it is named KPID *(Komisi Penyiaran Indonesia Daerah)*
KUHP	Kitab Undang-Undang Hukum Pidana (Penal Code)
LAC	Law on Administrative Courts (5/1986, amended by 9/2004 and 51/2009)
Laksus Pangkopkamtibda Jaya dan Sekitarnya	Special Task Force, Command for the Restoration of Security and Order for Djakarta Raya and surroundings
LBH Pers	*Lembaga Bantuan Hukum Pers* or Press Legal Aid Institution
Lex specialis derogat legi generali	Generally accepted as a technique of interpretation in solving legal cases when dealing with two or more conflicting norms in a particular case, meaning that a specific rule should be prioritised over a more general one
Lex suprema	Law is 'supreme' when it concerns cases, other laws are only supplementary to it
Malari	Political riots in 1974 known as the Fifteenth of January Riots
Manipol (-USDEK)	*Manipol* was the Political Manifesto set forth in Soekarno's August 17, 1959, Independence Day speech, and USDEK was an acronym for the 1945 Constitution, Indonesian Socialism, Guided Democracy, Guided Economy, and Indonesian Identity

Manipolisasi Pers National	Bringing the National Press under the Political Manifesto, during Guided Democracy
Melanggar kesopanan/ kesusilaan	Violating Public Decency
Menghasut	Incitement
Menyiarkan kabar bohong	Spreading false news
MIPPA	*Masyarakat Indonesia Peminat Pers Alternatif* or Alternative Press Interest Indonesian Society
MKGR	Mutual Assistance Families Society, an NGO closely related to the Golkar Party
MMI	*Majelis Mujahiddin Indonesia* or Indonesian Mujahiddin Council
MOFS	Monitoring Office of Frequency Spectrum
MPPI	*Masyarakat Pers dan Penyiar Indonesia*, or the Indonesian Press and Broadcasting Society
MPR	*Majelis Permusyawaratan Rakyat*, or People's Consultative Assembly
MPRS	*Majelis Permusyawaratan Rakyat Sementara* or People's Provisional Consultative Assembly
Nasakom	*Nasionalisme, Agama, Komunism*, or Nationalism, Religion, Communism
Nawaksara	Originally from Sanskrit which means 'nine statements', the title of President Soekarno's speech for MPRS (Parliament) on 22 June 1966
Niet ontvankelijk verklaard	Dismissal of a case
NKRI	*Negara Kesatuan Republik Indonesia* or Unitary State of the Republic Indonesia
OAS	Organisation of American States
OSCE	Organisation for Security and Co-operation in Europe
Osamu Seiri	The Japanese military law
P3SPS	*Pedoman Perilaku Penyiaran dan Standar Program Siaran*, or Guidelines for Broadcasting Manners and Broadcasting Program Standards KPI Decision Letter 009/SK/KPI/8/2004

PAN	*Partai Amanat Nasional* or National Mandate Party
Pancasila	Five moral principles, as philosophical basis of Indonesian life and society
Panitia Hukum Dasar	Committee of Fundamental Law
Panitia Kecil Perancang Undang-Undang Dasar	Small Committee of Constitutional Drafters, chaired by Soepomo
Panitia Undang-Undang Dasar	Constitutional Committee
Pantja Tunggal	The Single Five Pillars as the basis for important state institutions (following the *Manipol* ideology)
PBHI	*Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesi*, or the Indonesian Legal Aid and Human Rights Association
PDI-P	*Partai Demokrasi Indonesia Perjuangan* or the Struggle for Indonesian Democracy Party
Pencemaran nama baik	Degrading reputation, also closely related to the general concept of defamation
Penerangan Massa	Mass Information
Penghinaan	Insult
Peninjauan kembali	A review by the Supreme Court on the basis of new evidence (*novum*)
Peperti	*Penguasa Perang Tertinggi*, Highest War Authority
Persbreidel	Press banning
Pertamina	The state oil company
PIDL	Public Information Disclosure Law (14/2008)
PKB	*Partai Kebangkitan Bangsa*, or the Nation's Awakening Party
PKI	*Partai Komunis Indonesia*, or Indonesian Communist Party
POP	*Peragaan, Olahraga, Perfilman*/Style, Sport and Film, a magazine
PPM	*Pemuda Panca Marga*, a paramilitary organisation
Prematuur exceptie	Exception because a case is brought too early

PSII	*Partai Sjarikat Islam Indonesia*, or Indonesian Islamic Association Party
PWI	Indonesian Journalists Association
RCTI	*Rajawali Citra Televisi Indonesia*, a national television corporation
RAPP	Riau Andalan Pulp and Paper, Inc. (PT)
REB	*Radio Suara Harapan Semesta* corporation (or also known as *Radio Era Baru*) is a local radio based in Batam, Riau. REB is the local affiliate of Sound of Hope Radio Network
Reformasi	'Reform,' refers to the motto of domestic opposition. It is also known as an era after Soeharto's authoritarian regime
Regeringsreglement	The Netherlands-Indies Constitution
Rekonvensi	Counter claim
RIS	*Negara Republik Indonesia Serikat*, or the United States of Indonesia (USI)
RRI	*Radio Republik Indonesia* or Republic of Indonesia Radio
RSF	*Reporters Sans Frontières* or Reporters Without Borders
RSMS	*Radio Suara Marga Semesta* or well know as *Radio Sing*
Satgas Mass Media Laksus Pangkopkamtibda Jaya	The Mass Media Task Force Unit of Command for the Restoration of Security and Order in Jakarta
SEMA	*Surat Edaran Mahkamah Agung* or the Supreme Court Circular Letter
SIC	*Surat Ijin Cetak* or printing permit
SIT	*Surat Ijin Terbit* or publishing permit
SIUPP	*Surat Izin Usaha Penerbitan Pers* or Letter of Press Publication Permit
SLAPP	Strategic Lawsuits against Public Participation
SOB	The Emergency Ordinance, literally State of War and Siege Ordinance, *Regeling op de Staat van Oorlog en Beleg*

SP3	*Surat Penghentian Penyelidikan Perkara* or Letter of Discontinuation for Investigating a Case, released by the police
SPS	*Serikat Penerbit Suratkabar,* or Newspapers Publisher Association. Since 2011, the name was changed into *Serikat Perusahaan Pers (SPS Indonesia)* or Press Company Association
STT	*Surat Tanda Terdaftar* or Registered Signed Letter
Subjektief eerbaarheidsgevoel	Subjective feeling of decency
Supersemar	Instruction Letter of 11 March 1966
Surat Pembaca	A letter to the editor
Tim Pembina Pers Kampus Mahasiswa Tingkat Nasional	The National Supervisory Team for University Student Press, established on 31 May 1980 by the Ministers of Education and Information
Tjatur Tunggal	Four institutions, these institutions were at three levels of regional government (provincial, regency and city), comprised of the provincial governor (or regent or mayor), local army commander, local police chief and local public prosecutor, started in 1964
UDHR	The Universal Declaration of Human Rights, signed in 1948
ULAP	Unjustifiable Lawsuit against Press Freedom
UN	United Nations
UNCI	*United Nations Commission for Indonesia,* the organisation established by the United Nations
UUDS	*UUD Sementara Republik Indonesia* or the Provisional Constitution of the Republic of Indonesia, was formally enacted by Law No. 7 of 1950, State Sheet of RIS 56/1950
VOC	*Verenigde Oost-Indische Compagnie,* Dutch East India Company
Wayang	Folk puppetry
WvS. Ned. Ind.	The Penal Code for the Netherlands-Indies (*Wetboek van Strafrecht voor Nederlandsch-Indië*)
YLBHI	*Yayasan Lembaga Bantuan Hukum Indonesia*, or the Indonesian Legal Aid Foundation

1 Press Freedom: Introduction, Theoretical Framework, and Research Approach

Saya kira bukan perbedaan persepsi, tetapi perbedaan kemauan.
Penguasa itu *kan* maunya pers bertanggung jawab kepada mereka.
Kita nggak mau *dong*!
Penguasa harus tetap kita kritik kalau kita lihat dia berbuat salah.
Kita harus berpegang pada hukum.
(Mochtar Lubis 1995)[1]

1.1. Introduction

1.1.1. Research Questions

Press freedom is an essential feature of a democratic society. Without press freedom a constitutional democracy cannot function properly, to the extent that the degree of press freedom becomes an indicator of the level of democracy in a particular country. That historically press freedom in Indonesia has been the exception rather than the rule is therefore telling, but even today, when Indonesia's democracy seems to have become relatively stable, press freedom is constantly under threat.

Press freedom has never been guaranteed explicitly in Indonesia's Constitution, but can be subsumed under the concept of freedom of expression, which in 1945 was already mentioned in Article 28. In spite of this provision, Indonesia has seen many preventive and repressive rules enacted by subsequent regimes since it became independent, targeting films, books, paintings and other forms of expression. As this book will demonstrate, the press in particular has been targeted by the authorities, through restrictive and repressive legal or non-legal actions, including censorship, banning, criminalisation, and violence.

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1 "I think it is not a difference in perspective, but a difference in will. The power holders simply want the press to be accountable to them. And we simply don't want that! We must criticise the power holders if we see that they do things wrong. We have to stick to the law." This is a statement by the famous journalist Lubis to students of journalism at the Faculty of Social and Political Sciences of Padjadjaran University, published in *Polar*, 8th Edition, Year III, April 1995, in "Pers Sekarang Terburuk Sepanjang Sejarah," in Hadimadja (ed.) (1995: 226). This response addressed the question whether the press and the ruler have a different conception of a free and responsible press.

The 'constitutional recognition' of freedom of expression thus seems to have had little influence on reality. The implementation of freedom of expression, including press freedom, has been determined by political-economy configurations which seemed to care little for such constitutional inhibitions. Nonetheless, this constitutional guarantee has always remained an important rallying point for political opposition. The struggle for press freedom has been part of the struggle for democracy and the constitution has at least always provided legitimacy to this effort, and thus influenced the dynamics of challenging the government or other state institutions. Law matters, even if it is being subverted. This study tells the story of press freedom in Indonesia and how law has been used to alternatively promote and undermine it.

In order to achieve this purpose, this book combines a legal with a social-science perspective. Such studies about press freedom are rare. There is a growing number of studies about the press in Indonesia from a social or political perspective, but they seldom intend to inspire legal studies, or the other way round. Thus, this study intends to fill a gap, by providing a comprehensive analysis of the history of press laws and their implementation,[2] through the executive, the judiciary, and sometimes private actors. It also elaborates on how various actors perceive press freedom. What makes this study particularly important is that after the fall of Soeharto, intitially the position of the press seems to have improved tremendously, but that in practice it has come under increasing pressure, even if pressure of a different nature than under the preceding regimes.

In short, this study aims to clarify:

a. *how the concepts of freedom of expression and press freedom have evolved in Indonesian law;*
b. *how press freedom as one of the main pillars of constitutional democracy has been guaranteed or curbed by the Indonesian legal system;*
c. *how press freedom has been shaped in practice by various state and non-state actors and factors; and*
d. *how this can be evaluated from a rule of law perspective.*

The research will end with a number of recommendations for more effectively guaranteeing press freedom in the framework of Indonesia's rule of law.

2 The meaning of 'implementation' here is broader than commonly understood by lawyers – it relates to how laws, regulations and policies are brought into practice, and how they are influenced by political, social and cultural factors (vide: Randall Peerenboom, 2004).

1.1.2. Academic Background

As already mentioned there is a growing number of studies about the Indonesian press, most of them written within disciplines such as communication studies, political science, sociology, or history. Likewise, there are numerous legal studies on press and/or press freedom. In particular the latter are quite limited in scope, not only because they seldom pay any attention to the political and social context of the topic, but because they usually limit themselves to explanations or commentaries on legislation without taking into account judicial rulings.

Probably the most cited legal study of press law in Indonesia is the one by Oemar Seno Adji (1990), who analysed the development of press crime in Indonesia. His book has inspired courses on press crime that are taught at most faculties of law.[3] More recent legal works on press freedom in Indonesia are those of Samsul Wahidin (2006), Rudy Satryo Mukantardjo (2002) and Amir Syamsuddin (2008), all of them written as PhD-theses. Wahidin's is a purely doctrinal study, coloured by a very optimistic view of the new press law and how it will be implemented. Mukantardjo's dissertation is broader in scope and ambition and addresses press freedom from a legal-political history and criminal law point of view. It contributes to an understanding of the historical context in which criminal law concerning the press arose, especially Article 154 of the Penal Code (one of the so-called 'hatred sowing' articles). Amir Syamsuddin's thesis provides an elaborate analysis of the meaning of public order and public interest in relation to press legal cases. Rather similar to Mukantardjo, Syamsuddin's work concentrates on a particular article, Art. 310(3) of the Penal Code, which serves as the basis for a defence of press activities in criminal procedure. While providing a useful point for debate for the present dissertation, none of these studies extend beyond criminal law as a means to control the press and moreover only cover a particular aspect of criminal law.

The most comprehensive legal study on press freedom is Harahap (2000). Unlike the above this book extends beyond criminal law issues, also touching on constitutional law and private law in relation to press freedom. Moreover, Harahap also pays attention to the implementation of some of the laws he discusses and offers a welcome starting point for this study to explore or discuss particular issues. However, Harahap's study is far from comprehensive, both in the legal-analytical and the practice-related part. In addition to these legal studies, there are a number of legal analyses about press freedom by NGOs such as AJI and ISAI (Sudibyo 2004) and LBH Pers (2010), or by media watch practitioners (Syah 2002).

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3 Such courses are taught under a variety of titles, such as *Tindak Pidana Pers* (Criminal Offences by the Press), *Kejahatan Pers* (Press Crimes), and *Delik Pers* (Press Offences).

Social scientific studies of the Indonesian and the Netherlands-Indies' press are more numerous. There is a long list of such studies that have been important to the present book, such as the historical studies of Adam (1995), Smith (1969), Said (1988), Surjomihardjo (2002), Termorshuizen (2001, 2011), Faber (1930), Matters (1998) and Oey Hong Lee (1971). Important studies about the press in more recent times include those of Romano (2002), Nurudin (2003), Sen and Hill (2007), Steele (2005), Eisy (2007) and Ispandriarno (2008). Studies about the New Order period – or part of it – include Dhakidae (1991) and Hill (1994; 2010). Hill's work is of particular importance because it pays relatively more attention to the operation of press law and legal cases.

These studies of a legal and a non-legal nature need to be linked in order to gain a more comprehensive insight into press freedom. To this end, the present study will explain how press freedom has been shaped by Indonesia's legal system, by tracing and discussing all relevant laws, how they have been used in and out of court, how various actors have attempted to influence these laws and their implementation and what all of this teaches us about press freedom in Indonesia.

1.2. Theoretical Framework

Before starting the task set out above, I will first discuss several theories of press freedom, press law and how these relate to democracy. On this basis I will construct a conceptual framework that will form the basis of my analysis.

1.2.1. Socio-Legal Study

This research uses a socio-legal perspective. It is interdisciplinary in nature and has the objective of integrating aspects of disciplinary perspectives, law and social science, into a single approach. The objective of this approach is "ultimately to combine knowledge, skills, and forms of research experience from two (or several) disciplines in an attempt to transcend some of the theoretical and methodological limitations of the disciplines in question and create a basis for developing a new form of analysis" (Banakar and Travers 2005: 5).

In studying press freedom and its relation to the law, the benefit of this approach is that it helps to understand and provide the context of social and political configurations that influence law and its implementation. Thus, this study is not merely an attempt at developing legal doctrine. Legal analysis *is* important, but in this case it is used to further an understanding of more comprehensive problems of law and its application. Connecting a study of legislation, court decisions, and policies to practice is not only an empirical exercise but also enables me to evaluate whether judges have fairly exam-

ined cases, whether policy makers have enacted proper policies, and so on. The analysis of context and its normative implications can thus be used to inform the legal analysis.[4]

Research about the press may look at social, political, economic, and legal problems. A socio-legal study opens the way by its interdisciplinarity to "produc[e] new forms of knowledge in its engagements with direct disciplines" (Moran 2002: 16). Legal analysis is needed in such a venture for a proper understanding of press freedom in Indonesia – and because there is so little of it much of this thesis will consist of thorough legal analysis of Indonesian press law. The new form of knowledge in this study concerns the role of the legal system and its political-economic context in shaping press freedom.

The research will thus be able to show how a similar normative framework of press freedom may operate in different ways depending on the political-economic context. To give an example, the prohibition of censorship against the press became part of the Press Law in 1966. A similar provision is part of the 1999 Press Law. Yet, the way in which this provision has to be explained is by linking the law to its context – and hence the need for a socio-legal study.

1.2.2. Freedom of Expression

Freedom of expression is a human right that has been included in the constitutions of many countries across the globe. This freedom can be found in Article 19 of the Universal Declaration of Human Rights, which says that,

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Although introduced in 1948 and agreed to by virtually every country in the world, there is still no unanimity on how to interpret this freedom. Nevertheless, its adoption as a human right underlines that the right to express oneself is an entitlement, not a privilege. It assumes that humans cannot live a meaningful life without the right to express themselves. Freedom of expression is furthermore closely related to various other fundamental freedoms such as those of speech, association, religion as well as freedom of the press.

As regards the concept of 'press' this research follows the definition of the concept of press stipulated in Art 1.1 *jo* Art. 3 of the 1999 Press Law:

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4 'Context' in this regard refers to Selznick's principle of 'fidelity to context.' Contexts may be transcended by invoking general purposes and principles, including of a normative nature (Selznick 2002).

> The press is a social institution and an instrument of mass communication that performs the journalistic activities of covering, seeking, acquiring, owning, recording, analysing, and disseminating information both in the form of writing, sound, picture, sound and picture, and in the form of data and graphics or in any other form, by using printed media, electronic media, and all kinds of available channels. (Art. 1.1)

Although the research will look at many press cases, including electronic and broadcast media, its focus will be on the printed press.

1.2.3. Press Freedom as Freedom of Expression

Freedom of speech and freedom of the press fall under the umbrella of 'freedom of expression.' Freedom of expression is concerned with communication, which always involves two sides and therefore requires two kinds of protective rights: the right to express and the right to hear that expression. According to Alexander, the right of the audience to hear an expression is even more important than the right of the speaker to express it (Alexander 2005: 7-11).[5] For conceptual clarity this study will refer to the right of the audience as the right to freedom of information.

The most obvious form of communication is language, the expression of information through words, whether orally or in writing. However, information can also be expressed in non-verbal symbols, visually, musically, or by feeling. A particular form of expression which is at the centre of much debate about freedom of expression is persuasion. This refers to an effort to change the position of the receiver of the expression. Persuasion is often thought of as arguments which attempt to convince the hearer of the merits of the speaker's position, but may be cloaked in storytelling, ritual practices, or artistic practices. Persuasion is a typical example of an 'idea' states may wish to protect. The state's definition of the types of ideas worthy of protection then may also influence the amount of protection awarded to particular media (Guinn 2005: 3-4).

A second way to understand the nature of expression is to consider how it functions in a social setting. The first function expression may serve from this perspective is personal or self-centred and constitutes an essential dimension of self-identity. Freedom of expression in terms of the self represents a fundamental liberty interest of the individual against the state, where the state simply has no authority or right to intrude upon the individual's expressive needs or interests. The second function of expression is to advance or support an important social activity or function of the community's polity. This social function is needed to maintain a public space

5 By considering that freedom of expression is not only the right of the speaker, but also the right of the audience, press freedom becomes not only the right of the journalist or media owner, but also the right of the public to have credible information.

and assure the greatest potential diversity of expressions, including posing public challenges to the ruler (Guinn 2005: 4-6, cf. Meyerson 2001: 295, 298).[6]

1.2.4. Theories of the Press

Press freedom is in no way monolithic. All press systems reflect the values of the political and economic systems of the nations within which they operate (Hachten and Scotton 2002). This has led scholars to provide a typology of this relation, which is relevant to this study and will therefore be discussed in this section.

1.2.4.1. Siebert et al.'s Four Theories of the Press[7]

Many press and/or communication studies depart from the seminal work called *Four Theories of the Press* (Siebert, Peterson and Schramm 1956), which established the dominant paradigm in analysing global media systems and assessing levels of press freedom in countries and regions throughout the world. Siebert et al. are concerned with the relation between the press and its political environment, which they divide into four types, or models: the authoritarian, the libertarian, the Soviet and the "social responsibility." These four types are still acknowledged by many mass media researchers to describe how different media systems operate in the world.

The first is the authoritarian regime, where the government has absolute power and control over the press, such as ownership, content, license, and the use of mass media. The authoritarian state requires direct governmental control of the mass media, and the media are not allowed to print or broadcast anything which could undermine the established authority. Any offense to the existing political values is avoided. The fundamental assumption of the authoritarian state is that the government is infallible. It may punish anyone who questions the state's ideology or challenges its policies. In such a situation, the press cannot be free to deliver information to society, it is only used as a machinery to serve the state.

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6 Alexander (2005: 9) lists the following criteria to check whether an issue involves freedom of expression:
- Freedom of expression is implicated whenever conduct that is intended to communicate a message is suppressed or penalised.
- Freedom of expression is implicated whenever an audience is prevented from receiving a message.
- Freedom of expression is implicated whenever conduct intended to communicate a message is suppressed or penalised with the result that an audience is prevented from receiving the message.
- Freedom of expression is implicated whenever an activity is suppressed or penalised for the purpose of preventing a message from being received.

7 Although Siebert et al. call them "theories" they are actually more models or types. I will use these two interchangeably to refer to their "theories."

By contrast, in the second, libertarian model the press is not an instrument of the government, but rather a device for presenting evidence and arguments on the basis of which people can check the government and make up their minds as to whether its policies are adequate. Therefore it is imperative that the press is completely free from any state control and influence.

The third type is the Soviet one, which is closely tied to a specific communist ideology. Siebert traces the roots of this model back to the 1917 Russian Revolution and the postulates of Marx and Engels. The media organisations in this system were not intended to be privately owned and were to serve the interests of the working class, but the Soviet system appeared similar to the authoritarian model, in that in both types the government, and notably the party, is superior to the media. The mass media in the Soviet model are expected to be self-regulatory with regard to the content of their messages and to provide a complete and objective view of the world according to Marxist-Leninist principles. Since the beginning in the mid-1980s and continuing after the fall of the Soviet Union, Russia itself has made the transition to a mass media model closer to the social responsibility model (see below), while communist countries such as China have drifted away from the Soviet to the authoritarian model.

The fourth type is called the social responsibility model, a name inspired by the ideas of the US Commission on Freedom of the Press in the late 1940s. In this model the press is basically free, but it has certain obligations to society that can be expressed as "informativeness, truth, accuracy, objectivity, and balance." According to Siebert et al. (1956), the goal of the social responsibility model is to diversify the media, reflecting "the diversity of society as well as [providing] access to various points of view." By contrast to the libertarian model, the social responsibility one is to provide minority groups with access to and influence on different mass media. Most media systems in Western Europe today come close to the social responsibility model.[8]

1.2.4.2. Oloyede's Socio-Political Systems Approach

Some scholars have constructed alternative models for classifying press systems after Siebert's theory. A recent one that has been quite influential and is more contemporary is Oloyede (2005), who has elaborated on the social responsibility model, which he discusses in relation to a division of socio–political systems into three categories: (i) the capitalist liberal democracies of North America and Western Europe; (ii) the socialist system, and (iii) the developing world.

8 As will become clear the "social responsibility" model promoted by Soeharto's New Order resembled the authoritarian model far more closely than the "social responsibility" model coined by Siebert et al.

About North America and Western Europe, Oloyede mentions that although press freedom evolved in a capitalist liberal democracy, what developed was a system of social responsibility of the press. Central to this social responsibility is an attempt to reconcile a set of three divergent principles, i.e. those of individual freedom and choice, of media freedom, and of media obligations to society. Press freedom is therefore not only subject to regulation by the "self-righting process of truth" in a "free market place of ideas" as under libertarianism, but also to community opinion, consumer action and professional ethics. These may be enforced by the courts. This leads to a system where the Western concept of press freedom is built around three main principles: (i) the prohibition of government interference with the press in the form of censorship or similar prior restraint [although prior restraints are justified under carefully limited circumstances], (ii) the principle that any restriction on press freedom must be applied or subject to review by the courts, and that courts alone have the right to impose penalties; and (iii) the principle of complete private ownership of the print news media and largely private ownership of the broadcast media.

The socialist system in Oloyede's account is quite similar to Siebert's Soviet model. About developing countries Oloyede mentions that they are in between the other two, but he adds an important insight: "regardless of the ideology of a Third World nation, strong developmental efforts by ruling elites in Third World nations do not leave much room for a free and independent press in the Western tradition." This means that we can distinguish a specific type of development media/development journalism. As we will see later in this book, this insight is certainly applicable to the Indonesian context, especially during Guided Democracy (1957-1965) and the New Order (1965-1998).

1.2.4.3. Political Culture Theories about Press Freedom

A number of other relevant theories about press freedom add to the models discussed above by further contextualising the functioning of the press. They not only consider the influence of the state, but also look at other sources of power influencing press freedom in the particular context of Indonesia. The concept of political culture as central to this type of theory has been emphasised by Romano (2003). She discusses the new political culture that emerged after Soeharto stepped down under Presidents Habibie and Wahid, which can be characterised as one of bold and dynamic reportage and increased freedom to organise and associate. It showed how the relationships of political power and communication changed under the influence of a new political structure. Those favouring a liberalisation of journalism and the political system were using the transitional period to pass legal and constitutional changes in order to prevent the elite from returning to an authoritarian system as soon as it would no longer be convenient to maintain an image of open dialogue with other sectors of society

(Romano 2003: 174). In this model the role of the state in shaping and influencing press freedom is still central, but the focus turns from the interaction between state and society to how this interaction is shaped by the relationship between social groups. Press curbing, for instance, may not be initiated by the government, but by business elites and their militias, while the state apparatus takes no action to prevent or protect the press.

Sen and Hill have further elaborated on this theoretical perspective by arguing that "what is much more disputed is exactly how media, culture and politics are articulated, how one phenomenon shapes the other, and what else needs to be taken into account…." (Sen and Hill 2007:1). They call for examining a "media ecology" which consists not only of the government's media policies, but also of "cross-border cultural transfers" and other factors within and beyond the control of government (Sen and Hill 2007: 13).

In the same vein, Yin (2003) has argued for explaining press freedom by looking at the local and regional context, rather than departing from Siebert et al.'s somewhat outdated four models of press freedom, and thus doing justice to the complexity of Asia or other third world regions and countries. Yin argues that in building a new paradigm for press theories, new ways of thinking should be adopted as press control comes in many ways and forms, including social and professional institutions. Press theories do not have to be limited to address the issue of press freedom and government control alone, they can describe stages of press development and the level of public involvement as well.

1.2.4.4. Press Theories in this Research

The concepts and theoretical ideas above may be used for two purposes. First, they contribute to the terminology that can be used to describe some of the findings in this research. And second, they have sensitised the researcher to the different factors and actors that may help explain press freedom in Indonesia during different periods.

All of these theories point at the political environment as the most important influence on press freedom. This is the point of departure for Siebert et al.'s typology of 1956, as well as for scholars such as Oloyede who built on their work. The theories that focus on political culture add to this by picturing a more dynamic context of press freedom. They indicate that press control comes in many ways and forms, including social and professional institutions. Although the law is both an outcome of politics as well as a tool to control the press, the present research does not limit itself to press laws and government control alone: it also looks at stages of press development, the level of public involvement and other factors influencing the functioning of the press.

1.2.5. Press: Freedom and Limitation from a Normative Perspective

Next to the above typological and analytical ideas on press freedom there is a literature of a more philosophical nature that looks at press freedom from a normative perspective. What is the proper balance between freedom and limitation and what should be the yardstick to measure this? This question has been the subject of scholarly debate as long as there has been a press and this debate is unlikely to ever draw to a close. This section will discuss some of the main positions that have been advanced by different theorists, with particular attention for the question of how limitations on press freedom have been justified in order to protect other fundamental rights.

1.2.5.1. Libertarian Theories

The most extreme position is taken by libertarian theorists, who argue for complete or virtually complete freedom of expression. A rather recent version of this argument is McQuail (1987), who holds that press freedom at its genesis was based on the notion that individuals should be free to publish, including in the mass media, whatever they like without interference from the government or anyone else. This freedom is an extension of other freedoms, particularly those of conscience and free speech, and underpins all major civil, political and religious rights. Lichtenberg (1987: 353) has added that the press must be free of government interference just because the government can never be trusted to correct it. In other words, the prospect of regulators regulating their own potential critics involves a basic conflict of interest.

1.2.5.2. Mill's Harm Principle

In exploring the idea of freedom of expression, scholars often refer to the seminal work of John Stuart Mill *On Liberty* (1859), which discusses the appropriate scope of human liberty. The latter comprises, first, the inward domain of consciousness, demanding liberty of conscience (in a comprehensive sense); liberty of thought and feeling; and absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people, but, being almost of as much importance as the liberty of thought itself and resting in great part on the same reasons, according to Mill the two are practically inseparable. Secondly, human liberty requires liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Third, from this liberty of each individual follows the liberty, within the same limits, of combinations of individuals: the freedom to unite, for any purpose

not involving harm to others, the persons combining being supposed to be of full age, and not forced or deceived (Mill 2008: 16-17).

By this argument, Mill proposes one of the central tenets of his theory: the so-called 'no harm principle,' which until today has remained a central point of reference in discussions about human liberty. According to Brink (2001: 121), Mill draws a clear distinction between restrictions on liberty based upon the harm principle and restrictions based on paternalist and moralist considerations, and that he suggests that only the former are legitimate.

Scanlon (1972: 204-226) has further elaborated on the harm principle in relation to freedom of expression. Harmful acts include, first, acts of (violent) expression, for instance by assault, which can bring about injury or damage as a direct physical consequence. It seems clear that an appeal to freedom of expression in such a case cannot prevent the imposition of a criminal penalty or the success of a civil action. Second, an act of expression can harm a person by causing others to form an adverse opinion of him or by making him an object of public ridicule. Third, as Justice Holmes said, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Fourth, an act of expression may contribute to the production of a harmful act by someone else, and at least in some cases, the harmful consequences of the latter act may justify making the former a crime as well. And fifth, an action which would bring about a drastic decrease in the general level of personal safety by radically increasing the capacity of most citizens to inflict harm on each other should be subject to restrictions as well.

The idea of harm itself has been specified in relation to freedom of expression as harm to social interests instead of personal harm. Guinn (2005) has drawn attention to the potential conflict between free expression – which itself serves some social interests – to other social interests. Thus, when the act of expression promotes an important social interest (or value), restricting that act would require the identification of an equally compelling interest (or value) that would be harmed by the act of expression. Where free expression or the interests it serves are deemed important, these cumulative concerns justify the development of a 'preventive' policy of protecting free expression. The state may decide to refrain from regulating expression not because these acts advance a social value or interest, but out of concern that the attempt to control that expressive act may have the unintended consequence of limiting or 'chilling' other expressions that would advance society's interests. Such a policy is based on the fear that any fault in the wall of protection represents the first step on a slippery slope of declining freedom.

According to Guinn the type of expression most suitable for protection is political expression in a broad sense. Their content is explicitly concerned with political ideas, including the advocacy of state policies, criticism of

state action, and the promotion of political representatives. Non-protectable, because devoid of social value, are expressions creating danger, hate speech and obscenity.

The result of Guinn's argument comes very close to Principle 11 of the Camden Principles on Freedom of Expression and Equality:[9]

> 11.1. States should not impose any restrictions on freedom of expression that are not in accordance with the standards set out in Principle 3.2.[10] and in particular, restriction should be provided by law, serve to protect the security and public order, or public health or morals, and be necessary in a democratic society to protect these interests. This implies, among other things, that restrictions: (i) are clearly and narrowly defined and respond to a pressing social need, (ii) are the least intrusive measure available, in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression; (iii) are not overbroad, in the sense that they do not restrict speech in a wide or untargeted way, or go beyond the scope of harmful speech and rule out legitimate speech; (iv) are proportionate in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorize.; 11.2. States should review their legal framework to ensure that any restrictions on freedom of expression conform to the above.

1.2.5.3. Habermas's Public Sphere

As has been argued above, press freedom has a special character which it derives from its role in spreading information, in particular information of a political nature. This freedom brings along a particular responsibility: the mass media ought to understand themselves as the mandatory of an enlightened public whose willingness to learn and capacity for criticism they at once presuppose, demand, and reinforce. Just as the judiciary they ought to preserve their independence from political and social pressure; they ought to be receptive to the public's concerns and proposals, take up these issues and contributions impartially, augment criticisms, and confront the political process with articulate demands for legitimation (Habermas (1996: 378-379).

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9 The Camden Principles were developed by the NGO ARTICLE 19 following discussions involving UN and other officials, civil society representatives and academic experts in 2008/2009. They represent "a progressive interpretation of international law and standards, accepted state practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognised by the community of nations" (ARTICLE 19 2009: 2).

10 Camden Principle 3.2.: "Domestic legislation should guarantee that:
i. All persons are equal before the law and are entitled to the equal protection of the law.
ii. Everyone has the right to be free of discrimination based on grounds such as race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language, political or other opinion, national or social origin, nationality, property, birth or other status."

Habermas (1996: 368) adds that freedom of the press, radio and television, as well as the right to engage in these areas, safeguards the media infrastructure of public communication; such liberties are thereby supposed to preserve openness for competing opinions and a representative diversity of voices. He highlights the importance of the public sphere in establishing communicative action. This public sphere can best be described as a network for communicating information and points of view (i.e. opinions expressing affirmative or negative attitudes). The streams of communication are in the process filtered and synthesised in such a way that they coalesce into bundles of topically specified public opinions (Habermas 1996: 360).

1.2.5.4. Press Freedom and its Limitation: An Overview

What is the relevance of the ideas and concepts above to this research? In my view they provide the broad normative framework needed for the legal analysis of press freedom conducted in this dissertation. Acts of expression can be both violent and arbitrarily destructive, and it seems unlikely that anyone will maintain that as a class they should be immune from legal restrictions (Scanlon 1972: 207). Mill's 'harm principle,' its elaboration on freedom of expression by Scanlon, and Guinn's and Habermas' ideas on balancing the interests of freedom of expression and other socially important interests are important analytical tools to examine limitations on press freedom – not only for analysing cases, but also for re-examining laws and policies. The bottom line is that press freedom must be protected in order to promote a democratic society and respect for human rights.

1.2.6. Press Freedom, Democracy and Rule of Law

Arguably, press freedom is the most important fundamental freedom in promoting democracy and the rule of law.[11] In the words of Friedrich, "freedom of the press is considered a cornerstone of constitutional democracy… the emergence of constitutional government and in particular the crystallisation of the system of popular representation as we know them are inextricably interwoven with the growth of the modern press" (quoted in Alger 1996: 10). In 1792 John Milton already stated (in the classic *Areopagitica*) that a free press will advance a democracy by performing the function of a watchdog in preventing the government from abusing its citizens and manipulating political processes. As a social institution, the press plays a unique role in informing the public, shaping public opinion, and checking abuses of government power. This unique role is sometimes referred to as "the fourth estate": the press acts as a fourth, 'unofficial check' on the three official state branches. In this manner it has been key to promoting the expansion of civil and political

11 Cf. the remarks above about Habermas.

rights and civil liberties. The press is also central to promoting a balance of power in developing the political economy, because it can represent the public in controlling, understanding, and informing the government about the course and consequences of its policies (Meyerson 2001: 299).

Regardless of the ideological differences in the various socio-political systems of the world, press freedom as a logical extension of man's inalienable freedom of expression is of universal validity (Oloyede 2005: 101). In practice, however, press banning, tort suits for libel and slander, defamation, intimidation or killing of journalists and many other acts have continued to threaten press freedom around the world. Such violations do not only come from the government, but also from paramilitary or other social groups. If there is no safety for journalists in reporting, it is easy to repress freedom of expression in general.

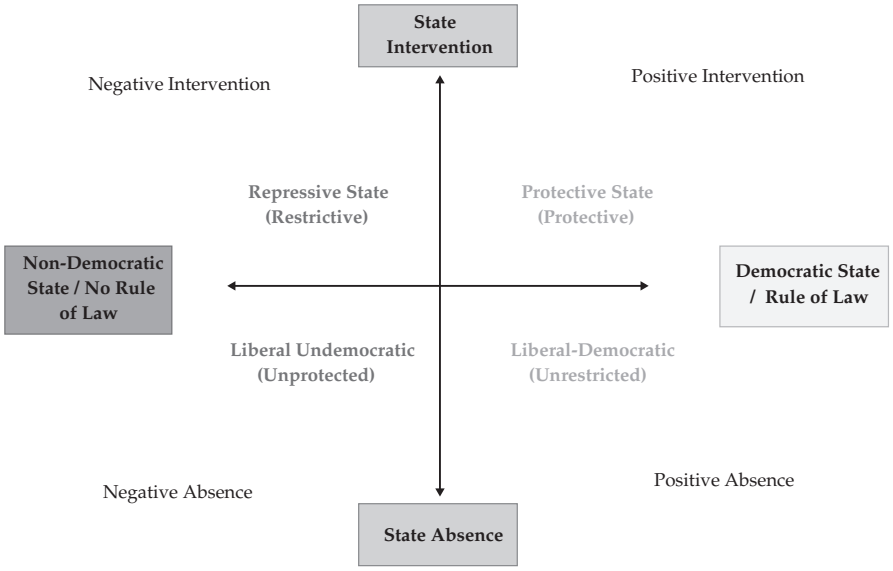
Press freedom is constitutionally protected in Indonesia under the article about freedom of expression. As such it is part of the framework forming the basis for constitutionalism, which can be defined as the political doctrine that claims political authority should be bound by institutions restraining the exercise of power. Human rights are a central component of constitutionalism, as is the separation of powers (Lane 1996: 19). Constitutionalism can be considered as a particular form of the rule of law. This thesis intends to discuss press freedom in the normative light of constitutionalism. In so doing, it does not limit itself to a doctrinal analysis of laws defining press freedom, but also looks at factors influencing both these laws and their implementation.

The basic functions of the rule of law are, first, to curb arbitrary and inequitable use of state power, and second, to protect citizens' property and their lives from infringements or assaults by fellow citizens (Bedner 2010: 50-51). In the context of press freedom both these functions are relevant. They may be achieved through different mechanisms (or elements), which in various combinations together constitute a particular form of the rule of law. Bedner's article provides an overview of legal and empirical questions one may ask to assess whether these elements have been realised, thus combining them into a single model (Bedner 2010: 70).[12]

States also differ in the degree to which they are democratic and how invasive they are in regulating the press. Combining these two continuums leads to the following typology:

12 I will not list them here, but the relevant questions will be referred to in the chapters concerned.

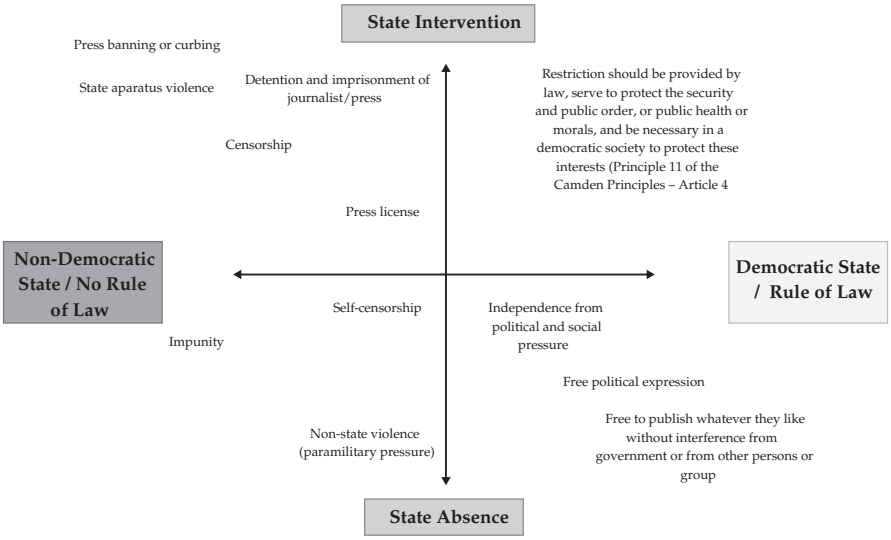
The Role of the State and Press Freedom: Types



The first type is the protective or liberal-democratic state under the rule of law, where the state guarantees the freedom of the press and uses its power to protect the press from infringements by other citizens. The second type of state is the libertarian one, where the state leaves the press completely to its own devices: it does not infringe on press freedom, but neither does it protect the press against any actions by citizens that may undermine press freedom within the limits of the law (such as concentration of press ownership or harassment by civil suits). The combination of a non-democratic state without rule of law and a lack of state interference leads to a situation where the press can be harassed at will by the powerful – citizens and officials acting on behalf of their own interests alike. And finally, a non-democratic state without rule of law but where the state does interfere is repressive or authoritarian.

This typology has been used in the present study to identify how the Indonesian state and its press policies have moved along both axes. As we will see, the Indonesian state has taken all four forms at different points in time. The next chart indicates in more detail what types of intervention are associated with these four types.

The Role of the State and Press Freedom: Ideas Map



1.3. Research Approach and Methodology

The present research started in January 2009. At that time press freedom in Indonesia had come under serious pressure when compared to the previous early years of *Reformasi.* Journalists and editors increasingly fell victim to legal and non-legal attacks from social and political elite figures who felt their interests were harmed by press reports. The situation became worse in 2010, when journalists were killed in Maluku and Papua. Many other physical attacks against journalists and editors occurred throughout the country, and the government banned *Radio Era Baru* in Batam and passed several measures limiting press freedom. Various anti-press legislations were passed by the government. In 2010, *Reporters Sans Frontières* ranked Indonesia at 117, which was the worst position since 2002, but in 2012 Indonesia even dropped to 146, out of 179 countries. In short, this research was conducted at a time of deteriorating press freedom.

As already mentioned such press repression has a long history, which started even before Indonesia became independent. Some of the legal provisions that are still important today – such as those in the Penal Code – were created first by the Dutch colonial government of the Netherlands-Indies. Therefore, this research takes a long-term perspective of press freedom, looking at the separate topics which together constitute freedom of the press as they have developed in the Netherlands-Indies and following them on until the present.

The first of these topics is constitutional law, which I mainly address on the basis of the different constitutional texts and the debates surrounding their adoption. The second is the development of laws and policies. I have combined their discussion with a brief description of contemporary landmark cases, but also with a discussion of the political and legal context in which they were adopted or adjudicated. Mechanisms of press self-regulation are included as well.

In this manner the research aims to provide a comprehensive understanding of press freedom, combining legal inquiry with an analysis of the law's implementation and the factors which shape this process. It is therefore of an interdisciplinary nature, as alluded above, or more precisely, a socio-legal study. Legal scholarship is at its centre, but this is combined with socio-political analysis. Because it involves those different perspectives, the research required not only exploring legal norms and text documents, but also undertaking empirical fieldwork.

Yet, the largest part of this thesis consists of a thorough analysis of criminal, civil and administrative court decisions, from independence until the present. Only a few of these judgments were examined before by other scholars.[13] Some of them concern interpretations of the progressive Press Law that was adopted in 1999 (Law 40/1999), but they also involve the Penal Code, the Civil Code, the Pornography Law (Law 44/2008), the Broadcasting Law (Law 32/2002), the General Election Law (Law 8/2012), and the Electronic Information and Transaction Law (Law 11/2008).

It may seem remarkable that such an analysis has never been undertaken before, but in the Indonesian practice of legal research court decisions are usually ignored and by some they are not even considered a source of law (Bedner 2013: 263).

I spent the first ten months of 2009 in Leiden, designing the research and doing literature research. I started by collecting all relevant laws, regulations and policies, taking 1848 – the year the Netherlands-Indies was given its first constitution-like document – as my starting point. These materials were available in the Van Vollenhoven Institute's library or could be found on the Internet. Furthermore, I gathered all information I could find about press cases, both in- and outside of the court, and I conducted a literature review, both of legal doctrinal writing about the press as historical and social-scientific scholarship.

13 Notably by Hill (1994), Millie (1999), Bedner (2002: 177-182), Agustina (2004), and by the NGO LBH Pers (2010).

In October 2009 I started my field research. I focused mainly on press cases and disputes that occurred after the fall of Soeharto, but I also conducted interviews in order to obtain information about such cases and disputes during the regimes of Soeharto and Soekarno. I had several interviews and discussions with Atmakusumah Asraatmadja,[14] whose memories enabled me to acquire a thorough understanding of several legal landmark cases, especially those of the newspaper *Indonesia Raya*.[15]

I used the fieldwork not only to interview journalists and others about the problems they faced regarding press freedom, but also to collect judgments from courts to be examined for the legal part of this thesis. I also observed court sessions about press cases, attended seminars/conferences, trainings of journalists, attended strikes, engaged with regional and local social-advocacy networks, and engaged in other activities which promoted my getting information as well as obtaining critical input.[16] In the middle of the research process, I became actively involved in establishing the Press Legal Aid in Surabaya. All of this gave me the opportunity to stay up to date on major changes in the field.[17]

In summary, the fieldwork served to:

1. collect data, especially official and unofficial documents;
2. conduct interviews – altogether I interviewed more than 150 informants, mostly journalists, but also judges, policemen, lawyers, press council members, media owners, editors in chief, NGO-activists, government officials, broadcasting commission members, and historians/experts on the press;
3. observe the situation in the field, by attending court sessions, visiting secretariats of journalist associations, visiting media offices, and engaging in seminars, discussions, hearings at local or national parliament, etc.

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14 One in Leiden (May 2009), one in Amsterdam (April 2010), and two in Jakarta (2009 and 2011). One of these interviews was attended by David Hill, the author of *The Press in New Order Indonesia*, which was very helpful in better understanding the historical context of press freedom.

15 See Chapter 3.

16 The ANRC (Australia-Netherlands Research Collaboration) enabled me to do research and discuss some of my findings in the Asian Research Centre, Murdoch University, in March and April 2012.

17 I was inspired by Cohen's approach to media research: "Clarify and explain the application of law to media, society, and individuals; suggest legal reform; identify the impact of law on society and institutions; identify the impact of society and institutions on law; examine and explain judicial decision-making; and examine the process and quality of media coverage of the law" (Cohen 1986: 14).

I started to conduct my research in seven fieldwork sites: Medan, Jakarta, Surabaya, Makassar, Denpasar, Mataram and Kupang. The research sites were selected on the basis of the following criteria: first, number of legal cases, second, the presence or absence of serious political and social tensions, third, the presence or absence of violence against the press, fourth, the presence or absence of a strong or weak press freedom movement, and fifth, financial and time constraints. The sites were chosen after discussions with informants, and information obtained through the Internet. During the period of fieldwork I decided to include two others, Banda Aceh and Jayapura, because of serious press cases which emerged there. At these research sites I spent from several days to several weeks, depending on the number of court cases to be examined, the number of interviews I could conduct and the number of other meaningful activities I could engage in. Altogether I carried out a year of field research.

The interviews were conducted in a semi-structured way on the basis of a list of questions I drafted in Leiden, at the beginning of the research. However, I continuously adapted it on the basis of new insights from my field research. In triangulating findings, I also used small group discussions, mostly with journalist associations at the field level.[18]

1.3.1. Structure of the Book

Chapter 2 starts with an overview of the constitutional history of freedom of expression and freedom of the press. It explores the debates about and ideas underlying these rights, starting with the 1945 Constitution, and continuing with those about the Constitutions of 1949 and 1950, those in the *Konstituante* (the Constitution Making Assembly) during 1956-1959, and finally those during the amendment process of the 1945 Constitution during 1999-2002. This discussion provides a basic overview of the various political positions regarding press freedom as they will also come to the fore in the subsequent two chapters.

Chapters 3 and 4 consist of a legal-political history of press freedom in Indonesia, Chapter 3 starting with the Netherlands-Indies and continuing until the beginning of the New Order (1966), Chapter 4 discussing the New Order until the present. These chapters provide a general overview of the development of press freedom, incorporating political and legal developments, with an emphasis on changes in legislation and policy and landmark court cases.

18 Semi-structured interviews and group discussions complement one another in the type of information they generate (Bryman 2004: 126).

Chapter 5, 6, and 7 are of a legal nature and focus in depth on how the Indonesian courts have protected – or sometimes failed to protect – press freedom. Chapter 5 looks at criminal law cases, Chapter 6 at civil law (mainly tort) cases, while Chapter 7 discusses administrative law cases (mainly licensing disputes).

Finally, Chapter 8 brings together the major findings of the study by providing an answer to the research questions set out in this introduction. I will also make a number of suggestions based on these findings to promote press freedom in Indonesia and thus contribute to reinforce this "fourth pillar of constitutional democracy."

2 Constitutional Ideas, Freedom of Expression and Press Freedom

2.1. Introduction

The development of human rights ideas in Indonesian constitutional history has been influenced by the human rights discourse as it first emerged after the American War of Independence and during the French Revolution. These revolutions were the first to highlight political rights and civil liberties, including freedom from torture, freedom from extra-judicial punishment, freedom to unite, freedom of assembly, and freedom of expression. The American Bill of Rights of 1791, which provides the guarantee of press freedom, and the French *Déclaration des droits de l'homme et du citoyen* of 1789 became major land marks in political thought worldwide, including in the European colonies.

The idea to embed fundamental rights and freedoms in a constitution was further stimulated by the promulgation of the Universal Declaration of Human Rights (UDHR) in 1948 and incorporating human rights provisions into a constitution is now characteristic of most modern constitutions. Since 1948, the normative framework of human rights in the UDHR has been followed and operationalised by numerous international covenants or conventions on human rights, and gradually been adopted by states – including Indonesia – as a recognition of an international legal order constructed to maintain international relations (Wiratraman 2007).

The idea of human rights is thus closely linked to the concept of constitutionalism. According to Wignyosoebroto (2002: 415-417; 2003: 19), 'constitutionalism' incorporates the pursuit of grounding rights and freedoms in a constitution, thus limiting strictly and clearly the power of the state, listing what is legitimate authority or, adversely, what is arbitrary power or misuse of power. In other words, constitutionalism is a political doctrine which claims that political authority shall be bound by institutions in order to limit the ruling power (Lane 1996: 19). The diverse approaches within constitutionalism are sometimes explained as a dichotomy between liberal approaches, which centre on rights-possessing individuals who seek equality before the law, and socialist approaches, which grant rights to the community at the expense of the individual and which allow community interests to be determined by the state (Hassall and Saunders 2002: 33).

Understanding the constitutionalism regarding freedom of expression in Indonesia, including press freedom, requires an inquiry into the constitution and constitutional debates. It concerns the extent to which freedom of

expression has been discussed in promoting rights and what guarantees the constitutional framers had in mind to make sure that freedom of expression would be effectively guaranteed.

The present chapter will focus on these constitution-making processes and their debates regarding freedom of expression and press freedom under the Indonesian Constitution. It looks at the minutes of the debates dealing with either drafting or amending the Constitution, especially in 1945, 1949, 1950, 1956-1959, and 1999-2002. At the same time, it is also necessary to pay attention to the *absence* of such debates in the period 1959-1999, as this will help to understand the jump from the *Konstitutante* (Constitutional Council) debates in 1956-1959 to the People's Consultative Assembly (MPR) sessions in 1999-2002. In the absence of (recorded) debates, the proposals on constitutional change in the period 1959-1999 will be explained by looking at why the idea of constitutional reform had failed.

2.2. Freedom of Expression in BPUPKI and PPKI Sessions

> Freedom of association and assembly, and freedom of expression of thought and of issuing writing and the like, shall be prescribed by statute.
> (Article 28, Indonesia's Constitution, 1945)

In order to understand the nature of the debate about the 1945 Constitution, it is necessary to understand the political situation at the time. During World War II, with the Japanese about to lose the war, the Dutch sought to re-establish their authority in Indonesia. Before their defeat, however, the Japanese started helping the Indonesian nationalists to prepare for self-government. On 7 September 1944, Prime Minister Kuniaki Koiso promised Indonesia independence, although no date was set.[1]

About half a year later, this promise led to the establishment of the Investigating Committee for Preparing Indonesia's Independence (BPUPKI), a Japanese-organised committee, which was to support independence in Indonesia.[2] The first task of this committee was to prepare independence and to draft a constitution. This development contributed significantly to the revolutionary character of the transition to independence (Feith 1962: 2).

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1 The promise of independence was continued by appointing Soekarno and Hatta as leaders of the nationalists, whose antagonism to the Dutch had led them to look at the Japanese as an evil, but necessary ally. The two started the process of preparing for independence in May 1945, hoping to secure it before the expected victory by the allied forces (Cribb and Brown 1995: 15).

2 *Dokuritu Zyunbi Tyoosakai* or *Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*. The organisation was founded on 29 April 1945 by Lieutenant General Keimakici Harada, the commander of the 16th Army in Java.

The first debate on the freedom of expression as a constitutional right in Indonesia took place during one of the meetings held by the BPUPKI. The BPUPKI members were divided into several sub-committees (*Bunkakai*) and the so-called Committee of Fundamental Law (*Panitia Hukum Dasar*). The Committee of Fundamental Law had 19 members and was chaired by Ir Soekarno. It was renamed the Constitutional Committee (*Panitia Undang-Undang Dasar*), with most of its members assigned to sit on the so-called Small Committee of Constitutional Drafters (*Panitia Kecil Perancang Undang-Undang Dasar*), chaired by Prof Mr Dr Soepomo. There were two official sessions, chaired by Dr Radjiman Wedyodiningrat. The first session was held between 28 May-1 June 1945, and discussed the philosophical underpinning of the state;[3] the second session was conducted between 10-17 July 1945, and dealt with the state's form, its territory, citizenship, the draft constitution, economy and finance, defence, education and teaching.

The Constitution Committee's first meeting took place on 11 July 1945 in the Tyuuoo-In building.[4] The draft of the constitution was first debated, followed by checking its language. The concept and rules around the freedom of expression, as articulated in Article 28 of the Constitution (UUD 1945),[5] were only touched upon briefly. In BPUPKI's second session, on 15 July 1945, Soekarno spoke of the importance of moving away from individualism and asked the members of the BPUPKI to not incorporate freedom of thought into the constitution as a 'right of the citizen'. For Soekarno, the idea of 'social justice', which was formulated in the Preamble of the Constitution, was a fundamental statement against individualism:

> Your excellencies! We want social justice. For what the *Grondwet* says, that humans not only have freedom of speech, the right to vote, the right to have meetings and sessions, if there is no *sociale rechtvaardigheid*? For what purpose do we make a *Grondwet*, if the *Grondwet* can't provide for suffering and starving people? A *Grondwet* which contains *"droit de l'homme et du citoyen"* cannot prevent poor people's starvation and their consequent death. Therefore, if we really want to establish our state on the principles of kinship,[6] help, mutual assistance,[7] and social justice, throw away any ideas of individualism and liberalism. (Bahar et al. 1995: 259-260)

What is interesting about Soekarno's idea is that it reflects an 'indivisibility' principle. This refers to the inseparability or integration of two types of human rights, the civil and political rights on one hand, and economic, social and cultural rights on the other. Soekarno regards what he calls 'freedom of speech' as a right that is inseparable from the 'right to food or freedom from starvation'. This opinion reflects closely a human rights theory,

3 *Dasar Negara.*
4 Currently this building is the Foreign Affairs Department.
5 Undang-Undang Dasar 1945.
6 *Kekeluargaan.*
7 *Gotong royong.*

which is based on the idea that both types of rights are needed for a dignified human life, and all human rights have an equal status (Ravindran 1998; Leckie 1998). This principle was also discussed during the drafting process of the Universal Declaration of Human Rights (Morsink 1999: 290-296; Freeman 2002: 34-42).

After Soekarno had spoken before the BPUPKI session, Hatta replied as follows:

> … [B]ut I worry about one thing, if there is no belief or commitment to the people in the Constitution about the right to speech and expression – the right in the Constitution that we are drafting now – we may establish a state model with which we disagree. Because in the state's law as we have it now, we see a "*kadaver* discipline" situation as we have seen in Russia and Germany, and this is my point of objection. Regarding the incorporation of the *"droits de l'homme et du citoyen,"* it is indeed unnecessary to include them here (Constitution), because they are just the requirements for protecting human rights against ruthless kings in the past. These rights are incorporated in the *grondwet-grondwet* (fundamental law) after the *Franse Revolutie* (French Revolution), just for fighting such ruthlessness. But we are founding a new state. We should consider requirements in order for our state not to turn into an authoritarian state based upon power. We want a state that rules, we awaken a new society based on mutual assistance, common endeavour, our aim to improve society. Nevertheless we should never give unlimited power to the state so that on top of that new state, a state based on power arises. Therefore, it is good to provide an article to prevent fear of using freedom of speech for citizens. (Bahar et al. 1995: 262)[8]

Hatta's statement thus underlined the importance of "freedom of speech" for making power accountable.[9] This line of argument was consistently championed by Hatta during the BPUPKI sessions. In the end, it was due

8 "*.. [t]etapi satu hal yang saya kuatirkan, kalau tidak ada satu keyakinan atau satu pertanggungan kepada Rakyat dalam Undang-Undang Dasar yang mengenai hak untuk mengeluarkan suara, yaitu bahwa nanti di atas Undang-Undang Dasar yang kita susun sekarang inimungkin terjadi suatu bentukan negara yang tidak kita setujui. Sebab dalam hukum negara sebagai sekarang ini mungkin timbul suatu keadaan "kadaver discipline" seperti yang kita lihat di Rusia dan Jerman, inilah yang saya kuatirkan. Tentang memasukkan hukum yang disebut "droits de l'homme et du citoyen." memang tidak perlu dimasukkan di sini, sebab itu semata-mata adalah syarat-syarat untuk mempertahankan hak-hak orang seseorang terhadap kezaliman raja-raja masa dahulu. Hak-hak ini dimasukkan dalam grondwet-grondwet sesudah Franse Revolution semata-mata untuk menentang kezaliman itu. Akan tetapi kita mendirikan negara yang baru. Hendaklah kita memperhatikan syarat-syarat supaya negara yang kita bikin jangan menjadi Negara Kekuasaan. Kita menghendaki negara pengurus, kita membangunkan masyarakat baru yang berdasar kepada gotong royong, usaha bersama, tujuan kita ialah membaharui masyarakat. Tetapi di sebelah itu janganlah kita memberikan kekuasaan yang tidak terbatas kepada negara untuk menjadikan di atas negara baru itu suatu negara kekuasaan. Sebab itu ada baiknya dalam salah satu pasal, misalnya pasal yang mengenai warga negara, disebutkan juga di sebelah hak yang sudah diberikan kepada misalnya tiap-tiap warga negara jangan takut mengeluarkan suaranya.*" (1998: 286)

9 The opinion that freedom of speech and freedom of expression should be regarded as fundamental freedoms cannot be separated from Hatta's ideas during the BPUPKI sessions. Although it was hardly debated, freedom of expression was finally guaranteed by the Constitution, even if some restrictions remained in place. See also Soebadio Sastrosatomo (1995: 25), who argues that human rights articles, especially on the freedom of expression, were adopted into the Constitution because of Hatta's efforts.

to Hatta's persistence on this issue that freedom of expression was guaranteed in Indonesia's Constitution (Sastrosatomo 1995: 25). Although its form was limited due to the parliament's capability of restricting it, this could be regarded as a necessary compromise in the initial process of building the country.

Hatta advocated a similar stance on press freedom. He argued that press freedom should be guaranteed, and, therefore, that censorship and press banning (*persbreidel*) should be prohibited. Nevertheless, he accepted the imposition of certain limitations by acts of parliament – the formal voice of people's representatives in the political system. In principle, he argued, the limitation had to be bound by legislation, in order to respect other rights.

This position differed from what he had defended earlier. During a speech at an Indology Student Association meeting in Utrecht on 4 November 1930, Hatta had already discussed the need for fundamental freedoms, and how people's pressure on the colonial government had led to the annulment of Article 11 of the *Regeringsreglement* (the Netherlands-Indies Constitution), which prohibited the gathering of political organisations (Hatta 1930: 8). Limiting freedom of expression including press freedom should never be done "in a conservative way," so he argued. As he wrote in *Daulat Rakjat* (No. 8, 30-11-1931), press freedom in the Constitution of Belgium was much broader than in the Dutch Constitution (as stipulated in Article 7), because under the Dutch Constitution, press freedom could be limited by the law. If the ruler is conservative, it is likely that "what is given by the right hand is taken away by the left hand." Thus, originally, Hatta argued for a more liberal way of protecting press freedom. During the constitution-drafting process, however, he agreed to the idea of limiting press freedom through legislation on the grounds that the limitation could not contradict the essence of constitutional rights.

The idea of press freedom was also advocated by Liem Koen Hian, chief editor of *Sit Tit Po*. He argued during the BPUPKI session on 15 July 1945 that press freedom must be guaranteed by Indonesia's Constitution. According to Liem, "[i]n proposing fundamental rights (*grondrechten*), not only the right of assembly and the right to discuss, but also right to print (*drukpers*), and the *onschendbaarheid van woorden* (inviolability of words) should be guaranteed. Press freedom is needed to reduce the badness of state and society" (Adinegoro 1963: 62).

However, Liem's proposal was rejected by Soepomo, and press freedom was left out of Article 28 of the Indonesian Constitution. In the role of 'law expert', Soepomo could exert considerable influence over the BPUPKI sessions, and he disagreed with Hatta's way of regarding and incorporating into the Constitution a number of fundamental rights. Nonetheless, he proposed a compromise article to accommodate Hatta's ideas as follows:

> … Mr Chairman excellency, if the guarantee of fundamental rights in the Constitution, which is based upon the principle of the family system, would not be established, it does not mean at all that people who organise themselves, can neither speak nor assemble… Absolutely not. The principle of the family system and of deliberation which have been accepted as Indonesian state foundations, automatically include people's freedoms to unite and assemble.[10]

> .... Both the Committee chairman and myself have explained at length that the reason why the Committtee did not include it [freedom of expression] in the fundamental rights (*grondrechten*), is because this idea would be contrary to the family system, our draft's systematic, but we have also explained, that because it was not included, this does not mean at all that people cannot hold meetings or gatherings and so on, because those things are in a modern state automatically regulated by law.... Hence, we propose a compromise provision, but never one against the systematics of this constitutional draft.... (Bahar et al. 1995: 276, 321)[11]

Soepomo thus argued that to insert *grondrechten* (fundamental rights) into the Constitution would go against the underlying principle of kinship and the system designed on that basis.[12] The most fundamental opposition came from Yamin, who said:

> I only ask to really consider this, because what we are talking about is people's rights. If this is unclear in our Constitution, there is a mistake of the *Grondwet*; a *Grondwettelijke fout* [Constitutional Error] would be a big sin to the people who are expecting their rights from the Republic. For instance as to what addresses citizens, it should never be considered that only citizens will have rights; residents will be protected by this Republic as well. (Bahar et al. 1995: 323)[13]

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10 "*[P]aduka Tuan Ketua, jikalau jaminan hak-hak dasar orang seseorang dalam Undang-Undang Dasar yang bersifat kekeluargaan itu tidak diadakan, itu sama sekali tidak berarti, bahwa rakyat berserikat, tidak boleh bersuara atau tidak boleh berkumpul, sama sekali tidak. Dasar kekeluargaan dan dasar permusyawaratan yang telah kita terima sebagai dasar-dasar Negara Indonesia, dengan sendirinya menghendaki kemerdekaan rakyat berserikat dan berkumpul*." (1998: 301).

11 "*[T]adi dengan panjang lebar, baik oleh Ketua Panitia, maupun oleh saya sendiri diterangkan apa sebabnya Panitia tidak memasukkan dalam hukum dasar tadi yang dinamakan grondrechten, ialah oleh karena pemasukan itu menentang sistematik kekeluargaan, sistematik rancangan kita, akan tetapi kami telah menerangkan juga, bahwa tidak dimasukkannya sama sekali tidaklah berarti, bahwa rakyat tidak akan mempunyai kemungkinan bersidang atau berkumpul dan lain-lain, sema sekali tidak, oleh karena hal-hal itu dalam negara yang modern dengan sendirinya sudah tentu diatur dalam Undang-Undang. ...Oleh karena itu, kami usulkan suatu aturan yang mengandung kompromis, akan tetapi tidak akan menentang sistematik rancangan anggaran dasar ini...*" (1998: 346).

12 According to Sri Soemantri, "… these different thoughts should be scrutinised, whether the situation has influenced personal thought or not. It is because Professor Soepomo was involved during the Constitution (UUD 1945)-making process and the UUDS-making process. The UUD 1945 was formulated during the Japanese occupation. Soepomo, as a professor of *adat* law, has always promoted the principle of the family system which he based on elements of Hegel's theory." (*Kompas Sabtu*, 14 Agustus 2004).

13 "*Saya hanya minta perhatian betul-betul, karena yang kita bicarakan ini hak rakyat. Kalau hal ini tidak terang dalam hukum dasar, maka ada kekhilafan daripada grondwet, grondwettelijke fout, kesalahan Undang-Undang Hukum Dasar, besar sekali dosanya buat rakyat yang menanti-nantikan hak daripada republik, misalnya mengenai yang tertuju kepada warga negara, jangan difikirkan bahwa hanya warga negara yang akan mendapat hak, juga penduduk akan diperlindungi oleh republik ini*" (1998: 348).

Yamin thus demonstrated a view promoting universalism of human rights, i.e. not limiting or distinguishing between human rights by dividing them into particular ideological or political blocks.

Finally, Soepomo proposed what he called a 'compromise formulation', by adding an article saying that:

> Citizens' freedoms to discuss and assemble, to express thought by oral or written and other forms will be prescribed by law. (Sekretariat Negara 1998: 346)

The right, thus, did not become a *subjectief recht* (subjective right), as proposed by Soetardjo but was named a liberty/freedom (*kemerdekaan*) through a vote by the members of the BPUPKI. At the next session, on 16 July 1945, Soepomo proposed to further adjust the article according to Djajadiningrat's proposal. Thus Article 28 became, "The freedoms to unite and assemble, to express thought in oral, written and other forms are prescribed by law" (Bahar et al. 1995: 360).

One day after the promulgation of independence, the Committee for Preparing Indonesia's Independence (PPKI/Panitia Persiapan Kemerdekaan Indonesia) started its sessions. The PPKI was established on 7 August 1945, and started work after the declaration of independence on 17 August 1945. At the first session of the PPKI on 18 August 1945, the BPUPKI draft of Article 28 of the Constitution was read out again by PPKI Chairman Soekarno, and it was finally and formally approved. This formulation was maintained until 1949 and would also be valid between 1959 and the second amendment of the 1945 Constitution in 2000.

The proposals and debates about the freedom of expression in the BPUPKI meetings show that it was considered as an important means to fight the abuse of power. Founding fathers Soekarno, Hatta, Yamin, Soepomo and others demonstrated that they had a thorough understanding of the concept. The different ideological perspectives in relation to liberalism and individualism which were presumed to endanger the tradition of mutual assistance, were finally resolved by the introduction of a short and simple article on freedom of expression as a fundamental freedom under the Constitution, which included freedom of the press.

For this reason, many discussions about press freedom relate to Article 28 of the 1945 Constitution. Yet, this constitutional right eventually proved insufficient to offer clear protection of press freedom. There are three reasons for this. First, the concept is very broad and open to interpretation. Second, the article had to be operationalised by legislation. Lastly, the words 'prescribed by statute' in Article 28 were later changed into specific rules, which seriously restricted the freedom of expression. This also explains Bedner's conclusion that "freedom of opinion and expression is not guaranteed by the Constitution" (2001: 177).

2.3. Freedom of Expression in the 1949 Federal Constitution and UUDS 1950 Draft

In the early years of Indonesia's independence, the Dutch government still tried to claim authority and control over Indonesia. Part of its strategy was to promote a federal state form, to which end the Netherlands supported the establishment of a union of regional states such as Indonesia Timur, Pasundan, Jawa Timur and others.[14] The federal principle was actually accepted by both the Netherlands and the Republic of Indonesia, in the Linggarjati Agreement, concluded in November 1946. During these discussions, both sides also agreed to promote fundamental human rights as formulated in the United Nations Charter and to respect them in both the Republic and the other states forming part of the Union (Drooglever 1997: 69).

A few months later, in 1947, the Dutch started their first military action against the Republic,[15] followed by a second attack in 1948. The latter backfired, but elicited a negative response from the international community.[16] As a result, the United Nations forced the Dutch government to resume negotiations with the government of the Indonesian Republic, the so-called Renville negotiations (Kahin 2003: 401; Nasution 1979). On 18 March 1948 the Dutch presented a working paper on the Constitution. Only a few days later, the Indonesian Republican Committee headed by Soepomo presented a draft of its own, which contained the principal outline of a constitution for the United States of Indonesia. This draft included the protection of human rights as referred to in the United Nations Charter (NIB XIII: 222-3; 276-9, in Drooglever 1997: 70-71).

The United Nations' Security Council Resolution of 28 January 1949 once again made clear what importance was attached to the freedom of expression. It recommended the establishment of a commission to guarantee fair and democratic general elections as well as freedom of expression (Para. 4

14 For a closer look at political developments in the early years of independence, and how the Dutch government tried to reclaim power by politically supporting the federal government, see George McTurnan Kahin (2003).

15 The Dutch government preferred to use the term *politionele acties*, instead of 'agression'.

16 The states which supported Indonesia in condemning the Dutch military attack included Iraq, Iran, Egypt, Pakistan, Morocco, and many other Asian states, especially the states that attended the Asian Conference in New Delhi on 20 January 1949. It should be noted that India was the pioneer of Asian and African states in mobilising international support for Indonesia's independence struggle at that time (Nasution 1979: 9-63).

(e) a-b).[17] This resolution became an important reference for the negotiations between Indonesia and the Netherlands about the provisional constitution for the new state. These negotiations, called the Roundtable Conference (KMB),[18] took place in The Hague from 23 August to 2 November 1949. The Indonesian side was represented by the government of the Republic of Indonesia and members of the *Bijeenkomst voor Federaal Overleg* (BFO),[19] led by Mr Mohammad Roem. The other participants were the Dutch government and the United Nations Commission for Indonesia.[20] The negotiations led to three major points of agreement: first, the establishment of the United States of Indonesia (USI; *Negara Republik Indonesia Serikat*, RIS); second, the transfer of sovereignty to the United States of Indonesia, and third, the establishment of a union between the Netherlands and the United States of Indonesia.

The draft constitution for the United States of Indonesia, henceforth referred to as the 1949 Federal Constitution, was formulated by the delegates of the Republic of Indonesia and the BFO.[21] It had already been discussed before the official negotiations started, and once again Soepomo was its main architect.[22] The draft had also been approved by the Central Indonesia National

17 UN Security Council Resolution Para. 4 (e) a-b: "The Commission, or such other United Nations agency as may be established in accordance with its recommendation under paragraph 4 (c) above, is authorized to observe on behalf *of* the United Nations the elections to be held throughout Indonesia and is further authorized, in respect of the territories of Java, Madura and Sumatra, to make recommendations regarding the conditions necessary (a) to ensure that the elections are free and democratic, and (b) to guarantee freedom of assembly, speech and publication at all times, provided that such guarantee is not construed so as to include the advocacy of violence or reprisals."

18 *Konferensi Meja Bundar.*

19 The Meeting for Federal Consultation, also known as the PPF delegation. The chairman of the BFO/PPH was Sultan Hamid II, who also represented the delegation from West Kalimantan/Borneo.

20 UNCI (*United Nations Commission for Indonesia*) is the organisation established by the United Nations.

21 The final document was concluded in Scheveningen and added as an appendix to the Agreement Charter (*Handvest van Overeenstemming*) between the Republic of Indonesia delegation and the BFO delegation about The Draft Planning of the United States of Indonesia Constitution, 29 October 1949 (*Het Secretariaat-Generaal van de Ronde Tafel Conferentie* 1949: 54-55). Nevertheless, the republicans and federalists had already discussed and negotiated a constitutional design during a pan-Indonesia conference in Yogyakarta.

22 According to Drooglever (1997: 79), the republican arrogance and the federalist weakness was reflected furnished by an act of Soepomo, who at the end of a long discussion on an unrelated subject flung a small note on the table with the casual remark that he supposed that the gentlemen would agree with its contents, and that they would do so without a word.

Committee (*Komite Nasional Indonesia Pusat*/KNIP).[23] It was officially adopted on 14 December 1949 and came into force on 27 December 1949.[24]

Then, on 19 May 1950, the Republic of Indonesia and USI agreed to rebuild a Unitary State of the Republic Indonesia (NKRI, *Negara Kesatuan Republik Indonesia*), as mandated since the promulgation of independence on 17 August 1945. This was written in the so-called Agreement Charter between the Government of the United States of the Republic of Indonesia and the Government of the Republic of Indonesia, who were represented by their respective Prime Ministers, Mohammad Hatta (RIS) and A. Halim (RI).[25]

In the session on 19-20 July 1950, after the draft of the Provisional Constitution of the Republic of Indonesia had been presented, agreement was reached and finally, the new constitutional draft (the Provisional Constitution of the Republic of Indonesia or *UUD Sementara Republik Indonesia/ UUDS*) was formally enacted by Law No. 7 of 1950 (State Sheet of RIS (*Lembaran Negara*) 56/1950). From the point of view of a constitutional lawyer, enacting a constitution by using lower legislation is incorrect, but – similarly

23 The Vice-President's Proclaim (*Maklumat Wakil Presiden*) No. X of 16 October 1945 authorised the legislative power of the KNIP, whilst MPR and The People's Representative Council (or DPR) had not been established yet.

24 Two important things should be noted. First, the 1949 Federal Constitution was provisional in nature, as defined by Article 186, which stipulated: *"The Constituante (Constitution Making Council), together with the Government are asked soon to formulate the Republic of Indonesia Constitution that will change this provisional constitution."* Second, the USI establishment was based on the 1949 Federal Constitution, which also recognised the territory of the Republic of Indonesia. Article 2 of the 1949 Federal Constitution recognised the Republic of Indonesia as a part of the USI, which territory was mentioned in the Renville agreement. From the point of view of the constitution's applicability, the UUD 1945 still existed in the Republic of Indonesia, whilst the 1949 Federal Constitution still existed in the USI. Hence, Indonesia used to have two constitutions, each of which was applicable to a different territory. The federal state in the form of the KMB could no longer exist, because power had been consolidated in the early years after independence, so that the idea of the United States of Indonesia became unpopular. Both in the Netherlands as well as in Indonesia, the result of the KMB was opposed, not only for the legal consequences, but also for political and psychological reasons. See for example Mr Moh Roem's speech, the Chairman of the Republic of Indonesia delegation in The Second Minister Conference Union Indonesia-Netherlands, S-Gravenhage, 20-29 November 1950 (*Secretariat Uni Indonesia-Belanda* 1950: 24).

25 The follow-up to this agreement was the preparation of a draft constitution and the establishment of a Joint Committee (*Panitia Bersama*). The Joint Committee was chaired by Prof Dr R. Soepomo (representing RIS) and Mr Abdul Hakim (representing RI). The result of this committee was noted in *Rentjana Konstitusi Sementara Republik Indonesia* (the Provisional Constitution Draft of the Republic of Indonesia), which was set up by the Joint Committee of the United States of the Republic of Indonesia and the Republic of Indonesia. The result was submitted to and authorised by the Working Council of the Central Indonesia National Committee (*Badan Pekerja Komite Nasional Indonesia Pusat* or *KNIP,* authorised on 12 August 1950 and also known as the People's Representative Council (*Dewan Perwakilan Rakyat*)) and the Senate of the United States of Indonesia (*Senat Republik Indonesia Serikat*, authorised on 14 August 1950).

to the 1949 Federal Constitution – the UUDS 1950 was provisional in nature, as clearly formulated in Article 134.[26]

The main difference between the 1950 Constitution and the 1949 Federal Constitution concerned the form of the state. Regarding human rights there was only one change. The 1949 Federal Constitution had incorporated the Universal Declaration of Human Rights (UDHR), and thus contained a solid list of fundamental rights and freedoms. These were directly transplanted to the 1950 Constitution (Purbopranoto 1979: 28). The fundamental rights and freedom provisions in the Annex of Statute of the Indonesia-Netherlands Union were also stipulated in Part V and VI of the UUDS 1950. In addition, Article 21 of the 1950 Constitution introduced the right to strike, which neither the 1949 Federal Constitution nor the 1945 Constitution had included.[27] The 1950 Constitution formulated the freedom of expression as follows:

> Article 19: Every person has the right to hold and express opinions.[28]

Article 33 and 34 of the 1950 Constitution stipulate a number of limitations on rights and freedoms, and how the authorities should apply these.

> Article 33: The exercise of the rights and freedoms listed in this part can only be limited by legislation in order to guarantee their recognition and respect for them and to fulfill the just requirements for peace, morality, and prosperity in a democratic society.[29]

> Article 34: No provision in this part can be interpreted so as to mean, that a ruler, a group, or an individual can derive any right from it to try something or to commit any deed denying rights or freedoms as clarified within the Constitution.[30]

The above articles thus allowed for limiting rights and freedoms under certain considerations. This was stated by Yamin, who argued that legislation may only further regulate constitutional rights, but never narrow them down (Yamin 1956: 183). This observation is important in evaluating the degree of constitutionality of legislation, which limits the freedom of expression. It may be used to ascertain whether the law only serves the interests of the regime, or whether it genuinely protects freedom of expression. This will

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26 Article 134 of the UUDS 1950 states: "*The Constituante (Constitution Making Council), together with the Government are asked soon to formulate a Republic of Indonesia Constitution that will change this provisional constitution.*" This article is similar to Article 186 of the Federal Constitution.

27 Civil rights groups, especially Indonesian labour movement groups, faced a real struggle to obtain this right. The inclusion of this right in post-WWII constitutions following civil rights groups pressure also occurred in the USSR (1946), France (1946), and Italy (1947) (Soepomo 1950: 9-10, 42).

28 This provision is similar to Article 19 of the Konstitusi RIS.

29 This article is similar to Article 32 of the Konstitusi RIS and Article 29 section 2 of the 1948 Universal Declaration of Human Rights.

30 This article is similar to Article 33 of the Konstitusi RIS and Article 30 of the 1948 Universal Declaration of Human Rights.

be further discussed in the next chapter of this thesis. Nevertheless, despite this point of concern, the scope of guarantees of rights and freedoms in the 1950 Constitution and the 1949 Federal Constitution was considerable, certainly for its time. As noted by Poerbopranoto in 1953 (1953: 92), "the 1949 Federal Constitution and 1950 Constitution are the only constitutions that adopted human rights as a United Nations Organisation decision (Universal Declaration of Human Rights, 1948) into a Constitution Charter."

Moreover, these two constitutions provided a far more detailed and complete formulation of rights than the Constitution of 1945. Yet, although both contributed to the development of human rights in Indonesia, they paid no serious attention to press freedom as a special issue. While it might have made no difference if they would have done, this foreshadowed what was to follow and what will be discussed in further detail in the next chapters: press freedom in practice was constantly endangered. In other words, these progressive articles on human rights were hardly important in the eyes of the governments in their dealings with the press.

2.4. Freedom of Expression in the Konstituante Council Sessions (1956-1959)

The Constitutional Council or *Konstituante* was officially formed on 10 November 1956 and held meetings for almost two and a half years. As mandated by Article 134 of the 1950 Constitution, the *Konstituante* together with the government, was in charge of drafting a new Constitution. It was elected at the same time as Parliament during the general elections of 1955. The majority of the parties constituting the Council fell ideologically into three groups:[31] those based on religion,[32] those based on socialism,[33] and those based on so-called 'indigeneous nationalism' (Cribb and Brown 1995: 52).[34]

In his doctoral dissertation, Adnan Buyung Nasution (1992) explained how the idea of freedom of expression as debated by the *Konstituante* cannot be separated from the historical context of the early years of independence, when Indonesia had numerous steps to take in order to develop a constitutional government. One such step was to embed freedom of expression into the new constitution. As expressed by one of the *Konstituante* members:

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31 Other scholars have distinguished different categories, such as Feith and Castles (1970) who divided Indonesia's political thinking into five groups: (1) radical nationalism; (2) Javanese traditionalism; (3) Islam; (4) democratic socialism; (5) communism.

32 *Nahdlatul Ulama*, *Masyumi*, *Pergerakan Tarbiyah Islamiyah (Perti)* and *Partai Syarikat Islam Indonesia (PSII)*.

33 Indonesian Communist Party (PKI) and Indonesian Socialist Party (PSI).

34 PNI, *Partai Indonesia Raya* (PIR), and *Partai Rakyat Nasional* (PRN).

> Not only to become a people free to express its opinion, free to choose any life philosophy and religion, free from arbitrariness and oppression by power, free from want, but also to become a healthy and rational people. (Koesnodiprodjo 1951, in Nasution 1992: 20-21)

In the *Konstituante* session of 12 August 1958, a Drafting Committee was established to wrap up the debate about human rights and to formulate a decision about the human rights discussed in the plenary session (Risalah, 1958/IV: 1877-1878). An important distinction made by the *Konstituante* was between 'human rights', which applied to all human beings, and 'citizen rights', which only applied to those with the Indonesian nationality. The drafting report, submitted one week later, contained 24 human rights articles, which were agreed upon, 18 citizen rights, and 13 additional rights, which were to be adopted as human rights or citizen rights, but which still had to be further considered by the Preparatory Committee. This last group included the right to freedom of expression and opinion. The report listed 14 proposals for formulating other articles, including the right to freely print and publish (*hak kebebasan tjetak-mentjetak*) (Risalah, 1958/IV: 1881).[35]

The latter proposals were never put to a vote or returned to the Preparatory Committee for a final formulation. According to Nasution (1995: 242), these rights, including press freedom, should be interpreted as general observations that were never officially formulated but ought to be recognised.

The right to freedom of expression arose again, when the *Konstituante* discussed which human rights it would adopt. The right 'to have and express opinions, either orally or in writing', was mentioned on list number 6, and held 'third category' status, which meant that it was "recognised by the *Konstituante* as a citizen right, and that its extension to become a human right to include people who were not citizens, was being considered and that there was need for a further definitive formulation" (Risalah, 1958/VI: 3161, in Nasution 1995: 245). The Constitution Preparatory Committee was asked to continue discussions on whether the 13 rights in the 'third category' should become human rights or citizen rights.

Among the 13 rights listed was the limitation on the freedom of expression discussed above, but now defined with far more caution than in the 1950 Constitution: "Establishing rights and freedoms as explained in this part can only be limited by legislation, just for guaranteeing and respecting non-derogable rights and freedoms and for fulfilling the requirements of legal justice, peace, decency, and prosperity in a democratic society." These requirements look quite reasonable, but this of course depends in the end

35 This draft was proposed by the Human Rights/Citizen Rights and Obligations Drafting Committee, signed by Kuasini Sabil (Chair) and M. Soetimboel (Vice), Bandung 16 August 1958.

on the interpretation of the article by the authorities and – ultimately – the judiciary.

The next stage was the Chairman's proposal for drafting 'rights'. 'Rights' under the Constitution Preparatory Committee were accepted by acclamation. The proposal also defines the 'third category' of rights which includes a more comprehensive article on freedom of expression, since such article also regulates derogation in the Indonesian Constitution.

Unlike the debates about the 1949 Federal Constitution and the 1950 Constitution, the *Konstituante* addressed the difference between the concepts of 'every person' (*setiap orang*) and 'citizen' (*warganegara*). During Session II, in 1958, Muhammad Tahir Abubakar, from the *Partai Sjarikat Islam Indonesia* (PSII Faction) proposed to Constitution Commission II that, "the basic material which covers human rights and citizen rights should be formulated by using the word 'every person, without the word 'citizen'," since the term 'every person' included 'citizen'.[36] In a later session, Soedijono Djojoprajitno from *Murba Pembela Proklamasi* (Murba party) objected to the use of the word 'person' (*orang*) in human rights provisions, because this would include foreigners. He proposed to replace all instances of the use of the word 'person' with 'citizen' (*warganegara*), except when asylum issues were concerned.[37] The *Konstituante* decided not to follow this suggestion, but to distinguish between two kinds of rights subjects: 'every person' (*setiap orang*) versus 'citizen' (*warganegara*). In relation to the former, every human being would be protected by the Constitution.

One other important provision related to freedom of expression was the right to submit complaints or petitions to the government. It was agreed upon by acclamation in the following wording: "(1) Everyone alone as well as together with others has the right to freely submit complaints to the government either orally or in written form; (2) Everyone alone as well as together with others has the right to submit petitions to the government either orally or in writing." (Risalah Perundingan, 1958/VI: 3281).

In summary, the debates of the *Konstituante* between 1956-1959 about freedom of expression and freedom of the press showed new and interesting ideas for rights and freedoms, which were more concrete and detailed compared to the ideas during earlier constitutional debates. The *Konstituante*

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36 Konstituante of the Republic of Indonesia Session II (1958), Session 26, Thursday, 14 August 1958, p. 1768. Thirteen basic materials which included Group II as mentioned by Constitution Commission report II No. 36/III/Red/58, 10 March 1958, which stated that "basic material that was as yet undefined as to in which group it should be included: human rights or citizen rights."

37 Konstituante of the Republic of Indonesia, Session II (1958), Session 29, Tuesday, 19 August 1958, p. 1849-1850.

even tried to formulate a special article to establish the press as an important pillar for constitutional democracy. However, this is more obvious from the formulation resulting from the debates than from the debates themselves.

The work of the *Konstituante* was eventually overturned when Soekarno released the Presidential Decree of 5 July 1959 (*Dekrit Presiden*). It put an end to the sessions of the *Konstituante* and proposed to return to the 1945 Constitution. Ironically, this had already been suggested by Yamin, who earlier had shown himself a supporter of a liberal constitutional model (Lev 1966: 247). Some argue that the *Konstituante* only had itself to blame for failing to finish the task on time. Regardless of whether this is true or not, Soekarno's presidential decree paved the way to a truly authoritarian state (Nasution 1995: 259).

2.5. Transition to the New Order: The Absence of Constitutional Change (1959-1998)

After Soekarno's Guided Democracy and the political turbulence and mass murders of 1965-1966, Soeharto established the authoritarian New Order regime. The Temporary People's Consultative Assembly (*Majelis Permusyawaratan Rakyat Sementara*/MPRS) adopted Decree No. XX/MPR/1966 on statutory hierarchy, which legalised the 1945 Constitution and placed it at the top of this hierarchy.

The procedure to change the Constitution was laid down in MPR's Decrees I/MPR/1983 and IV/MPR/1983 and in lower legislation, especially Law No. 5 of 1985. According to constitutional law expert Sri Sumantri (1987), this system was too complicated for practical implementation. Politically, changing the 1945 Constitution was even more difficult. Soeharto interpreted the Pancasila and the Constitution as 'pure and consistent' (*murni dan konsekuen*) and anyone proposing any changes was accused of being disloyal to the Pancasila and the UUD 1945. Constitutional lawyers were later often said to have behaved as if they 'suffered from a toothache' (*sakit gigi*),[38] in the sense that they had failed to provide criticism and just followed the regime.

The MPR produced two decrees about freedom of expression and press freedom, IV/MPR/1978 and II/MPR/1983. These fully supported the authoritarian New Order approach as can be read from the following quote:

38 According to Professor J.E. Sahetapy, a criminal law expert from Airlangga University. Interview on 10 May 2011, Jakarta.

> Building and developing a national press or media should be based on the spirit and soul of the Pancasila, so that the press can support a Pancasila society. In increasing and spreading 'enlightenment' throughout the country we need to increase the usefulness of the media such as radio, television, film, news agencies, etc. In order to increase the role of the press in development we need a healthy, free and responsible press, which can function as a disseminator of information and has the objective to achieve constructive social control, channelling people's aspiration and expanding people's communication and participation. For this purpose we need to be develop a positive interaction between the press, government and society. For securing a healthy, free and responsible press the Basic Press Law should be reviewed. It needs to prepare regulatory instruments which can secure a healthy press development in the light of the implementation of Pancasila Democracy. (Lubis 1997: 264-265)

The legislation based on these decrees will be discussed in the next chapter.

2.6. Debates during the Constitutional Amendment Process (1999-2002)

After Soeharto stepped down in 1998, the wave of *Reformasi* that swept over Indonesia included a process of amending the 1945 Constitution. In order to prevent systematic human rights violations in the future, public pressure rose to limit the power of the president and to prevent misuse of power by providing guarantees for the protection of human rights. Human rights could no longer be kept from the reformation agenda in Indonesia post-Soeharto.[39] This also appeared from the enactment of Law 39/1999 on Human Rights and Indonesia ratifying the major international human rights treaties.

The MPR's debates about constitutional reform centred on Article 28 of the 1945 Constitution, into which all new human rights were eventually included.[40] In the 1945 Constitution, the human rights provisions could be found in Articles 27, 28, 29 (2) and 31 (1). In the Elucidation to the Constitution two relevant categories were included: citizen rights (Articles 27, 30, 31(1)) and welfare (Articles 28, 29(1), 34).

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39 During *Reformasi* the following pieces of legislation related to human rights were enacted: MPR Decree XVII/MPR/1998 on Human Rights, Presidential Decree 129/ 1998 on Indonesia's National Action Plan on Human Rights, Law 5/1998 on Ratification of the **Convention against Torture** and Other Cruel, Inhuman or Degrading Treatment or Punishment, Law 8/1998 on Consumer Protection, Law 9/1998 on Freedom of Expression in the Public Sphere, Law 29/1999 on Ratification of the International **Convention** on the Elimination of All Forms of **Racial Discrimination,** Law 39/1999 on Human Rights, Law 40/1999 on Press, and Law 26/2000 on the Human Rights Court.

40 Freedom of expression was included in Article 28E(3), but a specific provision about press freedom was never added. The main resource for the discussion is *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan, Buku VIII: Warga Negara dan Penduduk, Hak Asasi Manusia, dan Agama,* published by the Constitutional Court (2008).

The first discussion on human rights was held in the Ad Hoc Committee III Forum (Panitia Ad Hoc/PAH III) in 1999. The discussion was continued by PAH I between 1999 and 2000. It resulted in a revised draft of Article 28, which was brought before Commission A during the annual session of the MPR. The final revision was agreed upon during the MPR's annual session in 2000. During the sessions of the PAH, numerous representatives from professional organisations, human rights based NGOs and constitutional law experts provided their opinions.

For the discussion about press freedom, the PAH invited the Indonesian Journalists Association (PWI),[41] the Independent Journalists Alliance (AJI),[42] and the Indonesian Press and Broadcast Society (MPPI).[43] Freedom of expression was discussed several times. In the Third Session of PAH I, on 6 December 1999, Abdul Khaliq Ahmad of the Nation's Awakening Party (*Fraksi Partai Kebangkitan Bangsa*), stated:

> As a nation which upholds democracy, the state should provide autonomous freedom for every citizen to create and express him or herself, also to choose his or her profession and his or her way of life. For that reason, according to the Nation's Awakening Party, don't you think that it is proper for the Constitution as a constitutional basis, a fundament, and beacon to provide specially or explicitly for human rights?

Similarly, Hamdan Zoelva of the Crescent Star Party (*Fraksi Partai Bulan Bintang*) suggested formulating special articles on human rights in addition to Articles 27 and 28, and thus to change the structure of the Constitution.

This idea was fleshed out by Tarigan from the journalist association PWI during the Eighteenth Session of PAH I in 2000. According to Tarigan, Article 28 should be amended to incorporate the freedom to express one's opinion, with specific reference to the press.

> Our suggestion regards Article 28 because this article does not guarantee freedom of the press as a right. I have said that the formula of Article 28 defines that the freedom to unite and assemble, to express one's thought orally or in writing and in other forms are prescribed by law. There is no explanation of the word 'right', which becomes even clearer if we look at the Elucidation. The Elucidation to Articles 28, 29 and 34 is not talking about rights, but about representing the status of the inhabitants (*kedudukan penduduk*) […]. These articles (Article 28, 29, and 34) are not perceived as citizen rights, but are about the status or position of the inhabitants of Indonesia. (Mahkamah Konstitusi 2008: 96-97)[44]

What Tarigan referred to is the formulation of Article 28 as a right. The Elucidation to the 1945 Constitution indeed speaks only of the status of inhabitants (*kedudukan penduduk*), not about their rights, but this can virtually be

41 *Persatuan Wartawan Indonesia.*
42 *Aliansi Jurnalis Independen.*
43 *Masyarakat Pers dan Penyiar Indonesia.*
44 The Eighteenth Session of Ad Hoc Committtee of 2000, page 69.

discounted as the Elucidation has never been recognised as a formal part of the Constitution. In any case, Tarigan argued that the formulation of Article 28 did not really provide strong constitutional protection for press freedom, a priority which was indeed absent during the constitution-making process in 1945.

The MPR sessions, in which human rights articles were discussed, were attended by numerous non-governmental activists, such as representatives from the Indonesian Legal Aid and Human Rights Association (PBHI)[45] and the Indonesian Legal Aid Foundation (YLBHI).[46] The PBHI, through its Chairman Hendardi, recommended a comprehensive and explicit inclusion of citizens' fundamental rights, i.e. first, the protection of human dignity; second, the guarantee of individual freedom; third, equality before the law; fourth, freedom of religion and belief; fifth, freedom of expression; sixth, freedom to unite and assemble; seventh, the right to reside and move; eighth, the right to work and a proper salary; and ninth, property and heritage rights. Press organisations, such as the PWI, AJI and MPP, focused more specifically on press freedom as a pillar of freedom of expression. Tarman Azam from PWI proposed that Article 28 of the UUD 1945 should be maintained, but suggested to add a new paragraph saying "[p]ress freedom is guaranteed by the state based on the right to information as an Indonesian human right as regulated by MPR Decrees and Law." Didik Supriyanto from AJI went even further saying that,

> Press Law 40/1999 has been more or less guaranteeing press freedom, because under Article 4 it is mentioned that: first, press freedom is guaranteed as a citizen's right; second, the national press cannot be censored, banned, or stopped from broadcasting. Moreover, the following two sub-articles mention that to guarantee press freedom, the national press has the right to seek, receive and impart ideas and information and has to be responsible for its reporting before the law, and the journalist has the right to refuse [to reveal his sources]. Nevertheless, the guarantee to press freedom, just as the freedom to unite or the freedom of speech, should be accommodated by the Constitution as a citizen's fundamental right. Article 28 of the 1945 Constitution, textually or practically cannot guarantee press freedom. (Mahkamah Konstitusi 2007: 166-167)

Didik continued saying that,

> The guarantee of press freedom similar to the freedom to unite and freedom of expression as fundamental rights, should be recognised and adopted into the Constitution. Article 28 of the 1945 Constitution, neither textually nor in practice secures press freedom. Press freedom and freedom of expression are human rights which human beings are entitled to, not because the state grants these rights. Because of that, there is no privilege of the state to limit human rights, moreover this state has been established on the principle of liberty. In this regard, we could learn from the American experience in practicing the constitution.

45 *Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesia.*
46 *Yayasan Lembaga Bantuan Hukum Indonesia.*

> After 180 years of application of the Constitution of the United States of America,[47] a first amendment was proposed in order to secure fundamental rights related to freedom of expression and press freedom. This amendment stated that Congress is not allowed to make legislation, which limits press freedom and freedom of expression. For that reason, it is necessary for the amendment of the 1945 Constitution to mention explicitly that the state should secure freedom of expression, freedom to unite and freedom to assemble. In addition, it should be mentioned that no regulation can limit those freedoms […]. The rule for press freedom should be given to society, either a code of ethic assembly, journalist associations, or a society-based press organisation.[48]

Lukas Luwarso from AJI added that press activities had been threatened by Penal Code articles:

> We have Press Law 40/1998, which it is textually quite good. Moreover, a number of foreign observers have said that Indonesia's Press Law is the best in Asia. But the problem is that the Press Law we have and that has been fought for by Parliament and the press has not been applied or operationalised yet. For what reason? We have the Penal Code which contains 35 articles threathening the press. The articles about defamation, libel, the *haatzaai artikelen* (hatred sowing articles) can be implemented to contain press reports.

AJI's statement was supported by the MPPI, represented by Leo Batubara, who argued specifically for deleting the word 'prescribed by statute' in Article 28. This argument was founded on past experience, when press laws Law 11/1966 and Law 21/1982 were applied to suppress press freedom.[49]

Despite their arguments, the critical perspectives brought forward by the journalist organisations and NGO activists were not seriously discussed in the reformulation of Article 28.

The main discussion focused on whether it was necessary to include all human rights articles of the Universal Declaration of Human Rights in the Amendment of the 1945 Constitution, whether only a limited number should be introduced, or whether the relevant articles should be left as they were. For instance, Drs H.A. Rosyad Sholeh from the Golkar Party (*Fraksi Utusan Golongan*) questioned the need for incorporating all human rights into the constitution. And if indeed so, he suggested preventing repetitive

47 The statement is incorrect, because the First Amendment was adopted in 1791, and it was four years after the passing of the Constitution. It may well be possible that his statement was misinterpreted by the subsequent team.

48 *Ibid*, page 59-60, Mahkamah Konstitusi (2008: 167-168).

49 *Ibid*, page 61-62, Mahkamah Konstitusi (2008: 169).

formulations, such as the right to express one's thought and opinion, which was mentioned several times in other legislation.[50]

Several debates during the plenary session, especially those about the Second Amendment and those attended by civil society groups, were concerned with articulating a true spirit of constitutionalism, paying special attention to freedom of expression. Nevertheless, many debates were far removed from notions of constitutionalism and merely addressed technicalities, such as format, structure and other such subsidiary questions. In the end, repetition in the formulation of the human rights articles could not be prevented either, including the formulation of freedom of expression (see Article 28 and Article 28E section (3) of UUD 1945).

This result was disappointing for journalists and others supporting press freedom. The absence of a special clause addressing press freedom reflected the lack of attention and unwillingness by MPR's members to take seriously press freedom in Indonesia. Even if the MPR invited many journalist organisations and press freedom experts during the amendment process, the idea of guaranteeing press freedom in the Constitution still gained insufficient support. Perhaps these representatives were afraid of a truly liberal press after so many years of repression.

However, in several discussions between 2007-2008, the Regional Representative Council (DPD)[51], which together with the national Parliament constitutes the MPR, completed a draft to amend the constitution. In this document, the DPD proposes a special article guaranteeing press freedom. It remains to be seen what will come of this suggestion.

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50 The idea of limiting the number of human rights articles was proposed by the Struggle for Indonesian Democracy Party (*Partai Demokrasi Indonesia Perjuagan*). According to their spokesman Muhammad Ali human rights had already been adopted in Indonesia's legal system, especially by Law 39/1999 on Human Rights, which contains 106 articles. Therefore, he argued, human rights did not need to be unnecessarily detailed in the Constitution. Golkar Party's Dra. Siti Hartarti Murdaya also objected to the 'deconstruction' of the 1945 Constitution by inserting many human rights articles, which in her perspective started to look *jelimet* (complicated) and containing too much overlap. Because this process had been so quick, she feared that the Constitution would lose its 1945 spirit and soul of the Independence Proclamation.

51 The People's Consultative Assembly (MPR), comprises the members of the DPR and the DPD. Article 22D of Indonesian Constitution restricts the DPD to dealing with law on "regional autonomy, the relationship of central and local government, formation, expansion and merger of regions, management of natural resources and other economic resources, and Bills related to the financial balance between the centre and the regions." The DPD can propose particular laws to the DPR and must be heard on any regional laws proposed by the DPR.

2.7. Conclusion: Constitutionalism and Freedom of Expression

This overview of constitutional debates shows in what way the legal concept of freedom of expression was ultimately broadened and given a clear constitutional basis. Although the 1945 Constitution still holds no explicit provision on press freedom, Article 28's clause on freedom of expression is generally deemed to also include press freedom.

As we have seen, the wish to provide a constitutional foundation for freedom of expression has been the subject of profound debate since 1945, when during the BPUPKI sessions it was considered in the context of kinship/mutual assistance and social justice versus liberalism-individualism. The BPUPKI discussions finally resulted in the elegant but ambivalent formulation of Article 28 of the Indonesian Constitution (UUD 1945), which relegates the regulation of the freedom of expression to lower levels of legislation. Even if they ended in a compromise, the debates on the freedom of expression in 1945 show that the 'founding fathers' of Indonesia were capable of thinking critically about some of the basic principles and universalism of human rights. Nevertheless, the result was disappointing from a human rights perspective, as the final draft of the 1945 Constitution only provided a very limited number of human rights articles, whereas during the debates the importance of human rights for every Indonesian citizen had been underlined. The debates show that there was a general willingness to realise and guarantee freedom of expression in order to prevent the misuse of power, and there seemed to be agreement about this point – even if the participants supported different reasons and perspectives and proposed different ways to achieve this.

The debate on freedom of expression disappeared during the drafting process of the 1949 Federal Constitution and the Provisional Constitution of the Republic of Indonesia (UUDS 1950), but reappeared during the *Konstituante* sessions as well as during the amendment process of the 1945 Constitution in the MPR in 2000.

The *Konstituante* sessions highlight how freedom or human rights could be limited or restricted by means of the so-called derogation articles. This idea reappeared in 2000 during the debates about the Second Amendment of the 1945 Constitution, but the debate in the *Konstituante* was sharper and deeper. In the end the *Konstituante* agreed that "[e]stablishing rights and freedoms as explained in this part can only be limited by legislation with the purpose of guaranteeing and respecting non-derogable rights and freedoms and fulfilling the requirements of legal justice, peace, decency, and prosperity in a democratic society." This idea was finally adopted into the Second Amendment of 2000, in Article 28J, section (2).

Furthermore, articles on the right to information and the right to complain against the state, as a requirement for obtaining freedom of expression was discussed by the *Konstituante* in a very comprehensive manner. However, these debates had few direct results due to the re-enactment of UUD 1945 by Soekarno's decree on 5 July 1959. This idea of the *Konstituante* was extremely relevant for the political context at that time, as well as for the New Order period, when access to information was extremely difficult, tightly controlled by the Soeharto regime which acted as a single authority to claim or justify information flows. In this situation, arbitrary and repressive rule could not be controlled and there was no constitutional clause to mount in public debates.

Yet, eventually, it reappeared in the 2000 Amendment. Article 28F provides a guarantee on access to information. The conceptual development of freedom of expression in the Indonesian Constitution has thus evolved progressively. The formulation of Article 28 of the 1945 Constitution was the result of the efforts by Muhammad Hatta, who as a thinker and Indonesian socialist showed perseverance and courage in highlighting the importance of freedom of expression in the new constitution. What he did not fully achieve at the time was finally realised more than half a century later, when human rights articles and freedom of expression were incorporated into the 1945 Constitution in order to prevent arbitrary and misuse of power.

However, the formulation of a specific article on press freedom failed. Press freedom's constitutional basis is freedom of expression, and to an extent freedom of information. This is not enough. The concept of press freedom is still unclear and open to misuse. This has been the failure of those members of the MPR who refused to recognise press freedom as a major pillar for constitutional democracy. Hence, the legal arena to promote and strengthen press freedom is laid down in legislation, but will be seriously endangered if law-makers do not consider the principles of the rule of law.

Furthermore, the constitutional debates in the past demonstrate how freedom or liberty to express opinions or thought in oral or written form has been debated many times and has become part of constitution- making history. Moreover, the development of conceptual and constitutional thoughts is inseparable from the context of the political dynamics. Certainly, the relevance of those debates goes beyond being historical documents, but should be a challenge to explore, position, and enlighten the constitutionalist spirit of human rights in a more democratic Indonesian constitutional law system. In this regard, press freedom still ought to be incorporated as a constitutional right, if Indonesia is serious about recognising press freedom as one of the pillars of a constitutional democracy.

3 From the VOC to the End of Guided Democracy: Press Freedom in Legislation

3.1. Introduction

A legal history of the press in Indonesia is the story of the politics of different regimes and to what extent they were willing to allow dissident voices. During the colonial period, from the moment the Dutch East India Company (VOC)[1] first arrived, controlling public expression was a primary concern of the government. Laws and decrees targeted journalists, editors and publishers in order to silence dissident voices, and from the 1910s preventing the emergence of a nationalist press demanding independence became a particular concern. These colonial laws and decrees were adopted by the newborn Republic through Article II of the Transitional Rules of Indonesia's Constitution in 1945.[2] They included notorious articles addressing crimes against the public order in the Netherlands-Indies Penal Code (Wetboek van Strafrecht voor Nederlands-Indië or WvS. Ned. Ind), such as 'sowing hatred', insulting state bodies, 'inciting' (*opruiïng*), defamation, and crimes against decency.[3] Yet, many laws and regulations limiting press freedom were added by the Indonesian legislator later on.

This chapter examines such laws and decrees against press freedom from a legal-historical perspective. It starts with the colonial period, and then analyses how freedom of expression and press freedom were adopted into Indonesian laws and policies after independence, until the end of Guided Democracy in 1965. I will moreover try to explain these developments and therefore include in this analysis a description of the relation between legislation or policies and their political context.

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1 Verenigde Oost-Indische Compagnie.

2 Presidential Decree 2/1945 confirmed this by recognising "all the state institutions and regulations as long as they are not contradictory to the Constitution."

3 The formulation of these articles was based on the Dutch *Wetboek van Strafrecht* (WvS). However, the hatred sowing articles (*haatzaai-artikelen)* were specifically meant for the Netherlands Indies, in order to allow the government to take measures against those criticising the government. One of them, Article 155, was applied many times, including in 1930 against Soekarno (Soekarno 1989).

3.2. The Netherlands Indies and the Japanese Occupation

3.2.1. The VOC Administration

The story about 'modern' press restrictions by legislation in what is now Indonesia started with the rule of the VOC in the eighteenth century. In 1712 the Heeren XVII of the VOC even went so far as to prohibit all press publications in the Netherlands Indies. The main reason was that the VOC did not want its trade rivals to obtain relevant knowledge from commercial news published for a broad readership (Faber 1930: 13-14). Curtailing advertisement in particular made it easier for the VOC to maintain its trade monopoly.

This measure was actually taken before the emergence of a proper press. It was only some thirty years later that the first newspaper was introduced to the Netherlands Indies, when on 7 August 1744 trader Jan Erdmans Jordens first published the *Bataviase Nouvelles en Politique Raisonnementen* (Batavia News and Political Reasonings) in Batavia. Governor-General Gustaaf Willem Baron van Imhoff gave permission for the publication, but changed his mind two years later (on 20 June 1746) after the Director of the VOC asked him to ban the paper. The reason was the same as in 1712: the VOC attempted to keep any information relating to its activities as secret as possible in order to avoid competition, even though – ironically – the information published in the *Bataviase Nouvelles* was not critical at all and had little trade value. This decision showed the extent to which the VOC feared for any publication to affect its monopoly of power in the Netherlands Indies (Termorshuizen 2001: 27-32). Hence, the social and political roles of newspapers during the VOC administration were limited.

This situation only changed after the bankruptcy of the VOC, the subsequent take-over of the colony by the Dutch state, the Napoleonic Wars and the British Interregnum from 1811 to 1816. After the British had returned the Netherlands Indies to the Netherlands the first newspaper appeared in 1817: the *Bataviasche Courant*. It consisted of a part containing official notices to the public and an informal part (Termorshuizen 2001: 46-47; Faber 1930: 32-36). It was followed by the *Bataviasche Advertentieblad* (1827),[4] *Nederlands Indiesche Handelsblad* (1828),[5] *Soerabajasche Courant* (1831),[6] and *Samarangsche Advertentieblad* (1845).[7] There were also newspaper publications with Malay

4 *Bataviasche Advertentieblad* was more an advertisement paper than a newspaper (Termorshuizen 2001: 47).

5 *Nederlands Indiesche Handelsblad* was a newspaper published by the government, its content consisted of news and messages relating to trade in the Indonesian archipelago (Termorshuizen 2001: 56).

6 *Soerabajasche Courant,* its name changed to *Soerabaya Courant* in 1861 started as an advertisement paper, but soon became more of a newspaper.

7 *Samarangsche Advertentieblad* was an advertisement newspaper.

names and in Malay language, such as *Bramartani* (1855), *Soerat Kabar Bahasa Melajoe* (1856), *Selompret Melajoe* (1860), *Bintang Timor* (1862), *Djeroe Martani* (1864), and *Biang Lala* in Jakarta (1867). All of them were published on Java. The newspapers mainly contained public notices, such as government announcements, updates on official activities, and new regulations.

Between 1817 and 1848 the government left these publications alone, which is not as remarkable as it may seem because they were not very critical of the former's policy. This situation only started to change after the constitutional reform of the Dutch state and its colony from 1848 until 1854.

3.2.2. The Dutch Constitution of 1848 and the Government Regulation for the Netherlands-Indies (Regerings Reglement) of 1854

The Dutch Constitution of 1848 and the *Regerings Reglement* for the Netherlands-Indies of 1854 provided a new legal underpinning for Dutch rule in the Netherlands Indies. They provided the points of departure for freedom of expression in the Netherlands Indies for the largest part of the colonial period. Significantly, Article 8 of the 1848 Constitution provided for press freedom: "No one needs prior permission to express through the press any thoughts or feelings, without prejudice to his responsibility under the law." Dutch liberal MPs, led by Thorbecke, struggled against the conservatives to insert the same provision into the 1854 *Regerings Reglement,* as they believed freedom of the press was needed as a tool to monitor the Dutch government. Promoting press freedom was for a large part inspired by their own experience of suppression under the authoritarian government of Willem I. However, the liberal MPs were opposed by the conservative faction led by ex-Governor-General (1833-1836) Jean Chrétien Baud, who promoted clear limitations on press freedom. The conservatives feared that the fact that the native population of the Indies was being "somewhat exploited" might be "exhibited" by opposition newspapers and could then be employed as a weapon against the government (Faber 1930: 40).

The result was a compromise, but closer to the liberal than to the conservative point of view. Article 110 of the *Regerings Reglement* stipulated that:

> The supervision of the press by the Government must be regulated by ordinance in agreement with the principle that the publication of ideas and sentiments by the press and the admission of printed manner from outside the Netherlands must not be submitted to any restriction except such as is needed to ensure public order.

3.2.3. Drukpersreglement (1856)

Unfortunately, the elaboration of Article 110 of *Regerings Reglement* into the Regulation on Printed Matter in the Netherlands Indies of 1856 (*Reglement*

op de drukwerken in Nederlandsch-Indie, or the so-called *Drukpersreglement*),[8] showed little of its liberal intent. Thirty-five articles under the *Drukpersreglement* were enacted on 8 April 1856 by a Royal Decree (*Koninklijk Besluit*) in Amsterdam, then officially proclaimed as an Ordinance by the Governor-General in the Netherlands-Indies on 10 November 1856.

The *Drukpersreglement* clearly aimed at stifling criticism of the colonial government (Adam 1995: 17). It was scornfully called a "brainchild of darkness" by Thorbecke (Faber 1930: 40) and it immediately led to serious protests and even a riot by journalists and others in the Netherlands Indies (Termorshuizen 2001: 77). The *Drukpersreglement* was seriously criticised in Parliament in 1857, but the MPs could do little more than express their dismay – the regulation was to remain in place until the end of Dutch rule over the Indies.

The *Drukpersreglement* introduced a system of pre-censorship for the press, which was formulated under article 13:

> Of each paper printed in the Netherlands Indies, or printed elsewhere bar the Netherlands and published in the Netherlands Indies, the printing house or publisher is obliged to submit a signed copy to the head of the local administration (*het hoofd van het plaatselijk bestuur*), another copy to the public prosecutor (*officier van justitie*), and a third copy to the general secretariat. The printing house or publisher will receive a free proof of receipt. Violation against this provision shall be liable to a fine of 50 to 1000 guilders.

This pre-censorship system meant the end of press freedom in the Netherlands Indies, since it was no longer allowed to publish thoughts and feelings through the press without prior authorisation. Every new magazine, journal or periodical needed permission from the *Binnenlands Bestuur.*[9] In addition, the *Drukpersreglement* introduced criminal liability for defamation (*smaad*), insult (*hoon*), or slander (*laster*) against the King of the Netherlands or his family (article 23) or against public officials (article 25).

The government proved moreover willing to use its powers: in 1864 it fined a journalist from the *Java Bode*, in 1868 an editor of the *Soerabajasche Handelsblad,* in 1869 the *Celebes Courant,* and *Jeroe Martani*, and in 1873 the *Samarangsche Courant* and – again – the *Java Bode*.[10] These cases mostly related to defamation and insult. The government even exiled the editor of the *Samarangsche Courant* and a journalist from the *Java Bode.* Both cases were unsuccessfully challenged in the court (Said 1988: 16).

8 Koninklijk Besluit No. 54, 8 April 1956, Staatsblad van Nederlandsch-Indie 1856 No. 74: Reglement of de Drukwerken in Nederlandsch-Indie.

9 According to Gerard Termorshuizen this is the reason why at least 95 percent of the printed newspapers from the Netherlands Indies can be found in the *Algemeen Rijksarchief* (General State Archives) in The Hague, Personal communication, Leiden, 27 March 2010.

10 Unfortunately, I could not find clearly to what extent the threat of a fine influenced journalists or papers to publish or not to publish.

The obligation to submit to the authorities an unsigned copy of all manuscripts before publication was also challenged by the printer/publisher of the *Soerabaja Courant* in 1869. He argued that this obligation could not possibly apply to daily newspapers. When he refused to submit the first number of his *Courant* to the public prosecutor before publication, a prosecution followed. Surprisingly, the Soerabaja Court decided that the defendant was correct. According to the judges daily publications were regulated by another article.[11] The court acquitted the accused, and this judgement was confirmed on appeal by the Supreme Court on 4 June 1869 (Faber 1930: 40-41). This case shows that there was at least the possibility to challenge the government and that newspapers were henceforth subject to a less stringent regime, but it did not alter the repressive nature of press regulation.

3.2.4. Press and Ethical Policies

> Bumiputera Hindia Olanda yang baru bangun patut
> mendapat hak dan bebas (rechten en vrijheden),
> baik dengan tulisan, baik dengan bicara.[12]
> (Tirto Adhi Soerjo, 1909a)

In the early twentieth century the new 'Ethical Policy,' inspired by C. Th. van Deventer's article "A Debt of Honour" (*Een Eereschuld*), led to a different government view of press freedom (Maters 1998: 79-80). The wish to repay the 'surplus millions' the Netherlands had reaped from the Indies by improving the socio-economic welfare of 'the natives' through educational and economic measures (Deventer 1899) was accompanied by the birth of a new consciousness among the Indonesian people in the closing years of the nineteenth century (Adam 1995: 90-107; Ricklefs 1981).

Newspapers in the Netherlands Indies were an important source of information on the situation in the colonies and contributed to the criticism underpinning Van Deventer's quest. A well-known example of a critical journalist is Pieter Brooshooft (1845–1921), who wrote many articles about oppression and inequities of the colonial system, and about the moral duty of the Dutch to repay the Indies what the Indies was due. As the editor of the largest and liveliest of the Dutch-language Indies' newspapers, *De Locomotief*, Brooshooft sent reporters all over the Netherlands Indies to investigate what was wrong. He paid special attention to the so-called 'declining Native welfare,' the actual reduction in living standards of large parts of the

11 I have not been able to find this article, while Faber in his writing also did not give any further explanation about this issue.

12 "Netherlands-Indies indigenous inhabitants who have just awoken ought to get rights and freedoms, both in writing and in speaking."

population in substantial areas of the colony at the end of the nineteenth century (Vickers 2005: 17).

In 1906, the changed atmosphere led to an amendment of the *Drukpersreglement*. It was initiated by the Minister of Colonial Affairs, who also requested the Governor-General to formulate a new penal code for the Netherlands Indies. The 19 March 1906 Royal Decree[13] abolished the notorious pre-censorship system. According to its Article 17, printing houses were responsible for the entire content of the newspapers or periodicals they published, if the author could not be prosecuted or convicted, or if the judgment could not be executed against him (Faber 1930: 42). Although censorship was still possible, the changes to the *Drukpersreglement* thus contributed to more freedom of the press in the Netherlands Indies, and in particular promoted the involvement of Chinese and Indonesians in public debates waged in the press. Criticism of unjust policies gained a platform and promoted more political consciousness among Indonesians (Maters 1998).

Before the introduction of the so-called 'Ethical Policy,' there was actually no 'native' press of political importance, but in 1903 R.M Tirto Adhi Soerjo established *Soenda Berita* and in 1907 *Medan Prijaji* (Termorshuizen 2011: 148).[14] He managed to get the funding for *Soenda Berita* by selling his own property in Batavia, and found support for his effort with the Regent of Cianjur. The newspaper quickly developed an agenda of knowledge promotion and preparing the reader for the coming modernisation. It addressed topics as health, medicine, medical review, bacteriology, meteorology, law, governance, Islamic law, photography, and *wayang* (folk puppetry). It also introduced specific rubrics for women, such as cooking, tailoring, and housekeeping, some of them even written by female authors. According to Pramoedya Ananta Toer, the *Soenda Berita* was really a 'one-man business' (Toer 1985: 39-40). *Medan Prijaji* was of a more political nature. Next to providing general news, the newspaper aimed at promoting justice for Indonesians – through legal aid, providing access for marginalised people to forums of complaint, providing information for job seekers in Batavia and pushing citizens to become involved in organisations and to organise themselves (Toer 1985: 46). Soerjo developed several other publications, such as *Soeloeh Keadilan* (1907) and *Poetri Hindia* (1908) and set the stage for many other newspapers, journals and magazines.

On top of the changes to the *Drukpersreglement* came the liberal policies of Governor-General J.B. van Heutsz, who took office in 1904. Soerjo applauded the appointment of Van Heutsz, because he had finally brought the war

13 Koninklijk Besluit, 19 March 1906, Staatsblad van Nederlandsch-Indië 1906 No. 270.

14 R.M. Tirto Adhi Soeryo was awarded the title of Father of the National Press by Soeharto in 1973, and National Hero by Soesilo Bambang Yudhoyono in 2006 (by Presidential Decree 85/TK/2006).

in Aceh to an end "and the people in Java had been under a heavy burden to provide the funds for the Aceh War" (1904: 31-32).[15] Soerjo also noted that before Van Heutsz's appointment newspapers could not criticise the government for arbitrariness of its officials. This was now allowed, as long as it did not constitute an attack on the honour (*eer*) and moral value (*zedelijke waarde*) of persons or of officials – but one could use sharp wordings. In Soerjo's words: "This leeway (policy) is enough for the press to write about influential persons who govern in arbitrary ways. The more the Malay press dares to state its thoughts, the more attention the government will pay. Such attention is the aim of Governor-General Van Heutsz. He likes supporting the press. He allows journalists to attend official parties and visit prohibited areas, he even gives financial support – taken from the 25 percentage budget reduction of the Dutch railways – to journalists. He also very much respects and gives attention to the Malay press, and sees the press as useful for the governed nation" (Toer 1985: 53).[16] Indeed, Van Heutsz encouraged Malay language journalism, and thus provided the opportunity for Soerjo and his colleagues to publish their articles. Soerjo also became friends with Van Kol, Stigter (director of the Koningin Wilhelmina School), and other 'ethicals,' and even enjoyed direct personal access to Van Heutsz (Shiraishi 1987: 132).

Yet, this did not prevent Soerjo from getting into trouble in a case which demonstrated that the boundaries were still tight. In 1909 Soerjo was prosecuted for a '*persdelict*' concerning an article about an official from the indigenous administration, Mas Tjokrosonto (*Wedono*[17] in Cangkrep, Purworejo) and one from the Dutch administration, A. Simon (*Aspirant Controleur*). In the article these officials were called '*snotaap*' (naughty boy), '*ambtenaar broddelaar*' (messy official) or '*ambtenaar stupperaar*' (stupid official).[18] On the basis of Article 25 of the *Drukpersreglement*, Soerjo was prosecuted after Simon had filed a complaint for defamation (*smaad*), insult (*hoon*), or slander (*laster*), and was ultimately sentenced by the Court of Appeal (*Raad van Justitie*) to two months of seclusion away from his home (Soerjo 1909b).

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15 This is somewhat ironic, since the Military Governor in Aceh Van Heutsz had conducted a scorched earth policy in which 60,000-70,000 Acehnese lost their lives (an estimated 37,000 troops were killed on the Dutch side) (Vickers 2005: 13). However, Van Heutsz's military success had turned him into a popular hero of expansion, and therefore he was in a position to silence some of the conservative criticism on the 'Ethical Policy.'

16 I have not been able to find where Toer got his quotation from.

17 Official position at the sub-district level.

18 The case was about the article "*Betapa Satoe Pertolongan Diartikan*" ('How An Act of Help Should be Understood') in *Medan Prijaji* no. 24 of 30 June 1908. It referred to earlier articles in *Medan Prijaji*, no. 19 and 20 pp. 224-235 and 244-258, "*Persdelict, Oempatan dan Penistaan: Aspirant Controleur A Simon contra Tirto Adhi Soerjo, Hoofredaktur Medan Prijaji*" ("Press crime, Detraction and Defamation: Candidate Controller A. Simon Against Adhi Soerjo, Chief Editor of the Medan Aristocrat").

3.2.5. Haatzaai Artikelen (1914)

The climate of press freedom changed substantially after the introduction of the amendment of the *Wetboek van Strafrecht in Nederlands Indië* (Penal Code in the Netherlands Indies) in 1914.[19] In response to the emergence of a nationalist movement and the growth of a vernacular press which was increasingly critical of the Dutch government in the Netherlands Indies, the Dutch authorities introduced stricter controls on the press. Prior to these amendments, on 2 June 1913, Minister of Colonial Affairs De Waal Malefijt wrote to Governor-General Idenburg:

> Strong action should be taken against the public preaching of revolt against the Dutch authorities, against those extremely tiresome efforts to discredit the best intentions of the Government, against the sowing of hate and discordance between the various races which has become the order of the day. Tolerating this manifestation or leaving their repression to the constantly varying opinion of the judiciary in the Indies – which in practice amounts to the same thing – is like committing political suicide…. Introduction of a preventive control has, of course, been made impossible by the changes to the press rules in 1906. Therefore, a new means of repression should be looked for, not by the judiciary but by administrative authorities (Wal 1967: p. 239).

Indeed, at that time administrative intervention into press matters was no longer permitted. The authorities in the Netherlands Indies had to resort to criminal prosecution when they thought an author or a journalist had gone too far in discrediting the government and, therefore, had to be accused of attempting to disrupt public order and tranquillity (Maier 1991: 68-70). De Waal Malefijt's successor as Minister of Colonial Affairs, Mr. Th. B. Pleyte (1913-1918), was pushed by Parliament to take the initiative to keep a tighter control on the press. It was in this context that the Netherlands Indies' Penal Code was amended. It gave the authorities the power to take action whenever they deemed this necessary (Maters 1998: 98).

Following British India, where the government in 1908 enacted the Newspapers (Incitement to Offences) Act, in January 1914 the Dutch Parliament introduced several articles restricting press freedom (Termorshuizen 2011: 155-156). Most notable were Articles 63a and b, the so-called *haatzaai artikelen* (hatred sowing articles):[20]

> Article 63a: He, who by words, signs or depictions or in any other way gives rise or promotes feelings of hostility, hatred or contempt against the government of the Netherlands or the Netherlands Indies, shall be punished with a penal servitude sentence of five to ten years.

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19 Royal Decree of 7 Januari 1914 no. 28 (S. 205), (Royal Decree on amending and supplementing the Penal Code for Europeans in the Netherlands Indies and amendment of the Regulations on printed matters in the Netherlands-Indies).

20 Other provisions, however, are more recent. The articles 137c and 137d about insulting a group in society and incitement to hatred or discrimination were formulated in 1934. The extensions in Articles 137e and 137f were added after Indonesia became independent, in 1971 and 1991.

> Article 63b: He, who by words, signs or depictions or in any other way gives rise to or promotes feelings of hostility, hatred or contempt against different groups of Dutch nationals or residents of the Netherlands Indies, shall be punished with imprisonment varying between six days and five years.

A month later, Governor-General Idenburg released Decree 32/1914 (S. 206 and 207), which introduced similar measures with harsher punishments for the Indonesian population committing such offences – to up to ten years of hard labour in chains. After the unification process of the Penal Code, which resulted in a single Code applicable to all population groups, these articles were refined to become Articles 154, 155,[21] 156,[22] and 157.[23] The new formulations were meant to prevent different interpretations (Termorshuizen 2011: 156). They were usually applied in connection with other notorious articles from the Penal Code about crimes against public authority (especially Articles 207[24] and 208[25]).

In fact, the *haatzaai-artikelen* were not such a novelty. The *Drukpersreglement* in 1857 already enabled the prosecution of journalists and editors for 'defamation' of the Governor-General or for inciting people to hatred of or con-

21 Section (1): Any person who disseminates, openly demonstrates or puts up a writing where feelings of hostility, hatred or contempt against the Government of Indonesia are expressed, with the intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of four years and six months or a maximum fine of three hundred *f*. Section (2): If the offender commits the crime in his profession and during the commission of the crime five years have not yet elapsed since an earlier conviction of the person on account of a similar crime has become final, he may be released from the exercise of said profession.

22 The person who publicly gives expression to feelings of hostility, hatred or contempt against one or more groups of the population of Indonesia, shall be punished by a maximum imprisonment of four years or a maximum fine of three hundred *f*.
By group in this and in the following article shall be understood each part of the population of the Netherlands Indies that distinguishes itself from one or more other parts of that population by race, country of origin, religion, origin, descent, nationality or constitutional condition.

23 Any person who disseminates, openly demonstrates or puts up a writing or portrait where feelings of hostility, hatred or contempt against or among groups of the population of the Netherlands Indies are expressed, with the intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of two years and six months or a maximum fine of three hundred *f*.

24 Any person who with deliberate intent in public, orally or in writing, insults an authority or a public body set up in the Netherlands Indies, shall be punished by a maximum imprisonment of one year and six months or a maximum fine of three hundred *f*.

25 Section (1): Any person who disseminates, openly demonstrates or puts up a writing or portrait containing an insult against an authority or public body set up in the Netherlands Indies with the intent to give publicity to the insulting content or to enhance the publicity thereof, shall be punished by a maximum imprisonment of four months or a maximum fine of three hundred *f*; Section (2): If the offender commits the crime in his profession and during the commission of the crime two years have not yet elapsed since an earlier conviction of the person on account of a similar crime has become final, he may be deprived of said profession.

tempt for the government. It is moreover not true that the *haatzaai-artikelen* were only applicable to the Netherlands Indies, as claimed by R.H. Siregar et al. (2000: 12), for they had also been included as Articles 261 and 262 in the Penal Code in the Netherlands in 1881. Moreover, other articles in the Penal Code could be used against journalists in the Netherlands Indies as well. These included Chapter II: Crimes against the Dignity of Kingdom of the Netherlands and Governor-General (Articles 134 and 137); the articles about incitement (*opruiing*) in Chapter V: Crimes Against the Public Order (Articles 160 and 161); and Chapter XVI: Defamation (Articles 310, 315, 316, 317, 320, and 321).[26]

In practice, the application of the *haatzaai-artikelen* turned out to be discriminatory, as Dutch and Indonesian (*Bumiputera)* press were often treated differently, and the *artikelen* seemed to be used especially to attack the Indonesian nationalist movement.[27] Defamatory articles in Dutch newspapers or journals were not nearly as often prosecuted as those in Indonesian ones. The pluralist system of the administration of justice exacerbated this situation (Maters 1998: Chapter III-IV). Unfortunately there is no evidence of how often such criminal prosecution took place, but a number of cases have been reported. The best-known involved Marco Kartodikromo, a former *Medan Prijaji* journalist, who started his own newspaper, *Doenia Bergerak* (World in Motion), in 1914. This paper was considered the mouthpiece of the Native Indonesian Journalists' Association (*Inlandse Journalisten Bond*). Kartodikromo wrote an attack on the Dutch Advisor on Native Affairs R.A. Rinkes in 1914. On 26 January 1915 the authorities started an investigation on account of the publication of several anti-Dutch editorials. This led to his incarceration in the same year, but after a public outcry he was released after 100 days (Vickers 2005: 75-76; Wasono 2000). It is unclear what legal basis was used to indict him, but the case is representative of the growing level of repression by the authorities.

3.2.6. The Persbreidel Ordonnantie (1931)

The suppression of press freedom worsened when the Press Banning Ordinance (*Persbreidel Ordonnantie*)[28] was introduced in the Netherlands Indies on 7 September 1931. The draft of this ordinance led to vehement debates in Par-

26 These articles will be further discussed in Chapter V: Press Freedom in Criminal Law.

27 All of the major nationalist leaders were in one way or another involved in the press. Soekarno was editor and publisher of the magazine *Fikiran Rakjat* (People's Thought); Muhammad Hatta was a regular contributor to the magazine *Daulat Rakjat* (People's Sovereignty); Amir Syarifudin was a member of the editorial staff of the magazine *Banteng* (Wild Buffalo); Haji Agus Salim was editor in chief of *Mestika* (Flower).

28 Staatsblad van Nederlandsch-Indië 1931 No. 394 jo. Staatsblad van Nederlandsch-Indië 1932 No. 44. The original title is '*Drukwerken, Bescherming van de openbare orde tegen ongewenschte periodiek verschijnende drukwerken*' (Printed matters: Protection of public order against undesirable periodical printings).

liament and was seriously criticised by journalists, who had been excluded from the drafting process. The enactment of the Press Banning Ordinance can be explained by the rise of a political movement that was increasingly critical of the Dutch government's colonial policies. It combined socialist, communist and nationalist groups, and arose both in the Netherlands and the Netherlands Indies. According to Maters (1998: 204, 220), the Press Banning Ordinance was mainly a response to the communist insurgency in East Java of 1926.

Moreover, between 1927 and 1931 the government found that the Penal Code proved an insufficient basis for applying the restrictive policies deemed necessary. The government wished to push the judiciary out of press control and to return it to the realm of administrative policies. To this end it developed a license system which could be applied directly (Termorshuizen 2011: 156). After the enactment of the Press Banning Ordinance, there were two mechanisms to control the press: through the criminal courts and through a license system.

Articles 1 and 2 of the Press Banning Ordinance stated that the Governor-General had the right to ban publications for a maximum of eight days in the interest of public order. If he found that the newspaper concerned was violating public order, he could ban the publication for a longer period, without involvement of the judiciary. Article 2 section (1) and (3) stated:

> If the designation referred to previous article does not have the desired effect, the Governor-General may, after hearing the Council of the Netherlands Indies, issue a ban on printing, publishing and distributing such print works, in the case of a newspaper for a maximum of eight days and in the case of other printed periodicals for a maximum of three times the period between the appearance of two consecutive issues.
>
> When, after the ban has expired, printing of the banned work is resumed, appearance of the same printed materials can be temporarily banned as designated by article 1, as long as the designation referred to in article 1 is in force. For a newspaper, the duration of a second or third ban can be no more than thirty consecutive days.

One of the newspapers banned on the basis of the Press Banning Ordinance was *Soeara Oemoem* in Surabaya. The ban, by Decree No. 6 of 23 June 1933, followed the newspaper's reports about the mutiny on the '*De Zeven Provinciën*' [The Seven Provinces] considering them as 'inciting.'[29] This was the outcome of an investigation process started by Attorney General Verheijen, who

29 The mutiny broke out on the Dutch warship *De Zeven Provinciën*, when a group of about ten native sailors seized the firearms and ammunition on board, and took over the ship. Almost all of the native crew members, about 180 men, joined in the mutiny, while of the approximately 50 Europeans on board some immediately and enthusiastically joined the mutineers, while others hesitated and tried to exercise a restraining influence (Bloom 1975; Western Argus (Kalgoorlie, WA 1916 – 1938), Tuesday 28 February 1933, page 1). The case led to a strong call in the Netherlands for stronger government powers in the Netherlands Indies.

had Tjindar Boemi, the author of the *Soeara Oemoem* articles, arrested. He reported to the Governor-General that the investigation showed that *Soeara Oemoem*'s articles were of an inciting nature. After having heard the advice of the Council of the Netherlands Indies, the Attorney General suggested to the Governor-General to impose a ban on the basis of the Press Banning Ordinance. Four days later, the Council of the Netherlands Indies gave the same advice to the Governor-General, and on 23 June 1933, the Governor General issued the decree (Maters 1998: 239; Swantoro and Atmakusumah 2002: 197-198).

Between 1933 and 1935, the government banned 18 Indonesian and five Dutch newspapers. On Java and Madura, in 1934 alone the government banned 26 daily newspapers – out of a total of 30 daily newspapers. On top of this, 108 weeklies and 244 monthlies were banned (Maters 1998: 237, 241). These bans clearly had an appalling effect on press freedom in the Netherlands Indies, far worse than the Penal Code. Any article relating to nationalist consciousness, struggle, democracy and independence was suspect[30] and considered a threat for Dutch rule over the Netherlands Indies (Maters 1998: 238-239). Although the Press Banning Ordinance was primarily aimed at controlling Indonesian newspapers, it was also applied to European ones. Ironically, this led to a situation where the Indonesian nationalist press found itself in the same situation as the extreme right-wing and fiercely Dutch nationalist '*Het Nationale Weekblad*' (The National Weekly), which was prohibited from being published for three weeks in 1938.

In 1940 two military regulations were added to the repressive machinery already in place: Military Ordinance 14/Dv.0/7A-3 (*Verordening van het Militair Gezag*, Javasche Courant 17-5-1940 No. 40 a) and Military Ordinance 66/Dv.0/VII A-3 (Javasche Courant 26-3-1941 No. 24 a). They prohibited publishing any news or reports concerning military matters which (a) endangered public order and security; (b) related to army, navy, air force, state defense, and/or other military interests, and which were never to be made public.

Press freedom in the Netherlands Indies was directly influenced by political dynamics in the Netherlands and the Netherlands Indies. The main actors were Parliament and the Minister of Colonial Affairs in the Netherlands and the Governor-General in the Netherlands Indies. The struggle for freedom of expression by socialist newspapers in the Netherlands and in the Netherlands Indies, as well as the emergence of a vernacular press in the Netherlands Indies contributed to an increasing number of press reports that were critical about the government. This attitude was also promoted

30 Press bans in 1933 were applied to silence the 'non-cooperative movement,' by banning *Pemoeda* and *Gempar* as papers of the Partindo (Indonesia Party), *Medan Rakjat* as paper of the Permi (Union of Indonesian Muslims), and *Pahlawan Moeda* as paper of the HPII (Association of Indonesia Moslem Youth) (Maters 1998: 239).

by the political context of the 'Ethical Policy' in the early twentieth century discussed above, which led to a 'modern' self-consciousness for Indonesians as reflected in the press owned by Indonesians.

In summary, throughout the colonial period the government combined multiple instruments for restraining press freedom, ranging from preventive to repressive censorship. The Penal Code's *haatzaai-artikelen* are often considered key to the repression, but in fact the involvement of the judiciary made this law not as effective as the government would have wanted. This led the Minister of Colonial Affairs to introduce administrative policies for more direct forms of control, and ultimately Parliament enacted the Press Banning Ordinance in 1931. This marked the end of an age of relative press freedom, with the period from 1906 until 1914 as the liberal highlight. After 1914, growing political consciousness among Indonesians and the emergence of the nationalist movement made the government fearful of the role of newspapers in the vernacular language in promoting these ideas among larger sections of Indonesian society. The situation for the Dutch language press deteriorated as well, but in particular after 1931 the Press Banning Ordinance was mainly applied against the *Bumiputera* press. Administrative sanctions provided the effective instrument the colonial administration was looking for, not only because they did not involve judicial checks, but also because they could be applied against newspapers rather than individual journalists or editors. The absence of an appeal or even complaint mechanism made administrative sanctions even more expeditious. At the end of Dutch colonial rule, therefore, there was not much left of press freedom in the Netherlands Indies.

3.2.7. The Press and the Japanese

On 1 March 1942 Japanese troops landed at three places along the northern coast of Java and quickly defeated the Dutch colonial army. This marked the start of more than three and a half years of Japanese occupation, lasting until after the end of the Second World War on 2 September 1945.

In spite of mixed feelings, in the beginning many Indonesians enthusiastically welcomed the Japanese invasion as a liberation from the Dutch, waving flags and shouting slogans such as "Japan is our elder brother." As Soekarno said,

> I know all about their brutality. I know of Nipponese behavior in occupied territory – but okay. I am fully prepared for a few years of this. I must rationally consider what they can do for my people. We must be grateful to the Japanese. We can use them… (Adams 1965: 157)

Nevertheless, the situation rapidly deteriorated. During the Japanese occupation of Indonesia, many who lived in areas considered strategically important were subjected to torture, rape, slavery, arbitrary arrest and exe-

cution, and other atrocities. An estimated 270,000 Indonesians were deported as unpaid labourers or *romusha* to work on Japanese military projects and thousands of women ended up in brothels to 'comfort' Japanese soldiers.

The Japanese enacted Military Law (*Osamu Seiri*) 1/ 1942, which applied to Java and Madura. This law determined the basic outlines of the government system. All the laws and regulations of the Netherlands Indies were to remain effective temporarily provided they were not in conflict with Japanese regulations. Similar regulations were also proclaimed for the other Netherlands Indies territories (Wignyosoebroto 1994: 183; Han 1998: 421).

In its propaganda campaign for 'the Greater East Asia Co-Prosperity Sphere,' on 25 May 2602 (1942), the High Command of the Japanese armed forces in Java and Madura promulgated Law 16/1942 on 'The Control of Organs of Publication and Information and the Censorship of Publication and Information.' It introduced a 'double model' for press control, providing for both preventive and repressive measures, unlike the Dutch who had replaced a preventive with a repressive model. Without publication permits newspapers were not allowed to appear (Thoolen 1987: 96; Surjomihardjo et al. 2002: 175-176). Article 1 of Law 16/1942 stated that "all categories of printed matter were required to have a publication permit," while Article 2 "prohibited former hostile publications to continue their activities." Article 3 provided that "Publishing printed media which relate to publication and information, either daily, weekly, monthly or irregular publication, without a permit is prohibited."

Preventive censorship was introduced by Articles 4, 9 and 10. It stated that all printed newspapers should pass through the Japanese Army's Censorship Department before they could be circulated or distributed. The Censorship Department office was situated in Batavia (Jakarta), with branches in cities such as Bandung, Yogyakarta and Surabaya. Before being allowed to publish, a publisher should get a permit from a censorship official (*Domei*), acquiring a signature (*paraf*) after inspection. Some newspapers, such as the *Sedya Tama* daily (Yogjakarta) adapted to the new conditions and changed their name and function to become mere tools of propaganda (Said 1988: 48-49).

Law 16/1942 also forced all Dutch and Chinese newspapers to close down. The military commander issued some permits for well-established newspapers, but they were required to change their names into Japanese, such as Jakarta based newspapers, *Asia Raja* – with editors Sukardjo Wirjopranoto, R. Winarno, A. Tjokroaminoto and B.M. Diah –*Kung Yung Pao-Indonesia*,[31]

31 Indeed, *Kung Yung Pao* still seems a Chinese name. However, *Kung Yung Pao* was run by Oey Tiang Tjoei, a loyal to the pro-Japan Chinese puppet president Wang Ching Wei, based in Japanese-occupied Nanking.

Kana Monji Shimbun, *Pandji Pustaka*, *Soeara Moeslimin Indonesia* and *Djawa Baroe*. Outside Jakarta the same happened to *Sinar Matahari* (Yogyakarta), *Sinar Baru* (Semarang), *Soeara Asia* (Surabaya), and newspapers outside Java, such as *Kita Sumatra Shimbun* (Medan), *Padang Nippo* and *Sumatera Shimbun* (Padang), *Palembang Shimbun* (Palembang), *Lampung Shimbun* (Tanjung Karang), *Borneo Shimbun* (Kalimantan) and *Selebes Shimbun* (Ujung Pandang).

Publishers of newspapers that violated the press rules above could be convicted to imprisonment of up to one year. Newspapers violating the censorship mechanism would be brought before the *Gunsei Hooin* (Court of Justice of the Military Government); other offenders had to appear before the *Gunritsu Kaigi* (Martial Court). However, in practice extra-judicial mechanisms, such as arbitrary detention, were used more frequently to suppress the press if they were critical of Japanese colonialism.

A clash between the Indonesian nationalist movement and the Japanese military seemed inevitable. The Japanese military threatened and arrested any Indonesian they did not trust, including journalists. Many journalists were suspected of being anti-Japanese and were detained, such as Herusukarto, Subekti, Tabrani, Sajuti Melik and S.K. Trimurti. The journalist Kusen died in a Japanese prison. In Kalimantan, several journalists were assassinated, including Anomputro, M. Homan, H. Babou, A. Atjil and Amir Bondan (Said 1988: 50). Unfortunately I have been unable to find the reason for why they were killed, and how they were treated in custody.[32]

During the Japanese occupation, the press system had a rigorously authoritarian character and only served the interests and propaganda of the Japanese army. Nonetheless, as argued by Lee (1971: 28), in some respects Indonesian journalists also benefited from the Japanese occupation. Firstly, there was the possibility to spread nationalist ideas despite the restrictions of Japanese-imposed press censorship, and secondly, they could contribute linguistically to the formation of modern Indonesian (*Bahasa Indonesia*). Journalists were able to produce comments with nationalist overtones and wrote them in a language which gradually became more uniform and modern. The war was moreover a useful training period for journalists, preparing them for their tasks in the imminent armed struggle for independence and the building of a free Republic of Indonesia. Despite the oppressive systems under Dutch and Japanese administration, journalists managed to develop their skills and could promote a spirit of nationalism and independence (Soemanang 1952; Said 1988).

32 I contacted Tribuana Said by email in order to learn more about the assassination of journalists. He did not remember the specific source of the story, but recommended me several sources. However, these did not contain any further information either. Personal communication with Tribuana Said through email, 30 November 2011.

3.3. Post-Independence

This part covers the analysis of legislation and policies related to press freedom from 1945 until 1957. I have hereby made a sub-division of two shorter periods, 1945-1949 and 1950-1957. The first period represents the transition from colonialism to independence. The second concerns the first few years of independence, when Indonesia was under a parliamentary system after the Dutch had finally recognised Indonesia's sovereignty and given up on their colonial war.

3.3.1. 1945-1949

Press freedom during the early years of Indonesian independence was first completely suppressed by the British army, which landed in Indonesia in 1945. Indonesia's independence was not recognised, and the British troops were to control the situation after the Japanese had left and before the Dutch returned. Hence, newspapers became a primary target for controlling information. Said (1988) notes that the British army stopped the daily *Sinar Deli* and *Pewarta Deli* in Medan from publishing. A.O. Lubis and the head of the printing house of *Syarikat Tapanuli*, Rachmat, were even detained for three days in March 1946. *Mimbar Oemoem*'s Wahab Siregar was also arrested. The printing house of *Soeloeh Merdeka* was occupied by soldiers. More drastic action was taken in Padang, where a printing house which published *Oetoesan Soematra* was blown up by British soldiers.

Dutch troops joined in the repression after they had landed in February 1946. Attacks against press offices also occurred in Jakarta (*Berita Indonesia*). Moreover, journalists and editors were regularly detained. B.M. Diah and Herawati Diah from the daily *Merdeka* in Jakarta, as well as several journalists: Sajuti Melik, Wonohito, P. Wardojo, Sudarso Warsokusumo, Anwar Tjokroaminoto, Siauw Giok Tjan, Tabrani and Adam Malik, were all arrested in the early years after independence without any consideration of a due process of law. Thus, it were the British and Dutch armies to first suppress press freedom, not the new Indonesian government. This was the context, with the press under serious attack by the colonial authorities, in which the *Persatuan Wartawan Indonesia* (Indonesian Journalists Association or PWI) was established on 9 February 1946 in Surakarta (Central Java). PWI's focus was almost entirely on supporting the press in the struggle for independence and in enhancing solidarity among journalists.[33]

33 The first chairman and secretary of PWI were respectively Mr. Sumanang Surjowinoto and Sudarjo Tjokrososworo. A short historical overview can be read at the PWI website: http://pwi.or.id/index.php/Sejarah/Sekilas-Sejarah-Pers-Nasional.html (retrieved on 15 June 2012).

While less repressive than the British and the Dutch, the new Indonesian government was concerned about what was being published. It ordered that any foreign journalist should submit telegram copies of his reports directly to the Military Governor of the Indonesian Republic. Since the Dutch were considered foreigners, this included all Dutch journalists. However, according to the Indonesian authorities this rule was 'not part of censorship,' but a way to know what was being published about the Indonesian situation abroad (Zweers 2013: 346).

Constitutionally speaking, there was a 'dualistic' situation. While the 1945 Constitution claimed authority over the entire territory of Indonesia, the Netherlands opposed this with their own territorial claim and argued that their colonial constitution of 1925 (the *Indische Staatsregeling*) was still valid. As one may recall from the previous chapter, the 1945 Constitution stipulated the 'guarantee' of freedom of expression under article 28,[34] which states: "The freedom to associate and to assemble, to express oral or written thoughts, etc., shall be prescribed by statute." However, it was difficult to realise this freedom under the conditions of war and territorial dispute in these years.

3.3.1.1. Colonial Legacy

The context of the fight for independence made it difficult for the national leaders to realise their revolutionary dreams, spirit and ambition to change the colonial law. This system was moreover deeply rooted in the Netherlands Indies system of administration and its organs, procedures, doctrinal principles, and enforcement processes. Therefore, the old colonial legal and institutional system could not be removed within a short period of time.[35] According to Lev (1985: 57) and Benda (1966), the new government owed a great deal to the colonial precedent, "for even the most shattering revolutions, very rare among new states, cannot wipe out the past". Similarly, Wignyosoebroto (1994: 187-9) said that,

> It is impossible to develop national law from zero, because the new configuration still needs to be explored. Moreover, educated people who had been trained in the Dutch law tradition, would more or less think and act based on this tradition or school of thought, ... they preferred to push a type of positive law system like the Netherlands Indies legacy, which still existed according to the Constitution's transitional provision. The founding fathers of the State had been trying to propose an alternative law to develop a new legal system during the PPKI discussion in 1945, but had not yet reached agreement because the first major debate was how to build a governance system or system for leading the country.

34 I added quotation marks to the word 'guarantee', because the article did not really protect freedom of expression. This will be further detailed in the next chapters.

35 This was admitted by Soekarno when he was chairing the PPKI: "The Constitution just formulated by PPKI, is considered 'a rapid constitution' and a '*revolutie grondwet*'…. Later we shall make a more complete and perfect Constitution" (Yamin 1959).

There are, at least, two reasons that explain why the Netherlands-Indies laws were adopted as national laws for Indonesia. First, as mentioned by Lev (1985: 69), the failure of the revolution to demystify the colonial heritage accounts in large part for the ease with which the old forms were carried over. Second, retention of the old laws was not a matter of oversight. The previous laws were sustained, and their continuation was stipulated explicitly in the first Constitution of 1945[36] and the succeeding two Constitutions of 1949 and 1950. Although no fundamental changes were introduced immediately, at least the 1949[37] and 1950 Constitution contained protective human rights. The transitional provision in the Constitution was drafted by Soepomo. As he said, this

> "…was not merely a matter of convenience… nor was it simply because no one had any ideas," but also because "…the colonial law provided an available and appropriate framework," and moreover this colonial law "… was a … secular neutrality between conflicting religious and social groups" (Lev 2000: 46).

Soepomo's statement about an 'available and appropriate framework' did not take into account the implementation of especially those laws that had been detrimental to the nationalist movement. As explained in this chapter, the colonial system knew many oppressive laws which were contradictory to justice and the rule of law. Notorious laws against press freedom, such as the *Drukpersreglement*, many articles of the Penal Code, and the Press Banning Ordinance (1931) were not repealed. In short, the same laws that had been used to oppress numerous nationalist leaders, including journalists and publishers, were kept in place without much further consideration.

In 1946, the Penal Code was amended, expanded, and reinforced by Law 1/1946 on Criminal Law Legislation (*Peraturan Hukum Pidana*, or KUHP

36 Article II of Transitional Provision of UUD 1945 stated that, "All regulations in force at the time of independence are declared to remain valid unless or until replaced in a manner prescribed by the Constitution." Then, slightly similar to Article II of UUD 1945, the transitional process provision was also stipulated by Presidential Decree (*Maklumat President*) No. 2 of year 1945 (10 October 1945). The decree stated that, "All regulations in force at the time of independence are declared to remain valid as long as they do not contradict the Constitution."

37 Article 192 of the 1949 Federal Constitution, Section 1: "At the moment this Constitution becomes valid, the existing regulations by law and administrative provisions, remain in force unchanged as the own regulations and provisions of the Republic of the United States of Indonesia, as long and insofar as they have not been withdrawn, supplemented or changed by legislation and administrative provisions based on this Constitution." Section 2: "Maintenance of the existing regulations by law and administrative provisions prevails only insofar as these regulations and provisions are not incompatible with the provisions of the Charter of Transfer of Sovereignty, of the United Statute, of the Agreement on Transitional Measures or of any other agreement connected with the Transfer of Sovereignty, and insofar as they are not in contravention with those provisions of this Constitution which require no further legislation or executive measures."

or Penal Code).[38] It meant that several criminal provisions which could be used to attack the press were maintained, including the *haatzaai-artikelen*.[39]

3.3.1.2. The First Restrictions against the Press

However, not all anti-press laws were transplanted. Less than a year after independence, the government of the Republic of Indonesia enacted an 'anti-press law' to deal with the emergency situation. Law 6/1946 stipulated in Articles 8, 9, and 10[40] that the State Defense Council (DPN) had the authority to restrict and prohibit freedom of assembly, freedom of expression, printing or information, and sending news. The latter terms clearly addressed the press. Article 24 stated that the DPN had the authority to apply pressure, even by using violence, in order to fulfill the implementation of this laws and other regulations. Moreover, if the government conducting such action would incur expenses, the violators were to recompensate. Obviously, in practice Law 6/1946 was effective only in the area controlled by the Republic (Smith 1969: 117). In the Dutch controlled territory the old laws, such as the *Drukpersreglement*, the Press Banning Ordinance and the Penal Code were still in force.

According to Abdulgani (1952: 102), the first effective restriction of the press after the declaration of independence was related to the 'Madiun affair' in September 1948. This concerned a communist uprising against the nationalist government. The rebels were, however, not well prepared and were quickly defeated by the nationalist army (Kahin 2003: 300). The nationalist government issued a restriction on the press, targeting specifically those papers connected with the *Front Demokrasi Rakyat* (*FDR*, the People's Democratic Front) and those affiliated to the communists, such as the *Patriot*, *Boeroeh* and *Soeara Iboe Kota*. In turn, the *FDR* imposed restrictions on *Api Rakjat*, the paper representing its political opponents, especially during the power struggle in Madiun.

According to Atmakusumah (2009: 18) the first press restriction based on Law 6/1946 was not related to Madiun, but concerned the banning of the weekly *Revolusioner*. The exact date of when this happened is unclear, however it was between 1946 and 1949. The chief editor Soepeno criticised Soekarno's speeches as "*bombastis*" (turgid) and *Revolusioner* was immediately banned from dissemination by Wedono Salamoen of the *Djawatan Pengawas*

38 *Republik Indonesia* News No. II, 9, 16 February 1946. The change referred to the Penal Code (Article 1).

39 These were adapted from *Titel V, Misdrijven tegen de openbare orde* (Crimes against Public Order) of the Penal Code, which included the *haatzaai-artikelen* (Articles 154, 155, 156, 157, 207, and 208). These articles will be discussed further in Chapter 5.

40 Law 6/1946 was enacted on 6 June 1946 by Soekarno (Republic of Indonesia Gazette Year II, No. 18-19, p. 189-192). This law was also operationalised by the State Defense Council Regulation No. 8, 11, and 16 of 1946 and No. 34 of 1947.

Keamanan Negara or DPKN (intelligence services under the police corps). Another paper prohibited was *Soeara Moeda*, which was managed by the Indonesian Student Association (*Ikatan Pelajar Indonesia*) in Solo, led by Soelistio, Slamet, and Soekarto. *Soeara Moeda* was accused of being a proponent of the 'autonomous territories' (*Daerah Swapraja*) supported by the Dutch. Third, the daily *Soeara Rakjat* in Kediri, led by A. Aziz (who later established the *Surabaya Post*) was banned after reporting the death of communist leader Musso. The military governor imposed a ban on the newspaper for several days. In September 1948, the government also banned three newspapers in Yogya, *Revolusioner*, *Patriot* (led by J. Simandjuntak or Yusuf Adjitorop), and the daily *Soeara Iboekota* (led by Wikana). Except for *Soeara Moeda* these were all communist newspapers.

The fact that measures were taken against the press is not surprising, if we take into account the chaotic political situation during the first three years of independence. Power struggles between Islamic, nationalist and communist groups were widespread and there was a lack of government stability. However, they demonstrate that the revolution did not automatically lead to press freedom, despite the 1945 Constitution's basic point of departure that freedom of expression should be protected.

3.3.2. 1950-1957

After the Round Table Conference in 1949, which led to the transfer of sovereignty from the Dutch to the Republic of Indonesia, the latter adopted a parliamentary government model. During the parliamentary government years, most political parties established their own newspapers, for instance *Abadi* (the modernist Islamic party Masyumi). *Merdeka* (Soekarno's nationalist party PNI), *Pedoman* (Sjahrir's Socialist Party PSI) and the *Harian Rakjat* (the communist PKI). Mochtar Lubis (1952: 93) observed that these political linkages were reinforced by the weak financial position of Indonesian newspapers, which exposed them to external influences. Few newspapers were really independent or non-partisan. Nonetheless, Lubis added that the Indonesian press was honest in the sense that newspaper staff would not take bribes for expressing certain views, and unanimous in their campaign against corruption among government officials and against a slow and wasteful bureaucracy.

In the polarised situation, those political parties represented in the government used the Press Banning Ordinance of 1931 to silence "over-enthusiastic" criticism from the opposition (Feith 1962: 576). This happened for the first time when in August 1951 the Masyumi-dominated government, led by Prime Minister Sukiman, launched an anti-communist attack on the pretext that the communists were conspiring to overthrow the government. According to his speech in Parliament, 15,000 persons had been arrested by the

end of October, including a few journalists. In the smaller provincial towns, newspapers with a communist, Dutch, or Chinese signature were banned (Feith 1962: 323).

After 1951 these anti-press freedom measures continued, with at least 14 anti-press actions in both 1952 and 1953 (Smith 1969: 152, 178). This led to vehement reactions from the opposition and the press and ultimately to the revocation of the Press Banning Ordinance by Law 23/1954.[41] The government then in place considered the Press Banning Ordinance at odds with democracy and the rule of law, in particular because it contained no fair mechanism for journalists, editors, or media owners to defend their rights in a fair judicial process. This, the government argued, violated Article 19 of the 1950 Provisional Constitution. According to Smith (1969: 181-182, 186), in 1954 the only action against press freedom consisted of eight cases brought to the criminal court.

The revocation of the Press Banning Ordinance led to increasingly vociferous press attacks on the government (Lee 1971: 51). The leading critical (and independent) newspaper was *Indonesia Raya,* with Mochtar Lubis as its editor in chief, which ran a series of articles about scandals, feuds, and frauds within the various ministries and within several Indonesian diplomatic missions abroad, without sparing persons of high status and rank – including President Soekarno. Mutual accusations and recriminations reached their climax in the party press in 1955, when the first general elections for the DPR were approaching. Unlike the reporting in *Indonesia Raya*, few allegations were supported by thorough investigation or reported facts.

On 6 January 1956 the *Djawatan Kepolisian Negara Bagian Dinas Pengawasan Keselamatan Negara* or State Police Security Monitoring Agency (DPKN-DKN) released a report, denouncing intimidating, false and defamatory language in press reporting during 1955.[42] It paid attention to the vitriolic conflict between Masyumi's *Abadi* and PKI's *Harian Rakjat*, and the lack of ethical standards applied in the party press in general when propagating their own ideology and vilifying their opponents. In some cases this led to criminal prosecution, but the abolition of the Press Banning Ordinance

41 State Gazette No. 54-77.

42 DPKN-DKN is a police body. The DKN (*Djawatan Kepolisian Negara*, or State Police) was established on 19 August 1945. This institution employed special agents, named PAM (*Pengawas Aliran Masyarakat*, short for Supervisors of Societal Groups). One of PAM's mandates as stipulated in Police Decree Pol. 68/Staf/PAM, on 22 September 1949, was "Monitoring public opinion in the press, radio, and community." PAM were then replaced by the DPKN-DKN (*Dinas Pengawasan Keselamatan Negara-Djawatan Kepolisian Negara* or State Police Security Monitoring Agency) on the basis of Police Decree Pol: 4/2/28/UM, on 13 March 1951. The change was related to the expansion of its mandates, especially to secure personal safety of the President and Vice-President as well as other high level officials.

seems to have really opened the floodgates. Some Western observers were amazed by the lack of governmental control, for example Schumacher, who noticed that Indonesian press freedom, "…. would be unthinkable even in the countries of the Western world with the greatest press freedom." (Schumacher in Lee 1971: 52).

Although the government could apply the Penal Code in controlling the press and freedom of expression, it seemed that this law when it concerned press cases had been reduced to relative 'statutory dormancy', since the revocation of the Press Banning Ordinance in 1954. Smith (1969: 184-185) suggests that this had to do with the loss of power of the presidency: "… Soekarno was no longer regarded with awe... perhaps the president (Soekarno) was not in a strong position. Otherwise, one may wonder if the president might not have taken aggressive action against the press that so brazenly bandied the news about the tension between the president's latest wife, Hartini, and the women's clubs."

However, this situation was not to last for long. The decline of press freedom started when the military intervened, with Army Commander of the Military Authority A.H. Naution imposing martial law by Military Ordinance PKM/001/9/1956 on 14 September 1956. Article 1 of this ordinance stipulated that,

> It is prohibited to print, publish, offer statements, broadcast, post, provoke or have writings, pictures, or paintings, which contain criticism, insinuations/insults against the President and the Vice-President, or against an authority or general assembly, or a public servant when acting on the basis of an official mandate; writings which contain hostility, hatred, and insulting statements against groups of society; or writings which contain news or announcements that provoke chaos in society.

Article 2 provided for a maximum of one-year imprisonment and a fine. In fact, this military ordinance was a summary version of the *haatzaai-artikelen* in the Penal Code. The difference was that now the military authorities gave themselves the authority to enforce these rules, which meant they could arrest anyone on this basis or put him or her into jail without judicial process. The military thus usurped the public prosecutor's position.

It soon became clear that these were serious threats. After his return from the International Journalist Conference in Zürich in 1956 Mochtar Lubis was interrogated and arrested by the Military Police Corps (Hutagalung 1968: 14). On 21 December 1956, he was first detained for three days, then confined to the Military Prison in Budi Utomo Street for 14 days, and finally put under 'house arrest' for 4,5 years (Lubis 1980: 1). Prior to 1957, many journalists were detained for several days or charged for libel or similar offences, but Mochtar Lubis was the first editor in the post-1949 history of Indonesia to be held without charge for more than a couple of weeks (Smith 1969). However, this was only a taste of things to come under martial law (Lee 1971: 52).

According to Mochtar, he was arrested because of his '*tajuk rencana*' (editorial opinion) on the 'Central Sumatra Incident' (Lubis 1980: 2-3), where he

> ... drew the conclusion that this incident will surely not be limited to Central Sumatra alone, but will have consequences for other regions as well… The (coalition) Cabinet will not be able to overcome this, nor will President Soekarno himself, without Bung Hatta, nor will Chief of Staff Nasution… if necessary for the greater good, then President Soekarno and Chief of Staff Nasution must also be prepared to relinquish their positions.

The arrest letter was drafted by the Military Police Corps Commander of '*Detasemen Garnizun III/6*' in his capacity as Military Assistant to the Prosecutor of the Military Court in Jakarta. The letter stated that, "… after hearing and/or reading and/or considering Instruction Letter KMKBDR[43] on 21 December 1956, there are reasonable arguments for saying that Mochtar Lubis has violated the KUHP/KUHPT (Penal Code/Military Penal Code),[44] and needs to be temporarily detained and therefore we instruct (Lets/CPM) M Jacoub Wahab et al. to arrest and detain the accused on 21 December 1956 in CPM (Military Police Corps) Det. Gar. III/6" (Lubis 1980: 27-28). *Indonesia Raya* reported the speech of Ministry of Justice, Mr. Mulyatno (2 January 1957), who stated: "I cannot do anything about the arrest of *Indonesia Raya*'s editorial chief, Mochtar Lubis, and I do not know when he will be released."

Thus, from now on, under martial law, the military could effectively silence the press as they wished, without any controls in place. Combined with the above quoted legal provision, which was so broad to be almost meaningless, the situation allowed subjective political considerations to determine whether journalists and editors should be arrested. Banning newspapers became common practice.

3.4. Guided Democracy and The Decline of Press Freedom (1957-1965)

> I do want the news released not to be objective,
> but to clearly take the side of our Revolution
> and attack the enemies of the Revolution
> (Soekarno, 1962).[45]

The first years of Guided Democracy were still influenced by the parliamentary system and the Konstituante which had been elected in 1955 and continued formulating a new constitution.[46] These debates, as well as those in parliament, still seemed democratic in nature and allowed for different

43 *Komando Militer Kota Besar Djakarta Raya* or Military Commando of Great Jakarta City.
44 *Kitab Undang-Undang Hukum Pidana/Kitab Undang-Undang Hukum Pidana Tentara*.
45 *Indonesian Observer*, December 19, 1962, p. 1.
46 See the previous Chapter.

ideological convictions to be expressed. Outside parliament, however, the situation was different. For the press 1957 was the worst year in the entire period of Guided Democracy. In this year, three regulations affecting the press were enacted. The first was Military Authority Regulation of Djakarta Raya (*Peraturan Penguasa Militer Djakarta Raya*) 6/1957, promulgated on 13 March, which merely affirmed military authority in controlling the press.[47] The regulation defended its prohibition on information regarding military matters by stating

> ... that in the current situation there are still news reports, especially reports on matters related to the military situation, for the time being newspapers in Djakarta Raya, which contents and sources can not be accounted for, so that it will affect security and public order.

This regulation was effectively used to attack journalists. On 20 April 1957, the Military Authority of Djakarta Raya instructed to ban two newspapers (*Pedoman* and *Bintang Timur*) for three days, from 23 April until 25 April 1957. According to the official statement this ban was promulgated because of their report "*Banteng* Council representatives are arrested in Jakarta," on 16 April 1957.[48]

The Emergency Ordinance (literally State of War and Siege Ordinance, *Regeling op de Staat van Oorlog en Beleg* known as S.O.B) was the next regulation to have a major influence on press freedom. President Soekarno declared it applicable on 14 March 1957,[49] after the stepping down of the Ali Sastroamidjojo Cabinet. The Emergency Ordinance permitted the military to respond to any act or situation considered as endangering the state. It was a logical response to the insurgencies against the Republic in several regions,[50] but the military used their authority to introduce many political, economic and even legal policies that had nothing to do with the insurgencies.

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47 Ironically, this regulation was more repressive than the Dutch military regulations of the 1940s, see Verordening No. 14/Dv.0/7A-3 van het Militair Gezag (Javasche Courant 17-5-1940 No. 40 a) jo Verordening No. 66/Dv.0/VII A-3 (Javasche Courant 26-3-1941 No. 24 a).

48 "*Dua Utusan Dewan Banteng Ditahan di Jakarta.*" The *Banteng* Council was an organisation demanding at the national level for "immediate implementation of progressive and radical improvements in all fields, especially in the leadership of the Army and henceforth in the leadership of the State" (Kahin 1999: 182-183).

49 This regulation was adopted from the Netherlands Indies regulation, *De Regeling op de Staat van Oorlog en Beleg* (Staatsblad 1939 No. 582, amended by Staatsblad 1948 No. 146 and Staatsblad 1949 No. 274). In implementing this regulation, the government enacted Government Regulation 7/1950 on 16 March 1950. This regulation was repealed by Law 74/1957 on Determining Dangerous Situations (*Penetapan Keadaan Bahaya*), on 30 October 1957.

50 Such insurgencies took place in Aceh, Kalimantan, South Sulawesi, Sumatera and West/Central Java. Best-known were PRRI/Permesta, which tried to gain independence from Indonesia, and *Darul Islam*, which was a fundamentalist Islamic group that fought for establishing a religious state in Indonesia.

These policies included detaining journalists and closing down press companies which dared to publish views that differed from those of the government. According to the data collected by Smith (1969: 238, 328), the government took 125 actions against the press in 1957 alone. Soekarno and the military commander General A.H. Nasution took the lead in this. On 23 April 1957, the latter banned *Indonesia Raya* for three days, after it had published an interview with the Commander of the Banteng Council, Lieutenant Colonel Ahmad Husein.[51] In fact, *Indonesia Raya* just quoted from *Haluan* in Padang, 20 April 1957. Chief editor of *Keng Po* Inyo Beng Goat was also threatened, and his office was occupied by the military on 27 May 1957. Three other chief editors, Syaaf from *Pemandangan*, Josef Dick from *Marinyo*, and Hafas from a Dutch language newspaper,[52] were also arrested, just as Rosihan Anwar from *Pedoman* (on 13 August 1957).

Not all state institutions sided with the government and the military. Judge Abdul Razak Sutan Malelo and his colleagues from the Central Jakarta Court bravely acquitted Mochtar Lubis and Kustiniyati Mochtar[53] (both of *Indonesia Raya*) from a charge based on a report on the involvement of Roeslan Abdulgani (Foreign Affairs Minister) and the Ali Cabinet in a Rp. 1,5 million corruption case (Lubis 1980: 62-63, 81).

On 13 September 1957, 13 newspapers, *Antara, Pia, Ins, Indonesia Raya, Pedoman, Harian Rakyat, Bintang Timur, Keng Po, Djiwa Baru, Merdeka, Pemuda, Abadi,* and *Java Bode* were banned by the Military Commander of Djakarta Raya City. The afflicted newspapers were informed of the ban by telephone. During the National Consultative Conference (Lubis 1980: 93-94), which was initiated by the Djuanda government as a mechanism for reconciliation between central government and district army commanders, the spokesman of the Central Army's Information Office (*Penad*) Kolonel Pringadi, announced that the ban had been lifted..

On 21 September 1957, the military authorities banned *Haluan* (published in Padang) from being disseminated in Jakarta, although the National Consultative Conference in Jakarta had just started. Four days later, Rosihan Anwar from *Pedoman* was brought to court a second time because he had allegedly reported some military news on 16 April 1957 from an unofficial source, which was considered violating KMKBDR 6/1957 of the Mili-

51 Ahmad Husein was a regimental commander in West Sumatera. On 20 December 1956, he took charge of the government in Central Sumatera in a bloodless coup. The coup took place after a reunion meeting of the Banteng Division, when this meeting had held elections for the position of chairperson of the Banteng Council.

52 T.D. Hafas was arrested on 6 July 1957.

53 On 12 December 1957, Kustiniati Mochtar was sent to the court, accused of insulting the former Resident of Palembang, Abdul Razak. This accusation was based on her writing in *Indonesia Raya*, 21 February 1956. She was detained from October 1957 till January 1958.

tary Commander of Djakarta Raya.[54] He was quickly released however, on 2 October 1957, once again because of the unwillingness of Judge Abdul Razak Sutan Malelo and his colleagues to succumb to the pressure from the authorities (Lubis 1980: 96-97, 106). In his legal consideration Judge Malelo said that, "… the allegations that Rosihan Anwar violated Regulation No. 6 of the Military Authorities of Djakarta Raya cannot be proven [..].there is no valid reason for applying the mentioned prohibition in Article I and it has not been the objective of the maker of this law to create a general prohibition on all news reports, or even only on certain elements of them, because each rule of prohibition (*verbodsbepaling*) has its own ratio. The ratio of this rule of prohibition can be found in the introduction (*considerans*) to the regulation, i.e. that the 'content' and its 'source' can interfere with security and public order." The court argued that such prohibition as stated in Article 1 is punishable in accordance with the law (*strafbaar/strafwaardig*) if such news can indeed harm security and public order.

In September 1957 over 60 cases were examined at the Jakarta District Court (Atmakusumah 1992: 69),[55] but no matter what the court ruled, dozens of journalists were interrogated and sent to military detention. The use of military decrees was an effective way to bridle the press in the absence of a compliant judiciary, and regular court procedures and extra-judicial mechanisms combined led to an effective breakdown of the rule of law and press freedom.

Prosecution of journalists, press banning and extra-judicial detention led to concern outside Indonesia. The International Press Institute (IPI, based in Vienna) expressed this as follows in its December 1957 report:

> In the past year eleven editors have been arrested in Indonesia and seventeen newspapers as well as national news agencies have been closed down at one time or another. However, no other newsman has been exposed to the treatment shown Lubis. Some observers report that the government is embarrassed by his stubborn stand and recently offered to send him out of the country on a scholarship. Lubis is reported to have indignantly rejected the offer with the reply, "Either set me free or give me a fair trial" (p.11).

However, such international concern had no effect. Press curbing by the military continued in 1958, and the government took measures against the Chinese language press in Java, summoning 17 of their editors and banning well-known newspapers as *Sin Po* and *Ken Po* (Government Decree of 19 April 1958). The official reason was "to prevent misuse of (Chinese) scripture for certain purposes which might harm the security of the country", 'misuse' the government could not monitor for lack of censors who

54 According to Rosihan Anwar, many press companies and journalists in the capital became the victim of press bans and other measures after KMKBDR 6/1957 was issued.

55 Atmakusumah (1992) "Mochtar Lubis dan Indonesia Raya", in Atmakusumah (ed), *Mochtar Lubis, Wartawan Jihad*. Jakarta: Penerbit Harian Kompas.

could read Chinese.[56] Japanese, Hindi and Russian newspapers were banned as well and similar measures were taken in other regions.[57] Another step towards turning the press into full compliance with the ideas of the government was Government Regulation 34/1958 on the Agency of Information Coordination. This agency was to control all news and broadcasting channels. Article 6.6 extended such control to 'perilous' news from foreign newspapers, magazines, books, brochures, and foreign films and other communication channels.

On the surface, press bans started to look increasingly erratic. On 30 May 1958, *Indonesia Raya* was banned for an undefined period of time, but was allowed to reappear on 26 July 1958. Bans could apply for a short period of time, even for a few hours only. While at first this may seem sympathetic and allowing for proportionality, bans were utterly unpredictable and thus contributed to instilling editors and journalists with terror – the ultimate aim being the collapse of an independent press industry (Atmakusumah 2009: 20).

The military further expanded its authority in controlling the press by establishing a system of publication permits (*Surat Izin Terbit*/SIT) for newspapers and magazines in Jakarta (Military Authority of Djakarta Raya on 1 October 1958). In order to prevent publications about 'sensational' and immoral matters all newspapers and magazines had to register with the Authority of Djakarta Raya Military, which could refuse or repeal the publication permit.[58] This was the first license mechanism for newspapers since independence in 1945.

During the same period, political developments moved in a negative direction for press freedom. In early 1959 President Soekarno and his cabinet accepted an army proposal on the concrete forms to be given to "Guided Democracy" (Feith 1964: 214). After a complicated and ultimately unsuccessful series of moves to persuade the *Konstituante*, the elected constituent assembly, to approve this proposal, President Soekarno finally promulgated Presidential Decree of 5 July 1959. This brought an end to the constitution-

56 *Times*, 19 April 1958, p. 4.

57 In Medan, five Chinese language newspapers were closed down, including The Sumatera Times, New China Times, Sumatera Bin Poh, Hwa Choa Jit Poh, and the Democratic Daily News. Three hundred printers were left jobless. In Makassar, four newspapers were banned: Kuo Min-Tang, Chiao Seng Po, the Daily Chronicle and the Daily Telegraph (Smith 1969: 245).

58 According to Atmakusumah the new regulation was the reason why *Indonesia Raya*'s Director, Hasyim Mahdan asked Chief Editor, Mochtar Lubis to resign from *Indonesia Raya*. However, other editors refused Mochtar's resignation. (personal communication with Atmakusumah, 28 March 2012). Eventually, the SIT was introduced throughout Indonesia on 12 October 1960, based on Peperti (Supreme Martial Authority) 10/1960 (State gazette No. 116, 1960).

al debates, re-enacted the 1945 Constitution and disbanded parliament.[59] Guided Democracy had now become the official form of government and Soekarno turned it into a mantra to propagate his policies.

In order to control the political situation and overcome the opposition against it, the government enacted Government Regulation in Lieu of Law (Perpu) 23/Prp/1959 on the Emergency Situation, on 16 December 1959.[60] This regulation gave very broad rights and powers to the Military Emergency Authority for maintaining security and public order, including those for restricting publications and printed matters.[61] If there was still any press freedom left, it had disappeared by now. What remained was a lot of 'Guidance,' but very little 'Democracy.'

3.4.1. National Press Political Manifesto

In 1960, President Soekarno formulated a development programme and established the National Planning Council (Dewan Perencanaan Nasional, henceforth as NPC), chaired by Muhammad Yamin. Soekarno instructed the NPC to draft an Eight Year Plan for National Press Development. The result appeared under the heading 'Penerangan Massa' (Mass Information) as Appendix A to the Majelis Permusyawaratan Rakyat Sementara (People's Provisional Consultative Assembly, henceforth as MPRS) Edict II/MPRS/1960.[62] This became the foundation for the Manipolisasi Pers National (Bringing the National Press under the Political Manifesto) during Guided Democracy.[63] The edict stated that "all the media of mass communication such as press, radio, films, etc., should be operated in waves, as one co-ordinated unit, in a guided, planned and continuous way, thus leading to an awareness regarding Indonesian Socialism and the Pancasila (five principles)."

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59 For a discussion of the constitution, see Chapter 2.

60 This government regulation repealed Law 74/1957 on State of Emergency (State Gazette 160/1957). This GR in Lieu of Law became a Law through Law 1/1961 about the Determination of All Emergency Laws and Lieu of Laws Prior to 1 January 1961 Becoming Law (State Gazette 1961/3; additional State Gazette 2124).

61 Article 24 jo. 26 of Government Regulation in Lieu of Law 23/Prp/1959.

62 MPRS Edict II/MPRS/1960 was enacted in Bandung on 3 December 1960. The MPRS was established by Presidential Decision. 2/1959 (*Penetapan Presiden*), following a Presidential Decree of 1959. The decree mandated that the president himself was to form MPRS in the shortest possible time, consisting of members of the House of Representatives and a delegation from regions and factions.

63 *Manipol (-USDEK)* was introduced in 1960. *Manipol* was the Political Manifesto set forth in Soekarno's August 17, 1959, Independence Day speech, and USDEK was an acronym for a collection of symbols: the 1945 Constitution, Indonesian Socialism, Guided Democracy, Guided Economy, and Indonesian Identity.

Critical elements of the plan were providing assistance in printing news (item f); creating a press law (item h) with definitions of press functions within the *Manipol* framework in order to further 'the revolution' and the 'national construction of the country'; defining press rights and obligations; defining basic rights in accordance with Article 28 of the 1945 Constitution on freedom of expression; and the revision of existing regulations in accordance with the newly defined functions, rights and obligations of the press (item i). These 'socialist press' measurements would shape the situation of press freedom and result in promoting Soekarno's Guided Democracy.

MPRS Edict II/MPRS/1960 moreover stipulated 12 press 'functions': political; social; economic; educational and cultural; as an instrument for the implementation of overall planning; aiding the completion of 'the revolution'; criticising and correcting; being a collective instrument based on Indonesian socialism; as a barometer; as an indicator; as a controller; and assisting in the implementation of the *Manipol* and especially in the implementation of the plan for national construction.

The next session of the MPRS resulted in Resolution I/Res/MPRS/1963. The appendices to this resolution dealt specifically with the press, and demanded:

(a) The implementation, as soon as possible, of MPRS Edict II/MPRS/1960 with regard to drawing up a press law that must define the area, functions, tasks and rights of the press as an instrument for informing and moving the masses.
(b) The taking of measures within the shortest time with the aim of improving the quality of the press in order to make it a real instrument of 'the revolution' based on the revolutionary key forces and masses, and imbued with a collective awareness of the objectives of 'the revolution'.
(c) Making an effort within the shortest possible time to ameliorate the system of press distribution with regard to quantity (circulation), extensiveness of field (area) and actuality (swiftness of dissemination). Such efforts can be made in the following ways, for example: by steadily increasing newsprint production, improving the graphic industry, perfecting the telecommunication apparatus and services, facilitating internal and external transportation and distribution, and improving the quality and technical aspects of the services of the national news agency.
(d) The provision of aid to the organisation of the national press in their commendable efforts to fulfill their functions and tasks as instruments of 'the revolution' in both the national and international field. Such aid can stimulate the press in achieving integration with the struggle of the masses and in strengthening solidarity and cooperation with the international press and journalist associations.

By looking at the functions attributed to the *Manipol* press and the measures advocated by MPRS Edict II/MPRS/1960 and Resolution I/Res/MPRS/1963, the contours of an authoritarian press system begin to emerge (Lee 1971: 116). The press function under Guided Democracy was not to inform, to seek the truth, or to be a watchdog for regime activities, but the press should advance and promote the policies of the government. Press legislation was thus becoming increasingly authoritarian.

Based on these MPRS edicts, the government would successfully create press laws and regulations to promote the *Manipol*. In practice, "taking measures within the shortest time with the aim of improving the quality of the press in order to make it a real instrument of 'the revolution'" was interpreted predominantly as a license for disciplining any newspaper or journal which dared to criticise the government. *Manipol* and 'socialist press' served to further legitimise restrictive regulations against the press.

3.4.2. Ten Restrictive Regulations

During Guided Democracy, especially from 1959 until 1965, the most important press regulations were produced by the Supreme Martial Authority (*Penguasa Perang Tertinggi*/Peperti). This does not mean that the military was somehow unconnected to Soekarno's leadership. As Mortimer (2006: 327) wrote, "it is important to bear in mind that this was a period when the national press was under great pressure to report only what accorded with Soekarno's view of events."

The first of these press regulations was Peperti Regulation 3/1960 on the Prohibition of Newspapers/Periodicals that are not printed in the Latin or Arabic Script of a Regional Language. This regulation was the army's second attempt to eliminate the Chinese press in Indonesia outside of Java.[64] The first one had been Presidential Regulation 10/1959 on the Prohibition of Small Business and Retail Trade for Foreigners Outside the Capitals of Autonomous Regions Level I and II as well as Residencies. This regulation addressed not only Chinese retail traders, but was also used to ban Chinese newspapers and magazines. According to Lee (1971: 118) the basic motive for wishing to prohibit Chinese-language newspapers and periodicals was to create a purely Indonesian press. There was also a deep-seated mistrust of the contents of Chinese publications due to the lack of censors fluent in Chinese, as referred to earlier. Peperti Regulation 3/1960 was the military way to 'purify the press,' which totally disregarded the minority population's need for news or even communications from the government.

The second and most notorious regulation restricting press freedom during this period was Peperti Regulation 10/1960 on publishing permits for newspapers and magazines. It was enacted on 12 October 1960, two months after the banning of the political parties Masyumi and PSI[65] and led to a complete subversion of the press to the political aims of the government.

64 As mentioned earlier Government Decree of 19 April 1958 had already banned the Chinese press in Java.

65 Presidential Letter 3568/HK/1960, issued on the same day, used this regulation as a basis to purge the press of 'enemies of the revolution' and banned the newspapers *Pedoman* (PSI) and *Abadi* (Masyumi).

According to this regulation, newspapers and magazines henceforth had to adhere to a number of conditions before receiving a publication permit. These conditions were supporting and propagating the *Manipol* and the political programme of the government with the aim of eliminating imperialism and colonialism, liberalism, federalism and separatism; defending the independent and active foreign policy of the government and to contribute to its implementation; strengthening the belief of the Indonesian people in the basic tenets, orientation, programme and leadership of 'the revolution'; supporting all measures in maintaining public order, security and political climate; strengthening an awareness of the existence of an Indonesian personality, for example by banning articles, pictures and drawings having a sensational character and therefore antagonistic to good morals; and criticising, if necessary, the state of affairs and the execution of government policy on the condition that this criticism is of a constructive nature and always takes the *Manipol* as a guideline.

In addition to these conditions, newspaper and magazine publishers and editors were required to sign a '*dokumen kesetiaan*' (loyalty document). These documents contained 19 points, which mostly overlapped with the requirements already stated in the regulation itself.[66] Signing the loyalty document kept one's newspaper alive, a refusal meant the end of it.[67]

The requirement to sign the loyalty document elicited different reponses. Rosihan Anwar, the chief editor of *Pedoman*, signed the agreement. His newspaper had actually just been banned, but signing the document meant it could be published again. Anwar argued that in the current transitional phase towards democracy it was difficult to fully implement press freedom. In this situation the main task of the media was to make sure that they could at least continue publishing some news. Tasrif from *Abadi* and Mochtar Lubis from *Indonesia Raya* refused to sign the loyalty document, which meant that their newspapers were closed down. Mochtar Lubis denounced Rosihan Anwar's choice as ethically wrong and as 'kowtowing' to the government. According to Hill (2010: 61), in 1961 Mochtar even recommended the expulsion of his long-term close friend Rosihan Anwar from the Inter-

66 They included the obligation to obey guidance announced by Peperti and other government institutions; to support and defend the *Manipol* and the government programme, as well as the Presidential Decree of 5 July of 1959; UUD 1945, the Pancasila, Indonesian Socialism, Guided Democracy; Guided Economy; Indonesian National Character; Dignity of the Indonesian State; the effort to establish public order, security and political stability; and restrictions against press reports of a sensational or a morally degrading nature, insulting the head of the state and head of government of foreign countries friendly to the Republic of Indonesia, and defending disbanded and prohibited organisations.

67 The so-called loyalty document raised a debate among the members of the International Press Institute (IPI) since both Rosihan Anwar and Mochtar Lubis sent letters to the IPI explaining their arguments, as mentioned in the IPI reports of January 1961 and September 1966.

national Press Institute (IPI). Indeed, because of Mochtar's letter, Rosihan Anwar's IPI membership was temporarily suspended.

The third piece of legislation relevant to press freedom was Peperti Regulation 2/1961 on the Monitoring and Supervision of Private Printing Houses. This regulation was based on the same paradigm of controlling the press, and aimed to reinforce the '*Manipolisasi*' of printing houses owned by private corporations by submitting them to direct government supervision, notably by the Regional Authority for an Emergency Situation (Article 1). The latter's members included the army, the information department, the police, and the public prosecutor. The regulation stated that the private printing houses that printed the major part of the Indonesian newspapers and magazines should be used for the dissemination of *Manipol* and as a means to put an end to sentiments of imperialism, colonialism, liberalism, federalism and separatism. The authorities could employ preventive and repressive control to ensure the printing houses obeyed the purpose of the political manifesto (Article 4). This regulation also provided sanctions in the form of imprisonment of one year and fines if the printing houses refused to implement the *Manipol* ideology (Article 6).

In order to control the National News Agency, *Antara*, Soekarno promulgated Presidential Decision 307/1962 on the Establishment of the Institute of the National News Agency *Antara* (24 September 1962). This was the fourth regulation targeting press freedom. It was issued to resolve an internal conflict within *Antara* that started in September 1961, between an anti-PKI group chaired by Zein Effendi against a pro-PKI group led by Djawoto.[68] The decision assigned Peperti to run *Antara.* (Said 1988: 126-127)., President Soekarno merged Persbiro Indonesia (PIA) into Antara on 13 December 1962. The President also closed down two other news agencies: the Asian Press Board (APB) and the Indonesian National Press and Publicity Service (INPS). According to Atmakusumah, the ultimate aim of this presidential decision was to control the flow of information and opinion in the media.[69]

Inseparable from the martial law framework was the fifth anti-press regulation, Presidential Regulation 4/1963 on the Securing of Printed Papers which Disturb Public Order, Especially Bulletins, Newspapers, Magazines, and Regular Publications. This law resembled the pre-censorship system during the colonial period, when publishers had to submit copies of the printed materials to the authorities. As found in Article 2 section (1),

> Within 48 hours of the printing being concluded, the printer shall submit a copy of the printed material [...] to the High Public Prosecutor, carrying the signature of the printer.

68 Djawoto was the former chair of the PWI.

69 Personal communication with Atmakusumah Asraatmadja through email, 11 September 2014.

This legislation gave the public prosecutor the authority to control and curb publishers. If the latter provided services to critical newspapers, they could be prosecuted. Most restrictive for the press was Article 6 of this regulation, which stated that prohibited printed material could be confiscated by prosecutor, police and other state institutions, which were to maintain public order. Hence, the military was also allowed to control the press. Although the state of emergency was lifted on 1 May 1963, and Government Regulation in Lieu of Law 23/Prp/1959 was therefore no longer applicable, the government imposed an even more oppressive system by introducing the Anti-Subversion Law 11/PNPS/1963. This change of emergency regime required a new military press control regulation, i.e. Presidential Regulation 4/1963.

Sixth, a fortnight after lifting the state of emergency, on 15 May 1963, the president passed Presidential Decree 6/1963 on Stipulations regarding the Promotion of the Press, which replaced Peperti Regulation 10/1960. This was henceforth the most important press regulation enacted after 1959, promoting a 'guided press' under civil rather than martial law. Article 1 and 2 stated that all guidance of the press would be entrusted to the minister of information, assisted by the chief of staff of the armed forces, the commanders of the army, navy, air force, the head of the police force, and by the attorney general, all acting in their capacity as ministers of the Cabinet. Article 3 stipulated that in giving guidance to the press, the minister of information was required to: (a) promote the function of the press in the climate of Guided Democracy; (b) act as a liaison between the leadership of 'the revolution' and the press organisations with regard to problems of the press under Guided Democracy; (c) lend his ear to voices of public opinion or to proposals from the side of representatives of the press, all within the context of the general press policy of the leadership of 'the revolution'; (d) forward his views to the leadership concerning the policy of promoting the press; and (e) draw up directives concerning the implementation of this press policy within the context of Guided Democracy. Article 4 stated that in fulfilling his task the minister of information was accountable only to the president as the 'great leader of the revolution.'

Article 6 of the Presidential Decree also stated that a publication permit was needed for the publication of newspapers and magazines, in accordance with conditions laid down by the minister of information. Article 8 stipulated that Indonesian publishing companies should fulfill several obligations, such as: (a) to support, defend and disseminate Pancasila and *Manipol*; (b) to publish invariably constructive articles and commentaries about the situation and implementation of government policy, using the *Manipol* for guidance, and (c) to pay attention to the conditions of public order and to existing government regulations.

The regulation also provided for sanctions. As stipulated by Article 9, a sanction against the violation of any obligation following from this law would be imposed in the form of a revocation of the publication permit. Article 10 stated that the firm, or its leadership, which printed newspapers and magazines without a printing permit was liable to a maximum penalty of a one-year imprisonment or a maximum fine of Rp. 50,000. In addition, Articles 11 and 12 stated that the stapling and printing machines could be confiscated and/or destroyed, as well as the stocks of newspapers and magazines concerned.

Presidential Decree 6/1963 thus emphasised non-military control of the press, but its spirit and content were quite similar to Peperti Regulation 10/1960. In fact, by enacting such regulation as part of the post-emergency situation, the government revealed its intention to make the restriction of press freedom permanent and to move Indonesia further towards an authoritarian state.

However, despite the fully-fledged framework to control the press already in place, press control regulations continued to appear, aiming to turn the press even more into an ideological agent for the government. A good example is the regulation enacted on 19 December 1964, a week after the official banning of the Body for the Support/Diffusion of Soekarnoism (BPS).[70] This presidential decree in the form of Supreme Commander of the Armed Forces/KOTI Regulation D/450/64 on the Publishing of the Writings of the Great Leader of the Revolution without Interpretation put the press under the obligation to publish Soekarno's ideas without any further questions or comments, and in particular sections from the book *Di Bawah Bendera Revolusi* (*Under the Flag of the Revolution*). The implementation of this regulation led to the requirement for all newspapers and magazines to include a column under the heading 'The Teachings of the Great Leader of the Revolution Bung Karno.' In this way, Soekarno claimed the commitment of the press to the 'revolutionary struggle'. Soekarno said in front of the *Antara* (National News Authority) staff in Jakarta (14 October 1962) that "many journalists argue that the press is capable of spreading all sorts of thinking, even if this contradicts the spirit of the revolution." On another occasion, Soekarno complained, "[Journalists] argued that this is a press democracy. I don't want to see *Antara* become such an institution. Therefore, *Antara* should become a tool of 'the revolution' that is capable of refusing all counter-revolutionary thoughts" (*Indonesian Observer*, 15 October 1962, p. 1, in Smith 1983: 12). He repeated a similar statement when he inaugurated the Monitor Agency of *Antara* News in the presidential palace on 18 December 1962: "Objective reporting during a time of revolution is impossible. [...] I don't want the news to be objective, but I want it to

70 The *Badan Pendukung Soekarnoisme* or *BPS* was an institution to create solidarity among journalists against the communist press, journalism politics and the communist influence in the press association. Since Soekarno was close to the communist party elite he disagreed to be supported by BPS and in the end decided to disband the organisation.

be committed to our revolution and to become an instrument to fight against the enemies of the revolution" (*Indonesian Observer*, 19 December 1962, p.1, in Smith 1983: 12). By demanding such a 'revolutionary press,' Soekarno arbitrarily threatened journalists, especially those who criticised him, his administration, or his leadership.

Ministerial Decision 17/SK/M/65 and 27/SK/M/65 were a sequel to the disbanding of the BPS. They banned all newspapers associated with the BPS after a longstanding conflict between pro- and anti-communist press. The latter had long pushed for such a measure; the PKI newspaper *Harian Rakjat* for instance published the anti-BPS article "Clear the Press and the Ideas of the BPS and the Counter-Revolution" ("*Bersihkan Pers dan Ide-Ide BPS dan Kontra Revolusi*") (*Harian Rakjat*, 17 February 1965, XV, 4024). Previously, the leftist writers organisation Lekra had also pushed for a press ban against BPS newspapers (*Harian Rakjat*, 10 January 1965, XIV, 3980). Minister of Information, Major General Achmadi responded by revoking the printing permit (*Surat Ijin Cetak*) of 21 newspapers and magazines associated with the *BPS* (*Harian Rakjat*'s headline, "*21 Koran BPS di Djakarta dan Medan Ditjabut Idjin Terbitnya*," on 25 February 1965, XV, 4024).[71] How grim the situation was, is clearly demonstrated by Soekarno's speech in Istora Senayan, Jakarta, at the occasion of PWI's anniversary:

> I dissolved the BPS… my order to dissolve the BPS was surely with reason. I received information, secret information, that the CIA drove the BPS … Well, after getting such information and after looking at its practice, the BPS is anti-Nasakom, so then I dissolved the BPS. I said firmly, any newspapers, any organisation, any tool that becomes part of the BPS cohorts, dissolve it! I repeat, I am not *plintat-plintut* (a 'weather cock'). The thing that must be dissolved is whatever is related to the BPS cohorts (Soekarno 1965: 30).

BPS journalists and editors were detained and prosecuted, although the public prosecutor soon released them due to lack of evidence regarding the involvement of the CIA and the intention to attack Soekarno. In 1966 many BPS newspapers were re-established (Said and Moeljatno 1983: 109-110).

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71 Under Ministerial Decision No. 17/SK/M/65 (24 February 1965), 21 publications were prohibited, including Jakarta-based: *Berita Indonesia* (News of Indonesia), *Berita Indonesia Sport and Film*, *Merdeka* (Independent), *Indonesian Observer*, *Warta Berita* (News Journal), *Revolusioner*, *Garuda* (Eagle), *Semesta* (Universe), *Karyawan* (Labour), *Gelora Minggu* (Sunday Surf); *Suluh Minggu* (Sunday Torch); Medan-based: *Mimbar Umum* (Public Platform); *Waspada* (Vigilant); *Tjerdas Baru* (New Intelligence); *Bintang Indonesia* (Star of Indonesia); *Mimbar Taruna* (Youth Platform); *Suluh Masa* (Torch of the Masses); *Resopim* (Presidential speech on 17 August 1961); *Genta Revolusi* (Revolution Bells); *Duta Minggu* (Sunday Envoy); and *Indonesia Baru* (New Indonesia). On account of the same regulation, several newspapers and weeklies were also prohibited, including Jakarta-based: *Mingguan Film* (Film Weekly); Medan-based: *Pembangunan* (Development); *Waspada Teruna* (the youth edition of Waspada); *Mingguan Film* (Film Weekly); *Siaran Minggu* (Sunday Transmission); *Sjarahan Minggu* (Sunday Lecture); Padang-based: *Aman Makmur* (Securely Prosperous); and Semarang-based: *Pos Minggu* (Sunday Post).

The next anti-press measure was Ministerial Decision 29/SK/65 about the Basic Norms for Press Enterprises within the Context of the Promotion of the Indonesian Press (issued on 26 March 1965 by the minister of information). Its aim was reorganising press enterprises along new lines based on the idea of a closer relationship between these enterprises on the one side and political parties, 'functional groups' and mass organisations on the other. The basis for this reorganisation could be found in the Introduction of Presidential Decree 6/1963.

The first chapter of Ministerial Decision 29/SK/65 prescribed the ideological basis of the press, as well as its tasks and duties. The Indonesian press as a tool of 'the revolution' had to reflect and defend the ideals of 'the revolution' unconditionally. According to this decision, the press ought to support the idea of Pancasila as the basis of the state and *Manipol* as the general orientation of state policy. The press must strengthen national unity by being of a progressive nature and should subscribe to the so-called *Nasakom* (*Nasionalisme, Agama, Komunism* [Nationalism, Religion, Communism]) as an ideology. It furthermore had to function as an instrument for disseminating the teachings of President Soekarno as the 'great leader of the revolution', as well as the 'message of the people's suffering' (*Ampera* or *Amanat Penderitaan Rakyat*).

The second chapter was about the management of press enterprises. It stated that newspapers and periodicals should only be managed by those who supported the basic tenets and objectives of 'the revolution,' and possessed the required technical and journalistic capabilities. Journalists who had been involved in a rebellion against the republic or in counter-revolutionary activities were excluded. The remaining 'patriotic' and *Manipol* journalists needed the official support from a political party, functional group or mass organisation, or the 'Single Five Pillars' (*Pantja Tunggal*).[72] Journalists furthermore needed a written recommendation and approval of their biographies from the police before they could be forwarded to the minister of information, together with an application for a publication permit. Such recommendations were also needed for the managerial staff and editorial personnel of newspapers. The newspaper's management needed a recommendation from the *Serikat Perusahaan Suratkabar* (Federation of Newspaper Enterprises or SPS), and from the Press Division of the *Organisasi Perusahaan Sejenis, Pers* (Organisation of Similar Enterprises or OPS, Pers). Junior journalists had to obtain a recommendation from the PWI.

72 The *Pantja Tunggal* (Single Five Pillars) was an institution formed to promote the *Manipol* ideology. Actually it started in March 1964 by the *Tjatur Tunggal* (Single Four Pillars): four institutions at three levels of regional government – provincial, regency and city), comprised of the provincial governor (or regent or mayor), army commander, police chief and public prosecutor. The fifth pillar was the 'national front leader'.

The third chapter dealt with financial management and determined that the national press should be fully financed by Indonesian capital. The fifth chapter, on accountability, held the important clause that political parties, functional groups or mass organisations and *Pantja Tunggal* were responsible for publications from the newspapers and magazines whose editorial boards they had officially supported and recommended. The sixth chapter contained sanctions, in the form of a temporary suspension or definite closing-down of a newspaper or magazine. This could happen if a newspaper or magazine was found to no longer reflect an *aliran* (school of thought) of a particular constituency as stated in the publication permit, either because it aired other opinions or because this *aliran* had been prohibited; when it introduced ideological deviations that damaged and/or were in contradiction with the teachings of the president; when it undermined the authority of the government and the president; when it disturbed public order and security; when it harmed the cooperative principle of *Nasakom*; and when it harmed the development of the national press by transgressing the limits of its publication permit. Existing newspapers and periodicals were given three months for applying for a new publication permit in accordance with the stipulations of this decision as from the date of its enactment (Chapter 7).

While it seemed that Ministerial Decision 29/SK/65 had exhaustively supressed any remaining press freedom and brought newspapers and magazines under full control of the state, both practically and ideologically, a tenth and final restriction was added to this regulatory framework. It consisted of Ministerial Decisions 51, 52 and 53/SK/M/65, which dealt with respectively government and other official publications, and newspapers and periodicals in scripts other than Latin, Arabic or a regional language, and the circulation of these. The aim of these regulations was to also bring these specific categories under the ideological wings of Guided Democracy and infuse them with its stipulations and phraseology.

In defence of this complete suppression of press freedom, Soekarno told Cindy Adams (Adams 1965: 279):

> In Guided Democracy the key ingredient is leadership […]. Revolution needs leadership. Without it, there is panic and fear. It is because we are still in an economic revolution that I shall not allow destructive criticism of my leadership nor do I permit freedom of the press.

It is clear that Guided Democracy had produced a myriad of regulations that not only suppressed press freedom, but befitted a state on its way to becoming totalitarian. Not only was press freedom systematically subverted by all these rules and regulations from various state institutions, the press was moreover forced to actively support the propaganda of the state. Press publications were increasingly forced to promote Soekarno's *Manipol/USDEK* and other policies, at the risk of being banned if they would not cooperate.

Guided Democracy thus became the worst period for press freedom after Indonesia became independent in 1945. Indonesia's identity in Soekarno's *USDEK* was merely 'Soekarno's identity,' not that of the nation nor of a constitutional democracy as stipulated in the 1945 Constitution. The creation of this myriad of suppressive legislation clearly violated the principles of justice and the protection of substantive liberties underpinning the rule of law. Soekarno's Guided Democracy introduced law as guidance ('rule by law'), but at the same time he imposed an ideological perspective that tended towards 'rule by men.' The law was not used to protect freedom of the press, but adversely, to conceal and mistify the abuse of power. Paraphrasing Tamanaha (2006: 219), Soekarno considered law as an "empty vessel that can be applied to achieve any end."

3.5. Conclusion

As shown in this chapter, press freedom in the territories now known as Indonesia has known highs and lows over the centuries. Limitations on press freedom were introduced long before Indonesia became an independent state, with the VOC already keeping strict controls on the printed press in their Javanese territories. The Dutch government, which took over after the VOC collapsed, continued to do so. The enactment of the *Drukpersreglement* in 1856 enabled the Netherlands-Indies' government to exert excessive control over the press, an opportunity it immediately and enthusiastically deployed. The *Drukpersreglement* introduced a pre-censorship system, which imposed the rule that printing houses and newspaper owners had to submit their newspapers to the authorities for approval prior to publication.

However, not all colonial policies were equally detrimental to press freedom. The 'Ethical Policy' that was implemented at the start of the twentieth century not only included education, improving irrigation in agriculture and transmigration, but also introduced more freedom for the press. This became most evident in the revision of the *Drukpersreglement* in 1906. Although it did not lift all press control, this revision allowed for the development of a vernacular and *Bumiputera* press under Governor-General Van Heutz.

Press freedom declined in 1914 with the introduction of the Netherlands Indies Penal Code, which included several so-called 'hatred sowing' articles. These were often applied in a discriminatory way, targeting the *Bumiputera* rather than the Dutch language press. This development shows that from 1914 onwards criminal law became more dominant than administrative law and repressive control more prevalent than preventive control. A real low was reached when in 1931, during the final period of conservatism, the Netherlands Indies' government enacted the Press Banning Ordinance. Both the Penal Code and the Press Banning Ordinance provided for severely repressive criminal sanctions in order to control press.

The arrival of Japanese troops replacing the Dutch authorities in 1942 first meant few changes to the repressive system in place, as the Japanese military administration continued to apply the preventive and repressive law introduced by their predecessors. Later, the system of press control became rigorously authoritarian in character and was only used to serve the Japanese army and Japanese propaganda in the occupied territory.

Indonesia's independence in 1945 was followed by three years of conflict and chaos, between Indonesians and Dutch, but also among Indonesians themselves. In the territory controlled by the republic, the first press ban was effected in 1948 after the 'Madiun affair', and was directed against the communist press. To this end, the government applied Law 6/1946, which it had enacted barely eight months after independence.

Much changed after the Netherlands recognised Indonesia's independence in late 1949. Four years later the more open political atmosphere resulted in the revocation of the Press Banning Ordinance of 1931. This ushered in what Schumacher called the period of "greatest press freedom in Indonesia," and newspapers used it to the full. As most newspapers were closely allied to particular ideologies and political parties, the press became extremely partisan in nature and published many accusations and recriminations, series about scandals, feuds, and frauds – often without much fact-checking. However, this period was not to last for very long. The introduction of martial law in 1956 allowed the army to arrest and detain journalists and editors, without judicial process. The ample space left open to interpretation caused by the law gave broad discretionary powers to the military and no guarantees for press freedom.

Atmakusumah has argued that, from the time the first newspapers in the Netherlands Indies were published in the mid-eighteenth century to the present, "there has not been a single period of considerable length without government pressure and suppression of the press."[73] This goes against Gazali's argument that perhaps the period 1950-1957 was an exception (Gazali 2004: 4). However, this chapter confirms Atmakusumah's point of view. Only the brief period between 1954 and 1956 deserves praise from a press freedom perspective, but as we have seen, Military Ordinance PKM/001/9/1956 put an end to this.

Press freedom declined drastically after 1957. Under Soekarno's Guided Democracy, journalists, editors, and publishers were submitted to all kinds of anti-press freedom actions. Part of it was a mere 'ideological' effort, with Soekarno calling for a 'revolutionary' press; part of it consisted of legal measures. After the return to the 1945 Constitution through the Presidential

73 Atmakusumah, personal communication, on 30 March 2010 in Leiden, cf. Basori 2001.

Decree of 5 July 1959 and the renewal of the state of emergency, the government intensified its anti-press freedom policies by military (Peperti), presidential and ministerial legislation. These served to impose Soekarno's *Manipol* policy, specifically the 'national press political manifesto.' This meant that the press had to promote 'the revolution' and the struggle for developing the nation. The regime introduced various mechanisms to create a 'guided press' through the control of ideology, organisation, personnel, and circulation of publications. This allowed Soekarno to arbitrarily act against journalists who criticised him, his administration or leadership. The press freedom situation reminisced of communist China, where the press was controlled in a similar way by the communist political party (Chu 1983).

Opposition against the concept of a 'guided press' proved ineffective. Military legislation using administrative controls was applied to easily close down papers opposing Soekarno. At the same time, journalists and editors were silenced by being sent to jail without judiciary process, although the Penal Code actually enabled the government to prosecute them. Twenty-nine papers were closed down for their support of an anti-communist (as opponents argued, anti-Soekarno) bloc, in February and March 1965. Alternatively, in the backlash that followed the political chaos of 1 October 1965, 46 of Indonesia's 163 remaining newspapers were banned indefinitely because of their presumed association with or sympathy for the PKI or its allies. The year of 1965 thus became the worst year for press freedom in Indonesia (Hill 1995: 34).

In theoretical terms, the Indonesian press situation during Soekarno's Guided Democracy resembled an authoritarian system, rather than the Soviet one that has sometimes been suggested as its primary model (Siebert, Peterson and Schramm 1956, see the first Chapter for this typology). In an authoritarian system the government has absolute power and control over the press, over its ownership, content, license, and the use of mass media. Soekarno's regime was characterised precisely by such authoritarianism. Since the idea of *trias politica* was weakly developed, Soekarno's administration forced the judiciary and the legistative to bow to the executive power. The military played a key role in producing the law, interrogating and detaining journalists, and banning particular papers and magazines. Put bluntly, from 1957 until the end of Guided Democracy in 1965, press freedom languished until it ceased to exist altogether.

The restrictions or limitations were formulated into laws, but these laws substantively violated the fundamental principles of press freedom. Albeit restrictions to protect security and public order are justified by law, military installment for regulating the press as shown in this chapter illustrate that there were unclear borders as to what extent such restrictions are necessary in a democratic society. However, this chapter shows that those military laws, S.O.B. and also their implementation were applied beyond the inter-

ests of justice and the development of a constitutional democracy as stipulated under the constitution. The involvement of the military in regulating the press and the extra-judicial detention are strong evidence to confirm that press freedom was severely curtailed during the parliamentary years and Soekarno's Guided Democracy.

This period demonstrates how a lack of democracy, ideology and contradictory lower legislation undermined the Constitution and the legal system more generally. Law was simply practiced as a tool to legitimise suppressing voices critical of Soekarno.

4 Press Freedom from the Early New Order to the SBY Administration

4.1. Introduction

The demise of Guided Democracy was dramatic in all respects and the situation of press freedom was no exception. During the backlash that followed the aborted coup of 30 September 1965, 46 of Indonesia's 163 remaining newspapers were banned indefinitely because of their presumed association with, or sympathy for, the Indonesian Communist Party (PKI) and its allies. Left-wing journalists were expelled from the Indonesian Journalists Association (PWI) and the national news agency *Antara*. Thirty percent of all editorial staff was dismissed. As Hill (1995: 34-35) put it, "the arrests and killing of communist and sympathizing journalists in 1965-66, carried out against a background of large-scale massacres in the country side, cast a very long shadow over the press for a subsequent decade."

Initially, the unstable and chaotic political situation led to strong attacks on the press, but when the New Order took form the situation gradually changed. This chapter starts where the previous chapter stopped. It describes and analyses from a rule of law perspective how press freedom has been shaped and implemented during the periods of the New Order and *Reformasi*, looking at legislation and key cases (i.e. cases which drew much attention).

4.2. From Hope of Restoration of the Rule of Law to Repression

> Press freedom in Indonesia is the freedom to express and enforce truth and justice, not freedom in a liberalist sense.
> (MPRS Decree XXXII/MPRS/1966, 5 July 1966)

During and immediately after the attempted coup of 30 September, the media had an important role in informing the public on how to understand what was happening or had happened. The press and radio also played a significant role in military propaganda, and the military immediately acted to make sure that they could control the flow of information. In the evening of 1 October 1965, Major General Umar Wirahadikusumah, the army commander in Jakarta, released instruction letter 01/Drt/10/1965, which ordered the closure of all publications without special permits. Only the two

army papers *Berita Yudha* and *Angkatan Bersendjata* were allowed to appear.[1] The letter also instructed the police commander of VII/Jaya (Jakarta) to seize all printing houses, except for those of *Berita Yudha*'s and *Angkatan Bersendjata*'s.[2]

Although the prohibition on publishing newspapers only lasted for five days, it is likely to have shaped public opinion. By monopolising the news, the military could use it for political framing. The control of *Radio Republik Indonesia* (Republic of Indonesia Radio, henceforth RRI) played at least as important a role. The influence of RRI must have been clear to all sides in the coup and counter-coup of 1965. Untung's first public action was to announce through RRI that the Council of Generals' attempt to overthrow the President had been foiled. Then, after the military had occupied the RRI Jakarta studios, Soeharto broadcast that he had assumed personal command over the army, which helped legitimise his rise to power in 1965 (Sen and Hill, 2007: 82-83).

Soeharto's counter-coup operation attacked communist party members, those sympathising with them, and those suspected of such sympathies and their friends and relatives at various levels of society. The communist party and other leftist groups were quickly and easily exterminated by the military and the militias associated with them. This was the start of an official 'depoliticisation' of the country, with the military in a supreme position (Crouch 1979: 576; Crouch 2007). Soeharto's position as military commander received political legitimation by Soekarno providing him a license to restore order (by the so-called *Supersemar* [Instruction Letter of 11 March 1966]) and by the unanimous authorisation of the same purpose by the Pro-

1 *Berita Yudha* was established on 9 February 1965, chaired by brigadier general Ibnusubroto. *Angkatan Bersendjata* was founded on 15 March 1965. Both papers were established after most BPS' newspapers were banned in early 1965 (see the previous chapter).

2 The measure was not 100 percent effective, as PKI's *Harian Rakjat* still published an issue on 2 October 1965. According to Peter Dale Scott (1985), this indicates that the CIA and the military were involved in the publication of this issue. Anderson and McVey (1971) have also questioned the authenticity of the 2 October issue of *Harian Rakjat* and argued that it was possibly a "falsification by the army." As they wrote (1971; 1978), "Why did the PKI show no support for the Gestapu coup while it was in progress, then rashly editorialized in support of Gestapu after it had been crushed? Why did the PKI, whose editorial gave support to Gestapu, fail to mobilize its followers to act on Gestapu's behalf? Why did Suharto, by then in control of Jakarta, close down all newspapers except this one, and one other left-leaning newspaper which also served his propaganda ends?" The United Kingdom Embassy document (Southeast Asia Department, Indonesia, D.H. 1015/218, 10 October 1965) in Jakarta also expressed wonder about such a strange publication at that time (Adam 2000). By contrast, Salim Said argued that at that time it was usual that papers were printed a few days before the actual date of publication. The issue of *Harian Rakyat* dated 2 October 1965 would therefore have been printed a few days before the ban, and may even have appeared prior to this date (Salim Said, personal communication, Leiden, 5 December 2011).

visional People's Consultative Assembly's (henceforth MPRS) Decree IX/MPRS/1966 of 21 June 1966.

The change in the political situation gave new hope to detainees, including outspoken anti-Soekarno journalists such as Mochtar Lubis, who believed that their release was imminent. Lubis was indeed released (into 'town arrest') on 17 May 1966, with the obligation to report every Monday to the attorney-general's department (Lubis 1980: 477; Hill 2010: 85-86).

In 1966 two important press regulations were enacted. The first was MPRS Decree XXXII/MPRS/1966 on Press Supervision, enacted on 5 July 1966. Article 2 of this decree states that press freedom is closely related to the responsibility towards God almighty; the people's interest and state security; the sustainability and the achievement of 'the revolution'; morality and decency; and the nation's character. It also stipulated that press freedom in Indonesia is the freedom to express and enforce truth and justice, but not freedom in a liberalist sense (no clarification about this term was offered). Most important was Article 3, which stated that the main objective of the decree was to reinforce press responsibility in promoting and emphasising the *Pancasila* and in rejecting communism, Marxism, and Leninism. The decree contained a provision almost literally taken from Peperti 3/1960 on the Prohibition of Newspapers/Periodicals in a Regional Language not printed in the Latin or Arabic Script; Article 4 of the MPRS Decree stated that the government would allow only one press publication in a non-Latin script. The contents of the decree were clearly influenced by the military and its anti-communist stance.

The second regulation was Press Law 11/1966, signed by Soekarno on 12 December 1966. Although at the time the press was under strict control of the military, several of the law's provisions were remarkably favourable to press freedom:

> Article 4: No censorship or banning shall be applied to the National Press.
> Article 5(1): Freedom of the press is guaranteed in accordance with the fundamental rights of citizens.
> Article 8(2): No publication permit is needed.

The one exception to this rule concerned communism, Article 11 stating that

> Press publications on the basis of Communism/Marxism-Leninism, contradicting the *Pancasila*, are prohibited.[3]

3 Elucidation of Article 11 Law 11 of 1966.

As a sanction for the violation of this article, according to its elucidation, the government could decide to ban the publication. Second, Article 20(1a) of the law stipulated that,

> In the transitional period, the requirement for obtaining a Publication Permit (SIT) is still valid, until the revocation of the law by the Government and Parliament.[4]

The legal implication of this provision was that the government could still apply old anti-press regulations from Soekarno's Guided Democracy (see Chapter 3). For instance, a publisher still had to obtain two permits: a 'publication permit' (*Surat Ijin Terbit*/SIT)[5] and a 'permit to print' (*Surat Ijin Cetak*/SIC).[6] A newspaper publication without both permits would be seized and destroyed. The government granted many of these dual permits to papers supporting its policies, such as *Harian Kami* and *Mahasiswa Indonesia*, both associated with the militant students whose anti-PKI and anti-Soekarno posture was evident (Hill 1995: 35).

So in spite of the promise of the introduction of more liberating legislation, not much improved in practice. The press had to support the government's position, or at least they had to be "a good partner in accelerating development" (Hill 1995: 36). If the press took an opposing view, either the journalist, the editor or the publisher involved would be jailed, as would often happen during the late 1960s and 1970s. The legal framework in place still made it easy to discipline the press to conform to the government's policies.

Although Soekarno was still formally president, the military under Soeharto controlled the government. Soeharto's position was further legitimised by MPRS Decree IX/MPRS/1966, of 21 June 1966. One day later Soekarno delivered a speech before the MPRS (entitled "*Nawaksara*") to account for his acts, but the MPRS refused to approve. In Decree 5/MPRS/1966, dated 5 July 1966 the MPRS seemed to aim for the replacement of Soekarno as

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4 *Dalam masa Peralihan keharusan mendapatkan Surat Izin Terbit (SIT) masih berlaku sampai ada keputusan pencabutannya oleh Pemerintah dan DPR (GR).*

5 During Guided Democracy, at first a publication permit for the press had to be obtained from the military authorities (Peperti Regulation 10/1960). This military regulation was annulled by Presidential Decree 6/1963 on Stipulations regarding the Promotion of the Press; after the annulment the minister of information held the authority to provide a publication permit.

6 This prevention mechanism found its basis in Peperti Regulation 2/1961 on the Monitoring and Supervision of Private Printing Houses and in Presidential Regulation 4/1963 on the Securing of Printed Papers which Disturb Public Order, Especially Bulletins, Newspapers, Magazines, and Regular Publications. They were implemented by the Regional Authority for Emergency Situations and formed a reminder of the pre-censorship system of the colonial period, when publishers were to submit copies to the authorities prior to publication (see Chapter 2).

president.[7] Although Soekarno still signed the Press Law on 12 December 1966, it was clearly Soeharto's political product.

The legitimacy conferred upon Soeharto by the MPRS, the dominant role of the military in controlling society, and the continued disciplining of the press combined formed the platform for Soeharto's ascent to power in 1966. On 12 March 1967 the MPRS deposed of Soekarno as president through Decree XXXIII/MPRS/1967, thus paving the way for Soeharto to start taking over the leadership of the country in a more formal and legitimate way. Article 3 of the decree stipulated that "Soekarno was prohibited to engage in political activities until the next general elections." The article was quite controversial, as it indicated that there was no freedom of political expression, not even for the former president and founder of the nation Soekarno. If the latter's fundamental rights were legally constrained by the MPRS, it would be even easier to deny them to common people.

4.3. 'Press Responsibility' and 'Pancasila Press'

The 1966 Press Law was amended by Law 4/1967, on 6 May 1967. The amendment repealed Presidential Regulation 4/1963 on the Securing of Printed Papers Disturbing Public Order, in response to a PWI campaign against press control.[8] Yet, this only removed the authority of the supreme prosecutor to prosecute press reporting, but initially left intact the power of the military authority to examine press violations and impose sanctions on the basis of Peperti Regulation 10/1960 on the Publication Permit for Newspapers and Magazines.[9] Even if the latter was soon replaced by another regulation on the publication permit, which took this power out of the hands of the military (see below), the publication permit remained a powerful instrument of press control.

To the prohibition of promoting communism/Marxism in Indonesia's press, the amended press law added the requirement of 'press responsibility, based on God almighty, the people's interest and state security', and the sustainability and achievement of 'the revolution.' The press was no longer 'an activator of the masses,' but 'an activator of national development'; no longer a 'guardian of the revolution,' but a 'guardian of the *Pancasila* ideology'; and no longer a '*Pancasila* Socialist Press,' but simply a '*Pancasila* Press' (Hill 1995: 62).

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7 It was promulgated on the same day as the MPRS Edict on Press Supervision mentioned above. This would later be signed into the Press Law.

8 See the PWI Report on its 13th Congress in Banjarmasin, 17-21 June 1968.

9 Peperti (Supreme Martial Authority) Regulation 2/1961 on Monitoring and Supervision of Private Printing. According to this regulation, the Peperti authority (military) had the power of preventive and repressive monitoring of printing materials.

During the government of the so-called first and second *Ampera* Cabinets, B.M. Diah as a senior journalist and one of the founders of the PWI served as the minister of information (1967-1968).[10] Diah actually felt unhappy about his appointment in the complex situation following the events of 1965, raising the ire of Soekarno by running programmes assigned by Soeharto. These were to promote 'press responsibility'. Diah was also to lead (ex-officio) the new organisation of the Press Council (*Dewan Pers*).

The Press Council, an organisation specifically set up to control the press, was established on 8 July 1967 by Government Regulation 5/1967.[11] Its main function was to assist the government in guiding the establishment and development of the national press. To this end the council was to: 1. assist the government in preparing the rules and regulations of the press as well as monitoring their implementation; 2. act as a liaison between the government and press organisations in resolving problems concerning the relationship between the press and government; and 3. assist the government in conducting supervision of journalists and journalist organisations (Art. 2). Although it was officially an autonomous state organ in the Department of Information, the Press Council's composition put it under firm control of the government: the minister of information and the general director of the Department of Information were its chair and vice-chair (Art. 5). Thus, the Department of Information became the central actor in shaping press freedom during the early years of the New Order.

The Press Council became an effective political instrument to transmit the idea of 'press responsibility' under the Soeharto regime and could structurally discipline newspapers, journalists, and associations by using operational regulations, permits, and 'government-press liaisons' as leverage (Hill 2010; Wiratraman 2011). After Soekarno was ousted from the presidency, the press according to Minister B.M. Diah seemed "untrustworthy and uncontrollable" (Kakiailatu 1997: 231) and on 24 October 1967 his department warned several and the next day banned eight newspapers by withdrawing their publication permits.[12]

On the other hand, the minister of information allowed the reappearance of several critical newspapers that had been banned by Soekarno. *Indonesia Raya* obtained a publication permit and the essential permit to print (SIC) from the Jakarta commander of the all-powerful command for the restoration of security and order (*Komando Operasi Pemulihan Keamanan dan Ketertiban*

10 Diah was appointed minister of information by Presidential Decree 171/1967.

11 The proposal was recommended by the minister of information, 14 April 1967, 69/SM/67 on Government Regulation Draft on the Press Council.

12 The newspapers concerned were *Andjangsana Pusat, Andjangsana Djaja, Populer, Dharma Bakti, Indodjaja, Tamsja, Warta Minggu* and *Djakarta Minggu.*

or *Kopkamtib*), on 10 August 1968.[13] This gave much hope to journalists that press freedom was on its way to being restored. In an interview on 13 January 1981, Mochtar told Hill (2010: 89):

> I gave full support to Soeharto's government… I accepted the statements of intent of these people for our nation so I supported them because they [said] they wanted to correct all the mistakes, the fatal mistakes under Soekarno. They wanted to develop democracy in Indonesia … build welfare for the people, … social justice and political justice.

Hill shows how Mochtar truly believed that the Soeharto government was willing to establish a fairly liberal political system, free from leftist agitation and Soekarno. Given his stature as a very critical journalist, his positive attitude towards the new regime influenced many journalists to adopt a similar view. However, one should take into account that many newspapers and magazines had been banned in 1965-1966, and that the few which remained were inclined to be more obedient to the New Order. Indeed, very few papers published critical news reports (Hill 2010: 89). Those which were brave enough to be critical first focused on the rising corruption. A notable target was General Ibnu Sutowo, who became minister for oil and gas in February 1966, and in 1967 president director of state oil company Pertamina. From the start he became the culprit of student demonstrations on account of corruption and mismanagement. He ran Pertamina without government control and accountability, mainly because the company proved a major revenue generator for the army and the regime. Mochtar's *Indonesia Raya* exposed Ibnu Sutowo's opulent lifestyle, especially in 1969 at the occasion of his daughter's wedding. In a way Ibnu Sutowo became the central target of Mochtar's moral crusade, as Soekarno had been targeted before 1966 (Hill 2010: 100-101).

Indonesia Raya was not immediately subjected to censorship, but pro-army papers, such as *Angkatan Bersenjata* and *Merdeka*, defended Ibnu Sutowo and accused Mochtar of a conflict of interest as chief editor of *Indonesia Raya* and his involvement in consultancy firm *Indoconsult*.[14] This made other news-

13 Mochtar Lubis as chief editor and director of Indonesia Raya Corporation sent two application letters to the minister, on 31 May 1966 and on 11 February 1967. He received his publication permit only on 24 July 1968 (Minister of Information Decree 0632/SK/DIR/PDLN/SIT/1968). Indonesia Raya was officially first republished on 30 October 1968.

14 One of newspapers which made a claim about Mochtar's conflict of interests, *Merdeka*, stated that *Indonesia Raya* had received 'foreign' funding to attack Pertamina and destroy Ibnu Sutowo, because his 'tough' oil policies were limiting foreign oil company profits. B.M. Diah, chief editor of *Merdeka* stated that Mochtar had attacked Pertamina because they had rejected a project proposal made by *Indoconsult* (Hill 2010: 102).

papers more hesitant to stand up for Mochtar Lubis.[15] Yet, in August 1970 Soeharto declared that if papers like *Indonesia Raya* and *Nusantara* remained a nuisance, they would be dealt with firmly (Rosihan Anwar in Hill 2010: 103). Eight months later, in April 1971, *Nusantara*'s chief editor T.D. Hafas was charged with disseminating hatred against President Soeharto and his assistants, and sentenced to one year in prison (2 September 1971). Hafas was accused by the public prosecutor of having printed a series of news items, articles and cartoons in 1970 and early 1971 with the intention of disseminating feelings of enmity, hatred and contempt towards the president of the republic and his assistants. The accusation centred on the words "*tidak becus*" (a vulgar expression meaning 'not capable'), used by Hafas when describing the performance of Minister of Information Budiarjo, and his comment that Soeharto's 'development' cabinet was "amateurish" (Lee 1974: 30-31).

As a result of these events the press soon became less outspoken. From the start, issues that were considered out of bounds, such as political prisoners and the recent massacres, could not be properly researched by newspapers, including *Indonesia Raya.* Soon, 'critical' newspapers did not cover the news significantly differently from the 'moderate' press or even the New Order militant press (Abdurrahman Saleh, p. 47, in LBH, 1976).

The one year imprisonment sentence for T.D. Hafas in 1971 demonstrates how the Soeharto regime started to use the colonial legal legacy, in this case the *haatzaai-artikelen* from the Penal Code, to restrict press freedom.[16] Journalists and other press workers now found themselves between the Press Law on one side and the Penal Code on the other, both of them with their own apparatus of repression involved. In short, there were two types of press control: first, the Penal Code mechanism (carried out by the police and public prosecutor), and second, the administrative mechanism of the publication permit or SIT (from the minister of information) and the permit to print or SIC (from the *Kopkamtib*).

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15 Hill wrote that although the issue of a conflict of interests was not clear-cut, this still had a moderating effect on a number of dailies, such as *Kompas*, *Pedoman* and the student press which had initially backed Mochtar's *Indonesia Raya*. The issue was also used by B.M. Diah to attack Mochtar Lubis after *Indonesia Raya* had published an article about B.M. Diah's involvement in a sex scandal. Later on, Diah was unable to prove his allegations during an ensuing series of court cases, in which Mochtar and Diah sued one another for defamation (Hill 2010: 101-102).

16 Hafas as editor in chief of *Nusantara* was accused of disseminating hatred against Soeharto and his assistants. This case was inseparable from the case of corruption in Pertamina, about which Soeharto gave a statement in August 1970 saying that if *Indonesia Raya* and *Nusantara* continued to make trouble against him, these papers would be dealt with firmly (Hill 2000: 103). The role of mass media in criticising corruption and its relation to politics and the military are discussed in detail in Crouch (2007: 293-299).

One of the key elements of the New Order press policy was a strict control on publication permits. As mentioned above, this was taken out of the hands of the military. On the basis of Article 20(1)a of the Press Law,[17] the minister of information enacted Regulation 03/PER/MENPEN/1969 on the Institution of Publication Permits in the Transitional Period for General Press Publications. This regulation replaced Peperti Regulation 10/1960 and reformulated in detail the mechanism for providing publication permits. It defined 'the transitional period' as the time frame from 30 September 1966 until the next general elections for the People's Consultative Assembly (MPR) in 1971.[18]

In fact, this regulation was in clear contravention with another provision of the Press Law, i.e. Article 8. The latter stipulated that "every citizen has the right to publish papers…," and section (2) clearly added that, "in exercising such a right [a citizen] does not need a publication permit letter." Regulation 03/PER/MENPEN/1969 thus violated the legal principle that a regulation of a lower level may not go against a regulation of a higher level. However, it was never submitted to judicial review.

In practice, the mechanism for obtaining permits was quite complicated, and state officials intervened in the process. Permits to publish had to be applied for with the minister of information (Art. 2). The applicant was obliged to abide by a legally permitted company structure as prescribed by a regional police commander (*Komando Daerah Angkatan Kepolisian* or KOMDAK); he needed recommendation letters from the regional and national level PWI; as well as recommendation letters from the regional and national Newspaper Publishers Association (SPS) (Article 2 (d, e, and f). Each company was only allowed to publish a maximum of three newspapers (Art. 4). The publication permit would be repealed if a publication of a newspaper concerned contravened Article 11 of Law 11/1966, which prohibited any publication involving: (a) communist/Marxist – Leninist thoughts; (2) pornography; (3) cruelty or sadism; and (4) content contravening Pancasila, such as the contravention of religious values, moral dignity, and social justice involving moral responsibility for securing the coming generation. The repeal of a publication permit meant automatically that the newspaper concerned could no longer be published, printed or disseminated.

The PWI also played a role in legitimising New Order's control of press associations. Through Ministerial Decree 02/PER/MENPEN/1969, the Department of Information limited the number of journalist associations and in the end only recognised one single journalist organisation (the PWI). According to Article 3 of the Press Law, "Indonesian journalists are obliged

17 Article 20(1)a. During the transitional period the obligation to obtain a publication permit was still in force, until the government and DPR(GR) decided to revoke it.

18 Point 4 of the General Consideration of Ministerial Regulation 03/PER/MENPEN/1969.

to become members of a journalist association which is recognised by the government." This was an effective tool for the New Order strategy to discipline and control journalists and their associations. That the restrictions on establishing a journalist organisation and the obligation for journalists to join the PWI violated Article 28 of the 1945 Constitution, which guarantees freedom of expression, freedom of assembly and freedom to unite, was of little concern to the government. It shows how the New Order regime purposively disregarded fundamental requirements of the rule of law.

In summary, the hope for press freedom at the beginning of Soeharto's New Order regime in 1966 was soon thwarted by bans and suppressive legislation. The Press Law and its amendments were designed to support counter-coup measures and/or to fight communism, but in practice they were used against any critic of the regime. The key terms from the dominant discourse became 'press responsibility' and 'Pancasila press.' The regime also applied unlawful administrative regulations to force the press to obtain a publication permit, with the minister of information at the centre of control. If deemed useful to counter transgression of the New Order rules, like in the case of T.S. Hafas, the regime turned to criminal prosecution. 'Self-regulation' by a single journalist association in combination with co-optation became the final building-blocks of the systematic undermining of press freedom under the New Order.

In short, there was not much of a 'honeymoon relation' between the press and the government even in the early years of New Order. It rather showed how the press switched the 'crocodile pit' for the 'tiger cage.'

4.4. A 'Bureaucratic-Authoritarian State' and the Press

Press freedom is the crown of the New Order.[19]
(Lieutenant General Ali Moertopo, minister of information, 1978-1983)

Press bans continued to be imposed in the 1970s. Prior to the general elections of 1971 *Harian Kami* and *Duta Masyarakat* were banned for not having respected the so-called 'week of calm' (*minggu tenang*) when political campaigns were to be halted. Another example is the revocation of *Sinar Harapan*'s permit to print (SIC) by the *Kopkamtib* in January 1973 for allegedly leaking details of the 1973-74 national budget proposal (RAPBN) (Hill 1995: 38). This example also shows how the military had certainly not lost its power over the press, even after the authority to issue and revoke a publication permit had been moved to the minister of information.

19 "*Kebebasan pers adalah mahkota Orde Baru*." This statement is a quotation from Kakiailatu (1997: 224).

The first implementing decree with regard to the permit to print was KEP 063/PK/IC/VIII/1973 of the Special Task Force, Command for the Restoration of Security and Order of Djakarta Raya and Surroundings (*Laksus Pangkopkamtibda Jaya dan Sekitarnya*). The decree provided the permit to print to a number of publications, including *Indonesia Raya*. The permit given on 1 August 1973 to Mochtar Lubis included the obligation to submit ten printed copies of every publication of *Indonesia Raya* to the Mass Media Task Force Unit of the Command for the Restoration of Security and Order in Jakarta (*Satgas Mass Media Laksus Pangkopkamtibda Jaya*).[20]

Military control over the press reflected the power of the armed forces generally during the early period of the New Order. The military held strategic positions in the state bureaucracy, with the Indonesian state becoming more and more centralised and authoritarian in character through the exclusion of political parties from effective participation in the decision-making process and the appropriation of the state by its officials. This character was inextricably intertwined with the regime's economic policy, which stimulated industrialisation and economic growth, and allowed the elites to increasingly appropriate large parts of the benefits which were the result of the economic development of the time (Robison 1986: 105). The regime justified its authoritarian control through the need for rapid economic development and to preserve a fragile social 'harmony' during the complex transition to modernity (Gosh 1996: 36-37). Thus, the Indonesian New Order defined itself as a modernising, developmentalist state, and actually made little pretences of being a democracy. The resulting bureaucratic capitalism sustained a military bureaucratic state and provided officeholders of that state with patronage for themselves, their families, and the political factions to which they owed their authority (Robison 1978: 37).

This political configuration contributes to the explanation of the political riots in 1974 known as the *Malari* (Fifteen January Riots) and the ensuing oppression of the press. When Japanese Prime Minister Tanaka visited Jakarta on 14-17 January 1974, pro-democracy students used the occasion to voice their protests against the New Order's economic policy and in particular against the extractive and manufacturing investments sponsored by Japanese, American and expatriate Chinese capital. The protests led to a violent response by the regime.[21] Students were molested and arrested by the military, and serious measures were taken against journalists and

20 This decision was signed by Colonel L.S.M. Panggabean, S.H. Actually the permit to print was given five years later, after a publication permit was given by minister of information on 24 July 1968, through its decision 0632/SK/DIR/PDLN/SIT/1968.

21 During the *Malari* riots, at least 11 people were killed, 775 people were arrested, 807 cars and 175 motorcycles were burned, and 144 buildings were destroyed. These riots have been analysed from different perspectives, including as a protest against Soeharto's personal assistants, or as internal friction among military officials (General Soemitro against General Ali Moertopo) (Adam 2003).

newspapers. At least 470 people were arrested, including *Indonesia Raya*'s Enggak Bahau'din (who was detained for nearly 11 months) and Mochtar Lubis (detained for two and a half months). Several printing and publication permits were withdrawn because they had reported on the *Malari* events, including *Indonesia Raya*, *Nusantara*,[22] *Abadi*, *Harian Kami*, *The Jakarta Times*, *Pedoman* (Jakarta); *Mingguan Wenang*, *Pemuda Indonesia*, *Ekspres*, *Suluh Berita* (Surabaya) and *Indonesia Pos* (Ujung Pandang). Only a few of these were eventually allowed to re-appear under a different name, such as *Pelita* (replacing the *Islamic Abadi*) and *The Indonesian Times* (replacing the English-language *The Jakarta Times*) (Hill 1995: 37).

It was clear that the government held these newspapers responsible for the *Malari* demonstrations. *Indonesia Raya* may serve as an example. Its editorial of 14 January 1974, written by Mochtar Lubis with the title "A Welcome to Tanaka,"[23] analysed Japan's role in Southeast Asia, with critical attention for the impact of Japanese business in Indonesia. On 15 January, *Indonesia Raya*'s headline carried news about student detentions, and its editorial asked the authorities not to accuse students of the riots following their demonstrations. Such headlines and editorials continued for four days (15-18 January 1974).[24] Later on, in its revocations of their publication and printing permits, the government accused the press of inciting the public to riot. At that time, only *Indonesia Raya* had been openly critical of the Indonesian government's foreign policy.

Indonesia Raya's permit to print (SIC) was thus withdrawn within six months of receiving the permit (on 1 August 1973). The Commander of Security and Order in Jakarta, through Decree KEP-007-PK/I/1974, repealed it on 21 January 1974, considering that:

> … (a) *Indonesia Raya* has breached the spirit and core of the norms stipulated in MPR Decree IV/MPR/1973 and Law 11/1966; (b) *Indonesia Raya* has published news which can degrade the authority of and trust in the national leadership; (c) *Indonesia Raya* is considered to have provoked people, which has led to chaos on 15 and 16 January 1974 and which could cause conflict among leaders.

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22 *Nusantara* was the first newspaper banned in the context of the *Malari* riots. Its permit to print was withdrawn on 16 January 1974 by the *Kopkamtibda*, together with the banning of three radio stations: *Suara Neggala*, *Radio Arief Rahman Hakim*, and *Suara Radio Kebebasan* (Haryanto 1995: 190).

23 "Selamat Datang Tanaka-san" (Welcome, Tanaka-san), *Indonesia Raya*, 14 January 1974.

24 "Harus Diselesaikan dengan Bijaksana" [This needs to be resolved wisely], *Indonesia Raya*, Editorial Column on 15 January 1974; "Pengalaman dengan Jepang selalu Pahit" [The experience with Japan has always been bitter], *Indonesia Raya*, Editorial Column on 16 January 1974; "Jangan Pamer kekayaan" [Never show your riches], *Indonesia Raya*, Editorial Column on 17 January 1974; "Kita Lihat Pelaksanaannya Nanti" [We'll see the implementation later on], *Indonesia Raya*, Editorial Column on 18 January 1974. Although *Indonesia Raya* still published about the *Malari* riots on 19 January 1974, its editorials were quiet by then. Further details about *Indonesia Raya*'s role in the *Malari* riots can be found in Haryanto (1995).

Indonesia Raya's publication permit was also withdrawn, by Decree 20/SK/Dirjen-PG/K/1974, on 22 January 1974. Its considerations were more elaborate:

a. It is necessary to take action against *Indonesia Raya* by withdrawing its permit to print (SIT) 0632/SK/DirPP/SIT/1968, 24 July 1968-10632/Per/Per/SK/DirPP/SIT/1971, on 18 June 1971, which was given to *Indonesia Raya* Corporation, Bonang 17 Jakarta.
b. The publication permit's withdrawal is based on the following considerations:
   (e) *Indonesia Raya* daily has breached the spirit and core of the norms stipulated in MPR Decree IV/MPR/1973 and Law 11/1966;
   (f) *Indonesia Raya* daily has written things which: 1. in principle lead to attempts to weaken the foundations of national life, by fuelling issues such as foreign capital, corruption, failing dual function of government officials, high-level battles, and *Kopkamtib* personal assistant problems; 2. damage public confidence in the national leadership; 3. provoke sensitivities without giving precise and positive solutions, which may lead to inciting people to rise up and take actions which are liable to cause disruption to public order and state security; 4. create a situation that leads to acts of treason;
   (g) Although the *Kopkamtib* has given warnings to all media in Bandung since 5 August, […] nevertheless, the reports and writings of certain newspapers have actually disregarded such warnings.
   (h) The permit to print was withdrawn by *Laksus Pangkopkamtibda* on 21 January 1974.
c. The acts of *Indonesia Raya* daily have been contradicting and violating the function and responsibility of the press, as stipulated in MPR Decree IV/MPR/1973, the Press Law, the Journalist Code of Ethics and Ministry of Information Regulation 03/1969, Chapter III, article 7d.
d. The withdrawal of *Indonesia Raya*'s publication permit does not violate press freedom, but precisely serves to implement press freedom in a concrete way in response to the Pancasila democratic order, with a healthy press as dreamed of by the Indonesian people as formulated under MPR Decree IV/MPR/1973, i.e. a "free and responsible press."

Although more elaborate, these legal considerations are so vague as to give no criteria at all for determining what is allowed and what is not. The two decrees clearly demonstrate that the repeal of *Indonesia Raya*'s permits was not only decided without involvement of the judiciary, but also that the military authority and the minister of information applied a procedure that would not even come slightly near a fair trial. Haryanto (1995: 218) has observed that the decision was taken without first consulting the Press Council. This consultation was actually a legal obligation at that time (GR 5/1967 Article 2(2) and (4) and Article 3(2).[25] In any case, on 22 January 1974 *Indonesia Raya* published its last issue.

25 The relevant articles state that the Press Council's task is to act as a connecting institution (*Badan Penghubung*) between the government and press organisations in resolving problems in their relation, and give advice to the government in helping and protecting the press. Article 3(2) moreover states that the Press Council has the authority to offer advice on institutional policies and acts regarding press companies and their journalists which violate the Press Law or other press regulations.

Three months later, on 9 April 1974, the Council for Political and Security Stabilisation (*Dewan Stabilisasi Politik dan Keamanan*) decided to repeal the publication permit (SIT) of daily *Pedoman* and weekly *Ekspres*. As quoted by *Tempo*, the Minister of Information Mashuri said that:

> Such a decision was issued in order to complete the resolution to close down several newspapers and magazines as a consequence of the *Malari* riots…. Now, 12 publications are closed down, 417 workers and journalists in Jakarta and 85 workers in regional offices were dismissed.[26]

The 1974 bans make clear how the government used the publication permit and the permit to print for limiting press freedom. Yet, the government went further, by also targeting journalists considered as 'offensive'. These were 'blacklisted' by the authorities. When eight journalist who had formerly worked for *Pedoman* and *Indonesia Raya* attempted to join the daily *Cahaya Kita*, the director-general of Press and Printing of the ministry of information announced that all journalists who had been working with banned papers were required to obtain permission, in the form of a 'clearance letter' from the directorate-general, before they could be reemployed by another newspaper (Hill 1995: 38). This added another instrument to the extra-legal repertoire of the government to control the press.

There was little organised resistance to such measures. The PWI hardly responded to the repressive turn of government policy and was absent altogether when it came to advocating for journalists or newspapers. By the end of March 1974, the Ethical Council of the PWI had only pointed at a common statement of the PWI and the Department of Information of 18 June 1973, which stipulated that "the difficulties which currently besiege the Indonesian press need not mean that they disturb or even harm the development of national press quality and sweep aside the responsibility in guiding the nation's and the young generation's morals."[27] Such a statement completely disregarded the painful realities for the press and the freedom of expression.

The *Malari* riots badly embarrassed and annoyed Soeharto. The events made him more careful in choosing his aides and in developing policies to sustain his power and position in a more systematic way, including curbing the press. This further entrenched the politics of 'bureaucratic authoritarianism' and its combination of military involvement in politics and the Ministry of Information's role as an executive body for disciplining the press. The press had to do without the protection of a fair judicial process mechanism in facing government and military intervention through 'administrative' measures without a proper legal basis.

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26 "Yang Eksit dan Yang Terbit" [Who exits and who publishes], *Tempo*, 20 April 1974.
27 "Yang Eksit dan Yang Terbit" [Who exits and who publishes], *Tempo*, 20 April 1974.

4.5. Discourse and Streamlining Organisations as Sources of Control

One way of disciplining the press under the New Order was framing the proper relation between 'democracy' and the press through a particular discourse (Kitley in Lloyd and Smith 2001: 262-263; Mundayat 2005). In particular Soeharto's speeches were an important source of information in this regard. A good example is his speech of 26 March 1975:

> In a democratic society as we wish to develop, there is no doubt whatsoever among us, about the right to have a different opinion, including having a different opinion than the government. Nevertheless, such a difference of opinion must grow from the pure desire to improve oneself, and therefore needs to be accompanied with a better result, while the effort to realise a different opinion as mentioned before should be done in a democratic manner, based on the Pancasila and the 1945 Constitution.[28]

Two years later, Soeharto started to emphasise 'national stability' as an important issue:

> The press should avoid any writing which incites or irritates people and shakes national stability.[29]

It was the government which defined whether press reporting supported the regime's interests. There was a clear prohibition on exposing the government or government policies in a negative way, especially when they concerned the regime's economic policy and its bureaucratic capitalist network. However, there was a grey area where concepts as 'democracy' and 'national stability' were arbitrarily interpreted by the regime, just as 'Pancasila press' or 'responsible press' under Guided Democracy as described in Chapter 3. No special institution turned these concepts into clear legal standards, and hence a large degree of legal uncertainty remained.

Another way of disciplining the press was the further streamlining of press organisations. In 1975 the minister of information promulgated Decree 47/KEP/MENPEN/1975 to recognise only a single organisation for journalists (PWI) and publishers (SPS). These organisations could be easily controlled by the Soeharto regime, a policy it used in many other fields as well (Hill 1995).

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28 "*Pers Pembawa Panji-Panji Demokrasi*" [Press as Carrier of the Banner of Democracy], Opening remarks for Indonesia's chief editors' meeting in Jakarta, 26 March 1975.

29 "*Hindari Pemberitaan yang Membakar dan Menghasut Rakyat*" [Avoid News that Heats up and Incites People] Soeharto's speech for Indonesia's editorial chief and PWI in Jakarta, 9 February 1977.

In January 1978, new press banning measures, following student protests against the government's development policies and their involvement of foreign investors, ethnic-Chinese investors and government officials, once again showed the tight limits on press freedom. The *Kopkamtib* arrested 223 students, disbanded all university student councils, and banned seven student newspapers and seven prominent newspapers in Jakarta (*Kompas*, *Merdeka*, *Sinar Harapan*, *Pelita*, *Pos Sore*, *Indonesia Times* and *Sinar Pagi*). Almost similar to 1974, they were accused of provoking people directly or indirectly to engage in activities which threatened national security and public order. Before they could reapply for a permit, the directors of these newspapers had to send a written statement to the president, the minister of information, and the *Kopkamtib* commander, in which they promised to henceforth obey the "norms of a free and responsible press."

President Soeharto responded directly to what had happened during his visit to Surakarta for the opening ceremony of the National Press Monument Building, on 9 February 1978:

> Until the end of January 1978, an almost uncontrollable evolution of press freedom endangered national stability. And if there would have been an opportunity for further growth, this would have created a dangerous situation for the state and the safety of the people. For the greater interest, and in order to remove this dangerous situation for the state, the government was forced by the situation to temporarily bridle several newspapers.[30]

For students, Minister of Education Daoed Joesoef developed a policy of depoliticisation through a special body, the Normalisation of Campus Life/Student Affairs Coordination Body (NKK/BKK).[31] Undoubtedly, this affected the student press. Several student papers were banned in 1979 and 1980, and on 31 May 1980 the ministers of education and information established the National Supervisory Team for the University Student Press (*Tim Pembina Pers Kampus Mahasiswa Tingkat Nasional*) through joint Decree 0166/P/1980. The supervisory team included officials from both departments and appointed university lecturers. Its tasks were supervising the student press as a tool of education, which as a subsystem of the university should be part of the university government system, and the student press should be 'assisted' by the government in its efforts. The supervisory team could apply pressure to the student press, by the requirement for the latter to hold a sort of permit, the STT (*Surat Tanda Terdaftar* or Letter of Registration) (Supriyanto 1998: 80-84).[32]

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30 *PWI adalah Kekuatan Perjuangan* [PWI is a Power in the Struggle], Soeharto's speech during the opening ceremony of the National Press Monument Building, in Surakarta, 9 February 1978.

31 NKK/BKK, '*Normalisasi Kehidupan Kampus/Badan Koordinasi Kemahasiswaan*,' was based on Ministry of Education Decree 0156/U/1978 and 037/U/1979.

32 The STT was based on Minister of Information Regulation 01/Per/Menpen/1975.

This 'depoliticisation' through press bans and disbanding student councils, which obviously contravened Article 28 of UUD 1945, was the hallmark of the New Order. The hypocrisy of the regime in this matter can be illustrated by the following quotes from one of Soeharto's speeches:

> Fundamental postulates for the press are: improving responsible freedom to maintain dynamic national stability, strengthening national unity and continuity of development. Those should be developed on the basis of the Pancasila and the 1945 Constitution.[33]

And in the same speech:

> One of the important elements of democratic life is the improvement of freedom of opinion. And the press is one of the channels to freely express one's opinion.[34]

The period from 1970-1978 was the worst for press freedom during Soeharto's regime, in the sense that there was no court involvement in press banning at all and that the military authorities were heavily involved. In this respect the situation was basically the same as under Soekarno during the period in which martial law applied and the military were in charge of supervising the press (from 1957 to 1965). Rule of law was a far cry from Soeharto's bureaucratic-authoritarianism during these years.

4.6. 'Responsible Freedom' According to the New Order

I am happy, because based on my current observations,
the principle of responsible freedom is more
entrenched in our press society
(Soeharto, 1981)[35]

There are two sources that illuminate the earth.
The first one is the sun and the second is the press….
(Soeharto 1984)[36]

In the early 1980s, the press was closely controlled by the state. Not only did the Department of Information and the military exercise full control over press publications, but the Soeharto regime also successfully supervised jour-

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33 *PWI adalah Kekuatan Perjuangan*, Soeharto's speech during the opening ceremony of the National Press Monument Building, in Surakarta, 9 February 1978.

34 *Asas Kebebasan yang Bertanggungjawab Harus disadari Pers Sendiri* [The Principle of Responsible Freedom Needs to be Acknowledged by the Press], Soeharto's speech to Indonesia's editorial chief and the PWI in the State Palace, Jakarta, 11 September 1981.

35 *Asas Kebebasan yang Bertanggungjawab Harus disadari Pers Sendiri*, Soeharto's speech to Indonesia's editorial chief and tge PWI in the State Palace, Jakarta, 11 September 1981.

36 "*Ada dua sumber yang menerangi bumi ini. Pertama matahari dan kedua pers….*" Soeharto's speech at the opening session for the Conference of the Ministers of Information of Non-Aligned Countries (COMINAC), Jakarta, 26th-30th January 1984.

nalists through the PWI and press owners through the SPS. The next step was to further internalise control of the press itself. To this end Soeharto addressed the PWI's national congress in 1981, which had the theme "Strengthening Positive Interaction between Government, Press and Society."[37] Soeharto's speech emphasised the normative concept for the press known as 'a responsible press.'

Like its predecessors 'democracy' and 'national stability,' the concept of a 'responsible press' was fairly vague. Four years before addressing the PWI congress, on 7 February 1977, Soeharto had already introduced the idea of a 'responsible press,' saying that "The press itself should be responsible to measure whether news or a problem needs to be publicly known, and how to expose it. In this regard, [the press should] exercise ultimate responsibility and carefully estimate this." It never became much clearer than this. 'Development' also remained a central but equally vague concept, as can be illustrated by the following quote of a 1982 Soeharto speech: "In our great activities of national development, the press has a respectable position to light an enlightening torch of explanation, so that society can really understand the direction and purpose of our development."[38]

In practice, press responsibility and national stability led to strict control of the press, for instance when *Tempo*'s publication permit (SIT) was repealed on 12 April 1982. The reason was simply that *Tempo* had posted a news report and a photo about the unrest accompanying the general elections in Banteng Square in Jakarta, which the Minister of Information Decree 76/Kep/Menpen/1982 considered as 'disturbing national stability.' In order to regain its publication permit, *Tempo* should obey the Press Council's directions, which held that (1) *Tempo* should be responsible in securing national stability, safety, order and public interest, and not make matters worse and create tension in society; (2) *Tempo* should exercise self-restraint and prioritise the public interest rather than individual and *Tempo*'s interests; (3) *Tempo* should always protect the good reputation and authority of the government and the national leader; (4) *Tempo* should obey the law and rules of the Press Council, the Journalist Code of Ethics, and other regulations stipulated by the government to promote a free and responsible press; (5) *Tempo* should apply 'introspection,' 'correction,' and internal improvements for stabilising a free and responsible press.

37 *Pers Jadilan Pelopor Pemerataan Pembangunan* [The Press Must Become a Protagonist of Even Development], Soeharto's speech at the PWI National Working Conference, Banjarmasin, 9 February 1981.

38 *Pers Mendapat Kehormatan untuk Menyalakan Obor Penerangan Pembangunan*, [The Press Gets Respect for Lighting the Torch for Explaining Development], presidential speech at the inauguration of the Press Council Building, Jakarta, 1 March 1982.

From this case, it is quite hard to find the connection between 'development' as stipulated by Soeharto and the requirement for *Tempo* to fulfil these five requirements. Of the guidelines prescribed to *Tempo* 'securing national stability, safety, order and public interest, and not make matters worse and create tension in society' and 'always protect the good reputation and authority of the government and the national leader' are especially problematic. These issues have been addressed by the international press community, for instance at the Talloires conference in France in 1981.[39] The conference observed that governments, in developed and developing countries alike, frequently constrain or otherwise discourage the reporting of information they consider detrimental or embarrassing, and that governments usually invoke the national interest to justify these constraints. By contrast, the Talloires participants held that the people's interests, and therefore the interests of the nation, are better served by free and open reporting. From robust public debate grows better understanding of the issues facing a nation and its peoples; and out of understanding grow better chances for solutions. They also reaffirmed that censorship and other forms of arbitrary control of information and opinion should be eliminated; the people's right to news and information should not be abridged; access by journalists to diverse sources of news and opinion, official or unofficial, should be without restriction; members of the press should enjoy the full protection of national and international law; and also journalists should be free to form organisations to protect their professional interests.

In 1982, in order to promote a 'responsible press,' the Indonesian legislator promulgated Law 21/1982. This new law amended Law 11/1966,[40] and became the cornerstone of Indonesian press regulation during the 1980s and 1990s. It followed MPR Decree IV/MPR/1978, which described the differences between the Press Law put into place in 1966 and the objectives the New Order regime now sought to realise. While in 1966 the National Press was obliged to 'struggle for honesty and justice upon the basis of press freedom,' the objective now was 'responsible press freedom.' The obligation to be a 'channel for constructive and revolutionary progressive public opinion' was replaced by a 'positive interaction between the government, press and society,'[41] aimed at 'broadening communication and community participation and implementing constructive control by society' (Article 1(6)).

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39 The conference adopted a declaration, namely 'the Declaration of Talloires.' This declaration was adopted by leaders of independent news organisations from 21 nations at the Voices of Freedom Conference in Talloires, France, May 15-17, 1981. It contained a statement of principles to which a free world media ought to subscribe, and on which it will never compromise. The conference was attended by 63 delegates from 21 countries.

40 This law was passed on 20 September 1982.

41 The terms 'positive interaction between the government, press and society' were used earlier as PWI's theme of the National Working Conference, Banjarmasin, 9 February 1981.

Article 5 stipulated that the National Press has the following duties and obligations:

(a) Preserving and socialising the Pancasila as stipulated in the Preamble of the 1945 Constitution [..];
(b) Fighting for the Implementation of the Message of the People's Suffering based on Pancasila Democracy;
(c) Fighting for truth and justice on the basis of a responsible press freedom;
(d) Stimulating the spirit of serving the people's struggle, strengthening national unity, broadening the feeling of responsibility and national discipline, helping to raise the intelligence of the people's living and stimulating the people's participation in development;
(e) Fighting for the realisation of a new international order in the field of information and communication on the basis of the national interest and the belief in one's own strength in building regional and international co-operation, especially in the field of the press.

This article thus changed Soekarno's revolutionary press into a 'free and responsible press.' This term was always 'connected' to the Pancasila as the state ideology, even if the meaning of this connection was never made clear.

The 1982 Press Law knew five general restrictive articles, revolving around a new permit that replaced the publication permit and the permit to print. This new permit was the 'Press Publication Permit' (*Surat Izin Usaha Penerbitan Pers* or SIUPP, Article 5(1)). Second, each printing house had to be a member of a state-recognised printing organisation (Article 29); third, printing houses were not allowed to print newspapers without a SIUPP; fourth, press companies were required to adjust the form, governance and structure of their corporations as determined by the law and register with the government and the Press Council; and fifth, non-compliance with these provisions could be punished by the sanctions stipulated by Article 19(2). According to this provision, publishing news without a SIUPP could lead to imprisonment for a maximum of three months and/or a fine of as much as Rp. 10 million. All political parties in parliament agreed upon the necessity of the SIUPP, and considered it as an improvement on the previous situation (Simorangkir 1986: 76-101).

The military was thus no longer involved in controlling the press and the minister of information became the single authority to perform this task. Two years later, the minister of information published an implementing regulation of the 1982 Press Law, 1/PER/MENPEN/1984.[42] It was made operational by Minister of Information's Decree 214A/KEP/MENPEN/1984 on the Procedure and Conditions for obtaining a SIUPP. These regulations

42 Ministerial Regulation 01/PER/MENPEN/1984 on SIUPP was enacted on 31 October 1984.

allowed the minister to ban any paper without allowing recourse to the judiciary or another forum to defend itself.[43]

Hence, albeit there was no longer any military involvement in processing press permits, the SIUPP turned out to be 'old wine in a new bottle.' The first paper banned after the adoption of the 1982 Press Law was *Sinar Harapan* in 1986, when it reported that the government planned to abolish 44 import monopolies before the government had officially announced its plan (Lubis 1993: 277).[44] This exposed the way in which the elites drew profits from the New Order business climate. It was unclear from the decision what the basis for the ban was and the case was not taken to court. *Sinar Harapan* reappeared in 2001, after a 15-year close down.[45]

The second case was the weekly magazine *Prioritas*, whose SIUPP was withdrawn in 1987 because it had reported on issues considered too sensitive. In response, *Prioritas*'s chief editor Surya Paloh wrote an open letter to parliament and the People's Consultative Assembly (DPR and MPR) to ask for the annulment of the 1984 Regulation. Paloh also approached Supreme Court Chairman Ali Said to check whether he might bring Minister of Information Regulation 1/PER/MENPEN/1984 before the Supreme Court for review, but he was told that he should address the district court first. As he supposed this was not going to bring any relief, Paloh did not file a claim before the district court. Instead he directly asked the Supreme Court for the nullification of the minister of information's decision to withdraw *Prioritas*' SIUPP. The Supreme Court apparently agreed to consider the issue, but stalled until the March 1993 session of the MPR, when a new president and vice- president were appointed. Eventually, in June 1993 the Supreme Court rejected Surya Paloh's request to challenge the regulation on SIUPP.[46] The reason was that there was no appropriate procedure for review. Although the court decided to dismiss the *Prioritas* case, this decision brought an important change by stipulating rules of procedure for judicial review of regulations below the level of an act of parliament so that in the future such

43 The minister of information at that time was Harmoko, who would serve until the end of the New Order and became quite notorious. Ironically, Harmoko had a background is the press world, as the founder of Jakarta's big-selling down-market newspaper, *Pos Kota*. He had been a journalist and editor since 1960, working with papers as *Merdeka* and *Angkatan Bersenjata*.

44 About two weeks after *Sinar Harapan*'s banning, the government announced the abolition of 165 import monopolies, none of them controlled by the Soeharto family. Interestingly, Soeharto's son Bambang Trihatmodjo and his brother in law Sudwikatmono expressed their interest in buying *Sinar Harapan*.

45 "*Koran Sinar Harapan Kembali Terbit*" [Newspaper *Sinar Harapan* is Published Again], *Liputan6.com*, 3 July 2001, http://news.liputan6.com/read/15825/koran-sinar-harapan-kembali-terbit (accessed on 13 January 2013).

46 Supreme Court Regulation 1/1993.

cases could effectively be addressed by the Supreme Court (Pompe 2005: 144-146).[47]

There were also complaints about the procedure for acquiring a SIUPP. *Monitor*'s chief editor Arswendo once remarked that getting a SIUPP in a 'formal way' was a complicated matter, implicitly commenting on the fact that if one had a close relationship with Minister Harmoko, it was much easier. Such a relation could be constructed, according to Arswendo, by delivering a certain sum of money to the minister: "If the 'deal' had been agreed upon, administrative trivial matters could be easily arranged thereafter. That is the shrewdness of Harmoko, even if dealing with a friend, all administrative requirements must be fulfilled" (*Tempo*, 13 January 2003).

In the early 1990s, Soeharto promoted a policy of 'openness' (*keterbukaan*) that permitted wider public debates in parliament and the press, and restored some hope of a more independent judiciary (Bedner 2001: 6-7; Crouch 2010: 18-19). This 'openness,' the Indonesian equivalent of the Soviet Union's *Glasnost*, intended to create a dynamic and developing society. In the name of 'openness,' controls on the press became more relaxed, demonstrations became possible, student activism started to flourish, NGOs grew in number and influence, and criticism of the government became both more frequent and more trenchant. The establishment of Komnas HAM (the National Human Rights Commission) in 1993 was part of this policy. However, the policy of 'openness' was abruptly ended by one of the most notorious crackdowns on press freedom in Indonesian history.

It concerned the banning of two prominent weeklies: *Tempo*, *Editor* and the daily *Detik*, whose SIUPP were withdrawn by Minister of Information Harmoko.[48] The Director General of Press and Printed Media Guidance Subrata explained in an official announcement that the three papers had been warned on a number of occasions, but had failed to heed these warnings. In addition, he argued, there had been a 'discrepancy' between what was allowed by the SIUPP and the contents of the publications concerned.[49]

Before the ban was announced, Minister of Information and Press Council Chairman Harmoko conducted a meeting at 9 a.m. in the Press Council office.[50] Jakob Oetama, the chief editor of *Kompas* and present in his capacity as a Press Council member, later testified before the administrative court

47 Paloh brought his case on 16 November 1992. It will be further elaborated in Chapter 7.

48 The ban was based on Minister of Information Decree 123/KEP/Menpen/1994 (21 June 1994).

49 *AFP News Service (Antara)*, "Government Cancels *Tempo*, *Editor* and *Detik* Printing and Publishing Licenses," 21 June 1994.

50 The participants included Jakob Oetama from *Kompas*, Director General of Press and Graphics Guidance Drs. Subrata, and Handjojo Nitimihardjo from *Antara*.

that the Press Council had not found the newspapers concerned to be in contravention of the limitations of a free and responsible press and had certainly not recommended banning them. Nonetheless, Subrata announced the ban at 16 p.m. It seemed that the Press Council meeting was an empty formality and that the decision to ban these papers had long been taken.

Tempo's editorial staff was uncertain about the reason for the withdrawal. According to the minister's decree, several *Tempo* editions "had not reflected a healthy, free and responsible press" and the decision was taken to supervise and develop a national press in accordance with the 1945 Constitution and the Pancasila, as well as to promote 'national stability.' In short, the reasons were utterly vague. Albeit *Tempo* won a legal case against the minister in Jakarta's Administrative Court, both in first instance and on appeal, officially the reasons for the ban remained a mystery.[51]

Unofficially, several high ranking government officials referred to news reports related to the purchase of used marine ships from Germany, controversial within the government itself, as the immediate cause.[52] *Tempo* had already published a cover story on the contested purchase on 7 June 1994.[53] The following week *Tempo* reported that the costs of these 39 ships had increased 62-fold.[54] The press community in Jakarta also believed that this was the main reason for the bans.[55] However, the absence of any official reasons made it difficult to address the ban on substantive grounds. Without mentioning particular newspapers or magazines, Soeharto stated from a navy ship in Teluk Banten that strict measures should be taken against a whistle-blowing press.

The ban on *Tempo*, *Detik* and *Editor* did not directly lead to public silence and 'national stability.' On the contrary, it was followed by numerous protests in nearly every part of the country (Dhakidae 1994: 54). During protests in Jakarta 53 people were arrested, including well-known performer and poet W.S. Rendra. The situation also led to international outrage. In response, Soeharto simply redefined the concept of openness: "Openness does not mean unlimited freedom, or even worse, the freedom to be hostile, pitting one party against another and unconstitutionally imposing one's ideas."[56]

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51 See Chapter 7 for this case.

52 "*Jerman Punya Kapal, Tempo Ketiban Bredel*" [Germany Holds Ships, Tempo is Banned], *Tempo*, 13 October 1998. This case is discussed further in Chapter 7.

53 "*Dihadang Ombak dan Biaya Besar*" [Intercepted by Waves and High Cost], *Tempo,* 7 June 1994.

54 "*Jerman Punya Kapal, Tempo Ketiban Bredel*" [Germany Holds Ships, Tempo is Banned], *Tempo*, 13 October 1998.

55 "*Jerman Punya Kapal, Tempo Ketiban Bredel*" [Germany Holds Ships, Tempo is Banned], *Tempo*, 13 October 1998.

56 "The Limits of Openness: Human Rights in Indonesia and East Timor," *Human Rights Watch*, 1 September 1994.

Underground journalist associations[57] and individual journalists throughout the country established a larger network, namely AJI, the Independent Journalists Alliance.[58] Its main objectives were realising public rights to information, opposing press restraints and rejecting a single organisation for journalists. As only the PWI was recognised by the government, AJI had to operate underground.

The government immediately moved to suppress the AJI. It indicted AJI activists Ahmad Taufik, Eko Maryadi and Danang Kukuh Wardoyo, who were condemned to three years in prison each (Danang received a lighter sentence of 20 months imprisonment). In October 1996, Andi Syahputra, who printed news on behalf of the AJI, was also imprisoned for 18 months. To this end, the prosecutor used Minister of Information's Decree 47/Kep/Menpen/1975, which provided for a single journalist organisation.

During the same period, in 1996, Indonesia was shaken by the killing of journalist Fuad Muhammad Syafruddin, also known as Udin, in Bantul, Yogyakarta. Udin had worked for ten years for the regional newspaper *Bernas*. He had written a number of articles in July 1996 about corruption in Bantul regency, involving illicit land deals and the election of officials.[59] During the night of 12 August 1996, his house was visited by a number of unknown people. Then, on 13 August 1996, two men (later on identified as Hatta Sunanto, a Bantul parliament member, and Suwandi, a broker) came to the *Bernas* office. After work, Udin went home, and was tortured and stabbed Udin in front of his own house. He died after three days in coma at the hospital in Yogyakarta. The police refused to look at a connection between the killing and his critical articles, and instead focused on an extramarital affair Udin was allegedly having, arguing that he had been killed by a jealous husband. This version remained the dominant story, but led nowhere and no one was ever brought to trial for the killing.[60]

The Udin case became symbolic of the anti-press attitude of the Soeharto regime, which by now banned and censored both foreign and national publications at will and condoned severe beatings of journalists reporting on demonstrations against the repression of political opposition. This situation also drew attention at the international level. In 1997 UNESCO produced a

57 Independent Journalists Forum (FOWI) Bandung, Yogyakarta Journalist Discussion Forum (FDWY), Surabaya Press Club (SPC) and Independent Journalists Solidarity (SJI) Jakarta.

58 Through the so-called Sirnagalih Declaration, on 7 August 1994.

59 "The Death of a Journalist," *Inside Indonesia*, 52: October-December 1997.

60 In 1997 Amnesty International called on the Indonesian government to re-open the investigation into the death of Udin and for the investigation to be thorough and impartial. AJI Yogyakarta also released a petition for investigation into the death of Udin and to stop violence against journalists ("AJI Yogyakarta: Buka Kembali Kasus Pembunuhan Udin," *Voice of Human Rights*, 16 August 2010).

resolution about violence against journalists, referring specifically to Indonesia. The Committee to Protect Journalists (CPJ), a US-based organisation for press freedom, put Soeharto among "The 10 Worst Offenders or Enemies of the Press of 1997."[61] Although Soeharto seemed to pay little attention, the international support contributed to mounting criticism in Indonesia itself, which was to come to a head after the onset of the financial crisis in 1997.

In short, the closing years of the Soeharto regime saw an ever-tightening press and information control. The regime ignored international pressure to respect press freedom, clinging to its conception of the role of the press as the guardian of the *Pancasila* and the 1945 Constitution, and to its interpretation of 'responsible press freedom.' The discourse of '*Pancasila* press' and 'responsible press' was ambiguous and liable to different interpretations,[62] which created continuous uncertainty and enabled the government to discipline the media at will as part of its strategy in establishing 'political stability.' This discourse was articulated through laws, the absence of judicial control and violence against journalists, all of them underlining the authoritarian nature of the regime.

4.7. Reformasi

After Soeharto stepped down on 21 May 1998, there was a tremendous push to liberalise the country and to reform all aspects of social and political life. This led to many new laws, including on human rights, and the ratifying of almost all international human rights law instruments.[63] Press freedom was high on the list of the reform movement. AJI immediately seized the initiative through its call to the government to reform the media, in its press release on 23 May 1998. The demands for media reform included, first, removal of a single professional organisation for journalists and publishers; second, permit providers that contravene the press freedom principles and rights of the people should be dissolved, and the SIUPP and broadcasting license should be abolished. These demands pushed the government and parliament to review the Press Law (21/1982), Minister of Information Regulation 01/Per/Menpen/1984 (on the SIUPP), Minister of Information Decree 47/Kep/Menpen/1975 (on the PWI and SPS Organisation).[64]

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61 CPJ (1997) *Enemies of the Press of 1997*, http://cpj.org/reports/1997/05/enemies97.php#more (accessed on 4 March 2011).

62 Cf. McCargo (2003: 77-99), who has argued that 'Pancasila press' was an 'enigmatic discourse.'

63 Law 5/1998 on the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Law 29/1999 on the Racial Discrimination Convention, Law 11/ 2005 on the Economic, Social and Cultural Rights Convention, and Law 12/2005 on the Civil and Political Rights Convention.

64 AJI press release about media reform, 23 May 1998.

The government swiftly responded to the public concerns. On 5 June 1998 Yunus Yosfiah, the new minister of information, annulled Ministerial Decree 1/1984 on the SIUPP[65] and 47/Kep/Menpen/1975 and 184/1978, both about the regulation of journalists.[66] On 26 October 1998, President Habibie enacted Law 9/1998 on Freedom of Expression. According to Article 1, freedom of expression means the right of citizens to express their thoughts orally, in writing, or by other means, freely and responsibly in accordance with existing legislation. Article 3 stipulated that this freedom should take into account:

> (a) the principle of balancing between rights and duties; (b) the principle of deliberation and consensus; (c) the principle of legal certainty and justice; (d) the principle of proportionality; and (e) the benefit principle.

These principles are not further explained in the law, except for proportionality, which is defined as "that any activity must be in line with its context and purpose, whether conducted by citizens or the government's institutions and apparatus, based on individual ethics, social ethics, and institutional ethics." While not against freedom of expression, this is a rather flexible definition which can potentially be abused by the authorities. The absence of a further definition of the other principles is even more of a problem. For instance, the principle of deliberation and consensus can easily be interpreted as demanding the application of these mechanisms before publication is even allowed.

According to Article 4, the aims of regulating freedom of expression are:

> (a) realising a responsible freedom as a fulfilment of human rights in accordance with the Pancasila and the 1945 Constitution; (b) realising consistent and continuous legal protection in guaranteeing freedom of expression; (c) realising a conducive climate for improving participation and creativity of all citizens as rights and responsible fulfilment in democratic life; (d) establishing social responsibility in society, the nation and the state's life, without ignoring individual and group interests.

The problem with this article is obviously that it does not fully distance itself from the New Order legacy. Pancasila, the 1945 Constitution and the idea of 'social responsibility' still feature prominently and carry with them strong connotations of the practice that had developed during the thirty years of the Soeharto regime.

The law also contained articles explicitly limiting freedom of expression. Article 10(3) required a three-day notice to the police for activities such as demonstration or strikes, long marches, and/or other activities using public facilities. If unreported, the authorities held the power to halt such activi-

65 By Minister of Information Regulation 01/PER/MENPEN/1998 on SIUPP.
66 By Minister of Information Regulation 02/PER/MENPEN/1998 on Journalists.

ties (Article 15). This provision was problematic in threatening spontaneous actions to call policy makers to account or to protest against unfair decisions. Labour strikes, for instance, for protesting against a managerial decision can seldom be postponed three days, because they would come too late to influence the negotiation process. Likewise, journalists need to be able to stage an immediate protest if they are not allowed to cover a particular event. If this is not possible, it probably means the loss of a resource person or even the news itself.

In practice, in the case of labour strikes, the 'mechanism to report' to the police effectively became a 'permit' to conduct strikes. Strikes without such a 'permit' were easily dissolved by being labelled illegal, with leaders being arrested and punished. These rules about the freedom to express one's opinion remain controversial in their implementation, and such mechanism has been maintained until the present.

More generally, and despite many advances, 1999 was a problematic year for human rights in Indonesia. It was marked by gross human rights violations, most notably the crimes against humanity committed in East Timor before, during and after the referendum for independence, as well as the so-called 'Banyuwangi murders'.[67] These cases caused the international community, including the United Nations, to increase pressure on the Indonesian government, but the weakness of many state institutions in combination with the conflict about secessionist movements made it difficult for the government to respond. In short, the process of democratisation during this early phase of political transition was messy and fragile. Nevertheless, important steps were taken, with the first free national elections since 1955 (on 7 June 1999), in which a large number of parties participated – and with a press reporting freely and critically without being harassed by the authorities.

Government and parliament also enacted two important laws on human rights and press freedom, on the same day (23 September 1999): the Human Rights Law 9/1999 and Press Law 40/1999. Much attention was paid to them, both domestically and at the international level. They were passed to show Indonesia's commitment to reform itself into a democracy under the rule of law.[68]

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67 The 'Banyuwangi murders' concerned the killing of persons who were suspected as *Dukun Santet* (persons using black magic). There were at least 117 people killed, 80 of them followers of the Islamic mass organisation Nahdlatul Ulama. The case was suspected to be connected to an intelligence operation in Banyuwangi, involving military agents and local officials.

68 The drafting process was organised by the minister of information and involved legal academics, journalist associations and media practitioners. The draft was delivered to parliament on 7 July 1999 (President Instruction, R. 33/PU/VII/1999), and was formally approved by parliament on 13 September 1999 (Parliament/DPR Decree 8/DPR-RI/I/1999-2000).

Human Rights Law 9/1999 was passed prior to the Constitutional Amendment on Human Rights in 2000 and presents a detailed legal framework for human rights protection in Indonesia. Of importance for the press was that it clearly defined press freedom as a human rights issue. Article 23(2) of the law explicitly guarantees freedom of expression and especially freedom of the press:

> Everyone is free to have, impart, and disseminate his opinion according to his conscience, either orally or in writing through print or electronic media while taking into account religious values, morals, public order, public interest, and the unity of the nation.

The legal framework for press freedom was elaborated in the new Press Law. It provided much better protection of journalists and others working for the press than the previous law (Law 21/1982), even if it also carried several weaknesses. According to Atmakusumah (2007: xxxiv) the 1999 Press Law was passed in the context of a continued battle between those still clinging to the 'old' New Order paradigm and those supporting the liberal paradigm which flourished by *Reformasi*'s euphoria. This explains why the Press Law in the end became more restrictive than what had initially been suggested by the *Reformasi* supporters.

Yet, press freedom was clearly promoted by three important changes compared to the previous situation: (1) censorship was abolished; (2) press banning was no longer allowed; and (3) the press permit (SIUPP) could no longer be revoked. As we have seen, these issues had been extremely oppressive in practice before. In the wordings of Article 4 of the 1999 Press Law:

> (1) Press freedom is guaranteed as a fundamental citizen's right;
> (2) No censorship, banning or broadcast prohibition can be imposed on the national press;[69]
> (3) In order to guarantee press freedom, the national press has the right to seek, acquire, and disseminate ideas and information;
> (4) In accounting their reporting before the law, a journalist has the right to refuse (*hak tolak*).

Interestingly, any violation of these provisions, including by officials, are considered a crime, and punishable by up to two years of imprisonment or a fine of up to Rp. 500,000,000.

Equally important provisions are Articles 7(1) and 8, which provide protection of the freedom for journalists to join journalist associations. Article 9(1) protects the rights of Indonesian citizens to establish press companies and

69 Article 1(6) said "the national press is the press which has been established by Indonesian press corporations. This definition includes the local and regional press as long as they are owned by an Indonesian corporation."

Article 13c determines the same for news agencies. Both articles provide a legal underpinning for Minister of Information Regulations 1 and 2 of 1998.

Nevertheless, as already mentioned, the 1999 Press Law also contains a number of unnecessary or potentially harmful provisions. As pointed out earlier by the AJI, Article 15 is unclear about the institutional status, position and competence of the Press Council, in particular in dealing with complaints about the press. The role of the Press Council can be read as a mere public relations and press facilitating institution, rather than a press freedom defender and monitoring institution for law enforcement (Jamaludin 2009: 28-31). Nevertheless, according to Margiyono, a coordinator of the legal division in the AJI, the Press Council from the start claimed 'effectiveness for its decisions,' and the power to decide on complaints or claims against the press.[70] Yet, again according to Margiyono, the enforceability of Press Council decisions has remained problematic.[71] Another way for the Press Council to exert influence has been opened up by Supreme Court Circular Letter 13/2008, which puts courts under the obligation to invite a Press Council member as an expert witness in press cases.

A second weakness of the 1999 Press Law is its inclusion of codes of ethics, codes of publication, codes of conducts, and codes of enterprises and law enforcement. A code of ethics should be separate from the law, for it is a form of self-regulation, usually formulated as an agreement by a professional association. A violation of a code of ethics should be examined by the professional association itself, and not by the court. It is not surprising, therefore, that the inclusion of the code of ethics into the 1999 Press Law, instead of having been promulgated by the journalist association itself, has led to confusion. When there is a case, the first legal institution to consider to what extent a journalist has violated the press code of ethics should be the Press Council and/or the journalist association itself.

A third problem concerns the definition of the right to reply (Article 1(11) juncto article 5(2)), which is much broader in scope than a simple right to reply to statements violating one's legal rights. Moreover, the refusal of media to serve such a reply carries a fine of up to Rp. 500 million. However, this does not refer to an obligation to publish a reply. If the reply would affect third parties, contains unethical references, makes unclear statements, or bears no clear relation to the news report it is supposed to respond to, an editor may refuse it. The publication of the reply ultimately depends on the decision of the editor, without any outside interference (Asraatmadja, 2007c).

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70 Margiyono, personal communication, 9 March 2011.
71 See Chapter 6 for an elaborate discussion.

The purpose of a right to reply is to provide an individual with an opportunity to respond to and correct inaccurate facts or statements which infringe his or her legal rights, such as privacy rights. NGOs concerned with freedom of expression have therefore suggested that a right of reply should be voluntary rather than prescribed by law, and at least should conform to certain conditions: (1) the reply should only be available to respond to statements which violate a legal right of the person involved and not serve to comment on opinions which the reader or viewer does not like; (2) the way in which it is published should be of the same prominence as the original article or broadcast; (3) the reply should be proportionate in length to the original article or broadcast; (4) it should be restricted to addressing the contested statements in the original text; and (5) it should not be taken as an opportunity to introduce new issues or to comment on other correct facts (ARTICLE 19, 2004: 10-11). The Indonesian Press Law is clearly far removed from this standard.

Fourth, many journalists, associations, and lawyers have urged for an amendment of the Press Law to make it unequivocally clear that the Press Law is a *lex specialis* to the Penal Code. Now the police, public prosecutor and (lower) courts often apply the Penal Code rather than the Press Law.[72] Bagir Manan, chairman of the Press Council from 2010 to 2013, has argued that the Press Law is 'supreme' when it concerns cases involving the press (*lex suprema*), meaning that other laws are only supplementary to it.[73] In fact, the addition of the term *lex specialis* should be unnecessary, because lawyers, including law enforcers, should understand that the Press Law simply *is* one. Moreover, as will be discussed in Chapter 5, the Supreme Court has confirmed this time and again in its case law. Unfortunately, it seems that an additional article may be needed to convince all involved.

In summary, despite the limitations of the 1999 Press Law, its introduction also meant an important step ahead, and we may conclude that in the early post-Soeharto years several important legislative steps were taken to support freedom of expression and press freedom.

4.8. Turning Point of Press Freedom, From Abdurahman Wahid to Megawati

After the abolition of the SIUPP as a requirement for establishing media, the number of newspapers and magazines increased exponentially. Within

72 The statement is from Abdul Mutholib, director of the Makassar Legal Aid Bureau, 1 February 2010; Amir Syamsuddin (lawyer of seven media against Raymond Teddy), interview, Jakarta, 15 June 2010; Andi Siahaan, TV contributor in Pematang Siantar, 10 July 2010. Yemris Foutuna, *Jakarta Pos*t's journalist, Kupang, 20 July 2010.

73 Bagir Manan (the Press Council chairman), interview, Leiden, 26 March 2010.

a few months after Soeharto stepped down, 1,200 new dailies, magazines, or tabloids were started. However, as Atmakusumah remarked,

> When I was chairing the Press Council in 2000-2003, about half or 600 of the 1,200 printed media were quickly closed down during one and half years only. In this regard, I have seen that citizens are already critical and smart in choosing media, they can differentiate between media which are more or less informative and educative. This forms a public punishment for untrue and unprofessional media…[74]

Press freedom steadily became more respected, especially during the Abdurahman Wahid ('Gus Dur') presidency. A major step he took was to abolish the cornerstone of New Order press repression, the Department of Information. Of course, this policy elicited protests of thousands of staff of the Department of Information, as well as former Minister of Information, Yunus Yosfiah, who had a vehement debate with Abdurahman Wahid Dur in the State Palace. Nevertheless, Abdurahman Wahid stuck to his decision, which he had long considered:[75]

> Already too long have the common people been suffering at the hands of the government, so I am trying to correct this situation, including restructuring, promoting efficiency, and dissolving the Department of Information. Information is the business of society, and it is inappropriate when the government intervenes. The existence of the Department of Information will only provoke the common people to oppose the government if it always forces to regulate the exchange of information.[76]

For the AJI, as an independent journalists movement, the dissolution of the Department of Information in 1999 went beyond what they had proposed the year before in their press release on media reform in Jakarta, on 24 May 1998. A new phase of press freedom started. In 2002, the Press Freedom Index ranked Indonesia 57th, much higher than its neighbouring countries, such as Thailand (65th), Malaysia (110th) and the Philippines (89th). The Abdurahman Wahid administration showed an unprecedented commitment to human rights and democracy, and its strengthening of press freedom was a logical but courageous step in this context, with immediate results.[77]

The situation changed however when Wahid was impeached in 2001 for allegations of corruption and Megawati Soekarnoputri, his vice-president replaced him. During her leadership, Megawati often criticised the press for being '*njomplang*' (unbalanced), '*njlimet*' (complex), and '*ruwet*'

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74 Atmakusumah, personal communication, 30 March 2010, Leiden.

75 "*Gus Dur-Yunus Yosfiah Bersitegang*" [Tension Arises between Gus Dur-Yunus Yosfiah], *Republika*, 29 October 1999. Also see: Hidayat, 2007, p. 63.

76 "*Membredel Sang Raja Bredel*" [Silencing the Silencing King]. http://majalah.tempointeraktif.com/id/arsip/1999/11/01/MD/mbm.19991101.MD97591.id.html, *Tempo Online*, 1 November 1999 (accessed on 10 March 2011).

77 Gus Dur received awards of numerous organisations and universities because of his commitment to promoting human rights and democracy. This included the Tasrif Award on Press Freedom which he was awarded by the AJI on 11 August 2006.

(complicated),[78] and, later on, 'un-nationalistic', or 'un-patriotic.'[79] These statements addressed the newspapers in general, but most notably *Rakyat Merdeka*, which heavily criticised the policies of Megawati leading to higher fuel prices.

More generally, the way in which Megawati approached the media led to increasing tension. She tended to perceive the media as a 'problem' for her leadership, instead of developing a policy to deal with them. Thus, she refused to talk to the press about several issues that at the time were a cause for public concern, including the fuel price. Neither had she appointed a spokesperson for communicating with the press or the public. And to critics she would respond that it all concerned a 'public misunderstanding,' without any further clarification.[80] According to Arismunandar (*Kompas*, 23/1/2003), Megawati's responses to criticism were often disproportional, and she took them personally, instead of seeing them as criticism of her policies as the head of government. Moreover, her political communication with the general public was inadequate, which caused serious problems for her presidency. Yet, despite the deteriorating relationship between Megawati and the media, during her presidency no bans or institutional pressure were imposed on the press.[81]

During the Megawati administration, one important piece of legislation related to the press was enacted, providing an important addition to the Press Law. This was the Broadcasting Law (Law 32/2002).[82] It addressed some issues relevant to press freedom, in particular preventing a monopoly of ownership and supporting healthy competition in broadcasting matters (Article 5(g)).[83] This article is connected to Article 41, which states: "Broadcasting institutions can engage in co-operation to broadcast together as long as this does not turn into an information or opinion making monopoly." However, there is no further elucidation of this article, or a specific sanction if it is violated.

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78 '*Njomplang*,' '*njlimet*' and '*ruwet*' were terms used during her speech before the PDI-P (Indonesian Democratic Party for Struggle) in Jakarta, 21 January 2003 (*Kompas*, 22 January 2003).

79 'Un-nationalistic' and 'un-patriotic' were used during a meeting between Megawati and the Press Council in 2001, soon after she had become president (Press Council 2003, "Answering Questions from Commission I of Parliament in Public Hearing Session: Press Council Explanation," Jakarta, 30 January 2003).

80 During 2002-2003, the government policies on R&D (Release & Discharge) for debtors, the divestment of stock shares of Indosat Incorporation, and also the most controversial policy regarding fuel prices, electricity prices and the telephone tariff were not preceded by any adequate communication.

81 This opinion is also based on the Press Council explanation during the Public Hearing Session in Parliament, Jakarta, 30 January 2003.

82 The Broadcasting Law (Law 32/2002 replacing Law 24/1997) was enacted on 28 December 2002.

83 This article is related to Law 5/1999 on the Prohibition of Monopolies and Unhealthy Competition Law.

The agency which is responsible for supervision and enforcement is the Indonesian Broadcasting Commission (*Komisi Penyiaran Indonesia* or KPI). The KPI consists of a central office in Jakarta and branch offices at the provincial level. It has the authority to: (a) determine broadcasting programme standards; (b) formulate regulations and determine the guidelines for broadcasting behaviour; (c) monitor the implementation of broadcasting regulations, guidelines, and programme standards; (d) impose sanctions for violating broadcasting regulation, guidelines, and programme standards; (e) build co-ordination and/or co-operate with the government, broadcasting institutions, and society. The KPI did not exercise its authority to ban a broadcasting station under the Megawati presidency, but as will be discussed later, it did under her successor Susilo Bambang Yudhoyono.

Yet, threats against press freedom started to resurface during the Megawati administration, most notably two cases in 2003. The first concerned *Rakyat Merdeka*, whose chief editor Karim Paputungan was sentenced to five months with ten months probation by the South Jakarta District Court for defamation, violating Article 310 after having insulted Chairman of Parliament Akbar Tandjung. Tandjung was being investigated for embezzling Rp. 40 billion (USD 4.7 million) in state funds and the report concerned showed Tanjung shirtless, crippled, sweating and looking sad with a banner reading "Akbar to be finished soon. Golkar shedding tears of blood" (Paputungan 2011).[84]

In another legal case against *Rakyat Merdeka* editor Supratman was sentenced by the South Jakarta District Court to six months imprisonment and a 12-month suspension because of insulting Megawati. Supratman was proven to have violated Article 137(1) of the Penal Code, which prohibits insulting the president and vice-president. The Chair of the Council of Judges, Zoeber Djajadi, stated that "anyone who is sane must be annoyed or offended" by the wordings used in the headlines to a number of articles. This court case was accompanied by threats of ultra-nationalist pro-Megawati groups to kill *Rakyat Merdeka*'s journalists.[85]

Another threat to press freedom came from altogether seven civil and criminal lawsuits against *Tempo*, initiated by business tycoon Tommy Winata after *Tempo* had published an article questioning his involvement in a market fire in the Jakarta district of Tanah Abang. The Central Jakarta District Court ordered *Tempo* to pay Rp. 500 million in damages to Tommy for 'material losses' and

84 Paputungan lodged an appeal with the Jakarta High Court, but I have not been able to find any information about the subsequent proceedings and their outcome.

85 "*Redaktur Eksekutif Rakyat Merdeka Divonis Enam Bulan*" [Executive Editor of *Rakyat Merdeka* Sentenced to Six Months], *Tempo Interaktif*, Senin, 27 October 2003. This case will be further elaborated in the next chapter.

'forfeiture of future profit.'[86] In the criminal case public prosecutor Bastian Hutabarat used article XIV(2) of Law 1/1946 *juncto* Article 55 (1)-1e of the Penal Code to indict chief editor Bambang Harymurti to nine years imprisonment. *Tempo* was accused of 'libel' and of intentionally creating 'a chaotic situation in society.' On 16 September 2004 the Central Jakarta District Court sentenced Bambang to one year imprisonment, a verdict confirmed by the Jakarta High Court on 14 April 2005. However, the Supreme Court overturned the latter decision on 9 February 2006 on the basis of the precedence the Press Law takes over the Penal Code. The court added that since press freedom is a *conditio sine qua non* in a democratic state based on the rule of law, cases against it should be treated with utmost circumspection.[87]

Although *Tempo* won this case, it appears that in legal practice there are serious threats to press freedom. *Tempo* and its employees, for instance, faced at least nine lawsuits, none of them brought under the 1999 Press Law. There is no doubt that such legal harassment influences journalists and editors. To this we can add the use of violence against journalists and media, and the lack of seriousness of the police in protecting journalists. The attack by Tommy Winata's thugs on the *Tempo* office on 17 May 2004 presents a clear example.[88] Unlike her predecessor, President Megawati took no steps to improve this situation.

In short, during Megawati's presidency press freedom was reduced in the way in which prosecutors and lower courts applied the law as well as by the use of violence against the press. The state offered insufficient protection against such violence and Megawati herself had a problematic relation with the media. Her lack of responsiveness in addressing attacks on the press can be interpreted as violating press freedom by omission, while her consenting to prosecution of *Rakyat Merdeka* staff she went beyond mere omission.

4.9. Surplus Freedom of the Press? The Press under the SBY Administration

> Before reformation, press freedom was jeopardised, or deficient. But now after reformation, press freedom is working well, there is even a surplus of it….
> (SUSIBY, 3 June 2010)[89]

86 "Court Orders Tempo to Pay Rp. 500 million to Tommy Winata," *LKBN Antara*, 18 March 2004.

87 This case will be further discussed in Chapter 5.

88 "*Penyerangan Kantor MBM Tempo*" [Attack on MBM Tempo Office], *Tempo Interaktif*, 17 May 2004.

89 "*SBY: Kebebasan Pers Harus Disertai dengan Tanggung Jawab*" [SBY: Press Freedom Must Be Accompanied By Responsibility], *Detik News*, 3 June 2010.

Parliamentary elections were held on on 5 April 2004 and for the first time in Indonesian history they were followed by direct presidential elections. Susilo Bambang Yudhoyono, better known as SBY, gained more than 60 percent of the vote, defeating Megawati Soekarnoputri.

At the start of SBY's presidency, many NGOs expected him to show more respect for human rights, including press freedom, than his predecessor. However, by the end of 2004 he had already disappointed many, and Indonesia dropped even further in the international press freedom ranking.[90] By the end of 2004 the two most important human rights issues for the government concerned the addressing of the tsunami tragedy in Aceh and the investigation – or rather the lack of it – of the Munir case.[91] Munir was poisoned while travelling from Jakarta to Amsterdam on 7 September, and his death became a major issue in the media. As it quickly became clear that the Indonesian intelligence service had been involved in the killing, the murder on Munir became something of a test case for SBY's stance regarding the protection of human rights and human rights defenders (including journalists) in Indonesia. The fact that the culprits of the Munir killing have never been punished certainly contributed to the eventual disappointment of the human rights movement with SBY.

In 2005, Indonesia seemed to be doing better with regard to press freedom, when it moved from position 117 to 103 in the JPC press freedom index. However, the database of LBH Pers (the Press Legal Aid Institute) demonstrates that state pressure on the press had actually increased, including attacks on the press by government officials, police and military personnel (Tim LBH Pers 2009: 103). The number of violent attacks by thugs had increased even more quickly than those by state security officials, though the former were sometimes organised by state officials.[92] For instance, the *Palopo Pos* office was brutally attacked and destroyed by thugs sent by the district head of Palopo (South Sulawesi) on 19 January 2005. *Palopo Pos* chief editor Mukhramal Azis was severely beaten and a journalist, Jusriadi, was strangled. According to Mukhramal, the reason for the attack was *Palopo Pos* reporting about the severance pay for 35 former district parliament members of in total Rp. 1,05 billion, which had angered the district head.[93] Similar cases happened in Medan, where a TV journalist was beaten, on 16

90 The IPJ's Press Freedom Index ranked Indonesia at 110th in 2003 and at 117th in 2004.

91 Munir was a public interest lawyer of YLBHI, and the founder of well-known human rights NGOs KontraS, Imparsial, and Voice of Human Rights. He was extremely courageous and the only one openly accusing the military and intelligence of kidnapping students and activists during the years 1997 and 1998 – which ultimately led to him being murdered.

92 The term 'thugs' (p*reman*) in this context comes quite close in meaning to 'gangster' in the sense of organised crime.

93 Interview with Mukhramal Azis, Makassar, 3 February 2010.

April 2005, and in Bogor, where *Radar Bogor* journalist Ahmad Junaedi was tortured by unknown persons in July 2005.

This formed only part of a wider lack of interest from the government in human rights protection and civil society groups were questioning the seriousness of the government in promoting and protecting human rights. Human rights NGO *Elsam* gave its 2005 Human Rights Enforcement Report the title "*Ekspektasi Yang Sirna*" [Expectations that Disappeared].

President SBY denied the allegations and expressed his satisfaction about the level of press freedom. As he said during his 'End of the Year Speech,'

> We should also be grateful that democratic life in the country is developing. People are more accustomed to different opinions. The number and quality of criticism in society s is steadily increasing, with sustained press freedom.[94]

It was not only the written press that came to face the more repressive policies regarding press freedom. As already mentioned, in 2007 the KPI for the first time used its authority to ban *Radio Era Baru* FM in Batam. This station had been broadcasting since 2005, but in 2007 came under pressure to halt its activities.[95] The KPI and the minister of communication and information asked *Radio Era Baru* to stop broadcasting without providing any clear reason, in the end by having the Frequency Monitor Section in Batam release a final letter imposing a broadcasting ban on account of broadcasting in Chinese, on 21 October 2008. The radio station took the case to the administrative court, but lost in first instance and on appeal.[96] However, the Supreme Court overturned this decision and quashed the banning decision on 5 October 2010. This ended a three-year legal battle between *Radio Era Baru*, and the KPI and minister of communication and information. *Radio Era Baru* thus regained its license and can now freely broadcast in Indonesia.[97]

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94 'End of Year Speech' in Cipanas Palace, 31 December 2005.

95 The pressure to close down *Radio Era Baru* originally came from the Chinese government. It was the KPI which decided to use the broadcasting language as the official reason to close down the station as a way to hide the true reasons. Raymond Tan and Gatot Supriyanto (director of *Radio Era Baru*) said that Chinese officials visited the KPI in 2007, asking the government to shut down *Radio Era Baru*, because it had been airing criticism of Beijing's human rights conditions, including news of the suppression of Tibetans, Uyghurs, and Falun Gong practitioners. Letters to this extent were sent to the ministers of foreign and domestic affairs, the department of espionage, the department of communication and information and the KPI. Tan held evidence about the letters from the Chinese Embassy and news of Chinese officials visiting the KPI, as well as the letter of 8 March from the KPI, asking the station to halt its activities (personal communication of Raymond Tan and Gatot Supriyanto in Jakarta, 22 September 2010). See also Chapter 7 for more details.

96 Administrative Court judgment 166/G/2008/PTUN-JKT.

97 This case is discussed further in Chapter 7.

Press freedom came further under threat after the killing of Herlyanto, a journalist of *Delta Pos*, a daily in Probolingo (East Java). On 29 April 2006 Herlyanto was found dead, his body covered with wounds. The motive behind this killing related to his report on the corruption of local officials.[98] In September of the same year, the killer was arrested and testified that the killing had been ordered by the head of a project, who had marked up the government budget concerned. This was the first time since the end of the New Order and the killing of *Bernas* journalist Udin in Bantul that a journalist was actually murdered.

Criminal cases against the press on the basis of the Penal Code instead of the Press Law occurred as well, such as those against *Rakyat Merdeka Online* and *Playboy Magazine*. Chief Editor of *Rakyat Merdeka Online*, Teguh Santosa was indicted for violating Article 156a of the Penal Code, on defamation against religion. The case concerned the covering of the story of the cartoons considered as humiliating Islam's Prophet Muhammad published in the *Jylland-Posten* in Denmark. Fortunately, the South Jakarta Court judges dismissed the case. The suit against *Playboy Magazine*'s Chief Editor Erwin Arnada did not end as well. He was prosecuted under Article 282(3) of the Penal Code, on crimes against decency, with *Playboy Magazine* being considered as pornography. The Supreme Court sentenced Erwin to two years imprisonment (Decision 972K/Pid/2008), but eventually the Supreme Court reviewed its own decision.[99]

Using legal suits against press freedom in Indonesia started to become a trend during this period, not only under the Penal Code but there was also a rise in civil lawsuits against several media and journalists for extraordinary amounts of damages. The case of *Radio Era Baru* is a good example, as the station not only lost its license, but also saw its director prosecuted under the Telecommunication Law for imprisonment for up to six years.[100] The

98 The AJI investigation concluded that the killing was related to news involving numerous village authorities ("*AJI Malang Yakin Herlyanto Tewas Akibat Pemberitaan*" **[AJI Malang Is Certain That Herlyanto Was Killed as a Consequence of Reporting],** *Gatra*, 8 October 2006).

99 Erwin Arnada, through his lawyer, Todung Mulya Lubis, requested a review (*peninjauan kembali*) of this Supreme Court decision ("*Pimred Playboy Ajukan PK Dan Penangguhan Eksekusi*" [The Chief Editor of Playboy Requests Review and Suspension of his Sentence], *Primair Online*, 6 September 2010). Then, the Supreme Court's review ended up in favour of Erwin's position, and he was released on 24 June 2011 ("Mantan Pemimpin Redaksi Playboy Dibebaskan," *Tempo.co.id*, 24 June 2011). The cases are further discussed in Chapter 5.

100 This indictment was based on the Letter of Radio Frequency Monitoring Agency (Balmon) Batam – Directorate General Post and Telecommunication, Ministry of Communication and Information Technology number 65/IIc/b.II.BTM/II/2011. According to the aforementioned letter the criminal case files were considered complete (P21) by the public prosecutor ("Criminalization of Director of *Radio Era Baru* Continues": Press Release of *Era Baru*, 17 February 2011, signed by Rachmat Pudiyanto (general manager)). The case is elaborated further in Chapter 7.

other cases in 2007 included a civil suit by Riau Andalan Pulp and Paper (RAPP), which filed a claim for damages against *Tempo Newspaper* and a criminal prosecution in the same case against journalist Bersihar Lubis. Both concerned defamation.

The most notorious judgment against the press was the Supreme Court's 3215K/Pdt/2001, adjudicated on 28 August 2007 in the case of *Soeharto v Time.* Judges German Hoediarto, H. Muhammad Taufiq, and Bahauddin Qaudry overturned the judgments by the first instance and the appellate court and awarded damages to the plaintiff for defamation to the fantastic amount of one quintillion rupiah, on the basis of tort, without any comprehensible legal reasoning. The case drew international attention and further harmed the already tainted image of the Indonesian judiciary. The judgment totally disregarded the Press Law, which Article 18 stipulates a maximum fine of Rp. 500 million.[101]

However, 2007 also saw an important milestone in favour of press freedom. First, the Constitutional Court decided that *haatzaai artikelen* 154 and 155 of the Penal Code were contradictory to the constitution and were hence no longer legally binding (Number 6/PUU-V/2007, 17 July 2007). More than 90 years since the enactment of the *Wetboek van Strafrecht voor Nederlandsch-Indië* in 1914, this Constitutional Court decision did away with an important symbolic marker of suppression against freedom of expression and press freedom in Indonesia.

However, the situation of press freedom grew progressively worse in 2008, with several new criminal and civil lawsuits against the press, such as *Munarman* (coordinator of Islamic Defender Front/FPI) *v Tempo*, and the criminal prosecution of journalist Upi Asmaradhana,[102] of *Tempo*'s journalist/editor, Irvansyah and Sunudyantoro, and of Kwee Meng Luan and Khoe Seng-Seng who were convicted because of their letters to the editor.[103] Moreover, two important pieces of legislation related to the press were enacted. The first one, Law 11/ 2008 on Electronic Information and Transactions (EIT), is the most controversial.[104] Its articles 27 and 28 allow for a criminal suit against journalists for defamation. Article 27(3) determines that

> Any person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of insult and/or defamation.[105]

101 This case will be further discussed in Chapter 6.
102 Upi Asmaradhana, a freelance journalist in Makassar, South Sulawesi, was acquitted of a defamation charge.
103 These cases will be elaborated in the next chapters.
104 This law was approved by the House of Representatives on 21 April 2008.
105 The phrasing of the article is not in line with the basic rules of Indonesian grammar.

while Article 45(1) states that

> Any person who satisfies the elements as intended by article 27 section (1), section (2), section (3), or section (4) shall be sentenced to imprisonment not exceeding 6 (six) years and/or a fine not exceeding Rp. 1.000.000.000 (one billion rupiah).

Because the sentence can be more than five years imprisonment, journalists can be taken into custody immediately when accused of violating Article 27(3) and therefore this provision can be used to harass journalists or citizens without judicial intervention.

Such fears of arbitrary use of the EIT Law led a number of NGOs and individuals[106] to challenge Article 27(3) before the Constitutional Court. According to the applicants, this article is contradictory to the following articles of the Constitution: Article 1(2),[107] Article 1(3),[108] Article 27(1),[109] Article 28,[110] Article 28C(1) and (2),[111] Article 28D(1),[112] Article 28E(2) and (3),[113] Article 28F,[114] and Article 28G(1).[115] Article 27(3) of the EIT Law notably violated the rule of law requirement that a provision must be clear, easily understood, and fairly enforced. However, their claim was rejected by the Constitutional Court. In their Decision No. 2/PUU-VII/2009, dated 5 May 2009, the judges argued that the EIT Law is important to secure and protect free-

106 The Indonesian Association of Legal Aid and Human Rights (PBHI), the Alliance of Independent Journalists Indonesia (AJI), the Legal Aid Centre for the Press (LBH Pers) Edy Cahyono, Nenda Inasa Fadhilah, and Amrie Hakim.

107 Sovereignty is in the hands of the people and is implemented according to this constitution.

108 The State of Indonesia shall be a state based on the rule of law.

109 All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions.

110 The freedom to associate and to assemble, to express written and oral opinions, etc., shall be regulated by law.

111 (1) Each person shall have the right to develop him/herself through the fulfillment of his/her basic needs, the right to get education and to benefit from science and technology, arts, and culture, for the purpose of improving the quality of his/her life and for the welfare of the human race; (2) Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state.

112 Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.

113 (2) Every person shall have the right to the freedom to believe his/her faith, and express his/her views and thoughts, in accordance with his/her conscience; (3) Every person shall have the right to the freedom to associate, to assemble and to express opinions.

114 Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, posses, store, process, and convey information by employing all available types of channels.

115 Every person shall have the right to protection of him/her, family, honour, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right.

dom of expression, and to give legal certainty, because it not only addresses the press or journalism but also ordinary people.[116]

In practice, it soon appeared that the EIT Law does effectively threaten freedom of expression. Most notorious in this regard is the case of Prita Mulyasari, an Indonesian woman arrested on 13 May 2009 for allegedly circulating online defamatory statements against Alam Sutera Omni International Hospital in Serpong, Tangerang (Banten). Prita had been a patient at the Omni International Hospital, and had asked her doctor for her medical record. When the doctor refused, Prita complained about this via e-mail to a number of friends, as well as about the fact that she had been misdiagnosed as suffering from dengue fever whereas in August 2008 further medical examination proved that she had mumps. She accused the doctors of unprofessional conduct and warned her friends against visiting this hospital. The e-mail was circulated through various mailing groups and eventually came to the attention of the Omni Hospital. The hospital filed a complaint with the police and Prita was sued for defamation. When this became known it caused a public outrage and a media frenzy, in particular when Prita was taken into custody three weeks ahead of her trial.[117]

The prosecution indicted Prita for defamation of doctors Hengky Gosal and Grace Hilza Yarlen Nela, in an email sent to twenty people that described the two as unprofessional and impolite. She was indicted by three articles – Article 45(1) jo. 27(3) of the EIT Law, Article 310(2) and 311(1) of the Penal Code –, all of them concerning defamation and insult. The prosecutor demanded a sentence of six months in jail, but the judges at the Tangerang District Court rejected the indictment for unclarity. However, this judgment was quashed in cassation and the Supreme Court convicted Prita to six months in jail with one month probation.[118]

At the same time, the Omni Hospital brought a civil suit against Prita, and she was found guilty of defamation and ordered to pay Rp. 204 million to the hospital by the Tangerang District Court on the basis of tort, Civil Code Arti-

116 This case will be further discussed in Chapter 7. Chapter 5 will further discuss EIT provisions that may endanger press freedom.

117 The case led to public outrage, with tens of thousands joining a Prita support page on Facebook.and other social media. That the case invited such huge public sympathy was at least in part because it exposed the injustice and corruption within the country's judicial system. Many took part in the action 'Coin for Prita,' and altogether an amount of Rp. 317,639,105 was raised ("Coin for Prita Sums up to 317 Million Rupiahs," *Kompas*, 17 December 2009, http://english.kompas.com/ read/2009/12/17/14380167/Coin.for.Prita.Sums.up.to.317.Million.Rupiahs, accessed on 15 January 2010).

118 This case was registered as 1269/PID.B/2009/PN.TNG. At the time of writing, this case is under review (*peninjauan kembali*) by the Supreme Court ("Tolak Status Terpidana, Prita Ajukan PK" [Refusing the Status of a Convict, Prita Requests Review], *Detik.com*, 01/08/2011). This case will be further discussed in the next chapter.

cle 1365.[119] This judgment was upheld by the Banten High Court,[120] which forced Prita to appeal to the Supreme Court (Wiratraman 2010). Here she finally received justice, when judges Harifin A Tumpa, Rehngena Purba and Hatta Ali quashed the appellate judgment, arguing that such a case could never be qualified as defamation.[121]

The Prita case made clear that the EIT Law not only threatens journalists, but also ordinary citizens expressing opinions on the internet. According to Press Council member Agus Sudibyo (2009), "the EIT Law is strange. Other countries really wish to regulate cyber crime, but in Indonesia the purpose of this law is merely restricting the freedom to information and criminalising citizens."[122] Yet, it is clear that online media have most to fear from the EIT Law.

The year 2008 also witnessed the promulgation of other laws introducing new criminal sanctions for the press: the General Election Law 10/2008, the Presidential Election Law 42/2008 and the Pornography Law 44/2008. Article 99(1) of the General Election Law listed the following sanctions:[123]

> (a) a written warning; (b) temporary suspension of a problematic programme; (c) reducing time and duration of election campaign news, broadcasting, and advertisements; (d) fines; (e) termination of activities regarding election campaign news, broadcasting, and advertisement for a certain period; (f) revoking the broadcasting license or publication permit.

Those sanctions were to be regulated further by the Electoral Commission (Article 100). The Presidential Election Law held similar provisions and its Article 47(5) added that

> Printed papers and broadcasting agencies as stipulated under section (1) during the period of non-campaigning,[124] are prohibited to broadcast news, track records of candidates, or other forms promoting the interest of a campaign which are beneficial or detrimental to the candidates.

This provision is followed by the threat of heavy punishment, including the revocation of the broadcasting license and SIUPP (Article 57(1)). In short, these laws seriously endanger press freedom and have raised much con-

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119 Tangerang District Court Decision 300/Pdt.G/2008/PN.TNG, 11 May 2009.

120 Banten High Court Decision 71/PDT/2009/PT.BTN, 8 September 2009.

121 Supreme Court Decision 300 K/Pdt/2010. The criminal case was decided by a different panel of judges.

122 "*Kebebasan Berpendapat Janganlah Direduksi*" [Never Reduce Freedom of Opinion], *Kompas*, 4 June 2009, kompas.com/read/xml /2009/06/04/03091447/kebebasan.berpendapat.janganlah.direduksi [accessed on 5 January 2010].

123 They refer to Article 98(2), which refers to Articles 93, 94 and 95, all of them concerning media campaign advertisement.

124 This is a period of three days immediately before the elections when campaigning is no longer allowed (Article 40(2)2).

troversy, for one thing because there was hardly any public participation in their formulation (Hendrayana 2009). The only positive thing we can say about these provisions is that they have never been applied.

This is different for the third law threatening press freedom introduced in 2008. Article 1.1. of the Pornography Law defines pornography as

> any pictures, drawings, illustrations, photographs, writings, voices, sounds, moving pictures, animation, cartoons, conversation, bodily movements, or any other form of message through the media of communication and/or demonstrations in public, which depict lewdness or sexual exploitation which violates the moral norms of society.

This definition is highly moralistic without setting any clear standard or method for evaluating what 'lewdness' is, in particular because it is so difficult to establish what 'the moral norms of society' are in a normatively pluralistic country as Indonesia. In Bali for instance, some common daily activities based on tradition could very well be categorised as pornography on the basis of this law.[125] Such unclear standards lend themselves to arbitrary interpretation by state or non-state actors and can be easily used for putting pressure on particular social groups (Wiratraman 2009). The sanctions of the law are moreover extremely serious. As defined in Article 29:

> Anyone who produces, makes, reproduces, duplicates, disseminates, broadcasts, imports, exports, offers, sells, leases, and provides pornography as stipulated in Article 4 Section 1 shall be punished with imprisonment of no less than 6 months and exceeding twelve years and/or a fine of at least Rp. 250,000,000 (two hundred and fifty million rupiahs) and a maximum of Rp. 6,000,000,000 (six billion rupiahs).

The danger is evident from the conviction mentioned earlier of Erwin Arnada (chief editor of *Playboy Indonesia*), who was convicted for crimes against decency on the basis of Penal Code Article 282(3). In 2007 the Press Council explicitly stated that *Playboy Indonesia* was not a pornographic magazine according to the Press Law, but this could not prevent his conviction.[126] The far greater leeway the Pornography Law offers is therefore quite dangerous.

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125 A respected Hindu high priest, Ida Pedanda Gede Ketut Sebali Tianyar Arimbawa offered such an argument, reminding that sexual organs were important parts of the religion's sacred iconography. Lingga and Yoni, the three-dimensional images of a phallus and a vagina, are the sacred symbols of divine creation and sustenance, fertility and creativity. The full breast of Kali or Durga is also the symbolic representation of their motherly compassion in nurturing the universe. Sexual organs and nudity are often the primary characteristic of sacred objects of worships. "Balinese culture and belief had never considered sexual organs, nudity and sensuality as filthy, morally reprehensible and offensive things," scholar I Ketut Sumarta said.

126 "*Dewan Pers: Playboy Indonesia Tak Porno*" [Press Council: Playboy Indonesia is not Porn], *Kompas*, 9 October 2010.

Yet, there also was a positive development for press freedom in 2008. This concerned the enactment of the Public Information Disclosure Law (PIDL) 14/2008, which guarantees access to public information as mandated by Article 28F of the constitution. According to its general elucidation, the PIDL is important as a legal basis for,

> (1) the right for everyone to access information; (2) the duty for public agencies to provide information quickly, on time, at low/proportional cost, and in a simple way; (3) that exceptions are strict and limited; (4) the duty for public agencies to improve documentation and information service systems.

The law thus allows the public, including the press, to be better informed and to better participate in decision-making processes and their implementation. For journalists, the PIDL provides a new 'weapon' besides the Press Law to force public officials to disclose information. A government official can no longer say that a document is secret if it has been categorised as a public document, which can only be done in exceptional cases. Yet, in practice, the application of the law has been difficult for several reasons. First, the regional government has been reluctant to set up a minimum operational standard for delivering public information; second, the old paradigm that information 'belongs' to officials is still strong at that level; and third, many officials know little about the PIDL and have no idea how to deal with journalists in giving public information.[127] This had already been predicted when the PIDL was formulated and in the debates in parliament very little attention was paid to the pervasiveness of the 'old paradigm' and the new law.[128]

4.10. Physical Attacks on the Press

> Journalists in Indonesia like living in an inhuman jungle!
> (Ahmadi, journalist from *Harian Aceh* newspapers, 2010)

As discussed in the previous section, in 2008 it seemed to become a trend to use the court for attacking the press, and as a result some journalists, editors and media owners became more preoccupied with defending themselves in court than with focusing on providing information to the public. Moreover, the judges or other judicial enforcers did not apply the Press Law as a legal

127 These views were expressed in interviews by journalists and public interest lawyers: Anton Muhajir (AJI Bali and Sloka Institute, Denpasar), interview in Denpasar, 27 July 2010; Paul Sinlaeloe (anti-corruption division staff of PIAR, NTT), interview in Kupang, 22 July 2010; and Rika Yoez (coordinator of AJI Medan), interview in Medan, 28 June 2010.

128 Personal communication of Ignatius Haryanto (director of the LSPP/Institute for Press and Development Studies, Jakarta), during a discussion on the right to information, Demos Jakarta, 8 January 2010.

source to resolve disputes. Albeit the Supreme Court released an important letter on 30 December 2008[129] that mentioned the Press Council as an appropriate institution to decide on press cases in the court, the court is still considered as a threat. The relation between the press and the judiciary system is discussed in the next part of this dissertation. This sub-chapter discusses another type of attacks on the press: physical violence against journalists, media owners and press offices.

Unfortunately, press freedom is not only influenced by law and its application. Violence against journalists has taken place under all Indonesia's regimes and journalists have been assaulted by all kinds of actors, both from the state and from society. Such violence ranges from damaging or destroying cameras or other equipment to torture or even murder.

The first Indonesian journalist to be killed in the period post-Soeharto was Sander Thoenes, on 21 September 1999. Sander went to Dili, East Timor, on a reporting mission. That same day, he was brutally murdered by two officers of the Indonesian army, Major Jakob Djoko Sarosa and Lieutenant Camillo Dos Santos on Becora Road in Dili.[130] According to the Committee for Protecting Journalists (CPJ), Thoenes was the first foreign reporter killed in East Timor since 1975, when six Australia-based reporters were killed during the Indonesian military invasion of East Timor.[131]

Yet, the main change after the end of the New Order was that violence no longer came from the state apparatus in the first place, but rather from thugs and similar 'social groups.' The drama is that such violence has almost without exception remained with impunity, while state officials have hardly made any effort to protect the press.

During Susilo Bambang Yudhoyono's administration, *Delta Pos* journalist Herlyanto was killed in Probolingo, on 29 April 2006, in relation to his report on local corruption. Unfortunately, his case received little attention. This was different for *Radar Bali*'s journalist Anak Agung Narendra Gede Prabangsa, who was found dead on 16 February 2009. He was killed in relation to his reporting on a corruption case in Bangli's education district office.

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129 Supreme Court Circular Letter No. 14/Bua.6/Hs/SP/XII/2008 on Asking Information from Expert Witnesses. This letter supports press freedom, because it emphasises the nature of the Press Law as a *lex specialis*.

130 After a thorough investigation by the Serious Crimes Unit of the United Nations, it became clear that Sander had been murdered in cold blood. He was executed lying on the ground, after he had fallen off the back of a taxi motorbike he was riding to visit the Becora district, where he was going to gather some quotes of people in the street ("Sander Thoenes: Freelancer," *Committee for Protecting Journalists*, http://cpj.org/killed/1999/sander-thoenes.php, accessed on 16 January 2014; "Documentary revisits murder of FT journalist in East Timor," *Financial Times*, 30 October 2013, written by John Aglionby).

131 Ibid. "Sander Thoenes: Freelancer."

Initially, it was difficult to get a serious investigation started, because the intellectual perpetrator of the killing, I Nyoman Susrama, was a member of the district parliament and brother of Bangli's district head. However, concerted action from journalist associations, NGOs, political parties, media and wider solidarity networks pushed the police to seriously investigate the case and in the end Susrama was convicted to life imprisonment, while five accomplices received sentences of eight to twenty years in jail.[132] The attention for this case moreover resulted in a wider campaign to protect journalists.

Nonetheless, during 2009-2010 assaults on and killing of journalists continued. Cases that drew much attention were the torture of *Harian Aceh*'s journalist Ahmadi on Simeulue Island, Aceh (18 May 2010),[133] and Ardiansyah Matrais in Merauke, Papua (30 July 2010),[134] and the killing of Ridwan Salamun in Tual, Maluku (21 August 2010).[135] "Being a journalist in Indonesia is like living in an inhuman jungle!" Ahmadi stated after he was beaten up by military officers on Simeulue Island, because of his reports about illegal logging by the military. All of his equipment was destroyed as well.[136] Other cases of violence during 2009-2010 were the security guard attack against Imam Abdurrahman (*Megaswara TV*, Bogor, 2 January 2010), the violence against Miftahuddin Halim (*Radar Bali* journalist, 15 January 2010) by Paul Handoko and his gang, the brutal attack on Nurul Iman and Zabur (*Tribun* Batam, 11 February 2010) in Sekupang port, the mob attack on the *Siantar* office after a publication on local politics (25 May 2010), and other physical attacks in various places. In Jakarta, *Tempo Magazine* was intimidated through a Molotov cocktail thrown at its office on 7 July 2010 after it reported about suspect bank accounts owned by police officers.[137] An even

132 In September 2010, the Supreme Court confirmed the judgments of the district and the high court. Nyoman Susrama was sentenced to life; I Nyoman Wiradnyana, I Komang Gede, and I Komang Gede Wardana to twenty years; and I Dewa Gede Mulya Antara and I Wayan Suecita to eight years. The Supreme Court council consisted of Artidjo Alkostar, Imam Harjadi and Zaharuddin Utama.

133 Former military intelligence officer Faizal Amin was convicted of grievous assault against Ahmadi. The Iskandar Muda Military Court in Banda Aceh sentenced him to ten months in jail.

134 Matrais, a reporter for the local broadcaster *Merauke TV*, had been covering plans for a large agribusiness development in Merauke. In the week before his death, he had received threatening text messages similar to those sent to at least three other local journalists. "To cowardly journalists, never play with fire if you don't want to be burned. If you still want to make a living on this land, don't do weird things. We have data on all of you and be prepared for death" ("Ardiansyah Matra'is, Merauke TV," *CPJ*, 2010, http://www.cpj.org/killed/2010/ardiansyah-matrais.php, accessed on 21 March 2011).

135 Ridwan Salamun, 28, a correspondent for *Sun TV*, was filming violent clashes between local villagers in the southeastern Tual area of the Maluku Islands when he was stabbed repeatedly.

136 Interview with Ahmadi, 5 July 2010.

137 "*Rekening Gendut Perwira Polisi*" [Fat Account for Retired Police Officers], *Tempo Magazine*, 28 June – 4 July 2010.

worse attack happened on 31 March 2013 when the *Palopo Pos* office in South Sulawesi was burnt down by a mob because of a report about a particular candidate in the local elections.[138]

Two important points can be made about these cases. First, corruption and natural resource exploitation at the local level can be dangerous topics for critical reporting, as indicated by the cases of Ahmadi in Aceh and Ardiansyah Matrais in Papua. This is particularly the case when they write about the connections between local business elites and government officials. Second, the actual violence is performed by non-state actors rather than state officials, whether thugs (*preman*) or ordinary civilians. This differs from the New Order, when state institutions were often directly involved in such violence.

The surge of violence against the press at the regional level cannot be considered separately from the political context of decentralisation. Political gangsters and vigilantes have been major beneficiaries of the decentralisation reforms. The greater autonomy and power of regional governments have turned paramilitary groups and 'political gangsters' into valuable political capital and influential power brokers in their own right (Hadiz 2003). The proliferation of paramilitary and vigilante groups since 1998 represents a manifestation of the decentralisation of violence as a political, social and economic strategy, leading to a loss of state control (Wilson 2006). This has changed the political culture in which the press operates. The role of the state in shaping and influencing press freedom is still large, but the pattern has changed from an interaction between state and society, to struggles within society (Romano 2003).

Another fundamental issue for press freedom is impunity. Most cases involving violence against journalists or editors fail to bring justice, either because there is no prosecution at all or because of an inappropriate punishment. In the cases of Udin (1996), Herliyanto (2006), Prabangsa (2006), Salamun (2010) and Matrais (2010), the strong structural connection between political and business elites at the regional level made prosecution difficult or even ruled it out altogether. One of the worst is the case of *Jakarta Globe* journalist Banjir Ambarita, who was stabbed in the chest and stomach by two assailants on a motorbike on 3 March 2011. The unidentified attackers sped off. The attack was related to his report linking police to a prisoner sex abuse scandal.[139] The case remains unclear and so far no judicial prosecution has followed. Violence against journalists combined with weak law enforcement has thus become a major terror for the press.

138 "*Palopo Pos Dibakar Massa dengan Tabung Gas dan Bom Molotov*" [Palopo Pos Burned Down by Gas Stove and Molotov Bomb], *News Detik.Com*, 31 March 2013.

139 "*Wartawan Ditusuk di Jayapura*" [Journalist Stabbed in Jayapura], *Viva News*, 3 March 2011.

However, impunity is not merely caused by factors external to the press. It seems that sometimes media owners or even journalist associations suggest to the police and the public prosecutor to drop a case in order not to damage relations. A good example is a case involving an official from national oil company *Pertamina* in Lombok. Head of the Ampenan branch office Sadikun Syahroni threatened four local journalists from the *Lombok Post*, *Suara NTB*, *NTB Post* and *Radio Global* by a gun and sickle at an interview about fuel scarcity in West Nusa Tenggara, in Ampenan, 18 July 2007. The case was reported to the police, but no prosecution followed, apparently because the PWI had lobbied the journalists involved to drop the case. In the end they did not dare bring the case to justice, because they were lacking sufficient protective support from the editor and media owner.[140]

A similar thing happened in the case of the Adam Malik Hospital in Medan, after an incident on 7 February 2010. The doctor (with a navy background) locked the door when five TV journalists were trying to get an interview on malpractice. The security guard and other paramedical personnel intimidated them, although there was no physical assault. The matter was reported to the police, but under pressure from the media owner ended by an agreement not to further press charges. Other journalists and representatives of journalist associations later privately expressed their anger about this 'win-win solution,' which they considered as undermining law and press freedom.[141]

Even more disturbing were two cases in East Java in 2012, where it was the Press Council to forge an agreement instead of pressing for criminal prosecution. The first incident, on 25 May 2012, concerned the attempt of several internet and TV journalists to make a report about a fire at the Indospring corporation in Gresik. They were stopped in their activities by corporation manager Paulina Pradini, who ordered security guards to take away their camera, tape recorder and other equipment. The security guards not only took the equipment, but also destroyed it. Gresik's journalist community reported the case to the police, which started an investigation. The case was subsequently accepted by the public prosecutor, who took it to the Gresik District Court. Surprisingly, the Press Council then interfered by starting a mediation process, eventually reaching an agreement with the journalists. The corporation subsequently tried to discontinue the criminal case. However, the court stated that such agreement could not stop criminal legal proceedings before the court and it sentenced Pradini to one-month

140 Personal communication and interview (Mataram, 24 June 2010) with two journalists (anonymous).

141 Personal communication with a journalist (anonymous), Medan, 29 June 2010.

imprisonment. Ironically, the journalists involved in the case expressed their appreciation for the conviction.[142]

A similar case occurred after an incident on 15 December 2012. Head of Pamekasan's Religious District Office Normaluddin threathened to kill journalist Sukma Firdaus after her reporting about a corruption scandal at Normaluddin's office.[143] This led to many protests and upon a complaint filed by journalists the police started an investigation, finally leading to a prosecution before the Pamekasan District Court. However, on 11 March 2013, still during the trial, the Press Council held a meeting in Surabaya with the parties involved in order to settle and discontinue the criminal case. The meeting resulted in three points of agreement, one of them being that "parties agreed to resolve the case by apologising to one another and the legal case is considered closed." For Sukma this agreement was hard to accept, but in the end she complied with the policy of her employer.[144] In my opinion, to prioritise a mediation process over a criminal case leads to a form of impunity which fails to send a clear message to those threatening or using violence against journalists.

This problem of impunity has received very little attention from the post-Soeharto governments, but compared to the case of Udin it also failed to grasp the attention of the international community. This may be caused by the general impression that Indonesia is now a fairly well functioning democracy. Under Soeharto, violence against journalists was considered part of the authoritarian repertoire to silence the press, whereas at present it is something more 'localised' and 'privatised.' The tendency of the SBY administration to blame the press, calling it 'unprofessional,' 'excessive' or 'partisan' may also lead to institutionalising an anti-press discourse. This may well lead to underestimation of the seriousness of the acts of violence against the press which remain unpunished – by the public, the state and perhaps even by the press itself.

142 "*Kekerasan Wartawan Gresik, HRD Indospring Divonis Satu Bulan*" [Violence against Gresik Journalists, HRD Indospring Convicted to One Month], *Gresik.co*, 9 November 2012.

143 "*Diancam Dibunuh, Wartawan Madura Unjuk Rasa*" [Under Threat of Being Killed Madurese Journalists Stage a Demonstration], *Tempo*, 20 December 2012, http://www.tempo.co/read/news/2012/12/20/058449447/Diancam-Dibunuh-Wartawan-Madura-Unjuk-Rasa (accessed on 14 March 2013).

144 Sukma said, "[...] in my heart, I would like the case to be brought before the court. An agreement could be necessary after the court has given its judgment first. Since I am working at a press company, of course I have to obey the company policy, otherwise if I disagree with this policy, it would surely influence my career as a journalist. Hence, I do not have any choice. To me, discontinuation of the legal process is an injustice for a journalist. Nonetheless, this case may provide a learning process for the violator, since he has admitted his fault and promised not to repeat his act to put a journalist under pressure [...]" (Sukma Firdaus, interview, 2 April 2013).

In addition to this overview of attacks against journalists, it is useful to consider the views of international organisations, especially Reporters Without Borders (RSF), about press freedom in Indonesia. RSF recorded a decrease in press freedom in Indonesia in 2008 with the country dropping from 100th position in 2007 to 111th in 2008. In 2010, RSF ranked Indonesia 117th, the lowest position since 2004, but Indonesia has since continued to slide down even further, to 146th place in 2011-2012. Indicators used by RSF to compile their index include violence and abuse against journalists, the state's role in combating impunity for those responsible for violence and abuse, censorship and self-censorship, media control (regarding questions of ownership), media legislation, pressure from the administration and the judiciary, pressure from business, and freedom on the internet and of new media.

The increasing number of killings of journalists in 2010 contributed to the drop in ranking, in particular because they were not followed by further judicial prosecution to bring the culprits to justice. Physical assaults continued as well, as can be seen from the following table, based on data from the AJI:

Table 1: Cases of violence against journalists: 2008-2012[145]

	2008	**2009**	**2010**	**2011**	**2012**
Intimidation	18	1	6	10	15
Eviction and obstruction of access	9	3	7	8	5
Censorship[146]	3	2	3	3	1
Physical assault	21	18	16	17	18
Prosecution and legal suit	6	7	6	2	2
Demonstration	1	3	2	2	2
Hostage	1	2	-	1	2
Killing	-	1	3	1	-
Mysterious deaths	-	-	1	-	-
Attack of a press office	-	-	4	2	2

145 This table is adapted from the AJI annual reports.

146 This is a policy or regulation which prohibits journalist from reporting. For instance, the East Jakarta government released a circular letter (*Surat Edaran*) to schools and teachers for not accepting journalists whose identity is unclear, or who have not obtained a recommendation from government officials or the regional parliament.

Indonesia did slightly better in 2013 (139th position), but this does not seem to be caused by changes in government policy.[147] The next table offers a disheartening view of the safety of journalists.

Table 2: Journalists killed in Indonesia: 1996-2012[148]

Victim	**Date**	**Location**	**Perpetrator**	**Judicial Process** (investigation to judicial decision)
Fuad Muhammad Syafruddin, Bernas	16 August 1996	Yogyakarta	Two unidentified assailants	No further prosecution[149]
Muhammad Sayuti Bochari, ***Pos Makassar***	11 June 1997	Luwu, Sulawesi	Unidentified assailants	No further prosecution[150]
Naimullah, ***Sinar Pagi News***	25 July 1997	Pantai Penibungan, Pontianak, West Kalimantan	Unidentified assailants	No further prosecution[151]
Sander Thoenes, *Financial Times*	21 September 1999	Dili, East Timor	Indonesian army, Major Jakob Djoko Sarosa and Lieutenant Camillo Dos Santos	Under investigation of UN Serious Crimes Unit, but murderers were never brought to justice
Ersa Siregar, *Rajawali Citra Televisi*	29 December 2003	Aceh	Killed during a gun battle between Indonesian military forces and the Free Aceh Movement	No further prosecution

147 'Press Freedom Index,' *Reporters Without Borders*, 2011-2012 and 2013, http://en.rsf.org/,

148 This data is gathered from various sources. The baseline is made by the Committee to Protect Journalists (CPJ), added are the two columns listing the perpetrator and the ensuing judicial process.

149 In court, Dwi Sumaji Iwik who previously confessed to killing eventually withdrew his confession. He claimed that he had been forced to confess by police officer Edy Wuryanto in order to protect the interests of the Bantul District Head Sri Roso Sudarmo (Marajo 2007).

150 Sayuti's death was a result of his reporting on local corruption (Andi Tonra Mahie), but local police said the cause was a traffic accident ("Muhammad Sayuti Bochari," *CPJ*, June 11, 1997, https://cpj.org/killed/1997/muhammad-sayuti-bochari.php, accessed on 19 January 2014).

151 CPJ reported that Naimullah was killed for his reporting on police links to illegal logging activities in the area. The police failed to investigate the case, according to local sources, and some journalists suggested that the police may have been involved in the murder ("Naimullah," *CPJ*, https://cpj.org/killed/1997/naimullah.php, accessed on 19 January 2014).

Victim	**Date**	**Location**	**Perpetrator**	**Judicial Process** (investigation to judicial decision)
Herliyanto, *Radar Surabaya*	29 April 2006	Probolinggo, East Java	Seven assailants, led by Abdul Basyir	Three assailants were prosecuted, but Abdul Basyir and three of his men were never brought to justice
Anak Agung Gede Prabangsa, *Radar Bali*	11 February 2009	Bali	I Nyoman Susrama and five of his men	Susrama was convicted to life imprisonment, while five accomplices received sentences of eight to twenty years in jail
Ardiansyah Matrais, *Merauke TV*	30 July 2010	Merauke	Unidentified assailants	No further prosecution
Ridwan Salamun, *Sun TV*	21 August 2010	Tual, Maluku Islands	Killed during violent clashes between local villagers in the southeastern Tual area	Three suspects were prosecuted, but later acquitted
Alfrets Mirulewan, *Pelangi Weekly*	17 December 2010	Kisar, Maluku Islands	Risart Salampessy/ Ris, Markus Sahureka (the Maluku Water Police Directorate), Imanuel Belly/ Bima, Thomas Pukeey and Risam Augusten	They were sentenced, the sentences varied from three to nine years
Leiron Kogoya, *Papua Pos Nabire* and *Pasifik Pos Daily*	8 April 2012	Mulia	Unidentified gunmen	No further prosecution[152]

152 Kogoya was killed when unknown gunmen fired on a small passenger plane landing at Mulia Airport, Papua. Kogoya had travelled to Mulia to report on elections in Jayapura, Papua's capital, for the *Papua Pos Nabire* and the *Pasifik Pos Dail* ("Hunt Begins for Gunmen Who Machine-Gunned Plane in Papua," *Jakarta Globe*, 9 April 2012).

4.11. Conclusion

From the start of the New Order until the present, there have been lower and higher levels of press freedom in Indonesia in a direct relation with the character of the political regime – from authoritarian to more democratic and from centralised to decentralised government. Unfortunately, the post-Soeharto era has in the end not fully delivered on its liberal promises regarding press freedom.

The authoritarian Soeharto regime often used legal forms to pressurise the press. The law was used for banning media and the criminal prosecution of journalists and editors. Military rules applied during the emergency situation in the early New Order years, and subverted human rights principles and press legislation. The law was also designed to create a hegemonic discourse through its use of central concepts such as 'development press,' '*Pancasila* press' and 'social responsibility press.' In this respect the New Order recalled Soekarno's press policies. These discourses were to serve the interests of the regime and led to much hypocrisy.

The introduction of the SIUPP (publication and printing permit) in 1982 meant a serious administrative threat to press freedom and endangered critical reporting by the media, especially about the government. During the New Order, legislation was used to subvert higher legislation in restricting the press, meaning that the government could impose sanctions without using the court system. Yet, by banning *Tempo*, *Detik* and *Editor* in 1994 the government somehow went too far, in the sense that this became a 'stepping stone' for journalists and the public at large to start seriously questioning government policies regarding press freedom. It led to establishing the AJI as an alternative journalist association, and thus to building solidarity outside the control of the government. This likely helped pave the way for the call for democratisation that swept over Indonesia after the start of the economic crisis in 1997 and eventually led to the ousting of Soeharto.

In the early post-Soeharto years press freedom was at a peak. Under President Habibie, in September 1999, a new Press Law was enacted, which abolished the SIUPP and contained important guarantees for press freedom. The peak of press freedom fell during the presidency of Abdurrahman Wahid. He dissolved the Department of Information, which had been the cornerstone of New Order repression of the press. Under Wahid no journalist ended up in jail. According to Wahid "…Information is society's business, which means it is inappropriate for the government to intervene." In his wordings and policies Wahid subscribed to the principle that democracy requires well-informed citizens. Their capacity to produce intelligent agreements by democratic means can be nurtured only when they enjoy equal and open access to diverse sources of opinion (cf. Keane 1991: 176).

Unfortunately, this situation of full freedom started to change after Megawati took office as president, and regularly confronted the press by accusations that its reports were 'un-nationalist,' 'un-patriotic,' '*njomplang*' (unbalanced), '*njlimet*' (complex), and '*ruwet*' (complicated). Under Megawati prosecution of journalists and editors started again, including at her own initiative when she felt her reputation was tarnished by cartoons.

Under the SBY presidency the situation has further deteriorated. First, new legislation started to undermine the 1999 Press Law, such as the Pornography Law, the Electronic Information and Transactions Law, the General Election Law, and the Presidential Election Law. At the same time the number of criminal and civil lawsuits against journalists, editors and media owners has continued to rise. Criminal law enforcement under the Penal Code has become common again, despite the fact that the Press Law should take priority. Both criminal and civil lawsuits have put financial stress on the press. On top of this, there has been an increase in violent attacks against journalists and media offices, usually by privately hired thugs and societal groups. Those committing such acts usually avoid any sanction, which adds to the general feeling of impunity for human rights violations. All of this disturbs the processes of democratisation and rule of law formation. When we compare the current situation to the New Order, violence against journalists has become more 'localised' and 'privatised' – usually benefiting elites at the district level rather than the national government. This change is closely related to the decentralisation process. As argued by Heryanto and Hadiz (2005: 261): "freedom of the press continues to be challenged, not by an authoritarian state, but by a variety of vested business interests or by the exercise of societal political violence." One may add that exposing issues of corruption and natural resource exploitation by regional elites are most likely to lead to violence against the press.

Despite these serious drawbacks, there is still much more press freedom now than under the New Order. There is a constitution which has been amended to clearly guarantee freedom of expression. This freedom is also sustained by the Human Rights Law of 1999 and the Press Law of the same year. New restrictive or even suppressive laws have been enacted, but they are not specifically targeted at the media. Under the New Order the limits of press freedom were moreover never clearly defined and Soeharto's speeches played an important role in their interpretation, whereas today the Press Council and the court articulate the rules.

There are also significant institutional changes that have sustained press freedom. While direct influence of the military on the press through its involvement in licensing was abolished in 1982, similar control was exercised by the Department of Information thereafter. Post-Soeharto there is no military influence and the Department of Information was dissolved during the early 'reformation.' Although it was re-established under the SBY presi-

dency as the Department of Information and Communication, and the KPI became the licensing and monitoring organ for broadcasting media, these bodies lack the power and influence of their predecessor. Measures against the press now at least involve the judiciary and are no longer purely administrative in nature. And finally, under Soeharto press organisations, printing houses and the Press Council were co-opted by the regime. Today there is no longer such co-optation, certainly not at the national level.

The next three chapters will focus on the legal means of limiting press freedom, considering in depth how viz. criminal, civil and administrative law have been used in court cases involving the press and to what extent the courts have supported press freedom.

5 Press Freedom and Criminal Law

5.1. Introduction

In the Indonesian history of freedom of expression, the criminal courts have been used by all kinds of political regimes to suppress opposition against or criticism on authority. After 1918 the Penal Code for the Netherlands Indies (*Wetboek van Strafrecht voor Nederlandsch-Indië*) proved an effective tool to this purpose, originally for the colonial government to prosecute Indonesian nationalist leaders and press, but after independence for the Indonesian government to silence dissenting voices in a similar way. In post-Soeharto Indonesia the government has no longer been the dominant actor in criminalising the press, but businesses and certain civil society organisations have been able to use the criminal law to instigate prosecutions against journalists and editors.

This chapter examines from a legal point of view – but taking into account the socio-political context – the relation between press freedom and the criminal court process. It looks at how the Penal Code and criminal provisions in other laws have been interpreted and applied, and whether this has contributed to promoting press freedom or the opposite. Understanding the socio-political context helps us to explain why prosecutors and courts have remained within the boundaries of the rule of law, or transgressed them. In the end the chapter draws a few conclusions regarding the importance and need for criminal law provisions to regulate press freedom.

Cases have been selected on the basis of their importance for specific criminal law provisions such as those on defamation, insult, or secrecy. Regarding a few provisions only a single case turned out to be available, which sometimes has to do with the relative unimportance of such a provision, but this may also be due to the unavailability of sources. Nonetheless, altogether the chapter offers a fairly comprehensive overview.

5.2. A Few General Notes on Press Criminal Law

Probably the most notorious provisions used in silencing the press have been the so-called *haatzaai-artikelen* (hatred sowing articles), which were first introduced by the colonial regime, but continued to apply after independence. As explained in the previous chapter, the most despised of the

haatzaai-artikelen have now been declared in violation of the Constitution (Constitutional Court decision 6/PUU-V/2007), but some variations still apply, as well as many other criminal law provisions threatening the freedom of the press. This includes several other articles in the Penal Code, as well as provisions in more recently enacted special laws such as the General Election Law, the Pornography Law, and the Electronic Information and Transaction Law. The following two tables offer an historical overview of the relevant legislation:

Table 3: Criminal Law Provision against the Press in Indonesia (Within the Press Law)[1]

Issue in Criminal Law	**Law (Art./s)**	**Sanction** (imprisonment)
National Press Duties	Art. 2, 3, and 19 of Law 11/1966[2]	1 year
	Art 19(1) (Point 17) of Law 21/1982[3]	4 years and/or 40 million rupiah
Press without Permit (SIUPP)	Art. 13 (5) (Point 17) of Law 21/1982[4]	3 months and 10 million rupiah
Non-Authorised Press Corporation	Art. 9 (2) and 12 jo. 18 (3) of Law 40/1999	100 million rupiah (criminal fines)
Violating Public Decency (*kesopanan /kesusilaan*)	Art. 5 (1), 13, and 18 of Law 40/1999	500 million rupiah (criminal fines)

1 Laws 11/1966, Law 4/1967, Law 21/1982 and Law 40/1999.
2 No longer valid.
3 *Ibid.*
4 *Ibid.*

Table 4: Criminal Law Provisions against the Press in Indonesia (Outside the Press Law)

Issue in Criminal Law	**Specific issues**	**Law (Art./s)**	**Sanction** (imprisonment)
Haatzaai-artikelen (hatred sowing or hate speech – *menabur kebencian* or *ungkapan kebencian*)	Against government and state symbols	Art. 154-155 of the Penal Code[5]	4-7 years
	Against person/ public	Art. 156-157 of the Penal Code	2.5-4 years
	Cyber media	Art. 28 (2) of the EIT Law	6 years and/or fine of 1 billion rupiah
Opprobrium or insult or defamation (*penghinaan, pencemaran nama baik*)	Against President or Vice President	Art. 134, 136 bis and 137 of the Penal Code	6 years
	Against the King or heads of friendly countries	Art. 142	5 years
	Against representatives of foreign countries	Art. 143 and 144 of the Penal Code	5 years
	Against state institutions (public institutions)	Art. 207, 208 and 209 of the Penal Code	6 months
	Against person/ public	Art. 310, 311, 315, and 316 of the Penal Code	9-16 months
	Against dead person	Art. 320-321 of thePenal Code	4 months
	Cyber defamation	Art. 27 (3) and 28 (1) of the EIT Law	6 years and/or fine of 1 billion rupiah
Spreading false news (*menyiarkan kabar bohong*)		Art. 171 of the Penal Code[6]	2-10 years
		Art. 317 of the Penal Code	4 years
Incitement (*menghasut*)		Art. 160 and 161 of the Penal Code	6 years
Violating public decency (*kesopanan / kesusilaan*)		Art. 282 and 533 of the Penal Code	2 months-2 years and 8 months
		Art. 27 (1) of the EIT Law	6 years and/or fine of 1 billion rupiah
		Art. 4 (1) jo. 29 of the Pornography Law	6 months-12 years, and/or 250 million-6 billion rupiah
Crimes against state security (including official secrecy)		Art. 112, 113, 114 and 115 of the Penal Code	1.5-7 years
Receiving stolen property, publishing and printing	(a)	(b) Art. 483, 484, and 485	(c) 1 years and 4 months

5 Art. 154-155 of the Penal Code have been repealed by Constitutional Court judgment 6/ PUU-V/2007.

6 Art. 171 of the Penal Code was repealed by Art. XIV and XV of Law 1/1946 (Penal Code).

These tables show that the majority of criminal provisions can be found outside the Press Law, and that many of them contain severe sanctions.

No wonder that there has been an ongoing debate about whether the Press Law is in fact a special law which prevails over the other criminal provisions when it concerns press cases. This debate finds its origin in the legal doctrine *lex specialis derogat legi generali*. In Indonesia this doctrine is now often interpreted meaning that a law governing a specific subject matter (*lex specialis*) overrides a law which governs general matters (*lex generalis*).

This matter was brought into clear relief by the case of *Upi Asmaradhana* in 2008. The case started with public remarks made by South Sulawesi police chief Sisno, who asked the public to report press 'violations' to the police, which would then be prosecuted on the basis of the Penal Code or other criminal law provisions, rather than on the basis of the Press Law. After organising a protest against this policy journalist Upi was prosecuted for defamation at the Makassar District Court. He was acquitted, but his case led to a public debate about the extent to which the press law is a *lex specialis* vis-à-vis other laws.

There are basically two perspectives on this matter. On one side are those who argue that the Press Law is *not* a *lex specialis*, for the following reasons. First, the Press Law does not mention that it is one. Second, it does not specifically refer within which field of law it would be a special law (criminal, civil, constitutional or administrative law) and it holds no reference to procedure within any of these fields. Third, the content of the Press Law and its Elucidation confirm that it is not a *lex specialis*: Articles 13.b, 16, as well as the Elucidation to Articles 4.2, 8, 9, 11, 12, and finally the last paragraph of the General Elucidation all refer to 'existing legislation' which continues to be valid.[7] The fourth reason is that the Supreme Court has never stated that the Press Law is a *lex specialis*.[8] And fifth, the Press Law does not only regulate 'journalist activities', but also regulates foreign press corporations, advertisements, and social welfare (Sukardi 2007: 177-186).

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7 For instance, the Elucidation of Article 12 of Law 40/1999, stipulates that "as long as related to criminal responsibilities, this refers to existing legislation." Likewise, the final paragraph of the General Elucidation of Law 40/1999 stipulates that "…in order to avoid overlapping regulation, this law does not regulate provisions which have already been formulated by other legislation." These two reasons were mentioned by Sisno when he talked during Working Meeting among Governors, Mayors and District Heads of South Sulawesi on 19 May 2008. "*UU Pers bukan Lex Specialis*" [The Press Law is Not a *Lex Specialis*], *Kompas*, 24 March 2009. The statement of 'existing legislation' was added by Parliament (Aryani et al. 2007: 77).

8 According to former Supreme Court Chairman Bagir Manan, the Supreme Court considers the Press Law as a supreme law ('*lex suprema*'), to be applied in press cases instead of other legislation. However, the meaning of this concept is not entirely clear (*Interview*, Leiden, 26 March 2010).

On the other side, those who support the Press Law as *lex specialis* bring forward several arguments as well. First, there is no need for the Press Law to be referred to explicitly as *lex specialis*, because the process and background of the law making process already put beyond doubt that it is one, as it aims specifically to clarify the boundaries of journalist activities (Batubara, 2007; Pandjaitan and Siregar, 2004). Second, the law contains special mechanisms to deal with potential transgressions of these boundaries, such as the right to respond (*hak jawab*) and the right to correct (*hak koreksi*). Only if a journalist moves out of this realm, for instance by extorting a company he or she should be prosecuted on the basis of the Penal Code. Third, the Press Law has been a response to the systematic oppression of the press by previous authoritarian regimes and its fundamental aim is to improve the quality of democracy, as an operational law of article 28 of UUD 1945. Going back to the Penal Code to resolve issues of press freedom is therefore not only contrary to the spirit of law reform, but also a-historic.

These lines of argument both suffer from a misinterpretation of the principle of *lex specialis derogat legi generali*. This principle is generally accepted as a technique of interpretation in solving legal cases when dealing with two or more conflicting norms in a particular case, meaning that a specific rule should be prioritised over a more general one. This means that the relationship between the *lex specialis* principle and other norms of interpretation or conflict resolution cannot be determined in a general way. That a special rule holds priority over a general one is justified by the fact that such a special rule, being more concrete, takes better account of the particular features of the context in which it is to be applied than a more general one. The rationale of *lex specialis* dates back to Hugo Grotius (1653), who wrote that "*Inter eas pactiones quae supradictis qualitatibus pares sunt ut praeferatur quod magis est peculiare, & ad rem propius accedit: nam solent specialia efficaciora esse generalibus*."[9]

The original idea about a *lex specialis* refers to a 'rule' or a 'provision,' not to a 'law.' The principle does not entail that a special law automatically overrides all general law, or that a special rule overrides all general rules, because the application of a special rule should be in accordance with the principles and aims formulated by general law or rules. The application of a special rule can only follow if it produces a more equitable result. For this reason, the present research considers about each individual rule whether it has an equivalent that deals specifically with such issues for the press.

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9 H. Grotius, *De jure belli ac pacis, libri tres* (1653) Liber II, Caput XVI, § XXIX. 'Among those treaties, which, in the above named respects, are equal, the preference is given to such as are more particular, and approach nearer to the point in question. For where particulars are stated, the case is clearer, and requires fewer exceptions than general rules do.' (Trans. A. C. Campbell, 1814, available at http://www.constitution.org/gro/djbp.htm, retrieved on 5 June 2011).

The question on the relation between the Penal Code and the Press Law in Indonesia should therefore be determined by the equivalence between rules in the Press Law and rules in the Penal Code to be applied to cases concerning the press.

Another issue is the question which mechanism should take precedence in addressing press cases. The Press Law contains a special mechanism for dealing with such cases, consisting of the 'right to reply,' a complaint through the Press Council, mediation, and court procedure as a last resort. A growing number of people have brought press cases to the Press Council: between (April) 2000 and 2009, the Press Council has roughly seen a fourfold increase in the number of complaints in relation to press publication matters (see table below, www.dewanpers.org, accessed on 8 April 2011).

Table 5: Complaints in relation to press publication matters 2000-2009

Year	2000-2003	2003	2004	2005	2006	2007	2008	2009	**Total Complaints**
Total	427	101	153	127	207	319	424	442	2200

If we look at the minutes of parliament, we further find that the legislator clearly intended to formulate special characteristics of the law in order to promote and protect press freedom. There were several debates on *lex specialis*, and even if they departed from an incorrect interpretation of this concept they put beyond doubt that the legislative intent was to strengthen the role of the press in order to bolster democratisation processes in post authoritarian Indonesia.[10] Therefore, it should be clear that even if not based on the *lex specialis* argument the Press Law's mechanism for dealing with complaints against the press should take precedence over other mechanisms.

Before dealing with cases concerning this issue, the next sections will first provide an overview of the role of specific criminal provisions in cases against the press.

10 See: *Rapat Kerja Kedua Pembahasan DIM RUU Pers*/The 2nd Meeting for Discussing of the List of Problem on Press Law Draft (27 August 1999), The Short Report of the Meeting between Commission I of DPR and Minister of Information (Aryani 2007: 322; 351; 353; 359; 362; 406; 518; 523). For instance, the Minister of Information stated that "…. If we return to the Penal Code, it means our friends as journalists may be potentially sent to jail for 1-4 months, then I ask you to consider the issue of justice in this regard" (Aryani 2007: 359).

5.3. The Haatzaai-Artikelen

In 1914 the *haatzaai-artikelen* were introduced through the new Penal Code for the Netherlands Indies for the Dutch part of the population. According to R. Soesilo (1976)[11] the Dutch took these articles from Article 124a of British Indian Penal Code, but in fact similar articles had long been part of the Dutch Penal Code in the Netherlands (Maters 1998: 98). On 1 January 1918 (Han 1961: 5), Articles 66a and b became Articles 154, 155, 156, and 157 of the Netherlands Indies Penal Code, when the former code was included in the new one.

The main purpose of the *haatzaai-artikelen* was to restrict opposition and criticism against the government, and they were indeed primarily applied to attack Indonesian nationalists writing in newspapers, such as Soekarno (*Fikiran Rakjat*), Muhammad Hatta (*Daulat Rakjat*), Amir Syarifuddin (*Banteng*) and Haji Agus Salim (*Neratja*).[12] Soekarno was indicted on the basis of the *haatzaai-artikelen* in 1930 in the Bandung District Court, and attacked them vehemently during his trial,[13] but left them in place after he became President in 1945.

Articles 154 and 156a of the Penal Code are directly linked to the press; on the other hand, Articles 155 and 157 of the Penal Code are not directly related.[14]

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11 Later often quoted, see a.o. Sukardi 1989: 59 and Surjomihardjo et al. 2002: 339.

12 As written by Kahfi (1996: 7). Ironically, *Neratja* had originally been funded by the Dutch administration, before Salim became editor in chief in 1916-1920.

13 See: Ir. Soekarno's (1989) speech, entitled "*Indonesia Menggugat: Pidato Pembelaan Bung Karno di Depan Pengadilan Kolonial Bandung, 1930*" [Indonesia Indicts: The Defence Speech of 'Bung Karno' begore the Colonial Court in Bandung, 1930]. Although the *haatzaai-artikelen* have been applied to attack the nationalist movement and the press, these articles were never repealed until the Constitutional Court decided to quash Articles 154 and 155 of the Penal Code (No. 6/PUU-V/2007). Nevertheless, Articles 156 and 157 are still valid and these can constitute possible threats for the press.

14 Article 155 stipulates: "(1) Any person who disseminates, openly demonstrates or puts up a writing where feelings of hostility, hatred or contempt against the Government of Indonesia are expressed, with intent to give publicity to the contents or to chance the publicity thereof, shall be punished by a maximum imprisonment of four years and six months or a maximum fine of three hundred rupiah; (2) If the offender commits the crime in his profession and during the commission of the crime five years have not yet elapsed since an earlier conviction on account of a similar crime has become final, he may be released from the exercise of said profession." Article 157 states that: "Any person who disseminates, openly demonstrates or puts up a writing or portrait where feelings of hostility, hatred or contempt against or among groups of the population of Indonesia are expressed, with intent to give publicity to the contents or to enhance the publicity thereof, shall be punished by a maximum imprisonment of two years and six months or a maximum fine of three hundred rupiah."

Article 154 stipulated,

> The person who publicly gives expression to feelings of hostility, hatred or contempt against the government of Indonesia, shall be punished by a maximum imprisonment of seven years or a maximum fine of three hundred rupiah.

Article 156 states:

> The person who publicly gives expression to feelings of hostility, hatred or contempt against one or more groups of the population of Indonesia, shall be punished by a maximum imprisonment of four years or a maximum fine of three hundred rupiah.
>
> By group in this and in the following article shall be understood each part of the population of Indonesia that distinguishes itself from one or more other parts of that population by race, country of origin, religion, origin, descent, nationality or constitutional condition.

The next sections will discuss two cases before and one after 1998 which were based on these articles. The following table provides a summary overview of them:

Table 6: Press Cases on Hate Speech and Hatred Sowing Issues[15]

The case	Indictment		Court Decision		
	Rules	**Sanction**	**District Court**	**High Court**	**Supreme Court**
Goei Po An (*Terompet Masyarakat*), 1951	Art. 154 Penal Code	7 years & fine	Sentenced	Sentenced	Sentenced
AJI (Ahmad Taufik, Eko Maryadi, and Danang K.W.), 1995	Art. 154 Penal Code	7 years & fine	Sentenced to 3 years in jail (except Danang, 18 months in jail)	Sentenced to 3 years in jail (except Danang, 18 months in jail)	Sentenced to 3 years in jail (except Danang, 18 months in jail)
Andi Syahputra (*Suara Independen*), 1996	Art. 154 Penal Code	7 years & fine	Sentenced for 2.5 years in jail, but early release following the fall of Soeharto	Unknown	Unknown
Teguh Santoso (*Rakyat Merdeka Online*), 2006	Art. 156a Penal Code	5 years	Interlocutory decision: indictment was unacceptable	Unknown[15]	Unknown

15 Unknown in the table is defined as may be appealed to the High or Supreme Court, but there is no further information, or also I have not been able to find any information about a High or Supreme Court decision.

5.3.1. Haatzaai Cases Prior to 1998

In 1951, chief editor of *Terompet Masyarakat*, Goei Po An in Surabaya was convicted of violating Article 154 of the Penal Code. In its decision the Surabaya District Court argued that the newspaper had spread "feelings of hostility, hatred or contempt against the government of Indonesia," by writing that "the government acts as if it is blinded (by rage or craze)" (*…Pemerintah seakan-akan mata gelap*). The reason for such critique was the detention of numerous public figures in Jakarta. The District Court's decision was upheld by both the High Court (1953) and the Supreme Court (1955) (Soeprapto in Soesilo 1989: 132-133). It is clear from these judgments that the limits of tolerance had not shifted far from those in the colonial days.

The next case occurred some 44 years later, under the Soeharto regime. On 16 March 1995, three AJI activists (Independent Journalists Association), Ahmad Taufik, Eko Maryadi, and Danang Kukuh Wardoyo were arrested during an AJI meeting in Hotel Wisata, Jakarta. They were charged on the basis of Art. 154 *juncto* 55 (1) of the Penal Code, because they had published a magazine called *Independen* that allegedly had "insulted the government" on several occasions. The most offensive article concerned *Independen*'s exposure of the business involvement of relatives of the Minister of Information Harmoko, as well as the latter's role in revoking publication licenses. On top of that, *Independen* had speculated about the succession of President Soeharto. In spite of the difficulty to bring these acts of publishing under Article 154, the Central Jakarta District Court sentenced Ahmad Taufik and Eko Maryadi to almost three years and Danang Kukuh Wardoyo to 18 months. These sentences were later confirmed on appeal and cassation.

Ahmad Taufik remembered the case as follows during an interview in 1997:

> I saw our legal system was not independent. Judges were under pressure when they gave this decision. After I was released, I met the public prosecutor and he asked me whether Harmoko's stocks in several newspapers had been disputed in the court (?). I said that this had not been discussed at all. It should have been in order to prove whether Harmoko had stocks in those newspapers […]. In my thought […], I imagined that substantial matters would be discussed (during court session), but it was not […] the substance of the problem was only discussed as a procedural matter.[16]

Likewise, Andi Syahputra was arrested by the police in Cipulir, Jakarta Selatan, on 27 October 1996, because of his involvement in publishing *Suara Independen* on behalf of MIPPA (*Masyarakat Indonesia Peminat Pers Alternatif* / Alternative Press Interest Indonesian Society), an organisation based in Australia. The prosecutor indicted Andi Syahputra for four years imprisonment for showing hostility towards the President. According to the indict-

16 "*Saya Terlambat Masuk Penjara: Wawancara Ahmad Taufik*" [I Went to Prison Too Late: Interview with Achmad Taufik], *Tempo*, Edisi 22/02 – 30/Jul/97.

ment, the accused had ordered the printing of 5000 copies of *Suara Independen*, containing an article called, "*Soeharto Dalam Proses* J*adi Raja Telanjang*" (Soeharto on the Way to Becoming a Naked King).[17]

According to one of his lawyers, Irianto Subiakto,[18] the indictment contained an *error in persona*, because Syahputra's position was only that of a printer. Even, the title of the writing actually was taken from foreign scholar Takashi Shiraishi who wrote that "Soeharto in the process of becoming a King of the Nude". Syahputra did such printing because it provided him with an income. There was no indication that Syahputra intended to defame Soeharto. The person who was in fact legally responsible in this case was MIPPA, because as stated by Benyamin Kurnia (the chair of MIPPA), through his letter to Syahputra's lawyer, he claimed responsibility for the publication of *Suara Independen*.

The panel of judges at the South Jakarta District Court – chaired by Marsel Buchari –, decided that Andi Syahputra as the printer of the alternative magazine *Suara Independen* (Voice of Independence) was guilty. He was sentenced to two years and six months in prison for distributing material hostile to Soeharto.[19] Eventually, he was released earlier than the period of his sentence following the fall of Soeharto.

Looking at the use of the *haatzaai-artikelen* in these cases shows the prosecutor's intention to merely silence the press by sentencing journalists and editors, similar to the Netherlands Indies' government's intention to silence the nationalists prior to independence.

5.3.2. Haatzaai Cases Post-Soeharto: Rakyat Merdeka Online (2006)

Despite the spirit of reform and euphoria of freedom in Indonesia after the fall of Soeharto, the *haatzaai-artikelen* were used again in the case against *Rakyat Merdeka Online*'s Teguh Santoso. It became something of a *cause célèbre* because it drew international attention, especially in many Muslim countries.

The case concerned a repost by *Rakyat Merdeka Online* of one of the cartoons of the Prophet Muhammad published originally by the *Jyllands-Posten* in Denmark. Taken from this daily's website, the cartoon showed the Prophet

17 "*Kasus "Suara Independen": Jaksa Tetap Menuntut Terdakwa Empat Tahun Penjara*" [The Case of "Suara Independen": Public Prosecutor Still Demands Four Years of Prison for the Suspect", Kompas, 5 April 1997.

18 *Interview*, in Jakarta, 20 October 2012.

19 Committee to Protect Journalists (CPJ), http://www.cpj.org/attacks97/asia/indonesia.html (retrieved on 20 October 2012).

Muhammad with red eyes, beard and dishevelled moustache, wearing a bomb turban igniting fire wicks carrying the Arabic text *Laa illaha Illalah Muhammadarasulullah.* Ironically, when *Rakyat Merdeka Online* had published this cartoon for the first time, in October 2005, nothing had happened, but this time it caused an uproar and Teguh Santoso, chief editor of *Rakyat Merdeka Online* was prosecuted before the South Jakarta District Court, on the basis of Article 156a of the Penal Code.

In his plea (with the title "*Saya Hanya Jurnalis Biasa, Bukan Penista Agama*" / I am an ordinary journalist, not a religion hater),[20] Teguh Santoso pointed out that before publishing it, *Rakyat Merdeka Online* had actually modified the cartoon in order to reduce the vulgar aspects of the original. Moreover, it belonged to a story about the controversy the cartoon had raised, under the heading "*Nabi Muhammad Dihina, Indonesia Lancarkan Protes*" (the Prophet Muhammad Has Been Insulted, Indonesia Protests). After many complaints about the posting, *Rakyat Merdeka Online* explained that it had not intended to insult anyone ("*Kami Tak Bermaksud Ikut Menghina*" / We Did Not Intend to Insult Anyone), on 2 February 2006.

Nevertheless, about 200 members of the Muslim fundamentalist vigilante FPI (the Front of Defenders of Islam) gathered at the *Rakyat Merdeka* office, while on their way to the Danish Embassy. After the editors had provided an explanation to the FPI's leaders, the FPI expressed its understanding and just asked the editors to delete the posting and apologise to the public. This agreement was published on the *Rakyat Merdeka* website.[21] As stated above, the editors had in fact already done this.

Moreover, *Rakyat Merdeka* itself asked the AJI (Independent Journalists Alliance) to examine whether or not it had breached the ethical code for journalists. After a hearing, the Ethics Assembly of AJI, consisting of Abdullah Alamudi, Atmakusumah Asraatmaja, and Stanley, decided that there had been no violation of either ethics or methods of journalism, as laid down in the 2006 Code of Journalist Ethics.

Islamic fundamentalist leaders Habib Rizieq from the FPI (Islamic Defender Front) and Abu Bakar Baasyir from MMI (Indonesian Mujahiddin Assembly) also agreed to drop the case and accepted that *Rakyat Merdeka Online* had not intended to insult the Prophet Muhammad. One may therefore imagine the widespread surprise when the public prosecutor decided to bring a case against Teguh Santosa before the South Jakarta District Court.

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20 The plea was delivered by Teguh Santosa during the second court session, 6 September 2006, in the South Jakarta District Court.

21 "*Redaksi dan FPI Sepakat Akhiri Kontroversi*" [Editorial Board and FPI Agree to End the Controversy], 3 February 2006, 11:12 am.

However, before the judges examined the main case, they passed an interlocutory verdict in which they considered the prosecutor's indictment "unacceptable" and returned the case to the prosecutor.[22] This final case based on the *haatzaai-artikelen* thus ended in an 'anti-climax.'

Nonetheless, from the perspective of press freedom the case is quite disturbing. *Rakyat Merdeka Online* was intimidated by a vigilante, without the police doing anything to prevent this or without this group taking recourse to a legal mechanism. This fact is even cast into sharper relief by the AJI's Ethic's Assembly that there had been no infringement of the code of ethics for journalists. On top of this, the public prosecutor's actions indicate that law enforcement institutions show little understanding of the 1999 Press Law mechanism.

5.3.3. The End of the Haatzaai-Artikelen?

There is an interesting contradiction between the notoriety of the *haatzaai-artikelen* on the one hand and the scant use that has been made of them. The different regimes ruling Indonesia have generally preferred to use other laws to silence the press, such as military regulations, licenses, censorship, etc. Still, this notoriety can be understood if we consider the fundamental injustice contained in them. This was finally legally acknowledged, when in its decision 6/PUU-V/2007, on July 17, 2007, the Constitutional Court declared that Articles 154 and 155 of the Indonesian Penal Code were contradictory to the Constitution and therefore were no longer legally binding.

For AJI, the annulment of Articles 154 and 155 meant a restoration of civil liberties and press freedom.[23] 'Sowing hatred' against the government is no longer an issue, because there is no longer a legal basis for prosecution. Nonetheless, some government officials have difficulties to adjust to the new conditions, as for instance Cabinet Secretary Dipo Alam when he argued that television channels *Metro TV*, *TV One* and the daily *Media Indonesia* were sowing hatred against the government, while "to criticize the government is allowed, but not to sow hatred!"[24] Usman Kasong, Director of Newsroom, *Media Indonesia*, rebutted that, saying "*Media Indonesia* has reported as required by proper standards of journalism, […] if we are accused of sowing hatred, then we should open a public assessment. Perhaps the public doesn't

22 I have so far been unable to find the complete reason why the District Court's decision found this 'unacceptable.'

23 AJI: Press Release, 19 July 2007 in Jakarta.

24 "*Dipo Alam Kecewa Metro TV, TV One, & Media Indonesia*" [Dipo Alam is Disappointed with Metro TV, TV One & Media Indonesia], *Detiknews.com*, 22 February 2011.

like it, and then perhaps they will not read it."[25] It seems that there is still a danger that the *haatzaai-artikelen* will be 'excavated from their grave.'

A more serious matter is that Articles 156 and 157 on hate speech are still valid. As elaborated in the previous section, *Rakyat Merdeka Online* was sentenced on the basis of Article 156. Moreover, the scope of hate speech under the Penal Code has been reinforced by special rules under the Electronic Information and Transaction Law (EIT Law) of 2008 when it concerns online media. As Article 28(2) of the EIT Law determines:

> It is prohibited that any person knowingly and without any right disseminates information that is intended to evoke feelings of hatred or hostility against an individual and/or particular groups based on ethnicity, religion, race and intergroup.

The wordings of this article are similar to those in Article 156, which speaks of '[…] expression to feelings of hostility, hatred or contempt against one or more groups'. For press freedom, these two articles provide a double-barrelled gun for anyone to attack the press, either printed or electronic.

5.4. Opprobrium or Insult (penghinaan/pencemaran nama baik)

Other notorious articles against press freedom under the Penal Code are those concerning opprobrium. They range from insults against the President and Vice President, to insults against foreign officials, public institutions, individuals, and even deceased persons. The maximum sanctions vary from four months to six years in jail.

This table shows the cases on opprobrium I was able to track down:

25 "*Media Indonesia: Kami Tidak Pernah Menyebarkan Kebencian*" [Media Indonesia: We Never Spread Insults], *Detiknews.com*, 22 February 2011.

Table 7: Summary: Press Cases on Opprobrium or Insulting or Defamation Issues

The case / year	Indictment		Court Decision		
	Rules	**Sanction**	**District Court**	**High Court**	**Supreme Court**
Soeharto v. Pop Magazine (Rey Hanintyo) / 1974	Art. 134 and 136 of the Penal Code and Art. XIV (2) & XV Law 1/1946	6 years & fine; 2-10 years (* SIC and SIT were repealed prior to decision)	2 years[26]	Unknown	Unknown
Megawati v. Rakyat Merdeka (Supratman) / 2003	Art. 134 & 137 of the Penal Code	6 years maximum	Probation for 12 months	-	-
Sriwijaya Post (M. Sholeh Thamrin) / 1992	Art. 207, 208 (1) and 310 (2) of the Penal Code	1 years and 6 months maximum	Prosecutor's indictment was invalid (*error in persona*)	Unknown	Unknown
Tempo (Bersihar Lubis) / 2007	Art. 207, 310, 316 of the Penal Code	1 years and 6 months maximum	1 month in jail and probation for 3 months	1 month in jail and probation for 3 months	Still in process
Warta Republik and *Gatra* (1998)	Article 310 of the Penal Code	1 year and 4 months	Probation	-	-
Radar Yogja (Risang Bima Wijaya) / 2002	Art. 310 section (2) of the Penal Code	1 year and 4 months	9 months in jail	9 months in jail	6 months in jail
Winny and Aseng / 2006	Art. 310 (2) and 311 (1) of the Penal Code	4 years maximum in jail	6 months in jail and probation for one year[27]	6 months in jail and probation for one year[28]	Still in process[29]
Iwan Piliang *versus* Alvin Lie on Cyber Defamation / 2009	Article 27 (3) of the EIT Law[30]	6 years in jail and 1 billion rupiah	-	-	-

26 *Tempo Mingguan* 20/XXVII 14 February 1999.

27 The East Jakarta District Court Decision No. 1591/Pid.B/2008/PN.Jkt.Tim.

28 The Jakarta Higher Court Decision No. 324/PID/2009/PT.DKI.

29 The Cassation to the Supreme Court, No. 1951 K/PID/2010. The KontraS (The Commission for the Disappeared and Victims of Violence) also paid attention by sending a letter asking the Supreme Court to correct the Higher Court Decision No. 324/PID/2009/PT.DKI. See: KontraS Letter on 2 May 2011, signed by Sri Suparyati.

30 The case was unclearly processed, and it remained questionable whether it would be followed up or not into further judicial process. Iwan was investigated by the Cyber Crime section of Metro Jaya's Regional Police. "Beberapa Kasus Ekspresi di Dunia Maya vs UU ITE dan KUHP", *ICT Watch*, 22 October 2009 [http://ictwatch.com/internet-sehat/2009/10/22/beberapa-kasus-ekspresi-di-dunia-maya-vs-uu-ite-dan-kuhp/]

5.4.1. Against the President and Vice President

Insults against the President and Vice President are dealt with in Articles 134, 136bis, and 137.[31] These articles reflect the Dutch colonial legacy of strict control and silencing opposition and were only slightly adjusted after independence.

Article 134 stipulates,

> Deliberate insult against the person of the President shall be punished by a maximum imprisonment of six years or a maximum fine of three hundred rupiah.

Article 136bis stipulates,

> Deliberate insult in article 134 also includes acts as described in article 135, if these have been committed in the absence of the insulted person, either in public or not in public but in the presence of more than four persons, or only in the presence of a third party who is present without a clear will thereto and who takes offence, by acts as well as by words or in writing.

And article 137 stipulates,

> (1) Any person who disseminates, demonstrates openly or puts up a writing or portrait containing an insult against the President or Vice President with the intent to make the contents public or enhance the publicity thereof shall be punished by a maximum imprisonment of one year and four months. Or a maximum fine of three hundred rupiah; (2) If the offender commits the crime in his profession and during the commission of the crime two years have not yet elapsed since an earlier conviction on account of a similar crime has become final, he may be deprived of the exercise of said profession.

These articles were used in two cases: *Soeharto v. Pop Magazine (Rey Hanintyo)* in 1974 and the case of *Megawati v. Rakyat Merdeka (Supratman)* in 2003.

5.4.1.1. Soeharto v. Pop Magazine (1974)

POP (abbreviation of *Peragaan, Olahraga, Perfilman*/Style, Sport and Film) magazine's 17th edition of October 1974 contained a five page story about Soeharto's genealogy, with the headline, "*Teka-teki Sekitar Garis Keturunan Soeharto, Kulo Sampun Trimah Dados Tiyang Dusun*" (Puzzles about Soeharto's descent, I have been admitted as a village person). The story claimed that, differently from O.G. Roeder's biography (1969), Soeharto was the son of the aristocratic R.L. Prawirowiyono. The author of the article, POP magazine's reporter Rey Hanityo, later told in *Tempo* that Soeharto would actually accept this as new information.[32]

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31 Of course at that time it concerned the King or the Queen.

32 "Misteri Anak Desa Kemusuk", *Tempo Online*, 4 February 2008.

However, Soeharto immediately rejected the account and reconfirmed the Roeder version that his father was the poor peasant Kertosudiro from Kemusuk, a small village near Yogyakarta, calling the article "not only detrimental for me personally, but also for my family and descendants".[33] POP magazine's printing permit (SIC) and publishing permit (SIT) were repealed and Rey was arrested and taken to jail. In the case that followed at the Central Jakarta District Court, the public prosecutor argued that Rey had insulted the President, breaching Articles 134 *juncto* 136bis of the Penal Code, and – subsidiary – Article XIV section 2 of Law No. 1 of 1946 *juncto* article XV of Law No. 11 of 1966.[34]

During the court hearing Rey mainly relied on the argument that he "did it with good intentions". On judge's Chabib question whether he checked the truth of these facts with the person involved Rey answered that he had not yet done this because it was "difficult to check this with the President personally". He admitted that from a journalist perspective this had been improper indeed. However, when the judge asked whether it had also been improper to publish on the President's genealogy in this way Rey's lawyer Yap Tjiam Hien replied with the question "with whom actually should a journalist check the truth of any piece of news?". He emphasised that there would be no obligation to directly verify with the person concerned and that it depended on the journalist what source to select.

Rey added that he had already prepared an erratum to be published in the next edition of POP, but that his arrest and the banning of POP had made this impossible.[35] Moreover, the Department of Information immediately published an "Explanation by President Soeharto about his descent ("*Keterangan Presiden Soeharto tentang Silsilah Keluarga*"). On top of this, still during the same year Suryo Hadi published a book rendering Soeharto's version of the matter.[36]

The matter of verification of news under Indonesia's legal framework was intensively discussed during the court hearing, focusing on the question whether Rey had violated the journalistic code of ethics. In the end the judges decided to disregard the fact that Rey had tried to check the facts and produce an erratum, sentencing him to two years imprisonment.[37] The fact that Rey was already in detention and that POP magazine had been banned

33 "Apakah Maksud Menghina", *Tempo*, 25 January 1975; "Misteri Anak Desa Kemusuk", *Tempo Online*, 4 February 2008.

34 The court assembly was chaired by Chabib Sarbini SH, with the members Abdullah SH and Hargadi SH. The prosecution was represented by Gatot Hendarto SH. Rey; the accused was defended by two lawyers, Tjiam Joie Khiam SH and Drs. Sumadji.

35 This procedure was provided for in the journalist code of ethics.

36 The title was *Genealogy of Soeharto as a Peasant's Son: An Explanation from President Soeharto himself*. ("*Silsilah Presiden Soeharto Anak Petani: Penjelasan dari Presiden Soeharto Sendiri*").

37 Tempo Mingguan 20/XXVII 14 February 1999.

already meant that in fact the prosecution had already drawn its own conclusions before the court had passed its verdict. Hence the court process cannot be separated from the situation of press suppression that had been in place for some time and became particularly critical after the Malari riots. The court was under severe influence from the executive, which was active in co-opting the judiciary during this period (Pompe 2005: 112-129).

5.4.1.2. Megawati vs. Rakyat Merdeka (2003)

As already discussed, the demise of Soeharto led to legal and institutional changes that greatly contributed to press freedom. Nevertheless, the Megawati government decided to use the Penal Code articles on opprobrium, which had remained in place, to take action against *Rakyat Merdeka*. This daily reacted to Megawati's policies of raising the fuel price with headlines such as "Mega's mouth smells of gasoline",[38] "Mega is more cruel than Sumanto",[39] "Mega is a Usurer"[40] and "Mega is of the same standard as a District Mayor".[41] Unsurprisingly, Megawati was upset and criticised the press for being "*tidak seimbang*" (unbalanced), "*ruwet*" (complicated), "*tidak adil*" (unfair) and "*tidak patriotis*" (unpatriotic).[42]

The Minister of Manpower Jacob Nuwawea, publicly warned *Rakyat Merdeka* that if it "insisted to insult PDI-P leaders, it would face thousands of PDI-P supporters."[43] Ultra-nationalist, pro-Megawati masses threatened journalists, editors and others working for *Rakyat Merdeka*.

In February 2003 *Rakyat Merdeka* was summoned by the police after PDI-P filed a complaint and the case was proceeded to court by the public prosecutor – in spite of the fact that the titles referred to above reflected the content of the articles and were hence in line with the Press Law and the Press Code of Ethics. Chief editor Supratman was prosecuted before the South Jakarta District Court on the basis of Articles 134 *juncto* 65 (1) of the Penal Code, and a subsidiary charge on the basis of Article 137 (1) *juncto* 65 (1). There had been no previous complaint to the Press Council.

38 "Mulut Mega Bau Solar," *Rakyat Merdeka*, 6 January 2003.

39 "Mega Lebih Kejam dari Sumanto," *Rakyat Merdeka*, 8 January 2003. Sumanto is supposedly a cannibal.

40 "Mega Lintah Darat," *Rakyat Merdeka*, 30 January 2003.

41 "Mega Sekelas Bupati," *Rakyat Merdeka*, 4 February 2003.

42 See: PWI (2003) "Pers Bebas: Demokrasi, Anarki atau Tirani?", Tafsir ke-5 Sikap Dasar PWI-Reformasi; Suara Pembaruan, 22 January 2003; and Ali, Novel (2003) "Pers, Megawati, Dulu dan Sekarang," in *Suara Merdeka*, 3 Februari 2003.

43 "Jacob threatens media, students not to criticize PDI-P," *The Jakarta Post*, 23 February 2003, and "Police summon editor over article allegedly insulting Megawati: lawyer," *Agence France-Presse*, 19 February 2003.

During the court session, the chair of the panel of judges, Zoeber Djajadi, stated that the headlines involved were clearly an attack on the President's dignity and that anyone sane would be annoyed or offended by them.[44] While it had not been proven that Supratman deliberately insulted the President, he had disseminated writings which insulted the President and was therefore sentenced to six months imprisonment on a probation period of 12 months.

Two important points should be noted about this judgment. First, it held that a particular headline is sufficient to determine the guilt of the defendant, regardless of whether the content is true or not. Second, Supratman was sentenced on the basis of an 'insult against Megawati's dignity', which introduces a new and unclear standard. Unfortunately the case was not appealed, so no clarification on this issue has been provided by a higher court.

These cases illustrate that, while seldom applied, the provision of insulting the President can easily be misused to silence criticism against the government. Neither judgment has provided a clear standard on what is to be considered opprobrium, while bringing the case to the criminal court without first considering the Press Law mechanism denied the intention of the legislator to provide a special mechanism to try to settle such cases first. The only difference between the *Pos Magazine* and *Rakyat Merdeka* cases seems to be the political context: Soeharto had taken control of the courts to a large extent, but under Megawati they had a fair degree of autonomy. However, the degree of hooligan-like protests in the latter case showed that not everything had become better.

5.4.2. Against the King or Heads of Friendly Countries and Representatives of Foreign Countries

There are three articles in the Penal Code, Articles 142, 143, and 144,[45] regarding insulting Kings or heads of friendly countries and representatives of for-

44 "Redaktur Eksekutif Rakyat Merdeka Divonis Enam Bulan", *Tempo Interaktif*, 27 October 2003.

45 Article 142 stipulates: "Deliberate insult against a ruling king or another head of a friendly state shall be punished by a maximum imprisonment of five years or a maximum fine of three hundred Rupiahs." Article 143 stipulates: "Intentional insult against a representative of a foreign power to the Indonesian Government in his capacity, shall be punished by a maximum imprisonment of five years or a maximum fine of three hundred rupiah." Article 144 stipulates: "Section 1, Any person who disseminates, openly demonstrates or puts up a writing or portrait containing an insult against a ruling king or another head of a friendly state or against a representative of a foreign power to Indonesian Government in his capacity, with the intent to make the insulting content public or to enhance the publicity thereof, shall be punished by a maximum imprisonment of nine months or a maximum fine of three hundred rupiah; Section 2, If the offender commits the crime in his profession and during the commission of the crime, two years have not yet elapsed since an earlier conviction on account of a similar crime has become final, he may be deprived of the exercise of said profession."

eign countries. Although those articles could be applied to attack journalists, they are similar in wording to the equivalent articles discussed in the previous subsection, and I will therefore not further discuss them here.

5.4.3. Against State Institutions (Public Institutions)

The articles concerning insulting state institutions (207, 208 and 209 Penal Code) have a legal construction similar to the *haatzaai-artikelen* and are likewise open to flexible interpretation. The main difference is that they carry a lower penalty.

Article 207,

> Any person who with deliberate intent in public, orally, or in writing, insults an authority or a public body set up in Indonesia, shall be punished by a maximum imprisonment of one year and six months or a maximum fine of three hundred rupiah.

Article 208 states,

> Section 1.
> Any person who disseminates, openly demonstrates or puts up a writing or portrait containing an insult against an authority or public body set up in Indonesia with the intent to give publicity to the insulting content or to enhance the publicity thereof, shall be punished by a maximum imprisonment of four months or a maximum fine of three hundred rupiah.
> Section 2.
> If the offender commits the crime in his profession and during the commission of the crime two years have not yet elapsed since an earlier conviction of the person on account of a similar crime has become final, he may be deprived of said profession.

Article 209 stipulates,

> Section 1
> By a maximum imprisonment of two years and eight months or a maximum fine of three hundred rupiah shall be punished:
> 1st any person who gives a gift or makes a promise to an official with intent to move him to commit or omit something in his service contrary to his duty;
> 2nd any person who gives a gift to an official following or in pursuance of what this official has committed or omitted in his service in contravention of his study.
> Section 2
> Deprivation of the rights mentioned in article 35 nos. 1- 4 may be pronounced.

This section looks at the only two cases based on these articles I have found so far: those against *Sriwijaya Post*'s editor Mohammad Soleh Thamrin (1991) and *Koran Tempo*'s journalist Bersihar Lubis (2007).

5.4.3.1. Sriwijaya Post (1991)

This case took place in South Sumatera after *Sriwijaya Post*, a Palembang based newspaper, reported about corruption with the title "Eight Corrupt

Sub-District Heads Fired" (*Dipecat 8 Camat Korupsi*) on 4 April 1991. One of the Sub-District Heads involved – Marchan Mukti – filed a complaint with the police against *Sriwijaya Post*'s chief editor Muhammad Soleh Thamrin. The basis for this complaint was that a month before the report appeared the complainant had been appointed as the chair of the Financial Audit Agency in Palembang District and that prior to having been reassigned to this new position, he had been audited by the Functional Monitor Institution of Palembang, which confirmed that he had a 'clean status.'[46]

That the complaint led to an actual prosecution took Chief Editor Thamrin by surprise, because *Sriwijaya Post* had immediately conceded its fault and corrected the news four times, as required by the journalistic code of ethics. Thamrin argued that the case should rather be taken to the Honorary Council of the Indonesian Journalists' Association (PWI). However, Marchan insisted on pressing criminal charges, officially supported by the governor.[47]

At the trial, public prosecutor Muchtar Arifin said that the news had been gathered by *Sriwijaya Post*'s journalist Abadi Tumenggung from official sources within the South Sumatra Government, but without first checking the facts and seeking the opinion of those involved. The sub-district heads had been reassigned, not fired, and there was no relation with corruption.[48] The defendant denied none of these points, which was the reason his newspaper had apologised to Marchan Mukti and provided a rectification. Still, according to the prosecutor, this would amount to a violation of Articles 207, 208 (1) and 310 (2) of the Penal Code.

However, the council of judges acquitted Thamrin from all charges. First, they argued, there was a case of *error in persona* – not Thamrin as chief editor should have been prosecuted, but the journalist who wrote the report. Likewise, the defendant could not be held accountable for a crime he knew nothing of when it was committed, the judges referring to the Penal Code that stipulated 'individual or personal accountability'. Hence, nothing was said about the main issue, the court leaving open the possibility of prosecuting the journalist who wrote the report.[49]

In fact the decision was problematic from the perspective of accountability. The Press Law of 1982 – valid at the time – introduced the concept of 'waterfall accountability' (Art. 15), meaning that the owner of a newspaper can transfer responsibility for publications to the chief editor, who can further

46 "Disidang setelah Disensor," *Tempo*, 8 August 1992.
47 "Disidang setelah Disensor," *Tempo*, 8 August 1992.
48 "Disidang setelah Disensor," *Tempo*, 8 August 1992.
49 In another case against the *Sriwijaya Post* in (1999), the same court did apply 'waterfall accountability' as stipulated in the 1982 Press Law. This case will be further discussed in the next chapter.

delegate this to the other members of the editorial team or to the reporter. The judges did not consider this matter in the case at hand, but relied entirely on the Penal Code instead of looking at the internal accountability regime of the *Sriwijaya Post*.[50]

The *Sriwijaya Post* case drew much attention at the time because it was a way of intimidating the press rather than seeking to clarify legal boundaries. The case was sent to court more than one year after the news had been published and it was not the only way in which the local government sought to control the *Sriwijaya Post*. For instance, the office of the newspaper had been visited by staff members of the South Sumatra Government, to check whether any other news that might be damaging for the government was going to be released in the following days. The matter also drew public attention because the governor's staff became involved in directly influencing the press. In the end, Governor Ramli Hasan publicly apologised about the issue. However, Thamrin and many others were not satisfied and called the Governor, Interior Minister and Minister of Information to further account for this.[51] This case was well known as "*sensor gaya Palembang*" (Palembang *style censorship*), and this reminds us of the practice during the colonial regime when any publication had to get the permission and signature from the Dutch government.

From a legal point of view, the court did not make a clearer standard for defining 'insult'. However, the court decided an interesting legal position to refuse the application of 'individual' responsibility as stipulated under the Penal Code. Although, judges did not clearly refer to the Press Law, the court considered a special mechanism as showed by *Sriwijaya Post* in accommodating the 'right to correction' and 'right to reply.'

5.4.3.2. Bersihar Lubis' Column: "The Story of the Stupid Interrogators" (2007)

Not only reporters can be charged with insulting officials, but authors of newspaper columns as well. This became apparent when in 2007 Bersihar Lubis was prosecuted for his column "The Story of the Stupid Interrogators", published by *Tempo Interaktif* on 17 March 2007. In this column Lubis addressed the bans on historical books for middle and high schools and referred to the former prohibition of Pramoedya Ananta Toer's novels by the Attorney General in 1981. These were published by Hasta Mitra, owned by Joesoef Ishak and Lubis quoted Ishak who said about his interrogation

50 Decision of Palembang District Court, No. 222/Pid/B/1992/PN/PLG, 5 November 1992). The council of judges consisted of Mulkan Lutfi, Yahya Wijaya, and Chaidir Anwar.

51 "Disidang setelah Disensor," *Tempo*, 8 August 1992.

by the public prosecutors: "I was tortured by the idiocy of the interrogators, but they in turn were tortured by their bosses who were even more stupid."[52]

This quotation was considered as insulting a state institution, i.e. the Attorney General's Office (AGO, *Kejaksaan Agung*) and Lubis was put on trial for this alleged offence. Articles 207, 316 *juncto* 310 of the Penal Code formed the basis for this charge.[53] The public prosecutor did not use the Press Law of 1999, because the case addressed Bersihar Lubis in person, not the *Tempo* Corporation (*Tempo Interaktif*, 28 November 2007). This in itself was a strange decision, since the principle of press responsibility as laid down in the Press Law puts the accountability for publications with the chief editor, not with the reporter or the author of a column. An opinion or article is moreover normally edited or discussed first by the internal editorial team.

In his defence, Lubis stated that what he had written was not a crime, but rather an expression covered by the freedom of opinion as guaranteed by article 28 of UUD 1945, and as a part of democratic life in Indonesia. Because of its nature it was an effort to support public interest, and therefore allowed by Article 310 section (3) of the Penal Code.[54] The logic of this argument notwithstanding, the Depok District Court under presiding judge Suwidya agreed with the public prosecutor that Lubis in his capacity as an opinion writer should be held accountable for the content of his work and that the word "*dungu*" (stupid) could not be considered other than as an insult. He was therefore sentenced to a prison sentence of one month with a probation of three months. On appeal Lubis repeated his earlier arguments and pointed out that the word "dungu" was not his, but Joesoef Ishak's.[55] Nonetheless, the West Java High Court upheld the argument by the District Court and imposed the same sentence.[56]

These judgments drew strong reactions from legal aid and journalist associations, which considered them as violations of the freedom of expression,

52 The two novels concerned were *Bumi Manusia* (*The Earth of Mankind*) and *Anak Semua Bangsa* (*Child of All Nations*). The statement was made when celebrating Indonesia's Literature Day in Paris, October 2004.

53 The indictment also applied Article 316, about opprobrium directed to a person or individual. This article is discussed in the next sub-chapter.

54 "Perkara Penulisan Opini: Jaksa Sanggah Pembelaan Bersihar," *Tempo Interaktif*, 28 November 2007.

55 "Kasus Artikel di Koran: Bersihar Lubis Ajukan Banding," Gatra, 20 February 2008, http://www.gatra.com/artikel.php?pil=23&id=112386 (retrieved on 9 June 2011).

56 Hendrayana, personal communication, on 19 June 2012. He said that Lubis did not give the Letter of Attorney to the LBH Pers, especially for making cassation to the Supreme Court.

press freedom, and human rights generally.[57] Irfan Fahmi al-Kindy, a lawyer from the human rights NGO PBHI,[58] said that "the court process in prosecuting Lubis was too forced. What Lubis had written was actually as critique of how the public prosecutor functions. If the public prosecutor wants to complain about the insulting issue, he should use the 'right to reply' against such writing."[59] Press Legal Aid executive director, Hendrayana said his organisation would ask for a constitutional review of the Criminal Code articles concerned, including Article 207, which violated the freedom of the press. The Alliance of Independent Journalists Head Heru Hendratmoko said his organisation would support Lubis in a request for constitutional review. He said, "The articles are no longer relevant for a democratic country like Indonesia."[60]

In this manner the case was taken from the usual track to the Supreme Court and instead became the reason for a general suit about the constitutionality of Articles 207 and 306 of the Penal Code, brought by Bersihar Lubis, together with Risang Bima Wijaya. Unsurprisingly, the Constitutional Court refused the case by stipulating that such articles are of a general nature, and not only for press cases. Hence, they are not contradicting the Constitution.[61]

The two cases of *Sriwijaya Post* and *Bersihar Lubis* demonstrate how Penal Code Article 207 concerning insults against an authority or a public body in Indonesia may lead to restrictions on press freedom. First, by not recognising the general principle of press accountability as laid down in the Press Laws, the article may put any press worker, either editor or journalist, in trouble, because they may all be prosecuted individually. Second, the case shows that the Press Law mechanisms to deal with insults and the like, such as the use of the right to reply and other correction mechanisms are overlooked by judges in criminal cases and do not lead to protection of press freedom against criminal liability. Even if a case is not successful, the criminalisation in itself is already a serious problem for the press. This problem is exacerbated by the absence of clear criteria on criminal liability regarding insults. While in *Sriwijaya Post* the judge may have had good reasons to dismiss the case, the judgments in *Bersihar Lubis* seem if not plain wrong at least badly reasoned. It has therefore been a strategic error that Lubis and his defenders decided to turn the case into one for the Constitutional Court

57 PBHI (Perhimpunan Bantuan Hukum dan Hak Asasi Manusia Indonesia/Association for Legal Aid and Human Rights), AJI (Independent Journalists Alliance), and LBH Pers (Press Legal Aid) were not only complaining of the judge's decision, but also appealing a judicial review to the Constitutional Court to repeal article 207 of Penal Code.

58 Association for Legal Aid and Human Rights.

59 "Bersihar Lubis Diadili Karena Menulis Opini," *Koran Tempo*, 21 November 2007.

60 "Indonesia: Journalists To Seek Judicial Reviews On Defamation," *Jakarta Post*, 23 February 2008.

61 Constitutional Court Decision No. 14/PUU-VI/2008, on 15 August 2008.

instead of simply addressing the Supreme Court, which could have provided the clarity required.

As a result of all of this, Article 207 of the Penal Code presently constitutes a threat to press freedom, which will not be lifted until a new case will be decided differently.

5.4.4. Against Person/Public

Both during and after the New Order, legal cases of opprobrium against an individual have occurred most frequently. This might be related to the very wide scope of these Penal Code articles in potentially criminalising the press. The articles concerned are the following:[62]

Article 310

> Section 1: The person who intentionally harms someone's honour or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of three hundred rupiah.
> Section 2: If this takes place by means of writings or portraits disseminating, openly demonstrated or put up, the principal shall, being guilty of libel, be punished by a maximum imprisonment of one year and four months or a maximum fine of three hundred rupiah.
> Section 3: Neither slander nor libel shall exist as far as the principal obviously has acted in the general interest or for a necessary defence.

Article 311

> Section 1
> Any person who commits the crime of slander or libel in case proof of the truth of the charged fact is permitted, shall, if he does not produce said proof and the charge has been made against his better judgment, being guilty of calumny, be punished by a maximum imprisonment of four years.
> Section 2
> Deprivation of rights mentioned in article 35 first to thirdly may be pronounced.

62 Although such a case has never happened, one may potentially be prosecuted for insulting a dead person, as stipulated under Article 320 (1) of the Penal Code: Any person who in respect of a deceased person commits an act that if the person were still alive, would have been characterised as libel or slander, shall be punished by a maximum imprisonment of four months and two weeks or a maximum fine of three hundred rupiah; Section 2: This crime shall not be prosecuted other than upon complaint by either one of the blood relatives or persons allied by marriage to the deceased in the straight line or side line to the second degree, or by the spouse; Section 3: If by virtue of matriarchal institutions the paternal authority is exercised by another than the father, the crime may also be prosecuted upon complaint by this person.

Article 315

> A defamation committed with deliberate intent which does not bear the character of slander or libel, against a person either in public orally or in writing, or in his presence orally or by deed, or by a writing delivered or handed over, shall as simple defamation, be punished by a maximum imprisonment of four months and two weeks or a maximum fine of three hundred rupiah.

Article 316

> The punishment laid down in the foregoing articles of this chapter may be enhanced with one third, if the defamation is committed against an official during or on the subject of the legal exercise of his office.

These articles can be applied in relation to one another. Insulting a person or the public can include any kind of insulting (slander, libel, defamation), either orally, written, or pictures and the press has not been excluded from their scope.[63] In other words, they provide a very wide and flexible 'legal trap' for anyone expressing his or her opinion and indeed they have given rise to many prosecutions.

5.4.4.1. Warta Republik (1998) and Gatra (1998)

In November 1998 *Warta Republik* published an article under the following headline: "Triangle love involving two generals: Try Sutrisno and Edi Sudrajat compete to date widow".[64] The news was based on rumours only and the newspaper had not taken any effort to obtain confirmation or denial from either Try Sutrisno or Edi Sudrajat prior to publication. No wonder that Chief Editor of *Warta Republik*, Husein Majelis soon found himself in court to face charges of defamation after complaints by the two generals mentioned above.

The Jakarta District Court argued that he had indeed violated Article 310 of the Penal Code, since all three of its elements were in place: first, the deed had been carried out intentionally and in public, second, the article accused persons without providing adequate evidence, and third, such news degraded the reputation of the two generals concerned. Majelis was given a punishment on probation and did not appeal the decision.

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63 These articles are also closely related to Article 317 (1) of the Penal Code, which stipulates: "Any person who with deliberate intent submits or causes to submit a false charge or information in writing against a certain person to the authorities, whereby the honor or reputation of said person is harmed, shall, being guilty of calumnious charge, be punished by a maximum imprisonment of four years." Nevertheless, Article 317 (1) is discussed in the next section, especially dealing with the 'false news' issue.

64 "Cinta Segitiga Dua Orang Jenderal: Try Sutrisno dan Edi Sudrajat Berebut Janda," *Warta Republik*, November 2008.

Actually, the correction or reply mechanisms had not been used by either Try Sutrisno and Edi Sudrajat, through which the case should have been resolved. So, once again we see how the court bypassed the official mechanism and thus contributed to the decrease of press security against violations of its independence. In this particular case there is no reason why a correction or a reply would not have sufficed.

Another case in the same year concerned the widely read *Gatra* magazine, which in Edition No. 48, 17 October 1998 carried a report under the following headline: "Prohibited Drugs, Tommy's name has been mentioned".[65] Tommy Soeharto – the Tommy referred to in the headline – then filed a complaint with the police which led to a prosecution of the editor of *Gatra* before the Jakarta District Court.

The Jakarta District Court rejected all the charges against *Gatra*. The judges found that *Gatra's* reporting had been up to the professional standard. The defendant could indeed demonstrate that he had accurately referred to sources and cross-checked with various informants. In following this path of reasoning the judges digressed considerably from the course discussed in the previous cases about insulting the state or officials. Thus, the judges affirmed the supremacy of the Press Law criteria to protect professional journalism. That this was not always the case after *Reformasi* will become clear from the following sections, which will demonstrate how the Penal Code's opprobrium articles have continued to be used to attack the press.

5.4.4.2. Risang Bima Wijaya (2002)

The case of Risang Bima Wijaya started with the publication of a sex harassment scandal with the title "Newspaper Boss Sentenced", on 24 May 2002.[66] It concerned Soemadi Martono Wonohito, the executive director of *Kedaulatan Rakyat* newspaper, who had been reported to the police because he would have sexually harassed his employee Sri Wahyuni. Two other employees had been witness to the harassment. On the basis of the police file of the case – of which he held a copy – *Radar Yogja* journalist Risang Bima Wijaya, did an interview with Sri Wahyuni. After having worked on the case for 20 days Risang published his findings in *Radar Yogja*.

However, in October 2002 the police decided to drop the case due to lack of evidence. Soemadi then reported Sri Wahyuni, her lawyer and Risang to the police for slander, based on Articles 310 (2) *juncto* 64 (1) of the Penal

65 "Obat Terlarang, Nama Tomy pun Disebut," *Gatra*, No. 48, 17 October 1998.
66 "Bos Koran Dipidanakan," *Radar Yogja*, 27 May 2002.

Code.[67] Even if working for the press himself, Soemadi did not use the 'right to reply' to counter Risang's report. Risang moreover received a text message from his boss (the general manager of *Radar Semarang*) that he had been fired as general manager of *Radar Yogja* and that he should return to Surabaya.

One and a half years later, in April 2004, Risang was then formally summoned by the Yogyakarta Police and subsequently prosecuted before the Yogyakarta District Court. On 22 December 2004 he was eventually sentenced to nine months in jail, without probation. The judgment was based on three legal arguments brought forward by the public prosecutor: the accused had written and published a number of reports which accused Soemadi of sexual harassment; the reason for this had been to draw public attention and finally, the reports together seriously harmed Soemadi's reputation.

Several weaknesses are immediately visible in this reasoning. First, the judges provided no clarification on the nature and the boundaries of the 'insult,' giving no guidance whatsoever for future cases and failing to clarify why this particular case was insulting in the first place. The main problem, however, is that they did not make a link with the proper standards for reporting: can you insult someone by publishing something that is true? This relates to the next issue at stake: the professional standards in place. The judges clearly denied applying the Press Law and the standards it contains – all of which had been followed by Risang. There had been no ethical examination by the Indonesian Journalists Association or the Press Council, Soemadi had never used the 'right to reply' and no attempt had been made at dispute resolution through the Press Law mechanism. In short, the judges simply ignored the availability of the Press Law.

As we have seen so far, this has happened in many cases in the first instance. However, it was unacceptable for Risang, and therefore he made an appeal to the High Court and cassation to the Supreme Court. Neither appeal nor cassation were accepted by the court. The Supreme Court, in its judgment No. 1374K/Pid/2005 on 13 January 2006, decided to strengthen the High Court Decision No. 21/Pid/2005/PTY.[68] The sentence was only lowered on

67 Article 64 section (1) of Penal Code is related to the 'conjunction of punishable acts': "If among more acts, even though each in itself forms a crime or misdemeanour, there is such a relationship that they must be considered as one continued act, only one the heaviest penal provision shall be imposed."

68 The decision was received by Risang on 3 May 2007.

appeal to six months in jail. Risang's appeal for review of the cassation judgment because new evidence (*novum*) would have been found, was refused.[69]

According to the Supreme Court's decision at the review level, the reasons for pleading were unjustified since *judex facti* and *judex juris* had been legally applied correctly and there was no evidence of the "obvious mistake and failure" in such judgment (see: Supreme Court Decision No.14 PK/Pid/2008, 24 June 2009). In this regard, all arguments on the use of press law as a special mechanism and also previous jurisprudence decisions at the Supreme Court level had been rejected by the judges.[70]

This is actually one of the few decisions in which the Supreme Court digressed from its fairly consistent course to uphold the Press Law mechanisms. The Risang case therefore stands out as a depressing example of the failure of the Indonesian legal system to uphold press freedom. I will later return to the question whether this concerns a single – even if terrible – error, or whether it points to a major flaw in legal reasoning and its origins in such cases, and hence legal uncertainty in Indonesia's press law system more generally.

5.4.4.3. Winny and Aseng (2006)

The cases of Kwee Meng Luang (or Winny) and Khoe Seng-Seng (or Aseng) were unique, since they were neither journalists nor editors. The reason to discuss their ordeal is because it started with a letter to the editor (*Surat Pembaca*). Letters to the editor fall under the responsibility of the editors, because they select which letters will be published. Letters to the editor are quite important from a general press point of view in that they provide a platform for information sharing and engagement of newspapers with their readers.

Winny and Aseng had bought real estate property from Duta Pertiwi Corporation in Mangga Dua (Central Jakarta) and in their letter complained, because they had found out that they had acquired a lease hold (*Hak Guna Bangunan*) on top of a management right (*Hak Pengelolaan*) instead of a full

69 The n*ovum* concerned a clarification by the former member of the Press Council, R.H. Siregar as an expert witness in the Sleman District Court, 8 July 2004, which states that the relevant articles in the Penal Code cannot be applied against journalists. He also said that the transcript of the court session was inaccurate, unclear and incomplete. The court somehow concluded that Siregar agreed to prosecute Risang Bima Wijaya by using the Penal Code, a conclusion it adopted from the public prosecutor.

70 The Supreme Court judges at review level were Dr H. Abdurrahman, SH, MH (chair); H.M. Zaharuddin Utama, SH, MM, and Prof Dr Mieke Komar, SH, MCL (members).

lease right.[71] They claimed that they had been deceived by Duta Pertiwi Corporation because this developer had never informed them about the true status of the property,[72] and made this public in a number of letters to the editor in *Suara Pembaruan, Kompas* and *Warta Kota*.[73] Together with 17 other buyers they also reported Duta Pertiwi to the police for having committed fraud (Article 378 of the Penal Code), but the police decided to stop the investigation for lack of evidence of a crime.

Duta Pertiwi, however, retaliated by reporting Aseng to the police for slander and this case did lead to a prosecution in the North Jakarta District Court for violating Articles 311 (1) and 310 (2). The defendants were assisted by the Press Legal Aid Institution (*LBH Pers*), which concentrated its plea on the original fraud case and the need to consider this case in the context of the Press Law. Expert witness Leo Batubara confirmed that this case should be resolved by the mechanism stipulated in the Press Law, i.e. the 'right to reply' mechanism. However, judges Robinson Tarigan, Heras Sihombing and Firdaus decided differently and followed the prosecutor's indictment, sentencing Winny and Aseng for slander to six months in jail and one year probation. They refused to grant Winny and Aseng the protection of the Press Law, which would only concern the accountability of the editor, not of citizens writing to them.

On appeal to the Jakarta High Court, a similar decision followed, which made the plaintiffs appeal to the Supreme Court, through cassation application No. 1951 K/Pid/2010. Again, the judges, consisting of Moegihardjo as chair of the panel, Salman Luhtan and Surya Jaya as members, refused the appeal (31 May 2011) and sentenced the plaintiffs to one year probation.[74] The case is now pending for a review in the Supreme Court.[75]

It will be clear that this case compromises press freedom. Not only does it limit public space in promoting civil society participation, it also denies the fact that the editor in chief holds ultimate responsibility for what appears in his newspaper and that the mechanism to prevent transgressions of pro-

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71 HGB is a property status, entitled to construct, to own buildings or other structures over the land. HPL is also a property status, only granted to government institutions and state (national/local)-owned companies for developing public facilities.

72 "Khoe Seng Seng Dinyatakan Bersalah," *Tempo*, 15 July 2009.

73 *Kompas* (26 September 2006), "*Duta Pertiwi Bohong*" (Duta Pertiwi Lies) and *Suara Pembaruan* (21 November 2006), "*Jeritan Pemilik Kios ITC Mangga Dua*" (ITC Mangga Dua Stall Owner's Plight).

74 "Kasasi Ditolak, Penulis Surat Pembaca Tetap Divonis 1 Tahun Percobaan," *Detik News*, 2 March 2012, http://news.detik.com/read/2012/03/02/201520/1856856/10/ (retrieved on 12 October 2012).

75 "Kalah di Kasasi, Terpidana Kasus Surat Pembaca Ajukan PK," *Detik News*, 29 May 2012, http://news.detik.com/read/2012/05/29/174527/1927712/10/ (retrieved on 12 October 2012).

priety should be drawn from the Press Law instead of the Penal Code. It is therefore clear that the application of the general articles on slander seriously compromises press freedom. During the Soeharto years the articles concerning individual slander were not needed by the regime, which could simply punish and ban newspapers without judicial processes. A case in point is *Matahari* magazine, which on 25 June 1979 saw its publication permit (SIT) revoked after publishing two articles considered as damaging to government allies.[76] While this is no longer possible, we see that the use of the Penal Code in a majority of cases has had a detrimental effect as well.

5.4.5. Iwan Piliang vs. Alvin Lie on Cyber Defamation (2008)

Since 2008, Indonesia has a new law on Electronic Information and Transaction (EIT), Law No. 11 of 2008. Initially the Press Council did not pay any attention, but after its enactment the council realised that the law actually held criminal provisions on defamation and hate speech. As Press Council member Bambang Harymurti later put it, "the Press Council felt cheated".[77] The EIT's most controversial provision concerned defamation in cyber space, which is threatened by six years of imprisonment (Art. 27(3) *jo.* Art. 45). This means that direct detention is allowed during the pre-trial phase. From a press freedom perspective the main problem is that the article does not exclude journalists from its scope.

> Article 27 section (3):
> It is prohibited that any person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts reputation and/or defamation.
>
> Article 45 section (1):
> Any person who satisfies the elements as intended by article 27 section (1), section (2), section (3), or section (4) shall be sentenced to imprisonment not exceeding 6 (six) years and/or a fine not exceeding Rp. 1,000,000,000 (one billion rupiah).

Another controversial Article is 28(2) in combination with Art. 45(2)

> Article 28 section (2):
> Any person who knowingly and without authority distributes information which is intended to create hate feelings or individual and/or particular society group hostility based on ethnicity, religion, race and groups.
> Article 45 section (2):

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76 "*Cukong Sumber Malapetaka*" (Financier as Catastrophe Sources) (16 May 1979), and "*Bangkrutnya Teknokrat ala Mafia Berkeley*" (The Collapse of Berkeley Mafia's Technocrat) (17 June 1979). According to the decree, both articles have been considered as breaching decency boundaries, containing an insult and libel against state officials, as stipulated in Article 310 of the Penal Code. In fact, neither Article 310 nor those implicated in the report were state officials.

77 "Dewan Pers Ajukan Judicial Review UU ITE," *Kompas*, 25 April 2008.

> Any person who satisfies the elements as intended by article 28 section (1) and section (2) shall be sentenced to imprisonment not exceeding six years and/or a fine not exceeding Rp. 1,000,000,000 (one billion rupiah).

In fact Article 28(2) looks very much like the *haatzaai-artikelen* that had been invalidated by the Constitutional Court and it is unsurprising that soon after their enactment these provisions became the target of a suit for constitutional review of this law by a coalition of civil society groups including the Press Council. Yet, the case ended in disappointment and disbelief. The Constitutional Court argued that Article 27 (3) of the EIT Law is a lawful limitation of the freedom of expression. According to the court the law is important to protect citizens against any threats against their individual and family dignity.[78] Hence, the articles of EIT have continued to be enforceable.

That this has jeopardised freedom of expression generally but also the freedom of the press has been proven in several cases that have happened since. One concerned Prita Mulyasari's case that was discussed in the previous chapter, but the other – earlier – suit brought on this basis concerned a journalist. Narliswandi (Iwan) Pilliang, a journalist and blogger was denounced on the basis of the EIT Law by MP Alvin Lie, after a publication on the latter's business interests.[79] The article alleged that the coal mining company PT Adaro Energy bribed the National Mandate Party (PAN) through its legislator Alvin Lie to influence the proposal in the House of Representatives to investigate PT Adaro's involvement in transfer pricing when selling coal to Singapore-based Coaltrade Services International Pte. Ltd. This company, whose shares are owned by Adaro shareholders, received coal at a price of US$32 per ton, when coal prices stood at an average of US$95 per ton at that time.[80] The police also summoned Agus Hamonangan, the moderator of the mailing list, for questioning.

There is no further information about whether the case continued to the court process or not. The only fact that is known is that an investigation has been carried out by the Cyber Crime section of Greater Jakarta's Regional Police. However, it illustrates how presently the EIT Law is held to be applicable to online-media journalists. The case was directly taken to the police, without any prior recourse to a 'right to reply' or a complaint to the Press Council as stipulated in the Press Law.

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78 Court Decision Number 2/PUU-VII/2009, 5 May 2009.

79 "*Hoyak Tabuik* Adaro dan Soekanto" published in the *Kompas* Readers Forum's mailing list. *Hoyak Tabuik* is a ceremonial tradition in West Sumatera, usually done for rejecting bad things in society. Adaro is a coal mining company, and Soekanto is the owner of Asian Agri Corporation.

80 New media law "threatens press freedom," *Jakarta Post*, Monday, September 2008.

5.4.6. Conclusion

The Penal Code carries more provisions about defamation than about any other issue restricting press freedom. Most of them are still in force, while the enactment of the EIT has further added to the repertoire available to silence journalists or the press. As shown by the cases above, the application of these articles has indeed led to such situations, in particular because of the arbitrary interpretation of some of the articles concerned, without the judgments concerned providing clear and consistent guidelines for their future use. Unfortunately this includes those by the Constitutional and the Supreme Court.

The sometimes abusive application of defamation articles by the Indonesian police, prosecutors and courts has been addressed by several international organisations. Internationally, there is a tendency to consider all use of criminal law regarding defamation against the press as a violation of the freedom of expression. The United Nations (UN) and the Organisation for Security and Co-operation in Europe (OSCE) have been lobbying for this purpose. Thus, the *OSCE* Parliamentary Assembly has called for the abolition of all laws that provide criminal penalties for the defamation of public figures or which penalise defamation of the state or state organs. The UN, *OSCE* and Organisation of American States (*OAS)* Special Mandates have gone even further, by stating that:

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[81]

ARTICLE 19, a London based NGO for freedom of expression, has suggested that because all criminal defamation laws breach the guarantee of freedom of expression but are unlikely to be repealed in the near future, interim measures should be taken to attenuate their impact until they are abolished. Indonesia's record on this issue certainly supports such a stance.

81 International Mechanisms for Promoting Freedom of Expression: Joint Declaration, by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2002.

5.5. Spreading False News

Although not always acknowledged as such, spreading false news is a critical issue for press freedom. Three criminal law provisions relate to this issue: Art. XIV and XV of Law 1/1946[82], and Art. 317 of the Penal Code.

Article XIV of Law No. 1 of 1946 stipulates:

> Section 1: Whoever, by publishing false news or notifications, by deliberately publishing sensation among the people, is punishable by maximum ten years of imprisonment.
> Section 2: Whoever circulates news or issues a notification which can lead to sensation among the people, whereas he can assume that such news or notification are false, is punishable by maximum three years of imprisonment.

Article XV of Law No. 1 of 1946 stipulates:

> Whoever circulates unclear news or excessive or incomplete news, while he understood, or it would at least be predictable that such news would or could cause sensation among the people, is punishable by maximum two years of imprisonment.

Article 317 of Penal Code stipulated,

> (5) Any person who with deliberate intent submits or causes to submit a false charge or information in writing against a certain person to the authorities, whereby the honour or reputation of said person is harmed, shall, being guilty of calumnious charge, be punished by a maximum imprisonment of four years.
> (6) Deprivation of the rights mentioned in article 35 first to third may be pronounced.

I managed to find four cases related to these articles, two during the New Order and two after *Reformasi*.

82 Law 1/1946 on Rules of Criminal Law was enacted on 26 February 1946. This law was a legal basis for adopting the *Wetboek van Strafrecht voor Nederlandsch Indië* (WvS.NI) into the Indonesian legal system. Law 73/1958 made this Penal Code applicable to the full territory of Indonesia.

Table 8: Summary: Press Cases on Spreading False News

The case	Indictment		Court Decision		
	Rules	Sanction	District Court	High Court	Supreme Court
Sinar Pagi Daily (S.A.S.) / 1982	Art. XIV-XV Law No. 1/1946, Art. 310, 311, 316, 207, 208 of Penal Code and Art. 19 of Law 11/1966	10 years maximum	Sentenced, 6 months imprisonment with 1 year probation	Sentenced to 6 months imprisonment with 1 year probation	Unknown. Cassation was submitted on 16 July 1984
Berita Buana (H. Abdul Wahid) / 1989	Art. XIV-XV of Law No. 1/1946	10 years maximum	Sentenced, 1 year[83]	Unknown	Unknown
Tempo (Bambang Harymurti, A Taufik & Teuku Iskandar) / 2003	Art XIV of Law No. 1/1946, 311 (1) & 310 (1) of Penal Code	10 years maximum	Sentenced, 1 year (for Bambang Harymurti)	Sentenced to 1 year imprisonment (for Bambang Harymurti)	Acquitted
Upi Asmaradhana / 2008	Art. 317 section (1), 311 section (1), 160 of Penal Code	6 years maximum	Prosecutor's indictment refused	Unknown	Cassation in process[84]

5.5.1. Sinar Pagi (1980-1982)[85]

> *… membawa masalah ini ke Pengadilan dalam keadaan keblinger dan tidak ubahnya seperti menembak nyamuk dengan meriam.*[86]

This case was highly controversial because it concerned an indictment of the press for reporting on corruption, "*Bupati Tangerang Lalap Uang Rakyat 28 Juta*" (Tangerang Mayor Ate (=corrupted) People's Fund of 28 Million),

83 "Buntut Berita Lemak Babi," *Tempo*, 1 September 1990.

84 The Makassar District Court passed judgment on 14 September 2009, but then the prosecutor appealed for cassation to the Supreme Court on 25 September 2009. "Jaksa Ajukan Kasasi Melawan Upi: Pengajuan Kasasi Telah Diajukan Jaksa ke Mahkamah Agung pada Jumat siang," *Viva News*, 26 September 2009.

85 The details of this case have been taken from Hamzah et al. (1987: 97-140; 152-251).

86 The plea delivered by S.A.S. during the court session in Tangerang District Court, 8 September 1981 stated that: "… bringing this case into the court is excessive, like shooting a mosquito by a cannon."

published on 23 July 1980.[87] It addressed S.A.S, the vice-editor of the daily *Sinar Pagi*,[88] on the basis of six articles: (1) Art. XIV (1) *jo.* (2) of Law 1/1946 (false news or notifications); (2) Art. XV of Law 1/1946 (unclear, excessive and incomplete news); (3) Art. 310 (1) and (2) *jo.* Art. 311 (1) *jo.* Art. 316 of the Penal Code (opprobrium or insulting of individual); (4) Art. 207 of the Penal Code (insulting of state institution); (5) Art. 208 of the Penal Code (insulting of state institution); (6) Art. 19 of Law 11/ 1966. The case started in 1981 and continued until 1982.

The news item consisted of a report about a number of people from Setu village (Serpong, Tangerang) who submitted a complaint to the national parliament on 22 July 1980. They were accompanied by their lawyer, from MKGR Tangerang (the Mutual Assistance Families Society, an NGO closely related to the Golkar Party). The complaint concerned the embezzlement of a compensation fund of 28 million rupiah for acquisition of the complainants' land funds by the Mayor of Tangerang (H. Muhammad Syukur). The report just contained a description of the event and the complaints concerned, without further interpretation. The article was published on the first and third page of *Sinar Pagi*, one day after the complaint had been lodged.

In court S.A.S.'s main defence was that *Sinar Pagi* had merely reported what others had said in parliament.[89] He also claimed that the indictment was biased, as it stated that the Setu people had no rights to receive any compensation, and that the criminal court could not decide this matter, as it concerned a moot point of civil law in which the court held no jurisdiction. S.A.S added that:

> It is difficult to imagine that if someone doesn't like how he or she is being mentioned in the news he or she just reports this to the prosecutor, who then takes the case to court, as has been done by H. Muhammad Syukur. If this happens all the time, one can imagine how courts throughout Indonesia would be seeing a lot of editors prosecuted […] and if such situation would become normal, it would threaten a healthy press development.

87 The complete title was "Dilapor ke DPR: Bupati Tangerang Lalap Uang Rakyat Rp. 28 Juta" [Reported to Parliament: Tangerang Mayor Ate (=corrupted) People's Fund 28 Million], *Harian Umum Sinar Pagi*, 23 July 1980, No. 2299 Year X.

88 The acronym S.A.S. is used in Hamzah et al.'s book. (see: Hamzah, A, et al. (1987) *Delik-Delik Pers di Indonesia*. Jakarta: Media Sarana Pers).

89 Before the case actually started there was a dispute about the court's jurisdiction. *Sinar Pagi*'s lawyer argued that based on Art. 252 (2) of the HIR (*Herzien Indonesisch Reglement*), jurisdiction was determined by either the *locus delictie* principle or the domicile of the accused. In both cases this was Jakarta and not Tangerang, and hence within the jurisdiction of the Jakarta District Court. This argument was rejected in an interlocutory verdict, however, which stated that in 1972-1973 the Supreme Court had decided in three cases that an exception could be made to Art. 252 (1) HIR when the witnesses involved lived sufficiently close to the district court concerned.

The judgment held that the public prosecutor had failed to prove that the news item had been false, unclear, excessive or incomplete. The court specifically argued that the title of the article, "Tangerang Mayor Ate (=corrupted) People's Fund [of] 28 Million [rupiah]" was not misleading, because this had not been effectively proven. Neither had the prosecutor proven any intention on the part of the defendant to incite people, which could create chaos – in fact the article addressed the mayor, not society. The elements of 'excessive' and 'incomplete' were also unproven, because they could not be separated from 'causing turmoil in society'. Hence, the indictment on 'spreading false news' fell through. The court's arguments thus offered a clear interpretation of the relations between the title, the body of content, and the facts of the case in light of the criminal provisions involved.

Yet, the court sentenced S.A.S to six months with a one-year probation for violating Art. 207 of the Penal Code, by insulting or defaming an authority or a public body set up in Indonesia.[90] This judgment was upheld on appeal by the High Court of West Java.[91] S.A.S. then appealed for cassation to the Supreme Court, on 16 July 1984, but I have not been able to trace the outcome of the procedure.

The Sinar Pagi case took place while the government was preparing a revision of the Press Law. During this period the government kept an extremely tight watch on the press and strongly urged journalists to subscribe to the 'responsible press' discourse. Traces of this discourse can be seen in the judgment of the Tangerang District Court, which stipulated that press freedom meant a 'responsible' press: (1) responsible to the government; (2) responsible to the press itself; (3) responsible to society.[92] As explained in the previous chapter the 'responsible press' discourse in practice led to many contradictions. Yet, the case of *Sinar Pagi* stands out favourably compared to *Tempo*'s case in the same year, after *Tempo* was banned by Minister of Information's Decree Letter No. 76/Kep/Menpen/1982. The decree repealed *Tempo*'s publishing permit (SIT) on 12 April 1982.

It seems likely that in the *Sinar Pagi* case the court felt under pressure from the government to sentence S.A.S. While the judges provided clear arguments to refuse the more serious allegations, they still upheld the indictment on the basis of Art. 207, but without much evidence and without providing many arguments for this decision. In fact it seemed clearly contradictory to the earlier assessment that there had been no case of 'spreading false news'.

90 Tangerang District Court Decision No. 36/Pid/PN/TNG1981.K., on 22 April 1982. The panel of judges consisted of Bremi (chair), Rahadjeng Endah and Pardoman Sidabutar.

91 The judges' panel was chaired by M.S. Hadi Imam and member, W.J. Winardi and Siti Kamari Soebari. This verdict was taken on 28 May 1984. See: The Higher Court of West Java Decision No. 174/1982/Pid/PTB.

92 Tangerang District Court Decision No. 36/Pid/PN/TNG1981.K., on 22 April 1982.

5.5.2. Berita Buana (1989)

On 14 October 1988, business newspaper *Berita Buana* published a contentious article with the title "Much food produced evidently contains pork fat".[93] The article warned consumers to be more careful in consuming suspected food items and demanded that the government be stricter in this matter.[94] The article was based on a news item in *Canopy* magazine, published by the Agriculture Faculty of Brawijaya University, which referred to a list of 63 food items containing suspected ingredients. The original report underlying the *Canopy* coverage, was based on research by Dr. Tri Susanto, which listed only 34 food items as suspect, not 63.

As consumption of pork is a highly sensitive matter for most Muslims in Indonesia, the article led to some public debate and the sales of some of the suspected food products dropped drastically. For these reasons the public prosecutor brought a case against the author of the article, H. Abdul Wahid, a journalist and editor of *Berita Buana*,[95] accusing him of publishing false news or notifications which could cause public unrest. During the court session Wahid admitted that he should have used the word "*diragukan*" (doubtful) rather than "*ternyata*" (evidently).

The case took an interesting turn when the issue of responsibility according to Art. 15 (1) of the 1982 Press Law arose. According to this provision, the "chairperson [of newspapers] is responsible for all publications either internally or externally." Some argued this to mean that not Wahid should have been prosecuted but the chairman of *Berita Buana*, H. Wibowo. According to Oemar Seno Adji, acting as press expert for 'a de charge' witness, "[…] in the past, criminal law principles did not allow successive and fictive accountability. Now, this (in the court session) would introduce successive and fictive responsibility. This is against criminal law principles."[96] Similarly, the defendant's lawyer, T.M. Abdullah, said that, "[…] the process of court is illogical, or even hypocritical […]. As a commander, the chief editor should not be 'washing his hands'. This is a shame for journalists, it will create much legal uncertainty for them." Wahid added that he was "interrogated because of the writing, but the chairman just kept his silence. Please speak up, Press Council, Minister of Information, Parliament, Ministry of Justice. Why have they kept their silence as well?"

However, the public prosecutor said that Wahid had been careless, without having first consulted with his boss before delivering his draft to be printed.

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93 'Banyak Makanan yang Dihasilkan, ternyata Mengandung Lemak Babi'.
94 "Buntut Berita Lemak Babi," *Tempo*, 1 September 1990.
95 "Buntut Berita Lemak Babi," *Tempo*, 1 September 1990.
96 Successive responsibility means it can be represented, and fictive responsibility means a representative will take responsibility.

Neither did the council of judges go along with this line of argument. Judge Sulaiman held that "it is not the court's authority to review the law. The court has only considered that Wahid is accountable because he received such authority from the chief editor/chairman. In the court session, it has been proven that he has written this article." Wahid was then sentenced to one year of imprisonment.

I would like to make two comments on this case. First, the 'spreading of false news' was indeed legally proven, but the punishment was far too heavy for a journalist who had only been attempting to deliver information to the public without seeking his own interest. He made a mistake and recognised he did so. Therefore, it would have been far better not to treat this case as a criminal case, but as a case to be resolved through a special mechanism or perhaps the civil court. The prosecution against this journalist was also excessive, because those reporting the case to the police could also have asked *Berita Buana* to publish their complaint in the newspaper.

Second, indeed H. Wibowo, as the chief editor of *Berita Buana*, should have been held accountable, regardless of whether or not his journalist had confirmed with him whether the news report should have been published. Art. 15 (1) is eminently clear on this matter. The court should therefore have relieved the journalist in this case from any criminal liability.

5.5.3. Tomy Winata v. Tempo (2003)

Investigative journalism is one of the most sensitive tasks of the press, especially when it deals with political elites or business mafia. It is likely to lead to all sorts of resistance, including legal cases. Indonesia's flagship of critical journalism, *Tempo* magazine, has several times been confronted with the latter, one of them being a suit following the report with the title "*Ada Tomy di Tenabang*?" (Is Tomy present in Tenabang?).[97]

The article discussed the role of business tycoon Tomy Winata regarding a fire that destroyed the Tanah Abang market in central Jakarta. Before the fire broke out, Winata had proposed to the Jakarta government to renovate this market, for a total sum of 53 billion rupiah. As the fire somehow paved the way for the renovation, it was clearly to Winata's advantage and *Tempo*'s investigation indeed suggested his involvement in arson. Winata vehemently denied this charge, with support from the director of the Tanah Abang market, and on 10 March 2003 filed a complaint with the police against *Tempo*'s Chief Editor Bambang Harymurti, reporter Ahmad Taufik, and language editor Teuku Iskandar Ali.

97 *Tempo Magazine*, Edition No. 01/XXXII/3-9 March 2003.

The case was then processed by the police and taken to court by the public prosecutor, with the first court session taking place on 15 September 2003. The indictment consisted of two allegations: first, 'spreading false news' (Art. XIV (1) and (2) of Law 1/1946 *juncto* Art. 55 (1) of the Penal Code[98]), and second, 'slander or defamation' (Art. 311 (1) and 310 section (1) of the Penal Code *juncto* Art. 55 (1) of the Penal Code). The prosecutor's indictment argued that the report by *Tempo* had provoked people by "publishing false news and causing confusion among people," especially among the victims who, after the news had spread, had gone to Winata's office and house to protest. Winata himself gave testimony of having been intimidated by telephone, which in turn led employees of Winata's Artha Graha Group to engage in demonstrations at the *Tempo* headquarters, which were accompanied by vandalism. The public prosecutor also argued that *Tempo* had insulted Winata by referring to him as a "*pemulung besar*" (big scavenger) and that the report was false.

The judges in Central Jakarta District Court acquitted Ahmad Taufik and Teuku Iskandar Ali, because their positions as journalist and language editor relieved them from accountability on this matter. This is in line with the Elucidation to the Press Law Art. 12, which puts responsibility over news reports with the chief editor. However, the judges found that the indictment on defamation and false news were 'proven' during the court session, which was contentious because Bambang Harymurti refused to disclose the sources underlying the report. The panel of judges left the Press Law aside, because – in their own words – "the Press Law regulates neither defamation nor false news". They also pointed out that according to its Transitional Rules and Elucidation, the Press Law did not override Law 1/1946 or the Penal Code. Hence, Harymurti was punishable under these laws as he was unable or unwilling to provide any evidence before the court that Tomy Winata was 'a big scavenger' and that he had actually proposed a renovation project of Tanah Abang market three months prior to the fire.

The court thus swept aside Harymurti's defence, which under the title "*Wartawan Menggugat*" (A Journalist's Claim) had emphasised the special position of the press, as mandated by the law. "Should a journalist who practices his profession as mandated by law, and who publishes his works according to journalistic norms enshrined in law, be seen as a criminal?", Harymurti had asked. He had pointed out the overriding importance of the Press Law, especially referring to Art. 4(1) ("Freedom of the press is guaranteed as a basic human right of citizens"), Art. 4(3) ("… in order to guarantee freedom of the press, the national press has a right to explore, discover and disseminate ideas and information"), and Art. 8 ("In practicing his profes-

98 Article 55 section (1) 1 of the Penal Code is part of 'participation in punishable acts': "As principals of a punishable act shall be punished, those who perpetrate, cause others to perpetrate, or take a direct part in the execution of the act."

sion a journalist has protection of the law"). In the light of these provisions, as argued by Harymurti, the prosecutor's indictment had to be rejected.

He furthermore appealed to the double standards applied by the public prosecutor, who had asked the court to release the leader of the demonstrations at the *Tempo* office, David Tjoe, from all charges (No. P-139/JKTPS/03/2003). This was somewhat remarkable, given that David Tjoe had admitted to this fact as well as to 'represent' Tomy Winata and had also assaulted Bambang Harymurti at the Metropolitan Central Jakarta Police Station, an event that had been witnessed by many police officers who had done nothing to prevent such violence. Now the same public prosecution council charged Harymurti as a criminal who must be sentenced to two years imprisonment, with an order for immediate detention. "Isn't this extraordinarily unjust?", Bambang had asked in court (Harymurti 2004).

After Chairman Suripto of the Central Jakarta District Court had read the decision to sentence Bambang Harymurti to one year imprisonment (see: Court Decision No. 1426/Pid.B/2003/PN.Jkt.Pst, 16 September 2004), Bambang described this as an 'extraordinary blow' for press freedom. The decision would scare other editors in chief from publishing reports on contentious issues, and therefore he would continue to fight the case to the end by bringing it to the Supreme Court, expecting it to develop to the same kind of precedent in Indonesia as *Sullivan versus New York Times* in the United States.[99]

The Press Council shared Harymurti's fears for Indonesian press freedom. As stated by its Chairman Ichlasul Amal:

> the judges' decision was similar to those taken under the New Order Soeharto, when the law enforcer always tried to find the press at fault. Critical papers were banned and journalists were taken to jail […]. Before reformation, the power was exerted by the executive. Now, in the name of the 'supremacy of the law', the power has shifted to the law enforcers, police, prosecutors, and judges. The problem is, especially with judges, that they have not understood the meaning of reformation. To me, the *Tempo* verdict has tarnished reformation and democracy.[100]

Initially Harymurti was unsuccessful, as the Jakarta High Court rejected his appeal. However, in the end his perseverance paid off, for the Supreme Court overturned the lower courts' judgments. On 9 February 2006, also known as Press Day, the Supreme Court acquitted him (No. 1608 K/PID/2005). The ruling stated that, "there have been mistakes in the application of the law by the District Court and the High Court in examining this

99 "Bambang Harymurti Divonis Satu Tahun Penjara," *Liputan 6 SCTV*, 17 September 2004, http://berita.liputan6.com/read/86184/bambang_harymurti_divonis_satu_tahun_penjara [retrieved on 1 July 2011].

100 "Ichlasul Amal: Keputusan Hakim Mencederai Demokrasi," *Tempo*, 20 September 2004.

press case. The Supreme Court is of the opinion that such cases must not merely be viewed from the perspective of the Penal Code, as the offence by the accused was related to Press Law."

The judges' panel, chaired by Supreme Court Chairman Bagir Manan and with members Djoko Sarwoko and Harifin Tumpa, argued that the Press Law is a *lex specialis* and in such cases overrides the Penal Code. The special mechanism for dealing with offences as regulated in the Press Law holds priority over a criminal procedure. Sarwoko later clarified in an interview that the Press Law does not provide for criminal law as such, but that the press as the fourth pillar of democracy should be protected. The court also considered the roles of journalists and the linguistic aspects of the case, i.e. the headline "*Ada Tomy di Tenabang*" and the phrase "a big scavenger."[101]

Alhough Tomy Winata complained about the term "big scavenger", the court did not discuss this term and its meaning in detail. Given the story's context, the term "big scavenger" was quite applicable to Winata's role in the whole story of the Tanah Abang fire. As *Tempo* had carefully checked the facts of the case, their report was actually in accordance with the Press Code of Ethics regarding carefulness, balance or proportionality, and applying the presumption of innocence.

The decision thus restored the rights, dignity, and position of Bambang Harymurti, with the state paying for the cost of the cases. Harymurti himself recognised the decision as 'a special gift' for press freedom in Indonesia.[102] Yet, as we have seen, the Supreme Court's decision in this case is not just another step in the development of full legal protection of press freedom in Indonesia as guaranteed by the judiciary. There have been inconsistencies in the line of Supreme Court decisions, notably in the *Risang Bima Wijaya* case, which also concerned Art. 310 of the Penal Code.[103] In this case the Supreme Court failed to refer to its own judgment in *Tomy Winata v. Tempo* and to provide any arguments as to the difference between the two. This clearly continues to lead to legal uncertainty in the development of press freedom.

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101 "MA Menangkan Bambang Harymurti," *Tempo*, 29 February 2006, http://www.tempo.co/read/news/2006/02/09/05573708/MA-Menangkan-Bambang-Harymurti (retrieved on 2 June 2012).

102 "Bambang Harymurti: Ini Kado Istimewa untuk Pers," *Tempo*, 9 February 2006.

103 As previously discussed in this Chapter, the decision was made by the Supreme Court, the panel of which was chaired by Artidjo Alkostar, SH, LLM. Decision No. 1374 K/Pid/2005, on 13 January 2006, refused Risang's cassation, and strengthened the Yogyakarta Higher Court decision (No. 21/Pid/2005/PTY), which sentenced Risang to six months in prison due to the offence as stipulated in Article 310 section (2) of the Penal Code *juncto* Article 64 section (1) of the Penal Code.

5.5.4. Upi Asmaradhana (2008)

This case concerned Jupriadi Asmaradhana, better known as Upi, a freelance TV journalist in Makassar. Upi had been actively promoting press freedom through AJI (the Independent Journalists Alliance) Makassar. On behalf of the KJTKP (Journalist Coalition to Refuse Press Criminalisation), he coordinated a campaign against Sisno Adiwinoto, the head of the South Sulawesi Police (*Polda*), after the latter had publicly announced that "...if the press insults someone, I ask that person to report directly to the police without using the right to reply (or Press Law mechanism)."[104] Sisno thus denied the priority of the 1999 Press Law's special mechanism in dealing with complaints against the press. The campaign sought the support from the Press Council, the National Police Commission, and other institutions, but also organised a demonstration demanding that Sisno repeal his statement.

In order to explain his statement, Sisno had already sent a response to the *Harian Fajar* newspaper (4 June 2008, p. 4, 19 May 2008 and 30 May 2008). However, this had not stopped journalists from considering Sisno's statement as causing confusion and endangering them.

Sisno considered the actions coordinated by Upi as defamation and started a suit against several mass media, demanding ten billion rupiah in damages. He soon dropped this case, however, to concentrate on a criminal case against Upi, against whom he lodged a formal complaint. On 18 September 2008, the police sent a warrant to Upi, accusing him of violating Art. 317 (1),[105] Art. 311 (1) and Art. 160 of the Penal Code. It contained the main grounds Sisno used to support his case. First, the protests by KJTKP Makassar were instigated by Upi and based on a false allegation: Sisno argued that he had never intended to deny the status of the Press Law as a *lex specialis* and this statement harmed his reputation. Second, the letters sent to the Press Council and National Police Commission had caused damage to his reputation and/or dignity, and he claimed to have suffered material losses due to the protests. Third, because the actions organised by Upi were not part of his activities as a journalist, he was not protected by the Press Law and could be held responsible individually.

The public prosecutor adopted these arguments and brought the case to trial, but the court dismissed all the charges. The judges argued that the letter sent by Upi on behalf KJTKPM resulted from an interpretation by South Sulawesi journalists and could therefore not be seen as unrelated to press

104 Sisno gave the same statement twice: first during a workshop of the governor and district heads of South Sulawesi (19 May 2008) and second at a 'Jamboree' of Local Press in South Sulawesi (30 May 2008).

105 Article 317 section (1) of Penal Code and its case are further elaborated in the next subchapter.

freedom. Second, although Sisno had already sent a response to the *Harian Fajar* newspaper, this had not been sufficient to change the journalist's perception and understanding of Sisno's statement. Third, there was a case of miscommunication, and the 'intention' to disseminate false information, as stipulated under Article 317 (1) of the Penal Code could not be addressed to Upi, because Upi and KJTKPM had not offended Sisno's dignity with false information. Fourth, the complaint letter addressed the appropriate institutions and therefore could not be considered as defamation. Hence, the judges argued that the element of 'false complaint and information to the ruler' could not be proven,[106] and that Upi had neither engaged in 'defamation' nor in 'insulting a ruler or public institution.'

Makassar District Court judges, Parlas Nababan, Mustari and Kemal Tampubolon, thus contributed to the line of thought of the Press Law as *lex specialis*. The judges also confirmed that the manner in which Upi and KJTKP Makassar had conducted their protest had been reasonable and therefore remained within the limits of the law.

Since journalist and press associations have been monitoring the court sessions and campaigning closely, these have to some extent influenced court decisions. Outside and even in the courts, journalists and their alliances at national and international level have had a favourable influence on the judicial process with regards to press freedom. A type of solidarity movement also played a role in the judicial process when Susrama and his gang were brought before the law for killing *Radar Bali*'s journalist Prabangsa in 2009. As believed by local journalists, without a strong solidarity movement and large-scale campaigns, law enforcement might fail to provide justice.

An important aspect of the Upi Asmaradhana case was that it was closely followed by international networks concerned with press freedom and widely covered by national and international newspapers, and other media. It thus became a widely recognised monument for promoting press freedom in Indonesia.

5.6. Violating Public Decency: Selera Hakim[107]

In Indonesia public decency is a contested issue, especially when it concerns the press. This contestation is partly caused by the differences in social and cultural settings within the country itself. A media accusation of someone being called a prostitute could lead to controversies in Aceh's *syariat* law context, but not in other regions. Hence, journalists in Aceh have to be more careful in showing pictures, illustrations or writing texts in order not to

106 No. 197/Pid.B/2009/PN.Mks (14 September 2009).
107 The *Selera Hakim* decision can be translated as the 'Judges' Taste' decision.

offend conservative Muslims, with 'Islamic values' in Aceh seemingly having become a standard for measuring appropriateness of press reporting.[108] As a result, the same provisions concerning press freedom operate differently in these different contexts and the way in which they influence journalists' practices and professional self-perception (Romano 2003: 164).

The 1999 Press Law addresses the issue of public decency in Art. 5(1) *juncto* Art. 18(2):

> The national press has the obligation to respect religious norms and public decency as well as the presumption of innocence in its news and opinions.
> The press corporation that violates the provision in Article 5 section (1) […] can be charged with a maximum fine of 500 million rupiah.

Until the present, no case has been brought before a court in relation to this article.

In addition to the Press Law, the Penal Code contains the following provisions on public decency:

> Article 282:
> (1) Any person who either disseminates, openly demonstrates or circulates a writing of which he knows the content or a portrait or object known to him to be offensive to decency, or produces, imports, conveys in transit, exports or has in store, either openly or by dissemination of a writing, unrequestedly offers or indicates that said writing, portrait or object is procurable, in order that it be disseminated, openly demonstrated or put up, shall be punished by a maximum imprisonment of one year and four months, or a maximum fine of three thousands rupiah.
> (2) Any person who disseminates, openly demonstrates or puts up a writing, a portrait or an object offensive to decency, or produces, imports, conveys in transit, exports or has in store, either openly or by dissemination of a writing unrequestedly offers or indicates that said writing, portrait or object is procurable, in order that it be disseminated, openly demonstrated or put up if he has serious reasons for suspecting that the writing, portrait, or an object is offensive to decency, shall be punished by a maximum imprisonment of nine months or a maximum fine of three thousand rupiah.
> (3) If the offender makes an occupation or a habit of the commission of the crime described in the first paragraph, a maximum imprisonment of two years and eight months or a maximum fine of five thousands rupiah may be imposed.

> Article 533,
> By a maximum light imprisonment of two months or a maximum fine of two hundred rupiah shall be punished:
> (1) any person who at or alongside a place destined for public traffic openly demonstrates or puts up either a writing, of which the legible title, cover or the content is appropriate to stimulate the sensuality of the youth, or a portrait or an article appropriate to stimulate the sensuality of the youth;

108 Syaifuddin Bantasyam, interview, Aceh, 5 July 2010. I add quotation marks to his statement, in order to indicate that 'Islamic values' in this context should be interpreted as values supported by the dominant Acehnese conservative establishment.

(2) any person who at or alongside a place destined for public traffic openly announces the contents of a writing which is appropriate to stimulate the sensuality of the youth;
(3) any person who openly or unrequestedly offers, either openly or by disseminating a writing unrequestedly shows where a writing, a portrait or an article appropriate to stimulate the sensuality of the youth is available;
(4) any person who offers, hands over permanently or temporarily, delivers or shows such writings, such portraits or such article to a minor under the age of seventeen years;
(5) any person who announces the contents of such writing in the presence of a minor under the age of seventeen years.

The most difficult issue in relation to these articles is how to 'measure' whether or not a news item has transgressed the limits of public decency. The absence of clear standards inevitably leads to uncertainty and subjective interpretations by judges, policy makers, government officials, journalists and media workers. In the Netherlands, this led the government in 1979 to request the Advisory Commission on the Decency Law *(advies commissie zedelijkheidswetgeving)* to explore whether it would be necessary to change the Penal Code (including Article 240, the equivalent of Article 282 of Indonesia's Penal Code). Although the commission could offer no solution for the problem of definition, they advised against dropping the 'decency article', instead recommending for the judiciary to determine such a definition by precedent (Seno Adji 1990: 49-50).[109]

In Indonesia, the General Prosecutor, in the Circular Letter concerning Monitoring of Publications Violating Decency dated 22 February 1952, stipulated that "a definition of decency must be based on a general objective concept (*algemeen objectief begrip*), not on a person's sense of offence after having read or seen any writing or picture, or on a sense of subjective feeling of decency (*subjektief eerbaarheidsgevoel*)." However, this guideline has not been translated into a series of precedents that has provided a more objective interpretation.

During the Soeharto regime, the Department of Information controlled the press in matters concerning public decency by means of warning letters. A well-known case for instance concerned *Jakarta-Jakarta* magazine, which received such a warning from the Department of Information after publishing a picture of a female that the Department categorised as pornography and as such, violated Article 282 of the Penal Code.[110] The magazine had already received three previous warning letters, but no ban followed.[111]

109 The advice has been followed and this practice has continued until the present, see for instance http://www.wetboek-online.nl/wet/Sr/240.html.
110 Department of Information's warning letter, No. 167, 17 September 1989. The letter was sent to the magazine on 18 October 1989 (Sadono 1993: 84-85).
111 These letters were sent in response to three editions, No. 145 (20 April 1989), No. 152 (2 June 1989) and No. 157 (6 July 1989) (Sadono 1993: 85).

In fact, against what one might expect, there have been few press cases concerning public decency. I only found the following three:

Table 9: Press Cases on Public Decency

The case	Indictment		Court Decision		
	Rules	Sanction	District Court	High Court	Supreme Court
Varia Baru (Kadis Purba) / 1971	Art. 282 (1) of the Penal Code	1 year and 4 months	Sentenced to 6 months with two years on probation	Unknown	Unknown
Matra Magazine (Nano Riantiarno) / 1999	Art. 282 (1) of the Penal Code	1 year and 4 months	Sentenced 5 months with 8 months on probation	Unknown	Unknown
Playboy Indonesia (Erwin Arnada) / 2006	Art. 282 (1), (2), and (3) of the Penal Code	2 years and 8 months	Indictment dismissed	Indictment dismissed	2 years imprisonment, but after a judicial review 7 months later, the defendant was acquitted.

5.6.1. Varia Baru (1971)

Varia Baru was a three-monthly Jakarta magazine that mostly published gossip about Indonesian and foreign celebrities, but also serials and short stories. The case concerned one serial ("*Ranjang-Ranjang yang Dingin*" (The Cold Beds)) and one short story ("*Penyelewengan Seorang Kekasih*" (A Lover's Affair)) in edition No. 37/4, October 1971, which led to the revocation of *Varia Baru*'s SIT (Publishing Permit) by the Department of Information.[112] The legal basis for the decision was Ministry of Information Decree No. 52/Kep/Menpen/1968 on The Prohibition of Newspaper Publications which Contravene Pancasila by using Pornography and other Misuses Dangerous to Supervising Pancasila Morality.[113]

112 Ministry of Information Decree No. 35/SK/Dirdjend-PG/1971.

113 Keputusan Menteri Penerangan Republik Indonesia No.52/Kep/Menpen/1968 tentang "Larangan terbit bagi penerbitan berita suratkabar, jang bertentangan dengan Pantjasila menggunakan tjara-tjara pornograts dan lain-lain penjelewengan jang membahajakan pembinaan achlak Pantjasila."

Prior to this administrative sanction, the vice-chair of *Varia Baru* Kadis Purba had been prosecuted for violating public decency and on 25 August 1971 he had been sentenced to six months with two years on probation by the Central Jakarta District Court on the basis of Art. 282 (1) of the Penal Code. One of the judges argued that, ".. in order to eradicate pornography, punishment of an individual is ineffective, it is better if its SIT is also repealed."[114]

As far as I can judge from the sources, the judgment did little to define the legal term of 'pornography' or determine the legal limitations to decency. Unfortunately, I have not been able to find any further information on this case.

5.6.2. Matra Magazine (1999)

The next case in this category only arose after the fall of the New Order when Chief Editor Nano Riantiarno of *Matra* Magazine was prosecuted for publishing the covers of Edition 155, June 1999 and Edition 156, July 1999 that portrayed film stars Inneke Koesherawati and Sarah Azhari in ways some considered as pornographic. On 8 June 2000, Nano was convicted by the South Jakarta District Court to five months with eight months on probation, on the basis of Art. 282(1) of the Penal Code, significantly less than the 16 months imprisonment the public prosecutor had demanded.

The case had been controversial from the start, because other magazines, such as *Top*, *Pop*, *Liberty*, and *Desah* had published women's pictures many considered far more explicit than those in *Matra*. The prosecutor, Y.W. Mere, denied any imbalance here, saying that it was only a matter of time – the *Matra* case had just been processed more quickly by the police and the public prosecutor.[115]

What was actually the issue? On the cover the first contested edition ran the headline: "A Reportage: Celebrities' Nude Photos", across a picture of Inneke Koesherawaty taken from the side, on which she appeared nude, but covered most of her breast, arms and hands. The second cover told the readers: "Sex: Plant Support for Doughtiness", and showed Sarah Azhari in sitting position, with her legs and hands crossed, equally suggesting that she was nude.

Nano argued that these positions and style aimed at exploring beauty.[116] Supporting him, press expert Atmakusumah Asraatmadja argued that *Matra*'s cover could be categorised as art rather than pornography, as it did not

114 "Menindak Porno," *Tempo*, 16 October 1971.
115 "Delik Asusila: Mengadili Pornografi?" *Tempo*, 18 October 1999.
116 "Vonis Porno untuk Majalah Matra," Tempo, 12 June 2000.

show any "sensitive and vital body parts", or articulated them in a vulgar manner.[117] However, prosecutor Y.W. Mere held on to his view that, "..such covers were not included as works of art. They are merely famous women with a sexy style […]. Then, what makes this art? For the prosecutor, these pictures go against the public feeling of decency."[118] In its judgment the court basically agreed with this view. Decency concerns morality, and is related to sexuality. Both photos suggested that the models concerned were nude, and therefore these photos were related to sex, hence morality. Because *Matra* magazine's readership consists of a wide audience, without age limitation, Nano was sentenced for violating morality by spreading pictures of which he knew that they violated public morals. In its judgment, the court put little argumentation to determine the nature of pornography.

In an interview, one of the judges – T.H.D Pardede – added that such magazine covers were considered as a porn form, and it breached the law (Article 282 section (1) of Penal Code).[119] Both *Matra*'s lawyer Todung Mulya Lubis and media expert Ade Armando complained that the decision had produced no clarity at all regarding the definition of pornography or the limitations on public decency.

The *Matra* case shows how easily '*selera hakim*' or subjective 'judicial taste' can become decisive in such issues.[120] It also demonstrates how the limitations regarding public decency had not necessarily been widened after the end of the Soeharto era.[121] Atmakusumah, at the time chairperson of the Press Council, argued that the public view as to what constituted pornography was excessive. He added that, "media are held to contain pornography if they show genitals or sexual intercourse. But, if the intercourse serves educational purposes, this can not be categorised as pornography."[122] In addition, the standards for indicating pornography limitations always change from time to time. For instance, the word 'kissing' was considered as porn during the 1940s, but this is no longer considered as pornography at present.

117 "Delik Asusila: Mengadili Pornografi?" *Tempo*, 18 October 1999.
118 "Delik Asusila: Mengadili Pornografi?" *Tempo*, 18 October 1999.
119 "Vonis Porno untuk Majalah Matra," *Tempo*, 12 June 2000.
120 Cf. Pompe, S. (1999). "Between Crime and Custom: Extra-Marital Sex in Modern Indonesian Law." In Lindsey, T. (ed.), *Indonesia: Law and Society* (pp. 111-121). Sydney: The Federation Press.
121 In *Tempo* (2000), this case was said to be the first prosecution case against a chief editor on the basis of Article 282 of the Penal Code in the Indonesian press history. Actually, it was not the first time, because *Varia Baru*'s Kadis Purba was earlier than Nano's case.
122 "Bila Bukan Porno, Apa Namanya?" *Media Watch & Consumer Center Online*, 11 October 2000.

Indeed, it is hard to define what 'the public' thinks about pornography. Also it is not easy to understand what the purpose of the restrictions is. Hence, an exploration of the question in which circumstances a restriction of pornography is necessary, would be useful, to create clarity for journalists and editors.

5.6.3. Playboy Magazine (2006)

After the *Matra* case the next lawsuit concerned a scandal that became known far beyond Indonesia itself. It concerned the publication of the Indonesian version of *Playboy*, which on 7 April 2006 led to an attack on the magazine's office in Jakarta by the radical fundamentalist group Islamic Defender Front (FPI). The FPI held speeches outside of the building, harassed employees, and eventually invaded and destroyed the office. Next to their non-legal strategy the FPI reported *Playboy* to the police as publishing pornography.

The police had done little to nothing to prevent the FPI's violence against the magazine's property and employees, or to take any action later on, but it seemed eager to follow up on the FPI's complaint against *Playboy*. Chief Editor Erwin Arnada and models Kartika Oktavina Gunawan and Andhara Early became subject to investigation on 29 June 2006. Meanwhile, *Playboy*'s headquarters were moved to Bali to prevent further attacks and in July 2006 *Playboy* published its second and third editions. This was followed by renewed complaints from the FPI and police investigations of models Fla Priscilla and Julie Estelle.

Eventually the public prosecutor only charged Chief Editor Erwin with violating Article 282 sections (1), (2) and (3) of the Penal Code, before the South Jakarta District Court. The primary indictment for this case was that *Playboy* depicted sexual photos or pictures which violated published decency and could be viewed by many readers.

However, on 5 April 2007 the panel of judges dismissed the suit since it held that the case should be heard under the Press Law instead of the Penal Code (2362/Pid.B/2006/PN.JakSel).[123] This judgment was confirmed on appeal by the Jakarta High Court (255/Pid/2007/PT.DKI) on 22 October 2007.

Normally speaking this would have meant the end of the case, because acquittals (*vrijspraak*) and a 'dismissal of proceedings' (*ontslag van rechtsvervolging*) cannot be subjected to cassation according to Art. 67 jo. 244 of the

123 This decision was appreciated by AJI, through its press release No. 012/AJI-Adv/Siaran Pers/IV/2007 (5 April 2007), especially because the decision confirmed the press law as the legal basis to solve this press conflict.

Criminal Code of Procedure (KUHAP). However, there is a law that allows for the proposal of appeal based on the Letter of the Ministry of Justice No. M.14-PW.07.03 of 1983 on Additional Guidelines to KUHAP Implementation. The annex to this letter, Number 19, stipulates that,

(i) 'acquitted decisions' cannot be appealed against;
(ii) nevertheless, depending on the situation and conditions, for the sake of law, truth, and justice, the 'acquitted decision' can be turned into a cassation.

This letter is clearly in violation with the law, but the Supreme Court itself follows this guideline instead of the law. When the public prosecutor sent an appeal for cassation to the Supreme Court on 18 February 2008, this court decided to follow the ministerial guideline and examine the case. It then overturned the decisions of the lower courts, arguing that the High Court had been incorrect assuming that the Press Law serves as a *lex specialis* vis-à-vis the Penal Code, because the Press Law holds no provisions on decency.

> Law No. 40 of 1999 on the press does not regulate 'the offence of disseminating writings, pictures, or objects which are known to violate decency', or 'anyone who intends to disseminate, show or post these writings, pictures, or objects publicly.'

The court thus disregarded its own line of precedents, which – as we have seen – had consistently upheld the prevalence of the Press Law mechanism over the Penal Code. Regardless of whether this case is related to decency which could lead to sexual arousal, *Playboy* magazine remains a press product and it has an editorial board which is responsible for publishing its contents. For those reasons, the Press Law should prevail in this case as well.

Second, the judges held that the High Court should have taken into account Art. 27 (1) of Law 14/1970 on the Judiciary, which stipulates that judges should pay attention to 'wisdom and values of society', especially Islamic and traditional ones.

This proved to be only the prequel to an outrageous judgment (no. 972 K/Pid/2008), passed on 29 July 2009.[124] The Supreme Court adopted all arguments of the public prosecutor without any objection to indictment, and convicted Erwin on the basis of Art. 282 to two years of imprisonment, as well as ordered his immediate arrest.

The judgment was followed by a whole array of events. Erwin refused to obey the summons by the public prosecutor, who then ordered his arrest on 7 October 2010 (Letter no. 160/0.1.14/Euh.2/10/2010) and put him into prison. This was clearly long after the passing of the judgment and in spite

124 The Supreme Court's panel of judges was chaired by Mansyur Kartayasa and the members were Abbas Said and Imam Harjadi.

of the protests by the FPI. Less than a month after the Supreme Court ruling, the latter had made a press statement in which they had called for the execution of the judgment, to put Erwin on the DPO (List of Wanted Persons), and asked the Minister of Law and Human Rights to annul Erwin's passport to prevent him from leaving the country.[125] The organisation had also called on its members to arrest Erwin and bring him to the prosecutor.

On the other hand, press organisations – the Independent Journalists Alliance (AJI), the Indonesian Journalist Forum (FJI)[126] and the Indonesian Journalists Association (PWI) – took action on behalf of Erwin. Nezar Patria of the AJI attacked the ruling: "The press organisation regrets to hear that the Supreme Court has applied the Penal Code instead of the Press Law. The judge should have applied the Press Law because *Playboy* magazine is a press product".[127] The Press Council made a similar statement concerning the failure of the Supreme Court to apply the Press Law[128] and sent a letter to the President for support.

On top of this, three NGOs sent an *amicus curiae* (friends of the court) letter to the Supreme Court, requesting a review of its decision on Erwin Arnada.[129] Erwin himself applied for a review (*Peninjauan Kembali*) on 12 October 2010, and seven months later the Supreme Court passed judgment. The judges were in favour of Erwin and ordered his immediate release.[130] The panel of judges, chaired by Supreme Court Chairman Harifin Andi Tumpa, made an unequivocal statement that should for once and for all settle the controversy about the relation between the Press Law and the Penal Code:

> The prosecutor's indictment is dismissed, because the prosecutor was inaccurate in making his indictment as it did not apply Press Law, which prevails.

125 Press statement on the *Playboy* case, signed by Al Habib Muhammad Rizieq Syihab and KH. Sabhri Lubis, Head and General Secretary of the Central Leadership Board of the Islamic Defender Front (FPI), Jakarta, 25 August 2010.

126 See: Position Statement of the Indonesian Journalist Forum on the Press Criminalisation of Erwin Arnada, Bandung, 12 October 2010.

127 "Organisasi Pers Sesalkan Pidana Pemimpin *Playboy*," *Tempo*, 28 August 2010.

128 Press Council Statement No. 07/P-DP/IV/2006. The Press Council also pointed out that there had been no violation of Press Regulation 8/Peraturan-DP/X/2008 on Guidelines regarding the Dissemination of Printed Adult Media. Such media cannot be sold to children under 21, at schools or in religious places. The cover should moreover be covered and it should say "21+". In case of violations, complaints can be filed with the Press Council.

129 "Delik Kesusilaan dan Kemerdekaan Pers dalam Perkara Majalah *Playboy* di Indonesia: *Amicus Curiae*" was submitted by the Indonesian Media Defense Litigation Network (IMDLN), Institute for Criminal Justice Reform (ICJR) and Institute of Policy Research and Advocacy (ELSAM) (2011).

130 "Erwin Arnada Bebas Hari Ini," *Kompas*, 24 June 2011; "Indonesia: Court acquits Playboy editor Erwin Arnada," *BBC News*, 23 June 2011.

Hence, although the Press Law does not include norms on decency, there is no legal basis for the argument that cases regarding decency can therefore be tried under another statute. The Supreme Court's judicial review decision has put beyond doubt that all press cases should be resolved under the Press Law.

In drawing a conclusion on decency-related matters in this section, it is obvious that decency and a restriction of pornography present a considerable conflict between competing values. There are at least three perspectives on the restriction of pornography: a liberal, a legal moralist, and a feminist perspective. Bakan wrote,

> … all appear to agree that, in certain circumstances, restrictions on pornography are justified, but they vehemently disagree as to why and in what circumstances such restrictions are justified. Liberals argue that restricting pornography means curtailing freedom of expression and the right to individual liberty, and that such restrictions are only justified where the exercise of these rights and freedoms can be shown to cause harm to individuals. Legal moralists, on the other hand, argue that restrictions on pornography are necessary even where no harm to individuals can be shown. Pornography, they claim, is immoral, and the law must protect society from breaches of its moral standards. Feminists are not concerned with the moral or immoral nature of pornography, but with the harm that pornography causes to individual women. In this sense the feminist position is consistent with the liberal theory, although there is a reluctance on the part of many liberals to recognize this (Bakan, 1985: 1).

Considering Bakan's description of the different views on a restriction of pornography, the illustrated cases above seem closer to a 'legal moralist perspective,' rather than a liberal or feminist one. With the 'legal moralist perspective' having become a dominant perspective in approaching decency matters in the press, several cases have been brought to the court or entered a judicial process to examine the issue at stake. Interestingly, although the court argued closer to the 'legal moralist perspective,' the decision did not articulate clearly what was meant with the term 'harm to another individual.' Hence, criminalisation of decency issues in the press seems too excessive and creates injustices for press freedom.

The Press Code of Ethics (2006) also formulated a special article on public decency. Article 4 states that, "An Indonesian journalist is prohibited to publish something fake, slander, sadistic, and/or obscene." This article is formally elucidated by the Press Council as "point d: Obscenity means the depiction of erotic behaviour by means of photos, images, voices, graphics or writing which is solely intended to arouse lust." Such definition provides no guarantee of press protection, since it can be interpreted widely. However, since this relates to the press, the Press Council has the authority to review and assess whether a particular news item is considered as obscene or not. The Press Council is in this regard expected to define clearer standards for decency than the judicial decisions.

5.7. Conclusion: The Decriminalisation of the Press?

Karya jurnalistik tak layak dipidanakan![131]
(Atmakusumah Asraatmadja)

This chapter has focused on press freedom in the light of criminal law. Indonesia's legal system has many criminal provisions that can be used against the press, some in the Penal Code, others in special statutes. Several of them have indeed been used to 'discipline' newspapers, including legislation on hate speech (*haatzaai-artikelen*), opprobrium or insult, spreading false news, and violating public decency. The way in which they have been applied shows that in many cases prosecutors and judges have shown little consideration for the importance of press freedom.

Judges have seldom produced arguments that consider whether a criminal sanction is commensurate to the seriousness of the violation in the light of the importance of press freedom for the goals of a democratic society. Many judges have even disregarded the availability of a new statute, the Press Law of 1999, to prevent such one-sided reasoning and continued to apply the traditional criminal law provisions in such cases. In the end however, one should admit that there is also a positive development: the Supreme Court has in the large majority of cases upheld the primacy of the Press Law and clearly stated that cases concerning the press should refer to this statute. If judges feel bound to this fairly unequivocal line of precedents, much future problems should be prevented.

Under Soeharto criminal law was not the preferred mechanism to keep the press in line, but if needed it was used effectively, as we have seen in the case of *Pop Magazine's* Rey Hanintyo (1974), AJI activists in 1995 (Ahmad Taufik, Eko Maryadi, and Danang K.W.) and *Suara Independen*'s Andi Syahputra (1996). After Soeharto had stepped down the relative importance of criminal law in cases against the press seems to have increased rather than subsided, especially in those involving state officials and after Megawati took office in 2002, as illustrated by cases such as those of *Rakyat Merdeka*'s Supratman (2003), Bersihar Lubis' column (2007), and *Metro TV*'s Upi Asmaradhana (2008).

Altogether, however, the situation has improved, which should come as no surprise given the nature of the authoritarian New Order vis-à-vis the Reformation Era. The enactment of the Press Law has been central here. Not only does it prohibit the application of press banning, censorship and permits, it also provides more clarity about the role of the Press Council. Although many judges have had difficulty in understanding this, many judgments

131 "Journalistic work is unworthy to be criminalised!" This statement was strictly spoken when I met Atmakusumah Asraatmadja for first time in Leiden on 8 May 2009.

– and in particular those of the Supreme Court – have shown an increased understanding of the new legal constellation. The Supreme Court has not only stimulated this development by its case law, but also by disseminating a Circular Letter to the courts in which they are summoned to involve a representative from the Press Council as an expert witness in cases involving the press (Supreme Court Circular Letter 13/2008).

Nonetheless, criminal cases have continued to impact negatively on press freedom. Even if the outcome is not a conviction, a criminal trial in itself is already detrimental for journalism. Therefore, Susanto et al. (2010: 232) have argued that the Press Law should be amended to put beyond any doubt that it prevails over any criminal procedure. To this end, to Article 5 of the Press Law should be added that "No press crime can be held to exist before the 'right to reply' and mediation by the Press Council have been tried."

However, Susanto's next suggestion is to allow for a criminal prosecution after the 'right to reply' and mediation by the Press Council have failed to satisfied the aggrieved party. This research argues that the application of criminalisation itself against journalists due to inaccuracy, unreliability, defamation, insulting, and so on, must not be allowed. The Press Council has sufficient power to punish a newspaper failing to live up to the Press Code of Ethics and is better positioned than the judiciary to do this. We have seen that the application of criminal law is always merely aimed at attacking journalists or the press, and it affects not only press freedom, but also fails to reflect the rule of law, democratisation and human rights. Hence, criminal provisions in press cases are no longer relevant.

Another opinion is offered by Syamsuddin in his dissertation (2008). Basically he argues that criminal law should not be applicable to the press if its reporting is done in the 'public interest'. Moreover, the concept of 'public interest' in the Penal Code should be interpreted differently in cases concerning the press. First, public interest in press activities must be interpreted as the people's interest instead of state interest, group interest, an organisation's interest or national interest. Second, public interest includes knowledge about activities and/or public instruments and facilities that have 'public use' or 'public purpose,' including central and local government's procurement and operational activities for the benefit and utility of society either directly or indirectly. Third, since press activities are related to the right of citizens to access news information, news for people's interest is news that has to fulfil honesty, objectivity, truth, impartiality, balance, quality and affordability requirements (Syamsuddin 2008: 301-304).

However, it is quite difficult to see how such an argument helps to provide press freedom protection on the basis of the interpretation of public interest. In practice, this Chapter shows that such criteria could lead to arbitrariness by the ruler, since an open flexible interpretation is detrimental for the press.

In other words, this chapter argues that, based on socio-legal observations, criminal provisions for press legal cases always have a negative impact on press freedom.

The core of the matter is whether criminal provisions can be tolerated at all if one wishes to take press freedom in Indonesia seriously. At present, a criminal law approach is still taught in law schools, which emphasises the importance of the Penal Code and other criminal provision for controlling the press – well-known as *delik-delik pers* (*persdelicten* or press crimes). . Such an approach misjudges the fact that the application of criminal law to the press cannot be separated from its political context. For this to change, the discussion among legal scholars in Indonesia should be broadened from doctrinal interpretation of the current criminal law to a full picture of press freedom and press control

This political context has changed dramatically over the years, while many of the criminal law provisions have remained the same. Originally, the Penal Code was a legal instrument for the colonial government to silence the nationalist opposition, while after Independence it has been used to support a new type of authoritarian regime. Such repression has continued to some extent during the post-Soeharto era and has thereby continued to threaten press freedom.

The criminal laws and cases discussed in this Chapter show that we are not merely discussing unjust law enforcement, but that there is a problem of substantive law. Criminal provisions provide a legal framework to suppress the press in spite of the constitutional guarantee of press freedom. Even though the Supreme Court in particular has stood up for press freedom on most occasions, criminal law has continued to be used to harass journalists, editors and publishers.

Therefore, this Chapter argues that criminal provisions are detrimental to press freedom in Indonesia. It has simply been too easy to misuse them and this will continue to be the case even if amendments or interpretations as discussed above will be implemented.

First, this historical overview has taught us that neither authoritarian nor post-authoritarian regimes have used criminal provisions with due regard for press freedom. This was quite evident during the Soeharto years, but since then cases such as Megawati versus *Rakyat Merdeka* (2003), Tomy Winata versus *Tempo* (2003), and Bersihar Lubis' column (2007) have demonstrated how the government has continued to put media under pressure or even silence them. Apparently, the authoritarian regime's assumption that the government is infallible has continued to hold sway and the government feels entitled to punish anyone who questions the state's ideology or challenges policies. Thus, it seems that in this respect actually not so much has changed.

Second, the words 'written' (*tertulis*) or 'writing' (*tulisan*) in the Penal Code, such as an article "Any person who with deliberate intent submits or causes to submit a false charge or information in writing against a certain person to the authorities, …" can be interpreted as a legal basis by the public and/or applied by the authorities to attack the press.

While the role of the state in reducing press freedom has diminished, private parties start to cause more harm (cf. Romano 2003: 174) – even if the pattern is slightly different. Interference with press freedom by vigilantes (such as in the case of Tomy Winata against *Tempo*, or the FPI's attack on *Playboy* magazine) have shown where this may lead to, with the state refusing to take action to protect the press. Press freedom needs a liberal environment but it also needs protection. The liberal perspective as its genesis is based on the notion that individuals should be free to publish in the news or mass media whatever they like without interference from government, other persons or groups (McQuail 1987; Lichtenberg 1987: 353). The facts show that the government could not prevent vigilantes to attack the press, which leads to the conclusion that it is therefore not a liberal one.

Third, it has become clear that in Indonesia a precedent is insufficient to prevent criminal law prosecutions being regarded as unlawful, as the Supreme Court has time and again argued that press cases should be resolved on the basis of the Press Law, instead of the Penal Code. Notably in its judgment No. 1608 K/PID/2005, the Supreme Court made perfectly clear the following three important points:

- The lower courts have been mistaken in applying the Penal Code, since the facts of the case showed that the accused had carried out its activities within the framework of the Press Law (point 82).
- With due regard to the philosophical foundation underpinning the Press Law that the national press is the fourth pillar in a democratic state, judges should contribute to developing case law in order to support the legal protection of press workers, and consider the Press Law as a *lex specialis*. The Press Law is not sufficiently able to protect press freedom, especially on the issue of 'press crimes' because of the absence of criminal provisions in Press Law, but these are enforced under the Penal Code. The press also stressed the importance of law instruments and the press code of ethics to ensure press freedom and to prevent the misuse of press freedom (point 83).
- Criminalising (the press) goes against press freedom and hence the rules under the Press Law should be prioritised over other rules (point 84).

Although the Supreme Court still allows for the possibility of applying the Penal Code, it is clear that it should be used with the utmost restraint and only as a complement to the Press Law. Of particular importance is the Supreme Court's opinion that "strengthening press freedom" should be cen-

tral and that punishment in principle goes against it. In short, this decision was a clear message from the highest judicial institution to avoid the use of the Penal Code for prosecuting journalists, editors or publishers, but it has not been heeded by the public prosecutors and the lower courts.

A fourth reason, which has only been touched upon in this chapter, concerns the current international development of changing criminal provisions against the press into private law. In line with this development, Atmakusumah Asraatmadja, a press expert and former chair of the Press Council, has stated that more than 50 countries have diverted the issue of malicious wording, insults, and defamation, from criminal law to private law. Several countries have even repealed the rules of defamation and insult because these were deemed insufficiently objective and therefore difficult to prove.[132] In his words:

> …for the professional press, which for decades has been dreaming of press freedom from the threats of the political regime, 35 articles of Penal Code can be used against the press and journalists [...] which seems excessive. Moreover, those (criminal) articles can send journalists into jail for seven years. Whereas, ideally, in democratic states that guarantee press freedom, products of journalistic work shall never lead to journalists being sent to jail, but instead sentenced by a fine only. (Asraatmaja 2002: vii-viii)

International bodies such as the UN and the OSCE have also recognised the threat to press freedom posed by criminal defamation laws in particular and have recommended that they should be abolished. For example, the OSCE Parliamentary Assembly has called for the abolition of all laws that provide criminal penalties for the defamation of public figures or which penalise defamation of the state or state organs. The UN, OSCE and OAS Special Mandates have gone even further, stating that:

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[133]

The UN Human Rights Committee (HRC) has expressed its concern several times over the misuse of criminal defamation laws in concrete cases, recommending a thorough reform in countries as wide-ranging as Azerbaijan, Norway and Cameroon.[134] In its General Comment No. 34, the HRC stipulates in paragraph 47, "State parties should consider the decriminal-

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132 Atmakusumah Astraatmadja, personal communication, on 30 March 2010 in Leiden. Also Atmakusumah's statement as quoted by Constitutional Court Decision No. 50/PUU-VI/2008, page 8.

133 International Mechanisms for Promoting Freedom of Expression: Joint Declaration (2002), retrieved from http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&lID=1 (4 June 2012).

134 Article 19, Criminal Defamation, retrieved from http://www.article19.org/pages/en/criminal-defamation.html (4 June 2012).

ization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."[135] In addition, the Concluding Observation of the HRC on the Initial Report of Indonesia in 2013 stipulates under paragraph 27, "The Committee is concerned at the application of the defamation provisions of the Criminal Code and Law No. 11 of 2008 on information and electronic transactions to stifle legitimate criticism of State officials (art. 19). The State party should consider revising its defamation law and, in particular, the Law on information and electronic transactions, to ensure that they are in compliance with article 19 of the Covenant."[136]

Press freedom support organisations such as ARTICLE 19 similarly argue that all criminal defamation laws breach the guarantee of freedom of expression. However, in recognition of the fact that many countries do have criminal defamation laws which are unlikely to be repealed in the very near future, it has suggested interim measures to attenuate their impact until they are abolished.[137]

In response to such international developments, the Indonesian government seems to have actually started to reconsider the application of the Penal Code against the press. The Head of BPHN (National Law Development Agency, Ministry of Law and Human Rights), Prof. Dr. Ahmad M Ramli, for example, said that, "…. Therefore it is unnecessary to criminalise journalistic works."[138] He also stated, "… the threats against the press do not only consist of criminalisation, but also the massive private lawsuits against the

135 General Comment No. 34 of Human Rights Committee on Article 19: Freedoms of opinion and expression (102nd session, Geneva, 11-29 July 2011), (CCPR/C/GC/34, 12 September 2011).

136 Concluding Observation of Human Rights Committee on the Initial Report of Indonesia (21 August 2013) / CCPR/C/IDN/CO/1

137 (i) No-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below; (ii) The offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed; (iii) Public authorities, including the police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official; (iv) Prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practice journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

138 "*….Demikian juga tidak boleh ada kriminalisasi terhadap karya jurnalistik*", Ramly's statement BPHN: Hukum Pers Masih Banyak Kelemahan, 20 May 2010, http://www.suarakarya-online.com/news.html?id=253521 (accessed on 3 June 2012).

press … there are no limits as to how much compensation must be paid by the press, and this can lead to threatening press freedom."[139]

Thus, there is a glimmer of hope. The application of criminal provisions in cases concerning the press – and in particular those leading to the imprisonment of journalists – goes against building a more democratic public sphere. The cases in this chapter have made clear that they are merely used to protect the interests of the rulers and the elites associated with them. The only solution seems to be to decriminalise press cases, which is in line with international legal developments. In fact the enactment of the 1999 Press Law should have been sufficient to achieve this, but given the current attitude of the government, public prosecutors as well as many judges, it would be better to abolish all criminal law provisions regarding the press.

139 "Gugatan Perdata Ancaman Kebebasan Pers", *Antara News*, 20 May 2010, http://www.antaranews.com/berita/187658/gugatan-perdata-ancaman-kebebasan-pers (retrieved on 5 May 2013).

6 Press Freedom and Private Law

6.1. Introduction

Just as criminal prosecutions, civil law suits pose a threat to press freedom. Many cases against the press have been brought to the civil court, mostly asking the court for damage compensation and/or rehabilitation because of news reports. Clearly, everyone ought to have the right to defend her- or himself against detrimental news, but – as we will see – this mechanism is open to abuse and has sometimes been deployed to attempt silencing critics by threatening them with serious material losses or even bankruptcy.

The use of private law to sue journalists or media owners reflects the tension between private and public law in the contestation between privacy, dignity, reputation and personality versus the public right to information. Although this is not stipulated explicitly in the Press Law (40/1999), the civil court mechanism is applicable as the last resort when the mediation process through the Press Council has failed. The civil court should also take into account the Press Law in determining the balance between private rights on the one hand and press freedom as a public interest on the other. This chapter will discuss to what extent the Indonesian civil courts have managed to strike such a balance on the basis of a legal analysis of civil court decisions, starting with cases under the New Order until approximately 2010. This analysis will be preceded by a brief discussion about the limits that can be imposed on press freedom within a private law context, and by an introduction into the main private law rules relevant to press freedom.

6.2. Private Law, Public Interest and Press Freedom

In providing accurate information to the public, the press serves the public interest. Journalists have to be professional in reporting news, in particular when it may be harmful to the interests of private persons. Press freedom does not provide a blanket protection, but only protects if it strikes a proper 'balance' between private interests and the public interest in acquiring information.

As already mentioned in the previous chapter, Syamsuddin has argued that there are three criteria to help understand the term 'public interest.' First, public interest as related to press activities must be interpreted as 'the people's

interest,' not a state interest, a group interest, an organisation's interest, or the national interest. Second, public interest refers to activities and/or public instruments and facilities that have a 'public use' and/or 'public purpose,' including procurement and operational activities that provide benefits to society by the central, regional and local government. Third, public interest refers to the right of the people to access information, but only information fulfilling the following criteria: honesty, objectivity, truth, impartiality, balance, quality and affordability (Syamsuddin 2008: 301-304).

If we view the development of democracy as a public interest, then the relation with press freedom is evident, as accurate information is indispensable for the well functioning of a democracy. The disclosure of information bears directly on public decision making. Excluded from the protection offered by the need to further this public interest are the disclosure of false information. The same applies to information that bears directly on public decision making, but violates private interests, such as another person's dignity or privacy, in a disproportionate way. If such information has little or no relevance to public education or to public decision making, it is less likely to pass the test of proportionality (Gordley 2006: 246-257).

These criteria are relevant to determine whether particular news qualifies for being in the 'public interest,' especially in relation to tort law (*onrechtmatige daad* or *perbuatan melawan hukum*) and to answer questions such as when reporting infringes on the rights of others, or how much evidence a reporter needs to be allowed to publish news going against someone's interest.

6.3. Tort Law and Insult in Indonesia's Civil Law

As there are important differences between countries regarding the arrangements of tort law, I will first briefly explain the Indonesian system. The basics of tort law have been adopted from the former Dutch *Burgerlijk Wetboek* (Civil Code) and can be found in Articles 1365-1366 of the Indonesian Civil Code of 1848. Tort is known as a '*perbuatan melawan hukum*' or '*perbuatan melanggar hukum*' (*onrechtmatige daad*):[1]

> Art. 1365: Any unlawful act causing damage to others shall oblige the person who caused the damage to pay compensation.[2]
>
> Art. 1366: Anyone shall be responsible not only for damage caused by his action, but also for losses caused by his negligence or imprudence.

1 The original text is still in Dutch and uses the term *onrechtmatige daad*. There is no consensus about the translation, some legal scholars using '*perbuatan melawan hukum*' (Badrulzaman, 1983; Djojodirjo, 1982; Agustina, 2003; and Satrio, 2005), others '*perbuatan melanggar hukum*' (Prodjodikoro, 2000; Subekti and Tjitrosudibio, 2002).

2 This article was adopted from Article 1401 of the former Dutch Civil Code.

Originally, Article 1365 was interpreted narrowly: '*onrechtmatig*' (unlawful) was equated to '*onwetmatig* (infringing statutory law). This narrow interpretation changed with the Dutch Supreme Court's decision of 31 January 1919 (*Lindenbaum v. Cohen*). In this case, the court included into the concept of unlawfulness behaviour infringing on "social norms deemed proper in social intercourse." Indonesian courts have continued to follow this interpretation (e.g. 3191/K/Pdt/1984 (*Masudiati v. I Gusti Lanang Rejeg*)).

The scope of liability is further regulated in Articles 1367, 1368 and 1369. Even more important for our purpose are Articles 1372-1380, which deal specifically with insult.[3] The central articles are 1372 and 1373:

> Art. 1372: The civil legal claim with respect to an insult shall extend to compensation of damages and to the reinstatement of good name and honour that were damaged by the offense. The judge shall, in the consideration thereof, have regard to the severity of the offense, as well as to the position, status and financial condition of the parties involved and the circumstances.
>
> Art. 1373: The insulted party may also demand a judgment declaring that the insulting act is slanderous or insulting. If he demands a declaration that the insulting act is slanderous, then the provisions of Article 314 of the Penal Code with regard to punishment for slander shall apply. The sentence shall, if the offended party so requests, at the expense of the convicted party, be posted in public in so many copies and in the location as ordered by the judge.

Article 1374 adds that a declaration as mentioned in Article 1373 will not be applied if the defendant states before the court that "he regrets the act committed; that he therefore apologizes and that he considers the offended party to be a person of honour."

These articles do not define explicitly what an insult is. The concept of insult is implicitly defined in Article 310 of the Penal Code:

> (1) The person who intentionally harms someone's honour or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of three hundred rupiahs. (2) If this takes place by means of writings or portraits disseminated, openly demonstrated or put up, the principal shall, being guilty of libel be punished by a maximum imprisonment of one year and four months or a maximum fine of three hundred rupiahs.
> (3) Neither slander nor libel shall exist as far as the principal obviously has acted in the general interest or for a necessary defence.

If we look at the history of the law making process of the Civil Code in the Netherlands, it appears that the legislator intended to adjust the formulation of insult in article 1372 to the meaning of slander under the Dutch Penal

3 I use the term insult for what is originally '*belediging*' in Dutch. This is usually translated in Indonesian as '*penghinaan*.'

Code of 1884. According to Pitlo and Bolweg (1979: 363, in Satrio 2005) "[i]t is generally accepted that lawsuits on insult can be accepted only if there is a basis for criminal prosecution as stipulated under article 310 of the Penal Code."

This has two consequences. First, those who defame or insult someone carry a 'double liability' under criminal and civil law (even if the two processes cannot be conducted simultaneously, see Art. 314(3) of the Penal Code). And second, on the basis of Article 1373, civil liability can only be assumed if the insult contains the elements stipulated in Article 310 of the Penal Code. This does not mean, however, that criminal liability automatically leads to civil liability. Article 1376 of the Civil Code adds that:

> A civil legal claim with respect to the insult cannot be admitted, if it does not appear that there existed intent to insult. The intent to insult shall not be considered to have existed if the alleged offender apparently acted in the public's interest or if he did so as an act of necessary defence.

Hence, there is a difference between a civil and criminal law insult. The 'intent to insult' (in Dutch '*het oogmerk om te beledigen*') cannot be found in Chapter XVI of the Penal Code, which says that the insult must be 'deliberate.' Satrio poses the question whether 'intent' in the Civil Code is similar to 'deliberate' in the Penal Code. Indeed, originally the Dutch Supreme Court in its judgment dated 10 January 1896 held that these concepts had the same meaning. However, in a decision of 22 January 1965 the Dutch Supreme Court argued that they were different, as someone might deliberately state something in self-defence or to further the public interest (Satrio 2005: 72-75). To what extent similar interpretations have occurred in Indonesia is unclear in the absence of relevant precedents.

The next issue is how to determine form and amount of indemnification. This is quite complex since there is no statutory standard. Neither Article 1365 nor Article 1372 say anything about this, except for their reference to 'the losses' caused by insults. Certainly, form and amount of indemnification must be proportional, even if lower court rulings do not always follow this principle and in a very few instances the Supreme Court itself seems to have deliberately ignored it. As will be discussed later on in this chapter, some tort claims against the press even seem to have the intention of driving journalists or newspapers into bankruptcy.

However, the court cannot confine itself to looking at the Civil Code, but should also consider tortuous liability in the light of the Press Law, the Human Rights Law, the Public Disclosure Law, and other relevant statutes. In this manner the courts have to find a balance between the rights of the claimant, the rights of the public and the public interest in a wide sense.

6.4. Procedural Aspects: Press Council and Civil Court Mechanisms

A preliminary question we need to answer is whether someone can file a lawsuit on account of insult to the court directly, or whether he or she first needs to address another forum. Some practioners answer this question in the negative, arguing that the Press Law does not sufficiently regulate insult, defamation and humiliation and how to address it. The statement of law enforcer, such as South Sulawesi Provincial Police Commander (*Kapolda*) Sisno, in the case of *Sisno Adiwinoto v Upi Asmaradhana* (2008). Sisno stated that [it was] unnecessary to use the 'right to reply' and the press mechanism under the Press Law, [as] journalists can be prosecuted in a criminal process (see this case further in the last part of this chapter). Several scholars are less certain, but still leave it to the potential plaintiff to decide whether to follow the procedure of the Press Law or to directly address the civil court. (Wahidin 2012: 57; Satrio 2005; Susanto et all 2010: 232). Satrio for instance holds that the victim of an alleged insult can simply choose whether to use the mechanism under the Press Law, the Penal Code or a civil lawsuit. He supports this position by reference to the absence of any support for a *lex specialis* argument from either the government or the Supreme Court. On the contrary, he argues, the government has maintained 42 articles on press offences outside of the Press Law and the Supreme Court has argued in 277K/Kr./1979 that "[…] the Press Law does not reduce the defendant's liability for insult or defamation" (Satrio 2005: 106-116).

There is however convincing evidence to the contrary. First, of course, a 1979 precedent is of little value if we take into account that a completely different Press Law was in place at that time. Moreover, during the public hearing session on 6 June 2000, the parliamentary commission responsible for the debates about the Press Law (Commission I) unanimously supported the opposite opinion. It held that someone who felt he or she had been affected negatively by a news report should first use the right to reply provided for in the Press Law. If the dispute could not be resolved in that manner, the Press Council should be asked to mediate the dispute. Only after the mediation would have failed to satisfy one of the parties should the case proceed to court, with the opportunity that a 'social punishment' would be added to the legal one – such as the general public boycotting 'dishonest' news media (Asraatmadja and Luwarso 2001: 56-67). This idea was subsequently adopted by the Press Law, even if the intention of Parliament that this would be a compulsory sequence was not made fully explicit in the Press Law itself.

Hence, even if the Press Law does not provide special provisions on insult, defamation and humiliation, its mechanisms of 'right to reply' and 'right to correction' (Art. 5) are applicable. In addition, one may bring a complaint to the Press Council according to Article 15(2) c and d, which holds that the Press Council is responsible for "determining and monitoring the Press

Code of Ethics" and that the Press Council "gives consideration and seeks resolution of cases related to society's complaints about news reports."[4]

The Press Council can issue 'legally binding decisions' in press disputes. The Council's procedural rules can be found in Press Council Regulation No. 3/Rule-DP/VII/2013, which stipulates how the public complaints over cases related to press coverage can be lodged and how the Press Council should review them on the basis of the Code of Ethics of Journalism and the principles of freedom of the press.

There are three types of complaint (Article 2 of the Press Council Regulation), concerning journalists' professional behaviour, violence against journalists and editors/press owners, and advertising (Article 13 of the Press Law). Such complaints must be lodged within two months after the incident that happened gave rise to the case, except for special cases involving the public interest. The Press Council does not deal with complaints that have been filed with the police or the courts unless the complainant withdraws his complaint or unless the police hands over the case to the Press Council. A complaint should be addressed within 14 working days, and the procedure must be posted on the website of the Press Council.

The Press Council will examine the testimony of the complainant and the reported parties before issuing a decision. It can resolve cases through mediation or through adjudication. The results of the mediation are signed by the parties and will not be disclosed unless the parties agree to this. If the mediation does not lead to an agreement, or if the case is decided in adjudication immediately the Press Council will issue a Statement of Assessment and Recommendations (Pernyataan Penilaian dan Rekomendasi). Adjudication takes the form of a decision in writing. Such a decision must be implemented within 14 working days after the parties received the Statement of Assessment and Recommendations. If one of the parties fails to comply with the decision, the Press Council will issue a public statement specifically for this purpose. The civil court process is the last resort and can only be followed after the resolution process in the Press Council has failed.

This view has been corroborated by Bagir Manan, former chairman of the Supreme Court and currently chairman of the Press Council:

4 According to Article 15 of the Press Law the Press Council has the following tasks: 'protecting press freedom from interference by third parties; conducting studies about the development of the press; establishing and overseeing the implementation of the Code of Ethics of Journalism; considering and resolving public complaints about cases relating to press coverage; developing communication between the press, the public, and the government; facilitating press organisations in formulating regulations in the field of press and improving the quality of journalists.'

> The 1999 Press Law must be applied at first stage prior to any court examination related to press cases. Law enforcers should understand the 'speciality' of the Press Law to examine press cases, especially when considering whether such a case has followed the mechanisms of the 'right to reply' and the 'right to correction,' or mediation in the Press Council. Without applying the Press Law during the first stage, the case is unacceptable or inappropriate as a civil court case.[5]

In relation to Article 15(2c), there is a question whether the Press Council can impose a sanction for insulting news. The closing part of the Press Code of Ethics[6] stipulates the following:

> The final assessment on the violation of the Press Code of Ethics is made by the Press Council. Sanctions over violation of the Press Code of Ethics are imposed by journalist organisations and/or press companies.

Thus, the Press Council is only an examiner in this case and cannot impose any sanctions itself. Only after the Press Council has passed judgment finding fault with the contested report may the aggrieved party address the civil court for compensation.

In conclusion, the plaintiff must first use his or her right to reply and/or correction. If he feels dissatisfied he must address the Press Council and only after that may he bring an action to the civil court.

6.5. 'Pencemaran Nama Baik' (Insult and Defamation): Lawsuits against the Press

Civil lawsuits against the press can be brought under several headings, but by far the most important are 'insult' and 'defamation.' These two concepts do not correspond directly to the common law definitions, as already explained in Chapter 1. Under Indonesian law there are no clear distinctions between the two. I will refer either to insult, or if this happens orally I will refer to it as slander and if it happens in writing as libel. When I speak of a 'libel suit' I refer to a lawsuit against the press because of a written insult.

I will now examine several libel suits from before and after the enactment of the 1999 Press Law. They have been selected on the basis of their legal importance, in that they contributed to new developments in press law (landmark decisions), but I have also added a few 'famous' (or notorious) cases, which have drawn much public attention.

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5 Bagir Manan (the Press Council chairman), *interview*, Leiden, 26 March 2010. A similar statement is recorded in Kusumaningrat and Kusumaningrat (2011: 309-310).

6 Press Code of Ethics, appendix of Press Council Decision No.: 03/SK-DP/III/2006. This code was agreed after a workshop attended by 29 journalist associations, the Press Council, and the Indonesian Broadcasting Commission, on 14 March 2006.

6.5.1. Libel Suits before the Enactment of the 1999 Press Law (40/1999)

The number of cases before 1999 is extremely limited, in fact I could only find two: *Ms Djokosoetono (Blue Bird Taxi) v Selecta Magazine* (1981, Jakarta) and *Anis v Garuda Daily Newspaper* (1991, Medan).[7] They were examined while different Press Laws were in place, viz. Law 11/1966 jo. Law 4/1967 and Law 21/1982. However, both cases were brought under the Civil Code's Articles 1365 and 1372-1380.

6.5.1.1. Ms Djokosoetono (Blue Bird Taxi) v Selecta Magazine (1981)

On 22 June 1981, Selecta Magazine's issue 1031 printed an article called "*Kasus Pengemudi Taksi Blue Bird*" [The case of the Blue Bird Taxi Driver, pp. 60, 61, 98 and 100]. The article referred to Bluebird's owner, Ms Djokosoetono, as of Chinese descent. Ms Djokosoetono objected to this description. She had married Mr Djokosoetono and they had been living as a Javanese family, observing Javanese and not Chinese *adat*. According to the plaintiff this article harmed her public standing as well as her and her company's good name and reputation. She felt that the effect of the article had caused public criticism and she felt a victim of a 'trial by the press.' Her company had since incurred financial losses and as a result she had fallen ill and her peace of mind had been disturbed.

Therefore, Ms Djokosoetono sued the chief editor of *Selecta Magazine*, Syamsuddin Lubis, on the basis of Article 1365 of the Civil Code. She argued that both the defendant and the managing director of *Selecta Magazine*, Sahala R. Siregar, had been careless to the point of unlawfulness, and hence were liable for compensation of the damages the plaintiff had suffered morally and materially.

In its decision 497/1981/PN.Jak-Pst, the Central Jakarta District Court rejected the plaintiff's claim, a decision that was confirmed on appeal by the Jakarta High Court through its decision 330/1983/PT. Jakarta.[8] The plaintiff then appealed for cassation to the Supreme Court, arguing that only the Supreme Court was competent to decide on the interpretation of the term 'insult.'[9] Moreover, she added legal opinions from former Supreme Court Chairmen Wirjono Prodjodikoro and Oemar Seno Adji. The former held (1993: 104, in the Plaintiff's Cassation Note) that if a journalist publishes something for public purposes, it should not contain unnecessary or annoy-

7 According to Samsul Wahidin no private lawsuits were brought to court prior to his publication in 2006 (2006: 189).

8 Unfortunately, I have been unable to find these decisions, only the reference to them made by Agustina (2004: 44-45). Hence, I could not analyse the legal reasoning in more depth.

9 Reference is made to Supreme Court Decision 27K/Sip/1972, 5 July 1972 for supporting this position.

ing words. Seno Adji's was quoted as saying that criticisms are allowed as long they are constructive and do not amount to a '*formele belediging*' (a formal insult). This is the case if a statement is unnecessarily harsh, without considering etiquette and good manners.

The Supreme Court, in its judgment 1265 K/Pdt/1984, upheld the appeal for cassation and found that the defendant had acted in an unlawful manner. First, the Supreme Court held that the report went beyond the limits necessary to serve the 'public interest,' while hurting the feeling and reputation of the plaintiff. Second, this should be considered as defamation of the plaintiff, either as an individual or as the director of the Blue Bird Corporation, and therefore the defendant should pay a compensation of Rp. 100,000 (approximately USD 58,82 in 1984) (Agustina 2004: 45).

This judgment was clearly flawed, for several reasons. First, the judgment limited itself to the Civil Code as the relevant legal framework and failed to consider the 1967 Press Law, which stipulated in Art. 15(3):

> The chief editor must be responsible on redaction matters and has the obligation to serve the rights to reply and correction.

The plaintiff had not made use of her rights to reply and correction and therefore the case ought to have been dismissed. Furthermore, its reasoning was insufficiently clear, because the judges did not provide any criteria for assessing the limits of 'serving the public interest.'

Nonetheless, *Ms Djokosoetono v Selecta Magazine* set a new standard for press freedom, in determining that it is not allowed to include an 'unnecessary issue regarding race' in the 'assessment of an act which harms feeling, reputation and also privacy.' I have not been able to find any information about the influence of this judgment on journalists' practice, but unlike most other cases this one has actually been referred to as a precedent in at least one civil court case.[10]

6.5.1.2. PT ALM (Anugerah Langkat Makmur) v Garuda Daily (1991)

PT ALM v Garuda Daily is probably the best-known case in the history of libel suits against the press. The court arguments in this case have been often quoted, by journalists, lawyers and in later court decisions. It concerned a suit for libel under the Civil Code by the Anugerah Langkat Makmur Corporation, which had caused the removal of a school and a railway station in order to speed up its business operations. The locals had protested against these actions to the North Sumatra Parliament. According to PT ALM, this statement negatively affected the company and caused it to incur considerable losses.

10 In *Asian Agri Corporation v Tempo Magazine*.

PT ALM then filed a suit against *Garuda* before the Medan District Court. In their judgment (14/Pdt/G/1990), the judges found that the defendant had acted in an unlawful manner by defaming the plaintiff, and they ordered *Garuda* to pay a compensation of Rp. 50 million (approximately USD 25,000 in 1991). *Garuda* appealed to the High Court in Medan, but to no avail as the court confirmed the judgment in first instance (150/Pdt/1991).[11]

Garuda then appealed for cassation to the Supreme Court, arguing that the *judex facti* had wrongly applied the law because the news report had been produced in accordance with the ethical standards for journalism. The PWI (Indonesian Journalists Association) confirmed this, stating that the report could not be considered as an 'unlawful act.'

The Supreme Court upheld the appeal in its judgment 3173K/Pdt/1991. It considered that on the basis of standards of 'morals, ethics, ideals and law' under Press Law 21/1982, the legal argumentation of the original plaintiff could not be accepted. The court clarified its finding as follows. First, *Garuda* had produced its report in a context of 'openness and democracy,' implementing its function of social control to protect a group of people in Alor II Village, Sub-District of Babalan, Langkat, in the interest of the population of North Sumatra and the nation. *Garuda* had been right in not only representing the view of the government or companies, but in also making heard the voice of those suffering. The second reason was that the information published by *Garuda* was not coloured by ethnic, religious or racist feelings; it was truthful, and in accordance with moral and journalist ethics. If the original plaintiff felt that the facts were not true he should have used his right to reply, but he had failed to do so. Third, the *Garuda* journalist who had written the report had observed the standards of 'investigative reporting,' in seeking, finding, and scrutinising news sources.

The main difference between *Ms Djokosoetono (Blue Bird Taxi) v Selecta Magazine* and *PT ALM v Garuda Daily* thus concerned the reference to the right to reply in the latter case, which was absent in the former. Apart from that, the cases are not as contradictory as one may think at first sight. *Ms Djokosoetono (Blue Bird Taxi) v Selecta Magazine* provided a clear message about the 'prohibition of racism' as a limitation to press reporting. *PT ALM v Garuda Daily* is an important judgment, in being the first to take seriously 'journalist professionalism.' In this context the court referred to principles of 'morality, journalistic ethics, and truthfulness.' It also highlighted the importance of 'openness and democracy' as the proper context for evaluating the lawfulness of news reports. And thirdly, for the first time the 'right to reply,' as stipulated by Art. 15 of the Press Law, was suggested as the proper preliminary mechanism to deal with such cases. Even if not explicitly presenting the 'right to

11 Once again, I have not been able to find these decisions. Their numbers have been taken from Supreme Court Judgment 3173K/Pdt/1991.

reply' as a mandatory mechanism, the court came quite close, explaining its importance in maintaining the balance between freedom and responsibilities in reporting news in order to guarantee protection, safety, and welfare.

Anif v Garuda Daily thus introduced both new 'substantive' elements into examining libel cases as well as a procedural one and thus became a landmark case for press freedom.

6.5.1.3. Tommy Soeharto v Gatra Magazine (1998)

Just prior to Soeharto's resignation from the presidency, during the chaotic political situation in 1998, Tommy Soeharto filed a lawsuit against *Gatra Magazine* for libel. The reason was a publication by *Gatra* which exposed Tommy's involvement in drug trafficking in Australia. Tommy argued that *Gatra* had never asked him to confirm that the news was not true, and that it had tarnished his reputation.

The case was heard by the Central Jakarta District Court. In their judgment 619/PDT.G/1998/PN.JKT.PST, the judges found that *Gatra* was not at fault, for which they provided a fairly elaborate argument. First, the report was 'accurate' and did not mix up facts and opinions. The court also explicitly considered that the news had been gathered 'politely and respectfully' as stipulated in Article 10 of the Press Code of Ethics. The *Gatra* journalist moreover always informed his sources about his identity.

Second, the report was professional and balanced in the sense of Article 5 of the Press Code of Ethics. Neither did the news violate the principles of 'propriety, thoroughness, and carefulness,' even if the plaintiff had not been found guilty of drug trafficking by a criminal court. Neither was it 'insulting or sensational.' This finding was based on the testimony of expert witness, R.H. Siregar, who held that the journalist had conducted a thorough investigation and had tried to check and recheck the facts he found, even if some of his requests for interviews to confirm had been rejected.

Hence, the court found that the way of reporting was not unlawful, or constituting 'libel,' and rejected the claim for damages. Neither plaintiff nor defendant lodged an appeal. It is quite possible that Tommy decided not to appeal in view of the political uncertainty after his father had stepped down and because he was targeted as an 'enemy' of *Reformasi*.

The reasoning of the court was quite progressive in using the Press Code of Ethics as the standard for its evaluation, and thus went one step beyond *PT ALM v Garuda Daily.* We will now see whether this standard was also followed in subsequent cases.

6.5.2. Lawsuits after the Enactment of the 1999 Press Law

The enactment of the new Press Law in 1999 provided new hope for press freedom in Indonesia. As already discussed in Chapter 3, censorship, banning, and permits were no longer allowed under the law, but it remained to be seen to what extent the Press Law would also promote protection of press freedom in civil cases.

It is important to note that far more lawsuits against the press have been brought before the civil court after 1999. Furthermore, the amount of damage compensation asked in most cases is extremely high, indicating that the main objective of the lawsuit is silencing the press through fear of bankruptcy rather than trying to obtain a reasonable compensation for damage suffered.

This section addresses those libel suits that have attracted much attention from the public. Most of them were lawsuits against *Tempo.* I have selected these for two reasons, first, *Tempo* has a reputation for professionalism, and second, as the leading magazine of the country it wields considerable political influence. These two reasons combined make the cases against *Tempo* genuine test cases for press freedom more generally. In addition I will look at the notorious cases of *Soeharto v Time Inc.* to complete this overview of leading cases.

6.5.2.1. Soeharto v Time Inc. (2000)

In the early post-Soeharto years, the most astonishing civil lawsuit was the one against *Time* for its article "Soeharto Inc.: How Indonesia's Longtime Boss Built a Family Fortune" (24 May 1999, Volume 153 No. 20). It started in April 2000 and it took almost ten years before the final judgment was passed. According to the plaintiff, ex-President Soeharto, *Time* had committed tort by publishing tendentious, insinuating, and provocative statements. These included, first, the picture of Soeharto and some of his luxurious properties on the cover, second, the statement that "a staggering sum of money linked to Indonesia had been shifted from a bank in Switzerland to another in Austria, now considered a safer haven for hush-hush deposits," third, the statement: "Time has learned that $9 billion of Soeharto money was transferred from Switzerland to a nominee bank account in Austria" (pp. 16-17), and fourth, the statement: "It is very likely that none of the Soeharto companies has ever paid more than 10% of its real tax obligation" (p. 19). According to the plaintiff this would constitute a violation of Articles 1365 (tort) and 1372 (insult) of the Civil Code and therefore he filed a claim at the Central Jakarta District Court.[12]

12 Soeharto also reported *Time* to the police for violating Article 310 of the Penal Code, concerning insult. This case was discussed in Chapter 5.

The district court rejected all of the plaintiff's arguments. The judges ignored the Press Law and argued that for the applicability of Article 1372, Article 1373 refers to Article 314 of the Penal Code. They interpreted this provision as requiring that such violation should be established first in a criminal procedure. While there is no legal basis for such an argument, the judges then returned to the right track when they themselves continued to assess whether the facts of the case transgressed the norms stipulated in the Penal Code. They found this not to be the case. Thus, the cover of *Time*, with the drawing of Soeharto 'hugging' luxurious houses, as well as *Time*'s statements mentioned above did not fulfil the criteria for being considered 'insult.' *Time* had been sufficiently cautious in gathering its information, and when it asked Soeharto and his family for an interview to verify their data the request was declined.

Furthermore, the judges denied that *Time* had acted in a tortuous manner by stating that Soeharto's companies never paid more than 10 percent of what they were due, since *Time* explicitly based this information on an interview with Teten Masduki, a leading anti-corruption activist. A lawsuit on this issue should therefore address Masduki, not *Time*.

Finally, and perhaps most fundamentally, the judges held that the *Time* report clearly intended to serve the 'public interest.' Referring to People's Consultative Assembly Decree XI/MPR/1998 on State Governance that is Clean and Free from Corruption, Collusion and Nepotism, *Time*'s report was written out of concern about the misuse of power, corruption, collusion and nepotism and hence serving the public interest.

This judgment was confirmed by the Jakarta High Court. The plaintiff then filed for cassation to the Supreme Court. It took the Supreme Court some six years to produce an altogether different judgment (3215K/Pdt/2001), which it issued on 30 August 2007. The Supreme Court overturned the appellate court's judgment on several grounds. First, the judges held that the lower courts had not considered whether *Time*'s report had violated the principles of propriety, thoroughness, and care as criteria under Article 1365 of the Civil Code. Second, the lower court looked at liability under Article 1365 only, whereas the defendant had referred to Article 15 of the Press Law – which according to the Supreme Court only related to criminal and administrative liability. Third, the judges accepted the plaintiff's denial that the sources of the contested news report had already been published before, either in Indonesia or abroad, and therefore the defendant should have heeded the warning of the plaintiff. This in itself, according to the Supreme Court, was already sufficient to meet the 'objective' criteria of unlawfulness – the principles of propriety, thoroughness, and care mentioned above. Therefore, *Time*'s news report was unlawful; an insult to a retired military general and former president, and a clear basis for a claim in material and immaterial damages.

The judges decided to award part of the claim, ordering the defendants to apologise to the plaintiff for their news report in the following newspapers and magazines: *Kompas*, *Suara Pembaruan*, *Tempo Magazine*, *Forum Keadilan*, *Gatra*, *Gamma*, and *Sinar*, in three consecutive editions. Furthermore, the defendant was ordered to pay compensation to the plaintiff amounting to Rp. 1 trillion (approximately USD 100 million).[13]

This ruling caused a huge shock, both within Indonesia and internationally. NGO *LBH Pers* initiated a so-called 'public examination' in which it voiced serious criticism against the Supreme Court's judgment (Wicaksono 2008). Many newspapers offered similar criticism,[14] as did other NGOs through press releases. The international NGO CPJ (Committee to Protect Journalists) condemned the ruling, and many lawyers, media, and journalist organisations contributed to a brief to the Supreme Court (as *amicus curiae*) to support a review (*peninjauan kembali*) of the cassation judgment.[15]

Looking at the legal arguments used by the Supreme Court, one cannot escape the conclusion that this judgment was informed by political rather than legal considerations. Before this judgment was passed, the Supreme Court had already ruled several times in similar cases that the court should have prioritised the Press Law mechanism over a lawsuit on the basis of the Civil Code.[16] The court also failed to pay attention to the 'public interest' as something that must always be taken into account in press cases according to Article 1376 of the Civil Code. And perhaps worst of all, the decision did not consider what the lower courts had established about the facts of the case. The Supreme Court acted as if the accuracy of the facts of the report and how this had been established were not important at all, whereas in fact the court was bound by the findings of the lower courts in this matter. Fifth, the judgment provided no reasons at all for determining the nature and amount of the damage the plaintiff would have suffered.

Two of the judges who examined *Soeharto v. Time*, Muhammad Taufiq and Bahauddin Quadri, had been clients of the lawyers for Soeharto – Indriyanto Seno Adji, Felix Tampubolon, O.C. Kaligis and Denny Kailimang – in a

13 The council of judges consisted of German Hoediarto, Muhammad Taufik, and Bahauddin Qaudry.

14 Atmakusumah Asraatmaja, "HAM dan Perkara Time" [Human Rights and the Time Case], *Kompas*, 13/9/2007; Nono Anwar Makarim, "Satu Lagi Saga Diskriminasi" [Another Story of Discrimination], *Kompas*, 26/9/2007, and Satjipto Rahardjo, "Apakah Pengadilan Itu" {What Kind of Court is This?], *Kompas*, 24/9/2007.

15 It was drafted and sent by 26 organisations from various countries. See: Mahkamah Agung Republik Indonesia: H.M. Soeharto melawan Time Inc, et al.: "Pernyataan Para Teman untuk Mendukung Permohonan Peninjauan Kembali'" [The Opinion of Friends to Support the Request for Review]. See: International Bar Association, "H.M. Suharto," www.ibanet.org (retrieved on 12 March 2014).

16 These cases will be discussed below.

case where they acted as plaintiffs when they appealed to the Constitutional Court for a constitutional review of Law 22/2004 on the Judicial Commission (Constitutional Court judgment 005/PUU-IV/2006). Hence, a conflict of interest on the part of the judges was quite possible.

Time indeed appealed for review to the Supreme Court, and eventually, on 16 April 2009, the Supreme Court reversed its own decision in 273 PK/PDT/2008.[17] The judges on the review panel agreed to virtually all the points of criticism voiced in reaction to the cassation judgment: the *Time* report should be considered in the light of the public interest, the authors had acted according to the Press Code of Ethics and had no intention of insulting the plaintiff; the report should be seen as a manifestation of the function of social control to protect state ownership and national interest; the cassation judgment had disregarded the Press Law, especially its provisions regarding the importance of the public interest, as well as failed to take into account the requirement to look at both sides of a dispute and the right to reply. Soeharto had not attempted to exercise his right to reply before taking the case to court and *Time* had moreover already published Soeharto's lawyer's statement regarding the report in the same edition – as had indeed been recognised by the district court and the court of appeal. Finally, *Time*'s report was an effort to realise MPR Decree XI/MPR/1998, 13 November 1998, concerning efforts against corruption, collusion, and nepotism.

While the cassation judgment was the Supreme Court at its worst, the review was the opposite: in a clear and well-reasoned judgment the Supreme Court applied all the relevant criteria based on the new Press Law, the Civil Code and legal precedents that had been established in the meantime. This judgment has created more space for press freedom in Indonesia by adopting the Press Code of Ethics and the Press Law as basic rules for determining this space. The AJI was exhilarated, praising the 'laudable argumentation' to recognise the Press Code of Ethics as a yardstick for lawfulness and putting beyond any doubt the primacy of the 'right to reply' prior to court examination.[18]

6.5.2.2. Tomy Winata v Tempo (2003)

This heading covers four rather than a single court case in a strategic series of attacks on the press. It concerned four separate civil lawsuits filed by notorious business tycoon Tomy Winata, who has made a fortune in gam-

17 The judges' panel for the review of the cassation judgment in *Soeharto v. Time Inc.* consisted of Supreme Court Chair Harifin A. Tumpa, Hakim Nyak Pa,, and Hatta Ali.

18 "Pernyataan AJI Indonesia Mengenai Pengabulan PK Majalah Time v. Soeharto: Penegak Hukum Harus Perhatikan Hak Jawab" [AJI Statement on Acceding the Judicial Review, Soeharto v. Time: Law Enforcer Must Pay Attention to Right To Reply], *Press Release*, 17 April 2009.

bling and other illicit activities.[19] There are two main reasons why this case drew so much attention, even internationally, apart from the fact that *Tempo* – as we have seen – is the main protagonist of investigative and critical journalism in Indonesia. First, Tomy not only used 'legal violence' against *Tempo*, but also organised an attack by thugs against the *Tempo* office in Jakarta. Second, there were strong suspicions that Tomy connived with the police to prevent serious investigations against those committing the attack,[20] and in administrating the criminal prosecution of *Tempo*'s Chief Editor Bambang Harymurti.[21]

Tomy's intention to silence *Tempo* by all means, rather than by following a straight legal avenue, was already demonstrated by his not using the 'right to reply' mechanism. The table below presents an overview of the cases:[22]

19 In addition Tomy Winata is the owner of numerous companies, such as banks and hotels.
20 "Sangat disesalkan, Polisi Cuma diam saat Wartawan Tempo dipukul" [Very Distressing, Police Remained Quiet While *Tempo* Journalists were Beaten], *Kompas*, 13/3/2003.
21 This case was discussed in Chapter 5.
22 The table is adapted from Gasma (ed.) (2005: 21-23), and updated by the writer.

Table 10: Overview of Cases after 1999 Press Law Enactment

No.	Defendant	Article	Legal Case Summary	Court Decision
01	• Tempo Inti Media Harian (IMH) • Bambang Harymurti (Editor) • Dedy Kurniawan (Journalist)	Article 1365 and 1372 of Civil Code Article 6 and 5 (1) of Press Law	*Tempo IMH* was sued for an 'insulting statement' in edition No. 6 February 2003, with the title, "Governor Ali Mazi Denies TW Opening a Gambling Business." It concerned a report alluding to Tomy Winata (TW)'s role in an investment into a gambling business in Southeast Sulawesi. TW brought the case on 5 June 2003 and demanded compensation for material damages of Rp. 1 billion and for immaterial damages of US$ 2 million.	The South Jakarta District Court accepted part of the plaintiff's claim and ordered *Tempo* to pay immaterial compensation of US$ 1 million and to pay a daily fine of Rp. 10 million in case of non-compliance (20 January 2004). The court moreover ordered *Tempo* to apologise through eight newspapers and 12 television stations. This judgment was overturned on appeal and the appellate judgment was upheld in cassation.
02	• Goenawan Muhammad (GM) • Tempo Inti Media Inc.	Article 1365, 1372 of Civil Code	TW sued GM for his insulting statement in *Tempo*, 12 March 2003, that "[…] the state must not fall into the hands of gangster." TW brought the case on 18 August 2003 and asked compensation for material damages of Rp. 1 billion and immaterial damages of Rp. 20 billion, as well as demanding that GM and *Tempo* apologise through a range of newspapers and television channels.[22]	The East Jakarta District Court awarded part of TW's claims, ordering GM to apologise to TW through two national newspapers, with a daily fine of Rp. 10 million in case of non-compliance. In 2009, GM and TW made agreement to end their dispute.[23]

23 They included *Kompas, Republika, Suara pembaruan, Sinar Harapan, Suara Karya, Bisnis Indonesia, Asian Wall Street Journal, Herald Tribune, Gatra, Forum Keadilan, Gamma, Trust, Investasi, Warta Bisnis, Pilar, Time and television channels TVRI, TPI, RCTI, SCTV, ANTV, Indoesia, Metro TV, Trans TV, Trans 7, Lativi, CNN, CNBC,* and *BBC*. All of this on front pages or during prime time.

24 This agreement has been made after the Supreme Court on 12 August 2009 decided to refuse GM's cassation and ordered GM and Tempo to apologize through several medias. See: "Tempo dan Tomy Winata Berdamai**,"** *Tempo***, 6 October 2009,** http://www.tempo.co/read/news/2009/10/06/063201199/Tempo-dan-Tomy-Winata-Berdamai (retrieved on 24 March 2014).

No.	Defendant	Article	Legal Case Summary	Court Decision
03	• Tempo Inti Media Inc. • Zulkifly Lubis • Bambang Harymurti • Fikri Jufri • Toriq Hadad • Ahmad Taufik • Bernarda Rurit • Cahyo Junaedy	Article 1365 and 1372 of Civil Code Article 5 (1) and 6 (c) of Press Law	TW sued *Tempo* for its report "Is Tomy in Tenabang?", which he labelled as insult and defamation. The report suggested that TW had applied for market renovation just before the market concerned was destroyed by a fire. TW brought the case to court on 5 June 2003, demanding material damage compensation of Rp. 100 billion and immaterial damage compensation of Rp. 100 billion.	The Central Jakarta District Court awarded part of the claim, on 18 March 2004. The court ordered *Tempo* to pay Rp. 500 million in compensation, and to repeal the news. The court also ordered *Tempo* to express its regret through several newspapers for three consecutive days, and to pay a daily fine of Rp. 300 thousand in case of non-compliance This judgment was overturned on appeal and the appellate judgment was upheld in cassation.
04	• Tempo Inti Media Inc. • Ahmad Taufik	Article 1365, 1372 of Civil Code	TW brought a claim against Ahmad Taufik and *Tempo IMI* for slander and insult, concerning the former's statement that TW must have been responsible for the attack against the *Tempo* office by Artha Graha's thugs. TW brought the case to court on 5 June 2003, and asked material damage compensation amounting to Rp. 40 billion and immaterial damage compensation of Rp. 80 billion.	The Central Jakarta District Court dismissed the case (*niet ontvankelijk*) for lack of witnesses.

The next section discusses two of these cases which led to a Supreme Court judgment.

6.5.2.3. Tomy Winata v Tempo IMH, Bambang Harymurti and Dedy Kurniawan

The immediate reason for this case was *Koran Tempo*'s news report of 6 February 2003, which suggested that TW was involved in opening a gambling business in Southeast Sulawesi. TW brought the case to the South Jakarta District Court on 5 June 2003. According to TW's lawyer the report contained misinformation, was inaccurate, and not true. *Koran Tempo* was accused of

failing to recheck the information it had obtained and of not confirming the case with TW. This would be a violation of Articles 1365 and 1372 of the Civil Code, since the report tainted the reputation of the plaintiff. According to the plaintiff this was moreover in violation of Article 5(1) and (6) of the Press Law.[25] In addition to the claims referred to in the above Table the plaintiff demanded the court to seize *Tempo IMI*'s properties.

According to the defendants the case ought to be dismissed because it was brought prematurely (*prematuur exceptie*), for the plaintiff ought to have followed the Press Law mechanism for such matters. Second, the claim was unclear (*exceptie obscurum libellum*) because it mixed up the Press Law and the Civil Code. Third, it made no sense that the plaintiff only addressed the defendants (*exceptie iurium litis consortium*), for the same news had also been published by other newspapers or magazines – according to Supreme Court precedent 151 K/Sip/1972 including these in the case is obligatory. Fourth, the lawsuit was wrongly addressed (*exceptie error in persona*), because among those publishing this news *Tempo* had not been the first.

On 20 January 2004 the South Jakarta District Court passed its ruling. The judges refused all of the defendant's arguments, stating that *Tempo*'s news report had been 'defamatory and insulting' and thus a tortuous act. The defendant was to publish an apology and pay a substantial sum of damage compensation (see above Table). The court took no account of the Press Law, nor did it offer a clear explanation for why it considered the report 'defamatory and insulting.' Its judgment was moreover in contravention of the applicable legal precedent on the use of 'right to reply' as set by *PT ALM v Garuda Daily* (from 1991, so before the 1999 Press Law was enacted).

Hence it is unsurprising that this judgment was overturned on appeal, a decision that was confirmed upon cassation. The Jakarta High Court refused all arguments by TW (358/Pdt/2004). However, because the appellate judges failed to take into full consideration the prevalence of the Press Law mechanism, not only TW applied for cassation but *Tempo* as well. In their ruling Supreme Court Judges Bagir Manan, Djoko Sarwoko and Atja Sonjaja awarded the claim by *Tempo* and put beyond any doubt that the 'right to reply' and 'right to correction' as regulated in the Press Law must be followed before one can bring a claim to court. Not using them distorts the balance between the obligation to guarantee and protect press freedom and

25 Article 5(1): The national press has the obligation to report events and opinions with respect for religious norms and moral norms of the public, as well as for the presumption of innocence. Article 6: The national press must: a. fulfill the public's right to know; b. enforce democratic basic principles, promote the embodiment of supremacy of law and human rights, while at the same time respecting diversity; c. develop the public opinion based upon factual, accurate and valid information; d. conduct control of, provide criticism against, corrections of, and suggestions regarding any public concern; e. fight for justice and truth.

the obligation to protect individuals (931 K/PDT/2005). As we have seen, this argument was later confirmed in *Soeharto v. Time*. In fact, the judgment did not come as a surprise, because the Supreme Court argued the same in the other case by TW against *Tempo,* which I will now discuss (it was taken to the district court later, but eventually decided earlier).

6.5.2.4. Tomy Winata v Tempo IMI et al.

This case received more attention than the previous one because it also involved violence and terror against journalist and editors. The suit followed the news report in *Tempo Magazine* (edition 3-9 March 2003, page 30-31) that mentioned TW had applied for a market renovation in Tanah Abang (Tenabang) just before the market was destroyed by a fire. TW took issue with the suggestion that he would have been involved in arson. Such a suggestion was not made explicitly, but the facts mentioned by *Tempo* clearly pointed in that direction and according to TW caused unfounded suspicion and reflected negatively upon him. According to TW the report was tendentious, insinuating, and provocative.

In his claim to the Central Jakarta District Court TW argued that *Tempo* had violated Articles 1365 and 1372 of the Civil Code, as well as Articles 5(1) and 6(c) of the Press Law. The defendants relied on basically the same arguments as in *Tomy Winata v Tempo IMH, Bambang Harymurti and Dedy Kurniawan*, which was not surprising since they were so close in time. First, they stated that the lawsuit was too early because the plaintiff had not applied the Press Law's mechanism of right to reply, second, that the plaintiff mixed up the Press Law and the Civil Code, and third, that the plaintiff should have addressed other parties who had published this news prior to *Tempo*. Moreover, the plaintiff did not address the responsible editor T. Iskandar Ali, as well as journalists Julihantoro and Wahyu Muryadi, who had been more involved than others who did appear on the list of defendants. The defendants added a counter claim (*rekonvensi*) for the material and immaterial damages they had suffered as a consequence of the mob attack by TW's thugs against the *Tempo* office and its employees, on the basis of Articles 1365 and 1367[26] of the Civil Code. Altogether *Tempo* claimed Rp. 200 billion and asked the court to pass an injunction ordering TW to apologise through newspapers, electronic media and magazines.

In its judgment 233/Pdt.G/2003/PN.Jkt.Pst, passed on 18 March 2004, the judges rejected all of the defendants' objections and accepted part of the plaintiff's claim. Just as in the other case involving TW and *Tempo*, without any serious supporting arguments the court held the defendants' actions to

26 Article 1367 of the Civil Code relates to the scope of liability, stipulating that: "Someone is not only liable for damage caused by himself, but also for damage caused by people who act under his responsibility or caused by things which are in his control."

be unlawful. It ordered *Tempo* to revoke its report and to express its regret through the newspapers *Media Indonesia*, *Warta Kota* and *Tempo* newspaper for three consecutive days, and half a page in *Tempo Magazine* – so not as excessively as had been demanded by the plaintiff. As already stated in the Table above, the judges awarded Rp. 500 million in immaterial damage compensation and a daily fine of Rp. 300,000 in case of non-compliance. Evidently, they rejected all of the defendants' counterclaims. The judgment was quite similar to the one passed by the South Jakarta District Court in deciding *Tomy Winata v Tempo IMH, Bambang Harymurti and Dedy Kurniawan*.

However, just like in that case the district court's judgment was reversed on appeal. In its judgment 314/Pdt/2004/PT.DKI dated 3 September 2004, the Jakarta High Court rejected the plaintiff's claim, but – again – just as in the earlier case, it did not rely on the Press Law. Neither did the court award the defendants' counterclaims. This time *Tempo et al.* did not file for cassation, but TW did. In its judgment 903K/Pdt/2005, the Supreme Court followed the basic argument of the High Court, but added several considerations of its own:[27]

> First, the cassation memorandum is unjustified, because the High Court as *judex facti* has not wrongly implemented the law and not gone beyond its jurisdiction. The press has the freedom to seek and impart information in order to fulfil needs for and rights to access information. In implementing its function, rights, obligations and role, besides respecting the human rights of individuals, the press must be professional, so then the public at large can control the press.
> Second, in order to develop checks and balances, the Press Law has provided such a mechanism. Public control refers to the guarantee of the 'right to reply' and the 'right to correction' by watching the media and by the Press Council through various forms and ways. This mechanism is aimed to give equal protection to press freedom on the one hand, and the individual and public interest on the other hand.
> Third, the 'right to reply' mechanism, 'right to reply' obligation and 'right to correction' are procedural aspects which must be passed through, before the press is required to account for its criminal/civil law liability, in the case of unlawful acts.
> Fourth, press freedom is one of the fundamental principles guaranteed by the 1945 Constitution and the Indonesian constitutional system, therefore it must be protected and guaranteed. However, it must be admitted that there is news which may cause suffering to individuals or groups in society, so then they need a procedure to protect their interests. Therefore, there must be order to guarantee the balance between the principle of press freedom and the individual's or group's interest. In order to create such a balance, there is a 'special relation' between the press and the individual and a group in society.
> Fifth, the 'special relation' to guarantee press freedom and the individual interest, is regulated in the special mechanism to determine the relation between press and individual or group. Universally, in democratic states which guarantee press freedom and the rights of the individual/group have a right to reply for individuals or groups who are disadvantaged by the press through the available press institution (in this regard, the Press Council). Thus, the 'right to reply' and the resolution through a press institution is the principle (not only the mechanism) which constitutes the balance between the press and the individual or group. As a principle, the use of the 'right to reply' through a press institution is the 'gate which cannot be denied or passed, but must be applied before engaging in other efforts, if not, it would deny the principle of a balance between the obligation to guarantee and protect press freedom and the obligation to protect individual and group rights.

27 Supreme Court Decision 903K/Pdt/2005, pp. 82-83.

The judges also rejected TW's objection against the use of the words '*konon*' (reputedly) and '*pemulung*' (scavenger) in *Tempo*'s news. The word '*konon*' was used to indicate that it is an opinion held by others, so *Tempo* was right to qualify the statement in this manner. The word '*pemulung*,' according to the Supreme Court, is actually neutral and not necessarily degrading. In fact, considering it as degrading would be humiliating to all those who are working as '*pemulung*.' The Supreme Court thus rejected TW's claim for cassation, a judgment passed on 9 February 2006 by Judges Bagir Manan, Djoko Sarwono and Atja Sondjaja.

This Supreme Court decision has further contributed to the importance of the press law mechanism. The right to reply and resolution through the Press Council have to be applied first before such a case can be taken to court. This promotes a balance between the obligation to guarantee and protect press freedom on the one hand and the obligation to protect individual and group rights on the other.

Nonetheless, these cases also show that lawfully criticising the rich and powerful is not easy. The press must be extremely careful in its investigations and write down the results in a very professional manner, paying full attention to the Press Code of Ethics. If not, it may be subjected to a civil lawsuit. The first instance judgments in the cases above moreover indicate that the lower courts – for whatever reasons – tend to side with the plaintiff in such cases.[28] Fortunately, in the end the appellate court and the Supreme Court have provided clear guidelines on this matter, which, if followed, should make it much more difficult for the first instance courts to award such unjustified claims. Hence, in the end these cases represent an important victory for press freedom.

6.5.2.4. PPM v Bambang Harymurti, Ahmad Taufik, and Leonardi Kusen (2003)

Another series of attacks against the press through the civil courts followed in the same year. In the first one *Tempo* was once again the target, but this time it was the *Pemuda Panca Marga* (*PPM*, a paramilitary organisation) which brought the case to court. The case followed a report by *Tempo* about *PPM*'s involvement in an attack on the office of the Commission for Disappearances and Victims of Violence (*KontraS*) in Jakarta, on 27 May 2003. They said to be looking for *KontraS* co-ordinator Munir, who they claimed to have 'destroyed the country' by opposing military operations in Aceh. However, Munir was not at the office at that time and the group decided that the best thing to do was to vandalise the office. The attackers then moved to the

28 International organisations also addressed the matter. Press freedom protagonist Article 19 said that this 'unjustifiable and exceptional action against a leading magazine sends a clear signal that criticism of the rich and powerful will not be tolerated' ("Indonesian Magazine Guilty of Defamation," *Article 19: Press Release*, 19 March 2004).

PBHI (Indonesian Human Rights and Legal Aid Association) office to look for Hendardi, another activist opposed to military operations in Aceh. At the *PBHI* office, however, the group apparently ran out of steam and they did not cause any further damage.

These actions were widely discussed in public and covered by many news media. *KontraS* activists suspected military involvement in the attacks. Activist/priest Romo Sandyawan in a press release said that "it is clear who the people were who committed this violence. Their address is also clear. They have a secretariat at Kodim (Makodim Kemayoran 0501, or Military Office at District Level) [..]."[29]

Tempo magazine reported about these events on 8 June 2003 under the title "If Private Soldiers Act" [*Kalau Tentara Swasta Bergerak*]. *PPM* took issue with this report for using the words '*gerombolan*' (gang) and '*keluarga bekas tentara*' (ex-soldiers' family), which they claimed discredited their organisation. They brought a claim before the Central Jakarta District Court against Bambang Harymurti (chief editor of *Tempo*), Ahmad Taufik (the journalist who wrote the report) and Leonardi Kusen (director of *Tempo Inti Media Inc*.). Judges Mulyani, Agus Subroto and H. Hamid started examining the case on 11 August 2004. During one of the court sessions expert witness on journalism, Abdullah Alamudi, testified before the court that,

> the title "If Private Soldiers Act" fulfils the requirements of a news title. The use of the word "private soldier" is appropriate, because it uses quotation marks. The reason is that the group of people coming to the *KontraS* office were wearing camouflage/military uniforms [..]. From a journalist point of view, the use of such a title is relevant to describe the incident. If then those concerned feel discredited by such news, they must use their right to reply as stipulated under the Press Law.

Unlike in the earlier cases against *Tempo* the judges in their judgment (502/Pdt.G/2003/PN. Jkt.Pst) rejected the plaintiff's claim, which they held to be 'excessive, obscure, and unclear.' They argued that the plaintiff did not detail why the acts of each individual defendant could be qualified as unlawful. The plaintiff had moreover argued that the defendants had violated Article 1365 *juncto* 1372 of the Civil Code. The court accepted the defendant's argument that these articles, 1365 about tort and 1372 about insult, could not be combined. These articles furthermore only allow for compensation, while the plaintiff also asked the court to revoke *Tempo*'s permit and to halt its operations for two years. In addition, the plaintiff asked the defendant to apologise as deemed fit by the plaintiff. This combination of claims was considered 'ambiguous.' In fact, the judges argued, the plaintiff tried to use the court in order to ban *Tempo*, an authority the court does not have. Revoking a non-existing permit (such a permit was abolished by the 1999

29 "*Kantor Kontras Diserang Massa*" [Kontras Office Attacked by Mob], *Suara Merdeka Daily*, 28/5/2003.

Press Law) made no sense either. On these grounds the court dismissed the case (*niet ontvankelijk verklaard*).

The court could actually have relied on the Press Law mechanism to obtain the same result, but then the Supreme Court had not yet passed judgment in the other *Tempo* cases discussed above. However, the court provided a few interesting arguments. First, in claiming damage compensation, the plaintiff must prove how the contested news report has caused damage to the plaintiff. Second, Articles 1365 and 1372 cannot be mixed up, but must be deployed separately, requiring different elements, as they serve different purposes.

6.5.2.5. PT RAPP v Tempo and S. Malela Mahargasarie (2007)

This case and the next one were brought during the second term of Susilo Bambang Yudhoyono (SBY). Both concerned harm that had allegedly been inflicted on the SBY bureaucracy. The first one involved three reports by *Tempo Magazine* about the involvement of several high ranking government and police officials in illegal operations by the pulp and paper business in Riau. Riau Andalan Pulp and Paper, Inc. (PT RAPP) filed a lawsuit against *Tempo* and *Tempo Magazine*'s chief editor S. Malela Mahargasarie at the South Jakarta District Court, on 16 August 2007, for inaccuracy in reporting, violating the presumption of innocence, judgmental argumentation, spreading false information and tarnishing the reputation of PT RAPP. This would be in violation of the Press Code of Ethics.[30]

In fact the news about PT RAPP had already been reported by other media and had also been disseminated by the Indonesian Anti-Deforestation Committee.[31] Nonetheless, according to PT RAPP *Tempo* had committed a violation against the Press Law and Article 1365 *juncto* 1372 of the Civil Code.[32] PT RAPP demanded that the court would state that the defendant had committed a tortuous act, creating losses for the plaintiff and degrading its reputation. By way of fulfilling the 'right to correction' and 'right to reply' the defendant should publish an apology to the plaintiff and the readers of *Tempo*

30 The news reports were the following: "*Pertikaian Menteri Ka'ban dengan Polisi Memanas*" [The Clash between Minister Ka'ban versus the Police Heats Up], *Tempo Magazine* 2181/VII/6 July 2007; "*Polisi Bidik Sukanto Tanoto*" [The Police Targets Sukanto Tanoto], *Tempo Magazine* 2187/VII/12 July 2007, and "*Kasus Pembalakan Liar di Riau, Lima Bupati Diduga Terlibat*" [Illegal Logging Cases in Riau, Five Regents Allegedly Involved], *Tempo Magazine* 2188/VII/13 July 2007.

31 The Indonesian Anti-Deforestation Committee (*Komite Anti-Perusakan Hutan Indonesia*), included Aliansi Buruh Menggugat, AJI Jakarta, Walhi, Sahabat Walhi, Sawit Watch, LS-ADI, HUMA, ICEL, PBHI, Sarekat Hijau Indonesia, dan LBH Pers.

32 Interestingly, one of the lawyers representing RAPP was Hinca Panjaitan, who used to be a Press Council member (Tim LBH Pers, 2010: 213). He therefore must have understood that he ought to have referred his client to the Press Council instead of to the civil court.

Magazine, express its regret and withdraw the report in the first full page of *Tempo Magazine*. The substance of this apology would be determined by the plaintiff. Further, the court was asked to declare sequestration of the defendant's property, as well as to order immediate execution of this judgment.

The demand to implement' the 'right to reply' and 'right to correction' in this manner was a novel type of claim. The substance of the press law mechanism remained undisputed, but PT RAPP brought its claim before the civil court instead of submitting a complaint to the Press Council. In fact, originally the plaintiff did follow the Press Law procedure, for he had immediately sent a letter to *Tempo* in which he demanded that *Tempo Magazine* publish a reply and a correction. However, for some reason PT RAPP decided to subsequently sidestep the procedure. *Tempo* only followed the demand for publishing a reply after it was summoned to appear in court and did this in a small column in *Tempo Newspaper* only.

In its defences *Tempo* partly relied on this column, arguing that it had already fulfilled the requirement to publish a reply and a correction.[33] Second, it argued that the court could not examine the case under the Press Code because this is a professional and not a legal norm. Only the Press Council, as a professional association, holds this authority, as stipulated under Article 15(2) of the Press Law. Furthermore, *Tempo* argued that the lawsuit was 'premature' because the plaintiff had not first taken the case to the Press Council. It would also be 'premature' because there was no executable criminal judgment about insult yet. The defence continued that the claim was unclear and obscure because it confounded the accountability of the first (*Tempo Inti Media Harian Inc*.) and the second defendant (chief editor S. Malela Mahargasarie). It moreover combined Articles 1365 and 1372 of the Civil Code, which is not allowed. Finally, the news had already been reported by other media as well, and these should have been included in the lawsuit.

Substantively, *Tempo* argued that the report was written in serving the public interest and that it complied with the standards of careful reporting. *Tempo* had checked the facts with the Riau Police, which had confirmed that in order to supply raw materials PT RAPP was suspected of illegal logging in the Riau forest.[34] The defendant also submitted a counterclaim, demanding that the court would stipulate that the lawsuit was a violation of press freedom and therefore a tortuous act itself.

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33 The correction had been published in *Tempo Newspaper* 2202, 27 July 2007 and 2208, 2 August 2007.

34 "Hakim Diminta Tolak Gugatan RAPP terhadap Koran Tempo" [Judge Asked to Refuse Claim of RAPP against Tempo Newspaper], *Tempo Interaktif*, 3 July 2008. <http://www.tempo.co.id/hg/nasional/2008/07/03/brk,20080703-127375,id.html> (retrieved on 24 December 2011).

In their judgment of 3 July 2008 (1089/Pdt.G/2007/PN.Jkt.Sel), the judges rejected all of the defences. They argued that the court had the authority to examine the lawfulness of the report on the basis of the Civil Code. In regard to the combination of Articles 1365 and 1372 the court held that 1365 could be used as a separate basis and that therefore this combination was not barring the proceeding of the case. As regards the alleged mixing up of the defendants, the court said that this would be taken into account in discussing the substance of the case.

According to the judges, the fundamental issue was the implementation of the 'right to reply' and the 'right to correction.' According to Articles 1(11), 5(2) and 5(3) of the Press Law,[35] so the judgment said, it is the obligation of the press to serve the 'right to reply' or 'right to correction.' How this should be done is not further elaborated in the Press Law and therefore the judges quoted the statement of Widyatmoko Kukuh Sanyoto, expert for the plaintiff, who had explained that the 'right to reply' aims to create a balance between press and public. According to Widyatmoko, if the use of the right to reply does not lead to a satisfactory result, the aggrieved party can take the case to court.

Because the correspondence between the parties had never led to an agreement about the reply and the correction, the judges concluded that the right to reply had not been implemented. The defendant had only made an erratum to the wording and the data, which according to the plaintiff was insufficient. Hence, the court found that the defendant had not served the plaintiff's 'right to reply,' which is unlawful according to Article 5(2) of Press Law. The plaintiff had moreover suffered material and immaterial losses as a consequence of the defendant's publication, which had harmed the plaintiff's reputation. This was enough to fulfil the elements of Article 1365 of the Civil Code and the court ordered the defendant to pay compensation and apologise to the plaintiff in the manner demanded by the plaintiff, as well as through other media.[36] The only slightly positive note for the defendant was the finding of the court that

Article 180 HIR *juncto* SEMA No. 3 of 2000 and SEMA No. 4 of 2001 prevented immediate execution. Obviously, the court rejected the counterclaim, by the notable argument that the Press Law did not strictly demand that such a case would be taken to the Press Council first.

35 Article 1(11): The 'right to reply' is the right of an individual or group to respond to or deny any news facts that are unfavourable for his or her good reputation. Article 5(2): The press has the obligation to serve the right to reply.

36 Magazines included *Tempo, Forum Keadilan, Gatra*, and *Trust*. Newspapers included *Kompas, Suara Pembaruan, Media Indonesia, Riau Pos, The Jakarta Post, Bisnis Indonesia*, and *Investor Daily.* Electronic media included *RCTI, SCTV, Metro TV, Trans TV,* and *Riau TV.*

It will be obvious that this judgment completely disregarded the case law developed on this matter by the Supreme Court in 903K/Pdt/2005 and 931 K/PDT/2005. These judgments clearly stipulate the precedence of the Press Council procedure over a tort suit. Moreover, the South Jakarta District Court did not even consider the substance of the news and whether standards of proper reporting had been observed or not. In fact, the court should leave this to the Press Council, which has the expertise and legal authority for this, but if the court denies the precedence of the Press Council procedure it should at least look into this matter. Now the court found that, no matter what are the facts of the case, the press must obey the wishes of the aggrieved party.

Tempo appealed to the Jakarta High Court on 31 August 2009, and fortunately Judges Parwoto Wignjosumarto, Jurnalis Amrad and I Putu Widnya demonstrated more legal sense. The court found that the reply and correction mechanisms had been used as intended by the Press Law. The question whether this had been performed properly, they argued, had been wrongly answered by the first instance court. Moreover, this question was not to be answered by the court but by the Press Council, as stated in Article 15(1) and (2) of the Press Law. Press Council Regulation 9/Peraturan-DP/X/2008 about Guidance on the Right to Reply provides the standards for assessing whether reply and correction have been performed in a satisfactory manner. This was also in line with the requirement that parties should always try mediation before taking a case to court. On this basis the judgment from the South Jakarta District Court was quashed.

Although the High Court decision did not quote explicitly from the Supreme Court precedents, it used the same arguments. While in the end *Tempo* was put in the right, this case does show how continuously wrong interpretation of the Press Law by the first instance court, caused by paying no attention to legal precedent, creates a serious burden for the press. It then needs to spend time, energy and money on defending itself in court. This allows parties to use court procedure as a form of harassment, ultimately undermining press freedom in Indonesia.

6.5.2.6. Asian Agri v Tempo (2008)

The case of *Asian Agri v Tempo* was similar to *PT RAPP v Tempo*, again with the performance of the right to reply as the main issue. In an article with the title "*Akrobat Pajak*" (Tax Acrobats) *Tempo* reported about suspicions of tax fraud against the Asian Agro Abadi Group[37] (Asian Agri). On the cover

37 The Asian Agri Group refers to Asian Agro Abadi Inc., which consists of Inti Indosawit Subur Inc.; Rigunas Agri Utama Inc.; Raja Garuda Mas Sejati Inc.; Gunung Melayu Inc.; Supra Matra Abadi Inc.; Indo Sepadan Jaya Inc.;Rantau Sinar Karsa Inc.; Andalas Inti Agro Lestari Inc.; Mitra Unggul Perkasa Inc.; Tunggal Yunus Estate Inc.; Dasa Anugerah Sejati Inc.; Saudara Sejati Luhur Inc.;Nusa Pusaka Kencana Inc.

Asian Agri owner Sukanto Tanoto was depicted as a somersaulting acrobat.[38] According to Asian Agri, *Tempo*'s report fell short of the standards of accuracy and covering both sides, and had not properly served its obligation to allow Asian Agri to reply. Therefore, on 14 January 2008 Asian Agri brought a claim against *Tempo* for violation of Articles 1365 and 1372 of the Civil Code. *Tempo* basically used the same defences as in *PT RAPP v Tempo*, with the central defence that the case should have been first brought before the Press Council.

Just as in previous cases, the court in first instance acted as if there were no Press Council mechanism and no case law confirming its priority. Instead they focused on the question whether the elements of tort of Article 1365 had been fulfilled. Two conflicting statements were produced by the experts asked to testify for either party to the dispute. Hernani Sirikit argued that the title and picture referring to 'acrobatics' was clearly insulting. Furthermore, the words '*penyelewengan pajak*' (tax fraud) were used without quotation marks, and therefore ought to be considered a conclusion drawn by the journalist himself. This could be qualified as 'trial by the press' because there was no court decision to this intent. Sirikit claimed a journalist would not be allowed to produce such an opinion. Thirdly, neither would journalists be allowed to use 'words of suspicion,' unless they referred to an external source holding them. If these guidelines were not followed, the media in Indonesia would end up producing 'reports of suspicion' (*berita duga-dugaan saja*) only.

By contrast, Atmakusumah Astraatmadjah argued that the media have the obligation to disseminate news, regardless whether it concerns facts or opinions, which provides information, knowledge, education, entertainment, and should not impose limits on their topics. There is no need for a court decision before a journalist can use the words 'suspecting,' 'preaching,' or other terms deployed in the context of media reporting to describe possibilities, suspicions or uncertainties. Those words are allowed in journalism, as long as the reporters have done their investigation with sufficient care.

In its judgment the court dismissed Atmakusumah's arguments and, following Sirikit, agreed that *Tempo*'s news constituted a 'trial by the press.' Therefore *Tempo*'s report could be categorised as 'insulting and attacking the dignity and reputation of another,' thus violating Articles 1365 and 1372 of the Civil Code.

Before coming to that conclusion, however, the court first had to consider the question of whether *Tempo* had served the right of reply or not. The plaintiff had summoned *Tempo* to publish its reply and a correction three

38 *Tempo* magazine 47/XXXV/15-21 January 2007.

times, through its letters dated 21 December 2007, 8 January 2008, and 11 January 2008. *Tempo* published Asian Agri's reply in the form of a letter to the editor in its edition of 14-20 January 2008, which appeared on precisely the same day the lawsuit was registered at the Central Jakarta District Court. This reply, according the plaintiff, was insufficient. *Tempo*'s letter to the editor covered only 33 lines, followed by an explanation of the editor, whereas the plaintiff had wished to address 36 problems in 13 pages. The judges therefore found a lack of proportionality between the reply demanded and the one published, even more so because of its form as a letter to the editor and because the reply had been published more than one year since the original publication. This, they argued, was 'insufficient and unprofessional' and in violation of Article 11 of the Press Code of Ethics.

In their decision 10/Pdt.G/2008/PN.Jkt.Pst, the judges ordered the defendants to pay a compensation of Rp. 50 million, and to publish an apology to the plaintiff for the contested report in *Tempo Magazine*, *Kompas*, and *Tempo Newspaper* for three days, as well as a daily fine of Rp. one million for non-compliance with this judgment. The judgment made reference to Jakarta High Court Decision 113/1970/PT.Jakarta and Supreme Court 27/K/Sip/1972, which hold that even if the Press Law guarantees freedom of expression, insult is still unlawful.

It needs little imagination to see the weakness of these judicial arguments. The judges referred to precedents from 1970 and 1972, based on a Press Law that had been replaced in 1982 already, and they disregarded the more recent decisions, such as 903K/Pdt/2005 (*TW v Tempo* on "Tomy in Tenabang?") and 931 K/PDT/2005 (*TW v Tempo* on "TW in Gambling Business?"). In this manner they ignored the prevailing rules on the mechanism for resolving press cases before the civil court. Neither did they rely on the available precedents for interpreting the proportionality of the reply and correction, nor did they ask the Press Council, as the most authoritative body in this field, to consider this matter.

No wonder *Tempo* was successful on appeal. The Jakarta High Court reversed the first instance judgment, arguing in the first place that PT RAPP ought to have addressed the Press Council first. The judges moreover found that the proportionality of the reply as published by *Tempo* could not be dismissed so easily, but had to be assessed in the light of the purposes of the 'right to reply' as determined by Press Council Regulation 9/Peraturan-Dp/X/2008.[39] Once again, the Press Council is the most appropriate institution to consider such a claim, hence this is where complaints should be

39 Press Council Regulation on Right To Reply Guidance (*Peraturan Dewan Pers* No. 9/Peraturan-Dp/X/2008). It contains 17 points.

addressed first (see point 17 of 2008's Right To Reply Guidance).[40] Neither party appealed for cassation.[41]

This case thus repeats the pattern we found earlier: the district court does not pay attention to precedent or the Press Law, but decides to adjudicate the case on its own terms. Fortunately, in this case the High Court acted as it should, thus strengthening precedent in the context of press legal cases in the civil court system and reinforcing legal certainty. It moreover added new arguments to sustain the priority of the Press Council in deciding all aspects of the right to reply.

During the period that this case was heard on appeal, the Supreme Court published Circular Letter 14/Bua.6/Hs/SP/XII/2008 on Asking Information of Expert Witnesses (30 December 2008). It requires the civil and criminal court to invite experts from the Press Council in court proceedings dealing with press cases. It is likely that this circular letter will have more influence over the first instance courts than precedents (cf. Pompe 2005) and therefore this circular letter may at least bring some relief for the press.

6.6. Intimidation through Lawsuits

Because court decisions in press cases have often been inconsistent and uncertain, at least at the district court level, the civil court has become an institution which can be deployed to harass journalists, editors and press publishers. Nearly every journalist I interviewed considered civil lawsuits against the press as a means of 'intimidation' rather than as a process to sustain accurate reporting. I found this feeling to be spread widely all over Indonesia and not only in Jakarta.

Several reasons may account for this impression. The first one is the amount of money demanded as compensation. For individual journalists this stands in huge contrast to their limited salaries and modest social position. But even if it is not the individual journalist who is targeted, such compensation may potentially cause bankruptcy of the press or media company. It may also cause internal problems within boards of editors and journalists, with the former trying to shift responsibility to individual journalists – even if the Press Law clearly states that journalists are not directly and personally

40 Point 17: A dispute with regards to the implementation of the right to reply is to be resolved by the Press Council.

41 "Adu Silat setelah Akrobat," [Martial Arts Fighting after Playing the Acrobat], *Tempo Online*, 7 March 2011 <http://majalah.tempointeraktif.com/id/arsip/2011/03/07/KEC/ mbm.20110307.KEC136070.id.html> (retrieved on 28 December 2011).

liable.[42] Thirdly, the judicial process is usually time consuming, complicated and costly. It diverts the attention of journalists from their real job and disturbs their routines in gathering and disseminating information. Those without a legal background must learn about legal procedure, and even if the other side loses in the end and must pay for the costs of the lawsuit, a case may still require considerable spending on lawyers, experts, etc. Finally, some of these lawsuits are initiated by powerful figures who do not hesitate to add threats and mob violence to their claim.

Even if a lawsuit is generally accepted as the ultimate mechanism for dispute resolution under Indonesia's legal system, a lawsuit cannot be justified if it is merely used to attack journalists, editors and owners. In this section I will explore the criteria for labelling a lawsuit against the press as 'unjustifiable.' Before turning to the 'unjustifiable lawsuit' I will first discuss the so-called 'SLAPP' (Strategic Lawsuits against Public Participation), as these have been widely discussed in the scholarly literature and offer a good point of departure.

6.6.1. Strategic Lawsuits against Public Participation (SLAPPs)

The term 'Strategic Lawsuits Against Public Participation' or SLAPP, was introduced by Penelope Canan and George Pring (Canan and Pring, 1988a and 1988b). It resulted from empirical research into 100 lawsuits involving the press and how these impacted political values and participation in public decision-making in the United States. SLAPP start with a civil complaint or claim, filed against individuals or organisations, about communication regarding an issue of public interest or concern. Canan and Pring (1988a: 387) developed a four-pronged operational definition to capture the phenomenon. To be a SLAPP, a case must be:

(i) a civil claim for money damages;
(j) filed against non-governmental individuals and organisations;
(k) based on advocacy before a government branch official or the electorate; and,
(l) about a substantive issue of some public or societal significance.

SLAPP are often brought by corporations, real estate developers, government officials and other relatively powerful figures against individuals and community groups, who claim compensation for injury resulting from citizens' efforts to influence the government or sway voters on an issue of public significance.

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42 This applies specifically to those journalists who are not permanent staff, such as freelancers, correspondents, and stringers (interview with group of journalists at AJI Mataram office, Mataram, 25 June 2010). This was also mentioned by many journalists when they told their story during the "Press Legal Training for Journalists" in Surabaya, 4-5 August 2012 and in Kediri, 11-12 August 2012 (LBH Pers and AJI Surabaya/Kediri).

SLAPP are usually disguised as ordinary civil lawsuits based on traditional theories of law, including defamation, interference with contract or economic advantage, or conspiracy. Albeit most SLAPP are unsuccessful in court, they 'succeed' in the public arena. This is because defending oneself against a SLAPP, even when the legal defence is strong, requires a substantial investment of money, time and resources. The effect is the 'chilling' of public participation in, and open debate on, important public issues, not only of the SLAPP defendants themselves, but also of other people who will refrain from speaking out on issues of public concern because they fear being sued for what they say. SLAPP thus impede proper public reasoning and decision making, by removing interested parties from this process. Thus, the court is used for 'political retaliation' and/or as a weapon in social conflict in such a manner as to discourage political participation (Canan and Pring, 1988b: 507, 515).

In the United States there have been hundreds, or perhaps thousands of SLAPP against expressions ranging from circulating petitions, submitting letters to officials or newspapers editors, reporting police misconduct, complaining to school officials about teacher misconduct, to even speaking at public or academic meetings (Canan and Pring, 1988b: 506). To counter the phenomenon, more than 20 states in the United States now have 'anti-SLAPP' statutes that protect citizens' rights to free speech and to petition the government. A key feature of these anti-SLAPP statutes is that they offer immunity from civil liability for citizens or organisations participating in the processes of government, for instance by written or oral statements made before a legislative, executive or judicial body or in any other official proceeding. When a citizen or organisation is sued for protected activities, anti-SLAPP statutes provide for expedited hearing of a special motion to dismiss the SLAPP.

Albeit Canan and Pring did not explicitly discuss the press or the role of media, their main idea of SLAPP closely relates to how journalists and editors contribute to influencing opinions regarding public concern issues. Since the press has this strategic but difficult role, it has often been sued by those who are in power or have an interest in silencing public debate. It is therefore not difficult to apply the concept of SLAPP to refer to those lawsuits, where issues of public participation, democracy, and freedom of expression are at stake.

However, I feel that the concept of SLAPP does not fully cover the range of legal actions to stifle freedom of expression, especially in lawsuits against the press, and that we need a more specific and appropriate concept. First, SLAPP cover much more than cases against the press, which is a special sub-category. The press has a distinct character, due to its specific societal task. Second, while SLAPP are specifically about monetary compensation, many of the cases we discussed in this chapter are about other actions as

well. And third, these lawsuits are not always related to advocacy before a government branch official or the electorate, but to a broader range of public debate. I therefore suggest using the more specific concept of Unjustifiable Lawsuits against Press Freedom (ULAP).

6.6.2. Unjustifiable Lawsuits against Press Freedom (ULAP)

The idea of 'Unjustifiable Lawsuits against Press Freedom' (ULAP) first came to me after my reading of a Reporters Without Borders report with the title *Unjustified Lawsuits by Church against Press Condemned*.[43] It describes how followers of the Brazil-based evangelical Universal Church of the Kingdom of God (Igreja Universal do Reino de Deus) filed dozens of lawsuits against the media. The sheer number of claims is important, because this is likely to go beyond affecting the accountability of a particular newspaper or magazine to freedom of the press more generally.

The findings of my research show a similarity between the Indonesian situation and the stifling of freedom of speech through SLAPP in the United States, but it differs in a number of respects (as I have argued above). Many of the lawsuits in Indonesia specifically target the press and are sometimes accompanied by violence in order to make sure that journalists and editors do not criticise the rich and powerful. These lawsuits do not target inaccuracy or unreliable information.

Nearly every journalist I interviewed said that if a journalist will make an investigative report on corruption or illegal business, he or she must not only consider the professionalism of his or her work based on the Press Code of Ethics, but also the readiness of the press company and its staff to face harassment.[44] This can take the form of legal actions, intimidation, occupation and destruction of media offices, kidnapping, torturing and even murder. Editors and media owners must assure journalists of sufficient protection before the latter can write an investigative report.

If the main objective of a lawsuit is to intimidate the press, it qualifies as an ULAP.[45] It consists of the following elements: first, an ULAP aims at professional journalism, i.e. journalism that is consistent in keeping up its quality standards and in following the Press Code of Ethics. Journalists must provide information in an accurate, comprehensive, reliable, timely and

43 See http://en.rsf.org/brazil-evangelical-church-loses-two-more-26-02-2008,25861.html (retrieved on 29 December 2011).

44 Anonymous (a journalist in Mataram), *interview*, 24 June 2010; Damyanus Ola (editor of *Pos Kupang* newspapers), *interview*, 22 July 2010.

45 For Javanese, the term 'ULAP' is easy to remember, as it means 'blinding.'

understandable manner. Moreover, professional journalism requires consistent and fair responses to the 'right to reply' and the 'right to correction.' Second, the lawsuit intends to cause damage to the media, in order to discourage professional and critical journalism. Usually, the plaintiff demands an extraordinary amount of compensation, which exceeds the defendant's financial capacity. A good example is the case of *Radar Tegal v Cipta Yasa Multi Usaha Inc. (CYMA Inc.)* in which CYMA Inc. sent a reply to *Radar Tegal* that was published almost immediately without any revision of its content.[46] Nevertheless, two weeks later CYMA filed a lawsuit against *Radar Tegal* claiming Rp. 247,4 billion, a sum that if awarded would cause bankruptcy of a newspaper the size of *Radar Tegal*.[47] The lawsuit moreover aims at retaliation rather than redressing incorrect reporting or reparation of damage.

An indicator that a claim concerns an ULAP is that a lawsuit is accompanied by intimidation, violence or forms of pressure on the court. It does not mean that a lawsuit without intimidation cannot be an ULAP, but this is an indicator. Another indicator is that the news report concerns certain political-economic interests, for instance the relationship between the government and business elites.

The use of the concept of ULAP extends beyond mere scholarly purposes. During my fieldwork I found that journalists often have difficulties in labelling this kind of attack on their work. The plaintiff uses legal action, but it is clear to the journalist concerned that this legal action is in fact concealed intimidation. Yet, it is difficult for the journalist to say it concerns an illegal action, but speaking of an 'unjustifiable' action provides a way out of this problem.

Applying the concept of ULAP to the cases discussed above, those of Tomy Winata against *Tempo* clearly qualify as such. Tomy Winata filed several lawsuits against *Tempo* reports that were the fruits of investigative journalism.[48] The investigation and reporting were conducted in a professional manner, with *Tempo* following the law and the Press Code of Ethics. The case moreover concerned business interests and relations between business and officials, and was accompanied by mob violence.

46 It concerned the report *PT. Cyma Belum Kantongi Izin* [CYMA Does Not Have a Permit Yet].

47 Fortunately, in this case the court dismissed the claim because CYMA Inc. did not follow the Press Law procedure (10 May 2011). "*Radar Tegal* Lolos dari Gugatan" [Tegal Radar Free from Claim], *Hukum Online*, 10 May 2011, http://www.hukumonline.com/berita/baca/ lt4dc8f256a4039/iradar-tegali-lolos-dari-gugatan.

48 See above, *Tomy Winata v. Tempo Inti Media Inc.*

6.6.2.1. Raymond Teddy v Seven Media (2009)

I will now discuss one other ULAP: *Raymond Teddy v. Seven Media*.[49] The plaintiff, a well-known businessman, was reported to have been arrested while gambling in a luxury hotel in Jakarta, in October 2008. At the time of the arrest, Raymond had the status of 'suspect,' facing a criminal indictment for involvement in a gambling business in Jakarta. He disputed the publication of the news reports that he had been arrested by the police, for this, he argued, would lead readers to believe that he was considered guilty of the charges.

In response Raymond filed claims for damages on account of insult against seven media in four separate lawsuits in four different district courts. The amounts claimed varied from one case to the other. *Suara Pembaruan* for instance, sued by Raymond in the East Jakarta District Court, was confronted by a USD 3 million claim. In the South Jakarta District Court, Raymond claimed USD 3,5 million from *Republika* and *Detik.com*. *Harian Sindo* (*Seputar Indonesia*) was sued for USD 2,5 million before the Central Jakarta District Court, and in the West Jakarta District Court, *Kompas*, *Warta Kota* and *RCTI* were faced by a USD 16 million claim. It was completely unclear how Raymond had calculated his losses and what the relation was between these losses and the publications.

What made the case even stranger was that according to the police Raymond *had* actually been arrested, and the information about the gambling was also gathered from official police statements. Yet Raymond argued that the information provided in the contested news reports was incorrect and 'false,' even if he could not clearly point out how it differed from the official police sources. He also asserted in court that he had used his right to reply and lodged a complaint with the Press Council.

All district courts refused Raymond's claims, on similar grounds. West Jakarta District Court Judgment 520/Pdt/G/2009/PN.Jkt.Bar. therefore suffices as an example. The court argued that the law allows one to bring a claim against the press if its reports hurt a private person, a group of people, an organisation or a legal institution, in order to require a reply to or correction of a news report. In case of a dispute on such a matter, section 17 of Press Council Regulation 9/Peraturan-DP/X/2008 determines that it must be resolved by the Press Council. The judges found that Raymond had not used this right to reply and right to correction, as he claimed, but had sent a legal summons to the defendants (*somasi*). Raymond then complained to the Press Council, but did not await its conclusion, the so-called 'Statement, Assessment and Recommendation.' Instead he also took the case to court, which is only allowed if the defendant refuses to follow the recommenda-

49 They were *Suara Pembaruan*, *Republika*, *Detik.com*, *Harian Sindo*, *Kompas*, *Warta Kota*, and *RCTI*.

tion of the Press Council to publish a reply or correction. Finally, the news published was taken from police sources, and therefore Raymond ought to have addressed the police and not the press.

Margiono commented that Raymond's lawsuits were efforts to instil the press with 'fear.'[50] Raymond Teddy's claims are clear examples of ULAP. These lawsuits intentionally attacked professional journalism, claiming a huge amount of damages with a retaliatory purpose. His gambling business interests were apparently in need of protection from further scrutiny.

The outcome of all court cases was satisfactory, and they drew much attention from a wide variety of societal actors. Even the president spoke out about Raymond's cases.[51] Perhaps they backfired against the plaintiff. Most important perhaps is that the first instance courts finally followed the Supreme Court precedents with regard to the application of the press law mechanism and actually referred to the relevant Supreme Court Circular Letter as well as to the relevant judgments. All courts in this case considered the role of the special mechanism under the Press Law, including the use of the 'right to reply' and the 'right to correction.' If consistently followed, as argued earlier, these will lead to legal certainty and a solid guarantee for developing press freedom in Indonesia. In that case an ULAP loses much of its power.

6.6.2.2. The 'Terminated Civil Lawsuit': Sisno Adiwinoto v Upi Asmaradhana (2008)

A particular form of ULAP is the 'terminated civil lawsuit.' It starts as a 'normal' ULAP, by a huge claim for damage compensation against journalists, editors and/or media owners, which is beyond their financial capacity. The special feature of this type of lawsuit is that in the middle of the court process the plaintiff terminates his lawsuit, probably because he understands that in the end he is not going to win the case. Yet, the lawsuit itself is already an effective form of harassment.

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50 "AJI: Tak Ada Masalah Hukum di Perkara Raymond" [AJI: There is no Legal Issue in the Raymond Case], *Republika*, 12 May 2010.

51 "Tersangka Judi, Satgas Mafia Hukum Soroti Kasus Raymond" [Gambling Suspect, Taskforce Legal Mafia Clarifies the Raymond Case], *Republika*, 19 April 2010; "Satgas Mafia Hukum Dorong Penuntasan Kasus Judi Raymond" [Taskforce Legal Mafia Urges the Resolution of the Raymond Gambling Case], *Republika*, 29 April; "Ketua MPR Minta Kapolri-Jaksa Agung Dipertemukan" [Chair of the People's Congress Asks Head of the Police and Chief Public Prosecutor to Meet], *Republika*, 6 May 2010; "PBNU: Jangan Jadikan Pers Korban Kasus Judi" [Leadership of the Nahdlatul Ulama: Never Let the Press Fall Victim to Gambling Cases], *Republika*, 7 May 2010.

A well-known example of this form of ULAP is *Sisno Adiwinoto v Upi Asmaradhana*. The dispute started with South Sulawesi Provincial Police Commander (*Kapolda*) Sisno's statement that it would be "…unnecessary for government officials to use the 'right to reply' and the press mechanism under the Press Law… journalists can be prosecuted in a criminal process."[52] Upi was a *Metro TV* journalist, who in his capacity as a coordinator of the Makassar *Koalisi Jurnalis Tolak Kriminalisasi Pers* (*KJTKP*, Journalist Coalition Refusing Press Criminalisation) organised a three-day protest on account of Sisno's statements (from 1-3 June 2008). The *KJTKP*'s action aimed at promoting professional journalism and respect for the Press Law, also from officials.

First, Sisno lodged a complaint with the police, requesting that Upi be prosecuted for violating Articles 207, 311 and 317 of the Penal Code for defamation and insult.[53] Next to this complaint, Sisno filed a civil lawsuit at the Makassar District Court, asking Rp. 30 million for material compensation and Rp. 10 billion for immaterial compensation, as well as a daily fine of Rp. 100,000 in case of non-compliance with the court's decision. Probably scared by this intimidation, *Metro TV* decided to fire Upi.

While Upi and his coalition criticised Sisno for a statement he made in his capacity as police commander, Sisno's counterattack addressed Upi personally. It was quite clear that Upi would never be able to pay the amount of compensation demanded. Maryadi, from AJI's advocacy department, stated that "If the civil lawsuit is accepted by the Makassar District Court, Upi will be finished (*habis*). How is it possible that a former journalist, who was just fired by his employer (*Metro TV*) for his conflict with the police commander would be required to pay a compensation in billions of rupiahs?" (Maryadi 2009). AJI officially stated that Sisno's lawsuit was a threat against press freedom in general[54] – in particular because this case was extraordinary in the personal nature of the attack.

On 28 May 2009 Sisno withdrew his claim.[55] By that time Upi had lost his job and had been in constant fear about the damage claims he was facing and his future as a journalist. It is likely that Sisno felt sufficiently revenged.

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52 Sisno said this on 19 May 2008, during an official meeting with all district heads in South Sulawesi.

53 This case was discussed in greater detail in Chapter 4.

54 "Gugatan 10 Miliar Sisno Adiwinoto Merupakan Tekanan terhadap Kebebasan Berpendapat" [Sisno Adiwinoto's Claim of 10 Billion Appears to be Pressure against the Freedom of Opinion], *press release of AJI Indonesia*, 16 April 2009.

55 "Sisno Adiwinoto Batal Gugat Upi Rp 10 Miliar, Kuasa Hukum Mantan Kapolda Cabut Gugatan" [Sisno Adiwinoto Halts Claim against Upi, the Former Police Head's Legal Attorney Withdraws the Claim], *Tribun Timur*, 29 May 2009.

6.7. Conclusion

Before Soeharto stepped down, the number of civil lawsuits related to press freedom was relatively low in comparison to the number of criminal law cases. During the authoritarian regimes of Guided Democracy and the New Order the state dominated the press, among others by deploying the criminal court system in order to silence dissident voices. Atmakusumah, speaking from his experience as a journalist during the New Order, said that at that time there were several reasons for this preference for criminal law. First, the criminal law system requires relatively little investment in time and money: after one has filed a complaint with the police, police and public prosecutor do the work. Second, a criminal conviction means a straight win in case of a conviction, as opposed to the sometimes equivocal outcomes of a civil lawsuit.[56] After 1998 a combination of more democracy, decentralisation, and the rise of regional business elites caused an increase in civil lawsuits against the press and a decrease in criminal cases.[57]

As we have seen in this chapter, the main private law issue regarding the press is insult. This may be due to the absence of provisions on this issue in the Press Law. As argued by Effendi Gazali: "Our Press Law needs articles on 'insult' that are quite detailed, so that legal cases are not brought under other legal regulations because the provisions in the Press Law are unclear."[58] However, we have also seen from the discussion of cases in this chapter that there is a legal development with judges increasingly often referring to the Press Code of Ethics as a supplementary source of rules to judge whether journalists have lived up to the standards of professional reporting. These standards then determine whether or not a news report is unlawful and hence insulting.

Nevertheless, procedurally speaking claims can only be made to the civil court after the procedures stipulated in the Press Law have been followed first. Thus, an aggrieved person should first use his 'right to reply' and 'right to correction,' and if the result is unsatisfactory he should address the Press Council. As we have seen in this chapter, in several judgments the Supreme Court has put beyond doubt that this mechanism holds priority over a case being brought to civil court.

Furthermore, we have found that the lower courts have been inconsistent in heeding these Supreme Court precedents. Moreover, they have also allowed plaintiffs to use the general Article 1365 of the Civil Code (usually in combination with 1372) to seek compensation, instead of the more specific Articles

56 Atmakusumah Asraatmadja, *personal communication*, 6 December 2011, Tribuana Said, *personal communication*, 3 December 2011.
57 See Chapter 5.
58 *Kompas*, 24 November 2003.

1372-1380 about insult, and they have been inconsistent in their interpretation of these articles. The most simplified interpretation of Article 1365 we encountered was that the press has acted in an unlawful manner and needs to pay compensation, without indicating in any detail how these injuries or losses have been measured or whether the 'public interest' was served by the report.

Another problem is that Article 1372 of the Civil Code refers to Articles 310-321 of the Penal Code for specifying the requirements for the unlawfulness of an insult or defamation, whereas these articles are not sufficiently specific themselves. Elements of insult and defamation commonly referred to in other jurisdictions receive no attention in Indonesia, such as that the person concerned must be identifiable, whether it concerns an intentional or unintentional communication of the defamatory statement to a third party, and that a false statement must cause harm or damage in order for it to be actionable. Other issues not well regulated in Indonesia – either by legislation or by precedent – are whether the plaintiff must establish that the communication was false and published with negligence and, if so, how this must be established. Likewise, there are no clear rules on the specification of damages and its consequences for the compensation due, such as damage to esteem or social standing, damage through ridicule, damage to trade, occupation, professional ability, etc. (cf. Overbeck 2011: 123-128).

Yet, several 'landmark decisions' can be pointed at which contain building blocks for a legally certain and proportionate protection of the press. *Mrs. Djokosoetono (Blue Bird Taxi) v Selecta Magazine* (1981) set boundaries to press freedom in referring to racial issues irrelevant to a case in assessing whether an act 'unlawfully harms feeling, reputation and privacy.' In *PL ALM v Garuda Daily* (1991) the Supreme Court introduced the Press Code of Ethics as the standard for determining whether a news report is unlawful or not, a position confirmed in *Tomy Soeharto v Gatra Magazine* (1998) and the review in *Soeharto v. Time Inc*. (2009).

In this ruling the Supreme Court moreover determined that the 'right to reply' and the mechanism for complaints to the Press Council, as regulated in the 1999 Press Law, have to be followed first before a tort case can be taken to the civil court. This decision has reinforced the special position of the press in issues concerning freedom of expression, thus recognising the importance of press freedom for the well-functioning of a democratic state. The way in which the right to reply should be exercised has been further clarified by the Press Council in its Right to Reply Guideline of 29 October 2008. In the same year the Supreme Court issued Circular Letter 13/2008 on press expert witnesses, underlining once again the precedence of the Press Law over the Civil Code.

Although these judgments and guidelines have reinforced the protection of press freedom, civil lawsuits are still used to harass journalists, editors and newspaper companies. Nearly all journalists I interviewed, regardless whether in Jakarta or elsewhere, said that many lawsuits aimed at intimidating them rather than at resolving a dispute. Such lawsuits can be labelled Unjustifiable Lawsuits Against Press Freedom, or ULAP. They are directed against professional journalism, demand an extreme amount of compensation, are often accompanied by intimidation and usually serve to promote political-economic elite interests.

Several cases taken to the civil court described in this chapter qualify as ULAP. The good news is that all of these cases were dismissed in first instance. Nonetheless, they do interfere with a proper functioning of the press, as they force journalists, editors and media owners to invest time and money in defending themselves. In my opinion, the fact that some of these cases were terminated by the plaintiff before the court passed judgment confirms that these plaintiffs are not serious about their demands and only deploy the lawsuit for the purpose of intimidation or retaliation. Perhaps one way to address ULAP would be to bring claims for tort against those using the ULAP. As far as I know, this has not been attempted, however.

Despite the ULAP and the problems with first instance courts not recognising the precedence of the right to reply and the Press Council procedure, the civil court seems to be developing into the mechanism of last resort as intended by the legislator when it passed the 1999 Press Law. If it would further develop the criteria for tortuous action as indicated above, it may well become a legal mechanism capable of balancing the protection of individuals and/or a group interests against press freedom.

7 Press Freedom and Administrative Court Review

7.1. Introduction

Administrative court review is the third form of litigation that is of importance for press freedom. Most of the cases taken to the administrative courts relate to various publication or broadcasting permits. Before the administrative courts were established in 1991 through Law 5/1986 (Law on Administrative Courts or LAC), such cases could be taken to the civil courts on the basis of government tort. In addition, cases against lower legislation of a general nature can be taken directly to the Supreme Court on the basis of Supreme Court Regulation 1/1993. Although there are far fewer administrative law cases concerning press freedom than civil or criminal ones, some of them are very well-known; those of *Prioritas* (1992) and *Tempo* (1994) have perhaps even transformed the public debate about the relation between citizen and state in Indonesia's legal system.

The enactment of the new Press Law in 1999 meant a radical change in the field of administrative law control of the press. The law stated clearly that banning, censorship or permits were no longer allowed. Nonetheless, even if cases concerning the written press have become rare, the new law has not abolished the mechanism of administrative court or Supreme Court review. There are still instances of administrative law intervention in press activities, mostly in relation to broadcasting permits for radio and television. Moreover, the Indonesian Broadcasting Commission (*Komisi Penyiaran Indonesia* or *KPI*), which falls under the Ministry of Communication and Information Technology (*Kementerian Komunikasi dan Informatika or Menkominfo*), may impose administrative sanctions which can be challenged before the administrative court. Such interventions and sanctions have indeed materialised into several claims before the administrative court. These constitute the only cases relating to radio or television broadcast in Indonesia, for there have been no criminal or civil cases concerning these media.

This chapter examines whether the legal cases taken to the administrative court have been examined in a fair manner and whether the court has adequately protected the interests of the justice seeker and press freedom. As it concerns relatively few cases nearly all of them will be discussed, starting with the New Order and continuing until the present.

7.2. Administrative Court Review

Although ideas about establishing administrative courts circulated during colonial times, such courts were not established until 1991 (Bedner 2001: Chapter 2). The basis for the LAC was present in Law 14/1970 on Basic Principles of the Judiciary and the Public Prosecutor's Office, which assigned judicial review of individual acts (or actions) to special courts under the authority of the Supreme Court and determined that regulations below the level of act of parliament could be challenged directly before the Supreme Court.[1] After a failed attempt in 1982 (Bedner 2001: 26-31), the LAC was finally enacted in 1986, but would not come into force until 1991. Its mandate is quite limited, with individual administrative decisions (*keputusan*) as the basic point of departure for jurisdiction and the explicit grounds for review limited to statutory violations and misuse of power, even if in practice the courts also applied principles of proper administration (Bedner 2001: 97-99).

The LAC has been amended twice, by Laws 9/2004 and 51/2009. The first amendment introduced general principles of proper administration as a ground for review[2] and provided a sanction for officials who refused to execute court decisions.[3] Altogether it remains a rather limited system of review because of the limitation to administrative decisions that are "individual, concrete, and final." Nonetheless, the administrative courts have adjudicated some important cases related to press freedom.

7.3. Administrative Law Cases Concerning Press Freedom prior to Administrative Court Review

Unlike criminal trials and civil lawsuits, cases concerning press freedom of an administrative law nature are very few in number. As already stated above, provisions allowing for censorship, banning and permits were removed from the Press Law in 1999 and the role of the administrative courts, which served to challenge such actions, diminished correspondingly. However, even during the New Order, there were few cases, in spite of the government's extensive use of administrative measures against the press. As noted by Mochtar Lubis, the New Order government perceived the publicity surrounding court proceedings against the press as potentially undermining its legitimacy and preferred to use administrative controls.

1 Article 10 section (4).

2 The principles of good governance, as stipulated in Article 53 of Law 9/2004, are now based on the definitions of the Anti-Corruption Law (20/2001). This may make their application in an administrative court context problematic (Bedner 2010: 363).

3 Law 51/2009's changes all pertained to management matters which hold no direct relevance for the subject of this chapter.

Newspapers and journals which fell victim to such measures doubted the effectiveness of challenging them in court. When Lubis asked Goenawan Mohamad of *Tempo* why he did not go to court to question the legality of the ban by the government of *Tempo* (see below), Mohamad dismissed this suggestion as politically unrealistic. *Kompas* Chief Editor Jacob Oetama stated that "there is no way for the press to take an adversarial position against the government" (Lubis 1993: 267).

Undoubtedly, the most powerful instrument of press control by the Soeharto regime consisted of permits. As already discussed in Chapter 3, before 1982 the government used two types of permits: the printing permit (*Surat Izin Cetak* or *SIT*) and the publishing permit (*Surat Izin Penerbit* or *SIP*). *Indonesia Raya*, *Abadi*, and *Nusantara* were all banned permanently in 1974 by the withdrawal of these permits. *Kompas*, *Sinar Harapan* and *Merdeka* were banned in the same way in 1978, followed by *Tempo* and *Pelita* in 1982. None of these bans were challenged in court, even if this was possible on the basis of government tort in the absence of an administrative court. The 1982 Press Law and its implementing regulation, Minister of Information Regulation 1/1984, then merged these permits into the one single publishing and printing enterprise permit (*Surat Izin Usaha Penerbit dan Pencetak* or *SIUPP*, henceforth publication permit). As argued in Chapter 3, officially the new publication permit could not be refused or revoked for reasons of censorship (Bedner 2001: 179).

The first press ban after the introduction of the new publication permit was against *Sinar Harapan* in 1986, but the paper took no legal action.[4] This was different in the second case, when in 1987 the minister of information banned the journal *Prioritas* because it ran reports on issues that were considered "too sensitive."[5] In the absence of an administrative court which he could address directly, *Prioritas* owner Surya Paloh decided to challenge Minister of Information Regulation 1/1984 on the basis that its provisions on the publication permit were in conflict with the 1982 Press Law as well as with the constitutional guarantee of freedom of expression and opinion.[6] Eventually, he did this when the administrative courts were already in place, on 16 November 1992,[7] but then the statute of limitation barred him from addressing the administrative court. This challenge attracted broad public attention and press coverage.

4 See Chapter 4.
5 See Chapter 4.
6 Surya Paloh was likely following Purwoto S Gandasubrata's statement who announced in the press that if a judicial review were brought to court, he would consider it (*Media Indonesia*, 3 November 1992, in Pompe 2005: 144).
7 The judicial review application was made on 8 November 1992.

In its decision 01P/TN/1992 of 4 January 1993, the Supreme Court dismissed the claim. The court did confirm its authority to hear such an application of judicial review, as stipulated by Law 14/1970 on the Judiciary *juncto* Law 14/1985 on the Supreme Court. It held that judicial review could be applied in two ways, either indirectly when a plaintiff suffered the consequences from the application of a regulation that was in violation of a higher statue. Such a case could then be taken to the first instance court, with the possibility of appeal and finally cassation to the Supreme Court. Alternatively, the provision concerned could be challenged directly at the Supreme Court. However, in accordance with the legal principle of '*audi et alteram partem*' (hearing both sides to a dispute), in this particular case the Supreme Court considered that a procedure for the review of Minister of Information Regulation 1/1984 should involve the minister of information. Since the application for review did not address the latter as a defendant, the claim could not be further processed. The Supreme Court promised that in future it would provide a procedure for judicial review, to prevent such unclarities.

Surya Paloh was reportedly dejected by the decision, but later on expressed his satisfaction when within two weeks of this ruling the Supreme Court promulgated Supreme Court Regulation 1/1993.[8] According to Pompe, opening up this possibility made both the Supreme Court and the government vulnerable to criticism and forced them to justify their rejection of judicial review actions (Pompe 2005: 146). Thus, the *Prioritas* case had implications that stretched far beyond mere press freedom.

The next press bans concerned *Tempo*, *Detik* and *Editor* in 1994. *Tempo*'s decision to challenge the revocation of its permit led to the first administrative court case in relation to the press, and is still one of the best-known in the history of administrative court cases.

7.4. Administrative Court Review of Press Bans

7.4.1. Goenawan Mohamad v. Ministry of Information

The first challenge to a press ban before the administrative court concerned the *Tempo* ban of 1994. The case was brought before the Jakarta administrative court by *Tempo*'s Chief Editor Goenawan Mohamad, and 40 *Tempo* journalists, against Minister of Information Harmoko.[9] As already discussed in Chapter 3, this case evoked a strong societal response, both because of

8 "*Hikmah dari Kasus Prioritas*" [Wisdom from the *Prioritas* Case], *Tempo*, 26 June 1993.

9 Actually, two claims were submitted to the administrative court, one by Goenawan Mohamad and his colleagues, the other by 43 employees of *Graffiti Pers* corporation. *Graffiti Pers* corporation is the owner of *Tempo* and holder of the publication permit. The judges followed their decision in the first case in the second suit.

Tempo's stature as the leading journal in Indonesia and the hope for a change in the political situation. It has moreover been discussed by many political observers and academic scholars, also outside Indonesia.[10]

The case started with the revocation of the publication permits of two of Indonesia's most famous weekly magazines, *Tempo* and *Editor*, and the tabloid, *Detik*, by Minister of Information Decree 123/KEP/Menpen/1994. The decree referred to Minister of Information Regulation (*Permenpen*) 1/PER/Menpen/1984 and Minister of Information Decree on the Procedure and Conditions for Obtaining a Publication Permit 214A/KEP/Menpen/1984. These regulations had always been controversial, because they opened the way for press bans despite the prohibition of such bans by Article 4 of the 1982 Press Law.

The lawsuit brought by Goenawan Mohamad and his colleagues was generally considered as having little chance of success, but against most predictions and despite the 'bureaucratic-authoritarianism' of the New Order state the judges of the Jakarta administrative court decided that the revocation of the publication license had been unlawful.[11] They found that the article that had been used as a basis for the revocation (Article 33 of *Permenpen* 1/1984) was indeed in violation with Article 4 of the 1982 Press Law. Yet, even if Article 33 of *Permenpen* 1/1984 had been valid, the minister had not followed the correct procedure. According to Article 33 the minister can revoke a license only "if in the opinion of the Press Council [...], the press publisher and the publication no longer reflect a press that is sound, a press that is free and responsible," and the Press Council had never stated such a thing. Third, the judges concluded that the decision was arbitrary. The defendant had paid no attention to the opinion of the Press Council, the interests of the publisher, and had not even heard the aggrieved party. Moreover, Mohamad and his colleagues could reasonably have expected that no such measure would be taken, as they had already published 12 issues of *Tempo* after having received a warning in response to the contested publication that eventually led to the revocation of *Tempo*'s license.

The surprising outcome was reinforced when the Jakarta Administrative High Court on appeal confirmed this judgment.[12] The minister then appealed for cassation. In its decision 25K/TUN/1996, dated 13 June 1996, the Supreme Court judges undid all that had been achieved by the judges in first instance and appeal. The council of judges, chaired by Chief Justice Soerjono, and further consisting of Sarwata and Th. Ketut Suraputra, first argued that Article 33 under letter 'h' of *Permenpen* 1/1984 was not in violation with Article 4 of the Press Law, which prohibits press banning. For sup-

10 E.g. Bedner (2001: 179-182); Millie (1999: 269-278); Pompe (1997: 75-78).
11 094/G/1994/IJ/PTUN-JKT, dated 3 May 1995.
12 111/B/1995/PT.TUN.JKT, dated 21 November 1995.

port they referred to the statement of expert witness A. Soekarno, a former official of the Department of Information, that the revocation of a publication permit differs from press banning because a press ban is permanent, while one can always apply for a new publication permit.

The second argument of the lower courts, namely that the procedure had not been followed correctly, was also rejected. According to the Supreme Court judges:

> […] the consideration of the judges in first instance and appeal stating that the Minister of Information in revoking the publication license had not yet heard the considerations of the Press Council as intended in Article 33 letter 'h' for the reasons according to the considerations of the judges in first instance, is not correct and not true according to the Supreme Court, because the Minister of Information in issuing his decision had already heard the considerations of the Press Council which held a meeting on 21 June 1994, and moreover the decision of the Minister of Information does not have to be in accordance with the advice of the Press Council [...] because the power of the defendant to take this decision is a discretionary power of the Minister of Information, and moreover Article 9 of *Permenpen* No. 1 of 1984 says that the Press Council 'may' [which means that it does not have to] give its opinion by providing the Minister of Information with its considerations.

Third, the Supreme Court judges argued that the decision was not arbitrary, as *Tempo* had received six warnings prior to the revocation and had not bothered to address the minister to defend itself "nor shown any concern about the warnings, although between the last warning and the revocation of the publication license about four months had passed." And finally, the Supreme Court stated that on the one hand the judges concerned argued

> that *Permenpen* No. 1 of 1984 violated the Press Law and therefore the said regulation had been put aside or eliminated, while on the other hand they still have based their considerations on Article 9 of *Permenpen* No. 1 of 1984 and finally [...] ordered the defendant to issue a new license for *Tempo* magazine, hence still on the basis of *Permenpen* No. 1 of 1984.

Bedner (2001: 179-182) has criticised the Supreme Court judgment as follows. First, the distinction between imposing a press ban and revoking a publication permit made no sense because the defendant had used the revocation of the permit as a ban instead of limiting itself to the grounds for which a publication permit can be refused. This argument is in line with Millie's opinion, who states that the most disappointing aspect of the Supreme Court decision is the 'facile distinction' it makes between the withdrawal of a SIUPP and a ban (Millie 1999: 275).

Bedner's next point is that the Supreme Court's argument of procedure was wrong on both counts. First, the Press Council had not discussed the *Tempo* case during its 21 June 1994 meeting, so the Minister could not claim that he had heard its opinion. Secondly, the revocation of the publication permit was based on Article 33 (h), which does not give the minister discretionary

power, but allows him/her only to quash a publication permit if the Press Council agrees.[13]

Blaming *Tempo* for not 'actively defending itself' against a warning made no sense, given that no such response is required. The Supreme Court furthermore disregarded the argument of the first-instance court that the measure had been disproportionate and that *Tempo* should have been heard before it was taken. The Supreme Court did not mention that the six warnings against *Tempo* had been given over a period of ten years.

Finally, Bedner claims – correctly – that the Supreme Court judges demonstrated ignorance of basic concepts of administrative law. The first-instance court never quashed *Permenpen* 1/1984, but declared that its Article 33 (h) violated the Press Law and therefore could not be used as the basis for the litigated decision. The regulation itself remained unaffected. Hence, it could serve as a basis for a new permit, in particular because the issuance of a new permit involved provisions other than Article 33 (h).

I would like to add a few points to those made by Bedner. First, the administrative court judges at first instance or appeal level deserve our praise. They did not succumb to political pressure and produced excellent judgments. Unfortunately, this case bears testimony to Pompe's thesis that under political pressure the Supreme Court "may relapse into truly absurd reasoning in order to save the government" (Pompe, 1997: 75-78), and therefore the hope that the new administrative courts would better control and balance executive power had been in vain.

Second, the Supreme Court decision focused on issues of formality, especially claiming that the lower courts held no authority to review *Permenpen* 1/1984. While this may seem a problem, as Bedner has argued, the administrative court did not go as far, but considered whether Article 33h was applicable in the case at hand.[14] Moreover, this was not a primary argument of the lower court decisions, which focused on the substantive issue of why *Tempo*'s SIUPP was withdrawn.

Thirdly, I would like to add another argument against the opinion expressed by expert witness, A. Soekarno, who differentiated between press banning (*pembredelan*) with permanent consequences, or the withdrawal of the pub-

13 "… [a] publication permit that has already been given to a press publisher can be quashed by the minister of information after he has heard the Press Council, if [...] according to the opinion of the Press Council [...] the press publisher concerned no longer reflects a press life that is sound, a press that is free and responsible."

14 The Supreme Court did not refer to its previous decision 01P/TN/1992 [4 June 1993], in *Surya Paloh* v *Minister of Information*, where it explicitly left open the avenue of indirectly addressing a regulation below the level of act of parliament through the first instance courts.

lication permit, which theoretically could be reapplied for. In my opinion, these actions have similar consequences, as the press can no longer operate and the company must be closed down.[15] This suggests a similarity between the SIUPP and the permit based on the *Persbreidel Ordonantie 1931*. *Soeara Oemoem* was banned on 23 June 1933 by the Governor-General after several warnings. Even if the owner of the newspaper was able to reapply, the withdrawal of the permit was nonetheless called a ban. In general, there are no known cases of successful reapplication for a SIUPP enabling recommencement of publication under the same title as before the withdrawal (Millie 1999: 275). On the other hand, as explained in Chapter 3 and 4 of this book, the term '*breidel*' (banning) itself did not necessarily indicate a permanent prohibition. The ban on *Indonesia Raya* is a clear example. On 23 April 1957, this daily was prohibited from being published by the CPM (Military Police Corps) Commander. Yet, it soon appeared again, until the next press-curb on 30 May 1958, based on Regulation 34/1958. Nevertheless, *Indonesia Raya* appeared again on 26 July 1958. Then *Indonesia Raya* was banned again by the Soekarno regime, until it received a publishing permit from the Minister of Information in 1968 (0632/SK/DIR/PDLN/SIT/1968). Hence, H.A. Soekarno's interpretation of 'once and for all' for '*breidel*' and the possible reapplication for a SIUPP after withdrawal is a-historical and not legally valid.

From *Goenawan Mohamad v Minister of Information* we can conclude that the early administrative court constituted a promising new mechanism for offering citizens protection against the government. However, this was quickly undone by the Supreme Court, which thus further removed public trust in the court system. This can also be concluded from Goenawan Mohamad's statement after the Supreme Court judgment was handed down: "I am not surprised that this happened. The struggle of the press through the law track [procedure] is over, now we turn to the struggle through another track. In the current political constellation we should not expect the Supreme Court to be willing to make a sound and independent decision."[16]

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15 Chair of the council of judges in the Jakarta Administrative High Court, Charis Subijanto, stated in response to the Supreme Court decision, "[…] A prohibition to talk or be silenced is similar to banning. Banning to publish or curbing has a similar meaning as the withdrawal of a SIUPP. It means it cannot be published. Hence, according to our opinion in the Higher Court, withdrawing a SIUPP means banning and curbing, not only the editorial team, but also the management of the company is discarded." "*Wawancara Charis Subijanto: Memang Persepsinya Sudah Berbeda*" [Interview with Charis Subijanto: Indeed our Perceptions Differ], *Tempo*, 15 June 1996. <http://www.tempo.co.id/ang/har/1996/960615_4.htm> (retrieved on 9 January 2012).

16 "*Pernyataan Goenawan Mohamad: Usaha Melalui Hukum Sudah Selesai Dilakukan*" [Statement by Goenawan Mohamad: The Effort through Law Has Already Been Halted], *Tempo*, 15 June 1996, <http://www.tempo.co.id/ang/har/1996/960615_5.htm> (retrieved on 8 January 2012).

7.4.2. Developments regarding Administrative Court Review after 1999

As discussed several times in this thesis, the enactment of the new Press Law in 1999 constituted a landmark in press freedom. This applied perhaps most to the field of administrative controls, which for the written press were lifted altogether. It is presently no longer necessary to apply for a government permit to publish a newspaper or a journal, with only an obligation to register as a legal body (Art. 1(2) *juncto* 9(2) of the Press Law). Despite this regulation, broadcasting media still need to obtain permits and disputes about these have arisen. The permits concerned are defined in Law 32/2002 on Broadcasting (BL), viz. the 'broadcasting permit' (Art. 1.14 *jo*. 33, *Izin Penyelenggaraan Penyiaran* or *IPP*), and the 'subscription broadcasting permit' (Art. 25(1), *Izin Penyelenggaraan Penyiaran Berlangganan* or IPPB), which should be obtained before one can apply for the former permit. Both must be obtained from the Indonesian Broadcasting Commission (*Komisi Penyiaran Indonesia* or *KPI*) and the minister of communications and information technology of Indonesia (MOCI).[17]

Just as with the publication permit (*SIUPP*), under the BL a broadcasting permit can be withdrawn. The reasons are specified in Article 34(5):

> A broadcasting permit is withdrawn due to, (a) not passing the trial period of broadcasting as predetermined; (b) violation of the use of the radio frequency spectrum and/or broadcasting coverage area as predetermined; (c) not having broadcast for more than three months without any notification to the *KPI* (Indonesian Broadcasting Commission); (d) transferring [the permit] to another party; (e) violation of the basic plan of broadcasting techniques and the technical requirements of broadcasting tools; (f) violation of the provision of the broadcasting programme standard according to an executable court decision.

Administrative sanctions may also be imposed on broadcasting media, as stipulated in Art. 55(2) of the BL:

> Administrative sanctions as mentioned in section (1), can be: (a) a written warning; (b) a temporary sanction of a problematic programme after having gone through certain stages; (c) a limitation of broadcasting duration and time; (d) an administrative fine; (e) suspension of a broadcasting programme for a certain amount of time; (f) no renewal of a broadcasting permit; (g) revocation of the broadcasting permit.

Such restrictions on broadcasting media are not particular to Indonesia – in a 1993 comparative study, Barendt found that broadcasting is generally more heavily regulated by the government than newspapers and other print media. Three reasons account for this: first, the airwaves are regulated as a public resource, and thus the government is authorised to license their use for broadcasting; second, frequencies for broadcasting are limited which further justifies that the government deploys licenses for sharing them; and

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17 *KPI (Komisi Penyiaran Indonesia)* is a new institution established by LB 2002, Article 1.13 jis. Articles 7-12. At the lower level, it is named *KPID (Komisi Penyiaran Indonesia Daerah).*

third, the character of broadcasting is distinct from that of printed media, because broadcasting is much more pervasive and also uniquely accessible to children (Barendt 1993: 4-5).

When Indonesian broadcasting media encounter problems related to their permits, they may take such cases to the administrative court. In the next sections I will discuss the two cases I found where journalists indeed applied for administrative court review of administrative decisions relating to their broadcasting permits.

7.4.3. Radio Era Baru v Minister of Communication and Information

Radio Suara Harapan Semesta corporation (or also known as *Radio Era Baru*, *REB*) is a local radio station based in Batam, Riau. *REB* is the local affiliate of the Sound of Hope Radio Network, which is closely related to the Falun Gong movement. The station started broadcasting mainly Chinese-language news in Indonesia in March 2005, after having obtained recommendations from the mayor of Batam City (21 June 2004) and the governor of Riau (12 August 2004), as well as a frequency permit from the Riau Branch Office of the Ministry of Telecommunication and Transportation (3 September 2004). At the time it commenced operations *REB* held no broadcasting permit yet, because the Riau Islands Branch Office of the Indonesian Broadcasting Commission was only established in June 2005 and applications for broadcasting licenses (IPP) could only start to be filed in September of the same year. In December 2006 *REB* applied for an IPP.

A complication arose when the *KPI* enacted Regulation 3/2007 on the Change of the Broadcasting Programme Standard, which defined that only a maximum of 30 percent of all programmes broadcast could be in a foreign language. In response *REB* adjusted its offer of programmes to comply with the new standard. Nonetheless, in December 2007 *REB* found out from a newspaper announcement in the Batam Post that it had not been recommended to the minister to obtain a permit and on 17 July 2008 the minister of communication and information officially rejected *REB*'s application in decision 162A/M.KOMINFO/VII/2008. Between December 2007 and the refusal in August, *REB* had already received two administrative warnings to stop broadcasting. After it received a third warning in October 2008, *REB* filed a claim with the Jakarta Administrative Court to challenge the refusal of the IPP.

According to their lawyer from the Legal Aid Center for the Press (LBH Pers), the refusal violated several principles of proper administration, particularly the principle of transparency, the principle of legal certainty, and the principle of accountability. Besides, the defendant would have exceeded the time allowed for releasing a decision as stipulated in GR 50/2005 on

Private Broadcasting Institutions, as the decision was taken on 5 October 2007, but the letter of rejection was not sent until 17 July 2008. According to Article 5(2) the decision must be communicated within 30 days rather than nine months and 12 days.[18]

The violation of the principles of proper administration was sustained by the absence of any justification in the decision. This not only created uncertainty for *REB*, but also for others who wanted to apply for an IPP in the future. Furthermore, during one court session it turned out that the minutes of the coordination meeting to prepare for the minister's decision on the application (7 September 2007) showed that at that moment the *KPID* Riau Islands ranked *REB* second out of seven applicants for an IPP. No explanation was provided why *REB* was dropped from this list entirely.

However, the Jakarta Administrative Court could not be convinced and rejected the claim. Judges Wenceslaus, Sri Setyowati and Bonnyarti Kala Lande argued that *REB* had been inconsistent in applying the 30 percent foreign language norm in its broadcasting. This violation of Article 38(2) on the Broadcasting Programme Standard, as stipulated in *KPI* Regulation 3/2007, would suffice to warrant the rejection of *REB*'s application.

The judges found that Article 5(11) of GR 50/2005 had not been violated. The *KPID* Riau Islands had good reasons to take more time in order to prevent problems at a later stage. The judges moreover refused to admit as evidence a letter from the Chinese Embassy in which it complained to the Indonesian government about the activities of *REB*, as it considered this letter a matter of politics and not of law. In other respects too, the processing of the contested decision had been carried out in a careful manner, in accordance to the mechanism stipulated in Article 33(4) BL 2002 *jis* Articles 4, 5(6), 5(10) and 6 of GR 50/2005.

REB appealed against this judgment on 24 April 2009, but the Jakarta Administrative High Court confirmed the first instance decision on 20 October 2009. *REB* then appealed to the Supreme Court. We will later provide an analysis of these judgments, but first we will look at another problem *REB* had to deal with in the meantime. This led to another administrative court case, which we will now discuss.

18 Article 5(12): "The approval or disapproval of the IPP as mentioned in section (10) shall be released by the minister within a maximum of 30 working days after the Joint Meeting Forum agreement."

7.4.4. Radio Era Baru v General Director of Post and Telecommunication (GDPT)

While the Supreme Court continued to undertake the administrative review of the rejection of *REB*'s application for an IPP, *REB* continued receiving warnings from the Monitoring Office of Frequency Spectrum (MOFS) in Batam that it should stop broadcasting.[19] Then, without any legal basis,[20] and before the Supreme Court had passed judgment, on 24 March 2010 the MOFS and the police broke into *REB*'s radio station and seized all broadcasting equipment.[21] The Riau police started an official criminal investigation against *REB* Director Gatot Supriyanto for violating Law 36/1999 on Telecommunication. On top of this, the general director of post and telecommunication (GDPT) provided a Radio Station Permit (*Izin Stasiun Radio* or *ISR*) to *Radio Suara Marga Semesta* (RSMS), better known as *Radio Sing*, by Decision 01386004-000SU/2020092010, on 30 October 2010. The problem for *REB* was that the permit allocated *Radio Sing* the frequency of 106.5 MHz for its broadcasting, which was the same frequency as that had been given to *REB* in 2004 and which it had used since. *REB* only found out about this decision on 15 February 2010, when the MOFS sent a warning letter to *REB* to not use this frequency.

REB then filed a claim with the Jakarta Administrative Court, this time against the decision of the general director of post and telecommunication. *REB* argued that after the recommendations of the mayor of Batam and the governor of Riau on 3 September 2004, *REB* was given a permit to use the frequency of 106.5 MHz by the Provincial Office of Transportation (*Dinas Perhubungan*, which also dealt with telecommunication at the provincial level). *REB* had also used this frequency in its application for an IPP. The Certificate of Recommendation (*Sertifikat Rekomendasi Kelayakan*) from the *KPID* Riau, on 20 June 2009, also assigned *REB* the frequency of 106.5 MHz. *REB*'s lawyer argued that the decision to allocate this frequency to *Radio Sing* was premature and unlawful, whilst the administrative court review of *REB*'s IPP refusal case was still pending cassation. This would be in violation with almost all principles of proper administration, including (1) the principle of legal certainty; (2) the principle of orderly state governance; (3)

19 These warnings were given on 16 December 2009 and 9 March 2010. In response *REB* filed a complaint with the Press Council and the National Human Rights Commission (Komnas HAM) in Jakarta. The Press Council sent a letter to the minister of communication and information and the *KPI*, requiring an explanation for the rejection of *REB*'s permit application (23 March 2010).

20 The MOFS and police referred to the continued broadcasting as the basis for their action, but there is no regulation allowing seizure in such a case.

21 *REB* disputed the seizure and expropriation in the Batam District Court, but saw its claim rejected for the court argued that it held no jurisdiction to investigate these matters within the limitations of the pre-trial process (*praperadilan*) (this decision was released on 27 April 2010).

the principle of public interest; (4) the principle of openness; (5) the principle of proportionality; (6) the principle of professionalism; and (7) the principle of accountability. In addition it would go against Articles 5 and 7 of GR 50/2005, which prescribe which procedure is to be followed before a frequency can actually be allocated.

The defendant countered *REB*'s arguments by saying that the statute of limitation had expired, and that the defendant was not the right authority to bring a claim against (an '*error in persona*'). Substantively, the main line of defence was that a Certificate of Recommendation gave no right to a particular frequency. This meant that it was exchangeable and could easily be given to another station, in this particular case to *Radio Sing*. The defendant also argued that there was no reason to postpone the implementation of the ISR for RSMS, because there had been no suspension order by the administrative court in the previous case of *REB* v Minister of Information (166/G/2008/PTUN-JKT.) Moreover, even if the Supreme Court would uphold the claim of the plaintiff, this did not create an obligation for the minister to approve *REB*'s IPP. *Radio Sing*, acting as an interventionist in the case, argued that it had followed all requirements of GR 50/2005 and that therefore *REB* had no reason to complain.

This time *REB* proved more successful. On 5 October 2010 the Jakarta Administrative Court upheld the plaintiff's claim (61/G/2010/PTUN. JKT). Referring to Supreme Court judgments 41K/TUN/1994 and 270 K/TUN/2001, the judges argued that the plaintiff's interest had been sufficiently damaged to allow him to bring a claim and that the statute of limitation had not expired because the plaintiff had brought his claim within 90 days from the moment he found out about the allocation of the frequency to *Radio Sing*. The main findings on substantive matters were also in favour of the plaintiff. The basic argument was that indeed the General Director had been too quick in allocating *REB*'s radio frequency to another radio station. The Joint Meeting Forum[22] had violated Article 5(9) of GR 50/2005, because it has no authority to change the frequencies proposed. Second, the court argued that the Joint Meeting Forum had violated article 115 of the LAC, which stipulates that "… [o]nly court decisions which have become final (*in kracht van gewijsde*) can be implemented." As the court case between *REB* and the minister of communication and information had not been decided yet by the Supreme Court the Joint Meeting Forum's decision was premature. Therefore, the defendant had not been sufficiently careful, and it ought to revoke the contested decision.

22 Proceedings of Joint Meeting Forum No. 01/FRB/KEPRI/10/2007 (particular for private broadcasting institutions in Riau).

This judgment was confirmed upon appeal by 272/B/2010/PT.TUN.JKT, on 24 May 2011 and by the Supreme Court in 285/K/2011. The below table provides an overview of these cases.

Table 11: Radio Era Baru in Administrative Court

Year	In opposition to	Object to be reviewed	Decision		
			First instance (PTUN)	Appeal (PTTUN)	Cassation (MA)
2008	Minister of communication and information	IPP Disapproval [Decision No. 162A/M. KOMINFO/ VII/2008, on 17 July 2008]	Claim refused	1st instance judgment confirmed	Still in process
2010	General director of post and telecommunication & *Radio Suara Marga Semesta*	ISR for RSMS [Decision, No. 01386004-000SU/2020092010, on 30 October 2010]	Claim upheld	1st instance judgment confirmed	1st instance judgment and appeal confirmed

7.4.5. Analysis of the REB cases

The two administrative court cases discussed above were quite different in terms of substance of matter. Yet, the fact that the results were so different requires some further explanation. Therefore, I will now first provide a legal analysis, before linking these cases to the broader political context.

The first case, as we have seen, focused primarily on the issue of language in broadcasting or more precisely on the 30 percent limit on the use of a foreign language in radio programmes. Given that *REB* had broadcast for five years in mainly Chinese before this limit was put into place, and given the fact that *REB* had immediately changed its policy after the prohibition was imposed – which it had proven by submitting the minutes of an internal meeting – both the refusal by the government and the rejection by the court legally made no sense.

Even less understandable from a legal point of view was the court's rejection of the argument that the defendant had violated the prescribed procedure by only releasing its decision some nine months after the meeting of the Joint Forum whereas GR 50/2005 prescribed a term of 30 days. Whereas the article concerned leaves no room for digression, the judges merely held that the possibility of problems later on would provide sufficient ground for the minister to go against this procedure.

The second case was problematic as well, though in a less fundamental manner. First, on the main issue, the judges rightly decided that giving the 106.5 MHz frequency to *Radio Sing* after *REB* had been using it for five years already was in violation of the principles of legal certaintyand reasonableness, given that the first *REB* case had not been settled yet. Moreover, the procedure to obtain a permit by *Radio Sing* was clearly manipulated by the defendant GDPT and therefore the judges were right in their decision to uphold the claim on this point. The same applied to the legal argument that "no law allows the Joint Forum to change the frequency, the main task of that meeting is to approve or disapprove." The Joint Forum had clearly exceeded its powers here.

However, on the third point the judgment was highly problematic. The court's argument that the Joint Forum had violated article 115 of the LAC showed how the court misjudged a basic issue of its own competence. Now that *REB*'s claim in the first case had been rejected twice, the administrative decision had not been suspended and was still of full effect. So it was not a matter of implementing a court judgment, but simply one of implementing the original decision. It is worrying that an administrative court after so many years still makes such elementary mistakes.

Another important feature of this case was the refusal by the Batam District Court to protect *REB*'s property under the pre-trial procedure. This may have been a mistake on the part of the lawyers of *REB*, who could have also filed a government tort case – it is not immediately clear whether the seizure of equipment can also be brought under the pre-trial procedure – but this kind of legal uncertainty weighs heavy on those engaged in such a procedure. This shows how the administrative court can offer only partial protection against the arbitrary exercise of power by the government.

There is little doubt that the key to understanding the *REB* case is the role of the Chinese Embassy and the response of the Indonesian government to its wishes. *REB* indicated in its chronological overview of the case that on 8 May 2007, the website of the *KPI* made reference to the objection of the Chinese Embassy to the broadcasting of *REB* and its request to the *KPI* to closely monitor the station because it would allegedly spread political propaganda discrediting the Chinese Communist Party (CCP). The Embassy also accused *REB* of receiving funds from the Falun Gong organisation.[23] Another indication was the copy of a letter obtained by the management of *REB*, addressed to the minister of foreign affairs of Indonesia, the minister of internal affairs of Indonesia, the Indonesian State Intelligence Agency (*Badan Intelijen Negara*, BIN), the minister of communication and informa-

23 "*Kronologi Kasus Radio Era Baru 2005-2011*" [Chronology of the Radio Era Baru Case 2005-2011], *Era Baru News*, 1 April 2011, http://www.erabarufm.com/2011/04/kronologi-kasus-radio-erabaru-2005-2011.html (retrieved on 15 January 2012).

tion and the *KPI*. This letter asked the Indonesian government to close down *REB*.[24] According to *REB* Director Gatot Supriyanto the closing down of *REB* was a direct result of pressure from the Chinese Embassy. This rendered all attempts by *REB* to adjust to the conditions set by the *KPI* in vain.[25]

The behaviour of the Indonesian government agencies involved in this case indeed seem to indicate that they were heeding the advice of the Chinese Embassy. To what extent this also influenced the courts is hard to say, but it very likely did. The eventual outcome of the criminal procedure against *REB* Director Gatot Supriyanto consisted of him being sentenced for violation of the Telecommunication Law by the Batam District Court to six months in jail with a probation of one year and a fine of Rp 50 million (Batam District Court Decision 180/Pid.B/2011/PN.BTM).[26]

There are other cases which bear testimony to the susceptibility of the Indonesian government to such pressure. For instance, on 7 May 2011, when a number of journalists were attending and recording the parade on the occasion of the anniversary of the Falun Gong in Surabaya, they were harassed by Surabaya district police officers. The police also forced journalists to stop recording how a colleague was arrested and beaten.[27]

The *REB* case does not provide us convincing evidence of the effectiveness of the administrative courts in upholding freedom of the press in cases about broadcasting permits, but it does show that administrative review is badly needed. The case certainly demonstrates how the Press Law can be (and has been) ignored and how broadcasting permits may be used in a way reminding of Guided Democracy and the New Order, to silence dissenting voices.[28]

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24 Ibid., and "*Kedutaan China, Ancaman Kebebasan Pers*," [Chinese Embassy, Threats to Press Freedom], *Era Baru News*, http://erabaru.net/nasional/50-politik/255-kedutaan-china-ancaman-kebebasan-pers, 16 September 2008 (retrieved on 15 January 2012). The international organisation for press freedom RSF also paid attention to this case. "We fear that this obstruction is the result of pressure by China […]. Media freedom is a constitutional right in Indonesia, so no foreign government should have the right to influence official decisions on such an important subject. If Radio Era Baru is forced to close, it will be a serious violation of the freedom to report news." Vide: "Radio Era Baru Closed by the Police," *Reporters Sans Frontiers (RSF)*, 24 March 2010 <http://en.rsf.org/indonesia-radio-era-baru-closed-by-the-24-03-2010,36765> (retrieved on 15 January 2012). Komnas HAM sent a letter of protest to the Chinese Embassy (10 March 2010).

25 Gatot Supriyanto, personal communication, Jakarta, 9 February 2010.

26 "*Dirut Radio Era Baru Batam Divonis Diskriminatif*" [President Director of Radio Era Baru Sentenced in a Discriminatory Way], *Kompas*, 6 September 2011.

27 "Surabaya Police Beat Journalists, Regional Police Cover up the Case," *LBH Pers Surabaya: Berita*, 2011, http://www.lbhperssurabaya.org/?p=134 (retrieved on 15 January 2012).

28 The regulation capping the use of foreign languages also recalls the regime regarding the printed press during Guided Democracy and the early New Order, embedded among others in Peperti 3/1960 which prohibited the use of regional languages in Latin or Arabic scripture.

7.5. RCTI v KPI

The next administrative review case discussed in this chapter concerns a sanction by the *KPI* against 'Eagle Image Television Indonesia' (*Rajawali Citra Televisi Indonesia* or *RCTI*). The reason for the sanction was a broadcast of *Silet*, an entertainment programme of *RCTI*, about an eruption of the Merapi volcano near Yogyakarta, on 7 November 2010. The programme contained many interviews with locals, paranormals, experts (volcanologist), government officials, etc. One of the paranormals interviewed referred to King Joyoboyo's prediction in the twelfth century that Yogyakarta would experience a more serious disaster than the Merapi eruption on 8 November 2010, so some time after the broadcasting of the programme. Volcanologists confirmed that a more serious disaster might happen, but were less specific on the date than King Joyoboyo. Apparently, the broadcast caused a big stir in Yogyakarta and many people who watched *Silet* tried to leave the city to reach a safer place. In the mean time, more than 1000 people sent a complaint to the *KPI* about the broadcast.[29] Eventually, 8 November passed without much happening and the Merapi volcano's activity slowing down.

The *KPI* acted immediately upon these complaints and found that the contentious *RCTI's Silet* broadcast about the Merapi eruption contained 'fallacies' and 'lies.' This would constitute a violation of the Broadcasting Law, and therefore *KPI*, through its letter 667/K/KPI/11/10, dated 8 November 2010, invited *RCTI* to discuss an administrative sanction. On 9 November *RCTI* attended the meeting in the *KPI* office, which lasted for only about a quarter of an hour. After ten minutes the *KPI* gave letter 669/K/KPI/11/10, also dated 8 November 2010, to the representatives of *RCTI*. The letter repeated that *RCTI* had violated the law by broadcasting fallacies and lies, had been provocative and irresponsible by causing disquiet, fraud, fright, trauma, and more suffering to the victims of the Merapi eruption. Therefore, for the time being the *KPI* prohibited any further broadcasting of *Silet*. The *KPI* also reported *RCTI* to the police, thus subjecting the television station to both an administrative sanction and a criminal prosecution.

Following this meeting *RCTI* stopped running *Silet*, after a final broadcast on 15 November 2010 in which it redressed some of the remarks made during the contested broadcast and in which *RCTI* openly apologised for having caused anxiety to those living near the Merapi volcano. Yet, the television station disagreed with *KPI*'s decision, which it considered unfair, incorrect, and unlawful. Therefore, on 29 November 2010 *RCTI* filed a claim with the Jakarta Administrative Court to challenge *KPI*'s decision. In the words of Arya Sinulingga, corporate secretary of *RCTI*'s mother company MNC Inc.,

29 By 30 November 2010 the *KPI* had received 1,032 objections, against 40 expressions of support of *Silet* ("*Perseteruan Setajam Silet*" [A Conflict as Sharp as Silet], *Tempo*, 4 April 2011).

"… we do not object to the sanction, but to the processes carried out by *KPI*."[30] The plaintiff also requested suspension of the sanction, which it obtained on 10 December 2010.

RCTI's lawyers listed nine points to sustain its claim against *KPI*'s decision 669/K/KPI/11/10:

> ... First, the *KPI*'s decision was incorrect and incomplete […]. Second, the *KPI* has misused its authority by suspecting and publishing that *RCTI* violated Article 36(5)A of the BL[31] and Article 55 of the Broadcasting Programme Standard (*Standar Program Siaran*),[32] and by sentencing *RCTI* by imposing a sanction based on different articles, Article 56D and E of the Broadcasting Programme Standard.[33] Third, the *KPI* has decided beyond its authority by assessing whether or not a criminal offence has been committed by *RCTI*. Fourth, the *KPI*'s sanction to discontinue *Silet* as a product of journalism violates the Press Law which provides the right to the national press to broadcast information without prohibition to broadcast (press freedom). Fifth, the *KPI* violates Article 71 of the Broadcasting Programme Standard and the principle of formal care and legal certainty by imposing a sanction of temporary cessation without providing the opportunity to *RCTI* to give a clarification and to defend its decision. Sixth, the *KPI* violates the principle of legal certainty and the principle of proportionality by imposing a sanction of temporary cessation without mentioning a clear time frame. Seventh, the *KPI* violates the principle of legal certainty by stating that *RCTI* has violated Article 55 of the Broadcasting Programme Standard and punished *RCTI* by a sanction of temporary cessation. Eighth, the *KPI* violates Article 67 of the Broadcasting Programme Standard, the principle of legal certainty, the principle of proportionality, and also the principle of non-discrimination (equality before the law) by stating that *RCTI* has violated Article 56D and E of the Broadcasting Programme Standard and by imposing a sanction of temporary cessation; and ninth, the *KPI* has acted beyond its authority and violated the principle of legal certainty by imposing a sanction on *RCTI* to demand a statement of apology.

The *KPI* denied all of these points. It maintained that the contested *Silet* broadcast had contained fallacies and lies. Therefore *RCTI* would have violated Article 33 of the Guidelines on Broadcasting Behaviour and Broadcasting Programme Standard (*Pedoman Perilaku Penyiaran dan Standar Program Siaran*, P3SPS),[34] and Articles 55 and 56 of the Broadcasting Programme Standard (of 2009). In the commission's view this required the heaviest sanc-

30 "Dilaporkan ke Polisi, *RCTI* Melawan ke PTUN: Kami Bukan Keberatan kepada Sanksinya, Tetapi pada Proses-Proses yang Dilakukan KPI" [Reported to the Police, *RCTI* Resists through the Administrative Court], *Viva News*, 1 December 2010. http://us.showbiz.vivanews.com/news/read/191586-dilaporkan--rcti-adukan-keberatan-ke-ptun (retrieved on 17 January 2012).

31 Article 36(5)a BL: "The content of a programme is prohibited if: a. it is defamatory, inciting, misleading and/or untruthful."

32 The *SPS* (*Standar Program Siaran*) is based on *KPI* Regulation 03/P/KPI/12/2009 on the Broadcasting Programme Standard. Article 55: "Broadcasting programmes that cover natural disasters or calamities shall take into consideration the recovery process of the victim, families, and/or communities who are affected by the natural disaster."

33 Article 56D of the *SPS*: "[…] exposing images of victims or corpses in detail (close up, medium close up, extreme close up); and/or Article 56E: "[…] exposing images of severe wounds, bloody, and/or pieces of body organs."

34 *KP*I Decision 009/SK/KPI/8/2004 of 30 August 2004.

tion, which is temporary cessation of broadcasting. To support its argument, the *KPI* provided a recorded video of the *Silet* programme on 7 November 2010, and copies of the complaint letters it had received. It moreover argued that in imposing the sanction it had gone through all the steps prescribed for imposing a sanction, starting with examining the evidence of the violation, investigation, an assessment of the violation, and a clarification. All of this had been communicated clearly to *RCTI*. The *KPI* also presented several witnesses in court, who testified to the fear they had experienced by the contested broadcast.[35] Furthermore, the *KPI* denied that *Silet* could be a qualified product of journalism, because the programme lacked any reference to an editor in chief. According to the Press Law and Press Council Regulation 4/Peraturan-DP/III/2008 on the Press Corporation Standard, a press corporation should provide name and address of the person accountable for the contents of a product of journalism openly through its media.

On 23 March 2011 the council of judges, consisting of Bambang Heryanto, Sri Setyowati and Herman Baeha, passed judgment (174/G/2010/PTUN-JKT). The judges upheld the claim by *RCTI.* They argued that the *KPI* had failed to go through the procedure required for imposing the contested sanction, and notably that the *KPI* had already taken its decision on 8 November 2011, before having heard *RCTI*. This was in violation of Article 71(1) of the Broadcasting Programme Standard. Moreover, the *KPI* had acted in violation of Article 70 of the Broadcasting Programme Standard.[36] A violation of Article 55 of the Broadcasting Programme Standard should first be followed by a 'written warning,' and not immediately by a 'temporary cessation.' The judges also checked whether *RCTI*'s *Silet* programme had violated Articles 56D and E, as held by the *KPI*, by watching the recording of the contested programme. They found that indeed victims had been exposed, but that *RCTI* had blurred the images so that exposure of 'severe wounds' could not be assessed. Such images could be found in other television programmes as well. The court further dismissed the testimonies of the victims as irrelevant, because they could not underpin the decision. The judges thus applied a form of 'marginal review,' assessing whether the *KPI* could have 'reasonably' arrived at its decision. They concluded that the *KPI* had acted in an arbitrary manner (*sewenang-wenang*) and thus in violation of the principles of proper administration, as well as of the Broadcast Programme Standard.

35 The witnesses on part of the *KPI* were Putri Asmarani, Ivony Arti Jiwani and an administrative law expert, from the Indonesian Islamic University (UII), Ridwan. *RCTI* asked Leo Batubara and Abdullah Alamudi as expert witnesses ("*Saksi KPI dalam Sidang PTUN*" [*KPI* Witnesses in Administrative Court Session], 9 February 2011. http://www.kpi.go.id/index.php?option=com_content&view=article&id=2823%3Asaksi-kpi-dalam-sidang-ptun-&catid=14%3Adalam-negeri-umum&lang=id, retrieved on 16 January 2012).

36 Article 70 of the Broadcast Programme Standard details a 'written warning' for several violations, including those in Articles 34, 54, 55 and 56.

The *KPI* was ordered to withdraw its decision, which had become unenforceable as from the moment the judgment was passed.

One day before the Jakarta Administrative Court passed judgment, the police halted its investigation of the *Silet* programme for 'lack of evidence' and not meeting the standards of criminal liability. This was officially laid down in a Letter of Discontinuation of Investigation (*Surat Penghentian Penyelidikan Perkara* or *SP3*).

This did not keep the *KPI* from appealing to the Jakarta Administrative High Court. In its press release on 23 March 2011, the commission regretted the administrative court's judgment as well as the decision by the police. The *KPI* also complained that the court had not considered the letters of objection sent by the governor of Yogyakarta Special Region and the mayor of Yogyakarta.[37] Fortunately for *RCTI* the Jakarta Administrative High Court confirmed the judgment of the court of first instance in 127/B/2011/PT.TUN.JKT.

One of the positive features of this case has been the attitude of *RCTI* to obey the *KPI*'s decision and to challenge it through the administrative court. Only after it had obtained the suspension of the *KPI* sanction did *RCTI* resume the broadcasting of *Silet.* What is really disturbing is that the *KPI* apparently understood so little of administrative court procedure that it complained about *RCTI*'s failure 'to respect the law' and even addressed the matter in parliament.[38] The Jakarta Administrative Court moreover seems to have investigated this case fairly and thoroughly, as confirmed by the High Court. The judges recognised the position and role of the *KPI*, but made clear that it cannot ignore procedures and substantive law.

Most unfortunate is that the *KPI* went as far as to turn the issue into a criminal law case as well. As argued in previous chapters, the use of criminal law is a serious threat to press freedom. That a government institution such as the *KPI* misjudges this matter and files a report to the police is quite disturbing, even more so as the commission itself has the tools to address this issue and since it appeared that the administrative court even found the use

37 "*PTUN Kabulkan Gugatan RCTI Terkait Silet, KPI Banding*" [The Administrative Court Upholds the Claim of *RCTI* about *Silet*, the *KPI* appeals], *Detik News*, 23 March 2011. http://us.detiknews.com/read/2011/03/23/170600/1599730/10/ptun-kabulkan-gugatan-rcti-terkait-silet-kpi-banding?nd992203605 (retrieved on 16 January 2012).

38 "Munculkan Kembali Silet, RCTI 'Kangkangi' KPI: Penayangan Kembali Silet Menunjukkan Gejala Pembangkangan Industri TV terhadap Kewenangan KPI selaku Lembaga Negara" [Silet Reappears, RCTI Humiliates the KPI: Rebroadcasting Silet Points at the Symptoms of a Rebellion by the TV Industry Against the Competence of the KPI as a State Agency], *Skala News*, 2 March 2011. http://www.skalanews.com/baca/news/4/9/90535/sengketa/munculkan-kembali-silet--rcti--kangkangi--kpi.html (retrieved on 17 January 2012).

of these tools excessive. In fact such cases should be reported to the Press Council, which can examine them using the Press Code of Ethics. More generally, as long as a case is under administrative court review, criminal prosecution should wait.

7.6. Conclusion

Even if the number of cases is small, administrative court review has played a significant role in protecting press freedom. Especially in cases of press banning the courts have formed an important avenue for legal protection. While under the New Order this applied to the written press, with the *Tempo* case as the most prominent example, it currently concerns cases about television and radio broadcasts: with regard to the written press, the publication permit was abolished by the 1999 Press Law, but the 2002 Broadcasting Law still requires a permit for radio and television stations.

Here the record of the administrative courts is mixed. The case of *REB* has demonstrated how the licensing regime is of tremendous influence on press freedom and how it is open to abuse by the authorities. In order to obtain a permit, *REB* had to bring two separate cases to the administrative court, one for the broadcasting and the other for the radio station permit. The administrative court judgments in first instance and appeal about the refusal to obtain a broadcasting permit were seriously flawed and demonstrated a serious lack of understanding by the court, including of its own procedure. By contrast, in the case about the radio station permit the courts' judgments in first instance and appeal were up to the standard. Both administrative court cases are currently under review by the Supreme Court, which will hopefully straighten out matters, as it has in so many civil law cases (see the previous Chapter).

The *REB* case furthermore shows how politics still matter in press freedom. It is hard to believe that the Chinese Embassy played no role in the decision taken by the minister of information and communication about *REB*'s broadcasting permit. The subsequent actions by the police against *REB* and the conviction of *REB*'s director by the criminal court add fuel to this interpretation. The role of the government in this case strongly recalls the situation under the New Order, with the minister of information and communication and the Indonesian Broadcasting Commission as a 'reincarnation' of the New Order's minister of information and his department.

The case of *RCTI* v *KPI* was of a different nature. In this case, there was not as much political pressure as in the *REB* case. This probably made it easier for the administrative court to uphold *RCTI*'s claim, but then the *KPI*'s case was extremely weak. Many aspects of the case indicate that the *KPI* made its decision without following its own procedure or paying attention to the

substantive rules applicable to the matter. The case also showed the importance of a suspension order by the court, for this may limit the financial losses incurred by a television or radio station as a result of an administrative sanction to stop broadcasting.

It seems important that the administrative court carefully considers such a request in view of the need for the sustainability of a particular media as essential to press freedom.

In addition to the findings about the role of administrative court review I would like to argue here that the BL of 2002 should be amended. As demonstrated above, the BL permits can be used against broadcasting media in the same way as the publication permit could be used against the printed press during the New Order. This could be resolved by recognising the Press Council as the proper instance for judging broadcasting media behaviour instead of the *KPI,* which has no expertise in this matter and whose role should be limited to judging technical issues. Thus, prohibitions as those mentioned in Article 36(5)A of the BL, including defamatory and inflammatory language, fallacies and/or lies, religious defamation, attacking Indonesian human dignity, and damaging international relations, should be judged by the Press Council. This would lead to a much more balanced situation.

8 Conclusion

> Before reformation, press freedom was jeopardised, or deficient. But now after reformation, press freedom is working well, there is even a surplus of it…. (President Susilo Bambang Yudhoyono, 3 June 2010)

> …an 'overdose' of press freedom cannot be seen separately from the umbrella law, as during the lawmaking process, Indonesia was overwhelmed by a post-Soeharto drunkenness of freedom. (Professor Tjipta Lesmana, Oase, *Kompas*, 9 December 2010)

> Press freedom in Indonesia is very, very strong! … such freedom is indicated by a more diverse content and ownership than during the Soeharto regime. (Vice Minister of Law and Justice, Professor Denny Indrayana, lecture at Leiden Law School, 8 March 2013)

8.1. Introduction

Many claim that presently press freedom is well guaranteed in Indonesia and according to some it is even 'excessive' ('*pers kebablasan*!'). But is this true? Is there a 'surplus' or 'overdose' of press freedom in Indonesia, and is press freedom 'very strong'?

This thesis has demonstrated that there is much evidence undermining such assessments. The research has found that indeed there is far more freedom of the press now than there was under the New Order or Guided Democracy, and that the diversity of news sources has increased. However, there is still a pattern of legal and non-legal attacks against the press. While news coverage is generally broad in scope and critical in nature, the pressure on the press to exercise self-limitation is high. After the removal of the major legislative restrictions of the past, new limitations have been put into place through the Pornography Law (2008), the Electronic Information and Transactions Law (2008) and the General Elections Law (2008). An important change in practice is that while before 1998 it was mainly the state that limited press freedom, it is now rather non-state actors, such as business elites and their vigilantes, or religious fundamentalists who threaten the press.

What is worrying is the finding of this research that the government has done little to prevent or punish such actions, and neither has it taken much

effort to protect journalists. Another worrying finding is that the courts have been frequently misused in order to intimidate journalists, editors and press owners, both through civil and criminal law suits. On a positive note, the Supreme Court has consistently ruled that cases against the press should be dealt with by the Press Council, but so far lower courts have continued to sideline this policy.

While these are some important findings about the present situation of press freedom in Indonesia, the conclusions to this study are much broader. The next sections attempt to bring together the findings presented in the previous chapters to help answer the questions formulated at the start of this book. How has the concept of freedom of expression and press freedom evolved in Indonesian law? How has press freedom as one of the main pillars of constitutional democracy been guaranteed or curbed by the Indonesian legal system? How has press freedom been shaped by various government and non-government actors? And how we can judge all of this from a rule of law perspective? Such evaluation is necessary to understand how press freedom can be more effectively guaranteed in the framework of Indonesia's rule of law, for which at the end of this chapter I will present a number of suggestions and recommendations.

8.2. Press Freedom in Indonesia: An Overview

It is clear from this study that until Soeharto stepped down, press freedom in Indonesia was hardly ever legally guaranteed. Indonesia has a long history of legal control of the press which already started before the country became independent, during the time of the VOC. Through the years the constituent elements of press control through law have varied and so has their implementation, which became stricter or less strict according to the socio-political situation. This history is characterised by strict and often vague rules, censorship, permits, and (excessive) punishment or fines for transgression of the rules. The abolition of censorship and permits by the 1999 Press Law is therefore a historical moment, even if other laws and regulations have continued to impose restrictions on the press since.

The history of systematic state control of the press started under the colonial government with the *Drukpersreglement* in 1856, which introduced a pre-censorship system that was eventually abolished in 1906 by Governor-General Van Heutz. This meant the abolition of administrative controls on the press and the start of a period of relative freedom. However, the situation deteriorated after Governor-General Idenburg introduced the new Penal Code for the Netherlands-Indies, which contained several new provisions that could be used to prosecute the press. With the enactment of the Press Banning Ordinance (*Persbreidel Ordonanntie*) in 1931 criminal law became even more dominant in controlling the press.

After they conquered the Netherlands-Indies in 1942, the Japanese reintroduced the pre-censorship system that had characterised press control in the Netherlands-Indies until 1906. The Japanese were no less authoritarian than the Dutch had been, and both systems combined the absence of democracy with a weak rule of law and strong state intervention. The example they set to the Indonesian Republic that became their successor was hence not very favourable to press freedom.

After independence in 1945, the guarantee of press freedom was not clearly and explicitly formulated in the new Indonesian Constitution. Most legal commentators note that press freedom was normatively guaranteed by the reference to freedom of expresssion in Article 28 of the 1945 Constitution. There is support for this view in the minutes of the constitutional debates in 1945, where press freedom and freedom of expression were labelled as inseparable, but the ultimate text of the article was a compromise: it refers to freedom of expression only and states that it should be regulated by acts of parliament. From the perspective of press freedom the formulation is too broad and indeed subsequent practice has showed how its interpretation led to legislation suppressing the press. Second, the acts of parliament regulating freedom of expression have seldom interpreted the constitutional reference as meaning that it should principally be upheld, instead often introducing explicit restrictions. And finally, on the basis of transitional Article 2, all colonial legislation not in conflict with the 1945 Constitution remained in place. On this basis Indonesia continued to apply colonial press regulations.

As the early years of independence were characterised by colonial war and internal conflicts, it is no surprise that press freedom did not feature prominently on the agenda of the Indonesian Republican government. Indeed, during this period the first 'Indonesian' press banning occurred, as a result of the communist uprising in Madiun in 1948. The banning used the colonial law legacy to this purpose. When the Dutch finally recognised Indonesian independence, Indonesia replaced its revolutionary constitution by a much more liberal one, which unequivocally recognised freedom of expression. However, the colonial press laws remained in place once again.

The situation regarding press freedom only improved after the revocation of the Press Banning Ordinance in 1954. Unfortunately this led to a situation proponents of press regulation had always warned against. Most newspapers strongly associated with particular ideologies and were aligned to political parties, and in the heated political atmosphere of the time what followed was a cacophony of mutual accusations, incriminations, scandals, feuds, and frauds. Newspapers became channels for political propaganda instead of vehicles for professional journalism.

This situation was not to last for long. The imposition of martial law in 1956 led to the arrest and detention of journalists and editors, often extra-judicial,

and the brief episode of press freedom quickly came to an end. By contrast, the simultaneous deliberations in the Constitutional Assembly (*Konstituante*) demonstrated virtually unanimous support for enacting a special provision to support press freedom. This provision never came into force, however, as in 1959 Soekarno dissolved the Assembly and proclaimed the return to the 1945 Constitution. This marked the start of Guided Democracy, which was the worst period in Indonesian history in terms of press freedom from rule of law perspective. The new regime introduced a 'revolutionary press' and 'guided press' as the leading concepts. Any criticism of Soekarno and his leadership would be punished, with the military playing a central role in both regulation and enforcement without judicial control, including imprisoning journalists or editors. Many newspapers were closed down.

The demise of Soekarno and the start of the New Order raised hopes about a freer press, which were reinforced by the adoption of Indonesia's first Press Law in 1966. The new law contained new guarantees for press freedom, notably the prohibition of censorship and banning. However, it soon appeared that these guarantees did not keep the new regime from interfering with press freedom by banning newspapers, using criminal lawsuits against journalists and editors. The New Order moreover used an effective strategy of co-opting newspapers to promote its interests.

Just as Soekarno's Guided Democracy, Soeharto's New Order produced ideological discourses in order to discipline the press, promoting concepts as 'development press,' '*Pancasila* press' and 'socially responsibile press.' If discourse was insufficient to instill obedience, the system of permits for newspapers was used to silence critical voices – even if this was in clear contravention of the 1966 Press Law and its successor, the 1982 Press Law. Most notoriously, the government revoked the publication permits of magazines *Tempo*, *Detik* and *Editor* in 1994. The subsequent manipulation of the Supreme Court to legalise the bans by quashing the lower court judgments that defeated the government sent a clear message that the government could arbitrarily abuse the licensing system to control the press.

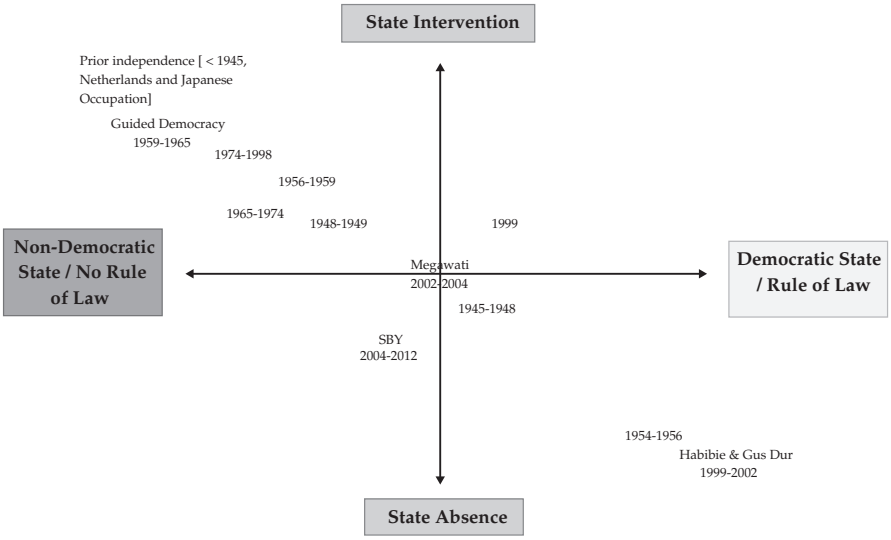
In short, Indonesian press freedom from independence until the end of the New Order was characterised by disciplining discourses, incoherence between principles and rules, manipulation of rules, an important role for the military and absence of judicial control.

This situation changed after the enactment of a new press law in 1999. Censorship, press bans, and press permits are strictly forbidden under this law. President Abdurahman Wahid furthermore dissolved the Department of Information, which had played a central role as an implementing agency of government policies for press control. However, the changes in political climate under the subsequent governments of presidents Megawati Soekarnoputri (2001-2004) and Susilo Bambang Yudhoyono (2004-2014) reintro-

duced repression of the press. Several laws threatening press freedom were enacted, such as the Law on General Election, the Electronic Information and Transaction Law and the Pornography Law. These threaten newspapers with banning and heavy punishment for journalists. As already mentioned, civil lawsuits on account of press publications are now more frequent than criminal law suits, but occasionally the government still acts against press freedom and in any case it does little to protect it. So far many journalists have managed to remain critical and professional, but if the pressure continues this may change for the worse with the increasing political competition.

If we try to picture the relation between government regimes and press freedom in Indonesia in different moments in time on the basis of the model set out in the introduction (which combines a continuum of the degree of democracy/rule of law with one on the degree of state intervention (or state strength), we get the following scheme:

The Role of the State and Press Freedom: Regime Map



8.3. Freedom at Present

As I have described, press freedom is determined by various legal factors, including regulation/legislation, judicial decisions, and law enforcement, political-economic factors, such as shifts in power balances following decentralisation, as well as by legal and non-legal actors, including government officials (police, judicial actors, professional organisations) and private actors (media owners, civil society groups, political elites, capital owners, and vigilantes). This section starts with the main findings as to how press freedom is presently regulated and practiced, especially discussing the Press

Council which has special authority to solve press legal cases in the present situation. It also elaborates on the patterns of violence against press freedom.

8.3.1. The Constitution and the Press Law

The constitution is an important foundation for maintaining press freedom in any legal system. Presently, there is no explicit guarantee on press freedom in the Indonesian constitution. As elaborated in Chapter 2, the absence of a specific article on press freedom in the 1999-2002 Constitutional Amendments reflects a lack of recognition by the constitutional legislators of the importance of press freedom in a democracy under the rule of law, despite the insistence of journalist groups and press freedom experts involved in the process. Press freedom therefore still falls under freedom of expression, which is admittedly better guaranteed now than was the case under the 1945 Constitution.

The legal cornerstone of protection of press freedom is therefore the 1999 Press Law (40/1999). As we have seen, however, much of the old legislation regulating press freedom was never explicitly repealed, and even though it should be considered to have lost its binding power implicitly through the enactment of the 1999 Press Law, in practice several actors have continued to use it to control the press. This started after Abdurrahman Wahid was removed as president. Both civil and criminal lawsuits have been conducted against the press, mainly on the basis of the numerous articles on defamation as stipulated in the Civil and the Penal Code. Such cases should have been brought to the Press Council on the basis of the 1999 Press Law, but even if the Supreme Court has consistently defended this line in its judgments, public prosecutors and lower court judges have continued to handle such cases.

As already mentioned earlier, the Press Law has also been subverted by subsequent statutes, notably the Pornography Law, the General Election Law and the Electronic Information and Transaction Law. Numerous draft laws which have not been enacted yet, such as the draft Penal Code, the draft Secrecy Law and the draft National Security and Defense Law likewise contain articles which take no account of the basic mechanism formulated in the Press Law that such cases should be taken to the Press Council first. Some protection has been offered by the Constitutional Court, which has declared unconstitutional several articles on press banning under the 2008 General Election Law. However, the reintroduction of press banning only ten years after Soeharto stepped down reflects a worrying shift in attitude of executive and parliament, without them having any indication that the Press Council mechanism does not function well. Cases such as the one discussed in Chapter 7 about *Radio Era Baru* (REB) show how easy it is for the government to misuse its licensing powers for banning purposes.

8.3.2. Actors Limiting Press Freedom

Problems of press freedom have been shaped by various factors and actors. These are not only related to law and the judicial system, but also to the political context of decentralisation in post-Soeharto Indonesia. This section singles out two actors who have been central in influencing press freedom and are particularly influential today: the judiciary and regional elites who attempt to get rid of press control of their actions.

The judiciary: insufficient and inconsistent protection
Despite the efforts of subsequent governments in Indonesia to remove the judiciary from its role of protecting freedom of the press and to control the press by way of administrative policies, as I have elaborated in Chapter 3 and 4, the judiciary has always continued to play a role in interpreting laws guaranteeing or undermining freedom of the press. Even during the worst days of Soekarno's Guided Democracy judge Abdul Razak Sutan Malelo bravely acquitted prominent editors Mochtar Lubis and Kustiniyati Mochtar from *Indonesia Raya*. While Soeharto's New Order manipulated the judiciary in more subtle ways and thus managed to secure convictions of several journalists and editors, there were occasional acts of resistance such as the judgments by the Jakarta Administrative Court and the Jakarta Administrative High Court in the banning of *Tempo*. In the post-Soeharto period the judiciary's independence has steadily increased. Yet, the courts should play a very limited role in press cases after the 1999 Press Law determined that all press disputes should be decided by the Press Council. As indicated earlier, the practice of civil parties – and sometimes the public prosecutor – to take cases to the general court and the resistance of lower court judges to refer these cases to the Press Council has continued to provide a role for the courts – but not a positive one. It should be noted, however, that the Supreme Court has been a positive exception by producing a consistent line of precedents referring cases to the Press Council.

What has been shown by this study is that civil lawsuits have gained in importance compared to criminal lawsuits (see notably Chapter 6).[1] This can be explained partly by the shift from an authoritarian state to a democratic one, as well as by the change from a centralised to a decentralised state. As to the first point, there is no longer an authoritarian state which by all means tries to impose its ideology on society as happened during

1 Some observers do recognise this as well. The Head of the National Law Development Agency (the *Badan Pembangunan Hukum Nasional*), Ahmad Ramli said that "the threat against the press is not only criminalisation, but the massive private lawsuits against the press… there are no limits to how much compensation must be paid by the press, and this leads to a serious threat against press freedom." "Gugatan Perdata Ancaman Kebebasan Pers," *Antara News*, 20 May 2010, http://www.antaranews.com/berita/187658/gugatan-perdata-ancaman-kebebasan-pers (retrieved on 5 May 2013).

Guided Democracy and the New Order. Using administrative policies and the criminal courts to silence a critical press were typical means to achieve this. The decentralisation has engendered a shift in monetary capital from the centre to the regions which has led to the capitalist regional elites using the civil courts to protect their interests against a critical press. This ought to change the role of the government from an aggressor to a protector, but this is seldom to be perceived. In several cases (e.g. *Tomy Winata v. Tempo*), a combination of a civil court case, criminal prosecution and mob violence demonstrates how private interests may coalesce with those of particular state agencies and may lead to serious threats of press freedom.

To end this discussion about the judiciary on a more optimistic note, as already mentioned, the Supreme Court has played a positive role in guaranteeing press freedom during the past years. Under the New Order the Supreme Court's ruling of *Anif v. Garuda Daily Newspapers* in 1991 already introduced the importance of the right to reply in resolving press legal cases before going to court, but this was still a sort of 'incident.' Since the enactment of the 1999 Press Law the Supreme Court has firmly stuck to its position that the Press Council holds precedence over court proceedings, which it first laid down in *Tomy Winata v. Tempo* (1608 K/PID/2005). It is to be hoped that the Supreme Court will manage to (re)establish its authority over lower courts and that this precedent will be effectively followed. Now that Supreme Court judgments have finally become accessible, it is to be hoped that this can counterbalance the regional business interests and political configurations influencing the courts in press cases (cf. Bedner 2013).

Regional elites and patterns of threats and violence

As discussed above, the decentralisation process has led to a shift from criminal to civil lawsuits in press cases. The same process has also created regional patterns of violence against the press. Decentralisation in this context must not be understood as the mere transfer of political authority from central to local government levels. Decentralisation has shifted power relations more broadly and deeply influenced the connection between political elites and local providers of capital. Business networks and bureaucratic elites now cooperate to differing extents in different constellations to secure their interests (Hadiz 2007, 2010, Tans 2012).

Some business elites whose interests are insecure will use any strategy available to them to protect these interests, including the law, courts or other formal mechanisms, but also violence. Since decentralisation started, there has been a remarkable rise of violent incidents involving journalists and others working for the press. More concretely, the press often publishes about local issues concerning corruption, illegal logging or mining, and other forms of exploiting natural resources, and as a result it has become a target for attacks. The killing of Prabangsa in Bali (16 February 2009), Ardiansyah Matrais in Merauke (30 July 2010) and Alfrets Mirulewan in Maluku (17 December

2010) are just a few instances. This growing violence by regional elites and their thugs is becoming an increasingly worrying phenomenon.

Violence against journalists also occurred during Guided Democracy and under the New Order, but was never as common as it is now. Underlying this violence is of course the fact that the press is now far freer to address what it thinks should be addressed and thus is more likely to make enemies than it was in the past. This requires the state to be actively involved in protecting the press. The decentralisation that led to the violence in the first place also makes it difficult to do something about it. Often political configurations in a decentralised context involve powerful coalitions of interests at national and sub-national levels, which Hadiz (2007) calls 'predatory elites.' In order to maintain such configurations, these elites create 'privatised gangsterism' (Hadiz 2010). As a result few of them are ever brought to trial and such impunity has become a fundamental problem for the press.

Impunity is sometimes also promoted by the willingness of the newspaper management to accept an amicable settlement. Offences against journalists are in those cases resolved by an agreement which usually requires ceasing judicial proceedings. Surprisingly, one of the findings of this research it that the Press Council itself has been involved in mediating criminal offences – in the end unsuccessfully and the judicial proceedings were subsequently continued (see the case of Mrs. Paulina Pradini in Gresik, in 2012, discussed in Chapter 4). Impunity is also promoted because many journalists, press associations, and civil society groups are hesitant to take legal action against those committing violence, and prefer to resolve problems by making agreements, often euphemistically called "*sama-sama nggak rugi*" (win-win solution) (see Chapter 4).

This impunity goes against Indonesia's obligations under international law. Indonesia ratified the International Covenant of Civil and Political Rights (ICCPR) in 2006. The Guidelines on Article 19 (see General Comment No. 34 (2011), paragraph 23) stipulate that "State parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecut-

ed, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress."[2]

Hesitation to address legal and non-legal attacks against the press in the end leads to failure in developing a secure legal system for protection of press freedom. Currently the press on the whole is still pluriform and daring, but the combination of elite attempts to 'buy' news reports supporting their interests, to buy media, and to intimidate those media who refuse poses a serious threat. This is not yet a serious problem at the national level, but in certain regions it has already led to monopolies on reporting which sustain coalitions of business and political interests.

8.4. Indonesian Press Law: Legal Debates and Press Freedom Theory

The main objective of this research is to contribute to a comprehensive understanding of the role of law in relation to press freedom in Indonesia. The study has attempted to achieve this purpose by looking at the development of legislation, precedents and doctrine and combining this with an analysis of the role of these legal sources in practice. This section compares some of these findings which earlier research on Indonesian press law. It then continues reviewing theoretical issues on press freedom and ends with a discussion about legal unclarity and uncertainty, the tendency to avoid the judiciary, and ULAP (Unjustified Lawsuits Against the Press) as a new concept.

8.4.1. Studies on Press Law

The main study I address is the dissertation by Wahidin of 2006. This study is of a doctrinary nature, yet, on this doctrinary basis it draws several conclusions which would have far-reaching consequences for press freedom in practice. I will not go into Wahidin's claim to completeness,[3] but evaluate the five fundamental legal policies he proposes at the end of his thesis. First, Wahidin argues that the procedure for the 'right to reply' mechanism should be regulated more in detail in combination with procedures before the court. Then he suggests to establish a new 'mediation institution' (*lembaga musyawarah*), where the press is required to respond to the request for exercising the 'right to reply'. His third suggestion is heavier punishment for anyone

2 General Comment No. 34 of Human Rights Committee on Article 19: Freedoms of opinion and expression (102nd session, Geneva, 11-29 July 2011), (CCPR/C/GC/34, 12 September 2011).

3 Wahidin (2006: 180-189) alleges that when he carried out his research there had been no civil lawsuits against those affected by news versus the press. By contrast, this research found six such cases: *Ms Djokosoetono (Blue Bird Taxi) v. Selecta Magazine* (1981, Jakarta) and *Anis v. Garuda Daily Newspapers* (1991, Medan), *Tommy Soeharto v. Gatra Magazine* (1998); *Soeharto v. Times* (1999); *Tommy Winata v. Tempo* (2003); *Pemuda Panca Marga (PPM, a Veteran's Youth group) v. Tempo* (2003).

using violence against journalists, and fourthly, he argues for clear ethical standards and a professional organisation of journalists overseeing them. Finally, he calls for applying criminal law to journalists who violate the law or the code of ethics. This, he argues, would lead to better self-control (Wahidin 2006: 182-186).

The conclusions of this research are different from Wahidin's. First, as I have discussed in Chapter 4, the right to reply could be regulated more clearly, but certainly not in connection with court procedure. Neither is there any reason to establish an alternative organisation for the Press Council, which seems to be functioning well enough – in any case Wahidin provides no evidence to the contrary. The true problems are the lack of political commitment to support the Press Council against parties who have no interest in using their right to reply, but look for ways to harass the press. Next, heavier punishment for those who use violence against the press will not be a solution, because the problem is impunity of aggressors, not the absence of legal sentences. This is due to the practices described in the previous section. However, I most seriously disagree with Wahidin's suggestion that heavy punishment would be beneficial in order to promote self control of journalists.

This self control is a matter of professionalism and the application of the code of ethics is meant to ensure it. There is no indication whatsoever that there would be a problem with journalists violating the law or even the code of ethics. As described in chapters 5 and 6 in all cases against journalists or editors, they were eventually acquitted by the court. It may make sense to further support professionalism and the application of the code of ethics, but at present journalists are sued for absurd reasons and thus intimidated to the extent that they will think twice before publishing anything that could jeopardise their position. Therefore, the last thing we need is heavy punishment in order to teach journalists self-control. I hope to have shown the limitations of a legal analysis which has not looked at case law, and even less at press freedom in practice. By departing from untested assumptions about this practice, conclusions may be drawn which will effectively worsen an already problematic situation.

An issue of a more purely legal nature I want to address next is the argument found in several dissertations on press law, namely that press law is still dominated by criminal law (Syamsuddin 2008; Wahidin 2006; Mukantardjo 2002). As argued in Chapter 5, this is no longer the case. Indeed, under the authoritarian regimes of Guided Democracy and the New Order criminal law played an important role, even if then administrative permits were a more effective means of control. The shift to a more democratic regime under the rule of law has entailed a shift from criminal courts to the Press Council. Criminal law has thus lost its prevalent role and this actually promotes press freedom.

I therefore disagree with Mukantardjo's argument (2002: 371) that the use of criminal law has the advantage that it allows journalists or editors to defend themselves before a court and thus achieve acquittal of all charges. There is no need for this, and as we have seen in Chapter 5 (but also in Chapters 2 and 3), defending oneself in a criminal court is no sinecure.

8.4.2. Indonesia and Theories of the Press

In the introduction to this thesis I discussed several general theories presenting a typology of the press in its political environment. Looking at Indonesia through the lense of these theories we can make a few observations. First, my study confirms the point of departure of the press theories discussed that the political environment is crucial in determining the functioning of the press. And second, the case of Indonesia over time does not fit neatly into the categories offered by Siebert et al. (1956) or Oloyede (2005), but their typologies are still helpful to describe the functioning of the Indonesian press.

During Guided Democracy and the New Order Indonesia certainly resembled the authoritarian regime model discussed by Siebert et al., with both regimes controlling the press through licensing, banning, and arresting journalists or editors. Both regimes sentenced anyone who questioned the state's ideology or challenged its policies. At the same time Soekarno's demand that the press be a 'revolutionary press,' and Soeharto's creation of a '*Pancasila* press' or '*pers pembangunan*' (developmental press) went beyond the common authoritarian model. These features remind us of Oloyede's development journalism, but with the authoritarian nature of the state always in the foreground.

The situation of the press in post-Soeharto Indonesia is more difficult to categorise according to Siebert et al.'s and Oloyede's typologies. Although Indonesia has become more democratic, the press system can neither be described as a libertarian nor a social responsibility model. Indeed, the media have become more plural and now better reflect the diversity of society, and the press is no longer an instrument of the government. Nevertheless, in practice some features of the authoritarian model are still present, with some repressive legislation still being applied (see Chapter 4) and the state offering insufficient protection for attacks against the press by 'predatory elites.'

My research confirms what Romano (2003) has observed about the Indonesian press in Indonesian culture post-Soeharto. Indeed, the role of the state in shaping and influencing press freedom is still important, but in the present political culture press curbing is now initiated by societal actors, depending on the regional political configuration (cf. Yin 2003). My research has demonstrated that this development has continued after Romano con-

cluded her study. One point I may add is that next to 'privatised gangsterism' judicial proceedings are used as well to intimidate the press.

This study has not provided a 'media ecology' as called for by Hill and Sen (2007). Yet, I hope to have added a few insights which can be used for such a study. What this study does show is that examining press freedom with an exclusively doctrinary legal approach misses essential parts of the puzzle. This is even more of a problem given the present custom in Indonesian legal academia to pay no or only scant attention to judicial rulings. Drawing conclusions about press freedom in reality cannot be done on the basis of legislation only. This presents a dual challenge for Indonesian law researchers, who should to be more open to include other disciplines in order to understand press freedom more comprehensively, and who should pay attention to legal decisions made by the court.

Having said that, I will now look more closely at the conclusions concerning the judicial rulings discussed in chapters 4, 5 and 6.

8.4.3. Legal Unclarity and Uncertainty

Since 1999 press bans are no longer allowed in Indonesia, but civil and criminal lawsuits have still been conducted against journalists, editors and media owners. Judicial protection for the press has therefore remained very important. This study has found that the inconsistencies characteristic of legal interpretation of press law under the New Order are still commonly found today.

There are at least three possible reasons why court rulings have been inconsistent. First, court judgments are often still unavailable or quite difficult to obtain. Legal information is better accessible now than it was under the New Order (Churchill 1992: 1), but in particular regarding judgments the situation has not much changed. It is true that the Supreme Court publishes its judgments on its website now, but the system is not well-organised so that finding judgments on particular topics is very difficult. As regards judgments of lower courts the situation has not changed at all, so it seems. The use of precedent has fallen into disuse in Indonesia and this goes against uniformity in adjudicating similar cases (Bedner 2013).

The second reason is that many lower court judges seem unable or unwilling to understand the special mechanism of the 1999 Press Law, which unequivocally requires cases to be taken to the Press Council before they may end up in court. This is even more remarkable given the Supreme Court's consistency in its judgments in prioritising the Press Council mechanism. It is to be hoped that in the end judges will no longer step out of line with the Supreme Court in this matter. Perhaps the appointment of former Supreme Court

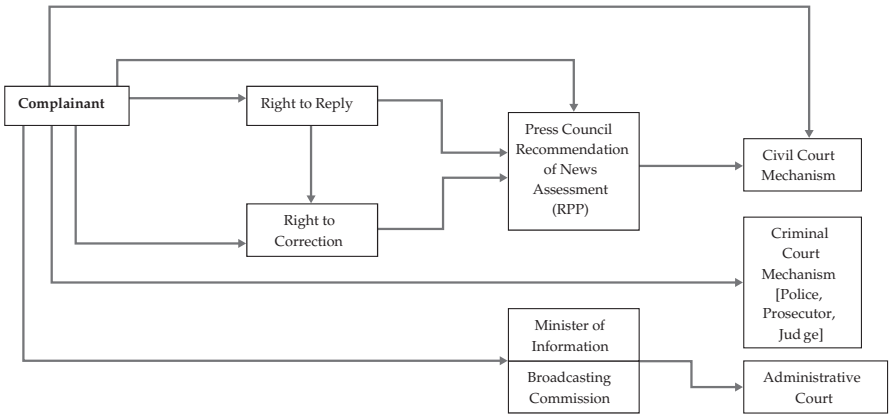
Chairman Bagir Manan as Chairman of the Press Council will support this process. Only in this way can 'real legal certainty' (Otto 2002) be achieved.

Thirdly, several cases in chapters 5, 6, and 7 demonstrated, or contained indications, that the judicial process was influenced by political or economic interests. Under the New Order this political influence was centralised in order to serve regime's interests, whereas presently political and capital interests are more diverse. That such influence is likely to be important is sustained by the broadly sustained thesis that corruption in the judiciary is still widespread.

Ultimately such inconsistency leads to legal uncertainty. The research found inconsistency in rulings between lower courts and the Supreme Court, but also within the Supreme Court itself. In *Soeharto v Time* (2000) the Supreme Court reviewed its own decision in cassation, and in the criminal defamation cases against *Tempo*'s Bambang Harymurti (2003) and Risang Bima Wijaya (2006) the Supreme Court took completely different decisions based on similar constellations of facts – acquitting Bambang and sentencing Risang.

The following scheme portrays how the failure to give priority to the 'right to reply' mechanism leads to cases being taken to an array of courts and instances, and thus to problems of forumshopping (cf. Bedner 2010). The red line shows which institutions a complainant may address in practice.

Press Conflict Mechanism in Indonesia
[process reality]



This forumshopping not only leads to inconsistency in procedures and outcome, but also to unpredictable time frames. In order to establish legal certainty state institutions should therefore stick to the law and use the right to reply mechanism as the point of departure for any complaints against the press.

8.4.4. Avoiding the State Legal System for Protection

As I already remarked, journalists and in particular editors are inclined to settle or 'lump' cases of violence rather than report them to the police. They fear for retaliation and more violence if they do press charges. Criminal proceedings are moreover cumbersome in terms of time and the stress involved. Another reason to prefer private agreements is that the majority of newspapers in Indonesia have no lawyer to assist their journalists in cases of harassment. Therefore, there seems to be a preference for 'peace agreements' (*kesepakatan damai*), which may involve professional associations, such as the medical one at the Adam Malik Hospital in Medan, and the taxi drivers' association in Denpasar. Journalists have sometimes employed the services of the Independent Journalists Association to this end.

Not all journalists agree to this line of behaviour. They fear that private settlements instead of pressing charges in the end leads to systematic impunity. It may prevent violence in particular cases, but on the whole the deterrent effect of the criminal law will lose its power. In order to enable journalists to make a well-informed choice on this matter, in recent years a number of press legal aid institutes have been established, sometimes with the help of law faculties. This may lead to a different approach in such cases than is common at present.

8.4.5. ULAP as an Oppressive Strategy

Many lawsuits against the press in post-Soeharto Indonesia have neither the intention to protect the public interest nor support press freedom, but merely aim to drive certain newspapers or media businesses into bankruptcy. Examples are the cases of *Tomy Winata v. Tempo* and *Raymond Teddy v. Seven Medias*. Such cases remind of so-called SLAPP (Strategic Lawsuits Against Public Participation), but I argue they can better be described by a new term: ULAP (Unjustifiable Lawsuits Against the Press). I found that in Indonesia ULAP were mainly conducted against newspapers and magazines that are well-known for their high professional standards, reliability, and quality of information.

There are two reasons for introducing this new concept. First, it provides a clear identification of a particular kind of case against the press that, unfortunately, occurs quite often. Second, it is important to have a working notion to explore the distinction between a 'pure' legal action and a form of political suppression by means of the courts. It may also assist journalists, editors or even judges in more easily identifying the true reasons behind a case against the press.

As discussed in Chapter 6, not all lawsuits against the press are ULAP. These are extraordinary cases with several particular features: they target professional journalism, try to drive news media into bankruptcy, and often have a motive of retaliation. ULAP are often accompanied by intimidation and/or physical violence against journalists, they are usually inspired by certain political and/or economic interests. ULAP are typically aimed to silence media conducting investigative journalism and thus they harm the public interest. In the present political conditions in Indonesia, where 'predatory elites' have gained ascendancy in many regions, public access to good, reliable news is of great importance and needs to be protected by all means.

8.5. Recommendations and Suggestions for Further Research

8.5.1. Recommendations

This research has demonstrated that not all is well with press freedom in Indonesia. However, some of the findings actually point in the direction of possible solutions for the problems I registered. In this section I will formulate a number of recommendations in order to improve the current situation. Some of them are of a legal nature, others institutional.

Public Interest
As we have seen in this research, 'public interest' has been a problematic legal concept in press law. In particular during Guided Democracy and the New Order it has been misused in suppressing opinions critical of the regime which were entirely peaceful. Syamsuddin (2008) has also pointed at this problem in his dissertation and argues that "public interest in press activities must be interpreted as the people's interest, instead of state interest, group interest, organisations' interest or the nation's interest."

However, this approach still leaves a broad range of possible interpretations which may lead to arbitrary repression of the press. This research therefore suggests to reinforce the procedural guarantees to ensure that 'public interest' is interpreted in a reasonable, proportionate manner. These guarantees are already in place, in the form of the right to reply as the primary mechanism to respond to press reports that would go against the public interest, the priority of the Press Council over other mechanisms of redress against alleged press offences and in the self-regulating mechanism by the journalists' association, its code of ethics, and its capacity for education and training of its members. Finally, I would argue (unlike Syamsuddin) that it is never in the public interest to send a journalist to jail for his professional actions.

Decriminalising Press Offences
This takes me to the next point, which is that there are several good reasons to remove criminal law entirely from the repertoire of press regulation. The

main one is that criminal law is simply too dangerous. From the colonial period until the present, criminal law has been used to harass journalists and to silence press voices not in line with the government or certain elite interests. This insight is shared by many countries in the world, which have replaced criminal law with civil law provisions. According to Atmakusumah Asraatmadja more than 50 countries have moved charges for libel, slander, defamation etc. from criminal law to private law.

This position finds support in the ICCPR, as already pointed out in the Conclusion of Chapter 5. In paragraph 47 of the General Comments No. 34 about the application of Article 19 the HRC says that "Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression." In addition, paragraph 47 stipulates that "States parties should consider the decriminalization of defamation113 and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."[4]This certainly is not present practice in Indonesian yet.

In fact, legally speaking we are already almost there. All press cases should be decided on the basis of the Press Law instead of the Penal Code. This has been confirmed by the Supreme Court (1608 K/PID/2005), which stated that using criminal law against the press endangered press freedom and hence the rules under the Press Law should be prioritised (point 84). This should become more widely publicised and acknowledged, and ultimately lead to a different discourse. I would even suggest to go one step further and remove all criminal provisions regarding the press from the Penal Code and other legislation – even if I am aware that the present tendency in Indonesia is to add criminal provisions related to the press.

Unfortunately, most law schools in Indonesia do not contribute much to this. The main courses about press law still emphasise criminal law, with titles such as 'Press Offences' or 'Criminal Offences by the Press' (*Delik Pers* or *Hukum Tindak Pidana Pers*). Instead, laws schools should offer courses called for instance 'Law and Press Freedom,' which offer more space to discuss press law as an amalgamate of constitutional law, human rights, civil law, administrative law, and public policy issues.

The Press Council and the Civil Court as the Last Resort

As stipulated above, having a choice of various alternatives for resolving press legal cases leads to legal uncertainty. State institutions should therefore adhere to the law and support the clear and straightforward route of resolving press disputes through the Press Council if applying the right

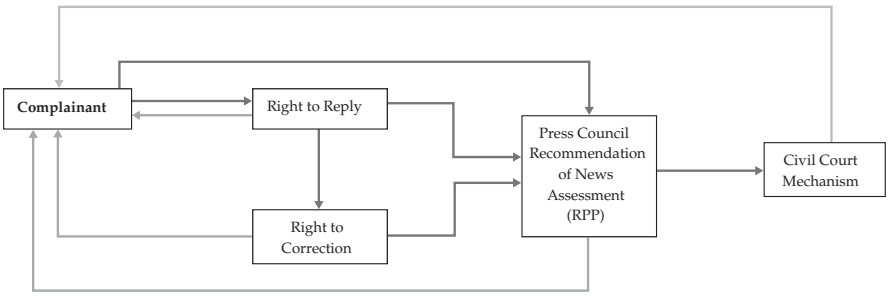
4 Made by the Human Rights Committee (HRC) in its 102nd session, in Geneva, 11-29 July 2011.

to reply and the right to correction has not provided sufficient relief. This research has found that the Press Council functions quite well and deserves to get the practical support it is legally entitled to. It has been seeing a growing number of press legal cases for mediation or for obtaining a recommendation. In order to protect and improve the press freedom situation, it has also developed standards for journalists and for monitoring the implementation of the journalist code of ethics.

It should be acknowledged that the Supreme Court has provided such support for the Press Council already. Not only has it recognised the priority of the Press Council in its case law, but it has also published a Circular Letter in 2008 asking judges to invite the Press Council as an expert witness in court when handling cases where the press is involved.

This research does not argue that there is no role at all for the civil courts in press cases. The civil courts should be the '*ultimum remedium*,' if the special mechanism does not lead to a sufficient level of satisfication of those bringing the complaint. The court can then apply a marginal test to the judgment of the Press Council. The mechanism looks as follows:

Press Conflict Mechanism in Indonesia
[proposed process based on Press Law and Press Code of Ethics]



A final note regards the form and amount of compensation in the civil court. Measuring proportionality is not easy, but in any case the court should take into account the financial means of the press firm involved and never drive it into bankruptcy. As discussed in Chapter 6, there are no guidelines in precedents or legal doctrine to determine proper compensation in press cases. It is beyond this thesis to propose such guidelines, but the bottomline should be that they may never lead to a weapon that turns compensation into a press ban.

Removing Misconceptions about Press Law
As this research has indicated, there are many misconceptions on the part of judges, lawyers and the general public about the current press law in Indonesia, but there are hardly any mechanisms for clarification. I think that law

scholars and judges have a special task in this. They ought to refer to many more resources than is currently common, including to Supreme Court precedents, experts' opinions and research publications. Hence, the role of legal documentation is quite significant. The role of and reference to precedents by judges is clearly of central importance.

Supporting the Press
I already mentioned the current development of providing legal aid to journalists and others accused of violations of the Press Law and other statutes. This is particularly important in the regions, where many press organisations do not dispose of sufficient funding to have access to proper legal assistance. Yet, undoubtedly the role of journalists associations is significant in promoting journalists' interests by designing strategies to reinforce press freedom.

And finally, conducting this research has taught me how difficult it is to gather data about challenges to press freedom. Therefore, not only should journalists' associations themselves be concerned with this challenge, but NGOs should monitor press freedom as well. Given the political and economic strength of those who stand to benefit from the absence of a critical press, organised efforts to back up a critical press are badly needed, and this starts with adequate information.

8.5.2. Suggestions for Further Research

This research suggests several themes and topics that merit further research. They include both legal and non-legal issues.

The first topic is of a legal nature and was already mentioned above: it concerns developing guidelines for compensation in civil proceedings against the press. It should start with gathering all the information available from court cases and then carefully looking at their consequences before turning to the more practical side of weighing all the interests involved and valuing these in monetary terms.

The second topic is more of a political nature. It relates to a side of press freedom that has hardly been explored in this book, but that is quickly gaining in importance. It concerns the media-ownership and how this influences the pluriformity of the press. On the one hand the press has been growing fast since Soeharto stepped down and the public has more choice in accessing media and its contents, but media ownership has become increasingly concentrated in a few hands, such as Media Nusantara Citra (MNC), Media Group, Bakrie and Brothers, Kompas-Gramedia and Jawa Pos Group, and a few others (Lim 2012). The question is how these media networks influence the public opinion and political power, an issue that was hotly debated with

regard to television reporting about the presidential elections of 2014. There is clearly a legal side to this, with the regulation of ownership and broadcasting licenses.

For Indonesia to become a truly democratic country under the rule of law good press regulation guaranteeing freedom of the press in all of its aspects is a *sine qua non.* I truly hope that this study will form the start of much more socio-legal research into this matter that will contribute to realising this objective.

Summary

Press Freedom, Law and Politics in Indonesia
A Socio-Legal Study

Press freedom in Indonesia is still under pressure, despite the demise of Soeharto's authoritarian New Order regime in 1998. The political transition of 'Reformasi' has promoted a decentralised model of governance, which has led to new types of attacks on the press. Extra-judicial killings, physical violence, bringing criminal or civil claims against journalists and impunity of those perpetrating such acts have made it difficult for many journalists to conduct their work in a proper manner and without fear.

This study aims to present a comprehensive overview of how press laws and court cases involving the press have influenced press freedom in Indonesia. Adopting a socio-legal approach it looks at the history of press laws, their implementation through government institutions and courts, and the debate concerning these laws and their implementation. Four key research questions serve as the point of departure: (i) how has the concept of freedom of expression and press freedom evolved in Indonesian law; (ii) how has press freedom as one of the main pillars of constitutional democracy been guaranteed by the Indonesian legal system; (iii) how has press freedom been shaped by various actors, and (iv) do these dynamics reflect the rule of law?

Chapter 1 provides an introduction to the topic and elaborates the theoretical framework underlying the research. This includes a discussion of what it means to take a socio-legal perspective, the legal concept of the press, the relation between press freedom and freedom of expression, theories of the press, limitations to press freedom, and the relation between press freedom, democracy and rule of law. The chapter also discusses the methods used for the research.

Chapter 2 looks at press freedom as a main element of freedom of expression in the light of constitution making processes. It explores the history of constitutional debates about freedom of expression, starting with those concerning the 1945 Constitution, continuing with the debates of 1949, 1950 and 1956-1959, and ending with those of the constitutional amendment process of 1999-2002. The chapter provides an overview of the political situation at the time in order to situate the discourses encountered. It demonstrates how freedom of the press has always received much attention of constitution makers, but how this never led to its protection by a separate constitutional clause. Its subsumption under freedom of expression has proven insufficient to offer sufficient protection, up until the present.

The next two chapters deal with the history of press laws and policies. Chapter 3 runs from the Netherlands Indies to Soekarno's Guided Democracy and Chapter 4 continues with the New Order and *Reformasi*, up until the present. They show how press freedom was shaped and influenced by different political regimes.

From the start the colonial regime introduced strict controls over newspapers and other publications by pre-censorship, censorship, banning, criminal provisions, etc. The 'ethical policy' that was implemented at the start of the 20th century introduced more freedom for the press, as most evident in the revision of the *Drukpersreglement* in 1906. This allowed for the development of a vernacular, Indonesian (*Bumiputera*) press. However, press freedom declined after the introduction of the Netherlands Indies Penal Code in 1914. Several of the latter's articles were applied against the vernacular press in a discriminatory manner, marking a transition from preventive to repressive control. The Press Banning Ordinance of 1931 was a further blow to press freedom and was used by the regime to exert strict control on press publications.

When the Japanese occupied the Netherlands Indies in 1942, the military administration made few changes to the repressive system in place. Gradually, press control became rigorously authoritarian and in the end the press turned into a mere vehicle for Japanese propaganda. After Indonesia declared its independence in 1945, many restrictions on the press and attacks on journalists followed during the period of conflict between Indonesia and the Netherlands, most of them initiated by the Dutch government that reclaimed its former colony. The first press ban by the new Indonesian government was promulgated in 1948, against the Indonesian communist press after the so-called "Madiun affair", on the basis of Law 6/1946.

After the Dutch recognised Indonesia's independence in 1949, press freedom improved considerably. In 1954 the Press Banning Ordinance of 1931 was revoked, which in the politically polarised atmosphere of the time opened the gates to extremely partisan reporting. Press publications featured accusations and recriminations, scandals, feuds, and frauds – often without much fact-checking. This period was not to last very long however, as the introduction of martial law in 1956 allowed the army to arrest and detain journalists and editors at will without judicial process. Since then press freedom declined dramatically. Under Soekarno's Guided Democracy journalists, editors, and publishers were subjected to all kinds of anti-press actions. Part of this control was ideological – Soekarno's call for a 'revolutionary press' – part of it consisted of legal measures.

Upon the reintroduction of the 1945 Constitution in 1959, the government intensified its anti-press policies by military, presidential and ministerial legislation. The control of ideology, organisation, personnel, and circulation of publications through 'Press Guidance' allowed Soekarno to act quickly

and effectively against journalists who criticised his administration or his leadership. The military administrative legislation enabled the government to immediately close down critical newspapers. Journalists and editors were sent to jail without judicial process, which for the government was less bothersome than a trial on the basis of the Penal Code.

The change to the New Order regime in 1965 started ominously. In the words of David Hill, "the arrests and killing of Communist and sympathizing journalists in 1965-66, carried out against a background of large-scale massacres in the countryside, cast a very long shadow over the press for a subsequent decade" (Hill 1995: 34-35). The New Order soon developed its own press discourse. Concepts as 'development press', 'Pancasila press' and 'social responsibility press' helped underpin new legal and psychological forms of press control. The Press Law (first Law 11/1966, later Law 4/1967, and finally Law 21/1982) served as the legal basis for press banning or prosecution of journalists and editors. The cornerstone of the system was the publication permit (in various forms), which in 1994 was key to the notorious bans on *Tempo*, *Detik* and *Editor*. The undermining of judicial independence moreover ensured that the press had little to expect from court review.

In the early post-Soeharto years after 1998 press freedom was at a peak. The new Press Law (40/1999) prohibited censoring, banning and licensing, and President Abdurrahman Wahid abolished the Department of Information – the New Order's institutional bulwark of press control. Yet, after Megawati became president the situation started to deteriorate, as she regularly and publicly took issue with the press. Prosecution of journalists and editors started again, sometimes at her personal initiative. This tendency continued under President Susilo Bambang Yudhoyono (SBY). Newly introduced laws, such as the Pornography Law,[1] the General Election Law,[2] and the Electronic Information and Transaction Law,[3] reversed parts of the 1999 Press Law. The number of criminal and civil lawsuits against journalists, editors and media owners has continued to rise, and has put much financial stress on newspapers. Instead of the Press Law, which should hold priority, once again the Penal Code is used as a basis for prosecution. On top of this, violent attacks by hired thugs and mobs against journalists and media offices have increased in number. Those committing such acts usually get away with them, which adds to the general feeling of impunity for violations of press freedom. Institutionally, SBY re-established the Department of Information and Communication, and introduced a new agency (the KPI) for licensing and monitoring broadcasting media. These bodies lack the power and influence of their predecessors, but they do exercise institutionalised political control on broadcasting.

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1 Law No. 44 of 2008 on Pornography
2 Law No. 42 of 2008 on General Election
3 Law No. 11 of 2008 on Electronic Information and Transactions

When we compare the current situation to the New Order, the most conspicuous difference is that violence against journalists has become more 'localised' and 'privatised' – usually benefiting predatory elites at the district level rather than the national government. This change is closely related to the decentralisation process. As argued by Heryanto and Hadiz (2005: 261): "freedom of the press continues to be challenged, not by an authoritarian state, but by a variety of vested business interests or by the exercise of societal political violence." One may add that exposing issues of corruption and natural resource exploitation by local elites are most likely to lead to violence against the press.

Despite these serious drawbacks, there is still much more press freedom now than under the New Order. There is a Constitution which has been amended to clearly guarantee freedom of expression. This freedom is also sustained by the Human Rights Law of 1999 and the Press Law of the same year. New restrictive or even suppressive laws have been enacted, but they are not specifically targeted at the media. Under the New Order the limits of press freedom were moreover never clearly defined and Soeharto's speeches played an important role in their interpretation, whereas today the Press Council and the court articulate the rules.

Chapters 5, 6, and 7 focus on the administration of justice in cases concerning the press – Chapter 5 on criminal law cases, Chapter 6 on private law cases, and Chapter 7 on administrative court review. These chapters are of a legal nature, and also take into account the socio-political context. This helps explain how and why prosecutors and courts have remained within the boundaries of the rule of law, or transgressed them.

The criminal courts have been used by all kinds of political regimes to suppress opposition or criticism. The Penal Code for the Netherlands Indies proved an effective tool for the Indonesian government to silence dissenting voices. In post-Soeharto Indonesia the state no longer is the dominant actor in subjecting the press to criminal trials, but businesses and certain 'civil society organisations' have been able to instigate prosecution of journalists and editors.

Presently, Indonesia's legal system has many criminal provisions that can be used against the press, some in the Penal Code, others in special statutes. Several of them have indeed been used to 'discipline' newspapers, including legislation on hate speech (*haatzaai-artikelen*), insult, spreading false news, and violating public decency. The way in which they have been applied shows that in many cases prosecutors and judges have demonstrated little consideration for the importance of press freedom and its goals of a democratic society. Many judges have even disregarded the availability of a new statute, the Press Law of 1999, and they have continued to apply the

traditional criminal law provisions in such cases. In the end, however, the Supreme Court has in the large majority of cases upheld the primacy of the Press Law and clearly stated that cases concerning the press should refer to this statute. If judges feel bound to this fairly unequivocal line of precedents, many future problems would be prevented.

The Supreme Court has not only stimulated this development through its case law, but also by disseminating a Circular Letter to the courts in which the latter are summoned to involve a representative from the Press Council as an expert witness in cases involving the press (Supreme Court Circular Letter 13/2008). Nonetheless, even if the outcome of a criminal case is positive for the defendant, the trial itself impacts negatively on press freedom, as this involves tension, time and costs. Therefore, the research supports Susanto et al.'s argument that the Press Law should be amended to put beyond doubt that it prevails over any common criminal procedure (2010: 232). However, contrary to Susanto et al. the chapter argues that the Press Council's review on the basis of the Press Law and the Press Code of Ethics should completely replace criminal procedure. This also requires a shift in thinking and teaching of Press Law at Indonesian universities.

Chapter 6 demonstrates how civil law suits also pose a threat to press freedom. Many cases against the press have been brought to the civil court, mostly asking the court for damage compensation and/or rehabilitation because of news reports. This mechanism is open to abuse and has at times been deployed by political and business elites to silence critics by the threat of serious material losses or even bankruptcy.

The use of private law to sue journalists or media owners reflects the tension between private and public law in the contestation between privacy, dignity, reputation and personality versus the public right to information. Although this is not stipulated explicitly in the Press Law (40/1999), the civil court mechanism is applicable as the last resort when the mediation process through the Press Council has failed.

During the authoritarian regimes of Guided Democracy and the New Order, the number of civil lawsuits related to press freedom was relatively low in comparison to the number of criminal law cases. The state dominated the press and deployed criminal and administrative law to silence dissident voices. This changed after 1998, when a combination of more democracy, decentralisation, and the rise of regional business elites caused an increase in civil lawsuits against the press. The Supreme Court has put beyond doubt that the use of the 'right to reply', the 'right to correction' and mediation by the Press Council should precede litigation before the civil court, but this consistent line of precedents has not prevented cases from being heard by a civil court early on.

The chapter shows that the main civil law issue regarding the press has been insult. Several 'landmark decisions' contain building blocks for a legally certain and proportionate protection of the press against this accusation. *Mrs. Djokosoetono (Blue Bird Taxi) v Selecta Magazine* (1981) set boundaries to press freedom in referring to racial issues irrelevant to a case in assessing whether an act 'unlawfully harms feeling, reputation and privacy.' In *PL ALM v Garuda Daily* (1991) the Supreme Court introduced the Press Code of Ethics as the standard for determining whether a news report is unlawful or not, a position confirmed in *Tomy Soeharto v Gatra Magazine* (1998) and the review in *Soeharto v. Time Inc*. (2009).

Despite these developments, political and business elite figures still deploy civil lawsuits to harass journalists, editors and newspaper companies. Lawsuits aiming for intimidation can be labelled Unjustifiable Lawsuits against Press Freedom, or ULAP. They are directed against professional journalism, demand an extreme amount of compensation, are often accompanied by intimidation, and usually serve to promote political-economic elite interests. Although generally dismissed by the courts, they do interfere with a proper functioning of the press, as they force journalists, editors and media owners to invest time and money in defending themselves. Perhaps one way to address ULAP would be to bring claims for tort against those using it.

Chapter 7 discusses how administrative court review has changed from cases concerning the printed press to ones concerning radio and television. Administrative court cases concern administrative decisions, and licenses in particular, and the printed press no longer requires these. Although few in number, some administrative court cases about the press have drawn much public attention. Under the New Order the *Prioritas* case (1993) led to a new mechanism of judicial review of administrative regulation by the Supreme Court. Most famously, the *Tempo* case (1994) in first instance and on appeal suggested that administrative court review would provide genuine protection for the press against the New Order government, until the Supreme Court crushed all hopes. Still, administrative court review to some extent became a stepping stone for the larger democratisation process in Indonesia's bureaucratic authoritarian regime, and offered at least a degree of protection against arbitrary decisions by the government.

The post-Soeharto case of *REB* demonstrates how press freedom in the field of radio and television is still under the influence of the 'licensing regime' and how the state may abuse its powers in this field. In this case the government moreover exerted political pressure on the administrative courts of first instance and appeal not to annul the two litigated decisions (it concerned two permits). This may have led the administrative courts of first instance and appeal to follow suit, with the Supreme Court overturning one judgment while confirming the other (so the opposite of *Tempo*). The entire

event demonstrates how in the field of broadcasting the government has returned to administrative censoring policies, and how this may challenge the independency of the administrative court.

The final chapter brings together the most important findings of the thesis, situates them more explicitly within the theoretical framework elaborated in the first chapter, and provides a number of recommendations. In summary, the research has found that from colonial times until the present Indonesia has struggled with press freedom. During the history of the country many draconian laws against the press were enacted, and the press has more or less continuously been under attack from state officials, police, military officers, business and political elites, and political and religious mobs. In case of attacks by non-state actors the government has done little to prevent and or punish such actions. There is a rather good Press Law, but it is not implemented the way it should be.

Overall, this reflection on press freedom, law and politics in Indonesia shows that the struggle for press freedom must be relentlessly continued if we wish the fourth pillar of constitutional democracy to function properly in Indonesia's future.

Samenvatting

Persvrijheid, Recht en Politiek in Indonesië
Een sociaal-rechtswetenschappelijke studie

Persvrijheid in Indonesië staat nog steeds onder druk, ondanks de val van Soeharto's autoritaire Nieuwe Orde regime in 1998. De politieke overgang naar 'Reformasi' heeft geleid tot een gedecentraliseerd bestuursmodel, dat tot nieuwe typen van aanvallen op persvrijheid heeft geleid. Oneigenlijk gebruik van het strafrecht en van civielrechtelijke vorderingen en geweld maken het voor veel journalisten moeilijk om hun werk zonder angst te verrichten. Dit effect wordt versterkt doordat de overheid hier niet of nauwelijks tegen optreedt.

Dit onderzoek biedt een uitgebreid overzicht van de manier waarop wetgeving en rechtszaken betreffende de pers de persvrijheid in Indonesië hebben beïnvloed. De studie gaat in op de geschiedenis van perswetgeving, de implementatie door overheidsinstanties en rechtbanken, en het openbare debat rondom deze wetten en hun implementatie vanuit een sociaal-rechtswetenschappelijk ('socio-legal') perspectief. Het onderzoek is gebaseerd op de volgende vier onderzoeksvragen: (i) hoe hebben de concepten van vrijheid van meningsuiting en persvrijheid zich ontwikkeld in de Indonesische wetgeving?; (ii) hoe wordt persvrijheid als een van de belangrijkste pilaren van een constitutionele democratie gegarandeerd door het Indonesische rechtssysteem?; (iii) hoe is de persvrijheid beïnvloed door de verschillende actoren? en (iv) zijn deze processen in overeenstemming met de eisen van de rechtsstaat?

Hoofdstuk 1 biedt een inleiding tot het onderwerp en zet het theoretisch kader uiteen dat aan het onderzoek ten grondslag ligt. Dit hoofdstuk bevat ook een discussie over wat een sociaal-rechtswetenschappelijk perspectief inhoudt en behandelt daarnaast het concept van de persvrijheid in juridische zin, de verhouding tussen persvrijheid en vrijheid van meningsuiting, theorieën over de pers, beperkingen van persvrijheid, en de verhouding tussen persvrijheid, democratie en de rechtsstaat. Ten slotte worden ook de methoden die gebruikt zijn voor dit onderzoek besproken.

Hoofdstuk 2 kijkt naar persvrijheid als een belangrijk element van de vrijheid van meningsuiting in de context van grondwetgevende processen. Het bespreekt de ontwikkeling van constitutionele debatten over de vrijheid van meningsuiting, in 1945, 1949-1950, 1956-1959, en ten slotte die van 1999-2002. Deze worden geplaatst in de politieke context van hun tijd. Het overzicht laat zien hoe persvrijheid altijd veel aandacht kreeg, maar dat dit nooit heeft

geleid tot bescherming door een aparte clausule in de grondwet. Gebleken is dat alleen de vrijheid van meningsuiting onvoldoende waarborgen biedt voor effectieve bescherming van de persvrijheid.

De volgende twee hoofdstukken gaan in op de geschiedenis van perswetgeving en –beleid. Hoofdstuk 3 betreft loopt van Nederlands-Indië tot aan Soekarno's Geleide Democratie, hoofdstuk 4 gaat verder met de Nieuwe Orde en *Reformasi*. Deze hoofdstukken laten zien hoe persvrijheid is vormgegeven en beïnvloed door de verschillende politieke regimes.

Vanaf het begin introduceerde het koloniale regime strenge controles op kranten en andere publicaties door middel van voorafgaande censuur, gewone censuur, en straf- en administratiefrechtelijke bepalingen. Het 'ethische beleid' dat werd ingezet aan het begin van de twintigste eeuw zorgde voor meer vrijheid voor de pers, zoals vooral blijkt uit de herziening van het Drukpersreglement in 1906. Deze zorgde voor de ontwikkeling van een eigen, Indonesischtalige ('Bumiputera') pers. Na de introductie van het Nederlands-Indische Wetboek van Strafrecht in 1914 ging het echter weer bergafwaarts met de persvrijheid. Een aantal artikelen uit het WvS werd op discriminerende wijze gebruikt tegen de Indonesischtalige pers, wat duidde op de overgang naar een repressiever regime. De Persbreidel Ordonnantie uit 1931 betekende een nieuwe klap voor de persvrijheid; deze werd door het regime gebruikt om strenge controle uit te oefenen op publicaties.

Tijdens de Japanse bezetting van Nederlands-Indië vanaf 1942, veranderde de militaire overheid weinig aan het repressieve systeem. Langzamerhand werd de controle op de pers steeds stringenter en uiteindelijk was de pers weinig meer dan een instrument voor Japanse propaganda. De onafhankelijkheidsverklaring van Indonesië in 1945 werd opgevolgd door talloze beperkingen van de pers en aanvallen op journalisten gedurende de periode van het conflict tussen Indonesië en Nederland (1945-1949). De meeste maatregelen tegen de pers werden genomen door het teruggekeerde Nederlandse gezag, dat aanspraak maakte op de voormalige kolonie. Het eerste verschijningsverbod dat werd uitgevaardigd door de nieuwe Indonesische regering dateert van 1948 en was gericht tegen de Indonesische communistische pers na de zogeheten "Madiun affaire", op basis van Wet 6/1946.

Nadat Nederland de Indonesische onafhankelijk erkende in 1949, verbeterde de persvrijheid aanzienlijk. In 1954 werd de Persbreidel Ordonnantie afgeschaft, wat op dat moment in het politiek sterk gepolariseerde landschap leidde tot extreem partijdige berichtgeving. Publicaties in de pers werden gekenmerkt door beschuldigingen en verwijten, schandalen, vetes en fraude – vaak zonder dat de feiten werden gecontroleerd. Deze periode zou echter niet lang duren, omdat de invoering van de staat van beleg in 1956 het leger in staat stelde om journalisten en redacteuren willekeurig en zonder vorm van proces in hechtenis te nemen. Nadien ging het snel achteruit met

de persvrijheid. Onder Soekarno's Geleide Democratie werden journalisten, redacteuren en uitgevers onderworpen aan allerlei vormen van repressie. Deze bestond deels uit ideologische maatregelen – zoals Soekarno's oproep tot een 'revolutionaire pers' – en deels uit wettelijke regelgeving.

Na de herinvoering van de Grondwet van 1945 in 1959 versterkte de regering haar repressieve beleid t.a.v. de pers door militaire, presidentiële en ministeriele wetgeving. De controle over de ideologie, organisatie, personeel en verspreiding van publicaties door de zogenaamde 'Geleide Pers' leidde ertoe dat Soekarno snel en effectief kon reageren op journalisten die kritiek hadden op zijn regering of zijn leiderschap. De militaire wetgeving stelde de regering in staat om kritische kranten direct te verbieden en journalisten en redacteuren werden veelvuldig opgesloten zonder enige vorm van proces.

De periode van de Nieuwe Orde begon in 1965 niet bepaald positief voor de persvrijheid. In de woorden van David Hill, "the arrests and killing of Communist and sympathizing journalists in 1965-66, carried out against a background of large-scale massacres in the country side, cast a very long shadow over the press for a subsequent decade" (Hill 1995: 34-35). Soeharto's regime ontwikkelde al snel haar eigen discours met betrekking tot de pers. Concepten als 'ontwikkelingspers', 'Pancasila pers' en 'sociaal verantwoordelijk pers' vertegenwoordigden nieuwe juridische en psychologische vormen van perscontrole. De Perswet (Wet 11/1966, gevolgd door Wet 4/1967, en uiteindelijk Wet 21/1982) vormde de juridische basis voor een verbod op de pers of vervolging van journalisten en redacteuren. De hoeksteen van het systeem was de publicatievergunning (in verschillende vormen), die in 1994 een belangrijke rol speelde in het beruchte verschijningsverbod van de tijdschriften *Tempo*, *Detik* en *Editor*. Bovendien zorgde het ondermijnen van rechterlijke onafhankelijkheid ervoor dat de pers weinig kon verwachten van toetsing door een rechtbank.

De eerste jaren na de val van Soeharto in 1998 vormden een hoogtepunt voor de persvrijheid. De nieuwe Perswet (Wet 40/1999) verbood censuur, verschijningsverboden en vergunningen, en President Abdurrahman Wahid schafte het Departement van Informatie af, het institutionele bolwerk voor controle over de pers gedurende de Nieuwe Orde. Zijn opvolgster Megawati ging echter soms openlijk de strijd aan met de pers. In deze periode vond ook weer vervolging van journalisten en redacteuren plaats, soms op haar persoonlijke initiatief, en deze ontwikkeling zette door tijdens het presidentschap van Susilo Bambang Yudhoyono (SBY). Nieuwe wetten, zoals de Pornografiewet,[1] de Wet op de Algemene Verkiezingen[2] en de Elektronische Informatie en Transactie Wet,[3] vervingen delen van de Perswet van 1999.

1 Wet 44/2008.
2 Wet 42/2008.
3 Wet 11/2008.

Het aantal strafrechtelijke en civiele zaken tegen journalisten, redacteuren en media eigenaren begon weer toe te nemen. Deze ontwikkeling heeft doorgezet en zorgt op dit moment voor grote financiële druk op sommige kranten en tijdschriften. In plaats van de Perswet, die op juridische gronden voorrang zou moeten hebben, wordt het Wetboek van Strafrecht weer vaker gebruikt als basis voor vervolging. Bovendien vinden regelmatig aanvallen plaats op journalisten en mediakantoren door ingehuurde criminelen. Degenen die hierbij betrokken zijn komen er vaak mee weg, wat bijdraagt aan het algemene gevoel dat schending van de persvrijheid niet bestraft wordt. Verder heeft SBY het Departement van Informatie en Communicatie heropgericht, en houdt een nieuwe instantie (de KPI) zich bezig met het verlenen van vergunningen aan en het uitoefenen van toezicht op radio en televisie. Deze organisaties hebben minder macht en invloed dan hun voorganger, maar zij vormen toch een bron van politieke controle op de media.

Als we de huidige situatie vergelijken met die tijdens de Nieuwe Orde, lijkt het duidelijkste verschil dat het geweld tegen journalisten meer gelokaliseerd en 'geprivatiseerd' is. Vooral roofzuchtige elites op provinciaal en districtsniveau maken zich schuldig aan dit soort schending van de persvrijheid. Deze verandering is nauw verbonden met het proces van decentralisatie dat na 1998 is ingezet. Zoals ook wordt beargumenteerd door Heryanto en Hadiz (2005: 261): "freedom of the press continues to be challenged, not by an authoritarian state, but by a variety of vested business interests or by the exercise of societal political violence." Men kan hieraan toevoegen dat geweld pers vaak volgt op onthullingen van corruptie en ongeoorloofde exploitatie van natuurlijke grondstoffen door lokale elites.

Ondanks deze negatieve ontwikkelingen, heerst er in Indonesië op het moment een grotere mate van persvrijheid dan tijdens de Nieuwe Orde. Er is een herziene grondwet die de vrijheid van meningsuiting duidelijk garandeert, net als de Mensenrechtenwet van 1999 en de Perswet uit hetzelfde jaar. Nieuwe restrictieve of zelfs repressieve wetten zijn ingevoerd, maar zij richten zich niet specifiek op de media. Bovendien waren de beperkingen op de persvrijheid tijdens de Nieuwe Orde juridisch slecht gedefinieerd, en speelden Soeharto's toespraken een belangrijke rol bij de interpretatie van deze beperkingen – nu zijn het in ieder geval de Persraad ('Dewan Pers') en de rechtbanken die de regels opstellen.

Hoofdstukken 5, 6 en 7 richten zich op de rechtspraak in zaken betreffende persvrijheid. Hoofdstuk 5 gaat over strafrecht, hoofdstuk 6 over privaatrecht en hoofdstuk 7 houdt zich bezig met toetsing door de bestuursrechtbanken. Deze hoofdstukken zijn juridisch van aard en besteden tevens aandacht aan de sociaal-politieke context van de behandelde zaken. Centraal staat de vraag in hoeverre rechtbanken en officieren van justitie binnen de grenzen van de rechtstaat zijn gebleven in hun interpretaties en optreden.

De strafrechtspraak is door allerlei verschillende politieke regimes gebruikt om oppositie of kritiek te onderdrukken. Na de onafhankelijkheid bleek het *Wetboek van Strafrecht voor Nederlands-Indië* van 1918 nog steeds een effectief middel om politieke tegenstanders te vervolgen. In het Indonesië van na Soeharto is de regering niet langer de dominante partij in het onderwerpen van de pers aan strafrechtelijke processen, maar zijn het bedrijven en (religieuze) bewegingen die er soms in slagen het Openbaar Ministerie te bewegen tot vervolging van journalisten en redacteuren.

Het Indonesische rechtssysteem kent nog steeds een groot aantal strafrechtelijke bepalingen die tegen de pers kunnen worden gebruikt, waarvan sommige in het Wetboek van Strafrecht staan en andere in speciale wetgeving. Enkele daarvan zijn inderdaad gebruikt om kranten en tijdschriften te 'disciplineren', zoals de zogenaamde 'haatzaai-artikelen', en bepalingen m.b.t. tot het verspreiden van onjuiste berichten en het schenden van fatsoensnormen. De wijze waarop zij deze wetgeving toepassen laat zien dat sommige rechters en officieren van justitie weinig aandacht hebben voor het belang van persvrijheid in een democratische samenleving. Veel lagere rechters negeren zelfs de Perswet van 1999, en passen nog steeds rechtstreeks de traditionele strafrechtelijke bepalingen toe. Gelukkig heeft het Hooggerechtshof in bijna alle zaken die aan haar zijn voorgelegd voorrang gegeven aan de Perswet en duidelijk gemaakt dat zaken betreffende de pers onder deze regeling dienen te worden behandeld. Als rechters zich aan deze vrijwel eenduidige jurisprudentie houden, zou dit veel problemen in de toekomst kunnen voorkomen. Het Hooggerechtshof bevordert deze ontwikkeling niet alleen door haar jurisprudentie, maar ook door een rondschrijven ('Surat Edaran' 13/2008) aan de rechtbanken, waarin deze worden opgeroepen een vertegenwoordiger van de Persraad in te roepen als expert in zaken betreffende de pers.

Men mag niet uit het oog verliezen dat zelfs als een proces wordt beslist in het voordeel van de beklaagde, een strafrechtszaak toch een negatief effect op persvrijheid heeft door de tijd, geld en spanning die de rechtsgang met zich meebrengt. Om die reden steunt dit onderzoek het voorstel van Susanto et al. om de Perswet aan te passen, zodat elke twijfel wordt weggenomen dat deze voorrang heeft boven andere wetgeving in een strafproces tegen de pers (2010: 232). Anders dan Susanto et al. betoogt de auteur van dit proefschrift dat de rechtsgang voor de Persraad op basis van de Perswet en de Gedragscode van de Pers de strafrechtelijke procedure volledig dient te vervangen. Dit vraagt ook een verandering in de huidige doctrinaire benadering van de Perswet in het huidige juridische onderwijs.

Hoofdstuk 6 toont hoe ook civiele zaken een bedreiging voor persvrijheid kunnen vormen. Vaak wordt de rechtbank in een civiele vordering gevraagd om een schadevergoeding en/of het rehabiliteren van de goede naam. Dit mechanisme leent zich voor misbruik om kritische media het zwijgen op te leggen met als dreiging substantiële materiële verliezen of zelfs faillissement.

In de toepassing van privaatrecht in een zaak tegen journalisten of media-eigenaren zien we de de spanning tussen het private belang van privacy, waardigheid en reputatie tegen het publieke belang van het openbare recht op informatie. Hoewel dit niet expliciet is bepaald in de Perswet van 1999 is juridisch gezien volgens de auteur van dit proefschrift het mechanisme van het civiele recht slechts van toepassing als een laatste toevluchtsoord indien het klachtmechanisme bij de Persraad niet heeft gewerkt.

Tijdens de autoritaire regimes van de Geleide Democratie en de Nieuwe Orde was het aantal civiele rechtszaken tegen persvrijheid relatief klein in vergelijking met het aantal strafrechtelijke zaken. De staat zette strafrecht en administratief recht in om andersdenkenden tot zwijgen te brengen. Dit veranderde na 1998, toen een combinatie van meer democratie, decentralisatie, en de opkomst van regionale economische elites voor een toename in civiele zaken tegen de pers zorgde. Het Hooggerechtshof heeft eenduidig geoordeeld dat het gebruik van 'het recht op antwoord', 'het recht op correctie' en het klachtmechanisme bij de Persraad voorrang heeft op een civiel proces. Net als in het strafrecht heeft een eenduidige jurisprudentiële lijn van die strekking toch niet kunnen voorkomen dat sommige zaken nog steeds direct door een civiele rechtbank in behandeling worden genomen.

Verder laat dit hoofdstuk zien dat 'belediging' de belangrijkste civiele grondslag voor een vordering tegen de pers is. Verschillende vonnissen en arresten bevatten bouwstenen voor rechtszekerheid in dergelijke zaken en voor een proportionele bescherming van de pers tegen een dergelijke vordering. *Mrs. Djokosoetono (Blue Bird Taxi) v Selecta Magazine* (1981) stelt beperkingen aan persvrijheid door erop te wijzen dat racistische aspecten relevant zijn wanneer de rechter moet nagaan nagaan of een daad 'op onrechtmatige wijze het gevoel, de reputatie en privacy schaadt.' In *PL ALM v Garuda Daily* (1991), introduceerde het Hooggerechtshof een gedragscode voor de pers als standaard om na te gaan of een nieuwsbericht onrechtmatig is of niet. Deze werd bevestigd in de zaak *Tomy Soeharto v Gatra Magazine* (1998) en de herziening in *Soeharto v Time Inc*. (2009).

Ondanks deze ontwikkelingen, maken politieke en economische elites nog steeds gebruik van civiele procedures om journalisten, redacteuren en kranten lastig te vallen. Rechtszaken die tot doel hebben om te intimideren kunnen 'Unjustifiable Lawsuits against Press Freedom [ULAP, 'Niet te Rechtvaardigen Rechtszaken tegen Persvrijheid'] worden genoemd. Deze zaken richten zich tegen professionele journalisten, eisen een extreme groot bedrag ter compensatie, gaan vaak samen met intimidatie, en dienen meestal om de belangen van de politiek-economische elite te bevorderen. Ondanks het feit dat deze zaken over het algemeen worden afgewezen verstoren zij het functioneren van de pers, doordat zij journalisten, redacteuren en media-eigenaren ertoe dwingen om tijd en geld in hun verdediging te investeren. Eén manier om ULAP zaken tegen te gegaan zou bestaan uit het indienen van een klacht van onrechtmatige daad tegen de personen die zich van ULAP bedienen.

Hoofdstuk 7 bespreekt de wijze waarop toetsing door de bestuursrechtbank is veranderd van zaken betreffende de gedrukte pers naar zaken m.b.t. radio en televisie. Deze gaan over vergunningen in de vorm van administratieve beschikkingen en voor de gedrukte pers zijn deze niet langer vereist. Hoewel het om een klein aantal zaken gaat, hebben een aantal van deze veel aandacht getrokken. Tijdens de Nieuwe Orde resulteerde de *Prioritas* zaak (1993) in een nieuw mechanisme van juridische toetsing van administratieve regelgeving door het Hooggerechtshof. De meeste bekende zaak, de *Tempo* zaak (1994) zorgde voor grote opschudding doordat zowel in eerste aanleg als in hoger beroep de rechter de intrekking van de publicatievergunning van 'Tempo' als onrechtmatig beoordeelde. In een zeldzaam slecht beargumenteerd arrest maakte heet Hooggerechtshof echter duidelijk dat men voor effectieve bescherming van de pers tegen de regering onder de Nieuwe Orde niet bij de rechtbank moest zijn.

De enige zaak bij de bestuursrechtbank na 1998, *REB*, toont hoe persvrijheid op het gebied van radio en televisie nog steeds onder invloed staat van het vergunningsregime, en op welke manier de staat haar bevoegdheid op dit gebied voor oneigenlijke doelen kan aanwenden. In deze zaak oefende de regering bovendien politieke druk uit op de bestuursrechtbanken in eerste aanleg en in hoger beroep om de bestreden beschikkingen in stand te laten. Uiteindelijk verwierp het Hooggerechtshof het oordeel in de ene zaak, maar bevestigde dat in de andere. Deze kwestie laat zien hoe op het gebied van radio en televisie de regering opnieuw een beleid van administratieve censuur toepast, en hoe dit de onafhankelijkheid van de administratieve rechtbank in gevaar kan brengen.

Het laatste hoofdstuk brengt de belangrijkste resultaten van dit onderzoek samen, plaatst deze op een meer expliciete wijze in het theoretisch kader, en doet een aantal aanbevelingen. Samenvattend kunnen we stellen dat vanaf de koloniale tijd tot heden Indonesië moeite heeft gehad om persvrijheid te garanderen. Het historische overzicht wordt gekenmerkt door de vele draconische wetten die de persvrijheid aan banden moesten leggen, en de pers is min of meer voortdurend het mikpunt geweest van aanvallen door overheidsambtenaren, politie, militairen, bedrijfs- en politieke elites, en politieke en religieuze bewegingen. In het geval van aanvallen door niet-statelijke actoren heeft de regering meestal weinig gedaan om dergelijke acties te voorkomen of te bestraffen. Op dit moment is er is een goede Perswet, maar deze wordt niet naar behoren geïmplementeerd.

Dit onderzoek over persvrijheid, recht en politiek in Indonesië laat zien dat de strijd om persvrijheid onafgebroken moet worden voortgezet als we ervoor willen zorgen dat de vierde zuil van een constitutionele democratie nu en in de toekomst op de juiste manier kan functioneren.

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Curriculum Vitae

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Herlambang initiated the Southeast Asian Human Rights Studies Network (SEAHRN) and the Indonesia Lecturers Association for Human Rights (SEPAHAM). In September 2013 he was appointed Chair of the Indonesian Association for Philosophy of Law (AFHI). Beside in academia, he has been active in numerous human rights groups. He served as a human rights defender in 1998-2004 at the Indonesian Legal Aid Foundation Surabaya (YLBHI-LBH Surabaya), the Federation Council of the Commission for the Disappeared and Victims of Violence (KontraS), the Association for Community and Ecologically-based Law Reform (HuMa) in Jakarta. He was also a board member of the Institute of Policy Research and Advocacy (Elsam) and Epistema Institute Jakarta, a member of the Council of Ethics of the Public Interest Lawyer Network Indonesia (Pil-Net) and founder of the Institute for Press Legal Aid Surabaya (LBH Pers Surabaya).

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