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Press freedom, law and politics in Indonesia : a socio-legal study

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Citation

Wiratraman, H. P. (2014, December 11). *Press freedom, law and politics in Indonesia : a socio-legal study*. *Meijers-reeks*. Retrieved from https://hdl.handle.net/1887/30106

Version:	Corrected Publisher's Version
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Note: To cite this publication please use the final published version (if applicable).

Cover Page

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Title: Press freedom, law and politics in Indonesia : a socio-legal study
Issue Date: 2014-12-11

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.

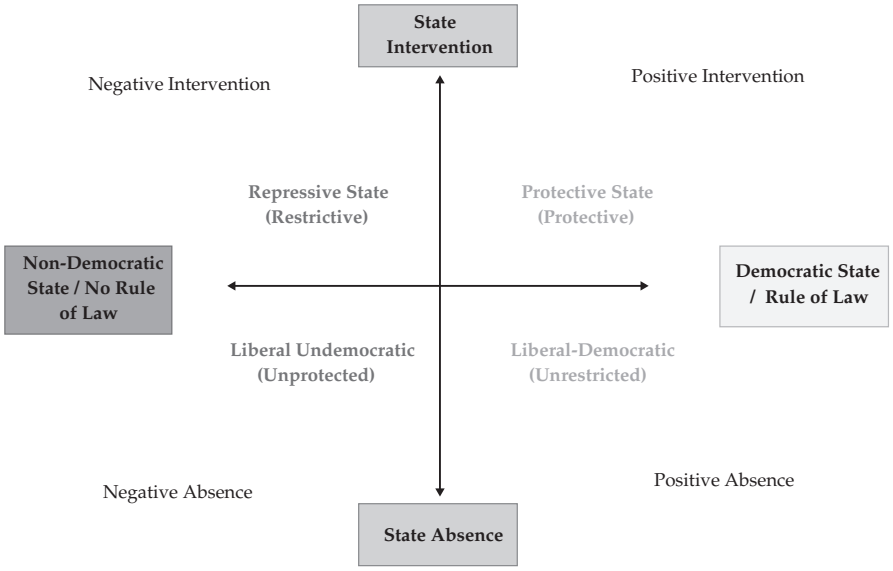
Press freedom is constitutionally protected in Indonesia under the article about freedom of expression. As such it is part of the framework forming the basis for constitutionalism, which can be defined as the political doctrine that claims political authority should be bound by institutions restraining 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.

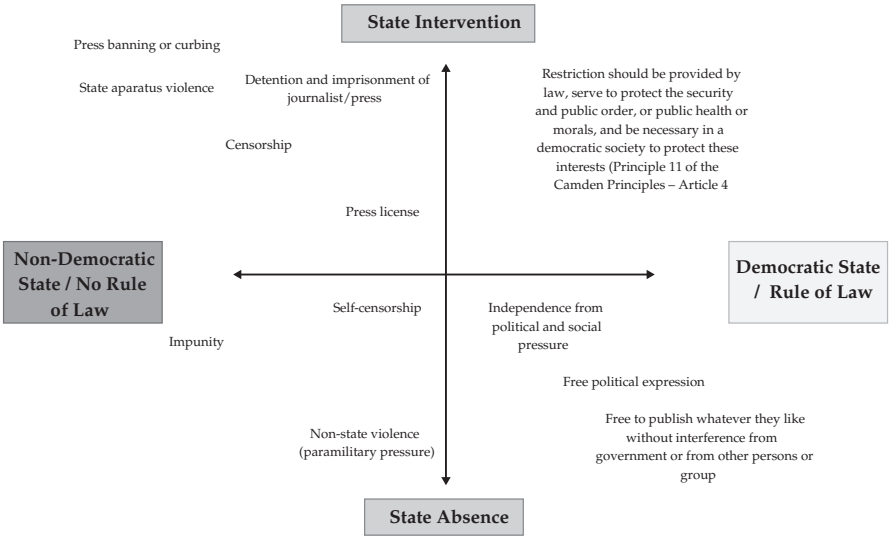
The Role of the State and Press Freedom: Types



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."