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

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### 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)*<sup>1</sup>

Issue in Criminal Law	Law (Art./s)	Sanction (imprisonment)
National Press Duties	Art. 2, 3, and 19 of Law 11/1966 <sup>2</sup>	1 year
	Art 19(1) (Point 17) of Law 21/1982 <sup>3</sup>	4 years and/or 40 million rupiah
Press without Permit (SIUPP)	Art. 13 (5) (Point 17) of Law 21/1982 <sup>4</sup>	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 ( <i>kesopanan /kesusilaan</i> )	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)
<i>Haatzaai-artikelen</i> (hatred sowing or hate speech – <i>menabur kebencian or ungkapan kebencian</i> )	Against government and state symbols	Art. 154-155 of the Penal Code <sup>5</sup>	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 ( <i>penghinaan, pencemaran nama baik</i> )	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 the Penal 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 ( <i>menyiarkan kabar bohong</i> )		Art. 171 of the Penal Code <sup>6</sup>	2-10 years
		Art. 317 of the Penal Code	4 years
Incitement ( <i>menghasut</i> )		Art. 160 and 161 of the Penal Code	6 years
Violating public decency ( <i>kesopanan / kesusilaan</i> )		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.<sup>7</sup> The fourth reason is that the Supreme Court has never stated that the Press Law is a *lex specialis*.<sup>8</sup> 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).

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 qualitibus pares sunt ut praeferatur quod magis est peculiare, & ad rem propius accedit: nam solent specialia efficaciora esse generalibus.*”<sup>9</sup>

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 four-fold increase in the number of complaints in relation to press publication matters (see table below, [www.dewanpers.org](http://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.<sup>10</sup> 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-ARTIKELN

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)<sup>11</sup> 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*).<sup>12</sup> Soekarno was indicted on the basis of the *haatzaai-artikelen* in 1930 in the Bandung District Court, and attacked them vehemently during his trial,<sup>13</sup> 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.<sup>14</sup>

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' before 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<sup>15</sup>*

The case	Indictment		Court Decision		
	Rules	Sanction	District Court	High Court	Supreme Court
Goei Po An ( <i>Terompet Masyarakat</i> ), 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 ( <i>Suara Independen</i> ), 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 ( <i>Rakyat Merdeka Online</i> ), 2006	Art. 156a Penal Code	5 years	Interlocutory decision: indictment was unacceptable	Unknown <sup>15</sup>	Unknown

<sup>15</sup> 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.<sup>16</sup>

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-

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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 Jadi Raja Telanjang*” (Soeharto on the Way to Becoming a Naked King).<sup>17</sup>

According to one of his lawyers, Irianto Subiakto,<sup>18</sup> 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.<sup>19</sup> 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 Illallah 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),<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> '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!"<sup>24</sup> 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.”<sup>25</sup> 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:

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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
<i>Soeharto v. Pop Magazine</i> (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 <sup>26</sup>	Unknown	Unknown
<i>Megawati v. Rakyat Merdeka</i> (Supratman) / 2003	Art. 134 & 137 of the Penal Code	6 years maximum	Probation for 12 months	-	-
<i>Sriwijaya Post</i> (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 ( <i>error in persona</i> )	Unknown	Unknown
<i>Tempo</i> (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
<i>Warta Republik and Gatra</i> (1998)	Article 310 of the Penal Code	1 year and 4 months	Probation	-	-
<i>Radar Yogja</i> (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
<i>Winny and Aseng</i> / 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 <sup>27</sup>	6 months in jail and probation for one year <sup>28</sup>	Still in process <sup>29</sup>
<i>Iwan Piliang versus Alvin Lie</i> on Cyber Defamation / 2009	Article 27 (3) of the EIT Law <sup>30</sup>	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.<sup>31</sup> 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 17<sup>th</sup> 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 Hanintyo, later told in *Tempo* that Soeharto would actually accept this as new information.<sup>32</sup>

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”.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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",<sup>38</sup> "Mega is more cruel than Sumanto",<sup>39</sup> "Mega is a Usurer"<sup>40</sup> and "Mega is of the same standard as a District Mayor".<sup>41</sup> Unsurprisingly, Megawati was upset and criticised the press for being "*tidak seimbang*" (unbalanced), "*ruwet*" (complicated), "*tidak adil*" (unfair) and "*tidak patriotis*" (unpatriotic).<sup>42</sup>

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."<sup>43</sup> 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, Zoerber 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.<sup>44</sup> 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,<sup>45</sup> 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:

1<sup>st</sup> 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;

2<sup>nd</sup> 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.'<sup>46</sup>

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.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup>

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

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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*.<sup>50</sup>

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.<sup>51</sup> 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.”<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> Nonetheless, the West Java High Court upheld the argument by the District Court and imposed the same sentence.<sup>56</sup>

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.<sup>57</sup> Irfan Fahmi al-Kindy, a lawyer from the human rights NGO PBHI,<sup>58</sup> 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.”<sup>59</sup> 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.”<sup>60</sup>

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.<sup>61</sup>

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

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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:<sup>62</sup>

##### 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.

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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.<sup>63</sup> 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".<sup>64</sup> 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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<sup>63</sup> 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.

<sup>64</sup> "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".<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> The sentence was only lowered on

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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.<sup>69</sup>

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.<sup>70</sup>

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 *novum* 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.<sup>71</sup> 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,<sup>72</sup> and made this public in a number of letters to the editor in *Suara Pembaruan*, *Kompas* and *Warta Kota*.<sup>73</sup> 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.<sup>74</sup> The case is now pending for a review in the Supreme Court.<sup>75</sup>

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-

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.<sup>76</sup> 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”.<sup>77</sup> 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):

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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.

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.<sup>81</sup>

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.

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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<sup>82</sup>, 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*.

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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
<i>Sinar Pagi Daily</i> (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
<i>Berita Buana</i> (H. Abdul Wahid) / 1989	Art. XIV-XV of Law No. 1/1946	10 years maximum	Sentenced, 1 year <sup>83</sup>	Unknown	Unknown
<i>Tempo</i> (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
<i>Upi Asmaradhana</i> / 2008	Art. 317 section (1), 311 section (1), 160 of Penal Code	6 years maximum	Prosecutor's indictment refused	Unknown	Cassation in process <sup>84</sup>

### 5.5.1. Sinar Pagi (1980-1982)<sup>85</sup>

*... membawa masalah ini ke Pengadilan dalam keadaan keblinger dan tidak ubahnya seperti menembak nyamuk dengan meriam.*<sup>86</sup>

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),

<sup>83</sup> "Buntut Berita Lemak Babi," *Tempo*, 1 September 1990.

<sup>84</sup> 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.

<sup>85</sup> The details of this case have been taken from Hamzah et al. (1987: 97-140; 152-251).

<sup>86</sup> 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.<sup>87</sup> It addressed S.A.S, the vice-editor of the daily *Sinar Pagi*,<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> This judgment was upheld on appeal by the High Court of West Java.<sup>91</sup> 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.<sup>92</sup> 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 Brems (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”.<sup>93</sup> The article warned consumers to be more careful in consuming suspected food items and demanded that the government be stricter in this matter.<sup>94</sup> 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*,<sup>95</sup> 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.”<sup>96</sup> 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?).<sup>97</sup>

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.

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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<sup>98</sup>), 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-

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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 Suropto 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.<sup>99</sup>

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.<sup>100</sup>

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](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.”<sup>101</sup>

Although 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.<sup>102</sup> 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.<sup>103</sup> 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.

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, LL.M. 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 Adiwino, 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).”<sup>104</sup> 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),<sup>105</sup> 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,<sup>106</sup> 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<sup>107</sup>

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.<sup>108</sup> 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;

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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).<sup>109</sup>

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*)."<sup>110</sup> 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.<sup>110</sup> The magazine had already received three previous warning letters, but no ban followed.<sup>111</sup>

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
<i>Varia Baru</i> (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
<i>Matra Magazine</i> (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
<i>Playboy</i> 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.<sup>112</sup> 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.<sup>113</sup>

<sup>112</sup> Ministry of Information Decree No. 35/SK/Dirdjend-PG/1971.

<sup>113</sup> Keputusan Menteri Penerangan Republik Indonesia No.52/Kep/Menpen/1968 tentang "Larangan terbit bagi penerbitan berita suratkabar, yang bertentangan dengan Pantjasila menggunakan tjara-tjara pornograts dan lain-lain penyelewengan yang membahayakan 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.”<sup>114</sup>

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.<sup>115</sup>

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.<sup>116</sup> Supporting him, press expert Atmakusumah Asraatmadja argued that *Matra*’s cover could be categorised as art rather than pornography, as it did not

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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.<sup>117</sup> 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.”<sup>118</sup> 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).<sup>119</sup> 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.<sup>120</sup> It also demonstrates how the limitations regarding public decency had not necessarily been widened after the end of the Soeharto era.<sup>121</sup> 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.”<sup>122</sup> 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).<sup>123</sup> 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

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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.<sup>124</sup> 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

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<sup>124</sup> 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.<sup>125</sup> 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)<sup>126</sup> 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".<sup>127</sup> The Press Council made a similar statement concerning the failure of the Supreme Court to apply the Press Law<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> 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!*<sup>131</sup>  
(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

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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 satisfy 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.<sup>132</sup> 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. (Asraatmadja 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.<sup>133</sup>

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.<sup>134</sup> In its General Comment No. 34, the HRC stipulates in paragraph 47, "State parties should consider the decriminal-

132 Atmakusumah Asraatmadja, 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&IID=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.”<sup>135</sup> 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.”<sup>136</sup>

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.<sup>137</sup>

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.”<sup>138</sup> 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.”<sup>139</sup>

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.

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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).

