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

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6.1. INTRODUCTION

Just as criminal prosecutions, civil law suits pose a threat to press freedom. Many cases against the press have been brought to the civil court, mostly asking the court for damage compensation and/or rehabilitation because of news reports. Clearly, everyone ought to have the right to defend her- or himself against detrimental news, but – as we will see – this mechanism is open to abuse and has sometimes been deployed to attempt silencing critics by threatening them with serious material losses or even bankruptcy.

The use of private law to sue journalists or media owners reflects the tension between private and public law in the contestation between privacy, dignity, reputation and personality versus the public right to information. Although this is not stipulated explicitly in the Press Law (40/1999), the civil court mechanism is applicable as the last resort when the mediation process through the Press Council has failed. The civil court should also take into account the Press Law in determining the balance between private rights on the one hand and press freedom as a public interest on the other. This chapter will discuss to what extent the Indonesian civil courts have managed to strike such a balance on the basis of a legal analysis of civil court decisions, starting with cases under the New Order until approximately 2010. This analysis will be preceded by a brief discussion about the limits that can be imposed on press freedom within a private law context, and by an introduction into the main private law rules relevant to press freedom.

6.2. PRIVATE LAW, PUBLIC INTEREST AND PRESS FREEDOM

In providing accurate information to the public, the press serves the public interest. Journalists have to be professional in reporting news, in particular when it may be harmful to the interests of private persons. Press freedom does not provide a blanket protection, but only protects if it strikes a proper ‘balance’ between private interests and the public interest in acquiring information.

As already mentioned in the previous chapter, Syamsuddin has argued that there are three criteria to help understand the term ‘public interest.’ First, public interest as related to press activities must be interpreted as ‘the people’s

interest,' not a state interest, a group interest, an organisation's interest, or the national interest. Second, public interest refers to activities and/or public instruments and facilities that have a 'public use' and/or 'public purpose,' including procurement and operational activities that provide benefits to society by the central, regional and local government. Third, public interest refers to the right of the people to access information, but only information fulfilling the following criteria: honesty, objectivity, truth, impartiality, balance, quality and affordability (Syamsuddin 2008: 301-304).

If we view the development of democracy as a public interest, then the relation with press freedom is evident, as accurate information is indispensable for the well functioning of a democracy. The disclosure of information bears directly on public decision making. Excluded from the protection offered by the need to further this public interest are the disclosure of false information. The same applies to information that bears directly on public decision making, but violates private interests, such as another person's dignity or privacy, in a disproportionate way. If such information has little or no relevance to public education or to public decision making, it is less likely to pass the test of proportionality (Gordley 2006: 246-257).

These criteria are relevant to determine whether particular news qualifies for being in the 'public interest,' especially in relation to tort law (*onrechtmatige daad* or *perbuatan melawan hukum*) and to answer questions such as when reporting infringes on the rights of others, or how much evidence a reporter needs to be allowed to publish news going against someone's interest.

6.3. TORT LAW AND INSULT IN INDONESIA'S CIVIL LAW

As there are important differences between countries regarding the arrangements of tort law, I will first briefly explain the Indonesian system. The basics of tort law have been adopted from the former Dutch *Burgerlijk Wetboek* (Civil Code) and can be found in Articles 1365-1366 of the Indonesian Civil Code of 1848. Tort is known as a '*perbuatan melawan hukum*' or '*perbuatan melanggar hukum*' (*onrechtmatige daad*):¹

Art. 1365: Any unlawful act causing damage to others shall oblige the person who caused the damage to pay compensation.²

Art. 1366: Anyone shall be responsible not only for damage caused by his action, but also for losses caused by his negligence or imprudence.

1 The original text is still in Dutch and uses the term *onrechtmatige daad*. There is no consensus about the translation, some legal scholars using '*perbuatan melawan hukum*' (Badrulzaman, 1983; Djodirjo, 1982; Agustina, 2003; and Satrio, 2005), others '*perbuatan melanggar hukum*' (Prodjodikoro, 2000; Subekti and Tjitrosudibio, 2002).

2 This article was adopted from Article 1401 of the former Dutch Civil Code.

Originally, Article 1365 was interpreted narrowly: '*onrechtmatig*' (unlawful) was equated to '*onwetmatig*' (infringing statutory law). This narrow interpretation changed with the Dutch Supreme Court's decision of 31 January 1919 (*Lindenbaum v. Cohen*). In this case, the court included into the concept of unlawfulness behaviour infringing on "social norms deemed proper in social intercourse." Indonesian courts have continued to follow this interpretation (e.g. 3191/K/Pdt/1984 (*Masudiati v. I Gusti Lanang Rejeng*)).

The scope of liability is further regulated in Articles 1367, 1368 and 1369. Even more important for our purpose are Articles 1372-1380, which deal specifically with insult.³ The central articles are 1372 and 1373:

Art. 1372: The civil legal claim with respect to an insult shall extend to compensation of damages and to the reinstatement of good name and honour that were damaged by the offense. The judge shall, in the consideration thereof, have regard to the severity of the offense, as well as to the position, status and financial condition of the parties involved and the circumstances.

Art. 1373: The insulted party may also demand a judgment declaring that the insulting act is slanderous or insulting. If he demands a declaration that the insulting act is slanderous, then the provisions of Article 314 of the Penal Code with regard to punishment for slander shall apply. The sentence shall, if the offended party so requests, at the expense of the convicted party, be posted in public in so many copies and in the location as ordered by the judge.

Article 1374 adds that a declaration as mentioned in Article 1373 will not be applied if the defendant states before the court that "he regrets the act committed; that he therefore apologizes and that he considers the offended party to be a person of honour."

These articles do not define explicitly what an insult is. The concept of insult is implicitly defined in Article 310 of the Penal Code:

- (1) The person who intentionally harms someone's honour or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of three hundred rupiahs.
- (2) If this takes place by means of writings or portraits disseminated, openly demonstrated or put up, the principal shall, being guilty of libel be punished by a maximum imprisonment of one year and four months or a maximum fine of three hundred rupiahs.
- (3) Neither slander nor libel shall exist as far as the principal obviously has acted in the general interest or for a necessary defence.

If we look at the history of the law making process of the Civil Code in the Netherlands, it appears that the legislator intended to adjust the formulation of insult in article 1372 to the meaning of slander under the Dutch Penal

3 I use the term insult for what is originally '*belediging*' in Dutch. This is usually translated in Indonesian as '*penghinaan*.'

Code of 1884. According to Pitlo and Bolweg (1979: 363, in Satrio 2005) “[i]t is generally accepted that lawsuits on insult can be accepted only if there is a basis for criminal prosecution as stipulated under article 310 of the Penal Code.”

This has two consequences. First, those who defame or insult someone carry a ‘double liability’ under criminal and civil law (even if the two processes cannot be conducted simultaneously, see Art. 314(3) of the Penal Code). And second, on the basis of Article 1373, civil liability can only be assumed if the insult contains the elements stipulated in Article 310 of the Penal Code. This does not mean, however, that criminal liability automatically leads to civil liability. Article 1376 of the Civil Code adds that:

A civil legal claim with respect to the insult cannot be admitted, if it does not appear that there existed intent to insult. The intent to insult shall not be considered to have existed if the alleged offender apparently acted in the public’s interest or if he did so as an act of necessary defence.

Hence, there is a difference between a civil and criminal law insult. The ‘intent to insult’ (in Dutch *‘het oogmerk om te beledigen’*) cannot be found in Chapter XVI of the Penal Code, which says that the insult must be ‘deliberate.’ Satrio poses the question whether ‘intent’ in the Civil Code is similar to ‘deliberate’ in the Penal Code. Indeed, originally the Dutch Supreme Court in its judgment dated 10 January 1896 held that these concepts had the same meaning. However, in a decision of 22 January 1965 the Dutch Supreme Court argued that they were different, as someone might deliberately state something in self-defence or to further the public interest (Satrio 2005: 72-75). To what extent similar interpretations have occurred in Indonesia is unclear in the absence of relevant precedents.

The next issue is how to determine form and amount of indemnification. This is quite complex since there is no statutory standard. Neither Article 1365 nor Article 1372 say anything about this, except for their reference to ‘the losses’ caused by insults. Certainly, form and amount of indemnification must be proportional, even if lower court rulings do not always follow this principle and in a very few instances the Supreme Court itself seems to have deliberately ignored it. As will be discussed later on in this chapter, some tort claims against the press even seem to have the intention of driving journalists or newspapers into bankruptcy.

However, the court cannot confine itself to looking at the Civil Code, but should also consider tortuous liability in the light of the Press Law, the Human Rights Law, the Public Disclosure Law, and other relevant statutes. In this manner the courts have to find a balance between the rights of the claimant, the rights of the public and the public interest in a wide sense.

6.4. PROCEDURAL ASPECTS: PRESS COUNCIL AND CIVIL COURT MECHANISMS

A preliminary question we need to answer is whether someone can file a lawsuit on account of insult to the court directly, or whether he or she first needs to address another forum. Some practitioners answer this question in the negative, arguing that the Press Law does not sufficiently regulate insult, defamation and humiliation and how to address it. The statement of law enforcer, such as South Sulawesi Provincial Police Commander (*Kapolda*) Sisno, in the case of *Sisno Adiwino v Upi Asmaradhana* (2008). Sisno stated that [it was] unnecessary to use the ‘right to reply’ and the press mechanism under the Press Law, [as] journalists can be prosecuted in a criminal process (see this case further in the last part of this chapter). Several scholars are less certain, but still leave it to the potential plaintiff to decide whether to follow the procedure of the Press Law or to directly address the civil court. (Wahidin 2012: 57; Satrio 2005; Susanto et al 2010: 232). Satrio for instance holds that the victim of an alleged insult can simply choose whether to use the mechanism under the Press Law, the Penal Code or a civil lawsuit. He supports this position by reference to the absence of any support for a *lex specialis* argument from either the government or the Supreme Court. On the contrary, he argues, the government has maintained 42 articles on press offences outside of the Press Law and the Supreme Court has argued in 277K/Kr./1979 that “[...] the Press Law does not reduce the defendant’s liability for insult or defamation” (Satrio 2005: 106-116).

There is however convincing evidence to the contrary. First, of course, a 1979 precedent is of little value if we take into account that a completely different Press Law was in place at that time. Moreover, during the public hearing session on 6 June 2000, the parliamentary commission responsible for the debates about the Press Law (Commission I) unanimously supported the opposite opinion. It held that someone who felt he or she had been affected negatively by a news report should first use the right to reply provided for in the Press Law. If the dispute could not be resolved in that manner, the Press Council should be asked to mediate the dispute. Only after the mediation would have failed to satisfy one of the parties should the case proceed to court, with the opportunity that a ‘social punishment’ would be added to the legal one – such as the general public boycotting ‘dishonest’ news media (Asraatmadja and Luwarso 2001: 56-67). This idea was subsequently adopted by the Press Law, even if the intention of Parliament that this would be a compulsory sequence was not made fully explicit in the Press Law itself.

Hence, even if the Press Law does not provide special provisions on insult, defamation and humiliation, its mechanisms of ‘right to reply’ and ‘right to correction’ (Art. 5) are applicable. In addition, one may bring a complaint to the Press Council according to Article 15(2) c and d, which holds that the Press Council is responsible for “determining and monitoring the Press

Code of Ethics” and that the Press Council “gives consideration and seeks resolution of cases related to society’s complaints about news reports.”⁴

The Press Council can issue 'legally binding decisions' in press disputes. The Council's procedural rules can be found in Press Council Regulation No. 3/Rule-DP/VII/2013, which stipulates how the public complaints over cases related to press coverage can be lodged and how the Press Council should review them on the basis of the Code of Ethics of Journalism and the principles of freedom of the press.

There are three types of complaint (Article 2 of the Press Council Regulation), concerning journalists' professional behaviour, violence against journalists and editors/press owners, and advertising (Article 13 of the Press Law). Such complaints must be lodged within two months after the incident that happened gave rise to the case, except for special cases involving the public interest. The Press Council does not deal with complaints that have been filed with the police or the courts unless the complainant withdraws his complaint or unless the police hands over the case to the Press Council. A complaint should be addressed within 14 working days, and the procedure must be posted on the website of the Press Council.

The Press Council will examine the testimony of the complainant and the reported parties before issuing a decision. It can resolve cases through mediation or through adjudication. The results of the mediation are signed by the parties and will not be disclosed unless the parties agree to this. If the mediation does not lead to an agreement, or if the case is decided in adjudication immediately the Press Council will issue a Statement of Assessment and Recommendations (Pernyataan Penilaian dan Rekomendasi). Adjudication takes the form of a decision in writing. Such a decision must be implemented within 14 working days after the parties received the Statement of Assessment and Recommendations. If one of the parties fails to comply with the decision, the Press Council will issue a public statement specifically for this purpose. The civil court process is the last resort and can only be followed after the resolution process in the Press Council has failed.

This view has been corroborated by Bagir Manan, former chairman of the Supreme Court and currently chairman of the Press Council:

4 According to Article 15 of the Press Law the Press Council has the following tasks: 'protecting press freedom from interference by third parties; conducting studies about the development of the press; establishing and overseeing the implementation of the Code of Ethics of Journalism; considering and resolving public complaints about cases relating to press coverage; developing communication between the press, the public, and the government; facilitating press organisations in formulating regulations in the field of press and improving the quality of journalists.'

The 1999 Press Law must be applied at first stage prior to any court examination related to press cases. Law enforcers should understand the 'speciality' of the Press Law to examine press cases, especially when considering whether such a case has followed the mechanisms of the 'right to reply' and the 'right to correction,' or mediation in the Press Council. Without applying the Press Law during the first stage, the case is unacceptable or inappropriate as a civil court case.⁵

In relation to Article 15(2c), there is a question whether the Press Council can impose a sanction for insulting news. The closing part of the Press Code of Ethics⁶ stipulates the following:

The final assessment on the violation of the Press Code of Ethics is made by the Press Council. Sanctions over violation of the Press Code of Ethics are imposed by journalist organisations and/or press companies.

Thus, the Press Council is only an examiner in this case and cannot impose any sanctions itself. Only after the Press Council has passed judgment finding fault with the contested report may the aggrieved party address the civil court for compensation.

In conclusion, the plaintiff must first use his or her right to reply and/or correction. If he feels dissatisfied he must address the Press Council and only after that may he bring an action to the civil court.

6.5. 'PENCEMARAN NAMA BAIK' (INSULT AND DEFAMATION): LAWSUITS AGAINST THE PRESS

Civil lawsuits against the press can be brought under several headings, but by far the most important are 'insult' and 'defamation.' These two concepts do not correspond directly to the common law definitions, as already explained in Chapter 1. Under Indonesian law there are no clear distinctions between the two. I will refer either to insult, or if this happens orally I will refer to it as slander and if it happens in writing as libel. When I speak of a 'libel suit' I refer to a lawsuit against the press because of a written insult.

I will now examine several libel suits from before and after the enactment of the 1999 Press Law. They have been selected on the basis of their legal importance, in that they contributed to new developments in press law (landmark decisions), but I have also added a few 'famous' (or notorious) cases, which have drawn much public attention.

5 Bagir Manan (the Press Council chairman), *interview*, Leiden, 26 March 2010. A similar statement is recorded in Kusumaningrat and Kusumaningrat (2011: 309-310).

6 Press Code of Ethics, appendix of Press Council Decision No.: 03/SK-DP/III/2006. This code was agreed after a workshop attended by 29 journalist associations, the Press Council, and the Indonesian Broadcasting Commission, on 14 March 2006.

6.5.1. Libel Suits before the Enactment of the 1999 Press Law (40/1999)

The number of cases before 1999 is extremely limited, in fact I could only find two: *Ms Djokosoetono (Blue Bird Taxi) v Selecta Magazine* (1981, Jakarta) and *Anis v Garuda Daily Newspaper* (1991, Medan).⁷ They were examined while different Press Laws were in place, viz. Law 11/1966 jo. Law 4/1967 and Law 21/1982. However, both cases were brought under the Civil Code's Articles 1365 and 1372-1380.

6.5.1.1. *Ms Djokosoetono (Blue Bird Taxi) v Selecta Magazine* (1981)

On 22 June 1981, *Selecta Magazine*'s issue 1031 printed an article called "*Kasus Pengemudi Taksi Blue Bird*" [The case of the Blue Bird Taxi Driver, pp. 60, 61, 98 and 100]. The article referred to Bluebird's owner, Ms Djokosoetono, as of Chinese descent. Ms Djokosoetono objected to this description. She had married Mr Djokosoetono and they had been living as a Javanese family, observing Javanese and not Chinese *adat*. According to the plaintiff this article harmed her public standing as well as her and her company's good name and reputation. She felt that the effect of the article had caused public criticism and she felt a victim of a 'trial by the press.' Her company had since incurred financial losses and as a result she had fallen ill and her peace of mind had been disturbed.

Therefore, Ms Djokosoetono sued the chief editor of *Selecta Magazine*, Syamsuddin Lubis, on the basis of Article 1365 of the Civil Code. She argued that both the defendant and the managing director of *Selecta Magazine*, Sahala R. Siregar, had been careless to the point of unlawfulness, and hence were liable for compensation of the damages the plaintiff had suffered morally and materially.

In its decision 497/1981/PN.Jak-Pst, the Central Jakarta District Court rejected the plaintiff's claim, a decision that was confirmed on appeal by the Jakarta High Court through its decision 330/1983/PT. Jakarta.⁸ The plaintiff then appealed for cassation to the Supreme Court, arguing that only the Supreme Court was competent to decide on the interpretation of the term 'insult.'⁹ Moreover, she added legal opinions from former Supreme Court Chairmen Wirjono Prodjodikoro and Oemar Seno Adji. The former held (1993: 104, in the Plaintiff's Cassation Note) that if a journalist publishes something for public purposes, it should not contain unnecessary or annoy-

7 According to Samsul Wahidin no private lawsuits were brought to court prior to his publication in 2006 (2006: 189).

8 Unfortunately, I have been unable to find these decisions, only the reference to them made by Agustina (2004: 44-45). Hence, I could not analyse the legal reasoning in more depth.

9 Reference is made to Supreme Court Decision 27K/Sip/1972, 5 July 1972 for supporting this position.

ing words. Seno Adji's was quoted as saying that criticisms are allowed as long they are constructive and do not amount to a '*formele belediging*' (a formal insult). This is the case if a statement is unnecessarily harsh, without considering etiquette and good manners.

The Supreme Court, in its judgment 1265 K/Pdt/1984, upheld the appeal for cassation and found that the defendant had acted in an unlawful manner. First, the Supreme Court held that the report went beyond the limits necessary to serve the 'public interest,' while hurting the feeling and reputation of the plaintiff. Second, this should be considered as defamation of the plaintiff, either as an individual or as the director of the Blue Bird Corporation, and therefore the defendant should pay a compensation of Rp. 100,000 (approximately USD 58,82 in 1984) (Agustina 2004: 45).

This judgment was clearly flawed, for several reasons. First, the judgment limited itself to the Civil Code as the relevant legal framework and failed to consider the 1967 Press Law, which stipulated in Art. 15(3):

The chief editor must be responsible on redaction matters and has the obligation to serve the rights to reply and correction.

The plaintiff had not made use of her rights to reply and correction and therefore the case ought to have been dismissed. Furthermore, its reasoning was insufficiently clear, because the judges did not provide any criteria for assessing the limits of 'serving the public interest.'

Nonetheless, *Ms Djokosoetono v Selecta Magazine* set a new standard for press freedom, in determining that it is not allowed to include an 'unnecessary issue regarding race' in the 'assessment of an act which harms feeling, reputation and also privacy.' I have not been able to find any information about the influence of this judgment on journalists' practice, but unlike most other cases this one has actually been referred to as a precedent in at least one civil court case.¹⁰

6.5.1.2. *PT ALM (Anugerah Langkat Makmur) v Garuda Daily* (1991)

PT ALM v Garuda Daily is probably the best-known case in the history of libel suits against the press. The court arguments in this case have been often quoted, by journalists, lawyers and in later court decisions. It concerned a suit for libel under the Civil Code by the Anugerah Langkat Makmur Corporation, which had caused the removal of a school and a railway station in order to speed up its business operations. The locals had protested against these actions to the North Sumatra Parliament. According to PT ALM, this statement negatively affected the company and caused it to incur considerable losses.

10 In *Asian Agri Corporation v Tempo Magazine*.

PT ALM then filed a suit against *Garuda* before the Medan District Court. In their judgment (14/Pdt/G/1990), the judges found that the defendant had acted in an unlawful manner by defaming the plaintiff, and they ordered *Garuda* to pay a compensation of Rp. 50 million (approximately USD 25,000 in 1991). *Garuda* appealed to the High Court in Medan, but to no avail as the court confirmed the judgment in first instance (150/Pdt/1991).¹¹

Garuda then appealed for cassation to the Supreme Court, arguing that the *judex facti* had wrongly applied the law because the news report had been produced in accordance with the ethical standards for journalism. The PWI (Indonesian Journalists Association) confirmed this, stating that the report could not be considered as an 'unlawful act.'

The Supreme Court upheld the appeal in its judgment 3173K/Pdt/1991. It considered that on the basis of standards of 'morals, ethics, ideals and law' under Press Law 21/1982, the legal argumentation of the original plaintiff could not be accepted. The court clarified its finding as follows. First, *Garuda* had produced its report in a context of 'openness and democracy,' implementing its function of social control to protect a group of people in Alor II Village, Sub-District of Babalan, Langkat, in the interest of the population of North Sumatra and the nation. *Garuda* had been right in not only representing the view of the government or companies, but in also making heard the voice of those suffering. The second reason was that the information published by *Garuda* was not coloured by ethnic, religious or racist feelings; it was truthful, and in accordance with moral and journalist ethics. If the original plaintiff felt that the facts were not true he should have used his right to reply, but he had failed to do so. Third, the *Garuda* journalist who had written the report had observed the standards of 'investigative reporting,' in seeking, finding, and scrutinising news sources.

The main difference between *Ms Djokosoetono (Blue Bird Taxi) v Selecta Magazine* and *PT ALM v Garuda Daily* thus concerned the reference to the right to reply in the latter case, which was absent in the former. Apart from that, the cases are not as contradictory as one may think at first sight. *Ms Djokosoetono (Blue Bird Taxi) v Selecta Magazine* provided a clear message about the 'prohibition of racism' as a limitation to press reporting. *PT ALM v Garuda Daily* is an important judgment, in being the first to take seriously 'journalist professionalism.' In this context the court referred to principles of 'morality, journalistic ethics, and truthfulness.' It also highlighted the importance of 'openness and democracy' as the proper context for evaluating the lawfulness of news reports. And thirdly, for the first time the 'right to reply,' as stipulated by Art. 15 of the Press Law, was suggested as the proper preliminary mechanism to deal with such cases. Even if not explicitly presenting the 'right to

11 Once again, I have not been able to find these decisions. Their numbers have been taken from Supreme Court Judgment 3173K/Pdt/1991.

reply' as a mandatory mechanism, the court came quite close, explaining its importance in maintaining the balance between freedom and responsibilities in reporting news in order to guarantee protection, safety, and welfare.

Anif v Garuda Daily thus introduced both new 'substantive' elements into examining libel cases as well as a procedural one and thus became a landmark case for press freedom.

6.5.1.3. *Tommy Soeharto v Gatra Magazine* (1998)

Just prior to Soeharto's resignation from the presidency, during the chaotic political situation in 1998, Tommy Soeharto filed a lawsuit against *Gatra Magazine* for libel. The reason was a publication by *Gatra* which exposed Tommy's involvement in drug trafficking in Australia. Tommy argued that *Gatra* had never asked him to confirm that the news was not true, and that it had tarnished his reputation.

The case was heard by the Central Jakarta District Court. In their judgment 619/PDT.G/1998/PN.JKT.PST, the judges found that *Gatra* was not at fault, for which they provided a fairly elaborate argument. First, the report was 'accurate' and did not mix up facts and opinions. The court also explicitly considered that the news had been gathered 'politely and respectfully' as stipulated in Article 10 of the Press Code of Ethics. The *Gatra* journalist moreover always informed his sources about his identity.

Second, the report was professional and balanced in the sense of Article 5 of the Press Code of Ethics. Neither did the news violate the principles of 'propriety, thoroughness, and carefulness,' even if the plaintiff had not been found guilty of drug trafficking by a criminal court. Neither was it 'insulting or sensational.' This finding was based on the testimony of expert witness, R.H. Siregar, who held that the journalist had conducted a thorough investigation and had tried to check and recheck the facts he found, even if some of his requests for interviews to confirm had been rejected.

Hence, the court found that the way of reporting was not unlawful, or constituting 'libel,' and rejected the claim for damages. Neither plaintiff nor defendant lodged an appeal. It is quite possible that Tommy decided not to appeal in view of the political uncertainty after his father had stepped down and because he was targeted as an 'enemy' of *Reformasi*.

The reasoning of the court was quite progressive in using the Press Code of Ethics as the standard for its evaluation, and thus went one step beyond *PT ALM v Garuda Daily*. We will now see whether this standard was also followed in subsequent cases.

6.5.2. Lawsuits after the Enactment of the 1999 Press Law

The enactment of the new Press Law in 1999 provided new hope for press freedom in Indonesia. As already discussed in Chapter 3, censorship, banning, and permits were no longer allowed under the law, but it remained to be seen to what extent the Press Law would also promote protection of press freedom in civil cases.

It is important to note that far more lawsuits against the press have been brought before the civil court after 1999. Furthermore, the amount of damage compensation asked in most cases is extremely high, indicating that the main objective of the lawsuit is silencing the press through fear of bankruptcy rather than trying to obtain a reasonable compensation for damage suffered.

This section addresses those libel suits that have attracted much attention from the public. Most of them were lawsuits against *Tempo*. I have selected these for two reasons, first, *Tempo* has a reputation for professionalism, and second, as the leading magazine of the country it wields considerable political influence. These two reasons combined make the cases against *Tempo* genuine test cases for press freedom more generally. In addition I will look at the notorious cases of *Soeharto v Time Inc.* to complete this overview of leading cases.

6.5.2.1. *Soeharto v Time Inc.* (2000)

In the early post-Soeharto years, the most astonishing civil lawsuit was the one against *Time* for its article "Soeharto Inc.: How Indonesia's Longtime Boss Built a Family Fortune" (24 May 1999, Volume 153 No. 20). It started in April 2000 and it took almost ten years before the final judgment was passed. According to the plaintiff, ex-President Soeharto, *Time* had committed tort by publishing tendentious, insinuating, and provocative statements. These included, first, the picture of Soeharto and some of his luxurious properties on the cover, second, the statement that "a staggering sum of money linked to Indonesia had been shifted from a bank in Switzerland to another in Austria, now considered a safer haven for hush-hush deposits," third, the statement: "Time has learned that \$9 billion of Soeharto money was transferred from Switzerland to a nominee bank account in Austria" (pp. 16-17), and fourth, the statement: "It is very likely that none of the Soeharto companies has ever paid more than 10% of its real tax obligation" (p. 19). According to the plaintiff this would constitute a violation of Articles 1365 (tort) and 1372 (insult) of the Civil Code and therefore he filed a claim at the Central Jakarta District Court.¹²

12 Soeharto also reported *Time* to the police for violating Article 310 of the Penal Code, concerning insult. This case was discussed in Chapter 5.

The district court rejected all of the plaintiff's arguments. The judges ignored the Press Law and argued that for the applicability of Article 1372, Article 1373 refers to Article 314 of the Penal Code. They interpreted this provision as requiring that such violation should be established first in a criminal procedure. While there is no legal basis for such an argument, the judges then returned to the right track when they themselves continued to assess whether the facts of the case transgressed the norms stipulated in the Penal Code. They found this not to be the case. Thus, the cover of *Time*, with the drawing of Soeharto 'hugging' luxurious houses, as well as *Time*'s statements mentioned above did not fulfil the criteria for being considered 'insult.' *Time* had been sufficiently cautious in gathering its information, and when it asked Soeharto and his family for an interview to verify their data the request was declined.

Furthermore, the judges denied that *Time* had acted in a tortuous manner by stating that Soeharto's companies never paid more than 10 percent of what they were due, since *Time* explicitly based this information on an interview with Teten Masduki, a leading anti-corruption activist. A lawsuit on this issue should therefore address Masduki, not *Time*.

Finally, and perhaps most fundamentally, the judges held that the *Time* report clearly intended to serve the 'public interest.' Referring to People's Consultative Assembly Decree XI/MPR/1998 on State Governance that is Clean and Free from Corruption, Collusion and Nepotism, *Time*'s report was written out of concern about the misuse of power, corruption, collusion and nepotism and hence serving the public interest.

This judgment was confirmed by the Jakarta High Court. The plaintiff then filed for cassation to the Supreme Court. It took the Supreme Court some six years to produce an altogether different judgment (3215K/Pdt/2001), which it issued on 30 August 2007. The Supreme Court overturned the appellate court's judgment on several grounds. First, the judges held that the lower courts had not considered whether *Time*'s report had violated the principles of propriety, thoroughness, and care as criteria under Article 1365 of the Civil Code. Second, the lower court looked at liability under Article 1365 only, whereas the defendant had referred to Article 15 of the Press Law – which according to the Supreme Court only related to criminal and administrative liability. Third, the judges accepted the plaintiff's denial that the sources of the contested news report had already been published before, either in Indonesia or abroad, and therefore the defendant should have heeded the warning of the plaintiff. This in itself, according to the Supreme Court, was already sufficient to meet the 'objective' criteria of unlawfulness – the principles of propriety, thoroughness, and care mentioned above. Therefore, *Time*'s news report was unlawful; an insult to a retired military general and former president, and a clear basis for a claim in material and immaterial damages.

The judges decided to award part of the claim, ordering the defendants to apologise to the plaintiff for their news report in the following newspapers and magazines: *Kompas*, *Suara Pembaruan*, *Tempo Magazine*, *Forum Keadilan*, *Gatra*, *Gamma*, and *Sinar*, in three consecutive editions. Furthermore, the defendant was ordered to pay compensation to the plaintiff amounting to Rp. 1 trillion (approximately USD 100 million).¹³

This ruling caused a huge shock, both within Indonesia and internationally. NGO *LBH Pers* initiated a so-called ‘public examination’ in which it voiced serious criticism against the Supreme Court’s judgment (Wicaksono 2008). Many newspapers offered similar criticism,¹⁴ as did other NGOs through press releases. The international NGO CPJ (Committee to Protect Journalists) condemned the ruling, and many lawyers, media, and journalist organisations contributed to a brief to the Supreme Court (as *amicus curiae*) to support a review (*peninjauan kembali*) of the cassation judgment.¹⁵

Looking at the legal arguments used by the Supreme Court, one cannot escape the conclusion that this judgment was informed by political rather than legal considerations. Before this judgment was passed, the Supreme Court had already ruled several times in similar cases that the court should have prioritised the Press Law mechanism over a lawsuit on the basis of the Civil Code.¹⁶ The court also failed to pay attention to the ‘public interest’ as something that must always be taken into account in press cases according to Article 1376 of the Civil Code. And perhaps worst of all, the decision did not consider what the lower courts had established about the facts of the case. The Supreme Court acted as if the accuracy of the facts of the report and how this had been established were not important at all, whereas in fact the court was bound by the findings of the lower courts in this matter. Fifth, the judgment provided no reasons at all for determining the nature and amount of the damage the plaintiff would have suffered.

Two of the judges who examined *Soeharto v. Time*, Muhammad Taufiq and Bahauddin Quadri, had been clients of the lawyers for Soeharto – Indriyanto Seno Adji, Felix Tampubolon, O.C. Kaligis and Denny Kailimang – in a

13 The council of judges consisted of German Hoediarto, Muhammad Taufik, and Bahauddin Qaudry.

14 Atmakusumah Asraatmaja, “HAM dan Perkara Time” [Human Rights and the Time Case], *Kompas*, 13/9/2007; Nono Anwar Makarim, “Satu Lagi Saga Diskriminasi” [Another Story of Discrimination], *Kompas*, 26/9/2007, and Satjipto Rahardjo, “Apakah Pengadilan Itu” [What Kind of Court is This?], *Kompas*, 24/9/2007.

15 It was drafted and sent by 26 organisations from various countries. See: Mahkamah Agung Republik Indonesia: H.M. Soeharto melawan Time Inc, et al.: “Pernyataan Para Teman untuk Mendukung Permohonan Peninjauan Kembali” [The Opinion of Friends to Support the Request for Review]. See: International Bar Association, “H.M. Suharto,” www.ibanet.org (retrieved on 12 March 2014).

16 These cases will be discussed below.

case where they acted as plaintiffs when they appealed to the Constitutional Court for a constitutional review of Law 22/2004 on the Judicial Commission (Constitutional Court judgment 005/PUU-IV/2006). Hence, a conflict of interest on the part of the judges was quite possible.

Time indeed appealed for review to the Supreme Court, and eventually, on 16 April 2009, the Supreme Court reversed its own decision in 273 PK/PDT/2008.¹⁷ The judges on the review panel agreed to virtually all the points of criticism voiced in reaction to the cassation judgment: the *Time* report should be considered in the light of the public interest, the authors had acted according to the Press Code of Ethics and had no intention of insulting the plaintiff; the report should be seen as a manifestation of the function of social control to protect state ownership and national interest; the cassation judgment had disregarded the Press Law, especially its provisions regarding the importance of the public interest, as well as failed to take into account the requirement to look at both sides of a dispute and the right to reply. Soeharto had not attempted to exercise his right to reply before taking the case to court and *Time* had moreover already published Soeharto's lawyer's statement regarding the report in the same edition – as had indeed been recognised by the district court and the court of appeal. Finally, *Time's* report was an effort to realise MPR Decree XI/MPR/1998, 13 November 1998, concerning efforts against corruption, collusion, and nepotism.

While the cassation judgment was the Supreme Court at its worst, the review was the opposite: in a clear and well-reasoned judgment the Supreme Court applied all the relevant criteria based on the new Press Law, the Civil Code and legal precedents that had been established in the meantime. This judgment has created more space for press freedom in Indonesia by adopting the Press Code of Ethics and the Press Law as basic rules for determining this space. The AJI was exhilarated, praising the 'laudable argumentation' to recognise the Press Code of Ethics as a yardstick for lawfulness and putting beyond any doubt the primacy of the 'right to reply' prior to court examination.¹⁸

6.5.2.2. *Tomy Winata v Tempo* (2003)

This heading covers four rather than a single court case in a strategic series of attacks on the press. It concerned four separate civil lawsuits filed by notorious business tycoon Tomy Winata, who has made a fortune in gam-

17 The judges' panel for the review of the cassation judgment in *Soeharto v. Time Inc.* consisted of Supreme Court Chair Harifin A. Tumpa, Hakim Nyak Pa,, and Hatta Ali.

18 "Pernyataan AJI Indonesia Mengenai Pengabulan PK Majalah Time v. Soeharto: Penegak Hukum Harus Perhatikan Hak Jawab" [AJI Statement on Acceding the Judicial Review, *Soeharto v. Time: Law Enforcer Must Pay Attention to Right To Reply*], *Press Release*, 17 April 2009.

bling and other illicit activities.¹⁹ There are two main reasons why this case drew so much attention, even internationally, apart from the fact that *Tempo* – as we have seen – is the main protagonist of investigative and critical journalism in Indonesia. First, Tomy not only used ‘legal violence’ against *Tempo*, but also organised an attack by thugs against the *Tempo* office in Jakarta. Second, there were strong suspicions that Tomy connived with the police to prevent serious investigations against those committing the attack,²⁰ and in administrating the criminal prosecution of *Tempo*’s Chief Editor Bambang Harymurti.²¹

Tomy’s intention to silence *Tempo* by all means, rather than by following a straight legal avenue, was already demonstrated by his not using the ‘right to reply’ mechanism. The table below presents an overview of the cases.²²

19 In addition Tomy Winata is the owner of numerous companies, such as banks and hotels.

20 “Sangat disesalkan, Polisi Cuma diam saat Wartawan Tempo dipukul” [Very Distressing, Police Remained Quiet While *Tempo* Journalists were Beaten], *Kompas*, 13/3/2003.

21 This case was discussed in Chapter 5.

22 The table is adapted from Gasma (ed.) (2005: 21-23), and updated by the writer.

Table 10: Overview of Cases after 1999 Press Law Enactment

No.	Defendant	Article	Legal Case Summary	Court Decision
01	- Tempo Inti Media Harian (IMH) - Bambang Harymurti (Editor) - Dedy Kurniawan (Journalist)	Article 1365 and 1372 of Civil Code Article 6 and 5 (1) of Press Law	<i>Tempo IMH</i> was sued for an 'insulting statement' in edition No. 6 February 2003, with the title, "Governor Ali Mazi Denies TW Opening a Gambling Business." It concerned a report alluding to Tomy Winata (TW)'s role in an investment into a gambling business in Southeast Sulawesi. TW brought the case on 5 June 2003 and demanded compensation for material damages of Rp. 1 billion and for immaterial damages of US\$ 2 million.	The South Jakarta District Court accepted part of the plaintiff's claim and ordered <i>Tempo</i> to pay immaterial compensation of US\$ 1 million and to pay a daily fine of Rp. 10 million in case of non-compliance (20 January 2004). The court moreover ordered <i>Tempo</i> to apologise through eight newspapers and 12 television stations. This judgment was overturned on appeal and the appellate judgment was upheld in cassation.
02	- Goenawan Muhammad (GM) - Tempo Inti Media Inc.	Article 1365, 1372 of Civil Code	TW sued GM for his insulting statement in <i>Tempo</i> , 12 March 2003, that "[...] the state must not fall into the hands of gangster." TW brought the case on 18 August 2003 and asked compensation for material damages of Rp. 1 billion and immaterial damages of Rp. 20 billion, as well as demanding that GM and <i>Tempo</i> apologise through a range of newspapers and television channels. ²²	The East Jakarta District Court awarded part of TW's claims, ordering GM to apologise to TW through two national newspapers, with a daily fine of Rp. 10 million in case of non-compliance. In 2009, GM and TW made agreement to end their dispute. ²³

23 They included *Kompas*, *Republika*, *Suara pembaruan*, *Sinar Harapan*, *Suara Karya*, *Bisnis Indonesia*, *Asian Wall Street Journal*, *Herald Tribune*, *Gatra*, *Forum Keadilan*, *Gamma*, *Trust*, *Investasi*, *Warta Bisnis*, *Pilar*, *Time* and television channels TVRI, TPI, RCTI, SCTV, ANTV, *Indoesia*, *Metro TV*, *Trans TV*, *Trans 7*, *Lativi*, *CNN*, *CNBC*, and *BBC*. All of this on front pages or during prime time.

24 This agreement has been made after the Supreme Court on 12 August 2009 decided to refuse GM's cassation and ordered GM and *Tempo* to apologize through several medias. See: "Tempo dan Tomy Winata Berdamai," *Tempo*, 6 October 2009, <http://www.tempo.co/read/news/2009/10/06/063201199/Tempo-dan-Tomy-Winata-Berdamai> (retrieved on 24 March 2014).

No.	Defendant	Article	Legal Case Summary	Court Decision
03	• Tempo Inti Media Inc. • Zulkifly Lubis • Bambang Harymurti • Fikri Jufri • Toriq Hadad • Ahmad Taufik • Bernarda Rurit • Cahyo Junaedy	Article 1365 and 1372 of Civil Code Article 5 (1) and 6 (c) of Press Law	TW sued <i>Tempo</i> for its report “Is Tomy in Tenabang?”, which he labelled as insult and defamation. The report suggested that TW had applied for market renovation just before the market concerned was destroyed by a fire. TW brought the case to court on 5 June 2003, demanding material damage compensation of Rp. 100 billion and immaterial damage compensation of Rp. 100 billion.	The Central Jakarta District Court awarded part of the claim, on 18 March 2004. The court ordered <i>Tempo</i> to pay Rp. 500 million in compensation, and to repeal the news. The court also ordered <i>Tempo</i> to express its regret through several newspapers for three consecutive days, and to pay a daily fine of Rp. 300 thousand in case of non-compliance. This judgment was overturned on appeal and the appellate judgment was upheld in cassation.
04	• Tempo Inti Media Inc. • Ahmad Taufik	Article 1365, 1372 of Civil Code	TW brought a claim against Ahmad Taufik and <i>Tempo IMI</i> for slander and insult, concerning the former’s statement that TW must have been responsible for the attack against the <i>Tempo</i> office by Artha Graha’s thugs. TW brought the case to court on 5 June 2003, and asked material damage compensation amounting to Rp. 40 billion and immaterial damage compensation of Rp. 80 billion.	The Central Jakarta District Court dismissed the case (<i>niet ontvankelijk</i>) for lack of witnesses.

The next section discusses two of these cases which led to a Supreme Court judgment.

6.5.2.3. *Tomy Winata v Tempo IMH, Bambang Harymurti and Dedy Kurniawan*

The immediate reason for this case was *Koran Tempo*’s news report of 6 February 2003, which suggested that TW was involved in opening a gambling business in Southeast Sulawesi. TW brought the case to the South Jakarta District Court on 5 June 2003. According to TW’s lawyer the report contained misinformation, was inaccurate, and not true. *Koran Tempo* was accused of

failing to recheck the information it had obtained and of not confirming the case with TW. This would be a violation of Articles 1365 and 1372 of the Civil Code, since the report tainted the reputation of the plaintiff. According to the plaintiff this was moreover in violation of Article 5(1) and (6) of the Press Law.²⁵ In addition to the claims referred to in the above Table the plaintiff demanded the court to seize *Tempo* IMI's properties.

According to the defendants the case ought to be dismissed because it was brought prematurely (*prematuur exceptie*), for the plaintiff ought to have followed the Press Law mechanism for such matters. Second, the claim was unclear (*exceptie obscurum libellum*) because it mixed up the Press Law and the Civil Code. Third, it made no sense that the plaintiff only addressed the defendants (*exceptie iurium litis consortium*), for the same news had also been published by other newspapers or magazines – according to Supreme Court precedent 151 K/Sip/1972 including these in the case is obligatory. Fourth, the lawsuit was wrongly addressed (*exceptie error in persona*), because among those publishing this news *Tempo* had not been the first.

On 20 January 2004 the South Jakarta District Court passed its ruling. The judges refused all of the defendant's arguments, stating that *Tempo*'s news report had been 'defamatory and insulting' and thus a tortuous act. The defendant was to publish an apology and pay a substantial sum of damage compensation (see above Table). The court took no account of the Press Law, nor did it offer a clear explanation for why it considered the report 'defamatory and insulting.' Its judgment was moreover in contravention of the applicable legal precedent on the use of 'right to reply' as set by *PT ALM v Garuda Daily* (from 1991, so before the 1999 Press Law was enacted).

Hence it is unsurprising that this judgment was overturned on appeal, a decision that was confirmed upon cassation. The Jakarta High Court refused all arguments by TW (358/Pdt/2004). However, because the appellate judges failed to take into full consideration the prevalence of the Press Law mechanism, not only TW applied for cassation but *Tempo* as well. In their ruling Supreme Court Judges Bagir Manan, Djoko Sarwoko and Atja Sonjaja awarded the claim by *Tempo* and put beyond any doubt that the 'right to reply' and 'right to correction' as regulated in the Press Law must be followed before one can bring a claim to court. Not using them distorts the balance between the obligation to guarantee and protect press freedom and

25 Article 5(1): The national press has the obligation to report events and opinions with respect for religious norms and moral norms of the public, as well as for the presumption of innocence. Article 6: The national press must: a. fulfill the public's right to know; b. enforce democratic basic principles, promote the embodiment of supremacy of law and human rights, while at the same time respecting diversity; c. develop the public opinion based upon factual, accurate and valid information; d. conduct control of, provide criticism against, corrections of, and suggestions regarding any public concern; e. fight for justice and truth.

the obligation to protect individuals (931 K/PDT/2005). As we have seen, this argument was later confirmed in *Soeharto v. Time*. In fact, the judgment did not come as a surprise, because the Supreme Court argued the same in the other case by TW against *Tempo*, which I will now discuss (it was taken to the district court later, but eventually decided earlier).

6.5.2.4. *Tomy Winata v Tempo IMI et al.*

This case received more attention than the previous one because it also involved violence and terror against journalist and editors. The suit followed the news report in *Tempo Magazine* (edition 3-9 March 2003, page 30-31) that mentioned TW had applied for a market renovation in Tanah Abang (Tenabang) just before the market was destroyed by a fire. TW took issue with the suggestion that he would have been involved in arson. Such a suggestion was not made explicitly, but the facts mentioned by *Tempo* clearly pointed in that direction and according to TW caused unfounded suspicion and reflected negatively upon him. According to TW the report was tendentious, insinuating, and provocative.

In his claim to the Central Jakarta District Court TW argued that *Tempo* had violated Articles 1365 and 1372 of the Civil Code, as well as Articles 5(1) and 6(c) of the Press Law. The defendants relied on basically the same arguments as in *Tomy Winata v Tempo IMH, Bambang Harymurti and Dedy Kurniawan*, which was not surprising since they were so close in time. First, they stated that the lawsuit was too early because the plaintiff had not applied the Press Law's mechanism of right to reply, second, that the plaintiff mixed up the Press Law and the Civil Code, and third, that the plaintiff should have addressed other parties who had published this news prior to *Tempo*. Moreover, the plaintiff did not address the responsible editor T. Iskandar Ali, as well as journalists Julihantoro and Wahyu Muryadi, who had been more involved than others who did appear on the list of defendants. The defendants added a counter claim (*rekonvensi*) for the material and immaterial damages they had suffered as a consequence of the mob attack by TW's thugs against the *Tempo* office and its employees, on the basis of Articles 1365 and 1367²⁶ of the Civil Code. Altogether *Tempo* claimed Rp. 200 billion and asked the court to pass an injunction ordering TW to apologise through newspapers, electronic media and magazines.

In its judgment 233/Pdt.G/2003/PN.Jkt.Pst, passed on 18 March 2004, the judges rejected all of the defendants' objections and accepted part of the plaintiff's claim. Just as in the other case involving TW and *Tempo*, without any serious supporting arguments the court held the defendants' actions to

26 Article 1367 of the Civil Code relates to the scope of liability, stipulating that: "Someone is not only liable for damage caused by himself, but also for damage caused by people who act under his responsibility or caused by things which are in his control."

be unlawful. It ordered *Tempo* to revoke its report and to express its regret through the newspapers *Media Indonesia*, *Warta Kota* and *Tempo* newspaper for three consecutive days, and half a page in *Tempo Magazine* – so not as excessively as had been demanded by the plaintiff. As already stated in the Table above, the judges awarded Rp. 500 million in immaterial damage compensation and a daily fine of Rp. 300,000 in case of non-compliance. Evidently, they rejected all of the defendants' counterclaims. The judgment was quite similar to the one passed by the South Jakarta District Court in deciding *Tomy Winata v Tempo IMH, Bambang Harymurti and Dedy Kurniawan*.

However, just like in that case the district court's judgment was reversed on appeal. In its judgment 314/Pdt/2004/PT.DKI dated 3 September 2004, the Jakarta High Court rejected the plaintiff's claim, but – again – just as in the earlier case, it did not rely on the Press Law. Neither did the court award the defendants' counterclaims. This time *Tempo et al.* did not file for cassation, but TW did. In its judgment 903K/Pdt/2005, the Supreme Court followed the basic argument of the High Court, but added several considerations of its own:²⁷

First, the cassation memorandum is unjustified, because the High Court as *judex facti* has not wrongly implemented the law and not gone beyond its jurisdiction. The press has the freedom to seek and impart information in order to fulfil needs for and rights to access information. In implementing its function, rights, obligations and role, besides respecting the human rights of individuals, the press must be professional, so then the public at large can control the press.

Second, in order to develop checks and balances, the Press Law has provided such a mechanism. Public control refers to the guarantee of the 'right to reply' and the 'right to correction' by watching the media and by the Press Council through various forms and ways. This mechanism is aimed to give equal protection to press freedom on the one hand, and the individual and public interest on the other hand.

Third, the 'right to reply' mechanism, 'right to reply' obligation and 'right to correction' are procedural aspects which must be passed through, before the press is required to account for its criminal/civil law liability, in the case of unlawful acts.

Fourth, press freedom is one of the fundamental principles guaranteed by the 1945 Constitution and the Indonesian constitutional system, therefore it must be protected and guaranteed. However, it must be admitted that there is news which may cause suffering to individuals or groups in society, so then they need a procedure to protect their interests. Therefore, there must be order to guarantee the balance between the principle of press freedom and the individual's or group's interest. In order to create such a balance, there is a 'special relation' between the press and the individual and a group in society.

Fifth, the 'special relation' to guarantee press freedom and the individual interest, is regulated in the special mechanism to determine the relation between press and individual or group. Universally, in democratic states which guarantee press freedom and the rights of the individual/group have a right to reply for individuals or groups who are disadvantaged by the press through the available press institution (in this regard, the Press Council). Thus, the 'right to reply' and the resolution through a press institution is the principle (not only the mechanism) which constitutes the balance between the press and the individual or group. As a principle, the use of the 'right to reply' through a press institution is the 'gate which cannot be denied or passed, but must be applied before engaging in other efforts, if not, it would deny the principle of a balance between the obligation to guarantee and protect press freedom and the obligation to protect individual and group rights.

27 Supreme Court Decision 903K/Pdt/2005, pp. 82-83.

The judges also rejected TW's objection against the use of the words 'konon' (reputedly) and 'pemulung' (scavenger) in *Tempo's* news. The word 'konon' was used to indicate that it is an opinion held by others, so *Tempo* was right to qualify the statement in this manner. The word 'pemulung,' according to the Supreme Court, is actually neutral and not necessarily degrading. In fact, considering it as degrading would be humiliating to all those who are working as 'pemulung.' The Supreme Court thus rejected TW's claim for cassation, a judgment passed on 9 February 2006 by Judges Bagir Manan, Djoko Sarwono and Atja Sondjaja.

This Supreme Court decision has further contributed to the importance of the press law mechanism. The right to reply and resolution through the Press Council have to be applied first before such a case can be taken to court. This promotes a balance between the obligation to guarantee and protect press freedom on the one hand and the obligation to protect individual and group rights on the other.

Nonetheless, these cases also show that lawfully criticising the rich and powerful is not easy. The press must be extremely careful in its investigations and write down the results in a very professional manner, paying full attention to the Press Code of Ethics. If not, it may be subjected to a civil lawsuit. The first instance judgments in the cases above moreover indicate that the lower courts – for whatever reasons – tend to side with the plaintiff in such cases.²⁸ Fortunately, in the end the appellate court and the Supreme Court have provided clear guidelines on this matter, which, if followed, should make it much more difficult for the first instance courts to award such unjustified claims. Hence, in the end these cases represent an important victory for press freedom.

6.5.2.4. *PPM v Bambang Harymurti, Ahmad Taufik, and Leonardi Kusen (2003)*

Another series of attacks against the press through the civil courts followed in the same year. In the first one *Tempo* was once again the target, but this time it was the *Pemuda Panca Marga* (PPM, a paramilitary organisation) which brought the case to court. The case followed a report by *Tempo* about PPM's involvement in an attack on the office of the Commission for Disappearances and Victims of Violence (*KontraS*) in Jakarta, on 27 May 2003. They said to be looking for *KontraS* co-ordinator Munir, who they claimed to have 'destroyed the country' by opposing military operations in Aceh. However, Munir was not at the office at that time and the group decided that the best thing to do was to vandalise the office. The attackers then moved to the

28 International organisations also addressed the matter. Press freedom protagonist Article 19 said that this 'unjustifiable and exceptional action against a leading magazine sends a clear signal that criticism of the rich and powerful will not be tolerated' ("Indonesian Magazine Guilty of Defamation," *Article 19: Press Release*, 19 March 2004).

PBHI (Indonesian Human Rights and Legal Aid Association) office to look for Hendaradi, another activist opposed to military operations in Aceh. At the PBHI office, however, the group apparently ran out of steam and they did not cause any further damage.

These actions were widely discussed in public and covered by many news media. *KontraS* activists suspected military involvement in the attacks. Activist/priest Romo Sandiawan in a press release said that “it is clear who the people were who committed this violence. Their address is also clear. They have a secretariat at Kodim (Makodim Kemayoran 0501, or Military Office at District Level) [..].”²⁹

Tempo magazine reported about these events on 8 June 2003 under the title “If Private Soldiers Act” [*Kalau Tentara Swasta Bergerak*]. PPM took issue with this report for using the words ‘*gerombolan*’ (gang) and ‘*keluarga bekas tentara*’ (ex-soldiers’ family), which they claimed discredited their organisation. They brought a claim before the Central Jakarta District Court against Bambang Harymurti (chief editor of *Tempo*), Ahmad Taufik (the journalist who wrote the report) and Leonardi Kusen (director of *Tempo Inti Media Inc.*). Judges Mulyani, Agus Subroto and H. Hamid started examining the case on 11 August 2004. During one of the court sessions expert witness on journalism, Abdullah Alamudi, testified before the court that,

the title “If Private Soldiers Act” fulfils the requirements of a news title. The use of the word “private soldier” is appropriate, because it uses quotation marks. The reason is that the group of people coming to the *KontraS* office were wearing camouflage/military uniforms [..]. From a journalist point of view, the use of such a title is relevant to describe the incident. If then those concerned feel discredited by such news, they must use their right to reply as stipulated under the Press Law.

Unlike in the earlier cases against *Tempo* the judges in their judgment (502/Pdt.G/2003/PN. Jkt.Pst) rejected the plaintiff’s claim, which they held to be ‘excessive, obscure, and unclear.’ They argued that the plaintiff did not detail why the acts of each individual defendant could be qualified as unlawful. The plaintiff had moreover argued that the defendants had violated Article 1365 *juncto* 1372 of the Civil Code. The court accepted the defendant’s argument that these articles, 1365 about tort and 1372 about insult, could not be combined. These articles furthermore only allow for compensation, while the plaintiff also asked the court to revoke *Tempo*’s permit and to halt its operations for two years. In addition, the plaintiff asked the defendant to apologise as deemed fit by the plaintiff. This combination of claims was considered ‘ambiguous.’ In fact, the judges argued, the plaintiff tried to use the court in order to ban *Tempo*, an authority the court does not have. Revoking a non-existing permit (such a permit was abolished by the 1999

29 “Kantor KontraS Diserang Massa” [Kontras Office Attacked by Mob], *Suara Merdeka Daily*, 28/5/2003.

Press Law) made no sense either. On these grounds the court dismissed the case (*niet ontvankelijk verklaard*).

The court could actually have relied on the Press Law mechanism to obtain the same result, but then the Supreme Court had not yet passed judgment in the other *Tempo* cases discussed above. However, the court provided a few interesting arguments. First, in claiming damage compensation, the plaintiff must prove how the contested news report has caused damage to the plaintiff. Second, Articles 1365 and 1372 cannot be mixed up, but must be deployed separately, requiring different elements, as they serve different purposes.

6.5.2.5. *PT RAPP v Tempo and S. Malela Mahargasarie (2007)*

This case and the next one were brought during the second term of Susilo Bambang Yudhoyono (SBY). Both concerned harm that had allegedly been inflicted on the SBY bureaucracy. The first one involved three reports by *Tempo Magazine* about the involvement of several high ranking government and police officials in illegal operations by the pulp and paper business in Riau. Riau Andalan Pulp and Paper, Inc. (PT RAPP) filed a lawsuit against *Tempo* and *Tempo Magazine's* chief editor S. Malela Mahargasarie at the South Jakarta District Court, on 16 August 2007, for inaccuracy in reporting, violating the presumption of innocence, judgmental argumentation, spreading false information and tarnishing the reputation of PT RAPP. This would be in violation of the Press Code of Ethics.³⁰

In fact the news about PT RAPP had already been reported by other media and had also been disseminated by the Indonesian Anti-Deforestation Committee.³¹ Nonetheless, according to PT RAPP *Tempo* had committed a violation against the Press Law and Article 1365 *juncto* 1372 of the Civil Code.³² PT RAPP demanded that the court would state that the defendant had committed a tortuous act, creating losses for the plaintiff and degrading its reputation. By way of fulfilling the 'right to correction' and 'right to reply' the defendant should publish an apology to the plaintiff and the readers of *Tempo*

30 The news reports were the following: "*Pertikaian Menteri Ka'ban dengan Polisi Memanas*" [The Clash between Minister Ka'ban versus the Police Heats Up], *Tempo Magazine* 2181/VII/6 July 2007; "*Polisi Bidik Sukanto Tanoto*" [The Police Targets Sukanto Tanoto], *Tempo Magazine* 2187/VII/12 July 2007, and "*Kasus Pembalakan Liar di Riau, Lima Bupati Diduga Terlibat*" [Illegal Logging Cases in Riau, Five Regents Allegedly Involved], *Tempo Magazine* 2188/VII/13 July 2007.

31 The Indonesian Anti-Deforestation Committee (*Komite Anti-Perusakan Hutan Indonesia*), included Aliansi Buruh Menggugat, AJI Jakarta, Walhi, Sahabat Walhi, Sawit Watch, LS-ADI, HUMA, ICEL, PBHI, Sarekat Hijau Indonesia, dan LBH Pers.

32 Interestingly, one of the lawyers representing RAPP was Hince Panjaitan, who used to be a Press Council member (Tim LBH Pers, 2010: 213). He therefore must have understood that he ought to have referred his client to the Press Council instead of to the civil court.

Magazine, express its regret and withdraw the report in the first full page of *Tempo Magazine*. The substance of this apology would be determined by the plaintiff. Further, the court was asked to declare sequestration of the defendant's property, as well as to order immediate execution of this judgment.

The demand to implement' the 'right to reply' and 'right to correction' in this manner was a novel type of claim. The substance of the press law mechanism remained undisputed, but PT RAPP brought its claim before the civil court instead of submitting a complaint to the Press Council. In fact, originally the plaintiff did follow the Press Law procedure, for he had immediately sent a letter to *Tempo* in which he demanded that *Tempo Magazine* publish a reply and a correction. However, for some reason PT RAPP decided to subsequently sidestep the procedure. *Tempo* only followed the demand for publishing a reply after it was summoned to appear in court and did this in a small column in *Tempo Newspaper* only.

In its defences *Tempo* partly relied on this column, arguing that it had already fulfilled the requirement to publish a reply and a correction.³³ Second, it argued that the court could not examine the case under the Press Code because this is a professional and not a legal norm. Only the Press Council, as a professional association, holds this authority, as stipulated under Article 15(2) of the Press Law. Furthermore, *Tempo* argued that the lawsuit was 'premature' because the plaintiff had not first taken the case to the Press Council. It would also be 'premature' because there was no executable criminal judgment about insult yet. The defence continued that the claim was unclear and obscure because it confounded the accountability of the first (*Tempo Inti Media Harian Inc.*) and the second defendant (chief editor S. Malela Maharagasarie). It moreover combined Articles 1365 and 1372 of the Civil Code, which is not allowed. Finally, the news had already been reported by other media as well, and these should have been included in the lawsuit.

Substantively, *Tempo* argued that the report was written in serving the public interest and that it complied with the standards of careful reporting. *Tempo* had checked the facts with the Riau Police, which had confirmed that in order to supply raw materials PT RAPP was suspected of illegal logging in the Riau forest.³⁴ The defendant also submitted a counterclaim, demanding that the court would stipulate that the lawsuit was a violation of press freedom and therefore a tortuous act itself.

33 The correction had been published in *Tempo Newspaper* 2202, 27 July 2007 and 2208, 2 August 2007.

34 "Hakim Diminta Tolak Gugatan RAPP terhadap Koran Tempo" [Judge Asked to Refuse Claim of RAPP against Tempo Newspaper], *Tempo Interaktif*, 3 July 2008. <<http://www.tempo.co.id/hg/nasional/2008/07/03/brk,20080703-127375,id.html>> (retrieved on 24 December 2011).

In their judgment of 3 July 2008 (1089/Pdt.G/2007/PN.Jkt.Sel), the judges rejected all of the defences. They argued that the court had the authority to examine the lawfulness of the report on the basis of the Civil Code. In regard to the combination of Articles 1365 and 1372 the court held that 1365 could be used as a separate basis and that therefore this combination was not barring the proceeding of the case. As regards the alleged mixing up of the defendants, the court said that this would be taken into account in discussing the substance of the case.

According to the judges, the fundamental issue was the implementation of the 'right to reply' and the 'right to correction.' According to Articles 1(11), 5(2) and 5(3) of the Press Law,³⁵ so the judgment said, it is the obligation of the press to serve the 'right to reply' or 'right to correction.' How this should be done is not further elaborated in the Press Law and therefore the judges quoted the statement of Widyatmoko Kukuh Sanyoto, expert for the plaintiff, who had explained that the 'right to reply' aims to create a balance between press and public. According to Widyatmoko, if the use of the right to reply does not lead to a satisfactory result, the aggrieved party can take the case to court.

Because the correspondence between the parties had never led to an agreement about the reply and the correction, the judges concluded that the right to reply had not been implemented. The defendant had only made an erratum to the wording and the data, which according to the plaintiff was insufficient. Hence, the court found that the defendant had not served the plaintiff's 'right to reply,' which is unlawful according to Article 5(2) of Press Law. The plaintiff had moreover suffered material and immaterial losses as a consequence of the defendant's publication, which had harmed the plaintiff's reputation. This was enough to fulfil the elements of Article 1365 of the Civil Code and the court ordered the defendant to pay compensation and apologise to the plaintiff in the manner demanded by the plaintiff, as well as through other media.³⁶ The only slightly positive note for the defendant was the finding of the court that

Article 180 HIR *juncto* SEMA No. 3 of 2000 and SEMA No. 4 of 2001 prevented immediate execution. Obviously, the court rejected the counterclaim, by the notable argument that the Press Law did not strictly demand that such a case would be taken to the Press Council first.

35 Article 1(11): The 'right to reply' is the right of an individual or group to respond to or deny any news facts that are unfavourable for his or her good reputation. Article 5(2): The press has the obligation to serve the right to reply.

36 Magazines included *Tempo*, *Forum Keadilan*, *Gatra*, and *Trust*. Newspapers included *Kompas*, *Suara Pembaruan*, *Media Indonesia*, *Riau Pos*, *The Jakarta Post*, *Bisnis Indonesia*, and *Investor Daily*. Electronic media included *RCTI*, *SCTV*, *Metro TV*, *Trans TV*, and *Riau TV*.

It will be obvious that this judgment completely disregarded the case law developed on this matter by the Supreme Court in 903K/Pdt/2005 and 931 K/PDT/2005. These judgments clearly stipulate the precedence of the Press Council procedure over a tort suit. Moreover, the South Jakarta District Court did not even consider the substance of the news and whether standards of proper reporting had been observed or not. In fact, the court should leave this to the Press Council, which has the expertise and legal authority for this, but if the court denies the precedence of the Press Council procedure it should at least look into this matter. Now the court found that, no matter what are the facts of the case, the press must obey the wishes of the aggrieved party.

Tempo appealed to the Jakarta High Court on 31 August 2009, and fortunately Judges Parwoto Wignjosumarto, Jurnalism Amrad and I Putu Widnya demonstrated more legal sense. The court found that the reply and correction mechanisms had been used as intended by the Press Law. The question whether this had been performed properly, they argued, had been wrongly answered by the first instance court. Moreover, this question was not to be answered by the court but by the Press Council, as stated in Article 15(1) and (2) of the Press Law. Press Council Regulation 9/Peraturan-DP/X/2008 about Guidance on the Right to Reply provides the standards for assessing whether reply and correction have been performed in a satisfactory manner. This was also in line with the requirement that parties should always try mediation before taking a case to court. On this basis the judgment from the South Jakarta District Court was quashed.

Although the High Court decision did not quote explicitly from the Supreme Court precedents, it used the same arguments. While in the end *Tempo* was put in the right, this case does show how continuously wrong interpretation of the Press Law by the first instance court, caused by paying no attention to legal precedent, creates a serious burden for the press. It then needs to spend time, energy and money on defending itself in court. This allows parties to use court procedure as a form of harassment, ultimately undermining press freedom in Indonesia.

6.5.2.6. *Asian Agri v Tempo* (2008)

The case of *Asian Agri v Tempo* was similar to *PT RAPP v Tempo*, again with the performance of the right to reply as the main issue. In an article with the title “*Akrobat Pajak*” (Tax Acrobats) *Tempo* reported about suspicions of tax fraud against the Asian Agro Abadi Group³⁷ (Asian Agri). On the cover

37 The Asian Agri Group refers to Asian Agro Abadi Inc., which consists of Inti Indosawit Subur Inc.; Rigunas Agri Utama Inc.; Raja Garuda Mas Sejati Inc.; Gunung Melayu Inc.; Supra Matra Abadi Inc.; Indo Sepadan Jaya Inc.; Rantau Sinar Karsa Inc.; Andalas Inti Agro Lestari Inc.; Mitra Unggul Perkasa Inc.; Tunggal Yunus Estate Inc.; Dasa Anugerah Sejati Inc.; Saudara Sejati Luhur Inc.; Nusa Pusaka Kencana Inc.

Asian Agri owner Sukanto Tanoto was depicted as a somersaulting acrobat.³⁸ According to Asian Agri, *Tempo*'s report fell short of the standards of accuracy and covering both sides, and had not properly served its obligation to allow Asian Agri to reply. Therefore, on 14 January 2008 Asian Agri brought a claim against *Tempo* for violation of Articles 1365 and 1372 of the Civil Code. *Tempo* basically used the same defences as in *PT RAPP v Tempo*, with the central defence that the case should have been first brought before the Press Council.

Just as in previous cases, the court in first instance acted as if there were no Press Council mechanism and no case law confirming its priority. Instead they focused on the question whether the elements of tort of Article 1365 had been fulfilled. Two conflicting statements were produced by the experts asked to testify for either party to the dispute. Hernani Sirikit argued that the title and picture referring to 'acrobatics' was clearly insulting. Furthermore, the words '*penyelewengan pajak*' (tax fraud) were used without quotation marks, and therefore ought to be considered a conclusion drawn by the journalist himself. This could be qualified as 'trial by the press' because there was no court decision to this intent. Sirikit claimed a journalist would not be allowed to produce such an opinion. Thirdly, neither would journalists be allowed to use 'words of suspicion,' unless they referred to an external source holding them. If these guidelines were not followed, the media in Indonesia would end up producing 'reports of suspicion' (*berita duga-dugaan saja*) only.

By contrast, Atmakusumah Astraatmadjah argued that the media have the obligation to disseminate news, regardless whether it concerns facts or opinions, which provides information, knowledge, education, entertainment, and should not impose limits on their topics. There is no need for a court decision before a journalist can use the words 'suspecting,' 'preaching,' or other terms deployed in the context of media reporting to describe possibilities, suspicions or uncertainties. Those words are allowed in journalism, as long as the reporters have done their investigation with sufficient care.

In its judgment the court dismissed Atmakusumah's arguments and, following Sirikit, agreed that *Tempo*'s news constituted a 'trial by the press.' Therefore *Tempo*'s report could be categorised as 'insulting and attacking the dignity and reputation of another,' thus violating Articles 1365 and 1372 of the Civil Code.

Before coming to that conclusion, however, the court first had to consider the question of whether *Tempo* had served the right of reply or not. The plaintiff had summoned *Tempo* to publish its reply and a correction three

38 *Tempo* magazine 47/XXXV/15-21 January 2007.

times, through its letters dated 21 December 2007, 8 January 2008, and 11 January 2008. *Tempo* published Asian Agri's reply in the form of a letter to the editor in its edition of 14-20 January 2008, which appeared on precisely the same day the lawsuit was registered at the Central Jakarta District Court. This reply, according to the plaintiff, was insufficient. *Tempo's* letter to the editor covered only 33 lines, followed by an explanation of the editor, whereas the plaintiff had wished to address 36 problems in 13 pages. The judges therefore found a lack of proportionality between the reply demanded and the one published, even more so because of its form as a letter to the editor and because the reply had been published more than one year since the original publication. This, they argued, was 'insufficient and unprofessional' and in violation of Article 11 of the Press Code of Ethics.

In their decision 10/Pdt.G/2008/PN.Jkt.Pst, the judges ordered the defendants to pay a compensation of Rp. 50 million, and to publish an apology to the plaintiff for the contested report in *Tempo Magazine*, *Kompas*, and *Tempo Newspaper* for three days, as well as a daily fine of Rp. one million for non-compliance with this judgment. The judgment made reference to Jakarta High Court Decision 113/1970/PT.Jakarta and Supreme Court 27/K/Sip/1972, which hold that even if the Press Law guarantees freedom of expression, insult is still unlawful.

It needs little imagination to see the weakness of these judicial arguments. The judges referred to precedents from 1970 and 1972, based on a Press Law that had been replaced in 1982 already, and they disregarded the more recent decisions, such as 903K/Pdt/2005 (*TW v Tempo* on "Tomy in Tenabang?") and 931 K/PDT/2005 (*TW v Tempo* on "TW in Gambling Business?"). In this manner they ignored the prevailing rules on the mechanism for resolving press cases before the civil court. Neither did they rely on the available precedents for interpreting the proportionality of the reply and correction, nor did they ask the Press Council, as the most authoritative body in this field, to consider this matter.

No wonder *Tempo* was successful on appeal. The Jakarta High Court reversed the first instance judgment, arguing in the first place that PT RAPP ought to have addressed the Press Council first. The judges moreover found that the proportionality of the reply as published by *Tempo* could not be dismissed so easily, but had to be assessed in the light of the purposes of the 'right to reply' as determined by Press Council Regulation 9/Peraturan-Dp/X/2008.³⁹ Once again, the Press Council is the most appropriate institution to consider such a claim, hence this is where complaints should be

39 Press Council Regulation on Right To Reply Guidance (*Peraturan Dewan Pers No. 9/Peraturan-Dp/X/2008*). It contains 17 points.

addressed first (see point 17 of 2008's Right To Reply Guidance).⁴⁰ Neither party appealed for cassation.⁴¹

This case thus repeats the pattern we found earlier: the district court does not pay attention to precedent or the Press Law, but decides to adjudicate the case on its own terms. Fortunately, in this case the High Court acted as it should, thus strengthening precedent in the context of press legal cases in the civil court system and reinforcing legal certainty. It moreover added new arguments to sustain the priority of the Press Council in deciding all aspects of the right to reply.

During the period that this case was heard on appeal, the Supreme Court published Circular Letter 14/Bua.6/Hs/SP/XII/2008 on Asking Information of Expert Witnesses (30 December 2008). It requires the civil and criminal court to invite experts from the Press Council in court proceedings dealing with press cases. It is likely that this circular letter will have more influence over the first instance courts than precedents (cf. Pompe 2005) and therefore this circular letter may at least bring some relief for the press.

6.6. INTIMIDATION THROUGH LAWSUITS

Because court decisions in press cases have often been inconsistent and uncertain, at least at the district court level, the civil court has become an institution which can be deployed to harass journalists, editors and press publishers. Nearly every journalist I interviewed considered civil lawsuits against the press as a means of 'intimidation' rather than as a process to sustain accurate reporting. I found this feeling to be spread widely all over Indonesia and not only in Jakarta.

Several reasons may account for this impression. The first one is the amount of money demanded as compensation. For individual journalists this stands in huge contrast to their limited salaries and modest social position. But even if it is not the individual journalist who is targeted, such compensation may potentially cause bankruptcy of the press or media company. It may also cause internal problems within boards of editors and journalists, with the former trying to shift responsibility to individual journalists – even if the Press Law clearly states that journalists are not directly and personally

40 Point 17: A dispute with regards to the implementation of the right to reply is to be resolved by the Press Council.

41 "Adu Silat setelah Akrobat," [Martial Arts Fighting after Playing the Acrobat], *Tempo Online*, 7 March 2011 <<http://majalah.tempointeraktif.com/id/arsip/2011/03/07/KEC/mbm.20110307.KEC136070.id.html>> (retrieved on 28 December 2011).

liable.⁴² Thirdly, the judicial process is usually time consuming, complicated and costly. It diverts the attention of journalists from their real job and disturbs their routines in gathering and disseminating information. Those without a legal background must learn about legal procedure, and even if the other side loses in the end and must pay for the costs of the lawsuit, a case may still require considerable spending on lawyers, experts, etc. Finally, some of these lawsuits are initiated by powerful figures who do not hesitate to add threats and mob violence to their claim.

Even if a lawsuit is generally accepted as the ultimate mechanism for dispute resolution under Indonesia's legal system, a lawsuit cannot be justified if it is merely used to attack journalists, editors and owners. In this section I will explore the criteria for labelling a lawsuit against the press as 'unjustifiable.' Before turning to the 'unjustifiable lawsuit' I will first discuss the so-called 'SLAPP' (Strategic Lawsuits against Public Participation), as these have been widely discussed in the scholarly literature and offer a good point of departure.

6.6.1. Strategic Lawsuits against Public Participation (SLAPPs)

The term 'Strategic Lawsuits Against Public Participation' or SLAPP, was introduced by Penelope Canan and George Pring (Canan and Pring, 1988a and 1988b). It resulted from empirical research into 100 lawsuits involving the press and how these impacted political values and participation in public decision-making in the United States. SLAPP start with a civil complaint or claim, filed against individuals or organisations, about communication regarding an issue of public interest or concern. Canan and Pring (1988a: 387) developed a four-pronged operational definition to capture the phenomenon. To be a SLAPP, a case must be:

- (i) a civil claim for money damages;
- (j) filed against non-governmental individuals and organisations;
- (k) based on advocacy before a government branch official or the electorate; and,
- (l) about a substantive issue of some public or societal significance.

SLAPP are often brought by corporations, real estate developers, government officials and other relatively powerful figures against individuals and community groups, who claim compensation for injury resulting from citizens' efforts to influence the government or sway voters on an issue of public significance.

42 This applies specifically to those journalists who are not permanent staff, such as freelancers, correspondents, and stringers (interview with group of journalists at AJI Mataram office, Mataram, 25 June 2010). This was also mentioned by many journalists when they told their story during the "Press Legal Training for Journalists" in Surabaya, 4-5 August 2012 and in Kediri, 11-12 August 2012 (LBH Pers and AJI Surabaya/Kediri).

SLAPP are usually disguised as ordinary civil lawsuits based on traditional theories of law, including defamation, interference with contract or economic advantage, or conspiracy. Albeit most SLAPP are unsuccessful in court, they 'succeed' in the public arena. This is because defending oneself against a SLAPP, even when the legal defence is strong, requires a substantial investment of money, time and resources. The effect is the 'chilling' of public participation in, and open debate on, important public issues, not only of the SLAPP defendants themselves, but also of other people who will refrain from speaking out on issues of public concern because they fear being sued for what they say. SLAPP thus impede proper public reasoning and decision making, by removing interested parties from this process. Thus, the court is used for 'political retaliation' and/or as a weapon in social conflict in such a manner as to discourage political participation (Canan and Pring, 1988b: 507, 515).

In the United States there have been hundreds, or perhaps thousands of SLAPP against expressions ranging from circulating petitions, submitting letters to officials or newspapers editors, reporting police misconduct, complaining to school officials about teacher misconduct, to even speaking at public or academic meetings (Canan and Pring, 1988b: 506). To counter the phenomenon, more than 20 states in the United States now have 'anti-SLAPP' statutes that protect citizens' rights to free speech and to petition the government. A key feature of these anti-SLAPP statutes is that they offer immunity from civil liability for citizens or organisations participating in the processes of government, for instance by written or oral statements made before a legislative, executive or judicial body or in any other official proceeding. When a citizen or organisation is sued for protected activities, anti-SLAPP statutes provide for expedited hearing of a special motion to dismiss the SLAPP.

Albeit Canan and Pring did not explicitly discuss the press or the role of media, their main idea of SLAPP closely relates to how journalists and editors contribute to influencing opinions regarding public concern issues. Since the press has this strategic but difficult role, it has often been sued by those who are in power or have an interest in silencing public debate. It is therefore not difficult to apply the concept of SLAPP to refer to those lawsuits, where issues of public participation, democracy, and freedom of expression are at stake.

However, I feel that the concept of SLAPP does not fully cover the range of legal actions to stifle freedom of expression, especially in lawsuits against the press, and that we need a more specific and appropriate concept. First, SLAPP cover much more than cases against the press, which is a special sub-category. The press has a distinct character, due to its specific societal task. Second, while SLAPP are specifically about monetary compensation, many of the cases we discussed in this chapter are about other actions as

well. And third, these lawsuits are not always related to advocacy before a government branch official or the electorate, but to a broader range of public debate. I therefore suggest using the more specific concept of Unjustifiable Lawsuits against Press Freedom (ULAP).

6.6.2. Unjustifiable Lawsuits against Press Freedom (ULAP)

The idea of 'Unjustifiable Lawsuits against Press Freedom' (ULAP) first came to me after my reading of a Reporters Without Borders report with the title *Unjustified Lawsuits by Church against Press Condemned*.⁴³ It describes how followers of the Brazil-based evangelical Universal Church of the Kingdom of God (Igreja Universal do Reino de Deus) filed dozens of lawsuits against the media. The sheer number of claims is important, because this is likely to go beyond affecting the accountability of a particular newspaper or magazine to freedom of the press more generally.

The findings of my research show a similarity between the Indonesian situation and the stifling of freedom of speech through SLAPP in the United States, but it differs in a number of respects (as I have argued above). Many of the lawsuits in Indonesia specifically target the press and are sometimes accompanied by violence in order to make sure that journalists and editors do not criticise the rich and powerful. These lawsuits do not target inaccuracy or unreliable information.

Nearly every journalist I interviewed said that if a journalist will make an investigative report on corruption or illegal business, he or she must not only consider the professionalism of his or her work based on the Press Code of Ethics, but also the readiness of the press company and its staff to face harassment.⁴⁴ This can take the form of legal actions, intimidation, occupation and destruction of media offices, kidnapping, torturing and even murder. Editors and media owners must assure journalists of sufficient protection before the latter can write an investigative report.

If the main objective of a lawsuit is to intimidate the press, it qualifies as an ULAP.⁴⁵ It consists of the following elements: first, an ULAP aims at professional journalism, i.e. journalism that is consistent in keeping up its quality standards and in following the Press Code of Ethics. Journalists must provide information in an accurate, comprehensive, reliable, timely and

43 See <http://en.rsfsf.org/brazil-evangelical-church-loses-two-more-26-02-2008,25861.html> (retrieved on 29 December 2011).

44 Anonymous (a journalist in Mataram), *interview*, 24 June 2010; Damyanus Ola (editor of *Pos Kupang* newspapers), *interview*, 22 July 2010.

45 For Javanese, the term 'ULAP' is easy to remember, as it means 'blinding.'

understandable manner. Moreover, professional journalism requires consistent and fair responses to the 'right to reply' and the 'right to correction.' Second, the lawsuit intends to cause damage to the media, in order to discourage professional and critical journalism. Usually, the plaintiff demands an extraordinary amount of compensation, which exceeds the defendant's financial capacity. A good example is the case of *Radar Tegal v Cipta Yasa Multi Usaha Inc. (CYMA Inc.)* in which CYMA Inc. sent a reply to *Radar Tegal* that was published almost immediately without any revision of its content.⁴⁶ Nevertheless, two weeks later CYMA filed a lawsuit against *Radar Tegal* claiming Rp. 247,4 billion, a sum that if awarded would cause bankruptcy of a newspaper the size of *Radar Tegal*.⁴⁷ The lawsuit moreover aims at retaliation rather than redressing incorrect reporting or reparation of damage.

An indicator that a claim concerns an ULAP is that a lawsuit is accompanied by intimidation, violence or forms of pressure on the court. It does not mean that a lawsuit without intimidation cannot be an ULAP, but this is an indicator. Another indicator is that the news report concerns certain political-economic interests, for instance the relationship between the government and business elites.

The use of the concept of ULAP extends beyond mere scholarly purposes. During my fieldwork I found that journalists often have difficulties in labeling this kind of attack on their work. The plaintiff uses legal action, but it is clear to the journalist concerned that this legal action is in fact concealed intimidation. Yet, it is difficult for the journalist to say it concerns an illegal action, but speaking of an 'unjustifiable' action provides a way out of this problem.

Applying the concept of ULAP to the cases discussed above, those of Tomy Winata against *Tempo* clearly qualify as such. Tomy Winata filed several lawsuits against *Tempo* reports that were the fruits of investigative journalism.⁴⁸ The investigation and reporting were conducted in a professional manner, with *Tempo* following the law and the Press Code of Ethics. The case moreover concerned business interests and relations between business and officials, and was accompanied by mob violence.

46 It concerned the report *PT. Cyma Belum Kantongi Izin* [CYMA Does Not Have a Permit Yet].

47 Fortunately, in this case the court dismissed the claim because CYMA Inc. did not follow the Press Law procedure (10 May 2011). "*Radar Tegal Lolos dari Gugatan*" [Tegal Radar Free from Claim], *Hukum Online*, 10 May 2011, <http://www.hukumonline.com/berita/baca/lt4dc8f256a4039/iradar-tegali-lolos-dari-gugatan>.

48 See above, *Tomy Winata v. Tempo Inti Media Inc.*

6.6.2.1. *Raymond Teddy v Seven Media* (2009)

I will now discuss one other ULAP: *Raymond Teddy v. Seven Media*.⁴⁹ The plaintiff, a well-known businessman, was reported to have been arrested while gambling in a luxury hotel in Jakarta, in October 2008. At the time of the arrest, Raymond had the status of 'suspect,' facing a criminal indictment for involvement in a gambling business in Jakarta. He disputed the publication of the news reports that he had been arrested by the police, for this, he argued, would lead readers to believe that he was considered guilty of the charges.

In response Raymond filed claims for damages on account of insult against seven media in four separate lawsuits in four different district courts. The amounts claimed varied from one case to the other. *Suara Pembaruan* for instance, sued by Raymond in the East Jakarta District Court, was confronted by a USD 3 million claim. In the South Jakarta District Court, Raymond claimed USD 3,5 million from *Republika* and *Detik.com*. *Harian Sindo* (*Seputar Indonesia*) was sued for USD 2,5 million before the Central Jakarta District Court, and in the West Jakarta District Court, *Kompas*, *Warta Kota* and *RCTI* were faced by a USD 16 million claim. It was completely unclear how Raymond had calculated his losses and what the relation was between these losses and the publications.

What made the case even stranger was that according to the police Raymond *had* actually been arrested, and the information about the gambling was also gathered from official police statements. Yet Raymond argued that the information provided in the contested news reports was incorrect and 'false,' even if he could not clearly point out how it differed from the official police sources. He also asserted in court that he had used his right to reply and lodged a complaint with the Press Council.

All district courts refused Raymond's claims, on similar grounds. West Jakarta District Court Judgment 520/Pdt/G/2009/PN.Jkt.Bar. therefore suffices as an example. The court argued that the law allows one to bring a claim against the press if its reports hurt a private person, a group of people, an organisation or a legal institution, in order to require a reply to or correction of a news report. In case of a dispute on such a matter, section 17 of Press Council Regulation 9/Peraturan-DP/X/2008 determines that it must be resolved by the Press Council. The judges found that Raymond had not used this right to reply and right to correction, as he claimed, but had sent a legal summons to the defendants (*somasi*). Raymond then complained to the Press Council, but did not await its conclusion, the so-called 'Statement, Assessment and Recommendation.' Instead he also took the case to court, which is only allowed if the defendant refuses to follow the recommenda-

49 They were *Suara Pembaruan*, *Republika*, *Detik.com*, *Harian Sindo*, *Kompas*, *Warta Kota*, and *RCTI*.

tion of the Press Council to publish a reply or correction. Finally, the news published was taken from police sources, and therefore Raymond ought to have addressed the police and not the press.

Margiono commented that Raymond's lawsuits were efforts to instil the press with 'fear.'⁵⁰ Raymond Teddy's claims are clear examples of ULAP. These lawsuits intentionally attacked professional journalism, claiming a huge amount of damages with a retaliatory purpose. His gambling business interests were apparently in need of protection from further scrutiny.

The outcome of all court cases was satisfactory, and they drew much attention from a wide variety of societal actors. Even the president spoke out about Raymond's cases.⁵¹ Perhaps they backfired against the plaintiff. Most important perhaps is that the first instance courts finally followed the Supreme Court precedents with regard to the application of the press law mechanism and actually referred to the relevant Supreme Court Circular Letter as well as to the relevant judgments. All courts in this case considered the role of the special mechanism under the Press Law, including the use of the 'right to reply' and the 'right to correction.' If consistently followed, as argued earlier, these will lead to legal certainty and a solid guarantee for developing press freedom in Indonesia. In that case an ULAP loses much of its power.

6.6.2.2. *The 'Terminated Civil Lawsuit': Sisno Adiwino v Upi Asmaradhana (2008)*

A particular form of ULAP is the 'terminated civil lawsuit.' It starts as a 'normal' ULAP, by a huge claim for damage compensation against journalists, editors and/or media owners, which is beyond their financial capacity. The special feature of this type of lawsuit is that in the middle of the court process the plaintiff terminates his lawsuit, probably because he understands that in the end he is not going to win the case. Yet, the lawsuit itself is already an effective form of harassment.

50 "AJI: Tak Ada Masalah Hukum di Perkara Raymond" [AJI: There is no Legal Issue in the Raymond Case], *Republika*, 12 May 2010.

51 "Tersangka Judi, Satgas Mafia Hukum Soroti Kasus Raymond" [Gambling Suspect, Taskforce Legal Mafia Clarifies the Raymond Case], *Republika*, 19 April 2010; "Satgas Mafia Hukum Dorong Penuntasan Kasus Judi Raymond" [Taskforce Legal Mafia Urges the Resolution of the Raymond Gambling Case], *Republika*, 29 April; "Ketua MPR Minta Kapolri-Jaksa Agung Dipertemukan" [Chair of the People's Congress Asks Head of the Police and Chief Public Prosecutor to Meet], *Republika*, 6 May 2010; "PBNU: Jangan Jadikan Pers Korban Kasus Judi" [Leadership of the Nahdlatul Ulama: Never Let the Press Fall Victim to Gambling Cases], *Republika*, 7 May 2010.

A well-known example of this form of ULAP is *Sisno Adiwinoto v Upi Asmaradhana*. The dispute started with South Sulawesi Provincial Police Commander (*Kapolda*) Sisno's statement that it would be "...unnecessary for government officials to use the 'right to reply' and the press mechanism under the Press Law... journalists can be prosecuted in a criminal process."⁵² Upi was a *Metro TV* journalist, who in his capacity as a coordinator of the Makassar *Koalisi Jurnalis Tolak Kriminalisasi Pers (KJTKP)*, Journalist Coalition Refusing Press Criminalisation) organised a three-day protest on account of Sisno's statements (from 1-3 June 2008). The *KJTKP*'s action aimed at promoting professional journalism and respect for the Press Law, also from officials.

First, Sisno lodged a complaint with the police, requesting that Upi be prosecuted for violating Articles 207, 311 and 317 of the Penal Code for defamation and insult.⁵³ Next to this complaint, Sisno filed a civil lawsuit at the Makassar District Court, asking Rp. 30 million for material compensation and Rp. 10 billion for immaterial compensation, as well as a daily fine of Rp. 100,000 in case of non-compliance with the court's decision. Probably scared by this intimidation, *Metro TV* decided to fire Upi.

While Upi and his coalition criticised Sisno for a statement he made in his capacity as police commander, Sisno's counterattack addressed Upi personally. It was quite clear that Upi would never be able to pay the amount of compensation demanded. Maryadi, from AJI's advocacy department, stated that "If the civil lawsuit is accepted by the Makassar District Court, Upi will be finished (*habis*). How is it possible that a former journalist, who was just fired by his employer (*Metro TV*) for his conflict with the police commander would be required to pay a compensation in billions of rupiahs?" (Maryadi 2009). AJI officially stated that Sisno's lawsuit was a threat against press freedom in general⁵⁴ – in particular because this case was extraordinary in the personal nature of the attack.

On 28 May 2009 Sisno withdrew his claim.⁵⁵ By that time Upi had lost his job and had been in constant fear about the damage claims he was facing and his future as a journalist. It is likely that Sisno felt sufficiently revenged.

52 Sisno said this on 19 May 2008, during an official meeting with all district heads in South Sulawesi.

53 This case was discussed in greater detail in Chapter 4.

54 "Gugatan 10 Miliar Sisno Adiwinoto Merupakan Tekanan terhadap Kebebasan Berpendapat" [Sisno Adiwinoto's Claim of 10 Billion Appears to be Pressure against the Freedom of Opinion], *press release of AJI Indonesia*, 16 April 2009.

55 "Sisno Adiwinoto Batal Gugat Upi Rp 10 Miliar, Kuasa Hukum Mantan Kapolda Cabut Gugatan" [Sisno Adiwinoto Halts Claim against Upi, the Former Police Head's Legal Attorney Withdraws the Claim], *Tribun Timur*, 29 May 2009.

6.7. CONCLUSION

Before Soeharto stepped down, the number of civil lawsuits related to press freedom was relatively low in comparison to the number of criminal law cases. During the authoritarian regimes of Guided Democracy and the New Order the state dominated the press, among others by deploying the criminal court system in order to silence dissident voices. Atmakusumah, speaking from his experience as a journalist during the New Order, said that at that time there were several reasons for this preference for criminal law. First, the criminal law system requires relatively little investment in time and money: after one has filed a complaint with the police, police and public prosecutor do the work. Second, a criminal conviction means a straight win in case of a conviction, as opposed to the sometimes equivocal outcomes of a civil lawsuit.⁵⁶ After 1998 a combination of more democracy, decentralisation, and the rise of regional business elites caused an increase in civil lawsuits against the press and a decrease in criminal cases.⁵⁷

As we have seen in this chapter, the main private law issue regarding the press is insult. This may be due to the absence of provisions on this issue in the Press Law. As argued by Effendi Gazali: “Our Press Law needs articles on ‘insult’ that are quite detailed, so that legal cases are not brought under other legal regulations because the provisions in the Press Law are unclear.”⁵⁸ However, we have also seen from the discussion of cases in this chapter that there is a legal development with judges increasingly often referring to the Press Code of Ethics as a supplementary source of rules to judge whether journalists have lived up to the standards of professional reporting. These standards then determine whether or not a news report is unlawful and hence insulting.

Nevertheless, procedurally speaking claims can only be made to the civil court after the procedures stipulated in the Press Law have been followed first. Thus, an aggrieved person should first use his ‘right to reply’ and ‘right to correction,’ and if the result is unsatisfactory he should address the Press Council. As we have seen in this chapter, in several judgments the Supreme Court has put beyond doubt that this mechanism holds priority over a case being brought to civil court.

Furthermore, we have found that the lower courts have been inconsistent in heeding these Supreme Court precedents. Moreover, they have also allowed plaintiffs to use the general Article 1365 of the Civil Code (usually in combination with 1372) to seek compensation, instead of the more specific Articles

56 Atmakusumah Asraatmadja, *personal communication*, 6 December 2011, Tribuana Said, *personal communication*, 3 December 2011.

57 See Chapter 5.

58 *Kompas*, 24 November 2003.

1372-1380 about insult, and they have been inconsistent in their interpretation of these articles. The most simplified interpretation of Article 1365 we encountered was that the press has acted in an unlawful manner and needs to pay compensation, without indicating in any detail how these injuries or losses have been measured or whether the 'public interest' was served by the report.

Another problem is that Article 1372 of the Civil Code refers to Articles 310-321 of the Penal Code for specifying the requirements for the unlawfulness of an insult or defamation, whereas these articles are not sufficiently specific themselves. Elements of insult and defamation commonly referred to in other jurisdictions receive no attention in Indonesia, such as that the person concerned must be identifiable, whether it concerns an intentional or unintentional communication of the defamatory statement to a third party, and that a false statement must cause harm or damage in order for it to be actionable. Other issues not well regulated in Indonesia – either by legislation or by precedent – are whether the plaintiff must establish that the communication was false and published with negligence and, if so, how this must be established. Likewise, there are no clear rules on the specification of damages and its consequences for the compensation due, such as damage to esteem or social standing, damage through ridicule, damage to trade, occupation, professional ability, etc. (cf. Overbeck 2011: 123-128).

Yet, several 'landmark decisions' can be pointed at which contain building blocks for a legally certain and proportionate protection of the press. *Mrs. Djokosoetono (Blue Bird Taxi) v Selecta Magazine* (1981) set boundaries to press freedom in referring to racial issues irrelevant to a case in assessing whether an act 'unlawfully harms feeling, reputation and privacy.' In *PL ALM v Garuda Daily* (1991) the Supreme Court introduced the Press Code of Ethics as the standard for determining whether a news report is unlawful or not, a position confirmed in *Tomy Soeharto v Gatra Magazine* (1998) and the review in *Soeharto v. Time Inc.* (2009).

In this ruling the Supreme Court moreover determined that the 'right to reply' and the mechanism for complaints to the Press Council, as regulated in the 1999 Press Law, have to be followed first before a tort case can be taken to the civil court. This decision has reinforced the special position of the press in issues concerning freedom of expression, thus recognising the importance of press freedom for the well-functioning of a democratic state. The way in which the right to reply should be exercised has been further clarified by the Press Council in its Right to Reply Guideline of 29 October 2008. In the same year the Supreme Court issued Circular Letter 13/2008 on press expert witnesses, underlining once again the precedence of the Press Law over the Civil Code.

Although these judgments and guidelines have reinforced the protection of press freedom, civil lawsuits are still used to harass journalists, editors and newspaper companies. Nearly all journalists I interviewed, regardless whether in Jakarta or elsewhere, said that many lawsuits aimed at intimidating them rather than at resolving a dispute. Such lawsuits can be labelled Unjustifiable Lawsuits Against Press Freedom, or ULAP. They are directed against professional journalism, demand an extreme amount of compensation, are often accompanied by intimidation and usually serve to promote political-economic elite interests.

Several cases taken to the civil court described in this chapter qualify as ULAP. The good news is that all of these cases were dismissed in first instance. Nonetheless, they do interfere with a proper functioning of the press, as they force journalists, editors and media owners to invest time and money in defending themselves. In my opinion, the fact that some of these cases were terminated by the plaintiff before the court passed judgment confirms that these plaintiffs are not serious about their demands and only deploy the lawsuit for the purpose of intimidation or retaliation. Perhaps one way to address ULAP would be to bring claims for tort against those using the ULAP. As far as I know, this has not been attempted, however.

Despite the ULAP and the problems with first instance courts not recognising the precedence of the right to reply and the Press Council procedure, the civil court seems to be developing into the mechanism of last resort as intended by the legislator when it passed the 1999 Press Law. If it would further develop the criteria for tortuous action as indicated above, it may well become a legal mechanism capable of balancing the protection of individuals and/or a group interests against press freedom.