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

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8 Conclusion

> Before reformation, press freedom was jeopardised, or deficient. But now after reformation, press freedom is working well, there is even a surplus of it…. (President Susilo Bambang Yudhoyono, 3 June 2010)

> …an 'overdose' of press freedom cannot be seen separately from the umbrella law, as during the lawmaking process, Indonesia was overwhelmed by a post-Soeharto drunkenness of freedom. (Professor Tjipta Lesmana, Oase, *Kompas*, 9 December 2010)

> Press freedom in Indonesia is very, very strong! … such freedom is indicated by a more diverse content and ownership than during the Soeharto regime. (Vice Minister of Law and Justice, Professor Denny Indrayana, lecture at Leiden Law School, 8 March 2013)

8.1. Introduction

Many claim that presently press freedom is well guaranteed in Indonesia and according to some it is even 'excessive' ('*pers kebablasan*!'). But is this true? Is there a 'surplus' or 'overdose' of press freedom in Indonesia, and is press freedom 'very strong'?

This thesis has demonstrated that there is much evidence undermining such assessments. The research has found that indeed there is far more freedom of the press now than there was under the New Order or Guided Democracy, and that the diversity of news sources has increased. However, there is still a pattern of legal and non-legal attacks against the press. While news coverage is generally broad in scope and critical in nature, the pressure on the press to exercise self-limitation is high. After the removal of the major legislative restrictions of the past, new limitations have been put into place through the Pornography Law (2008), the Electronic Information and Transactions Law (2008) and the General Elections Law (2008). An important change in practice is that while before 1998 it was mainly the state that limited press freedom, it is now rather non-state actors, such as business elites and their vigilantes, or religious fundamentalists who threaten the press.

What is worrying is the finding of this research that the government has done little to prevent or punish such actions, and neither has it taken much

effort to protect journalists. Another worrying finding is that the courts have been frequently misused in order to intimidate journalists, editors and press owners, both through civil and criminal law suits. On a positive note, the Supreme Court has consistently ruled that cases against the press should be dealt with by the Press Council, but so far lower courts have continued to sideline this policy.

While these are some important findings about the present situation of press freedom in Indonesia, the conclusions to this study are much broader. The next sections attempt to bring together the findings presented in the previous chapters to help answer the questions formulated at the start of this book. How has the concept of freedom of expression and press freedom evolved in Indonesian law? How has press freedom as one of the main pillars of constitutional democracy been guaranteed or curbed by the Indonesian legal system? How has press freedom been shaped by various government and non-government actors? And how we can judge all of this from a rule of law perspective? Such evaluation is necessary to understand how press freedom can be more effectively guaranteed in the framework of Indonesia's rule of law, for which at the end of this chapter I will present a number of suggestions and recommendations.

8.2. Press Freedom in Indonesia: An Overview

It is clear from this study that until Soeharto stepped down, press freedom in Indonesia was hardly ever legally guaranteed. Indonesia has a long history of legal control of the press which already started before the country became independent, during the time of the VOC. Through the years the constituent elements of press control through law have varied and so has their implementation, which became stricter or less strict according to the socio-political situation. This history is characterised by strict and often vague rules, censorship, permits, and (excessive) punishment or fines for transgression of the rules. The abolition of censorship and permits by the 1999 Press Law is therefore a historical moment, even if other laws and regulations have continued to impose restrictions on the press since.

The history of systematic state control of the press started under the colonial government with the *Drukpersreglement* in 1856, which introduced a pre-censorship system that was eventually abolished in 1906 by Governor-General Van Heutz. This meant the abolition of administrative controls on the press and the start of a period of relative freedom. However, the situation deteriorated after Governor-General Idenburg introduced the new Penal Code for the Netherlands-Indies, which contained several new provisions that could be used to prosecute the press. With the enactment of the Press Banning Ordinance (*Persbreidel Ordonanntie*) in 1931 criminal law became even more dominant in controlling the press.

After they conquered the Netherlands-Indies in 1942, the Japanese reintroduced the pre-censorship system that had characterised press control in the Netherlands-Indies until 1906. The Japanese were no less authoritarian than the Dutch had been, and both systems combined the absence of democracy with a weak rule of law and strong state intervention. The example they set to the Indonesian Republic that became their successor was hence not very favourable to press freedom.

After independence in 1945, the guarantee of press freedom was not clearly and explicitly formulated in the new Indonesian Constitution. Most legal commentators note that press freedom was normatively guaranteed by the reference to freedom of expresssion in Article 28 of the 1945 Constitution. There is support for this view in the minutes of the constitutional debates in 1945, where press freedom and freedom of expression were labelled as inseparable, but the ultimate text of the article was a compromise: it refers to freedom of expression only and states that it should be regulated by acts of parliament. From the perspective of press freedom the formulation is too broad and indeed subsequent practice has showed how its interpretation led to legislation suppressing the press. Second, the acts of parliament regulating freedom of expression have seldom interpreted the constitutional reference as meaning that it should principally be upheld, instead often introducing explicit restrictions. And finally, on the basis of transitional Article 2, all colonial legislation not in conflict with the 1945 Constitution remained in place. On this basis Indonesia continued to apply colonial press regulations.

As the early years of independence were characterised by colonial war and internal conflicts, it is no surprise that press freedom did not feature prominently on the agenda of the Indonesian Republican government. Indeed, during this period the first 'Indonesian' press banning occurred, as a result of the communist uprising in Madiun in 1948. The banning used the colonial law legacy to this purpose. When the Dutch finally recognised Indonesian independence, Indonesia replaced its revolutionary constitution by a much more liberal one, which unequivocally recognised freedom of expression. However, the colonial press laws remained in place once again.

The situation regarding press freedom only improved after the revocation of the Press Banning Ordinance in 1954. Unfortunately this led to a situation proponents of press regulation had always warned against. Most newspapers strongly associated with particular ideologies and were aligned to political parties, and in the heated political atmosphere of the time what followed was a cacophony of mutual accusations, incriminations, scandals, feuds, and frauds. Newspapers became channels for political propaganda instead of vehicles for professional journalism.

This situation was not to last for long. The imposition of martial law in 1956 led to the arrest and detention of journalists and editors, often extra-judicial,

and the brief episode of press freedom quickly came to an end. By contrast, the simultaneous deliberations in the Constitutional Assembly (*Konstituante*) demonstrated virtually unanimous support for enacting a special provision to support press freedom. This provision never came into force, however, as in 1959 Soekarno dissolved the Assembly and proclaimed the return to the 1945 Constitution. This marked the start of Guided Democracy, which was the worst period in Indonesian history in terms of press freedom from rule of law perspective. The new regime introduced a 'revolutionary press' and 'guided press' as the leading concepts. Any criticism of Soekarno and his leadership would be punished, with the military playing a central role in both regulation and enforcement without judicial control, including imprisoning journalists or editors. Many newspapers were closed down.

The demise of Soekarno and the start of the New Order raised hopes about a freer press, which were reinforced by the adoption of Indonesia's first Press Law in 1966. The new law contained new guarantees for press freedom, notably the prohibition of censorship and banning. However, it soon appeared that these guarantees did not keep the new regime from interfering with press freedom by banning newspapers, using criminal lawsuits against journalists and editors. The New Order moreover used an effective strategy of co-opting newspapers to promote its interests.

Just as Soekarno's Guided Democracy, Soeharto's New Order produced ideological discourses in order to discipline the press, promoting concepts as 'development press,' '*Pancasila* press' and 'socially responsibile press.' If discourse was insufficient to instill obedience, the system of permits for newspapers was used to silence critical voices – even if this was in clear contravention of the 1966 Press Law and its successor, the 1982 Press Law. Most notoriously, the government revoked the publication permits of magazines *Tempo*, *Detik* and *Editor* in 1994. The subsequent manipulation of the Supreme Court to legalise the bans by quashing the lower court judgments that defeated the government sent a clear message that the government could arbitrarily abuse the licensing system to control the press.

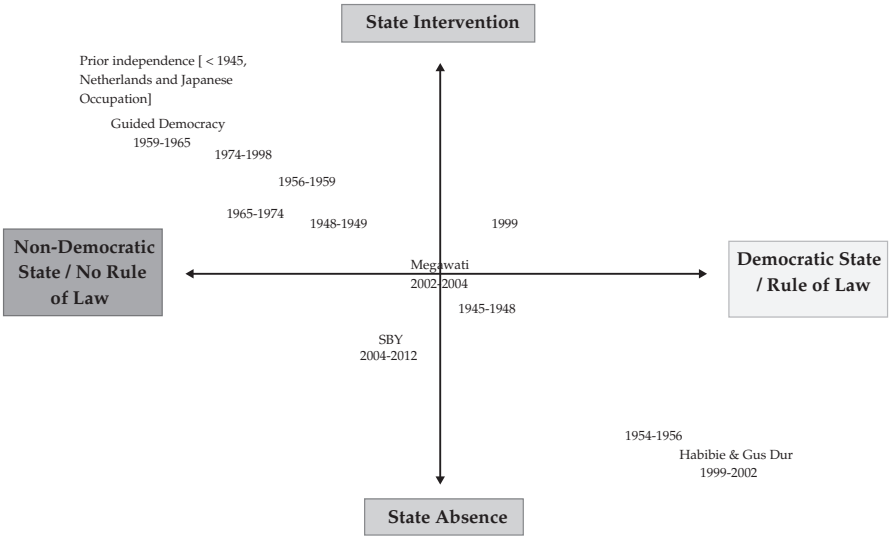
In short, Indonesian press freedom from independence until the end of the New Order was characterised by disciplining discourses, incoherence between principles and rules, manipulation of rules, an important role for the military and absence of judicial control.

This situation changed after the enactment of a new press law in 1999. Censorship, press bans, and press permits are strictly forbidden under this law. President Abdurahman Wahid furthermore dissolved the Department of Information, which had played a central role as an implementing agency of government policies for press control. However, the changes in political climate under the subsequent governments of presidents Megawati Soekarnoputri (2001-2004) and Susilo Bambang Yudhoyono (2004-2014) reintro-

duced repression of the press. Several laws threatening press freedom were enacted, such as the Law on General Election, the Electronic Information and Transaction Law and the Pornography Law. These threaten newspapers with banning and heavy punishment for journalists. As already mentioned, civil lawsuits on account of press publications are now more frequent than criminal law suits, but occasionally the government still acts against press freedom and in any case it does little to protect it. So far many journalists have managed to remain critical and professional, but if the pressure continues this may change for the worse with the increasing political competition.

If we try to picture the relation between government regimes and press freedom in Indonesia in different moments in time on the basis of the model set out in the introduction (which combines a continuum of the degree of democracy/rule of law with one on the degree of state intervention (or state strength), we get the following scheme:

The Role of the State and Press Freedom: Regime Map



8.3. Freedom at Present

As I have described, press freedom is determined by various legal factors, including regulation/legislation, judicial decisions, and law enforcement, political-economic factors, such as shifts in power balances following decentralisation, as well as by legal and non-legal actors, including government officials (police, judicial actors, professional organisations) and private actors (media owners, civil society groups, political elites, capital owners, and vigilantes). This section starts with the main findings as to how press freedom is presently regulated and practiced, especially discussing the Press

Council which has special authority to solve press legal cases in the present situation. It also elaborates on the patterns of violence against press freedom.

8.3.1. The Constitution and the Press Law

The constitution is an important foundation for maintaining press freedom in any legal system. Presently, there is no explicit guarantee on press freedom in the Indonesian constitution. As elaborated in Chapter 2, the absence of a specific article on press freedom in the 1999-2002 Constitutional Amendments reflects a lack of recognition by the constitutional legislators of the importance of press freedom in a democracy under the rule of law, despite the insistence of journalist groups and press freedom experts involved in the process. Press freedom therefore still falls under freedom of expression, which is admittedly better guaranteed now than was the case under the 1945 Constitution.

The legal cornerstone of protection of press freedom is therefore the 1999 Press Law (40/1999). As we have seen, however, much of the old legislation regulating press freedom was never explicitly repealed, and even though it should be considered to have lost its binding power implicitly through the enactment of the 1999 Press Law, in practice several actors have continued to use it to control the press. This started after Abdurrahman Wahid was removed as president. Both civil and criminal lawsuits have been conducted against the press, mainly on the basis of the numerous articles on defamation as stipulated in the Civil and the Penal Code. Such cases should have been brought to the Press Council on the basis of the 1999 Press Law, but even if the Supreme Court has consistently defended this line in its judgments, public prosecutors and lower court judges have continued to handle such cases.

As already mentioned earlier, the Press Law has also been subverted by subsequent statutes, notably the Pornography Law, the General Election Law and the Electronic Information and Transaction Law. Numerous draft laws which have not been enacted yet, such as the draft Penal Code, the draft Secrecy Law and the draft National Security and Defense Law likewise contain articles which take no account of the basic mechanism formulated in the Press Law that such cases should be taken to the Press Council first. Some protection has been offered by the Constitutional Court, which has declared unconstitutional several articles on press banning under the 2008 General Election Law. However, the reintroduction of press banning only ten years after Soeharto stepped down reflects a worrying shift in attitude of executive and parliament, without them having any indication that the Press Council mechanism does not function well. Cases such as the one discussed in Chapter 7 about *Radio Era Baru* (REB) show how easy it is for the government to misuse its licensing powers for banning purposes.

8.3.2. Actors Limiting Press Freedom

Problems of press freedom have been shaped by various factors and actors. These are not only related to law and the judicial system, but also to the political context of decentralisation in post-Soeharto Indonesia. This section singles out two actors who have been central in influencing press freedom and are particularly influential today: the judiciary and regional elites who attempt to get rid of press control of their actions.

The judiciary: insufficient and inconsistent protection
Despite the efforts of subsequent governments in Indonesia to remove the judiciary from its role of protecting freedom of the press and to control the press by way of administrative policies, as I have elaborated in Chapter 3 and 4, the judiciary has always continued to play a role in interpreting laws guaranteeing or undermining freedom of the press. Even during the worst days of Soekarno's Guided Democracy judge Abdul Razak Sutan Malelo bravely acquitted prominent editors Mochtar Lubis and Kustiniyati Mochtar from *Indonesia Raya*. While Soeharto's New Order manipulated the judiciary in more subtle ways and thus managed to secure convictions of several journalists and editors, there were occasional acts of resistance such as the judgments by the Jakarta Administrative Court and the Jakarta Administrative High Court in the banning of *Tempo*. In the post-Soeharto period the judiciary's independence has steadily increased. Yet, the courts should play a very limited role in press cases after the 1999 Press Law determined that all press disputes should be decided by the Press Council. As indicated earlier, the practice of civil parties – and sometimes the public prosecutor – to take cases to the general court and the resistance of lower court judges to refer these cases to the Press Council has continued to provide a role for the courts – but not a positive one. It should be noted, however, that the Supreme Court has been a positive exception by producing a consistent line of precedents referring cases to the Press Council.

What has been shown by this study is that civil lawsuits have gained in importance compared to criminal lawsuits (see notably Chapter 6).[1] This can be explained partly by the shift from an authoritarian state to a democratic one, as well as by the change from a centralised to a decentralised state. As to the first point, there is no longer an authoritarian state which by all means tries to impose its ideology on society as happened during

1 Some observers do recognise this as well. The Head of the National Law Development Agency (the *Badan Pembangunan Hukum Nasional*), Ahmad Ramli said that "the threat against the press is not only criminalisation, but the massive private lawsuits against the press… there are no limits to how much compensation must be paid by the press, and this leads to a serious threat against press freedom." "Gugatan Perdata Ancaman Kebebasan Pers," *Antara News*, 20 May 2010, http://www.antaranews.com/berita/187658/gugatan-perdata-ancaman-kebebasan-pers (retrieved on 5 May 2013).

Guided Democracy and the New Order. Using administrative policies and the criminal courts to silence a critical press were typical means to achieve this. The decentralisation has engendered a shift in monetary capital from the centre to the regions which has led to the capitalist regional elites using the civil courts to protect their interests against a critical press. This ought to change the role of the government from an aggressor to a protector, but this is seldom to be perceived. In several cases (e.g. *Tomy Winata v. Tempo*), a combination of a civil court case, criminal prosecution and mob violence demonstrates how private interests may coalesce with those of particular state agencies and may lead to serious threats of press freedom.

To end this discussion about the judiciary on a more optimistic note, as already mentioned, the Supreme Court has played a positive role in guaranteeing press freedom during the past years. Under the New Order the Supreme Court's ruling of *Anif v. Garuda Daily Newspapers* in 1991 already introduced the importance of the right to reply in resolving press legal cases before going to court, but this was still a sort of 'incident.' Since the enactment of the 1999 Press Law the Supreme Court has firmly stuck to its position that the Press Council holds precedence over court proceedings, which it first laid down in *Tomy Winata v. Tempo* (1608 K/PID/2005). It is to be hoped that the Supreme Court will manage to (re)establish its authority over lower courts and that this precedent will be effectively followed. Now that Supreme Court judgments have finally become accessible, it is to be hoped that this can counterbalance the regional business interests and political configurations influencing the courts in press cases (cf. Bedner 2013).

Regional elites and patterns of threats and violence

As discussed above, the decentralisation process has led to a shift from criminal to civil lawsuits in press cases. The same process has also created regional patterns of violence against the press. Decentralisation in this context must not be understood as the mere transfer of political authority from central to local government levels. Decentralisation has shifted power relations more broadly and deeply influenced the connection between political elites and local providers of capital. Business networks and bureaucratic elites now cooperate to differing extents in different constellations to secure their interests (Hadiz 2007, 2010, Tans 2012).

Some business elites whose interests are insecure will use any strategy available to them to protect these interests, including the law, courts or other formal mechanisms, but also violence. Since decentralisation started, there has been a remarkable rise of violent incidents involving journalists and others working for the press. More concretely, the press often publishes about local issues concerning corruption, illegal logging or mining, and other forms of exploiting natural resources, and as a result it has become a target for attacks. The killing of Prabangsa in Bali (16 February 2009), Ardiansyah Matrais in Merauke (30 July 2010) and Alfrets Mirulewan in Maluku (17 December

2010) are just a few instances. This growing violence by regional elites and their thugs is becoming an increasingly worrying phenomenon.

Violence against journalists also occurred during Guided Democracy and under the New Order, but was never as common as it is now. Underlying this violence is of course the fact that the press is now far freer to address what it thinks should be addressed and thus is more likely to make enemies than it was in the past. This requires the state to be actively involved in protecting the press. The decentralisation that led to the violence in the first place also makes it difficult to do something about it. Often political configurations in a decentralised context involve powerful coalitions of interests at national and sub-national levels, which Hadiz (2007) calls 'predatory elites.' In order to maintain such configurations, these elites create 'privatised gangsterism' (Hadiz 2010). As a result few of them are ever brought to trial and such impunity has become a fundamental problem for the press.

Impunity is sometimes also promoted by the willingness of the newspaper management to accept an amicable settlement. Offences against journalists are in those cases resolved by an agreement which usually requires ceasing judicial proceedings. Surprisingly, one of the findings of this research it that the Press Council itself has been involved in mediating criminal offences – in the end unsuccessfully and the judicial proceedings were subsequently continued (see the case of Mrs. Paulina Pradini in Gresik, in 2012, discussed in Chapter 4). Impunity is also promoted because many journalists, press associations, and civil society groups are hesitant to take legal action against those committing violence, and prefer to resolve problems by making agreements, often euphemistically called "*sama-sama nggak rugi*" (win-win solution) (see Chapter 4).

This impunity goes against Indonesia's obligations under international law. Indonesia ratified the International Covenant of Civil and Political Rights (ICCPR) in 2006. The Guidelines on Article 19 (see General Comment No. 34 (2011), paragraph 23) stipulate that "State parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19. Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. So too are persons who engage in the gathering and analysis of information on the human rights situation and who publish human rights-related reports, including judges and lawyers. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecut-

ed, and the victims, or, in the case of killings, their representatives, be in receipt of appropriate forms of redress."[2]

Hesitation to address legal and non-legal attacks against the press in the end leads to failure in developing a secure legal system for protection of press freedom. Currently the press on the whole is still pluriform and daring, but the combination of elite attempts to 'buy' news reports supporting their interests, to buy media, and to intimidate those media who refuse poses a serious threat. This is not yet a serious problem at the national level, but in certain regions it has already led to monopolies on reporting which sustain coalitions of business and political interests.

8.4. Indonesian Press Law: Legal Debates and Press Freedom Theory

The main objective of this research is to contribute to a comprehensive understanding of the role of law in relation to press freedom in Indonesia. The study has attempted to achieve this purpose by looking at the development of legislation, precedents and doctrine and combining this with an analysis of the role of these legal sources in practice. This section compares some of these findings which earlier research on Indonesian press law. It then continues reviewing theoretical issues on press freedom and ends with a discussion about legal unclarity and uncertainty, the tendency to avoid the judiciary, and ULAP (Unjustified Lawsuits Against the Press) as a new concept.

8.4.1. Studies on Press Law

The main study I address is the dissertation by Wahidin of 2006. This study is of a doctrinary nature, yet, on this doctrinary basis it draws several conclusions which would have far-reaching consequences for press freedom in practice. I will not go into Wahidin's claim to completeness,[3] but evaluate the five fundamental legal policies he proposes at the end of his thesis. First, Wahidin argues that the procedure for the 'right to reply' mechanism should be regulated more in detail in combination with procedures before the court. Then he suggests to establish a new 'mediation institution' (*lembaga musyawarah*), where the press is required to respond to the request for exercising the 'right to reply'. His third suggestion is heavier punishment for anyone

2 General Comment No. 34 of Human Rights Committee on Article 19: Freedoms of opinion and expression (102nd session, Geneva, 11-29 July 2011), (CCPR/C/GC/34, 12 September 2011).

3 Wahidin (2006: 180-189) alleges that when he carried out his research there had been no civil lawsuits against those affected by news versus the press. By contrast, this research found six such cases: *Ms Djokosoetono (Blue Bird Taxi) v. Selecta Magazine* (1981, Jakarta) and *Anis v. Garuda Daily Newspapers* (1991, Medan), *Tommy Soeharto v. Gatra Magazine* (1998); *Soeharto v. Times* (1999); *Tommy Winata v. Tempo* (2003); *Pemuda Panca Marga (PPM, a Veteran's Youth group) v. Tempo* (2003).

using violence against journalists, and fourthly, he argues for clear ethical standards and a professional organisation of journalists overseeing them. Finally, he calls for applying criminal law to journalists who violate the law or the code of ethics. This, he argues, would lead to better self-control (Wahidin 2006: 182-186).

The conclusions of this research are different from Wahidin's. First, as I have discussed in Chapter 4, the right to reply could be regulated more clearly, but certainly not in connection with court procedure. Neither is there any reason to establish an alternative organisation for the Press Council, which seems to be functioning well enough – in any case Wahidin provides no evidence to the contrary. The true problems are the lack of political commitment to support the Press Council against parties who have no interest in using their right to reply, but look for ways to harass the press. Next, heavier punishment for those who use violence against the press will not be a solution, because the problem is impunity of aggressors, not the absence of legal sentences. This is due to the practices described in the previous section. However, I most seriously disagree with Wahidin's suggestion that heavy punishment would be beneficial in order to promote self control of journalists.

This self control is a matter of professionalism and the application of the code of ethics is meant to ensure it. There is no indication whatsoever that there would be a problem with journalists violating the law or even the code of ethics. As described in chapters 5 and 6 in all cases against journalists or editors, they were eventually acquitted by the court. It may make sense to further support professionalism and the application of the code of ethics, but at present journalists are sued for absurd reasons and thus intimidated to the extent that they will think twice before publishing anything that could jeopardise their position. Therefore, the last thing we need is heavy punishment in order to teach journalists self-control. I hope to have shown the limitations of a legal analysis which has not looked at case law, and even less at press freedom in practice. By departing from untested assumptions about this practice, conclusions may be drawn which will effectively worsen an already problematic situation.

An issue of a more purely legal nature I want to address next is the argument found in several dissertations on press law, namely that press law is still dominated by criminal law (Syamsuddin 2008; Wahidin 2006; Mukantardjo 2002). As argued in Chapter 5, this is no longer the case. Indeed, under the authoritarian regimes of Guided Democracy and the New Order criminal law played an important role, even if then administrative permits were a more effective means of control. The shift to a more democratic regime under the rule of law has entailed a shift from criminal courts to the Press Council. Criminal law has thus lost its prevalent role and this actually promotes press freedom.

I therefore disagree with Mukantardjo's argument (2002: 371) that the use of criminal law has the advantage that it allows journalists or editors to defend themselves before a court and thus achieve acquittal of all charges. There is no need for this, and as we have seen in Chapter 5 (but also in Chapters 2 and 3), defending oneself in a criminal court is no sinecure.

8.4.2. Indonesia and Theories of the Press

In the introduction to this thesis I discussed several general theories presenting a typology of the press in its political environment. Looking at Indonesia through the lense of these theories we can make a few observations. First, my study confirms the point of departure of the press theories discussed that the political environment is crucial in determining the functioning of the press. And second, the case of Indonesia over time does not fit neatly into the categories offered by Siebert et al. (1956) or Oloyede (2005), but their typologies are still helpful to describe the functioning of the Indonesian press.

During Guided Democracy and the New Order Indonesia certainly resembled the authoritarian regime model discussed by Siebert et al., with both regimes controlling the press through licensing, banning, and arresting journalists or editors. Both regimes sentenced anyone who questioned the state's ideology or challenged its policies. At the same time Soekarno's demand that the press be a 'revolutionary press,' and Soeharto's creation of a '*Pancasila* press' or '*pers pembangunan*' (developmental press) went beyond the common authoritarian model. These features remind us of Oloyede's development journalism, but with the authoritarian nature of the state always in the foreground.

The situation of the press in post-Soeharto Indonesia is more difficult to categorise according to Siebert et al.'s and Oloyede's typologies. Although Indonesia has become more democratic, the press system can neither be described as a libertarian nor a social responsibility model. Indeed, the media have become more plural and now better reflect the diversity of society, and the press is no longer an instrument of the government. Nevertheless, in practice some features of the authoritarian model are still present, with some repressive legislation still being applied (see Chapter 4) and the state offering insufficient protection for attacks against the press by 'predatory elites.'

My research confirms what Romano (2003) has observed about the Indonesian press in Indonesian culture post-Soeharto. Indeed, the role of the state in shaping and influencing press freedom is still important, but in the present political culture press curbing is now initiated by societal actors, depending on the regional political configuration (cf. Yin 2003). My research has demonstrated that this development has continued after Romano con-

cluded her study. One point I may add is that next to 'privatised gangsterism' judicial proceedings are used as well to intimidate the press.

This study has not provided a 'media ecology' as called for by Hill and Sen (2007). Yet, I hope to have added a few insights which can be used for such a study. What this study does show is that examining press freedom with an exclusively doctrinary legal approach misses essential parts of the puzzle. This is even more of a problem given the present custom in Indonesian legal academia to pay no or only scant attention to judicial rulings. Drawing conclusions about press freedom in reality cannot be done on the basis of legislation only. This presents a dual challenge for Indonesian law researchers, who should to be more open to include other disciplines in order to understand press freedom more comprehensively, and who should pay attention to legal decisions made by the court.

Having said that, I will now look more closely at the conclusions concerning the judicial rulings discussed in chapters 4, 5 and 6.

8.4.3. Legal Unclarity and Uncertainty

Since 1999 press bans are no longer allowed in Indonesia, but civil and criminal lawsuits have still been conducted against journalists, editors and media owners. Judicial protection for the press has therefore remained very important. This study has found that the inconsistencies characteristic of legal interpretation of press law under the New Order are still commonly found today.

There are at least three possible reasons why court rulings have been inconsistent. First, court judgments are often still unavailable or quite difficult to obtain. Legal information is better accessible now than it was under the New Order (Churchill 1992: 1), but in particular regarding judgments the situation has not much changed. It is true that the Supreme Court publishes its judgments on its website now, but the system is not well-organised so that finding judgments on particular topics is very difficult. As regards judgments of lower courts the situation has not changed at all, so it seems. The use of precedent has fallen into disuse in Indonesia and this goes against uniformity in adjudicating similar cases (Bedner 2013).

The second reason is that many lower court judges seem unable or unwilling to understand the special mechanism of the 1999 Press Law, which unequivocally requires cases to be taken to the Press Council before they may end up in court. This is even more remarkable given the Supreme Court's consistency in its judgments in prioritising the Press Council mechanism. It is to be hoped that in the end judges will no longer step out of line with the Supreme Court in this matter. Perhaps the appointment of former Supreme Court

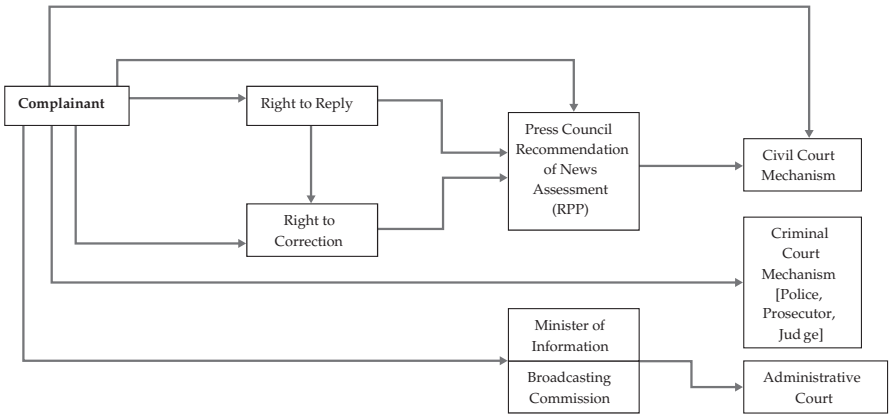
Chairman Bagir Manan as Chairman of the Press Council will support this process. Only in this way can 'real legal certainty' (Otto 2002) be achieved.

Thirdly, several cases in chapters 5, 6, and 7 demonstrated, or contained indications, that the judicial process was influenced by political or economic interests. Under the New Order this political influence was centralised in order to serve regime's interests, whereas presently political and capital interests are more diverse. That such influence is likely to be important is sustained by the broadly sustained thesis that corruption in the judiciary is still widespread.

Ultimately such inconsistency leads to legal uncertainty. The research found inconsistency in rulings between lower courts and the Supreme Court, but also within the Supreme Court itself. In *Soeharto v Time* (2000) the Supreme Court reviewed its own decision in cassation, and in the criminal defamation cases against *Tempo*'s Bambang Harymurti (2003) and Risang Bima Wijaya (2006) the Supreme Court took completely different decisions based on similar constellations of facts – acquitting Bambang and sentencing Risang.

The following scheme portrays how the failure to give priority to the 'right to reply' mechanism leads to cases being taken to an array of courts and instances, and thus to problems of forumshopping (cf. Bedner 2010). The red line shows which institutions a complainant may address in practice.

Press Conflict Mechanism in Indonesia
[process reality]



This forumshopping not only leads to inconsistency in procedures and outcome, but also to unpredictable time frames. In order to establish legal certainty state institutions should therefore stick to the law and use the right to reply mechanism as the point of departure for any complaints against the press.

8.4.4. Avoiding the State Legal System for Protection

As I already remarked, journalists and in particular editors are inclined to settle or 'lump' cases of violence rather than report them to the police. They fear for retaliation and more violence if they do press charges. Criminal proceedings are moreover cumbersome in terms of time and the stress involved. Another reason to prefer private agreements is that the majority of newspapers in Indonesia have no lawyer to assist their journalists in cases of harassment. Therefore, there seems to be a preference for 'peace agreements' (*kesepakatan damai*), which may involve professional associations, such as the medical one at the Adam Malik Hospital in Medan, and the taxi drivers' association in Denpasar. Journalists have sometimes employed the services of the Independent Journalists Association to this end.

Not all journalists agree to this line of behaviour. They fear that private settlements instead of pressing charges in the end leads to systematic impunity. It may prevent violence in particular cases, but on the whole the deterrent effect of the criminal law will lose its power. In order to enable journalists to make a well-informed choice on this matter, in recent years a number of press legal aid institutes have been established, sometimes with the help of law faculties. This may lead to a different approach in such cases than is common at present.

8.4.5. ULAP as an Oppressive Strategy

Many lawsuits against the press in post-Soeharto Indonesia have neither the intention to protect the public interest nor support press freedom, but merely aim to drive certain newspapers or media businesses into bankruptcy. Examples are the cases of *Tomy Winata v. Tempo* and *Raymond Teddy v. Seven Medias*. Such cases remind of so-called SLAPP (Strategic Lawsuits Against Public Participation), but I argue they can better be described by a new term: ULAP (Unjustifiable Lawsuits Against the Press). I found that in Indonesia ULAP were mainly conducted against newspapers and magazines that are well-known for their high professional standards, reliability, and quality of information.

There are two reasons for introducing this new concept. First, it provides a clear identification of a particular kind of case against the press that, unfortunately, occurs quite often. Second, it is important to have a working notion to explore the distinction between a 'pure' legal action and a form of political suppression by means of the courts. It may also assist journalists, editors or even judges in more easily identifying the true reasons behind a case against the press.

As discussed in Chapter 6, not all lawsuits against the press are ULAP. These are extraordinary cases with several particular features: they target professional journalism, try to drive news media into bankruptcy, and often have a motive of retaliation. ULAP are often accompanied by intimidation and/or physical violence against journalists, they are usually inspired by certain political and/or economic interests. ULAP are typically aimed to silence media conducting investigative journalism and thus they harm the public interest. In the present political conditions in Indonesia, where 'predatory elites' have gained ascendancy in many regions, public access to good, reliable news is of great importance and needs to be protected by all means.

8.5. Recommendations and Suggestions for Further Research

8.5.1. Recommendations

This research has demonstrated that not all is well with press freedom in Indonesia. However, some of the findings actually point in the direction of possible solutions for the problems I registered. In this section I will formulate a number of recommendations in order to improve the current situation. Some of them are of a legal nature, others institutional.

Public Interest
As we have seen in this research, 'public interest' has been a problematic legal concept in press law. In particular during Guided Democracy and the New Order it has been misused in suppressing opinions critical of the regime which were entirely peaceful. Syamsuddin (2008) has also pointed at this problem in his dissertation and argues that "public interest in press activities must be interpreted as the people's interest, instead of state interest, group interest, organisations' interest or the nation's interest."

However, this approach still leaves a broad range of possible interpretations which may lead to arbitrary repression of the press. This research therefore suggests to reinforce the procedural guarantees to ensure that 'public interest' is interpreted in a reasonable, proportionate manner. These guarantees are already in place, in the form of the right to reply as the primary mechanism to respond to press reports that would go against the public interest, the priority of the Press Council over other mechanisms of redress against alleged press offences and in the self-regulating mechanism by the journalists' association, its code of ethics, and its capacity for education and training of its members. Finally, I would argue (unlike Syamsuddin) that it is never in the public interest to send a journalist to jail for his professional actions.

Decriminalising Press Offences
This takes me to the next point, which is that there are several good reasons to remove criminal law entirely from the repertoire of press regulation. The

main one is that criminal law is simply too dangerous. From the colonial period until the present, criminal law has been used to harass journalists and to silence press voices not in line with the government or certain elite interests. This insight is shared by many countries in the world, which have replaced criminal law with civil law provisions. According to Atmakusumah Asraatmadja more than 50 countries have moved charges for libel, slander, defamation etc. from criminal law to private law.

This position finds support in the ICCPR, as already pointed out in the Conclusion of Chapter 5. In paragraph 47 of the General Comments No. 34 about the application of Article 19 the HRC says that "Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression." In addition, paragraph 47 stipulates that "States parties should consider the decriminalization of defamation113 and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."[4]This certainly is not present practice in Indonesian yet.

In fact, legally speaking we are already almost there. All press cases should be decided on the basis of the Press Law instead of the Penal Code. This has been confirmed by the Supreme Court (1608 K/PID/2005), which stated that using criminal law against the press endangered press freedom and hence the rules under the Press Law should be prioritised (point 84). This should become more widely publicised and acknowledged, and ultimately lead to a different discourse. I would even suggest to go one step further and remove all criminal provisions regarding the press from the Penal Code and other legislation – even if I am aware that the present tendency in Indonesia is to add criminal provisions related to the press.

Unfortunately, most law schools in Indonesia do not contribute much to this. The main courses about press law still emphasise criminal law, with titles such as 'Press Offences' or 'Criminal Offences by the Press' (*Delik Pers* or *Hukum Tindak Pidana Pers*). Instead, laws schools should offer courses called for instance 'Law and Press Freedom,' which offer more space to discuss press law as an amalgamate of constitutional law, human rights, civil law, administrative law, and public policy issues.

The Press Council and the Civil Court as the Last Resort

As stipulated above, having a choice of various alternatives for resolving press legal cases leads to legal uncertainty. State institutions should therefore adhere to the law and support the clear and straightforward route of resolving press disputes through the Press Council if applying the right

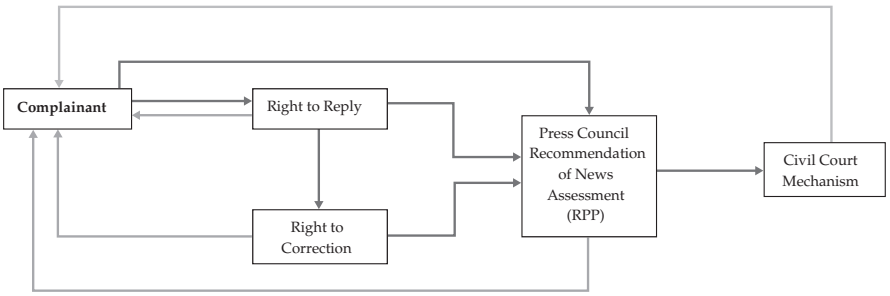
4 Made by the Human Rights Committee (HRC) in its 102nd session, in Geneva, 11-29 July 2011.

to reply and the right to correction has not provided sufficient relief. This research has found that the Press Council functions quite well and deserves to get the practical support it is legally entitled to. It has been seeing a growing number of press legal cases for mediation or for obtaining a recommendation. In order to protect and improve the press freedom situation, it has also developed standards for journalists and for monitoring the implementation of the journalist code of ethics.

It should be acknowledged that the Supreme Court has provided such support for the Press Council already. Not only has it recognised the priority of the Press Council in its case law, but it has also published a Circular Letter in 2008 asking judges to invite the Press Council as an expert witness in court when handling cases where the press is involved.

This research does not argue that there is no role at all for the civil courts in press cases. The civil courts should be the '*ultimum remedium*,' if the special mechanism does not lead to a sufficient level of satisfication of those bringing the complaint. The court can then apply a marginal test to the judgment of the Press Council. The mechanism looks as follows:

Press Conflict Mechanism in Indonesia
[proposed process based on Press Law and Press Code of Ethics]



A final note regards the form and amount of compensation in the civil court. Measuring proportionality is not easy, but in any case the court should take into account the financial means of the press firm involved and never drive it into bankruptcy. As discussed in Chapter 6, there are no guidelines in precedents or legal doctrine to determine proper compensation in press cases. It is beyond this thesis to propose such guidelines, but the bottomline should be that they may never lead to a weapon that turns compensation into a press ban.

Removing Misconceptions about Press Law
As this research has indicated, there are many misconceptions on the part of judges, lawyers and the general public about the current press law in Indonesia, but there are hardly any mechanisms for clarification. I think that law

scholars and judges have a special task in this. They ought to refer to many more resources than is currently common, including to Supreme Court precedents, experts' opinions and research publications. Hence, the role of legal documentation is quite significant. The role of and reference to precedents by judges is clearly of central importance.

Supporting the Press
I already mentioned the current development of providing legal aid to journalists and others accused of violations of the Press Law and other statutes. This is particularly important in the regions, where many press organisations do not dispose of sufficient funding to have access to proper legal assistance. Yet, undoubtedly the role of journalists associations is significant in promoting journalists' interests by designing strategies to reinforce press freedom.

And finally, conducting this research has taught me how difficult it is to gather data about challenges to press freedom. Therefore, not only should journalists' associations themselves be concerned with this challenge, but NGOs should monitor press freedom as well. Given the political and economic strength of those who stand to benefit from the absence of a critical press, organised efforts to back up a critical press are badly needed, and this starts with adequate information.

8.5.2. Suggestions for Further Research

This research suggests several themes and topics that merit further research. They include both legal and non-legal issues.

The first topic is of a legal nature and was already mentioned above: it concerns developing guidelines for compensation in civil proceedings against the press. It should start with gathering all the information available from court cases and then carefully looking at their consequences before turning to the more practical side of weighing all the interests involved and valuing these in monetary terms.

The second topic is more of a political nature. It relates to a side of press freedom that has hardly been explored in this book, but that is quickly gaining in importance. It concerns the media-ownership and how this influences the pluriformity of the press. On the one hand the press has been growing fast since Soeharto stepped down and the public has more choice in accessing media and its contents, but media ownership has become increasingly concentrated in a few hands, such as Media Nusantara Citra (MNC), Media Group, Bakrie and Brothers, Kompas-Gramedia and Jawa Pos Group, and a few others (Lim 2012). The question is how these media networks influence the public opinion and political power, an issue that was hotly debated with

regard to television reporting about the presidential elections of 2014. There is clearly a legal side to this, with the regulation of ownership and broadcasting licenses.

For Indonesia to become a truly democratic country under the rule of law good press regulation guaranteeing freedom of the press in all of its aspects is a *sine qua non.* I truly hope that this study will form the start of much more socio-legal research into this matter that will contribute to realising this objective.