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Summary

Press Freedom, Law and Politics in Indonesia A Socio-Legal Study

Press freedom in Indonesia is still under pressure, despite the demise of Soeharto's authoritarian New Order regime in 1998. The political transition of 'Reformasi' has promoted a decentralised model of governance, which has led to new types of attacks on the press. Extra-judicial killings, physical violence, bringing criminal or civil claims against journalists and impunity of those perpetrating such acts have made it difficult for many journalists to conduct their work in a proper manner and without fear.

This study aims to present a comprehensive overview of how press laws and court cases involving the press have influenced press freedom in Indonesia. Adopting a socio-legal approach it looks at the history of press laws, their implementation through government institutions and courts, and the debate concerning these laws and their implementation. Four key research questions serve as the point of departure: (i) how has the concept of freedom of expression and press freedom evolved in Indonesian law; (ii) how has press freedom as one of the main pillars of constitutional democracy been guaranteed by the Indonesian legal system; (iii) how has press freedom been shaped by various actors, and (iv) do these dynamics reflect the rule of law?

Chapter 1 provides an introduction to the topic and elaborates the theoretical framework underlying the research. This includes a discussion of what it means to take a socio-legal perspective, the legal concept of the press, the relation between press freedom and freedom of expression, theories of the press, limitations to press freedom, and the relation between press freedom, democracy and rule of law. The chapter also discusses the methods used for the research.

Chapter 2 looks at press freedom as a main element of freedom of expression in the light of constitution making processes. It explores the history of constitutional debates about freedom of expression, starting with those concerning the 1945 Constitution, continuing with the debates of 1949, 1950 and 1956-1959, and ending with those of the constitutional amendment process of 1999-2002. The chapter provides an overview of the political situation at the time in order to situate the discourses encountered. It demonstrates how freedom of the press has always received much attention of constitution makers, but how this never led to its protection by a separate constitutional clause. Its subsumption under freedom of expression has proven insufficient to offer sufficient protection, up until the present.

The next two chapters deal with the history of press laws and policies. Chapter 3 runs from the Netherlands Indies to Soekarno's Guided Democracy and Chapter 4 continues with the New Order and *Reformasi*, up until the present. They show how press freedom was shaped and influenced by different political regimes.

From the start the colonial regime introduced strict controls over newspapers and other publications by pre-censorship, censorship, banning, criminal provisions, etc. The 'ethical policy' that was implemented at the start of the 20th century introduced more freedom for the press, as most evident in the revision of the *Drukpersreglement* in 1906. This allowed for the development of a vernacular, Indonesian (*Bumiputera*) press. However, press freedom declined after the introduction of the Netherlands Indies Penal Code in 1914. Several of the latter's articles were applied against the vernacular press in a discriminatory manner, marking a transition from preventive to repressive control. The Press Banning Ordinance of 1931 was a further blow to press freedom and was used by the regime to exert strict control on press publications.

When the Japanese occupied the Netherlands Indies in 1942, the military administration made few changes to the repressive system in place. Gradually, press control became rigorously authoritarian and in the end the press turned into a mere vehicle for Japanese propaganda. After Indonesia declared its independence in 1945, many restrictions on the press and attacks on journalists followed during the period of conflict between Indonesia and the Netherlands, most of them initiated by the Dutch government that reclaimed its former colony. The first press ban by the new Indonesian government was promulgated in 1948, against the Indonesian communist press after the so-called "Madiun affair", on the basis of Law 6/1946.

After the Dutch recognised Indonesia's independence in 1949, press freedom improved considerably. In 1954 the Press Banning Ordinance of 1931 was revoked, which in the politically polarised atmosphere of the time opened the gates to extremely partisan reporting. Press publications featured accusations and recriminations, scandals, feuds, and frauds – often without much fact-checking. This period was not to last very long however, as the introduction of martial law in 1956 allowed the army to arrest and detain journalists and editors at will without judicial process. Since then press freedom declined dramatically. Under Soekarno's Guided Democracy journalists, editors, and publishers were subjected to all kinds of anti-press actions. Part of this control was ideological – Soekarno's call for a 'revolutionary press' – part of it consisted of legal measures.

Upon the reintroduction of the 1945 Constitution in 1959, the government intensified its anti-press policies by military, presidential and ministerial legislation. The control of ideology, organisation, personnel, and circulation of publications through 'Press Guidance' allowed Soekarno to act quickly

and effectively against journalists who criticised his administration or his leadership. The military administrative legislation enabled the government to immediately close down critical newspapers. Journalists and editors were sent to jail without judicial process, which for the government was less bothersome than a trial on the basis of the Penal Code.

The change to the New Order regime in 1965 started ominously. In the words of David Hill, “the arrests and killing of Communist and sympathizing journalists in 1965-66, carried out against a background of large-scale massacres in the countryside, cast a very long shadow over the press for a subsequent decade” (Hill 1995: 34-35). The New Order soon developed its own press discourse. Concepts as ‘development press’, ‘Pancasila press’ and ‘social responsibility press’ helped underpin new legal and psychological forms of press control. The Press Law (first Law 11/1966, later Law 4/1967, and finally Law 21/1982) served as the legal basis for press banning or prosecution of journalists and editors. The cornerstone of the system was the publication permit (in various forms), which in 1994 was key to the notorious bans on *Tempo*, *Detik* and *Editor*. The undermining of judicial independence moreover ensured that the press had little to expect from court review.

In the early post-Soeharto years after 1998 press freedom was at a peak. The new Press Law (40/1999) prohibited censoring, banning and licensing, and President Abdurrahman Wahid abolished the Department of Information – the New Order’s institutional bulwark of press control. Yet, after Megawati became president the situation started to deteriorate, as she regularly and publicly took issue with the press. Prosecution of journalists and editors started again, sometimes at her personal initiative. This tendency continued under President Susilo Bambang Yudhoyono (SBY). Newly introduced laws, such as the Pornography Law,¹ the General Election Law,² and the Electronic Information and Transaction Law,³ reversed parts of the 1999 Press Law. The number of criminal and civil lawsuits against journalists, editors and media owners has continued to rise, and has put much financial stress on newspapers. Instead of the Press Law, which should hold priority, once again the Penal Code is used as a basis for prosecution. On top of this, violent attacks by hired thugs and mobs against journalists and media offices have increased in number. Those committing such acts usually get away with them, which adds to the general feeling of impunity for violations of press freedom. Institutionally, SBY re-established the Department of Information and Communication, and introduced a new agency (the KPI) for licensing and monitoring broadcasting media. These bodies lack the power and influence of their predecessors, but they do exercise institutionalised political control on broadcasting.

1 Law No. 44 of 2008 on Pornography

2 Law No. 42 of 2008 on General Election

3 Law No. 11 of 2008 on Electronic Information and Transactions

When we compare the current situation to the New Order, the most conspicuous difference is that violence against journalists has become more 'localised' and 'privatised' – usually benefiting predatory elites at the district level rather than the national government. This change is closely related to the decentralisation process. As argued by Heryanto and Hadiz (2005: 261): "freedom of the press continues to be challenged, not by an authoritarian state, but by a variety of vested business interests or by the exercise of societal political violence." One may add that exposing issues of corruption and natural resource exploitation by local elites are most likely to lead to violence against the press.

Despite these serious drawbacks, there is still much more press freedom now than under the New Order. There is a Constitution which has been amended to clearly guarantee freedom of expression. This freedom is also sustained by the Human Rights Law of 1999 and the Press Law of the same year. New restrictive or even suppressive laws have been enacted, but they are not specifically targeted at the media. Under the New Order the limits of press freedom were moreover never clearly defined and Soeharto's speeches played an important role in their interpretation, whereas today the Press Council and the court articulate the rules.

Chapters 5, 6, and 7 focus on the administration of justice in cases concerning the press – Chapter 5 on criminal law cases, Chapter 6 on private law cases, and Chapter 7 on administrative court review. These chapters are of a legal nature, and also take into account the socio-political context. This helps explain how and why prosecutors and courts have remained within the boundaries of the rule of law, or transgressed them.

The criminal courts have been used by all kinds of political regimes to suppress opposition or criticism. The Penal Code for the Netherlands Indies proved an effective tool for the Indonesian government to silence dissenting voices. In post-Soeharto Indonesia the state no longer is the dominant actor in subjecting the press to criminal trials, but businesses and certain 'civil society organisations' have been able to instigate prosecution of journalists and editors.

Presently, Indonesia's legal system has many criminal provisions that can be used against the press, some in the Penal Code, others in special statutes. Several of them have indeed been used to 'discipline' newspapers, including legislation on hate speech (*haatzaai-artikelen*), insult, spreading false news, and violating public decency. The way in which they have been applied shows that in many cases prosecutors and judges have demonstrated little consideration for the importance of press freedom and its goals of a democratic society. Many judges have even disregarded the availability of a new statute, the Press Law of 1999, and they have continued to apply the

traditional criminal law provisions in such cases. In the end, however, the Supreme Court has in the large majority of cases upheld the primacy of the Press Law and clearly stated that cases concerning the press should refer to this statute. If judges feel bound to this fairly unequivocal line of precedents, many future problems would be prevented.

The Supreme Court has not only stimulated this development through its case law, but also by disseminating a Circular Letter to the courts in which the latter are summoned to involve a representative from the Press Council as an expert witness in cases involving the press (Supreme Court Circular Letter 13/2008). Nonetheless, even if the outcome of a criminal case is positive for the defendant, the trial itself impacts negatively on press freedom, as this involves tension, time and costs. Therefore, the research supports Susanto et al.'s argument that the Press Law should be amended to put beyond doubt that it prevails over any common criminal procedure (2010: 232). However, contrary to Susanto et al. the chapter argues that the Press Council's review on the basis of the Press Law and the Press Code of Ethics should completely replace criminal procedure. This also requires a shift in thinking and teaching of Press Law at Indonesian universities.

Chapter 6 demonstrates how civil law suits also pose a threat to press freedom. Many cases against the press have been brought to the civil court, mostly asking the court for damage compensation and/or rehabilitation because of news reports. This mechanism is open to abuse and has at times been deployed by political and business elites to silence critics by the threat of serious material losses or even bankruptcy.

The use of private law to sue journalists or media owners reflects the tension between private and public law in the contestation between privacy, dignity, reputation and personality versus the public right to information. Although this is not stipulated explicitly in the Press Law (40/1999), the civil court mechanism is applicable as the last resort when the mediation process through the Press Council has failed.

During the authoritarian regimes of Guided Democracy and the New Order, the number of civil lawsuits related to press freedom was relatively low in comparison to the number of criminal law cases. The state dominated the press and deployed criminal and administrative law to silence dissident voices. This changed after 1998, when a combination of more democracy, decentralisation, and the rise of regional business elites caused an increase in civil lawsuits against the press. The Supreme Court has put beyond doubt that the use of the 'right to reply', the 'right to correction' and mediation by the Press Council should precede litigation before the civil court, but this consistent line of precedents has not prevented cases from being heard by a civil court early on.

The chapter shows that the main civil law issue regarding the press has been insult. Several 'landmark decisions' contain building blocks for a legally certain and proportionate protection of the press against this accusation. *Mrs. Djokosoetono (Blue Bird Taxi) v Selecta Magazine* (1981) set boundaries to press freedom in referring to racial issues irrelevant to a case in assessing whether an act 'unlawfully harms feeling, reputation and privacy.' In *PL ALM v Garuda Daily* (1991) the Supreme Court introduced the Press Code of Ethics as the standard for determining whether a news report is unlawful or not, a position confirmed in *Tomy Soeharto v Gatra Magazine* (1998) and the review in *Soeharto v. Time Inc.* (2009).

Despite these developments, political and business elite figures still deploy civil lawsuits to harass journalists, editors and newspaper companies. Lawsuits aiming for intimidation can be labelled Unjustifiable Lawsuits against Press Freedom, or ULAP. They are directed against professional journalism, demand an extreme amount of compensation, are often accompanied by intimidation, and usually serve to promote political-economic elite interests. Although generally dismissed by the courts, they do interfere with a proper functioning of the press, as they force journalists, editors and media owners to invest time and money in defending themselves. Perhaps one way to address ULAP would be to bring claims for tort against those using it.

Chapter 7 discusses how administrative court review has changed from cases concerning the printed press to ones concerning radio and television. Administrative court cases concern administrative decisions, and licenses in particular, and the printed press no longer requires these. Although few in number, some administrative court cases about the press have drawn much public attention. Under the New Order the *Prioritas* case (1993) led to a new mechanism of judicial review of administrative regulation by the Supreme Court. Most famously, the *Tempo* case (1994) in first instance and on appeal suggested that administrative court review would provide genuine protection for the press against the New Order government, until the Supreme Court crushed all hopes. Still, administrative court review to some extent became a stepping stone for the larger democratisation process in Indonesia's bureaucratic authoritarian regime, and offered at least a degree of protection against arbitrary decisions by the government.

The post-Soeharto case of *REB* demonstrates how press freedom in the field of radio and television is still under the influence of the 'licensing regime' and how the state may abuse its powers in this field. In this case the government moreover exerted political pressure on the administrative courts of first instance and appeal not to annul the two litigated decisions (it concerned two permits). This may have led the administrative courts of first instance and appeal to follow suit, with the Supreme Court overturning one judgment while confirming the other (so the opposite of *Tempo*). The entire

event demonstrates how in the field of broadcasting the government has returned to administrative censoring policies, and how this may challenge the independency of the administrative court.

The final chapter brings together the most important findings of the thesis, situates them more explicitly within the theoretical framework elaborated in the first chapter, and provides a number of recommendations. In summary, the research has found that from colonial times until the present Indonesia has struggled with press freedom. During the history of the country many draconian laws against the press were enacted, and the press has more or less continuously been under attack from state officials, police, military officers, business and political elites, and political and religious mobs. In case of attacks by non-state actors the government has done little to prevent and or punish such actions. There is a rather good Press Law, but it is not implemented the way it should be.

Overall, this reflection on press freedom, law and politics in Indonesia shows that the struggle for press freedom must be relentlessly continued if we wish the fourth pillar of constitutional democracy to function properly in Indonesia's future.

