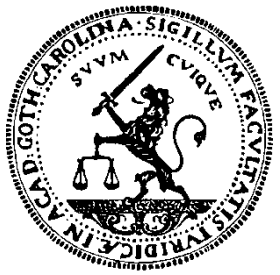

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Facing SLAPP in Indonesia

A Human Rights Approach to Judicial Measures Silencing Journalists

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Contents

SUMMARY 1

SAMMANFATTNING 2

PREFACE 3

ABBREVIATIONS 4

1 INTRODUCTION 5

1.1 Background 5

1.2 Purpose of the study and research question 7

1.3 SLAPP 7

1.3.1 Introduction 7

1.3.2 Attention to SLAPP 8

1.3.3 Historical background 9

1.3.4 Indonesian discourse 10

1.3.5 Responses to SLAPP 11

1.4 Methodology 12

1.5 Outline 13

2 ARTICLE 19 OF THE ICCPR 15

2.1 Introduction 15

2.2 Protecting the press 16

2.3 Limitations 18

2.3.1 Necessity and proportionality 18

2.3.2 Purposes for restrictions 18

2.3.3 Tripartite typology in the UN 20

2.3.4 Applied by the UN Human Rights Committee 21

3 SLAPP IN INDONESIA 23

3.1 Historical background 23

3.1.1 Dutch governance 23

3.1.2 Guided Democracy under Sukarno 24

3.1.3 Suharto's New Order 26

3.1.4 Reformation era post Suharto 27

3.1.5 Democratic regression under Jokowi 28

3.2 Current status 30

3.2.1 National actors of protection 30

3.2.1.1 The Indonesian Press Council 30
3.2.1.2 NGOs 32
3.2.2 Situation for journalists ***33***
3.2.2.1 Overview 33
3.2.2.2 Access to justice 35
3.2.2.3 Attacks against journalists in 2021 36
3.2.2.4 Covid-19 pandemic 37
3.3 Legal scrutiny **38**
3.3.1 Laws protecting journalists ***38***
3.3.1.1 Consitution of Indonesia 38
3.3.1.2 Laws on freedom of expression and human rights 39
3.3.1.3 Press Law 40
3.3.2 Laws generating SLAPPs against journalists ***46***
3.3.2.1 Penal Code 46
3.3.2.2 Civil Code 51
3.3.2.3 ITE Law 53
3.3.2.4 Amendment to the MD3 Law 58
4 CONCLUSIONS **59**
BIBLIOGRAPHY **63**
ELECTRONIC SOURCES **68**
TABLE OF CASES **71**

Summary

The UN Human Rights Council has several times addressed the expanding issue of judicial harassments against journalists around the world. In a functioning democracy, it is important to protect the freedom of expression and the freedom of the press. The Council has emphasized that laws on defamation are used to intimidate public debate and public scrutiny. Generally, the term for this method is *strategic lawsuit against public participation* (SLAPP).

The thesis uses Indonesia as a case study to show how SLAPPs are used to intimidate journalists and what consequences it has on the press environment. Southeast Asia is a global hotspot for these litigations and for the last decade there has been a worrying trend in Indonesia with constantly increasing numbers. The aim is to elaborate on the main reasons for SLAPPs against journalists in Indonesia and whether the situation complies with the country's international human rights obligations under article 19 of the International Covenant on Civil and Political Rights (ICCPR).

The Indonesian Press Law establishes a self-regulatory system to handle press disputes, which aims to avoid public court procedures for journalistic activities. However, due to legal uncertainty in case law, flexible formulations, and corruption, the lower courts sometimes disregard these protective mechanisms. Instead, journalists are judged under the general criminal provisions in the Indonesian Penal Code that have been shaped under authoritarian rule for the whole 20th century. In addition, an internet law from 2008 with heavy sanctions has shown to have severe consequences for online journalism.

The arbitrary use of criminal provisions against journalists in the country is a serious threat to the freedom of expression and freedom of the press. This is a violation of the right constituted in article 19 of the ICCPR. In addition, civil lawsuits on dubious grounds and with high claims of damages are constantly targeting Indonesian journalists, often without intervention by the Police or the courts. These litigations risk a financial collapse for press corporations and create self-censorship in the media landscape. Therefore, Indonesia also fails in its duty to protect individuals covered by the right in ICCPR from abuses by other private actors.

Sammanfattning

FN:s råd för mänskliga rättigheter har flera gånger uppmärksammat det växande problemet med juridiska trakasserier mot journalister i världen. I ett fungerande demokratiskt samhälle är det viktigt att skydda så väl yttrande- som pressfrihet. Rådet har betonat att regler kring ärekränkning utnyttjas för att tysta ner den offentlig debatten och granskningen av makten. Vanligtvis går den här bestraffande metoden under benämningen SLAPP (Strategic Lawsuit Against Public Participation).

Uppsatsen använder Indonesien som en fallstudie för att synliggöra hur SLAPPs används för att tysta journalister och hur detta påverkar medielandskapet. Sydostasien har blivit ett centrum för sådana yttrandefrihetskränkningar och under det senaste årtiondet har Indonesien upplevt en alarmerande trend där antalet SLAPPs konstant ökar. Syftet med uppsatsen är att utreda vilka som är de huvudsakliga orsakerna till SLAPPs mot journalister och huruvida Indonesien uppfyller sina internationella åtagande om mänskliga rättigheter i artikel 19 av den internationella konventionen om medborgerliga och politiska rättigheter (ICCPR).

Den indonesiska presslagen upprättar ett självsanerande system för att hantera pressdispyter och syftar till att undvika allmänna rättsliga processer mot journalister. Men på grund av osäkerhet i rättspraxis, diffusa formuleringar och korruption så åsidosätter ibland de lägre domstolarna dessa skyddsmekanismer. I stället används den allmänna brottslagstiftningen vid åtal av journalister som har formats under hela 1900-talet av auktoritära styren. Dessutom har en internetlag från 2008 med höga straffvärden visats sig skapa allvarliga konsekvenser för journalister som publicerar online.

Det godtyckliga användandet av brottslagstiftning mot journalister i landet är ett hot mot yttrande- och pressfriheten. Detta agerande strider mot rättigheten stadgad i artikel 19 i ICCPR. Dessutom riktas ständigt legala processer mot journalister på tvivelaktiga grunder och med höga skadeståndsbelopp, ofta helt utan ingripande av vare sig polis eller domstol. Dessa stämningar riskerar konkurs för mediabolagen och skapar självcensur inom presskåren. Indonesien misslyckas därför även i sin uppgift att skydda individer som omfattas av rättigheten i ICCPR från angrepp av andra privata aktörer.

Preface

The thesis marks the end of my five years as a student at the law faculty in Lund. The reason why I applied for the law program was my interest in working with foreign affairs. Therefore, I am joyful that my degree ended with a field study on the other side of the world. Especially since the topic also combined my great interest in journalism and the media. This could not have been carried through without the help of my co-workers and friends at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI). I want to send a message of gratitude to the colleagues at the office in Jakarta for welcoming me to Indonesia and guiding me in my research.

I also want to thank my supervisor Jessica for the warm-hearted support from the first time I contacted her to the very last day, the head of the RWI library in Lund Lena for bringing me into the organization, and my roommate Benjamin for constantly challenging me with new ideas and opinions. Lastly, I want to highlight my deep appreciation for all the Indonesians I interviewed for the thesis who provided me with their knowledge and perspectives. Besides the research question, I learned a lot about a fascinating country's history, politics, and traditions for which I am very grateful.

During my five years of law studies, I have many times questioned whether I chose the right direction. I knew very little about the subject beforehand and if I had gone for my mere interests, I would probably have picked something else. My competitive mind has probably been a reason for not quitting, but more importantly, I never wanted the leave the group of friends I made through my studies. We have shared many special memories together in discussions, celebrations, and travels. When I have now graduated and look back, I am proud of all the moments I continued to push even though I was stressed or uninspired. In the end, I found my area of law to be within international human rights and freedom of expression.

I dedicate the thesis to journalists around the world who by their work contribute to an open and democratic society.

Lund, June 2022.

Jonatan Klefbom

Abbreviations

AJI	Alliance for Independent Journalists in Indonesia
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICNL	International Center for Non-Profit Law
ITE Law	Indonesian Law on Electronic Information and Transactions
LBH Pers	Indonesian Legal Aid Foundation for the Press
MD3 Law	Indonesian Legislative Institution Law
NGO	Non-governmental organization
RSF	Reports without Borders
SAFEnet	Southeast Asian Freedom of Expression Network
SLAPP	Strategic lawsuit against public participation
ULAP	Unjustifiable lawsuits against press freedom
UN	United Nations
USD	United States Dollar
VOC	Dutch East India Company

1 Introduction

1.1 Background

The number of strategic litigations to silence journalism is rising globally and the UN Human Rights Council has repeatedly pointed out this as a major threat to an open and democratic society. In 2020 the Council adopted a resolution on the safety of journalists that expressed deep concerns about business companies and individuals using strategic lawsuits against public participation (SLAPPs) "to exercise pressure on journalists and stop them from critical and/or investigative reporting". [1] The imminent threat of lawsuits creates a chilling effect on investigative journalism, which leads to a democratic setback.[2]

The threat of SLAPPs against journalists has also been recognized by a few regional organizations, such as the European Union. In the light of the growing number of judicial harassments on the press, the European Commission announced in September 2021 that they would investigate new legislative measures to protect freedom of expression in the Union.[3]

The young democracies of the Southeast Asian region form one of the global hotspots for legal intimidation. Business companies and politicians take advantage of weak law enforcement and overbroad or vague defamation laws. With a population of about 270 million people, Indonesia is the third-largest democracy in the world and is anticipated to become one of the major economies in the coming years.[4]

Similar to other East Asian states, the Indonesian Government has shown a great commitment to socio-economic development and infrastructure, but at the expense of people's civil liberties. Under the current president's two terms in office, human rights scholars have recognized an alarming trend where the democratic transition that began in 1998 has gone from stagnation to regression. Postdoctoral researcher of the University of Melbourne, Ken

[1] UN General Assembly, *Resolution adopted by the Human Rights Council: The Safety of Journalists*, 6 October 2020, A/HRC/RES/45/18, p. 3.
[2] Ibid.
[3] European Commission, *State of the Union Address by President von der Leyen* https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_4701 accessed May 3, 2022.
[4] Business & Human Rights Resource Centre, *Defending Defenders: Challenging Malicious Lawsuits in Southeast Asia* (Bangkok 2020) p. 3.

Setiawan, argues that the erosion of free expression is the most prominent indicator of this decline.[5]

Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR) in 2006 and the freedom of expression is additionally protected by the Indonesian Constitution as well as a couple of national human rights instruments. Indonesian journalists also have a special status under the Press Law that empowers the Press Council to judge as a first instance in disputes over their publications.[6]

Still, judicial harassment against journalists has increased in Indonesia over the last decade and was at its peak during the Covid-19 pandemic. In November 2021 the UN Special Rapporteur on the situation of human rights defenders said that she was "extremely concerned at the way defamation laws are being used in Indonesia to undermine the right to freedom of opinion and expression".[7]

Civil society organizations and academics suggest that the growing numbers mainly are caused by the criminal provisions targeting public participation online.[8] In its latest Universal Periodic Review of Indonesia, the Office of the UN High Commissioner for Human Rights urged the Indonesian Government to decriminalize defamation against investigative journalism.[9] However, the Government has yet not shown any interest in revising these provisions.

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[5] Duxbury, Alison and Tan, Hsien-Li, *Understanding the Tensions and Ambiguities in Southeast Asian Attitudes Towards Human Rights* in Can ASEAN Take Human Rights Seriously? (Cambridge University Press, Cambridge 2019) p. 67; Setiawan, Ken M. P., *A state of surveillance?* Freedom of expression under the Jokowi presidency' in Thomas Power and Eve Warburton (eds), Democracy in Indonesia: From Stagnation to Regression? (ISEAS–Yusof Ishak Institute, Singapore 2020) p. 254 ff.

[6] Setiawan (2020) p. 254 ff.

[7] Office of the United Nations High Commissioner on Human Rights, *Indonesia: Stop judicial harassment of human rights defenders – UN expert* https://www.ohchr.org/en/press-releases/2021/11/indonesia-stop-judicial-harassment-human-rights-defenders-un-expert, accessed May 4, 2022.

[8] Alliance of Independent Journalists, *Year-End Note 2021: Violence, Criminalization & the Impact of the Job Creation Law (Still) Overshadows Indonesian Journalists* (Jakarta, 2022) p. 3; Tapsell, Ross, *The media and democratic decline* in Thomas Power and Eve Warburton (eds), Democracy in Indonesia: From Stagnation to Regression? (ISEAS–Yusof Ishak Institute, Singapore 2020) p. 223.

[9] UN Human Rights Council, *Compilation on Indonesia - Report of the Office of the United Nations High Commissioner for Human Rights*, 17 February 2017,A/HRC/WG.6/27/IDN/2.

1.2 Purpose of the study and research question

My overarching purpose is to understand what legal (civil and criminal provisions in Indonesian law), and main non-legal factors, are prone to be misused to initiate SLAPPs against journalists, and how this situation affects Indonesia's international obligations under article 19 of the ICCPR about freedom of expression and freedom of the press. In addition, the thesis aims to highlight some of the key aspects of Indonesian political history that have shaped the SLAPP situation for journalists of today.

In my thesis, Indonesia is used as a case study to demonstrate an example of how SLAPPs arise and of how this phenomenon interferes with binding international human rights obligations.

The misuse of defamation provisions in Indonesia is highlighted by several reports from non-governmental organizations (NGOs) but also by a few academic studies. However, in my findings, there is little research that focuses specifically on how such methods target journalists. In international human rights law, the press is recognized as the fourth pillar of a democratic society. Due to their essential function to examine the power, journalists have a special status under the freedom of expression that exceeds the right of individuals in general. With this in consideration, there is a need for more academic research that adopts a holistic approach to how SLAPPs are used to specifically intimidate journalists in Indonesia.

In order to fulfill the purpose of the research, I will answer the following question:

- To what extent does Indonesia comply with article 19 of the ICCPR in protecting journalists from SLAPPs?

1.3 SLAPP

1.3.1 Introduction

SLAPP is a punitive judicial method with the intent to intimidate freedom of expression. Litigations come with a high cost and procedures often take much

time and effort. The purpose of SLAPP is to use those aspects against individuals who take part in the public discussion.[10]

The plaintiff takes advantage of the right to complain as an act of revenge for something that is said, written, or done. Regardless of whether the action in the end is considered to be a crime, the mere possibility of being convicted is enough to create deterrence and discourage criticism.[11]

SLAPPs are filed both on civil and criminal grounds and are characterized by carrying an excessive economic claim for alleged damages on reputation or honor. Public watchdogs with an active role in the preservation of democracy are systematically threatened by SLAPPs. Apart from journalists, these kinds of lawsuits are also filed against human rights defenders, academics, and other actors in civil society.[12]

The plaintiff is often a superior party, with economic resources or political power, that can use the machinery of the courts to target constitutional rights to its own benefit. Instead of carrying on with the lawsuit, many journalists tend to withdraw their publications. This creates an atmosphere where media corporations choose to avoid covering sensitive subjects, such as corruption, in the first place. The event of being sentenced to pay the demanded damages, together with the law expenses for both parties, is enough for leading to bankruptcy for a smaller newspaper.[13]

1.3.2 Attention to SLAPP

In 2020 the UN Human Rights Council adopted a resolution on the safety of journalists where they explicitly addressed the threats of SLAPPs around the world. The Council raised deep concern over vague laws that enable repression of legitimate public debate. Considering the increasing numbers of prosecutions and imprisonments against journalists, they urged UN member states to ensure that the laws on defamation are not misused for intimidation. In addition, the Council emphasized that criminal punishments can never be proportionate responses to acts on defamation by journalists. The Human Rights Council cautioned that SLAPPs lead to a chilling effect on the

[10] Borg-Barthet, Justin, Lobina, Benedetta & Zabrocka, Magdalena, *The Use of SLAPPs to Silence Journalists, NGOs and Civil Society* (Brussels, 2021) European Parliament, p. 12 ff.
[11] Ibid.
[12] Ibid.
[13] International Center for Non-Profit Law, *Protecting Activists from Abusive Litigation SLAPPs in the Global South and how to Respond* (2020) p. 1.

freedoms that are constituted in article 19 of the ICCPR and that it is a serious violation of human rights.[14]

Similar concerns have been raised by the European Union. In her State of the Union Speech in September 2021, Ursula von der Leyen concluded that robust legislative interventions are needed to prevent the flow of litigations that harm democracy.[15] The acknowledgment came after a study on the use of SLAPPs against journalists was presented in front of the European Parliament in June 2021. This was the first time that the European Union addressed such judicial harassment. The study examined the situation in the European member states and highlighted what legal mechanisms that generate SLAPPs.[16]

In its conclusions, the study stressed the importance of empowering national courts to decide on early court dismissal, without disregarding the complainant's right to access justice. It also emphasized the risk of forum shopping where the defendant is sued in a court far away from its domicile. Unpredictability in terms of the forum and the applicable articles is a violation of the rule of law and causes fear to public participation.[17]

1.3.3 Historical background

The usage of the term SLAPP emerged in the US and Canada in the 1980s and has since then been an object of research and policymaking in North America. This has primarily focused on civil claims brought by private interests.[18] In a famous case from the New York Supreme Court in 1992 the judge stated that SLAPPs are "suits without substantial merit that are brought by private interests to stop citizens from exercising their political rights or to punish them for having done so."[19]

In western countries, SLAPPs have traditionally been brought by companies, government officials, or real estate developers, against citizens' efforts to influence matters of public significance. Therefore, nowadays many American states have anti-SLAPP statutes that offer citizens and civil society organizations immunity from civil court procedures in acts of public

[14] UN General Assembly (2020) p. 3.
[15] European Commission, *State of the Union Address by President von der Leyen* https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_4701 accessed May 3, 2022.
[16] Borg-Barthet, Lobina, and Zabrocka (2021) p. 5.
[17] Ibid.
[18] International Center for Non-Profit Law (2020) p. 1.
[19] Gordon v. Marrone 1992, 590 N.Y.S.2d 649, 155 Misc.2d 726, p. 735 f.

participation, and, for example, provide possibilities to have additional hearings about the accused activity before determining whether to dismiss it or not.[20]

1.3.4 Indonesian discourse

In the last decade, the number of SLAPPs has significantly increased in the southern hemisphere and Southeast Asia has become a global hotspot for litigations against journalists. Unlike SLAPPs in North America, it is more common that these lawsuits are brought through criminal proceedings. Few countries in the region have any legal protections against SLAPP. [21] The only exception in Indonesia is an immunity from criminal or civil offenses for "everyone who fights for the right to a proper and healthy living environment".[22]

Among Indonesian academics, SLAPP is a relatively untouched subject. The main source is Professor Wiratraman's doctoral dissertation from Leiden University, which takes an extensive grip on journalists' rights in the history of the country. In his study, Wiratraman uses the term *unjustifiable lawsuits against press freedom* (ULAP) as a specification of a SLAPP against a journalist. The distinguishment between litigations against the press and against others is made to highlight the special status journalism has for a functioning democracy. According to Wiratraman, almost all journalists he interviewed for the research said that they are prepared to face judicial or physical harassment when reporting about corruption or illegal business.[23]

Apart from having the intention of silencing criticism, ULAP consists of five elements. First, the petition is filed against a professional journalist. Second, the lawsuit has the purpose of causing damage to the press and discouraging investigative journalism. In these cases, the economic claims are often well overcalculated in the relation to the damage and exceed the media corporate's financial capacity. Third, the petition is not an actual reparation or correction of the situation but rather an act of punitive revenge. The fourth element is that the lawsuit is accompanied by acts or threats of violence against the defendant or the editorial office. Finally, the matter of the dispute should have a political or economic character.[24]

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[20] Wiratraman, Herlambang P, *Press freedom, law and politics in Indonesia: a socio-legal study* (Leiden University 2014) p. 231 f.
[21] Business & Human Rights Resource Center (2020) p. 1.
[22] Article 66 of UU No. 32/2009 Tentang Perlindungan dan Pengelolaan Lingkungan Hidup (Environmental Protection and Management Act).
[23] Wiratraman (2014) p. 230 ff.
[24] Ibid, 233 f.

1.3.5 Responses to SLAPP

In the USA and Canada, there are examples of both judicial and non-judicial mechanisms to prevent SLAPP. A report by the International Center for Non-Profit Law (ICNL) from 2020 raises different anti-SLAPP approaches that have been tried in North America.[25] One is to immunize participation in discussion over public interests. This was tested in British Colombia in 2001 where a provision afforded "protection from liability for defamation if the defamatory communication or conduct constitutes public participation".[26] Another approach is to create early dismissal procedures for inappropriate purposes and provide the courts with resources to discover such cases.[27]

Since SLAPP is based on the threat of paying legal expenses, there are also responses concerning monetary compensation to victims. The Canadian province of Quebec has tried two alternatives of this character, both through establishing funds in support of SLAPP defenses and regulating so that the plaintiff pays the bills for both parties when a strategic litigation is detected.[28]

There have been additional attempts to target filers of a SLAPP and sentence them to compensate the defendant for the harassment. The final anti-SLAPP response mentioned in ICNL's report comes from the state of New York that revised its defamation laws after noticing a misuse from petitioners. The result was that the threshold for proving an accusation of libel or slander was raised.[29]

Other anti-SLAPP approaches are highlighted in a report by the UN Secretary-General from 2021, that specially focuses on the threats to online expression. In its conclusion, the report urges the member states to repeal and amend unlawful criminalization of journalistic publications in digital spaces. It also emphasizes that the member states must do more in putting in place effective laws and policies that prevent intimidation of public participation on social media and other platforms.[30]

In the case of Southeast Asia, the Business and Human Rights Resource Center stresses the importance of educating people about the problem. An

[25] International Center for Non-Profit Law (2020) p. 22.
[26] Protection of Public Participation Act, 2001 (British Columbia), Sec. 2(a)(v).
[27] International Center for Non-Profit Law (2020) p. 23 ff.
[28] Ibid, p. 27 ff.
[29] Ibid.
[30] UN General Assembly, *The safety of journalists and the issue of impunity: Report of the Secretary-General*, 12 August 2021, A/76/285.

effective anti-SLAPP response can therefore be to raise awareness about strategic litigations among journalists, corporates, lawmakers, and judges. They uphold that making the conception known and showing different SLAPP methods will discourage the perpetrators. A united civil society can more strongly resist judicial harassment of this kind.[31]

1.4 Methodology

The principal method in legal scholarship is the legal analysis that relies on recognized sources, referred to as the legal dogmatic method in Swedish legal theory. This method is used to clarify the normative content of the law according to recognized legal sources which include written acts, judicial decisions, customary law, and sometimes preparatory work. The approach involves interpreting and stipulating the applicable law and categorizing the applicable law in the shape of rules, legal principles, and doctrines.[32]

According to article 38(1) in the Statue of the International Court of Justice, the primary sources for determining international human rights law are international treaties, customary law, and general principles of law. As subsidiary means, judicial decisions and academic writing are used. There are also a few soft law instruments that can have significance for the interpretation of international human rights law. For example, these involve the work of UN treaty bodies and resolutions adopted by the UN Human Rights Council.[33]

To answer my research question, I have used a method called legal analytical, which is similar to the legal dogmatic, but which takes a wider scope on the issues caused by the legal system. Instead of just establishing the legal outcome of a situation, the method also aims to analyze the origin of the problem and how it can be resolved. The legal analytical method also recognizes other sources outside of the traditional law sphere. For example, this can be administrative prescriptions, internal manuals, interviews with lawyers, statistics, and articles in newspapers. This method acknowledges the conception that there can be more than one answer to a legal matter.[34]

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[31] Business & Human Rights Resource Center (2020) p. 25.
[32] Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod och argumentation* (4th edn Norstedts Juridik, Stockholm 2018) p. 45 ff.
[33] Chinkin, Christine, *Sources* in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), International Human Rights Law (3rd edn Oxford University Press, Glasgow 2017) p. 63, 78 ff.
[34] Sandgren (2018) p. 50 f.

To gather data for my research, I have performed a field study for eight weeks in the Indonesian capital Jakarta. There, I conducted a number of semi-structured interviews with legal experts, human rights defenders, academics, journalists, and lawyers. The purpose of the interviews was to guide me in the Indonesian law system, to find relevant sources, and to understand how the problem is taking place in reality.

The basis of my reasoning on legal matters has been international and Indonesian legal instruments, case law, and academic literature. In addition, I have used non-legal sources to explain the situation for journalists in Indonesia more broadly and discuss solutions to the issues, such as news articles and reports from civil society organizations.

Since many of the relevant books, cases and other documents are written in Indonesian, I have been forced to use secondary sources in English. There are few institutes in neighboring countries such as Australia and Singapore that publish English papers and literature about the situation in Indonesia. However, the number of reliable legal sources has therefore been limited and Wiratraman's dissertation has been the basis for Indonesian case law.

1.5 Outline

The thesis is divided into four chapters: the first is a background on the study, the second is an explanation of the significance of the provisions in the ICCPR, the third is an elaboration on the threat of SLAPPs against journalists in Indonesia and the final is where I draw conclusions on my findings.

The first background chapter involves an examination of the term SLAPP. This is to demonstrate what components SLAPP contains, the consequences it has for journalists, and how it has been approached by states and international organizations.

The second chapter focuses on article 19 of the ICCPR and under which circumstances the freedom of expression and the freedom of the press can be limited. It also contains a presentation of the tripartite typology that has been developed by the UN treaty bodies. The chapter ends with an illustrative case of how intimidation by judicial measures against journalists has been dealt with by the UN Human Rights Committee.

The third and main chapter about the situation in Indonesia starts with an overview of the political history that has shaped the press freedom of the country into what it is today. This is followed by a section focusing on the

current status and what challenges Indonesian journalists are facing in terms of access to justice, the Covid-19 pandemic, and technological advancements. This section also includes a rundown on the main actors working to strengthen the press freedom in the country. After having gone through the societal aspects, the next section covers the relevant legal provisions that impact SLAPP in Indonesia. This section includes one part about the articles protecting the press and one part about the articles that are used in SLAPPs.

The thesis ends with a chapter where I draw conclusions on my findings and answer the research question by analyzing the principal points out of the result in the previous chapters.

2 Article 19 of the ICCPR

2.1 Introduction

Freedom of expression is one of the cornerstone rights in the ICCPR. It is a uniting clause for the civil and political aspects of the rights established in the Covenant. The right to freely express opinions is vital for the fulfillment of individual development, a functioning democracy, and a modern economy. The status the right has today within international human rights law origins from the European Enlightenment movement that proclaimed the belief in the faith of reason. This was later the foundation of the liberal revolutions in America and in France.[35]

The right is constituted in article 19(2) which says that:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

This is a right that concerns *all kinds* of expressions regardless of content and formats. It may be political discussion, commercial advertising, artistic expression, religious discourse or even pornography. The freedom of expression also has a correspondent right to seek information and opinions.[36]

However, the right in 19(2) is subject to limitations according to paragraph (3) of the same article:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[35] McGoldrick, Dominic *Thought, Expression, Association, and Assembly* in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), International Human Rights Law (3rd edn Oxford University Press, Glasgow 2017) p. 217; Schabas, William A, *U.N. international covenant on civil and political rights: Nowak's CCPR commentary* (3rd revised edition. edn N.P. Engel, Publisher, Kehl 2019) p. 541.
[36] Schabas (2019) p. 548 f.

The freedom of expression is not only protected against interference from the state but also on a horizontal level from other private actors in society. This relationship is emphasized by the *special duties and responsibilities* of public authorities; the State must protect the freedom of expression from all sorts of interference. State parties are allowed to restrict the freedom according to the principles (a) and (b), but never so far as to suppress and penalize the simple manifestation of an opinion, although its content is highly critical to the state.[37]

According to UN Human Rights Committee's General Comment 34, the right to free speech is an essential condition for the full development of people and society, and any restrictions must follow the narrow tests of *necessity and proportionality*. The State has the burden to show that the limitations have a justified purpose.[38]

2.2 Protecting the press

In some legal instruments, the special status of the press is recognized explicitly. An example of this is the first article of the US Bill of Rights. In ICCPR on the other hand, article 19 does not mention press freedom but its inclusion has been shown through other means.[39]

In General Comment 25 and 34, the UN Human Rights Committee has stressed the importance of a free and uncensored press for a democratic society. The Committee has emphasized that unhindered media is an essential condition for the enjoyment of other Covenant rights. The unrestrained expression of the press is particularly high concerning public and political debate.[40]

In addition, several reports from UN bodies have highlighted the significant role that journalists have under the freedom of expression provision for the purpose of maintaining an open and democratic society. The function of journalism is not only restricted to professional full-time reporters, but also includes other actors such as analysts, bloggers or social media publishers, that share information and opinions for the public good.[41]

[37] Ibid, p. 549.
[38] Ibid, p. 544.
[39] Ibid, p. 561.
[40] Ibid.
[41] UN General Assembly, *The safety of journalists and the issue impunity : report of the Secretary-General*, 6 August 2014, A/69/268; UN General Assembly, *The safety of journalists and the issue of impunity : report of the Secretary-General*, 6 August

The UN Human Rights Committee has several times taken a stance for press freedom as a right protected under the Covenant. For example, in Kankanamge v. Sri Lanka, the Committee condemned pending criminal charges against a journalist on defamation for causing a negative effect on freedom of expression. In its judgment, the Committee stated that lengthy procedures on journalistic publications promote a situation of uncertainty and intimidation.[42]

The UN Human Rights Committee has repeatedly called attention to defamation laws that are used by Governments to silence criticism and urged for their abolishment, especially when including sanctions of imprisonment. Laws on defamation must be applied as narrowly as possible so that they do not interfere with public scrutiny.[43]

This is exemplified by the case Lingens v. Austria from the European Court of Human Rights. The issue concerned a news article that alleged the former Austrian Prime Minister of political opportunism and for using his power to help a friend escape from Nazi crimes. The national court put the burden of proof on the newspaper to show that the allegations were true, and when this burden was not fulfilled, the journalist was convicted. Regarding the public interest in the question and the importance of scrutinizing the political power, the European Court found that this conduct was a breach of the provision about free expression.[44]

Likewise to freedom of expression, the State is obliged to protect press freedom on a horizontal level. This means that journalism should be safeguarded from harassment, intimidation, and violence committed by business companies and individuals. State parties to the Covenant have an active responsibility to investigate attacks against journalists and bring perpetrators to justice. There is also a requirement that civil defamation laws have reasonable limits on reimbursement claims for the plaintiff's legal expenses.[45]

2015, A/70/290; UN Human Rights Council, *The safety of journalists*, 1 July 2013, A/HRC/24/23.

[42] Kankanamge v. Sri Lanka, CCPR/C/81/D/909/2000, para. 9.4.

[43] McGoldrick (2017) p. 221 f; Schabas (2019) p. 561 f.

[44] Lingens v. Austria (1986) 8 EHRR 83.

[45] Schabas (2019) p. 561 f.

2.3 Limitations

2.3.1 Necessity and proportionality

As prescribed in article 19(3) limitations to the freedom of expression must comply with certain principles. Restrictions to someone's right to express his or her views and opinions must be provided by law. This for example disregards administrative, religious, or customary law as legitimate sources to limitations. They must also be aimed and necessary to accomplish one of the purposes given in (1) and (2).[46]

While giving the State party some flexibility when deciding on limitations, the UN Human Rights Committee has clarified that there are some actions that can never be considered as legitimate purposes, such as arbitrary arrests, torture, or threats to life. In the end, limitations should strictly be imposed to protect other constituted rights of the ICCPR, never to interfere with them.[47]

If a restriction to free expression is found necessary, it must also be proportional in terms of intensity and severity weighed against the targeted purpose. The State party has the burden to justify this. Unlike the European or American convention on human rights, there is no explicit conceptualization that it should be necessary *in a democratic society*. However, several times when applying article 19(3) of the ICCPR, the Committee has emphasized that the freedom of expression is a cornerstone for a free and democratic society.[48]

2.3.2 Purposes for restrictions

According to article 19 of the ICCPR, there are four legitimate reasons for limiting public expression. The first is to protect the rights or reputations of others. Here, the principle of proportionality has certain importance as it is linked to the political space and the role of the media. The starting point is always that an expression is allowed.[49]

The provision highlights the traditional clash between someone's right to criticize and another person's right to not be offended. State parties are obliged to protect individuals from untruthful information that harms their

[46] Ibid, p. 562.
[47] Ibid.
[48] Ibid, p. 565 f.
[49] Ibid, p. 568 f.

reputation or honor. The UN Human Rights Committee has also interpreted this limitation as covering the interests of the community as a whole. State parties are likewise allowed to restrict the freedom to seek information, but the scope is narrow and mainly concerns hindering sensational journalism to respect people's privacy.[50]

In order to maintain respect for the rights and reputations of others, State parties may impose laws against defamation, derision, or copyright infringements. Nonetheless, the remedies for such violations should primarily imply the right to reply and the right to correct; censorship is seen as the last resort.[51]

The second ground for restricting expressions due to national security is quite limited. This is only relevant in case of a serious political or military threat to the existence of the nation itself. Examples would be publishing military secrets or calling for violently overthrowing the regime. This possibility has been shown to be rather problematic from a human rights perspective as many states use the provision to restrain public debate or criticism against the Government.[52]

The third purpose mentioned in article 19(3) is limiting the right to free speech for the sake of maintaining public order. The formulation is considered quite vague and was disputed during the sessions of drafting. However, at minimum, this clearly includes the prevention of disorder, crime, and racial hatred. Under this condition, it is also possible to restrict what members of security forces can express.[53]

The final reason to limit people's freedom of expression is in regard to public health and public morals. This means that State parties can prohibit publications of misleading information or other health-threatening behavior. The fact that public morals can vary from country to country has given the parties a certain margin of discretion in the Committee's decisions. Although never in a way that encourages prejudice and intolerance.[54]

[50] Ibid.
[51] Ibid, p. 569.
[52] Ibid, p. 570.
[53] Ibid, p. 570 f.
[54] Ibid, p. 572.

2.3.3 Tripartite typology in the UN

In comparison to much of the public international law in general, international human rights law differs when it comes to the types of obligations that are imposed on the State parties. States are instructed to have more of an active role in making the rights meaningful and in implementing them for all individuals under their jurisdiction. Within the UN human rights treaty bodies, a tripartite typology has emerged involving the duty to respect, to protect, and to fulfill.[55]

The duty to respect is a negative obligation to not interfere with other rights protected under UN human rights conventions. Subject to this duty are state organs such as the parliament and state agents which for example involve the police and the army.[56]

The second obligation for State parties is to proactively protect individuals from infringements of human rights. Apart from that the state must refrain from harming people, the obligation also involves preventing violations from third parties or even environmental catastrophes. It does not mean that the State is responsible for all violations but is liable for interferences to human rights that are caused by its omissions to protect individuals from others. This is called the indirect horizontal effect and could be exemplified by a law adopted by the State that enables violations of conventional rights.[57] For example, in the case Plattform Ärzte Für Das Leben v. Austria, the European Court of Human Rights held Austria responsible for not protecting demonstrators from a third-party attack.[58]

The final part of the tripartite typology is fulfilling human rights. This means that State parties must take active steps toward accomplishing the aims of the conventional rights. The UN has stressed that, for example, the right to vote is worth nothing if the State parties do not actively implement a structure for its realization. It is up to the State to enact relevant domestic laws that implement its international human rights commitments. However, the UN has made clear that it is not enough that the right is stated in the constitution.[59]

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[55] UN Special Rapporteur on the Right to Food, *Report on the right to adequate food as a human right: submitted by Asbjorn Eide* (1987) E/CN.4/Sub.2/1987/23.
[56] Mégret, Frédérick, *Nature of obligations* in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), International Human Rights Law (3rd edn Oxford University Press, Glasgow 2017) p. 97 f; De Shutter, Oliver, *International Human Rights Law: Cases, Materials, Commentary* (3rd edn Cambridge University Press, Cambridge 2019) p. 292.
[57] Ibid.
[58] Plattform Ärzte Für Das Leben v. Austria (1991) 13 EHRR 204.
[59] Mégret (2017) p. 97 ff; De Shutter (2019) p. 292.

State parties to UN human rights treaties must also adopt non-legal measures to effectively protect and fulfill human rights. This could be through administrative or educational activities. The parties are obliged to manage a state apparatus that ensures the full exercise of everyone's rights.[60] The obligation to fulfill conventional human rights was demonstrated in a case from the Inter-American Court of Human Rights, Velásquez-Rodríguez v. Honduras. The judges highlighted that State parties must investigate all violations of the American Convention on Human Rights, and if they fail to do so, this also composes a breach.[61]

On a final note, the aspect of fulfilling human rights is also understood to involve promoting them. This is a rather vague criterion to evaluate but is a step to encourage states to adopt policies that strengthen the human rights agenda domestically and internationally.[62]

2.3.4 Applied by the UN Human Rights Committee

In 2020, the UN Human Rights Committee took a stance on an illustrative SLAPP case against a journalist and found Kazakhstan responsible for a breach of article 19 of the ICCPR. The root was a publication that alleged public officials of corruption. The news article was suspicious of the fact that a physical education teacher, with close family ties with the former Prime Minister, had suddenly been promoted to be the chief of the regional Department of Internal Affairs. Consequently, several complaints about defamation were filed by large oil and gas companies against him.[63]

The journalist was convicted in court on the basis that he refused to reveal his source of information and therefore not being able to prove the relationship between the teacher and the Prime Minister. The national court sentenced him to pay moral damages costs of approximately USD 33 000. The journalist tried to appeal the decision but was rejected by the higher instances and complained to the UN Human Rights Committee as a last resort.[64]

The Committee started by reaffirming that free expression is one of the pillars of a democratic society. Free and unhindered media is vital to ensure the full

[60] Ibid.
[61] Velásquez-Rodríguez v. Honduras (Merits), IACtHR Series C No 4, 29 July 1988.
[62] Mégret (2017) p. 98 f.
[63] Lukpan Akhmedyarov v. Kazakhstan, CCPR/C/129/D/2535/2015, para 2.1-7.7.
[64] Ibid.

enjoyment of all rights and freedom in the ICCPR. Above all, this has significant importance in communication about public and political issues. Freedom of expression also entails a corresponding right for citizens to receive information about candidates and elected representatives.[65]

The UN Human Rights Committee continued by stressing that insults against public officials rarely are sufficient to justify criminal sanctions. When faced with this sort of question, it is highly prioritized to consider the public interest. Laws on defamation must live up to the requirements in article 19(3) of the ICCPR and be crafted in a way so they never stifle this right. The Committee further reminded that there must be reasonable limits on economic reimbursement to the successful party.[66]

Looking at the facts, the Committee concluded that Kazakhstan had failed to justify the imposed restriction on the journalist's right to expression. The judgment against him was disproportionate to the aims of article 19(3) for four reasons. First, the local court had disregarded the journalist's non-derogable right to not disclose the name of his source. Second, the amount of compensation was disproportionate to the action. Third, the public interest in investigating corruption among public authorities was not considered enough. Finally, in this case, the freedom of expression must prevail over the corresponding right to reputation and honor. The UN Human Rights Committee urged Kazakhstan to make full reparation to the journalist as well as to take all necessary steps to prevent similar events.[67]

[65] Ibid, para. 9.1-9.8.
[66] Ibid.
[67] Ibid, para. 9.9-12.

3 SLAPP in Indonesia

3.1 Historical background

Laws that protect civil and political rights are scarce in Indonesia's history, especially when it comes to the freedom of the press. A liberal revolution occurred after the fall of authoritarian president Suharto in 1998 and set the country on a new course. But after only two decades of democracy, the country is still affected by centuries of repressive governance. This chapter conducts a brief overview of the political history that has significance for the press freedom of today.

3.1.1 Dutch governance

Indonesia was under Dutch control for almost 350 years prior to independence. In early 1600, Dutch traders arrived in Southeast Asia and subsequently, the Dutch East India Company (VOC) became the administrative power in the region. VOC was forced into bankruptcy around 1800 and the territory of today's Indonesia instead became a national colony of the Netherlands. From this point, the control expanded from only being commercial to affecting the whole Indonesian society.[68]

During the colonial era, the Dutch governors kept strict control of the printed press and a system of pre-censorship was established in 1856 where authors needed authorities' permission to publish. The press environment reached a negative climax during the uprise of the liberation movement in the early 1900. The will for self-determination led to repressive actions against public participation.[69]

In 1914, the Penal Code was amended with the intent to sanction all critical comments about Dutch governance.[70] The amended version included two sets of rules that have affected Indonesian criminal law until today. The so-called *lèse-majesté* provisions prohibited people from making defamation against the monarch or any other public officials.[71] Likewise, the *hatred-sowing* articles criminalized insults against Dutch descendants in general:

[68] Wiratraman (2014) p. 46.
[69] Human Rights Watch, *Turning Critics into Criminals: The Human Rights Consequences of Criminal Defamation Law in Indonesia*, (2010 New York) p. 10 ff.
[70] 1914 Penal Code of the Netherlands Indies.
[71] Human Rights Watch (2010) p. 10 ff.

> Article 63b: He, who by words, signs or depictions or in any other way gives rise to or promotes feelings of hostility, hatred or contempt against different groups of Dutch nationals or residents of the Netherlands Indies, shall be punished with imprisonment varying between six days and five years.[72]

Another low-water mark for this period was the enactment of the Press Banning Ordinance in 1931.[73] This law gave the authorities the right to ban any publication due to the interests of public order without judiciary involvement. In the years that followed, 26 out of the total 30 daily newspapers around the Jakarta area were banned by the Government. The Press Banning Ordinance brought severe criminal penalties with the aim to subdue the press.[74]

The Dutch dominance over Indonesia lasted until the Second World War when the islands were hit by a Japanese invasion in 1942. But the brutality among the new rulers escalated people's desire for self-governance. Only three years later in 1945, Indonesia could declare itself as an independent state.[75]As for many other European colonies of that time, independence was not a straight path to people's power. For the next five decades, Indonesia was governed by two authoritarian presidents.

3.1.2 Guided Democracy under Sukarno

A uniting force against the Netherlands' administration of the region was the Indonesian National Party. The organization was led by an engineer named Sukarno who became the focal point with the Japanese troops during the three years invasion. When Japan lost the Second World War and they retreated from the Islands, Sukarno proclaimed Indonesian independence and appointed himself president. In fact, the Netherlands made an attempt to reclaim the territories of Indonesia a few years later, but as it failed, it instead became the final proof of Indonesian sovereignty.[76]

Probably the most important legacy of Sukarno was composing the basis for Indonesia's national ideology called Pancasila, that still has a huge influence on the country today. The five principles were announced in a public speech

[72] Wiratraman (2014) p. 52.
[73] 1931 Press Banning Ordinance No. 394.
[74] Wiratraman (2014) p. 54 ff.
[75] Ibid, p. 57 f.
[76] Anata, Aris, Nurvidya, Arfin and Suryadinata, Leo, *Emerging democracy in Indonesia* (ISEAS, Singapore, 2005), p. 1 f.

in 1945 and included the belief in God, Indonesian nationalism, humanitarianism, democracy, and social justice. This proclamation has been used as a foundation for the Indonesian legal system, comparable to a constitution in civil law, meaning that laws, presidential decrees, or court decisions must be in line with Pancasila.[77]

In 1955 the nation held its first general election where 52 parties contested for the parliament. Sukarno won the presidential campaign but was not completely convinced by this electoral model and criticized the Western liberal democracy for being unsuited for Indonesia.[78]

After two years in power, Sukarno announced a new political system called Guided Democracy that was inspired by conflict management in the villages. The change was an attempt to create political stability where only the three most prominent groups of the society, including ten parties, were allowed representation: the nationalists, the Islamists, and the communists. Guided Democracy was a census-based model of decision-making and similar to the position of elders in a village, Sukarno would guide the nation forward.[79]

The press was in principle unrestrained in the first years after independence, but after Sukarno won his first public election the anti-press freedom actions returned. The era of Guided Democracy submitted all types of repression on journalism and Sukarno wanted the press to be part of the revolutionary effort. Publishers had to promote the national ideology Pancasila and the development of the nation.[80]

The Government used the regulations of state emergency to silence critical voices about the new governors and allowed Sukarno's party to arbitrarily act against journalists. Several rules of procedure were imposed on the press in terms of who to organize and who to employ. Military legislation in conjunction with the colonial Penal Code made it easy to close down media corporations and journalists were imprisoned without judiciary process.[81]

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[77] Vickers, Adrian, *A history of modern Indonesia* (Cambridge University Press, Cambridge, 2012) p. 117.
[78] Encyclopædia Britannica. 'Independent Indonesia to 1965' https://www.britannica.com/place/Indonesia/Independent-Indonesia-to-1965, accessed Mar 10, 2022.
[79] Ibid.
[80] Wiratraman (2014) p. 83 f.
[81] Ibid.

However, the rock bottom for Indonesian press freedom was still to come. The chaotic year of 1965, when almost all independent newspapers were banned, was the start of General Suharto's position in power.[82]

3.1.3 Suharto's New Order

The presidential era of Sukarno had an abrupt ending when a coup d'état occurred in 1965. Indonesia turned further away from democracy under the presidency of General Suharto. At the same time being characterized by totalitarianism, the economic progress Indonesia made in those years cannot be ignored. With the help of American-educated economists, Suharto exposed the Indonesian market to Western investment and aid. Suharto's policy was called the New Order, which afterward has become the name of his time in power.[83]

In the six general elections that were held under the New Order, Suharto restricted the allowed parties to three. Communism was criminalized which led to riots and mass killings by the army around the country.[84] Press freedom in the political discourse was heavily narrowed. Activists and leaders of opposition groups faced arrestments and disappearances.[85]

According to professor Wiratraman, Suharto left the idea that the press should promote the revolution and steered it to be the "guardian of the Pancasila ideology". The Press Law was amended with a requirement of press responsibility based on religion, nationalism, and security. The President wanted the media to have an active role in the development of the young nation.[86]

Suharto's regime often used legal methods to persecute the press. After the military coup, again, the state emergency regulations were enforced to silence oppositional thinking.[87] Also, the lèse-majesté and the hatred-sowing articles from the Dutch past were repeatedly employed to criminalize public expression that did not support the Government.[88]

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[82] Ibid, p. 84.
[83] Encyclopædia Britannica, *Suharto, president of Indonesia* https://www.britannica.com/biography/Suharto, accessed May 9, 2022.
[84] Encyclopædia Britannica, *Indonesia from the coup to the end of the New Order,* https://www.britannica.com/place/Indonesia/Independent-Indonesia-to-1965, accessed Mar 10, 2022.
[85] Setiawan (2020) p. 256.
[86] Wiratraman (2014) p. 91.
[87] Ibid, p. 138.
[88] Setiawan (2020) p. 257.

3.1.4 Reformation era post Suharto

In the wake of the Asian Crisis in 1997, Suharto's authoritarian regime started to crumble. Suharto stepped down in the following year which unleashed a wave of liberalization. Indonesia became an electoral democracy, and the first free parliamentary elections were soon organized. Under the new president, political prisoners were released, power was decentralized, and political parties were allowed to operate freely. The Government wanted to show that Indonesia had transformed into a country under the rule of law.[89]

The strong push for liberal reforms around the millennium influenced all aspects of social and political life. This led to the adoption of new human rights laws in the country and the ratification of international instruments such as the ICCPR in 2006.[90] However, Indonesia never ratified the optional protocol that gives the UN Human Rights Committee jurisdiction to take decisions over complaints of human rights abuses.[91]

The press environment underwent a similar liberal transition. A new press law was enacted in 1999 which removed the pre-censorship clause and, as will be shown in a later section, it included important guarantees for journalists. The unprecedented freedoms that sprang out of the reforms permitted Indonesians to organize themselves and a pluralistic media landscape emerged.[92]

In this progressive period of Indonesian democratic development, the old articles on lèse-majesté and hatred-sowing were examined before the Constitutional Court in 2006 and 2007.[93] Even though several of them remained, the Court found that the most controversial articles in the Penal Code were open to subjective interpretation and could potentially damage a properly functioning democracy. The Court stated that scrutiny of power must be allowed and that these articles constituted illegitimate limitations to the freedom of expression.[94] The lèse-majesté and hatred sowing provisions that were not annulled will be reviewed in section 3.3.2.1 about the Penal Code.[95]

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[89] Bunte, Marco and Ufen, Andreas, *Democratization in Post-Suharto Indonesia* (Routledge, London 2009) p. 3.
[90] Setiawan (2020) p. 256.
[91] Office of the UN High Commissioner for Human Rights, *Status of Ratification Interactive Dashboard – Indonesia*, https://indicators.ohchr.org/ accessed May 14, 2022.
[92] Tapsell (2020) p. 210; Wiratraman (2014) p. 138.
[93] Constitutional Court of Indonesia, Decision No. 013-022/PUU-IV/2006, p. 19; Constitutional Court of Indonesia, Decision No. 6/PUU-V/2007, para. 3.18.6.
[94] Human Rights Watch (2010) p. 12 f.
[95] UU No. 11 2008 Informasi dan Transaksi Elektronik (ITE).

Although the post-Suharto decade was the most prosperous one in terms of democratic progress, there were signs of a slight setback in the late 00s. The Government of those years showed tendencies to gain back control of the public discussion and the enactment of a law in 2008 would have a huge negative impact on the freedom of expression: the 2008 Law Electronic Information and Transactions (ITE Law).[96]

Politicians found it inevitable to restrict opinionating and discussion on internet platforms. A law on electronic information and transactions was designed to protect individuals and businesses online from malicious publications. However, while imposing severe sanctions on defamation crimes it left out clear definitions of what constitutes a breach.[97] The impacts of the ITE Law on Indonesian press freedom will be discussed in 3.3.2.3.

3.1.5 Democratic regression under Jokowi

If the first decade of democracy was filled with thriving belief for human rights in Indonesia, the second was somehow the opposite. Under current President Joko "Jokowi" Widodo many suggest that the liberal progress of early 2000 has not only stagnated but started to regress.[98]

At the start of Jokowi's presidency, there was anticipation that he would live up to the progressive agenda for human rights that he had announced during the presidential campaign. These involved strategies to resolve the conflict in the remote province of West Papua and bring an end to the violence against national and foreign journalists there.[99]

Compared to his opponent in the 2014 elections, Jokowi was seen as a man of the people and he had strong support from press associations. For example, remarkable scenes were broadcasted on television on the night of the election. When the results showed Jokowi's presidential victory, he crowd-surfed on the raised hands of the editorial staff of the investigative newspaper Tempo.[100]

However, Jokowi's promises have been conspicuous by their absence and the protection of citizens' rights to freedom of expression has dramatically decreased. Through a political agenda focused on socio-economic development, the freedoms from the post-Suharto period have slowly eroded.

[96] Ibid.
[97] Setiawan (2020) p. 258 f.
[98] Ibid, p. 258 f.
[99] Reporters without Borders, *Indonesia : Press freedom still pending in Jokowi's second term*, https://rsf.org/en/indonesia, accessed Mar 4, 2022.
[100] Tapsell (2020) p. 214 ff.

His administration has pointed out its primary interest to be infrastructure, deregulation, and de-bureaucratization. Consequently, non-economic areas have received little attention.[101]

Professor Setiawan suspects that a reason behind this has been to secure support from the conservative political forces. He also emphasizes that Jokowi has had an ambivalent approach to liberal democratic values. In 2017 the President said that he thought that the Indonesian democracy "has gone too far".[102] Jokowi stated that this gives opportunities for extreme politics such as fundamentalism, radicalism, liberalism, terrorism, or other agendas that are contradictory to the state ideology Pancasila.[103]

Professor Setiawan argues that the priority given to law enforcement is a consequence of Jokowi's fear of political instability that would harm his economic programs. Some of the reforms are similar to Suharto's New Order policy and reflect Indonesia's long tradition of adopting laws to restrict personal freedoms.[104]

Professor Setiawan further believes that the President lacks personal commitment to civil and political rights. Jokowi has repeatedly used nationalistic reasoning to emphasize the importance of a united Indonesia and the faith in Pancasila. These have been overriding principles in his politics that have motivated the Government's focus on economic development and limitations on personal freedoms.[105]

The use of both legal and non-legal instruments has even reversed some of the important achievements of the reformation period. Under Jokowi's two mandates in power, reforms of law enforcement policy have led to an inflation of criminalization against public participation.[106]

Following his re-election in 2019, his coalition tried to pass several anti-free speech revisions through the parliament. For example, the controversial so called *MD3 Law* that criminalized defamatory criticism of politicians will be discussed in section 3.3.2.4. There have also been attempts to criminalize fake

[101] Ibid.
[102] Setiawan (2020) p. 270.
[103] Ibid, p. 259 ff, 270 ff.
[104] Ibid.
[105] Ibid.
[106] Freedom House, *Indonesia: Country Profile* https://freedomhouse.org/country/indonesia, accessed Mar 30, 2022; Reporters without Borders, *Indonesia : Press freedom still pending in Jokowi's second term*, https://rsf.org/en/indonesia, accessed Mar 4, 2022; Setiawan (2020) p. 259.

news and hoaxes that lead to riots or other types of disturbance of public order.[107]

The political repression from the Suharto era can still be seen in the way that the military exercises influence over politics and the use of power for its own purposes. The Freedom House's report on Indonesia from 2021 gives a worrying description of systemic corruption and violence against minority groups.[108]

3.2 Current status

3.2.1 National actors of protection

After decades of authoritarianism, a liberal revolution swept through Indonesia in the early 2000s. As mentioned in the previous section, many public human rights bodies and civil society organizations emerged at this time. Before turning to the situation for journalists in Indonesia, the sections below will first give a brief presentation of the most prominent organizations that protect journalists' rights and that document many of the abuses against journalism: the Press Council and three NGOs.

3.2.1.1 The Indonesian Press Council

The Press Council was established in 1967 with its main function to assist the government in guiding the establishment and development of the national press. During the Suharto years, it was rather a tool in the continuation of repressive control that the Dutch conducted pre-independence. In 1999 the purposes of the Press Law were reformulated and since then, the Council has been a driving force in improving the situation for journalists.[109]

The main duties of the Press Council are stated in article 15 of the Press Law, which range from carrying out studies to sanctioning journalists who commit breaches of the Code of Ethics. Its working procedure is conducted by a steering document called the Regulation of the Press Council. The Council consists of press experts, journalists, and executives from press corporations.

[107] Ibid.
[108] Bunte and Ufen (2009) p. 3; Setiwan (2020) p. 270; Freedom House, *Indonesia: Country Profile* https://freedomhouse.org/country/indonesia, accessed Mar 30, 2022.
[109] UU No. 40 1999 Tentang Pers (Press Law).

The members are elected by the press community but must be ratified by a presidential decree.[110]

In a global comparison, Indonesia's Press Council has rather extensive powers in promoting journalistic professionalism and protecting the press. Especially, it has an important role in press-related cases. The Press Law stipulates that the Council is the first instance and the only place where people can seek remedies for problematic publications. Apart from prescribing the right to reply and the right to correction, the Council can fine journalists up to USD 35 000. For the past decade, the Press Council has handled an average of 628 complaints a year.[111] However, this process is still being round passed and the International Federation of Journalists raised concerns in their 2019 report over the high number of cases against investigating journalism that is being processed in courts.[112]

One of the reasons is that local courts sometimes deny the competence of the Press Council as a mediator. This happened in the Sulawesi province in a case from 2021. A journalist named Muhammad Asrul was prosecuted for a publication accusing public officials of committing fraud. The prosecutor argued that Asrul's newspaper was not registered as a media outlet at the time of publication. This would leave out the Press Law and hence be considered a criminal case.[113]

In order to cope with the inconsistency in court procedures, the Press Council signed a memorandum of understanding (MoU) with the National Police in 2012 on the protection of media independence.[114] The MoU recognizes the possibility of using legal actions against publications, but if the author is a professional journalist, the issue must be dealt with by the Council.[115]

The MoU states that the Press Law precedes other regulations and the Police must coordinate with the Press Council before investigating complaints against journalists. Jointly they give a decision on whether the expression is a journalistic publication supported by press freedom or if it is not. In dialogue

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[110] Press Council of Indonesia, *Background of the Press Council* https://dewanpers.or.id/profil/lembaga, accessed Mar 8, 2022.
[111] Romano, Angela and Adi Prasetyo, Stanley *Indonesia: A press council with exceptional powers* in Susanne Fengler, Tobias Eberwein and Matthias Karmasin (eds), The Global Handbook of Media Accountability (1st edn Routledge, Abingdon, Oxon 2022) p. 449, 453.
[112] Ibid, p. 455.
[113] Reporter without Borders, *Jail sentence for Indonesian reporter who covered corruption* (Dec 8, 2021) https://rsf.org/en/news/jail-sentence-indonesian-reporter-who-covered-corruption-0, accessed Apr 7, 2022.
[114] Nota Kesepahaman antara Dewan Pers dengan Polri No. 01/DP/MoU/II/2012.
[115] Romano and Adi Prasetyo (2022) p. 455 f.

with the accused journalist, they are to explore if the dispute can be resolved without legal means. Examples of this is a chance to reply or a correction of the previous publication.[116]

Since its reformation, the Press Council has educated media experts across Indonesia to assist the Police in investigating crimes committed by journalists. More than 100 academics and senior journalists have been certified. A Circular Letter by the Supreme Court from 2008 demands the lower court to elaborate press cases with media experts prior to investigation. This underscores their knowledge of journalistic theory and practice. [117]

The use of the MoU and press experts indicate that the Press Council strives to make a system of self-regulation for professional journalists. However, these efforts have low status and local courts often bypass the protective legal mechanisms for journalists.[118] The reasons for this situation will be further elaborated in section 3.2.2 about the situation for Indonesian journalists and section 3.3.1 about laws protecting them.

3.2.1.2 NGOs

The principal civil society organizations working with the freedom of the press are the Alliance for Independent Journalists (AJI), the Legal Aid Institute for the Press (LBH Pers), and the Southeast Asian Freedom of Expression Network (SAFEnet).

AJI started as a resistance movement during the 1990s and was a reaction by the Indonesian press community to the arbitrariness of authoritarian President Suharto's regime.[119] It was initiated by underground journalists that fought for liberalizing the press. Today, AJI is an important representative for the Indonesian journalists in the discussion and debate over press freedom in the country. The organization is involved in law proposals and educates journalists about their rights and duties.[120]

LBH Pers is a non-profit organization established in 2003 by a group of young lawyers. Its mission is to create a democratic civil society through giving legal

[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Alliance of Independent Journalists, *History of the Alliance of Independent Journalists* https://aji.or.id/read/sejarah/1/sejarah-aliansi-jurnalis-independen.html, accessed Mar 7, 2022.
[120] Wiratraman (2014) p. 110; Alliance of Independent Journalists, *Vision and Mission of AIJ Indonesia* https://aji.or.id/read/program-kerja/7/visi-misi-aji-indonesia.html, accessed Mar 7, 2022.

assistance and advocacy to Indonesian journalists. Similar to AJI, LBH Pers train and educate journalists about their rights, but they also appear for prosecuted journalists in court. The organization frequently shares statistics on the violence against journalists and the data is reported to the Office of the UN High Commissioner for Human Rights.[121]

The Southeast Asia Freedom of Expression Network (SAFEnet) was established in response to the increased criminalization of expression online. Initially, the organization focused on monitoring freedom of expression on the Internet but has since 2018 expanded to emphasize rights and safety in all digital spaces. Every year they release a report covering the Indonesian population's access to the internet, security online, and digital press freedom.[122]

3.2.2 Situation for journalists

3.2.2.1 Overview

Indonesia currently holds position 117 out of 180 in the 2022 World Press Freedom Index, placed between Cameroon and Mozambique.[123] Despite having constitutional protection of the freedom of the press, many journalists are confronted with violence on their work as well as on their well-being. Reporting on corruption or sensitive political issues risks leading to repressions from the Police. Also, subjects concerning LGBT+ rights or pre-marital sex are taboo and have resulted in harassments against the authors.[124]

According to Reporters without Borders (RSF) a high level of self-censorship is practiced among Indonesian journalists. This is caused by severe laws on defamation and anti-blasphemy, but also by factors within the press.[125] Professor Wiratraman highlights the difficult situation that a journalist is confronted with when reporting on illegal business. Not only do they need to compromise on the press ethics but they also face remedies from their own employer.[126]

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[121] Legal Aid Foundation for the Press, *Annual Report 2020* (Jakarta 2021) p. 11 f.
[122] Southeast Asian Freedom of Expression Network, *The Pandemic Might Be Under Control, But Digital Repression Continues: 2021 Digital Rights in Indonesia Situation Report* (2022) p. 7.
[123] Reporters without Borders, *2022 World Press Freedom Index* https://rsf.org/en/index, accessed May 10, 2022.
[124] Romano and Adi Prasetyo (2022) p. 450.
[125] Reporters without Borders, *Indonesia : Press freedom still pending in Jokowi's second term*, https://rsf.org/en/indonesia, accessed Mar 4, 2022.
[126] Wiratraman, Herlambang P, *No Room For Justice?* in Azmi Sharom (ed), Human Rights and Peace in the Southeast Asia Series 4: Challenging the Norms (Southeast Asian Human Rights Studies Network, Bangkok 2016).

As for journalism everywhere, media companies in Indonesia struggle with financing their content. This leads to low incomes, insecure employment, and bad working conditions for many journalists. Court procedures are costly and time-consuming and media owners persuade their employees to rather drop press legal cases. Journalists that are not willing to go for the settlement risk losing their jobs.[127]

In spite of this troublesome picture of Indonesian journalism, it has moved far away from the state-controlled press before the millennium. There is now a large variety of press corporations. Unlike many other countries in the Southeast Asian region, there is also a lively civil society that debates and pushes for change on human rights issues.[128]

The digital revolution has had many positive impacts on free speech in Indonesia and the use of the internet and social media has enabled more actors to publish. Statistics from the Press Council show that almost 90 % of the news is online. But there are also signs that this has consolidated the media into a small circle of oligarch owners within the media industry.[129]

The new technologies have also enabled authorities and individuals to easier collect evidence of controversial expressions. This is seen as a reason why defamation lawsuits have spiked in the last ten years. The vague formulations in the ITE Law together with its severe sanctions have undoubtedly created a hostile situation for online journalism, this is further explained in section 3.3.2.3.[130]

It should also be considered that the exponential increase of publishers due to technological advancements has led to a decrease in journalistic professionalism. The educated journalists have not been sufficient to appease the high demand for online news. Due to funding complications for many media corporates, a higher percentage of the media personnel has involved people with less experience or motivated by political or criminal aims. The estimation is that the number of journalists increased from 6 000 in 1998 to 75 000 in 2017. Research suggests that this has led to a lack of media ethics and to corruption within their ranks.[131]

[127] Romano and Adi Prasetyo (2022) p. 450.
[128] Tapsell (2020) p. 210.
[129] Ibid.
[130] Freedom House, *Indonesia: Freedom on the Net 2021 Country Report* https://freedomhouse.org/country/indonesia/freedom-net/2021, accessed Mar 30, 2022.
[131] Romano and Adi Prasetyo (2022) p. 452.

3.2.2.2 Access to justice

Indonesia is ranked 68th of 139 countries on World Justice Project's Rule of Law Index. Among the Southeast Asian states, Indonesia is third.[132] The Freedom House is critical of the situation on the rule of law in Indonesia, which gets a score of 1,25 out of 4 in the 2021 report. They point out that the court system remains plagued by corruption and that judges' decisions can sometimes be affected by religious aspects.[133]

Arbitrary arrests and detentions of people seeking to exercise their freedom of expression are committed by the National Police. This particularly targets protestors and activists. Even though it is contradictory to the constitution and human rights commitments, defendants are sometimes denied access to legal guidance, and a few Indonesian provinces apply sharia laws.[134]

When press freedom is being limited Indonesian journalists tend to avoid seeking justice from the court. The endemic corruption makes the use of legal provisions politized. If the dispute is against a high politician or an influential businessperson, disputes carry a risk of backlashing. The expensive court procedures are dreadful for a media industry that is already on its knees financially.[135]

Many journalists witness that they have felt long-lasting consequences after being brought to justice. The lengthy procedures with interrogations and check-ins twice a weak result in professional setbacks and dismissal for some of them. It can then be impossible to find a new job due to the threat of imprisonment.[136]

There is also a greater margin of corruption among public officials in remote areas. According to Professor Wiratraman, the success rate for SLAPPs is lower in Jakarta due to the presence of a critical and well-organized civil society in Jakarta.[137] Outside of the nation's capital, pressure from socio-political interests and weak legal protections make room for arbitrary lawsuits against journalists.[138]

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[132] World Justice Project, *WJP Rule of Law Index 2021* https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021, accessed Apr 18, 2022.
[133] Freedom House. *Indonesia: Freedom in the World 2021 Country Report* https://freedomhouse.org/country/indonesia/freedom-world/2021, accessed Mar 30, 2022.
[134] Ibid.
[135] Wiratraman (2016) p. 13.
[136] Human Rights Watch (2010) p. 5.
[137] Wiratraman (2016) p. 17.
[138] Ibid, p. 12.

Human Rights Watch (HRW) believes that the malfunctioning situation is symbolized by the prosecution of journalist Upi Asmaradhana, which circumstances are described in section 3.3.2.2. The complainant of the case was the Police Chief of a major city and subsequently he ordered his own staff to investigate the accusations.[139]

3.2.2.3 Attacks against journalists in 2021

In AJI's Year-End Note for 2021, they reported on 43 cases of violence against journalists. This was almost half of the all-time high number from the year before that was caused by the Covid-19 pandemic. The cases from 2021 include acts such as intimidation and terror, physical violence, and prohibition from reporting.[140]

AJI emphasizes that only in one of these 43 cases the perpetrator of violence against journalists was brought to prison. This symbolizes the courts' refrain from punishing those who commit crimes against the press. They also underscore the causal connection between the decline of democracy in the past years and the more restricted press.[141]

AJI states that the main legal threat to journalists is the use of the ITE Law. For example, these provisions brought journalist Asrul to three months of imprisonment. The NGO also finds it alarming that the Indonesian police have several times in 2021 labeled credible journalism with hoax stamps.[142]

The number of violent acts against journalists in 2021 was slightly higher in LBH Pers' Annual Report, which collected 55 cases. However, this was also a clear decrease of the 117 cases from 2020. Most of these cases involved journalists being hindered from reporting. LBH Pers highlights that the criminalization of journalistic work is still taking place at a high level although regulations between the Press Council and law enforcers have tried to avoid this. Also, they argue, that most of the violations are committed by state actors, where the Indonesian Police are the main perpetrators.[143]

SAFEnet's annual report from 2021 focuses specifically on freedom of expression online and had collected 38 cases of digital attacks. Five of these aggressions were targeting journalists. Likewise to AJI, SAFEnet also

[139] Human Rights Watch (2010) p. 4.
[140] Alliance of Independent Journalists, *Year-End Note 2021: Violence, Criminalization & the Impact of the Job Creation Law (Still) Overshadows Indonesian Journalists* (Jakarta 2022) p. 4 f.
[141] Ibid.
[142] Ibid.
[143] Southeast Asian Freedom of Expression Network (2022) p. 8 ff.

believes that the rubber clauses in articles 27 and 28 of the ITE Law are the primary reason. President Jokowi announced that the articles would be revised before the end of the year, but the attempt ended in a joint decree which has had a small impact on the courts' application of the ITE Law.[144]

SAFEnet criticizes the fact that local courts apply the Penal Code instead of using the protective mechanisms in the Press Law. According to them, there is a lack of understanding among law enforcers for the previously mentioned MoU. This results in a situation where many journalistic activities remain criminalized.[145]

Lastly, a survey from the National Commission on Human Rights showed that a third of the respondents were afraid of criticizing the government due to the threat of repression. A slightly higher percentage responded that they fear expressing their opinions online, irrespective of the subject.[146]

3.2.2.4 Covid-19 pandemic

The concern for press freedom in Indonesia grew during the covid-19 pandemic. The Government tightened the restrictions on journalism and criminalized opposition to the handling of the virus. A directive from April 2020 authorized sanctions up to 18 months in prison for those who spread hostile information about the President or otherwise disinformation about covid-19. In only two months, the police arrested 51 people under those provisions.[147]

Many press corporations witness that they experienced digital attacks after questioning the state's response to the virus. RSF criticized the Indonesian government in 2020 for taking advantage of the pandemic to impose repressions on journalists.[148] Several charges were also conducted under the ITE Law, where the government put a hoax stamp on all news reports that were not according to their own strategy. [149]

Particularly worrying for press freedom was the enactment of the Omnibus Law on Job Creation, which was passed by the government in response to the

[144] Ibid.
[145] Ibid, 28 ff.
[146] Komnas HAM, *Annual Report 2021* (Jakrata 2022), p. 13.
[147] Freedom House. *Indonesia: Freedom in the World 2021 Country Report* https://freedomhouse.org/country/indonesia/freedom-world/2021, accessed Mar 30, 2022.
[148] Reporters without Borders, *Indonesia: Press freedom still pending in Jokowi's second term*, https://rsf.org/en/indonesia, accessed Mar 4, 2022.
[149] Legal Aid Foundation for the Press, *Authoritarians and Oligarchies Break* (2020) p. 28 f; Southeast Asian Freedom of Expression Network, *Indonesia Digital Rights Situation Report 2020: Digital Repression Amid the Pandemic* (2021) p. 14 f.

weakened labor market during the pandemic.[150] The massive public rejection of the law resulted in many lawsuits against the publishers.[151]

The National Police also conducted cyber patrols to monitor the debate over the Ominbus Law online. An example is that the two websites Tempo and Tirto were targeted by hackers after reporting about celebrities who had been paid by politicians to promote the law.[152]

3.3 Legal scrutiny

3.3.1 Laws protecting journalists

3.3.1.1 Consitution of Indonesia

Freedom of expression has been a constitutional right in Indonesia since the first year of independence. The wording is very similar to the provision in ICCPR. Article 28E (3) in the Constitution states that everyone enjoys the right to freely express opinions.[153]

According to article 28, the right to freedom of expression can only be limited by law. The purpose of limiting this freedom must be of guaranteeing and respecting other non-derogable constitutional rights. The limitation must also fulfill the requirements of decency, peace, legal justice, and prosperity in a democratic society.[154]

During the constitutional amendment sessions post autocracy in 1999, there was a legal encounter regarding an explicit article on press freedom. The idea was pushed by journalist groups, NGOs, and academics. This group of journalism defenders at the same time fought against outdated criminal provisions, such as the Dutch hatred-sowing articles, in judicial processes.[155]

Although the suggestion was declined, the amended constitution involved a new provision strengthening journalism. In the 2002 version, the new article 28F covers the right to communicate, seek, obtain and possess information

[150] UU No. 11 Tahun 2020 tentang Cipta Kerja (Omnibus Law on Job Creation).
[151] Legal Aid Foundation of the Press (2020) p. 14 f.
[152] Public Media Alliance, *Impact of Covid-19 on media freedom, journalist safety and media viability in Southeast Asia* (Norwich 2021) p. 46.
[153] UUD 1945 Dasar Negara Republik Indonesia (Indonesian Constitution).
[154] Wiratraman (2014) p. 25, 43.
[155] Wiratraman, Herlambang P, *New Media and Human Rights: The Legal Battle of Freedom of Expression in Indonesia* (11th Annual Student Human Rights Law Conference Nottingham University, 2010) p. 10.

through all types of means. The article also states that the purpose of these actions should be to develop the individual or the social environment.[156]

3.3.1.2 Laws on freedom of expression and human rights

In addition to the constitution, there are two laws from the early years of democracy with similar wording that protect free expression. The demand for greater liberalization and press freedoms led to the passing of the 1998 Law on Freedom of Expression and the 1999 Law on Human Rights.[157]

According to article 1 in the law from 1998, every citizen holds the right to orally, in writing, or by other means freely express their opinions in line with existing legislation. However, the exercise of the right must pay attention to the principles stipulated in article 3, namely: (a) the principle of balancing between rights and duties; (b) the principle of deliberation and consensus; (c) the principle of legal certainty and justice; (d) the principle of proportionality; and (e) the benefit principle.

Professor Wiratraman criticizes article 3 for being vague and opening up for the arbitrariness of the judge. He argues that those broad principles could potentially be used by authorities to undermine the right. A further clarification would be needed to create transparency for the people that enjoy the freedom.[158]

Article 4 stipulates that one of the aims of regulating the press freedom is to build a responsible freedom that participates in the fulfillment of human rights in accordance with the Indonesian Constitution and Pancasila. This also raises concerns for Professor Wiratraman. He emphasizes that the interpretation of the Constitution, as well as the national ideology, have for three decades been shaped under Suharto's authoritarianism. In keeping those references, Professor Wiratraman sees the risk of maintaining the press freedom in a stage pre-democracy.[159]

On the same day the year after, two more laws were enacted for the protection of free expression: the 1999 Human Rights Law and the 1999 Press Law. The latter has had major importance for press freedom in Indonesia and will be discussed in the next section. The adoption of those laws got much attention

[156] Ibid.
[157] Setiawan (2020) p. 256; Law No. 9 of 1998 on Freedom to Express Opinion in the Public Sphere; Law No. 39 of 1999 on Human Rights.
[158] Wiratraman (2014) p. 112.
[159] Ibid.

from other democracies in the world. Many suggested that this was evidence of Indonesia's commitment to its reformation away from authoritarianism.[160]

Article 23(2) of the 1999 Human Rights Law recognizes free expression and press freedom as human rights issues. This was an important step of the time before the Constitution was amended in 2002. As both are derogable rights, article 23(2) also states that expressions must pay respect to religious values, morals, public order, public interest, and the unity of the nation.[161]

3.3.1.3 Press Law

Introduction

One of the outcomes of the liberal revolution after Suharto's authoritarian regime was a reformed Press Law. The reformulated provisions reflect a more open approach to the press and emphasize what importance investigative journalism has for a democratic society.[162]

There are two relevant sections in the Press Law from a SLAPP perspective: the criminal provisions for the press and the role of the Press Council. In addition, there is a Code of Ethics attached to the law. The media must follow these rules in order to be recognized as professional journalists.

Article 1 sets out the definitions for the law. According to (1) *the press* is a social institution that performs journalistic activities covering the seeking, obtaining, owing, and processing of information in different forms. In (2) it states that a *journalist* is a person doing journalistic work on a regular basis. There is also a general formulation in article 4 that press freedom is guaranteed as a fundamental citizen's right. According to article 12, press corporations are obliged to openly announce the person in charge of the publications and who will be accountable in case of a violation of the criminal provision.

Criminal Provision

The main criminal provision in the Press Law is stated in article 5(1). Equally to the 1999 Law on Human Rights that was enacted the same day, the Press Law obliges journalists to respect social values:

> In reporting events and opinions, the press is obliged to pay respect to the religious norms, social morality and the principle of presumption of innocence.

[160] Setiawan (2020) p. 256 f.
[161] Wiratraman (2014) p. 114.
[162] Romano and Adi Prasetyo (2020) p. 449.

According to article 18(2), a breach of this provision can result in a fine of up to USD 35 000, but there are no sanctions of imprisonment for respectless publications. In the commentary on the law, it is explained that the principle of presumption of innocence means that it is forbidden to pass judgment or make conclusions about someone's guilt in a case prior to a court decision.

A significant case under article 5(1) was between business mogul Tomy Winata and the news magazine Tempo in 2003. In a published article, Winata was alleged for being involved in the arson of a market hall in central Jakarta and was called *a big scavenger*. The background was that Winata short before the event had proposed a complete renovation of the mall to the government. Tempo suspected that the disastrous fire paved way for the proposal to go through.[163]

After the publication, Winata filed a complaint to the Police, and Tempo's editor-in-chief was prosecuted for violating article 5(1) in the Press Law as well as the general criminal provisions of defamation. The local court found him guilty of breaching articles 310 and 311 in the Penal Code on defamation against another individual and sentenced him to one year in prison. The reason was that the editor-in-chief could not prove that Winata was *a big scavenger*. The decision was widely criticized by journalists and the Press Council as a serious threat to the progress the press freedom had managed since Suharto.[164]

However, this decision was overturned three years later by the Supreme Court because the local court had disregarded the special status of the Press Law.[165] The position as *lex specialis* in press disputes will be discussed below.

The Role of the Press Council

The Press Council is an independent institution with the purpose of increasing professionalism and preventing interference with journalistic activities in Indonesia. The foundation of the Council is stated in article 15 of the Press Law. According to (3), it should consist of journalists, executives of press corporations, and experts in the field of the press. In (2) the functions of the council are defined, which are (c) to sanction a Journalism Code of Ethics and to supervise its implementation and (d) to give consideration and to help settle public complaints about press-related cases.

[163] Wiratraman (2014) p. 178 ff.
[164] Ibid.
[165] Ibid.

In addition, it has the function (f) to help press organizations in formulating regulations in the field of journalism. This means that the press community itself should draw the lines for misconduct. The purpose is to reduce government interference and to make space for a self-regulated media landscape.[166]

AJI has criticized these defining provisions and finds them unnecessary. The journalist organization argues that they are unclear whether the Press Council has exclusive competence in dealing with complaints against journalists and thus creates an unforeseeable situation. In the long run, this could potentially harm the press freedom in Indonesia. It is problematic that the Press Council sometimes is a monitoring institution for law enforcement but in others just an observer.[167] In the previously mentioned case between businessman Winata and the news magazine Tempo in 2006, the Supreme Court highlighted the Press Law's position as lex specialis which will be discussed below.

Code of Ethics

The Code of Ethics was drafted at a joint meeting between the Press Council and all Indonesian journalists' associations. The purpose was to prevent misinformation and damage to people's reputations in the media. In article 15 of the Press Law, it is stated how these press standards should be composed.

The aim of the Code is to impose a self-regulated system to avoid press-related cases in the public courts. It is up to the Press Council to decide whether a breach has occurred. According to the Regulation of the Press Council, everyone has the right to file a complaint about journalistic misbehavior or false information in publications. The applicable remedies for a violation are the right to reply and the right to correct. These sanctions are believed to be enough to uphold the dignity of people who feel disadvantaged by the press. In the end, both parties save time and money with the opportunity to correct and to resolve grievances without court interference.[168]

According to article 1 in the Code of Ethics journalists in Indonesia must produce news stories that are accurate and balanced. Articles 2 and 3 prescribe journalists to use professional methods, stay objective and uphold the presumption of innocence principle. Article 4 prohibits false, slanderous, sadistic, and obscene news stories. Lastly, article 9 stipulates that Indonesian journalists must pay respect to the right to private life, although this obligation has less importance in situations where there is significant public interest.

[166] Romano and Adi Prasetyo (2020) p. 453.
[167] Wiratraman (2014) p. 115.
[168] Romano and Adi Prasetyo (2020) p. 453 f.

In case someone feels offended by a press publication, the person must first submit a written counterargument to the publisher. If the person is not satisfied with the response, he or she is entitled to file a complaint to the Press Council. Thereafter, the Complaint Commission starts an investigation of what led up to the dispute. When the background to the publication is clear, the Press Council takes a decision on the matter. If the violation is not severe, the person held accountable is required to publish a reply or a correction. Otherwise, the Press Council may sanction the publisher with a fine of up to USD 35 000. This amount is equivalent to about two years' salary for a newspaper's editorial staff.[169]

Professor Wiratraman finds problems with the fact that the journalistic Code of Ethics is included in the Press Law. He argues that this enables the public courts to decide in disputes over publications, which interferes with the aim of being self-regulated. Similar to the conflict between the Press Law and the general criminal provisions, Professor Wiratraman says that there is confusion and inconsistency about who has jurisdiction. He highlights this as one of the main reasons why the press is still prosecuted for criminal actions in the public court.[170] Next, it will be examined whether the Press Law should prevail over the Penal Code.

Press Law as a lex specialis law

The Press Law imposes a system for press-related cases to be decided on by journalists and experts on press freedom. Even though the law was adopted in 1999, journalists are still being prosecuted in public courts. The Press Law instructs the Press Council to conduct misbehavior by journalists, but it is disputed whether the law is *lex specialis*. In other words, the scenario where a more specific rule on journalistic activities prevails over a general one.[171]

Although there are many aspects pointing at the fact that the Press Law is lex specialis, Professor Wiratraman argues that the inconsistency in case law demands clarification in the matter. As will be shown in the next section, many of the criminal provisions on journalism are regulated outside of the Press Law. At a local level, many public prosecutors chose to apply the criminal articles instead of the protective regulations for the press. Professor Wiratraman is also critical of the fact that in civil procedures it is often up to the plaintiff to decide whether the case should be governed by the Penal Code or the Press Law.[172]

[169] Ibid, p. 454 f.
[170] Wiratraman (2014) p. 115.
[171] Ibid, p. 116.
[172] Ibid.

On the one hand, the Press Law does not explicitly state how it should be interpreted in relation to other laws nor what type of laws it prevails; civil, criminal, administrative, etc. Several articles in the Press Law and its commentary suggest that other legislations continue to be applicable. One could also argue that the Supreme Court has not followed a straight line in the question of lex specialis in consideration of which lower court decisions they have overturned.[173]

On the other hand, the preparatory work to the Press Law and its provisions clearly show that it had the purpose of reforming the way press-related cases were settled during the Suharto era. Not giving precedence to the Press Law is contrary to its own spirit. In hearings prior to its adoption, the responsible parliamentary commission unanimously supported the opinion that an individual who had been negatively affected by a journalistic publication must mediate with the Press Council.[174]

The Press Law is the only regulation that explicitly draws the boundaries for journalistic activities, which suggests that it is special in such disputes. The applicable remedies for a violation of the law also differ from other criminal provisions, such as the right to reply and the right to correct. Only when a publication has gone so far that it cannot be considered professional journalism, the provisions in the Penal Code come into question.[175]

A case that supports the conception that the Press Law is lex specialis in press disputes was when the well-known businessman Raymond Teddy in 2008 sued seven media companies for defamation. Many newspapers had reported that he was arrested by the Police for being involved in illegal gambling activities. Teddy felt that the publications insulted his reputation because they already considered him guilty and filed complaints about defamation.[176]

The petitions varied with claims from USD 3 million up to USD 16 million, but it was not clarified how the losses were calculated. Even though the publications had only referred to the official police report, Teddy argued they were false and libelous. In the end, the local courts refused all seven petitions on the basis that Teddy had not exhausted all relevant means in the Press Law, such as the right to reply and the right to correction.[177]

[173] Ibid, p. 114.
[174] Ibid, p. 205.
[175] Ibid, p. 145.
[176] Ibid, p. 235 f.
[177] Ibid.

Professor Wiratraman emphasizes that this case is a clear example of a lawsuit targeting journalists with the intention to intimidate. For the sake of Indonesian press freedom, he is therefore satisfied that courts upheld the Press Law's status as a *lex specialis*. He concludes that Teddy's claims were unreasonable considering the background to the case and regards this as an important example of how to conduct press disputes.[178]

Professor Wiratraman also points to fact that the case was dealt with by courts in Jakarta and he is uncertain whether it would have had the same outcome anywhere else in Indonesia. He stresses that journalists generally receive stronger support for their rights in the capital area, not only by the judges in court but also by their own editors or directors. This is because of the political environment and the presence of national and foreign solidarity groups.[179]

As has been touched upon earlier in the thesis, the Supreme Court made an important statement in a case from 2006. The news magazine Tempo had alleged the businessman Tomy Winata of being involved in the arson of a market hall in central Jakarta and who countered with complaints of defamation.[180]

There are three main takeaways from the decision by the Supreme Court. Firstly, it stated that the lower courts had incorrectly applied the Penal Code because the accused activities by the author were all within the framework of the Press Law. Secondly, considering the function of the national press as the fourth pillar of a democratic society, it is the Court's duty to develop the case law in a direction that protects journalists. The Supreme Court emphasized that the Press Law and the Code of Ethics are the most favorable ways to prevent journalistic misconduct and to ensure Indonesian press freedom. Thirdly, criminalizing journalistic activities is contrary to the mere idea of press freedom and therefore the Press Law must be seen as lex specialis in relation to other rules.[181]

Professor Wiratraman concludes his analysis by stating that the decision is a strong argument on which provisions that should be applied in press disputes. However, after the case between Winata and Tempo, lower courts have still disregarded the Press Law without it being overturned by the Supreme Court. According to Wiratraman, this happens mostly when the accused crime is not regulated by the Press Law but exist in other criminal legislations.[182]

[178] Ibid, 236.
[179] Wiratraman (2016) p. 16.
[180] Wiratraman (2014) p. 196 f.
[181] Ibid.
[182] Ibid.

3.3.2 Laws generating SLAPPs against journalists

3.3.2.1 Penal Code

In the history of Indonesian journalism, the Penal Code has had a significant impact. With roots in the colonial social system, many of its articles have been used by all types of political administrations to silence criticism against the public authorities. Especially the provisions that were adopted in response to the Indonesian independence movement in early 1900 have been effective tools to prosecute dissidents.

After the liberal reformation post-Suharto, the main perpetrators of human rights violations against the press were no longer the government but private actors. People with political and economic power have been capable of using the old criminal provisions to judicially harass journalists.[183] The subsections below will elaborate on the provisions in the Penal Code that are used against the press.

Defamation against a person or the public

The most used provision in the Penal Code to target public participation is article 310 about defamation against an individual:

> The person who intentionally harms someone's honour or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof, shall, being guilty of slander, be punished by a maximum imprisonment of nine months or a maximum fine of three hundred rupiah.

Professor Wiratraman is worried that the formulation provides a wide scope that could potentially criminalize journalistic publications. In conjunction with similar provisions, such as articles 311 on calumny and 315 on simple defamation, which extend the scope for targeting journalists, it creates a flexible legal trap for the press and results in several prosecutions each year.[184]

Furthermore, article 316 stipulates that the sanction for defamation can be enhanced by a third if the insult is committed against a public official in the capacity of their profession.

[183] Ibid, p. 141.
[184] Ibid, p. 165.

A case that has been dealt with by the Indonesian courts under article 310 is the prosecution of journalist Wijaya in 2002 who reported on an allegation of sexual harassment. The executive director of a media house had been reported to the Police after two coworkers witnessed him sexually harassing another employee. Journalist Wijaya made an interview with one of the victims and published the story in his newspaper Radar Yogja.[185]

Later, when the police decided to drop the case against the executive director due to lack of evidence, he reported Wijaya to the Police for committing defamation. The following procedures were lengthy and the prosecution did not start until two years later. Even though the local court in Yogyakarta found the publication to be true, Wijaya was convicted for breaching article 310 and was sentenced to nine months in prison.[186]

The court's reasoning was that the publication had drawn much public attention and consequently had severely damaged the director's reputation. The judges did not consider the Press Law nor the remedies outside the criminal procedure such as the right to reply and the right to correction. Wijaya tried to appeal the case to the Supreme Court but was rejected because the Court did not find any evidence of misconduct under the Penal Code. Thus, the Press Law was completely disregarded for Wijaya.[187]

Hate Speech and Blasphemy

The articles on hate speech in the Penal Code originate from the era of Dutch dominance and are based on the previously mentioned hatred-sowing articles. The purpose was to intimidate opposition and criticism against the colonial rulers and mainly targeted the native Indonesian population.

Article 156 of today's Penal Code stipulates that:

> The person who publicly gives expression to feelings of hostility, hatred, or contempt against one or more groups of the population of Indonesia, shall be punished by a maximum imprisonment of four years or a maximum fine of three hundred Rupiahs.

The former chair of the Southeast Asian regional Intergovernmental Commission on Human Rights, Rafendi Djamin, believes that the article has a very broad definition of the terms hostility, hatred, and contempt. He

[185] Ibid, p 166 ff.
[186] Ibid.
[187] Ibid.

emphasizes that the article has therefore been liable to arbitrary interpretation by law enforcers and is criticized for its flexibility.[188]

Article 156A concerns the criminalization of blasphemy and states that:

> By a maximum imprisonment of five years shall be punished any person who deliberately in public gives expression to feelings or commits an act,
>
> a. which principally have the character of being at enmity with, abusing or staining a religion adhered to in Indonesia
>
> b. with the intention to prevent a person to adhere to any religion based on the belief of the almighty God.

Even after the liberal revolution post-Suharto, those articles have been in use. A significant case was against the news website Rakyat Merdeka in 2006, which drew much international attention. The allegations concerned a repost of one of the cartoons of Prophet Muhammed published in Danish Jyllands-Posten.[189]

The editor-in-chief named Santoso was prosecuted before the court. In his defense, Santoso stated that the publication was not intended to insult anyone but to report on news concerning the Muhammed cartoons. In fact, the newspaper had modified the original caricatures in order to reduce the vulgarness. Many Islamic groups accepted this explanation and AJI made a statement that Santoso had not breached any of the press ethics. However, the public prosecutor tried to proceed with the claims against Santoso but was stopped by the judges in the court who found the arguments baseless.[190]

Still, Professor Wiratraman believes that the conduct of the prosecutor highlights the possibility of misusing the hate speech articles. The prosecutor intentionally tried to intimidate ordinary news reporting which is a remarkable threat to Indonesian press freedom. Professor Wiratraman criticizes the fact that the prosecutor disregarded the safety mechanisms of the Press Law without any interference by the Police.[191]

Defamation against the President or Vice President

Articles 134 and 137 of the Penal Code are similar manifestations of the colonial Dutch legacy of silencing criticism of public authorities, which is

[188] Djamin, Rafendi, *The Paradox of Freedom of Religion and Belief in Indonesia* (2014) p. 4.
[189] Wiratraman (2014) p. 150 f.
[190] Ibid.
[191] Ibid.

still present today. They were only slightly changed after independence and can be used to silence political opposition.[192] Article 134 states that:

> Deliberate insult against the person of the President shall be punished by a maximum imprisonment of six years or a maximum fine of three hundred rupiah.

Article 137 constitutes a similar prohibition of publicly insulting the President or the Vice President in writing or portrait. The sanction is imprisonment up to one year and four months. If the insult is made in the offender's profession, the author can be deprived of exercising that job.

A remarkable case under those provisions was the prosecution against the editor-in-chief of the daily newspaper Rakyat Merdeka in 2003. The newspaper had reacted to President Megawati's decision to raise fuel prices with headlines such as "Mega's mouth smells of gasoline" and "Mega is of the same standard as a District Mayor".[193] This content was in line with the Press Law and the Code of Ethics, but made the President upset who criticized the press for being unbalanced.[194]

Without conducting with the Press Council, Megawati's party filed a complaint to the Police that then became a criminal case. The editor-in-chief was prosecuted for violating article 134 of the Penal Code. The court concluded that he had not deliberately insulted the President; however, he was accountable for the distribution of publications that did so. The editor-in-chief was therefore sentenced to six months in jail.[195]

According to Professor Wiratraman, this case shows that the provisions against insulting the President can easily be misused to intimidate criticism. The editor was imprisoned for having distributed a newspaper with a critical headline. Wiratraman also points out that he was punished for insulting the *dignity* of the president, which sets out a standard in case law with loose frames.[196]

Defamation against public institutions

The lèse-majesté provisions from the time of the Dutch colonial administration of Indonesia have also influenced the shape of articles 207 and 208. The provisions that concern insult of state institutions have likewise been

[192] Ibid, p. 155.
[193] Ibid, p. 157.
[194] Ibid, 157 f.
[195] Ibid.
[196] Ibid, p. 158.

open to wide interpretation by the courts, although with lower sanctions than before independence. Article 207 reflects article 134 and states that:

> Any person who with deliberate intent in public, orally, or in writing, insults an authority or a public body set up in Indonesia, shall be punished by a maximum imprisonment of one year and six months or a maximum fine of three hundred rupiah.

Similar to article 137, article 208 prohibits publicly presented writings and portraits that contain insults against an Indonesian authority. The maximum punishment is four months in prison.

A case that shows these provisions in practice was when columnist Lubis at Tempo news magazine was prosecuted for insulting public officials in 2007. In a column, Lubis had referred to an event in 1981 where an author was banned from publishing. Speaking about the police investigations the author had said that "he was tortured by the idiocy of the interrogators, but they in turn were tortured by their bosses who were even more stupid".[197]

Only by quoting this statement from the author, Lubis was prosecuted for insulting the office of the Attorney General. The Public Prosecutor disregarded the Press Law with the motivation that Lubis was prosecuted as a private person and not as a columnist at Tempo. Otherwise, as has been stated earlier, the responsibility would have fallen on the editor-in-chief.[198]

Lubis tried to defend himself by stating that he had acted within his freedom of expression and that his opinion was part of public discussion in Indonesia. He also emphasized that the critical parts were quoted from another person and not his own words. However, the court considered that the word *stupid* could not be seen as anything else than an insult. Lubis was therefore charged with imprisonment for one month.[199]

Many human rights defenders strongly condemned the decision and criticized the Penal Code articles for being unconstitutional. Therefore, Lubis filed a complaint to the Constitutional Court of Indonesia arguing that the provisions interfered with the right to freedom of expression in article 28E of the Constitution. However, the Court dismissed the case and stated that article 207 in the Penal Code is of general nature and does not specifically target the press. Hence, it is not contrary to the Constitution.[200]

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[197] Ibid, p. 162.
[198] Ibid, p. 161 f.
[199] Ibid. p. 162 f.
[200] Ibid.

Professor Wiratraman regards this case as a clear example of when courts contribute to restricting Indonesian press freedom through the Penal Code. First by rejecting the Press Law's principle of accountability, which has the purpose of preventing the situation where journalists are prosecuted individually. Second by easily overlooking the special press remedies, such as the right to reply, and instead, continuing straight to criminal procedures. [201]

Professor Wiratraman even considers cases under article 207 that do not lead to sanctions as harmful because there is no clear definition of the term *insult*. Unpredictability is a threat to the rule of law in general, and especially to investigative journalism.[202]

HRW has urged Indonesia to decriminalize defamation against journalists due to the disastrous democratic consequences that lawsuits result in. Until the Penal Code is revised, they at least want to see a prohibition for government officials from filing defamation petitions against the press.[203]

3.3.2.2 Civil Code

Apart from the criminal provisions, defamation cases can also be initiated through the articles in the Civil Code. Article 1365 states that:

> Any unlawful act causing damage to others shall oblige the person who caused the damaged to pay compensation.

The Civil Code does not mention *insult* nor gives a more precise definition of an *unlawful act*. However, it is generally considered to have the same meaning as article 310 of the Penal Code, which says that it is illegal to purposely harm someone's honor or reputation publicly. Further, article 1372 stipulates that the form and the amount of the compensation in question must be proportional to the caused damages.[204]

As was discussed earlier about the Press Law's position as lex specialis, the Supreme Court made an important statement in 2006. In the case Winata v. Tempo, the Court emphasized that the Press Law prevails over other regulations in press disputes. That speaks in favor of the fact that professional journalists cannot be targeted by article 1365 in the Civil Code. However,

[201] Ibid, p. 163.
[202] Ibid.
[203] Human Rights Watch (2010) p. 7.
[204] Wiratraman (2014) p. 231 ff.

there is inconsistency in law enforcement and Professor Wiratraman argues that the provision is still being used to silence the media.[205]

A clear example where this provision was used as a SLAPP is the case against the freelance TV journalist Upi Asmaradhana in 2008. Asmaradhana had criticized a police officer Sisno Adiwinoto for repeatedly neglecting the protective provisions in the Press Law. In response, Adiwinoto first complained to the police that the journalist had violated articles in the Penal Code for insulting public officials. As this was rejected by the court, Adiwinoto then filed a civil lawsuit against Asmaradhana. [206]

The litigation was based on article 1365 of the Civil Code and concerned the insult by Asmaradhana. Adiwinoto calculated the economic losses for the damage to around USD 1 million. Even though it was unclear how the damages could reach this amount, Asmaradhana's employer feared that a conviction could lead to bankruptcy and therefore fired the journalist.[207]

At the time, the civil rights organization AJI condemned Adiwinoto's action as an obvious intimidation of the press. AJI emphasized that Asmaradhana would never be able to pay the claimed amount and that such cases are an attack on press freedom. Adiwinoto later chose to withdraw his case but at that point Asmaradhana was already unemployed and had publicly apologized for his comments about the police officer.[208]

As was discussed in the background to SLAPP, the many civil lawsuits against journalists are weakening the Indonesian press freedom. According to Professor Wiratraman, the most serious threat is when those litigations are accompanied by high claims of economic compensation. Journalism is a low-income job in Indonesia with short-term contracts and the media companies rather dismiss an alleged author than risk a financial collapse. Professor Wiratraman concludes that the combination between time and costs in civil lawsuits discourages journalists to cover sensitive subjects.[209]

There is another illustrative case from 2011 where a lawsuit targeted four journalists. They had reported that a flight academy did not have a recognized certificate by the Department of Education. The Head of the institute found these publications insulting and filed complaints of defamation against the journalists as well as reported to the police. Apart from asking for USD

[205] Ibid.
[206] Ibid, p. 236 f.
[207] Ibid.
[208] Ibid.
[209] Wiratraman (2016) p. 23.

92 000 in compensation for damages, he also wanted their newspapers to continue publishing apologies for three months.[210]

This event created a shockwave in the Indonesian media landscape. The accused press companies were afraid of the resources needed for judicial procedures and the inconsistent law enforcement in courts. Instead, they chose to come to a non-legal settlement with the claimant. Professor Wiratraman thinks that this highlights the scepsis among the press to solve disputes in court and that there is a lot to gain for the petitioner in attacking journalists.[211]

3.3.2.3 ITE Law

In the center spot for most lawsuits against digital journalism in the last decade is the ITE Law, adopted in 2008. It was designed to protect individuals and businesses from misuse of internet publications but has resulted in far-reaching implications for the freedom of expression.[212]

The ones being positive about the ITE Law point out its legitimate aim to limit the freedom of expression. Considering the massive increase of online publications and media users, the Indonesian Government has a reason to actively prevent crimes in the digital space. According to a legal analysis by the Dean of the Law Faculty at the University of Indonesia, Edmon Makarim, the ITE Law reaches the requirements of international human rights instruments such as the ICCPR. He concludes that the provisions are needed to protect the rights of people in the digital space.[213]

However, the criticism of the ITE Law highlights its outcomes and the many criminal charges against public participation. Human rights defenders often describe the ITE Law as a draconian regulation that is used to target state critical comments online. Due to aspects discussed in earlier sections, the Press Law is sometimes set aside by courts, and thus journalists are attacked by provisions that do not consider their special democratic function. Five journalists were convicted under the ITE Law in 2021 according to SAFEnet's annual report.[214]

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[210] Ibid, p. 23 f.
[211] Ibid.
[212] Setiawan (2020) p. 258.
[213] Makarim, Edmon, *Limitation of Rights as a Manifestation of Duties and Responsibilities Pertaining to the Freedom Expression in Digital Communications,* Indonesia Law Review, Vol. 9: No. 3, Article 5 (2019) p. 289 ff.
[214] Southeast Asian Freedom of Expression Network (2022) p. 29.

The interesting articles in the ITE Law from a SLAPP perspective are 27(3) on defamation and 28(2) on hate speech. The provisions are generally called rubber articles by their critics because they have shown to be quite flexible in their application. Principally they are seen as problematic because they criminalize a broad range of journalistic activities without clear frameworks.[215]

Notable is that the sanctions are clearly higher for those provisions than in the Penal Code. In the ITE Law, defamation can give imprisonment for 4 years and hate speech for 6. This results in an important distinction between the criminal provisions. Only for offenses that are punishable by more than 5 years can a person be held in pre-trial detention. A journalist accused of hate speech could therefore in theory immediately be arrested. In the Indonesian academic discourse, it has been pointed out that these circumstances can easily be manipulated by political or economic interests as a tool to silence the media.[216]

Defamation

Article 27(3) is the digital equivalent of article 310 of the Penal Code on defamation and states that:

> It is prohibited that any person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts reputation and/or defamation.

In Indonesia's latest Universal Periodic Review, the Office of the UN High Commissioner for Human Rights expressed deep concerns about article 27(3) and stated that it can be used to suppress legitimate public debate. The Committee urged the Government to revise the ITE Law and decriminalize the provisions on defamation.[217]

A step in that direction was taken in June 2021 when the National Police Chief together with the Minister of Communication and Information released a Joint Decision Letter regarding the guidelines for the implementation of the ITE Law. In fact, the guidelines prohibited the use of the provision on journalistic work of public interest and confirmed that the Press Law is lex specialis in press disputes:

[215] Human Rights Watch (2010) p. 40; Setiawan (2020) p. 258 ff.
[216] Ibid.
[217] UN Human Rights Council (2017) A/HRC/WG.6/27/IDN/2.

> For news on the internet carried out by the Press institution, which is journalistic work following Law 40 of 1999 concerning the Press, a mechanism is applied following the Act. The press is a lex specialis, not Article 27 paragraph (3) of the ITE Law.[218]

However, the civil society organization AJI is still worried that this statement would not make a significant difference for journalists. The special status of the Press Law has been confirmed time again, even by the Supreme Court. According to SAFEnet's statistics, the number of cases actually increased by 80 % during the two months after the Decision Letter. AJI emphasizes that the main cause for the situation is ambiguous formulated articles together with poor law enforcement, especially in remote regions of the country. The Joint Decision is not enough to resolve these issues according to them.[219]

The case against journalist Muhammed Asrul from 2021 gives reason to this scepsis of the ITE Law. Asrul had published a three-part story suspecting fraud among local officials in different construction projects in the South Sulawesi province.[220] The son of the City Mayor found this insulting and filed a complaint about defamation and inciting hatred.[221]

For the first two days in detention, Asrul was denied legal supervision and was not allowed to contact his family or employer. After 36 days the Press Council tried to intervene but was refused by the public prosecutor who disregarded it as a press dispute. The prosecutor claimed that Asrul's newspaper was not officially recognized and therefore the Press Law could not be applied. In the end, the court found that his publications constituted defamation and Asrul was sentenced to three months in prison.[222]

After the conviction, many critical voices have been raised about the way the journalist was treated in the case. RSF condemned the imprisonment as a violation of the basic principles of Indonesian press freedom.[223] AJI has questioned why the Press Council's mediation was rejected and why the lex specialis status of the Press Law as overlooked. They also emphasized that

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[218] Alliance of Independent Journalists (2022) p. 14.
[219] Ibid.
[220] Ibid, p. 13 f.
[221] Ibid; Freedom House. *Indonesia: Freedom in the World 2021 Country Report* https://freedomhouse.org/country/indonesia/freedom-world/2021, accessed Mar 30, 2022; Reporter without Borders, *Jail sentence for Indonesian reporter who covered corruption* (Dec 8, 2021) https://rsf.org/en/news/jail-sentence-indonesian-reporter-who-covered-corruption-0, accessed Apr 7, 2022.
[222] Ibid.
[223] Reporter without Borders, *Jail sentence for Indonesian reporter who covered corruption* (Dec 8, 2021) https://rsf.org/en/news/jail-sentence-indonesian-reporter-who-covered-corruption-0, accessed Apr 7, 2022.

the Police completely disregarded the MoU from 2018 in their conduct of the case.[224]

Hate Speech

Similar to article 156 of the Penal Code, the provision on hate speech in the ITE Law is a modern version of the colonial Dutch legislation. The article was adopted only a year after the old hatred-sowing articles were annulled by the Constitutional Court. As will be discussed in the next subsection the Court came to another decision regarding constitutionality of the ITE Law.[225] Article 28(2) states that:

> Any person who knowingly and without authority distributes information which is intended to create hate feelings or individual and/or particular society group hostility based on ethnicity, religion, race and groups.

A significant case under the provision of hate speech was against the website editor Diananta Putra Sumedi in 2020. He was prosecuted after reporting on illegal seizure of land by a palm oil company. Sumedi had published an article on a website with primarily local readers that suspected the Jhonlin Group of removing indigenous people from three villages.[226]

In response, the company complained to the Press Council and the author had to make a few corrections of his article. However, the dispute did not end there as the Jhonlin Group continued with criminal complaints to the Police. Shortly after, Sumedi was arrested and the local police officer argued that this was a necessary action as he otherwise would have been able to continue publishing stories about the case. The court found the journalist guilty of inciting hatred and breaching the Code of Ethics.[227]

RSF was not satisfied with the decision and declared that it had sent a terrifying message to all journalists in the country: investigating Indonesia's biggest palm oil company will lead to imprisonment.[228] AJI also condemned the conviction and was concerned about the fact that the dispute continued to criminal procedures after the Press Council's mediation. The organization

[224] Alliance of Independent Journalists (2022) p. 13.
[225] Wiratraman (2014) p. 171.
[226] Reporters without Borders, *Indonesia: Borneo reporter jailed after palm oil giant complains* (20 May, 2020) https://rsf.org/en/news/indonesia-borneo-reporter-jailed-after-palm-oil-giant-complains, accessed Apr 7, 2022.
[227] Ibid.
[228] Ibid.

argued that this shows how easily press regulations are avoided using the ITE Law.[229]

Reviewed by the Constitutional Court

In 2009, a coalition of human rights organizations, including the Press Council, wanted the Constitutional Court to revoke some of the provisions in the ITE Law. The group put forward similar arguments that had annulled the old lèse-majesté and hatred-sowing articles a couple of years before. Although supporting the initiative to fill the digital legal vacuum, they argued that articles 27(3) and 28(1) were formulated in a way that strongly interfered with the right to freedom of expression. They enhanced that the provisions lacked clarity and meaning. This was not only contradictory to the Constitution, but also to the spirit of democracy where access to information is central.[230]

Nonetheless, the Constitutional Court found that the ITE Law was a permissible restriction on freedom of expression. The Court motivated this decision by underlining the corresponding right to protect someone's honor, dignity, and reputation. According to the Court, it is highly important to also safeguard this right and a duty to the State in a society based on the rule of law. The Court concluded that information published on the Internet risks causing greater damage as it is more accessible to the public. According to the judges, the ITE Law represents a balance between free expression and the right to dignity, which is necessary to avoid the law of the jungle in cyberspace.[231]

In comparison to the Dutch colonial articles, the Constitutional Court made clear that the fact that rules are open for abuse is not a sufficient reason to invalidate them. This is a matter for law enforcement. The Court also emphasized that the provisions limiting free expression were a proportional response to the many defamation cases in Indonesia. The number of allegations of corruption by the press is well over the few prosecutions under the ITE Law.[232]

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[229]International Federation of Journalists, *Indonesia: Press Council by-passed as journalist found guilty of inciting hatred* (Aug 11, 2020) https://www.ifj.org/media-centre/news/detail/category/press-releases/article/indonesia-press-council-by-passed-as-journalist-found-guilty-of-inciting-hatred.html, accessed Apr 7, 2022.

[230] Constitutional Court Decision Nr 2/PUU-VII/2009, p. 3 f; Junaidi, Ahmad, *Indonesia: Press Freedom: Indonesia government fears on critics and murals* (Sep 6, 2021) https://www.freiheit.org/indonesia/press-freedom-indonesia-government-fears-critics-and-murals, accessed Apr 8, 2022.

[231] Constitutional Court Decision Nr 2/PUU-VII/2009, para 3.14-3.23; Human Rights Watch (2010) p. 19 f.

[232] Human Rights Watch (2010) p. 19 f.

3.3.2.4 Amendment to the MD3 Law

In March 2018, Indonesia's House of Representatives passed a controversial amendment to the Legislative Institution Law (MD3 Law) that was later revoked by the Constitutional Court.[233] The new legislation was in line of lèse-majesté inspired articles in the Penal Code and the ITE Law. It enabled them to bring charges against any person or organization that expressed disrespect to the House or to its members. Article 122 (I) in the Law stated that the Ethics Council of the Parliament should:

> take legal steps or other steps against individuals, groups of people, or legal entities that demean the honor of the members of the Parliament.[234]

The articles in the MD3 Law were criticized for creating immunity for Indonesian politicians from public opposition. Anyone investigating a member of the House first had to seek approval from the Ethics Council.
For example, this criminalized journalistic scrutiny of corruption or poor performance. Also, the MD3 Law did not set out any minimum or maximum level of imprisonment and the meaning of "demean" was not clarified.[235]

Professor of Indonesian Law at The University of Sydney, Simon Butt, suspects that the purpose behind the amendment was to protect the politicians from investigations by the Indonesian Anti-corruption Commission. Before passing the amendment, the Commission had successfully prosecuted several legislators, both serving and retired.[236]

Five petitions were filed to the Constitutional Court seeking invalidation of the MD3 Law. The petitioners argued that article 122 had the potential to damage the constitutional right of free expression. The MD3 Law could have undermined the spirit of the parliament and the idea of serving the will of the people. The Court accepted the petition and found article 122 contrary to the Constitution.[237] Judge Saldi concluded that the articles would have acted as a shield from criticism to parliament members which was not the purpose of the amendment.[238]

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[233] UU No. 2 Tahun 2018 Tentang UU No.17 of 2014 (MD3).
[234] Article 122 (I) of the UU No.17 of 2014 (MD3).
[235] The Strait Times, *Indonesia makes criticising politicians a crime* (Mar 15, 2018) https://www.straitstimes.com/asia/se-asia/indonesia-makes-criticising-politicians-a-crime accessed Mar 11, 2022; Satrio, Abdurrachman, *Constitutional Regression in Indonesia under President Joko Widodo's Government: What Can the Constitutional Court Do?* (2018) Constitutional Review.
[236] Butt, Simon *Indonesia's legislative misfire* (Mar 21,) https://www.policyforum.net/indonesias-legislative-misfire/, accessed Apr 11, 2022.
[237] Constitutional Court Decision Number 16/PUU-XVI/2018 p. 17 ff., p. 412.
[238] The Jakarta Post, *Constitutional Court Scraps Controversial House Immunity* (June 29, 2018 https://www.thejakartapost.com/news/2018/06/28/constitutional-court-scraps-controversial-house-immunity.html, accessed Apr 11, 2022.

4 Conclusions

Recalling that article 19 of the ICCPR stipulates that everyone should have the right to freely express thoughts and opinions. State parties may restrict this right for the purpose of protecting a few public interests. They also have a duty to restrict the freedom of expression when the exercise causes severe damage to any of the other protected rights in the Covenant. The limitations must always be necessary and proportional to accomplish the purpose. According to the UN's tripartite typology, Indonesia also has a responsibility to respect, protect, and fulfill the human rights constituted in ICCPR.

Comparing the situation with a few decades back, there has been significant improvement of the press freedom in Indonesia. The liberal reformation after President Suharto affected the whole society and there have been signs of a growing commitment to international human rights standards since then. Indonesia is still a young nation and an even younger democracy with slightly more than 20 years of free elections. Looking at the geographical challenges and the enormous population Indonesia has, it is understandable that the country needs time to implement the belief in, and the application of, democratic ideas within the whole society.

The fast-growing civil society has an important role in this development. This is Indonesia's advantage in the democratic progress in comparison to other states in the Southeast Asian region. NGOs such as AJI, SAFEnet, and LBH Pers are vital for the fulfillment of the rights in the Constitution and international human rights instruments. They educate, raise awareness, document abuses and push for more liberalization. These measures are all essential to strengthen journalists' rights.

The Press Law from 1999 had a clear purpose to protect Indonesian press freedom. It aims to decriminalize professional journalistic activities and to conduct press disputes outside the public courts. The establishment of the Press Council and a Journalism Code of Ethics were important steps in this direction. Considering these circumstances together with the statement made by the Supreme Court in Winata v. Tempo in 2006, it is quite apparent that the Press Law is lex specialis in press disputes. The system for managing complaints against journalism speaks in favor of that Indonesia complies with the duty to protect press freedom.

However, there is still much uncertainty in the case law as to what extent this system hinders individuals and business companies from bringing charges

against journalists. There have been a few efforts between the Press Council, the Police, and the courts to resolve this problematic situation, such as the Joint Decision Letter and the MoU that have been discussed in this thesis. Even the Indonesian Supreme Court has sent out a Circular Letter ordering to always conduct press disputes with experts on media ethics. But because of the weaknesses in law enforcement, however, journalists are often not able to take advantage of existing protective measures.

There are many reasons why the self-regulatory system designed for press disputes is not maintained and why the press still ends up in the courtroom. In general, Indonesia struggles with widespread corruption and the rule of law is sometimes questionable, especially outside of the capital area. Scholars and human rights defenders also point at the vague formulations in many of the criminal provisions that restrict the freedom of expression.

The long tradition of conservative legislation prohibiting criticism against public authorities and the presence of the national ideology Pancasila create a narrow scope for public discussion and ambiguous frameworks for press freedom. In addition, many of the laws protecting journalists demand respect for religious values and societal morals. This is not only a rather arbitrary decision to make but can also many times be incompatible with the idea of public scrutiny. The inconsistency in law enforcement leads to a situation where journalists are judged under the same rules as people in general, and the special function of the press, recognized by many international human rights instruments such as the ICCPR, is disregarded.

In the second decade of post-authoritarianism, the Indonesian Government took steps in a direction favoring socio-economic progress and infrastructural development. Consequently, civil and political rights have been deprioritized and the level of democracy has started to regress. The enactment of the ITE Law followed just two years after some of the controversial Dutch criminal provisions were annulled. The so-called rubber articles 27 and 28 of this law are constantly criticized by civil society organizations and were condemned in the latest UN Universal Periodic Review.

Since the adoption of the ITE Law in 2008, freedom of expression has been jeopardized in digital spaces. This became very evident under the covid-19 pandemic where the public discussion moved to platforms online. The prosecutions against internet publications spiked under 2020 and the Indonesian Police targeted critical comments on the Government's handling of the coronavirus.

In accordance with article 19 of the ICCPR, Indonesia has a legitimate interest to restrict the freedom of the press to safeguard individuals' right to privacy as well as in regard to public order and public health. As journalism in the country, especially in the recent years of online publication, has sometimes shown to lack professionalism, there must be mechanisms, such as a code of ethics, guiding the press. However, the UN Human Rights Council has emphasized that criminal penalties and imprisonment are never proper responses to secure professional journalism.

The Council rejects the use of the Penal Code and the ITE Law against the press. The fact that the latter has sanctions of imprisonment up to 4 or 6 years is clearly a disproportionate remedy to limit the freedom of the press. The UN Human Rights Committee has made clear that laws cannot be crafted in a way that stifles the public debate. Considering the composition of the Press Law, which imposes the right to reply and the right to correction, it seems obvious that the provisions in the ITE Law were never meant to be used against journalists. From a human rights perspective, it is therefore worrying to see the many lawsuits against journalists under these articles. A remarkable case was seen in 2021 when journalist Asrul was convicted for defamation and sentenced to three months in prison after investigating fraud among local public officials.

Several reports indicate that public officials target journalists with strategic lawsuits with the intent to silence scrutiny of the public sector. This has also been shown through case law such as the proceedings against journalist Asmaradhana where the complaints came from the city mayor's son. The use of defamation provisions to silence the media is a clear violation of the negative duty to respect the freedom of expression.

In addition, the prosecutions in recent years against journalists Asrul and Sumedi are both similar to the illustrative case that was described under the background to SLAPP, where the UN Human Rights Committee found that Kazakhstan was responsible for a violation of article 19 of the ICCPR. In this case, the Committee reaffirmed that insults against public officials rarely are sufficient to legitimize criminal sanctions against the offender. As a solution to similar growing SLAPP issues in Indonesia, HRW has urged the Governemnt to remove the possibility for public officials to bring charges against journalists.

The Dutch legacy in controlling the masses through the lèse-majesté and hatred-sowing articles has been cemented in Indonesian criminal law. What started as a strategy of suppressing the independence movement has later been used by all kinds of political regimes to restrict the freedom of the national

press. It is highly questionable whether these far-reaching provisions prohibiting critical comments about the authorities have a legitimate purpose recognized by the ICCPR to limit press freedom.

As this thesis has discussed, the lèse-majesté and the hatred sowing articles have several times been subjected to reviews by the Constitutional Court which have led to different outcomes. In their proceedings in 2006 and 2007, the Court stated that a few of the provisions from pre-democracy in the Penal Code were outdated and constituted unlawful restrictions on the freedom of expression. The articles were open to arbitrary interpretations for the judges and caused legal uncertainty around the right. They could also potentially be used by political or economic interests to obstruct a functioning democracy. The same was stated about the MD3 Law in 2018.

With this reasoning in mind, it is unclear why the Constitutional Court came to different results in its decision over the other lèse-majesté and hatred-sowing inspired articles in the Penal Code and the ITE Law. Instead, the Court accentuated the right of the individual and the stability of the nation. However, again looking at the way these sanctions differ from the press remedies such as the right to reply and the right to correct, it is apparent that the Court did not take a stance on whether they should be applied to journalism. This is misconduct that should be revised by law enforcement.

Indonesia has to take steps further in fulfilling and promoting the freedom of expression. Revisions of the criminal provisions and the Press Law could give more clarity on how press disputes should be resolved, and which instances have jurisdiction. The UN Human Rights Council and several international NGOs have urged Indonesia to decriminalize defamation against the press. In fact, the rubber articles in the ITE Law have made it easier to use the criminal procedures than the civil, because the complainant does not need to manage the case, this is done by the public prosecutor, nor to pay the legal expenses.

Although, it has also been shown how private actors in Indonesia manipulate the civil proceeding in a similar way to intimidate free expression. As Professor Wiratraman has emphasized, civil lawsuits against journalists often come with large claims for economic damages. This a threat to the existence of the accused media company and create self-censorship among journalists. The right under article 19 of the ICCPR has a horizontal effect and the state of Indonesia is accountable for breaches that are made within the private sphere. The civil lawsuits initiated by Winata and Adiwinoto are examples where the judiciary system fails to protect the press freedom of the country. Cases like these, risk to having a severe and long-lasting chilling effect on the whole Indonesian media landscape.

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