

Journal of Civil Law Studies

Volume 3

Issue 1 *Civil Law Workshop*

Saúl Litvinoff Series

*Civil Law and Common Law: Cross Influences,
Contamination, and Permeability*

Article 9

1-1-2010

Press Freedom in Indonesia: A Case of Draconian Laws, Statutory Misinterpretation, but still one of the Freest in Southeast Asia

Nono Anwar Makarim

Follow this and additional works at: <http://digitalcommons.law.lsu.edu/jcls>

 Part of the [Civil Law Commons](#)

Repository Citation

Nono Anwar Makarim, *Press Freedom in Indonesia: A Case of Draconian Laws, Statutory Misinterpretation, but still one of the Freest in Southeast Asia*, 3 J. Civ. L. Stud. (2010)

Available at: <http://digitalcommons.law.lsu.edu/jcls/vol3/iss1/9>

This Civil Law Workshop is brought to you for free and open access by the Law Reviews and Journals at DigitalCommons @ LSU Law Center. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized administrator of DigitalCommons @ LSU Law Center. For more information, please contact sarah.buras@law.lsu.edu.

**PRESS FREEDOM IN INDONESIA:
A CASE OF DRACONIAN LAWS, STATUTORY
MISINTERPRETATION, BUT STILL ONE OF THE
FREEST IN SOUTHEAST ASIA**

Nono Anwar Makarim*

I. Summary	131
II. Introduction.....	135
III. Stretching Torts and Damages	137
IV. Disregard of the “Public Interest” Defense	143
V. The Horse, The Rider, and The Law	145
VI. Lex Specialis, or “Droit de Réponse”?	150
VII. Solutions, Comparatively Speaking.....	152
VIII. Something Happened on the Way to Freedom.....	156
IX. A Clause to Overturn All Clauses	161
X. To Conclude	165

I. SUMMARY

In assessing the state of press freedom in Indonesia, the key-word to look up is *insult*. It is listed as a crime in a special Title of the Criminal Code the country inherited from its colonial past. The word *insult*, or *belediging* in the original Dutch language is often referred to in the Indonesian language as *fitnah*, an Arabic word. In the Arabic lexicon, the word *fitnah* is linked to at least two

* Of Counsel, Makarim & Taira S. Law Firm.

This essay is an updated version of a paper presented to the *Law Colloquium 2004: From Insult to Slander, Defamation and Freedom of the Press*, Jakarta, July 28-29, 2004.

references in the *Holy Qur'an* which define it as *more cruel than murder*. Secular laws and religious condemnation lend legitimacy to judicial intransigence to appeals for the removal of excessively severe laws against *insult*. Prosecution, the judiciary, and the majority of the Indonesian polity demand that the criminalization of *insult* be maintained. Those on the other side of social critique, which include all three branches of the state, want even harsher punishments, stiffer fines, and larger damage awards. It is *civil society* in the French meaning of the term, that is, the collectivity of persons with individual liberty who objects to jailing critics. *Civil society* in transitional democracies, constitutes a tiny minority in urgent need of organization.

The civil suit against *insult* is begun by lodging a complaint with the court. Civil Code Article 1372 allows the plaintiff to claim real and verifiable damages, and damages for the restoration of honor and good name. In addition, a defendant may also be compelled to make public apologies. The article directly links the civil code with the criminal code's special Title XVI on *Insult* and its 12 articles. The provisions under this title, articles 310-322, set the size of fines and the terms of imprisonment. The filing of a civil suit does not bar the public prosecutor from commencing criminal proceedings against the defendant in the civil case if the plaintiff had him reported to the police. The *insulter* may, therefore, expect a series of punishments consisting of pecuniary compensation for real damage, awards for restorative damages, public apologies, criminal fines, and jail terms. *Insult* is a serious matter.

In order to come within the scope of *insult* as defined in the Criminal Code an *accuser* must deliberately direct an accusation of certain facts to the person of the *accusee*. The civil suit will not be admitted, and the *accuser* will escape criminal punishment, if he has clearly acted in the *public interest*. The truth of the accusation is of no importance, unless the accusation was motivated by a *public interest* concern, in which case the judge may allow the *accuser* to prove the truth of his accusation. These statutory rules have not been consistently applied by the courts. In one case, an editor wrote an angry piece sharply criticizing the installation of an official as member of a city council notwithstanding the council's knowledge of the candidate's involvement in two customs proceedings. *Public interest* motive was clearly proven, and truth of the allegation was established. The editor was sent to jail anyway. On the other hand, failure to prove the truth of accusations in other cases got the publications exonerated for

reasons that they tried to cover both sides, and offered to respect the *insultees*' right of response. Not much guidance in terms of predictability of the law here. The fact remains that a regime of laws hostile to criticism, particularly when directed at government, are retained in the old codes and the new statutes.

Among the restrictive provisions, three sets of laws stand out as particularly hostile: the so-called *hate-sowing* articles 154-157, the "major" *lèse majesté* articles 134-137 of the Code regarding insults directed at the president or the vice president, and the "lesser" *lèse majesté* articles 207 and 208 on insults to government authorities. While the concordance principle had Indonesia take over the Dutch codes lock, stock, and barrel, most of these oppressive provisions are not to be found in the codes of the Netherlands. They were tailor-made for the colony.

The *hate-sowing* articles made public expressions of feelings of hatred, hostility, and contempt against established authority punishable by imprisonment for up to seven years. These were *formal* offences. The mere expression of those feelings is sufficient for the prosecution to move in with indictments. These articles were recently challenged in the Constitutional Court and found to be in violation of fundamental rights guaranteed in the Indonesian Constitution. The sound decision was a bit marred by dicta expressing the Court's relief that a new draft Penal Code includes the very same provisions, this time as *material* offences.

Articles 134-137 of the Criminal Code were successfully challenged as well. The articles protecting the president and vice president from insults were found by the Constitutional Court to be in contravention of the basic principle of *equality before the law*. The provisions were declared unconstitutional and having no force of effect, but then the Court proceeded to split both the president and the vice president in two parts: The part of the *individual person* has, like everybody else, recourse to Criminal Code articles 310 *et seq* when insulted. The *presidential* and *vice presidential person* parts, however, were to remain protected by articles 207 and 208, the "lesser" *lèse majesté* provisions in the code.

The principle of *equality before the law* was maintained by pronouncing the government dignitaries subject to laws applicable to everybody else, but promptly set aside this action by placing them under the protective regulations for government authorities.

The issue with Criminal Code articles 207 and 208 is more serious than was thought when the articles were simply thrown in the grab bag of complaints filed with the Constitutional Court. Not

only were they thought unfit to be placed in the codes of civilized European nations and, therefore, absent from the Dutch Criminal Code, they were also deliberately made to make it easier to prosecute offences which are not punishable under Dutch law. Criminal Code Article 207 withholds from offenders their right to the defense of *public interest*, and removed the judicial discretion to order offenders to prove the truth of their allegations. The article which was specifically enacted for governing a subjugated nation, conflicts with section 2 of article 312, a systemic part of Title XVI, Book 2 of the Criminal Code. The section allows the offender to present proof of his accusation against a government official in the performance of his duties. Thus, a right granted by law to offenders is revoked by way of choosing which law to apply for one and the same offence. This is a violation of serious proportions.

So far Criminal Code Articles 207 and 208 have not been challenged in the Constitutional Court as a generically different set of laws from other, equally oppressive provisions in the Criminal Code. The articles have usually been lumped together with others in the rush to request their collective repeal. In its decision on the *hate-sowing* articles, the Court held the request for constitutional review of 207 and 208 inadmissible because of a procedural matter: the Court did not acknowledge petitioners' legal standing regarding the articles. In deciding the unconstitutionality of the *lèse majesté* articles, however, the Court gave a clear indication that a request for constitutional review of Criminal Code Articles 207 and 208 would not be favorably received.

Judging from a number of decisions bearing on freedom of expression, it seems that the Indonesian Constitutional Court has decided to opt for the status quo rather than risk controversy. It has consistently turned down opportunities to confirm change and lead to a future of accountable governance. This avoidance of change was not because there are no Asian examples of how courts have adopted changes gracefully and responsibly. The Korean Constitutional Court reasoned that too strict an implementation of the requirement to prove *truth and public interest* would stifle press freedom. The Japanese Supreme Court cautioned against giving too much protection to the honor and good name of government officials, and promotes the free flow of information and opinion to enable the people to partake responsibly in political decision-making. The Indonesian Constitutional Court chose to maintain colonial and post-independence laws, which are inimical

to freedom of expression. This was done by way of expounding on a theory of requisite balances between rights and duties, between the exercise of freedom and its limitation by the freedom of others. Balances are conditions of rest. In a context of rapid change, it conduces to abrupt changes, often violent, and always ill-prepared.

Draconian laws applied, within circumstances sometimes described as systemic corruption, contribute to abuses of power, selective prosecution, and miscarriage of justice. Notwithstanding these serious obstacles to freedom of expression, Indonesia has been listed as having one of the freest presses in Southeast Asia. The Indonesian press is presently continuing its multilateral engagement of the public, the state, and the courts. If the past is of any guidance, change may have to be seized through careful legislation and the ponderous processes in the conventional court hierarchy.

II. INTRODUCTION

In 1941, a year before the Japanese armies routed the Dutch military force in the then Netherlands East Indies, a middle-aged well to do Chinese businessman absconded with a 19 year old girl and carried on weeks of extra-marital activities with her. The daily newspaper *Keng Po* took up the story in all its concupiscent details.¹ The rich man appointed a top litigator and sued for libel. The defendant argued that the victim was only 19, while the perpetrator had a daughter who was already 17. He also argued that the despicable act could be construed as concubinage, a practice forbidden by the Criminal Code, and yet fashionable among men of means of a specific ethnicity. *Keng Po* was promoting a newly emerging ethical movement called *New Life*, and felt duty-bound to campaign against this disgraceful behavior. The write-up was done for the purpose of defending the *public interest*, the only excuse the Criminal Code allows to escape punishment.

The court disagreed and held the newspaper liable for intrusion into the plaintiff's private life, adding that the salacious language used in the coverage of the matter was improper. Ethical movements must employ ethical words and phrases. Damages in

1. KENG PO, an Indonesian language daily newspaper in its editions of May 20 and 24, and June 10, 1939.

the amount of f450 (four hundred fifty Dutch colonial guilders)² was awarded to the plaintiff.³ At no time did the plaintiff contest the facts stated in the newspaper coverage. The truth was established, but truth is of little import and easily brushed aside as insignificant in torts involving defamation. Proving the truth of an allegation is not a right defendants have under either the Civil Code or the Criminal Code. It is a favor the judge may bestow only if the defendant alleges that it was *public interest* which moved him to publicize the allegedly libelous statements. Judges are not obliged to order defendants to prove their allegations even if they were moved by considerations of *public interest*. Even when public interest was accepted, and truth was established, the defendant will still be punished.⁴ To establish a valid cause of action it is sufficient for plaintiff to feel hurt by the allegation made against him, and that it has done harm to his good name and reputation.

Armed with the victory in the colony's capital, the enthused abductor proceeded to file a suit against a publication in the town of Semarang covering the same matter. The Semarang court awarded damages in the amount of f500 but startled the legal fraternity when it held the writer, the editor and publisher liable as joint actors in the commission of the offence.⁵ The decision contravened consistently upheld rulings of the Dutch Supreme Court that ex-article 1372 Civil Code damages claims:

- (i) are only admitted against defendants who deliberately commit the offence,⁶ and that
- (ii) publishers can be held liable only if they have prior knowledge of the libelous content of writings appearing in their publications.⁷

2. When asked what f450 would be in today's currency, octogenarians interviewed recalled that it would probably buy three *Raleigh* 3-speed bicycles.

3. Raad van Justitie, Batavia First Chamber, August 22, 1941, *Tijdschrift van het Recht* ("T") 154, at 730-731.

4. See *infra* page 15 and note 36.

5. The *Matahari* case was referenced in the case report on the Batavia *Raad van Justitie* (the Court of First Instance for Europeans and those who had submitted themselves to the Civil Code by, in this case for instance, by claiming a cause of action pursuant to Article 1372 of the code) decision, *id.* at 734. No separate report on the case is available.

6. Hoge Raad, December 19, 1913, N.J. 1914, at 305 (as cited by the author of the end-note to the Batavia court decision, writing under the initials of "v. H.").

7. Hoge Raad, April 9, 1926, N.J. 1926, at 525 (cited by the same author of the above-cited end-note.).

The precedents regarding this matter should by no means be interpreted as barring damage suits against publishers in an increasingly complex management structure of modern newspapers. A negligent publisher can always be held accountable for libel damages, but the suit ought to be brought on the basis of his status as employer of the editor. The suit may be filed pursuant to Article 1367 of the Civil Code which provides that employers may be held liable for torts committed by their employees.⁸ Deciding on the choice between an Article 1367 cause of action and a suit pursuant to Article 1372 has pecuniary consequences. Courts insist that the measure of damages claimed under the tort articles proper⁹ must be strictly confined to real and quantifiable damage incurred. The fat prize is given to claims under Article 1372 which provides for both quantifiable and immaterial damages.¹⁰

III. STRETCHING TORTS AND DAMAGES

Mr. Cohen lived in Amsterdam. He was in the printing business. Sometime, in the early twentieth century, he managed to persuade an employee of *Mr. Lindenbaum*, his business competitor, to divulge company secrets in exchange for certain promises. For an extended period of time *Mr. Cohen* became the

Dutch Supreme Court precedents may be applied to similar cases in Indonesia pursuant to the so-called *concordance* principle. See Sections (1) and (2) of Article 159 of the Law on the Governance of the State of the Netherlands East Indies (Law of September 2, 1854, State Gazette of the Netherlands: S.1854-2, State Gazette of the Netherlands Indies: S. 1855-2 *jo* 1).

Note also that almost all of the articles of the Indonesian Civil Code, Commercial Code, Criminal Code, and Civil Procedural Code have their Dutch code counterpart article numbers printed on the side of each page. Indonesian law codes are basically old Dutch codes.

8. See "v. H." end notes to the Batavia court report in T.154, at 735-737; "v. H." is thought to be the initials of the very prominent Criminal Law scholar Professor W.F.C. van Hattum, co-author with Professor J.M. van Bemmelen of one of the leading texts on Criminal Law, the 2-volume *HAND- EN LEERBOEK VAN HET NEDERLANDSE STRAFRECHT*.

9. *INDONESIAN CIV. CODE* 1365-1371.

10. *INDONESIAN CIV. CODE* 1372:

The civil suit regarding insult aims at compensating the damage, and at curing the loss suffered in honor and good name.

In the valuation thereof the judge shall pay attention to the degree of grossness of the insult, besides the condition, status and the wealth of the adversaries.

(the unofficial translation from the Dutch original is the author's).

recipient of lists of customers, the range of prices charged, and contents of letters marketing *Lindenbaum's* products and services, all highly confidential information of the competitor's business. *Mr. Cohen's* business flourished, while *Mr. Lindenbaum's* declined. The cause of this unfortunate course of event was soon discovered, and *Mr. Lindenbaum* sued for damages under the civil code's general tort article 1401.¹¹ On 18 March 1918 the Court of Appeal in Amsterdam rejected *Lindenbaum's* claim on the theory that *Cohen* did not commit any act which was prohibited under the law.¹² The *fault* element, indispensable for the determination of a tort, was missing. *Lindenbaum* appealed, and the Supreme Court gave him what he wanted, and in the process shocked the Dutch legal community.¹³ The core article for tort, literally an *unlawful act*, Indonesian Civil Code Article 1365, required the presence of the following elements:

- (i) the commission or omission of an act;
- (ii) the act is unlawful; hence the existence of a fault;
- (iii) the act has caused harm to another person or property owned by another;
- (iv) the harm is caused directly and immediately after the Act;

The decision by the highest court in the Netherlands held that, in addition to the aforementioned ingredients, tort could also be established if the defendant's action is:

- (v) in conflict with his obligation, or
- (vi) violates the principle of morality, or
- (vii) contravenes the duty of care, or propriety in social interaction towards other persons, or towards the property of others.

The decision became a precedent in the Netherlands and, through the *concordance* principle,¹⁴ was faithfully followed by courts in Indonesia. It was occasionally, either by mistake or

11. The referenced article number is for the Dutch Civil Code (old); its Indonesian counterpart is INDONESIAN CIV. CODE 1365.

12. The *Cohen-Lindenbaum* case, Hoogerechtshof (court of appeal) of Amsterdam, March 18, 1918, *N.J.* 1918, at 1094; see also A. PITLO, HET VERBINTENISSENRECHT NAAR HET NEDERLANDS BURGERLIJK WETBOEK 218-219 (3rd print. 1952).

13. The *Cohen-Lindenbaum* case, Hoge Raad, January 31, 1919, *N.J.* 1919, at 161; it was said that the aim and consequence of the decision was like the introduction of a new *Book* in the civil code. See also H.F.A. VÖLLMAR, INLEIDING NEDERLANDS BURGERLIJK RECHT, N.V. 467 (Uitgevers-Maatschappij W.E.J. Tjeenk Willink, Zwolle, 1955).

14. See *supra* note 6.

design, used by plaintiffs to expand the reach of the special tort of insult. On May 24, 1999, one year after the fall of president *Suharto*, *Time Magazine* came out with an issue covering the financial exploits of a family who had been in power in Indonesia for over 32 years.¹⁵ The coverage used terms and phrases such as:

- (i) *Suharto Inc.*
- (ii) *How Indonesia's longtime boss built a family fortune;*
and
- (iii) *A staggering sum of money linked to Indonesia had been shifted from a bank in Switzerland to another in Austria, now considered a safer haven for hush bank deposits.*

The family sued *Time* for libel. The case was thrown out by both the court of first instance¹⁶ and the court of appeal.¹⁷ The Supreme Court, however, overruled the lower courts' decisions and awarded damages in the staggering amount of Rp. 189 trillion.¹⁸ In its decision, the panel of Justices¹⁹ adopted plaintiff's argument that the lower courts failed to take sufficient note of plaintiff's brief in their reasoning for rejecting the cause of action. Lawyers for the plaintiff filed their double-barreled claim by using the general tort article 1365 concurrently with the special tort article 1372 on *insult*. Civil Code Article 1365 was resorted to for its expansive reach pursuant to the 1919 Dutch Supreme Court decision.²⁰ Obviously, Article 1372 was employed not merely because it is the legally designated basis for defamation suits, but more importantly because it allows plaintiff to claim both quantifiable and verifiable damage, and whatever amount of money it takes to restore the good name and reputation of the victim. Having taken advantage of the wide reach of torts pursuant to *Cohen vs Lindenbaum*, plaintiff proceeded to substitute the doctrine of *objective criteria* for the strict requirement under Criminal Code Article 310, to prove that the defendant had

15. Major-General *Suharto* seized power in March 1966 and was forced to step down in 1998.

16. *Suharto v. Time Inc.*, Central Jakarta District Court, June 6, 2000, Decision No.338/PDT.G/1999/PN.JKT.PST.

17. *Suharto v. Time Inc.*, Jakarta High Court, March 16, 2001, Decision No.551/PDT/2000/PT.DKI.

18. *Suharto v. Time Inc.*, Supreme Court, August 30, 2007, Decision No. 3215K/PDT/200. The Rp.-US\$ exchange rate at the time was approximately Rp.10.000,- to the US\$.

19. The panel consisted of a military judge, acting as chairman of the panel, and two religious court judges.

20. *See supra* note 11.

committed the defamatory act deliberately. The doctrine originated in the cause-and-effect theory of the general tort. It was alleged that the modern theory of *objective criteria* has superseded the ancient *dolus* and *animus injuriandi* concepts of the Criminal Code. The *objective criteria* theory would have the actor liable if he was aware that the impact of his deed would result in a specific effect on the victim. In the heat of an international campaign against corruption, it wasn't easy to assess the specific effects of an investigative report on a fallen leader who had been ill for some time.²¹ Domestic and international coverage of the accumulated wealth of Suharto's family prior to *Time's* May 1999 issue had been widespread and intensive with no noticeable reaction from either Suharto himself or his family.²²

The Supreme Court almost paraphrased plaintiff's brief, overruled the lower courts' decisions, took over the matter, and awarded damages in the exact amount demanded by plaintiff. Upon judicial review a different panel of judges of the same court overruled the decision, and affirmed the lower courts' decisions. The court held that *Time* fulfilled norms governing the activities of

21. Suharto has been in ill health before his forced retirement. BBCIndonesia.com reported on May 19, 2006 that the fallen leader has had intensive testing done during a 3-day stay (July 9-11, 1996) at the Heart Center in Bad Oeyenhausen, Germany; he suffered a light stroke on July 20, 1999 and was rushed to the hospital, and since then had been in and out of hospital for bleeding intestines, appendicitis operations, pace-maker implant, lung infection, difficulty in breathing, and high fevers. In August 2002 the Indonesian Supreme Court ordered the suspension of court proceedings against Suharto pending an examination on his condition of frequent lapses of memory, emotional flare-ups due to irritation caused by incapacity to express thoughts in words, and speaking difficulty reducing communication to 4 words at a time. See on the late president, IndonesiaNow BlogSpot, available at <http://theindonesianowulasan.blogspot.com/2008/01/jejak-soeharto-di-rumah-sakit.html> (last visited July 10, 2010).

22. Note that the *Time* publication at issue was the investigative report appearing in its Volume 153, No. 20, of May 24, 1999. That was preceded by the daily MERDEKA on September 15, 1998 likening Suharto to the Pharaoh depicted in religious texts as the epitome of evil and sinfulness; the daily KOMPAS on November 17, 1998 carrying a report that the assembly of all university rectors in the country demanded the tracing of Suharto's assets; the newsweekly magazine GATRA on August 15, 1998 had a caricature on its cover depicting a drowning Suharto in a basket with US\$100 bills and the caption in big letters *Assets of Cendana [i.e. Suharto's private residence] in Switzerland and Austria*; THE FAR EASTERN ECONOMIC REVIEW *A Monopoly is Forever* (February 26, 1987); THE SYDNEY MORNING HERALD (April 6, 1998): SUHARTO Inc.; *Things Fall Apart*, THE FAR EASTERN ECONOMIC REVIEW (May 13, 1999); and many more publications.

the press, and the content and wording of the coverage were within the scope of journalistic ethics. It concluded that the investigative report in question did not meet the requirements for it to be adjudged an unlawful act.²³ The Judicial Review panel, headed by Chief Justice *Tumpa*, indicated that the May 24, 1999, *Time* issue should be seen within the context of the national anti-corruption campaign. The court stated that the media's depiction of former president *Suharto* as a target of investigation must not be deemed an intent to defame. It was the People's Consultative Assembly, the nation's highest political authority, which passed a resolution mandating the investigation of the former president.²⁴ The Court finally ruled that defamation suits should be exclusively filed under Civil Code Article 1372.²⁵ That seems to confirm the *communis opinio doctorum* that for tort without deliberateness the plaintiff is directed to seek remedies offered by Civil Code Articles 1365-1371, and that suits against deliberate insults are dealt with by Civil Code Articles 1372-1380, with specific reference to Criminal Code Articles 310 *et seq.* It has led scholars to refer to Civil Code Articles 1365-1371 as the *lex generalis* of tort, and Articles 1372-1380 as the *lex specialis*²⁶ for the specific tort of insult.

The distinction is of special importance for pecuniary and procedural purposes. Under Civil Code Articles 1365-1371, plaintiffs may only sue for damages which are quantifiable and verifiable. These must be real, calculated in detail, and supported by evidence. The general tort articles do not support claims for immaterial damages unless the tort resulted in a death or permanent disability.²⁷ Claims for immaterial damages to restore

23. The Supreme Court's Judicial Review decision is cited as No.273PK/PDT/2008 of April 16, 2009.

24. PEOPLE'S CONSULTATIVE ASSEMBLY RESOLUTION (*Ketetapan*, sometimes abbreviated as *Tap*) No. XI/MPR/1998 of November 13, 1998.

25. This view finds considerable support in the leading texts on private law. See C. ASSER, *HANDLEIDING TOT DE BEOEFENING VAN HET NEDERLANDS BURGERLIJK RECHT, Derde Deel – Verbintenissenrecht, Tweede Stuk: De Overeenkomst en de Verbintenis Uit de Wet*, bewerkt door Mr. L.E.H. Rutten, N.V. Uitgevers-Maatschappij, W.E.J. Tjeenk Willink, Zwolle (1954), at 619.

26. Jan de Meij, *Freedom of the Press and Defamation in the Netherlands*, unpublished paper submitted at *Law Colloquium 2004: From Insult to Slander, Defamation and Freedom of the Press*, Jakarta, July 28-29, 2004.

27. INDONESIAN CIV. CODE 1370 and 1371 allow for claims for loss of support for the family of the victim of a tort resulting in death, and for claims for the loss of livelihood in case the victim is incapacitated for life due to injuries sustained as a consequence of the tort.

the victim's good name and reputation must be based on an action against insult, and the suit must be based on Civil Code Articles 1372-1380.

Another feature of importance in distinguishing the *lex specialis* of the tort of insult from the general tort provisions, the *lex generalis*, is that the former is not self-contained within the private law system. In order to define *insult*, one has to consult the Criminal Code. Historically, Civil Code Articles 1365-1380 were part of the original civil code which was promulgated in 1847.²⁸ But articles 1372-1380 were substantially amended in 1917 linking them closer to the Criminal Code and the Criminal Procedural Code.²⁹ The amendments were announced in the *State Gazette* which promulgated the Dutch Criminal Code in the colony.³⁰ Six of the 9 articles on defamation have clear links mentioned in the articles with the Criminal and Criminal Procedural Codes.³¹ Only two of the general tort articles share this feature.³² Finally, the most obvious distinction between the general tort of Civil Code Articles 1365-1371 and the special tort articles 1372-1380 is that the former insist on the presence of the element of *fault, culpa*, while the latter come into motion upon proof of *dolus, deliberateness, the animus injuriandi*.

Note that the Court of First Instance, adjudicating the *Suharto vs. Time* suit, found no cause of action in its decision on June 6, 2000, and that the Court of Appeal affirmed the lower court's judgment on March 16, 2001. There was a wait of no less than 6 years before a Supreme Court panel overturned the lower courts' decisions, and awarded a spectacular Rp. 1 trillion damages to the plaintiff. In the meantime, another celebrated case was making its way to court.

28. STAATSBLAD (State Gazette) 1847 No. 23.

29. Reference to the changes are provided (between brackets) in lines before the texts of articles 1372, 1373, 1375-1377, and 1380.

30. STAATSBLAD 1917 No. 497.

31. Explicit references, at the end of the wording of the article, are called *schakel bepalingen* (linked provisions) to either the criminal code and the Criminal Procedural Code are to be found in INDONESIAN CIV. CODE 1372, 1373, and 1376-1379.

32. INDONESIAN CIV. CODE 1365 on general tort refers to criminal code article 382bis on unfair competition or fraudulence in competition, introduced through STAATSBLAD 1920-556, quite possibly in response to the *Cohen-Lindenbaum* decision, while INDONESIAN CIV. CODE 1368 (on liability of owners of animals for harm done by the animals) stipulates a link to criminal code article 490 regarding the control of dangerous animals.

Big fires, in traditional bazaars, in Indonesia are almost always followed by the construction of modern shopping centers, supermarkets, and malls. The fires are as a rule preceded by failed negotiations to persuade existing tenants to move to temporary quarters pending the completion of their new, and more expensive shops in the newly built premises. There has always been a suspicion, but no proof, that the developers somehow had something to do with the fires. In 2003 a major fire broke out in *Pasar Tanah Abang*, probably one of Southeast Asia's largest garment and textile markets. *Tempo*, the leading national newsweekly, covered the fire and mentioned the name of a developer with close links to the army as a party who was highly interested in a new *Pasar Tanah Abang* project.³³ Sensing the hidden accusation, and irritated by the use of certain terms in the coverage, the developer sued for libel. The Central Jakarta Court of First Instance agreed with plaintiff that the investigative report was libelous, and awarded damages in the amount of Rp.500.000.000,- (five hundred million rupiah),³⁴ and a penalty of Rp.300.000,- (three hundred thousand rupiah) for each day of delay in paying the awarded sum. The court also ordered the placement of a public apology in several newspapers with a national circulation.³⁵ The defendant appealed, and the High Court overruled the lower court's decision and took over the adjudication of the matter. The court rejected the damages claim for reasons that plaintiff had not submitted detailed and convincing quantification in arriving at the claimed amount. The Court also ruled that *Tempo* had correctly balanced out its freedom of expression by providing for the citizen's right of response.³⁶ In 2005, the Indonesian Supreme Court rejected plaintiff's appeal and affirmed the High Court's decision.³⁷

IV. DISREGARD OF THE "PUBLIC INTEREST" DEFENSE

In order to be successful with a suit for material and immaterial damages under Civil Code Article 1372, a court of law must

33. THE WEEKLY TEMPO (March 3-9, 2003).

34. Equivalent to US\$53,000 at the rate prevailing in June 2010.

35. Tomy Winata vs Tempo, Decision of the Central Jakarta Court of First Instance, No.233/Pdt.G/2003/P.N. Jkt.Pst., on March 18, 2004.

36. Decision of the Jakarta High Court No.314/PDT/2004/P.T. DKI, dated September 3, 2004.

37. Decision of the Supreme Court No.903K/PDT/2005, dated February 9, 2006.

establish that the defendant's act meets the requirements set forth in Criminal Code Articles 310 *et seq.* The act must be:

- (i) deliberate;
- (ii) an assault against the good name and reputation of the victim;
- (iii) an accusation of a certain fact;
- (iv) with the clear aim to publicize the fact.

Pre-independence court decisions had borne out that for the printed media the requirements set out above under items (i) and (iv) were deemed met by the mere fact of publication.³⁸ Although the *public interest* motive is the only way to escape punishment, the concept is underdeveloped due to the scarcity of decisions establishing guidelines. *Public interest* is known more for what it is not, than what it is. During the colonial era, court reports have recorded only one case where defense of *public interest* was successful.³⁹ The matter involved an editor of a daily newspaper published in Surabaya, a major harbor city in East Java. The editor allowed two unsigned articles to appear in his paper warning readers that a city council member scheduled to be installed was facing two customs suits, and should never be admitted to sit on the council. Notwithstanding the warnings the installation was carried through. This prompted the editor to release a harsh article criticizing the government department. The colony's highest court rejected the prosecution's count of defamation, but affirmed the lower court's finding that the editor afforded the offender, the writer whose identity the editor refused to disclose, with the opportunity to publish the punishable article. The *public interest* excuse was admitted, but the editor received a 3-day jail sentence for being an accessory to the offence committed by the unidentified offender. In addition for being locked up for 3 days, he was charged the costs of the proceedings in both the lower and

38. None of the court decisions cited in this essay raised the issues of *deliberateness* and *publicity* which are central to a determination whether a criminal code article 310 "insult" was indeed committed. There is solid doctrinal support for this position in HAZEWINKEL-SURINGA, *INLEIDING TOT DE STUDIE VAN HET NEDERLANDSE STRAFRECHT* 584 (15 ed., updated by J. R Emmelink, 1966), and II T.J. NOYON, *HET WETBOEK VAN STRAFRECHT* 256-257 (6th ed., updated by G.E. Langemeijer, 1954).

39. Hoogerechtshof (the highest court in the colony) van Nederlandsch-Indië, Second Chamber, Decision July 30, 1924 regarding the defamation of a public authority or complicity to it, on appeal regarding the defense of having acted in the public interest, *T.121*, at 451.

the appeals courts. *Truth* and the *public interest* were not considered judicially sufficient reasons to let him walk free.

V. THE HORSE, THE RIDER, AND THE LAW

The term *pers delict* or “press offence” does not constitute a separate class of offences within the Indonesian criminal law system. Most of the offences termed *pers delict* are general offences committed by persons, including journalists, writers, editors, and publishers. Most of the provisions curtailing media freedom are to be found in the Criminal Code.⁴⁰

Using the pen-name *Multatuli*,⁴¹ Eduard Douwes Dekker, wrote *Max Havelaar, or The Coffee Auctions of the Dutch Trading Company*, a novel dealing with plunder, oppression and extortion of the Javanese by their feudal masters. The book, first published in 1860, accused the colonial authorities of knowing about the mistreatments, and yet choosing to do nothing against it. Translated in 34 languages, an English version came out in 1868. It was reported that a shiver went through Europe when the book appeared.⁴² The author lost his job in the colonial administration, and wrote many letters to friends and editors. One of those letters contained the following famous phrase: “Insulinde⁴³ is a magnificent horse. Its rider is a thief.”⁴⁴

One Sunday morning at 09:00 on September 3, 1922, the Indies Social Democratic Party convened a congress, at the Oriental Movie Theatre, in the West Javanese town of Bandung. There, on

40. Criminal code articles 61 and 62 on requirements to be met if editors and publishers are to be exempted from prosecution; Criminal code articles 207 and 208 on insults directed to state authorities (the articles release the judge from an optional obligation of granting the right of defendants to prove their allegations); criminal code articles 310-328 defining insult, libel, slander, deliberateness, and the punishments for committing the offence; criminal code articles 155-157, the so-called *hatred-sowing* articles against statements, writings, posters containing expressions of hatred, hostility, and contempt against government, or ethnic, religious, and racial groups; criminal code article 160 prohibiting the advocacy of civil disobedience.

41. Latin for *I have suffered much*.

42. The first English translation from the original manuscript was done by Baron Alphonse Nahuijs, Edmonton & Douglas (Edinburgh, 1868); see a Dutch edited version, available at <http://cf.hum.uva.nl/dsp/ljc/multatuli/havelaar/index.html> (last visited July 10, 2010).

43. A poetic name for Indonesia, the largest archipelago in the world.

44. *Letter written to G.J.A. Boulet*, April 5, 1876, published in volumes of collected writings of the author cited as VW XVIII, at 333.

the door handle of the movie house, young party enthusiasts hung a white cardboard with precisely that phrase written in big letters. The prosecution moved to indict on the basis of Criminal Code Article 154, the so-called *hate-sowing* article. Article 154 prohibits people from publicly expressing hatred, hostility, and contempt against government, or population groups in the colony. The subsequent articles add the requirement of intentional publicity, and expand the target audience to population groups distinguished by race, religion, ethnicity, descent or nationality. The court found the phrase insulting. It also found the presence of elements required under article 154, including the aim to publicize or increase exposure in view of the location of the cinema on a busy public road by the town square.⁴⁵ The defendants were fined f300, which was convertible to a 2-months jail term if the offenders failed to pay up within two months of sentencing. On appeal, the Court of Appeal affirmed the lower court's judgment.⁴⁶

Article 154 of the Criminal Code used to read “. . . whosoever arouses or promotes feelings of hostility, hatred or contempt . . .” That was indeed how it read in the Dutch Criminal Code. In 1918, at the behest of the then Dutch Minister of Colonies, changes were made to the colony's version of the provision. It was then made to read “. . . whosoever expresses feelings of hostility, hatred, and contempt . . .” The change did away with the requirement of evidence of the prohibited arousal and promotion. The erstwhile material offence was turned into a formal offence. Henceforth, it was enough for a person to merely express the forbidden feelings, for that person to be sentenced to a jail term up to a maximum of 7 years. It was only on July 17, 2007, and 62 years after independence, that the Constitutional Court declared Criminal Code Articles 154 and 155 in contravention with the human rights guarantees in the Constitution of the Republic of Indonesia.⁴⁷

Emerging from a different era in the evolution of perceptions about government and the state, the Indonesian Criminal Code carries provisions which are excessively hostile to the media. Articles 207 and 208 stand out as being particularly ill-disposed to

45. Raad van Justitie Batavia, Second Chamber, April 6, 1923, *T.* 120, at 496-500.

46. Hooggerichtshof, Second Chamber, June 6, 1923, *T.* 120, at 496 and 500-501.

47. Constitutional Court Decision No. 6/PUU-V/2007. The Decision was limited to criminal code articles 154 and 155. The request to find the notorious criminal code articles 207 and 208 (insults against public authorities) unconstitutional was rejected.

freedom of opinion and social critique. The articles deal with insults directed against government agencies, and dispense with the basic principle that only natural persons are capable of feeling insulted. Fictitious persons, like the limited liability, can make insulting allegations through members of its board of management,⁴⁸ and can even incur damages caused by defamatory remarks at their expense. However, the cause of action does not lie with the special tort of insult, but rather with the general tort regime of Civil Code Articles 1365-1371. With Criminal Code Articles 207 and 208, we have a corporate entity called government, or its agencies capable of feelings thought to be invested exclusively in the human person.

Early 1938, the colony was feasting. The Royal House of Orange-Nassau was expecting the birth of *Princess Beatrix*, and the daily newspaper *Keng Po* was at it again. It published an article under the heading of *For the Knowledge of the Resident of Serang*.⁴⁹ A *Resident* was the highest Dutch colonial authority in the *residency*, a region which would now be equivalent to either a province, or half of it, depending on the area's economic importance to the colonial administration. The article told the story of festivities prepared, by the *Bupati*,⁵⁰ of Pandeglang in the town square using local bamboo and manpower without paying for either. The poor villagers, already living a subsistence life, were sunk deeper into poverty, but nobody dared to protest because the order was given by the *Bupati* himself. The article ended with the sentence: "If that were true . . . why make the people sad when jubilation is in order for the House of Orange-Nassau?"⁵¹

Criminal Code Article 207 was used by the prosecution because the article does not afford the judge with the prerogative of allowing the defendant to prove the truth of his allegation. The use of the article was intimated in private to the scholar who wrote the end note to the law report on the decision as *de rigueur* among prosecutors in the colony.⁵² The court of first instance rejected the

48. As with employer's liability for tort committed by employees, the limited liability company may escape liability for a director's libelous act if the act was committed outside the scope of work for which the director was contracted to perform.

49. *The Keng Po (Pandeglang)* case, Raad van Justitie Batavia, November 3, 1938, *T.* 149, at 67.

50. The *Bupati* is the highest ranking authority in the hierarchy of the local indigenous bureaucracy.

51. *See supra* note 46.

52. *Id.* at 74.

application of Criminal Code Article 207 for the simple reason that the insult was directed to the person of the *Bupati*, not to the Netherlands Indies administration as a body.⁵³ The court ruled that Criminal Code Article 310 was the more correct article to apply to the matter at hand. The prosecution was not satisfied and appealed to the colony's highest court. On November 29, 1938, the colony's Court of Appeal, Second Chamber in Batavia, ruled that the lower court had erred in its opinion that the insult was directed to the person of the *Bupati*, and not to the organ of the administration: “. . . Wasn't the aggrieved party called the Regent of Pandeglang?,” the court queried. “. . . It was indeed directed to a person, to be precise. But it is a person equipped with a public authority!”⁵⁴ Article 207 applied. Seventy years passed. *Insulinde*, the magnificent horse had become independent. The colonial rider had been chased away. He didn't take 207 with him. The new rider likes it.

In October 2007, a writer by the name of *Bersihar Lubis* wrote a piece for the *Tempo Daily* criticizing the burning of banned books per order of the Attorney General.⁵⁵ The heading of his article was “The Story of the Dumb Interrogator.” *Lubis* wrote about the interrogation by prosecutors of a certain *Joesoef Isak*, publisher of novels written by the left-leaning author *Pramoediya Ananta Toer*. *Isak* recounted to *Lubis* the reason given him by the prosecutor why he was summoned for the interview: “Pramoediya's books have the smell of Marxism . . .” The prosecutor later intimated that he actually carried out the summons and interview because his superior wanted him to. Personally he liked *Pramoediya's* books. To this *Isak* commented to *Bersihar Lubis* that a decision on the basis of a command is *dumb*. It was the inclusion of this word, *dumb*, in his article that got *Lubis* into trouble. The prosecutor's office in the *Depok* district reported the matter to the police. Eight months later *Bersihar Lubis* attended his trial at the *Depok* court of first instance for insulting a government agency. The court found him guilty of libel and sentenced him to a jail term of 1 month with a probationary period of 3 months, a considerably lighter punishment than the 8 months demanded by the prosecution.⁵⁶ Both parties appealed, and the

53. *Id.* at 65-68.

54. *Id.* at 69.

55. KORAN TEMPO, March 17, 2007.

56. The *Bersihar Lubis* case Decision, The Depok Court of First Instance, February 20, 2008 (unpublished).

High Court affirmed the lower court's decision.⁵⁷ At the time of writing this essay, the case is still on final appeal at the Supreme Court.

Bersihar Lubis and friends challenged the constitutionality of the jailing provisions in the criminal code before the Constitutional Court, particularly in the face of Indonesia's constitutional provisions protecting the freedom of expression and freedom from fear.⁵⁸

The request was for a material review of the jailing provisions of Criminal Code Articles 310, 311, and 316. The petitioners also requested a review of the constitutionality of Criminal Code Article 207 due to its implication of the privileged position granted to government agencies before the law, a violation of constitutional principle of *equality before the law*. In its decision on August 15, 2008 the Court found each and every petitioned criminal code articles in accord with the Constitution upon the following reasoning:

- (i) no freedom may be exercised without limitation;
- (ii) freedoms may be limited by considerations of public order, moral and public health, national security, rights and reputation of others, and limitations based on necessity in a democratic society, on the condition that the limitations must be prescribed by law;
- (iii) "The need for separate protection of public officials in the exercise of their duty (is warranted) because in their function, besides involving the subjective element of the individual person of the official, there is also an objective element of the institution which requires credibility, authority, and capability in order to effectively perform their public duties."⁵⁹
- (iv) the request relating to the preference of fines over incarceration has to do with the judicial application of the law, not with its constitutionality.⁶⁰

57. Mr. Hendrayana of the Press Legal Aid Institute told the author that on May 24, 2010 the High Court affirmed the Depok District Court (Court of First Instance) decision.

58. Request for review dated May 7, 2008 listed by the Court Registrar on May 12, 2008 under registration Number 14/PUU-VI/2008, corrected on June 3, 2008.

59. Constitutional Court Decision Number 14/PUU-VI/2008, August 15, 2008, at 286.

60. *Id.* at 287.

The decision contrasts unfavorably with the views of the commentator expressed in the End Note to the decision of the colonial Hooggerechtshof (Second Chamber) of November 29, 1938 in the Keng Po (Pandeglang) case.⁶¹ Commenting on the Court's support for the use of Criminal Code Article 207 by the *standing magistrate* to catch offences which according to the Dutch Criminal Code are not punishable, Professor W.F.C. van Hattum declared that such a position contravenes the very system of criminal law. He referred to Criminal Code Article 312 Section 2 which provides that when a government official is accused of a certain fact in the performance of his duties, the law allows the accuser to prove that fact. It violates this system if that right to prove the accusation is withheld by prosecuting the accuser pursuant to a statute not written for this case. The law was introduced exclusively to cover cases of insult which are not punishable according to Dutch law. The distinction between insult to the person and insult to the authority of the person is not only difficult to discern, it is also not acceptable if offenders of article 207 are not guaranteed the right of not being punished if they acted in the public interest. The right to critique is to some extent guaranteed under article 312 section 2. ". . . If this guarantee is rendered worthless by simply disqualifying the application of article 310, and replacing it by article 207, we would be taking another step on the road to the police-state."⁶²

VI. LEX SPECIALIS, OR "DROIT DE RÉPONSE"?

For over four decades, the Indonesian press suffered closures of newspapers and imprisonment of journalists under either oppressive dictatorships, or harsh treatment by the law. The day of liberation came, or so it was widely assumed, when a new press law was promulgated in 1999.⁶³ The law states that under no circumstances will there ever be any closures of newspapers by the state.⁶⁴ Any measure which has the effect of curtailing the freedom of the press will be fined.⁶⁵ Victims of libelous publications have the right to respond, and the media publishing the libelous allegations have the obligation to fulfil that right.⁶⁶

61. *T.* 149, at 71-74.

62. *Id.* at 74.

63. Law No. 40 of 1999 Regarding the Press.

64. *Id.* at Article 4, Section (2).

65. *Id.* at Article 18, Section (1).

66. *Id.* at Article 5, Sections (1) and (2).

The law also establishes a Press Council to act as a watchdog of ethics of journalism.⁶⁷ The government, the media, and parliament celebrated the law as the *lex specialis* for all possible offences committed by the media. The Press Law was widely hailed as governing all activities of the print media and, therefore, rendering inapplicable all other laws relating to the press. In the ensuing debates, it was mentioned that even if no consensus can be reached about its *lex specialis* status the matter can be settled simply by a Supreme Court Circular declaring it to be so.⁶⁸ The courts disagree, and rightly so.

The Press Law of 1999 was never meant to function as a self-contained and exclusive regime governing the media. It is by no means a collection of primary rules on a specific matter demanding priority over secondary rules provided by a *lex generalis*. The law itself in two instances, one in the body of the text, and another in its official elucidation refers to other laws as still applicable.⁶⁹ A cursory examination would also show that the Press Law bears some resemblance with the nineteenth century *Reglement op de Drukwerken*,⁷⁰ a piece of legislation normally referred to in legal texts as the *droit de réponse*. It provides a right for victims to respond to defamatory press coverage.⁷¹

An interesting decision on this matter was issued by the Batavia Court of First Instance⁷² on March 7, 1935.⁷³ The court ruled that the *droit de réponse* of Article 19 of the *Reglement op de Drukwerken* aimed at providing the victim of libelous acts with an opportunity to defend himself within the forum of the offender by way of a response to reach the same readers. A complaint filed with the court, in the matter of an insult, on the other hand, merely aims to enable the state to prosecute a punishable act which, absent

67. *Id.* at Chapter V, Article 15.

68. KOMPAS DAILY, July 19, 2004, at 7.

69. Article 19 of Law No. 40 of 1999 provides that all provisions of law bearing on the press which were still in effect at the time the Press Law was promulgated will remain so insofar as they do not conflict with, or have not been replaced by new laws arising out of the Press Law. The official elucidation of article 12 of the law stipulates that criminal liability is still governed by the criminal code.

70. *Regulation on Printed Matter*, STAATSBLAD 1856-74, after being reduced from 35 to 10 articles.

71. *Id.* at article 19.

72. The court known as *Landgerecht* was, much like the *Raad van Justitie*, the court of first instance for Europeans during the German occupation of the Netherlands.

73. *T.* 142 at 773.

a complaint would not be possible. The *droit de réponse* and the filing of a complaint with the court are two causes which may be pursued independently from each other. The filing of a complaint with the court in no way bars the plaintiff from making use of his right to reply.⁷⁴

There may well have been a time when the belief prevailed that the *Reglement op de Drukwerken* was some kind of a special law applicable to special offences, sometimes called *pers delicten* or press offences, committed by a special group of people such as writers, editors, publishers, and even printers. The *Reglement* itself was a solid 35-articles piece of legislation when it was issued in the mid-nineteenth century. Looking at the regulation now shows that 16 of the 35 articles were withdrawn, while 9 articles were repealed with the entry into force of the Criminal Code. Punishable offences committed by the printing press, which were originally in the *Reglement*, were taken out and put in the Criminal Code. The measure was probably motivated by the difficulties in defining press offences. To be sure, it represents a certain group of offences, but as a law category it is considered too limiting to deserve the attribute of a *lex specialis*. Offences committed by using the print media are only part of a larger category of offences involving, among others, public disclosures of thoughts and feelings. Press offences strictly relate to the means of such disclosures, not to the punishable offence of the disclosure itself. Articles in the Criminal Code prohibiting disclosure of secrets, for instance, cannot be categorized as press offences as understood by the law. Neither publicity, nor the public exposure of a thought is required under those articles. The 9 articles removed from the *Reglement op de Drukpers* were not considered press offences proper, but were offences of a more general nature which could be committed through the print media.

VII. SOLUTIONS, COMPARATIVELY SPEAKING

Most code provisions on defamation are more or less similar in civil code countries in Asia, be they Germanic or French in origin. In South Korea, both the Constitutional Court and the Supreme Court have chosen the creatively path-breaking route to respond to the changing times. On June 24, 1999 the Korean Constitutional Court pronounced that the standard of scrutiny in the criminalization of libel should be more strictly applied when the

74. *Id.*

victim is a private person rather than a public figure, and the matter alleged is of private rather than of public concern.⁷⁵ Matters of public concern, thus the Court, have to do with the public right to know, in order for the public to responsibly participate in political decision-making in a democracy. The Court underscored the chilling effect of criminal libel law on freedom of the press:

If the requirement of libel defenses (truth and only for public interest) under the Criminal Code are too narrowly applied, the scope of criminal sanctions will expand and press freedom will shrink. If criminal punishment is used to preclude criticism and debates about matters of public concern, freedom of the press will be suffocated and the balancing scale will be tipped too far towards reputational protection.⁷⁶

In both Korea and Japan, “truth and the public interest” are formidable defenses against Criminal Code punishment. In a decision dated February 27, 2004 the Korean Supreme Court held that a defendant is not liable if there is proof of the truth of his allegation, or the belief that the accusation is true notwithstanding the absence of evidence.⁷⁷ This applies even if there is only a reasonable ground to believe that the defamatory allegations are true. The burden of proof, however, remains with the media.

Similarly, the Japanese Supreme Court held in a case decided as early as June 25, 1969 that the defendant needs only to prove that the statement was made under the mistaken but reasonable belief, based on reliable materials and a reliable source, that it was true.⁷⁸ Statements made in good faith are not actionable because they do not indicate a criminal intent on the part of the publisher.

The Japanese also made a couple of conceptual refinements. The ‘*truth*’ defense concept, for instance, applied only in cases where defamation was inflicted on public figures. The private

75. Cited as “Constitutional Court, 97 Honma 265, June 24, 1999,” in Kyu Ho-youm, *Press Freedom and Defamation in South Korea*, unpublished paper submitted at *Law Colloquium 2004: From Insult to Slander, Defamation and Freedom of the Press*, Jakarta, July 28-29, 2004, at 26.

76. *Id.* at 27-28.

77. *Id.* cited as “Supreme Court 2001, Ta 53387, February 27, 2004”, at 25.

78. *The Yukan Wakayama Jiji* case, cited as “23 Keishu 975, Supreme Court, June 25, 1969” in Masao Horibe, *A Draft on Defamation and Freedom of the Press in Japan*, unpublished paper submitted at *Law Colloquium 2004: From Insult to Slander, Defamation and Freedom of the Press*, Jakarta, July 28-29, 2004, at 25.

person-public figure dichotomy was removed from its black-and-white realm. In 1981 the Japanese Supreme Court held that even the private behavior of a private person could be of public concern depending on the nature of the person's social activities and the extent of his influence in society.⁷⁹ The decision concerned improprieties carried out by a *Daisaku Ikeda*, honorary chairman of a Buddhist lay organization, towards two women members of the organization.

Japan's doctrine of popular sovereignty, a prominent principle in the nation's constitution, provides the rationale for the reduced protection of public officials against allegations thrown at their feet because they are "servants of the whole community" and, therefore, subjected to the people's will to hire or fire.⁸⁰ The doctrine is of particular interest because most national constitutions carry the same principle, but very few gave it the legal interpretation as far-reaching as Japan's.

The Indonesian judiciary is timid, cautiously conformist, more conventional, and less progressive compared to their East Asian counterparts. They prefer not to lead. In this regard, the Constitutional Court is more consistently so, while the Supreme Court occasionally issues a serendipitous decision or two. The latter's decision on the *Suharto vs. Time* review matter⁸¹ was both painful, since the Court had to censure its own decision,⁸² and clear-sighted. It annulled the Supreme Court decision of August 30, 2007, viewed *Time's* coverage within the context of national campaigns against corruption, saw no intention of *Time* to defame Suharto mainly because the People's Consultative Assembly in its resolution had mandated the investigation of Suharto's assets. A major issue it cleared up was that suits for damages due to insults must be exclusively conducted pursuant to Civil Code Article 1372.

Compared to the image of valiant resolve emerging from the *Time* review decision, the outcome of one of the many *Tempo* matters came across as *listless*. In March 2003, in the wake of the *Tempo* coverage of the big fire at *Pasar Tanah Abang*, the office of the weekly news magazine was visited by a group of angry people. The editors of the magazine felt themselves threatened and

79. *Id.* at 24-25, the Gekkan Pen. Case, cited as "1000 Hanrei Jiho 25, Supreme Court, April 16, 1981."

80. *Id.* at 26.

81. *Supra* note 23.

82. *Supra* notes 18, 15, and 16.

reported the matter to the police. Coming out from the police station, a senior editor explained to the media who were gathered outside that *Tempo* demanded the *attack* to be fully investigated, lest the country would fall into the hands of *gangsters*. The businessman whose employees paid the visit to *Tempo*'s offices felt insulted and filed a suit under Civil Code Article 1372 against the senior editor, the daily newspaper *Koran Tempo* which reported the senior editor's statement, and the company publishing the newspaper.⁸³ The damages demanded ran up to Rp. 1 billion for actual damage incurred, and Rp. 20 billion for restoring good name and reputation.⁸⁴ Additionally, plaintiff demanded that defendants issued public apologies in 4 daily newspapers, including the defendants' newspaper, the attachment for security purposes of the residence of the senior editor and the newspaper's office spaces, and a daily late performance penalty of Rp.10 million. The court of first instance found the defendants guilty of the tort of insult, rejected the plaintiff's damages claims because of insufficient precision in itemizing, calculating the amount demanded. The court lifted the attachment of the senior editor's residence, but ordered the defendants to issue the public apologies with the claimed daily late performance penalty.⁸⁵ The Jakarta Court of Appeal upheld the lower court's decision, but the senior editor lodged an appeal to the Supreme Court. The Court rejected the appeal,⁸⁶ and Chief Justice *Harifin Tumpa* suggested that the editor offer his apologies to the plaintiff.⁸⁷ The Supreme Court decision vacated the Rp.1 billion fine, and reduced the daily Rp.1 million penalty for performance delays. Lawyers for the defendants were quick in their response that a Judicial Review will be lodged with the Supreme Court. *Harifin Tumpa*, Chief Justice

83. Tomy Winata vs Gunawan Mohamad (the senior editor), KORAN TEMPO (the daily newspaper), and P.T. Tempo Inti Media Harian (the publisher of the daily newspaper).

84. The Rp.:US\$ exchange rate in 2003 was between Rp.8897,20 (January) and Rp.8487,75 (December) according to x-rates.com, available at <http://www.x-rates.com/d/IDR/USD/hist2003.html> (last visited July 10, 2010).

85. Decision of the East Jakarta Court of First Instance No.180/PDT.G/2003/PN.JKT.TIM (unpublished).

86. No reports were available of either the High Court decision, or the Supreme Court rejection of the appeal. The information about the appeal and rejection of the appeal was published in VIVA NEWS of August 13-14, 2009, available at <http://nasional.vivanews.com/news/read/82892-ma-tak-gunakan-uu-pers>; and <http://nasional.vivanews.com/news/read/82694-goenawan-mohamad-ajukan-peninjauan> (last visited July 10, 2010).

87. *Id.*

of the Supreme Court, was asked why he chose not to reprimand the lower courts for not consulting the Press Council in arriving at their decisions,⁸⁸ as he recommended in a recent instruction. Justice Tumpa answered that no instructions were issued, only an appeal. Judges should not be told what law to apply as that would violate judicial independence, he said. When asked what was to be done when lower courts refused to comply with the appeal, he referred to the institution of the judicial review as a last resort.⁸⁹ It never came to that. The last news heard about the case was that plaintiff and defendants got together on October 6, 2009, had dinner, and made peace.⁹⁰

VIII. SOMETHING HAPPENED ON THE WAY TO FREEDOM

A focus on the work of the Constitutional Court produces glum perspectives not only because of its authoritarian proclivities evident in their decisions regarding the Blasphemy Law,⁹¹ the Pornography Law,⁹² and maintenance of the Film Censor Board.⁹³ Reading through the detailed and timely produced reports of decisions it was not easy to suppress a sense of *déjà vu*. The tone in these decisions was paternalistic, gentle but steely, and convincingly set on a course of rolling back liberties perceived as having gone too far. The court meticulously maintained a clinical separation between the law on the books and its interpretation and enforcement by the police, the prosecution and the courts. Indonesia's Constitutional Court perceives its mandate to be limited to the constitutional review of positive law. The decisions impart the impression that no consideration was admitted of the general context within which the protected laws have been, and continue to be interpreted and enforced. That general context

88. On December 30, 2008, Chief Justice Harifin Tumpa issued Supreme Court Circular Letter No. 14 to all courts in Indonesia in which he recommended the judiciary to consult the Press Council on whether certain acts were or were not defamatory, and seek to mediate the conflict in accord with the provisions of the Press Law.

89. VIVA NEWS, August 14, 2009.

90. TEMPO INTERACTIVE, October 7, 2009, available at <http://www.tempointeractive.com/hg/nasional/2009/10/07/brk.20091007-201319.uk.html> (last visited July 10, 2010).

91. Constitutional Court Decision Number 140/PUU-VII/2009, April 12, 2010.

92. Constitutional Court Decision Number 10-17-23/PUU-VII/2009, March 25, 2010.

93. Constitutional Court Decision Number 29/PUU-V/2007, April 30, 2008.

discloses a field of abuses of power, arbitrary and selective enforcement of the law, and miscarriages of justice within a general atmosphere of corruption, collusion, and nepotism.

On the Corruption Perception Index list compiled by Transparency International for 2009, Indonesia occupies the 111th position on a list of 180 countries. The country shares the spot with Algeria, Djibouti, Egypt, Kiribati, Mali, Solomon Islands, and Togo. The recent exposures of widespread case brokerage activities involving the judiciary, the prosecution, and the police, have singled out the latter as the most corrupt institution in the country. Its latest exploit consisted of jailing a whistle-blowing police general, and the fabrication of indictments against two deputy heads of the Corruption Eradication Commission.⁹⁴ Two prosecutors and a judge were indicted for brokering a tax evasion case involving US\$1.6 million. The judge confessed to having received bribes to the amount of US\$ 5,000.⁹⁵ The head prosecutor at the Attorney General's office investigating a big corruption matter was caught red-handed receiving a bribe of US\$660,000.⁹⁶ To add spice to the context, on and around November 5, 2009, Chief Justice Mohamad Mahfud Md. of the Constitutional Court, ordered the Corruption Eradication Commission to deliver tapes to the Court the contents, of which had been circulating through mobile phones and computers. The 4.5-hour tapes, recording conversations between prosecutors, the police and a judge, were played in a court and exposed a conspiracy involving the law enforcement institutions and the person accused of siphoning off cash from a failed bank which was being bailed out with government money. The conspirators fabricated a bribery case against two deputy heads of the Corruption Eradication Commission. Coming out of the court room, Chief Justice Mahfud was interviewed and caught on TV saying how sad it was for him to witness law enforcers being controlled like animals by financiers. In retaliation against the playing of the tape, and saying unkind words about the police, the entire police contingent on personal guard duty to the Chief Justice and his family was withdrawn the next day.

94. THE JAKARTA GLOBE, October 5, 2009; THE JAKARTA POST, June 14, 2010.

95. THE JAKARTA POST, April 21, 2010; THE JAKARTA GLOBE WEBSITE, April 14, 2010.

96. Nurlis E. Meuko, *Misteri Aliran Dana Joko Versi Bibit*, VIVA NEWS, October 1, 2009, available at http://korupsi.vivanews.com/news/read/93712-misteri_aliran_dana_djoko_versi_bibit (last visited July 10, 2010).

The nine justices of the Constitutional Court do not work in a vacuum. The very same context is a continuing source of concern, worry, and fear for the ordinary citizen at the other end of enforcement. It is this fear that they brought to the Court when they asked for protection from the harshness, uncertainties, and abuses of colonial laws which are frequently interpreted and applied by less than caring police and the standing magistrature. Almost without exception, they have been turned away empty-handed. To wit, they have asked whether jailing journalists was not too excessive considering that they already have to suffer the obligation to abide by the victim's right of response, the hefty damages awards under Civil Code Article 1372, and the fines mentioned in Criminal Code Articles 310 *et seq.* Perhaps the jailing provisions could be found to be violating the *freedom from fear* protected by the constitution? The Court would have none of it.⁹⁷ They asked the Court whether it was possible at all to stick to the principle of equality before the law, and do away with the colonial *lèse majesté* clauses and have the law treat insults directed to the president and vice president the same way as insults aimed at the citizen. The Court seemed a bit moved, and bent over backwards to split the president and vice president in two. One part is to be the person of the president. If the person feels insulted, that part can resort to Criminal Code Article 310 *et seq* like everybody else. The presidential part of the person, however, is directed to Criminal Code Article 207, a no less colonial piece of legislation than the abrogated *lèse majesté* articles.⁹⁸ The decision assumes that a presidency is susceptible to feelings of being insulted.⁹⁹ None of the petitions, however, mentioned that the article violates the criminal law system. Nor did anybody raise the matter of a step-wise walk in the direction of the *police state* which concerned the writer of the end-note to the *Keng Po* (Pandeglang) case in 1938.¹⁰⁰

97. Decision of the Constitutional Court Number 14/PUU-VI/2008, August 15, 2008.

98. These would be Criminal Code Articles 134, 136bis, and 137. *See infra* page 20-21 for a scholarly comment on the popularity of criminal code article 207 by colonial prosecutors.

99. *But see*, the *Keng Po* (Pandeglang) case, at *infra* pages 18 and 19 ; one of the leading texts in Criminal Law insists that *insult* can only be inflicted against a natural or biological person, a principle faithfully maintained in all articles in the entire title XVI by consistently using the word "somebody" to designate the victim of the *insult* and, as a consequence thereof, by using the term "the deceased" in criminal code article 320 and 321.

100. *T.149* at 74.

The dissenting opinion to the decision offered some interesting observations. It saw the president as distillation of the Indonesian people so that the president is actually a personal manifestation of, and represents the dignity and grandeur of the people (the personal embodiment and representative of people dignity and majesty).

The opinion wanted more splits in the president, and produced the president as a Head of State, a Head of Government, a Commander-in-Chief of the Armed Forces, and a Chief Diplomat, all these functions are stipulated in the constitution, the implication being that each part of a president may have different feelings of being insulted. The dissent also quoted *dicta* allegedly cultivated by the U.S. Supreme Court which the dissenting judge interpreted as a refutation of the principle of equality before the law: The principle of equality does not mean that every law must have universal application for all who are not by nature, attainment or circumstances in the same position, as the varying needs of different classes of persons often require separate treatment.¹⁰¹

No citation was given for the U.S. Supreme Court quotation. It could either be taken out of context, or refer to differentiation rather than discrimination. To allow maternity leave to women and not to men is a recognition of difference, not a discrimination. A legal system granting a right to some but not to others is discriminative, as would be a law the breach of which is punishable to the man-in-the-street, but not to journalists. Granting the right to a *public interest* defense against accusations of libel when the victim is a private individual, but withholding it when the target of the insult is a government official is discrimination.

To some, the description of a president, as the “distillation of the people” conjures images of a dictatorship.¹⁰² The last time Indonesia had a president called *the voice of the people*, the show ended up in the most horrendous bloodbath the nation has known in its modern history.¹⁰³ The *lèse majesté* articles in the Indonesian

101. Decision of the Constitutional Court Number 013-022/PUU-IV/2006, at 74.

102. It also brings back recollections about the phrase “*All animals are equal, but some animals are more equal than others*” in GEORGE ORWELL, *ANIMAL FARM* (1945).

103. On September 30, 1965 a heavily armed contingent of the palace guard murdered almost the entire general staff of the army. The support of the Indonesian Communist Party, the largest party outside the Sino-Soviet bloc, was thought to be evident from editorials in the People’s Daily, the party’s *agitprop* organ, and the almost immediate nationwide formation of Revolutionary

Criminal Code were repealed in form, but promptly replaced in essence. Criminal Code Articles 134, 136bis and 137 were declared unconstitutional and devoid of force and effect. The Constitutional Court replaced them with Criminal Code Articles 310 *et seq* and 207. The opinion of the slim majority of the justices of the Court that there is no place in a democratic republic with popular sovereignty for articles which contradict the principle of *equality before the law* was not reflected in the decision.

Criminal Code Articles 154 *et seq* prohibit expressions of hostility, hatred, and contempt towards the government of Indonesia, hence the name *hate-sowing* articles. The petition to declare the articles unconstitutional included the request to review article 107 on rebellion, articles 160 and 161 on instigations to disobey government measures, and articles 207-208 on insulting government agencies. Legal standing of petitioners were recognized only in the case of the *hate-sowing* articles. The court found the petitioners wanting of legal standing for the remaining articles. The decision was passed by a thin majority of five to four. *The hate-sowing* articles were to be scrapped because they are formal offences, because they lend themselves to arbitrary interpretation by the authorities, and because critique tended to be easily qualified as an expression of hostility, hatred and contempt. The decision pointed out that the Dutch Minister of Justice himself stated that the *hate-sowing* provisions were meant to apply to colonial communities, and definitely not fit to be taken over by the realm in Europe. It is interesting to note that the majority thought the articles irrational because it is just not possible that citizens of an independent and sovereign country could be hostile towards their own state and government. Nevertheless, the Court hailed the government's testimony which stated that the same provisions have been maintained in the new draft criminal code, this time as material offences.¹⁰⁴

Councils. Within weeks the Party's organization was paralyzed by massive uprisings of non-communist political forces under the protection of army elements. The resulting witch-hunt and massacres claimed the lives of people estimated at between 60,000 to 200,000 men and women.

104. Constitutional Court Decision Number 6/PUU-V/2007, at 77-79.

IX. A CLAUSE TO OVERTURN ALL CLAUSES

After its second amendment, the Constitution of Indonesia¹⁰⁵ was said to contain *a world-standard Bill of Rights*.¹⁰⁶ Chapter XA on Human Rights contains 10 human rights clauses. It reads as if the entire contents of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights had been condensed into one chapter and bravely inserted in the Constitution. The way the clauses have been and continue to be interpreted by the judiciary, however, have been a source of serious concern to Indonesian as well as international rights organizations. A recurrent theme in rejecting applications for judicial review of oppressive criminal code provisions is the didactically prescriptive balancing of rights and obligations, and the consequent limitation of human rights. It is considered the state's duty to protect persons whose rights are violated by the exercise of the freedoms of other persons. The nine human rights articles in the Indonesian Constitution seem to be at the mercy of Article 28J at the end of the list which allows their limitation by statutory enactment.¹⁰⁷ Of tremendous support to the potential roll-back of rights provided by this clause is the similar clause in Article 19 Paragraph 3 of the *International Covenant on Civil and Political Rights* ("ICCPR").¹⁰⁸ Considerable support for maintaining the oppressive anti-defamation laws is derived from

105. Resolved at the Session of the People's Consultative Assembly ("M.P.R.") on August 18, 2000.

106. Simon Butt & Firmansyah Arifin, *Corruption and the Judiciary in Indonesia*, in POLICY BRIEFS 2 (2008), available at: <http://www.aigrp.anu.edu.au/publications/briefs.php> (last visited July 10, 2010).

107. Indonesian Constitution, Chapter XA, Article 28J, Section (2):

In exercising his rights and freedoms, every person is obliged to submit to limitations stipulated by law aimed exclusively to guarantee the recognition of- and respect for the freedom rights of other persons and for the satisfaction of just demands in accordance with moral, religious values, security, and public order considerations in a democratic society.

108. International Covenant on Civil and Political Rights, Article 19, Paragraph 3:

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 for the rights and reputations of others;
- b. For the protection of national security or of public order (ordre public), or of public health or morals.

the translation of the term *slander* into the Indonesian language by the word *fitnah*, a word of Arabic origin defined by the Qur'an as an act more heinous than murder.¹⁰⁹ The severity of punishment for defamation in the secular codes thereby obtains solid endorsement and legitimacy in religious doctrine. In independent Indonesia, *Fitnah* and sedition are widely felt to be deserving of more severe punishment, larger damage awards, bigger fines, and longer jail sentences than was ever meted out by colonial judiciaries.

It is not true that the Indonesian political elite has mobilized a broad move to roll back freedoms which were already granted. Restrictions on freedoms have always been present either by products of colonial legislation, or by laws passed by rubber-stamp parliaments under dictatorships during some 40 years, as well as laws made in the everlasting so-called *transition period* towards full democracy.¹¹⁰ It is this law-making aspect of the past, which Harold J. Berman referred to as the *law-based state*, known in Indonesia as the *Rechtsstaat*, or the system of Rule-by-Law, to distinguish it from a system of Rule-of-Law.¹¹¹ The unintended implication of this distinction is that freedoms are more rooted in the rule of law state, and that these are mostly found in common law countries. The identifications, however, do not fit reality. The

109. THE HOLY QUR'AN, Surah 2, *Al-Baqarah*, verses 191 and 217.

110. President Sukarno dissolved the Indonesian Constituent Assembly, seizes power on July 5, 1959, and established the national-democratic stage of his revolution. On March 11, 1966 it was Suharto's turn to wrest away power from President Sukarno, and sets up a military dictatorship that lasted until 1998;

111. Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat), With Special Reference to the Soviet Union, in TOWARD THE "RULE OF LAW" IN RUSSIA? POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD* especially n. 11 (Donald D. Barry ed. 1992). Jeffrey Kahn explains the Rule-by-Law as a consequence of the doctrine of representative democracy with parliament being the exclusive actualizers of sovereignty of the people. Laws made by elected representatives of those who hold the exclusive sovereignty of the nation hold the supreme authority in the state. The legislature being an arm of the state holds monopoly power over the making of laws. The executive state enforces, while the judiciary implements. The concept is clinically neutral from value judgments on the exercise of power by the state. Hence, Nazi Germany was a *Rechtsstaat*, as was *Stalin's* Soviet Union. "There is no substantive prescription beyond the positivist procedural requirements of rule by laws." See JEFFREY KAHN, *FEDERALISM, DEMOCRATIZATION, AND THE RULE OF LAW IN RUSSIA* 54 (2002). The Rule of Law, on the other hand, is the system which does not accept the state as the exclusive fountainhead of law. In *common law* states the depoliticized courts have acted as a major source of law and what Kahn called *other normative standards*.

countries in Western Europe are *rechtsstaat* countries, yet their states are not only subject to state-made laws, but to judge-made laws, international law and tribunals as well. Closer to Indonesia, Malaysia and Singapore, both wedded to the common law system, generate many complaints about “the blatant use of the criminal law as a political instrument . . . harsh laws which censor public opinion. . .” and then again “. . . established practice of Singapore which routinely uses defamation and contempt charges against foreign journalists and opposition politicians.”¹¹² Much like Indonesia, the legal infrastructure to restrict liberties already exists in both Singapore and Malaysia. It is the heritage of colonial times to which is added a newly set of enacted statutes after independence to lend a local flavor to “foreign” legislation.¹¹³

In Indonesia, the inundation of the Constitutional Court with petitions demanding the review of laws deemed obstructing the free flow of information, opinions and critique stems from a complex mental perspective. There is the thought ingrained in the back of the professional mind by decades of experience at the hands of dictatorship that the only threat to freedom of the press is the closure of publications. Such was indeed the single deadly measure the military regime unleashed unto critical media. The euphoria which accompanied the passing of the Press Law¹¹⁴ by a parliament liberated by the fall of a dictator,¹¹⁵ brought the wrong impression that the law will take care of all existing and potential dangers confronting journalists and the media. Finally there was the mixture of indignation, surprise, and panic at being faced by a plethora of lawsuits filed by plaintiffs, some of whom would not normally command the respect of the community, yet managed to persuade the judiciary to mete out stiff sentences and large awards. It was this complex of feelings, thoughts, and circumstances which moved petitioners to demand constitutional reviews of laws

112. Kanishka Jayasurya, *The Rule of Law and Regimes of Exception in East Asia*, Working Paper No. 96, Asia Research Center, Murdoch University, July 2000, at 3.

113. For a treatment on the subject during the military dictatorship in Indonesia, see Daniel S. Lev, *Colonial Law and the Genesis of the Indonesian State*, 40 *INDONESIA* (Oct. 1985). Referring to the take-over of oppressive colonial legislation by an independent Indonesia, Lev wrote: “It is not simply that such legal provisions have been retained, but that their retention implies the same understanding of political prerogative from which they originated,” *id.* at 73.

114. Law No.40 of 1999.

115. General Suharto was deposed in the wake of the monetary crisis of 1998.

deemed hostile to press freedom. The Constitutional Court rejected most of the demands, and acceded to some because other laws, no less hostile, are or will be substituted for the statutes to be repealed.

Human Rights Watch issued a most recent report on the state of freedom of expression in Indonesia.¹¹⁶ It is a scathing indictment against an excessively oppressive criminal defamation law regime, and a willing law enforcement apparatus to pursue the accuser rather than investigate the offence the plaintiff is accused of. The report complains that in the hands of financially and politically powerful personalities, criminal anti-defamation laws become destructive implements against critique and opposition. These laws are more susceptible to abuse and manipulation, particularly when employed by government officials with investigative authority backed by financially strong parties. The Information & Electronic Transaction Law¹¹⁷ was singled out as particularly hostile with its threat of imprisonment of up to 6 years, a fine of up to Rp. 1 billion, and a possible pretrial detention.¹¹⁸

The bad conditions of freedom of the press in Indonesia seems to be somewhat shared by its neighbors. Despite its bad report card, Indonesia is deemed to have the freest press in Southeast Asia by *Reporters Without Borders*. On its worldwide press freedom index for 2009, Indonesia was given a score of 28.50, over and above its neighbors. Eritrea stood at the bottom of the list with a score of 115.5. Scandinavian countries and Ireland were on top of the list and rated 0 (zero). It must have been a satisfying sight for the Indonesian government to watch Indonesia leading its neighbors in the Association of Southeast Asian Nations in press freedom.¹¹⁹

116. See, *Turning Critics into Criminals, The Human Rights Consequences of Criminal Defamation in Indonesia*, HUMAN RIGHTS WATCH, May 3, 2010, available at: <http://www.hrw.org/en/reports/2010/05/04/turning-critics-criminals> (last visited July 10, 2010).

117. Law No.11/2008 on Information & Electronic Transaction.

118. A petition for constitutional review of two articles in the law submitted by citizens was squarely rejected by the Constitutional Court in its decision Number 50/puu-VI/2008, on May 5, 2009.

119. On the Reporters without Borders World Press Freedom Index for 2009, Indonesia scored 28.50, above the Philippines (38.25), Thailand (44), Malaysia (44.25), and Singapore (45). See, Press Freedom Index 2009, available at <http://en.rsf.org/press-freedom-index-2009,1001.html> (last visited July 10, 2010).

X. TO CONCLUDE

The road to freedom meets a dead-end at Constitution junction. The Indonesian Constitutional Court is not ready to lead the nation on the way to reform. The Court is resolved to maintain laws on the books which were promulgated for the security and ease of law enforcement in a colony. The Court also held on to statutes which were enacted after independence by authoritarian regimes and compliant parliaments. The only way out is to muddle through the conventional judicial process and cope with its capricious outcomes. That is not an easy task. There is no discernible method in the way courts arrive at their decisions. This makes it very difficult to navigate a way through the hazards planted in the colonial civil and criminal codes, and the considerably more hostile post-independence statutes. The use of such “insulting” words as *dumb*,¹²⁰ or *thief*,¹²¹ or *scavenger*,¹²² or *Suharto Inc.*¹²³ is punished, but so are complaints against allegedly fraudulent sellers.¹²⁴ A patient sending an e-mail to friends complaining of maltreatment in a hospital,¹²⁵ editors warning authorities not to install an official who was still facing customs suits, and consumers complaining about bad service through letters to the editor are brought to trial. The Press Law of 1999 is not an adequate bar against criminal prosecution or tort suits.¹²⁶ An issue of grave concern is that serious critique, and by any standard necessary,¹²⁷ directed against public authority, even if *public*

120. The *Bersihar Lubis* case. See *supra* notes 56 and 57.

121. The *Indies Social Democratic Party Congress* case in Bandung, Raad van Justitie Batavia, Second Chamber, April 6, 1923, T.120 at 496-500.

122. The *Tomy Winata v Tempo* case, Central Jakarta Court of First Instance, Decision No.233/Pdt.G/2003/P.N.Jkt.Pst, March 18, 2004.

123. The *Suharto v Time Magazine* case, Supreme Court Decision No.3215 K/PDT/200, August 30, 2007.

124. The North Jakarta Court of First Instance Decision Number 178/PDT/G/2007/PN.JKT.UT, in the *Seng Seng* case on May 6, 2008.

125. The celebrated case of *Prita-of-the-Coins* (nationwide contributions of coins in support for the defense of *Prita Mulyasari*, a pregnant mother of two being the first victim of pretrial detention under the Information & Electronic Transaction Law); her criminal prosecution was dismissed by the Tangerang Court of First Instance (Decision Number 1269/Pid.B/2009/PN.TNG), but the prosecution appealed to the Supreme Court, while the hospital's civil suit against her awarded the plaintiff damages in the sum of Rp.204.000.000, an amount she could not afford.

126. See *supra* notes 70-71.

127. See *supra* note 46.

interest is judicially recognized remains punishable.¹²⁸ On the other hand, as if to increase the level of general uncertainty, defendants who failed proving the truth of their allegedly libelous accusations are pardoned.¹²⁹ It seems as if a message is forcefully imposed on the general public that complaints about bad treatment or fraud by sellers of goods or services must be kept a secret between the *complainer* and the *complainee*, or between the victim and the police. Complaints must not be put in *letters to the editor*, nor in e-mails if the latter is accessible by others. No bad words, no critique, and no complaints.

All of these decisions were reached by courts by having the facts meet with the law. This is how the law is interpreted, applied, and enforced. This IS the law. There is no way in which the law on the books can be clinically divorced from the way it is operated in practice. Statements by justices at the Constitutional Court that laws in operation are none of the Court's business, implying that the Court's exclusive mandate is to mathematically project a statute against provisions in the constitution. This understanding is excessively legistic and lack support in the dicta, holdings, and rulings in their own decisions.

The wait now is for more widespread publicity of decisions and transparency in the process of decision-making. A more brief and simplified version of law reports rather than the unnecessarily long and repetitive texts of decisions should persuade commentators to dwell more on the reasoning rather than the end result of court decisions. Open discussions and the emergence of recognizable doctrinal consensus in the civil and criminal law system of Indonesia, acknowledged sources of law, should persuade the judiciary to look beyond the black letter of the law in their search for justice. For justice is also to be found among the practitioners, enforcers, and those who receive its painful assaults. Nobody said that change was going to be easy for a system that survived centuries of feudal rule, colonial administration, and four decades of post-independence dictatorships.

128. See *supra* note 36.

129. Time Inc. failed to prove allegations regarding Suharto's shifting of huge amounts of money between bank accounts in Switzerland and Austria. Tempo was not able to prove that plaintiff Winata took an interest in the rebuilding of one of the largest garment and textile markets in Asia. See *supra* note 23, and notes 36 and 37.