Declaration

I undertake that all material presented for examination is my own work and has not been written for me, in whole or in part, by any other persons(s). I also undertake that any quotation or paraphrase from the published or unpublished work of another person has been duly acknowledged in the work which I present for examination.

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(Date) Arjuna Dibley

Acknowledgements

This honours thesis is the culmination of a personal and intellectually rewarding year for me. The positive experience of this year has largely been due to the people who have supported me, and with whom I have spoken to in the research process. The time, support, and insights that these people have generously given me have greatly enriched this thesis.

I begin by thanking my supervisor of this project, Dr. Marcus Mietzner. Marcus has been an outstanding supervisor, who has been a constant source of knowledge, insights about Indonesia, useful contacts, and the finer points of research and writing. I have learnt a great deal from him, and my thesis has benefited considerably because of the time and energy he has put into supervising me.

I am grateful to the participants of this research who generously donated their time, and shared their experiences with me. This thesis has also benefited from invaluable discussions with and suggestion from Indonesian studies experts. These people are, in alphabetical order: Mr. Luke Arnold, Australian Agency for International Development; Dr. Simon Butt, Sydney University; Professor Robert Cribb, Australian National University (ANU); Associate Professor Ariel Heryanto, ANU; Professor David T Hill, Murdoch University; Professor Terrance Hull, ANU; Professor Timothy Lindsey, University of Melbourne; Dr. Andrew Rosser, University of Adelaide; and Professor Veronica Taylor, University of Washington. I would particularly like to thank Dr. Greg Fealy, from the ANU, who convinced me to take on the honours year through several discussions in 2009.

I would also like to thank my family who have nurtured my interest in Indonesia. Particularly thanks to my sister, Thushara Dibley, who has encouraged, challenged and taught me a great deal throughout the year. Last but not least, special thanks must go to Rachelle Cole – her support and practical assistance has enhanced both the quality of this dissertation and the enjoyment I have gained in producing it.

Although I could not have completed this thesis without the support of all these people, I ultimately take responsibility for any of the errors that may appear on the following pages.

Abstract

This thesis discusses the use of and response to criminal defamation law in Indonesia. With the regulation of freedom of expression generally regarded as one of the main fields in which a country's democratic quality can be assessed, the study contributes to the highly controversial debate on Indonesia's state of democratisation. The thesis presents two major findings. Firstly, Indonesian criminal defamation laws and the way that they are applied have significantly restricted free expression and consequently pose a potential threat to democracy. Secondly, the thesis also highlights how Indonesian individuals, civil society and the press have been pushing-back against this misuse of the law. The successes of this coordinated civil society response points to the ability of Indonesians to put pressure on the state in regards to the regulation of freedom of expression. Consequently, the thesis concludes that citizen participation and civil society activism have largely neutralised the dangers inherent in Indonesian criminal defamation laws, allowing for substantial judgments on the dynamics and quality of the country's ongoing process of democratic consolidation.

A Note on Style

The thesis follows the style and citation method outlined in the *Chicago Manual of Style*, *15th Edition* (2004).

In this thesis all translations of Indonesian and Dutch language material are the work of the author, unless indicated otherwise. Where this thesis directly quotes primary Indonesian sources, an English language translation is included in the body of the thesis, and the original Indonesian text is included in parentheses, a footnote or an appendix. For secondary Indonesian language material, only the English-language translations are included in the body of the thesis.

Indonesian language spelling follows the post-1972 conventions, with the exception of quotations from sources that use the old style, and the names of political organisations. For example, words which formerly were spelt with 'oe' are replaced with 'u'; words using 'dj' are now replaced with 'j'.

All currency conversions in this thesis are to Australian Dollars and are current at August 30, 2010.

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Abbreviations and Acronyms

Anti-Subversion Law	Presidential Decree No. 11 of 1963 on Subversion
AJI	*Aliansi Jurnalis Independen* - Alliance of Independent Journalists
BPK	*Badan Pemeriksa Keuangan* - State Auditing Agency
BPUPKI	*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia* -Committee for Preparatory Work for Indonesian Independence
Cyber-Libel Provisions	Articles 27 paragraph (3) and 45 of Law on Information and Electronic Transactions
DPR	*Dewan Perwakilan Rakyat* - People's Representative Council
DPRD	*Dewan Perwakilan Rakyat Daerah* – Regional People's Representative Council
ELSAM	*Lembaga Studi dan Advokasi Masyarakat* - Institute for Policy Research and Advocacy
Hate-Sowing Case	Constitutional Court Case No. 06/PUU-V of 2007
Hate-Sowing Provisions	Articles 154 and 155 of the Indonesian Criminal Code
ICW	Indonesia Corruption Watch
KOMNASHAM	*Komisi Nasional Hak Asasi Manusia* - National Human Rights Commission
Kontras	*Komisi Untuk Orang Hilang dan Korban Tindak Kekerasan* - Commission of Disappeared Persons and Victims of Violence
KUHAP	*Kitab Undang-Undang Hukum Acara Pidana* - Code of Criminal Procedure
KUHP	*Kitab Undang-Undang Hukum Pidana* - Criminal Code
KUHPer	*Kitab Undang-Undang Hukum Perdata* - Civil Code
LBH Masyarakat	*Lembaga Bantuan Hukum Masyarakat* - Community Legal Aid Institute

LBH Pers	*Lembaga Bantuan Hukum Pers* – Press Legal Aid Foundation
Lèse-Majesté Case	Constitutional Court Case No.013-022/PUU-IV of 2006
Lèse-Majesté Provisions	Articles 131, 134 and 137 of the Indonesian Criminal Code
MA	*Mahkamah Agung* - Supreme Court
MENKONINFO	*Kementerian Komunikasi dan Informatika* - Ministry of Communications and Information Technology
MPR	*Majelis Permusyawarahan Rakyat* - People's Consultative Assembly
MK	*Mahkamah Konstitusi* - Constitutional Court
NGO	Non-Government Organisation
PKI	*Partai Komunis Indonesia* - Indonesian Communist Party
PN	*Pengadilan Negeri* - State Court
POLRI	*Kepolisian Negara Republik Indonesia* - Police Force of the Republic of Indonesia
Regular Defamation	Articles 310 – 321 of the Indonesian Criminal Code
UUD 1945	*Undang-Undang Dasar 1945* - Constitution of 1945
UU ITE	*Undang-Undang Informasi dan Transaksi Elektronik* - Law on Information and Electronic Transactions
UUITE Free Expression Case	Constitutional Court Case No. 14/PUU-VII of 2009
UUITE Free Press Case	Constitutional Court Case No. 14/PUU-VI of 2008
US	United States of America
WALHI	*Wahana Lingkungan Hidup Indonesia* - Indonesian Forum on the Environment
WvS	*Wetboeck van Strafregt voor Nederlandsch-Indië* - Penal code of the Netherlands East Indies

Introduction

Indonesia has been lauded for its remarkable transition from autocratic rule to democracy over the last fifteen years (Johannen and Gomez 2001, 2). The quality of this Indonesian democracy, however, remains contested. Since the fall of Suharto in May 1998, Indonesia has introduced significant reforms in an effort to make its political system more democratic. For instance the country introduced human rights into its constitution (Herbert 2008, 457), redefined the role of its military (Mietzner 2009c, 360-63), encouraged an active and free press (Sen and Hill 2000), and devolved political power to the regional level after decades of centralised rule (Erb and Sulistiyanto 2009b, 2-4). Over the course of the twelve years that these structural and institutional reforms have been implemented in Indonesia, scholars have made varied assessments of the quality of democracy in the country. The analyses that have emerged can be categorised into four dominant positions.

Scholars within the first position argue that after years of reform, Indonesia is now a democracy with an increasingly liberal political system (Royan 2008, 291). Heryanto, for instance, argues that the extent to which Indonesia upholds press freedoms is "comparable with most liberal democracies, and perhaps even higher than is found in some of them"(2010, 53). A second view amongst scholars is that although the reforms have brought about some fundamental changes to the political landscape of the country, they have not been a panacea to the problems with the quality democracy in Indonesia (Erb and Sulistiyanto 2009b, 31; Mietzner 2009a, 144). As McLeod and MacIntyre argue, although the reforms have been an important first step in the democratic process, one cannot "simply assume that there will be a steady upward trend of improved [democratic] governance" in Indonesia (2007b, 4). Some of the arguments that these scholars have advanced include that decentralisation has created greater political engagement, albeit of "low-quality", at the local level (Mietzner 2009a, 124); that although civil society is developing into a robust political force in Indonesia, it has not been able to mobilise as an effective driver of political change in the outer regions of the country (Nyman 2009, 267); that Indonesia's new independent Constitutional Court (*Mahkamah Konstitusi* –MK) offers some recourse against the common misuse of law (Butt 2007, 189; Royan 2008, 292); and that recent changes to electoral laws have resulted in a stable party system, but that the flawed application of these laws are cause for concern (Sherlock 2009, 3).

A third perspective among scholars of Indonesian politics is that the profound structural changes to the country have had little overall impact on creating a more democratic polity. Amongst other arguments, these scholars contend that democratisation in the country has increased ethnic and religious frictions (Hadiwinata 2009, 291); that the judicial reform has had limited effect in improving the rule of law (Stockman 2009, 71); that the reforms have not broken down business and political oligarchies entrenched during previous authoritarian regimes (Hadiz 2003, 609; Heryanto and Hadiz 2005); that state institutions are rife with corruption (Ramage 2007, 136); and that decentralisation has actually had "unintended consequences" expanding the space in which corrupt governance can occur (Bünte 2009, 102). Citing some of these persevering democratic shortcomings, a fourth group of analysts have recently warned that Indonesia may be on the verge of a democratic "recession" (Diamond 2009b). As the country moves further away from the *reformasi* era, these observers are concerned that Indonesian political elites are becoming less interested in driving pro-democracy reforms, and are more concerned with preserving their own political power (Barton 2008, 139-42; Reuter 2010, 4).

Where does Indonesia's democracy currently stand amongst this complex and contradictory set of perspectives? Is it a liberalising polity moving towards an ever stronger democracy, or has the country reached the apex of its era of elite-driven democratic reform, soon to enter a period of democratic recession? The corpus of literature cited above mainly assesses these questions by isolating a 'reformed' part of the political system in Indonesia, such as the electoral system or civil society, as a starting point. It then goes on to assess the operation of this institution or political space against theories of democratic quality. These assessments of democracy in Indonesia usually draw conclusions that take civil and political rights into account, amongst several other factors.[1] This thesis analyses democracy in Indonesia by doing the inverse; that is, it analyses a civil and political right in contemporary Indonesia, and questions what this reveals about the state of democracy in the country.

[1] Three recent edited books on democratisation in Indonesia use this technique. See the introductory chapters in Bünte and Ufen (2009), Erb and Sulistiyanto (2009a), and McLeod and McIntyre (2007a).

This thesis focuses on the right to freedom of expression,[2] and more concretely, on the ways in which this right is affected by a set of laws designed to regulate it, namely criminal defamation laws. In particular, this thesis examines what the use of these laws, and responses to them, demonstrates about the state of democracy in Indonesia. Freedom of expression is, of course, but one of several important dimensions of a democracy. Hence, this thesis cannot be read in isolation from the corpus of literature that analyses other elements of Indonesia's democracy. Examining the way the state regulates free expression through criminal defamation law is novel in the literature on democracy in Indonesia, and as this thesis will show, it reveals a great deal about the quality of democracy.

Investigating the way that criminal defamation laws regulate freedom of expression is useful for understanding democracy, because the right is interwoven into the fundamentals of the democratic process (Beetham 2004, 61; Birch 2001, 119). Political scientists link democracy and free expression by arguing that the protection of the right allows individuals to learn of, as well as express political ideas; thus the right furthers democracy by allowing the people to make decisions about who should govern them – the ultimate goal of a democracy (Dworkin 2006, 129). For this reason, several democratic states legally protect the right to free expression in their constitutions, legislation, courts or combinations of all three.

Although free expression is important for democracy, neither theorists nor governments suggest that the right should remain absolutely unregulated (Newton and van Deth 2010, 191; Wellington 1979, 1105-06). Democratic states must balance the right to free expression with other competing rights and interests such as national security, public safety and the rights of citizens to have their reputation protected (Scanlon 1972, 204). It is for this latter objective that criminal defamation laws continue to operate in many states. Generally, criminal defamation law refers to a legal action that allows individuals, including public officials and corporations, to seek the prosecution of other individuals who make false, misleading or insulting statements against them (Mitchell 2005, ii). This includes laws which criminalise the publication of false, insulting or hateful

[2] In this thesis the terms 'free expression' or 'freedom of expression' are used to encompass both the right to free speech and the right to a free press unless indicated otherwise.

statements which can affect the integrity of a person or group. Thus criminal defamation is defended by states that retain the laws, including Indonesia, on the basis that they are used to protect citizens against attacks on their privacy and standing in society (Marpaung 1997, 3).

Criminal defamation laws were introduced to Indonesia when the Dutch introduced their criminal law regime to the country at the start of the twentieth century (Hooker 1978, 188). When the Dutch colonial government ruled Indonesia, there were no legal protections for freedom of expression. Consequently, there were no legal limits on how the Dutch rulers could use criminal defamation laws. Accordingly, the Dutch did not only use criminal defamation laws to protect reputation, but also used the law to silence forces critical of its rule (Ricklefs 2008, 220). The authoritarian Sukarno and Suharto led governments which followed after Indonesia's independence from the Dutch, used the law in a similar way to the colonisers. Hence, the colonial and authoritarian regimes regulated freedom of expression from the top-down, using criminal defamation laws, amongst other methods, to give effect to this style of rule.

When Indonesia's last authoritarian government collapsed in 1998, an era of reform (*reformasi*) ushered in measures to advance the protection and promotion of the right to free expression. These reforms included creating a right to free expression under the Indonesian constitution, and forming the MK to protect that right (Lindsey 2008).These and other reforms have changed the way that freedom of expression is regulated in Indonesia. In promulgating, applying and adjudicating upon laws which impact freedom of expression, the democratic state has to pay much more attention to the wishes of its citizens than the previous autocratic regimes. This new political and societal dynamism has led to laws that regulate freedom of expression being challenged before the MK, becoming the subject of civil society scrutiny and turning into the focus of public discussion. This has occurred on several occasions since the start of *reformasi*, including in relation to the promulgation of a law to regulate pornography (Pausacker 2009), the use of a law to regulate the press (Sanyoto 2006, 44), and in relation to laws which are used to ban books and films (Farid 2010). A further controversy which has arisen in recent years is whether criminal defamation laws are being used to protect reputation, or whether the laws are used to unduly impinge the right of Indonesia

citizens to express them-selves freely. It is this latter controversy upon which this thesis focuses.

Scope of the Study

In studying criminal defamation, this thesis is limited mainly to two provisions of the laws, and the application of these laws against certain groups of people only. These limitations are both designed to narrow down the scope of the study and to reflect gaps in the literature. Accordingly, the thesis focuses on Chapter 16 of the Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana* - KUHP), and regulations on internet defamation, found under Law No. 11 of 2008 on Information and Electronic Transactions (*Undang-Undang Informasi dan Transaksi Elektronik* – UUITE). These laws are, at the time of writing, the oldest and newest incarnations of criminal defamation, and have been the subject of much of the recent controversy over the laws. It is important to note, however, that other criminal defamation regulations exist in Indonesia, and the thesis will refer to them whenever they are deemed crucial to the overall development of freedom of expression and democracy in the contemporary polity (appendix 1 includes a list of all current criminal defamation laws under Indonesian criminal law).

The case studies of this thesis look at the application of the two abovementioned laws to individuals and non-government organisations (NGOs), and intentionally exclude discussion about the application of the laws against the press. The history and regulatory scheme governing the activity of the press in Indonesia is highly complex, and would have been prohibitive to include within a research project of this size. In any case, several in-depth studies of press freedoms in Indonesia have been written which take the issue of criminal defamation law into account (Hill 2003; Hill and Sen 2005, 2009; Oey 1971; Romano 2002; Sen and Hill 2000).

Structure of the Thesis

This thesis begins by drawing theoretical links between criminal defamation laws, freedom of expression and democracy. The first chapter argues that one method employed by many democracies to regulate freedom of expression is through the use of criminal defamation law. Although many democracies retain criminal defamation laws, there are vast differences in the way the laws are applied in practice. Thus, chapter 1 of this thesis highlights that in order to understand the relationship between criminal defamation and democracy in Indonesia it is

important to analyse not only the content of the law, but also how the law is used in practice.

The second chapter of the thesis locates the current debate about criminal defamation in Indonesia in an historical context. The chapter argues that Indonesia has gone through a shift in how it uses criminal defamation law: during periods of colonial and authoritarian rule in the country, criminal defamation laws were used extensively to regulate freedom of expression in a way that served the interests of the central government; by contrast, in democratic Indonesia, reforms have been implemented which have allowed Indonesian citizens, through a vibrant press and civil society, to have input into how freedom of expression is regulated. These democratic reforms have not led to the eradication of criminal defamation law but have changed the dynamics of its application. The sustained existence of criminal defamation, a law created and used during the country's colonial and authoritarian past, has given rise to a debate about the compatibility of the laws with Indonesia's contemporary form of democracy.

Chapter 3 engages in both a legal analysis of criminal defamation laws and a discussion of their use. This analysis focuses on the two provisions discussed above: criminal defamation against individuals and public officials, found under Chapter 16 of the KUHP, and internet defamation, found under the UUITE. After examining the technical elements of how these laws are constructed, the chapter evaluates two case studies that demonstrate how these laws have been put into practice. These cases – one affecting the customer of a private hospital and the other targeting an anti-corruption NGO - show that criminal defamation laws are often used by political and economically powerful figures to silence criticism. Chapter 3 concludes that the use of criminal defamation laws in this specific way can have a detrimental effect on the quality of free expression in Indonesia.

Despite the risk of criminal defamation laws being used to silence free expression in Indonesia, chapter 4 emphasises that this has not had a detrimental effect on the quality of democracy in the country. Although criminal defamation laws can be manipulated so that they threaten freedom of expression, this is to some extent counteracted by Indonesia's strengthened post-reform press and civil society. To develop this argument, chapter 4 documents the response to the case studies introduced in the previous chapter. The response to these case studies reveal that

the Indonesian government affords significant freedoms to civil society and the press to support people charged with criminal defamation and to campaign against the laws. Hence, this chapter argues that although criminal defamation laws continue to be used in Indonesia, civil society and the media are limiting the potential for these laws to damage the country's democracy. In its conclusion, the thesis reflects upon what the use of criminal defamation laws and the societal reaction to them says about the status of Indonesian democracy.

Chapter 1: Democracy, Free Expression and Criminal Defamation Law

Criminal defamation laws have for centuries been the catalyst of debates about the role that democratic states should play in regulating free expression. In 1792, for instance, the laws sparked controversy when used to jail Thomas Paine following the publication of *The Rights of Man*, Paine's contentious polemic against the Monarch and British political institutions (Sandford 2008, 2-9). More recently, debates about criminal defamation law and democracy have arisen in Cambodia (Adornato 2006), in several Latin American countries (Lanao 2001), the Philippines (Hutchcroft 2008), Timor Leste (Pacheco 2009), South Korea (Youm 2009), and of course Indonesia. What causes these provisions of criminal law to spark debates about democracy? Criminal defamation laws allow the state to investigate, try and ultimately punish people for oral or written statements which injure the reputation of others; in other words, the laws give power to the state to restrict the right of one person to freely express them-selves, in order to protect the reputation of others (Brenner 2007, 709). Thus, criminal defamation is controversial because often the state or its citizens use the laws as a tool to silence critical individuals, rather than to protect their reputation. This chapter analyses the correlation between criminal defamation laws, their application, freedom of expression and the quality of a state's democracy.

This chapter begins by defining criminal defamation as a broad set of laws which restrict free expression by criminalising the making of statements which damage a person's good name, reputation, or are insulting, or hateful. The second part of this chapter discusses how these laws can impact democracy. It defines democracy as a political system made up of a number of inter-related dimensions to allow the people to rule government, including an effective electoral system, an active civil society, and the right of citizens to express them-selves freely. The third part of the chapter looks at the particular dimension of democracy upon which this thesis focuses, namely freedom of expression. It argues that there are two dominant and competing positions in the literature about the extent to which a state should be allowed to regulate the right, and still claim to be 'democratic'. The last part of the chapter examines how these differing positions about the regulation of freedom of expression manifest in debates about criminal defamation law, showing that these philosophical variations lead to differences in the way that criminal defamation is

used by the state. In concluding, the chapter emphasises that in order to understand the implications of criminal defamation for democracy it is important to consider the content of the law *and* the way those laws are used.

Criminal Defamation Law: Definition and History

To understand why criminal defamation laws have resulted in debates about democracy, it is first important to define the scope of 'criminal defamation'. Generally, defamation is a legal action which the state or its citizens can use against people who publically write or make spoken statements that are insulting, false, misleading or in some way injure the reputation of the person or institution at which they are aimed (Elder 1981, 38; McNamara 2007, 85-87).The ambit of the term 'criminal defamation' differs in the two main Western legal traditions, i.e., the Anglo-American, or common law tradition, and the Roman-Dutch, or continental legal tradition.[3] Most scholars trace defamation laws, as we know them today, to the Roman legal tradition, which included punishment for offences against written defamation (*famosus libellus*) (Voet 1952, 201-51; Yanchukova 2003, 42).[4] However, in the mid-seventeenth century regulations on defamation offences were also adopted by the common law (Kelly 1958; McNamara 2007, 85; Mitchell 2005, 66-68). This section focuses on criminal defamation under the Roman-Dutch legal tradition, which was brought to Indonesia through the transplantation of the Dutch Penal Code (*Wetboek van Strafregt*) into the country (Hooker 1978, 188; Lesmana 2005).

Criminal defamation law in the Roman-Dutch legal tradition seeks to prevent or provide recourse against injury (*injuria*). *Injuria* includes damage caused to a person through an insult (*iniuria*), or other statements which damage a person's reputation or good name (Athulathmudali 1964, 1888; Voet 1952, 221). The

[3] In the continental legal tradition, laws are found in a series of codes (such as a criminal law code or civil law code) which are updated by the legislature and interpreted by the courts. In these jurisdictions, the courts' interpretations of the laws usually do not carry binding force. By contrast, in common law jurisdictions, laws which are interpreted by courts carry with them binding legal force. Consequently, judges have played a central role in the formation of legal principles in countries that apply the common law. See Goodman (1995, Chapter 1 - 3) for further details about the evolution and differences between the two legal systems.

[4] Scholars contest the precise starting point of the laws: Carter traces criminal defamation laws to a decree by Alfred the Great which stated that a person found guilty of public slander would have their tongue cut off (2005, 293); Kelly traces criminal defamation to cannon laws of the Church (1958, 299); while Lisby claims that the laws have their origins in the Babylonian Code of Hammurabi (2004, 444).

concept of *injuria* is subjective, meaning that its application differs from individual to individual. Consequently, under the Roman-Dutch tradition the notion of 'criminal defamation' includes laws which criminalise injury to a person's mind, such as laws against making insulting statements about someone, destroying a persons reputation, or inciting hatred against someone (Athulathmudali 1964, 1881; Lesmana 2005, 30-31; Wessels 1908, 705-07).

The scope of criminal defamation in Indonesia has been contested amongst scholars and legal practitioners. Some scholars, when referring to criminal defamation in Indonesia, only include provisions of the law which criminalise statements against a person's good name (Lesmana 2005, 21-26).[5] However, others have broadened this definition slightly to include 'insult' laws (Human Rights Watch 2010, 16; Komite Pembela Kemerdekaan Berpendapat 2009, 5-6; Marpaung 1997, 3). Finally, some commentators additionally add 'hate-speech' laws under the banner of criminal defamation (Jaringan Dokumentasi dan Informasi Hukum BPK 2008). This thesis adopts the broad definition of criminal defamation, including in it laws which criminalise the making of statements which damage a person's good name or honour through writing (libel) or speaking (slander), as well as laws against insult and against producing hateful statements (see appendix 1 for a list of criminal defamation laws under the KUHP and other legislation).

This thesis adopts the broad definition of criminal defamation because Indonesian criminal law does not clearly differentiate between different types of defamation provisions. For instance, there are no clear distinctions between libel, slander, insult and hate-sowing laws under the KUHP or other criminal laws. Chapter 16 of the KUHP, is entitled "Insults" (*Penghinaan*), but includes provisions such as Article 310 that criminalise statements which attack a person's honour or good name. Further, Articles 154 and 155 of the KUHP makes it an offence to produce statements which incite "hatred" (*kebencian*) *and* statements which are insulting to public institutions. The overlapping nature of criminal defamation laws in

[5] Lesmana acknowledges that the meaning of 'defamation' under the Indonesian and Roman-Dutch tradition includes "statements which create a feeling of hatred, or harassment, or insult" [Pernyataan yang dapat menimbulkan rasa kebencian, atua melecehkan, atau menghina] (p. 30). Despite his acknowledgement of the broad scope of the term, Lesmana adopts the narrowest definition of 'criminal defamation' without justification.

Indonesia has partly contributed to a heated debate about the relationship between freedom of expression and democracy in Indonesia, discussed further in chapters 3 and 4. Against this background, to assess the impact of criminal defamation laws, it is first necessary to provide a definition of 'democracy'; the section that follows begins this process.

Assessing the 'Quality' of Democracy

The definition of democracy has been highly contested in political science literature (Collier and Adcock 1999; Przeworski, et al. 1996; Saward 2007; Schmitter and Karl 1991). One group of scholars focuses on the procedural conditions under which people are able to rule government, rather than the government ruling the people. These formal conditions include the existence of an electoral system and political parties (Przeworski, et al. 1999; Sartori 1987; Schumpeter 1987). Another school of thought assesses democracy by questioning whether the characteristics that make a polity democratic are present (Bollen 1990; Touraine and McDonald 1994). Dahl, for instance, assesses democracy according to whether a state's electoral system creates "opposition, rivalry or competition" (1971, 1). The third approach amalgamates both of the methods mentioned above. Diamond and Morlino, for example, have combined the analysis of procedural and substantive indicators to evaluate the "quality of democracy" (2004 ix-x). This thesis adopts Diamond and Morlino's approach because it is arguably the most effective in capturing nuances in a country's democratic development.

The quality approach of assessing democracy looks first at whether a state meets certain minimum procedural dimensions of democracy, and subsequently evaluates the quality of those dimensions. The four minimum conditions of democracy under this approach are: 1) universal suffrage; 2) reoccurring free elections; 3) more than one serious political party; and 4) the availability of alternative sources of information (Diamond and Morlino 2004, 3). Consequently, under this definition, there is no room for electoral authoritarian regimes such as Suharto's New Order. Diamond and Morlino argue that once states meet the minimum conditions of democracy, there are differences in their quality. While they identify eight dimensions in which democracies vary in quality, two of these are of direct relevance to this thesis: first, the extent to which governments are responsive to demands of citizens expressed through, for example, civil society; and second, the degree of a state's protection of civil and political freedoms,

including the freedom of expression (2004, 4-5). According to this approach, in order to assess democracy effectively it is important to analyse each dimension as an evolving process which interacts with other dimensions of democracy.

As will be shown in chapter 2 of this thesis, Indonesia has introduced the 'minimum conditions' of democracy; therefore, in contemporary discussions about Indonesia's democracy, it is issues of quality which are the subject of greatest contestation (Abdulbaki 2008, 159; Diamond 2009b). This thesis focuses in particular on the quality of one dimension of Indonesia's democracy, freedom of expression. Following Diamond and Morlino's model, this thesis will asses the quality of free expression in Indonesia by analysing the way the right interacts with the other dimensions of Indonesian democracy, such as the state's responsiveness to civil society. Although free expression is only one dimension of the Indonesian polity, it is fundamental to the way that democracy functions.

Freedom of Expression and Democracy

Freedom of expression is connected to democracy as it is the indispensable foundation for the people's ability to scrutinise, evaluate and occasionally replace their government. One of the earliest and best known theories arguing for free expression in these terms was developed by Meiklejohn (1960). Meiklejohn argues that free expression is fundamental to democracy, because it allows the people to access information they need to make political decisions; decisions such as who to elect, when to take political action and what political issues to raise with elected representatives (1960, 160). In other words, freedom of expression is the "conduit" through which the people rule government (Balkin 2004, 21).

The notion that free expression is a prerequisite for democracy has been widely accepted amongst scholars and courts (Barendt 2007, 18; Schauer 1982, 38-39).[6] Indeed, many democracies protect the right to freedom of expression in their constitutions or separate legislation (Newton and van Deth 2010, 151).[7] Although

[6] Some scholars take issue with specific aspects of the theory: Schauer, for instance, argues that it is 'equality of participation' in democracy which justifies free expression (1982, 38-41); Emerson adds that one further justification for free expression is that it creates a 'safety-valve', where people can express views rather than resorting to violence (1970, 6).

[7] The United States incorporated a Bill of Rights into its constitution in 1789, and includes the right to free speech under its First Amendment. Many states implicitly protect the right by 'reading' it into their constitutions. Australia, for example, reads the right of political communication into its

states widely protect free expression, none protects the right absolutely (Barendt 2007, 7). The literature is divided on the question of how far a state can regulate free expression and still claim that it is democratic: on one side of the debate is the "strong liberal" view; on the other side is the "reasonable regulation" view (Sani 2008, 88-89).

The 'strong liberal' view adopts the basic principle that government should not regulate except where it is trying to prevent violence in society (Greenawalt 1989, 9-10; Schauer 1982, 3-6; Wellington 1979, 1106). Liberal scholars argue that because democratic governments are elected by the people, they have a vested interest in preventing critical speech that could reduce their chance of getting re-elected (Greenawalt 1989, 12; Wellington 1979, 1135). Therefore, strong liberals argue that we should be sceptical of governments because if they are given *some* power to regulate free expression, they cannot be trusted to limit the exercise of that power responsibly (Sani 2008, 88-89; Schauer 1982, 78-85). Applying this strong liberal approach, the United States (US) Supreme Court has held that a wide variety of expressions is protected from government regulation through that country's constitutional right to free expression, including insulting, derogatory, radical, reactionary and hateful speech (Barendt 2007, 48-55).[8]

Unlike the strong liberal view, the 'reasonable regulation' approach is not based on scepticism of government. In fact, scholars of this approach argue that the will of the people is best served with some government regulation of expression (Bork 1971; Fiss 1996; Goodroad 1998). Scholars of this view argue that regulation of freedom of expression is useful because it can improve the capability of the people to control government (Sunstein 1993, xxviiii); create social stability (Chan 1997, 42; Emerson 1970, 6; Goodroad 1998, 291); promote human dignity (MacKinnon

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constitution; *Theophanous v The Herald and the Weekly Times Limited and Another* 182 CLR104 (1994). Other countries have promulgated the right to freedom of expression in legislation, including: Ireland in 1937, Canada in 1982, New Zealand in 1990, South Africa in 1996, and the United Kingdom in 1998.

[8] In large part this is a consequence of the broad scope of the First Amendment of the US constitution which says that "Congress shall make no law… abridging the freedom of speech". This has been interpreted by the court to allow very few restrictions on the right. As Justice Brennan famously said about the First Amendment, "debate on public issues should be uninhibited, robust and wide open…it may well include vehement, caustic, and sometimes unpleasantly sharp attacks". *New York Times v Sullivan* 376 US 254, 270 (1964). See similar statements by the majority in *Brandenburg v Ohio* 395 U.S. 444 (1969)*; Garrison v Louisiana* 379 US 64 (1964), 71-75*;* and *Yates v United States*, 354 U.S. 298 (1957).

1985, 8); and protect the reputation of government or individuals (Greenawalt 1989, 130-35; Schauer 1982, 168). Reasonable regulation arguments were perhaps most famously made in a Southeast Asian context during the 1990s with the debate over 'Asian Values' (Subramaniam 2000). In this debate, Southeast Asian political leaders argued that their states should be allowed to regulate rights, including free expression, in a way that takes account of 'Asian Values', such as respect, communitarianism, and collective interests over individual interest (Chan 1997, 41; Koh 1993). The debate has since largely been discredited on the basis that the term 'Asian Values' was a rhetorical device used to justify stringent restrictions on democracy (Hood 1998, 861; Ignatieff 2001; Sen 1999, 14-16). Nonetheless, the notion that unique cultural and historical experience justifies stricter regulation of free expression continues to be used in Asia, albeit using different terms (Peerenboom 2002, 52-54). For example, Yeh (2009) uses the term 'Asian Constitutionalism', to describe the way that Asian constitutional courts are more willing to balance individual rights with social responsibilities than non-Asian states.

As the conflict between strong liberal and reasonable regulation scholars shows, there are a variety of perspectives on the extent to which the right to free expression should be regulated by the state. Democratic states perpetually debate this issue as governments, technology and societies change (Barendt 2007, 35-37; Carter 2005, 313). Indeed, several scholars argue that the extent to which a democracy allows its citizens to debate and contribute to the regulation of expression is a key indicator of the level of protection that the state provides for the right to free expression (Balkin 2004, 57-58; Goodroad 1998, 295; Wellington 1979, 1122-24). The following section examines one law which has been the subject of debates on freedom of expression around the world – criminal defamation law.

Criminal Defamation and Democracy

The reason that criminal defamation has triggered debates about the quality of democracy is that the laws give power to the state to regulate free expression (Kelly 1958, 294). Criminal defamation gives law enforcement bodies, most often the police force, power to investigate and charge persons suspected of being perpetrators of defamation. The law also gives power to courts to fine or imprison persons convicted of defamation (Lawhorne 1971, 39-41). The involvement of the

state contrasts with civil defamation, where private individuals instigate and investigate alleged defamatory acts. In civil defamation, courts can only require that the party at fault apologise or pay for any damages caused (Wissler 1990, 470-71). Therefore, criminal defamation affects the quality of democracy because through the process of investigating, charging, trying and punishing individuals the state is regulating what can be said in public; this power is sometimes misused by the state or by individuals who use the aparatus of state to serve their personal interests (Elder 1981, 73-76; Leflar 1956, 1029; Van Der Berg 1989, 289; Walker 2006, 169).

In 2010, over 160 states retain criminal defamation laws (Article 19 2009), including many democratic polities, of both high and low quality, such as: Japan and South Korea (Youm 1990); Brazil and Mexico (Lanao 2001, 356-57); France, Germany, and the Netherlands (Yanchukova 2003, 871-75); fourteen states in the US (Carter 2005, 296); and all states and territories in Australia (Griffith 2002). The reason so many democracies retain the laws is that they provide the state and its citizens recourse against the risk of reputational harm (Van Der Berg 1989, 281-83; Walker 2006, 177). Greenawalt sums up the rationale of the laws neatly by stating that, "defamation can cause deep emotional upset, damage personal relationships with friends and acquaintances, and produce serious economic harm" (1989, 135).

Scholars who take a reasonable regulation view to the regulation of free expression argue that this risk of reputational harm justifies the use of criminal defamation law. Reasonable regulation scholars argue that modern communications technology, particularly the internet, increases the risk of harm through defamatory statements. Brenner (2007), for instance, argues in favour of criminal defamation laws because the internet provides an easier and cheaper way of spreading, storing and widely-publishing potentially damaging information than was previously possible. Additionally, these scholars maintain that criminal defamation laws allow the right to free expression to be balanced against other rights and interests. For example, Lesmana argues that in Indonesia criminal defamation laws are justified because Indonesians place significant emphasis on reputation, and

consequently would expect the state to protect them from statements which are made with disregard to their reputation (2005, 145-46, 218-20).[9]

Strong liberals, by contrast, generally do not support criminal defamation law as a justifiable way to regulate freedom of expression in a democracy. Notwithstanding the potential harm of defamatory speech, liberal scholars and courts argue that the risk that the laws will be misused and thus "chill'"speech outweighs the benefits of their usage as a form of redress (Lanao 2001, 375; Lawhorne 1971, 39-56; Pasqualucci 2006, 433). To support their arguments, these scholars often point to the "ignominious history" of criminal defamation laws (Lisby 2004, 443-52). Evidently, the laws were often used in the continental and common law legal traditions to shield the aristocracy and people with political power from criticism (Berg 1989, 281-82; Lisby 2004, 438; Yanchukova 2003). Additionally, liberal scholars point out that the laws continue to be used in some authoritarian regimes such as China to preserve the power of political elites (Fu and Cullen 1998). Consequently, liberal scholars argue that criminal defamation offers democratic states the potential to use the law to silence speech and maintain political power (Carter 2005, 293; Elder 1981, 79-80; Kelly 1958, 330; Lisby 2004, 434; Van Der Berg 1989, 290).

The liberal school of thought warns that if criminal defamation is used to preserve political power of elites, the laws could reduce the willingness of people to express opinions, and thus limit the amount and quality of political information available to the public (Carter 2005, 313; Emerson 1970, 892; Lisby 2004, 486-87; Mehra 2007, 813; Youm 2009, 149). As a result, liberal scholars recommend that reputational harm should be regulated through civil or tort law, rather than criminal law (Article 19 2009; Carter 2005, 317; Pasqualucci 2006, 433). As the strong liberal argument makes clear, the risk of criminal defamation to democracy arises not only in the letter of the laws, but also in the way they are used in practice.

[9] Scholars and courts of other Asian states have made these arguments as well, including Japan (Mehra 2007) and South Korea (Yuom 2002).

The Use of Criminal Defamation Laws

Differences in the way that states use criminal defamation laws reflect the theoretical dichotomy between liberal and reasonable regulation of free expression. In states which have taken a liberal view to regulating free expression, there has been a decrease in the use of the laws. In the US, for instance, there were only fifty-two threatened or actual criminal libel prosecutions between 1965 and 1996, (Carter 2005, 296) leading one commentator to call the laws "the crazy aunt we keep in the basement" (Perot in Mehra 2007, 781). Similarly, in England between 1996 and 2001 only five people were found guilty or were cautioned of one type of defamation, criminal libel (Walker 2006, 177).[10] By contrast, there has been an increase in the use of the laws in some states which take a reasonable regulation approach to freedom of expression (Brenner 2007, 22; Youm 2009, 142). In Japan, for instance, there has been an increase in complaints of internet criminal defamation to the National Police Agency, from 1,884 in the year 2000 to 2,619 in the year 2003 (Mehra 2007, 789).

However, it is not only the strong liberal and reasonable regulation divide that impacts on the way criminal defamation laws are used. The frequency and seriousness with which criminal defamation is used in a polity is also dependent on the strength and quality of other areas of democratic interaction. In states with a strong civil society and a robust judiciary, criminal defamation laws are only used where there are overwhelming grounds to charge someone (Mehra 2007, 767). Without such grounds, the state would attract significant criticism from the press and civil society, and hence there is a heavy political disincentive against overusing the laws. On the other hand, criminal defamation laws continue to be frequently used in less advanced democracies, where civil society is less developed, the judiciary is weaker and corruption is more prevalent (Rosenfeld and Sajo 2006, 6; Wright 2009). In Cambodia, for instance, criminal defamation is being used against journalists, opposition party members, teachers, and critical NGO leaders as part of a "systematic" effort to silence critics of the Prime-

[10] In 2009, the government of the United Kingdom introduced legislation which revoked the common law offences of criminal libel (Gibb 2009).

Minister Hun Sen and, when he was still a powerful political actor, Prince Norodom Ranarridh (Adornato 2006, 18-19).[11]

Conclusion: Defamation and the Dimensions of Democracy

The way a state regulates free expression through criminal defamation law is an important indicator of the depth and quality of its democracy. Freedom of expression gives citizens of a state greater opportunity to access information and participate in the political process, which is ultimately the goal of a democracy. Conversely, the misuse of criminal defamation laws in order to silence critical individuals and groups can erode the foundation upon which an effective, dynamic and competitive democracy rests. In this context, there are two views about whether democratic states should retain criminal defamation law. Strong liberals argue that criminal defamation should be revoked because they curtail free expression and reduce the amount of political information available in a polity. Reasonable regulation scholars, on the other hand, insist that criminal defamation is a legitimate way for democratic states to balance freedom of expression with the rights of citizens to protect their reputation. States that accept the reasonable regulation rationale have, consequently, been more willing to use the laws than those who follow a liberal tradition.

Similarly, in high-quality democracies, individuals, civil society and the press all contribute to debates about the role that criminal defamation should play in regulating free expression. Under democratic conditions, citizens can re-evaluate and challenge the way the state promulgates and uses laws to regulate free expression. As this thesis uncovers, this is a debate which is currently ongoing in Indonesia. Hence, the discussion above has proposed a framework to analyse the debate on criminal defamation and the application of the laws as a methodological mechanism to assess the quality of one important aspect of Indonesia's democracy. In order to conduct such an assessment, it is important to consider the content of the laws, the way they are used, and societal responses to them. States which retain and use criminal defamation laws, such as Indonesia, are not inherently un-democratic; instead, the impact of the laws on the quality of democracy is

[11] Overuse of the law has also occurred in other Southeast Asian states: by the president in the Philippines (Article 19 2009); by public officials and the Monarch in Thailand (Streckfuss 2011); and against journalists in Timor Leste (Pachecho 2009).

determined by how criminal defamation interacts with key arenas of a democratic polity, such as its civil society, press, police force and judiciary. The thesis will apply this framework in detail, with the following chapter discussing the history of criminal defamation laws in Indonesia.

Chapter 2: Criminal Defamation Law and the History of Regulating Freedom of Expression in Indonesia

Criminal defamation law has played an important role in Indonesia's troubled history of the regulation of free expression. The previous chapter examined how criminal defamation laws can be used by authoritarian governments to limit free expression in a polity. In Indonesia, the laws were used in this way during periods of colonial and authoritarian rule. During those periods, criminal defamation laws sat amongst a plethora of other legal and non-legal measures that handed powers to central governments to control free expression. While the rise of democracy has meant that many of the legal and non-legal methods used to regulate expression have been abolished, some criminal defamation laws have endured into contemporary Indonesia. The continued existence of laws which have an 'ignominious' history in Indonesia has led to a debate about whether criminal defamation is negatively affecting the quality of the country's democracy, discussed in chapters 3 and 4.

This chapter assesses the history of criminal defamation law in Indonesia, connects it to the history of the regulation of free expression in the country's various regimes, and describes the conditions under which the laws operate in the present day. The chapter is divided into two broad parts: the first part analyses the history of criminal defamation in Indonesia's pre-1998 political regimes; the second, by way of contrast, looks at the regulation of free expression since the fall of Indonesia's last authoritarian regime in 1998. This chapter argues that during Indonesia's colonial and authoritarian regimes, expression was regulated by central government figures to serve the interests of their ongoing rule. Criminal defamation laws were used to help achieve this objective. In contemporary Indonesia, however, the regulation of free expression has been loosened and dispersed. For the most part, the laws are no longer used by a powerful state to control its citizens, but have become a legal 'weapon' in disputes between individuals and groups in Indonesia. Moreover, the limits of speech have become the subject of debates amongst and within the government, civil society, and the press. As a result, criminal defamation has acquired a vastly different character than under Indonesia's previous regimes.

The Regulation of Free Expression in Indonesia's Pre-1998 Regimes

During the twentieth century, Indonesia was under the occupation of Dutch and Japanese colonial powers, a nascent and temporary democratic regime in the 1950s, and around forty years of authoritarian rule during Sukarno's Guided Democracy (1959-1965) and Suharto's New Order (1966-1998). Despite the diversity of these regimes, there are some similarities in the way that expression was regulated; this section examines some of these common features.

Regulating Expression and Authoritarian Regime Preservation

The Dutch first arrived in Indonesia for commercial purposes in 1596 (Ricklefs 2008, 29). However, it was not until 1808 that a legal jurisdiction was created to regulate the parts of the archipelago that were under Dutch rule (Ricklefs 2008, 135).[12] Freedom of expression emerged as an issue of controversy in the archipelago in the 1910s and 1920's (Ricklefs 2008, 192), during a period which Cribb refers to as the "age of political ferment" against the Dutch (2010, in 'Government, Society and the Rise of a National Consciousness').

This 'political ferment' emerged as a consequence of several factors including an increasingly paternalistic policy by the Dutch towards native Indonesian's,[13] the burgeoning of critical Malay and other vernacular press, better educational opportunities for native Indonesian's and the importation into Indonesia of leftist political ideas about organising to oppose oppressive rule (Cribb 2010, Government, Society and the Rise of a National Consciousness; Ricklefs 2008, 183-205; Schmutzer 1977, 14-15; Shiraishi 1990, 18-40). During this era, there was a proliferation of political movements built along ethnic and religious lines, including *Sarekat Islam* (Islamic Union), an Islamic organisation with a

[12] There were courts established in Batavia and Maluku during the seventeenth century which adjudicated over (mainly commercial disputes) using Dutch law, but it was not until the nineteenth century that Dutch laws applied to native 'Indonesian's'.

[13] At the end of the nineteenth century prominent public figures in the Netherlands, such as the lawyer Conrad Theodor van Deventer, agitated for a more ethical approach to the colonisation of the East-Indies. These public figures argued that because the Netherlands was benefiting economically from the occupation, they should provide greater educational and economic opportunities to native Indonesian's. This idea was taken up by Dutch politicians such as the Minister of Colonies, Alexander Idenburg, and hence the 'Ethical Policy' was born. Although created with good intentions, the Ethical Policy was seen by many Indonesian's as greater Dutch intrusion into their lives (Cribb 2010; Cribb and Kahin 2004, 136; Ricklefs 2008, 183-84).

membership of around half-a-million, which opposed Dutch colonial rule (Cribb 2010; Ricklefs 2008, 200-02; Shiraishi 1990, chapter 2).

The approach the Dutch leadership took to deal with the emergence of these critical voices who opposed its rule reversed over the course of the early twentieth century. Initially, the Dutch leadership took a liberal approach to ruling the archipelago. In 1913, for example, Dutch Governor General Alfred W.F. Idenburg legally incorporated *Sarekat Islam* thus providing some protection to the organisation against dissolution by Dutch officials (Ricklefs 2008, 201). One optimistic Dutch colonial scholar went as far as praising the Dutch administration during this period for granting in the East Indies "greater freedom [of expression] than exists in any of the independent Eastern States and in many European countries" (Angelino 1931, 424).

However, this period of increased liberalism toward the regulation of free expression was short-lived. In the 1920s and 1930s, in the face of mounting political opposition from nationalist and communist movements, the Dutch elite started to take a markedly different approach to the regulation of free expression (Ricklefs 2008, 208). The colonial administration began to use formal law as a tool to regulate expression. For instance, newspapers produced by nationalist organisations were periodically banned by the draconian Press Law of 1931 (Oey 1971, 11), and prominent anti-colonial politicians were pre-emptively arrested without charge (Ricklefs 2008, 220).

The replacement of liberal ideas with stricter regulation of free expression during Dutch colonial rule was echoed during Indonesia's post-independence government. In March 1945, after a brief interregnum, the Japanese colonial administration announced that it would appoint Indonesian political leaders to sit on an Investigatory Body for Preparatory Work for Indonesian Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia* – BPUPKI) (Cribb and Kahin 2004, 36). It was in the BPUPKI where Indonesia's first constitution (*Undang-Undang Dasar 1945*, or UUD 1945) was deliberated (Ricklefs 2008, 243-45). The question of whether freedom of expression, amongst other civil and political rights, should be included in the UUD 1945 was a subject of heated debate at the forum (Nasution 1992, 93-95).

Supomo, who became the chief architect of the UUD 1945, for instance, argued before the BPUPKI that the constitution should be based on the idea of an integralist state (*integralistic staatsidee*) (Nasution 1992, 90-93). According to Supomo, an integralist state does not require rights to keep government accountable, because theoretically, it always acts in the best interests of the individuals comprising it (Lindsey 2008, 29). On the other hand, liberal-minded leaders such as Mohammad Hatta argued that it was essential to include individual rights in the UUD 1945 for fear of the "tyranny" which may proceed from a state with "unlimited powers" (Hatta in Wiratraman 2009, 110). A compromise was finally reached on the debate; freedom of expression was included under Article 28, which did not create a right, but rather gave the People's Representative Council (*Dewan Perwakilan Rakyat* –DPR) power to decide when and how to protect expression (Lindsey 2008, 29; Wiratraman 2009, 112).[14]

When a parliamentary democracy was established in 1950, the executive and the parliament did indeed use the power vested in them to protect freedom of expression. For instance, the government initially tolerated, and encouraged a robust and vibrant press (Feith 1962, 323). As had happened during the Dutch era however, this period of liberalism in the regulation of free expression was followed by severe repression. During the mid-1950s, parliamentary democracy struggled with a fledgling economy, regional unrest and severe political and ideological fragmentation (Cribb and Brown 1995, 60-64; Schwarz 1999, 11). The difficulty of finding consensus amongst this fragmentation led President Sukarno to declare martial law in Indonesia on March, 14, 1957 and to take steps to usher in the authoritarian 'Guided Democracy' (*Demokrasi Terpimpin*) regime by 1959 (Cribb and Brown 1995, 78-83; Ricklefs 2008, 292-306).

During Guided Democracy, Sukarno took advantage of the ambiguous Article 28 of the UUD 1945 to abandon the polity's "earlier open character" (Feith 1962, 594). Sukarno's military-backed regime had "little time for legalism" (Bourchier 1999, 236). Instead of being constrained by already promulgated laws, Sukarno

[14] Human rights advocacy organisations and some academics classify Article 28 as conferring a right to freedom of expression (Article 19 and AJI 2005, 25; Hosen 2002, 2). However, this position is neither supported by the text of the constitution nor the practice of the state. According to Article 28, "the liberties of association and assembly, the freedom of thought expressed verbally or in writing and similar rights are to be determined by law" [kemerdekaan berserikat dan berkumpul, mengeluarkan pikiran dengan lisan dan tulisan dan sebagainya ditetapkan dengan undang-undang].

produced a series of decrees that gave significant power to him and the military to, amongst other things, strictly regulate expression. Presidential Decree No. 11 of 1963 about Subversion ('Anti-Subversion Law') was one such decree which was frequently used. The decree left the concept of 'subversion' undefined, thus handing power to the military to use the provision to restrict a wide variety of speech, including "criticism of the government and the Indonesian revolutionary 'ideology'" (Nasution 1992, 426).[15] The Anti-Subversion law continued to be used during Suharto's 'New Order' (*Orde Baru*) regime as well.

When Suharto came to power in 1966, he did not make any constitutional changes to the UUD 1945. Consequently, as during the Sukarno years, the scope of freedom of expression was defined largely by the will of the president. The New Order restricted civil and political rights, including free expression (Ricklefs 2008, 345; Schwarz 1999, 29). However, despite its often stringent restrictions, the regime did allow periods of greater tolerance towards critical expression. For instance, as Suharto tried to address growing concerns about his heavy-handed leadership in the late 1980s, he announced a new national openness (*keterbukaan*) policy (Aspinall 2005, 36). This involved a raft of measures to create greater freedom for the press, artists and civil society to criticise the regime. As part of the policy, in 1992 Suharto even created a National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia* - KOMNASHAM) to investigate and report human rights abuses committed by the regime (Elridge 2002, 132).

However, as with the Guided Democracy and colonial regimes, the period of greater openness in relation to free expression during the New Order was restricted when the power of the president was challenged. The *keterbukaan* policy is widely regarded to have ended on June 21, 1994, when Suharto revoked the publishing license of three popular weekly magazines, *DëTik, Editor* and *Tempo*, after they published several editorials critical of the president and his assistants (Aspinall 2005, 47; Cribb and Kahin 2004, 217; Ricklefs 2008, 374).

[15] The Anti-Subversion law defined subversion very broadly and included acts which could tend to "undermine" or "deviate" from official state ideology or "or disseminate feelings of hostility or arouse hostility, disturbances or anxiety among the population".

Demonstrably, the restrictive regulation of free expression was designed to preserve the rule of successive authoritarian regimes. To enforce these restrictions, the leaders of the colonial administration, Guided Democracy and the New Order used both legal and non-legal measures. Criminal defamation law was one prevalent legal instrument used by these regimes to keep dissidents in check.

Criminal Defamation Laws and Non-Legal Measures

Criminal defamation was often utilised by Indonesia's colonial and authoritarian regimes to control speech. To begin with, the Dutch introduced a criminal law regime to apply to all people of the colony in 1918, through the imposition of the Penal code of the Netherlands East Indies (*Wetboeck van Strafregt voor Nederlandsch-Indië –WvS*) (Hooker 1978, 188).[16] When Dutch rule came to an end, the newly independent administration effectively converted the *WvS* – including its criminal defamation provisions- into the criminal code of Indonesia, calling it the KUHP (Han 1961, 16-24).[17]

The *WvS* and KUHP includes laws which criminalise defamation, including provisions against damaging the good name or honour of individuals and public officials under Articles 310-318 of the *WvS* and converted into Articles 310-321 of the KUHP ('regular defamation');[18] provisions under Articles 134-137 of the *WvS*, against deliberate disrespect for the King or Queen of Holland, or governor general, and converted into the same articles of the KUHP, but against the president and vice-president ('lèse-majesté'); Articles 154 - 157 in both the *WvS* and KUHP against public expressions of hate or insult to the government ('hate-sowing'); and Article 315 of both the *WvS* and the KUHP which criminalise 'simple insults' towards public officials (Pompe 1992, 152) (see appendix 1 for a

[16] Prior to 1918, there were different *WvS'* which applied to different races. For instance, there was a *WvS* for Europeans (*voor de Euopeanen*) (Dutch East Indies 1866), and a *WvS* for Natives (*voor Inlanders*) (Dutch East Indies 1885).

[17] After independence Sukarno initially enacted Presidential Decree No. 2 of 1945 that gave legal effect to the last valid laws of the colony. By implication, this validated the Japanese criminal code (*Gunsei Keizirei*), as that had been the last active criminal law code in the region. However, by 1946 it became clear that there were several deficiencies with the *Gunsei Keizirei*. The *WvS* was more complete and considered to have more balanced penalties. Hence, Sukarno implemented Government Act No 1 of 1946, Article 1 of which annulled all criminal laws after March 9, 1942. The effect of this was that Presidential Decree No. 2 of 1945 now made the *WvS* the criminal law of Indonesia.

[18] The provisions of the *WvS* changed throughout the course of the Dutch colonisation, as new offences were added or removed. The provisions in this section reflect the *WvS* of 1926.

table of criminal defamation provisions under the KUHP and other Indonesian criminal laws).[19]

The criminal defamation provisions of the *WvS* were used extensively during times of political opposition to the Dutch occupation (see table 1). For instance, between 1924 and 1927, the Colonisers faced a significant insurgency by the Indonesian Communist Party (*Partai Komunis Indonesia* –PKI) in parts of Central Java and later in Sumatra (Ricklefs 2008, 213). The Dutch used criminal law, including defamation, to charge and arrest 13,000 PKI members during this period (Ricklefs 2008, 214). For instance, in 1924, in Pekalongan, one of the centres of the insurgency in Central Java, 1,004 people were convicted of simple insult under Article 315 of the *WvS* (Dutch East Indies 1924, 142).[20]

Table 1: Convictions for Criminal Defamation by Type of Offence (1918-1927)

Charges	1918*	1921	1924	1927
Regular defamation (Articles 310-18 *WvS*)	154	388	219	205
Simple insult (Article 315 *WvS*)	-	1,199	3,934	4,175
Hate-sowing (Articles 154-57 *WvS*)	-	6	16	241
Total annual convictions in Dutch East Indies	20,570	35,004	30,366	33,780

***Sources*:** Data from Dutch East Indies 1918, 1-2, 48-49; 1921, 2-3, 26-29, 58-59, 116-17; 1924, 2-3, 32-35, 76-77, 142-43; 1927, 2-5, 32-35, 76-77, 142-43.

* This was the first year of operation for the *WvS.* Many provisions were not yet included, including the Simple insult provisions.

In addition to the criminal defamation laws under the *WvS*, the Dutch also used non-legal methods to stymie expression of dissent. For instance, in relation to the PKI uprising of the mid-1920s, the Dutch used violence as well as the law to intimidate PKI members. The Dutch formed groups called the Green Union

[19] In the present day, the Dutch Penal Code still contains several defamation provisions, including Article 261 - violation of someone's honour or reputation in writing (*smaadschrift* - libel) or orally (*smaad* - slander), and Article 137c on publicly offending a group of people because of their race, religion, sexual orientation or physical or mental handicap (*groepsbelediging* – group defamation) (Altes 2009).

[20] This represented 26 percent of all convictions (3,934) under Article 315 in the entirety of Dutch controlled Indonesia. Interestingly, natives (*inlanders*) were by far the largest ethnic group convicted under this law; of the 3,934 convictions 3,132 (79 percent) were against natives.

(*Sarekat Hidjau*), made up of police, government officials and members of Muslim organisations siding with the Dutch. In 1925, there were around 20,000 members of *Sarekat Hidjau* who actively attacked and intimidated PKI members (Ricklefs 2008, 213).

Unlike the Dutch, Indonesia's early post-independence parliamentary governments did not make much use of the new criminal code (the KUHP), and Sukarno under his Guided Democracy preferred to use presidential decrees to give authority for the military to regulate expression (Bourchier 1999, 236-37). Consequently, there is not much data and research on the way that the administrations between 1945 and 1965 used the KUHP, let alone on the usage of criminal defamation provisions under it (Pompe 1992, 152).[21] With legal institutions such as the KUHP "subordinated by Sukarno's militant anti-legalism" in the early 1960s, they could easily be "re-harnessed by Soeharto's dirigiste state in the service of political control" from the late 1960s onwards (Bourchier 1999, 249).

Suharto's New Order frequently used provisions of the KUHP to regulate expression (Human Rights Watch 1998). In 1996, for example, 31,775 charges for insult offences were issued across Indonesia (Badan Pusat Statistik 1997, table 9.3).[22] Human Rights Watch has catalogued the extensive types of activity which were criminalised by these provisions between 1980 and 1990, including:

> distributing banned novels and participating in discussion groups on political themes…staging a satirical protest of the government's election campaign, holding a demonstration outside the national parliament calling on Soeharto to take responsibility for human rights violations, and possession of stickers calling Soeharto the 'mastermind of all disasters'. (1998, 26)

Detailed annual statistics on the use of each type of criminal defamation offence during the New Order are not available.[23] However, lawyers who worked during

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[21] There is some research on the procedural aspects of criminal law during the Sukarno presidency (Han, 1961). Additionally, Lev (1965), has written a general political history of the judiciary during the period, which includes some discussion of the criminal code.

[22] These statistics included all offences which involved 'insult' (*penghinaan*). Although a definition is provided for insult (p. 10), it is unclear exactly which provisions of the Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana* –KUHP) it refers to.

[23] Statistical data on criminal law collected during the New Order often excludes certain provisions of the KUHP which were not frequently used. The statistical data I was able to access for this period did not, for instance, include figures about the use of regular criminal defamation (i.e., Articles 310, 312, 315, and 316) (Badan Pusat Statistik, 1997, 2005, Biro Pusat Statistik, 1977, 1983).

the New Order say that both regular and lèse-majesté criminal defamation provisions were not frequently used by the government.[24] Instead, officials preferred to bring charges under the insult and hate-sowing provisions of the KUHP, or under the Anti-Subversion law which carried heavier penalties than defamation (International Commission of Jurists 1987, 85) (see table 2). For example, the famous poet Rendra was charged in 1978 under the hate-sowing provisions of the KUHP and imprisoned for reading poems critical of the New Order regime at the Taman Ismail Arts Centre in Jakarta; Rendra was released without trial after spending several months in jail (International Commission of Jurists 1987, 201).

Table 2: Number of People Imprisoned for Lèse-Majesté and Hate-Sowing Offences (1974-1986)

Charges	1974	1977	1980	1983	1986
Lèse-majesté (Articles 130-139 KUHP)	15	28	11	9	26
Public order offences – including hate-sowing (Articles 154-161 KUHP)	348	690	535	624	867
Total number of inmates	62,427	70,366	72,053	56,602	56,098

Note: I have included figures on people imprisoned, rather than the number of people who appeared before a court, because during the New Order it was common for people to be charged and imprisoned without going to court, or to spend long periods in prison before appearing before a court (International Commission of Jurists 1987, 187).

***Sources*:** Data from Biro Pusat Statistik 1975, 51-51; 1977, 70-71; 1984, 26; 1987, 25.

Similar to his predecessors, Suharto also had extensive extra-legal measures at his disposal to restrict freedom of expression. International governments and human rights NGOs have recorded a swathe of extra-legal methods used by the New Order to intimidate and silence people who expressed critical views, including arrests and detention (United States Department of State 1997); torture (Human Rights Watch 1998, 35); shutting down public forums (Human Rights Watch 1998, 37-38); forced disappearance of prominent critical figures (Human Rights

[24] According to Ifdhal Khasim (2010, interview), a human rights activist at that time, "during the New Order period, criminal defamation provisions were rarely used to deal with protests or the activities of civil society towards state authority" [pada masa Orde Baru pasal PNB (pencemaran nama baik) ini jarang digunakan untuk menghadapi protes atau aksi-aksi yang dilakukan oleh masyarakat sipil terhadap kekuasaan negara].

Watch 1998, 36); and using military surveillance to track political movements critical of the government (United States Department of State 1997).

Regulation of Free Expression After 1998

The collapse of the Suharto government in May 1998 ushered in the *reformasi* period in Indonesia. This period was marked by significant changes in the political system, aimed at creating a regulatory framework to introduce and support democracy in the country. This reform process included creating a stronger legislature, a more transparent executive as well as a constitutional and institutional framework to protect a range of political rights and civic freedoms, including the right to free expression.

Constitutional and Legislative Reform

A key reform that had a particularly profound effect on the protection of freedom of expression was the amendment of the UUD 1945. The People's Consultative Assembly (*Majelis Permusyawarahan Rakyat* –MPR), the body authorised to make changes to the Indonesian constitution, sat several times between 1999 and 2002 to consider amendments to the UUD 1945 (Indrayana 2008, part 4; Lindsey 2008, 23-24). Amongst the constitutional amendments the MPR sat to consider, was the introduction of human rights into the constitution, and the creation of the MK (Indrayana 2008, 217, 266).

Unlike the BPUPKI debates of 1945, when political, religious and social leaders had been appointed to the body based on their influence and seniority, the forum to debate the 1999-2002 amendments was comprised of democratically legitimated MPR members (Indrayana 2008, 217-18). Additionally, following over thirty years of authoritarian rule, it had become clear that Supomo's idea of an integralist state had failed, and that citizen's rights were important to secure democracy (Lindsey 2008, 29-30). As a result, on August 18, 2000 the MPR debate on rights and freedoms concluded by adopting a bill of rights, including a right to free expression under Article 28E.[25] This change to the constitution is described by

[25] The relevant sections of the new Article 28E of the Indonesian constitution read as follows: "(2) Every person shall have the right to have freedom of belief, express his/her thoughts and attitudes, in accordance with his/her conscience; (3) Every person shall have the right of freedom to organise, to assemble, and to express opinions" [(2) Setiap orang atas kebebasan meyakini kepercayaan, menyatakan pikiran dan sikap, sesuai dengan hati nuraninya; (3) Setiap orang berhak atas kebebasan berserikat, berkumpul, dan mengeluarkan pendapat].

Lindsey as "the most radical change to the original philosophy of the [UUD 1945]" (2008, 29).

In addition to the introduction of rights into the constitution, in 2000 the MPR included legal authority for a constitutional court to be established under Articles 24 paragraph (2) and 24C (Stockman 2007, 6). These articles of the new constitution, for the first time in Indonesia's history, vest power in a court to review whether legislation is consistent with the constitution, in a process called 'judicial review' (Stockman 2007, 11). Judicial review gives the MK power to consider whether laws are consistent with the bill of rights, including the right to freedom of expression (Lindsey 2008, 34-5). This, and other changes to Indonesia's regulatory system, have had profound impacts on Indonesia's political regime, as will be discussed further in chapter 4 (Indrayana 2008, 376-80; Lindsey 2008, 35; Stockman 2007, 1).

Aside from the changes to the constitution, the *reformasi* period also led to the introduction of several laws designed to better protect freedom of expression. For instance, amongst the first pieces of legislation introduced by President Habibie was Law No. 40 of 1999 on the Press (Romano 2002, 49). This law replaced Law No. 21 of 1982 on the Press which had required publications to get a government-approved license, and was notoriously used to censor publications critical of the government – such as Suharto's banning of *Tempo* in 1994 (Romano 2002, 90). Additionally, several laws used during Indonesia's authoritarian past were revoked, including the Anti-Subversion law.

The Effect of the Reforms for Freedom of Expression

Twelve years after the fall of the Suharto government, Indonesia is now widely regarded as a democracy. Today, the country meets Diamond and Morlino's minimum conditions for democracy discussed in chapter 1: Indonesia has had three national legislative elections, two presidential elections and hundreds of elections for local legislatures (*Dewan Perwakilan Rakyat Daerah* - DPRD) and government heads (Sherlock 2009, 1); there is more than one serious political party (Mietzner 2009b, 3); and Indonesia's growing print, broadcast and Internet media provide a diverse array of information (Hill and Sen 2009, 3). What is more heatedly debated than whether Indonesia is a democracy, however, is the 'quality' of each of the dimensions of this democracy, including freedom of expression

(Diamond 2009a). There are a variety of views about the extent to which Indonesia is protecting the right to free expression in the post-*reformasi* period.

Some commentators argue that expression remains stymied in Indonesia because non-legal measures are still used to regulate free expression. Leaders of national human rights and press NGOs recount several cases of continued violence and military intimidation against their members. For instance, Erwin Usman, national executive member and spokesperson for the Indonesian Forum on the Environment (*Wahana Lingkungan Hidup Indonesia* - WALHI), argues that several environmental activists have been subject to violence after protesting for greater royalty rights between mine owners and local villagers (Erwin Usman 2010, interview; also see Article 19 2007, 3). Despite these incidents of ongoing violence, human rights activists also generally concede that the use of violence has declined since the Suharto regime.[26] The Indonesian Alliance of Independent Journalists (*Aliansi Jurnalis Independen* – AJI), for example, collects statistics on violence against journalists. These figures show that there has been a significant drop in violence against journalists between 2000 (115 attacks) and 2005 (15 attacks) (Article 19 2007, 2; Article 19 and AJI 2005, 83-85).

In addition to non-legal measures, some scholars argue that there are legislative remnants of previous regimes that continue to codify authoritarian and colonial views of free expression into the Indonesian legal system (Farid 2010). One set of laws that remains unamended is the KUHP, which includes many criminal defamation laws. Some scholars argue that the effect of the unamended KUHP is the continued limitation of freedom of expression to the detriment of democracy, particularly in more isolated parts of the country. Robinson (2008), for instance, points out that in West Papua the impact of the unreformed KUHP is often used to silence political expression. Indeed, national Indonesian environment, human rights and free press NGOs that operate in Papua and other outer regions of the

[26] Ricky Gunawan (2010, interview), the head of the Community Legal Aid Foundation (*Lembaga Bantuan Hukum Masyarakat*- LBH Masyarakat) says that "during the Suharto era, he used the TNI [Indonesian military] and the police; nowadays, it is no longer possible to use the TNI and police, but instead [the government uses] the law" [Zaman Suharto, dia pakai TNI dan Polisi; zaman sekarang sudah tidak bisa lagi pakai TNI dan Polisi, tetapi pakai hukum]. Additionally, Angarra Suwahju (2010, interview), a lawyer with the Association of Indonesian Legal Aid and Human Rights Organisations (*Perhimpunan Bantuan Hukum dan HAM Indonesia*) says that "the threat to freedom of expression is shifting; during the New Order you just get kidnapped by the government; but now the government will sue you. It's the modern way!" [response in English].

archipelago, have reported several cases of their members being unfairly subjected to the KUHP.[27] For instance, Article 106 of the KUHP creates a criminal offence against any act done with intent to separate part of a territory of Indonesia, and human rights NGOs claim that this article is often used against activists who call for greater human rights accountability in Aceh, and West Papua (Usman Hamid 2010, interview).

Although there remain some shortcomings in the quality of freedom of expression, the regulatory changes made during *reformasi* have nonetheless allowed more Indonesian citizens to be involved in public policy discussions, including about the extent of free expression. The most fundamental of these changes is that government attempts to regulate expression are now subject to intense public scrutiny – a process in which Indonesian state institutions, but also civil society actors, intellectuals and the public are involved. This is clearly demonstrated in relation to recent public debate about two criminal defamation provisions found in the KUHP; the lèse-majesté and hate-sowing provisions. After the fall of Suharto, these two provisions initially continued to be used against activists who criticised the president and public officials (Human Rights Watch 2003, 15-18; Royan 2008, 295). In post-1998 Indonesia, however, civil society groups have taken advantage of the infrastructure introduced during *reformasi* to respond to this use of criminal defamation. For instance, individuals and civil society groups have used national and local media to campaign against the laws (Royan 2008, 296). Additionally, individuals and civil society groups have mounted judicial review challenges against the laws in the MK.

In 2006, a prominent lawyer and politician from Jakarta, Eggi Sudjana, sought a judicial review of the lèse-majesté provisions, questioning whether they were consistent with the right to freedom of expression under the constitution (*Putusan Mahkamah Konstitusi* 2006, 3-6, '*Lèse-Majesté Case*'). The case was joined by several people who had been charged under the lèse-majesté laws in recent years for making 'insulting' comments on the president during public protests (*Lèse-*

[27] For instance Ifdhal Khasim (2010, interview), the head of Indonesia's National Human Rights Commission (*Komisi Nasional HAM* –KOMNASHAM), argues that "a great deal of criminalisation [of free expression] occurs in the districts, such as Papua, because since decentralisation, power is in the hands of local elites, such as district heads, [and] members of the regional representative councils" [banyak sekali kejadian kriminalisasi di daerah, misalnya Papua, karena sejak desentralisasi kekuasaan itu berada di tangan elit lokal misalnya, bupati, anggota DPRD].

Majesté Case, 16-17). Similarly, in 2007 Panji Utomo, a medical doctor who travelled to Aceh to work as a volunteer following the December 2004 tsunami disaster, sought a judicial review of the hate-sowing provisions, with the support of two Indonesian legal NGOs (*Putusan Mahkamah Konstitusi* 2007, 3, '*Hate-Sowing Case*').[28] Utomo's case arose after he was charged under the hate-sowing laws for allegedly making statements of 'hatred' towards the governor of Aceh, complaining about a shortage of funding for ongoing medical care for tsunami victims (Kustiani 2007).

The outcome of these cases constituted great successes for the individuals and NGOs who challenged the criminal defamation laws, and highlighted the dramatic political and social change that had taken place in Indonesia since 1998. In the *Lèse-Majesté Case*, the court decided by a slim majority (5 agreeing, 4 dissenting) that the lèse-majesté provisions no longer "carry binding legal force" (*Lèse-Majesté Case*, 62).[29] Similarly, in the *Hate-Sowing Case* the majority of the MK held that hate-sowing laws were not consistent with Article 28E of the constitution on freedom of expression, and hence were not legally valid (*Hate-Sowing Case*, 22-23) (discussed in further detail in chapter 4). Wiratraman has argued that the adjudication of the right to free expression by the MK will result in the right increasingly becoming "stronger and more advanced", because the court provides a mechanism for ensuring that the government does not create or use laws in a way which are unnecessarily restrictive (Wiratraman 2009, 130; also see Royan 2008). The result of *Lèse-Majesté Case* and *Hate-Sowing Case* clearly support Wiratraman's argument.

Beyond the MK, the Indonesian public is now able to debate the regulation of free expression much more vigorously than in the past. In 2010, vibrant discussions about the regulation of free expression in Indonesia continue in books, the press, and on the internet. For instance, in an edited book on film banning in Indonesia, Wijaya insists that protecting the right to free expression is the best way to balance the rights of individuals to speak freely, and the rights of the community not to be offended (2004, 13). Other authors in the book argue, by contrast, that expression

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[28] The Indian Ocean tsunami of December 26, 2004, killed over 230,000 people in fourteen countries, including around 25,000 in and around Aceh.

[29] "tidak mempunyai kekuatan hukum mengikat".

should be restricted where it is inconsistent with Islamic morality (Armmando, et al. 2004). Yet others maintained that the standards of regulating free expression should be dictated by international law (Joni 2004).

Conclusion: The Indonesian Public and Regulation of Free Expression

This chapter demonstrated that regulation of free expression in Indonesia has gone through waves of openness and restriction. Until 1998, these waves were mostly controlled by a small political elite. In other words, during the early periods of the Indonesian state, regulation of free expression was largely a top-down process. This top-down process involved the elite using the law, including criminal defamation, in a way that suited its political needs. Criminal defamation law was one of several legal and non-legal tools available to elites during this period.

Reformasi, however, has introduced the minimum conditions of democracy in Indonesia, including laws and institutions that significantly loosened and dispersed the regulation of free expression. Following the fall of Suharto, it became possible for many citizens to engage in a dialogue amongst them-selves, in the media and with their elected officials about issues of public policy, including on what the permissible limits of government regulation of free expression should be. Additionally, the creation of the MK has provided an avenue for individuals and civil society actors to challenge and in some instances effect progressive law reform, as evidenced by the *Hate-Sowing Case* and the *Lèse-Majesté Case*. Finally, in post-Suharto Indonesia there has been a decreasing trend of violent reprisals against journalists, activists, politicians and other citizens critical of the central government. However, these positive trends may not be as apparent in the outer regions of Indonesia, particularly in Papua.

With several of the legal and non-legal methods used to control expression under previous regimes no longer available to the elite that governs democratic Indonesia, criminal defamation law stands as one of the few remnants of pre-1998 regulations that can restrict freedom of expression. The endurance of these laws through repressive regimes into a democratic polity explains why they have become the subject of a vibrant contemporary debate. The following chapter begins to analyse this important debate from a legal and political perspective.

Chapter 3: Criminal Defamation Law and Practice

Foreign and domestic commentators on Indonesian politics have increasingly criticised the impact of criminal defamation law on Indonesia's democracy (Broecker 2010b; Platzdasch 2009; Schonhardt 2010). Despite the growing criticism of the law, there is relatively limited scholarship on how the laws operate in practice.[30] The previous chapter demonstrated that the Indonesian public now has greater freedom to challenge how the state regulates free expression. In the past, it was mostly the Indonesian executive elite that made decisions about how to regulate free expression, which often included the use of violence to silence critical voices; in contemporary Indonesia however, free expression is primarily regulated through the legislative instruments and legal institutions such as the MK.

Against this background, criminal defamation has come to occupy a contentious space in Indonesia. A domestic debate has emerged in recent years about whether criminal defamation laws are an effective way of regulating the rights of people to express them-selves freely, or whether these laws have simply replaced violence as the government's main tool to threaten people who wish to express critical perspectives. Related to this, a series of other questions have been raised. For instance, do the laws create a disincentive for people to express potentially harmful defamatory statements? Do the laws ensure that civil society, journalists and individuals produce truthful and accurate statements? Or do the laws create a threat against activists, politicians or other citizens who oppose the incumbent government or other socio-political and economic elites? This chapter examines these questions by analysing two frequently used criminal defamation laws and the way that these laws are used in practice. Based on this analysis, the chapter makes initial judgments on what the laws say about the status of freedom of expression and democracy in Indonesia.

This chapter begins with a legal analysis of the criminal defamation provisions found under the KUHP and UUITE. This legal analysis demonstrates how the provisions of the UUITE and KUHP afford significant power to the police and

[30] Some general Indonesian language criminal law texts (briefly) discuss the operation of selected criminal defamation laws (Marpaung 1997; Soerodibroto 1991; Soesilo 1965). Additionally, in recent years, two Indonesian language texts have been published on the operation of the KUHP and the Law on Internet and Electronic Transactions (UUITE) (Chazawi 2009; Sunarso 2009).

prosecutors to exercise discretion when charging and investigating people with defamation. The second part of the chapter introduces two case studies: the first describes a defamation charge brought against Prita Mulyasari, a woman from West Java charged with defamation on the internet, while the second deals with a criminal defamation case against two activists of Indonesia Corruption Watch (ICW), an influential NGO based in Jakarta. Both Mulyasari's case and the ICW case demonstrate that powerful elites (who are not necessarily linked to the state or the incumbent national government) have manipulated the ambiguities inherent in Indonesian criminal defamation law to threaten individuals who wish to express critical opinions in public. While eventually none of the two cases led to convictions, the psychological and physical strain imposed on the 'suspects' has established significant disincentives for them to use their right to freedom of expression effectively.

Criminal Defamation under Indonesian Law

Criminal defamation law was defined in previous chapters as covering all offences which involve injury to a person's good name, reputation or honour, including insult, regular defamation, lèse-majesté and hate-sowing (see appendix 1). These criminal defamation offences are found under the KUHP and in several other pieces of legislation that regulate specific activities. This chapter focuses on two criminal defamation provisions that have been the cause of recent debate in Indonesia, namely Chapter 16 of the KUHP, which includes the regular defamation provisions, and Article 27 paragraph (3) of the UUITE that threatens punishment for 'cyber-libel' (see appendix 2 for translated versions of provisions referred to in the analysis below).

Criminal Defamation under the KUHP and the UUITE

The main offence of criminal defamation under Chapter 16 of the KUHP is found in Article 310. Paragraph (1) of this provision threatens punishment against, any person who "intentionally attacks someone's honour or good name by alleging a certain fact, with the clear intent to make that fact known publically".[31]

[31] "Barangsiapa dengan sengaja menyerang kehormatan atau nama baik seorang, dengan menuduh sesuatu hal, yang maksudnya terang supaya hal it diketahui umum".

If a person is found guilty of the offence under Article 310 paragraph (1) because of a verbal statement, they may be sentenced to a maximum of nine months imprisonment; and if an offence is carried out through writing or publically exhibited pictures or images, an offender may face one year and four months imprisonment under paragraph (2) of the same article. Additionally, if the offence under Chapter 16 is committed against a "government official" (*pejabat*), or a person who is exercising official duties, Article 316 increases these penalties by one-third.[32] In addition, all offences under Chapter 16 may also be punishable by fines. However, as the KUHP has not been substantially reformed for over fifty years, the fines have not been adjusted to match inflation (Human Rights Watch 2010, 18). The fine imposed under Article 310 paragraph (1), for instance, is only 300 rupiah ($0.04). Accordingly, Asep Komarudin (2010, interview), a lawyer with AJI who has dealt with several cases involving Article 310, say that it is "extremely rare" for fines to be issued.[33]

In contrast to the KUHP, the fine imposed by the UUITE – which was only created in 2008 – is severe. Article 45 paragraph (1) of the UUITE imposes a maximum fine of Rp. 1 billion ($123,000), or an imprisonment term of up to six years for defamation on the internet. Defamation on the internet is regulated by Article 27 paragraph (3) of the UUITE, which threatens punishment to, "any person who intentionally and without the right to do so distributes and/or transmits and/or makes it possible to access electronic information and/or an electronic document which contains insults and/or statements which defile the good name of someone."[34]

There are two legal defences available to persons charged with criminal defamation under either Article 310 of the KUHP or Article 27 paragraph (3) of the UUITE (*Putusan Mahkamah Konstitusi* 2008b, 40-41; Jaringan Dokumentasi dan Informasi Hukum BPK 2008, 5). The first is Article 310 paragraph (3) of the KUHP, which says that defamation does not occur where a person is making a

[32] The definition of *pejabat* is given under Article 92 of the KUHP and includes people who work for government, and also people chosen through elections to sit in legislative bodies.

[33] "sangat jarang sekali".

[34] "Setiap Orang dengan sengaja dan tanpa hak mendistribusikan dan/atau mentransmisikan dan/atau membuat dapat diaksesnya Informasi Elektronik dan/atau Dokumen Elektronik yang memiliki muatan penghinaan dan/atau pencemaran nama baik".

statement "in the public interest or out of necessary self defence".[35] Additionally, under Article 311 a person accused of defamation may argue that their statement is true, and hence not defamatory.

The Pre-Trial Process of Criminal Defamation Cases

The Indonesian Code of Criminal Procedure (*Kitab Undang-Undang Hukum Acara Pidana* –KUHAP) regulates the process for handling complaints against criminal activity, including defamation under both the KUHP and the UUITE (KUHAP, Article 2). The process begins when any member of the public reports an alleged incident of defamation to the police or certain civil servants who have been given authority under law to receive complaints (KUHAP, Articles 5 and 6).[36]

Police are given several powers under the KUHAP to investigate a complaint of criminal defamation. The most relevant to this study are the powers given to the police to require suspects to attend questioning, and to place people in pre-trial detention. Article 112 paragraph (1) of the KUHAP gives power to the police or other investigators to issue a summons, which requires a suspect deemed important to an investigation to come in for questioning. Articles 20 and 21 of the KUHAP authorises the police, prosecutors and judges to detain suspects alleged to have committed an offence that carries a penalty of more than five years, if they determine that there is a high likelihood that the suspect will flee, remove or destroy evidence, and/or repeat the offence.

The detention power given to police and prosecutors under the KUHAP is extensive. Where an arrest warrant is issued, a prosecutor can detain a suspect for 20 days under Article 25 paragraph (1). Under paragraph (2) of the same article, this may be extended by 30 days by the head of the local State Court (*Pengadilan Negeri* -PN). If a person is suspected of an offence under the UUITE, then additional requirements for pre-trail detention are created under Article 45 paragraph (6) of that law. The article requires that the investigator or police,

[35] "demi kepentingan umum atau karena terpaksa untuk bela diri".

[36] For example, Articles 4 and 5 of the Regional Regulation of the Special Capital Region of Jakarta Number 3 of 1986 gives power to civil servants who are at a low level management level (*Pengatur Muda Tingkat 1*), power to receive reports about breaches of criminal law.

through the public prosecutor, seek a determination within twenty-four hours from the head of the local PN on the validity of the detention (Sunarso 2009, 148). However, as demonstrated below, this is not always followed in practice.

Once the police or an investigator has completed the process of collecting evidence, they must inform a public prosecutor about whether they have been successful, or unsuccessful with their investigations (KUHAP Article 138). If the prosecutor decides there is enough evidence to proceed, he or she prepares an indictment, and the matter goes before a court (KUHAP, Article 140).

Legal Ambiguities: Police and Prosecutorial Discretion

There are many legal shortcomings with these provisions of the KUHP, KUHAP and UUITE (for detailed discussion see, Human Rights Watch 2010; Wiryawan, et al. 2009). For example, under the KUHAP there are no penalties created against police who violate provisions of the code, thus no disincentives exist against police simply ignoring these provisions (Fitzpartrick 2008, 507). This section focuses specifically on the legal deficiencies of these provisions, which in effect lead to a high level of police and prosecutorial discretion.

The subjectivity inherent in the regular defamation and cyber-libel provisions affords significant discretion to the police and prosecutors who use the laws. Criminal defamation in Indonesia follows the Roman-Dutch legal tradition (see chapter 1). In that tradition, the determination of defamation is based on the subjective feeling of the alleged victim (Lesmana 2005, 31; Sunarso 2009, 11). This contrasts starkly with the common law criminal system, in which the assessment of defamation uses more objective criteria. For example, Section 499 of the Malaysian Penal Code includes extensive illustrations and examples of objective types of situations in which defamation can occur, thus giving greater clarity to police at the investigation stage (Evans 1993, 134-42).

Additionally, the regular defamation and cyber-libel provisions create a great deal of judicial discretion because they are unclear. Many of the basic concepts included under Article 310 of the KUHP and Article 27 paragraph (3) of the UUITE are not defined, such as 'certain fact', or 'public'. Is, for instance, a

statement about someone made within a mosque 'public' for the purposes of proving defamation?[37] As these provisions are vague, Indonesian courts are left to define and interpret these terms (Soerodibroto 1991, 184-88). Therefore, at the investigation stage, police are not given any solid legal guidance on how to identify the conditions in which they can or cannot charge someone with defamation.[38]

A further problem with the defamation provisions is that they do not provide any limitations on double-charging. Therefore, it is possible for a suspect who writes a statement which is posted to the internet, or transmitted electronically, to get charged under both the UUITE and the KUHP for the same actions (Sunarso 2009, 139).[39] In addition to facing two sets of criminal charges, it is also possible for a person suspected of defamation to face a civil law suit under Article 1372 of the Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata* – KUHPer). Article 1372 of the KUHPer does not set any limitations on damages that an applicant can claim (for further discussion on the KUHPer see, Article 19 and AJI 2005, 65-67; Hendrayana, et al. 2009b, 59-63). This means that a person found guilty of writing a defamatory statement may face a maximum term of imprisonment period of around six years, a fine of up to Rp. 1 billion, and an unlimited claim for damages under civil defamation. As the head of KOMNASHAM, Ifdhal Khasim (2010, interview), puts it, "a person convicted under criminal law can be subject to prosecution again through the civil law!"[40]

In sum, the KUHP, KUHAP and the UUITE create powerful obstacles for citizens who wish to make critical statements about private or public affairs. The provisions' lack of clarity gives significant discretion and power to the police and

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[37] This issue was the subject of an appeal in the Supreme Court in 2009. In February 2008, Tarsip Jodriyo was alleged to have said in front of the pulpit at the end of Friday prayers that Ichsanoedin bin Umar Brojo Sudiro, although a senior member of the mosque, "still likes to consume forbidden (haram) goods" (*Putusan Mahkamah Agung* 2009, 2). The Court decided that the mosque was public, and sentenced Jodriyo to pay a fine.

[38] There are some texts published for civil servants and the police which catalogue the way that Indonesian courts have interpreted each of the criminal defamation provisions in the KUHP (Soerodibroto 1991; Soesilo 1965). However, these publications are not frequently updated, and it is not clear how available or how often these publications are used in practice by the police.

[39] The Constitutional Court (*Mahkamah Konstitusi* – MK) has determined that this *should* not occur; however, in practice it often does, as is discussed in case study below (*Putusan Mahkamah Konstitusi* 2008a, 281).

[40] "Orang sudah dipidana, bisa dituntut perdata lagi!"

prosecutors. Additionally, the charges carry with them significant periods of imprisonment, particularly for offences against public officials and for offences committed on the internet. The following section analyses how some of these legal shortcomings manifest themselves when the laws are put into practice.

Criminal Defamation Law in Practice

Criminal defamation laws continue to be applied in modern Indonesia, although no reliable statistics on the extent of their use are available.[41] Nonetheless, Khasim (2010, interview) argues that "from around the year 2000 until now, the intensity of the use of criminal defamation laws has been very high".[42] Supporting Khasim's claim are a number of reports from human rights NGOs in Indonesia and abroad, which have catalogued cases of criminal defamation against a variety of people and organisations over the last five years. These include cases against academics, farmers, NGOs, journalists, public commentators, students and, as Wahyu Wagiman (2010, interview), from the Institute for Policy Research and Advocacy (*Lembaga Studi dan Advokasi Masyarakat*- ELSAM) argues, other individuals who "put forward criticism or disparaging statements about the activities of government" (AJI 2009, 43-53; Human Rights Watch 2010; LBH Masyarakat 2009).[43] For example, AJI asserts that "between 2003 and April 2007, 41 defamation cases were filed against the country's media" (AJI in Article 19 2007, 1) (see appendix 3, for an overview of selected criminal defamation cases between 2008-2010).

This section focuses on two examples of criminal defamation against Prita Mulyasari and ICW, who were charged under the cyber-libel provisions and Article 310 of the KUHP respectively. These case studies were chosen for a number of reasons: first, the individuals involved were pursued on the provisions

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[41] I sought to obtain statistics about the use of criminal defamation law from the Indonesian Central Statistics Agency (*Badan Pusat Statistik*) as well as the Ministry of Law and Human Rights (*Kementerian Hukum dan HAM*), but was told that such data is unavailable. Human Rights Watch also unsuccessfully sought to obtain statistical data from these and other Indonesian government and law enforcement bodies (2010, 8-9). Additionally, criminal statistical data published by the Indonesian government focuses only on the incidence of violent crimes, and does not include offences against laws regulating free expression (Badan Pusat Statistik, 2005, 2007).

[42] "mulai tahun dua ribuan sampai sekarang intensitas penggunaan pasal pencemaran nama baik sangat tinggi".

[43] "Masyarakat yang mengajukan kritik-kritik, atau catatan-catatan keras atas kinerja pemerintah dituntut atau dilaporkan di bawa pencemaran nama baik".

cited above, thus constituting examples of one of the oldest and one of the newest criminal defamation laws being used in contemporary Indonesia; second, the cases involve the use of criminal defamation law against an NGO, in the case of ICW, and against an individual, in Mulyasari's case; third, the complainant in the cases include both government and corporations; fourth, the cases have featured prominently in the debate about criminal defamation and democracy; and finally, the cases are demonstrative of the problems in the application of criminal defamation laws through Indonesia's law enforcement bodies and judiciary.

Defamation on the Internet: the Case against Prita Mulyasari

The origin of the defamation case against Mulyasari was an email she sent on August 15, 2008 to around twenty friends and work colleagues (Joniansyah 2009a). Mulyasari's email, titled "Fraud in Tangerang's 'Alam Sutera' Omni International Hospital", provided a detailed and impassioned series of complaints about the services she had received a few days earlier at the Omni International Hospital of Tangerang (Mulyasari 2008a).[44] In her email, Mulyasari (2008a) claimed that the hospital's staff produced "fictitious" (*fiktif*) blood test results, overmedicated her, and required her to stay overnight beyond what was necessary, all designed to accumulate a large medical bill. Moreover, she levelled specific attacks on the hospital and its staff. She wrote, for instance, that "the Management at Omni are all BIG LIARS, all of them";[45] that "Dr Grace and Ogi do not possess polite manners or the ethics of customer service";[46] and she also "informed" the reader that they should be "particularly careful in receiving treatment" from the doctor who was in charge of her, an individual named Hengky.[47]

Mulyasari's email was circulated widely on the internet, and was soon posted on blogs and news websites (Mulyasari 2008b). It was subsequently seen by Hengky who, on September 5, 2008, filed a report to the Jakarta Metropolitan Police (*Polda Metro Jaya*) against Mulyasari, under Articles 310 and 311 of the KUHP

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[44] "Penipuan OMNI International Hospital Alam Sutera Tangerang". Alam Sutera refers to the street on which the hospital is located.

[45] "Manajemen Omni PEMBOHONG BESAR, semua".

[46] "Terutama dr. Grace dan Ogi, tidak ada sopan santun dan etika mengenai pelayanan customer, tidak sesuai dengan standard International yang RS ini cantum".

[47] "Saya informasikan juga dr. Henky praktek di RSCM juga, saya tidak mengatakan RSCM buruk tapi lebih hati-hati dengan perawatan medis dari dokter ini".

(Joniansyah 2009c; Republika 2009). Following their investigation, Polda Metro Jaya reported to Rahmawati Utami of the Banten Prosecutors Office, who indicted Mulyasari for her email. Utami charged her under Articles 310 and 311 of the KUHP, and added a charge under Article 27 paragraph (3) of the UUITE (Kompas 2009g). The consequence of including the UUITE charge to the indictment was that the charges against Mulyasari now carried a jail term of five years or more (Marhas 2009). Consequently, using the powers under Articles 21 and 25 of KUHAP, Utami placed Mulyasari under pre-trial detention on May 13, 2009. She was held in the Tangerang Women's Correctional Facility (*Lembaga Permasyarakatan Wanita Tangerang*), where she remained for twenty-one days until June 3, 2009 (Kompas 2009b, 2009g; Sunarso 2009, 7).

From June until December 2009, Mulyasari faced a series of trials and appeals.[48] Ultimately, the PN Tangerang acquitted Mulyasari on 29 December of all defamation charges issued against her under the UUITE and the KUHP (*Putusan Pengadilan Negeri Tangerang* 2009; Noorastuti 2009). In congruence with her criminal defamation charges, Mulyasari also faced a civil defamation lawsuit instigated by Hengky. Mulyasari initially lost this civil case following an appeal to the Banten High Court (*Pengadilan Tinggi Banten*) on June 5, 2009, and was ordered to pay Hengky damages of Rp. 204 million ($25,132), and to publish one letter of apology in the national press (Kompas 2009f). However, the Supreme Court (*Mahkamah Agung* – MA) overturned this decision in October 2010, declaring that Prita was not liable to pay any damages to the plaintiff (Joniansyah and Febriyan 2010; Liu 2010).

Mulyasari's criminal case highlighted the risk of misapplication and manipulation of the Indonesian criminal law regime for regulating defamation. The behaviour of Utami in particular is demonstrative of this risk. Firstly, the prosecutor did not follow the requirements of pre-trial detention. Mulyasari was indicted under Articles 310 and 311 of the KUHP and Article 27 paragraph (3) of the UUITE. The charges under the KUHP do not carry a five year term of imprisonment. Consequently, to justify pre-trial detention, the prosecutor must have relied on the

[48] Mulyasari's trial began in the Tangerang State Court on 25 June 2009. On that occasion, Justice Karel Tuffu dismissed all charges against her. Utami appealed to the Banten High Court, which overturned Tuffu's decision on 31 July, and ordered that the case be reheard by the Tangerang State Court (Joniansyah 2009b; Kementrian Komunikasi dan Informatika 2009).

UUITE article. As a result, Mulyasari should have been brought before a judge to asses the validity of her detention within twenty-four hours, as is required under Article 45 of the UUITE, rather than staying in detention as she did for twenty-one days.

Secondly, Utami used the legal powers under both the KUHP and UUITE to aggressively appeal Mulyasari's criminal cases. Utami sought an extension of Mulyasari's pre-trial detention, appealed an initial acquittal by the PN Tangerang to the Banten High Court, and then threatened to appeal Mulyasari's second acquittal to the MA (Sunarso 2009, 92). The aggression of this prosecutorial strategy was especially curious because by the time of her final criminal trial, the doctors had already received a remedy against Mulyasari's alleged defamation through their successful civil law suit.

Finally, it became clear that there was a "special relationship" (*hubungan khusus*) between the prosecutor's office and Omni Hospital (Kompas 2009d). On May 18, 2009, five days after Mulyasari's pre-trial detention, Omni had provided a notice to all employees of the Banten Prosecutor's Office stating that they were eligible to receive free pap-smears and medical checkups from the hospital (Lopies, et al. 2009). The belligerent strategies applied by the prosecution – combined with the apparently very close relationship the prosecutors office cultivated with Omni hospital – has caused commentators to speculate that corruption may have been behind the prosecutor's strong persistence in this case (Legalitas 2009; Malau and Huda 2009).

Mulyasari was among the first, but not the last individual to be charged under the UUITE. For example, on December 17, 2009, popular sitcom actress Luna Maya was reported for defamation under the UUITE after she wrote a Twitter[49] message stating that a tabloid news agency were "more DESPICABLE than PROSTITUTES, MURDERERS!!!!" (Maya in Dariyanto, et al. 2009).[50] There are also many other cases against people who, like Mulyasari, have complained about

[49] Twitter is an internet based social-networking website, which allows users to create an account and write comments which are publicly accessible.

[50] "Infotainment derajatnya lebih HINA dari pada PELACUR, PEMBUNUH!!! may ur [*sic*] soul burn in hell".

services of corporations and have found themselves facing jail terms under criminal defamation law (Human Rights Watch 2010, 4, 27) (see appendix 3). Human Rights Watch argues that these cases have "had an extremely detrimental effect on the willingness of private citizens to publicly express anger or dissatisfaction about anything" (2010, 50). In fact, Mulyasari herself says she "does not know how to complain again" (Mulyasari in Human Rights Watch 2010, 6). These comments give credence to the arguments of strong liberal scholars that having criminal defamation laws on the statute books can lead to a 'chilling' effect on free expression (see chapter 1). This is particularly pertinent if the laws are used to silence criticism against public officials, which is an issue discussed in the next case study.

Defamation vs. Criticism of Public Officials: the Case of Indonesia Corruption Watch[51]

ICW is a prominent Indonesian NGO that aims to identify and expose corruption within the many layers of the Indonesian government. The NGO is made up of several divisions which focus on particular elements of the government, including a 'Law and Court Monitoring' and a 'State Budget Analysis and Monitoring' division (Indonesia Corruption Watch 2010).

The criminal defamation case involving ICW relates to a press conference held on January 4, 2009, about corruption in the Supreme Court, or MA. The event was led by Illian Deta Arta Sari, the head of ICW's Law and Court Monitoring division, and Emerson Yuntho, the vice coordinator of the NGO. At the press conference, Arta Sari and Yuntho were asked about the MA's recovery of assets arising from successful anti-corruption prosecutions. The journalists wanted to know if the assets recovered by the MA had been returned to the state treasury, as is required by law whenever the state recovers money or assets in a criminal case. According to a newspaper article published in the Jakarta-based daily *Rakyat Merdeka* (2009) on the following day, Arta Sari responded to the journalists' queries by saying that it is "uncertain that money [recovered from corruption cases] goes directly into the state treasury", instead it may go into the "account of the prosecutor for years to

[51] Unless indicated otherwise, this section is based on interviews with Illian Deta Arta Sari and Emerson Yuntho on 10 February 2010 at the office of Indonesia Corruption Watch (ICW), Jakarta. During these interviews I was also shown sections of a Brief of Evidence (Indonesia Corruption Watch 2009) prepared by ICW for the Arta Sari and Yuntho cases.

accumulate interest" or even into the "accounts of private banks".[52] Additionally, Yuntho was quoted in the article saying that "the majority of the money is still in the holding accounts of the state prosecutor" and not in the state treasury (Rakyat Merdeka 2009).[53]

On January 7, 2009, two days after the publication of the article, officials from the Office of the Attorney-General (*Kejaksaan Agung*) filed a criminal defamation complaint against Arta Sari and Yuntho. Curiously, there was no further police activity until October 12, 2009, when the activists were issued with a summons to attend Polda Metro Jaya headquarters for questioning. The summons labels the activists suspects under articles 310 and 316 of the KUHP, which is the criminal defamation provision with a heightened penalty because the 'victim' was a public authority (Indonesia Corruption Watch 2009). However, the activists refused to attend questioning and the case has been on hold ever since, for reasons discussed in chapter 4.

Similar to Mulyasari's experience, this case pointed to several ways in which criminal defamation laws can be manipulated by complainants and law enforcement agencies – especially if they are one and the same. Firstly, the activists insisted that their statements were truthful and had already been publically made through the press and the government's own State Auditing Authority (*Badan Pemeriksa Keuangan* - BPK). Several publically available BPK reports over the course of four years outlined that the MA was consistently recovering more assets than it was returning to the state treasury (Badan Pemeriksan Keuangan 2004, 2005, 2007, 2008). The reports demonstrated that one reason for the discrepancy was because funds collected by the MA from the resolution of corruption cases were stored in the holding accounts of the court, rather than being transferred back to the state treasury (Badan Pemeriksan Keuangan 2008, 107). Even several newspapers had reported on the discrepancies in the MA's figures arising from the 2005, 2007 and 2009 BPK reports (Antara News 2007; Hendraman 2007; Kompas 2005, 2007; Pelita 2009; Suspato 2007).

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[52] "belum tentu hari ini juga uang tersebut masuk ke kas negara. Mungkin ditaruh dulu ke rekening kejaksaan lalu diputar bunganya selama bertahun-tahun. Apa lagi, ada rekening di bank swasta".

[53] "sebagian besar uang tersebut masih di rekening titipan Kejaksaan".

Secondly, Arta Sari and Yuntho did not contest the accuracy of the quotes made in the *Rakyat Merdeka* article. However, they questioned why they, and not the journalist who wrote the article, were charged for defamation. After all, their statements did not allege that the discrepancies between the BPK and MA figures were the result of corruption. Instead, it was the newspaper article's title ("Money from Corruption Cases is itself the Subject of Corruption; why has 7 Trillion Rupiah not been transferred to the State Treasury?"[54]) which insinuated that corruption was involved.

Thirdly, the activists argued that it is in the 'public interest' for government corruption to be uncovered and hence they should have been afforded protection under Article 310 paragraph (3) of the KUHP, which exempts statements made of this nature. Finally, Arta Sari and Yuntho pointed out that the summons that they received were legally invalid, because it addresses their place of work falsely – and bizarrely – as "International Coroption Word" (see figure 1).

These legal shortcomings have led to questions about why the police issued summonses against the activists, and why they waited eight months do so (Nilawaty 2009). Arta Sari believes that the Office of the Attorney-General was targeting ICW for being critical about corruption in the MA.[55] In other words, Arta Sari argues that the charges of criminal defamation were a form of retribution for her and Yuntho's criticism. Obviously, this suspicion is not far-fetched: the case was reported by the very Attorney-General's office that ICW suggested was holding on to the monies recovered by the MA from corruption cases. Accordingly, it is fair to conclude that both the prosecutors and the MA – the highest judicial institution in the country beside the MK – used their extraordinary powers and influence to silence an NGO that had questioned the way the two bodies cooperated in a specific field of financial affairs.

Beyond the concrete defamation case, there are many reasons why the MA and the Attorney-General's Office would have wanted to silence ICW activists. ICW is

[54] "Uang Perkara Korupsi kok Malah Dikorupsi: Kenapa Duit 7 Triliun Belum Masuk Negara?"

[55] Arta Sari (2010, interivew) argues that ICW were targeted by the Attorney-General because they were highly critical "towards the judges or the court which often acquitted corrupt people, or their activities" [Karena kita banyak kritis terhadap hakim atau pengadilan yang banyak pembebasan koruptor, atau soal-soal kinerja mereka].

regarded as "Indonesia's foremost anti-corruption NGO", because of the marked impact the organisation has had on exposing and sparking debate about corruption in Indonesia's executive, legislative and judicial institutions (Sherlock 2002, 373). In the months leading up to the summons being issued, Arta Sari and Yuntho were in fact particularly active in exposing corruption in the MA. For instance, in September 2009 the activists reported 31 judges from the MA and various State Courts to the Judicial Commission (*Komisi Yudisial*) for failing to properly apply anti-corruption laws in Indonesia (Syavira 2009). Furthermore, in October 2009, the activists argued that 71 percent of the candidates who had applied for the post of Supreme Court judge were corrupt or of questionable character (Antara News 2009a). This included allegations that five of the candidates were having extra-marital affairs (Kompas 2009h).

ICW's experience is not an isolated case of criminal defamation law being used by a public authority to try and silence criticism. Allegations and examples of this practice can be heard from environmental, labour migration, human rights, and free press NGOs.[56] For example, in 2008 Usman Hamid, the head of the Commission of Disappeared Persons and Victims of Violence (*Komisi Untuk Orang Hilang dan Korban Tindak Kekerasan* - Kontras), was charged with criminal defamation. The charges arose as a consequence of Hamid's statement which accused Muchdi Purwopranjono, the former head of Indonesia's Intelligence Agency (*Badan Inteligensi Nasional* - BIN), of being involved in the murder of well-known human rights activist Munir Said Thalib (Usman Hamid 2010, interview). While Hamid's case has effectively been halted – like ICW's – the impact of the defamation law being used was one of psychological and social intimidation. As a consequence, Arta Sari argues that, "often in practise the community is not able to speak; they are not able criticise government officials".[57]

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[56] I spoke to eleven national non-government organisations (NGOs), all of whom reported examples of their members being charged with criminal defamation offences. These NGOs include organisations such as the Alliance of Independent Journalists (*Aliansi Jurnalis Independen* –AJI), which campaigns for greater press freedom; the Commission of Disappeared Persons and Victims of Violence (*Komisi Untuk Orang Hilang dan Korban Tindak Kekerasan* – Kontras) and the Institute for Policy Research and Advocacy (*Lembaga Studi dan Advokasi Masyarakat* – ELSAM), human rights advocacy bodies; the International NGO Forum of Indonesia (INFID), which represents some labour unions and migrant worker organisations; and the Indonesian Forum on the Environment (*Wahana Lingkungan Hidup Indonesia* – WALHI), an environmental NGO.

[57] "Yang seringkali terjadi prakteknya adalah masyarakat tidak boleh bicara; tidak boleh mengkritik penjabat".

Thus as in the private and individual case of Mulyasari, the repercussions of charges against NGOs also highlight the potential 'chilling' effect that criminal defamation has had on the belief in and practice of freedom of expression.

Conclusion: Weak Laws, Pragmatic People

As demonstrated in this chapter, the vaguely defined criminal defamation provisions under the UUITE and KUHP establish offences that carry the risk of significant penalties and fines, while giving broad discretionary power to the police and prosecutors. For instance, although Mulyasari was ultimately acquitted, her prolonged pre-trial detention and protracted criminal appeal are testimony to the extensive powers given to the prosecutor through the KUHAP. Even more compelling was the ICW case, in which the Attorney-General's Office – formally in charge of prosecting criminal defamation cases –acted itself as a complainant, creating dangerous risks related to conflict of interest. Both Mulyasari's and Arta Sari's comments on their and society's reluctance to make further statements suggest that these powers can lead to a significant reduction in the freedom of public discourse.

The material presented in this chapter has revealed that Indonesian criminal law does not adequately protect the rights of people who make critical statements in public. The ambiguity of the regular defamation provisions of the KUHP and the cyber-libel provisions of the UUITE – coupled with extensive police and prosecutorial powers under the KUHAP – have led to a situation in which the law favours politically and economically powerful complainants. These complainants are able to leverage (in some cases, bribe) law enforcement agencies and prosecutors to serve their personal interests of silencing their critics. Hamid (2010, interview) sums up the situation neatly, by arguing that the problem with criminal defamation law in Indonesia is that "the law is so weak, law enforcement so corrupt, and political figures are all so pragmatic."

The attempts to silence expression in both case studies, and in other instances in which criminal defamation laws are used, follows the general trend of the regulation of free expression in Indonesia. That is, the law is mostly used in horizontal, inter-personal disputes, rather than as part of a centralised government effort to silence expression. In the Mulyasari case, the prosecutor's office

effectively used the law as a tool with which the economically powerful doctors were able to punish Mulyasari for being critical. Equally, the ICW case demonstrates how the ambiguous Chapter 16 of the KUHP and the KUHAP allowed a few politically powerful members of the MA and the Attorney-General's Office to use the law to launch a campaign of personal retribution against activists who accused them of corruption. Scholars have credited ICW for being part of the architecture which has advanced Indonesia's transition to a democracy in recent years (Baladas 2004, 525). Accordingly, the existence of any legal tool or practice able to silence this NGO or similarly important organisations would undermine the prospects of Indonesia's democracy to further consolidate.

But while powerful individuals have used criminal defamation law to try and silence criticism against them, the outcome of the two cases described above has indicated that there is another side of the story. In eventually overturning convictions or not bringing cases to court at all, judges and prosecutors were clearly influenced by NGOs, journalists and individuals who initiated an effective response to this overuse of the law. The following chapter discusses this societal push-back, suggesting that the effects of criminal defamation law on democracy may have been counterbalanced by vigorous post-1998 civil society activism.

Figure 1: "Sorry this is not the office of 'International Coroption Word'" - sign erected at ICW after Arta Sari and Yuntho issued with summons – Jakarta (October, 2009)



Source: Jakarta 45 Blog (http://jakarta45.wordpress.com)

Figure 2: A group of bloggers call for the revocation of cyber-libel under the UUITE - Denpasar, Bali (June, 2009)



Source: Rumah Tulisan Blog (http://www.rumahtulisan.com)

Figure 3: Coins collected at Al Azhar Syifa Budi preschool for the '*Koin Peduli Prita*' campaign -Solo, Central Java (November, 2009)



Source: Mata News

Figure 4: Megawati Sukarno Putri and Subianto Prabowo visit Prita Mulyasari (front left) - Tangerang, West Java (July, 2009)



Source: Viva News

Chapter 4: Civil Society and the 'Push-Back' against Criminal Defamation Law [58]

The previous chapter demonstrated that economically and politically powerful individuals often manipulate criminal defamation laws in Indonesia, to silence criticism against them. At the same time, however, Indonesian individuals, NGOs, and the press are responding with zeal to the use of criminal defamation law: in the six months between November 2009 and April 2010, no fewer than 500 editorials and news articles were published in the Indonesian press that discussed the effect of criminal defamation on the country's democracy;[59] there has been extensive discussion of the laws on Indonesian television and radio broadcasts (Surya Citra Televisi 2009; TV One 2009); NGOs have led protests on the issue (Melyani 2010); and criminal defamation laws have been challenged in the MK (Halim 2009). These efforts are the consequence of a concerted campaign by Indonesian civil society groups against criminal defamation laws. These campaigns have made use of Indonesia's key democratic institutions, including its free press, constitutional court, and legislature.

This chapter explores the Indonesian civil society response to the use of criminal defamation laws in general as well as their application in concrete cases. It argues that civil society activism has been an effective tool to counter, and in some cases, neutralise formal indictments on defamation charges. The chapter develops its argument in three sections which examine three different societal responses to criminal defamation: the first assesses political efforts to achieve reform of the laws; the second analyses the way that NGOs and individuals have made use of the MK in their reform efforts; and the third section considers the steps taken by Indonesian civil society groups to support people charged for criminal defamation offences. Each of the sections evaluates the strategies that civil society groups employed to achieve their goals, the success of these strategies, and possible hurdles which may constrain the future success of their approach. Despite these

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[58] The term "push-back" was used by Jim Nolan (2010, interview) an Australian barrister who assisted in a MK challenge of the UUITE, to describe the response of Indonesian NGOs against the misuse of criminal defamation law.

[59] I collated articles using an internet notification service searching for articles containing the Indonesian terms "*pencemaran nama baik*" and "*pidana*" and "*demokrasi*". Searches were limited to Indonesian language outlets that publish articles on the internet. Articles with identical repeating content were not included in the count.

limitations, there have been many successes: some criminal defamation laws have been reformed; Indonesian politicians have responded to calls to reform the laws; and Indonesian individuals, civil society and the press have been able to effectively stymie the misuse of criminal defamation in many cases. Accordingly, this chapter highlights the effectiveness of civil society in 'pushing-back' against the misuse of criminal defamation law in Indonesia and thus protecting Indonesian democracy from the threat that they could otherwise pose.

Political Lobbying to Reform Criminal Defamation

In response to the trend of misusing criminal defamation to settle personal disputes and silence opponents, civil society groups have launched campaigns to revoke or change the laws through public and political pressure. This section focuses specifically on calls to reform the regular defamation provisions of the KUHP and the cyber-libel provisions of the UUITE. Underpinning the individual, NGO and press demands for reform is a strongly liberal approach to criminal defamation law (see chapter 1). The strong liberal view holds that criminal defamation laws are inappropriate because they will inevitably lead to government attempts to 'chill' critical expression. This is a perspective which is often expressed amongst civil society actors in Indonesia (Kompas 2009a; Oktavery 2010; Subagja 2010). These actors argue that if criminal defamation laws continue to be used, as they were against the ICW activists and Mulyasari for instance, people will be fearful of keeping government and corporations accountable. Consequently, NGO actors insist that the laws should be regulated through civil, rather than criminal law (Astraatmadja 2009, 12; Human Rights Watch 2010, 62; Manggiasih and Wiyana 2010). This liberal objective of reform has pervaded the civil society response to the laws.

Strategies for Liberal Reform

The main strategy civil society groups have employed to lobby for this strong liberal reform has been to lead activities that will put domestic and international pressure on the Indonesian government. In 2009, for instance, a group of journalists led by the media advocacy group AJI, protested outside the headquarters of the Indonesian National Police (*Kepolisian Negara Republik Indonesia*- POLRI), complaining about what they perceived to be the increasing criminalisation of their profession, including the use of criminal defamation laws against them. The protestors called for the removal of criminal defamation, and

other laws regulating expression, from the KUHP (Kertapati 2009). In 2009 and 2010, criminal defamation laws have also been the subject of several other protests across the country calling for the revocation of the laws (Hasan 2009; Puspasari and Mahaputra 2010) (see figure 2).

Similarly, individuals, NGOs and journalists have made effective use of the press, the internet and other publications to try and drive their strong liberal agenda. The majority of the editorials mentioned in the introduction of this chapter call for the criminal defamation provisions contained within the KUHP and UUITE to be removed (Candra and Saputra 2009; Laksmi 2010; Suspato 2009; Suwahju 2009). As one NGO commentator emphasised, criminal defamation laws are "anti-democratic relics of a bygone, repressive era for which today's Indonesia has no use" (Broecker 2010a). Similar opinions also abound on several Indonesian 'blogs' which discuss issues of law and human rights (Nababan 2009; Paripurna 2009).[60] For example, one blogger, Suwahju (2008) warned that the UUITE will become a "threat" for bloggers because it "maintains articles which should no longer exist under Indonesian law, such as criminal defamation".[61] Finally, several Indonesian NGOs have written monographs on the issue of criminal defamation, calling for the provisions contained in the KUHP and UUITE to be deleted (AJI 2009; ELSAM 2010; International Federation of Journalists and AJI 2005).

Individuals and NGOs have also sought to reform the KUHP and UUITE defamation provisions by directly lobbying state officials and politicians. For instance, several NGOs have made submissions to the DPR that demand reforms of the KUHP and other pieces of legislation in order to eradicate criminal defamation law (Komite Pembela Kemerdekaan Berpendapat 2009; Yuntho and Aliansi Nasional Reformasi KUHP. 2007).

In addition to these domestic calls for reform, Indonesian NGOs have also sought to place international pressure on the Indonesian government to reform the laws. Many Indonesian NGOs actively campaigning on the issue of defamation have

[60] Angarra Suwahju runs of the most comprehensive blogs on the issue of criminal defamation law, available at: http://anggara.org/.

[61] "Ancaman yang akan terjadi adalah karena UUITE ini masih menyimpan pasal-pasal yang seharusnya tidak lagi ada di Indonesia, seperti pencemaran nama baik".

well established links with international organisations. For example, the Community Legal Aid Institute (*Lembaga Bantuan Hukum Masyarakat* - LBH Masyarakat) cooperates with the international human rights NGO, Amnesty International, to produce a monthly newsletter on human rights issues in Indonesia, which has an international circulation. Significantly, a 2009 edition of this newsletter included a story on the Mulyasari case, which stressed that as long as criminal defamation articles remain under Indonesian criminal law, "freedom of speech and expression [in Indonesia] will be trampled" (LBH Masyarakat 2009, 3).

The Political Approach: Partial Successes

These attempts to create domestic and international political pressure have yielded some success. Following the Mulyasari case, for instance, the UUITE was subject to enormous domestic political criticism of the law by civil society groups (Antara News 2009c; Cipta 2009; Hidayat 2009). As a result of this barrage of criticism, the Indonesian government has indicated that it would consider reforming the criminal defamation provisions of the UUITE. For example, Ministry of Communications and Information Technology (*Kementerian Komunikasi dan Informatika* – MENKOMINFO), the department which originally drafted the UUITE, has released a press statement acknowledging that Article 27 paragraph (3) may be too "extreme" (*ekstrem*) (Cornila 2009). The Minister for Communication and Information, Tifatul Sembiring, even went as far as saying that the UUITE needed to be "corrected" (*dikoreksi*) to ensure that criminal defamation was not misused (Candra 2009).

Indonesian NGOs have also had some success at generating international pressure. Criminal defamation has featured prominently in general human rights reports written about Indonesia by Article 19 (2007), an international organisation which campaigns for free expression, Amnesty International (2009), the International Federation for Human Rights (2009), and the International Federation of Journalists (2005). Some reports by international organisations included the cases studied in chapter 3. The ICW case, for instance, was discussed in a report about human rights in Indonesia produced by the Asian Human Rights Commission (2009, 18-19), and in a publication by Human Rights Watch (2010, 22-24). This latter report calls upon the Indonesian government to revoke all criminal defamation laws (Human Rights Watch 2010, 66), and this recommendation was

cited in several international media sources (Broecker 2010b; Schonhardt 2010). This has led to the head of DPR Commission I on Foreign Affairs, Defence and Communications to state publicly that the UUITE, and specifically its defamation provisions, need to be reformed (Prihadi 2010).

Limitations of Political Reform

The successes in kindling domestic and international political pressure have, nevertheless, not yet resulted in legislative reform. There are several reasons for this.[62] One of the most significant limitations to reforming either the KUHP or the UUITE is that many members of the Indonesian government adopt the 'reasonable regulation' view of criminal defamation. The central argument of this view is that defamatory statements made in public can cause reputational harm to individuals, and consequently the state has an obligation to protect citizens from it, just as it protects citizens from physical or other types of harm (see chapter 1). Accordingly, the reasonable regulation approach holds that civil law is insufficient to avenge defamatory statements. This is the dominant view expressed by Indonesian government officials who have made statements about the laws (Antara News 2009b). For example, Benny K Harman, a member of the Democratic Party (*Partai Demokrat*) and head of the DPR Commission III on Legal Affairs believes that,

> the state has an obligation to protect the reputation of individuals, [and] if there are citizens or groups who take actions to defame them, the state has an obligation to punish them – that is the role of criminal law.[63] (2010, interview)

In fact, members of the government accept the utility of criminal defamation laws to such an extent that they have called for the current provisions to be strengthened. The Speaker of the DPR, Marzuki Alie, argues that criminal defamation laws need to be "revised" (*direvisi*) in Indonesia, so that they include much harsher penalties (Alie in Antara News 2009b). In fact, the Draft Criminal Code (*Rancangan Kitab Undang-Undang Hukum Pidana*), which is proposed to amend the KUHP, increases the number of criminal defamation provisions in the

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[62] There are many political reasons which explain the stagnation of the KUHP reform process more broadly which are beyond the scope of this thesis. For example, Butt (2003) argues that one reason for the stagnation of KUHP reform is fear that a debate about criminal law will be dominated by Islamic politics.

[63] "Negara punya kewajiban untuk melindungi reputasi individu, apabila ada warga atau kelompok yang melakukan tindakan yang merusak nama baiknya, negara punya kewajiban untuk menghukum - itu adalah tindak pidana".

code (Yuntho and Aliansi Nasional Reformasi KUHP. 2007, 53-62).[64] Given the limited success of efforts to reform criminal defamation laws through the political process, Indonesian NGOs and individuals have also pushed for change by taking their cause the MK.

Challenging Criminal Defamation Laws in the MK

Between 2006 and 2009, five separate judicial review challenges of criminal defamation laws have been brought before the MK. Aside from the *Lèse-Majesté Case* and *Hate-Sowing Case* discussed in chapter 2, the three other judicial review challenges related to the criminal defamation laws upon which this thesis has focused: the regular defamation provisions of the KUHP and the cyber-libel provisions of the UUITE. The case challenging regular defamation provisions questioned whether the provisions of the KUHP are consistent with the right to free expression (*Putusan Mahkamah Konstitusi* 2008a, '*KUHP Case*'). The second case in 2008 examined whether the cyber-libel provisions of the UUITE violate the right to freedom of the press guaranteed under the constitution (*Putusan Mahkamah Konstitusi* 2008b, '*UUITE Free Press Case*'). Finally, a case in 2009 examined whether the same provision of the UUITE is consistent with the right to free expression more broadly (*Putusan Mahkamah Konstitusi* 2009, '*UUITE Free Expression Case*').

Liberal Challenges to the MK

The attempts to reform the KUHP and UUITE in the MK have been based on strong liberal arguments. In each of the five cases before the MK, the applicants recommended that the judges remove criminal defamation from Indonesian law (*Hate-Sowing Case*, 25; *KUHP Case*, 39-41; *Lèse-Majesté Case*, 28-30; *UUITE Free Expression Case*, 33-34; *UUITE Free Press Case*, 8). To make this argument for revocation, the applicants used 'strong liberal' reasoning.

Like the groups who have fought criminal defamation in the political arena, the applicants at the MK maintained that the various provisions under the UUITE and

[64] Hendrayana (2010, interview), the head of the Press Legal Aid Foundation (*Lembaga Bantuan Hukum Pers* – LBH Pers) claims that "the RKUHP…adds an additional 61 provisions of criminal defamation to the criminal code (originally) created by the Dutch" [Pasalnya dalam RKUHP lebih banyak lagi. Dari 32 pasal dalam kitab pidana buatan Belanda, tambah 61 pasal tentang pencemaran nama baik].

KUHP, "chill" (*membungkam*) critical expression in Indonesia (*Hate-Sowing Case*, 42; *KUHP Case*, 17; *Lèse-Majesté Case*, 27; *UUITE Free Press Case*, 13; *UUITE Free Expression Case*, 33-47). They predicted that if criminal defamation laws continue to be used people will be fearful of keeping government and corporations accountable (*Hate-Sowing Case*, 42-44; *KUHP Case*, 132; *UUITE Free Press Case*, 21; *UUITE Free Expression Case*, 31-33). This will ultimately lead to a diminution of the quality of Indonesia's democracy, because the people within the polity will not have access to enough information to make political decisions (*Hate-Sowing Case*, 44, 49; *KUHP Case*, 17-18; *UUITE Free Press Case*, 15-16; *UUITE Free Expression Case*, 47-51). Ricky Gunawan, one of the lawyers from LBH Masyarakat who assisted in these cases, summed up the argument as follows:

> Freedom [to express an] opinion is the corner-stone of democracy. These 'rubber' [criminal defamation] provisions which are highly subjective may silence and endanger freedom of opinion. Accordingly, if people do not receive information, the existence of democracy will be threatened.[65] (2010, interview)

Probably much to the surprise of their proponents, these strong liberal reform efforts have yielded some impressive outcomes.

The MK's Decisions: Win Some, Lose Some

Chapter 2 discussed the *Hate-Sowing Case* and the *Lèse-Majesté Case*, in which the MK decided to invalidate those criminal defamation provisions of the KUHP. The reasoning of the majority in those cases shows that they were particularly persuaded by the strong liberal arguments advanced by the applicants. Notably, the judges in both cases heeded the arguments of the applicants that the hate-sowing and lèse-majesté provisions were misused in practice, and were consequently silencing free expression. For instance, in both the *Hate-Sowing Case* and the *Lèse-Majesté Case*, the judges of the MK opined that the threat of six years imprisonment attached to the offence led to situations in which the police and prosecutors were misusing the KUHAP to detain suspects (*Hate-Sowing Case*, 72; *Lèse-Majesté Case*, 58). As pointed out previously, detention is possible if an offence is punishable by a prison term of more than five years.

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[65] "Kebebasan berpendapat itu *cornerstone*-nya demokrasi, sehingga kalau dia dibungkam dengan pasal-pasal karet, dengan subyektivitas yang tinggi, bisa membahayakan kebebasan berpendapat, sehingga kalau orang tidak mendapatkan informasi, kehidupan demokrasi terancam".

The initial successes of civil society groups in the MK have not been matched in recent years, with the court rejecting the three most recent judicial review challenges to regular defamation and cyber-libel provisions. Despite being challenged on two occasions, the MK has decided that the cyber-libel provisions are consistent with the rights to a free press and to free expression under the constitution, in 2008 and 2009 respectively (*UUITE Free Expression Case*; 145, *UUITE Free Press Case*, 107). In addition, Chapter 16 of the KUHP has been held to be consistent with the right to free expression (*KUHP Case*, 279-80). The court has found in favour of the respondents (the government) in these cases because it accepted their 'reasonable regulation' arguments.

Using arguments similar to those of reasonable regulation scholars such as Greenawalt and Brenner, the MK emphasised that defamatory statements can create significant harm to individuals, such as the loss of income from damage to reputation (*KUHP Case*, 104-106). The court relied heavily upon arguments about damage to reputation in relation to the internet (Majalah Konstitusi 2009, 13). Accordingly, in the UUITE cases in particular, the MK judges reasoned - using the exact same words on both occasions - that one reason they were upholding the law was because "electronic documentation can also create extreme and massive negative impacts in the real world" (*UUITE Free Expression Case*, 137; *UUITE Free Press Case*, 104).[66]

Additionally, in the three decisions in favour of the respondents, the majority of the MK relied on 'Asian-Values' type reasoning. The arguments of the judges mirrored those presented by Lesmana (see chapter 1), namely that the cultural importance of reputation in Indonesia justifies criminal defamation laws that curtail the right to free expression. For example, the MK reasoned that when considering the right to free expression under the constitution, "the culture of the Indonesian nation" must be acknowledged (*UUITE Free Expression Case*, 132; see similar statement in the *KUHP Case*, 280; *UUITE Free Press Case*, 98).[67] Further, the court argued that reputation and honour are important elements of Indonesian culture. The court pointed out that under Article 28J of the constitution,

[66] "dokumentasi elektronik juga dapat menimbulkan dampak negatif yang sangat ekstrim dan masif di dunia nyata".

[67] "sesuai dengan kebudayaan bangsa Indonesia".

the right to free expression is not absolute, and thus can be limited in order to protect other human rights, including the right to honour protected under Article 28G of the constitution (*KUHP Case*, 278; *UUITE Free Expression Case*, 130; *UUITE Free Press Case*, 108).

Consequently in all three cases, the MK held that criminal defamation laws found under the KUHP and UUITE are a constitutionally valid way to limit the right to free expression (*KUHP Case*, 98-99; *UUITE Free Expression Case*, 132; *UUITE Free Press Case*, 278). The MKs acceptance of the government's reasonable regulation reasoning, namely the stress put on the utility of criminal defamation to protect against reputational harm - particularly on the internet - and the importance of the right of honour in 'Indonesian culture', bodes poorly for individuals and NGOs who wish to reform criminal defamation laws. Partly because of this awareness, civil society groups have not only focused on challenging the laws in court, but also on actively supporting people charged with criminal defamation offences.

The Power of Civil Society: Supporting Citizens Charged with Criminal Defamation

In addition to trying to reform criminal defamation law, Indonesian individuals, press and NGOs also lobby for and defend people who have been charged under the law. This involves publicising the victim's case, raising money to pay off their fines, and providing legal support in their cases. The Mulyasari and ICW cases provide pertinent examples of the role that Indonesian civil society plays in supporting victims of criminal defamation.

Strategies of Support

Indonesian press, human rights and legal NGOs have used a variety of strategies to provide assistance to people charged with criminal defamation offences. For instance, the Press Legal Aid Foundation (*Lembaga Bantuan Hukum Pers* - LBH Pers), frequently offers legal support to journalists subject to criminal defamation law charges. Between 2008 and 2009, it has handled eight cases of criminal defamation, and four cases of civil defamation both at the appellate and initial stages of trial (Hendrayana, et al. 2009a, 8).

Similarly, civil society groups have tried to raise the public profile of criminal defamation cases. For example, in May 2009 a sophisticated campaign was started

in response to the criminal and civil defamation cases against Mulyasari. The campaign, called "*Koin Peduli Prita*" (A coin to care for Prita), mainly operated through the internet and utilised the popular social-networking website Facebook.[68] The purpose of the campaign was to encourage people to donate coins to pay off the damages claim in the civil suit and potential fines Mulyasari faced in her criminal trial (see chapter 3). The campaign was highly successful; by November 2009 the campaign's Facebook website had almost 400,000 supporters (Andriyanto 2009);[69] the campaign hosted a concert to raise money which attracted some of Indonesia's top pop-musicians and business people (Kompas 2009e); and by December 2009 the campaign stopped collecting money after it raised over Rp. 800 million ($98,584), comprised of five truckloads of coins (Jakarta Post 2010, Kompas 2009f). Additionally, the campaign received immense press coverage in Indonesia (Kompas 2009e; Sedayu 2009) (see figure 3), and was reported across the world (Onishi 2009; Shubert 2009).

NGOs and individuals have also strategically exploited the media to create political pressure in support of people charged with criminal defamation law. This mobilisation of the media was particularly effective in cases in which the defendants were civil society activists themselves. For example, Yuntho and Arta Sari from ICW used the media when they were issued with their summons' to attend police questioning. On October 14, 2009, two days after they received their summons, the two ICW activists held a press conference, during which they publicly refused to attend police questioning (Ratya 2009). In front of the assembled media, Yuntho and Arta Sari condemned the summons as symbolic attempts by the Indonesian state to silence their right to free expression (Tempo 2009). Following the press conference, several news sources reported on the problems of criminal defamation and democracy, with one *Viva News* article published under the heading "Criminal Defamation Laws Threaten Democracy" (Amarullah and Setiawan 2009, also see ; Kompas 2009c).[70]

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[68] Facebook is a social-networking website where individuals can create personalised web-pages which the public can access and comment on. There are around 28 million Facebook users in Indonesia (Firman 2010).

[69] The Facebook group is called "Dukungan Bagi Ibu Prita Mulyasari, Penulis Surat Keluhan Melalui Internet yang Dipenjara" [Support for Ibu Prita Mulyasari, Arrested Author of the Internet Complaint]. As of September 2010, there were still 388, 949 members.

[70] "Pasal Pencemaran Nama Baik Ancam Demokrasi".

Successes and Impact of Support

The immense and largely negative publicity on the criminal defamation charges against Mulyasari and the two ICW activists has had a marked impact on the way the cases have been handled. In relation to the ICW case, for example, the publicity caused by the civil society push-back has resulted in an effective abandonment of the charges by the police. Yuntho, when asked whether he thinks the case will be furthered by the police, highlighted that "if this case is advanced further, it will become a national issue [because the media and other NGOs are] supporting us. We really do not feel alone" (Emerson Yuntho 2010, interview).[71] Even Arta Sari, who has argued that criminal defamation laws *could* have a chilling effect on speech, (see chapter 3) explained that in her own case she only experienced the shock of being charged "for one or two days, after which [she] continued as normal" (Illian Deta Arta Sari 2010, interview).[72] The activists in the ICW case were so emboldened by the civil society push-back that they turned down an offer by the officials from the Office of the Attorney-General to dismiss their charges if they publically apologised for their criticism of the MA (Illian Deta Arta Sari 2010, interview).[73] This example demonstrates that the support provided by the press and NGOs to the ICW activists effectively counteracted the threat of speech being 'chilled'.

A similar, but even more powerful civil society response marked the Mulyasari case. Shocked by the overwhelming societal criticism in response to their lawsuit, the doctors of Omni Hospital declared on December 11, 2009, that they would not accept the Rp. 204 million damages award that they won in court against Mulyasari (Fidrus 2009). Additionally, following the intense campaign in support of Mulyasari, she was ultimately acquitted of all criminal charges (Kompas 2009b). Although it is not possible to identify with certainty what factors led to the decision to acquit Mulyasari, or the decision to drop her civil case, it is likely that the support she received from her lawyers and NGO supporters, coupled with the

[71] "Kami ada di Jakarta, kalau kasus ini dijalankan menjadi isu nasional. Kami merasa memang tidak sendiri".

[72] "Akhirnya terganggunya hanya sehari, dua hari saja, setelah itu jalan seperti biasa".

[73] Arta Sari (2010, interview) says that "officials from the Attorney-General's [office] wanted Emerson and I to apologise to the Supreme Court…and then the suit would have been deleted. But actually, we do not want to apologise" [pejabat dari Kejaksaan Agung minta saya dan Emerson minta maaf ke MA (Mahkamah Agung)… terus tuntutannya dihapus. Tetapi, sebetulnya, kami tidak mau minta maaf].

intense political pressure whipped up around her case, contributed to these outcomes.

Mulyasari's case was so effectively politicised that key national leaders took interest in her case. When she was released on bail on June 3, 2009, the day after the 2009 presidential campaign opened, Megawati Sukarnoputri and her running mate Prabowo Subianto personally visited Mulyasari at the Tangerang correctional facility (Cipta 2009) (see figure 4). Megawati, a former president, was trying to regain the presidency but was behind in the opinion polls. Additionally, incumbent Vice President Jusuf Kalla, and presidential candidate General Wiranto publically denounced the charges against Mulyasari during the presidential election campaign (BBC News 2009; Damayanti 2009; Kompas 2009i). Finally, the incumbent president, Susilo Bambang Yudhoyono, weighed into the debate, requesting the Attorney-General's office and the head of POLRI to brief him on the case, and calling upon these agencies to "use their heart and a sense of justice when applying the [criminal defamation] law" (Damayanti 2009).[74]

The Limitations of Civil Society Responses

The peculiarities of these two case studies partly explain the immense civil society response to them. The ICW activists were, at the time of their charges, located in Jakarta. Consequently, they were well placed to respond to cases of criminal defamation. The activists were connected to a sophisticated network of human rights, anti-corruption and other NGOs, as well as an active press who frequently reported on their cases. Similarly, Mulyasari was a relatively internet-savvy middle class woman from the Jakarta metropolitan area, giving her access to media and civil society support groups. By contrast, this type of support may not have been as forthcoming in more isolated parts of Indonesia. Khasim argues that,

> in Jakarta…public opinion…can quickly be used to resist the criminalisation [of free expression]. But in the districts, resources are very limited; the community or sections of the community that are critical are very limited.[75] (2010, interview)

[74] "dalam rangka menegakkan hukum juga menggunakan hati dan rasa keadilan".

[75]"Di Jakarta...opini masyarakat cepat**…**menentukan usaha untuk melawan kriminalisasi. Tetapi di daerah *resource* sangat terbatas; komunitas atau lapisan masyarakat kritis sangat terbatas".

Consequently, it is possible that many cases of criminal defamation occur in districts, away from the gaze of the press and civil society. In the absence of reliable statistics, it is not possible to determine how grave a problem this may be.

In addition to geographical location, the extent of civil society pressure may also depend on the popular appeal of people charged under the law. Wagiman (2010, interview), from ELSAM, argues that "ordinary citizens" (*warga biasa*) who lack education or technological sophistication are at even greater risk than NGOs in the districts. According to Wagiman, these individuals face the greatest threat from criminal defamation laws because in contrast to NGOs, it is rare for them to be able to stir up political ferment "quickly in response to repression or state policies".[76]

In the same vein, criminal defamation cases that involve individuals who the press or civil society cannot cast as 'victims' of the law may not receive the same level of support as Mulyasari and the ICW activists. For example, on March 9, 2010, Muhammad Wahyu – a university student from East Java – was charged under the KUHP and UUITE for defamation, after he made disparaging comments on the personal Facebook page of a fellow female student. Wahyu was given a three month jail term, suspended for six months (Djunaidy 2010).[77] In contrast to the Mulyasari case, or the Maya case (chapter 3), this case has had limited media coverage. Arguably, this was due to the fact that it is harder to mobilise public sympathy for a male university student who bullied a female colleague than for an unsuspecting mother or a popular actress who were singled out by the law.

Conclusion: A 'Push-Back' that Sometimes Protects

The discussion above has shown that Indonesian civil society is pushing-back against the misuse of criminal defamation laws by demanding their reform in the legislature or the courts, and by providing support to people who have been charged under the laws. One important element of this push-back was extensive efforts to change the KUHP and UUITE, including lobbying the DPR, holding

[76] "biasanya tidak bisa merespon secara cepat, terhadap represi atua kebijakan dari negara".

[77] A person who is given a suspended sentence is not imprisoned, but is placed under certain court imposed conditions. If they breach those conditions they are then required to serve the prescribed term of imprisonment. In this case, Wahyu was required to abide by conditions for 6 months. Had he failed to meet those conditions, he would have been imprisoned for a term of 3 months.

protests, and mounting MK challenges to the law. Other, less elite-focused components of the campaign became evident in the unprecedented civil society mobilisation surrounding the ICW and Mulyasari cases. In these cases, NGOs and individual citizens mounted domestic political support by utilising the press, running advocacy campaigns on the internet, and providing support for Mulyasari, Arta Sari and Yuntho in their legal proceedings. Additionally, the civil society groups involved in the cases made use of their vast networks to create international political pressure on the Indonesian government in relation to the legal aspects of the cases.

But while the ICW and Mulyasari cases yielded positive results as a consequence of the strong civil society reaction, there remain substantial limitations on the effectiveness of this response. As far as the possible revocation of criminal defamation laws is concerned, the most significant limitation is the continued acceptance of reasonable regulation arguments by the government, legislature and the MK. Further, the success of attempts to support individuals charged under the law varies with the level of development and sophistication of civil society and the press in the region where the law is applied. Khasim's experience as national human rights commissioner suggests that many cases of criminal defamation continue unsupported in isolated parts of Indonesia.

Overall, however, the civil society response to criminal defamation laws has led to some impressive outcomes. To begin with, it has produced significant reforms of criminal defamation law: the hate-sowing and lèse-majesté provisions of the KUHP were invalidated by the MK, and senior politicians have indicated that reform to the UUITE is a political priority for them. In terms of concrete cases, the police have taken no further action against the ICW activists, and seem unlikely to proceed much further. In fact, the unexpectedly powerful response by civil society and the unrelenting press coverage has encouraged the ICW members to continue expressing critical opinions. Similarly, Mulyasari was acquitted of the criminal charges against her, and had her civil law damages claim dropped. Thousands of normal citizens from all over the country made contributions to support her case, fund-raising over Rp. 800 million ($98,584). Most importantly, however, the societal push-back has projected the issue of criminal defamation into the political limelight in Indonesia, and has raised the problems associated with the law internationally. The following conclusion explores what the successes and

limitations of this response to criminal defamation laws demonstrate about the state of democracy in Indonesia.

Conclusion

The civil society response to the misuse of criminal defamation in Indonesia has pushed the laws into the centre of a public debate about the quality of freedom of expression and, by extension, of democracy in the country. As outlined at the beginning of this thesis, the analysis of criminal defamation laws, their application and their societal contestation can reveal a great deal about the state of democracy in Indonesia. After the previous chapters have addressed the political history, contemporary usage and the response to criminal defamation laws, it is now time to assess this linkage between criminal defamation, freedom of expression and democracy in post-Suharto Indonesia.

Three Findings

There are three key findings that emerge from the material presented in this study: first, criminal defamation laws have historically played a significant role in the shape of political regimes in Indonesia; second, in democratic Indonesia, the laws continue to pose a potential threat to the quality of freedom of expression and democracy in the country; and third, the laws have so far not seriously curtailed freedom of expression in Indonesia because other arenas of democratic interaction, such as civil society, have proven sufficiently strong to prevent such a scenario.

Criminal Defamation: From Colonialism to Democracy

Criminal defamation laws have a long history in Indonesia. The laws were introduced into Indonesia's regulatory infrastructure through the Dutch *WvS*, and have since remained, largely unreformed, in the KUHP. The Dutch colonisers in Indonesia used criminal defamation laws as part of their arsenal of legal and non-legal tools to control expression and punish dissenters. Similarly, Sukarno and Suharto used the laws to jail student activists and prominent journalists, poets and other individuals critical of their regimes. While the collapse of the New Order in May 1998 brought forty years of authoritarianism to an end and substantially changed much of the legal and political landscape in Indonesia, most criminal defamation laws remain on the statute books of the democratic polity, and continue to be used in the present day.

Criminal Defamation after 1998: The Threat of Misuse

Although criminal defamation continues to be used in democratic Indonesia, the laws are not applied in the same way as during the state's colonial and authoritarian past. Individuals, civil society and the press have been empowered by the democratic changes to the Indonesian polity to expose, criticise and even reverse attempts by influential interests (not all of whom are close to the government) to use criminal defamation laws as former authoritarian and colonial rulers did. As a result, it has become more difficult for the Indonesian government to use criminal defamation as part of a top-down approach to the regulation of free expression. Nonetheless, the laws can still be used in ways which are potentially damaging to that right. Most importantly, individuals with political and economic power have continuously misused weak judicial and law enforcement agencies to serve their interests. These elites are therefore able to use criminal defamation laws to seek retribution against individuals who publically criticise them. In other words, criminal defamation laws have been used as a weapon in the settlement of horizontal disputes between individuals with or without links to the state.

Accordingly, the laws could indeed result in the 'chilling' effect that strong liberal scholars argue is inevitable where a state retains criminal defamation on the statute books. This, in turn, has potentially negative impacts on the ability of Indonesians to keep their government officials accountable and to make informed political decisions, as Miekeljohn's conception of democracy demands. More generally, it could also discourage them from making any critical statements at all, regardless of whether they target state officials or other private citizens. But while the *threat* of this 'chilling' effect exists, to date this has not led to a significant erosion of democracy in Indonesia. This is due, in part, to the powerful societal push-back against the misuse of the laws by both prosecutors and complainants.

The Push-Back: Evidence of Democratic Quality

The reforms to the Indonesian polity since 1998, which reduced the number of repressive tools at the disposal of the state, have allowed ordinary citizens to scrutinise and criticise all areas of public policy, including the promulgation and application of laws. Using these freedoms, individuals, civil society and the press have effectively pushed back against many cases of horizontal misuse of criminal defamation laws, including in the ICW and Mulyasari cases. This push-back has also resulted in many impressive outcomes in relation to the reform of the law,

such as the revocation of the hate-sowing and lèse-majesté provisions of the KUHP, and indications from government that the cyber-libel provisions of the UUITE might soon be reformed.

Indeed, the vibrant response by Indonesian individuals and civil society to criminal defamation laws may say more about the quality of Indonesian democracy than the potential threats posed by these laws. As several scholars argue (see chapter 1), the extent to which a state allows its citizens to contribute to an ongoing debate about criminal defamation and free expression points to the quality of that state's democracy. In Indonesia, the civil society response has resulted in a robust national dialogue on the issue of whether freedom of expression should be regulated through criminal defamation law, or whether such laws should be abolished altogether.

The effectiveness of the civil society push-back to the misuse of laws which purport to regulate free expression is not limited to criminal defamation. For instance, in October 2010 the MK was asked by civil society groups to consider the constitutionality of Law No. 4 of 1963 on the Security of Printed Materials that Disturb the Public Order. This law, which gave power to the Attorney-General to ban certain books, was used extensively during the New Order to ban books critical of the regime, and has been used twenty-two times in the last six years to ban Indonesian history books (Farid 2010; Pasandaran, et al. 2010). In this recent decision, the MK did not invalidate the 1963 law, but did impose strict conditions on the Attorney-General, requiring any future books bans to be approved by a court (*Putusan Mahkamah Konstitusi* 2010, 254-55).

Similarly, in February 2010, the Minister of Communication and Information, Sembiring, proposed a draft regulation on Multimedia Content, which, amongst other things, would allow the government to monitor the flow of information on the internet. The proposal caused an enormous civil society response, including street protests, thousands of complaints to the Ministry, calls for a DPR hearing to examine the law, and numerous newspaper articles (Maulia 2010). The civil society response was so lively that several government ministers and President Yudhoyono publically denounced the draft law, forcing Sembiring to withdraw and reconsider the law (Saragih 2010).

These and other instances of civil societies push-back against the promulgation and misuse of laws which could limit freedom of expression, are indicative of a relatively high-quality of civic freedoms and democracy in Indonesia – especially if compared to many other Asian states. This is a view shared by Freedom House which, in its report on Indonesia, reasoned that the "active array of civil society organisations" and the positive outcomes in some criminal libel cases were factors which led to the country being classed in 2010, as a 'free' democracy (Freedom House 2010a, in 'Political Rights and Civil Liberties').[78] Given the democratic recession crippling Thailand and the Philippines, and the continued authoritarian regimes in Myanmar, Malaysia, Singapore, Vietnam, Laos and Brunei, Indonesia's achievements are rather unique in Southeast Asia, and should thus not be taken for granted.

Criminal Defamation and Democracy in Indonesia: The Challenge Ahead

This thesis has argued that in 2010, Indonesia's democracy has been resilient enough to guard against the widespread misuse of criminal defamation laws. Despite the strong activism by civil society, however, criminal defamation laws remain on Indonesia's statute books. This persistence of many criminal defamation laws raises the spectre that they could again be used in Indonesia, under different leadership, to suppress free expression. The current national government, led by President Yudhoyono, has been largely a passive but consistent supporter of democratic reform in Indonesia (Tomsa 2010). However, the election in 2014 of a new president who is less interested in protecting civil and political rights than Yudhoyono could lead to criminal defamation laws once again being misused to silence opponents of the government.

Current speculation about the 2014 election focuses on several candidates who have a history of opposing civil and political rights in Indonesia. One candidate speculated to run is Tommy Suharto, the son of the former president, who has previously been convicted for the murder of a MA judge (Crouch 2010, 201-02).

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[78] Freedom House produces an annual global review of the state of democracy, entitled – "Freedom in the World". In this study, all countries in the world are given a 'status' based on scores for their protection of 'Political Rights' and 'Civil Liberties'. A country is given one of three statuses: 'Free', 'Partly Free' or 'Not Free'. For further information about the methodology employed by Freedom House see: http://www.freedomhouse.org/.

Another potential nominee is Prabowo Subianto, Suharto's former son-in-law who was dismissed from the military in 1998 for the kidnapping of student activists (Crouch 2010, 170). Although it is far from certain that either Tommy or Prabowo will be successful in their bids to become president, this example indicates that there remain aspirant political leaders in Indonesia who are less committed to continued democratic consolidation than the current regime.

There are precedents of states which retain the infrastructure of democracy, yet have leaders who use criminal defamation laws to undermine the quality of that democracy. Thailand, for example, was regarded in 2004 as being a 'free' democracy with "among the most robust [protections of free expression] in Asia" (Freedom House 2004, in 'Political Rights and Civil Liberties'). However, within six years Thailand descended into semi-authoritarianism, featuring an unelected prime-minister who rules with the support of military muscle (Ahuja 2010). Freedom House (2010c) cites the use of criminal defamation laws by the current Prime-Minister Abhisit Vejjajiva "to target activists, scholars, students, journalists, foreign authors, and politicians who were critical of the government" as one of the factors which contributed to Thailand's assessment of being only a 'partly free' democracy in 2010. Some scholars have even argued that it was the chilling of free expression through the misuse of criminal defamation laws which both precipitated and maintained the political instability which has gripped the country since 2006 (Streckfuss 2011, 3).

This is not to say, however, that states which retain criminal defamation laws are generally prone to democratic recession. In Indonesia, criminal defamation laws continue to be justified by the government and the MK for the purpose of protecting the reputation of the state and its citizens. Many of the over 160 states which retain criminal defamation laws, which include democracies of high-quality, use this same reasoning as the Indonesian government. South Korea, a country which received Freedom House's highest ranking of 'free', is a good example of a state that maintained its democratic quality while holding on to criminal defamation laws (2010b).

In South Korea, criminal defamation remains on the statute books. As in Indonesia, the Supreme Court in South Korea decided, using 'reasonable regulation' reasoning, that criminal defamation is a valid way for the state to

protect the reputation of its citizens (Youm 2002, 137). In fact, criminal defamation laws are used frequently in South Korea; in 2001, for instance, there were 1,116 criminal trials for cyber-libel in the country (Youm 2009, 142). Nonetheless, in 2008, Article 19 argued that use of the laws against journalists had become "the exception, not the rule" (2008, in 'Repression of Media Workers'). The fact that criminal defamation laws have not eroded South Korean democracy is a result of the role that civil society, individuals and the press have played in ensuring that the government does not use the laws to serve its own interests. In South Korea, civil society groups are free to monitor the use of the laws by, for example, challenging criminal libel laws in the country's Supreme Court, running public awareness campaigns against the laws, and complaining about the laws to the United Nations (Asian Human Rights Commission 2010; Freedom House 2010b; Youm 2002, 135).

Therefore, the resolve of civil society groups to reform criminal defamation and support people charged under the laws suggests that Indonesia's democracy, like that of South Korea's, remains resilient. There are many reasons to assume that this civil society push-back will continue into the future: in 2010, NGO actors in Indonesia will advance a further challenge to Chapter 16 of the KUHP to the MK, in which Arta Sari, Yuntho and Hamid are expected to be amongst the joint-applicants;[79] a series of books on criminal defamation and democracy will be published in 2011 by academics and NGO actors (Suwahju 2010); new cases of criminal defamation continue to trigger strong reactions in the Indonesian media (Hardi 2010; Melyani 2010); and NGOs are planning to continue campaigning for reform on this issue in the years to come.[80] To gather a more complete picture of the potential future interactions between criminal defamation, free expression and

[79] Hendrayana (2010, interview), from LBH Pers said in February 2010, that his organisation and other "activists are currently advancing a similar law suit [to previous judicial review challenges of criminal defamation law] to the MK…The respondents to the case will be made up of several activists: Usman Hamid, ICW and people from the community" [para aktivis telah mengajukan gugatan yang sama ke MK; kita juga terlibat di dalamnya. Ada beberapa aktivis sebagai pemohonnya: Usman Hamid, ICW terus ada orang dari masyarakat].

[80] For example, Asep Komarudin (2010, interview) from AJI, argues that the use of criminal defamation law in recent years has not "changed the behaviour of activists, rather it has increased the actions [they] take. [They] will protest these laws for years to come." [Sebetulnya, penggunaan pasal-pasal ini tidak mengubah kelakuan gerakan aktivis; melainkan meningkat aksi-aksi kita. Kita akan protes pasal pencemaran nama baik selama tahun mendatang].

democracy in Indonesia, however, there are some areas of further research that scholars could and should engage in.

Future Research

This thesis has raised a number of issues about the regulation of free expression, which may pose problems for the future of Indonesia's democracy, and which require further research. At a philosophical level there is an undercurrent of Islamic politics in contemporary debates about the regulation of free expression and democracy in Indonesia. These debates have brought out tensions between supporters of a secular state, and those who argue that the Indonesian state has an obligation to regulate freedom of expression to take account of Islamic morality. Scholars have explored this tension in relation to recent debates about an anti-pornography law in Indonesia (Pausacker 2009), and in relation to reforms of the KUHP (Butt 2003).An emerging aspect of this debate in Indonesia relates to whether the state should regulate the internet in a way which takes account of Islamic values. In 2010, for instance, there have been calls for greater regulation of the internet from Islamic civil society groups such as Hizbut-Tahrir, following the rapid spread across the internet, of a pornographic video alleged to be of pop star Nazril Irham (nicknamed Ariel) and Luna Maya (Vaswani 2010). As internet use expands in Indonesia, the way this medium is regulated –including through criminal defamation laws - will become an increasingly important aspect of the country's democracy, and consequently warrants further scholarly analysis.

Additionally, there are problems which would benefit from further research in relation to the implementation of laws regulating free expression. The sources interviewed for this thesis indicated that in rural parts of Indonesia, civil society and the press are not able to push-back as effectively against criminal defamation laws and their application as in urban parts of the country. In a recent paper, Arnold (2009) argued that decentralisation has opened up new space for human rights violations to occur at a sub-national level of government in Indonesia. In particular, Arnold focuses on racial equality issues and the protection of the right to freedom of movement and religion at the district level in Indonesia. In line with Arnold's approach, it would be fruitful to examine how laws regulating freedom of expression, including criminal defamation laws, are used at the sub-national level in decentralised Indonesia.

Finally, while civil society groups are calling for the revocation of criminal defamation laws, they wish to maintain some form of civil defamation laws in Indonesia. However, civil defamation laws are often used by states to silence critical speech, in a similar way that criminal defamation laws are sometimes used. The incumbent People's Action Party of Singapore, for instance, is notorious for its use of civil law to sue and bankrupt opponents of the party (Manikas and Jennings 2001, 8). Indonesian activists themselves admit that they face the risk that civil defamation laws could be used to fill the lacuna if criminal defamation laws are revoked in the country.[81] In light of these calls for civil laws to replace criminal defamation laws in Indonesia, further comparative research on the way that civil defamation laws interact with democracy could feed useful information into this debate.

The political science literature on Indonesia has not paid much systematic attention to the quality of civil and political rights, including freedom of expression, in the post-Suharto polity. Instead, scholars have mostly focused on the political dynamics of elections, the distribution of power and resources in the new democracy, and the reinvigoration of local politics. This thesis has demonstrated that freedom of expression, and the way that the right has been regulated, has played a pivotal role in the shape of political regimes in Indonesia. As Balkin argues (see chapter 1), the level of free expression provides the 'conduit' through which either government is ruled by the people or government rules the people. Accordingly, the way that Indonesia's various political regimes have used criminal defamation laws to regulate free expression has been vital to the shape of those governments. This is because criminal defamation law interacts with and impacts on the other arenas of the Indonesian polity, including the press, civil society, police force and judiciary. As Indonesia's democracy develops further, scholars and political observers should take account of the extent to which laws such as those on criminal defamation continue to be used to regulate free expression in the country.

[81] For instance, Anggara Suwahju (2010, interview), a lawyer who has been involved in the *UUITE Free Press Case* and *UUITE Free Expression Case*, says that, "if you ask for the abolition of criminal law suits, you have to face the consequence that civil defamation may be used instead – with the potential for huge damages" [response in English].

Appendix 1: Criminal Defamation Provisions under the KUHP and Other Legislation

Article	Criminalises	Maximum penalty	Status	
KUHP				
131	Attack on the character of the president or vice-president	8 years imprisonment	MK declared invalid	Lese Majeste Provisions
134	Insult to the president or vice president	6 years imprisonment, or fine of Rp. 300	MK declared invalid	
137	Dissemination, demonstration or putting up writing or portraits that insult the president or vice president	1 year and 4 months imprisonment, or fine of Rp. 300	MK declared invalid	
142	Insult to the character of the head of state of a friendly-country	5 years imprisonment, or fine of Rp. 300	Valid	
143	Insult to character of a representative of a friendly-foreign country	5 years imprisonment, or fine of Rp. 300	Valid	
144	Disseminates statements other than through speaking which insults the head of state of a representative of another state	9 months imprisonment, or fine of Rp. 300	Valid	
154	Public utterance of hostility, hatred or insult toward the Indonesian government	7 years imprisonment, or fine of Rp. 300	MK declared invalid	Hate-Sowing Provisions
155	Hostility, hatred or insult towards the Indonesian government communicated to public in a way other than speaking	4 years and 6 months, or fine of Rp. 300	MK declared invalid	
156	Public utterance of hostility, hatred or insult against one or more groups within Indonesia	4 years imprisonment, or fine of Rp. 300	Valid	
207	Insults an authority or public body, either orally or in writing	1 year and 6 months imprisonment, or fine of Rp. 300	Valid	
208	Disseminates, demonstrates openly or puts up a writing or portrait that insults an authority or public body	4 months imprisonment, or fine of Rp. 300	Valid	

Article	Criminalises	Maximum penalty	Status	
310	Attack against honour or good name of any person	For speaking: 9 months, or fine of Rp. 300 Other than speaking: 1 year and 4 months, or fine of Rp. 300	MK declared valid	Regular Defamation Provisions
311	Libel	4 years imprisonment	MK declared valid	
315	Simple insult (defamatory conduct which does not meet requirements of defamation but still causes insult to any person)	4 months and 2 weeks, or fine of Rp. 300	Valid	
316	Insult towards an official carrying out official duties	Increase of regular defamation offence by a third	Valid	
320	Insult towards a dead person	4 months and 2 weeks, or fine of Rp. 300	Valid	
321	Insult towards a dead person in a form other than speaking	1 month and 2 weeks, or fine of Rp. 300	Valid	
Law No. 32 of 2002 on Broadcasting				
36 (5)	Libellous broadcasting	5 years imprisonment and/or fine for: Radio – Rp. 1 billion TV – Rp. 10 billion	Valid	
Law No. 32 of 2004 on District Government				
78 and 116	Insult towards a candidate for district head or vice district head	Min. 3 month imprisonment and max. 1 year and 6 month, and/or fine min. of Rp. 600 000 and max. of Rp. 6 million	Valid	
Law No. 10 of 2008 on General Elections of DPR, DPD and DPRD Members				
84(1) and 270	Insult towards a candidate and/or a participant of the election	Min. imprisonment of 6 months and max. of 24 months and a fine of min. Rp. 6 million and max. of Rp. 24 million	Valid	
Law No. 11 of 2008 on Information and Electronic Transactions				
27 (3) and 45	Insult or attacking good name on the internet or through electronic transactions	6 years imprisonment, and/or fine of Rp. 1 billion	MK declared valid	Cyber-Libel
Law No. 42 of 2008 on Presidential and Vice Presidential Elections				
41 (1) and 214	Insult towards the presidential and vice presidential candidate	Min. 6 months and max. 2 years imprisonment and/or fine min. of Rp. 6 million and max. of Rp. 24 million	Valid	

Appendix 2: Translations of Selected Criminal Defamation Laws: Indonesian-English

Provisions under the KUHP

Pasal 207

Barang siapa dengan sengaja di muka umum dengan lisan atau tulisan menghina suatu penguasa atau badan umum yang ada di Indonesia, diancam dengan pidana penjara paling lama satu tahun enam bulan atau pidana denda paling banyak tiga ratus rupiah.

Article 207

Whosoever intentionally and publically, whether orally or in writing, insults a public body or authority in Indonesia, is liable to imprisonment not exceeding one year and six months or a fine not exceeding three hundred rupiah.

Pasal 310

(1) Barangsiapa sengaja menyerang kehormatan atau nama baik seorang, dengan menuduh sesuatu hal, yang maksudnya terang supaya hal it diketahui umum, diancam, karena pencemaran, dengan pidana penjara paling lama sembilan bulan atau denda paling banyak tiga ratus rupiah.

(2) Jika hal itu dilakukan dengan tulisan atau gambaran yang disiarkan, dipertunjukkan atau ditempelkan di muka umum, maka yang bersalah, karena pencemaran tertulis, diancam pidana penjara paling lama satu tahun empat bulan atau denda paling banyak tiga ratus rupiah.

(3) Tidak merupakan pencemaran atau pencemaran tertulis, jika perbuatan terang dilakukan demi kepentingan umum atau karena terpaksa untuk bela diri.

Article 310

(1) Whosoever intentionally attacks someone's honour or good name by alleging a certain fact, with the clear intent to make that fact known publically, shall be guilty of slander and liable to imprisonment not exceeding nine months or a fine not exceeding three hundred rupiah.

(2) If the act [in Paragraph (1)] takes place by means of writings or pictures which are disseminated, openly exhibited or displayed in public, shall be guilty of libel, and liable to imprisonment not exceeding one year and four months or a fine not exceeding three hundred rupiah.

(3) The offence of slander or libel will not exist where the act was clearly done in the public interest or out of necessary self defence.

Pasal 311

(1) Jika yang melakukan kejahatan pencemaran atau pencemaran tertulis dibolehkan untuk membuktikan apa yang dituduhkan itu benar, tidak membuktikannya, dan tuduhan dilakukan bertentangan dengan apa yang diketahui, maka dia diancam melakukan fitnah dengan pidana penjara paling lama empat tahun.

(2) Pencabutan hak-hak berdasarkan pasal 35 No. 1-3 dapat dijatuhkan.

Article 311

(1) If the person who commits the felony of slander or libel is allowed to prove that the alleged fact is true, [but] does not do so, and the accusation was made contrary to what was known [by the person at the time the accusation was made], then that person is guilty of calumny and is liable to imprisonment not exceeding four years.

(2) Revocation of the rights under Article 35 No 1-3 may be imposed.

Pasal 316

Pidana yang ditentukan dalam pasal-pasal sebelumnya dalam bab ini, dapat ditambah dengan sepertiga jika yang dihina adalah seorang pejabat pada waktu atau karena menjalankan tugasnya yang sah.

Article 316

The penalties set forth in previous articles of this chapter may be increased by one third if the person subject to the insult is an official at the time or because he or she was carrying out official duties.

Provisions under the UUITE

Pasal 27 ayat (3)

Setiap Orang dengan sengaja dan tanpa hak mendistribusikan dan/atau mentransmisikan dan/atau membuat dapat diaksesnya Informasi Elektronik dan/atau Dokumen Elektronik yang memiliki muatan penghinaan dan/atau pencemaran nama baik.

Article 27 paragraph (3)

Any person who intentionally and without the right to do so distributes and/or transmits and/or makes it possible to access electronic information and/or an electronic document which contains insults and/or statements which defile the good name of someone.

Pasal 45 ayat (1)

Setiap Orang yang memenuhi unsur sebagaimana dimaksud dalam Pasal 27 ayat (1), ayat (2), ayat (3), atau ayat (4) dipidana dengan pidana penjara paling lama 6 (enam) tahun dan/atau denda paling banyak Rp1.000.000.000,00 (satu miliar rupiah).

Article 45 paragraph (1)

Any person that fulfils the elements of the offences set out in Article 27 paragraph (1), paragraph (2), paragraph (3), or paragraph (4), can be penalised with imprisonment for a maximum length of 6 (six) years and/or a maximum fine of Rp1.000.000.000,00 (one billion rupiah).

Selected Provisions under the KUHAP

Pasal 20 ayat (2)

Untuk kepentingan penuntutan, penuntut umum berwenang melakukan penahanan atau penahanan lanjutan.

Article 20 paragraph (2)

A public prosecutor is authorised to conduct detention or the continued detention, for the purposes of prosecution.

Pasal 21

(1) Perintah penahanan atau penahanan lanjutan dilakukan terhadap seorang tersangka atau terdakwa yang diduga keras melakukan tindak pidana berdasarkan bukti yang cukup, dalam hal adanya keadaan yang menimbulkan kekhawatiran bahwa tersangka atau terdakwa akan melarikan diri, merusak atau menghilangkan barang bukti dan atau mengulangi tindak pidana.

(2) Penahanan atau penahanan lanjutan dilakukan oleh penyidik atau penuntut umum terhadap tersangka atau terdakwa dengan memberikan surat perintah penahanan atau penetapan hakim yang mencantumkan identitas tersangka atau terdakwa dan menyebutkan alasan penahanan serta uraian singkat perkara kejahatan yang dipersangkakan atau didakwakan serta tempat ia ditahan.

(3) Tembusan surat perintah penahanan atau penahanan lanjutan atau penetapan hakim sebagaimana dimaksud dalam ayat (2) harus diberikan kepada keluarganya.

(4) Penahanan tersebut hanya dapat dikenakan terhadap tersangka atau terdakwa yang melakukan tindak pidana dan atau percobaan maupun pembenihan bantuan dalam tindak pidana tersebut dalam hal:

(a) tindak pidana itu diancam dengan pidana penjara lima tahun atau lebih;
(b) tindak pidana sebagaimana dimaksud dalam pasal…

Article 21

(1) Orders of detention or continued detention may be carried out against a suspect or a defendant who, based on sufficient evidence, is strongly suspected of committing a crime in circumstances that raise concerns that the suspect or the defendant will flee, destroy or remove evidence and/ or repeat the offense.

(2) Detention or continued detention of a suspect or defendant shall be carried out by an investigator or public prosecutor by giving [the suspect or defendant] an arrest warrant or judicial decree which lists the identity of the suspect or defendant, the reasons for the arrest, a brief case summary of the alleged crime and the place he or she is or will be detained, as the case may be.

(3) Copies of the arrest warrant or continued detention order or the judicial decree referred to in paragraph (2) must be given to the family of the suspect or defendant.

(4) Detention, referred to above, may only be imposed on a suspect or defendant who committed a crime and/or attempted or assisted in the commission of a crime which:

(a) is punishable by imprisonment of five years or more;

(b) is criminalised under articles…

Pasal 112 ayat (1)

Penyidik yang melakukan pemeriksaan, dengan menyebutkan alasan pemanggilan secara jelas, berwenang memanggil tersangka dan saksi yang dianggap perlu untuk diperiksa dengan surat panggilan yang sah dengan memperhatikan tenggang waktu yang wajar antara diterimanya panggilan dan hari seorang itu diharuskan memenuhi panggilan tersebut.

Article 112 paragraph (1)

Investigators who conduct an investigation, clearly citing the reasons for the summons, are authorised to call, by way of a valid summons, suspects and witnesses deemed necessary to be interrogated, taking into consideration an appropriate length of time between the receipt of the summons and the day on which the person is required to answer the summons.

Appendix 3: Selected Criminal Defamation Cases in 2008 – 2010

Defendant type	Defendant (Organisation)	Complaint date	Complainant	Provision	Basis of complaint	Status (in Sept '10)
Academic	George Junus Aditjondro	Dec/'09	Democrat Party DPR Member Ramadhan Pohan	Articles 207 and 310 KUHP	Complaint relates to statements made during launch of Aditjondro's controversial book "Unmasking the Cikeas Octopus — Behind the Bank Century Scandal" ("*Membongkar Gurita Cikeas: Di Balik Skandal Bank Century*"), during which Aditjondro and Pohan got into a verbal and physical spat.	May 10 – Aditjondro attends police questioning
Consumer complainants	Khoe Seng Seng and Kwee Meng Luan	Aug/'06	PT Duta Pertiwi – property developer	Article 310 and 311 KUHP	Both defendants discovered evidence that the properties which they had bought from PT Duta had, at the time of sale, actually been state owned land. Consequently, the defendants had no legal entitlement to their properties. Defendants wrote separate editorials in press claiming that PT Duta had been fraudulent. This claim led to complaint of defamation being filed against them.	Dec '09 – Found guilty in appeal case to High Court of DKI; appealed to Supreme Court Jun '09 –On appeal court rejects PT Duta's Rp. 1 billion damages claim against

Defendant type	Defendant (Organisation)	Complaint date	Complainant	Provision	Basis of complaint	Status (in Sept '10)
						defendants
	M Nur Sitepu	Apr/'09	PT K Link – a drug supplement producer	Article 310 of KUHP	Sitepu complained to the media that K Link products were poisoned and caused of the death of his wife.	May '10 – Sitepu publically apologises and charges dropped
Internet user	Jack Lapian (Indoclubbers website owner)	Feb/'10	Novarmi Bakti Massewa, after owner of 'Nu China Bar and Lounge' in South Jakarta	Article 310 KUHP and Article 27 (3) UUITE	Complaint filed with police after Lapian intimated through a statement on Facebook that Massewa had 'embezzled' money he was owed for a fundraiser.	Feb '10 – Complaint only
Journalist	Bersihar Lubis	Feb/'08	Attorney-General's Office	Articles 310, 311, 316 and 317 and Article 207 KUHP	Lubis charged after writing a column in the *Koran Tempo* newspaper calling the Attorney-General's office a "fool" for failing to ban history books distributed to junior and senior public high-schools, which did not adequately cover contentious historical events.	Feb '08 – sentenced to one month imprisonment Dec '08 – Appeal to MK, decided against Lubis

Defendant type	Defendant (Organisation)	Complaint date	Complainant	Provision	Basis of complaint	Status (in Sept '10)
	Jupriadi "Upi" Asmaradhana	Nov/'08	South Sulawesi Regional Police Office, Police Inspector General Sisno Adiwinoto	Articles 310, 311, 316 and 317 and Article 207 KUHP	Adiwinoto made speech stating that police should ignore 1999 Press Law, and should instead just use criminal defamation law against journalists. Upi responded to statement by filing complaints with KOMNASHAM and POLRI headquarters, and holding demonstration. These activities were basis of complaint.	Dec '09 – Upi acquitted of charges
NGO	Bambang Kisminarso (Flame of Justice)	Apr/'09	Edhie Baskoro (President Yudhoyono's son), then candidate for DPR election	Articles 310 and 311KUHP; UUITE 27 para (3)	Kisminarso complained to Ponorogo election supervision committee that Baskoro was distributing money in envelopes in a village in East Java	April '09 – Kisminaro and son in law (Naziri) arrested and then released Jan '10 – police say investigation ongoing
	Dadang Iskandar (Gunungkidul Corruption Watch)	Aug/'09	Three local legislators from Gunungkidul DPRD	Article 311 and 316 KUHP	Complaint following Iskandar coordinated a demonstration protesting corruption in the Gunungkidul legislature during the 1999-2004 term.	April '10 – Police investigating case

Defendant type	Defendant (Organisation)	Complaint date	Complainant	Provision	Basis of complaint	Status (in Sept '10)
	Jamaludin, Badrusaman and Zamzam Zamaludin (Coalition of Students and People of Tasikmalaya)	Jul/'08	Chief of the Office of Education in Tasikmalaya, Abdul Kodir.	Articles 310, 311 and 315 KUHP	Complaint filed after activists protested Kodir's failure to appear before a Tasikmalaya legislature investigation into corruption.	May '09 – three activists acquitted
	Mustar Bona Ventura and Ferdi Semaun (Bendera)	Dec/'10	Coordinating Minister for the Economy Hata Rajasa; Coordinating Minister for Political, Legal and Security Affairs Djoko Suyanto; State Minister for Youth and Sports Affairs Andi Mallarangeng and Edhi Baskoro	Articles 310, 311, 315 KUHP	Activists claimed in press they had evidence that Rp. 1.8 trillion from controversial Rp. 6.7 trillion Bank Century bail-out, was channelled to President Susilo Bambang Yudhoyono's campaign team, members of his inner circle and state agencies.	Sept '10 - Police have issued summons for questioning. - Activists refused to comply with summons voluntarily.
Official	Susno Duadji	Mar/'10	Brigadir Jenderal Edmon Ilyas dan Brigadir Jenderal Raja Erizman	Articles 310 and 311 KUHP and Article 27 (3) of UUITE	Duadji made complaints about senior officials in the Corruption Eradication Commission alleging that high level officials involved in corruption.	Mar '10 – summonsed for questioning

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