



MEMORANDUM

On

Indonesian Criminal and Civil Defamation Provisions

by

ARTICLE 19
Global Campaign for Free Expression

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I. Introduction

This Memorandum analyses the criminal and civil defamation provisions of Indonesia's Criminal and Civil Codes for compliance with international standards.¹ According to the information we have received, these provisions are largely based on the old Dutch defamation system, inherited by Indonesia at the time of independence.

ARTICLE 19 is of the view that the defamation regime created by these provisions is in flagrant violation of international law. The provisions tend to be drafted in vague and sometimes vastly overbroad terms; many are duplicative; both the criminal penalties and the civil damage awards can be wildly disproportionate to the harm likely to be caused; public officials, institutions and even some objects are inappropriately given special status and protection; and the regime as a whole fails to provide for adequate defences. Altogether, these provisions create a regime in which freedom of expression is likely to be severely chilled.

Events in the country amply warrant this conclusion. For example, during President Megawati's term of office, dozens of activists have been arrested under Article 134 of the

¹ The analysis is based on an unofficial translation of the provisions. ARTICLE 19 accepts no responsibility for errors based on faulty or misleading translation.

Criminal Code for insulting the President. In September and October 2003, Papatungan and Supratman, editors of the daily tabloid *Rakyat Merdeka*, were sentenced to suspended prison terms of, respectively, 5- and 6-months, for publishing material deemed insulting to political leaders.

Civil defamation laws are also often used by those in power to silence the media. For instance, this year, a court ordered the popular and respected magazine *Koran Tempo* to pay 8.4 billion Rupiah (approximately USD1 million) to Indonesian businessman Tomy Winata for having alleged that he was planning to establish gambling facilities. In a separate decision, Mr. Winata was awarded 500 million Rupiah (approximately USD58, 100) and the magazine was ordered to issue a public apology with respect to a story it had published alleging that Winata had been involved in a fire, which had damaged a textile market.

Where applicable, this Memorandum applies clearly established international law to highlight problems posed by certain provisions of the defamation regime. In other cases, and where appropriate, provisions are analysed against comparative national standards and best practices. These standards are distilled in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations (ARTICLE 19 Principles)*.² These principles have attained significant international endorsement, including by the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.³

II. International Standards

II.A Freedom of Expression in General

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* (UDHR), a United Nations General Assembly resolution,⁴ guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

It is universally recognised that this Article has attained the status of customary international law, and as such is legally binding on Indonesia.

² London: ARTICLE 19, 2000.

³ See their Joint Declaration of 30 November 2000. Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument>.

⁴ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

The *International Covenant on Civil and Political Rights* (ICCPR)⁵ elaborates on many rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR.⁶

Freedom of expression is also protected in the three regional human rights systems, including Article 10 of the *European Convention on Human Rights*⁷ (European Convention), Article 13 of the *American Convention on Human Rights*⁸ and Article 9 of the *African Charter on Human and Peoples' Rights*.⁹

The guarantee of freedom of expression applies to all forms of expression, not only those which fit in with majority viewpoints and perspectives. The European Court of Human Rights has repeatedly stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.¹⁰

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 19 of the ICCPR, which establishes a strict three-part test. This test, which has been confirmed by the Human Rights Committee,¹¹ as well as international courts,¹² requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest, including protecting the reputations of others, and (3) necessary to secure this interest. In particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations. Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest. Equally *penalties*, which are disproportionate to the harm caused by a particular expression, have been held not to be *necessary* to achieve legitimate aims and have, accordingly, been held to violate the guarantee of freedom of expression in their own right.

⁵ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

⁶ Indonesia has not ratified the ICCPR or any of the other international instruments described just below. However, ARTICLE 19 is of the view that they provide authoritative guidance as to the scope and nature of the guarantee of freedom of expression found in the UDHR. This is particularly true of the ICCPR, which is generally understood as an elaboration of the guarantees found in the UDHR.

⁷ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

⁸ Adopted 22 November 1969, in force 18 July 1978.

⁹ Adopted 26 June 1981, in force 21 October 1986.

¹⁰ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

¹¹ For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

¹² See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights).

II.B Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media. The Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality”.¹³ The media as a whole merit special protection under freedom of expression in part because of their role in making public,

...information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.¹⁴

This has been recognised by constitutional courts in countries around the world. For example, the Supreme Court of Japan has stated:

Reports by media on political matters provide important information necessary for the people’s political judgement and serve the people’s rights to receive information. Freedom of press is thus particularly important among rights to freedom of expression guaranteed under Article 21 of the Constitutional Law.¹⁵

And the Supreme Court of Appeal of South Africa has held:

[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens—from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people—their means to convey their concerns to their fellow citizens, to officialdom and to government.¹⁶

II.C The Indonesian Constitution

Article 28 of the 1945 Constitution of Indonesia guarantees freedom of expression in the following terms: “Freedom of association and assembly, of expressing thoughts by speech and writing, and so on, shall be laid down by law”. The amendments to the Indonesian Constitution adopted in August 2000 provide strengthened protection for free expression. New provisions Article 28E and 28F provide as follows:

Article 28E

(1) 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.

Article 28 F

¹³ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

¹⁴ *Ibid.*, para. 63.

¹⁵ *Nishiyama v. Japan*, 31 May 1978, Keiji-hanreishu 32 Kan. 33go, p. 457

¹⁶ *National Media Ltd. and Others v. Bogoshi*, [1999] LRC 616, p. 628 (references omitted).

Every person shall have the right to communicate and to obtain information to develop his/her personality and social environment, as well as the right to seek, to obtain, to possess, to keep, to process, and to convey information by utilizing all available kinds of channels.

These provisions find support in the Consultative Assembly's Decree No. XVII/MPR/1998 on human rights:

Everyone shall have the right to freedom to express his/her opinions and convictions based on their conscience. (Article 14)

Everyone shall have the right to freedom of association, assembly, and expressing their opinion. (Article 19)

Everyone shall have the right to communicate and receive information for his/her personal development and social environment. (Article 20)

Everyone shall have the right to seek, obtain, possess, keep, process and convey information by utilising all kinds of available channels. (Article 21)

The right of citizens to communicate and obtain information is guaranteed and protected. (Article 42)

Restrictions on freedom of expression are justified under Article 28(J)(2) in relatively narrow terms, reminiscent of the above-mentioned international instruments:

In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

III. Analysis of Indonesia's Defamation Regime

Our treatment of the Indonesian defamation regime falls into three main parts. In the first part, Section III.A, we delineate certain general principles, which should govern defamation regimes. In Sections III.B and III.C we describe the provisions of the criminal and civil regimes in detail and comment on our specific concerns with them.

III.A General Principles of Defamation Law

III.A.1 Public Officials and Bodies

As discussed in detail in Section III.B, the Criminal Code contains special protections for a wide range of public officials and bodies.¹⁷ This situation, in an important sense, stands international jurisprudence on its head. That jurisprudence establishes that public *officials* should tolerate a greater degree of criticism than private persons since they have willingly taken on a public role in a democratic context where their actions are subject to the

¹⁷ The Civil Code also appears to create a right in public officials, and possibly even public bodies, to sue in defamation. See below.

scrutiny of the public.¹⁸ Given this, ARTICLE 19 strongly recommends that, rather than according public officials extended protection, the standard for defamation in cases brought by public officials should be *stricter* than the standard for other individuals (see below under Defence of Reasonable Publication).

Added protection for public *bodies* is, if anything, even less appropriate. It is vitally important in a democracy that open criticism of government and public bodies be facilitated. It is equally important to recognise that public bodies have only limited reputations, which, in any case, can be said to belong to the public as a whole. Finally, public bodies possess ample means to defend themselves. For these reasons, ARTICLE 19 is of the view that defamation actions by public bodies should be prohibited altogether.¹⁹ This is in accordance with the decisions of superior courts in a number of countries, which have limited the ability of public bodies, including elected bodies, State-owned corporations and even political parties, to bring defamation actions.²⁰ Indonesia should follow this lead.

Recommendations:

- Public officials should not benefit from special protection under defamation laws, criminal or civil.
- Public bodies should not be able to bring defamation suits.

III.A.2 Defences

a. No Liability for True Statements

The Civil Code does not appear to provide for a separate truth defence and the Criminal Code allows such a defence in only a limited set of circumstances. It stands to reason, however, that one cannot protect a reputation, which one does not deserve. True statements about a person cannot detract from any reputation, which is legitimately theirs precisely because they are true. If the challenged statements are true, therefore, a defendant should not be liable in defamation.²¹

Even if defamation, criminal and civil, is restricted to false statements, in certain circumstances, in particular where the challenged statements relate to a matter of public concern, the burden should be on the plaintiff to prove that those statements are false. The need for this is particularly evident in the context of media reporting where, in practice, proof of truth, according to the strict rules of evidence, “can prove exceedingly hard for a media defendant because of the journalistic practice of promising

¹⁸ See, for example, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82 (European Court of Human Rights).

¹⁹ See *ARTICLE 19 Principles*, Principle 3.

²⁰ See, for example, *Derbyshire County Council v. Times Newspapers Ltd.* [1993] 1 All ER 1011 (United Kingdom); *Rajgopal v. State of Tamil Nadu*, (1994) 6 Supreme Court Cases 632, p. 650 (India); *City of Chicago v. Tribune Co.*, 307 Ill 595 (1923), p. 601 (United States); *Die Spoorbond v. South African Railways* [1946] SA 999 (AD) (South Africa); *Posts and Telecommunications Corporation v. Modus Publications (Private) Ltd.*, (1997), Judgment No S.C. 199/97 (Zimbabwe); and *Goldsmith and Anor. v. Bhojru and Others*, [1997] 4 All ER 268 (United Kingdom).

²¹ See *ARTICLE 19 Principles*, Principle 7.

confidentiality to those who provide information [...] Sources, even if not promised anonymity or confidentiality, may be unwilling to appear in court to testify against a plaintiff”.²² The UN Special Rapporteur is in accord, having stated: “The onus of proof of all elements should be on those claiming to have been defamed rather than on the defendant”.²³

Recommendations:

- No one should be held liable in defamation for statements, which are true. Accordingly, truth should be a full defence to any charge of defamation.
- Where an allegedly defamatory statement relates to a matter of public concern, the plaintiff should bear the burden of proving that the statement was false.

b. No Liability for the Expression of Opinions

For the most part, Indonesian defamation law does not clearly distinguish between the treatment of expressions of opinions and expressions of fact, or provide for higher standards for liability for opinions. However, courts around the world, international and national, regularly distinguish between opinions and statements of fact, allowing far greater latitude in relation to the former. ARTICLE 19 takes the view that statements of opinion should never attract liability under defamation law;²⁴ at a minimum, such statements should benefit from enhanced defamation protection.

Recommendation:

- Indonesian defamation law should distinguish clearly between expressions of opinion and expressions of fact and should provide that the former are not actionable in defamation. At a minimum, opinions should benefit from a high degree of protection against defamation actions.

c. Reasonable Publication

It is widely recognised that a rule assigning liability for *every* false statement is particularly unfair for the media. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. As the European Court of Human Rights has held:

[N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.²⁵

As a result, an increasing number of jurisdictions are recognising a ‘reasonableness’ defence – or an analogous defence based on the ideas of ‘due diligence’ or ‘good faith’ – due to the harsh nature of the traditional rule according to which defendants are liable

²² McGonagle, M., *Media Law, 2nd Edition* (Dublin: Thomson Round Hall, 2003), p. 82.

²³ See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52.

²⁴ ARTICLE 19 Principles, Principle 10.

²⁵ *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.

whenever they disseminate false statements or statements, which they cannot prove to be true. This provides protection to those who have acted reasonably in publishing a statement on a matter of public concern, while allowing plaintiffs to sue only those persons who have failed to meet a standard of reasonableness.²⁶

Recommendation:

- Indonesian defamation law should recognise a defence of reasonable publication.

d. Liability Exemption for Certain Categories of Statements

Certain kinds of statements should never attract liability for defamation. Generally speaking, this is where it is in the public interest that people be able to speak freely without fear or concern that they may be liable for what they have said. This would apply, for example, to statements made in court, in the legislature and before various official bodies. Equally, fair and accurate reports of such statements, in newspapers and elsewhere, should be protected.²⁷

Principle 11 of the *ARTICLE 19 Principles* details the types of statements, which should attract such protection:

- (a) Certain types of statements should never attract liability under defamation law. At a minimum, these should include:
 - i. any statement made in the course of proceedings at legislative bodies, including by elected members both in open debate and in committees, and by witnesses called upon to give evidence to legislative committees;
 - ii. any statement made in the course of proceedings at local authorities, by members of those authorities;
 - iii. any statement made in the course of any stage of judicial proceedings (including interlocutory and pre-trial processes) by anyone directly involved in that proceeding (including judges, parties, witnesses, counsel and members of the jury) as long as the statement is in some way connected to that proceeding;
 - iv. any statement made before a body with a formal mandate to investigate or inquire into human rights abuses, including a truth commission;
 - v. any document ordered to be published by a legislative body;
 - vi. a fair and accurate report of the material described in points (i) – (v) above; and
 - vii. a fair and accurate report of material where the official status of that material justifies the dissemination of that report, such as official documentation issued by a public inquiry, a foreign court or legislature or an international organisation.

²⁶ On this point, see the European Court's decision in *Bladet Tromso and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93. See also *ARTICLE 19 Principles*, Principle 9.

²⁷ See, for example, the following decisions by the European Court of Human Rights: *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97 (members of the legislature should enjoy a high degree of protection for statements made in their official capacity); *Nikula v. Finland*, 21 March 2002, Application No. 31611/96 (statements made in the course of judicial proceedings should receive a high degree of protection); *Bladet Tromso and Stensaas v. Norway* (media and others should be free to report, accurately and in good faith, official findings or official statements).

- (b) Certain types of statements should be exempt from liability unless they can be shown to have been made with malice, in the sense of ill-will or spite. These should include statements made in the performance of a legal, moral or social duty or interest.

Recommendation:

- Indonesian defamation law should provide protection against defamation for statements in the categories described above.

III.B Detailed Analysis of Criminal Defamation

As has already been noted, the criminal defamation regime in Indonesia consists of more than 20 articles of the Criminal Code. This regime is truly draconian and in serious breach of international standard relating to freedom of expression. It is a regime characterised by potentially extremely harsh penalties for expression; by prohibitions cast in terms so vague and/or overbroad that, in many cases, it is nearly impossible to determine which expressions are prohibited and which may be employed safely; by the absence of an intent element for some offences; and by special treatment for public officials and bodies, whose conduct should be the focus of attention and critical comment.

The result is a criminal defamation regime, which may be used to stifle nearly any kind of critical assessment of, any sort of investigative journalism with respect to and indeed any kind of fair comment about, government and government officials, as well as other public figures. The regime raises the spectre, on the one hand, of a high level of chill for journalists and others exercising their right to freedom of expression. Equally, it raises the spectre of imprisonment for those mass media and individuals who have the courage to go ahead and write about matters of public concern despite these grave threats.

III.B.1 The Legitimacy of Criminal Defamation

International law recognises that freedom of expression may be limited to protect individual reputations but defamation laws, like all restrictions, must be proportionate to the harm done and not go beyond what is necessary in the particular circumstances. Criminal defamation provisions breach the guarantee of freedom of expression both because less restrictive means, such as the civil law, are adequate to redress the harm and because the sanctions they envisage are not proportionate to the harm done.

Numerous international statements attest to this fact. The UN Human Rights Committee, the body with responsibility for overseeing implementation of the ICCPR, has repeatedly expressed concern about the possibility of custodial sanctions for defamation.²⁸ The UN Special Rapporteur on Freedom of Opinion and Expression has asserted that imprisonment is not a legitimate sanction for defamation.²⁹ In his Report in 2000, and again in 2001, the Special Rapporteur went even further, calling on States to repeal all

²⁸ For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999).

²⁹ *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.

criminal defamation laws in favour of civil defamation laws.³⁰ Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with “the abuse of legal provisions on criminal libel”.³¹

In their joint Declarations of November 1999, and again in December 2002, the three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – called on States to repeal their criminal defamation laws.

The *ARTICLE 19 Principles*, reflecting this clear international tendency, call for the complete repeal of criminal defamation laws. At the same time, in recognition of the fact that many countries still have such laws in place, Principle 4 notes that prison sentences suspended or otherwise, should never be imposed for defamation.

Based on the foregoing, our principal recommendation is that the defamation provisions in the Criminal Code be repealed altogether. If criminal defamation laws remain in force, however, they should be amended so as to minimise the potential for abuse or unwarranted restrictions on freedom of expression in practice. An essential element of this should be the removal of the possibility of imprisonment for defamation.

Recommendations:

- The criminal defamation regime should be repealed in its entirety.
- In the event that it is retained, the available penalties should be reduced considerably to ensure that they are strictly proportional to the harm done. In particular, in view of the extreme and always-disproportionate nature of imprisonment for defamation, all provision for prison sentences for defamation should be removed from the Criminal Code.

III.B.2 Special Protection for Certain Officials and Institutions

a. The President or Vice-President and Rulers of Friendly States

Articles 131 and 141 of the Criminal Code prohibit “factual assaults” against, respectively, the President or Vice-President and ruling kings or other heads of friendly States.³² By terms, they appear to be “fallback” provisions, as each provides for maximum terms of imprisonment – eight years in the case of Article 131 and seven in the case of Article 141 – in the event that the prohibited expression “does not fall under a heavier penal provision”. However, given that these terms of imprisonment are in fact the

³⁰ See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.

³¹ See, for example, Resolution 2000/38, 20 April 2000, para. 3.

³² We note that the term “friendly state” is not defined in Article 141. It is by no means clear what the term might mean in practice.

most severe, at least as regards criminal defamation provisions, rather than being fallback provisions they appear to be provisions of first resort.

Articles 134 and 142 prohibit the “deliberate insult” of, respectively, the President or Vice-President and a ruling king or another head of a friendly State. These provisions provide, again respectively, for imprisonment of up to six and five years, as well as for fines.³³

Article 136bis extends the provisions of Article 134 to Article 135, which governs governing “the consort of the reigning Queen, the crown prince (or crown princess), a member of the Royal House or the Regent”.³⁴

Articles 137 and 144, again relating, respectively, to the President or Vice-President and a ruling king or another head of a friendly State, prohibit the dissemination or open demonstration or the putting up of a writing or portrait containing insults to these persons, provided that the acts are perpetrated with the intent to make the contents public. The idea here, apparently, is to create a separate offence for intentionally publicising such materials. Imprisonment of up to one year may be imposed. Articles 137(2) and Article 144(2)) provide that, if the act has been perpetrated by a member of a profession, and if a similar act has been perpetrated by that person within the preceding two years, the person may be prohibited from practicing such profession.

Analysis

We have already explained that special protection against defamation for public figures turns the basic principle that public officials should tolerate more, rather than less, criticism, on its head. These provisions breach this rule by providing special protection against defamation to the President and Vice-President, as well as heads of friendly States.

What is certainly worse in relation to Articles 131 and 141 is that the prohibition on expression relating to them may reach just about any expression about them whatsoever. The expression need only constitute a “factual assault”. This term is undefined and is probably incapable of definition. It is not restricted to false allegations and there is no requirement that the impugned statements even damage the honour or reputation of the protected persons. The term “assault” appears to carry the implication that the prohibited expression must somehow be harmful to such persons, but it is simply impossible to say how mild a critique or comment may constitute an “assault”.

No matter, therefore, how well-founded a factual criticism is, no matter how well-verified, no matter how much the information expressed is in the public interest, and regardless of whether or not it is true, such criticism may subject the speaker or writer to long prison sentences. As a result, these provisions appear to render criminal a vast range

³³ The fines are up to Rp.4500, or about USD5, and the rates are similar for all of the criminal defamation provisions. Either these sums are very out-of-date or it is possible that they have been amended upwards.

³⁴ We are unclear whether this article would have any practical applicability in modern-day Indonesia.

of discussions of world affairs and Indonesia's place in them, whenever such discussions include references to the President or Vice-President, or to other world leaders.

Exacerbating this situation even further is the fact that, unlike virtually all of the other criminal defamation provisions, Articles 131 and 141 do not require *intent* on the part of the person making the expression. An innocent remark, a remark taken out of context, a joke or a light exaggeration might all qualify as "factual assaults", the expression of which might result in a heavy criminal liability.

Criminal provisions which are open-ended, as these articles are, are in flagrant violation of international law. They breach the well-established proposition that any restrictions on freedom of expression must be established by a "law" which is sufficiently clear to enable individuals to appreciate in advance what is prohibited. The European Court of Human Rights has been particularly clear on this point, writing:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.³⁵

The unfortunate effects of Article 131 are made yet worse by Article 165, which imposes criminal liability on any person who has knowledge that someone intends to violate certain provisions of the Criminal Code, including Article 131, and who intentionally fails to notify the police or "officers of the justice" in a timely fashion, as long as a violation of one of these provisions in fact occurs. By terms, therefore, any person who knows that there is to be, for example, a discussion of world affairs which might involve factual criticism of the President or the Vice-President, whether the discussion is to occur in a private home or in a private club or in a university classroom, must notify the authorities of this fact. In the event that he or she does not do so, and that a "factual assault" on one of these persons in fact occurs, he or she may face imprisonment or a fine. One would have thought and hoped that the sort of "spying" system encouraged, indeed obliged, by the terms of Article 165 would have been eliminated along with other vestiges of dictatorship thrown off by Indonesia recently.

Articles 134 and 142 also suffer from vagueness and potential over breadth in not defining the term "insult" and thereby permitting possible punishment for protected expression; although it must be admitted that their effect is mitigated to some small degree in that they do require intent.

Not only do Articles 131, 141, 134 and 142 suffer from vagueness (certainly fatal in the case of the first two); as well, all fail to stipulate that the expression in question must be public. Apparently even a private remark, made in one's home or in other intimate surroundings, may subject the speaker to liability under these articles. While prosecution

³⁵ *Sunday Times v. United Kingdom*, 26 April, 1979, Application No. 6538/74, para. 49 (involving a prior restraint on press publication sought to be justified on national security grounds).

for private remarks may not be the norm under this regime, it is very disturbing that this *potential* exists.

It is not clear why special provisions, in the form of Articles 137 and 144, are required to extend liability for insult to persons who further distribute insults but, in any case, these articles suffer from the same defects as the ones they effectively extend.

The provisions relating to the loss of ability to carry on one's profession are also objectionable. A profession is a livelihood and it is also a source of pride and reputation. Divesting a person of his or her profession, by disallowing him or her to practice it, can be a truly drastic step. Moreover, these provisions appear to place a double burden on professionals, as there is no indication in these articles that a professional might not also have to endure imprisonment. There is no justification for this.

The regime created by these articles creates the potential for criminal liability whenever the President, Vice-President or heads of State are discussed in any critical terms. They virtually outlaw serious reflection about these persons, analysis of their policies and activities, and discussion relating to elections and other highly relevant matters. They have no place whatsoever in a democracy and they should be removed immediately from the Criminal Code.

Recommendations:

- Articles 131, 141, 134, 142, 137 and 144 should be repealed.
- The reference to Article 131 in Article 165 should be removed.
- The additional penalties for professionals provided for in Articles 137(2) and 144(2) should be removed.

b. Institutions and Objects

Article 207 provides for imprisonment of up to one and one half years, as well as for fines, for any person who “with deliberate intent in public, orally or in writing, insults an authority or a public body set up in Indonesia”. Article 208, identical in form to Article 137, threatens imprisonment for intentionally *making public* writings or portraits containing insults against any such authority or public body.

National flags are also protected. Specifically, Article 154a of the Criminal Code subjects any person who “violates the National Flag ... and the coat of Arms of the Republic of Indonesia” to imprisonment of up to four years and potential fines, while Article 142a provides for imprisonment for up to four years and possible fines for anyone who “violates the national flag of a friendly state”.

Analysis

For reasons already described in Section III.A.1, the extension of the right to bring defamation actions to public bodies is highly problematic.

Articles 142a and 154a are also objectionable. It is signally unclear what would be included by the term “violate”. While the primary meaning of this term may refer to

physical actions against flags, there is no such explicit limitation in the provisions and it is conceivable, indeed entirely possible, that a critical remark about national flag – even a remark merely objecting on aesthetic grounds to a design or colour – could subject someone to criminal liability, including imprisonment. This would be grossly inappropriate. Indeed, even physical actions against flags, which amount to a form of expression, should be protected.³⁶

Recommendations:

- Public bodies should be precluded from bringing defamation actions.
- Articles 142a and 154a should be repealed. Alternatively, it should be made clear that they are restricted in scope to actions, which incite to violence or other illegal acts.

III.B.3 General Criminal Defamation

a. Offences of Libel and Slander

Article 310 provides for the general crimes of slander and libel. The former occurs when a person “intentionally hurts someone’s honour or reputation by charging him with a certain fact, with the obvious intent to give publicity thereof” and the latter occurs when such “charge” is based on the dissemination of writings or portraits. The maximum imprisonment for slander is nine months; for libel the maximum is one year and four months. Fines are provided for with respect to both offences as well.

Analysis

It is at least positive that these offences require an intention to damage a subject’s honour or reputation, by means of charging him with a certain fact, and a further intent to make the charge public. On the other hand, as we have made clear, imprisonment for such conduct is a disproportionate penalty as compared to any harm, which might conceivably be caused. Moreover, as we note below, the defences available with respect to these offences are inadequate.

b. Defences to Charges of Slander or Libel

The Criminal Code contains a complex, confusing and at the same time weak set of defences to libel and slander charges.³⁷ First, Article 310 provides: “Neither slander nor libel shall exist as far as the principal obviously has acted in the general interest or for a necessary defence”. Given this provision, it would seem that expressions in the general interest or for a necessary defence are not counted as libel or slander in the first place. But, as the discussion just below implies, the effect of Articles 311 and 312 would appear to put the burden on the defendant to show that the expression fulfilled one or the other of these functions; thus, the Article 310 “exceptions” would appear to be, in reality, defences.

³⁶ No doubt remarks, including potentially about flags, which amounted to incitement to violence or revolution could be subject to restriction under public order laws of general application but there is no reason to pick out national flags for specific treatment in this regard.

³⁷ No such defences appear to be provided for the charge of “simple” defamation, created by Article 315 (see below).

Article 312 provides that a proof of truth may be proffered – and, presumably, if successful, the defendant will be found innocent of the charge – only if “the judge deems it necessary to examine the truth in order to evaluate the allegation of the defendant that he has acted in the public interest or out of necessity to defend himself” or where the challenged expression charges an official with “having done something in the performance of his service”. The former case leaves this important matter entirely up to the discretion of the judge and gives no guidance to the judge as to when and whether to exercise such discretion.

Article 311, in turn, imposes a further, and very dramatic, penalty enhancement in the event that a person accused of libel or slander elects to try to prove that he or she acted in the public interest or out of necessity. In that event, and provided that the accused is found to have acted with knowledge of the falsity, he or she would be subject to imprisonment of up to four years.³⁸

Analysis

This defence regime is confusing and potentially quite troubling. It is not clear whether Article 311 is triggered by an offer to prove truth but, if so, it is highly problematic. In this case, any decision by a defendant to claim truth would be highly risky because, in the case that the evidence of truth is rejected on the terms of Article 311, the person is effectively subject to a potentially much longer prison sentence.

Article 312, dealing with truth, also fails to make clear what, exactly, is required. It appears that the accused needs to prove both that the statements were made in the public interest or for purposes of defence and also that they were true. Furthermore, even if successful, it is unclear that these proofs absolve the defendant of guilt. Indeed, according to our sources, one can be convicted of libel or slander for true statements.

Even putting these fundamental difficulties aside, these articles fail to meet the international standards outlined above. First, the right to prove truth should never be denied a defamation defendant. Second, there is no provision for a defence of reasonableness.

Recommendations:

- The “truth defence” should be radically simplified to provide that proof of truth is always a full defence to a charge of libel or slander.
- Article 311 should be repealed.
- The law should also provide for a defence of reasonableness as set out above.

³⁸ We actually have two translations of this provision, which differ potentially materially. The discussion in the text is based on a translation which we believe to be more reliable, based on its source. However, we note that the other translation implies that the Article 311 penalty enhancement only applies in the case of calumny – which we understand to mean: charging someone with a criminal offence. If this translation is in fact correct, then the analysis below, relating to Article 311, would need to be withdrawn. However, even if Article 311 were indeed restricted to calumny, the period of imprisonment provided for would still be disproportionate; and we would recommend its removal.

c. “Simple” Defamation

Article 315 creates a further general offence of defamation as follows: “A defamation committed with deliberate intent which does not bear the character of slander or libel, against a person either in public, orally or in writing, or in his presence orally or by battery, or by a writing delivered or handed over, shall [be] a simple defamation”. Such “simple” defamation is punishable by imprisonment of up to four months and two weeks, and by potential fines as well.

Analysis

“Simple” defamation is defined only negatively, as (presumably) defamation, which involves neither slander nor libel (both of which are defined in terms of hurting someone’s “honour or reputation”). It is, as a result, rather unclear. The term “defamation” suggests that it involves statements harming reputation but it is unclear how this might be engaged or why it is necessary given Article 310. Furthermore, while the article requires “deliberate intent”, it is silent on what the intent *relates to*. For example, it might be that the intent is to cause harm but, equally, it might only require that the *assertion*, or the *writing*, occur with intent. It is also unclear what defences, if any, apply.

Recommendation:

- The “crime” of simple defamation should be repealed.

d. Some Other Defamation-related Provisions

Article 317 subjects to fines and potential imprisonment of up to four years any person who “with deliberate intent submits or causes to submit a false charge or information in writing against a certain person to the authorities, whereby the honour or reputation of said person is harmed”.

Article 318 subjects to fines and potential imprisonment of up to four years any person who “with deliberate intent by some act falsely casts suspicion upon another person of having committed a punishable act”.

Finally, Article 316, relating to “general defamation”, provides for penalty enhancements, by one third, “if the defamation is committed against an official during or on the subject of the legal exercise of his office”.

Analysis

Article 317 is duplicative of the provisions discussed previously in this section and is therefore unnecessary. Moreover, it has the peculiar effect of elevating the role of public officials in the defamation regime. The honour or reputation of a person is in no way particularly sensitive in relation to public officials and yet Article 317 seems to imply that dishonouring the reputation of a person before public officials should be a separately-actionable offence, with particularly harsh penalties.

Article 318 implies that “casting false suspicion ... [for] having committed a punishable act” is *worse* than simply libelling or slandering someone, because it provides for a considerably longer period of imprisonment than Article 310. This is unnecessary,

inasmuch as Article 310 covers such situations and already provides for excessive penalties.

Article 316 is deeply problematic, but for reasons which have already been made abundantly clear: public officials should tolerate more rather than less criticism, particularly in relationship to their public work. Given this, it makes no sense whatsoever for defamation of such officials to be attended with enhanced penalties.

Recommendation:

- Articles 317, 318 and 316 of the Criminal Code should be repealed.

III.C The Civil Defamation Regime

III.C.1 Offences

The Civil Code does not include explicit provisions on defamation but its general tort provisions have clear application to defamatory acts. First, Article 1365 provides that a “party who commits an illegal act which causes damage to another party shall be obliged to compensate therefore”. The link to defamation is forged from there by Article 1372, which provides that a legal claim “with respect to an offence shall extend to compensation of damages and to the reinstatement of good name and honour that were damaged by the offence.”³⁹

Article 1375 extends the right to bring suit under the previous provisions to spouses, parents, grandparents and grandchildren on behalf of a deceased relative.⁴⁰

Article 1367, a vicarious liability provision, imposes potential liability for the acts of others “for whom [one] is responsible” or “caused by matters which are under his supervision”. In particular, parents or guardians are responsible for the acts of certain minor children; employers and other managers are responsible with respect to the acts of their “servants and subordinates in the course of duties assigned to them”; and teachers and work supervisors are responsible for the acts of their students and apprentices during the period of their supervision.

Analysis

The primary problem with these provisions is that they incorporate the over breadth of the criminal defamation provisions, noted above. A closely related problem is that these general civil provisions fail to take into account the constitutional guarantee and general importance of freedom of expression. What may be appropriate in relationship to a general civil wrong may need to be adapted when applied to a statement, to take into

³⁹ It is not entirely clear to us whether or not the term ‘offence’ here refers to criminal offences, so that this provision would be engaged only where the statements in question would be actionable in criminal defamation, or to something else. We have been informed that this has been held to be the case in at least some court decisions.

⁴⁰ Additionally, Article 1379 provides that a claim for compensation does not lapse upon the death of either the offender or the offended party. We note also that the Criminal Code also has provisions relating to defamation of the deceased, at Articles 320 and 321. We express no view on these provisions at this time.

account the importance of protecting the fundamental human right to freedom of expression. Rules in this area may be contrasted with general civil rules, which often simply seek to apportion loss to the party either best able to pay or on whom it is most appropriate for this burden to fall.

Inasmuch as Articles 1365 and 1372 refer simply to “another party”, they may be compatible with defamation lawsuits being brought by public bodies, which we have already noted is illegitimate.

The provisions on vicarious liability, while they may well be appropriate for other civil wrongs, are inappropriate in this area, failing, as they do, to take into account the importance of freedom of expression. In particular, it is simply not appropriate to impose liability on teachers, parents and the like for the potentially wayward expression of their trustees.

Recommendations:

- The civil law should include a fully developed set of defamation provisions, not linked to the criminal defamation provisions and which take into account the fundamental importance of freedom of expression.
- It should be clear that public bodies do not have the right to bring civil defamation actions.
- Civil defamation actions on behalf of deceased persons should be disallowed.
- Vicarious liability should not generally apply to defamation actions.

III.C.2 Defences

Article 1376 provides that an “offence cannot be admitted, if it does not appear that there existed intent to offend”. The same article goes on to provide that intent may not be supposed to have existed if the “alleged offender apparently acted in the public’s interest or if he did so as an act of necessary defence”.⁴¹

Article 1380 provides for a limitations period of one year, “effective as of the day upon which the act was committed and known to the plaintiff”.

Analysis

While a defence where the alleged offender acted in the public interest or for necessary defence is welcome, it does not go far enough. It seems to imply that intent may be supposed to exist where these conditions are not met. Furthermore, it fails to provide for other defences, such as proof of truth or reasonableness.

Additionally, we note that, while a general limitations period for defamation actions of one year is positive, Article 1380 suffers from the defect that the period does not appear to commence when the act is committed but, rather, only when the plaintiff gains

⁴¹ Article 1377 provides that a civil claim shall “not be admitted if the offended party has been irrevocably declared guilty of the act which was allegedly committed against him”.

knowledge that the act was committed.⁴² The article leaves open the possibility that an individual who happens to come across an allegedly defamatory remark or publication many years after it has been uttered or published – for example, because he or she was away from the country during his or her professional life and only returned upon retirement – may bring suit, even though the remark or publication has long passed from public view.

Recommendation:

- Article 1376 should make it clear that intent may not be presumed to exist absent proof of its existence.
- Proof of truth should always be a defence in a defamation action, and defendants should benefit from a reasonableness defence.
- The limitations period for defamation action should run from the time the impugned statements were published.

III.C.3 Sanctions

Article 1372 instructs the judge, when considering sanctions, to “have regard to the severity of the offence, also the position, status and financial condition of the parties involved and the circumstances”.

Article 1373 specifically imports the Criminal Code offence of slander into civil proceedings, providing that “the offended party may also demand a judgment declaring that the offensive act is slanderous or offensive”. In the event of such declaration, the provisions of Article 314 of the Criminal Code “with regard to punishment for slander, shall apply”. Article 1374 provides that the defendant may “prevent the [Article 1373] request ... by offering and providing a public declaration ... that he regrets the act committed; that he therefore apologises and that he considers the offended party to be a person of honour”. However, such declaration, according to this article, would be “notwithstanding his obligation to compensate”.

Analysis

Nothing in the Civil Code provisions limits the amount of compensation awardable in defamation actions. Indeed, Article 1372 would appear to encourage judges to award particularly significant sums because they are to take into account “the severity of the offence”. That courts have taken such advice to heart is quite plain, as evidenced by the recent award, mentioned in the Introduction, to Tomy Winata of Rp. 8.4 billion (approximately USD 1 million) for an allegedly defamatory newspaper article.

Civil defamation regimes should ensure that damage awards are strictly proportional to the harm actually caused, taking into account any negative effect such awards might have on freedom of expression. ARTICLE 19 strongly recommends that legislators specifically provide, in the civil defamation context, that non-monetary awards should be

⁴² There is some ambiguity on this point in the Article, at least in translation. The use of the conjunction ‘and’, in our view, makes it reasonable to assume that the limitations period begins only when both conjuncts are satisfied: commitment of the act and knowledge by the plaintiff of its commitment. Thus, in effect, the limitations period begins to run *only when* the plaintiff gains knowledge of the committed act.

prioritised wherever possible; that a fixed ceiling for compensation for non-material harm to reputation should be set out in law; and that the maximum should be awardable in only the most serious of cases.⁴³

The invocation, by Article 1373, of Criminal Code Article 314 is particularly problematic. It would appear to allow for double penalties – criminal and civil – to be imposed on defendants. Moreover, as the declaration involved will be made in the civil context, it may only need to satisfy a civil standard of proof, rather than the more exacting criminal standard but, at the same time, the declaration would effectively result in a situation where criminal liability was engaged. As a result, Article 1373 appears to create the possibility of “bootstrapping” a criminal conviction based on a civil one. For both these reasons – the potential for double penalties and the possibility of obtaining a criminal conviction with a civil evidentiary showing – Article 1373 raises the spectre of particularly disproportional penalties for expression.

Recommendations:

- Article 1372 should specify that civil defamation awards must be strictly proportional to the harm suffered.
- Non-monetary remedies should, wherever possible, be prioritised over pecuniary awards.
- A fixed ceiling for non-material harm for defamation should be established, to be awarded in only the most serious of cases.
- Article 1373 should be repealed.

IV. Alternative Measures to Address Defamation

ARTICLE 19 recognises that abusively defamatory expression does occur, and that both private persons and the mass media are sometimes responsible for such conduct. Despite this, our view is that criminal defamation provisions are always a disproportionate remedy and that even civil defamation provisions are routinely abused by the powerful to chill expression which should actually be encouraged or which is at least perfectly legitimate.

At the same time, neither criminal nor civil law provisions on defamation are truly effective in addressing abusive defamatory expression. Both are time-consuming and the harm to reputation may well have run its effective course by the time the problem is remedied. Neither promotes remedies, which really run to the heart of the matter. Criminal conviction leads to imprisonment or fines, neither of which really restores the reputation of the person who has been defamed, or even provides him or her with any direct benefit. Successful civil cases do at least lead to damage awards for the plaintiff but again fail actually to restore the reputation. A further problem with civil defamation is that it is costly, so that ordinary individuals who may have been defamed rarely take the issue up.

⁴³ See *ARTICLE 19 Principles*, Principle 15.

The most effective remedies are those, which can lead, quickly and for little cost, to the publication of a retraction, correction or reply. These measures, if applied rapidly, effectively negate the original statement and thus largely eradicate the harm done.

One mechanism, which may lead to the implementation of such measures, is an internal complaints system run by the media outlet concerned. Major outlets in many countries do run such systems on a voluntary basis. The BBC in the United Kingdom, for example, has a developed complaints system, along with a code of conduct against which such complaints may be measured.

A second mechanism is a formal, media-wide complaints body. Such a body should develop and publish a code of conduct or standards and then receive and adjudicate complaints against such a code, ordering retractions, apologies and the like as appropriate. There are a number of legitimate models for such bodies, ranging from truly voluntary bodies to statutory ones. The UK Press Complaints Commission is an example of the former, while the Danish Press Council is an example of the latter. The Indonesian Press Law is perhaps a hybrid of these two, being statutory in nature but also essentially self-regulatory. As such, it provides a valuable mechanism for redress for defamatory speech, the use of which should be encouraged.

Self-regulatory bodies have a number of advantages over those that are externally imposed, including the fact that, since they involve the profession, they have more credibility and moral suasion, so that their decisions are more likely to have wide impact. A judgement by one's peers that one is in breach of professional standards may be far more persuasive than a similar judgement by an external body.

Statutory complaints bodies may be legitimate as long as they meet certain criteria. Perhaps the most important of these is that they should be adequately protected against political or commercial interference. If the law fails adequately to guarantee their independence, they will be under constant threat of being undermined by interference. Their powers should also be appropriately tailored to their role, which is not to substitute civil defamation laws but to provide for an alternative, rapid, low-cost, relatively informal mechanism to address media excesses. They should not have quasi-judicial powers. Importantly, they should not be able to impose onerous sanctions, being instead limited in this regard to requiring the media to publish a statement or correction, as the case may be. The Indonesian Press Council conforms to all of these standards.

A third mechanism, common in Europe as well as in other parts of the world, is a right of reply.⁴⁴ Advocates of media freedom, including ARTICLE 19, generally suggest that a right of reply should be voluntary rather than prescribed by law. In any case, certain conditions should apply:

- The reply should only be in response to statements which are false or misleading and which breach a legal right of the claimant; it should not be permitted to be used to comment on opinions that the reader or viewer doesn't like.
- It should receive similar prominence to the original article or broadcast.

⁴⁴ France, Germany, Norway and Spain are some countries which provide for such a right.

- It should be proportionate in length to the original article or broadcast.
- It should be restricted to addressing the incorrect or misleading facts in the original text and not be taken as an opportunity to introduce new issues or comment on correct facts.
- The media should not be required to carry a reply, which is abusive or illegal.

Again, the 1999 Indonesian Press Law provides for a right of reply, albeit in rather broader terms than suggested above.