The Paradigm of Justice in Relation to Freedom of the Press and Private Rights

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Abstract

The aim of this study is to describe the protection of private rights in the context of press freedom. Achieving a formulation of how justice can be earned by someone who has experienced suffering or disadvantage as a result of a press coverage is the main goal of this study. There have been many civil suits filed by parties who feel that their reputation has been damaged by a press coverage, whereas the press obtains protection on the basis of human rights and its function as the fourth pillar of democracy. The concept of justice to be studied comes from the settlement of press-related disputes, regarding whether a lawsuit can be directly filed in a civil court without recourse to the right of reply. This study tries to make comparisons based on the different eras of government that have occurred in Indonesia.

Keywords: Justice; Freedom of Press; Private Rights

Introduction

The relationship between the press and the government influences the protection of the privacy rights of individuals against media coverage. In the history of governance in Indonesia, press freedom has experienced changes based on the government in power. In the days of colonialism, the Dutch East Indies government established *Persbreidel-Ordonnantie* (persbreidel ordinance) rules to restrict press freedom. The regulation was made by the Governor-General of the Dutch East Indies and states that the authorities may at any time act against newspapers and magazines whose contents are considered to disturb public order. The printing party, its publisher and editor will not be given the opportunity to defend or appeal to a higher court. After Indonesia gained independence, press freedom still suffered the same fate. Restrictions

on freedom of the press is a form of media control by the authorities to prevent media practitioners from arbitrarily publishing stories that are perceived to be against the rulers and political or community figures in order to promote Indonesian unity. *Persbreidel Ordonnantie* was only repealed in 1954 with Law No. 23 of 1954.

The government is very instrumental in protecting its citizens from media coverage that is considered arbitrary. However, the existing legislation on this issue is considered by the media to protect government policies and hamper the freedom of the press. Law No. 11 of 1966 on the Basic Stipulations of the Press, authorized by President Sukarno, remained in force until the transition of power to President Soeharto, who replaced the law with Law No. 21 in 1982. During the New Order period, the freedom of the press was measured by responsibility and not arbitrariness, so the government protected its citizens from media coverage such as defamation of the rulers and other people. Violations of private rights by the media can lead to civil and criminal prosecutions in order to achieve justice, because everyone is equal before the law.

After the transition of power from President Soeharto, who led Indonesia for 32 years, to B.J. Habibie, press freedom began to improve, and all laws and regulations that have impeded press freedom were reevaluated. Law No. 40 of 1999 on the Press is the brainchild of President B.J. Habibie. This law has greatly improved the freedom of the press. The issuance of a license for publishing news, i.e. the Press Publishing Business License (SIUPP), is no longer valid. Anyone from any circle may publish news through the print media without limitation; the only requirements are that the press companies must be owned by Indonesian citizens or the state itself and must be in the form of an Indonesian legal entity. The new law is deemed not to protect its citizens fairly. The Press Law is more dominant in protecting journalists, to the extent that citizens who are perceived as obstructing the duty of journalists can be sentenced to 2 years imprisonment or a fine of IDR 500,000,000. In addition, the system of responsibility is also unclear, and the media believes that the doctrine of *lex specialis* is relevant in this situation.

Press freedom contained in Law No. 40/1999 on Press (Press Law) has made the press very difficult to touch by law because of the strength of this law protecting the press workers. In fact, a community may be punished for committing a crime if it prevents journalists from carrying out journalistic duties. Meanwhile, if a journalist breaches the law in the case of a report, he shall only be liable to sanctions in the form of granting the right of reply. If one is dissatisfied with the postponement of the right of reply, he may approach the Press Council, a new institution established by the Press Act. The decision of the Press Council in the form of a Statement of Assessment and Recommendation is more of a process of mediation. Therefore, the following questions

arise: Can the public claim their rights that have been harmed, slandered or defamed by the print media? If the Press Law requires no criminalisation of the press, how is the protection of the privacy rights granted in the Civil Code enforced, for example related to the contempt set forth in Article 1372 of the Civil Code? This study will analyse how justice can be obtained by the public regarding privacy rights in relation to the freedom of the press.

Differences in Perspectives Regarding the Right to Reply

Conceptually, there are differences in views regarding how the right of reply should be implemented in cases involving the press and the public, especially with regard to the right to take a civil lawsuit to court. An opinion is that even if the right of reply is not used, an individual may directly commence a civil suit in court. Alternatively, others are of the opinion that the right of reply should be used before a criminal or civil case is instituted if the parties to the conflict could not be resolved by the Press Council. However, there is the tendency of the Press Council to protect the press on the grounds of press freedom. The form of protection comes from the Assessment and Recommendation Statement (PPR), which is the final decision of mediation between the victim and the press.

An issue that is still been debated is whether the right of reply is at the ethical level or has been included in legal matters (civil). On this issue, there are two main thoughts: First, the right to reply is one of the unique solutions in the press. The use of the right of reply is a compensation given by the press to the parties who feel disadvantaged. If the right of reply has been used, then the press has provided compensation to those who feel that they have been harmed. Thus, through the mechanism of the right to reply, the problem is considered already resolved. Consequently, after the use of the right of reply, the injured party has no right to file a case in court (Sukardi, 2007: 88).

The second thought is that the right of reply given by the law is to satisfy the elements of balance and democracy in the press mechanism. For the sake of order and protection of public interest, the possibility of been compensated in accordance with the general law must remain open to the aggrieved party. A default in contract, stealing or corruption cannot be erased nor can it be claimed that it is no longer a default even if the loot has been returned or the money replaced in a case of corruption. Similarly, if the press has made a mistake, has admitted the mistake, and has given opportunity to the injured party to explain his case through the right to reply, the mistake cannot be automatically erased in disregard to the provisions of the law. In other words, even

though the right of reply has been published, it is still possible to prosecute the press through legal means.

According to Syaefurrachman Al Banjary (2001), before the party who feels aggrieved by the press files a civil suit in the court, it must be proved beforehand that the broadcasting firm has indeed denied him the right of reply. The sequence of legal measures proposes that those who feel aggrieved must first demand the right of reply from the organisation that broadcasted the news. If the right of reply is not granted, the aggrieved party must send the summon up to three times. If the right of reply is still not granted, the aggrieved party may report the case to the police pursuant to violation of Article 5, Paragraph 2 and Article 18 Paragraph 2 of the Press Law. If the court declares that the accused press company violated the criminal provisions, then the party who feels aggrieved may sue to a civil court using article 1365 of the Civil Code.

This difference in opinion is fine. Judges in performing their functions certainly cannot be influenced by anyone. This is evident in the fact that the judge of Medan District Court granted the lawsuit filed by Dr. Benny Hermanto against a weekly media company. The media company had defamed him with the allegation that he sells drugs. This Medan District Court's decision is similar to that of the Medan High Court, which strengthened this case and made it a permanent legal force. The media company pleaded guilty and apologized to him (See Judgment of Medan District Court, No. 228 / Pdt.G / PN-Mdn, dated 24 December 1999 and the decision of the High Court. 176 / PDt / 2002 / PT-MDN, dated July 22, 2002).

In addition to unlawful acts, the claim for compensation on the basis of defamation is regulated in Article 1372 of the Civil Code, which states as follows: "The civil claim of humiliation is aimed at receiving compensation and restitution, honor and reputation". An important question arises: Do Articles 1365 and 1372 of the Civil Code both speak about the demand for compensation for the violation of a person's interests unlawfully? The answer is that claims of compensation based on defamation—which is categorised under unlawful acts in general—must also comply with the requirements of the basic claim of Article 1365, which constitutes a provision governing unlawful acts in general (Satrio, 2005:3).

Thus, the basis of the civil suit under Article 1365 and Article 1372 of the Civil Code are the same, i.e. the existence of unlawful acts which include acts or attitudes that violate the subjective rights of others and violates the legal obligations of the perpetrator himself. The view of this judge was not imprinted in the Press Law that was passed on 23 September 1999. It is a proof of the independence of judges.

In another case, the founder of Tempo magazine, Goenawan Mohamad, and his company, PT Tempo Inti Media Harian, were convicted by Supreme Court Justice Artidjo Alkostar after being found guilty of committing unlawful acts. In addition,

Tempo newspaper was sentenced to make an announcement of apology to Tomy Winata that will be published in the print media Koran Tempo and Kompas first page, size 4 (four), columns x 15 cm, for 2 (two) days in succession with the following words which is Court decided. Goenawan Mohamad and Koran Tempo were also severally punished financially; they were ordered to pay Tomy Winata IDR 500.000 daily if they fail to carry out this verdict, since the verdict had a permanent legal force.

The fact that there are differences in opinion was also submitted by R.H. Siregar (2006), Vice Chairman of the Press Council for two periods (Year 2000-2006). R.H. Siregar said that until now there is no way out of the debate regarding press coverage. An attempt to use the provisions of the Press Law in solving the problem associated with press coverage is unsatisfactory, and it is still been debated. On one hand, the press tends to make mistakes and/or mistakes in press coverage are resolved through the mechanism of right of reply and right of correction in accordance with the provisions of the Press Law. On the other hand, law enforcement officers generally tend to apply civil and criminal articles because the arrangements in the Press Law are incomplete. Likewise, several legal considerations of judges indicate that the implementation of right of reply and right of correction does not result in the loss of civil suits and criminal charges. Thus, right of reply and right of correction cannot be imposed on community members in accordance with the Press Law before taking legal proceedings in cases of mistakes in press coverage. In addition, people often complain that the implementation of the rights of reply is not satisfactory. In addition to its ineffectiveness, because of the prevailing circumstances associated with the right of reply, it is not totally equitable and its processes are often delayed. Lt. Gen. Djadja Suparman, former Military Commander of Jakarta, reported that during the reforms, he experienced character assassination by the media for alleged involvement in Poso riots, Bali bombing I and corruption. Regarding the Bali bombing I, Djaja reported six media firms to the Press Council in 2003. The Press Council's decision recommended that the six media firms offer him the right of reply. Although he used the right of reply, Djaja admits that it did not quite improve his name, which has already been reported incorrectly by national and international media. There is a tendency for the press to publish sensational stories that may not be true for financial gain and then later offer the right of reply to the injured party after the damage may have become irreparable. This is described as character assassination by various parties.

It must be admitted that the right to reply in the development of the press in Indonesia is one of the most important elements. It is this right of reply that causes the press to be regarded as having a democratic character or element. The right of reply is considered to be a channel or a pipe that carries the expressions or opinions of the public. It guards the balance between the exercise of press freedom and human rights

in protecting individuals from possible misuse of the press. The right of reply is important because its use or non-use may determine who wins or loses a court case. This can be seen in the case of humiliation and slander between Tempo Magazine and businessman Tommy Winata. The decisions of the lower courts were canceled. The Supreme Court in a session led by Chief Justice of the Supreme Court, Bagir Manan, freed the defendant, Chief Editor of Tempo magazine, Bambang Harymurti, because of this right of reply as regulated in Law No. 40 of 1999 on the Press. The Supreme Court is of the opinion that the right of reply was granted by Tempo magazine and that before the news was broadcast by Tempo magazine, it had already been checked by various sources, so the news cannot be categorised as unlawful.

Initially, the right to reply was only limited to the scope of the code of ethics, but now its existence has also been recognised in the law. Right now, the right to reply exists both in the Press Law and in the Journalistic Code of Ethics (KEJ) of various Indonesian media organisations. Thus, violation of the right of reply means violating the Press Law and KEJ. In Article 11 of the KEJ, it is stated that Indonesian journalists offer the right of reply and right of correction proportionately. This journalist's right is a follow-up of Article 7 Paragraph 2 of Law No. 40 of 1999 on Press, which states that, "Journalists should have and obey the Code of Ethics of Journalism". This provision has put ethics that was originally a moral obligation into the legal field.

It also must be admitted that the mechanism of the right of reply and right of correction set by the Press Law is a problem because both rights that were once the norms of ethics have become the norms of law. Before the two rights became legal norms, once the right of reply and right of correction have been implemented, the problem is considered to have been solved. However, with the stipulation of right of reply and right of correction as the legal norms in positive law, the resolution of a problem according to the ethical norm does not prevent the possibility of legal settlement in accordance with Article 18 Paragraph (2) of the Press Law. Thus, the mechanism of right of reply and right of correction stipulated in the Press Law becomes less effective. Therefore, there is no obligation of the community to make use of the mechanism in question (Siregar, 2006: 83).

Based on the view of the former Chief of Indonesian Press Council, Bagir Manan, a press dispute is a dispute arising out of or related to the activities or execution of journalistic tasks conducted by the press (journalists, editors, and press companies). Disputes involving the press but not in terms of journalistic activities are not included as press disputes. Journalists who blackmail, cheat or lie with the intent of self-benefit are not included as press disputes. Similarly, unlawful acts and misconducts committed by the press but not in the framework or in connection with the execution of journalistic duties are not included as press dispute. Acts that are not the actions of the press are

not protected by journalistic ethics and the law of the press. Actions outside of journalistic duties apply to general law provisions beyond the provisions of the ethics of the press and the laws of the press (Manan, 2011: 77). Barriers to freedom of the press can occur because of the act of public power, i.e. the state or government, as well as the act of a power outside the dominant public power, both within and outside politics. Examples of powers outside the dominant public power include a power within the dominant party system and certain pressure groups. An example of a power that is not a political power is the power of the owner of a business (power of a commercial nature).

Main Provisions for Justice

Press euphoria occurred almost throughout Indonesia during the reform period, particularly in terms of the print media. From 1998-2000, nearly 1,000 print media companies were licensed by the government (when the business registration was in the form of a foundation or limited liability company, after which the Press Law was used), although only a few print media companies survived due to the very serious competition in the business. In early 1999, the number of print media companies was about 289, and in 2001, the number was 181. By the end of 2010, the number of print media companies had gotten to 1,076 (Data of Newspapers Publishers, 2011). With the opening of the freedom of the press, yellow newspapers and unprofessional journalists increased in number. Violations of press laws are carried out arbitrarily (Supadiyanto, 2011).

The results of the Press Council survey reinforce the above conditions because about 70 percent of Indonesian journalists (70,000-87,500 journalists) have not read nor understand the Journalistic Code of Ethics (KEJ). The number of professional journalists is very minimal in Indonesia; out of about 100-125 thousand journalists, only about 10 thousand are professional journalists. Consequently, the law is violated by journalists. The Press Council stated that in the period 2000-2011, there were 3,225 complaints. When the data of Year 2000-2011 is compared with the period of 2017, it becomes clear that the level of law violations by the press has sharply increased. As of July 2017, there was an increase of 20 percent in KEJ violations, and at that time, nearly 600 people had reported to the Press Council about violations of the KEJ. By the end of 2017, the number of complaints to the Press Council had reached 1,000 to 1,200 (Antara News, 19 Dec. 2017).

Press companies should be subject to all applicable laws in Indonesia. Some of the regulations closely related to journalistic duties are the 1945 Constitution, Law No. 39 of 1999 on Human Rights, Article 1365 and Article 1372 of the Civil Code, and

other laws. Thus, everyone should respect the rights stipulated in these laws, especially the press. However, with the birth of Law No. 40 of 1999 on the Press, these constitutional rights seem not to be recognised because the regulation of rights in this law only focuses on journalists, and the rights of victims of wrong reporting is only regulated in the right to reply. The legal sanction arrangement for journalists is only a moral sanction of admitting a mistake by simply tendering an apology. But what if the aggrieved party is not satisfied with the answer; can the press be sued directly to court? This is in no way regulated in Article 12 of the Press Law. Journalists can only be punished when they commit criminal offences, such as murder, theft, and other forms of crime. The Press Law is regarded as a media and journalist protector, resulting in injustice in the freedom of the press. The liability of the media firm shall only be borne by the responsible person as stipulated in Article 12 of the Press Law; the journalist cannot be touched by law.

As a result, many people perpetrate violence against journalists for prejudicial reporting without respecting the rights of the community. According to data from the Alliance of Independent Journalists (AJI) Indonesia Year 2016-2017, there were 106 cases of violence against journalists (AJI, 2017). At the end of 2001, President Megawati Soekarnoputri complained about the press situation in Indonesia. According to her, a number of elites often say that the current state of media freedom has gone too far because it is too liberal and free, even freer than the press in developed countries. In her judgment, the press is now likened to a vehicle whose brakes are failing. Despite the fact that Megawati's concerns were not addressed to all press companies and her declaration that she will not prosecute a press company that is considered excessive, the statement shows the restlessness of some members of the society regarding the current state of the media.

The Press Law does not have a clear system of legal liability. The rule of conduct in the Press Law is absolutely not regulated; so, the implementation of the penalty for not granting the right of reply as contained in Article 18 Paragraph (2) of the Press Law is blurred altogether. For example, is the penalty imposed by the Press Council or does the aggrieved party have to sue the press company to enforce the fine imposed under the Press Law? Precisely, to fill this legal vacuum, the Press Council must be willing to understand and accept the meaning of the last paragraph of the Press Law stating as follows: "To avoid overlapping arrangements, this law does not regulate the provisions that are governed by other laws and regulations". Also, transitional provisions can be seen in Article 19 Paragraph (1) which states as follows: "With the coming into force of this law, all applicable laws and regulations in the field of press as well as existing bodies or institutions remain in force or continue to function as long as they are not contradictory or replaced by new ones under this law ". A deep analysis

of Article 19 Paragraph (1) of the Press Law makes it quite clear that the doctrine of *lex specialis* does not apply to the Press Law.

Thus, the right of reply that is contained in the media consciousness or "order" of the Press Council is not a binding and final decision because the Press Council's body only gives an opinion on a matter with the following title: "Assessment and Recommendation Statement" verdict from the judiciary. The Press Council is merely mediating between the press and the victims of public misconduct because of internal journalist code violations. Violation of the ethics of the press does not only have a moral sanction but also a legal sanction with all its consequences.

Illustrations of appropriate legal sanctions include the case involving the owner of the People's Sovereign Newspaper in Yogyakarta, Risang Bima, and his company together with its parent company, Jawa Pos; they were punished by the District Court and the decision was upheld by the High Court and by the Supreme Court. The ruling now has the power of law. Civil lawsuits (Article 1365 Civil Code) and humiliation (Article 1372 Civil Code) have shaken the media of Yogyakarta and Indonesia in general. The Radar newspaper, a subsidiary of Jawa Pos, and its board of directors had to pay $600,000 and publish an apology in the Yogyakarta media. Those seeking justice prefer to approach the courts because their decisions are more secure and helpful than the Press Council’s decisions.

According to John Rawls's (1971) theory of justice, the position of individuals in the society should be the same and equal. According to him, there is no difference in status or position between people. The primal position rests on rationality, freedom and equality to govern the basic structure of society. Thus, equality before the law between the public or the individual and the press (journalist) is the same, and nobody is immune from the law. Who does, he is responsible. But in the Press Law, this is not the case. The issue of legal responsibility of the press, as the word "responsible" entails, should cover both the editorial and the field staff. Meanwhile, in a press company in the form of Limited Company (PT), the responsibility is in the hands of directors. Thus, the status of those charged in the media needs to be elaborated by the rules or Law No. 40 Year 2007 regarding Limited Company (PT) should be applied. The public can also exercise their rights through the Company Law to the court without having to make a complaint to the Press Council.

A complaint to the Press Council to use the right of reply is legitimate, but there is no prohibition to prosecute because the court is prohibited from rejecting any case that comes to it in accordance with Article 10 paragraph (1) of Law No. 48 of 2009 on Judicial Power which states as follows: "The court is prohibited from refusing to examine, hear and adjudicate a case filed under the pretext that the law is absent or less clear, but it is obligatory to examine and prosecute". This is further clarified by Article

4 Paragraph (1) which states as follows: "The courts judge according to law by not discriminating against persons". Article 4 Paragraph (2) states that, "Courts help justice seekers and try to overcome all obstacles for the achievement of a simple, fast and just judiciary."

John Rawls (1971) concept of justice as fairness, in one aspect, points to the value that directs each party to give protection to the rights guaranteed by the law (element of rights). On the other hand, this protection should ultimately provide benefits to every individual (element of benefit). Rawls argues that there needs to be a balance between personal interests and common interests. The extent to which that balance is achieved is what is called justice. Justice is a value that cannot be bargained because only with justice is there a guarantee of the stability of human life.

Our last question is this: what kind of justice theory applies to the Indonesian nation? Obviously, we can find the answer to this question in the formulation of Pancasila precepts (the official, philosophical concept of Indonesia). The second precept reads: A just and civilized humanity, and the fifth precept states as follows: Social justice for all Indonesians. In MPR Decree No. II / MPR / 1978 on the Guidance on the Practice and Appropriation of *Pancasila* (later revoked by MPR Decree No. XVIII / MPR / 1998), the points of the principle of justice (including those mentioned by Rawls) have been clearly disclosed. Furthermore, when we look at the Preamble of the 1945 Constitution, the commitment of the Indonesian nation to justice is also expressly stated. It can be said that justice according to the conception of the Indonesian nation is social justice. Aristotle states that a person is said to be unfair when the person takes the larger share. Also, people who ignore the law are unjust people because all things based on the law can be regarded as fair. So, justice is judgment that gives to someone what is his right, that is, by acting proportionally and not violating the law.

From all these views, it is very clear that in the principle of equality of rights and justice contained in the Press Law has not been seen in law enforcement. Regarding various cases about the press, there are differences in opinions among judges themselves, to the extent of legal uncertainty. This can be seen in the case between Time Magazine and Suharto and other similar cases. The Supreme Court Justice, in a review judgment filed by Time magazine, overturned the verdict of the Supreme Court judge that earlier favoured Suharto. The reason for this is simply because before the civil suit, Suharto did not file for the right of reply as stipulated in Law No. 40 of 1999 on the Press. In fact, Suharto only asked for justice in civil terms which is his right.

Justice is so closely related to rights. However, in the conception of justice in the Indonesian nation, rights cannot be separated from its antinomy partner, namely obligation. Precepts of a just and civilized humanity, for example, firmly mandate harmony between rights and duties as human beings who live in the society. Justice

can only be upheld in a civilized society, and, likewise, only civilized society can appreciate justice.

Conclusion

The Indonesian Press Law to this day has no regulatory framework, so there are still many questions about the right of reply. The Press Council specified in the law was not granted the right to implement its rules. The Press Law only gives the press the obligation to serve the right of reply without explaining who has the right to determine whether it has been served or not. Presently, the Press Council is the institution that checks whether the right of the aggrieved party has been implemented or not. The Press Law should outline the process of compensation, whether through civil action or not, because it still leaves room for different interpretations. Is the Press Council entitled to decide something within the scope of civil matters, since in the Press Law there is the issue of fine to a press company that did not comply with the right of reply? Is the Press Council entitled to punish with fines? Other questions are as follows: Can the Press Council exercise coercion to implement a criminal verdict? Or should it be returned to criminal procedure and/or civil procedure law? Nothing in the Press Law provides legal guidance.

Another question is this: Is there a different impact between violation of the right of reply as an ethical violation and violation of the right of reply as a violation of law? In this case, there is no indication whatsoever in the Press Law regarding the conception of what is used by law. There are many unanswered issues in this press law. This law should be revised or amended for the realisation of a sense of fairness, justice and legal certainty for communities that have been negatively affected by press coverage.

Internally, complaints to the Press Council for violations of the Journalistic Code of Ethics within the media should be quickly addressed. Externally, if there is evidence of unlawful misconduct, the Press Council should support the prosecution of the press company in court because the Press Law is not yet complete. This will serve as a deterrent to the press not to repeat or violate the applicable legal provisions, since they will be held accountable for all their actions by law. It also provides justice and protection of one's civil rights.***

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