

## Defamation Law in Indonesia

### Overview

There is little doubt that the defamation law in every legal system gives rise to serious concerns among the masses, particularly with claims that it threatens the civil and political rights of all citizens. In Indonesia, these concerns are no different from anywhere else; defamation appears to impact negatively on many of the freedoms that Indonesians hold dear, like the freedom of speech and the freedom of expression.

It may be true that no freedom is absolute in that it does not allow one to impinge on the rights and freedoms enjoyed by other citizens. Nevertheless, it is unlikely that the law was constructed in such a manner as to stifle or censor any constructive criticism or opinion of events that engulf people's lives.

The recent case of a mother who was so dissatisfied with the services she receive from her local Indonesian hospital that she felt compelled to tell her story to her friends through email. This email then found its way onto a mailing list, and it was at this point in time that the hospital to which the email referred discovered that the quality of their patient services were being publicly debated in cyber space. The hospital, needless to say, reacted to the email and commenced defamation proceedings against the author of the email.

It must be noted that Indonesia has a long and trackable history with the issue of defamation. This history shows a primary defamation law that has remained intact for some 60 years and is a remnant of Dutch colonial power. The issue is perhaps not whether there should be a defamation law, but rather whether the offence should be characterized as both criminal and civil rather than just a civil breach of the law.

One of the major criticisms relating to why the Indonesian defamation law has remained essentially unchanged is that the current construction of the laws and regulations are a good means for stifling and censoring debate and criticism of the government and businesses affiliated with the

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government or doing the governments bidding. However, the most recent cases relate to a provision, specifically Article 27, of a much newer law, the Law on Information and Electronic Transactions (Law No. 11 of 2008).

This is noteworthy because the law was enacted by a parliament that has been elected by the people and to all intents and purposes Indonesia is a democracy. It is also noteworthy because Article 27 has survived a Constitutional Court challenge. The Court deciding that the Article and the

provisions it contains do not breach any guaranteed rights enjoyed by Indonesian citizens. Therefore, it is reasonable to assume that both the parliament and judiciary are content that the law reflects the best interests of the citizens in protecting their rights and delineating their freedoms.

The foundation of the defamation law in Indonesia can be found in, among other legislation, the Indonesian Criminal Code (*Kitab Undang-Undang Hukum Pidana / KUHP*), Law No. 14 of 2008 on Public Information, and the new (and some might say-) controversial, Law No. 11 of 2008 on Information and Electronic Transactions (ITE Law). Once again, it is worth noting that these are the basic provisions that have been subject to intense debate in Indonesia over a considerable period of time, and who many consider to be nothing more than a mocking of Indonesian democracy.

What the critics fail to acknowledge in many cases is that most countries have defamation laws and place restrictions on rights such as the freedom of expression and speech. Simply, there are good reasons to protect the reputations and names of individuals, organizations, or institutions from unfounded and unwarranted character attacks or assassination. Generally, in most countries defamation is pursued as a civil action and not a criminal one. Nevertheless, not all democracies have completely done away with criminal defamation. For example, Australia still has criminal defamation on its statute books and recent prosecutions for criminal defamation.

Therefore, perhaps the question is one of, "should Indonesia maintain laws and regulations that allow for criminal prosecution for defamation or should the law be amended so that defamation is dealt with exclusively as a civil action?"

Data from an international free expression advocacy group who call themselves, Article 19, shows that States such as Argentina, Sri Lanka, and Ghana have recently taken formal steps to abolish criminal defamation laws from their respective legal systems. The group also reported that there are many countries, the UK among others, which regard the defamation law as obsolete for not being in line with the democratic ways (*Briefing Note on International and Comparative Defamation Standards*, 2004).

## The Criminalization of Defamation

The attempts to remove criminal defamation provisions or amend the relevant laws in order to restrict defamation proceedings to civil actions only have failed, and have failed on more than one occasion. This suggests that generally the courts are satisfied that the legislature has not erred in the manner in which it has drafted the "debated" or "contested" provisions.

The activists that have dedicated themselves to the cause or seeing the criminal defamation provisions of Indonesian law amended include journalists, writers, advocacy groups, non-government organizations (NGOs), lawyers, and even select individuals have sort judicial review of the provisions.

Basically, the argument is that the nature of criminal defamation provisions are a clear breach of the rights of citizens to freedom of speech and expression as guaranteed under the Constitution. These arguments have become much more focused in the period after 1998 where the 1945 Constitution of the Republic of Indonesia was amended and a whole new chapter, Chapter X, was inserted. This chapter is in essence a "Bill of Rights" and sets out each and every right enjoyed by citizens.

However, these constitutional challenges have failed to convince the Court that there have been breaches. In spite of the rights laid out in Chapter X, it is also clear that the Constitution also states that these rights are to be regulated in law. Currently, the opinion of the Court seems to be that there has not been a breach as the laws enacted fall within the discretion that the Constitution envisages.

The decisions of the courts, and in particular the Constitutional Court, have seemingly not resolved the issue in the minds of many. On 15 October and 6 November 2008, a public examination was initiated by the Legal Aid Foundation for the Press (*Lembaga Bantuan Hukum Pers / LBH Pers*), NGOs, and academics to assess one of the Constitutional Court decisions on defamation law. This is a clear indication that Indonesians are refusing to sit idly by when they feel that their rights have been breached.

## Judicial Review on Defamation

There are three cases relating to defamation law that have been argued before the Constitutional Court. The relevance of noting the cases is solely to highlight what the issues are and how they have been resolved. In this sense, they are valuable in the process of scrutinizing the 'problem' of defamation law in Indonesia.

The first case was submitted on 7 May 2008 by LBH Pers on behalf of Risang Bima Wijaya and Bersihar Lubis, two journalists who were imprisoned for committing a libelous act. The application sort to review the validity of four specific articles on defamation in the KUHP, namely: Articles 310(1) and (2), 311(1), 316, and 207, with the view that the articles were unconstitutional. While the second and third applications, lodged on 25 November 2008 and 5 January 2009, were both lodged in relation to Article 27(3) of the ITE Law. This article was also alleged to breach the constitutionally guaranteed rights of the applicants.

## What is Defamation?

Bryan A. Gardner in his *Black's Law Dictionary* defines defamation as "the act of harming the reputation of another by making a statement to a third person" or "a written or oral statement that damages another's reputation."

To date, at least in the Indonesian context, it has been argued that a precise legal definition of defamation does not yet exist. However, the applicants in the 5 January 2009 judicial review of Article 27(3) argued that despite the fact that there is no clear definition to be found in the Indonesian legal system, it may, nevertheless, be systematically drawn from the existing regulations. To this end, the applicants were arguing that defamation is to be interpreted as an "act that attacks one's honor or good reputation."

## Exception

It was noted earlier the provisions relating to freedom of expression and speech are not absolute. It also must be noted that the provisions pertaining to defamation are also not absolute. There are exceptions that to all intents and purposes allow for defamation to occur. The KUHP provides that if the defamation was done in the public interest then it is legitimate. The defamation occurred in the conduct of self-defense. And, the defamation is in fact not defamation but the truth.

## Alleging Defamation

The KUHP clearly states that the entity that is defamed has the sole right to bring a defamation case. Therefore, defamation is an offence that requires a complaint from the victim, who alleges that they have been defamed in breach of the provisions of the KUHP. This is known in Indonesia as a complaint offence or *delik aduan*.

Article 27(3) of ITE Law is silent with respect to the question of "Who is eligible to bring a case of defamation?" The article merely prohibits:

*Anyone who intentionally and / or has no rights to distribute and / or to transmit and / or to make accessible an electronic information and / or electronic document which contain defamation and libel contents.*

Nevertheless, it has become increasingly clear that a law cannot be read without reference being made to similar provisions in other laws on the same subject matter. The Constitutional Court in its judicial review decision of 5 January 2009 explicitly notes that Article 27(3) of the ITE Law must be read in conjunction with the provisions and articles on the same substantive subject matter contained in the KUHP.

Therefore, in answering the earlier question on "who can allege defamation" under the ITE Law, it is reasonable to now state that this must be the person or entity defamed.

The major criticism of this position is that the prevailing laws and regulations do not restrict who may claim defamation beyond someone feeling aggrieved at the statements of another. In essence, anyone at anytime can claim or allege to have been defamed. Simply, without a more restrictive definition of defamation the number of frivolous and vexatious litigants exploiting the lack of a defamation definition to stifle and censor critical comment on and of them or their organizations or institutions.

For example, the Office of the Attorney General (AGO) may find the ongoing criticisms of, say, the Indonesian Corruption Watch (ICW) are defamatory. The AGO may then initiate defamation action against the ICW. However, ultimately the legal arguments would be tested in a court of law and a decision reached on this matter. The ICW plays a critical role in ensuring accountability and would almost certainly claim that its publications and comments are protected by the release of such information in the public interest. They ICW might also argue that there is truth to the

statements and therefore the statements cannot defame the AGO (plaintiff).

To this end, Toby Mendel, the Law Program Director of Article 19 argues that Indonesia must introduce legislation that amends current defamation laws to restrict who may bring a claim or allegation of defamation.

### The Constitutional Court's Position

The Constitutional Court's rationale for maintain criminal defamation and the provisions as they now stand, is that the applicants to-date have not submitted convincing arguments that the provisions breach any constitutionally guaranteed right. In Case No. 14/PUU-VI/2008 the Court reasoned that the protection of one's good reputation and honor is also protected by the Constitution.

Therefore, there is a balancing act between protecting the constitutionally guaranteed rights of two distinct and opposed groups; those that have a constitutionally guaranteed right to the protection of their honor and reputation and those who have constitutionally guaranteed rights to the freedom of speech and expression. At the present time the Court is clearly of the view that the current construction of the relevant defamation provisions are not in breach of the constitutional rights of the latter.

The rationale noted above is legally justifiable. However, the Court then goes on to hold that it must also be noted that Indonesia is a sovereign state with its own cultural norms and values, and therefore cannot be held to the standards of other countries. Rather Indonesia has a sovereign right to determine its laws and regulations in a manner that best supports those norms and values. Simply, the current construction of the defamation provisions reflects this unique Indonesian way.

The Court also followed similar arguments in the other two cases submitted for judicial review, namely: Case No. 517.50/MK/XII/2008 and Case No. 2/PUU-VII/2009.

### Conclusion

The simple conclusion to be drawn from the ongoing debate is that the defamation provisions as they currently stand are here to stay. The Constitutional Court, which is the court to test the constitutional validity of legislation, has consistently rejected applications seeking to repeal defamation provisions in the existing laws.

The fact that defamation remains a part of the Indonesian legal and regulatory framework is not the issue. The issue is, should defamation continue to be criminalized? The answer to this question is, obviously yes, at least in the eyes of the Constitutional Court.

The simple reality for anyone finding themselves subject to a claim or allegation of defamation is that they must be able to prove one of the three exceptions; public interest, self-defense, or truth.

However, it also is abundantly clear that Indonesians are going to continue to lobby and act in pursuit of the amendment of the current defamation regulatory framework to ensure that criminal defamation is a thing of the past, consigned to history.

The journey to a defamation law that is exclusively a civil action remains a long and tortuous one. 