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Contemporary Issues
In South-East Asia Countries



PREFACE

Over the last few years, Law Faculty of Brawijaya University has been actively engaged with several foreign universities all over the world for mutual academic collaboration. One of the active collaboration is with University of Wollongong, especially with Law School. Various seminars as well as forum group discussions and student and lectures exchange have been established between Brawijaya University and University of Wollongong. The latest academic collaboration was a short course held in June 2014 was aimed to produce a joint academic publication.

This special issue of Brawijaya Law Journal (BLJ) addresses contemporary issues in South-East Asia Countries. It comprises of 5 selected papers originally presented at short course programme jointly organised by Brawijaya University and the University of Wollongong on 2-14 June 2014 in Wollongong. However, 1 other paper included within this issue was selected on the regular basis with the same issue. The papers presented in this special issue of BLJ underwent strict editorial process as expected from its status as international legal journal. In this special issue, two academics from both universities worked together as guest editors: Associate Professor Nadirsyah Hosen of Law School Wollongong University and Dr. Dhiana Puspitawati of Law Faculty Brawijaya University. This special issue demonstrates a strong and solid collaboration between two universities.

We are outmost grateful to the Faculty of Law, Brawijaya University, and especially to our newly appointed Dean Dr. Rachmad Safa'at, SH, M.Si for his support in funding the printing cost of the special issue. Our special gratitude is also to the Dean of Law School Wollongong University, Professor Warwick Gullett for his support in establishing academic short course back in June 2014. The timely publication of this special issue would not be possible without the full commitment of Brawijaya Law Journal Division's editors and staff, Ms. Nanda Saraswati, Ms Hikmatul Ula and Ms. Angela Ade.

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ALIGNMENT OF MALAYSIA AND ASEAN AGREEMENTS ON ICT LAWS: A REVIEW

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ABSTRACT

The mega Multimedia Super Corridor (MSC) project launched in 1996 is a strong endorsement of the Malaysian government's commitment toward developing ICT industry in Malaysia. To attract world-class technology companies and prepare the local ICT industry, the government has offered MSC Malaysia status to companies developing or using multimedia technologies in producing and enhancing their products and services and locating in any of the 26 cyber-cities and cyber-centres in Malaysia. MSC status confers incentives, rights, and privileges under the MSC Malaysia Bill of Guarantees. This ICT initiative also underlies Malaysia's commitment to lead the region in protecting intellectual property and adherence to cyber laws. As a member of e-ASEAN, this assurance aligns with the e-ASEAN initiative: '... to adopt electronic commerce regulatory and legislative frameworks that create trust and confidence for consumers and facilitate the transformation of businesses towards the development of e-ASEAN'. This paper identifies and analyses the extent of the Malaysian government's compliance with e-ASEAN principles particularly in the legal and regulatory aspects.

Keywords: electronic commerce, ASEAN.

I. INTRODUCTION

The information communication revolution has had a significant impact on the world today. Computers and the Internet have become powerful tools permeating almost every area of modern living including making decisions on our behalf. The tremendous spread of these facilities has influenced not only social well-being but also has major ramifications on the overall development of nations. As in other countries, the use of ICT in Malaysia has contributed much to its development. However, similar to any other technology, the many positive aspects of ICT

also have their attendant downside risks. While acknowledging the strategic importance of ICT as a driver to support and contribute directly to the growth of Malaysian economy, the government is aware that appropriate legal mechanisms are needed to monitor and manage this technology. Thus, the Malaysian Multimedia Super Corridor project not only provides incentives for ICT development but also includes in its framework the necessary legislative and enforcement provisions.

II. DEVELOPMENT OF ICT IN MALAYSIA

Background

In the early years following the independence in 1957, Malaysia focused its efforts on strengthening the agriculture-based economy through the development of its basic infrastructure particularly in rural areas. After the riots of 1969, the New Economy Policy was formulated with its twin-pronged objective of eradicating poverty and restructuring Malaysia society to eliminate the identification of race with economic functions¹. During the 1980s, basic ICT infrastructure was developed in the form of basic telephony services to rural and urban area with the aim of increasing access to mobile and fixed-line services². Next, in 1991, Vision 2020 was formulated aimed at bringing Malaysia at par with developed countries by the year of 2020. This vision was a turning point to transform Malaysia into a knowledge driven society in which ICT plays a major role.

Subsequently, the 8th Malaysia Plan (2001-2005) included the introduction of a K-Economy and the potential growth of digital infrastructure. The succeeding 9th Malaysia Plan

¹ Mudiarsan Kuppusamy and Bala Shanmugam, (2007) 'Information Communication Technology and Economic Growth in Malaysia' 11(2) *Review of Islamic Economics* 89-90.

² Mudiarsan Kuppusamy, Murali Raman, Geoffrey Lee, (2009) 'Whose ICT Investment Matters to Economic Growth: Private or Public? The Malaysian Perspective' 37(7) *EJISDC* 1-19, 5.

(2006-2010) incorporated the enhancement of ICT as one of its agenda involving the building of vital ICT infrastructures in the public and private domains. The increased use of ICT infrastructure led to the need for national information security initiatives as reflected in the establishment of an emergency response centre to oversee the regulatory, technical, and security aspects of the internet³. With this framework in place, Malaysia is well-prepared to introduce ICT into its everyday life through initiatives such as *e-commerce*, *e-education*, and *e-health* or *telemedicine*.

These strategic plans have produced increasing accessibility to the internet and its related services including wired and wireless technologies for enhancing broadband services throughout the country. Competition in the telecommunication services is encouraged by allowing the entry of new players resulting in the proliferation of various products and services in the market and in more affordable internet services. ICT connectivity was enhanced in 2000 when 33 pilot community-based Internet Centres were established nationwide of which 12 of them were in rural areas. This was followed by additional thirty one Internet/ Information Centres developed throughout the country between 2001 until 2003 and 13 national pilot projects of the NITC Strategic Task Force conducted through a Public-Private Partnership model. ICT development in the country was boosted with the implementation of the US\$20 billion mega Multimedia Super Corridor project in Malaysia.

Multimedia Super Corridor Malaysia

On 12 February 1996, the Multimedia Super Corridor was launched with the aim of accelerating the objectives of Vision 2020. This MSC Malaysia project is an important program aimed at achieving the creation of knowledge based society. Amongst the initiatives of this

³ Muhammad Jehangir, P.D.D Dominic, Naseebullah, Alamgir Khan, (2011) 'Towards Digital Economy: The Development of ICT and e-Commerce in Malaysia' 5(2) *Modern Applied Science* 171 <www.ccsenet.org/mas>.

program is the formation of the MSC flagship which serves as a hub for players and users in the multimedia industry.

This mega project is fully supported by the Malaysian government and is a gateway to the ICT industry in Malaysia with the objective of attracting world class technology companies while preparing the local industry for the ICT age. The companies that develop or use multimedia technologies to produce and enhance their products and services may be granted MSC Malaysia status and be located in any of the 26 *cyber-cities* and *cyber-centres* in Malaysia. MSC status comes with some incentives, rights, and privileges accorded under the MSC Malaysia Bill of Guarantees. It also underscores the assurance by Malaysia to be a regional leader in promoting intellectual property protection and adherence to cyber laws.

MSC Malaysia operates within an area of approximately 15 km (9.3 mi) by 50 km (31 mi) or about 750 km² (290 sq mi) starts from the *Petronas* Twin Towers in the city of Kuala Lumpur to the Kuala Lumpur International Airport in Sepang including the towns of Putrajaya and Cyberjaya. The town of Port Klang was added to MSC Malaysia on 7 December 2006. To oversee the coordinated and managed development of MSC Malaysia, the Multimedia Development Corporation (*MDeC*, formerly *MDC*) was established.

III. ASEAN ICT INITIATIVE: e-ASEAN

ASEAN was created in 1967 to promote regional cooperation among its member countries with the objective of (a) accelerating economic growth, social progress and cultural development and (b) promoting regional peace and stability in the region. It currently has ten member countries, namely Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam.

Recognizing the potentials of ICT, ASEAN member countries endorsed the e-ASEAN initiative in 1999 based on the ASEAN Vision 2020 defined two years earlier. Amongst others the vision seeks to create a stable, prosperous, and highly competitive ASEAN economic region that facilitates the free flow of goods, services, investments, and capital, as well as the promotion of equitable economic development and reducing poverty and socioeconomic disparities by the year 2020.

The Elements of e-ASEAN

ASEAN views ICT as one of the economic key factors having a significant impact on enhancing competitiveness in other sectors of industry. Accordingly, e-ASEAN was established in the Annual Summit Meeting of ASEAN leaders in Manila on 28 November 1999 and signed during the ASEAN Informal Summit in Singapore in November 2000⁴.

The primary objective of e-ASEAN is to develop a ‘broad-based and comprehensive action plan including physical, legal, logistical, social, and economic infrastructure needed to promote an “ASEAN *e-space*” as part of an ASEAN positioning and branding strategy’⁵.

e-ASEAN Legal Framework

The ASEAN Information Infrastructure (AII) under the aegis of the e-ASEAN Framework Agreement of November 2000 focuses on the hardware and software systems needed to access, process, and share information, as well as to promote the growth of electronic commerce in the region. Towards this end, ASEAN countries are required to adopt electronic commerce regulatory and legislative frameworks that will promote trust and confidence for technology users. Under the agreement, the member states are required to:

⁴ Samtani Anil, (2001) ‘Electronic Commerce in Asia: The Legal, Regulatory and Policy Issues’ 9(2) *Int. J Law Info Tech* 93

⁵ Rodolfo Noel S. Quimbo, (2012) ‘The e-ASEAN Legal Framework and Its Challenges’ *Harmonized development of legal and regulatory systems for e-commerce in Asia and the Pacific: Current challenges and capacity-building needs*, 81-83.

- a. Expeditiously put in place national laws and policies relating to electronic commerce transactions based on international norms;
- b. Facilitate the establishment of mutual recognition of digital signature frameworks;
- c. Facilitate secure regional electronic transactions, payments and settlements, through mechanisms such as electronic payment gateways;
- d. Adopt measures to protect intellectual property rights arising from *e-commerce*. Member states should consider adoption of the World Intellectual Property Organization (WIPO) treaties, namely: ‘WIPO Copyright Treaty 1996’ and ‘WIPO Performances and Phonograms Treaty 1996’;
- e. Take measures to promote personal data protection and consumer privacy; and
- f. Encourage the use of alternative dispute resolution (ADR) mechanisms for online transactions.

The implementation of the e-ASEAN Framework Agreement is to be achieved via a series of measures outlined in the *Roadmap for Integration of the e-ASEAN Sector* (the e-ASEAN Roadmap). The two key targets in the roadmap are:

- a. Measure 78: Enact domestic legislation to provide legal recognition of electronic transactions (i.e., cyber laws) based on common reference frameworks.
- b. Review of *e-commerce* legislation harmonization in ASEAN resulting in 8 out of 10 countries having *e-commerce* legislation by the end of the project in 2009.

However, at the end of the project, Cambodia and the Lao People’s Democratic Republic had still not passed electronic transaction legislation.

IV. THE MALAYSIAN PERSPECTIVE

Law and Regulatory Framework

Laws relating to ICT have been in place in Malaysia even prior to the formulation of the e-ASEAN initiative. The launching of MSC Malaysia in 1996 saw the introduction of four cyber laws namely the Computer Crime Act 1997, the Digital Signature Act 1997, the Telemedicine Act 1997, and the Copyright Act 1987 (Amendment Act in 1997).

The purpose of these Acts is to foster the development of ICT systems and to address issues of threats and abuses arising from their employment. ICT related laws were strengthened by the inclusion of four other legislations namely the Communication and Multimedia Act 1998, the Electronic Commerce Act 2006, the Electronic Government Activities Act 2007, and the recent Personal Data Protection Act 2010.

Along with specific legislation for ICT-related issues, existing laws can also be used to provide that the matters involved fall within the legal elements provided in the traditional statutes. For example the application of the Computer Crimes Act 1997 and the Electronic Commerce Act 2006 are supported by the respective parent Penal Code and the Contract Act 1950.

Conformity of e-ASEAN Obligation by Malaysian Legal Framework: An Analysis

The rapid developments in ICT have posed huge challenges to legislators in instituting effective legal mechanisms aimed at protecting users of the technology; despite that the Malaysian government has been proactive in ensuring that necessary legislations are in place for that purpose. It can be said that with its wide range of cyber laws, Malaysia as a member state of ASEAN and in particular a signatory of e-ASEAN, has fulfilled the obligations required under the e-ASEAN Framework Agreement.

ICT opens up new and sophisticated opportunities for criminal acts and the potential to commit conventional crimes in non-traditional ways, cyber-crime being the foremost and most obvious among them. The enactment of the CCA 1997 is seen as a means to combat such cyber-crimes; where any unauthorised access/ modification to any programme or data in a computer is deemed an offence subject to penalties.

The anonymity provided by cyber space makes it necessary for additional and more robust security protections to be put in place. In line with this, the Digital Signature Act 1997 was enacted to provide the security and confidence that would encourage the public to perform electronic transactions domestically and internationally. Under the Act, the digital signature provides a verification system to authenticate the identity of the author and verify the transmitted message.

Being one of the seven flagships in the MSC Malaysia, telemedicine or tele-health activities require attention to ensure proper protection. For this purpose, the Telemedicine Act 1997 was enacted to provide the regulatory framework governing the practice of telemedicine and to recognise the use of multimedia in the medical field.

The digital element of ICT allows easy unauthorised copying and pasting primarily on the internet. The Copyright Act 1987 was amended in 1996 and 1997 to address this issue by extending copyright protection to internet transactions. The amendments took into account the developments in information technology particularly those related to copyrights covered by the World Intellectual Property Ownership (WIPO) Copyright Treaty 1996. The scope of copyright protection has been broadened to include the provision of exclusive rights of control to authors. New copyright infringements and offences have been identified and regulated under this Act⁶.

⁶ Nazura Abdul Manap et al, (2013), 'The Influence Of e-Asean In The Development Of ICT Law In Malaysia' 8(5) *Internal Journal of Soft Computing* 377-380.

The convergence of the three major technologies of telecommunications, broadcasting, and information resulted in the enactment of the Communication and Multimedia Act 1998. This Act covers communications over the electronic media and does not affect the application of existing laws on national security, illegal content, defamation, and copyright. It regulates various activities covering network facilities and service providers, application service providers, and content application services providers. This Act empowers the minister to grant licenses for particular types of activities deemed fit and the flexibility to address the changing requirements as the industry evolves.

The easy access to the internet services in Malaysia has encouraged the extensive use of *e-commerce* transactions by both large companies and small scale enterprises. Legal disputes arising out of such contractual transactions may be handled through the Electronic Commerce Act 2006 for resolution. This Act provides legal recognition of electronic messages in commercial transactions, the use of the electronic messages to fulfil legal requirements and to facilitate commercial transactions through the use of electronic means, and other related matters.

Electronic communication within the public sector as well as between the government and citizens requires a comprehensive legal framework to ensure efficient and secure electronic government services. For this purpose, the Electronic Government Activities Act (EGAA) 2007 which came into effect on 1 January 2008 can be applied to agencies handling electronic dealings. It does not grant any additional legal rights or change any substantive laws.

The above account demonstrates that Malaysia has met the provisions agreed upon in the e-ASEAN Agreement. However, such legislation, no matter how comprehensive, requires appropriate and serious commitment in their implementation especially with regard to enforcement.

V. PROTECTING ELECTRONIC COMMERCE ACTIVITIES IN MALAYSIA

Based on the combination of the Electronic Commerce Act 2006 and the Electronic Government Activities Act 2007, Malaysia has introduced a raft of comprehensive *e-commerce* laws. With the enactment of the Personal Data Protection Act in 2010, Malaysia also became the first ASEAN member country to pass privacy legislation. In addition, the government believes that updating of some provisions of its *e-commerce* legislation may be necessary owing to the constantly evolving technological changes and the emergence of social networking and mobile applications. Malaysia had a very high number of mobile subscriptions at 127 per 100 inhabitants in 2011 and is also equipped with a moderate level of fixed broadband connectivity. Overall Internet use in Malaysia stood at 61 per cent of the population in 2011, one of the highest in the region.

Electronic Transactions Laws

The Electronic Commerce Act 2006 and the Electronic Government Activities Act 2007 are the key regulations governing *e-commerce* in the private and public sectors respectively. The former closely mirrors the precepts of the United Nations Electronic Communications Convention.

Malaysia also has the Digital Signature Act 1997 specifically enacted for legislation for that purpose. Its legal framework was subsequently strengthened to encourage future use via amendments in 2001. In addition, the Electronic Commerce Act 2006 contains broad technology-neutral provisions on electronic signatures.

Consumer Protection

The Consumer Protection Act 1999 is a general piece of consumer legislation in Malaysia that protects consumers against a range of unfair practices and enforces minimum product

standards. The amendments were introduced in 2007 and 2010 to widen its scope to cover electronic commerce transactions, and to introduce, among others, a new provision on general safety requirement for services. The amendments also provide protection to consumers from unfair terms in a standard form contract respectively.

Malaysia also introduced the Consumer Protection (Electronic Trade Transactions) Regulations 2012, enforced in 2013. These regulations impose certain obligations on online traders and online marketplace operators. It seeks to promote consumer confidence in shopping and trading as a means to further spur the growth of *e-commerce* in the country.

There are also some limited consumer provisions incorporated in part 8 of the Communications and Multimedia Act 1998 which deal with the relationship between consumers and licensees and applies regardless of whether the transaction is electronic or not. Subsection 188(1) requires all licensed service providers to deal reasonably with consumers and adequately address consumer complaints. Part 8 of the Act also includes a voluntary consumer protection code covering the provision of information to consumers and the handling of personal information and complaints.

Privacy and Data Protection

The Personal Data Protection Act 2010 governs the private sector and does not include government agencies. It closely mirrors the principles in the European Union directive although some variations appear to adopt parts of the APEC Privacy Framework. However, the Act does not contain any European Union style registration requirements. To facilitate the implementation of Malaysia's Personal Data Protection Act which came into force on 1 January 2013, the Personal Data Protection Department was established.

Online Content Regulation

The Communications and Multimedia Act 1998 established the Malaysian Communications and Multimedia Commission (MCMC) which is empowered to regulate ICT industries. Broad authority has been provided by the Act to the commission to regulate online speech in which “no content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten, or harass any person”. Thus, publishers of media content who violate this provision are subject to criminal penalties.

The Act also included the establishment of the Communications and Multimedia Content Forum of Malaysia which formulates and implements the *Content Code*—a set of voluntary guidelines for content providers on the handling of content considered offensive or indecent.

In general, the Malaysian government has pledged not to censor the Internet and there are no indications of technological filtering of the medium in the country. However, existing government controls over the traditional media sometimes extend into the Internet resulting in self-censorship and the occasional investigation of bloggers and online commentators.

Cybercrime and Cyber Security

Various sections of the Computer Crimes Act 1997 prohibit the following categories of activities related to unauthorized entry into computer systems:

- a. Section 3: acts committed with intent to secure unauthorized access to programs or data stored in any computer;
- b. Section 4: acts committed with intent to secure unauthorized access to programs or data stored in any computer to commit an offence involving fraud or dishonesty;

- c. Section 5: acts committed with the knowledge that they will cause unauthorized modification of the contents of any computer;
- d. Section 6: wrongful communication of any password, code, or means of access to a computer to any person not authorized to receive the same.

These provisions are more related to computer crimes than cybercrimes. However, the provisions as found in *e-commerce* laws and copyright laws are updated and amended in 2012. It complements Malaysia's cybercrime legislation and makes them more aligned with international standards.

Online Dispute Resolution and Domain-Name Regulation

Three sections have been incorporated into Malaysia's Communication and Multimedia Act 1998 to address issues related the regulation of domain names. Section 179 specifies that the MCMC is responsible for the planning, control, and administration of electronic addresses or domain names. Section 180 empowers the MCMC with developing a numbering and electronic addressing plan that includes the formulation of rules for assigning and transferring such addresses. Furthermore, the functions contained in sections 179–181 appear to be delegated to MYNIC—the registrar of Malaysia's country code top-level domain (*ccTLD*). In addition to being the registrar, MYNIC is the registry and administrator of the *.my domain*.

VI. CONCLUSION

The ASEAN initiative to apply uniform standards for ICT implementation throughout the ASEAN region is a useful idea as it will provide member countries the opportunity to benefit from the current ICT regime without neglecting the need to regulate the use of technologies. Although some countries such as Malaysia have adopted relevant laws to ensure the secure and

effective use of ICT, the effectiveness of enforcement will remain an issue to be overcome with no or limited cooperation from the member countries. In a borderless electronic world, ASEAN member countries cannot confine themselves within the region. Thus, it is important to seek outside assistance and learn lessons from both within and outside the region.

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PRESS FREEDOM IN SINGAPORE AND MALAYSIA: DEFAMATION AND OTHER CONSTRAINTS

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ABSTRACT

This paper focuses on the arguments around restriction on freedom of the press in the Strong States of Singapore and Malaysia. It assesses the presence of constraints on press freedoms in democratic western countries imposed by corporation rather than the nations and the similar effects that these constraints may have on the bias present in publicly accessible news reporting. It argues that independence of the press does not only require protection from legal and executive regulation, but also protection from large media corporations and their political alignments. This report will assess the bias of reporting and news media publication that exists in Malaysia and Singapore due to legislative and regulatory constraints as opposed to the bias that exist in the western liberal democratic nations of the United Kingdom (UK) and the United States of America (USA) due to Media Organisation control.

Key words: freedom of press, publication control, media and politics.

I. INTRODUCTION

Civil defamation law limits the capacity of media outlets to report the news freely. There are ever present constraints to media from both corporate and political influences⁷. These create an interesting priority list; a hierarchy that does not put the interests of the individual and their access to accurate information first, or second.

Global media groups are the key social actors playing a large part in media accessibility; shaping the social world by exerting control over issue-framing and information gate keeping. One of the largest media organisations in the world, NewsCorp (top 5) is an example that will be used in this paper to outline influences on public's access to media in the liberal democracies of

⁷ Whiting and Majoribanks, (2013) 'Media Professionals' Perceptions of Defamation and Other Constraints upon News Reporting in Malaysia and Singapore' *Democracy, Media and Law in Malaysia and Singapore* 129.

the UK and the USA. The separation of corporation and State from power is difficult and it is even harder to determine whether it is to be the direct dominator of the other⁸. This will assist in supporting the view that the power which large media organisations possess can have large influences over both politics and legislation; moreover, their use of this power in changing access to the media and journalist ability to freely express opinions⁹.

Defamation legislation and the application of this legislation and regulation in Malaysia, Singapore—as opposed to the UK and the USA—will support the argument that restrictive regulation creates political and corporate alignments over press freedom and public access to information. Freedom of expression and speech is topical around the world. Article 19 is an example of this international focus¹⁰.

II. DEFAMATION LEGISLATION AND REGULATION

The United Kingdom (UK) and The United States of America (USA)

In the UK, civil actions around defamation for damages may be made brought to the High Court if the statement is defamatory, identifies or refers to the claimant, and were published¹¹. This is covered by the Defamation Act 2013¹². The defamation against media generally deals with libel—the publication of a statement in permanent form, generally;

- a. print,
- b. broadcast on TV or radio,
- c. film, and

⁸ Arsenault and Castells, (2008) ‘Switching Power: Rupert Murdoch and the Global Business of Media Politics: A Sociological Analysis’ 23(488) *International Sociology* 489.

⁹ Ibid.

¹⁰ Article 19 and Suaram, (2005) *Freedom of Expression and the Media in Malaysia* www.article19.org/data/files/pdfs/publications/malaysia-baseline-study.pdf.

¹¹ Defamation Laws in UK, 25/5/14, *Kelly/Warner: International Defamation Law Legal Database*, <<http://kellywarnerlaw.com/uk-defamation-laws/>>.

¹² *Defamation Act 2013* (UK).

d. Internet.

The rule in *Reynolds*¹³(UK) outlines recognition of ‘responsible journalism’, via a ten point test determining how information was collected and verified, and how consultative steps had been taken prior to publication¹⁴. It also addresses the urgency to publish. Thus, it is a public interest test rather than a political or economic test which allows individuals to represent themselves better or to publish media without any fear of litigation. This test ensures whether the information published is appropriately sought and presented.

In the USA, defamation legislation is dealt with by each individual state. It is also referred to as slander. Here, defamation is directly related to the First Amendment¹⁵; making a case in defamation much more difficult for a plaintiff to bring about; as opinion cannot be considered as defamation in the USA. Moreover, in this nation, service providers on the internet are not held to be accountable for defamatory statements made by visitors to their sites.

Large portions of the media outlets in both nations are owned by NewsCorp¹⁶. The influence of NewsCorp and the large political authorities within the UK and the USA will be investigated further in this article. In both of these democratic nations, defamation legislation is used predominantly by celebrities who feel that their image has been defamed in media.

Malaysia and Singapore

There are high levels of media regulation within both Malaysia and Singapore; both of which are non-liberal Asian democracies. Within non-liberal Asian democracies—sometimes

¹³ *Reynolds v Times Newspapers Ltd* [2001] 2.

¹⁴ Whiting and Majoribanks, (2013) ‘Media Professionals’ Perceptions of Defamation and Other Constraints upon News Reporting in Malaysia and Singapore’ *Democracy, Media and Law in Malaysia and Singapore* 135.

¹⁵ *United States Constitution* amend I.

¹⁶ Arsenault and Castells, ‘Switching Power: Rupert Murdoch and the Global Business of Media Politics: A Sociological Analysis, (2008), 23:488, *International Sociology*, 495.

referred to as semi or pseudo democracies¹⁷—government regulation over access to media and press freedoms is high¹⁸. There is large political pressure on editors of publication, in order to ensure that information provided to the public is not damaging the powerful political parties of these nations.

In Singapore, the Newspaper and Printing Presses Act (NPPA)¹⁹ will not circulate foreign publications if they are seen to be detrimental to the local political regime²⁰. These laws also require the possession of a licence for publishers to be able to release press to the public. The licensing has been—from interviewees—the most onerous element of the press freedom restrictions within Singapore²¹. This regulation is seen to be more restrictive than the defamation legislation itself—Defamation Act (cap. 75). In Singapore, it has been seen that in the court a media defendant has never succeeded against a government plaintiff²². This historical track has led to self-censorship by many journalists, for fear of financial consequences and licensing removals²³. It is interesting to note that the Singaporean judicial system has not come under scrutiny of process. However, it is the restrictive legislation causing the removal of press freedoms and access to media for the public.

The Malaysian legal system has historically imposed temporary bans or content censorships on media that ‘displeased the government²⁴’. Article 10 of the Malaysian Constitution guarantees the right to freedom of expression: ‘every citizen has the right to

¹⁷ Whiting and Majoribanks, (2013) ‘Media Professionals’ Perceptions of Defamation and Other Constraints upon News Reporting in Malaysia and Singapore’ *Democracy, Media and Law in Malaysia and Singapore* 131.

¹⁸ *Ibid*, 132.

¹⁹ *Newspaper and Printing Presses Act* (rev. edn 2002).

²⁰ Whiting and Majoribanks(2013) ‘Media Professionals’ Perceptions of Defamation and Other Constraints upon News Reporting in Malaysia and Singapore’ *Democracy, Media and Law in Malaysia and Singapore*, 132.

²¹ *Ibid*, 142.

²² *Ibid*, 136.

²³ *Ibid*, 132 and 145.

²⁴ *Ibid*, 132.

freedom of speech and expression... All citizens have the right to assemble peaceably and without arms²⁵. This right to freedom of expression has many restrictions placed on it. In reality, it may lead to heavy fines or potentially a prison sentence²⁶. It can be seen that there is also strict legislative control under the Printing Presses and Publications Act (PPPA)²⁷. Due to these restrictions, there is an increasing level of self-censorship by editors and journalists to ensure that they are able to renew their publishing licences. The Royal Commission of Inquiry in 2007, following the ‘Lingham Tape’ matter, led to Malaysians and others being able to open a dialogue around the issues within the Malaysian Courts with regard to defamation cases for media publication.

The court system in Malaysia has come under scrutiny for the efficiency and transparency of its judiciary, following a group of highly contentious defamation cases in the 1990’s where government and business interests were reported by international reporters and journalists. The damages awarded to the plaintiff’s in these cases were exorbitant and received criticisms in an international sphere²⁸. This belief that the courts ‘defer to the State at the expense of the plaintiff’s rights’²⁹, outlines the lack of faith of in those in power.

‘Responsible journalism’—based on *Reynolds*³⁰—has been addressed in both Malaysia and Singapore with different outcomes of importance in each legal system. Malaysian courts

²⁵ *Constitution of Malaysia* 1957, art X.

²⁶ Randhawa et al, (2005) *Freedom of Expression and the Media in Malaysia: Part of A Series of Baseline Studies on Seven South East Asian Countries* 6.

²⁷ *Printing Presses and Publications Act* 1984 (Act 301).

²⁸ Whiting and Majoribanks, (2013) ‘Media Professionals’ Perceptions of Defamation and Other Constraints upon News Reporting in Malaysia and Singapore’ *Democracy, Media and Law in Malaysia and Singapore*, 136.

²⁹ *Ibid*, 136.

³⁰ *Reynolds v Times Newspapers Ltd* [2001] 2.

have accepted the idea of responsible journalism to the extent of critical speech—in principle³¹. Singaporean courts have rejected the rule on all occasions. This rejection of responsible journalism, allowing for appropriate verification, shows that press freedoms do not exist under the legislature or the judiciary in Singapore and are still restrictive in Malaysia³².

These restrictions have led to a ‘chilling’ effect on media, reporting, and journalism in both of the nations, where levels of self-censorship have increased over the last 20 years following exorbitant claims by political and business officials against individual journalists and media outlets. This chilling effect occurs as individuals are deterred from publishing items that they believe could even potentially cause issue for the powerful political parties of the United Malays National Organisation (UMNO) Malaysia and the People’s Action Party (PAP) Singapore³³.

III. POLITICS OVER MEDIA ORGANISATIONS

Malaysia and Singapore

The strength of the PAP in Singapore and the UMNO in Malaysia , along with a concentration of media ownership (aligned with these parties), shows that revenue and business interests fall a close second to the political interests of the affluent politicians in both nations. Although there might be relationships with editors and owners of publishing houses, the political power that the PAP and UMNO have over media organisations damages the credibility of that

³¹ Whiting and Majoribanks, (2013) ‘Media Professionals’ Perceptions of Defamation and Other Constraints upon News Reporting in Malaysia and Singapore’ *Democracy, Media and Law in Malaysia and Singapore*, 135.

³² Whiting and Majoribanks, (2013) ‘Media Professionals’ Perceptions of Defamation and Other Constraints upon News Reporting in Malaysia and Singapore’ *Democracy, Media and Law in Malaysia and Singapore*, 135.

³³ Thio, (2010) ‘Soft Constitutional Law in Non Liberal Asian Constitutional Democracies’, 8(4) *International Journal of Constitutional Law* 766-799.

media by overriding newsworthy items and appropriately balanced coverage³⁴. International press is not owned by the politicians; yet, it is closed monitored by the government through the PPPA and the NPPA.

The alignment of the judiciary, executive, and legislature through the strict controls over publication and access to media has led to a lack of ability for economic prosperity for those companies that do not align themselves with either the PAP or the UMNO. This was apparent when the UMNO aligned *The New Straits Times* supported the government's prosecution of former Deputy Prime Minister (Ibrahim) on sodomy and corruption charges. The *Reformasi* rejected this and subsequently had a massive fall in circulation³⁵. The courts in both Singapore and Malaysia are concerned with the protection of the reputation of government figure, regardless of the effect on news reporting and commentary³⁶.

Media practitioners in Singapore are aware of the threat of defamation cases and aware of what issues constitute sensitive topics and should be avoided—ASEAN, China, race, religion, PAP internal politics, PAP personalities, corruption, and government linked companies³⁷. Media practitioners in both Malaysia and Singapore were aware of defamation law. However, most Singaporeans were not fully aware of their legal rights, nor did they have the resources available to them to successfully defend themselves against powerful political players³⁸.

Malaysians and Singaporeans considered media and publishing as part of a whole institutional context; where freedom of the press is not a right but that publishing falls within a legislation and regulation, and managing these was simply part of the world of reporting and

³⁴ Whiting and Majoribanks, (2013) 'Media Professionals' Perceptions of Defamation and Other Constraints upon News Reporting in Malaysia and Singapore' *Democracy, Media and Law in Malaysia and Singapore*, 135.

³⁵ *Ibid*, 132.

³⁶ *Ibid*, 135.

³⁷ *Ibid*, 142.

³⁸ *Ibid*, 142.

journalism³⁹. The media organisations are aware that there are many restrictions. Thus, draft articles and stories that do not breach these restrictions, the deterrent nature of the legislation, and regulation imposed by Strong hold States being effective in quashing individualism or disagreement. Consequently, companies align themselves with the political parties to ensure that they are successful and remain in circulation.

IV. MEDIA ORGANISATIONS OVER POLITICS

The United Kingdom (UK) and The United States of America (USA)

In evaluating media organisation control in both of the UK and the USA, a focal corporation in place of a Strong hold State should be assessed. NewsCorp (owned by Rupert Murdoch) allows for an effective assessment of the role that media organisations (conglomerates) negotiate political powers and what media is released to the public to benefit their economic goals⁴⁰. NewsCorp media reaches approximately 75% of the world's population over five continents with around \$28 billion in annual revenue.

Their power over press freedoms and access to the media makes them may have no competitor. In 2003, the 175 NewsCorp controlled newspapers supported Murdoch's personal stand for the invasion to Iraq; which was also supported by the Georg W Bush and Tony Blair (USA and UK leaders at the time)⁴¹. Murdoch has used the NewsCorp publications to back those political policies that support the NewsCorp group. The power of NewsCorp and the financial

³⁹ Whiting and Majoribanks, (2013) 'Media Professionals' Perceptions of Defamation and Other Constraints upon News Reporting in Malaysia and Singapore' *Democracy, Media and Law in Malaysia and Singapore*, 135.

⁴⁰ Arsenault and Castells, (2008) 'Switching Power: Rupert Murdoch and the Global Business of Media Politics: A Sociological Analysis, 23(488), *International Sociology*, 489.

⁴¹ *Ibid*, 493.

dealings of the company mean that regulators are sometimes hesitant to enforce laws for fear of ramifications by NewsCorp publications⁴².

The power of NewsCorp throughout the UK, the USA, and Australia has led to a large interference with politics and election cycles. This political leverage leads to the presentation of regulatory favours for NewsCorp entities and subsidiaries assisting with the growth of NewsCorp entities leading to more regulatory freedoms which increase the company and escalate its political influence⁴³. The political alliances made by NewsCorp are fickle. It reflects the business and economic interests of NewsCorp rather than any deep seeded political affiliation; contradictory to the political power and business affiliation in both Singapore and Malaysia⁴⁴.

NewsCorp has historically provided direct financial contributions to politicians and political parties (US\$ 4.7 million between 1998 and 2007)⁴⁵. The media regulatory review generally coincides with the contributions from NewsCorp. As in 2006, NewsCorp provided 10% of campaign contributions to Senator Ted Stevens, during which period Stevens was sponsoring a telecommunications bill that assisted with the NewsCorp business objectives. Similarly, HarperCollins, a NewsCorp owned company has provided book deals to politicians who then supported media regulatory changes⁴⁶.

NewsCorp has also been credited with shifting the outcome of the 1997 British Election of Tony Blair as prime minister—New Labour, when NewsCorp was historically Conservative and in support of Margaret Thatcher. Shortly before the election, all NewsCorp print media outlets endorsed Tony Blair for the Prime Minister role; which he subsequently won. New

⁴² Arsenault and Castells, (2008) ‘Switching Power: Rupert Murdoch and the Global Business of Media Politics: A Sociological Analysis, 23(488), *International Sociology*, 496.

⁴³ *Ibid*, 497.

⁴⁴ *Ibid*, 497

⁴⁵ *Ibid*, 497.

⁴⁶ *Ibid*, 499.

Labour has a favourable position on media regulation in contrast with the more accountable stance of the Conservative party at the time⁴⁷. Increased revenue and market share have led to NewsCorp being able to gain regulatory favours from politicians via financial contributions to their campaigns⁴⁸. This increases the power had by media organisations (conglomerates) over politics, whilst still controlling access to media and press freedoms.

V. CONCLUSION

Press Freedoms

By analysing the presentation of legislation and political power in Malaysia and Singapore contrasted with economic powers in the UK and the USA; it is clear to see that regardless of who hold the power political parties or media organisation there appears to be an intrinsic link between the two. This power and influence has led to restrictions being placed on what journalists and reporters publish and what is accessible by the masses.

Defamation Legislation

Defamation legislation creates chilling effect in Malaysia and Singapore which means that the level of litigation is no longer high as journalists are self-censoring to minimise their risk of personally being taken to court. It is important to note that although defamation legislation is not as restrictive; however, in the UK and the USA it does exist. Wider understanding between general population, report of individual legal rights, and more accessible independent judiciaries allow for the appropriate application of defamation legislation taking into consideration notions of responsible journalism.

⁴⁷ Arsenault and Castells, (2008) 'Switching Power: Rupert Murdoch and the Global Business of Media Politics: A Sociological Analysis, 23(488) *International Sociology*, 500.

⁴⁸ *Ibid*, 507.

It is fair to say that those restrictions and regulations present in Malaysia and Singapore as strong hold states are less plaintiff friendly and more intensive. Nevertheless, it is clear that with the removal of this global media companies and their influences on political parties and policy, it regulates and restricts what is published in the media for access by the public.

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THE FREEDOM OF INFORMATION IN INDONESIA AND AUSTRALIA

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Abstract

Freedom of Information laws promote access to data held by government authorities in the public sector to mainstream society. Such laws have been enacted on a global scale; however, the obedience they have attracted is not consistent amongst each geographical location. Freedom of Information Laws has been enacted in Indonesia. It was a scheme introduced in 2008 which included many different components that were to improve each individual's right to communicate and obtain information for the purpose of developing themselves and their current political and social environment. The adequacy of the Freedom of Information is a questionable notion in the grand scheme of Indonesia's legal environment as its effectiveness and motives are rather questionable. It has been acknowledged that this initiative is still developing on a national scale, which raises the main question, is 6 years long enough for a scheme to still be dubbed as 'developing'? This paper will analyse the advantageous and pitfalls of the legislative instrument ending with a comparative analysis with the current situation that Australia experiences.

Keywords: Freedom of Information, law, Indonesia, Australia

I. Introduction

“Every person has the right to communicate and to obtain information for the purpose of developing themselves and their social environment, and has the right to seek, obtain, possess, store, process and convey information through all available channels”⁴⁹. It is founded within this excerpt of Indonesia's Constitution, inserted as a result of the 2000 Bill of Rights that each citizen is inherently deserving of public information. The insertion of this extract stems from the previous legislative landscape that Indonesia fell victim to, commonly referred to as the ‘New Order’⁵⁰. Within this period Indonesia was under the rule of Suharto, who constructed the

⁴⁹Undang-Undang Dasar Republik Indonesia 1945, UUD '45 (Indonesian Constitution).

⁵⁰Daniel S. Lev, “Judicial Authority and the Struggle for an Indonesian Rechtsstaat” (1978) 13Law & Soc’y Rev. 37; Hans Thoolen, Indonesia and the Rule of Law: Twenty Years of “New Order” Government: A Study (London: F. Pinter, 1987).

government to resemble a highly centralised group within a small political elite⁵¹, a highly corrupt group who did not perceive the ‘rule of law’ to be a notion of any importance. Whilst it appears that the FOI Act⁵² is a remedy to the reformation of the corruption that existed, was this the most effective mechanism the government could enact? Did the implementation of this instrument efficiently alter the clouded boundary that existed when citizens requested information regarding Indonesia’s public bodies?

Within this article I will critically assess the implementation of the *Freedom of Information Act*⁵³ (“FOI”) in Indonesia as well as comparatively analysing the rights afforded to those residing in Australia to determine the effectiveness of the government’s response to the ‘New Era’. I will argue about the whole that whilst the reforms to date are perceived to be somewhat successful, there is a considerable, gaping hole in the legislative landscape that results in the denial of basic rights.

II. LEGAL MATERIALS AND METHOD

Research Method

This paper applies document of legal instruments relating to freedom of information both in Indonesia and the rights afforded to those residing in Australia to determine the effectiveness of the government’s response to the ‘New Era’. In particular, Indonesian Act Number 14 Year 2008 on Freedom of Information (2008 Freedom of Information Act) will be analyzed. It will use juridical normative method and comparative study. This paper will analyze the implementation

⁵¹Ross McLeod, “Soeharto’s Indonesia: A Better Class of Corruption” (2000) 7(2) Agenda 99.

⁵²*Freedom of Information Act 2008* (Undang Undang No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik)

⁵³*Freedom of Information Act 2008* (Undang Undang No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik)

of 2008 Freedom of Information Act. Certain articles in mass media, as well as academic papers articles are also extensively used.

Legal Materials

Legal materials applied in this paper include primary sources and secondary sources as well as tertiary sources, as follows: Primary sources include Indonesian Act number 14 Year 2008 on Freedom of Information Act, United Nation Declaration of Human Rights as well as Indonesian Constitution and relevant Australian legal material, Freedom of Information Act (No.3) 1982 (Cth). Whereas secondary sources to support primary sources analyzes include explanatory section of Indonesian Act Number 14 Year 2008 on Freedom of Information, explanatory section of Indonesian Constitution as well as experts' opinion on relevant matters, relevant academic written paper and Annual Report gained from Central Information Commission of Republic of Indonesia.

III. RESULT AND DISCUSSION

Explanation of the Act

As noted above, the driving force behind the FOI Act⁵⁴ is founded within the reign of Suharto under which corruption flourished, accountability and transparency were not present, and the rule of law was nothing but a myth. The successor to Suharto put in motion reforms that would shape Indonesia's trajectory towards anti-corruption, such as, constitutional reforms, institutional independence of the judiciary from the government, commitments to anti-corruption court, and the most important being the enactment of the FOI Act⁵⁵ in 2008. The blanket aim of the FOI law is founded within the notion of 'national cohesion'. It declares that by providing

⁵⁴*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik)

⁵⁵*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik)

heightened access to information the following goals will be achieved; “the increase of the quality of community involvement in decision making, expedite the creation of an open government and encourage public bodies to be”⁵⁶. To understand the motive of this legislative instrument, the following Articles must be noted:

Article 1(1) ‘information is broadly recognised as any information, statement, idea or sign that has value, meaning or a message that can be seen, heard or read’⁵⁷.

Article 1(2) ‘public information means information produced, stored, managed or received by a public body which concerns the public interest and either relates to the administration of the state or of another public body’⁵⁸.

Article 2(1) ‘all public information is to be open and accessible to users of public information which includes Indonesian citizens and legal entities, all citizens and entities possess the right to request, view, understand and obtain a copy of and distribute public information’⁵⁹

To achieve the desired result as prescribed within the legislation, significant obligations are imposed upon all public bodies in order to encourage their compliance. Such obligations include; the development of information and documentation systems to efficiently manage public information⁶⁰, the creation of request processing systems and to employ staff to respond to requests⁶¹, and the publishing of six-monthly reports on activities, performance, financial data

⁵⁶Daniel S. Lev, above n2.

⁵⁷*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 1(1)

⁵⁸*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 1(2)

⁵⁹*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 2(1)

⁶⁰Simon Butt, *Freedom of Information Law and its Application in Indonesia: A Preliminary Assessment*, (2014) *ASJCL* p 113-154.

⁶¹*Ibid.*

and any other information that could threaten the necessities of life of the people and public order⁶². The five central pillars are as follows:

- a. Central Information Commission – as a means to ensure compliance with this law the Central Information Commission, an independent commission which operates conjunctively with provincial bodies, was created and attains the primary responsibilities of providing dispute resolution procedures.
- b. Dispute Resolution – The FOI Act⁶³ puts into place mechanisms for which the public can utilise if they fall victim to a denied request. The process allows for a variety of avenues to be utilised including written reviews, voluntary mediation, public hearing by judicial bodies, and access to the general courts.⁶⁴
- c. Exemptions – In accordance with Article 2(2)⁶⁵, this legislative instrument does seek to limit the types of information that public bodies can keep secret. The extent to which disclosure takes precedence over transparency relates to the way in which public bodies interpret the content of the law.
- d. Harm Consequences Test – Article 2(4) of the FOI Law⁶⁶ establishes what has been labelled as the ‘Harm Test :*Confidential by reason of statute, appropriateness and the public interest, based on an assessment of the consequences that will arise if the information is disclosed to the community and after considering whether denying access to that information could protect a greater interest than the interest in open access, or vice versa*’⁶⁷

⁶²Ibid.

⁶³*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik)

⁶⁴Simon, Butt, above n12.

⁶⁵*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 2(2)

⁶⁶*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 2(8)

⁶⁷Ibid.

- e. Penalties – It is prescribed within this law that many criminal penalties are attached to offences such as, rejecting a legitimate request for information, falsifying or destroying public information and failure to provide required information as required within the six-monthly report. Such penalties are attributable to individual culprits or companies, a questionable deterrent to be explored.

Based upon the explanation provided of the legislative instrument, it is now time to analyse the Act and its implementation. Did it fulfil the expectations of the government and adhere to maintaining the trajectory towards national cohesion?

Effectiveness of the Act

In order to achieve efficiency, the measurement of this instruments effectiveness will take place with the analysis of certain criteria such as, time and cost effectiveness, precedents set by the Information Commission and an in-depth investigation of the components of the legislation. While many of the criticisms hold considerable merit in the argument they put forth, do they in turn fail to recognise, on a larger scale, the overall evolution of Indonesia?

Time and Cost Effectiveness

The implementation of this law occurred in 2008, its operation occurred fairly sporadically as it did not reach the stage of ‘functional’ until 2011. In accordance with Article 58⁶⁸ and Article 59⁶⁹ the Information Commission was to be established within one year of the laws implementation, which did not occur until 2010 and regional provincial commissions were to be established within two years. However, to date only 20 out of 34 provinces currently attain this requirement⁷⁰. According to data obtained from the Central Information Commission,

⁶⁸*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 58

⁶⁹*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 59

⁷⁰Annual Report 2010, Central Information Commission of Republic of Indonesia, available at www.komisiinformasi.go.id (last accessed 19 May 2014).

Information Officers were only appointed in the following industries, a condition prescribed by Article 13⁷¹:

- a. 25 of the 35 Ministries (74%)
- b. 29 of 129 State Institutions (22%)
- c. 14 of 33 provincial governments (42%)
- d. 53 of 399 county governments (13%)
- e. 17 of 98 city governments (17%)⁷²

The conclusion to be drawn from such statistics provides that slow compliance is currently an issue that is interfering with the success of the legislation, but who is at fault for this? When assessing article 13(b)⁷³ it notes that all public bodies were to train and hire employees in order to handle requests for information, however how can such goals be achieved if no government funding, training or procedural guidelines have been developed? It is through such negligence of government activity that an attitude of ‘non-compliance’ has spread throughout the Indonesian community.

Precedents established by the Information Commission

The performance of the Information Commission in establishing a precedent, and the degree of enforcement in which they are going to adopt has been a fairly developing aspect. According to the *Jakarta Post* between 2010 and 2011 the Information Commission received 227 requests for information, however only 7 were attended to in a judicial manner and of those 7, only 2 losing parties have been required to comply with the Commission’s ruling⁷⁴. A gradual

⁷¹Annual Report 2012, Central Information Commission of Republic of Indonesia, available at <www.komisiinformasi.go.id> (last accessed 19 May 2014).

⁷²UU Keterbukaan Informasi Diabaikan”, Hukumonline (26 May 2012), online: <www.hukumonline.com> (last accessed 30 October 2013).

⁷³*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 13(b)

⁷⁴Warief Djajanto Basorie, “Indonesia’s Freedom of Information Laws, One Year On”, *The Jakarta Post* (28 April 2011).

trend of compliance has been identified as, in accordance with the Commission's 2012 annual report, an approximate two thirds of the total 818 requests for information have been resolved⁷⁵. However, whilst a positive trend is depicted, does the way in which they approach them effectively embody the principles of the FOI Act⁷⁶? Two fundamental elements of case law lay the foundation as to the general ability of the Information Commission, which are described as follows:

1. 'An appeal against West Java Information Commission ordering the Mayor to provide three types of financial documents which due to the following reasons should not have been disclosed:
 - a. Comprehensive Report Documents are excluded information under the law and should not have been originally disclosed,
 - b. The report could not be released before obtaining permission,
 - c. The third report should not have been requested from the Mayor, nor any information to be extracted from his office as it was not his responsibility to produce, store or manage such records'⁷⁷.
2. 'This was an appeal against the central Information Commission decision in the Medan Flood Control Case – The applicant has requested copies of contracts for goods and services. The Ministry challenged the Commission's findings on the basis that the contract has a confidentiality clause and the other party to the contract refused permission for the document to be released. The three grounds in which the Information Commission was incorrect on are:

⁷⁵Annual Report 2012, above n23.

⁷⁶*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik)

⁷⁷*Bogor Mayor v. Hidayat* (Bandung Administrative Court Decision 34/G/TUN/2012 PTUN-BDG); *Bogor Mayor v. Hidayat* (Bandung Administrative Court Decision 64/G/TUN/2012 PTUN-BDG).

- a. The Ministry had an obligation to fulfil the contract as this contract had a confidentiality clause, they had an obligation to maintain it,
- b. The court found that the commercial information contained in the contract was subject to copyright and therefore should not have been subject to disclosure,
- c. The Court relied on Article 11(1)(e) of the FOI law⁷⁸ which states that public bodies must provide information about contracts with third parties, however in this instance no third part was present and disclosure was therefore not required⁷⁹.

Whilst it is perceived that increased compliance with the act is a positive aspect which has been slowly generating since its inception, the manner in which it is correctly interpreted and enforced is highly questionable. The apparent need for the Administrative Appeals Court to overturn the commission's original decisions allows for a degree of doubt as to what rights are actually being afforded to Indonesian citizens?

Analysis of the Acts Components

The imperative component to this text analysis is determining whether the components of the act effectively provide an avenue to the 'Freedom of Information' or if this is merely an instrument to evade further global scrutiny.

In accordance with the *Association of the Rule of Law*, 'The scope of Indonesia's Law on Public Information Transparency was a compromise between the government and civil society. The government did not want to bring State Owned Enterprises within the scope of the law however, civil society organisations demanded it. The result was a compromise where such

⁷⁸*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 11(1)(e)

⁷⁹*Public Works Ministry v. Antoni Fernando* (Jakarta Administrative Court Decision 102/G/2012/PTUN-JKT).

enterprises were required to disclose limited classes of information'⁸⁰. Although it appears that a compromise was an effective response, critics argue that an abundance of information is left undisclosed, for example 'it does not require disclosure of information related to the contract actually awarded nor is there any disclosure of information that would allow the public to evaluate its performance, such as statistics concerning output'⁸¹.

A vital component of the FOI Law⁸² is the 'harm test' which provides public bodies with the authority to deny information on a variety of bases. The legal foundation for such power is founded within Article 6⁸³ as it is declared that 'public bodies have the right to refuse to provide information that is 'excluded by' or 'does not accord' with 'written laws', which are any form of government law, from statutes through to regulations, presidential instructions, ministerial decrees and circulars and local parliament by-laws⁸⁴. To follow on from this avenue of exemption, Article 2(4)⁸⁵ establishes a proportionality test, where the public-interest in disclosure is balanced against the impending harm that disclosure might bring from a plain reading of the legislature. It appears that if the information officer believes the admission of particular information will be more detrimental to the public interest than advantageous, then disclosure can be repudiated⁸⁶. It is viewed that Article 2(4)⁸⁷ has the potential to expand 'excluded information' beyond the categories already specified within Articles 17⁸⁸ and 6(3)⁸⁹. Through this possibility it is therefore inherently possible that any information could be subjectively categorised as more harmful if released or against the public interest. The pitfall of

⁸⁰Angela Migally, *Freedom of Information: A Cornerstone of Democratic Transition* (2013) p20 – 21.

⁸¹*Ibid.*

⁸²*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik)

⁸³*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 6

⁸⁴*Ibid.*

⁸⁵*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 2(4)

⁸⁶*Ibid.*

⁸⁷*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 2(4)

⁸⁸*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 17

⁸⁹*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 6(3)

this provides public bodies with the ability to individually decipher whether the avoidance of disclosure is a more appropriate response, meaning a debate between their motives and the public's rights has the potential to never result in the latter.

Another component targeted by critics is the legislature's inability to provide a definition of a 'public body'. According to a professor of *Gadjah Mada University*, the characterisation afforded to a 'public body' is too broad and causes obscurity when classifying between public and private entities⁹⁰. This acts as a fundamental weakness as many entities have the ability to evade their obligations by claiming they do not possess the characteristics of a public body and no obligation to respond to information requests. An example of this is founded within the report of the *Association of the Rule of Law* which notes that the lack of transparency within private entities is a contributory factor to many human rights breaches, resulting in the recommendation for the release of all legal, financial and auditing reports for companies, cooperatives and military based entities⁹¹.

Further aspects of the legislature that have fallen under scrutiny although are not as vital as the abovementioned components are:

1. The inability of wholly deterrent penalties to be prescribed within Article 52 and 53 of the FOI Act⁹². The most effective element of the penalties under this instrument are its ability to target individuals who intentionally evade their obligations, however such a positive element is overshadowed by the inability of the Information Commission to issue penalties, and the minimal financial burden it can place on public bodies; and

⁹⁰Adistra Kusuma Waligalit, *Legal Proposition on the Public Freedom of Information in Indonesia* (2013) *Faculty of Law of Gadjah Mada University* p 1 – 7.

⁹¹Angela Migally, above n32.

⁹²*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik) 52, 53

2. There have been many instances in which the Information Commission has not responded to an individual's appeal within the specified timeframe and therefore do not afford elements of procedural fairness to all parties⁹³.

It is through such elements of analysis that I will now be in a position to provide an overall evaluation of this instrument.

Evaluation of the Act

As noted by the multiple critics, the evolution towards 'freedom of information' in Indonesia has been a slow and moderate journey. Whilst advances are evidenced in terms of providing a trajectory towards the rule of law and the recognition of fundamental human rights, the elements of accountability and transparency are yet to be achieved. After an assessment of the components of the act and the precedents that have failed to be followed by the Information Commission, Indonesia is yet to reach the pinnacle of providing an effective response to the demand for Information. To strengthen the inadequacies of Indonesia's response to this issue, I will now undertake a brief comparative analysis between the rights afforded to Australian citizens as opposed to those of Indonesia.

Comparative Analysis between the rights afforded to Australian and Indonesian citizens

According to the United Nations Educational, Scientific and Cultural Organisation, as a response to global demands Australia developed and enforced their national FOI Law⁹⁴ as early as 1982⁹⁵. The Australian Government enacted this legislation with the motive of providing citizens with an insight as to policy making, administrative decision making, government service

⁹³No 144/KMA/SK VIII/2007 on Disclosure of Information in Court.

⁹⁴*Freedom of Information Act (No. 3) 1982 (Cth)*

⁹⁵Freedom of Information in Asia Pacific (2013) *United Nations Educational, Scientific and Cultural Organisation: Communication and Information*

delivery and the ability to search and modify all records that attain personal information⁹⁶. The most notable differences, bar the initial motives and time of implementation of the legislature, between the Australian and Indonesian landscapes are, the Australian Government seeks to actively and regularly promote awareness of FOI opportunities, they regularly audit on an internal and external basis their ability to fulfil their obligations as per their legislative requirements, both public and private entities are susceptible to the FOI Law⁹⁷ and the Australian government maintains a heightened level of compliance to the legislative instrument by frequently providing information and procedural guidelines to both public and private entities. An example of the level of adherence and importance the Australian government provides to the freedom of information is founded within their yearly audit submitted to Parliament titled ‘Review of Freedom of Information Legislation’⁹⁸ which includes statistics, data and ideas of reform in order to provide each citizen with the level of rights they are entitled to.

It is through this comparative analysis that the words ‘transparency’ ‘accountability’ and ‘national cohesion’ cannot straightforwardly be applied to the Indonesian Government and the manner in which they address the ‘freedom of information’.

IV. CONCLUSION

The beginning of this text included a quote founded within the Indonesian Constitution that acknowledged the basic right that each citizen is deserving of, but when taking into account the evidence provided and the above analysis, the question of whether the Constitution is being wholly fulfilled arises. On a general note it is indisputable that the legal landscape of Indonesia

⁹⁶Ibid.

⁹⁷*Freedom of Information Act (No. 3) 1982 (Cth)*

⁹⁸John McMillan and James Popple, *Review of Freedom of Information Legislation (2012) Office of the Australian Information Commissioner* p 47.

has improved significantly since the inception of the FOI Act in 2008⁹⁹. To an extent it has established a degree of press freedom and has acted as a component to remedy the damage caused by the ‘New Order’. However, its effectiveness is significantly queried. In my opinion and based upon the above opinions of various criticisms, the notion of ‘freedom of information’ in Indonesia is yet to be achieved on a scale that embodies principles of accountability and transparency. Summarily the implementation of this instrument did not efficiently alter the clouded boundary that exists when citizens attempt to obtain information regarding Indonesia’s government, public bodies or personal items.

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⁹⁹*Freedom of Information Act 2008* (UU No. 14 Tahun 2008 tentang Keterbukaan Informasi Publik)

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**GOVERNMENTAL CONTROL OR BIG COMPANY CONTROL IN AUSTRALIA ON
JOURNALISTIC PRACTICE:
WHICH IS WORSE AND WHERE ARE THE PARALLELS?**

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Abstract

Restricted media freedom often happens in Asian States. Malaysia and Singapore, for instance, have experienced restriction on media freedom due to a number of reasons, which include democratic type of the state itself and the nature of government. While Malaysia and Singapore democratic pattern tend to adopt what so-called 'pseudo-democratic', the freedom of media is mostly control by the government. This condition is different to those countries with 'established-democratic' such as Australia. Although government control in media freedom is less, however, big companies seem to have more control in media freedom. In this paper, it will be examined as to which is worse; blatant government intervention resulting in journalist self-monitoring¹⁰⁰ or big company ownership in prominent media publications resulting in bias and ill-informed, ill-balanced pieces. It will also be concluded as to whether the restrictions imposed upon journalists in Singapore and Malaysia are only evident in these two countries, or whether journalists in other countries, including 'more' developed nations also practice self-monitoring.

Keywords: Media Freedom, Pseudo-Democratic, Established-Democratic,

I. INTRODUCTION

Amanda Whiting and Timothy Marjoribanks argued in their chapter *Media professional's perceptions of defamation and other constraints upon news reporting in Malaysia and Singapore*¹⁰¹ that Malaysia and Singapore experience, due to a number of factors, restricted media freedom - many of these factors relating to the semi-democratic nature of Malaysian and Singaporean government. This being, that there is still an element of autocratic control exerted by the government on media publications and that this is supported by the rigid court system

¹⁰⁰ Ibid.

¹⁰¹ Amanda Whiting and Timothy Marjoribanks, 'Media Professionals' Perceptions of Defamation and other Constraints upon News Reporting in Malaysia and Singapore' in Andrew Kenyon, Tim Marjoribanks, Amanda Whiting (eds.) *Democracy, Media and Law in Malaysia and Singapore* (Routledge, London, 2013), 129-156.

which has been generous and stringent in its awarding of damages in defamation suits brought by individuals against journalists. Whiting and Marjoribanks define the system in saying that:

‘Both Singapore and Malaysia are best described as illiberal regimes, semi- or pseudo-democracies, where the media is controlled or curtailed by state laws, policies and practices directed to limiting, rather than protecting, a space for democratic discourse.’¹⁰²

In their argument, they have inadvertently (or perhaps advertently depending on personal view, economic view and political context) depicted that this problem is inherent in Malaysia and Singapore because of its semi-democratic nature and that media restrictions of this nature are mostly prolific in pseudo-democracies, or that such democratic systems are conducive to restricted media freedom. They have argued that these problems are *unique* to Singapore and Malaysia. It could, however, be argued that many ‘first world’ or ‘fully established’ democracies experience similar problems in media reporting and that these problems are not centralised to these two countries or other semi-autocratic democracies. This paper looks to establish whether such a statement could be supported, in that a first world democracy such as Australia could be paralleled in its journalistic restrictions or non-freedom. An important distinction, however, must be made immediately: countries such as Malaysia and Singapore suffer from media restrictions as a result of blatant government control, subsequently also receiving labels such as ‘pseudo-democracy’. Other democracies in the first world – Australia, the UK and the USA for example, do not have such ‘blatant’ government intervention. Instead, the media restrictions in these nations are a result of big company influence and intervention. In this paper it will be examined

¹⁰²Ibid, 131.

as to which is worse; blatant government intervention resulting in journalist self-monitoring¹⁰³ or big company ownership in prominent media publications resulting in bias and ill-informed, ill-balanced pieces. In this instance, Australia will be exemplified. Subsequently, it will be concluded as to whether the restrictions imposed upon journalists in Singapore and Malaysia as reported upon by Whiting and Marjoribanks are only evident in these two countries, or whether journalists in other countries, including 'more' developed nations also practice self-monitoring. Although it would be prudent to also look at 'less established' or third world democracies in this argument to established a wider field of research, it would be unlikely to enlighten the argument. Third world and establishing democracies have an almost cemented media problem.¹⁰⁴ Stating as such in this argument would only serve to point out the obvious. Therefore, Australia will be used as a point of comparison. This will aid in concluding whether Malaysia and Singapore truly do experience these problems in a unique way, or whether some problems are not unique to pseudo-democracies at all. Through further research of media standards in Australia, it will be possible to conclude whether these media-based problems are only synonymous to the situations in Malaysia and Singapore, or whether commentary on this topic of restriction in media reporting and journalist self-monitoring should be extended to include other first world democracies in the discussion, and that Malaysia and Singapore should not be identified as unique.

II. MATERIALS AND METHOD

This paper applies legal instruments relating to journalist restriction in different type of democracy countries. The comparative study was conducted in analyzing state-practice

¹⁰³ Ibid.

¹⁰⁴ Cultural Survival, Inc. *Media Autonomy in the Third World*, Cultural Survival, February 2010, <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/brunei/media-autonomy-third-world> viewed 28 May 2014.

restrictions on media freedom, in ‘pseudo-democratic’ state, such as Malaysia and Singapore and in ‘establish-democratic’ state, such as Australia. It looks at the implementation on how such states control media freedom. Certain articles in mass media, as well as academic papers articles are also extensively used. The comparative analyses will make crucial contribution on which one is better in protecting freedom of media. Furthermore, legal materials applied in this paper include primary sources and secondary sources as well as tertiary sources relating to freedom of media and democracy. Since this paper focuses more on state-practice, it is the practice of states mentioned will be frequently discussed.

III. RESULT AND DISCUSSIONS

Journalistic Facts in Malaysia, Singapore and Australia

As stated above, there is an extremely important distinction that needs to be made and understood in regards to this argument: in Malaysia and Singapore, journalistic problems occur because of governmental pressure; whilst in Australia it is ‘big companies’ who are applying the pressure. An important notion in this paper is to explore which is worse, or perhaps reveal that they are equally as bad in promoting (and restricting) journalistic freedom. In Australia, two media outlets shall be exemplified; News Corp Australia, which is owned by Rupert Murdoch and controls 70% of all newspapers circulated in Australia (and owns 23%-33% of all printed media sources in the country) and Fairfax Media.¹⁰⁵ One can see from these facts that Murdoch and his empire will be an important point of focus in this paper. News Corp Australia is evidently a big business that wields political power in Australia. The second media outlet that will be considered in this paper is Fairfax Media. Fairfax Media is the second largest media

¹⁰⁵ Terry Flew, *FactCheck: does Murdoch own 70% of newspapers in Australia?*, The Conversation, 8 August 2013 <http://theconversation.com/factcheck-does-murdoch-own-70-of-newspapers-in-australia-16812> viewed 26 May 2014.

outlet in Australia. The largest shareholder in Fairfax Media is mining magnate Gina Rinehart who owns the absolute maximum amount of shares possible before a takeover bid must be offered.¹⁰⁶ These two media outlets have a huge monopoly on the news publications distributed throughout the company. These two media outlets serve as prime examples in exploring big business influence in the media in Australia, as opposed to governmental influence (even though the line between the two is arguably just as blurred in Australia as Whiting and Marjoribanks argue is the case in Malaysia and Singapore¹⁰⁷). The newspapers (as opposed to magazines or other news mediums) printed by these outlets will be the focus of this paper, as Whiting and Marjoribanks refer only to print media in regards to their assessment of media control in their chapter – reference to online media is only made in regards to the fact that it is not as tightly regulated due to the fluid and uncontrollable nature of the system and, therefore, is *mostly* free of these constrictions. This was exemplified through their examination of the career of Marina Mahathir who wrote for the Malaysian newspaper *The Star*¹⁰⁸ and was further expounded upon in great detail by Cherian George in his book, *Contentious Journalism and the Internet: Towards Democratic Discourse in Malaysia and Singapore*.¹⁰⁹ This notion of less restrictive practice in online journalism, blogs especially, is mostly a global (with exceptions) observation.

In returning to the importance of print media in this paper, David McKnight in his book *Rupert Murdoch: An Investigation of Political Power*¹¹⁰ emphasises the importance of print media by stating that,

¹⁰⁶ Kirsty Simpson, *Gina Rinehart lifts stake in Fairfax to 15% as pressure for board seats builds*, The Sydney Morning Herald, June 5 2012, <http://www.smh.com.au/national/gina-rinehart-lifts-stake-in-fairfax-to-15-as-pressure-for-board-seats-builds-20120614-20d5n.html> viewed 26 May 2014.

¹⁰⁷ Whiting and Marjoribanks, above n 2.

¹⁰⁸ Ibid, 132.

¹⁰⁹ Cherian George, *Contentious Journalism and the Internet, Towards Democratic Discourse in Malaysia and Singapore*, (Singapore University Press, 2006).

¹¹⁰ David McKnight, *Rupert Murdoch: An Investigation of Political Power*, (Allen &Unwin, 2012).

‘In an age when newspapers are in decline, do such [media] control matter? The answer is yes. They set the political agenda for radio, television and online news. Newspapers achieve the agenda-setting role because they have the biggest newsrooms and every day they originate far more stories than any other news medium.’¹¹¹

This excerpt supports the importance of considering print media throughout the argument in this paper and emphasises why Whiting and Marjoribanks have done so in their chapter. The question is now to look at how big company control of these newspapers in Australia, an ‘established’ democracy, affects journalistic practice and whether parallels can be established between democratic media practice in Australia and the restrictions placed on journalists by government in ‘pseudo-democratic’ Malaysia and Singapore. In his book *The Politics of Information: Problems of Policy in Modern Media*¹¹² Anthony Smith states that,

‘...in [western media’s] broadest context, we are seeing a single complex of institutions, private, public and mixed, evolving in modern societies as mediators of information and entertainment, mutually dependant, mutually abrasive, with functional overlaps and newly emerging demarcations. This is thus a kind of cultural-informational complex growing at the heart of modern societies, which does not in itself spell any kind of doom but which profoundly alters the way in which we should think about the role of the government and the press.’¹¹³

He continues on to comment on the notion of objectivity in western media, and touches upon one of the important notions in the paper; that of the difficulty of achieving journalistic

¹¹¹ Ibid, 7-8.

¹¹² Anthony Smith, *The Politics of Information: Problems of Policy in Modern Media*, (The Macmillan Press Ltd, 1978).

¹¹³ Ibid, 159.

objectivity in light of the now numerous factors which have to be considered in modern media. In Malaysia and Singapore, journalists are subjected to the added pressures applied by the government in regards to preserving the reputation of government officials/party politics and the stringent application of defamation damages by the courts, whilst in Australia we see major newspapers, such as The Daily Telegraph running front pages such as ‘Australia Needs Tony’¹¹⁴ or ‘Kick This Mob Out’¹¹⁵ which are evidently a reflection of media tycoon Rupert Murdoch’s political ‘muscle flexing,’ and touches on a wider issue in western media, that journalists are subjected to the commercial pressures of their editors.¹¹⁶ Smith states that,

‘...we speak of being objective as of a technique, sometimes as a glorious goal, occasionally as an external purpose which the journalist is supposed to serve... Each sliver of the infinity of reality at which the reporter thrusts his attention reaches the reader through the haze of motives and intentions – those of journalist, subject, editor, censor, printer, government – which are all the more insistent for being less evident.’¹¹⁷

Political Influences

From the above explanation, it can be seen that western societies suffer similar governmental problems as is identified by Whiting and Marjoribanks, although it is unlikely that these are to a similar extent as is evident in Malaysia and Singapore. Whiting and Marjoribanks note that journalists in Malaysia and Singapore are often so restricted by self-monitoring that many stories are disregarded from the outset.¹¹⁸ Media in Australia is clearly less restricted and more open for debate. Indeed, when the ‘Australia Needs Tony’ headline ran, Deputy Leader of

¹¹⁴Jeannette McMahon, *Political front page causes a stir*, ABC, 2 September 2013, <http://www.abc.net.au/local/stories/2013/09/02/3838874.htm> viewed 26 May 2014.

¹¹⁵Roy Greenslade, ‘Kick this mob out’: Murdoch flexes his election muscle from day one, The Guardian, 5 August 2013, <http://www.theguardian.com/commentisfree/2013/aug/05/daily-telegraph-election-australia> viewed 27 May 2014.

¹¹⁶Ibid.

¹¹⁷Smith, above n 11, 179.

¹¹⁸Whiting and Marjoribanks, above n 1, 140.

the Labour Party stated that front page was an “absolute disgrace.”¹¹⁹ The media environment in Australia is considerably more open for political debate with journalists and commentators such as Andrew Bolt having no qualms about attacking government officials.¹²⁰ However, Smith does identify more similarities between the issues identified by Whiting and Majoribanks and problems facing western media in that ‘the issues which confront journalism in the twentieth century which transmutes it stage by stage into different forms, is whom the journalists is to represent.’¹²¹ This point is crucial. The issue of whom the journalist is to represent transcends all democratic/autocratic boundaries. Journalists in Malaysia and Singapore are extremely mindful of who they are to represent in the press, as are journalists in western democracies, including Australia. Indeed, editors for News Corp Ltd who have fundamental ideological differences with that of Murdoch and his greater agenda have found their ‘tenure unceremoniously cut short in recent years.’¹²² The parties who apply pressure in Malaysia/Singapore and Australia may be different, but the ideology of being subjected to distracting outside pressures is the same. Because of this notion it is at this point in the paper where one can distinguish which is worse, governmental control on journalistic freedom in Malaysia and Singapore or big company control on journalistic freedom in Australia. Here the crux of the issue will be discussed.

The Parallels

Clearly, as noted above, there are parallels between the journalistic pressures experienced by journalists in Malaysia and Singapore and journalists in Australia. However, although

¹¹⁹ Bianca Hall, *Sunday papers unite behind Coalition*, The Sydney Morning Herald, September 1 2013, <http://www.smh.com.au/federal-politics/federal-election-2013/sunday-papers-unite-behind-coalition-20130901-2sye9.html> viewed 26 May 2014.

¹²⁰ Andrew Bolt, *Deceit and conceit of Prime Minister Julia Gillard’s latest blue*, The Herald Sun, June 12, 2013, <http://www.heraldsun.com.au/news/opinion/deceit-the-biggest-conceit-of-prime-minister-julia-gillards-latest-blue/story-fni0ffxg-1226662729427> viewed 25 May 2014.

¹²¹ Smith, above n 11, 196.

¹²² Margaret Simons, *Has Sydney’s Daily Telegraph lost touch with its readers?*, The Guardian, 28 May 2014, <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/brunei/media-autonomy-third-world> viewed 28 May 2014.

journalists in Australia and other western democracies may be subjected to political and corporate pressure, the fundamental ideology of ‘free’ Australian government as opposed to the semi-autocratic nature of Malaysian and Singaporean government, which maintains a monopolist control on many aspects of society, means that the journalistic pressures in Malaysia and Singapore are certainly more severe and restrictive, and therefore worse than journalistic pressures in Australia. Although the point of this paper has been to demonstrate that it is not simply ‘pseudo’ democracies that experience journalist self-monitoring and that this problem is clearly evident in western democracies (also to a large extent), it cannot be denied that Malaysia and Singapore suffer a unique problem. These problems are largely dealt with by Whiting and Majoribanks and are clearly unique. Although media outlets such as News Corp Ltd and Fairfax Media in Australia have questionable political ties through their ownership, Whiting and Marjoribanks state that ‘In both countries (Malaysia and Singapore) all major domestic print and broadcast media are owned by organizations that are themselves controlled by, or closely linked to and favourable towards, government policies and governing political parties.’¹²³ Here we see that government ownership is considerably more blatant and transparent in Malaysia and Singapore than in Australia. The licensing system¹²⁴ for publication in Malaysia and Singapore also transcends this debate to show that media restrictions in Malaysia and Singapore are considerably worse. Furthermore, the simple banning of international press publications in Malaysia and Singapore shows the inherent problems facing the dispersal on information in these countries.¹²⁵

The issue of defamation as addressed by Whiting and Marjoribanks solidifies the conclusion that in considering which is worse, governmental control in Malaysian and

¹²³ Whiting and Marjoribanks, above n 1, 131.

¹²⁴ Ibid, 132.

¹²⁵ Ibid.

Singaporean media or big company control in Australian media, journalists in Malaysia and Singapore face a considerably tougher challenge, and that balanced media representation in these two countries is limited. The awarding of damages for defamation cases brought to the courts against journalists in Malaysia and Singapore is unprecedented and acts as a huge barrier in journalistic freedom. This problem is not present in Australia. Indeed, achieving a successful suit against Andrew Bolt's incredibly racist remarks against light-skinned aboriginals was a difficult task.¹²⁶ In Malaysia and Singapore, defamation is at the forefront of journalist inability to report in a broad and balanced manner. No leader of the PAP in Singapore has ever lost a defamation case against an opposition leader and no foreign publisher has *ever* successfully defended a defamation suit brought against them.¹²⁷ Unlike in Australia, where the publishing of sensitive topics is likely to bring greater readership, in Malaysia and Singapore there is a huge array of topics that are off limits; relations with ASEAN states, China, race, religion, internal politics, political personalities, corruption and government linked companies.¹²⁸ One can see from this list that there are not many topics of substance left to report on. Although being berated over the phone is more likely than being sued in modern times, the real threat of becoming bankrupt defending a defamation suit in Malaysia and Singapore is a real problem that affects the role of journalism in Malaysia and Singapore.¹²⁹

Although it is clear that there are some parallels on the issue of journalistic pressure in Malaysia/Singapore and Australia, it is also evident that in a discussion of which side faces more severe pressure the answer must be Malaysia and Singapore. This is concluded from what is

¹²⁶ABC, *Bolt breached discrimination act, judge rules*, ABC, 29 September 2011, <http://www.abc.net.au/news/2011-09-28/bolt-found-guilty-of-breaching-discrimination-act/3025918> viewed 27 May 2014.

¹²⁷Whiting and Marjoribanks, above n 1, 136.

¹²⁸Ibid, 142.

¹²⁹Ibid.

outlined above, but also in light of notions such as that the Australian media is clearly more open to political debate and when bias becomes too extreme, there is the ability for media inquiries. Mr Ray Finkelstein QC conducted such a media inquiry in 2011.¹³⁰ Such liberty is not afforded to journalists in Malaysia and Singapore, and one can see that the Australian government has taken a priority in making the media and its agenda transparent.

IV. CONCLUSION

The media has never been considered a clear, objective source of topics; particularly not political topics. One must take news sources, especially newspapers articles, with a grain of salt. All journalists are subjected to workplace pressures. However, obviously political circumstances and media environments vary between nations. It cannot be denied that journalists in Malaysia and Singapore, as is made evident by Whiting and Marjoribanks, are subjected to severe cases of self monitoring, and it is further evident that Malaysia and Singapore certainly have unique problems in regards to the ease of the courts awarding damages for defamation, and the social and cultural norms in these societies have certainly accepted these court cases as a normal aspect of media reporting. As was stated at the opening of this paper, Whiting and Majoribanks have depicted Malaysia and Singapore as being unique in their journalistic problems and as having unique aspects in regards to the problems faced in regards to media reporting and restrictions on the media. It must be concluded that some of these problems are unique and some of these are not unique and should not be depicted as such. It is not necessarily that pseudo-democracies are alone in experiencing these problems, Australia also faces journalistic self-monitoring and a biased media pool, however, Malaysia and Singapore clearly suffer greater restrictions. In

¹³⁰ Mr Ray Finkelstein, QC, *Independent Media Inquiry report*, 14 September 2011, Australian Government, Department of Broadband, Communications and the Digital Economy, http://www.archive.dbcde.gov.au/2013/august/independent_media_inquiry viewed 26 May 2014.

regards to the argument of which is worse, governmental control on the media in Malaysia and Singapore or big company control on the media in Australia, it is clear that blatant government control, in light of the chapter by Whiting and Marjoribanks is considerably worse.

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COUNTER-TERRORISM IN INDONESIA

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Abstract

Since the incident of the World Trade Center (WTC) in USA, Indonesia has become an easy target for the next terrorism. Counterterrorist campaigns can be undertaken by military and paramilitary forces. Counterterrorism refers to proactive policies that specifically seek to eliminate terrorist environments and groups, Regardless of which policy is selected, the ultimate goal of counterterrorism is clear: to save lives by proactively preventing or decreasing the number of terrorist attacks. But, so far the Government of Indonesia is only able to capture the terrorists, but is unable to eradicate terrorism. Therefore, the government of Indonesia still needs a comprehensive ways to counter terrorism in Indonesia.

I. INTRODUCTION

Terrorism is coordinating attacks aimed to generate the feeling of terror against a group of people. Unlike the war, acts of terrorism are not obeyed to the procedures of warfare such as execution time is always a sudden, random target and victims are often civilians¹³². Terrorism, however defined, has always challenged the stability of societies and the peace of mind of everyday people.

Defining terrorism has been greatly debated and written about for decades. Countless books have entire chapters dedicated to this topic. There are three of the more commonly cited definitions come from the FBI, the U.S. Department of state, and the U.S. Department of Defense, and they are outlined here.

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¹³² Maslathif Dwi Purnomo, Violence, Extremism and Terrorism in Indonesia: A Case study of Terrorism acts in Indonesia during 2000 until 2011', 2012, 34, IACSIT Press, 74

The FBI defines terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”¹³³

The U.S. Ministry Of Foreign Affairs defines terrorism as “an activity, directed against persons involving violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the U.S and is intended to intimidate or coerce a civilian population to influence the policy of a government by intimidation or coercion or to affect the conduct of government by assassination or kidnapping”.¹³⁴

The Department of Defense defines terrorism as “the calculated use of violence or threat of violence to inculcate fear intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological”.¹³⁵

Terrorism in the world is not new thing, but it comes specifically a big thing since the Incident of World Trade Center (WTC) or has famously known as the 9/11 tragedy which took place in New York, United states of America on September 11, 2001. The terrorist attack through the air, they do not use military aircraft but using a US commercial aircraft, so it is not caught by United States’ radar. US commercial aircraft had been hijacked, and two of the plane crashed into the twin towers of the World Trade Center and the Pentagon. In total, approximately 3000 people died in the attacks. Terrorist attack the World Trade Center because they think that the World Trade Center was a "symbol of America". However, they attack the building is an international organization representing the world's economic prosperity. So, in fact, they do not

¹³³ Justice department, Federal Bureau of Investigation, (12 June 2014) <<http://www.fbi.gov/publish/terror/terrusa.html>>

¹³⁴ See further on General military training, Terrorism, N.p.,n.d., p1-3-10,p1-3-14, and p1-3-16.

¹³⁵ Heymann, P.B., *Terrorism and America: A Commonsense strategy for a democratic Society*, MIT Press, Cambridge, MA, 1998, 3

just attack the United States, but also around the world. United States thinks that Osama bin Laden as the prime suspect of the attacks.¹³⁶

International and regional attention on the radicalism Islamic groups in Indonesia came not only after the tremendous terrorist attacks on Bali on 12 October 2002. Right after the 11 September 2001 terrorist attacks in the USA and the military of USA retaliation against Al Qaeda and the Taliban in Afghanistan, Southeast Asia suddenly became concerned by the USA¹³⁷. Those concerns were stronger after a string caught of arrests made by Singaporean, Malaysian and also Philippine authorities of a number of Islamic militants linked to the illegal black organization called Jemaah Islamiyah (JI) which associated with Al Qaeda or other group with the same ideology. The indications were true by several organization members in Singapore, and some in the Philippines, provide some indications that a regional of terrorist network does in fact exist in the region¹³⁸.

Several years before the bombing on Bali on 2002, terrorism also bombed the Jakarta stock exchange on 2000, but more than that, the terrorism in Indonesia has been stimulated since 1981, this was evidenced by the hijacking of one of the most famous commercial aircraft, which was Garuda Indonesia DC-9 Woyla which flight from Palembang to Medan. In the event that a crew of flight, one soldier, and three terrorists were killed¹³⁹.

Furthermore, during 2000-2011 Indonesia has become the land for developing terrorist attack. Their motifs were remaining unknown, this interesting and worth studying, **what and**

¹³⁶ Ibid.

¹³⁷ Ramakrishna, Kumar, Tan See, Seng, *After Bali: The Threat Of Terrorism in Southeast Asia*, Nanyang Technological University and World Scientific Pub, 2003, 341

¹³⁸ BBC, *Profile: Jemaah Islamiyah* (1 April 2014) <<http://www.bbc.co.uk/news/world-asia-16850706>>

¹³⁹ Okezone, *Tak Hanya Malaysia Airlines Garuda pun pernah di bajak* (27 March 2014) <www.okezone.com/read/2014/03/15/411/955701/tak-hanya-malaysia-airlines-garuda-pun-pernah-dibajak>

how was the government of Indonesia encounter and combat the terrorism? That's the important point for this research.

II. LEGAL MATERIALS AND METHODS

A. Type of Research

Type of research that is used by author in researching problems in this research is a normative. Normative research is a process to identify the rule of law, legal principle, even law doctrines in order to answer the law issue.

B. Types of Legal materials

1) Primary Legal Materials

Primary legal materials are an authoritative legal materials, which means has an authorities. Primary legal materials used are:

1. Law of the Republic of Indonesia No. 9 of 2013 on the Prevention and Combating the Financing of Terrorism Crime.
2. Law No. 15 of 2003 on Criminal Acts of Terrorism
3. Law of the Republic of Indonesia Number 12 of 1995 on Community.
4. Presidential Instruction No. 4 Year 2002 on Terrorism.
5. United Nations Convention against Transnational Organized Crime.
6. Presidential Regulation Number 46 Year 2010 on the National Agency for Combating Terrorism.
7. Code of Criminal Law.

2) Secondary Legal Materials.

Secondary legal materials that are used in this paper is the legal materials that explain the primary legal materials, in the form of literatures or books related to terrorism and radicalization.

3) Tertiary Legal Materials.

Tertiary legal materials used in this paper is a material that can provide guidance or explanation of the primary legal materials, such as dictionaries, articles, legal journals and from the internet.

4) Result and Discussion

The actions of terrorism that occurred in Indonesia since 2000 until 2011 can be seen in the events as follows:

Year 2000

- a) Philippine Embassy Bombing, August 1, 2000. The bomb exploded from a car parked in front of the Philippine ambassador's house, Menteng, Central Jakarta. 2 people were killed and 21 others were injured, including the Philippine ambassador Leonides T Caday.¹⁴⁰
- b) Malaysian Embassy Bombing, August 27, 2000. The grenade exploded in the compound of the Malaysian Embassy in Kuningan, Jakarta. There were no fatalities.¹⁴¹
- c) Jakarta Stock Exchange Bombing, 13 September 2000. The explosion happened in the parking lot P2 of Jakarta Stock Exchange Building. 10 killed, 90 others were injured. 104 cars were severely damaged, 57 damaged.¹⁴²

¹⁴⁰ Bangla 2000, *Car bomb explodes at home of Philippine ambassador*, (2 August 2002) <http://www.bangla2000.com/news/archive/international/8-2-2000/news_detail4.html>

¹⁴¹ Malaysian embassy bombing, (23 May 2013), <<http://journalsrigunting.com/tag/kedutaan-besar-malaysia/>>

¹⁴² Levi Silalahi, Erwin Prima, *Tempo news, Teror Bom di Indonesia (Beberapa di Luar Negeri) dari Waktu ke Waktu*, (17 April 2004) <<http://tempo.co.id/hg/timeline/2004/04/17/tml.20040417-01.id.html>>

- d) A Bomb blasted on Christmas Eve, December 24, 2000. Another series of bomb blasts on Christmas Eve in several cities in Indonesia, it has gotten the lives of 16 people and injured 96 others and 37 cars also damaged.¹⁴³

Year 2001

- a) The Bombing at HKBP Church of Santa Anna, July 22, 2001. Kalimantan Region, East Jakarta, 5 people was killed.¹⁴⁴
- b) The Bombing in Plaza Atrium Senen, Jakarta, 23 September 2001. The bomb exploded in the Atrium Plaza, Senen, Jakarta. 6 people were seriously damaged.
- c) The Bombing at KFC restaurants, Makassar, October 12, 2001. The bomb explosion resulted in the glass, the ceiling, and neon sign KFC rupture. There were no damages. Luckily, Another bomb which was placed in The Makassar branch office of MLC Life didn't explode.¹⁴⁵
- d) The Bombing at School of Australia, Jakarta, 6 November 2001. Simple homemade bombs exploded in the courtyard of Australian International School (AIS), Pejaten, Jakarta.¹⁴⁶

Year 2002

- a) The Bombing at New Year, January 1, 2002. Mangosteen grenade exploded in front of the restaurant Bulungan, Jakarta. One person was killed and another wounded¹⁴⁷. In Palu, Central Sulawesi, four bomb blasts occurred at various churches. There were no fatalities.

¹⁴³ Tim Penulis, Detik.com, *Detik-detik Sebelum Aksi Bom Natal 2000 Christmas*, (8 May 2012), <<http://www.beritasatu.com/hukum/46781-detik-detik-sebelum-aksi-bom-natal-2000.html>>

¹⁴⁴ ICH/Darussalam dan Julianus Kriswantoro, Liputan 6 News, *Tiga Bom Ditemukan di Halaman Gereja HKBP*, (24 July 2001), <<http://news.liputan6.com/read/17015/tiga-bom-ditemukan-di-halaman-gereja-hkbp>>

¹⁴⁵ Iwan Taruna, Liputan 6 News, *Restoran KFC di Makassar Dibom*, (13 October 2001), <<http://news.liputan6.com/read/21665/restoran-kfc-di-makassar-dibom>>

¹⁴⁶ Human Terror, *List of terrorism in Indonesia on Human Terror*, *List of terrorism in Indonesia*, (31 July 2010) <<http://humanterror.blogspot.com.au/2010/07/list-of-terrorism-in-indonesia.html>>

- b) Bali Bombing, October 12, 2002. Three explosions occurred in Bali. 202 victims of the majority of Australian citizens were killed and 300 others were injured. At the same time, in Manado, North Sulawesi, simple homemade bombs also exploded in the office of Consul General of the Philippines, there were no casualties.¹⁴⁸
- c) The Bombing at McDonald's restaurants, Makassar, December 5, 2002. Homemade bomb wrapped in a steel plate container exploded in Makassar McDonald's restaurant. 3 people were killed and 11 wounded.¹⁴⁹

Year 2003

- a) Bombing at the Police Headquarter Complex, Jakarta, February 3, 2003, homemade bomb exploded in the lobby of Wisma Bhayangkari, Jakarta Police Headquarters. There were no fatalities.¹⁵⁰
- b) Bombing at Soekarno-Hatta Airport, Jakarta, 27 April 2003. the bomb exploded in the public areas of the terminal 2F, the international airport Soekarno-Hatta, Cengkareng, Jakarta. 2 people were seriously injured and eight other moderate and mild injuries.¹⁵¹
- c) JW Marriott bombing, August 5, 2003. The bomb destroyed part of the JW Marriott Hotel. 11 people were killed and 152 others were injured.¹⁵²

Year 2004

- a) The Bombing at Palopo, January 10, 2004. Killed four people.¹⁵³

¹⁴⁷ Tim Liputan 6 SCTV, Liputan 6 News, *Ledakan Bom Mewarnai Malam Pergantian Tahun* (2 June 2002), <<http://news.liputan6.com/read/26381/ledakan-bom-mewarnai-malam-pergantian-tahun>>

¹⁴⁸ Muhammad Darlis, Tempo Interaktif, *Bom di Gereja Pantekosta Palu Lukai Seorang Polisi*, (1 January 2002), <<http://www.tempo.co/read/news/2002/01/01/05817/Bom-di-Gereja-Pantekosta-Palu-Lukai-Seorang-Polisi>>

¹⁴⁹ Tim Penulis, Global Jihad, *Makassar McDonald Bombing*, (21 December 2008) <http://www.globaljihad.net/view_page.asp?id=1279>

¹⁵⁰ Tim Liputan 6 SCTV, Liputan 6 News, *Bom Meledak di Wisma Bhayangkari*, (3 February 2003), <<http://news.liputan6.com/read/48959/bom-meledak-di-wisma-bhayangkari>>

¹⁵¹ Ratna Nuraini, Teknologi news, *Duarr... Bom Guncang Kelima Bandara Ini*, (21 July 2013), <<http://teknologi.inilah.com/read/detail/2012432/duarr-bom-guncang-kelima-bandara-ini/870/5-bandara-soekarno-hatta-indonesia-2003>>

¹⁵² Tim Penulis Kompas, Kompas, *Catatan Ledakan Marriot Tahun 2003*, (17 July 2009) <<http://nasional.kompas.com/read/2009/07/17/10125777/catatan.ledakan.marriott.tahun.2003>>

- b) Australian Embassy Bombing, 9 September 2004. A large explosion occurred in front of Australian Embassy. 5 people were killed and hundreds injured. The explosion also resulted in damage to several buildings in the vicinity such as the Tower Plaza 89, Tower Grasia, and BNI Building.¹⁵⁴
- c) A bomb blast at Immanuel Church, Palu, Central Sulawesi on December 12, 2004.¹⁵⁵

Year 2005

- a) Two bombs exploded in Ambon on March 21, 2005.¹⁵⁶
- b) The Bombing at Tentena, May 28, 2005. 22 people were killed.¹⁵⁷
- c) The Bombing at Pamulang, Tangerang, June 8, 2005. The bomb exploded at the home page of the Expert Circuit Board Assembly Policy Mujahidin Indonesia M Iqbal alias Abu Jibril in Pamulang West. There were no fatalities.¹⁵⁸
- d) Bali Bombing, October 1, 2005. The Bomb detonated in Bali. At least 22 people were killed and 102 injured in the blast that occurred in R. AJA 's Bar and Restaurant, Kuta Square, Kuta Beach area and in the Nyoman Cafe, Jimbaran.¹⁵⁹
- e) The Bombing at Market Palu, December 31, 2005. The bomb exploded at a market in Palu, Central Sulawesi that killed 8 people and wounding at least 45 people.¹⁶⁰

¹⁵³BBC, *Four die in Indonesia cafe blast*, < <http://news.bbc.co.uk/2/hi/asia-pacific/3386113.stm>>

¹⁵⁴ Simon Jeffery, Mark Oliver and agencies, *The Guardian*, *Australian embassy bomb kills nine*, (9 September 2004), <<http://www.theguardian.com/world/2004/sep/09/indonesia.australia1>>

¹⁵⁵ Tim Liputan, *Indosiar News*, *Bom Meledak di Gereja Immanuel Palu Ciderai Seorang Satpam*, (12 December 2012), <http://www.indosiar.com/fokus/bom-meledak-di-gereja-immanuel-palu-ciderai-seorang-satpam_29499.html>

¹⁵⁶ Yusnita, *Tempo Interaktif*, *Bom Meledak di Batu Merah Ambon*, (21 march 2005), <<http://tempo.co.id/hg/nusa/maluku/2005/03/21/brk,20050321-69.id.html>>

¹⁵⁷ Den Tim Liputan 6 SCTV, *Liputan 6*, *Dua Bom Meledak di Poso, Lima Tewas*, (28 May 2005), <<http://news.liputan6.com/read/102428/dua-bom-meledak-di-poso-lima-tewas>>

¹⁵⁸ Umi, *Detik News*, *Komposisi Bom Pamulang Sama dengan Mercon*, (9 June 2005), <<http://news.detik.com/read/2005/06/09/114028/377954/10/komposisi-bom-pamulang-sama-dengan-mercon>>

¹⁵⁹ Raymond Bonner and Jane Perlez, *The New York Times*, *Bali Bombings Kill at Least 25 in Tourist Spots*, (2 october 2005), <<http://www.nytimes.com/2005/10/02/international/asia/02bali.html?pagewanted=all>>

¹⁶⁰ Aih, *Suara Merdeka*, *Bom Palu, Polisi Periksa 27 Saksi*, (2 January 2006), <<http://www.suaramerdeka.com/harian/0601/02/nas01.htm>>

Year 2009

July 17, 2009. Two powerful explosions occurred at the JW Marriott and Ritz-Carlton, Jakarta. The explosion occurred almost simultaneously at around 7:50 pm.¹⁶¹

Year 2010

Robbery of Bank CIMB Niaga in Medan September 2010.¹⁶²

Year 2011

- a) Bombing in Cirebon, 15 April 2011. Suicide bomb blast in a mosque during Muslim Friday prayers.¹⁶³
- b) The Bombing at Ivory Serpong, 22 April 2011. A planned bomb targeting the Christ Church Cathedral in Tangerang, Banten.¹⁶⁴
- c) The Bombing at Solo, 25 September 2011. Suicide bomb blast in GBIS Kepunton, Solo, Central Java after the worship service and the congregation out of church. One person suicide bombers were killed and 28 others seriously injured.¹⁶⁵

III. DISCUSSION**a. Counter Terrorism in Indonesia.**

Counter terrorist campaigns can be undertaken by military and paramilitary forces. These are long term policies of conducting operations against terrorist cadres, their bases, and support apparatuses. Counterterrorism refers to proactive policies that specifically seek to eliminate

¹⁶¹ Odi, Detik News, *Bom JW Marriott Meledak di JW Lounge, Bukan di Restoran Syailendra*, (18 July 2009), <<http://news.detik.com/read/2009/07/18/204111/1167801/10/bom-jw-marriott-meledak-di-jw-lounge-bukan-di-restoran-syailendra>>

¹⁶² Gus, Detk News, *Kronologi Perampokan Bank CIMB Niaga Medan Aksara*, (19 august 2010), <<http://news.detik.com/read/2010/08/19/120431/1423434/10/kronologi-perampokan-bank-cimb-niaga-medan-aksara>>

¹⁶³ Tim penulis, BBC Indonesia, *Polisi menangkap 5 orang terkait kasus bom Cirebon*, (8 october 2011), <http://www.bbc.co.uk/indonesia/berita_indonesia/2011/10/111008_limatersangkabomcirebon.shtml>

¹⁶⁴ Inggried, Kompas.com, *Bom Serpong Sempat Meledak*, (22 April 2011), <<http://nasional.kompas.com/read/2011/04/22/18494676/Bom.Serpong.Sempat.Meledak>>

¹⁶⁵ Agus Mulyadi, Kompas.com, *Bom Solo Bagian dari Upaya Adu Domba*, (25 September 2011), <<http://nasional.kompas.com/read/2011/09/25/15260572/Bom.Solo.Bagian.dari.Upaya.Adu.Domba.>>

terrorist environments and groups, Regardless of which policy is selected, the ultimate goal of counterterrorism is clear: to save lives by proactively preventing or decreasing the number of terrorist attacks. As a corollary, antiterrorism refers to target hardening, enhanced security and other defensive measures seeking to deter or prevent terrorist attacks¹⁶⁶.

In Indonesia, there are 3 (Three) departments which are responsible in combatting terrorism:

b. Police: Detachment 88

Indonesian National Police institution (referred to as the Police) is the vanguard of security in Indonesia. The development of the police cannot be separated from the history of the struggle for independence of the Republic of Indonesia since Indonesian proclamation. In the past, the police has been faced with tasks that are unique and complex. In addition, to manage the security and public order in times of war, the police also directly involved in the fight against the invaders with other military armed forces..¹⁶⁷

Currently, the performance of the police has not only focused current conflict / violence, but also on the preventive side. This is also straight with the vision of the Police is to become a patron and defender whose always compact to the society, as well as a professional and proportional law enforcement and always uphold the supremacy of law and human rights¹⁶⁸. In order to achieve this vision, the police have missions¹⁶⁹:

- a) Aspects of security, warranty, security and peace so that people are free from physical interference or psychological interference

¹⁶⁶ Martin, Gus, *Understanding terrorism*, Sage publications, 2006, 476

¹⁶⁷ POLRI, Sejarah POLRI, <<http://www.polri.go.id/organisasi/op/sp/>>

¹⁶⁸ POLRI, Visi POLRI, <<http://www.polri.go.id/organisasi/op/vm/>>

¹⁶⁹ POLRI, Misi POLRI, <<http://www.polri.go.id/organisasi/op/vm/>>

- b) Providing guidance to the public through preemptive and preventive efforts in order to raise the awareness of legal in society (Law abiding citizen)
- c) Maintaining the public order and safety with regard to norms and values that apply in the frame of territorial integrity of the Unitary Republic of Indonesia.
- d) Continuing to restore the security in several areas of conflict in order to ensure the integrity of the Unitary Republic of Indonesia

In case of combating terrorism in Indonesia, the police also has an important role, especially with the establishment of special anti-terror Detachment named Detachment Anti-Terror Special 88 (hereinafter referred to Detachment 88). The Establishment of Detachment 88 has a long history, it was associated with the institutional system of defense and security in Indonesia.

The momentum of the global campaign against terrorism, war, was a turning point for strengthening and developing of anti-terror institutions which are well established, reliable and professional. The strengthening of anti-terror institution is eventually done in the police service, beside this, other than as a strategy to gain support and assistance from the western countries to keep giving aid to build anti-terror institutions, and the Police also regarded as an institution that is able to develop the anti-terror institution.

When the global fight against terrorism campaign was getting stronger, the Indonesian government responded by issuing a Presidential Instruction (Instruction) No. 4 Year 2002 on Terrorism, which was then reinforced by the issuance of the National Policy in combatting

terrorism in the form of Regulation in Lieu of Law (GRL)¹⁷⁰ No.1 and 2 of 2002. As the response of Instruction, then the ministry of politics and security coordinator formed the Anti-Terrorism Coordinating Desk directly under the coordination of the Ministry of Politics and security coordinator.

In case of anticipating the terrorism, the Indonesian national police department has established 3 departments in combatting terrorism:

1. Detasemen C Resimen IV Gegana.
2. Police Bomb Task Force Detachment 88.

Besides the Detasement C resimen IV *Gegana* and Police Bomb Task Force, Indonesian National Police also has a similar organization with the name of the Anti-Terrorism Directorate VI under the Criminal Investigation Police Headquarters. The existence of the Anti-Terrorism Directorate VI overlapped and had the same functions and duties as are carried out by the Police Bomb Task Force. Then, the Police Headquarters finally reorganized the Directorate Anti-Terror VI, then the Chief of Police formally published the Skep police no. 30/VI/2003 dated June 20, 2003 marked as the establishment of the Special Detachment 88 Anti-Terror Police, or known as AT Police Detachment 88. Detachment 88, is defined here as a highly trained police unit that specialize in unconventional operations. This unit is usually not organized in the same manner as conventional forces, because their missions require them to operate quickly and covertly in very hostile environments. Operations are frequently conducted by small teams of operatives, although fairly large units can be deployed if required by circumstances. Depending on its missions, Detachment 88 is trained for long range, reconnaissance, surveillance, “surgical”

¹⁷⁰ GRL is a form of legislation enacted by the President in emergency circumstances. In the hierarchy of Indonesian law, a GRL(‘perpu’) is one rank below a law or act (‘Undang-undang’). Under the Constitution it is required for the Perpu to be brought before Parliament approval.

punitive raids, hostage rescue, abductions and liaisons with allied counterterrorist forces. It's training and organizational configurations are ideally suited to counter terrorist operations.

The existence of the Skep police as the issuance of Law no. 15 of 2003 on Terrorism or commonly called the Anti-Terrorism Act, which reinforce theof the police as a key element in the eradication of terrorism, while the TNI (Army) and BIN are the only supporting elements of the eradication of terrorism. The condition is actually in line with the Instruction and Government Regulations, which issued by the government before the legislation of combating terrorism is enacted into law.

Based on article 46 Paragraph 7 Perkap¹⁷¹ No 21 Tahun 2010, Detachment 88 or commonly known as *Densus* 88 has tasked in follows:

Detachment 88 charges of organizing the functions of intelligence, prevention, investigation, prosecution, and operational assistance in the framework of the investigation of criminal acts of terrorism.

The prevention efforts undertaken by the Police Headquarters is still less than optimal, this is due to three things that become obstacles 1) anti-terror entity's organizational structure, 2) the number of existing personnel and 3) judicial obstacles.

1. Anti-terror entity's organizational structure

Currently in the entity of Indonesia National police, there are three departments who have the duties and functions that handles terrorism, they are Detachment 88, Direktorat VI anti-terror, Datasemen C Resimen IV Gegana Brimob. Although the Detachment 88 was formed, the existence of three units still maintained, with the assumption that each entity can co-exist and synergy, but in fact the existence of three units in one institution and

¹⁷¹ Perkap is a form of legislation enacted by the Indonesia's police.

small differences between the unit. Indonesian National police contains an internal risk conflict and surely will hamper the prevention of terrorism in Indonesia.

The existence of three anti-terror in one department is being part of unfavorable, the internal police at least require clarification on the role and each main function. But, until now, the role and function of the Direktorat VI anti-terror, Detachment 88 and Datasemen C Resimen IV Gegana Brimob are almost identical and similar to each other, although the problem has not happened until now, but it is quite possible that problems will arise soon.

2. The number of existing personnel

Related to the number of personnel of Detachment 88, until now there are 400 personnel have joined Detachment 88 which has spread in some areas in Indonesia. Viewing the tasks and functions of Detachment 88, numbers are still too low. This because, many of its personnel doing a long term under cover, whereas, in Indonesia there are still a lot of terrorism, critical spots so that they need more numbers to back up.

3. Judicial obstacles.

It is associated with the procedures, duties and responsibilities that must be performed by Detachment 88. Detachment 88 is also given the authority to make arrests even the authority to shoot dead if endangered. However, the arrestment period only given 2 weeks or 14 days, actually this is a very short period of time, remembering the integration and examination of terrorist is longer and harder than any other common criminal suspect, so it takes longer time.

c. BNPT (The Interdepartmental National Antiterrorism Agency)

Based on the decision of the Ministry of Political and Security coordinator number *kep-26/Menko/Polkam/11/2002*. Then the Minister of Political and security coordinator formed the desk in preventing terrorism (DKPT) or in Indonesian version known as Desk *Koordinasi Pemberantasan Terorisme*. The DKPT was given a task to assist the Minister of Political and security coordinator in formulating policies for the prevention of terrorism, which includes aspects of deterrence, prevention, reduction, termination settlement, and all legal action if necessary. In its journey, DKPT subsequently changed the name and function into the Interdepartmental National Antiterrorism Agency (BNPT) which has duties and functions as set out in the Presidential Decree No. 46 Year 2010 as below¹⁷²:

1. Formulate the policies, strategies, and also national programs in combating terrorism
2. Coordinating with the government agencies which involved terrorism field area.

Based on that, then the function of BNPT is as below¹⁷³:

1. Forming the policies, strategies and programs in the counterterrorism field area
2. Monitoring, analysis, and evaluation in counterterrorism field area
3. A Coordination in the implementation of prevention and fight against radical ideology propaganda.
4. The implementation of deradicalization¹⁷⁴
5. The protection of objects as potential targets of terrorism attacks.
6. The implementation of international cooperation in counterterrorism field area

¹⁷² BNPT, Tugas pokok dan fungsi BNPT, < <http://www.bnpt.go.id/profil.php> >

¹⁷³ BNPT, Fungsi BNPT, < <http://www.bnpt.go.id/profil.php> >

¹⁷⁴ De-radicalization is a misleading term to encompass what are context specific and culturally determined efforts to reduce the risk of involvement or re-engagement. Hence 'risk reduction' is a more appropriate and accurate description of this progress.

The prevention efforts undertaken by the Interdepartmental National Antiterrorism Agency are still less than optimal, this is due to two things that become obstacles:

1. 15 year 2003 and the Presidential regulation No. 46/2010 are the only regulation in combatting and preventing terrorism.
2. Problems of Human Resources (HR) which assessed in BNPT and also need a new adjustment in infrastructure side.

d. The Correctional Facility.

From the previous discussion revealed the fact that in a criminal case as extraordinary crime, both the punishment of material and formal criminal has some differences with other criminal cases. So that the process of investigation, prosecution and court proceedings also have its own peculiarities. The next step is determining the treatment of terrorism prisoners in the correctional system as a process to create a presence of reformation, retribution, restraint, and deterrence to the prisoners themselves even the impact socially.

Inmates criminal acts of terrorism in general have a strong ideology that is considered a crime that they did is Jihad which struggle to defend religion. Besides having a hard ideology, the criminal acts of terrorism prisoners also have a closed stance with the other inmates and even closed on programs that should be taken by the prisoners. However, not most of them has closed character, there are some that are extroverted to the surrounding environment in prison.

By looking at the characters of terrorist, the correctional facility's officer will separate the terrorist's room with other inmates. This separation serves to facilitate the officers to conduct surveillance against terrorism prisoners. With such control all activities, the terrorist is closely

monitored by the officer or inmate who is believed to be a spy. This is done in order to avoid the dissemination of the Jihad concept to all inmates in a correctional facility.

One of the correctional facility's programs is the development of legal awareness, the goal of this program is to achieve a high level of legal awareness in the society. This program is also to guide the terrorist to recognize the rights and obligations in order to participate uphold law and justice, order, peace, rule of law and the behavior of every Indonesian citizen.

Related to the implementation of legal awareness program, there is one other program which given to the terrorist. The program, called de-radicalization. De-radicalization is a misleading term to encompass what are context specific and culturally determined efforts to reduce the risk of involvement or re-engagement. Hence 'risk reduction' is a more appropriate and accurate description of this progress.

The methodology developed by Indonesia is called "cultural interrogation." It requires the interrogator to be immersed in the culture of the terrorist, understand his hopes and fears, and speak his language.

Besides that, the program is reuniting the terrorist with their families, and to remind them of their earthly responsibilities as husbands and fathers. The police pay for the families' travel and also gives them some additional financial support. Since there are no governments or police funds available for this activity, the interrogators are forced to raise funds through private donations from friends and supporters.

From this terrorism prevention program, this program has been very successful in eliciting information that has enabled the police to disrupt the terrorist network in Indonesia. Some individuals are cooperating privately with the police to disengage another militants from another Jihad network.

So far, this approach is not successful works to all inmates, some show no remorse for their involvement in terrorism and tell the interrogators that one day they will switch places, the terrorist will interrogate the police, or that their struggle will continued by their children or grandchild.

IV. CONCLUSION

Whereas government agencies (stakeholders) which involved in the handling, prosecution and prevention of terrorist acts have yet to implement the de-radicalization program effectively. The ministry of law and human rights, BNPT (The Interdepartmental National Antiterrorism Agency) and Police Headquarters have a slightly different program on counter terrorism in Indonesia.

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MODERN SLAVERY IN INDONESIA: BETWEEN NORMS AND IMPLEMENTATION

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Abstract

People in the 21st century are still sold like objects, forced to work for little or no wages paid and at the mercy of 'employer'. Global Slavery Index (GSI) in 2013 showed that an estimated 29.8 million people living in modern-day slavery. In Indonesia there are 210 970 people living in slavery. Although Indonesia has some of the laws governing modern slavery are included in the Law of Anti-Trafficking. This paper tries to find the norms and implementation in practice of modern slavery. How norms are implemented by the government and what barriers to enforce the law.

Keywords: Forced Labor, Slavery, Human Rights, Human Trafficking

I. INTRODUCTION

Slavery is a problem that should be a concern to the international community as a violation of human rights. Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are carried out. The international prohibition on slavery is absolute; there are no exceptions (as there are for forced labor). Slavery is an institution in which the slave master's exercise of the rights of ownership destroys the human personality - the person as a bearer of rights - and reduces the slave to chattel, without rights. Human rights are the basic rights and freedoms that belong to every person in the world. Based on United Nations Universal Declaration of Human Right 1948 (UDHR), No one shall be held in slavery and the slave trade shall be prohibited in all their forms. But in reality, some people now in the 21st century are still sold like objects, forced to work for less Money or not paid at all and

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at the complete mercy of their 'employers'.¹⁷⁶

Definitions of modern slavery hardly found in any literature. But is in slavery if they are:

1. Forced to work - through mental or physical threat;
2. Owned or controlled by an 'employer', usually through mental or physical abuse or the threat of abuse;
3. Dehumanized, treated as a commodity or bought and sold as 'property';
4. Physically constrained or has restrictions placed on his/her freedom of movement.

Global Slavery Index (GSI) in 2013 showed that an estimated 29.8 million people were forced to work and paid less than they should accept or unpaid.

Table 1:¹⁷⁷

Countries with the highest estimate population in Modern Slavery

Country Name	Rank	Estimate of Population in Modern Slavery	Lower Range of Estimate	Upper Range of Estimate
India	1	13,956,010	13,300,000	14,700,000
China	2	2,949,243	2,800,000	3,100,000
Pakistan	3	2,127,132	2,000,000	2,200,000
Nigeria	4	701,032	670,000	740,000
Ethiopia	5	651,110	620,000	680,000
Russia	6	516,217	490,000	540,000
Thailand	7	472,811	450,000	500,000
Democratic Republic of the Congo	8	462,327	440,000	490,000
Myanmar	9	384,037	360,000	400,000

¹⁷⁶ What Is Modern Slavery, (6th April 2014)
<http://www.antislavery.org/english/slavery_today/what_is_modern_slavery.aspx>

¹⁷⁷ Ibid

Bangladesh	10	343,192	330,000	360,000
Tanzania	11	329,503	310,000	350,000
Sudan	12	264,518	250,000	280,000
Nepal	13	258,806	250,000	270,000
Uganda	14	254,541	240,000	270,000
Vietnam	15	248,705	240,000	260,000
Indonesia	16	210,970	200,000	220,000

The table above shows that Indonesia is ranked 16 in modern slavery, with around 210,970 Indonesian people enslaved. Modern slavery practices in Indonesia can be seen in some companies where workers are treated like a slave, not like the other workers.

The forms of slavery are various. Some of the forms of slavery are Bonded Labor, Forced Labor, Descent-based slavery, Trafficking, Child slavery, early and Forced Marriage. This paper would be focused on Forced Labor. Forced labor is any work or services which people are forced to do against their will under the threat of some form punishment. Almost all slavery practices, including trafficking in people and bonded labor, contain some element of forced labor.

The worst case is always remembered as an act of Slavery in Indonesia is the case in Pot Plant, which is located in Tangerang, West Java, Indonesia. The owner gets 11 years after he was proven guilty of holding employees at his factory captive, including several minors, and make them work without being paid. They were also not allowed to change their clothes and all their belongings were confiscated by their employer. However, protecting human rights is one of the Indonesian Government responsibilities. Being a forced labor means living in a modern slavery. Therefore, this paper will try to answer: How is forced labor according to Indonesian law? What is Indonesian Government effort in combating forced labor?

II. LEGAL MATERIALS AND METHODS

A. Type of Research

Type of research that is used by author in researching problems in this research is a norm. Normative research is a process to identify the rule of law, legal principle, even law doctrines in order to answer the law issue.

B. Types of Legal materials

1) Primary Legal Materials

Primary legal materials are an authoritative legal materials, which means has an authority. Primary legal materials used are:

- a. The Slavery Convention 1926
- b. Indonesian constitution 1945
- c. Act number 39 year 1999 on Human Rights
- d. Act Number 13 Year 2003 on Manpower
- e. Act no 21 year 2007 on Eradication of the Criminal Act of the Trafficking in persons
- f. Indonesian criminal code

2) Secondary Legal Materials.

Secondary legal materials that are used in this paper is the legal materials that explain the primary legal materials, in the form of literatures or books related to a modern form of slavery.

3) Tertiary Legal Materials.

Tertiary legal materials that are used in this paper is materials which could provide clues or explanations towards primary legal materials, such as dictionaries,

articles, law journals and from the internet.

III. Result and Discussion

Forced labor According to Indonesian Law

Indonesia is a larger country with the population more than 200 million people, with 7, 15 million people unemployed.¹⁷⁸ Poverty is almost everywhere and it makes them to accept a wide variety of work, and it could be one of the factors of human trafficking in Indonesia. We must remember that slavery is a type of human trafficking.

International concern with slavery and its suppression is the theme of many treaties, declarations and conventions of the nineteenth and twentieth centuries. The first of three modern conventions directly related to the issue is the Slavery Convention of 1926, drawn up by the League of Nations.¹⁷⁹ Based on The Slavery Convention 1926 article 1, Slavery can be described as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. People who forced to work and paid nothing is a kind of modern slavery. The regulation concerning about modern slavery is not just The Slavery Convention 1926, but also Suppelementary Slavery Convention, UN Trafficking Protocol, Abolition Forced Labor Protocol, and etc. It means since 1926 the world has agreed that no one shall be in slavery.

Although Indonesia is one of UN members, but some of those conventions have not been ratified by The Indonesian Government.

¹⁷⁸ Official report of Central Bureau of Statistic of Manpower Affairs February 2014 No. 38/05/Th. XVII, 5 May 2014

¹⁷⁹ Factsheet No 14, Contemporarry Forms of Slavery (26th June 2014)
<<http://www.ohchr.org/Documents/Publications/FactSheet14en.pdf>>

Table 2:¹⁸⁰

The Conventions Relevant to Modern Slavery

INDONESIA	RATIFIED
THE SLAVERY CONVENTION	NO
SUPPLEMENTARY SLAVERY CONVENTION	NO
UNTRAFFICKING PROTOCOL	YES
ABOLITION FORCED LABOR CONVENTION (ACT NUMBER 19 YEAR 1999)	YES
WORST FORMS OF CHILD LABOR CONVENTION	YES
CRC OPTIONAL PROTOCOL ON THE SALE OF CHILDREN	YES

From the table and explanation above shows that the slavery convention and supplementary slavery convention, which are the “main” conventions concerning about slavery has not been ratified by Indonesia. But it does not mean that Indonesia has no regulation about slavery practice. The Indonesian constitution year 1945 Article 28I (1) constitution of Indonesia ensures that:

The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.

Indonesian citizens are subjected to modern slavery in various forms.¹⁸¹

(1) No one shall be held in slavery or servitude

¹⁸⁰ The table is compiled from many resources.

¹⁸¹ Walk Free Foundation, 2013. Global Slavery Index 2013 : Indonesia (6th April 2014) <<http://www.globalslaveryindex.org/country/indonesia/>>

(2) *Slavery, the slave trade and servitude shall be prohibited in all their forms*

a. Occupational safety and health protection;

b. Protection against immorality and indecency;

“Slavery is the status or condition of a person who is under the ownership of another person. The slavery-like practice is the act to put someone under another person's power so that the person is not able to resist the job that is unlawfully commanded by another person. Even that person does not want to do it.”

The penal code also gives punishment for the employer who does the slavery-like practices. Indonesian penal code (Kitab Undang-Undang Hukum Pidana) article 333 (1) stated that:

Any person who with deliberate intent and unlawfully deprives someone or keeps someone deprived of his liberty, shall be punished by a maximum imprisonment of eight years.

Those articles in Indonesian national law above shows that Indonesia ensures that no person shall be in enslavement, or in any forms of it. Indonesia has a faith to protect the human rights.

Global Slavery Index 2013 states that Corruption weakens Indonesia's response to modern slavery.¹⁸² However, to end the modern slavery practice, especially the forced labor practice, it needs government's attention to monitoring and to solve it.

The Indonesian Government Effort in Combating Forced Labor

The preamble of UDHR 1948 that was adopted on 10 December 1948 states that recognition of the inherent dignity and of the equal and inalienable rights of all members of the

¹⁸² Walk Free Fondation, op.cit

human family is the foundation of freedom, justice and peace in the world.¹⁸³ The concept of human rights is related to the ethics and morals.¹⁸⁴ Protecting human rights is not as easy as it seems. It does not only need the government, but also the other people to protect human rights, starts from respect to others.

To end the practice of forced labor means giving back the human dignity of the labor force. They will regain their lost desire and can build a better life. It will make manifest of human equality. Then there arose a question, how to put an end to this practice?

Over the past decade the Government of Indonesia has demonstrated a clear commitment to address human trafficking. It all can be shown when Indonesia adopted Anti-Trafficking Law and also founded “Task Force on Preventing and Handling Human Trafficking”. This task force functioned to advocacy, socialization, monitoring the protection of human trafficking victims, monitoring law enforcement, reporting and evaluating. Besides that, The Indonesian government has been maximizing the task of the ministry of law and human rights and national police.

But even though Indonesian government has done so many things, the fact is combating forced labor is not easy. There are some problems handling human trafficking in Indonesia. Ledia Hanifa, member of the House of Representative Indonesia on her presentation stated that the sectorial budget bundling, lack of Number of Human Resources, and Insufficient Infrastructure are the main problems in handling human trafficking. Then again, Indonesia has more than 17.000 islands so that the enforcement of the law will be so challenging because the central government is located in Jakarta. Although the task force is made in every city in Indonesia, but the coordination between them will be really difficult if the government not monitoring regularly.

¹⁸³ Malcom N. Shaw QC, *Hukum Internasional*, Bandung, Nusamedia, 2013, 261

¹⁸⁴ *Ibid*

Then what the government should do is to improve the regulation so that the laborer will be well-protected under the law. Indonesia needs to amend the Act number 13 year 2003 on manpower and explain about slavery-like practices so that all companies will not make any space to do a modern-day slavery. Governments should actively enforce the laws to ensure that all slaves, victims of forced labor, debt bondage and trafficking are free, and all slave holders, employer/enforcers and traffickers are prosecuted and required to pay damages to their victims.

Governments that ratify Conventions are obliged to incorporate them into their own laws and to make sure that these laws are applied and respected. The International conventions were ratified by Indonesia related to the Modern Slavery Practice, but as the writer stated above that the Slavery Convention and Supplementary Slavery convention has not been ratified by the Government. Indonesia should have to ratify those conventions so that Indonesia can implement it to national laws.

The government also needs to be regulated and monitoring regularly to make sure that the laws are enforced by the corporation. Indonesian government also should make an agency which concern to report regularly that if there is a violation, especially if there is a practice of forced labor or all-kinds of slavery in Indonesia, Creating a National Action Plan for trafficking in person, Establish Integrated Services for Witnesses and / or Victims of human trafficking in the District / City. Besides that, the Indonesian government should educate people since the factor of human trafficking caused by low education. To change and even to end the practice of slavery, what governments should have to give to people is education about what the slavery is, what the slavery-like practices, and in what forms the slavery in modern-day. When people educated about slavery, they at least will know whether they were treated like a slave or not and be reported to the government whether they are in a slavery condition or not.

IV. CONCLUSION

Based on The Slavery Convention 1926 Article 1 (1), Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. Slavery in Indonesia is regulated under the forced labor practice has to end. The government needs to ratify the slavery convention and the supplementary convention and implement those conventions in Indonesia. Besides, The Indonesian government should have to amend the regulation which is regulating about forced labor, or modern slavery practices. Indonesia also needs to educate people about slavery so they can know whether they are in slavery or not.

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