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# Critique of the Criminalization of Communism Dissemination in Indonesia: A Lesson from Poland<sup>2</sup>

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## Abstract

This study discusses the criminalization of a communism dissemination in Indonesia. The new Penal Code regards this offence as an offence against national security. Indonesia has a horrible narrative on the communists' atrocity and their coup attempt in 1965. However, we should reconsider the existence of this offense. This study is a documental study employing a historical legal and a micro-comparative law approaches, comparing this communism dissemination offence in Indonesia with the situation in Poland. The results show that the criminalization should be based on legal protection of the public order and should prove the presence of clear and present danger. Finally, the formulation offences must be strict to protect freedom of expression.

**Keywords:** criminalization, communism, Indonesia.

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# Krytyka kryminalizacji rozpowszechniania komunizmu w Indonezji – lekcja z Polski<sup>3</sup>

## Streszczenie

W artykule omówiono kryminalizację szerzenia komunizmu w Indonezji. Nowy Kodeks karny uznaje to przestępstwo za przestępstwo przeciwko bezpieczeństwu narodowemu. Indonezja ma straszną narrację na temat okrucieństwa komunistów i ich próby zamachu stanu w 1965 r. Powinniśmy jednak ponownie rozważyć istnienie tego przestępstwa. Niniejsze opracowanie ma charakter studium dokumentalnego, w którym zastosowano podejście historyczne i prawo mikroprównawcze. Porównano przestępstwo szerzenia komunizmu w Indonezji z sytuacją w Polsce. Wyniki pokazują, że kryminalizacja powinna opierać się na ochronie prawnej porządku publicznego i wykazywać istnienie wyraźnego i aktualnego zagrożenia. Wreszcie formułowanie przestępstw musi być rygorystyczne, aby chronić wolność słowa.

**Słowa kluczowe:** kryminalizacja, komunizm, Indonezja.

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## Introduction

Pancasila is Indonesia's sole ideology. There was once an attempt to replace the Pancasila ideology with communism. In 1965, the leadership of the Indonesian army accused the Indonesian Communist Party (PKI) of orchestrating that coup.<sup>4</sup> This incident has affected Indonesia's stance on communism. Articles 188 and 189 of the Penal Code ban the dissemination and development of communism together with Marxism-Leninism as teachings that contrary to Pancasila. This offence is an offence against national security. Indonesia is not the only country which bans the dissemination of a certain narrative in the past. Poland also criminalizes any act having or publishing any substance containing fascist, communist, and other totalitarian symbolism.<sup>5</sup>

The state is authorized to criminalize a public statement threatening national security. The interests of national security are placed higher than any other interests, so freedom of expression can be restricted. If there is a personal interest pushing other people or another group of people to express their interest, this interest shall be suppressed by the interests of national security.<sup>6</sup> Nevertheless, that criminalization can only be made to a highly threatening scale. Only the need to prevent immediate and substantial harm to the society can override such privileges.<sup>7</sup>

Based on this description, this study serves as a critique on the criminalization of communism dissemination in Indonesia. This study serves two purposes. First, it finds the base for the criminalization of the communism dissemination in accordance with the current Indonesian situation. More than 50 years after the 1965 event have passed; situations have changed. Since 1989, communism has been in decline globally; in fact, many observers claim that communism has demised, since it has failed the test.<sup>8</sup> Therefore, we need to reconsider the criminalization of communism dissemination. Second, it determines the scopes of the criminalization in accordance with the criminal law principles which do not restrict freedom of expression. For

<sup>4</sup> K.W. Fogg, *Indonesian Socialism of the 1950s: From Ideology to Rhetoric*, "Third World Quarterly" 3, 2020, p. 465.

<sup>5</sup> A. Fijalkowski, *The Criminalisation of Symbols of the Past: Expression, Law and Memory*, "International Journal of Law in Context" 2014, 3, pp. 298–289.

<sup>6</sup> J. Feinberg, *Freedom and Fulfillment: Philosophical Essays*, New Jersey 2021, pp. 135–136.

<sup>7</sup> J.A. Corlett, *The Philosophy of Joel Feinberg*, "The Journal of Ethics" 2018, 1, p. 134.

<sup>8</sup> L. Holmes, *Communism: A Very Short Introduction*, New York 2009, p. 118.

this criminalization to take place, there should be an immoral behaviour which will result in a serious harm. On the other hand, that criminalization must not restrict freedom of expression.<sup>9</sup> Specifically, this study criticizes the formulation of the communism dissemination offence in the new Penal Code which passed in January 2023.

## Research Method

This is a documental study utilizing secondary data from existing documents, either from previous studies or data generated for non-study purposes.<sup>10</sup> To achieve its objectives, this study employs two approaches. First, a historical legal approach exposing the social transformation dimension of law and it gives clues for understanding the present law.<sup>11</sup> This study elaborates on the development of norms banning the dissemination of communism from three eras in Indonesia. Second, it applies a micro-comparative law which means the comparison between a certain law such as a law and the court's rulings with topics of certain aspects from two legal systems.<sup>12</sup> Poland was selected because this country has had a horrible history on communism and the criminalization of communism dissemination in public.

## Pancasila and Communism

Pancasila is an ideology attempting to unite Indonesian people who are pluralistic in terms of ethnic groups, religions, and ideologies. Pancasila serves as the middle ground over two ideologies, capitalism and socialism–communism. Pancasila declares Indonesia as a religious state without associating or relating the latter to a certain religion.<sup>13</sup> The first principle 'Belief in the one and only God,' it means that Pancasila serves as platform for religious diversity, since there are no official religions serving as the basis for the establishment of the Republic of Indonesia, though most Indonesian people are Muslims. Pancasila defines democracy as popularism and consultation aimed at achieving a consensus in the family or togetherness that is

<sup>9</sup> A.P. Simester, A. von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, Oxford 2011, pp. 119–130.

<sup>10</sup> R. Singleton, B.C. Straits, *Approaches to Social Research*, Oxford 2018, p. 326.

<sup>11</sup> P.I. Bhat, *Idea and Methods of Legal Research*, New Delhi 2020, p. 206.

<sup>12</sup> P.D. Cruz, *Comparative Law in a Changing World*, London 2015, p. 227.

<sup>13</sup> B.F. Intan, *"Public Religion" and the Pancasila-Based State of Indonesia An Ethical and Sociological Analysis*, New York 2006, p. 19.

not based on absolutism. Pancasila defines social justice as a behaviour of giving other people's property rights to realize a prosperous society. The fulfilment of this right should be carried out fairly and evenly regardless of the person's ethnic group, religion, ideological stance, and economic level.

Communism derives from Karl Marx's views criticizing capitalism. In the production system, the proletariat were so exploited that their conditions worsened, so their social and political positions were affected.<sup>14</sup> A collision between the bourgeoisie and the proletariat would be manifested through a revolution transforming them into a new society namely a communist society starting from the transitional era, namely proletariat's dictatorship which would be followed with the administrative government dominated by the communists. Marx stated that communism was a movement made to abolish oppression of the proletariat taking place at that time.<sup>15</sup>

Lenin gave a new approach to Marx's communism regarding the class collision by emphasizing the communism's organizational strategies. Marx, who was a thinker trying to change the world with his ideas, stated that economic development could not be intervened, and every country had to go through several capitalism stages before being ripe for a communist revolution. Unlike Marx, Lenin was a master organizer and a political leader who aimed at one objective, namely to seize power in his own country, Russia, to reshape it pursuant to the communist principles. Lenin stated that a social revolution was inevitable by destroying the weakest points in terms of both the political and organizational sides of the capitalist group. The proletariat possessing political understanding or mass organization capability would ensure the creation of the communist society and state.<sup>16</sup>

Pancasila's values conflict with communism in terms of religion and atheism. Pancasila reflects on the religious Indonesian people, so religion is placed as the first principle. That religion placed as the first principle shows that religious consideration and contribution play an important role in public affairs, including civil society life, human rights recognition, democracy, and social justice.<sup>17</sup> This view regarding the importance of religion in the life of a nation differs from Marx's view declaring the religion to be the opium of the people. Religion is an illusory happiness, and by abolishing religion, the oppressed group is required to get rid of that illusory happiness and seek true happiness. God is not the creator of man,

<sup>14</sup> W.J. Morgan, *Marxism-Leninism: The Ideology of Twentieth-Century Communism*, [in:] James Wright (ed.), *International Encyclopedia of the Social & Behavioral Sciences*, Oxford 2015, pp. 656–656.

<sup>15</sup> L. Holmes, op. cit., pp. 4–6.

<sup>16</sup> W. Ebenstein, *Today's Isms: Communism, Fascism, Capitalism, Socialism*, New Jersey 1973, pp. 31–33.

<sup>17</sup> B.F. Intan, op. cit., p. 19.

since man creates himself through the performance of productive labour.<sup>18</sup> In its development, communism in Russia and the Soviet Union at that time tried to replace religion with 'scientific atheism' serving as the hallmark of communism.<sup>19</sup> This view does not prohibit a person to embrace a religion, but the arrangement of religious life is not based on the belief in God, since God is illusory and nonconcrete. The one-party government replaces religious ceremonies and rituals in public and private spaces with secular rituals to control the religious supply in public life so that the state's ownership over the means of production can be centralized. Religion is deemed to conflict with the communism principle requiring a person to voluntarily renounce his or her private ownership rights of his or her property to be a collective property managed by one party. The needs for religion are eliminated by weakening or removing the capacity of religious organizations and leaders. After religion is weakened, Marxism–Leninism loosens up and tolerates religious life in which the religious organizations can serve their adherents in a limited fashion on the condition that they accommodate communism in their religion. This situation explained the existence of the Orthodox Church during the communist regime.

## Communism in Indonesia

During President Soekarno's administration (1945–1965), communism was well-accepted. Communism was represented by the PKI. Public acceptance of communism could be observed from the fact that there were many PKI members and sympathizers. With its hammer and sickle symbol, the PKI attracted the attention of many Indonesian villagers, since the hammer and the sickle were the main tools employed by the farmers for farming. The PKI claimed itself as the common people's party, it frequently addressed and voiced the community's concerns in various regions. The PKI's programmes were also adjusted to the needs of the common people such as demand for a better pay, distribution of the land, healthcare, and educational assurance. The PKI's main political opponent was the Masyumi Party, which issued a *fatwa* against communism, stating that those embracing communism were those refusing God, did not believe in God, and were heretic. The PKI had such a dynamic relation with Soekarno. The PKI criticized and supported Soekarno's policies. In 1959, Soekarno started to positively support the PKI, which consistently

<sup>18</sup> T.J. Blakeley, *Marxist-Leninist Scientific Atheism*, "Inquiry: An Interdisciplinary Journal of Philosophy" 1966, 1–4, p. 31.

<sup>19</sup> S. Pfaff, *Religion under Communism: State Regulation, Atheist Competition, and the Dynamics of Supply and Demand*, [in:] R.M. McCleary (ed.), *The Oxford Handbook of the Economics of Religion*, New York 2012, p. 1.

supported Soekarno's nationalistic political views.<sup>20</sup> Communism encouraged land reform and inspired the making of the Agrarian Act of 1960. From the very beginning, the PKI had focused its attention on various land reform programs serving as the PKI's revolutionary aspiration on a fair distribution of land.<sup>21</sup> PKI raised various issues on land reform, land rent, and landlord, calling for the nationalization of land and distributing it to the farmers for their personal interests. The position of communism changed after in 1965. PKI was accused of being behind the coup attempt by kidnapping and assassinating several armies general in its attempt to replace Pancasila ideology with communism.<sup>22</sup>

During the President Soeharto's administration (1966–1998), the People's Consultative Assembly issued a decree that declared the PKI as a proscribed party and banned communism in Indonesia. Communism was deemed to be a dangerous ideology, thus conflicting with Pancasila. During this era, PKI members and sympathizers were forcibly disappeared from the society. Many people consisting of soldiers, local elites, and civilians were mobilized to forcibly disappear those accused of being PKI members and sympathizers. This mobilization had not come without conflicts between the PKI and the Islamists, and landowners. The Islamists thought that communism would pose a threat to Islam, while the landowners felt threatened by the PKI's agrarian reform movement seizing their land.<sup>23</sup> It was at its height from 1965 to 1966 when many of those accused of being PKI members and sympathizers were massacred.<sup>24</sup> From 1969 to 1966, the Soeharto's government exiled approximately thousands of people accused of being PKI members and sympathizers without the benefit of a trial. They were deemed to be political prisoners posing a threat to society. Since 1984, the Soeharto's government had launched an anti-communist propaganda through a film titled *Penumpasan Pengkhianatan G30S/PKI*, directed by Arifin C Noer. The movie was given extensive circulation to create a state-approved memory on the 1965 events, so it will become a lasting memory for Indonesian people.<sup>25</sup> The movie started with a scene depicting PKI members attacking and massacring some people who were going to the mosque to pray. Moreover, the movie showed PKI members' atrocity in torturing and killing the army generals. The PKI, which was identical to communism, was portrayed

<sup>20</sup> R. Mortimer, *Indonesian Communism Under Sukarno: Ideology and Politics, 1959–1965*, Singapore 2006, p. 79.

<sup>21</sup> A. Bedner, Y. Arizona, *Adat in Indonesian Land Law: A Promise for the Future or a Dead End?*, "Asia Pacific Journal of Anthropology" 2019, 5, p. 419.

<sup>22</sup> K.W. Fogg, op. cit., p. 465.

<sup>23</sup> A.M. Mudhoffir, *Islamic Militias and Capitalist Development in Post-Authoritarian Indonesia*, "Journal of Contemporary Asia" 2017, 4, p. 505.

<sup>24</sup> A. Bedner, Y. Arizona, op. cit., pp. 33, 420.

<sup>25</sup> G.D. Parahita, V.I. Yulianto, *The Treachery on YouTube: The Politics of Memory on New Media in Indonesia*, "Archipel" 2020, 99, p. 50.

as a sadistic group which had no sense of humanity and did not believe in God. This film gave an impression to Indonesian people that communism was identical to violence and atheism.

The Soeharto's government was overthrown in 1998. Post Soeharto era did not significantly change Indonesia's stance on communism. Indonesian political parties must be based on Pancasila. Then, Law No. 27 of 1999 on the Criminalization of Communism Dissemination was passed. On the other hand, President Abdul Rachman Wahid had publicly extended his apology regarding the 1965–1966 events and encouraged national reconciliation to those affiliated with the PKI. Much discourse regarding the 1965–1966 events has frequently been conducted since they are no longer considered a taboo subject to be discussed in public. However, fear of the dangers of communism identical to violence and atheism still exists. Based on the results of an interview with several Muslim respondents in 2019, it was found out that Muslims deemed communism to be atheistic posing a dangerous threat to Indonesia's unity. Those respondents stated that forcible disappearance and exile of PKI members and sympathizers from 1965 to 1966 were normal, and the government was not supposed to apologize for that matter. Moreover, Indonesian people strongly believed in disinformation regarding the PKI revivalism threatening the society's religious life.<sup>26</sup> Similar cases took place during the 2014 and 2019 general elections; much disinformation circulated, accusing Joko Widodo of being a PKI member intending to revive communism in Indonesia.<sup>27</sup>

## Communism offence in Indonesia's new Penal Code

On 6 January 2023, the new Penal Code was passed, adopting provisions in Law No. 27 of 1999 in Articles 188 and 189 of the Penal Code. Article 188(1) bans a person from disseminating and developing communism in public spaces. Article 188(2) bans a person from disseminating communism to replace Pancasila as the national foundation. Article 188(3), (4), and (5) bans a person from disseminating communism resulting in loss of property, a serious injury, in a death. Article 188(6) stipulates that it is not a crime for a person to discuss communism for academic purposes. Article 189(1) bans an act of establishing an organization adhering to communism, while Article 189(2) stipulates that another prohibited act is nurturing a relation or receiving or giving funds from both domestic and foreign organizations embracing

<sup>26</sup> I. Nadzir, S. Seftiani, Y.S. Permana, *Hoax and Misinformation in Indonesia: Insights from a Nationwide Survey, "Perspective"* 2019, 92, pp. 8–10.

<sup>27</sup> R.P. Wadipalapa, *The Communist Imaginary in Indonesia's 2014 and 2019 Presidential Elections, "Asian Journal of Political Science"* 2023, 10, p. 1.



communism to replace Pancasila as the national foundation. In terms of the chapter arrangement, Articles 188 and 189 are part of the chapters regarding offense against national security. This cannot be separated from the coup narrative that the PKI's attempt to replace the Pancasila ideology. Therefore, it is necessary to maintain Pancasila as the national foundation from communism conflicting with religion serving as the basis for the life of the Indonesian nation.

Articles 188 and 189 have two problems. First, the unclarified legal interests to be protected from the criminalization of a communism dissemination. Second, the unclarified definition of harm inflicted by the dissemination of communism is worth criminalizing; thus, it is against freedom of expression.

The presence of a threat to individual and public legal interests and national security legitimizes the state to criminalize. However, the legal interests to be protected from criminalization are not clear. Systematically, Articles 188 and 189 belong to national security, so the pertinent interests to be protected should be the state institution's orders and functions implemented based on the Pancasila ideology. However, Articles 188 and 189 do not all reflect the protection for the legal interests of national security.

Criminalization shall be based on of any immoral behaviour and harm.<sup>28</sup> The question is, what is the immoral behaviour of the communism dissemination act? Is there any harm inflicted by disseminating communism, especially when it has proven to be a failed ideology? Furthermore, we should take into consideration the impact of that criminalization on one's freedom. One of the restrictions in criminalizing a public speech is to protect freedom of expression.<sup>29</sup> Article 28 E(3) of the 1945 Constitution of the Republic of Indonesia stipulates the protection to Indonesian citizens' freedom of expression. Discussions and dialogs on communism in public spaces are part of the freedom of expression constituting part of the civil and political rights.

## Lessons from Poland

The history of Poland cannot be separated from communism regimes. In 1939, the Soviet Union invaded eastern Poland. During World War II, the Soviet Union committed massacring twenty thousand Polish soldiers and intellectuals, well-known as the Katyn massacre. The Soviet Union also deported or relocated more than one million Polish citizens to eastern Soviet Union. After World War II ended,

<sup>28</sup> A.P. Simester, A. von Hirsch, *op. cit.*, pp. 12, 119–130.

<sup>29</sup> *Ibidem*, pp. 12, 121–122.

Poland was under the communist control. At the Yalta Conference in 1945, it was agreed that the interim government was still communist government supported by Joseph Stalin and the Soviet which controlled that Provisional National Unity Government. After the first general election was held in 1947, the communist ruled the country and made Poland the Polish People's Republic. In 1955, Poland joined and became part of the Soviet Union. From 1955 to 1989, Poland was under the communist control. In that period, some social and economic turmoil meant to demand both freedom (riots in Poznan, 1956) and economic reform (riots in Gdansk, 1970). In 1978, Karol Wojtyła, Cardinal of Cracow, was elected the Pope. This would then serve as a factor contributing to the fall of the Communist regime. In the early 1980s, political turmoil in the forms of solidarity movements resulting from some disruption in the shipyard in Gdansk broke out. As a result, from 1981 to 1983, martial law was declared. The Communist government ended in 1989.

After the Communist regime was overthrown, in 1997, Poland had a new constitution named the Constitution of Republic of Poland. The new constitution prohibited a political party from basing its activities on Nazism, Fascism, and Communism. Article 13 prohibits political parties and organizations based on totalitarian methods, Nazism, fascism, communism, racial or national hatred, violence, or secrecy. On the other hand, Article 54 also stipulates that the freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone. Moreover, the Constitution also stipulates that preventive censorship of the means of social communication and the licensing of the press shall be prohibited. This stipulation plays a crucial role since, before 1989, the censorship was applied in order that they would comply with the ruling communist government's politics and voices.<sup>30</sup>

In 1998, Poland introduced its new Penal Code containing a stipulation banning the fascist, communist and totalitarian propaganda. The Penal Code makers include crimes against public order. Article 256 (1) criminalizes promoting fascist or totalitarian systems of state or inciting hatred based on national, ethnic, racial, or religious differences, or lack of religious group. In 2008, it was amended by adding verse (2) criminalizing the act of producing, recording, or transporting items containing substances promoting fascist or totalitarian systems or carrying symbols aimed at inciting hatred and disturbing public order. The 2008 amendment to Article 256 criminalizes the circulation, possession, and distribution of substances promoting fascist, communist, or totalitarian state systems. This amendment is aimed at protecting the Polish people still having painful memories regarding wars and the fascist and communist regime's atrocities. From the perspective of a country just rid of a dictatorial communist regime such as Poland, the criminalization of a fascist

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<sup>30</sup> I. Lepka, *Freedom of Expression in Post-Communist Poland*, "Critique" 2009, 4 pp. 619–620.

material and symbolism dissemination plays a crucial role aimed at preventing the victims' agony when they see symbols related to the previous regime and at protecting the democratic values. The criminalization is justified during the transitional period from the dictatorial regime to the democratically elected government. However, over time, the lawmakers should reconsider this criminalization especially when the transitional period into democracy justifying the implementation of this policy no longer exists.<sup>31</sup>

In 2011, the Constitutional Tribunal of Poland ruled that words in Article 256(2) saying 'or other item containing fascist, communist or other totalitarian symbolism' unconstitutional because it violated freedom of expression. The Court emphasized that the criminalization of disseminating substance promoting fascist, communist, or other totalitarian system of state should only be justified if it did not restrict freedom of expression and if it did not allow any broad interpretation; it meant that criminalizing the act of using or presenting fascist, communist, or other totalitarian symbolism should appropriately formulate and be on the condition that the use be public. The Court thought that the forbidden acts as stipulated in Article 256 should mean an incitement propaganda in the context of fascist, communist, or other totalitarian symbolism pursuant to Article 20 of the International Covenant on Civil and Political Right (ICCPR). However, Article 256(2) was ambiguous and did not elaborately mention the forbidden symbols, so it would threaten freedom of expression. On the other hand, Article 256 only a little bit defined any act which did not commit an offense. Article 256(3) only stipulated that if the act was committed as part of artistic and academic activity, the perpetrator of the act should not be deemed to have committed an offence. On the contrary, Article 256(2) can criminalize a person's act which does not result in social harm such as expressing his or her opinion on substance presenting fascist, communist, or other totalitarian symbolism.

Furthermore, it is of great interests to discuss the European Court of Human Rights (ECHR) verdict on the case of Vajnai vs Hungary. The Constitutional Tribunal of Poland used this verdict as nor of its considerations. This case was about Attila Vajnai, the Vice Chairman of the Labor Party who was detained because he wore a five-red-star symbol becoming the symbol of the International Labour Movement. Article 269B of the Hungarian Penal Code specifically bans the use of totalitarian symbolism such as a swastika, a hammer and a sickle, and a red star. Like Poland, Hungary had a horrible history with communists both with the Soviet Union and with the communist despots. The criminalization of the red star symbolism dissemination is aimed at protecting public order from any incitement using

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<sup>31</sup> A. Fijalkowski, *op. cit.*, p. 296.

a red star symbolism. The ECHR argues that freedom of expression shall be exempted based on a clear, urgent and specific social need. That the Hungarian people are traumatized by the communists having violated the human rights may justify the restrictions on the use of communist symbolism in public activities. Nevertheless, in the case of red five stars symbolism, it was the symbol of the International Labour Movement fighting for a better society; thus, it cannot be identified with the communist regime, especially where the symbol is used by a legal organization and in a peace mass rally. That act cannot be deemed to be a dangerous propaganda. In this case, there are no stressing public needs constituting the reason to protect democracy from any harm justifying Attila Vajnai's detention.

## Critique of Indonesia's new Penal Code

Critique of Articles 188 and 189 of the Penal Code starts from the identification of the legal interests to be protected from this offence. The Penal Code deem it necessary to protect national security due to the horrible memory of the communists having attempted to replace Pancasila as Indonesia's ideology.

Poland has a bit different situation from that of Indonesia. Poland has experienced suffering inflicted by the communists. There was a period of great length from 1939 to 1989. After the fall of the communists, Poland got rid of an authoritarian government, heading for a more democratic government. In the former communist country, the transitional period into democracy justified the criminalization of the act of circulating substance containing fascist, communist, or other totalitarian symbolism. The legal interest to be protected was the feelings of everybody committed to democracy respecting the human rights and specifically, the victims' and their relatives' feelings persecuted by the communists in the past. This criminalization is aimed not at protecting national security, but at protecting the public order.

Based on those circumstances, it is necessary to question the necessity of protecting Pancasila serving as the basis for the criminalization. It is true that, in 1965, seven army generals were assassinated, but it is still being discussed whether the PKI was the mastermind behind those assassinations. On the other hand, there are some discussions regarding events taking place from 1965 to 1966 about those regarded as PKI members and sympathizers whose lands were confiscated and who were persecuted and massacred. Politically, on behalf of the Indonesian government, President Abdul Rahman Wahid had publicly acknowledged the events and apologized for those events taking place in that 1965–1966 period. It means that those horrible memories regarding communism should no longer be for the state but for the victims both the relatives of those assassinated generals and the people

and their families labelled as the PKI's members and sympathizers. Furthermore, it is not really accurate if the legal interest to be protected is national security based on protecting democratic values. Soeharto's regime was a long way from democratic values; his administration was an authoritarian government.<sup>32</sup> During the era of that regime, freedom of expression was tightly restricted through various laws and regulations such as the Law on Anti-Subversion. Lastly, the interest in national security during the transitional period from 1965–1966 to 2023 was not accurate, as the Penal Code was passed over a long period.

I argue that it is not really accurate if the act of disseminating communism and deemed to be an offence against national security, especially in Article 188(3), (4), and (5). Riots, serious injury or death as banned results are some kinds of disturbance against the public order. The legal interest to be protected should be public orderliness from any social friction resulting from the dissemination of communism substance or symbolism.

When the dissemination of communism is aimed at replacing the state's ideology that act constitutes treason. Articles 188(2) and 189 requires that the perpetrator shall intend to overthrow the legitimate government. A form of treason is violation to the legitimate or democratically elected government. This act, among others, may include the establishment of or participation in a banned organization or party aimed at replacing the legitimate government. This offence endangers the presence of the existing government system, since it attempts to abolish the democratic government system and endangers the existing institutions which exercise their functions.<sup>33</sup> In treason, the legal interests to be protected shall be to run a democratically elected government and to protect the citizens' fundamental rights. These legal interests including to protect state ideology. The Penal Code regulates the treason against a legitimate government; therefore, the provision on Article 188(2) and 189 should be integrated with the provision on treason.

The immorality of communism dissemination in public spaces lie in the content of that statement harming public order. Therefore, Article 188 must be constructed as incitement containing substance on communism including the use of symbolism and pictures. Constructing the criminalization of a communism as incitement actually aligns with the exemption to freedom of expression.<sup>34</sup> Included in a political

<sup>32</sup> E. Aspinall, G. Fealy, *Introduction: Soeharto's New Order and Its Legacy*, [in:] iidem (eds.), *Soeharto's New Order and Its Legacy*, Canberra 2010, p. 1.

<sup>33</sup> K. Ghanayim, M. Kremnitzer, *Offences against the Democratic System of Government*, Oxford University Comparative Law Forum, 2016, [https://ouclf.law.ox.ac.uk/offences-against-the-democratic-system-of-government/#:~:text=Offences against the democratic regime,to establish or change the](https://ouclf.law.ox.ac.uk/offences-against-the-democratic-system-of-government/#:~:text=Offences%20against%20the%20democratic%20regime,to%20establish%20or%20change%20the) (access: 12.12.2023).

<sup>34</sup> D.T. Coenen, *Freedom of Speech and the Criminal Law*, "Boston University Law Review" 2017, 4, p. 1552.

speech is when the political statement shows that the statement constitutes incitement aimed at inflicting a serious and imminent danger; accordingly, the state has the right to restrict that statement by imposing criminal law.<sup>35</sup> Moreover, when the incitement results in disturbance to public order, this exemption to freedom of expression is justified pursuant to Article 19(3) ICCPR. What is more, I refer to the consideration of the Constitution of the Republic of Poland, stating that when the offence of disseminating substance containing communist symbolism is deemed an incitement, it shall be pursuant to Article 20 ICCPR.

It is not enough to protect freedom of expression by merely constructing the act of disseminating communism as incitement. Freedom of expression shall sufficiently be protected when the criminalization is based on clear and present danger. This is of crucial matters since not only does incitement not inflict harm by itself, but the severity of that harm results from the consequence of the act perpetrated by a third-party possessing independence and free will. That third party is a person autonomously capable of selecting an alternative and responsible for it.<sup>36</sup> A clear and present danger must meet two conditions. First, the statement constitutes a threat that will likely be followed with a substantial crime. Second, there will be a clear crime to take place.<sup>37</sup> A communism dissemination will only pose a serious threat if the statement containing communism is expressed through provocation or incitement to launch an attack followed with some people's movement to make a riot, destroy a private or public property resulting in other people's serious injury or death. When measuring the clear and present danger, we must consider the situation and condition where that statement is made. In a socially and politically peaceful situation, where the society is not easily affected by any incitement to make any change, it will be more difficult for incitement through the dissemination of communism aimed at stirring unrest or replacing the Pancasila ideology to take place. In this situation, there is no clear and present danger yet.

The Constitution of the Republic of Poland and ECHR stipulates that the criminalization of the act of disseminating substance promoting fascist, communist or other totalitarian symbolism shall only be justified when the offense is tightly defined in order not to be given any opportunities to be broadly and ambiguously interpreted. I agree with that argumentation. However, I take exception to the next opinion that the offence must clearly and elaborately mention the symbolism that can be associated with fascist, communist, or totalitarian regime. I argue that

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<sup>35</sup> J. Magee, *Freedom of Expression*, Connecticut 2002, p. 244.

<sup>36</sup> A.P. Simester, A. von Hirsh, *op. cit.*, pp. 12, 46–47.

<sup>37</sup> D. Barnum, *The Clear and Present Danger Test in Anglo-American and European Law*, "San Diego International Law Journal" 2006, 2, pp. 272–274.

a tight formulation of the offence can also be made by expressly and elaborately describing the forbidden effects of that lawless deed.

The Indonesian criminal law recognizes a formal offence and a substantive offence.<sup>38</sup> A formal offence is an offense formulated by forbidding a certain act and not the effects of the act. This offence can be described as done when that forbidden act is committed without having to wait for its effects. The offence stipulated in Article 188(1) is a formal offence. This formal formulation will in turn result in multi-interpretations on the danger of the dissemination and the use of the symbolism in public spaces. This formulation allows the law enforcer to criminalize a person simply because he or she uses a hammer-and-sickle (PKI's symbol associated with communism) at a mass rally criticizing a government's policy even though the rally is peacefully held. Different with substantive offense, which is an offense that prohibits certain impacts. Article 188 (3), (4), (5) are substantive offenses. Therefore, this formulation meets the condition of clear and present danger, so it is worth criminalizing.

## Conclusion

Criminalization of a communism dissemination in Indonesia's new Penal Code become a subject of debate. The state shall be justified to criminalize the dissemination of communism because of the PKI coup attempt in 1965, if the criminalization meets some conditions stipulated in the criminal law. The criminalization on the incitement shall require clear and present danger. The formulation of the offence shall explicitly mention the forbidden harm against public order such as a riot, death, or serious wounds. What is more, it shall be important to pay attention to the situation and the condition at the time when the incitement is made.

Finally, the Indonesian Penal Code formulates this offence broadly and loosely, so this may potentially restrict freedom of expression, including discussions on the 1965–1966 events in public spaces. Therefore, improvement is required by restricting the offence only to any acts disrupting public order and by formulating the offence in the form of substantive offence.

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<sup>38</sup> T. Santoso, *Principles of Indonesian Criminal Law*, Oxford 2023, pp. 96–97.

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