

TREASON IN THE CONTEXT OF INDONESIAN CRIMINAL LAW

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Abstract: Indonesian criminal law addresses treason in its Penal Code. Since the ruling regime frequently uses the Penal Code articles to criminalize political opponents or members of opposition groups, the articles are interpreted broadly by both prosecutors and courts. This research discusses the construction of Indonesian criminal law related to the definition and interpretation of treason used by the courts. A normative juridical approach was applied. It was found that Indonesian criminal law does not provide any clear definition of treason. Consequently, the courts rely on criminal law experts' opinions. Some criminal law experts interpret treason as an incomplete attempt, while others interpret it as assault. Meanwhile, the courts interpret treason as any act intended to take the life of the president or vice president, undermine the government, or separate part of the Indonesian territory from the Republic of Indonesia, including conspiracy to commit one of these offenses. Since the courts do not put any limitation on the quality of the act, treason has been broadly interpreted and may even potentially include carrying the flag of a separatist group. In the future, the Penal Code needs to clarify the definition of treason so that it will not be interpreted too broadly.

Keywords: Assault, Attempt, Crime Against State, Indonesian Penal Code, Treason.

1. Introduction

In Indonesia, there has been a long debate over the interpretation of the criminal act of treason, which is treated in the articles of the Indonesian Penal Code. Debate over the interpretation of what constitutes treason occurs among not only academicians but also law enforcement and civil society organizations promoting human rights. Unfortunately, the Penal Code articles related to treason are often used by the ruling regime to criminalize political opponents. They are also used to deal with members of separatist movements who intend to separate from Indonesia. According to the Black Law Dictionary, treason is the offense of attempting to overthrow the government of the state to which one owes allegiance, either by making war against the state or by materially supporting its enemies ([Garner, 1999](#)).

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The Penal Code articles related to treason have a broad meaning as they can be interpreted differently by law enforcement and the courts. They are similar to the articles related to subversion found in Law No. 11/PNPS/1963. Since the law can be used to criminalize any group opposing the ruling regime, its enforcement often violates human rights. It is a multipurpose act that does not have *lexscripta*. Yet the spirit of the law is found in some articles related to treason in the Indonesian Penal Code.

Judges have applied different interpretations of the Penal Code articles related to treason used by public prosecutors to prosecute defendants in treason cases. In some cases, district courts have convicted defendants based on the articles related to treason, but then the supreme court corrected them. In other cases, when public prosecutors have prosecuted defendants with articles related to treason, district court judges have acquitted the defendants.

According to data from the civil society organization Aliansi Nasional Reformasi KUHP, under President Soesilo Bambang Yudhoyono, the courts disproportionately used the Penal Code articles related to treason. For example, Cakalele dancers who hung a Republik Maluku Selatan (RMS) flag in front of the president were charged with treason. A similar case occurred in Maluku, where people who hung the RMS flag in a gold mine on Buru Island, Maluku were convicted of treason ([Weda & Eddyona, 2016](#), [Lin, Xu & Liu, 2017](#); [Biabanpeima, 2017](#)).

The criminal act of treason is regulated in Book II and Chapter 1 of the Penal Code on crime against state. The inclusion of crime against state in Chapter 1 of the Penal Code shows that it is perceived as the most serious crime. Yet, although it is categorized as a serious crime, it is interpreted differently by criminal law experts. In addition to different interpretations of treason, criminal law experts have different interpretations of the elements of treason. Therefore, it is important for the Constitutional Court to clarify the definition of treason and its related elements.

Based on the description above, this paper will discuss interpretations of treason in court decisions in Indonesia and argue that the definition of treason needs to be revised in the Indonesian Penal Code.

2. Material and Method

A normative method was applied in the research. The articles regulating treason in the Penal Code were studied. In addition, court decisions for those convicted of treason were analyzed. Comparative and historical approaches were used to strengthen the analysis. The comparative approach was used to draw a comparison with the formulation of treason in the Dutch Penal Code. Then, the historical approach was used to explore the history of the formulation of treason and the history of Law No. 11/PNPS/1963.

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3. Legislation on Treason

According to Hamzah, the Netherlands is the only European country which, at that time, had an article on treason (*aanslag*) (Hamzah, 2017; Raksorn, 2016; Abdul et al., 2015). Penal codes of other countries generally include articles related to attempt (e.g., attempt to take the life of the king/president). The inclusion of articles on *aanslag* in the Dutch Penal Code was triggered by the communist revolution in Russia in 1918, when Tzar Nicolas II and his family were slaughtered by communists. Tzar Nicolas II was a relative of the U.K.'s king, who was a relative of the Dutch king. Since most European countries were kingdoms, the communist revolution in Russia caused the ruling kings in Europe, including the Dutch king, to worry. Therefore, the Netherlands enacted the Law on Anti Revolution (Anti Revolutie Wet) on July 28, 1920 through Staatsblad Number 619. *Aanslag* was also used for the first time in the Dutch Criminal Code that year. *Aanslag* is distinguished from *poging*. There are three elements of *poging*: intent, commencement of the performance, and incompleteness of the commencement of the performance not merely because of the individual's will.

Articles on *aanslag* were included in the Wetboek van Strafrecht (WvS) voorNederlands Indie in 1930, after the rebellion of the Indonesian Communist Party led by Muso. There were no articles on treason (*aanslag*) in WvS before 1930, but only articles related to attempt (*poging*) (Hamzah, 2017; Rayar, & Stafford, 1997).

In the Indonesian Penal Code, treason is addressed in Articles 87, 104, 106, 107, 108, 110, and 140. These six articles are found in two different books. Article 87 is placed in Book I of the Criminal Code, which contains general provisions or rules. Meanwhile, Articles 104, 105, 106, 107, 108, 110, and 140 are in Book II, which pertains to crimes. The placement of articles related to treason in two different books indicates that the Penal Code attempts to provide definitions of treason's components as stipulated in Article 87 (Book I of the Penal Code). Although an attempt is made to offer interpretations, the components of treason stipulated in Article 87 of the Penal Code are not sufficiently described, and criminal law experts have developed various doctrines to interpret them. Article 87 of the Penal Code stipulates the following.

Article 87

An attempt to commit an act exists as soon as the intent of the perpetrator has revealed itself by a commencement of the performance in the sense of Article 53.

The interpretation of jurisprudence cannot be separated from the philosophical root of hermeneutics. It is the theory and methodology of the interpretation of jurisprudence to find law in a real event (Shidarta,2010).

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Hamzah states that “treason” is the translation of the Dutch word *aanslag* in Article 104 of the Criminal Code, which is a copy of Article 92 of the Dutch Penal Code. Article 92 of the English version of the Dutch Penal Code, under the title “Serious Offenses Against the Security of the State,” stipulates the following.

Article 92

An attempt made with an object to take the life or liberty of the King, the reigning Queen or the Regent, or with an object of rendering any of them incapable of reigning, is punished by life imprisonment or a term of imprisonment or not more than twenty years or a fine of the fifth category.

Here, *aanslagis* translated as “attempt.” The question is, why? Is it difficult to find a more precise word in English, or is it because there is no *aanslagis* common law? Hamzah says that *aanslagis* often translated as “attempt on man’s life” in English. According to the Black Law Dictionary, “attempt” means

1. The act or an instance of making and effort to accomplish something, especially without success. 2. An overt act that is done with the intent to commit a crime but that falls short of completing the crime. Attempt is an inchoate offense distinct from the attempted crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward commission of a crime, such as enticing, lying in wait for or following the intended victim or unlawfully entering a building where a crime is expected to be committed.

Williams says,

An attempt to commit an indictable offense is itself a crime. Every attempt is an act done with intent to commit the offense so attempted. The existence of this ulterior intent of motive is the essence of the attempt... Although every attempt is an act done with intent to commit a crime, the converse is not true. Every act done with this intent is not an attempt for it may be too remote from a completed offense to give rise to criminal liability, notwithstanding the criminal law purpose of the doer. I may buy matches with intent to burn a haystack and yet be clear of attempted arson; but if I go to the stack and there light one of the matches my intent has developed into a criminal attempt.”

Meanwhile, Turner states,

Attempt is the most common of the preliminary crimes. It consists of steps taken in furtherance of an indictable offense which the person attempting intends to carry out if he can. As we have seen, there can be a long chain of such steps and it is necessary to have some test by which to decide that the particular link in the chain has been reached at which the crime of

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attempt has been achieved: that link will represent the actus reus of attempt. ([Garner, 1999, 137](#))

Meanwhile, Article 104 of the Indonesian Penal Code stipulates,

Treason (*aanslag*) undertaken with intent to deprive the President or Vice President of his life or his liberty or to render him unfit to govern, shall be punished by capital punishment or life imprisonment or a maximum imprisonment of twenty years. ([Soesilo, 1994, 108](#))

Lamintang interprets this article by dividing it into two main components: subjective and objective components.

Subjective Component

With intent

Objective component

1. Treason (*aanslag*)
2. or undertaken
3. or to deprive of life
4. or to deprive of liberty
5. or to render unfit to govern
6. President
7. or Vice President ([Lamintang & Lamintang, 2010, 6](#))

Law experts interpret the components of treason differently. They can be divided into two groups based on their opinion:

- a. Scientists interpreting treason as assault and violence
- b. Scientists interpreting treason as incomplete attempt

Assault and violence

Soesilo explains that *aanslag* means assault to deprive the president of his life or liberty or to render him unfit to govern. *Aanslag* is committed with violence and commences with performance (*uitvoeringshandelingen*). Meanwhile, violence is defined as unlawful use of energy or physical power, such as hitting with hands or an object, kicking, etc. The commission of violence is also identified with rendering a person unconsciousness or helplessness. Unconsciousness is defined as “not remembering or not being aware of himself or herself.” Helplessness means not to having any power or energy or being unable to fight back, such as when someone’s legs or hands are with a rope, he or she is locked in a room, or he or she has been neutralized with an injection of drugs.

As explained above, neither the Penal Code nor other criminal laws give a clear definition of treason or *aanslag*. Lamintang states that the word

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aanslagis derived from *aanval* (assault) or *misdadigeaanrading* (assault with bad intent), and he is not sure which possible derivation is correct.

Noyon and Langemeijer define treason as violence or at least the attempt to commit violence. However, according to them, *aanslag* should not always be defined as violence because in practice, it sometimes is not preceded by violence. As an example, they mention an act intended to change the political course of the nation that is not preceded by violence.

Simons states that *aanslagis* any action taken with intent as described in Article 104 of the Penal Code if it is prohibited under Article 104 of the Penal Code and if it is more than a preparation and has been perceived as the commencement of an action as stipulated in Article 87 of the Penal Code.

4. Incomplete Attempt

Criminal law experts give different interpretations of *aanslag*. They may define it as an amputated attempt, i.e., omission of the “discontinuation of an act not because of the perpetrator’s intent.” Moeljatno states that treason is a part of attempt. However, attempt has three components: “intent,” “commencement of the performance,” and “incompleteness of the commencement of the performance is not the perpetrator’s will” ([Moeljatno, 1982, p. 13](#)).

Article 87 is included in Book I of the Penal Code. It contains general provisions and gives the definition of some terms used in Book II and Book III. Unfortunately, the general provision in Article 87 is not sufficient. Why does the Penal Code relate it to Article 53?

Under Article 87 of the Penal Code, treason has two main components: intent and commencement of the performance. The two components have been interpreted according to various doctrines. Therefore, there are similarities between treason and attempt. Thus, the interpretation of the commencement of the performance in treason can also be used to interpret the commencement of the performance in attempt.

According to Moeljatno, treason falls into the attempt category given the following conditions: (1) the defendant’s objective has been fully achieved and (2) if the defendant voluntarily resigns, he or she still can be criminalized.

(1) Attempting to commit a crime is criminalized if the intent has been seen from commencement of the performance and incompleteness of the commencement of the performance is not merely because of his or her will. Intent and deliberateness are interpreted differently. An action is potentially deliberate if it is done with intent. However, if a criminal act has not yet been done, the intent still exists and has a spiritual nature that

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gives a direction to an act. Therefore, intent is not the same as deliberateness.

Commencement of the performance has three conditions:

1. Objectively, what has been done by the defendant must approach the intended offense. Or, in other words, it must have the potential to realize the offense.
2. Subjectively, from the perspective of intent, what has been done by the defendant must be undoubted and directed to a certain offense.
3. What has been done by the defendant is against the law.

Commencement of the performance in the article above is interpreted as the commission of a crime and it is incomplete. Prodjo dikoro and Moeljatno express similar views. They view *aanslag* treason as attempt targeting the president or vice president with intent and commencement of the performance.

Hiariej quotes the translation of treason from a Dutch-English Dictionary written by Boers, A., "Treason is translated from *aanslag*. *Aanslag* is translated as "attempt" in English. Therefore, he says that it is incorrect to translate *aanslag* as treason. Instead, it should be translated as an "initial act of an action" (Hiariej, 2016, p. 328). He further says that treason must consider the adagium *felonia implicatur in quolibet prodione* which means that treason is a serious crime. Therefore, it is not an attempt that is formulated as a complete or independent offense. Instead, it is formulated so because it is related to the security of the state and the safety of the president and vice president and undermines the legitimate government and sovereignty of the state.

Commencement of the performance, according to Memorie van Toelichting, must be differentiated from preparation and performance. Nevertheless, it is not easy to differentiate them and the matter is therefore left to a judge's considerations. In this context, Moeljatno states that preparation is to gain power and performance is to release the gained power.

5. Analysis of Court Decisions

This paper will analyze two court decisions that punished defendants who were found to have conducted criminal acts of treason. The first is the Wamena District Court decision regarding a group of six people who brought and intended to raise the BintangKejora flag in Papua Province. The BintangKejora flag (the morning star flag) is the symbol of the Papua Liberation Organization (OPM; Organisasi Papua Merdeka), which is a group of people who intend to separate Papua from the Republic of Indonesia and establish their own state. The six defendants intended to raise the flag on the grave of a Papua Liberation Organization member in a small village in the province. However, the plan to raise the flag failed

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because Indonesian military and police personnel arrested them. During the arrest, the officers found a small BintangKejora flag as evidence. It was still rolled up and had not yet been raised on the grave. Prosecutors charged them with treason under Article 106 of the Penal Code. Below are the components of Article 106 juncto Point 1 of Article 55 of the Penal Code that were cited by the prosecutors:

1. Treason component with an intent to bring the territory of the state wholly or partially into the hand of the enemy or to separate part thereof;
2. Component of those who commit, ask to commit, and are involved in the crime.

The prosecutors' interpretation of treason was based on the opinions of two Indonesian criminal law experts, Wirjono Prodjo dikoro and P.A.F. Lamintang. Wirjono stated that the word "treason" is derived from the Dutch *aanslag*, which means assault. Meanwhile, assault was not only interpreted as violence because treason as regulated under Article 106 of the Penal Code was interpreted as any act done to endanger state law and the unity of the state. It was also interpreted as the commencement of performance as regulated under Article 87 of the Penal Code, i.e., intent and commencement of performance. The defendants' intent was to separate Papua Province from the Republic of Indonesia, and the commencement of performance was the act of bringing the flag and a series of other acts that the defendants had previously done, such as attending training and meetings with the leader of OPM. Prosecutors interpreted these acts as the commencement of performance to separate the province from the Republic of Indonesia.

Judges in Wamena District Court agreed with the general prosecutors' opinions and found that the defendants had jointly conducted a criminal act of treason under Article 106 of the Penal Code to separate Papua Province from the Republic of Indonesia. The defendants were each sentenced to eight years imprisonment. Unfortunately, neither the defendants nor their lawyers appealed to a higher court.

As the court decision above shows, the criminal act of treason was broadly interpreted by both prosecutors and judges, especially the interpretation of "commencement of performance." The judges did not assess its quality in terms of whether or not it logically had the capacity to separate Papua Province from the Republic of Indonesia. They thought that the act of bringing Bintang Kejora flag to the grave had the potential to separate the province from the Republic of Indonesia even though the defendants had not bring any weapons with them when they intended to raise the flag on the grave and no violence had occurred. Therefore, we argue that the judges applied a poor interpretation of the commencement of performance because the interpretation was only based on Lamintang's opinions, which they quoted from his book. The prosecutors and judges should have also considered other criminal law experts' opinions to arrive at a better

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interpretation. Moreover, the court failed to present an expert witness who could give an interpretation of the components of commencement of performance in this case.

If the court had been able to present an expert witness or other expert, the interpretation of “commencement of performance” would have been stronger. The act of bringing a flag should not constitute a commencement of performance because it did not have the quality to separate the province from the Republic of Indonesia.

The second case also occurred in Papua. The defendant, Obaja Kemesrar, was one of the district commanders of OPM in Salawati, Sorong. He was invited by IsakKalaibin, the Military District Commander II of OPM in Sorong Raja Ampat, to attend a meeting. The aim of the meeting was to discuss their plan to raise the BintangKejora flag at the celebration of the OPM Proclamation. To attend the flag raising ceremony, Kemesrarpprepared two bows made of wood, 14 arrows made of bamboo, a military uniform, and a pair of boots produced by the Indonesian military. The flag raising ceremony was intended to proclaim the Independence of the Republic of West Papua. Therefore, prosecutors charged Kemesrar with conspiracy to separate parts of the Indonesian territory from the Republic of Indonesia and to establish an independent state. He was charged under Paragraph 2 of Article 110 juncto Article 106 of the Penal Code. The Sorong District Court stated that the defendant had legitimately and convincingly conducted the criminal act of conspiracy to commit treason, and it sentenced him to one year and six months imprisonment (Decision Number: 114/Pid.B/2013/PN/SRG).

The charge and the court decision above show that the criminal act of conspiracy to commit treason was also broadly interpreted by both prosecutors and courts. Conspiracy is a crime to commit the criminal act of treason, and it is treated under Articles 106, 107, 108, and 110 of the Penal Code. In this case, the definition of conspiracy was broadly interpreted by both prosecutors and the court because the defendant only met and discussed something with some people who planned to raise the BintangKejora flag. The court perceived this as a conspiracy to separate West Papua from the Republic of Indonesia and to establish an independent state, Papua Merdeka. They thought that the defendant’s act had the potential to establish an independent state. Article 110 of the Penal Code does not give any interpretation of what constitutes a conspiracy. The interpretation of conspiracy is regulated in Article 88 of the Penal Code. The article stipulates that a conspiracy exists as soon as two or more persons agree to commit a crime. Although the defendant and some other people had agreed to raise the BintangKejora flag, he was arrested before committing the act.

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Raising the BintangKejora flag as a conspiracy was perceived as a criminal act of treason to separate part of the area from the Republic of Indonesia. The court interpreted the act of separating the area as treason without assessing the quality of the defendant's actions. It was unreasonable to say that planning to raise the BintangKejora flag was an act that could separate the area from the Republic of Indonesia, especially since only a small number of people planned to commit the act while equipping themselves with bows and arrows—yet, the court gave this broad interpretation. Further, under the Penal Code, raising a certain organization flag is not a crime. Therefore, there must be another legal basis for the prohibition of the act.

6. Conclusion

As the discussions above show, the legal construction of treason is too broad. Therefore, it must be returned to its original legal form, i.e., “attempt” that removes the third component. Accordingly, the components of treason consist of (1) intent, (2) commencement of performance, and (3) to deprive the president or vice president of his life or liberty or to render him unfit to govern. It should be noted that commencement of the performance must contain violence or an act that makes the president or vice president powerless. This definition is aimed to prevent an interpretation of treason that is too broad. If treason is interpreted as an “assault,” the three elements must exist.

Therefore, *aanslag*(treason) is an offense that has two elements: intent and commencement of the performance. Meanwhile, attempt as stipulated in Article 53 of the Penal Code has three elements: intent, commencement of the performance, and incompleteness of the commencement of the performance is not merely because of the individual's will. Although the interpretation of treason as stipulated in Article 87 of the Penal Code is not yet satisfactory, it at least has a given juridical basis. Article 87 is included in Book I of the Penal Code. It contains General Provisions which describe the basis or principles of norms. Book I does not concern offenses that merit criminal punishment but explains some offenses.

Additionally, it can be concluded that the courts have used a too broad interpretation of treason in cases where a defendant's actions had no quality to undermine the legitimate government or separate parts of the Indonesian territory from the Republic of Indonesia to establish an independent state. Therefore, it is recommended that laws be enacted to place limitations to what acts constitute treason. One of the criteria is that the act must contain clear elements that can be categorized as treason. For example, if an act is aimed at separating part of the Indonesian territory from the Republic of Indonesia, it must have the quality to do so. This quality can be assessed based on various factors such as the number of people involved in the act, the weapons they use, number of trained

military personnel, etc. Setting such criteria is important for legal certainty and to enable the courts to identify whether an act is an ordinary crime or a crime against the state. The quality of an act considered in terms of whether or not it can threaten the security of the state can be an important indicator for deciding whether the act can be categorized as criminal treason.

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