

LAW, MEMORY, AND SILENCE: THE CASE OF ANTI-COMMUNISM LAWS IN INDONESIA

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Abstract: This article investigates the role of Indonesia’s Anti-Communism laws in shaping and shifting collective memory of past atrocities into an imperative history. These laws are to be understood as a set of rules enacted by the state to proscribe the existence of communism by criminalizing speech of any kind that disseminates the idea of Marxism, Leninism, and Communism. Based on our analysis of several judicial decisions and empirical evidence related to the creation of collective memory, we contend that the problem of the anti-communism laws is twofold. *First*, these laws show a conflict between law and history because they enable judicial practices to transform the judges into the arbiters of history. *Second*, these laws—in addition to other institutions, mechanisms and ultimately embedded ideas/norms—have been enabling a process of social silencing that infringes freedom of expression as they have moved away from punishing acts to punishing speech, writing and certain ways of being.

Keywords: Anti-communism, Indonesia, law, memory, silencing.

1. INTRODUCTION

Indonesia’s transition to liberal democracy has been largely haunted by the legacy of state sponsored violence that happened in the past. More importantly, given the absence of a comprehensive effort to (legally) resolve past human rights violation cases, the state has been unable to achieve the promised reconciliation declared by the People’s Representative Assembly during the transition in 1999 (Setiawan, 2019). Against this backdrop, the 1965/66 communist killings is still considered as one of the darkest historical events in the country and resonates in almost all Indonesians’ memories across generations. This atrocious memory has been shaped by “denial and competition, stigmatization and marginalization” (Eickhoff, Klinken and Robinson, 2017).

After the renowned failed coup d’état attempt on September 30th 1965, the state made a grand narrative of treachery perpetrated by the Communist Party of Indonesia (*Partai Komunis Indonesia*—PKI), alleging them for having kidnapped and killed six generals and masterminded to topple President Soekarno’s revolutionary leadership. During the period of October 1965 to March 1966 the killings targeted those who are indicated as PKI member or sympathizers. This tragedy happened five months before the official statement to ban the party. Only in March 1966, the state then banned the spreading of communism (and Leninist and Marxist) doctrine and prohibited the reestablishment of the Indonesian

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Communist Party through Presidential Decree 1/3/1966.³ The decree was signed on 12 March 1966, one day after President Soekarno was forced to transfer the executive power to Lieutenant-Colonel Suharto. It is also for the first time that the military government officially used the acronym G30S/PKI, which stands for the 30th of September Movement by PKI, to symbolize the blaming of the attempted putsch squarely on PKI (Melvin, 2018, p. 177). Four months later, the decree was reinforced through the enactment of the People's Representative Assembly Decree (TAP MPRS) XXV in 1966⁴ (Cribb, 2001, pp. 231–236). Since then, the law has become a powerful legal instrument to banish the party, to persecute and discriminate those identified as communism sympathizers, and to later legitimize the mass killing of communists during the military regime.

Situating this phenomenon in transitional justice discourse, it is suggestive that the rule of law is a fundamental indicator of transition to democracy (Arthur, 2016). Current studies on Indonesia's transition have primarily focused on identifying the limits of legal-institutional reform at the state level (Sulistiyanto, 2007; Suh, 2012; Setiawan, 2019). While these studies are indeed valuable, focusing on the state level may limit our ability to understand the complexity of legal-institutional responses at the individual cases level. In that regard, we submit that individual cases are in fact crucial sites in which the entanglement of the rule of law and collective memories is made apparent. Despite some legal-institutional reforms the state has performed, these individual cases demonstrate that collective memories continue to affect legal-institutional responses toward communism in ways that undermine the ideal of the rule of law.

This study contributes to existing scholarly works on violence, law, and memories which have been already done in a variety of disciplines—for instance, studies on the role of historical sites, (Eickhoff *et al.*, 2017; McGregor and Setiawan, 2019) social activism, (Wahyoeningrum, 2013) art, (Hatley, 2009; Heryanto, 2012) media, (Ikhwan, Yulianto and Parahita, 2019) and academic institutions (Wahid, 2018). Building on and adding to these approaches, this article aims to focus on examining legal institutional responses on a micro-sociological level, particularly through legal case analysis.

Looking at the intersection of law and memory can help us explain why the transition to democratic processes remains defective in Indonesia (Citrawan, 2018b; Wieringa and Katjasungkana, 2019). Conceptually, law contributes to the shaping of memory, while at the same time, memory is influential in the crafting of law and legal practices (Savelsberg and King, 2007; Lopez, 2015). Nonetheless, little has been done in examining the way

³ The decree was signed on behalf President Soekarno. However, since the document was enacted one day after the executive power was transferred to President Soeharto, it is fair to claim that it is President Soeharto who banned the party.

⁴ Article 1 TAP MPRS XXV/1966 states that “[the People's Representative Assembly] accepts and strengthens the policy of the President/ Supreme Commander of the Armed Forces of the Republic of Indonesia/Great Leader of the Revolution/Mandatory of the Provisional People's Consultative Assembly, on the dissolution of Indonesia Communist Party including its wing organizations as outlined under Presidential Decree 1/3/1966 and enhances the affirmation policy to the status of a parliamentary decree”.

in which memory of the past affects the law in the country, either in terms of its creation or enforcement (Setiawan, 2018). Moreover, only few scholars have discussed such an issue in the context of Indonesian historical violence, particularly the 1965/66 communist purges and killings (McGregor and Setiawan, 2019; Setiawan, 2019). In this context, this study examines how the existing anti-communism laws and judicial practices have shaped Indonesian collective memory about the past and vice versa. While some current studies in transitional justice have employed law as a means to promote reconciliation and victims' reparations for historical violence (McAuliffe, 2013; Citrawan, 2018a), this article emphasizes the idea that law has an important role in shaping collective memory of past violence (Löytömäki, 2014; Lopez, 2015; Osiel, 2017).

This study asserts that the anti-communism law mystifies the existence and the threat of communists in the country. This mystification has evidently hindered any reconciliatory efforts (Miller, 2018), and as such it is a clear indication of a nexus between the application of the laws and the current collective memory about past atrocity in Indonesia (Zurbuchen, 2002, p. 572). In that context, there has been a body of literature that conceptualizes communism in post-transition Indonesia as a *specter* (Heryanto, 1999, 2005). This sort of specter of communism, as McGregor argued, persists as a result of “the firmly entrenched historical orthodoxy that the military created during the Soeharto regime” (2015, p. 6).

Based on this understanding, this study employs a law and society approach, that is, situating law in the context of its socio-historical settings. This approach mainly challenges the idea that law is autonomous and apolitical (Cotterrel, 2004; Mather, 2013). This interdisciplinary approach builds upon the intersection between law, memory, and history, which enables us to address three critical questions of: how the anti-communism laws treat history, how history appears in court decisions, and how the authority of history is used to authorize legal decisions (Sarat and Kearns, 2005).

This article is divided into three parts. First is a brief survey of the relationship between law and collective memory, in which we claim that law's normalizing effect is capable of creating collective memory. Second is a descriptive analysis of several legal cases that by and large determine the history and memory of communism. This description will be divided into two categories: criminal cases and cases beyond criminalization. Last, the third part is an analysis of the creation of social silence as a result of the enforcement of anti-communism laws. Particularly, we are interested in scrutinizing the ways in which such a silencing process affects how the implementation of human rights norms and principles in present liberal-democratic Indonesia.

2. REINFORCING THE PAST THROUGH LAW

The meaning of memory has been discussed among scholars, writers, thinkers and even artists. In the literature, one founding question was how memories are created and how they shape identity and a sense of self. While many scholars position memory in the personal domain, Émile Durkheim (1995) describes how ancestral memory is transmitted across generations, which is shown by rituals and cultural symbols in the society. Following

Durkheim's initial insight on ritualized memory as a distinctly social phenomenon, his student Maurice Halbwachs laid the groundwork for the study of memory as a collective phenomenon. Halbwachs suggested that,

It is in society that people normally acquire their memories. It is also in society that they recall, recognize, and localize their memories. ... It is in this sense that there exists a collective memory and social frameworks for memory; it is to the degree that our individual thought places itself in these frameworks and participates in this memory that it is capable of the act of recollection. (1992, p. 38)

Halbwachs (1992) thus defines collective memory as the way people remember the past through the social framework of individual lives. Collective memory, according to Halbwachs (1992), is not given, it is socially constructed: "it is, of course, individuals who remember, not groups or institutions, but these individuals, being located in a specific group context, draw on that context to remember or recreate the past" (1992, p. 22). The relations between humans impact consciousness and the life of the mind, including the way they remember the past. People reconstruct and reinforce memory of past experiences by gathering with others who share the same experience in the past. Memory is therefore always related to politics, as history is. It can penetrate society through constant narratives delivered by state institutions and other actors in power. Halbwachs also examined the role of myths, narratives and symbolic systems in the transmission of memory, specifically through social structures such as the family, religion, and class relations. In this regard, Halbwachs (1992) argued that these social structures could preserve and disseminate how people remember the past.

Scholars have studied social memory as a contributing factor in national identity building for instance by looking at the remembrance of mass trauma through Holocaust memorialization, which is claimed that the institutionalization of Holocaust memory in postwar European culture has been widely reproduced in monuments, museums, and memorials (Jacobs, 2010). These media provide narratives of good and evil, victims and perpetrators, by suggesting the way society should remember and re-tell the tragedy of the Jewish genocide and the violence of Nazi terror.

Furthermore, scholars have theorized memory in different ways, ranging from the recollection of individual experience to "sedimented experience" which guides our actions in the world at an often-subconscious level. In a discussion on the remembrance of past atrocity, Whigham (2017, p. 55) defines memory as interpretations of the past that impact the present. Or, in Huyssen's (2003) words, memory is the way the past is present. Memory can be seen as different from history; we, however, would suggest seeing history as a form of memory. History is not about the whole truth of what happened in the past. History is always a selection from the past that is captured and restored by those in power. It is only certain memories that gain a certain level of consensus in society. This is why in history books, there are always stories that left behind, specifically stories of the oppressed (Whigham, 2017, 2022).

Memory is about the past as it is perceived by an individual, meaning that memory is always subjective. Jelin (2003) argues that rather than focusing on the subjectivity of memory, scholars need to analyze the process of memory making. Memory is always the object of disputes, Jelin argues, and it is important that everyone can actively participate in the process of its making. Speaking about the actors involved in memory-making, Jennifer Jordan argues that the way people remember the past depends on the vanguard of public memory production whom she calls *memorial entrepreneurs* (Whigham, 2017). That said, anyone can be memorial entrepreneur: we can think of mothers who lost their children during the 1998 riots in Indonesia who now hold mourning ceremonies every Thursday in front of the Presidential Palace, or a 1965 Communist massacre survivor who engages in storytelling as part of a theatrical performance. Arguably, the contestation of memory is not a socially bad thing. Nevertheless, problems may arise when everyone believes that there is only one version of the past that society should remember.

While Halbwachs uses the term collective memory, James E. Young (2016) prefers *collected memory*, which is defined as discrete memories that are gathered into common memorial spaces and assigned common meaning. Following Young, we can think of collected memory as memories shaped after a long trajectory of dispute, conflict, and struggle. Young's definition confirms that there is no single collected memory in society. Hence, we should understand that memory is not a singular term, it is not permanent, and it changes across time and place. In a study on building memory to prevent mass atrocity, Whigham (2017) claims that the non-permanence of memory may also allow for the possibility of changes on memory narratives—which in some instances are instrumentalized to perpetrate further violence or to create social division.

Law, on the other hand, is a powerful institution for the creation of collective memory as it involves highly effective rituals and is backed by coercive state apparatus. From a sociological perspective, law can be seen as an instrument of social control which aims to fulfill three main goals: solidarity, continuity, and conformity, each of which is implemented through force (Treviño, 2019, pp. 39–40). With respect to solidarity, the repressive nature of law is expected to integrate the society which is seen divided due to conflict and social disorder. The second function of law, i.e., social continuity, relates to the maintenance, furtherance, and transmission of civilization. The last aim of law is to ensure conformity with society's norms (Treviño, 2019).

That being the case, trials and verdicts produced by the Court of Law can function as memorializations, which direct the way in which people remember the past (Halbwachs, 1992). As a social system, law is autonomous insofar as its force operates within a habitus, that is “the habitual, patterned ways of understanding, judging, and acting which arise from our particular position as members of one or several social “fields,” and from our particular trajectory in the social structure” (Bourdieu, 1987, p. 811). In the present case, we can speak of a ‘juridical habitus’. Consequently, the reproduction of memory by law differs distinctly from those memories produced by historians or in the worlds of politics, art, and religion. According to Bourdieu,

When the legal norm makes the practical principles of the symbolically dominant style of living official, in a formally coherent set of official and (by definition) social rules, it tends authentically to inform the behavior of all social actors, beyond any differences in status and lifestyle. The universalization effect, which one could also term the normalization effect, functions to heighten the effect of social authority already exercised by the legitimate culture and by those who control it. It thereby complements the practical power of legal constraint. (1987, p. 846)

This kind of *normalization effect* can be found in *stare decisis* doctrine and the practice of precedent in common law tradition (Postema, 1991; Baxter, 1998, p. 2007). Outside this tradition, we can also find such normalization effect through law's coordination and convention, in the sense that, argued Postema, "regularities arising out of and reinforcing a system of mutual expectations and a commonly recognized need for coordinated act" (1982, p. 176). Within this normalizing process, we can say that "law constructs and uses history to authorize itself and to justify its decision" (Sarat and Kearns, 2005, p. 3). The law affects collective memory *first*, directly when such a memory is activated in judicial decisions and legislative processes, and *second*, indirectly when it regulates what information can be collected or accessed.

3. HISTORY IS PRESENT: THE ANTICOMMUNIST MEMORY IN CRIMINAL LAW

Based on our theoretical framework, it is fair to claim at this point that an analysis of the application of anti-communism laws can shed a light on how law and legal institution shape collective memory in Indonesia. Here, the anti-communism laws can be seen as a set of legal instruments made by the state to counter deviance and to control the way people should remember the past. These laws are meant to prohibit a particular kind of act considered as a serious violation of value, or a set of values, central to the identity and integrity of the community and its members (Meier, 2019).

In its initial form, the law did not criminalize communism. Historically, these laws were written during the military regime in 1966 in the form of a People's Representative Assembly Decree (TAP XXV MPR) that prohibits the spread of communist ideology. The law however shows clear evidence on how state reinforced collective memory towards communism. The preamble of TAP XXV MPR mentions that people who follow the idea of communism, particularly the PKI, have in the history from the Indonesian Independence been found to have attempted to overthrow the power of the Government of the Republic of Indonesia. The preamble makes a clear assertion that communists have attempted to overthrow the government for several times—while in fact there is only one incident, the Madiun Revolt in 1948, that can be assumed as such.

During the transition period in 1999, the anti-communism provisions were incorporated into the Indonesian criminal code through a parliamentary decision. The Parliament passed Law No 27/1999 which incorporates the dissemination of communism/Leninism/Marxism as a crime into Article 107 of the Criminal Code, along with some other acts categorized as crimes against state security. Similar with TAP XXV MPR,

the preamble states that communism/Leninism/Marxism ideology has been proved endangering the nation, thus it is important to incorporate such prohibition into the category of crimes against state security.

At this point, we can identify a shift of rationale behind the promulgation of anti-communism law. That is, initially in 1966 the law was enacted in the midst of political contestation during the cold war (Fahrurodji and Zuhdi, 2023). Meanwhile, during the transition in 1999, such criminalization appears to have become a social consensus in the country given the prolonged propaganda and repressive nature of the authoritarian regime since 1966.

The criminalization of communism through laws continues up to the present post-transition Indonesia. The anti-communism provisions remain intact when a new Criminal Code was enacted in January 2023. Article 188 (1) of the new Criminal Code stipulated that any person who disseminate or develop communism/Marxism/Leninism or any other ideology contrary to Pancasila in public either verbally or in written including the distribution of idea through any media, will be punished with imprisonment for maximum of four years. Furthermore, Article 188 (2) to (5) provide some aggravating factors, including the intention of the perpetrators and the impact of such actions. The content of Article 188 of this new Criminal Code is clearly a continuation of previous norms, except that this article provides several exclusions toward education, teaching or any other knowledge generating activities. Although it has been massively challenged by the public, the government insists on maintaining the provision because of its significance in avoiding encroachment on state security that once happened in 1965 (Badan Pembinaan Hukum Nasional, 2018, p. 211). This situation somehow indicates the state's attempt to maintain the dominant narrative that frames PKI as the scapegoat behind the attempted coup in 1965.

The creation of memory in the country can be juxtaposed with the sources of criminalization through analysis of criminal cases decided by the courts in recent years. Specifically, criminal cases selected in this study show that the anti-communism laws were enforced against a wide spectrum of events, such as expressions in social media, defamation, and public demonstration. A thorough examination on the case narrative and the Court's legal opinion could give us an understanding on how memory of the past is being enforced through the application of the laws.

One case related to the criminalization of expression is Andi Bajang case. Andi Bajang, a laborer from Kuningan, West Java, was prosecuted for twelve posts on his Facebook account in May 2017 (case no. 140/Pid.B/2017/PN KNG). One of the pictures shows himself holding an image of *palu dan arit* (hammer and sickle)—widely known as the symbol of the Indonesian Communist Party (PKI)—while beside him was the same symbol printed on a flag. Below the image was a caption: “The laborers stand with the peasants, the impoverished, and the poor”. The rest of the posts are several images of books entitled *Indonesian Communism Under Sukarno* and *Ideologi dan Politik 1959-1965*, both written by Rex Mortimer, and *The Communist Collapse in Indonesia* by Arnold C. Brackman, the author of *Indonesian Communism: A History*. Additionally, he posted an image of three soldiers captioned “*Aku Bangga Jadi Komunis*” (I am proud

to be a Communist) and another nine pictures of hammer and sickle next to the state's symbol of *Pancasila*. The defendant, Bajang, also wrote a post on the subject of *Nasakom* (abbreviation of Nationalism, Religion, and Communism), which is President Soekarno's concept that consolidates all religious and political groups into one ideological strand. The post read that, "If only *Nasakom* was maintained in Indonesia, it is certain that Indonesia would have allies, such as Russia, China, and the (capitalist) allied-states." Bajang was then accused of having violated Article 107a of the Criminal Code and the 1966 MPR Decree on the PKI Dissolution and the Prohibition on the Dissemination of Communist, Leninist/Marxist Ideology. Article 107a encapsulates that "Anyone who unlawfully in public, by oral or written means and/or through any media, spreads or develops the teachings of Communism/Marxism-Leninism in all forms and embodiments, shall be sentenced to a maximum of twelve years imprisonment."

There are two aspects of memory in this case. The first is concerned with the stigmatization of communism. The defense attorney implied that the defendant has nothing to do with communism and tried to challenge the applicability of this stigma by arguing that it is normal for laborers to use hammer and sickle as their daily working instruments. The Court, however, maintained that the defendant had misused them as symbols of communism. Instead of analyzing the meaning of these symbols in a particular context, and how this picture would affect the reader's opinion and understanding about communism, the Court asserted that 'hammer and sickle' symbolizes PKI and that therefore the picture itself should be seen as a means to spread communism. With respect to the books, the Judges foreclosed any discussion on their substance, that is, whether these books contained communism teachings. By contrast, the Court simply judged the books literally by their covers (and their titles). In its application of the anti-communist law, the Court mainly based its consideration on the historical fact that PKI used hammer and sickle as its symbol. This shows that there is an absence of substantial reasoning on what the meaning of 'communism teaching' is.

Under the prolonged stigmatization against communists, historical knowledge as a basis for this verdict must be seen as an important issue. The New Order regime actively generated this historical knowledge by establishing anti-communism law, promulgating propaganda through media, museum and the most significant was through movies. Heryanto (2012), who did a research on the New Order propaganda, noted that the government obliged the citizen to watch a state-produced movie '*The Treachery of PKI*' (*Penghianatan G30S/PKI*) on every September 30th. In the movie, the director presented the PKI's attributes such as: hammer and sickle sign, songs and books. These attributes were then associated with the cruelty of PKI, that is, how PKI members slaughtered the generals and threw them into a well. As a consequence, these symbolic attributes have been rooted in the mind of Indonesians as something horrifying for a long period of time. The government even condemned any film makers who dare to create alternative movies (Heryanto, 1999, 2012). This situation provides a solid basis for recent stigmatization and remains captured in some legal decision described above.

The second aspect is the shaping of memory through witness' statements (Thorne, 2023). In *Bajang*, there is an attempt by a witness to draw a link between the crime accused

and a historical fact that the defendant's grandmother was a former PKI member. Although the Court did not consider this testimony in its opinion, such evidence nevertheless demonstrates the ways in which the memory of communism works through the voice of witness in court proceedings—including expert witness. This is a clear indication that many still believe that ex-PKI members are evil and that they could 'transmit' their evilness to their descendants and relatives. The Court decided that the defendant had violated the anti-communism law and convicted him to one year and nine months imprisonment. The Court's verdict somehow confirms and preserves people's stigmatization of ex-political prisoners.

In fact, this criminal trial fails to be an inclusive space for memory curation as many discourses were left uncontested, favoring instead the stigmatization of a particular symbol. The Court likely continues to reproduce stigmatization of phrases, such as 'PKI', '*palu dan arit*' (hammer and sickle), and the 'red flag', and construing them as hostility to the state ideology of *Pancasila*. The Judges treated communist symbols as society's taboos, conforming themselves to the dominant narrative built by the previous authoritarian regime. Or, to put it in Halbwachs' term, the trial has become a 'memorialization' where people were forced to remember past events in a certain way.

The image of PKI as a violent, immoral, and threatening group is also apparent in defamation cases. Suwignya from Trenggalek, East Java, was charged for calling his neighbor, Suharyo, "a PKI!" (case no. 44/Pid.Sus/2015/PN.Trk). Feeling insulted, Suharyo filed a criminal report to the police. In its legal reasoning, the Court declared that this act was to be considered defamatory, since the PKI was perceived as "immoral and a threat, therefore being called a member of the PKI would cause people to feel insulted." The Judges considered the word 'communist' is equal to "slut" or "dog" by arguing that, "... it is hard for the government to accept [the word of] PKI, as well as dog and slut, which are perceived as despicable and dishonorable by the society. [in Indonesian: *PKI sangat sulit diterima oleh pemerintah Indonesia begitu juga dengan sebutan asu adalah kata-kata makian dan lonte adalah orang yang dipandang hina di masyarakat*]" This argument, however, came from an expert witness presented by the prosecutor who opined that the word 'PKI' implies an immoral character that might violate someone's dignity. The defendant, Suwignya, was then sentenced to three months of imprisonment. Similar reasoning can also be found in one of the military court's criminal proceedings (case no. PUT/04-K/BDG/PMT-II/AD/VI/2010) related to defamation. By saying "communist lackeys [*antek-antek komunis*]" toward a certain individual, the Military Court declared a defendant, who was previously an active army member, had violated Article 301 of the Criminal Code on defamation and imposed him five months in prison.

The complexity of this so-called judicialization of communist stigma is also evident in *Budi Pego* Case (case no. 559/Pid.B/2017/PN.Byw). Heri Budiawan, under the alias Budi Pego, was an activist who for environmental reasons led a public demonstration in 2017 against the opening of a gold mine company in Banyuwangi, East Java. While the Law of Environmental Protection clearly prohibits any criminal suits against any individuals who protesting in defense of the right to a good and healthy environment, the Court applied the anti-communism laws instead, and convicted Budi Pego to ten months

prison sentence for having spread communism teachings during the public demonstration. Also, in this case the Court grounded its decision simply on a video that captured a hammer and sickle symbol in a public demonstration. Several scholars have conducted a legal examination of the decision and found several legal flaws, especially regarding the burden of proof during the case proceeding (Wiratraman, 2019).

Criminal law by its own ritual has the legitimacy to distinguish the bad from the good in society. It has the power to enforce who should be punished, why, and how. Current criminal trials in Indonesia enforce the idea that communist ideology is intertwined with violent, cruel, and rebel behavior. Moreover, almost all criminal case-laws examined in this article frame communist parties as forbidden groups/organizations, atheist, a threat to national/social order and enemies of the people. The way communism is perceived in criminal trials impacts the way people remember violence against PKI members after 1965. As a consequence, historical narratives created during the criminal trials have re-produced a justification of the banning of PKI, communist ideology, and any symbols related to it.

By criminalizing the spread of communism doctrines, the Court justifies the historical violence on ideological basis. This situation indicates that certain aspects of memory are being preserved and some are excluded from the Indonesians' collective memory. The ritual embodied in criminal trials has become "communicative strategies of erasure that work toward silencing the experiences of subaltern groups" (Pitaloka and Dutta, 2019, p. 336). At this point, legal practices in criminal law imply a kind of state's denial. In that sense, Cohen (2001, p. 5) defines denial as "an unconscious defense mechanism for coping with guilt, anxiety and other disturbing emotions aroused by reality." The state of denial admittedly lies in the grey area between consciousness and unconsciousness (Lacey, 2007). Based on this definition, Cohen (2001) categorized denial into three forms: literal, interpretative and implicatory denial. Literal denial implies that the knowledge or the raw facts are blatantly denied: "nothing happened," "there was no massacre." With interpretive denial, the raw facts are not denied but instead are attributed a different meaning, such as population exchange or collateral damage (and not a massacre) (Moon, 2007, pp. 315–316). Implicatory denial refers to the denial or the minimization of its significance or of its implications, "these killings have nothing to do with me," "why should I risk my life to intervene" or "it is worse elsewhere" (Cohen, 2001; Parent, 2016).

Since there is no explicit refutation of the communist massacre declared by the Court, it is difficult to see these cases as a literal denial. Furthermore, any attempts to rationalize or justify past atrocity are hardly found in the legal arguments. At the same time, the government has shown concerns to the 1965 tragedy by initiating a National Symposium of 1965 massacre in 2016 (McGregor and Setiawan, 2019). These findings evidently imply the absence of implicatory denial. As such, it is plausible to say that the anti-communism criminal trials led to what Cohen conceptualizes as interpretive denial, as it is widely and publicly known that there were thousands of people killed and arrested due to their connection to the PKI. That said, the Court's argument in applying the anti-communist laws can be seen as an attempt to claim that the mass violence against the PKI members in 1965/66 and their family was not a genocide. Instead, it is seen as a form of protection against threat to national security.

4. BEYOND CRIMINAL LAW: THE SPILLOVER OF CRIMINALIZING COMMUNISM

Beyond criminal law proceeding, the reinforcement of stigma of communism can also be found in administrative claims and civil suits. These cases display what we call ‘spillover of memory’ from criminal law to other fields of law. Such a spillover evidently forms a broader area implicated by the anti-communism law. By introducing the concept of implicated area, we later claim that criminal law has a legitimating force towards other fields of law due its coercive nature in imposing punishment on individuals.

One of the implicated areas of the anti-communism law can be seen in the *Attorney General Clearing House* case. The case was brought to the Administration Court (*Pengadilan Tata Usaha Negara*) in 2010 by Institut Sejarah Sosial Indonesia (the Indonesian Institute of Social History) that challenging the Attorney General Office’s (AGO) decision on book banning. The dispute deals with the AGO’s decision to ban *Dalih Pembunuhan Massal Gerakan 30 September dan Kudeta Suharto*, which was written by John Roosa and published by the Institute.⁵ The AGO declared that the book itself was a provocation against the Indonesian government’s policy as its author argues that the army has conspired with the United States government to plan the coup against Soekarno, who then put the blame on PKI. From a strictly legal sense, the AGO also argued that by referring to the coup attempt as the ‘G-30-S’, without ‘/PKI’ following the phrase, the book has violated the People’s Assembly Decree XXV/1966 that inscribes the 1965 tragedy as “G-30-S/PKI”—which is basically a propagation of the idea that PKI was the responsible actor. Against this argument, the claimant grounded their argument on human rights norms under the constitution, national laws, and other ratified international law instruments. Moreover, the claimant brought forth a prominent Indonesian historian, Thamrin A. Tomagola, who argued that “if an event is seen from the historical point of view there will be different points of view. This [the history of the coup attempt] may be disclosed by anyone and there are differing ways in which an event is interpreted, which cannot be valued or judged except through expert hearings. These expert opinions are, however, works that should not be judged by other institutions.”

However, as this is an administrative dispute, the Court mainly decided the case on the basis of general principles of proper administration, namely: legal certainty, state administration order, public interest, transparency, proportionality, professionalism, and accountability. (Bedner and Wiratraman, 2019) While the Court explicitly made reference to the freedom of expression and thought, they elaborate public order as the basis to delimit that freedom. In interpreting public order, the Court refers to the Presidential Decree 4/1963 that ruled public order as instances “related to the foundations of social order in a certain period of time, directing people’s belief towards the revolution, national leadership, and socialism.” Under this regulation, argued the Court, Roosa’s book hence should be interpreted as a form of writing that is “... intolerable to read by the people, and closely

⁵ In 2000, the book was first published by the University of Wisconsin Press under the title *Pretext for Mass Murder: The September 30th Movement and Soeharto’s Coup d’Etat*.

related to society's legal situation in a particular period, to the events which happened to the people and the state, to Indonesia's personality." Rather than attempting to clarify how the writing materials *in casu* would infringe public order, the Court simply left the issue to the AGO's authority to take substantive measures. Furthermore, the Court appears to have arbitrarily interpreted the state's authority to infringe upon individuals' freedom of thought, namely on the basis of a "potential or a great likelihood" of public disorder. Finally, the Court declared valid the AGO's decision to ban Roosa's book on the basis that the AGO had procedurally invited all relevant stakeholders for a dialogue during the clearing house meeting. Important to note at this point that the Court's approach to public order manifests the dominance of a particular narrative about communism in the country.

The Court's reasoning in administrative dispute and civil suit is to a certain extent in line with the kind of reasoning found in criminal law cases—albeit that a few occasions yield different outcomes. In the field of civil law, there are at least two types of cases that can be traced back to the criminalization of communism. *First* is civil cases about ex-communists' economic rights (145/G/2006/PTUN.JKT; 73/G/2007/PTUN-BDG). Reading these cases shows that the Court has been lenient in interpreting the historical event, despite the prolonged disputable 'truest' history about the 1965 communist purge. The *Wimanjaya* Case (case no. 34/Pdt.G/ 2014/PN.Jkt.Sel.; 605/PDT/2015/PT.DKI.; 828 K/Pdt/2017) is one of the best examples of civil suit in which the economic violence of the past was acknowledged in legal proceeding by both the government and the Court. *Wimanjaya*, an author whose books were banned by the repressive government in 1990s, claimed for financial reparations from the government in 2015. Based on evidence provided by both parties, i.e., the plaintiff and the government, the trial court argued that the book banning was "backed by the authority's subjective and arbitrary power to uphold the political situation and social order." The trial court furthermore manifested that the banning should be considered "an 'abuse of power' or a misuse of authority by the government (*onrechtmatige overheidsdaad*)." While the trial court awarded *Wimanjaya* compensation up to one billion rupiahs, the appellate and cassation courts have unfortunately overturned this decision later in 2017.

The *second* type of cases that are implicated by the anti-communism criminalization deals with land extortion and expulsion (74/Pdt.G/2012/PN.Kdi), which involving thirty-four claimants against a plantation company and local land registrar. In this land possession dispute, an attempt to acknowledge the plaintiff's historical argument can be found in the Court's consideration of facts. The Court depicted that "Battalion 521 [of the army] gathered some farmers from two villages, 94 farmers from Durenan village and 120 from Balarejo village, and commanded the farmers to move to a certain location that had been prepared, Tegalrejo village, while issuing a threat that if they refused to be relocated they would be regarded as members of *Barisan Tani Indonesia* [the PKI's farmer organization] or as members of the PKI, and that they would be killed" (p.57) Nonetheless, the Court eventually rejected the claim because the plaintiff had failed to include the army as one of the defendants. Apart from the procedural issue, in this non-criminal case, as well as in some other comparable instances, the word 'communism' appeared to be less taboo than in criminal cases, and the Court appears to be willing to consider an alternative story rather than enforcing the dominant narrative against communism.

Our further implicated area is reflected in constitutional review case. In this area, certain legal arguments provided by the Constitutional Court (CC) point towards the fact that outside criminal law there is sometimes more room for acknowledging communist's victimization. As a product of the reform era, the CC has a significant role in shaping Indonesia's legal system, particularly through interpreting the constitutionality of laws (Faiz, 2016; Hendrianto, 2020; Pratiwi, 2021). To give an example, during the judicial review of the *Local Election Law* in 2003 (011-017/PUU-I/2003), the CC was presented a constitutional challenge delivered by persons who were formerly affiliated with PKI. They claimed that the prohibition against former PKI affiliated persons to run candidate in any local elections, as enshrined under the 2003 Local Election Law, is contrary to the constitution. In considering the case, the CC applied human rights norms as the basis to assess the constitutional validity of this prohibition, declaring that all individuals should legally be protected against discrimination and be ensured equality before the law. The CC emphasized that individuals who are the former members of PKI or any mass organization affiliated with PKI, "shall be treated equally with other citizens without discrimination" (p.36). The CC's rationale was that the PKI members' involvement in the historical 1965 coup attempt had been legally resolved through criminal proceedings, thus, the Court said, "it is an obstruction of justice and the rule of law if [PKI affiliated] individuals who were not involved in the coup attempt were held accountable for it and prohibiting them from running for candidate in a local election" (p.37). Rather than exclusively focusing on the issue of discrimination, however, the CC turned out to be invested in enforcing the criminalization of communists by stating that "the involvement of the Indonesian Communist Party in the G.30.S/1965 case" was "undoubtedly a fact for most Indonesians."

The CC declared that the prohibition of ex-PKI members to participate in elections was unconstitutional. In this respect, the CC made two significant legal arguments. *First* is that the People's Representative Decree XXV/1966 should only be invoked with respect to (i) the prohibition of the PKI; and (ii) the prohibition to spread communist or Marxist-Leninist doctrine. The CC opined that the Decree had nothing to do with any revocations or restrictions of citizens' active and passive electoral rights, including those of ex-members of PKI. *Second* is that the CC decided that the discriminative prohibition against ex-PKI members enshrined under the 2003 Election Law "should no longer be seen as relevant in light of the nation's commitment to reconciliation, a more democratic and just future."

Furthermore, a rather progressive interpretation of law could also be found in the Supreme Court's judicial review of Presidential Decision 28/1975 (33P/HUM/2011). Originally, this Presidential Decision enabled the state to label individuals who were allegedly involved in the G.30.S/PKI as *Golongan C* (literally as 'C Group'). In practice, individuals with this label were denied basic economic rights, such as a proper job, salary and pension rights. In its decision, the Supreme Court decided that the 1975 Presidential Decision was contrary to human rights norms, specifically Article 26 of the International Covenant on Civil and Political Rights, ruling that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or

other status.” By declaring this Presidential Decision void, the Supreme Court engaged in an act of reparative remembrance, which had the potential of leading to a new mnemonic narrative in the public sphere (Rigney, 2012, p. 253). To be more specific, the Supreme Court evidently interpreted the application of anti-communism laws from a human rights perspective, so that the people affected by these laws may obtain sufficient remedy from the state.

That being the case, the softening judicial narratives addressed in this section are contingent upon the ways in which collective memories canvassed in criminal trials. A careful reading of the legal cases above clearly delineates that the critical problem of the anti-communism laws (and their enforcement) is that their objective is to punish actors and certain ways of being rather than the act itself. In this sense, criminal law, as one may refer also to the criminalization of holocaust denial, has become “a bearer of messages rather than a warden of interest deserving protection” (Fronza, 2018, p. 159).

Historically, the anti-communism laws were initiated to serve a political goal, namely the criminalization of communist ideology. Meanwhile, in the current post-reform era and after decades of propaganda by the military dictatorship, it is likely that there is a kind of social consensus to put an end to communism in the country. It seems that, in our given cases, the memory of past mass atrocity was produced “on behalf of one’s own political collectivity [and] might serve as a last resort for the symbolic-political integration of [a] highly differentiated... societ[y]” (Langenohl, 2008). The laws made past atrocity unspoken and this situation turns out to becoming a symbolic integration of the society, a convergence of behavior. But this sort of integration of Indonesian society—through a shared rejection and criminalization of communism—has come with the cost of repeated social, political and legal exclusions of (alleged) communists and their families. Similar with the case of any other modern societies, the Indonesian national identity is partly built on historical trauma, leading the Indonesians to a continuous repetition of victimization of the same historically disenfranchised groups. That being the case, the anti-communist laws can be read as mnemonic responses to the traumatic period of the mid-1960s, and it is through their enforcement and reproduction of particular memories that the violence of 1966/66 persists in the country today.

5. REMEMBERING THE FUTURE: HISTORICAL SILENCE IN THE AGE OF HUMAN RIGHTS

In today’s age of human rights protection, the application of anti-communist laws pursues *latent* goals over the laws’ *overt* function.⁶ In this case, the overt function of the anti-communism laws aims to secure national identity and public order, while its latent function is inclined to control the way people perceive and remember communism and the mass atrocities that happened in the past. The laws become a tool to reinforce

⁶ Fronza (2018) defines *overt* function as what law explicitly declare. Meanwhile *latent* function define as what law is actually intended.

a social consensus with respect to the public memory of past events (Whigham, 2022). This placement of political ends before legislation and trials creates, as Fronza correctly suggests, “negative repercussions for criminal law and its general function to uphold legality and the harm principle” (2018, p. 160).

In line with this situation, the recent enactment of the new Indonesian Criminal Code also builds on collective memory that we have sketched above. The legislators have kept more or less the same formulations of the anti-communism laws as they currently exist. In Indonesia, the term “legislator” indicates both the parliament and the executive, as the two share the power to legislate. The constitution clearly states that “the *laws* are to be created by the parliament along with the president”, though the final decision to enact laws still is a parliamentary decision (Butt and Lindsey, 2018, pp. 43–44). This recent enactment of the Criminal Code accounts for the reproduction of collective memories through upholding the criminalization of communism. Both inside and outside Indonesia’s legislative process, the country has been involved in a power struggle in which the military plays a significant role (Diprose, McRae and Hadiz, 2019; Laksmana, 2019). In particular, the army has long pushed and preserved memories of communist evilness. These memories are not merely part of the army’s internal narrative and doctrine, but they are also communicated to the outside world through monuments, recruitment and marriage policy, and educational and training modules (Munsi, 2016).

As it is the case, restricting memories and criminalizing communism creates silences in today’s Indonesian society. Through the creation and implementation of the laws discussed above, the state affirms its official truth and cements “a definitive construction of facts” (Fronza, 2018). Conceptually, silencing is considered to be a cultural tool to silence memory of past wrongs. According to Pasupathi & McLean (2010, p. 86), social silencing “can be a means through which individuals within a group become aligned in their views of reality.” The process of silencing done by the state after the 1965 violence has marginalized certain groups in society for having different memories of the events. These groups mostly consist of ex-members of the PKI and its affiliate organizations (e.g., Gerwani, BTI, CGMI, Lekra) as well as others who were put in jail and tortured without trial. Many of these groups are forced to keep their memory silent because of social stigma and the repression of their activities.

On the other hand, silence, according to Labanyi, “offers the possibility of reflecting on what is remembered, and memories are transmitted not only through words but also through the body and material culture” (2009, p. 28). Persecution and intimidation by particular groups, especially some certain religious hardliners, compelled the victims to find more secure ways to maintain their memory (Putri, 2018). These victim groups gathered and held their own memorializations of past dark experiences (Heryanto, 1999; Hatley, 2009; Wahyuningroem, 2013; Lis, 2018). Some collaborations between survivors, NGOs, and local governments successfully conveyed clear messages to the wider public about the need to understand victims’ perspectives as well as calls for solidarity (Wahyuningroem, 2018). One example is formed by a silent protest called *Kamisan* to commemorate the victims of enforced disappearance in the past (Wahyuningroem, 2019; Irfani, Muharam and Sunarso, 2022). Inspired by the Mothers

of Plaza de Mayo in Argentina, the victims' families gather and hold a vigil before the President's palace every Thursday since 2007. In Palu, a city at the center of the Island of Sulawesi, a collaborative effort between an NGO and local government resulted in an official apology on the 1965 Communist purge in 2016, which was expressed by the mayor. Furthermore, a theatre play performed by women survivors in Yogyakarta in 2017 has focused on their personal experience of imprisonment, on how families lost their relatives without knowing whether they were still alive, and on how these women struggling to survive after being released from prison. These messages resonate amongst members of the audience who were either bystanders of the violence in their communities or indirectly affected by the violence.

All these initiatives share a number of characteristics. By adopting a liberal human rights framework to address their narratives and interests, these groups have shown that they are no longer divided based on the Cold War ideological lines as it was in the past (Wahyoeningrum, 2013). These groups asked the government to see them as human beings, not as members of political parties who hold the same rights as others. Such activism is dynamic and evolves over time. Currently, we are seeing the emergence of the so-called 'carrier groups' of collective memories which operate through new media, civil society organizations, and victim or survivor groups. Following Young's argument, there is no single collected memory—it is always contested—and that these groups have become "memorial entrepreneurs", struggling to preserve their memory of past atrocity in the midst of unfair contestation. Through the work of these groups, contemporary human rights issues are connected to historical injustices as today's structural injustice the survivors continue to face puts them as one of the marginalized groups in society (McGregor, 2013).

In the current legal development in the country, human rights appear to be an *emerging* language within the Court of law's arguments. At this point, a liberal framework of human rights has become a symbolic—yet contested—power within the existing dominant narratives of historical injustice. While the justification for restricting certain ways of being has been the protection of public order and public moral, human rights principles play an increasingly large role in reconfiguring such justificatory practices.

The shift towards human rights activism is a clear sign of the growing significance of liberalism and human rights discourse in the country. The future collective memory about historical injustice of the 1965/66 communist purge will largely be determined by this social activism, because it has the potential of amplifying alternative memories currently suppressed by the state. While the law as a system is, borrowing from the autopoietic lens (Luhmann, 2004), cognitively open to its environment—including to social and political influences—human rights have the potential to become a shared value and language amongst legal related institutions, specifically when dealing with past violence. As McNaughton put it, "the construction of a counter-power to the forces that were unleashed through the mass violence of 1965... demands the mobilization of memory, that is, the individual and collective process of putting the shards of memory back together to create something of a social whole" (2015, p. 304).

6. CONCLUSION

This article has argued that the nexus between law and memory sheds a light on the potential transformative character of law in a society, that is, transforming from a history of unacknowledged violence to the one in which violence is being remembered and contested in the courts of law. By examining Indonesia's anti-communism laws, this article concludes that the state's criminalization of certain ways of being (i.e., speech or expressions related to communism) has enabled the court of law to become one of the factories of memory in the country (amongst, for instance, museums, monuments, mass media, etc.). Through the power of ritual, the court manufactures collective memory and thereby authoritatively declares which history the society must remember.

Several judicial practices addressed in this article, moreover, made clear that the laws have led to the process of social silencing, especially upon the victims of the 1965/66 Communist Purge. Currently, these silencing processes are increasingly colliding with the current post-transition liberal human rights activism in the country. The force of human rights norms and principles have subsequently created a new social identity in the face of the repressive policy against the specter of communism. The effect is twofold. It summons the need for the country, on the one hand, to reconfigure the protection of public consensus about history, and, on the other hand, to reaffirm the state's commitment to resolving past atrocities.

That being the case, it is fair to say that the country is in the midst of transformative justice process. In this context, law ought to be a transformative instrument by providing a *communicative* space between subjects for the contestation of memory (Savelsberg and McElrath, 2014, p. 267). Law and legal system should not be seen exclusively as an instrument to fulfill the economic and political rights of the victim/survivor. It should not be seen merely as a solution to find the truth of past violence. Yet, the law must be adequate to become a space that allows for inter-memory discourse—an area that is worth to study further. In order to fulfil its role of bringing justice to the society, law and legal system must be able to adequately remember past injustice in order to generate a history for the present and to imagine a just future (Postema, 2004).

STATEMENT OF CONFLICT INTEREST

The authors whose names are listed above certify that they have NO affiliations with or involvement in any organization or entity with any financial interest (such as honoraria; educational grants; participation in speakers' bureaus; membership, employment, consultancies, stock ownership, or other equity interest; and expert testimony or patent-licensing arrangements), or non-financial interest (such as personal or professional relationships, affiliations, knowledge or beliefs) in the subject matter or materials discussed in this manuscript.

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