

# RECONSTRUCTION OF THE MEANING OF *MAKAR* AND ITS RELEVANCE TO THE CONCEPT OF *AL-BAGHYU* IN THE *FIQH JINAYAH*

Musda Asmara<sup>1</sup>, Le Thi Thao<sup>2</sup>

<sup>1</sup>Institut Agama Islam Negeri Curup  
Jl. Dr. AK. Gani No. 01 Curup Rejang Lebong Bengkulu, Indonesia

<sup>2</sup>University of Law, Hue University  
03 Le Loi Street, Hue city, Vietnam  
E-mail: <sup>1</sup>[musdaasmara@iaincurup.ac.id](mailto:musdaasmara@iaincurup.ac.id), <sup>2</sup>[ltthao@hueuni.edu.vn](mailto:ltthao@hueuni.edu.vn)

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**Abstract:** The 2019 General Election (*Pemilu*, Indonesia) divided Indonesian society into two sides, namely the *#2019GantiPresiden* and the *#Jokowi2Periode*. The situation between the two sides was tense, which could potentially cause a commotion and worsen the public's situation. Supporters of Jokowi's camp describe the *#2019GantiPresiden* movement as an attempt to commit *makar* (treason) against the legitimate government, while the government's opposing side describes the accusation of treason as a violation of democratic freedoms. Based on the foregoing, the question arises as to whether going against the government can be considered *makar*, which is a criminal act. The type of this study is normative research that uses library research to collect data. This study concludes that opposing the government (*Oposisi*) or criticizing the government is not *makar*, but rather the right to free expression. *Makar* as a negative brand image should not exist in a democratic post-reform environment. It should be used sparingly so that no arbitrariness violates human rights. This corresponds to the definition of *al-bughah* in Islamic criminal law.

**Keywords:** *makar*; *al-baghyu*; *fiqh Jinayah*.

**Abstrak:** Pemilihan umum (*Pemilu*) pada tahun 2019 telah memecahkan masyarakat dengan dua kubu/dua gerakan, yaitu gerakan *#2019GantiPresiden* dan gerakan *#Jokowi2Periode*. Situasi pun mencekam antara kedua belah pihak yang berpotensi mengarah kepada keributan, dan menyebabkan kondisi masyarakat semakin memanas. Pendukung kubu Jokowi menyebut gerakan *#2019GantiPresiden* merupakan upaya *makar* terhadap pemerintahan yang sah, sementara kubu disebelah pemerintah (*oposisi*) menyebut tuduhan *makar* tersebut merupakan pelanggaran terhadap kebebasan demokrasi. Berdasarkan latar belakang diatas timbul pertanyaan apakah bersebrangan dengan pemerintah dapat dikatakan sebagai *makar* yang merupakan tindak pidana?. penelitian ini termasuk jenis penelitian normatif dengan teknik pengumpulan data melalui penelusuran kepustakaan (*method of library*). Penelitian ini menyimpulkan bahwa bersebrangan dengan pemerintah (*oposisi*) atau mengkritik pemerintah belum bisa dimaknai sebagai *makar* melainkan hak kebebasan berpendapat. *Makar* sebagai *brand image negative* tidak sewajarnya muncul dalam suasana berdemokrasi pasca reformasi. Seharusnya *makar* dimakanai secara *limitative* agar tidak ada kesewenang-wenangan yang merugikan hak asasi manusia. Hal tersebut sejalan dengan makna *al-bughah* dalam hukum pidana Islam.

**Kata kunci:** *makar*; *al-baghyu*; *fiqh Jinayah*

## Introduction

Democracy is a way of life that prioritizes equality; in general, democracy in Indonesia is considered by-elections, specifically elections that are free and fair and respect civil liberties, but

the government has significant flaws, including an unhealthy political culture and low levels of political participation.<sup>1</sup>

<sup>1</sup> Siti Faridah, "Relevansi 'Makar' Dalam #2019GantiPresiden," *Prosiding*, vol. 4, no. 2 (2018), p. 238.

The General Election (Pemilu) in Indonesia was held on April 17<sup>th</sup>, 2019. Meanwhile, in 2018, before the general election for president and vice president, there was a growing movement called #2019GantiPresiden. Conflict occurs even among political elites who oppose the movement. #2019GantiPresiden was responded to by The Government with the hashtag #Jokowi2Periode. There was potential for chaos because of the tense situation between the two parties. Even before the General Elections Commission (KPU) announced the names of the presidential and vice presidential candidates, these hashtags had heightened the public's anxiety. Supporters of Jokowi argue that the #2019GantiPresiden movement was an attempt at *makar* (treason) against the legitimate government, while the opposition called the accusation of *makar* a violation of democratic freedoms (as happened in the New Order era).<sup>2</sup>

Furthermore, the call for "people power" was echoed by certain political elite groups about claims of structured, systematic, and massive fraud in the 2019 election, before the presidential and vice presidential elections, as well as members of the legislature, reaping both benefits and drawbacks among the public. Even some Human Rights activists had urged the apparatus not to act hastily in determining the *makar* violation against the call and assessing that the application of the *makar* offense could be contrary to democracy and the Indonesian legal system.

Simply put, *makar* means attack or "aanval," which means an attack with malicious intent (*misdadige aanranding*), while *makar* literally means attack or to attack.<sup>3</sup> Thus, in this democratic country, is freedom of expression associated with *makar*? Can groups that oppose the government be charged with *makar* under Article 107 of the Criminal Code (KUHP, Indonesia)? Thus, what exactly is the definition of *makar*?, and what about the concept of treason in the context of

*Fiqh Jinayah* if it is correlated with the concept of "al-bughah"? These matters are what this paper will look into.

The presentation of *makar* is indeed common in academic circles, as evidenced by a journal titled "The Problem of Understanding *Aanslag-Aanslag tot en feit*: Comparison of *Makar* in the Criminal Code, *WvSNI*, and *Sr*." The purpose of this paper is to investigate the meanings of the terms *aanslag* and *aanslag tot en feit* as used in the statutory provisions of the *WvSNI* (Colonial Dutch Criminal Code) and to compare them to similar provisions in *Sr* (the new Dutch Criminal Code).<sup>4</sup>

Furthermore, a paper titled "Offense against State Security (*Makar*) in Indonesia (A Normative Juridical Analysis in the Case Study of Sultan Hamid II)" explores normative (doctrinal) juridical studies on the subject of Offenses against State Security (*Makar*). In Indonesia, the offense was then compared to accusations of *makar* or rebellion leveled against Sultan Hamid II between 1950 and 1953.<sup>5</sup>

Another study, "Juridical Review of the Concept of *Makar* in the Perspective of Islamic Constitutional Law," reviews the specifications and indications of treason from the perspective of Islamic constitutional law by taking the constellation of thoughts of classical scholars.<sup>6</sup>

The writer admitted that the research on *makar* is not exactly new and is not the first time it has been conducted, because many other writers have previously researched this subject, both in the form of research published in journals and in the form of thesis, and dissertation. However, this study differs from previous research in several ways. The first, Widati compares *makar* in the Dutch Criminal Code during the colonial era to

<sup>2</sup> Siti Faridah, "Relevansi 'Makar'...", p. 239

<sup>3</sup> Adami Chazawi, *Kejahatan Terhadap Keamanan Dan Keselamatan Negara*, (Jakarta: Raja Grafindo Persada, 2002), p. 7.

<sup>4</sup> Widati Wulandari dan Tristam P. Moeliono, "Problematisasi Pengertian Aanslag-Aanslag Tot En Feit: Perbandingan Makar Dalam KUHP, WvSNI Dan Sr," *PJIH*, vol. 4, no. 3 (2017).

<sup>5</sup> Widati Wulandari dan Tristam P. Moeliono, "Problematisasi Pengertian Aanslag-Aanslag...", (2017).

<sup>6</sup> Syariful Alam, "Tinjauan Yuridis Konsep Makar Dalam Perspektif Hukum Tata Negara Islam", vol. 26, no. 2 (2019), p. 310.

*makar* in the new Dutch Criminal Code. Meanwhile, Anshari's journal focuses on *makar* in Indonesia and its connection to accusations of *makar* or rebellion against Sultan Hamid II in 1950-1953. Similarly, Syariful Alam's article focuses on the study of *makar* from the perspective of Islamic constitutional law. The preceding writings have a different side with this paper, not only in terms of the background of the problem but also in terms of its purpose.

This paper aims to re-open the discussion on the definition of *makar*, which some people would misinterpret the word as opposed to the government. This study will investigate the true meaning of *makar* and its relationship to the concept of *al-baghyu* in *Fiqh Jinayah*, in the hope that a clear understanding and rule of law regarding the concept of *makar* will emerge and that Indonesia will be more progressive in resolving the hustle and bustle of problems and political dynamics.

## Method

This study is a normative research design with data collection techniques based on library research. It will be explored through various literature relevant to the subject, such as books on offenses against state security and *Fiqh Jinayah*, to collect data on the notions of *makar* and *al-bughah* in the concept of *Fiqh Jinayah*. Meanwhile, the author employed the *verstehen* method (understanding the meaning of *makar*) and the comparative method of the concepts of *makar* and *al-bughah* in *Fiqh Jinayah* in analyzing the data.

## Discussions

### *Makar*

A crime against the state/state security has a direct impact on the rule of law and the process of the nation-state. Crimes against state security include acts that violate the rule of law and, of course, target the state. Citizens commit a crime by targeting a country's power or government system. Treason (*Makar*) is one example of the crimes committed against the state.

*Makar* is a crime against the state that is ruled by Book II and Chapter 1 of the Criminal Code. The inclusion of crimes against the state in Chapter 1 of the Criminal Code indicates that these are the most serious offenses. Nonetheless, despite being classified as a serious crime, this offense raises a variety of interpretations among criminal law experts. In addition to *makar* interpretations, scientists interpret the various elements of the *makar* offense differently, hence the Constitutional Court must define this offense.

*Makar* is defined in the Criminal Code in articles 87, 104, 106, 107, 108, 110, and 140. The seven articles are spread across two books. Article 87 is a general provision or rule in Book I of the Criminal Code, while Articles 104, 105, 106, 107, 108, 110, and 140 are crime offenses in Book Two. The division of *makar* offenses into two books reveals that the Criminal Code seeks to give meaning to the elements of *makar* as stated in article 87 (Book I of the Criminal Code). Despite efforts, the elements of *makar* as defined in Article 87 remain unsatisfactory, forcing the development of interpretations of various doctrines by criminal law scientists. The complete text of Criminal Code Article 87 is as follows:

"It is said to be *makar* to commit an act if the intention to do so can be proven from the start of the perpetration, as referred to in Article 53."

### The History of *Makar*

The Netherlands is the only European country with an article about "*aanslag*" (treason). Other countries' Criminal Codes often include an attempt at offense (attempting the king's/president's life). The origins of the *aanslag* offense in the Dutch Criminal Code can be traced back to the communist revolution in Russia in 1918 when communists massacred Tzar Nicolas II and his entire family. Tzar Nicolas II had blood relations with the King of England, who in turn had blood relations with the King of the Netherlands. Because practically all of Europe was still an empire, the communist

revolution in Russia alarmed Europe's ruling monarchs, especially those in the Netherlands. However, fear in the Netherlands trumped the fear in other countries. Thus, the Anti-Revolutionary Law (*AntiRevolutie Wet*) was enacted on July 28, 1920, through *Stbl No. 619. Aanslag* first appeared in the Dutch Criminal Code that year; before this, the term *aanslag* was not recognized in the Dutch Criminal Code. *Aanslag* is used to distinguish it from *poging*. *Poging* consists of three elements: the intention, the beginning of the perpetration, and the unfinished start of the perpetration, which is not solely due to one's own will.

These *aanslag* articles were published in the *Wetboek van Strafrecht (WvS) voor Nederlands Indie* in 1930. The inclusion of *aanslag* in *WvS* was due to an Indonesian Communist Party (PKI) rebellion led by Muso in 1926. Thus, before 1930, treason (*Makar*) was never included in *WvS*; the only article was *poging*.<sup>7</sup>

### Investigating the Meaning of *Makar*

*Makar* is derived from the Dutch words "*aanslag*" (attack) and "*aanval*" (attack with malicious intent) (*misdadige aanranding*). Meanwhile, *makar* literally means "attack" or "to attack"<sup>8</sup>, it can also be defined as a rotten mind; deception; the act (effort) of attacking (killing) people; or the act (effort) of bringing down the legitimate government illegally or unconstitutionally. The term *makar* appears in the Criminal Code in Article 87, which reads in its original text:<sup>9</sup>

"aanslag tot een feit bestaat, zoodra het voornemen des daders zich door een begin van uitvoering, in-den zin van art. 53, heeft geopenbaard"

That is, the act is regarded to exist if the perpetrator of the crime begins to carry out the

act following the intent of Article 53 (KUHP. 53, 104-108, 130, 139 a-c)<sup>10</sup>, or in other words, the act of *makar* exists only if there is a "start of perpetration" (*begin van uitvoering*).

The criminal act of *makar* that endangers the public interest and state security has three forms according to the Criminal Code:

1. *Makar* that violates the legal interest in the security of the Head of State or his Deputy (Article 104 of the Criminal Code);
2. *Makar* that violates the legal interest in the integrity of the State Territory (Article 106 of the Criminal Code);
3. *Makar* violates the legal interest in the establishment of the State Government (Article 107 of the Criminal Code).

In his dissertation, Loebby Loqman wrote that offenses against state security are almost always motivated and/or with political objectives that each government of a country has its understanding and limitations regarding actions that are categorized as political backgrounds and goals, and that there are even different interpretations of the notion of "politics" among scholars, judges, and rulers of a country.<sup>11</sup>

Crimes against national security are relative in the sense that they can be interpreted in a variety of ways. This crime is motivated by the perception of a government's leadership that is based on an objective consideration of the enemy's views and capabilities. Subjectively, it is also determined by the leader's personality and the morals of the community. About the preceding point, Mardjono Reksodiputro stated that the essence of the actions prohibited in the Criminal Code Chapter is "treason" (*verraad*), and the act in question is classified as "an attempt to betray the state and nation."<sup>12</sup> The placement of crimes

<sup>7</sup> Andi Hamzah, *Mengartikan Makar (Aanslag) Secara Keliru*, (Jakarta: Raja Grafindo Persada, 2002).

<sup>8</sup> Adami Chazawi, *Kejahatan Terhadap Keamanan Dan Keselamatan Negara*.

<sup>9</sup> Adami Chazawi, *Pelajaran Hukum Pidana*, (Jakarta: Raja Grafindo Persada, 2008).

<sup>10</sup> R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, (Bogor: Politea, 1991).

<sup>11</sup> Loebby Loqman, *Delik Politik Di Indonesia*, Ind-Hill-Co, (Jakarta: tp, 1993).

<sup>12</sup> Mardjono Reksodiputro, *Pembaharuan Hukum Pidana (Kumpulan Karangan)*, Buku Keempat, Pusat Pelayanan Keadilan



against state security in Chapter I demonstrates that these are the most serious crimes.

The Criminal Code regulates criminal acts of *makar* as a formal offense that can lead to a wide range of interpretations. There is no need for the consequences of a criminal act, such as freedom of expression, opinion, or oral or written expression of opinion; nonetheless, intending, agreeing to, or attempting to overthrow the legitimate government can be subject to formal offenses. A lack of clarity in the interpretation of *makar*, as well as the presence of an initial act in the crime of *makar*, has the potential to violate democratic rights. Thus, to avoid broad and varying interpretations, legislators must be able to formulate clear elements regarding the crime of *makar*, making the government (law enforcement officials) avoid the possibility of acting repressively on the freedom to express opinions and/or thoughts, as a human right guaranteed by the constitution and the Universal Declaration of Human Rights.

### **Makar Articles Interpretation**

*Makar* cannot be detached from the philosophical roots of the science of interpretation, namely *hermeneutics*, which is defined as the science of interpretation in inferring the science of law so that the law can be found in concrete events. There are at least ten types of interpretations of legal norms, namely:

1. Grammatical explanation
2. Genuine/official interpretation
3. Historical interpretation
4. Systematic interpretation
5. National interpretation
6. Teleological (sociological) interpretation
7. Broad interpretation
8. Limited interpretation
9. Interpretation based on analogy
10. *A contrario* interpretation (C.S.T. Cansil, 2002:36)

Each of the ten types of interpretation listed above has advantages and disadvantages. As a result, certain types of interpretation may be more appropriate in the context of specific concrete events, but it may also be the other way around.

Andi Hamzah stated that "*makar*" is a translation of the Dutch "*aanslag*" found in Article 104 of the Criminal Code, which is a copy of Dutch Criminal Code Article 92.<sup>13</sup> Article 92 of the Dutch Criminal Code itself, with the title "*Serious Offenses Against the Security of the State*," which reads in full as follows:

*"An attempt made with the object of taking the life or liberty of the King, the reigning Queen, or the Regent, or with the 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."* (Louise Rayar and Stafford Wadsworth, 1997:115)

According to article 92, *aanslag* translates into an attempt or, more colloquially, a trial. The question is, why is *aanslag* translated with an attempt? Is it difficult to find the correct English equivalent for *aanslag*, or is it because the common law tradition does not recognize the act of *aanslag*? In response to this issue, Andi Hamzah stated that the English translation of *aanslag* frequently uses the term "attempt on man's life." In the Black Law Dictionary, attempt is defined as:

*"1. The act or an instance of making an 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. An attempt is an inchoate offense distinct from an attempted crime. Under the Model Penal Code, an attempt includes any act that is a substantial step toward the commission of a crime, such as enticing, lying in wait for or following the intended victim, or unlawfully entering a*

Dan Pengabdian Hukum (d/h Lembaga Kriminologi), (Jakarta: Universitas Indonesia, 2007). p. 115

<sup>13</sup> Andi Hamzah, *Mengartikan Makar (Aanslag) Secara Keliru...*, (2002)

*building where a crime is expected to be committed.*

To paraphrase Glanville L Williams:

*"An attempt to commit an indictable offense is itself a crime. Every attempt is an act done with the intent to commit the offense so attempted. The existence of this ulterior intent or 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 completed offense to give rise to criminal liability, notwithstanding the criminal law purpose of the doer. I may buy matches with the 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."<sup>14</sup>*

Meanwhile, J.W. Cecil Turner made the following comment about this attempt:

*"Attempt is the most common of the preliminary crimes. It consists of steps taken in furtherance of an indictable offense that 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 attempt has been achieved: that link will represent the actus reus of attempt..."*

Meanwhile, according to Article 104 of the Criminal Code,

*"Makar (aanslag) committed to killing the President or Vice President, depriving them of their independence, or rendering them incompetent to govern, shall be sentenced to*

*death, imprisonment for life, or imprisonment for a maximum of twenty years."<sup>15</sup>*

P.A.F. Lamintang interprets the article's contents by dividing it into two major elements: the subjective element and the objective element. The subjective element indicates that there is a goal, while the objective element indicates that:

1. *Makar*
2. or to act
3. or to take life
4. or to seize independence
5. or to render incapable of ruling
6. President
7. or the Vice President<sup>16</sup>

The following are the two major groups offering interpretations of this *makar* offense:

1. A group of scientists interpret it as an offense of attack and violence.

R. Soesilo defined *aanslag* as an attack with the intent to kill, seize independence, or render the president incompetent to govern. *Aanslag* is carried out violently and begins with acts of perpetration (*uitvoeringshandelingen*). Meanwhile, acts of violence are defined by the use of physical strength, such as hitting with the hands or with various weapons, kicking, and so on. Violence can also cause people to faint or become helpless. Fainting is defined as "not remembering or being aware of oneself." Powerlessness means having no strength or power at all, such that one cannot withstand even the slightest resistance, such as tying oneself up with a leg or hand rope, locking oneself in a room, or being paralyzed by injections.<sup>17</sup>

As previously stated, the Criminal Code and other criminal laws do not define *aanslag* or *makar*. According to P.A.F. Lamintang, the word *aanslag* derives from *aanval* (attack) or

<sup>14</sup> ICJR, *Mengembalikan Makna "Makar" Dalam Hukum Pidana Indonesia: Uji Materil ICJR Terhadap Pasal-Pasal Makar Dalam R KUHP Di Mahkamah Konstitusi Dalam Perkara No 7/PUU-XV/2027*, (Jakarta: Institute for Criminal Justice Reform, 2017).

<sup>15</sup> R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*.

<sup>16</sup> P.A.F. Lamintang dan Theo Lamintang, *Kejahatan Terhadap Kepentingan Hukum Negara*, (Jakarta: Sinar Grafika, 2010). p. 6

<sup>17</sup> R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*.

a second interpretation, *misdadige aanrading* (attack with bad intentions). P.A.F Lamintang is still unsure whether *aanslag* is derived from the word *aanval* or *misdadige aanrading*, and whether the two are related or completely different words.

According to Prof. Noyon and Prof. Langemeijer's interpretation, *makar* is defined as an act of violence or an attempt to commit an act of violence. However, according to both, not every slack should be interpreted as an act of violence, because in practice, several *aanslag* can be carried out without being preceded by violence. They provide examples of actions that seek to change the course of the state without resorting to violence.

Prof. Simons defined *aanslag* as any action carried out with the intent as intended in Article 104 of the Criminal Code, if the actions are prohibited under Article 104 of the Criminal Code, and if these actions have exceeded the above of a preparatory act and can be considered the beginning of perpetration as referred to in Article 87 of the Criminal Code.<sup>18</sup>

2. The scientific community interprets it as an incomplete trial offense.

Other criminal law scholars offer a different interpretation of this *aanslag*, which is a separate trial offense due to the loss of the element "the cessation of the act is not at the will of the perpetrator." According to Moeljatno, *makar* is a derivative of the trial offense if it contains three elements: "intention," "beginning of perpetration," and "stopping the start of the perpetration is not from the wishes of the perpetrator."<sup>19</sup>

Article 87 is found in Book I of the Criminal Code. Book I provides a general explanation or definition for several terms found in the Second

and Third Books. However, the explanation in Article 87 is still insufficient. And why the Criminal Code drafters link it to Article 53 of the Criminal Code has not been explained.

According to Article 87, the main elements of *makar* are (1) the intention and (2) the commencement of the execution. In doctrine, these two elements have been widely interpreted. As a result, it may refer to existing doctrines. Because there is a similarity between the *makar* offense and the trial offense, the interpretation of the beginning of the perpetration of *makar* can also be used in the trial offense.

According to Moeljatno, *makar* falls under the category of trial offense and must meet the following criteria: (1) the accused's objectives have been fully realized (2) even if the defendant voluntarily resigns; the defendant may still be sentenced.

(1) Attempting to commit a crime is punishable if there is an intent to do so, the execution was initiated, and the execution was not completed solely due to one own will.

The intention is interpreted differently than deliberate, but the intention has the potential to become deliberate if the intended action is carried out. However, even if not all of it has been fulfilled into a criminal act, the intention remains and serves as an inner nature that guides the act. As a result, intention and deliberation are not the same thing.

Before engaging in self-perpetration, three elements must be met:

- a. What the defendant did must be objectively close to the intended offense. In other words, the offense must be capable of being committed.
- b. From the standpoint of intent, there must be no doubt that what the defendant did was directed or directed at a specific offense.
- c. That the defendant's actions were illegal.

In the preceding article, the beginning of the perpetration is interpreted as the beginning of committing a crime and not being completed.

<sup>18</sup> P.A.F. Lamintang and Theo Lamintang, *Kejahatan Terhadap Kepentingan Hukum Negara...*, p. 6

<sup>19</sup> ICJR, *Mengembalikan Makna "Makar" Dalam Hukum Pidana Indonesia: Uji Materil ICJR Terhadap Pasal-Pasal Makar Dalam R KUHHP Di Mahkamah Konstitusi Dalam Perkara No 7/PUU-XV/2027*.

Wirjono Prodjodikoro holds, almost identical to Moeljatno, that *aanslag* or *makar* is a trial offense but is addressed to the President or Vice President if there is an intention and an action is taken (ICJR, 2017:54).

In line with the preceding viewpoint, Eddy O.S. Hiarij quoted from A. Boers' Dutch-English Dictionary; the translation of *makar* was derived from the origin of the word *aanslag*. It becomes an *attempt* when translated into English. An attempt is defined as a trial. According to Eddy, referring to this translation is not appropriate because *aanslag* should be translated as "the first step of an act."<sup>20</sup>

Furthermore, the offense of *makar* must consider the adage *felonia implicatur in quolibet prodicione*, which means that the act of *makar* is a serious crime. As a result, *makar* is not a trial offense that is formulated as a complete or independent offense, but it is formulated as such because it is related to state security, which involves the safety of the President and Vice President, undermines the legitimate government, and undermines state sovereignty.

According to *Memorie van Toelichting*, the act of initiating must be distinguished from the acts of preparation and execution. However, distinguishing between the two is difficult and thus left to the judge's discretion. Moeljatno stated in this context that the preparatory act is to gather strength, while the act of execution is to release the strength that has been gathered.<sup>21</sup>

*Makar* is an "elastic" offense with a broad and varied interpretation; it is a multipurpose act with no *lex scripta* (clarity in the formulation of the offense). *Makar* is similar to the subversion offenses regulated in Law no. 11/PNPS/1963; this law is classified as a law that can criminalize all groups that are opposed to the authorities. According to Loebby Loqman, offenses against state security frequently cause problems when

we relate them to the evidence. Even though it continues to use "trial theory" both subjectively and objectively as in ordinary offenses, an act regarded as the beginning of the perpetration of an attempt to commit an offense against state security will experience a difference in the proof.<sup>22</sup>

When translated as *makar*, the word "*aanslag*" is inappropriate because it is different in the Indonesian context. When translated into Indonesian, the word "*aanslag*" is more accurately translated as "attack." The word *makar* is an absorption from Arabic, specifically "*al-makr*," which means deception, rebellion, and dishonesty. Errors in interpreting the term *makar* in Criminal Code articles result in problems. As a result of the seven articles' unclear formulation and purpose (legality principle), legal uncertainty regarding the offense of *makar* arose.

Keep in mind that the word *makar* comes from the Criminal Code, which is not from the Arab region. As a result, it is preferable to examine the original text as the "original intent" of the word *makar*. *Aanslag* is defined as *gewelddadige aanval*, which means violent attack in English. *Aanslag* also means violent attack, fierce attack, or any strong attack in English. (2018, Siti Faridah) Currently, we understand *makar* as an attempt to overthrow the government; however, this is not the case, and we must return to the original term, "*aanslag*," which means an attack or violent attack.

There are numerous interpretations of *makar* in the article that were initiated by legal experts, putting a person vulnerable to being subject to this article. There is currently no clear standard against the Criminal Code's concept of *makar*. Ahmad Sofian (criminal law expert at Bina Nusantara University), who served as an expert witness in the judicial review of the *makar* article at the Constitutional Court building, believes the following:

The legal framework based on *makar* becomes overly broad and flexible. As a result, *makar* must

<sup>20</sup> Eddy O.S. Hiarij, *Prinsip-Prinsip Hukum Pidana*, (Yogyakarta: Atma Pustaka, 2016).

<sup>21</sup> Eddy O.S. Hiarij, *Prinsip-Prinsip Hukum Pidana...*, (2016)

<sup>22</sup> Siti Faridah, Siti Faridah, "Relevansi 'Makar'...", p. 239."



be reinstated in its original legal form, namely as a "trial" offense. Thus, the elements of *makar* are only (1) the intention, (2) the initial act of perpetration, and (3) the goal of eliminating the President/Vice President's life, and independence, or making them incompetent to govern. It should be noted that the first act of perpetration must involve violence or actions that render the President powerless. This argument is intended to keep the definition of *makar* as narrow as possible. Even if *makar* is defined as an "attack," these three components must be present.

As a result, *aanslag* (*makar*) is an offense with only two elements, namely the intention and the beginning of the perpetration. The trial, as described in Article 53 of the Criminal Code, consists of three components: intention, the beginning of the perpetration, and the termination of the perpetration. The termination of the perpetration is not simply attributable to the perpetrator's desire. Regarding the interpretation of *makar* as regulated in Article 87 of the Criminal Code, while it is unsatisfactory, it has established the legal foundations. The first book includes Criminal Code Article 87. The first book is a General Rule that lays the groundwork for norms. The First Book does not regulate crime-punishable offenses, but it does explain several of them.<sup>23</sup>

### *Al-Baghyu*

In essence, there is no known term in Islam for *makar*, but there is an expression that supposedly has a similar meaning to it, namely *al-bughah* which means "طلب الشيء" "to seek or demand something."<sup>24</sup> The word *al-bughah* is a term in Islam, as stated in the surah Al-Hujurat [49]: 9

فَإِنْ بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَىٰ فَقَاتِلُوا الَّتِي تَبْغِي حَتَّىٰ تَفِيءَ إِلَىٰ أَمْرِ اللَّهِ

<sup>23</sup> ICJR, *Mengembalikan Makna "Makar" Dalam Hukum Pidana Indonesia: Uji Materil ICJR Terhadap Pasal-Pasal Makar Dalam R KUHP Di Mahkamah Konstitusi Dalam Perkara No 7/PUU-XV/2027*.

<sup>24</sup> Ahmad Wardi Muslich, *Hukum Pidana Islam*, (Jakarta: Sinar Grafika, 2005).

"...but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of Allah,"

Then proceeds with Surah Ali 'Imrân [3]: 85 and Surah Al-A'râf [7]:33.

وَمَنْ يَبْتَغِ غَيْرَ الْإِسْلَامِ دِينًا فَلَنْ يُقْبَلَ مِنْهُ وَهُوَ فِي الْآخِرَةِ مِنَ الْخَاسِرِينَ

"Whoever seeks a way other than Islam, it will never be accepted by them, and in the Hereafter they will be among the losers."

قُلْ إِنَّمَا حَرَّمَ رَبِّي الْفَوَاحِشَ مَا ظَهَرَ مِنْهَا وَمَا بَطَّنَ وَالْأِثْمَ وَالْبَغْيَ بِغَيْرِ الْحَقِّ وَأَنْ تُشْرِكُوا بِاللَّهِ مَا لَمْ يُنَزِّلْ بِهِ سُلْطَانًا وَأَنْ تَقُولُوا عَلَى اللَّهِ مَا لَا تَعْلَمُونَ

"Say, 'My Lord has only forbidden open and secret indecencies, sinfulness, unjust aggression, associating 'others' with Allah 'in worship'—a practice He has never authorized—and attributing to Allah what you do not know."

Abdul Qadir Audah revealed several *mazhab* scholars' perspectives on *al-Baghyu*<sup>25</sup>:

1. According to Maliki scholars  
Rebel is an attitude of refusing to obey someone whose leadership is considered legitimate, rather than action through resistance, even with strong arguments.
2. According to Hanafi scholars  
Rebellion is gaining ground against the true ruler. Meanwhile, rebels are people who unjustly rebel against legitimate rulers.
3. According to Malikiyah Shafi'iyah scholars  
The rebels are Muslims who defy the rulers by submission or rejecting the truth that is revealed to them, provided that there is strength and figures to follow among them.
4. According to Maliki Hanabilah scholars  
Rebels are groups of people who refuse to submit to the authorities, even when the rulers

<sup>25</sup> Abdul Qadir Audah, *Al-Tasyri' Al-Jina'i Al-Islami*, (Beirut: Mu'assasah Al-Risalah, 1992). p. 673

are unjust for compelling reasons. This group wields power, even though there are no figures to be obeyed.

According to some of the definitions above, rebels or *al-baghyu* are attempts to openly or truly oppose the legitimate government, either by taking up arms or by ignoring the government's provisions.

In another definition, *al-bughah* is for a group of Muslims who oppose and disobey the Imam and the legitimate government. Disobedience and disobedience to him, or an attempt to displace or overthrow his leadership through *takwil*, so that the group gains legitimacy, is supported by force, weapons, and others so that the leader must suppress and stop the opposition and disobedience. In addition to weaponry and strength, the group is led by a charismatic and well-respected figure.<sup>26</sup>

If we take the essence of these definitions, we can say that rebellion is disobedience to the head of state (Imam) through force and argumentation. Admitted that the truth was only on one side and power was in one's hands by refusing to carry out the orders and fighting other worshipers who were not from the group under the guise of differences in laws that they understood and believed in. Such individuals must be countered by Muslims and the legitimate government.<sup>27</sup>

According to *Fiqh* scholars, *al-baghyu* is a serious crime and is classified as a *hudud* crime. When it comes to punishing rebels, *Fiqh* scholars divide them into two types.

1. Rebels who lack armed forces and do not control specific areas as their base. *Fiqh* scholars agreed that the legitimate government may arrest and imprison such rebels until they wake up and repent.
2. Armed insurgents who control a territory. To deal with such insurgents, the government must first urge them to follow all applicable regulations and recognize the legitimate leadership. If they support the government's efforts with weapons,

the government will be able to fight them.<sup>28</sup>

The following are the components of a rebellion:

1. Against the legitimate government,
2. To escape or escape the *Imam's* power,
3. There is a depraved intention,
4. Have strength in terms of personnel and weapons that enable them to fight, and
5. Having a leader in place of the Imam who was abandoned or deposed.<sup>29</sup>

The elements of the rebellion described above show that the rebels are a group of people with strength, weapons, leadership, and specific areas where the purpose of their power is to overthrow the legitimate government and take over the leadership that has been overthrown.

According to the previous understandings, the meaning of *al-bughah* or rebellion is the same as the meaning of *makar* in positive law, namely physical attacks or attacks in general, and in Islamic law, a person can be said to be a rebel if he has attacked a legitimate government.<sup>30</sup> *Makar* can also be translated as a rotten mind; deception; the act (effort) of attacking (killing) people; or the act (effort) of bringing down the legitimate government illegally or unconstitutionally.

Muslim recounted a hadith of the Prophet Muhammad from Arfajah ibn Shurayh, the Prophet stated:

سمعت رسول الله صلى الله عليه وسلم يقول: من أتاكم وأمركم جميع يريد يفرق جماعتكم فاقتلوه  
 "Whoever comes to you while you have agreed with a leader to divide your group, kill him".

Related to a hadith recounted by Muslim:

من أتاكم وأمركم على رجل واحد يريد أن يشق عصاكم ويفرق جماعتكم فاقتلوه

<sup>28</sup> Abdul Aziz Dahlan, *Ensiklopedi Hukum Islam*, (Jakarta: Ihtiar Baru Van Hoeve, 1996), p. 174

<sup>29</sup> Rahmat Hakim, *Hukum Pidana Islam, (Fiqh Jinayah)*, (Bandung: Pustaka Setia, 2000), p.109.

<sup>30</sup> Adami Chazawi, *Kejahatan Terhadap Keamanan Dan Keselamatan Negara...*, p. 7.

<sup>26</sup> Abdul Baqi Ramdhun..., p. 56

<sup>27</sup> Mustofa Hasan and Beni Ahmad Saebeni, *Hukum Pidana Islam Fiqh Jinayah*, (Bandung: Pustaka Setia, 2013), p. 454

"Whoever comes to you while your business is in their hands with the intention of destroying your power and destroying your congregation, kill them."<sup>31</sup> (Muslim)

The above-mentioned arguments will procreate the rules,

الامتناع عن الطاعة في معصية ليس بغيا

"It is not a crime to refuse to obey (the Imam's order) to sin."

This rule implies that people who refuse to obey the Imam's command to commit immorality are not rebels. Because the people's submission or obedience to their leader is not absolute but is limited to non-immoral things, the people are obligated to obey them whether the order is liked or not. There is no obligation for the people to obey the leader if he orders them to commit immorality. As the Prophet stated, from Ibn Umar ra., the Prophet stated:

"Unless he orders him to sin, a Muslim is obligated to listen to and obey the Imam, whether he likes it or not." (Muslim)

The subsequent rule is:

الجروح علي الامام بعدم القوة ليس بغيا

"Opposition to the Imam without using force is not considered a crime against the Imam."

This rule suggests that opposing the Imam or refusing to obey his orders without accompanying actions of resistance or the use of force does not constitute *bughat*. For example, Ali bin Abi Talib refused to pledge allegiance to Abu Bakr for several months, Sa'ad bin Ubadah refused to execute Abu Bakr, and Abdullah bin Umar and Abdullah bin Zubair refused to pledge allegiance to Yazid bin Muawiyah. Ali Bin Abi Talib allowed the Khawarij to roam free as long as they did not fight or attack.<sup>32</sup>

<sup>31</sup> Hukum Pidana Islam: Fiqh Jinayah, (Bandung: Pustaka Setia, 2013).

<sup>32</sup> Jaih Mubarak dan Enceng Arif Faizal, *Kaidah-Kaidah Fiqh Jinayah: Asas-Asas Hukum Pidana Islam*, (Bandung: Pustaka Bani Quraisy, 2004), pp. 158-160

As a result, opposition to the Imam is not defined as *jarimah bughat* unless it manifests itself in the form of resistance or the mobilization of force to attack the Imam. As a result, the opposition or groups opposed to the government cannot be described as rebels.

## Conclusion

Based on the explanation above, it is clear that criticizing the government does not constitute *makar*, but rather the right to free expression. *Makar* as a negative brand image should not exist in a democratic post-reform environment. According to the Criminal Code, the article on *makar* is defined in a limitative manner to avoid arbitrariness that harms human rights. This is consistent with the definition of *al-bughah* in Islamic criminal law, which involves disobedience to the Imam accompanied by attacks against the legitimate government. While criticizing the government, no violent acts are committed.

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