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VICTIMS OF LEGAL CRIMINALIZATION CAUSED BY THE ARBITRARINESS OF THOSE IN POWER:

A NORMATIVE ANALYSIS OF DEVIATIONS IN THE APPLICATION OF CRIMINAL LAW AND REFLECTIONS ON THE REFORM OF THE NATIONAL CRIMINAL CODE

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***Abstract*.**

Criminalization is essentially a legislative policy through which a certain act is designated as a criminal offense. In practice, however, criminalization often occurs as a deviation in the application of criminal law by law enforcement officials. This article aims to analyze criminalization as a form of abuse of authority from the perspectives of criminal law and administrative law, and to evaluate it in the context of reform through Law Number 1 of 2023 concerning the Criminal Code. This research is normative legal research using statutory and conceptual approaches, analyzed qualitatively. The findings show that the practice of criminalization is often rooted in the expansive interpretation of elements of criminal offenses, the disproportionate use of discretion, and the transfer of non-criminal disputes into the criminal law sphere. From an administrative law perspective, such actions may be qualified as abuse of authority if they deviate from the purpose for which the authority was granted and violate the General Principles of Good Governance. Although the National Criminal Code emphasizes the principles of proportionality and a humanistic approach, the effectiveness of preventing criminalization ultimately depends on the integrity of law enforcement officials and the strengthening of accountability mechanisms in the exercise of state authority.

Keywords: Criminalization; Abuse of Authority; Discretion; Administrative Law; Proportionality; National Criminal Code.

INTRODUCTION

As a state based on the rule of law, as affirmed in the 1945 Constitution of the Republic of Indonesia, Indonesia places law as both a limitation on and a guide for power. In such a system, criminal law has a protective function, namely to protect the legal interests of society while safeguarding individual rights from arbitrary state action. The principle of legality serves as the main instrument to ensure that no act may be punished without a clear legal basis.

However, in the practice of law enforcement, particularly during the period in which the old Criminal Code was in force, a phenomenon commonly referred to as legal criminalization emerged. This term refers to the disproportionate use of criminal law, whether through the expansive interpretation of norms or through the transfer of non-criminal disputes into the criminal law sphere. In such circumstances, criminal law has the potential to shift from being an instrument of justice into an instrument of power.

Several cases that have attracted public attention demonstrate ongoing debates regarding the propriety of applying criminal norms. In a number of cases, the elements of the offense were disputed, the context of the act was debated, and the proportionality of punishment was questioned. This situation shows that formal legality is not always identical to substantive justice.

This phenomenon does not concern only certain individuals, but reflects structural issues within the law enforcement system. Power relations, the discretion of law enforcement officials, and the elasticity of legal norms are factors that interact in determining the direction of criminal proceedings.

The enactment of Law Number 1 of 2023 concerning the Criminal Code introduces a renewed paradigm for Indonesia's national criminal law. However, such normative reform must be understood as a reflection on past practices so that its implementation does not repeat the same patterns.

RESEARCH METHOD

This research is normative legal research using a conceptual approach and case studies. The analysis focuses on the principles of legality, proportionality, ultimum remedium, and the objectives of punishment. Several public cases are used as empirical illustrations, without focusing on personal aspects, but rather on legal construction and the application of norms.

RESULTS AND DISCUSSION

Legal Criminalization from the Perspective of the Rule of Law

According to Soerjono Soekanto, criminalization is an act or determination by the authorities concerning certain acts that society or certain groups within society regard as punishable, thereby turning them into criminal acts (Soerjono Soekanto, 1981), or making an act criminal and therefore punishable by the government acting in its name (Henry Campbell Black, 1979).

Criminalization is essentially the entry point for the application of substantive criminal law. According to Moeljatno, criminal law means the part of the entire body of law applicable in a country that establishes the foundations and rules for:

1. Determining which acts may not be committed, are prohibited, and are accompanied by threats or sanctions in the form of certain punishments for anyone who violates such prohibitions.

2. Determining when and under what circumstances those who have violated such prohibitions may be subjected to or sentenced to the punishments threatened.
3. Determining the manner in which punishment may be imposed when a person is suspected of having violated such prohibitions.

Criminalization is a complex and fragmented issue (A.P. Simester and G.R. Sullivan, 2000). The complexity of criminalization lies in the many factors that are involved and must be considered in the process of criminalization, and among these factors there may sometimes be very sharp differences. Such complexity relates to the types of acts that may be criminalized. These acts do not only include acts that are essentially evil in nature, but also neutral acts that do not inherently contain an element of evil (Salman Luthan, 2009).

The complexity of criminalization is also related to differences in values and norms held by different groups in society, whether due to religious and cultural backgrounds or due to differences in education and social class. Differences in values and norms affect the assessment of which acts deserve to be criminalized and also influence the assessment of the degree of seriousness of the acts to be criminalized (Salman Luthan, 2009).

The complexity of criminalization is also reflected in the diversity of instruments available for regulating social life, in which criminal law is only one instrument among many. Other instruments for regulating social life include civil law, administrative law, morality, religion, discipline, and custom. Criminal law should not be placed as the first instrument, or primum remedium, for regulating society, but rather as the last instrument, or ultimum remedium, for controlling individual behavior in communal life. Therefore, the use of criminal law to regulate society in relation to certain activities is not a necessity, but merely one alternative among the available regulatory instruments (Salman Luthan, 2009).

Legal criminalization in this context is understood as a deviation in the application of criminal law, not as the legislative process of creating criminal offenses. It occurs when criminal norms are used beyond the purposes for which they were created or are applied disproportionately to a certain act. In a state based on the rule of law, the application of criminal law must always be linked to the protection of human rights and real legal interests.

During the period in which the old Criminal Code was in force, the principle of legality was formally affirmed, but several offenses were formulated in relatively elastic terms. This elasticity opened wide room for interpretation, allowing differences in interpretation between law enforcement officials and the parties being processed. In certain situations, such differences in interpretation developed into debates regarding the propriety and justice of applying the relevant norms.

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Formal legality does not always guarantee substantive legitimacy. An act may textually fulfill the elements of an offense, but if the social context, the purpose of the act, and proportionality are not taken into account, punishment may lose its moral foundation. In such circumstances, criminal law risks being used as an instrument of pressure.

Power relations are also an important factor in understanding criminalization. Parties with access to power or legal resources can more easily initiate criminal proceedings. Meanwhile, parties in vulnerable positions face the burden of prolonged legal proceedings and potential social stigma.

In addition, the transfer of non-criminal disputes into the criminal law sphere is an important indicator. Disputes that should be resolved through civil, administrative, or ethical mechanisms are, in certain cases, instead qualified as criminal offenses. This practice illustrates how the function of criminal law can be expanded beyond its proper limits.

Thus, legal criminalization is a structural issue related to the interpretation of norms, the discretion of law enforcement officials, and power relations. It does not always appear as a procedural violation, but often manifests in the form of law enforcement that is formally valid yet substantively questionable.

Legal criminalization, in the sense of deviations in the application of criminal norms, is not merely a matter of criminal law, but also a matter of the use of authority within the framework of administrative law. The criminal law enforcement process is essentially the exercise of state authority by public officials. Investigation, inquiry, the designation of a suspect, and detention are forms of governmental action derived from authority granted by statute. Therefore, the exercise of such authority is subject to the principles limiting power under administrative law.

The normative basis can be found in Law Number 30 of 2014 concerning Government Administration, which expressly regulates the procedure for exercising authority and prohibits abuse of authority. Article 17 of the law prohibits government officials from exceeding their authority, confusing or mixing authority, and/or acting arbitrarily. In the context of legal criminalization, the act of elevating an event into a criminal case without sufficient evidentiary basis, or without considering proportionality and the real purpose of legal protection, may potentially be qualified as an action that deviates from the purpose for which the authority was granted.

Furthermore, Article 10 of the Government Administration Law emphasizes that every exercise of authority must be guided by the General Principles of Good Governance. The principle of legal certainty requires that norms not be interpreted extensively without clear rational limits. The principle of carefulness requires officials to conduct objective and comprehensive examination before making decisions that affect citizens’ rights. Meanwhile, the principle of not abusing authority means that authority must be used in accordance with the purpose for which it was granted. If criminal proceedings are carried out in disregard of these principles, such actions are problematic not only from the perspective of criminal law, but also defective from the perspective of administrative law.

From the perspective of state administrative law, the determination and assessment of abuse of authority are grouped into two criteria. First, for bound authority, the principle of legality is used as the standard, within which the principle of speciality is also contained, namely determining and assessing whether an act constitutes abuse of authority based on the laws and regulations that serve as the source and purpose of the authority itself. Second, for discretionary authority, the General Principles of Good Governance are used, because the principle of legality, or wetmatigheid van bestuur, is no longer sufficient to serve as the sole standard of legality for governmental acts in Indonesia (Arma Dewi, 2019).

Legal criminalization is often rooted in the uncontrolled use of discretion. Discretion in administrative law is recognized as a legitimate policy space, but its use is limited by the objectives of effective governance and protection of the public interest. If discretion at the inquiry or investigation stage is used to impose a criminal construction on a dispute that, by its nature, is more appropriately resolved through civil or administrative mechanisms, then there is a deviation from the purpose of the authority. In administrative law doctrine, such a situation may be understood as a form of abuse of authority, or détournement de pouvoir.

Moreover, criminal law enforcement actions have direct consequences for citizens' constitutional rights, including the right to liberty and protection from arbitrary treatment as guaranteed by the 1945 Constitution of the Republic of Indonesia. Therefore, every restriction of rights through criminal law instruments must satisfy the principles of legality, rationality, and proportionality. When officials exercise coercive authority without adequate evidentiary standards or without clear urgency, such actions may reflect the arbitrariness of those in power.

Patterns of Criminalization in Several Cases

Several public cases during the period in which the old Criminal Code was in force reveal relatively similar patterns. In cases involving criticism, expression, or professional conflict, the elements of the offense often became the main point of debate. The meaning of intent, loss, or malicious intent became interpretive spaces that determined the direction of the case.

In a number of cases, the debate did not stop at whether the elements of the offense had been fulfilled, but developed into the question of whether the act deserved to be punished. Disputes with civil or administrative dimensions were,

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in certain practices, transformed into criminal cases, thereby creating a perception of legal pressure.

Cases such as those experienced by Baiq Nuril and Prita Mulyasari show how the application of norms can draw widespread criticism when the context of the act is considered to have been insufficiently taken into account. Similarly, the case involving Haris Azhar and Fatia Maulidiyanti illustrates the tension between the protection of honor and freedom of expression.

In several other cases that did not necessarily attract national attention, debates also arose regarding the fulfillment of offense elements and the propriety of punishment. Defense pleas in such cases often emphasized the non-fulfillment of legal elements and errors in the construction of the indictment. This situation shows that the issue of criminalization is not limited to viral cases, but also occurs in everyday legal practice.

The emerging pattern shows a tendency to use criminal law as a response to complex conflicts. Instead of being a last resort, criminal law sometimes becomes the first instrument in dispute resolution. This condition has the potential to excessively expand the function of criminal law.

Reflecting on the Baiq Nuril case, the case emphasized the non-fulfillment of the subjective element as a requirement for punishment. For a person to be punished, all requirements for criminal liability must be proven in their entirety. Criminal law doctrine explains that, for a person to be punished, in addition to the objective element concerning the act, or actus reus, the subjective element relating to the perpetrator’s inner attitude, or mens rea, must also be proven, except for certain criminal offenses expressly stated by law as offenses adopting the principle of criminal liability without fault (Nefa Claudia Meliala, 2018).

The objective element is closely related to the principle of legality, nulla poena sine lege, meaning no punishment without law, while the subjective element is closely related to the principle of culpability, nulla poena sine culpa, meaning no punishment without fault. The act must be unlawful and there must be no justification, while the perpetrator must have the capacity to be held responsible, the element of fault in the form of either intent, dolus, or negligence, culpa, must be proven, and there must be no excuse. All these requirements are cumulative (Nefa Claudia Meliala, 2018).

The fundamental issue in this case is how the police, prosecutors, and especially judges should have been able to explain that the requirements for punishing a person are not limited to the unlawfulness of the act, but also require proof of fault on the part of the perpetrator. Referring to Article 27 paragraph 1 of the ITE Law, the act of “distributing and/or transmitting and/or making accessible electronic information and/or electronic documents containing content that violates decency” must be committed intentionally (Nefa Claudia Meliala, 2018).

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Based on the theory of will, or wils theorie, the perpetrator must know and will both the act and its consequences, or willen en weten. In Nuril's case, this should not have been proven. The interpretation that because Nuril made the recording, she became responsible for the widespread dissemination of the recording merely because she should have suspected or could have imagined the possible consequences after briefly handing over her mobile phone to HIM, is clearly an erroneous interpretation that entirely fails to take into account Nuril's position as a victim seeking to defend her rights (Nefa Claudia Meliala, 2018).

Likewise, in the case of criminalization experienced by me, this appears to have occurred through the forced construction of a criminal offense in relation to an event that was, in essence, an administrative and/or civil dispute. The act in question was actually related to the exercise of professional authority within the context of office and civil legal relations, yet it was positioned as a criminal act through an expanded interpretation. This shift indicates the use of criminal law as an instrument of pressure, rather than as an ultimum remedium to protect real legal interests.

Such criminalization is also reflected in the way law enforcement officials constructed the elements of the offense formally, without considering the context of authority and good faith in the performance of duties. The criminal norm used was stretched in such a way as to cover actions that normatively remained within the scope of authority, or at least required prior examination through other legal mechanisms. When the element of fault and the unlawful nature of the act are not examined carefully, yet criminal proceedings are nonetheless forced to continue, there is an indication of deviation from the purpose for which law enforcement authority was granted.

Furthermore, the process reflects symptoms of imbalance between state power and the position of the citizen being examined. The use of coercive authority, whether in the form of designation as a suspect, summons, or threats of criminal sanctions, was carried out in circumstances where the evidentiary basis remained fundamentally disputed. Within the framework of the rule of law, such conditions may be understood as a form of criminalization, namely when criminal law no longer functions as a means of legal protection but instead becomes an instrument legitimizing potentially arbitrary action.

More specifically, such criminalization is reflected in the disregard of the principle of differentiation between official responsibility and personal responsibility. Acts arising from the performance of professional functions, which under the legal system should first be examined through administrative or civil mechanisms, were directly transformed into criminal allegations without in-depth analysis of the existence of mens rea and real losses caused. Such an approach indicates a tendency to criminalize policy or official acts, rather than to examine whether there was individual malicious intent. When the boundaries

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between administrative error, civil breach of contract, and criminal offense are not strictly maintained, criminal law risks being used excessively and losing its character as an ultimum remedium.

In the case experienced by me, the construction of criminalization can be seen from the placement of professional acts carried out in an official capacity as the basis for criminal allegations, even though those acts were rooted in the performance of lawful legal functions and complex legal relations. Instead of first examining the legality of such acts through civil or administrative mechanisms, law enforcement officials directly qualified them as criminal acts by emphasizing formal consequences that were interpreted unilaterally. In fact, from the defense plea, it is apparent that the elements of intent and unlawfulness remained fundamentally disputed. This situation illustrates how criminal proceedings were used to assess and punish a professional act that should have been assessed within the framework of official responsibility, thereby strengthening the indication of criminalization through expansive interpretation and the disproportionate use of authority.

When directly connected to the previous discussion on deviations in the application of criminal law and the disproportionate use of authority, the substance of the defense plea further confirms the existence of a systematic pattern of criminalization. The plea shows that the legal event in question actually arose from a valid civil legal relationship that had existed based on the agreement of the parties. Within such a construction, all legal consequences arising from it should have been examined through mechanisms for breach of contract or civil claims, rather than immediately being drawn into the criminal law sphere. When law enforcement officials choose the criminal route without first examining the civil nature of the legal relationship, there is a clear shift in the function of criminal law from ultimum remedium to a primary instrument that has the potential to pressure certain parties.

This connection becomes clearer when examining how the element of fault was constructed in the case. As reflected in the defense, there was no concrete proof of mens rea or malicious intent consciously directed at causing loss. Nevertheless, the construction of the offense was still forced by relying on consequences that were unilaterally interpreted as loss. Such a pattern is consistent with the characteristics of criminalization described earlier, namely when criminal law is used beyond the purpose for which it was created and disregards the principles of proportionality and no punishment without fault. Thus, criminal proceedings no longer function to protect real legal interests, but instead to justify premature law enforcement action.

Furthermore, the defense set out in the plea also shows that the actions in question were performed in a professional capacity and within the framework of lawful official authority. From the perspective of administrative law, every act of an official or professional acting based on authority is protected so long as it is carried out in good faith and does not exceed the limits of the attribution, delegation, or mandate granted. If there is an allegation of error, administrative or civil examination mechanisms should first be pursued. When such corrective channels are ignored and criminal law is immediately activated, there is a strong indication of excessive use of authority that may be arbitrary in nature.

The series of facts in the case experienced by the author demonstrates how a complex professional act based on a valid legal relationship was reduced to a criminal narrative without comprehensive analysis of the context of authority and good faith. This is consistent with the concept of criminalization explained earlier, namely the punishment of acts that, in essence, remain within the realm of ordinary legal disputes. Thus, this case does not merely illustrate a problem in proving the elements of an offense, but also demonstrates the potential distortion in the use of law enforcement power when the boundaries between administrative error, civil dispute, and criminal responsibility are not strictly maintained within the framework of the rule of law.

Accordingly, the case study shows that legal criminalization is not merely an individual issue, but a reflection of how criminal norms are applied in the context of power relations and social dynamics.

Reflections on the Reform of the National Criminal Code

The reform introduced through Law Number 1 of 2023 concerning the Criminal Code brings important changes to the orientation of Indonesian criminal law. The National Criminal Code no longer views punishment merely as a means of retribution for wrongful acts, but as an instrument to maintain balance between the interests of individuals, society, and the state. This shift reflects a systematic effort to place criminal law within a more civilized and contextual framework.

One of the fundamental reforms lies in the formulation of the objectives of punishment, which explicitly include prevention, rehabilitation, conflict resolution, and the restoration of balance and a sense of justice in society. With these objectives formulated, criminal law is directed not only toward punishing, but also toward reforming and reintegrating offenders into social life. Normatively, this orientation shifts the retributive paradigm toward a more humanistic and restorative approach.

The strengthening of the principle of proportionality is a logical consequence of this change in orientation. Punishment may no longer be imposed automatically merely because the elements of an offense have been fulfilled, but must consider the gravity of the fault, the impact of the act, and the personal circumstances of the offender. Judges are given broader space to explore substantive justice, so that decisions are not only formally valid but also socially just.

In addition, the National Criminal Code emphasizes the importance of considering the social context and background of a criminal act. This opens space for an approach that is more sensitive to social realities, including power relations, the positions of perpetrators and victims, and the dynamics of conflict underlying the act. In the context of preventing criminalization, this contextual approach has the potential to serve as a limiting instrument so that criminal law is not applied rigidly and detached from the realities surrounding it.

Nevertheless, changes in norms do not automatically guarantee changes in practice. Criminal law continues to be implemented through institutional structures that grant significant discretion to law enforcement officials, from the inquiry stage through to the imposition of judgment. Such discretion can serve as a means of realizing justice, but it also has the potential to become a loophole for deviation if it is not accompanied by integrity and accountability.

In many past cases, the problem did not lie in the absence of norms, but in the way those norms were interpreted and applied. Criminalization often occurred when authority was exercised excessively or when the interpretation of offense elements was expanded beyond the legislature’s intent. This situation shows that criminal law reform must be accompanied by reform of the legal culture among law enforcement officials.

The broader interpretive space within the National Criminal Code indeed provides an opportunity for a fairer and more humane approach. However, the same space can also be used to justify disproportionate actions if it is not balanced by a strong commitment to the principles of legality, proportionality, and protection of human rights. Thus, the quality of implementation depends greatly on professional ethics and the independence of law enforcement officials.

The reform of the Criminal Code should be understood as a reflective momentum to evaluate previous patterns of law enforcement, including the practice of criminalizing acts that should in fact fall within the civil or administrative sphere. Past experience shows that without clear boundaries and awareness of the function of ultimum remedium, criminal law can become an instrument of pressure. Critical evaluation of such practices is important to ensure that the same mistakes are not repeated under the new legal regime.

Furthermore, the effectiveness of the National Criminal Code will also be determined by the synergy between criminal norms and other legal regimes, such as administrative law and civil law. A firm differentiation between administrative violations, breach of contract, and criminal offenses must continue to be maintained in order to avoid overcriminalization. Within the framework of the rule of law, each legal regime has its own function and limits, which must not negate one another.

Accordingly, the future of Indonesian criminal law is not determined solely by the quality of the norms formulated in Law Number 1 of 2023, but also by legal culture and collective commitment to the principles of the rule of law. Progressive norms will lose their meaning if they are not implemented consistently and with integrity. Conversely, if normative reform is accompanied by a reform in legal thinking and law enforcement practice, the National Criminal Code can become a strong foundation for a criminal justice system that is fairer, more proportional, and free from deviant practices of criminalization.

CONCLUSION

Legal criminalization, in the sense of deviations in the application of criminal norms, is a multidimensional issue that is not only related to the formulation of offenses, but also to the interpretation of norms, the discretion of law enforcement officials, power relations, and the exercise of authority within the framework of administrative law. Criminalization occurs when criminal law is used beyond the purposes for which it was created, disregards the principles of ultimum remedium, proportionality, and protection of human rights, and when law enforcement authority is exercised without being guided by the principle of legality and the General Principles of Good Governance. Therefore, preventing criminalization cannot be achieved merely through normative reform, but requires control over discretion, integrity among law enforcement officials, and consistent commitment to the principles of the rule of law so that power does not turn into arbitrariness.

Patterns of criminalization reflected in several cases during the period in which the old Criminal Code was in force, whether cases that attracted public attention or those that were not widely exposed, show that legal criminalization is a structural problem rooted in the expansive interpretation of offense elements, the disregard of the principle of culpability, and the tendency to transfer civil or administrative disputes into the criminal law sphere. When law enforcement officials emphasize the formal fulfillment of elements without carefully examining fault, proportionality, and the context of authority, criminal law risks shifting from an ultimum remedium into an instrument of pressure within unequal power relations. Therefore, the issue of criminalization cannot be understood merely as an error in applying norms in a single case, but as a reflection of law enforcement practices that require stronger commitment to the principles of legality, culpability, and the rule of law in a consistent and just manner.

The reform introduced through Law Number 1 of 2023 marks an important transformation in the orientation of Indonesian criminal law toward a more humanistic, proportional, and substantively just approach. However, its effectiveness in preventing criminalization practices depends greatly on how those norms are interpreted and implemented by law enforcement officials. Without control over discretion, integrity, and commitment to the principles of legality, culpability, and ultimum remedium, even progressive norms may lose their corrective power. Therefore, the future of Indonesian criminal law is determined not only by the quality of its formulation, but also by the consistency of its implementation and a legal culture that upholds the principles of the rule of law and the protection of human rights.

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