

## Critical Review of Criminalization Policies in Law Number 1 of 2023 Concerning the KUHP

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### ABSTRACT

The Criminalization Policy in Law Number 1 of 2023 concerning the Criminal Code is First, criminalization is limited to determining an act as a criminal offense which is punishable by criminal sanctions. Second, criminalization is a complex problem because there are different types of acts that can be criminalized, differences in values and norms in society. Third, important principles that need to be considered in criminalization are the principle of legality, the principle of subsidiarity, and the principle of equality before the law. Finally, the criteria to consider in criminalization include: The application of the Criminalization Policy in Law Number 1 of 2023 concerning the Criminal Code is an example of Article 509 of Law Number 1/2023 of the Criminal Code which is contrary to the 1945 Constitution and has no binding legal force. Because within the limits of reasonable reasoning, criminal error in Article 509 of the National Criminal Code is on the informant (client), not on the advocate. So it is not right for an advocate to be convicted because of a client's false statement. Article 509 of the National Criminal Code contradicts: Article 1 paragraph (3) of the 1945 Constitution which states: The State of Indonesia is a State of Law.

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## **INTRODUCTION**

The Criminal Code is considered to still contain articles of colonial heritage and is vulnerable to being used as a means of criminalization. The civil coalition continues to echo and hold demonstrations against the Criminal Code. Law No. 1 of 2023 concerning the Criminal Code (KUHP) has been ratified, the law is referred to as the new Criminal Code, which replaces *Wetboek van Strafrecht* or also known as the Criminal Code.

The fact is that the new Criminal Code article is still being strongly rejected by some people. The public considers that the new Criminal Code still contains problematic articles and has the potential to become "rubber articles" or multiple interpretations and shows an anti-democratic attitude, which allows criminalization to occur. For example, Article 509 of the National Criminal Code criminalizes the profession of advocate so that the regulation is contrary to the 1945 Constitution. Article 509 of the National Criminal Code reads: Punished with a maximum imprisonment of 1 (one) year or a maximum fine of category III:

- a. Advocates who include or ask to include in a lawsuit or divorce application or bankruptcy application, information about the residence or residence of the defendant or debtor, even though it is known or reasonably suspected that this information is contrary to the actual situation.
- b. Husband or wife who files a lawsuit or application for divorce who gives information that is contrary to the actual situation to the advocate or as referred to in letter a; or
- c. Creditors submitting a bankruptcy application that provide information contrary to the actual situation to the advocate as referred to in letter a.

Criminalization is a complex and separate issue. The complexity of criminalization lies in the many factors that are related and need to be considered in the criminalization process, and between these factors there are sometimes very sharp differences.

This complexity relates to the types of acts that can be criminalized, where the types of acts that can be criminalized do not only include actions that are essentially evil in nature, but also include neutral acts that do not essentially contain evil elements. The complexity of criminalization is also related to differences in values and norms adopted by community groups, both due to the influence of religious and cultural backgrounds, as well as due to the influence of educational background and social class in society. Differences in values and norms affect the assessment of what actions should be criminalized and also affect the assessment of the gradation of seriousness of the actions to be criminalized. The complexity of criminalization is also evident in the wide variety of instruments to regulate social life where criminal law is only one of the available instruments to regulate social life. Other instruments to regulate social life are civil law, administrative law, morals, religion, discipline and customs.

Criminal law should not be placed as the first instrument (*primum remedium*) to regulate people's lives, but rather as the last instrument (*ultimum remedium*) to control individual behavior in social life. Therefore, the use of

criminal law to regulate society regarding certain activities is not a necessity, but only an alternative to the available regulatory instruments.

The complexity of criminalization is also related to the rapid social changes in society. Social change is one of the factors that influence legal change. When society changes, the law will also change. Changes in law are the resultant of changes in society. This pattern of community and legal relations is illustrated in the expression *adat sakali aie gadang sakali titian baranjak*.

Social changes that occur in society include major changes in the structure of society that affect the joints of shared life and changes in cultural values that affect the mind, mentality and soul. In other words, social change does not only mean changes in the structure and function of society, but it also includes changes in the values, attitudes and behavior patterns of society. This is where the need for criminalization. According to the dictionary of criminal law terminology, criminalization means regulation of actions that were not originally constitutes an offense then becomes an offense.

Based on the things that have been stated above, the writer is interested in conducting research on A critical review of criminalization policies in Law Number 1 of 2023 concerning the Criminal Code. The formulation of the problem is:

1. How Criminalization Policy in Law Number 1 of 2023 concerning the Criminal Code?
2. What Application Criminalization Policy in Law Number 1 of 2023 concerning the Criminal Code?

## **THEORETICAL REVIEW**

### **A. Formulation Policy Theory**

In the formulation of criminal law policies, there are two central issues that must be determined, namely:

- a. What actions should be made a crime?
- b. What sanctions should be used or imposed on the offender.

Policy formulation is related to criminal law reform, because in essence criminal law reform is part of criminal law policy which is part of criminal law enforcement, criminal policy and social policy in order to protect society and achieve community welfare.

Policy formulation is a policy in formulating something in the form of legislation. Formulation policy according to Barda Nawawi Arief is "A plan or program from legislators regarding what will be done in dealing with certain problems and how to do or carry out something that has been planned or programmed".

Policy formulation is the beginning of planning in an effort to tackle crime, so it is only natural that policy formulation is part of a criminal policy which functionally can be seen as part of the procedure for efforts to tackle crime. Broadly speaking, planning or crime prevention policies are as outlined in legislation according to Barda Nawawi Arief includes:

- a. Planning or policies on what prohibited acts will be dealt with because they are seen as harmful or detrimental.

- b. Planning/policy regarding what sanctions can be made to be imposed on the perpetrators of the prohibited act (whether in the form of a crime or action) and the application system.
- c. Planning/policy regarding procedures or system mechanisms judiciary in the context of enforcing criminal law.

The purpose of criminal policy is to achieve the welfare of society in general, so even this law enforcement policy is included in the field of social policy, namely all rational efforts to achieve social welfare.

One of the means used in designing and implementing social policy is to use law and laws and regulations in a country. The use of positive law as a way of tackling crime is a must pay attention to the values that live in the community of a nation.

## **B. Criminalization Theory**

Criminalization is a material criminal law which as an object of study determines an action as a delict or a criminal offense with a specific criminal threat. Deeds something that is not commendable which was not originally included in the prohibited act is qualified as an offense with the threat of criminal sanctions.

Soerjono Soekamto's opinion was whimsical behavior or actions determined by the authorities that are considered by the group or by society as considered an act that can be criminalized to become a criminal or criminal act that can be punished by an authorized institution. According to Soedarto, criminalization can also be interpreted as the process of determining that all someone's actions can be punished by the process of making regulations or laws. Law so that such actions can be threatened with criminal sanctions.

The value perspective can also be interpreted as criminalization, namely changes in values caused by actions that were previously blameless and not prosecuted, turn into actions that are disgraceful and can be punished. Muladi explained the guideline benchmarks regarding criminalization, namely:

1. Criminalization does not seem to cause over-criminalization which is in the category of the misuse of criminal sanctions.
2. Criminalization is not ad hoc.
3. Criminalization contains an element of victimizing both actual and potential victims.
4. Criminalization takes into account the analysis of costs and results and the principle of *ultimum remedium*.
5. Criminalization results in enforceable regulations.
6. Criminalization is able to gain public support.
7. Criminalization contains elements of subsociality resulting in danger to society, even if it is very small.
8. Criminalization pays attention to every penal regulation that limits the people and law enforcement officers to put things in order.

The principle or basis or basis for making regulations, policies and decisions for social life is a basic understanding. Three principles of criminalization must be considered by the legislators in determining an act as

criminal acts and the threat of criminal sanctions are:

a) Legality Principle

According to JE Sahetapy there are seven meanings of the principle of legality, namely:

- 1) Cannot be punished except based on criminal provisions according to law.
- 2) Application of criminal law cannot be based on analogy.
- 3) Habits cannot be based on being punished.
- 4) There is no unclear formulation of the offense.
- 5) Do not recede in criminal provisions.
- 6) There is no other crime except that determined by law.
- 7) Criminal prosecution is only according to the method determined by law.

Meanwhile, according to Roeslan Saleh, who quoted Antonie AG Pete, explained that the function of the principle of legality in the context of criminalization is to secure the legal position of the people towards the state and function to protect members of society. From the arbitrary actions of the government which is a legal political dimension of the principle of legality.

b) The Principle of Subsidiarity

The principle of subsidiarity is that crime prevention in the criminal realm is placed as an *ultimum remedium* (ultimate weapon) as a penal instrument, not as a *primum remedium* (main weapon) to overcome the problem of crime. The principle of subsidiarity in criminalization and decriminalization policies must be applied strictly so that the use of law is effective criminal justice in crime prevention.

c) The Principle of Equality or Similarity

The principle of equality aims to overhaul the criminal law system to be clearer and simpler. The principle of equality is not only a push for a just criminal law, but also for an appropriate criminal sentence. What they have in common is simplicity and clarity. Simplicity and clarity will lead to order. In dealing with the problem of criminalization must pay attention to the criteria. The criteria for criminalization disclosed by Sudarto are:

- 1) The use of criminal law must create a just and prosperous society based on Pancasila. At least criminal law aims to prevent and overcome crime for the welfare and protection of society.
- 2) Actions that are prevented must be actions that cause harm (material or spiritual) over community members.
- 3) Principles of the use of criminal law taking into account costs and results (cost benefit principle).
- 4) The use of criminal law must also taking into account the working capacity or ability of law enforcement agencies (overbelasting).

Meanwhile, according to Moeljanto criminalization in the criminal law renewal process must have three criteria, namely:

- 1) Determination of an act as a prohibited act (criminal act).
- 2) Second, criminal threats and criminal imposition to prevent violations of the prohibitions.
- 3) Third, is the government, by using the relevant state apparatus, really capable of carrying out criminal threats if it turns out that someone has violated the prohibition?

### **C. Benefit Theory**

This theory was pioneered by Jeremy Bentham by holding the principle that humans will take action to get the greatest happiness and reduce suffering. On this basis, the goodness or badness of an action is measured by what the action is bring happiness or not. Likewise with the good and bad invitation is also determined by the size mentioned above. Thus, laws that bring happiness to the greatest part of society will be judged as good laws.

According to Jeremy Bentham, law aims solely at what is beneficial to people. This opinion is emphasized on things that are useful for many people and are general in nature without regard to issues of fairness. The law basically aims to realize what is beneficial for one person can also harm another person, so the purpose of the law is to provide as much benefit as possible. Here certainty through law for individuals is the main goal of law.

According to Romli Atmasasmita, the purpose of law in general, specifically Indonesian criminal law, is peace and utility for the conflicting parties and also for the surrounding community as the ultimate goals, while order, certainty and justice are secondary goals. or alternative.

### **D. Law Enforcement Theory**

According to Soerjono Soekanto, the main problem of law enforcement actually lies in the factors that might influence it. These factors have a neutral meaning, so impact positive or negative lies in the content of these factors. These factors are as follows:

- a. The legal factor itself
- b. Law enforcement factors, namely the parties that form and apply the law
- c. Facility factors or facilities that support law enforcement
- d. Community factors, namely the environment in which the law applies or is applied
- e. Cultural factors, namely as a result of work, creativity and taste based on human initiative in social life.

These five factors are closely related to each other, because they are the essence of law enforcement, they are also a benchmark for the effectiveness of law enforcement. Through legal instruments, unlawful behavior is attempted to be handled preventively, as well as repressively. Bringing before the court hearing and subsequently imposing criminal penalties on members of the public who are proven to have committed a criminal act, is a repressive action.

Lawrence Milton Friedman emphasizes that law enforcement is on the performance aspects of the legal apparatus and the legal facilities and infrastructure itself, legal substance and legal culture concerning behavior.

## **METHODOLOGY**

The research method is analytical descriptive in nature, namely describing the problems and facts that occur based on positive legal norms, namely the laws related to this research. Approach method with normative juridical namely using positive legal norms related to criminalization policies in Law Number 1 of 2023 concerning the Criminal Code. Data analysis was carried out qualitatively, meaning without using numbers and statistical formulas.

## **RESULTS AND DISCUSSION**

In carrying out their daily activities, individuals who are part of society may conflict with other individuals' interests and may even violate the law. Talking about breaking the law there must be agreement about whether an act is said violates a statutory regulation. The criterion is that the act is detrimental or endangers the community so that the act must be prohibited or criminalized. The prohibited acts are formulated in a legislation. Formulating an act that is prohibited in a law is called a formulation policy. Policy formulation is the initial stage in law enforcement namely in the form of law enforcement by legislators and also called the legislative stage.

It is at this stage that criminalization is carried out, namely by formulating prohibited actions and sanctions for these actions into a statutory regulation. This can be done by formulating new articles or by amending existing articles. For example, Article 509 of the National Criminal Code criminalizes the profession of advocate so that the regulation is contrary to the 1945 Constitution. Article 509 of the National Criminal Code reads: Punished with a maximum imprisonment of 1 (one) year or a maximum fine of category III:

1. Advocates who include or ask to include in a lawsuit or divorce application or bankruptcy application, information about the residence or residence of the defendant or debtor, even though it is known or reasonably suspected that this information is contrary to the actual situation.
2. Husband or wife who files a lawsuit or application for divorce who gives information that is contrary to the actual situation to the advocate or as referred to in letter a or
3. Creditors submitting a bankruptcy application that provide information contrary to the actual situation to the advocate as referred to in letter a.

Declare Article 509 of Law Number 1/2023 of the Criminal Code is contrary to the 1945 Constitution and does not have binding legal force. Because within the limits of reasonable reasoning, the criminal error in Article 509 of the National Criminal Code lies with the informant (client), not the advocate. So it is not right for an advocate to be convicted because of a client's false statement. The Petitioner argues that Article 509 of the National Criminal Code is contrary to:

Article 1 paragraph (3) of the 1945 Constitution which states: The State of Indonesia is a State of Law.

Article 28D paragraph (1) of the 1945 Constitution, which states: Everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law

Article 28G paragraph (1) of the 1945 Constitution, which states: Everyone has the right to protect himself/herself, family, honor, dignity and property under his control, and has the right to feel safe and protected from threats of fear to do or not do something which is a human right.

The provisions of the norms of Article 509 Law /2023 have created fair legal uncertainty and created threats and fear for advocates in carrying out their professional duties and have threatened the dignity and honor of advocates. Where advocates are one of the Law Enforcement Houses that according to the Advocate Law are granted immunity where advocates cannot be prosecuted both civilly and criminally for carrying out their professional duties in good faith for the benefit of client defense in court proceedings.

An advocate gets immunity when carrying out his duties with a power of attorney from the power of attorney (client) based on good faith. This means that when an advocate has obtained power of attorney from a client, in carrying out his duties for the benefit of the client's defense, as long as it is based on good faith both inside and outside the court, then what the advocate does cannot be prosecuted either civilly or criminally.

The provisions of the norms of Article 509 of the National Criminal Code will of course also be affected by advocates who take shelter under the leadership of the applicant who will also experience the same loss. Because with the enactment of the provisions of the norms of Article 509 Law 1/2023, the applicant does not get a guarantee of fair legal certainty and equal treatment before the law as guaranteed in Article 28D paragraph (1) of the 1945 Constitution which is the principle of a rule of law country as regulated in Article 1 paragraph (3) UUD 1945.

The desire to criminalize this problem is in accordance with the objectives of legislative policy, namely to improve the laws and regulations that have existed so far but are not in accordance with the demands and needs of the community. In addition to paying attention to the values that live within society, in carrying out criminalization as an effort to combat crime, must also be based on scientific findings and comparative studies of laws in other countries.

First, criminalization is limited to determining an act as a crime which is punishable by criminal sanctions. The definition of criminalization is not limited to determining an act as a crime and can be punished, but also adding (increasing) criminal sanctions to existing criminal acts. Second, criminalization is a complex problem because there are different types of acts that can be criminalized, differences in values and norms in society, various choices of instruments for regulating people's lives, and social changes that occur in society. Third, important principles that need to be considered in criminalization are the principle of legality, the principle of subsidiarity, and the principle of equality before the law. Finally, the criteria that need to be considered in criminalization

include: the act being criminalized is an act that is undesirable according to the sense of justice in society, the ability of criminal law to deal with the problem being criminalized, the balance between means and results or benefits obtained through criminalization, the balance between costs and results, impact negative aspects of criminalization, and the ability of the judiciary and law enforcement officials to enforce criminalized acts.

## CONCLUSIONS AND RECOMMENDATIONS

The Criminalization Policy in Law Number 1 of 2023 concerning the Criminal Code is First, criminalization is limited to determining an act as a criminal offense which is punishable by criminal sanctions. The definition of criminalization is not limited to determining an act as a crime and can be punished, but also adding (increasing) criminal sanctions to existing criminal acts. Second, criminalization is a complex problem because there are different types of acts that can be criminalized, differences in values and norms in society, various choices of instruments for regulating people's lives, and social changes that occur in society. Third, important principles that need to be considered in criminalization are the principle of legality, the principle of subsidiarity, and the principle of equality before the law. Finally,

ApplicationThe Criminalization Policy in Law Number 1 of 2023 concerning the Criminal Code is an example of Article 509 of Law Number 1/2023 of the Criminal Code which is contrary to the 1945 Constitution and has no binding legal force. Because within the limits of reasonable reasoning, the criminal error in Article 509 of the National Criminal Code lies with the informant (client), not the advocate. So it is not right for an advocate to be convicted because of a client's false statement. Article 509 of the National Criminal Code contradicts: Article 1 paragraph (3) of the 1945 Constitution which states: The State of Indonesia is a State of Law.

Based on the results of the research above, then some of the recommendations that the authors suggest are:

- a. The criminalization policy needs to be formulated as a guideline that is more concrete, in accordance with the values that live in society.
- b. It is better if the criminalization policy is based on the principles and criteria of criminal law whether an act can be said to be punishable or not.

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