

# CRIMINALIZATION AND DECRIMINALIZATION IN THE DRAFT CRIMINAL CODE

1. APRILIANI DEWI SUSANA, Student ID No. 20191024
2. DWI BADRU ABDILLAH, Student ID No. 20181050
3. ZAENAL ARIFIN, Lecturer Registration No. 03-2212-7503  
profgayuslumbuunstih@gmail.com

## ABSTRACT

The reformulation of criminal law necessitates a fundamental shift in societal perspectives concerning the evaluation of specific behaviors. This transformation is intricately entwined with the socio-cultural framework that underpins the community's evolution. Criminal acts, or offenses, are indivisible from the realm of criminal law politics, notably with regard to the determination of whether an act warrants criminalization or should be exempt from classification as a criminal offense through the process of decriminalization. Criminalization is the subject of substantive criminal law that delves into determining an act as a criminal offense, qualifying previously non-prohibited acts as punishable criminal actions. Issues in the renewal of criminal law center around Articles 477, 484, 488, and 881 of the Draft Criminal Code, sparking differing opinions among experts. This study employs a qualitative approach with a descriptive research design. The data analysis in this research is descriptive in nature. The conclusion drawn from this study is that Article 477 of the Draft Criminal Code does not define the concepts of decency and pornography. Article 484, paragraphs (1) and (4), demonstrate an over-criminalization in categorizing all non-marital sexual relations as the offense of adultery, thus excessively regulating private and personal matters of citizens as public affairs. Article 488 of the Draft Criminal Code fails to clarify the indicators of cohabitation, as the condemned action in cases of "living together not under marriage" pertains to the sexual act of fornication. The construction of Article 881 of the Draft Criminal Code is essentially similar to Article 534 of the Criminal Code. However, the use of the phrase "without right" reinforces the concept that those entitled to provide information are those mentioned in Article 483 of the Draft Criminal Code, whereas civil society is not granted the "right" as stipulated in Article 481 of the Draft Criminal Code.

**Key words:** *criminalization, decriminalization.*

## INTRODUCTION

Criminal law reform is part of criminal law policy or *penal policy*. According to Barda Nawawi, the background and urgency of criminal law reform are viewed from socio-political, socio-philosophical, socio-cultural aspects, or various policy aspects, especially social policy, criminal policy, and law enforcement policy. He further states that the essence of criminal law reform can be seen from two aspects: policy approach and value approach.<sup>1</sup>

Criminal law reform from the policy approach is as follows:

1. As part of social policy, law reform is essentially an effort to address social problems in support of national goals.
2. As part of criminal policy, criminal law reform is fundamentally about protecting society, especially in combating crime.
3. As part of law enforcement policy, criminal law reform is essentially about renewing legal substance.<sup>2</sup>

From a value approach, criminal law reform is essentially an effort to reassess the socio-political, socio-philosophical, and socio-cultural values that underlie and inform the normative and substantive content of the desired criminal law.<sup>3</sup>

<sup>1</sup> Barda Nawawi, published in Bandung by PT. Citra Adytia Bakti in 2002, p.30-31

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

Criminal law reform cannot occur without a change in society's perception of certain behaviors, and such behavioral changes are inseparable from the socio-cultural support where the society grows and develops.

A criminal act or offense cannot be detached from the realm of criminal law policy, especially concerning whether an act should be *criminalized* or *decriminalized*. Criminalization is a subject of study in substantive criminal law, discussing the classification of an act as a criminal offense (criminal act or crime) that is threatened with certain criminal sanctions. Disgraceful acts previously not qualified as illegal are justified as criminal offenses with criminal sanctions.<sup>4</sup>

Criminalization policy is the establishment of an act, which was not previously a crime (becoming a punishable act/crime) into a criminal act (an act that can be punished), while decriminalization is the determination of an act that was originally a criminal act (a punishable act) into an act that cannot be punished.

### PROBLEM STATEMENT

Why do Articles 477, 484, 488, and 881 of the Draft Criminal Code generate differing opinions among experts?

### RESEARCH METHODOLOGY

This study employs a qualitative approach with descriptive research as its type. The data analysis in this research utilizes descriptive analytics. The process is carried out from the data collection stage, so that while in the field, the researcher begins the data analysis process until the study concludes. This means that matters related to the legal system in society and its scope, especially inheritance law, are analyzed in-depth.

### ANALYSIS

#### Criminalization Definition of Criminalization

According to the language, 'criminal' is interpreted as evil or crime, or related to criminal acts. Criminalization refers to the determination of criminal acts (people who commit evil acts).<sup>5</sup> Criminalization in criminology (English: *criminalization*) is a process where there is a change in individual behaviors that tend to become criminals and eventually turn into offenders.

According to Soerjono Soekanto, criminalization is the action or determination by the authorities regarding certain acts that are considered by the society or groups within it as criminal acts and, therefore, can be punished by the government on its behalf.<sup>6</sup>

Soetandyo Wignjosebroto states that criminalization is a declaration that certain acts must be considered as criminal acts, resulting from normative *judgments*, culminating in a *decision*.<sup>7</sup>

According to Soedarto, criminalization is the process of elevating acts that were originally not criminal into acts that can be penalized. This criminalization process is part of the formulation stage of criminal law reform, concluding with the creation of legislation where such acts are threatened with a penalty.<sup>8</sup>

According to Muladi, there are several measures regarding criminalization that doctrinally should be noted as guidelines, namely:

- 1) Criminalization should not appear to cause *overcriminalization*, falling into the category of *the misuse of criminal conviction*.
- 2) Criminalization should not be ad hoc.


<sup>4</sup> Salman Luthan, *Principles and Criteria of Criminalization*, Journal of Law, Faculty of Law, Indonesia Islamic University, Yogyakarta, No. 1 Vol 16 January 2009, p.1.

<sup>5</sup> Dahlan al- Barry, *Popular Scientific Dictionary*, (Surabaya: Artaloka, 1994), p. 201.

<sup>6</sup> Soerjono Soekanto, *Criminology: An Introduction*, 1<sup>st</sup> edition, (Jakarta: Ghalia Indonesia, 1981), p. 62.

<sup>7</sup> Soetandyo Wignjoseboto, *Criminalization and Decriminalization: What Legal Sociology Says About This*, Presented in the Seminar on Criminalization and Decriminalization in Discussion of Indonesian Criminal Law, Yogyakarta, July 15, 1993, p. 1

<sup>8</sup> Soedarto, *Law and Criminal Law*, (Bandung: Alumni, 1983), p. 39

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- 3) Criminalization must contain elements of victimizing, both actual and potential.
  - 4) Criminalization must consider cost-benefit analysis and the principle of *ultimum remedium*.
  - 5) Criminalization should result in *enforceable* regulation.
  - 6) Criminalization must be able to gain public support.
  - 7) Criminalization must contain elements of subsociality, causing harm to society, however small.
  - 8) Criminalization should heed the warning that every criminal regulation limits the freedom of citizens and provides the possibility for law enforcement officials to restrain that freedom.<sup>9</sup>

### PRINCIPLES OF CRIMINALIZATION

There are three principles of criminalization that lawmakers need to consider when defining an act as a criminal offense along with its penal sanctions: the principle of legality, the principle of subsidiarity, and the principle of equality/sameness.

- 1) Principle of Legality: The essence of this principle is captured in the phrase "*nullum delictum nulla poena sine praevia lege penali*", put forward by van Voerbach. This phrase means that no act can be punished unless it is already established as a crime in the penal law before the act is committed. The principle of legality is the most important in criminal law, especially as a fundamental principle in establishing criminalization.<sup>10</sup>

According to Sahetapy, the principle of legality entails seven meanings: a) punishment can only be based on criminal provisions in the law; b) no application of the law based on analogy; c) no punishment based solely on customs; d) no vaguely defined offenses (*lex certa* requirement); e) no retroactive force of criminal provisions; f) no other penalties than those determined by law; g) criminal prosecution only according to procedures set by law.<sup>11</sup>

- 2) Principle of Subsidiarity\*: In criminality and decriminalization policies, it is necessary to investigate the effectiveness of using criminal law in combating crimes or acts harmful to society. This requires understanding the consequences of using criminal law and ensuring that the intervention of criminal law is beneficial.<sup>12</sup>

The need for the principle of subsidiarity in determining prohibited acts is driven by two factors:

*First*, employing the principle of subsidiarity promotes the emergence of fair criminal law.

*Second*, legislative practices have negative impacts on the criminal justice system, like *overcriminalization* and *overpenalization*, diminishing the law's influence in society. Additionally, *overcriminalization* and *overpenalization* overly burden legal apparatuses in criminal justice processes, ultimately impairing the function and authority of criminal law.<sup>13</sup>

- 3) Principle of Equality/Sameness

Equality implies simplicity and clarity, which foster order. According to Serwan and Lastrasne, as cited by Ruslan Saleh, the principle of equality is not just an aspiration for more just criminal law but a desire for a clearer and simpler criminal legal system.<sup>14</sup>

Therefore, these principles of criminalization are critical, as they are presented as measures to assess the fairness of criminal law, and normative, as they regulate government policies in the field of criminal law.<sup>15</sup>

<sup>9</sup> Muladi, *Selected Topics in Criminal Law*, (Semarang: Diponegoro University Publishing, 1995), p. 256

<sup>10</sup> Salman Luthan, *Principles and Criteria of Criminalization*, Journal of Law, No. 1 Vol Januari 16, 2009, p. 6.

<sup>11</sup> J. Sahetapy, (Ed), *Criminal Law*, (Yogyakarta: Liberty Publishing, 1996), p. 6-7

<sup>12</sup> Roeslan Saleh quoting Antonie AG Peter in "*Principles of Criminal Law in Perspective*" (Jakarta: Ghalia Indonesia, 1990), p. 50.

<sup>13</sup> Aruan Sakidjo and Bambang Poernomo, *Criminal Law* (Jakarta: Ghalia Indonesia, 1990), p. 50.

<sup>14</sup> Roeslan Saleh, *Op. Cit.*, pp. 36-37.

<sup>15</sup> *Ibid.*



## DECRIMINALIZATION

Decriminalization refers to the process where an act previously deemed reprehensible under criminal law and subjected to criminal sanctions is no longer considered reprehensible under criminal law.<sup>16</sup>

The process of decriminalization is where an act, initially a crime because it is prohibited by penal legislation, is later deemed not a crime. In practice, there are two models of decriminalization: *de jure decriminalization*, where the provision is officially repealed, and *de facto decriminalization*, where the provision is not repealed but is not enforced based on state policy.<sup>17</sup>

The 1980 Criminal Law Reform Symposium in Semarang discussed the criminalization and decriminalization of certain acts. These decisions should align with the criminal policy of the nation and consider whether the acts conflict with fundamental societal values. Such determinations aid in promoting societal welfare.

Key criteria for criminalization and decriminalization established by the symposium include:

- 1) Whether the act is disliked or condemned by society due to its harmful nature or potentially create victims;
- 2) Whether the costs of criminalization, including legislation, law enforcement, and the burden on victims and perpetrators, are balanced with the benefits from maintaining legal order,
- 3) Whether the excessively burdens law enforcement agencies beyond their capacity.
- 4) Whether the act impede national goals, posing a danger to society.<sup>18</sup>

### Criminalization and Decriminalization of Several Criminal Acts in the Draft Criminal Code

The symposium specifically critiqued several criminalizations in Book II of the Draft Criminal Code, including:

#### a. Pornography

The offense of pornography is included in the Draft Criminal Code under Part Two of Offenses against Morality, consisting of 10 articles from Article 470 to Article 480. Specifically for children, the Draft Criminal Code also criminalizes child pornography in Article 384 of the Draft Criminal Code, related to the use of technological means. In this regard, the Draft Criminal Code formulates five new actions classified as criminal acts of pornography, including: *making oneself or others the object of pornography, forcing children to become models or objects of pornography, purchasing pornographic materials and/or services, and financing or providing a place, equipment, and/or tools for engaging in pornography.*

The formulation of the offense of pornography in general is not much different from the formulation of offenses as regulated in the Criminal Code (KUHP). The difference lies in the Draft Criminal Code as the elements of the offense are expanded not only to include "writing, images, or objects" but also incorporate elements related to: *writing, sound or voice recordings, films or those deemed equivalent to films, song lyrics, poetry, images, photos, and/or paintings.*<sup>19</sup> The inclusion of these new elements emphasizes the components of "writing, images, or objects," which, in reality, are already encompassed within the elements of "writing, images, or objects," as stated in the formulations of articles in the Criminal Code.<sup>20</sup>

In the Draft Criminal Code, two categories susceptible to pornography-related sanctions may elicit contention: firstly, those individuals who position themselves as subjects in pornographic productions, and secondly, those individuals engaged in the acquisition of pornographic materials.

<sup>16</sup> Ari Wibowo, *Op. Cit.*, p. 18.

<sup>17</sup> Supriyadi Widodo Eddyono & Ajeng Gandini Kamilah, "Anti-Contraception? The Problematics within the Draft Criminal Code" (Jakarta: Institute for Criminal Justice Reform, 2017), p. 8.

<sup>18</sup> Barda Nawawi, *Op. Cit.*, p. 32

<sup>19</sup> National Law Development Agency (BPHN) Ministry of Law and Human Rights of the Republic of Indonesia, "Draft Criminal Law Academic Text for the Bill on the Criminal Code" (Jakarta: BPHN, 2015), p. 168.

<sup>20</sup> Leden Marpaung, "Criminal Acts against Decency and Prevention Issues," 2<sup>nd</sup> Edition, (Jakarta: Sinar Grafika, 2004), p. 38.



The Draft Criminal Code also expands the formulation of Article 281 of the Criminal Code, which pertains to offenses against morality. In the formulation of Article 469 in the Draft Criminal Code, the element of intent is eliminated. Meanwhile, in Book III of the Draft Criminal Code, by violating morality or pornography with accompanying explanations, it does not provide limits to what is meant by violating morality or pornography. This means that the criminalization policy for such actions, as in the Criminal Code, is left to the practice of the courts.<sup>21</sup>

Regarding the formulation of offenses against morality, the Criminal Code does not provide a definition of what constitutes morality and pornography but only provides guidance for law enforcement to construct it within legal boundaries that are contextual with the evolving conditions, both doctrinally and by reflecting the emotional atmosphere of society. Similarly, in Article 477 of the Draft Criminal Code, there is no definition of what constitutes morality and pornography. In that article, pornography is implicitly interpreted as "*depicting nudity, sexual exploitation, copulation, or other pornographic content.*"<sup>22</sup>

With the inadequate definition of offenses against morality and pornography, there are concerns that the Draft Criminal Code may face difficulties in determining legal subjects that can be subject to sanctions for violating offenses against morality and pornography.

## b. Adultery

Under the current KUHP (Indonesian Criminal Code), adultery is defined in Article 284. As explained by R. Soesilo, adultery involves consensual sexual intercourse between a married man or woman and someone who is not their spouse.<sup>23</sup>

There are four conditions for an act to be considered adultery:

- 1). Intercourse with someone other than one's spouse (irrespective of the individual's marital status).
- 2). The individual is not subject to Article 27 of the Indonesian Civil Code.
- 3). The sexual partner is subject to Article 27 of the Indonesian Civil Code.
- 4). The individual is aware that their partner is married and subject to the provisions of Article 27 of the Indonesian Civil Code.<sup>24</sup>

In the Draft Criminal Code, the crime of adultery is addressed in Article 484, which states:

### Article 484

- (1). A maximum of five years' imprisonment for:
  - (a) A married man engaging in sexual intercourse with a woman who is not his wife;
  - (b) A married woman engaging in sexual intercourse with a man who is not her husband.
  - (c) An unmarried man engaging in sexual intercourse with a married woman;
  - (d) An unmarried woman engaging in sexual intercourse with a married man.
  - (e) Both partners, unmarried, engaging in sexual intercourse;
- (2). Prosecution of the offenses in point 1 can only proceed upon complaint by the spouse or a third party affected by the act;
- (3). Complaints as mentioned in point 2 are exempt from the provisions of Articles 26, 27, and 29. Complaints can be withdrawn before court proceedings begin.

In this article, there is a broadening of the meaning, namely that the act of adultery constitutes sexual intercourse performed by two individuals, either both already bound by the bond of marriage or both not yet bound by marriage.

The Draft Article 484, paragraphs 1 to 4, can be concluded that the lawmakers have over-criminalized all individuals engaging in sexual intercourse without marital ties, turning it into the

<sup>21</sup> Supriyadi Widodo Eddyono, et al., *Reviewing Criminalization Policies in the Draft Criminal Code 2015*, (Jakarta: Institute for Criminal Justice System), p. 19.

<sup>22</sup> *Ibid.*

<sup>23</sup> R. Soesilo, *Criminal Code and Its Comprehensive Commentaries, Article by Article* (Bogor: Politea, 1976), p. 209.

<sup>24</sup> Supriyadi Widodo Eddyono, et al., *Op. Cit.*, p. 22.

criminal act of adultery. Consequently, some argue that the Draft Criminal Code goes too far in regulating the private and personal affairs of citizens, turning them into public matters.

### c. Cohabitation Offense

Cohabitation refers to a couple living together as husband and wife without being legally married. This practice varies in societal acceptance. Some communities view it as a legal violation, known as '*notorious cohabitation*,' but the law doesn't strictly penalize it. For some, this practice is negatively perceived as it is closely associated with premarital sex or free sexual behavior.

In several countries, the criminal act of cohabitation is already regulated in their criminal laws, although the regulations vary significantly. For example, in the Yugoslav Criminal Code (1951, Article 193), Norway, and Poland, cohabitation is considered a criminal act if done together with a child. In Singapore, Malaysia, Brunei Darussalam, India, Iceland, and Fiji, cohabitation falls under criminal categories when practiced with a woman who believes that she is legally married to the man. In China, cohabitation is considered a criminal act when done with the wife or husband of an active-duty military member. In Canada, cohabitation is considered a criminal act in the case of polygamy, living together as husband and wife with more than one person simultaneously, and in Arab countries and among followers of Islamic law, cohabitation is entirely prohibited as a form of forbidden adultery behavior.<sup>25</sup>

In the Draft Criminal Code, cohabitation or 'kumpul kebo' is addressed and included in Article 488, which states:

*"Anyone who lives together as husband and wife outside a lawful marriage shall be punished with imprisonment for a maximum of 1 (one) year or a fine of up to Category II."*

*Explanation: Article 488 This provision is known in society as 'cohabitation.'*

The author posits that prosecuting the offense of cohabitation poses significant challenges due to the offense's reliance on the criterion of 'living together as husband and wife outside a lawful marriage.' The Draft Criminal Code lacks clarity in elucidating the indicators of cohabitating as husband and wife, offering no standardized criteria. This absence of explicit guidance renders the evidential burden notably formidable. Moreover, in instances of cohabitation, the censured conduct primarily pertains to the sexual act.

### d. Criminal Acts Related to Contraceptives

In the Criminal Code, the provision that criminalizes the dissemination of contraceptive information or condoms is found in Article 534, which stipulates:

*"Anyone who openly displays a means to prevent pregnancy or, openly or without being asked, offers or, openly or by disseminating writings without being asked, indicates as obtainable such a means or intermediary, is threatened with imprisonment for up to two months or a fine of up to three thousand rupiahs."*

The regulation of contraceptives in the Draft Criminal Code is governed by Article 481 and Article 483.

Article 481:

*"Anyone who, without authority, openly displays a tool to prevent pregnancy, openly or without being asked offers, or openly or by disseminating writings without being asked, indicates the ability to obtain such a pregnancy prevention tool, shall be punished with a fine of up to Category I."*

Article 483:

*"Not punishable, anyone who performs the acts as referred to in Article 481 and Article 482, if such acts are carried out by authorized officers in the context of family planning and the prevention of infectious diseases."*

The construction of Article 481 of the Draft Criminal Code is essentially no different from the construction of Article 534 of the KUHP. However, the use of the term '*without authority*' strengthens the concept that those entitled to provide information are those mentioned in Article 483 of the

<sup>25</sup> *Ibid.* p. 26

Draft Criminal Code, while civil society is not granted the 'right' as stipulated in Article 481 of the Draft Criminal Code.

### CONCLUSION

Based on the analysis of several articles in the Draft Criminal Code outlined above, the following conclusions can be drawn:

1. Article 477 of the Draft Criminal Code does not provide an explanation of the meaning of decency and pornography. Implicitly, pornography is defined in the article *as depicting nudity, sexual exploitation, copulation, or other content deemed pornographic*.
2. Regarding Article 484, paragraphs (1) and (4) of the Draft Criminal Code, it can be observed that the lawmakers have over-criminalized all individuals engaging in sexual intercourse without marital ties, categorizing it as the criminal act of adultery. Some argue that the Draft Criminal Code goes too far in regulating the private and personal affairs of citizens, turning them into public matters.
3. Article 488 of the Draft Criminal Code does not explain the indicators of living together as husband and wife, as there is no standard explanation provided. This makes it very challenging to prove, especially since the condemned action in cases of 'kumpul kebo' revolves around sexual acts.
4. The construction of Article 481 of the Draft Criminal Code is essentially no different from the construction of Article 534 of the KUHP. However, the use of the term 'without authority' reinforces the concept that those entitled to provide information are those mentioned in Article 483 of the Draft Criminal Code, while civil society is not granted the 'right' as stipulated in Article 481 of the Draft Criminal Code.

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