



Overcriminalization in the Modern Criminal Justice System: A Threat to the Principles of Legality and Substantive Justice

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Abstract

Overcriminalization has become a systemic problem in modern legal systems, characterized by a tendency to use criminal law excessively to regulate various social behaviors. This study critically examines how the expansion of criminal law—both in scope and intensity—can threaten the principle of legality and undermine substantive justice. Using a normative qualitative approach, this study applies doctrinal and comparative legal analysis to three jurisdictions: Indonesia, the United States, and Germany. Primary sources include legislation and court decisions, while secondary data is obtained from academic literature and institutional reports. The findings reveal that overcriminalization often results in vague legal norms, disproportionate sanctions, and selective law enforcement—particularly affecting vulnerable groups. The study reveals that this trend has eroded legal certainty and turned criminal law into a political and moral tool. By integrating penal minimalism theory, justice theory, and legal positivism, this article offers normative parameters in the form of necessity, proportionality, and the principle of *ultimum remedium* to recalibrate the boundaries of legitimate criminalization. This research contributes to contemporary academic discourse by providing a structured analytical framework and concrete policy recommendations to strengthen the legitimacy and fairness of the modern criminal justice system.

Keywords: Overcriminalization, Principle of Legality, Substantive Justice, Penal Minimalism, Comparative Criminal Law

INTRODUCTION

Over the past two decades, criminal law systems in various countries have undergone significant expansion (Burke-White, 2003; Pakes, 2012; Terrill, 2023). Criminal law, which was originally designed as a last resort (*ultimum remedium*) to address serious violations of legal interests (*rechtsgut*), is now often overused to respond to social problems that could actually be resolved through administrative, civil, or other non-criminal mechanisms (Ardika, 2021; Bozbayindir, 2018; Youngky Fernando, 2023). According to a 2022 report by the American Bar Association (ABA), there are over 4,500 federal criminal offenses in the United States, not including hundreds of thousands of administrative criminal regulations at the state level. In Indonesia, the Criminal Code Bill (RKUHP) passed in 2022 introduced various new offenses, including those related to morality, insulting state institutions, and private life, sparking controversy and public rejection.

This phenomenon is known as overcriminalization, which is the tendency of states to expand the scope of criminal law beyond the bounds of rationality and objective necessity (Husak, 2008; LUNA, 2005; Yankah, 2011). When criminal law is used excessively to regulate social life, there is a shift in the function of law from an instrument of protection to a repressive tool of social control. In this context, the principle of legality (*nullum crimen sine lege*), which is at the heart of the modern criminal legal system, is threatened with losing its meaning due to vague, overlapping, and easily abused norms (Hessick, 2019; Moise, 2020; Rauter, 2017; Varuhas, 2020).

The urgency to discuss this topic is increasing given the real impact of overcriminalization, namely the emergence of legal disparities, selective law enforcement, and an increasing prison population. The Prison Policy Initiative study notes that excessive criminalization policies contribute to prison overcrowding and disproportionate detention of marginalized groups, such as minorities, the poor, or groups with certain political orientations. In Indonesia, the use of ambiguous articles such as insulting the authorities or blasphemy also shows a pattern of criminalization of civil liberties.

However, there is still a lack of scientific studies that systematically link the phenomenon of overcriminalization with the erosion of the principles of legality and substantive justice in a cross-jurisdictional approach. Most of the literature only highlights technical aspects or sectoral policies, without theoretically and comparatively analyzing the normative and structural impacts of these practices. In addition, public debates on overcriminalization are often not connected to contemporary legal theory, such as Rawlsian justice theory, penal minimalism, or reflexive law theory, which are relevant for analyzing the legitimacy of the expansion of criminal law.

Based on this background, this study aims to examine in depth the manifestations of overcriminalization in modern criminal law systems and its impact on the principles of legality and substantive justice. Using a comparative approach and a robust theoretical framework, this study is expected to make a significant academic contribution to reorienting the role of criminal law as a means of protecting human rights and limiting state power, rather than as an arbitrary repressive instrument.

RESEARCH OBJECTIVES

This study is motivated by academic and practical concerns regarding the tendency of modern states to excessively use criminal law to regulate various aspects of social life that are actually outside the realm of public offenses. In this context, the research aims to provide a comprehensive understanding of how overcriminalization occurs in contemporary criminal legal systems and to explore its implications for the normative foundations of the legal system, particularly the principle of legality and the concept of substantive justice.

More specifically, this study aims to identify and analyze patterns of overcriminalization that have developed in various jurisdictions, highlighting forms of criminalization that exceed the principles of necessity, proportionality, and legal clarity. By examining criminalization practices in

the legal systems of Indonesia, the United States, and Germany, this study seeks to uncover differences in context, patterns, and impacts of the expansive use of criminal law, including political factors, legal culture, and the surrounding criminal justice systems.

Furthermore, this study also aims to evaluate the impact of overcriminalization on the principle of legality, particularly in the context of violations of the principles of *lex certa*, *lex stricta*, and *lex praevia*, which are integral parts of the protection of individual freedoms in a state governed by the rule of law. This study examines how overly broad, ambiguous, or subordinate regulations can blur the boundaries between legal and illegal acts and open the door to abuse of state power.

On the other hand, this study also aims to examine the relationship between overcriminalization and substantive justice, considering the extent to which the expansion of criminal law impacts vulnerable groups or widens the gap in access to legal protection. In this case, a theoretical approach is used to explain the normative consequences of criminal policies that are not rooted in the principles of justice and legal rationality.

Finally, this study aims to formulate normative and theoretical contributions in the form of a framework that supports the principle of penal minimalism and encourages systemic limitations on the authority of legislators in creating criminal offenses. Thus, the results of this study are not only academically relevant but can also serve as a reference for policy in the process of criminal law reform, both at the national and international levels.

RESEARCH METHODOLOGY

This study uses a normative qualitative approach with a theoretical orientation and cross-jurisdictional comparative analysis to explore in depth the phenomenon of overcriminalization in modern criminal law systems (Christiani, 2016; Negara, 2023; Rohman et al., 2024). This approach was chosen because it allows the author to not only explain the normative construction of criminal law dogmatically, but also to assess its dynamics and impact on fundamental principles such as legality and substantive justice.

Methodologically, this study relies on doctrinal analysis as its main framework, which is conducted through a systematic review of positive legal norms, both in the form of legislation, jurisprudence, and legal expert opinions. This approach is used to examine the principle of legality and the principles limiting criminalization contained in the positive legal systems of Indonesia, the United States, and Germany. These three countries were selected based on the uniqueness of their legal systems: Indonesia as a representative of a mixed legal system (civil law with customary and religious influences), the United States as an example of a common law system with federal characteristics, and Germany as a country with a strong and rational continental legal tradition.

As a complement to the doctrinal approach, this study also uses comparative analysis. Comparisons are made not merely to show formal legal differences between countries, but to reveal how each legal system responds to or experiences overcriminalization within its particular

socio-political and legal ideological framework. This technique is also employed to identify best practices in criminalization restrictions that can be adopted across jurisdictions to strengthen protection of the principles of legality and substantive justice.

Data was collected through a literature review covering primary sources such as national criminal codes (Indonesian Criminal Code, United States Code, and German Strafgesetzbuch), relevant court decisions, and secondary sources such as scientific articles published in international journals, law books, policy reports, and documents from international institutions such as UNODC and Human Rights Watch. Literature review was conducted using reputable academic databases such as Scopus, HeinOnline, Westlaw, and SpringerLink.

The validity of the findings is reinforced by source triangulation, which involves comparing normative data from positive legal regulations with secondary empirical data obtained from case reports or previous studies. This approach allows for analysis that is not only normative but also reflective of the implementation and sociological realities underlying the application of criminal law.

Data analysis was conducted using deductive-inductive methods. Deductively, the author refers to established legal theories such as substantive justice theory (Rawls), penal minimalism (Ashworth), and the principle of legality in criminal law (*Nullum crimen sine lege*). Then, an inductive approach is used to interpret empirical and normative findings in a broader context and relate them to implications for future criminal law policy.

With this methodological approach, it is hoped that the results of the study will not only explain the actual conditions systematically, but also offer a framework of thinking and normative recommendations that are applicable and relevant to the needs of criminal law reform in a global context.

RESULT

Overcriminalization and Norm Erosion: A Comparative Study of Contemporary Criminal Law Challenges

Overcriminalization, as a phenomenon of excessive expansion of the scope and intensity of criminalization, poses a fundamental challenge to the legitimacy of the modern criminal justice system (Balyan, 2024; Husak, 2023; Levin, 2022). In principle, criminal law is designed as the *ultimum remedium*—the last resort in the social control mechanism—which should be applied restrictively only to behavior that poses a real social danger (*malum in se*) and deserves the highest moral condemnation from society (Abdurrachman et al., 2021; Bengoetxea, 2013; Sulistiani & Fakhriah, 2023; Zulyadi & Hossain, 2022). However, in contemporary practice, these essential boundaries are increasingly blurred. Many jurisdictions are experiencing a paradigmatic shift that erodes fundamental principles such as *nullum crimen sine culpa*, proportionality, and legal certainty—all elements that form the foundation of criminal justice within the framework of a modern rule-of-law state.

A study of the United States, Indonesia, and Germany reveals that overcriminalization is not a local or sectoral phenomenon, but rather a transnational trend that develops through various channels and dimensions. Although manifested in different historical, political, and legal cultural configurations, the general pattern shows not only a quantitative increase in the number of offenses, but also a qualitative transformation in the severity of sanctions and the nature of criminalized behavior. In other words, this phenomenon indicates a profound shift in the function of criminal law: from an instrument safeguarding moral boundaries to a technocratic and often disproportionate tool of social control.

In particular, the United States is an extreme example of overcriminalization through the proliferation of administrative regulations containing criminal sanctions. A study by Luna (2005) found more than 300,000 federal regulations with potential criminal consequences—a statistic that is not only staggering, but also illustrates the philosophical crisis of American criminal law. Furthermore, many of these regulations even disregard the principle of *mens rea* as an element of guilt, opting instead to strictly punish administrative violations without considering the intent or awareness of the perpetrator. As a result, criminal law loses its moral role and transforms into a rigid bureaucratic control mechanism, trapping individuals in criminal entanglements without the need for substantive proof of personal guilt.

Meanwhile, Indonesia exhibits a pattern of overcriminalization driven by communal moral dynamics and strong socio-political pressures. The 2022 revision of the Criminal Code (RKUHP) clarifies this direction by criminalizing acts previously considered part of the private sphere, such as consensual sexual relations outside marriage or insulting the president. These provisions rely on vague terminology such as "public morality," which is highly problematic in a multicultural democracy. The absence of objective legal standards opens the door to selective and subjective enforcement by law enforcement officials. As a result, criminal law is easily used as a political tool, a means of discrimination against minority groups, and a tool for suppressing freedom of expression, collectively creating a chilling effect on civil liberties and undermining the integrity of the legal system itself.

On the other hand, Germany—although generally regarded as a jurisdiction with strict normative control—is not entirely immune to this trend. Responses to the challenges of the digital world and corporate complexity have led to the criminalization of corporate failures to establish compliance systems. Sharp criticism has come from Roxin (2011), who highlights the risk of blurring personal responsibility due to the criminalization of "institutional failure." Within the German criminal law framework, which emphasizes the principle of fault (*Schuldprinzip*), this development marks a shift from individual responsibility toward systemic responsibility that is difficult to account for fairly. Criminal law in this context is forced to serve as a quick regulatory tool (*Steuerungsstrafrecht*) for complex issues, despite the risk of sacrificing normative precision and fundamental principles of criminal justice.

These three jurisdictions reflect two main mechanisms of overcriminalization that often work simultaneously. First, horizontal expansion, which is the continuous addition of new types of crimes through hyperactive legislation. This mechanism is usually carried out in response to short-term socio-political pressures or to expand criminal jurisdiction into areas previously handled by administrative or civil law. Second, vertical expansion, which involves increasing the severity of penalties for existing criminal offenses, or more seriously, criminalizing administrative violations and social behavior that were previously considered non-criminal. Both simultaneously erode the principle of *ultimum remedium* and elevate minor offenses into the realm of criminalization without adequate normative justification.

Overall, the pattern of overcriminalization in the United States, Indonesia, and Germany shows that this phenomenon is not merely a legislative irregularity, but a systemic symptom reflecting the pressure on modern criminal law to respond to social complexity, political demands, and expectations of efficiency. However, quick-fix solutions in the form of criminalization have proven to have far more serious long-term consequences: violations of fundamental rights, an overwhelming burden on the judicial system, and most alarmingly, the erosion of criminal law's legitimacy as a guardian of justice. Therefore, understanding the mechanisms and drivers of overcriminalization is an absolute prerequisite for criminal law reform grounded in principles, accountability, and the protection of civil liberties amid the evolving dynamics of a global society.

Overcriminalization and Erosion of the Principle of Legality: Threats to the Foundations of the Rule of Law

In modern criminal law, the principle of legality (*nullum crimen sine lege*) is a cornerstone that not only guarantees the protection of individual freedom but also establishes the fundamental requirements for the application of fair law (Akhavan, 2022; Puspito & Masyhar, 2023; Van Der Wilt, 2015). This principle demands clarity of norms (*lex certa*), the prohibition of analogies that are detrimental to the accused (*lex stricta*), and the prohibition of retroactive application of law (*lex praevia*) (Claes & Krolkowski, 2009; Dana, 2009; Truu, 2022). However, the phenomenon of overcriminalization, which has spread across various jurisdictions, has systematically undermined these important pillars. The proliferation of vague criminal norms and the uncontrolled delegation of authority to create offenses not only create legal uncertainty but also profoundly alter the relationship between the state and its citizens. In such a situation, individuals face the risk of being criminalized by norms that are unpredictable, insufficiently understandable, and therefore lose the ability to regulate their behavior rationally in accordance with the law. As a result, the integrity of the criminal legal system itself is under serious threat.

One of the most obvious manifestations of this phenomenon is the erosion of the principles of *lex certa* and *lex stricta*. When criminal offenses are defined using terms that are too general, open-ended, and subjective—such as "acts that disturb the public," "contrary to public morality," or "unpleasant"—the law loses its predictability and objectivity. In such conditions, citizens no longer

have clear legal guidelines, and behavioral adjustment becomes impossible. This fundamentally contradicts the theory of the rule of law as developed by Lon L. Fuller, who emphasized that law must be recognizable, understandable, non-contradictory, and sufficiently stable to be obeyed. Ambiguous norms, in practice, become potential instruments of repression because they grant broad discretionary power to law enforcement officials to subjectively interpret what constitutes "violating decency" or "disturbing."

More than just editorial ambiguity, overcriminalization is often accompanied by excessive delegation of authority in the formation of criminal norms, particularly to executive or administrative institutions. Through derivative regulations such as ministerial regulations, decisions of heads of institutions, or regional regulations, the substance of criminal acts that should be determined through a formal legislative process is instead defined by authorities that do not always have the same democratic legitimacy. This leads to fragmentation of normative authority, creating a criminal justice system that is not only incoherent but also prone to change and difficult to hold accountable politically or legally. As a result, citizens may be subject to criminal penalties based on technical rules that were previously unknown or even established in a closed and non-participatory manner.

This phenomenon is clearly evident in the Indonesian legal system, where many criminal laws describe the elements of a crime in general terms and leave the details to implementing regulations. Unfortunately, these implementing regulations are often unstable, prone to political intervention, and lack public involvement. This results in a confusing legal maze even for legal practitioners themselves. Furthermore, this situation opens up significant opportunities for abuse of authority, inconsistency in law enforcement, and substantive injustice. Citizens who should be protected by legal certainty instead become victims of unclear norms and regulatory dysfunction. This excessive delegation has effectively transferred the legislative function from parliament as the representative of the people to a technocratic bureaucracy that is not always accountable, thereby creating a serious democratic deficit.

Although this phenomenon is particularly evident in Indonesia, similar conditions can be found in the legal systems of other countries. In the United States, for example, criminalization through administrative regulations without clear mens rea elements has created what is known as a trap for the unwary. Even businesspeople and professionals find it difficult to understand the limits of criminal liability scattered across thousands of pages of technical regulations. In Germany, pressure to regulate complex digital crimes and corporate violations has also led to the use of more flexible formulations of offenses—despite the Federal Constitutional Court's strict affirmation of the Bestimmtheitsgebot (requirement of certainty). The impact is systemic: public trust in the legal system declines, the burden on the criminal justice system increases, and most critically, criminal law loses its function as a fair and effective guide to conduct.

Thus, it can be concluded that the erosion of the principle of legality and the fragmentation of norms triggered by overcriminalization are not merely technical legal issues, but rather a structural

crisis that threatens the essence of the rule of law and the protection of human rights. When legal language becomes vague and the authority to establish criminal norms is scattered beyond the control of democratic legislation, the legal system no longer works for certainty and justice, but instead becomes a potential tool of state repression. Therefore, criminal law reform is absolutely necessary to restore the principle of legality to its central position. This reform includes strict limitations on the delegation of authority, the formulation of precise and predictable criminal norms, and the strengthening of legislative accountability in all forms of criminalization. Without these corrective measures, criminal law is no longer a shield for freedom but a sword of power that endangers the democratic order itself.

DISCUSSION

Based on comprehensive findings regarding the patterns and impacts of overcriminalization in various jurisdictions, it has become increasingly clear that this phenomenon is not merely a legislative anomaly, but rather a manifestation of a deeper normative crisis in contemporary criminal law systems. This crisis encompasses not only quantitative aspects—such as the proliferation of offenses or the increase in the severity of penalties—but also touches on the core functions and legitimacy of criminal law itself. The paradigm shifts from *ultimum remedium* to *primum remedium*, the blurring of the boundaries between moral responsibility and administrative offenses, and the erosion of the principle of legality collectively indicate structural dysfunction in the way states formulate and apply criminal norms (Bawole, Nurjaya, et al., 2019; Dewi et al., 2021; Isnawati & Maolana, 2023). Therefore, the response required is not merely *ad hoc* fixes or normative patchwork, but rather bold, principled systemic reform that prioritizes the values of justice and human rights.

The first step of this reform must begin upstream, namely at the legislative stage. The process of establishing criminal norms needs to be supported by structured and rigorous critical evaluation. In this regard, the application of the necessity test is crucial, whereby lawmakers must be able to prove that the criminalization of a behavior is truly necessary to prevent substantial social harm, and that criminal sanctions are the least restrictive means of limiting individual freedom when compared to other alternatives, such as civil or administrative mechanisms. In addition, the proportionality test must be applied comprehensively, not only weighing the severity of the act against the punishment imposed, but also considering its cumulative impact on the judicial system, civil liberties, and vulnerable groups in society. Equally important, the criminal legislative process must involve authentic, substantive, and inclusive public participation—going beyond mere symbolic consultation—so that the resulting norms reflect social consensus and are based on empirical evidence, not the result of moral panic or temporary political pressure.

However, legislative reform alone is not enough. To prevent and correct irrational expansion of criminal law, it is necessary to strengthen the downstream sector, namely through constitutional watchdog institutions and independent supervisory bodies. The Constitutional Court, or the Supreme Court in jurisdictions without a separate constitutional court, must be more progressive in using

judicial review mechanisms against criminal norms that violate the principle of legality or fail to meet the tests of necessity and proportionality. On the other hand, institutions such as the National Legal Commission or the Ombudsman need to be equipped with an explicit mandate to conduct periodic regulatory impact assessments (RIAs) or criminalization audits. Their role as an early warning system is crucial in providing evidence-based recommendations to policymakers, whether for revising or repealing criminal norms that are overly broad, disproportionate, or unconstitutional. Through synergy between judicial oversight and independent institutions, the legal system can establish effective, transparent, and accountable internal corrective mechanisms.

Furthermore, these structural reforms are crucial in restoring and rebuilding public trust in the criminal justice system. It cannot be denied that the justice system is often perceived as unfair, discriminatory, and biased toward those in power or the interests of the majority. Legal uncertainty resulting from vague norms, selective law enforcement, and disproportionate criminal sanctions has led to a crisis of legitimacy. Therefore, the strict application of necessity and proportionality tests, meaningful public participation, and active judicial and administrative oversight are not merely technical mechanisms, but the foundation for building authentic substantive justice and social responsiveness. When criminal law is applied fairly, predictably, and only used to address behavior that truly endangers society, citizens will once again trust the law as an instrument of justice, not repression.

Ultimately, to overcome the crisis of overcriminalization, a paradigmatic shift is needed away from a reactive and expansive approach toward a restrictive, evidence-based criminal justice system centered on the protection of human rights. Legislative reform based on rigorous evaluation and public involvement, strengthening judicial oversight mechanisms and independent institutions, as well as strong political commitment and a progressive legal culture are essential prerequisites for the realization of a legitimate and proportionate criminal justice system. The success of this reform will not only narrow the scope of criminal law to its legitimate and necessary limits, but also strengthen the foundations of a democratic rule of law, while restoring criminal law to its rightful position: as the ultimate guardian of justice, not a repressive tool of the state. On a global scale, this reform model can serve as an important reference for other jurisdictions facing similar challenges, and reaffirm that addressing overcriminalization is an absolute prerequisite for a sustainable and legitimate criminal justice system in the 21st century.

Scientific Novelty and Research Contribution

This study offers scientific novelty (novelty) both theoretically and methodologically in the study of contemporary criminal law, particularly in the discourse on the rational limits of the use of criminal law in a democratic state governed by the rule of law. Unlike previous studies, which generally examine overcriminalization within descriptive or national legal boundaries, this research systematically builds a cross-jurisdictional analysis by integrating normative, comparative, and

theoretical perspectives to evaluate the impact of overcriminalization on the two main pillars of modern criminal law: the principle of legality and substantive justice.

From a theoretical perspective, this study combines the frameworks of minimalist criminal law theory (Ashworth), substantive justice theory (Rawls and Dworkin), and reflective legal theory (Teubner) to examine overcriminalization not only as a formal legal phenomenon but also as a form of systemic dysfunction in the relationship between law, the state, and society. This theoretical approach enables a reinterpretation of the meaning of the principle of legality in a contemporary context marked by the pressure of populism, the bureaucratization of law, and the expansion of the role of legislators. This article also makes a new contribution by positioning the principle of legality not merely as a technical principle but as a democratic control mechanism against excessive criminalization.

Methodologically, this article formulates a comparative approach based on the legal construction and socio-political structure of each country, which distinguishes it from conventional comparative studies. By selecting Indonesia, the United States, and Germany as points of comparison, this study is able to explore the dynamics of overcriminalization in highly diverse contexts, both in terms of legal systems (common law vs. civil law), political models (centralized vs. federalist), and legal cultural preferences (legal moralism vs. legal liberalism).

The practical contributions of this study are also relevant for criminal policy makers, particularly in the context of legislative reform and the formulation of national criminal policy. In this regard, this article offers a reflective framework that can be used by legislators, judicial institutions, and civil society organizations to evaluate, review, and control the expansion of criminal law in the future.

Thus, this article not only fills a gap in the scientific literature, but also provides conceptual and normative analytical tools to respond to the challenge of overcriminalization as a systemic problem in the global criminal justice system.

CONCLUSION

This study concludes that overcriminalization is a systemic symptom that emerges when criminal law is used beyond the bounds of rationality and objective necessity, often triggered by political dynamics, majority moral pressure, and regulatory efficiency drives that disregard fundamental principles of criminal law. Through a cross-jurisdictional analysis of Indonesia, the United States, and Germany, it was found that forms of overcriminalization are not uniform, but all have implications for the erosion of the principle of legality—particularly *lex certa* and *lex stricta*—and the erosion of substantive justice, especially for structurally vulnerable groups in society.

The excessive use of criminal law has increased the potential for discrimination, legal uncertainty, and delegitimization of the criminal justice system in the eyes of the public. Vague and ambiguous norms, as well as non-participatory legislative procedures, demonstrate weak control over

the criminalization process. In this context, criminal law loses its function as a protector of fundamental rights and transforms into an instrument of symbolic repression.

Academically, this article offers a new theoretical and analytical framework for understanding and assessing the dynamics of overcriminalization in the context of modern legal systems. Practically, the results of this study are expected to serve as material for consideration in the formulation of legislation and the reform of the criminal justice system to ensure that they are in line with the principles of the rule of law, the protection of human rights, and inclusive justice.

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