

TESTING THE NEED FOR SETTING CRIMINAL PROVISIONS IN ADMINISTRATIVE CRIMINAL LAW TO REDUCE OVERCRIMINALIZATION

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Abstract

Overcriminalization has become a severe problem in establishing a legal and regulatory regime. Therefore, standards must test the need for setting criminal provisions, especially in administrative, criminal law, to reduce overcriminalization. The study uses a mixed quantitative and qualitative methods. Quantitative approaches are used to simulate the need for testing the regulation of criminal provisions in the administration of criminal law in the health field. The Delphi method conducted simulations to gain consensus from seven respondents. Qualitative approaches are used to analyze simulation results with normative juridical approaches. The normative juridical approach is carried out regarding laws and regulations in health and relevant principles. Based on the test results, many administrative actions should not be criminalized if the criminal function is a request remedial. Therefore, this test can be used to determine the need for setting criminal provisions to reduce overcriminalization.

Keywords: Criminal Provisions, Administrative, Criminal Law, Overcriminalization, Ultimum Remedium

INTRODUCTION

Overcriminalization has become a severe problem in establishing laws and regulations regimes. Overcriminalization and legal ambiguity have recently become significant discussions in legal science. It should also be noted that, in the name of prevention, legislators augment existing provisions with poorly designed legal innovations but do not remove outdated and unjustified norms (Ažubalytė & Fedosiuk, 2021). Several controversial issues can still cause criminalization and overcriminalization (Gillespie, 2018). Therefore, some cases will make it necessary to discuss the risk of overcriminalization of these criminal offenses. Any discussion of overcriminalization must start 'from the conception of the average, of the right amount of criminal law' (Marcinauskaite et al., 2019). The legislator criminalizes and punishes all criminal acts when the extent to which he internalizes the dangers of a crime increases proportionally to the danger (Mungan & Miceli, 2021).

Almost all Indonesian legislation regulates criminal provisions, including administrative law legislation in the health field. The contribution also discusses how these provisions have been translated into court rulings (Wibisana et al., 2021). In addition, the provisions cited from the Statute are open to different interpretations of the perpetrator's capacity to commit a crime (Avdic, 2021).

Criminalization in health is necessary to protect people's health and the right to proper health. Many of the mechanisms and results of criminalization identified here apply to complaint-oriented policies and broader social marginality policies. These findings contribute to our

understanding of regulating society through criminal laws pursued by the welfare state (Herring, 2019).

In the same spirit, some acts that are administrative violations in health are also criminalized and qualified as criminal acts. Critics argue it is another example of 'overcriminalization,' seeking to regulate a morally ambiguous activity (Stephan, 2017). He argues that criminalization, on the whole, is the institutionalization of one key idea: that members of the political community answer and call each other accountable for alleged wrongdoing (Lacey, 2020). So, if a provision invalidates a person's fundamental rights and is unreasonable and unfair, that provision should be removed from the law (Singh, 2021).

1. What is unknown?

The absence of standards to determine the urgency of setting criminal provisions in administrative, criminal law in the field of health results in overcriminalization. Governance in health care is increasingly regarded as an important theme in developing and delivering health care. Previous reviews have highlighted the positive impact of good governance on the health sector, directly or indirectly, through their impact on revenues (Manaf et al., 2021).

Overcriminalization can burden the judiciary and cause severe impacts, such as overcapacity in correctional institutions. Overcriminalization and ambiguity of criminal law is not just theoretical issue. It directly affects the reality of the law and the fate of man. Prosecution authorities tend to follow the law, so any unjustified or ambiguous criminalization can lead to unnecessary criminal proceedings against the individual, and the fact that the court ultimately declares that the person did not commit any crime only partially offsets the damage suffered by the accused (Ažubalytė & Fedosiuk, 2021). The current criminalization policy does not consider the qualifications of criminal acts, the degree of accident, the impact or effect caused, the protected legal interests, the purposes of administrative law, and the general principles of good governance. Good governance provides equality, innovation, and a strong focus on the social efficiency of the country so that it can be a theoretical basis for the development of the social responsibility of public authorities (Pavlyshyn et al., 2021).

The current political legislation of the administrative criminal law does not function criminal law as an *ultimum remedium*. Given the requirements of the *ultima ratio* principle, the research paper formulated criteria, which would make it possible to prove the dangers of such offenses, thus making a person criminally liable, and therefore also proving its danger to the values protected by criminal law (Marcinauskaite et al., 2019). The principle of criminal liability as a measure of last resort (*ultima ratio*), first of all, establishes rational requirements for legislators and users of the law to be followed when recognizing certain acts as criminal — along with truly dangerous behavior, abstractly formulated rules are likely to include also dubious acts of harm (Marcinauskaite et al., 2019). The shaper of the law is that it seems useless and unsuccessful if it is not enforced through criminal law instruments. Descriptive statistics show that criminals themselves are an obstacle to access to justice to fundamental rights and citizenship; It also severely limits the possibility of managing and resolving legal issues that typically arise in the areas of family law, private law, and administrative procedures (Dalla

Pellegrina & Saraceno, 2021). While criminal law deals with the most serious violations, administrative law sets out the rules governing how the administration is authorized to work and resolves a breach of administrative regulations (Kryvoi & Matos, 2021). Cases that often apply the definition of 'mediation' are reflected in consideration of issues by courts to prosecute individuals for administrative violations. In particular, the court, in its decision to absolve a person of administrative responsibility, focused on the fact that the possibility of releasing a person from administrative responsibility is an element of the exercise of legal and social institutions as mediation, which at the time of the case did not have a clear rule of law (Oleksandr et al., 2021). This study showed that judges agree with the principle of last resort in theory, but, in practice, they often depart from it based on the demands of the case (Cuneo Nash, 2016).

2. How and Why?

It needs standards to test the need for setting criminal provisions in administrative and criminal law in the health field. This standard is determined by considering the qualification variables of the crime, the level of accident, the impact caused, the protected legal interests, the purpose of the criminal law of administration, and the relevant principles. In addition, there need to be parameters to determine whether an act or violation in the health sector needs to be criminalized. Therefore, research on testing the need to set criminal provisions in criminal law administration is very important.

METHODS

The study used a mixed method of quantitative and qualitative. Quantitative approaches simulate the testing needs of setting criminal provisions in criminal law administration in the health field. The Delphi method conducted the simulation to get consensus from seven respondents. The procedure of each respondent outlines their views regarding the regulation of criminal provisions in administrative criminal law. It provides value according to the level of need according to the scale of the Likert. The assessment considers the qualification variables of the crime, the level of accident, the impact caused, the protected legal interests, the purpose of the criminal law administration, and the relevant principles. The analysis is done to obtain actions that include divergent or convergent. Qualitative approaches are used to analyze simulation results with normative juridical approaches. The normative juridical approach refers to the laws and regulations in the health field and relevant principles.

RESULT & DISCUSSION

1. Finding of Research

Parameters for testing the need for setting criminal provisions in administrative, criminal law using the Likert scale. These parameters determine the type of violation, whether an administrative or criminal offense. From this, qualifiedness can be determined by the settings. It is necessary to conduct a variable test if it is a criminal offense.

Scale	Average	Collective assessment	Type of Offense	Settings	Note
1: no need	$1 < x < 1.5$	no need	Administration	Health Law	-
2: less necessary	$1.5 < x < 2.5$	less necessary	Administration	Health Law	-
3: quite necessary	$2.5 < x < 3.5$	quite necessary	Administration	Health Law	-
4: Necessary	$3.5 < x < 4.5$	need	Criminal	Health Law / Criminal Code	Variable test
5: very necessary	$4.5 < x < 5$	it is necessary	Criminal	Health Law / Criminal Code	Variable test

The variable test is carried out with the following scale:

Variable	Scale	Average	Type of Criminal Acts	Settings
Taking into account the variables: Qualification of crime, level of evil, loss or impact, protected legal interests, the purpose of administrative law, the ultimum remedium principle, the General Principle of Good Governance, and principles relevant in the healthcare field.	1: quite evil	$1 < x < 2$	Administrative Crime	Health Law (criminal provisions)
	2: Evil	$2 < x < 3$	Criminal Offense	Criminal Code
	3: very evil			

Here are the results of the simulation tests on the need for settings criminal provisions in the health law:

No.	Act	Respondents							Total	Average	Collective assessment	Result	
		1	2	3	4	5	6	7				D	C
1.	Health services without government permission	1	2	2	3	1	1	2	12	1,714	Less necessary	D1	-
2.	Health workers without permission to do professional work	2	3	1	2	1	1	2	12	1,714	Less necessary	D2	-
3.	Traditional unlicensed health services	1	1	2	1	2	1	1	9	1,285	No need	D3	-
4.	Pharmaceutical preparations and medical devices without distribution permits do not meet standards and/or safety requirements	2	1	1	2	1	2	2	11	1,571	Less necessary	D4	-
5.	Food and beverages without distribution authorization	2	2	2	3	1	2	3	15	2,142	Enough is necessary	D5	-
6.	Food and beverages do not contain signs or labels	1	1	2	2	1	1	2	10	1,428	No need	D6	-
7.	Food and drinks that do not meet the standards and/or health requirements	4	5	4	4	3	4	4	28	4	Need	-	C1
8.	Food and drinks that endanger the health	5	5	5	5	4	4	5	33	4,714	It is necessary	-	C2

No.	Act	Respondents							Total	Average	Collective assessment	Result	
		1	2	3	4	5	6	7				D	C
9.	Trading of organs or tissue of the body	5	5	5	4	5	5	5	34	4,857	It is necessary	-	C3
10.	Plastic and reconstructive surgery to change identity	5	4	4	5	4	4	5	31	4,428	Need	-	C4
11.	Abortion is not by the provisions of the Health Law	5	4	5	4	3	5	4	30	4,285	Need	-	C5
12.	Blood trading	4	4	5	4	4	5	4	30	4,285	Need	-	C6
13.	Do not have the expertise and authority to carry out pharmaceutical practices	4	3	4	3	4	4	3	25	3,571	Need	-	C7
14.	Production or putting cigarettes into the territory of Indonesia with no form of images, including health warnings	3	3	3	3	4	3	3	22	3,142	It is quite necessary	D7	-
15.	Breaking the smoke-free area	2	2	2	2	2	1	2	13	1,857	Less necessary	D8	-
16.	Obstruct the program providing breastfeeding exclusively	2	2	1	1	1	2	2	11	1,571	Less necessary	D9	-

Information:

- D (divergent): It was not agreed that criminal law was needed in law enforcement.
- C (convergent): It was agreed that criminal law is needed in the law enforcement mechanism (consensus).
- D1 to D9: The act qualifies as an administrative violation because it is mala prohibita or related to fulfilling certain requirements or permits.
- C1 to C7: The act qualifies as a criminal offense because it is mala in se or violates public welfare. Criminal law is needed to protect the interests of society.

The variable test does to C1 to C7 to know the types of criminal offenses and set it as follows:

Act	Respondents							Total	Average	Type criminal offense	Settings	Result	
	1	2	3	4	5	6	7					D	C
C1	1	2	1	1	2	1	1	9	1,285	Administrative crime	Health Law	-	C
C2	2	2	2	1	2	2	2	13	1,857	Administrative crime	Health Law	-	C
C3	3	3	3	3	3	3	2	20	2,857	Criminal offense	Criminal Code	D	-
C4	1	1	1	1	2	1	1	8	1,142	Administrative crime	Health Law	-	C
C5	3	3	3	3	3	3	3	21	3	Criminal offense	Criminal Code	D	-
C6	2	2	2	3	2	3	2	16	2,285	Criminal offense	Criminal Code	D	-
C7	1	1	1	1	1	2	1	8	1,142	Administrative crime	Health Law	-	C

Information:

- D (divergent): Not agreed as an administrative crime.
- C (convergent): It is agreed as an administrative crime; therefore, it is necessary to regulate the criminal provisions in the health law.
- C1, C2, C4, and C7: The acts qualified as administrative, criminal law, and penal provisions are stipulated in the health law.
- C3, C5, and C6: The act is qualified as a criminal offense regulated in the Criminal Code.
- C3 and C6: It can be stipulated in the health law as an administrative crime because it is a specialist.
- C5: For abortion, in terms of fulfilling the provisions in the health law, it eliminates the unlawful (as a justification). The rest must be interpreted as a criminal offense regulated in the Criminal Code.

It needs standards to determine the urgency of setting criminal provisions in the administrative criminal law in the health field so as not to result in overcriminalization. This test reduces overcriminalization because many acts should not need to be criminalized. Criminalization carried out proportionally can reduce the burden on the judiciary in handling criminal cases. Criminalization policies should consider the qualifications of criminal acts, the degree of accident, the impact or effect caused, protected legal interests, the purposes of administrative law, and relevant principles. Administrative law does not need to be completely transformed to operate in an era of increasing automation because automation, when applied responsibly, will advance the democratic principles and good governance values that have long underlie administrative law (Coglianese, 2021).

Political legislation of administrative and criminal law must still pay attention to the principle of *ultimum remedium*. The possibility of conceiving nonpersons to whom a "Criminal Law of the Enemy" may be applied is incompatible with the liberal conception of Penal Law as a last resort (Budiastuti, 2019). Criminal law is the last resort in enforcing administrative law not to seem repressive. Inclusion and 'thick' welfare states tend towards more moderate penal regimes, whereas means-tested 'thin' welfare states tend to rely on repressive penal regimes (Barker & Smith, 2021). Repressive practices, including a harsh penal code, sometimes react to a real aggravation of the crime situation (Zubkova, 2020). For many years, I believed that people were disposed not to offend, but nowadays, I am obliged to agree that people don't accept rules without repressive measures. Although I believe that it is possible to change people and resocialize them, without repression, people won't do it (de Castro Rodrigues et al., 2019).

The law remains useful and successful even if not through criminal law instruments as long as the provisions regarding sanctions are determined proportionately. Therefore, a proper penalty strategy is the main principle that the administration should follow when setting the fine amount. Appropriate fines not only guarantee the proper punishment of offenders, thus effectively preventing them from breaking the law, but also ensuring that the number of

penalties falls within the scope of the offender's responsibility, which avoids negative impacts on economic development for the most part (Hu & Zhu, 2021).

2. Analysis

The analysis results of each variable can be spelled out as follows:

a. Qualification of Criminal Acts

Before criminalizing, an act must be determined in advance whether the act is an administrative violation or a criminal offense. Breaches in administrative law need to be criminalized if they threaten the general welfare or endanger public safety and health.

b. Level of Accident

An act is qualified as a criminal offense because it is against the law and considered objectionable by the community: the more reprehensible an act, the greater the need to threaten it with criminal sanctions. Likewise, with administrative, criminal acts, the higher the level of violations of the general welfare or the more serious the crime, the more necessary it is to be regulated in criminal provisions.

3. Loss or Impact

Similarly, the level of accidents, losses, or impacts caused by criminal acts is also directly proportional to the need for criminal regulation. The assessment of losses is carried out for material and immaterial losses, individual and community losses, and even the state.

4. Protected Legal Interests

The purpose of using criminal law in administrative, criminal law is to protect the public. The government's job is to serve the community as the highest legal interest protected. If the community's interests are threatened, the criminal policy is firm that the criminal law must be enforced. The criminal policy is ideally shaped by compelling reasons for prioritizing certain types of crimes over others and applying limited human and technical resources. States should initially evaluate which crimes they should address in the context of their particular situation (Estrada et al., 2021).

The most basic and primary public interest to protect is in the health field, including food and medicine issues. Criminal acts on health are very detrimental to the community and pose a common danger.

5. Purpose of Administrative Law

Criminal law is used to support administrative law. If the purpose of administrative law has been fulfilled with its instruments, then criminal law is not necessary. On the other hand, if administrative law enforcement is perceived as less than optimal, tougher efforts are needed to protect the public using criminal law. Criminal law regulation is also intended to cause deterrent effects.

Health development goals are directed at increasing awareness, willingness, and the ability to live healthy lives to realize the highest degree of public health as an investment to develop socially and economically productive human resources.

6. Relevant Fundamentals

In principle, in administrative criminal law, the criminal is placed as an *ultimum remedium* or as a last resort, especially if the act is more of an administrative offense. On the other hand, criminal law can serve as a *premium remedium* if the crime threatens the general welfare. For administrative, criminal law legislation, the regulation of criminal provisions needs to consider the general principles of good governance. Governance is considered 'good' if it includes stakeholder participation, transparency of decision-making, accountability of actors and decision-makers, the rule of law, and predictability. 'Good governance' is also associated with efficient and effective management of resources and fair and equitable allocation of resources and benefits (Nzyoka et al., 2021).

Based on the testing of the setting of the needs of criminal provisions, the level of regulatory needs can be determined. If the result is unnecessary, the act is qualified as an administrative violation and does not need to be criminalized. However, the breach is quite subject to administrative sanction. If the result is less necessary, the act is still qualified as an administrative violation and less necessary to criminalize. Administrative sanctions can still be applied. If the results are sufficient, it is also not yet considered criminalized. If the result is necessary, the act must be considered for criminalization because it is a criminal offense. Its criminalization can be regulated in criminal law regulations or administrative law laws. If the results are necessary, then the act should be criminalized. For acts that need and urgently need to be criminalized, variable tests are carried out to determine whether it is a criminal offense stipulated in the regulations (Schotel, 2021). Lawmakers prefer this model because lawmakers are concerned about the administration's expansion and the immediate issue of high criminal penalty rates (de Groot, 2021).

CONCLUSION

To establish criminal provisions in administrative, criminal law, standards must test the variables and parameters of its regulatory needs. The variables in question include the qualification of criminal acts, the accident level, the impact or loss incurred, protected legal interests, and some relevant principles. Based on the research results, some administration violations do not need to be criminalized. Therefore, this test can be used as a standard in determining the need for setting criminal provisions in administrative, criminal law by placing criminals as *ultimum remedium* to reduce overcriminalization.

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