

# Ad Criteria Of Criminalization

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## **Abstract**

*In the criminalization, there are three primary principles need to be considered; legality, subsidiary, and equality before the law. There are also criteria to be taken into account; the act shall be in contravention with the sense of justice of the people, the ability of the existing legal framework to cater such act, the balance between the instruments required and the outcomes, the balance between the cost and benefit of the criminalization, the effect of such criminalization, and the last is the ability of the judicial system to enforce the law on the criminalized act.*

**Keywords:** Basic principle, Criminalization, Criminal Law

## **Introduction**

Criminalization is a subject of study in substantive criminal law which discusses the determination of acts as criminal acts which are subject to criminal punishment. A condemned act which was not qualified as a prohibited act is justified as a criminal act with a criminal punishment.

According to Soerjono Soekanto, criminalization is an act or determination of a ruler about certain acts which by the society or members of the society considered as acts which can be penalized as a criminal act or making an act to become a criminal act<sup>1</sup> and therefore can be penalized by the government by and on behalf of the government.<sup>2</sup> Soetandyo Wignjosoebroto states that criminalization is a statement that a certain act must be considered as a criminal act which is the result of normative judgments which end product is a decision.<sup>3</sup> Criminalization can also be defined as a process of determining an act of a person as an act which can be penalized. This process is finalized by the creation an act where the action is subject to criminal punishment.<sup>4</sup>

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<sup>1</sup> Soerjono Soekanto, *Kriminologi: Suatu Pengantar, Cetakan Pertama, Jakarta: Chalia Indonesia, 1981, page 62.*

<sup>2</sup> Henry Campbell Black, *Black Law Dictionary, Fifth Edition, Sint Paul Minn: West Publishing Co., 1979, page 337.*

<sup>3</sup> Soetandyo Wignjosoebroto, "Kriminalisasi dan Dekriminalisasi: Apa Yang Dibicarakan Sosiologi Hukum Tentang Hal Ini," stated in *Seminar Kriminalisasi dan Dekriminalisasi Dalam Pebaruan Hukum Pidana Indonesia, Faculty of Law UII, Yogyakarta, 15 July 1993, page. 1.*

<sup>4</sup> Sudarto, *Kapita Selektta Hukum Pidana, Bandung: Alumni, 1986, page 31.*

Aside from that, the definition of criminalization can also be assessed from the value perspective. In this case, criminalization is a transformation of values that causes a number of acts which formerly not condemned acts and are not criminally prosecuted to become condemned acts and criminally prosecuted.<sup>5</sup> In labeling perspective, criminalization is the decision of a legislative body to label human behavior as a criminal act.<sup>6</sup>

The definition of criminalization mentioned above explains that the scope of criminalization is limited to the determination of an act as criminal act which is subject to criminal penalty. However, according to Paul Cornil, the definition of criminalization is not limited to the determination of an act as a criminal act and can be penalized, but includes the enhancements of penalties towards existing criminal acts.<sup>7</sup>

### **Criminalization Complexity**

Criminalization is a complex and fragmented problem.<sup>8</sup> The complexity of criminalization is located in many factors which are related to each other and needed to be considered in the process of criminalization. Among these factors are contrasting differences. The complexity is related to the kinds of acts being criminalized where the kind of acts being criminalized is not only acts which essentially contain evil but also includes neutral acts which does not essentially contain evil.

Complexity of criminalization is also related to the difference of norms and values followed by groups of societies due to religious, cultural, education, and social class. The difference of values and norms affects the judgments of which acts are eligible for criminalization and also affects the judgments on the level seriousness of the acts being criminalized.

The complexity of criminalization is also seen in the various options of instruments regulating society's lives in contrast to criminal law, where there is only one available instrument in regulating society. Other social live regulating instruments are private law, administration law, morality, religion, discipline, and customs. The criminal law cannot be placed as the prime instrument (*primum remedium*) to regulate the society but as the last instrument (*ultimum remedium*) to control the behavior of individuals in the social live.

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<sup>5</sup> Rusli Effendi et. Al., "Masalah Kriminalisasi dan Dekriminalisasi dalam Rangka Pembaruan Hukum Nasional" in BPHN, Simposium Pembaruan Hukum Pidana Nasional Indonesia, Jakarta, Binacipta. 1986, page 64-65.

<sup>6</sup> Hugh D. Barlow, Introduction to Criminology, Third Edition, Boston: Little Brown and Company, 1984, page 9.

<sup>7</sup> Paul Cornill, "Criminality and Deviance in a Changing World", Speech in United Nations Congress IV 1970 About Prevention of Crime and Treatment of Offender.

<sup>8</sup> A. P. Simester and C R Sullivan, Criminal Law Theory and Doctrine, Oxford: Hart Publishing, 2000, page 6.

Therefore, the use of criminal law to regulate the society concerning certain activities is not obligatory<sup>9</sup> but as one alternative from the available regulatory instruments.

The complexity of criminalization is also related to the social change of the society in which occurs rapidly. Social change is one of the factors affecting the change of law. The law will change if the society changes. Change of law is a result of society change.<sup>10</sup> This relation pattern between society and law is illustrated in the traditional proverb of “sakah aie gadang sakali titian baranjak.”<sup>11</sup>

The social change occurring in the society includes major changes in social structure that affects the social lives and changes in cultural values which affect the mind, mentality, and soul.<sup>12</sup> In other words, social changes do not only mean the changes of the structure and function of society, but also contain changes in values, attitudes, and behaviors of the society.<sup>13</sup>

A value change in essence is the change of code of conduct in the society. The kinds of value changes can be differentiated into two: (1) changes in primordial cultural values determined by kinship groups and village communication to a national cultural system ..., and (2) changes in traditional value system to modern value system.<sup>14</sup>

The effect of the social changes is acts that are formerly considered condemned acts are currently considered normal and non condemned acts. In Indonesia for instance, the act of showing birth control instruments in public, homelessness, and competitive war is still regulated in the Book of Criminal Law.<sup>15</sup> In the other hand, there are actions which formerly qualified as usual actions which are now considered evil

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<sup>9</sup> Criminal law must be used to efficiently because criminal punishment is the fiercest legal punishment and may inflict stigma towards the subjects of the punishments. The use of criminal law to regulate society's activities show the tendency to be overdone in totalitarian states and relatively small in democratic countries. Criminal law can be implemented in small amounts in relatively orderly society and can be overdone in relatively unordered society.

<sup>10</sup> Relationship pattern between law and social change is not only in the form of social change affecting legal changes but also legal changes can affect social changes. Laws that endure rapid changes are specific laws in the economic matters. Meanwhile, codified laws are hard to change because it regulates many matters and systematically structured

<sup>11</sup> The statement comes from Minang proverb which means, “When the river water rises and overflows, the bridge will shift from its position.”

<sup>12</sup> Koentjaraningrat, "Pergeseran Nilai-Nilai Budaya dalam Masa Transisi" in BPHN, Kesadaran Hukum Masyarakat dalam Masa Transisi, Jakarta: Binacipta, page 25.

<sup>13</sup> Rush Effendi et. al., citing Selo Soernardjan in "Masalah Kriminalisasi dan Dekriminalisasi dalam Rangka Pembaruan Hukum Nasional" in BPHN, Simposium Pembaruan Hukum Pidana Nasional Indonesia, Jakarta, Binacipta- 1986, page 64-65.

<sup>14</sup> Koentjaraningrat, Op. Cit, page 26.

<sup>15</sup> Criminalization of showing birth control instruments in public is based on the high population growth rate and the low consumption goods production growth rate and to prevent the use of birth control for casual sex. Criminalization of homelessness is urged by the lazy nature of people and the high rise of labor needs in the industrial revolution era.

and offending. Examples of these acts are polluting, monopoly in the economy,<sup>16</sup> money laundering, and neglecting consumer rights.

## Principles of Criminalization

Principles are the basics or foundations of the creation of a regulation, policy, and decree regarding peoples activities. Legal principles are ethical norms, national philosophy conceptions, and political doctrine.<sup>17</sup> Legal principles are also thoughts which guide actions, options of policies, peoples and societies view, and society's hope structure.<sup>18</sup>

According to Scholten, legal principles are thoughts which are not explicitly stated in the law. Measure of decency according to the law can be found in the thoughts behind the text of the acts. Meanwhile, according to Van Hoecke, legal principles are basic options for actual social policy and ethical legal principles.<sup>19</sup>

In the context of criminalization, principles are defined as basic conceptions, ethical norms, and legal principles which guide the creation of criminal law norms through the drafting of criminal acts. In other words, legal principles are basic conceptions, ethical norms, and basic principles of the utilization of criminal law as an instrument for fighting crimes.

There are three criminalization principles that are needed to be considered by legal drafters in determining an act as criminal act and its penalty. They are (1) legality principle, (2) subsidiary principle, and (3) equality principle. The essence of the legality principle is contained in the proverb *nullum delictu, nulla poena sie praevia lege poenali* stated by von Feurbach. The statement means that there could not be any actions that can be penalized unless by criminal law that existed since before the action is committed. The legality principle is the most important principle in the criminal law, specifically as the main principle in determining criminalization.

According to Schafmeister and J.E. Sahetapy<sup>20</sup> legality principle contains seven meanings: (i) nothing can be penalized unless based on legal criminal laws; (ii) no implementation of the penal law is

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<sup>16</sup> Criminalization of polluting is urged by the high level of pollution in large scale done by large industries which have harmful effects for humah savety and the conservation of the environement. Criminalization of monopoly is due to unhealthy competition in business practice

<sup>17</sup> Roeslan Saleh, "Kebijakan Kriminalisasi dan Dekriminalisasi: Apa Yang Dibicarakan Sosiologi Hukum Dalam Pembaruan Hukum Pidana Indonesia", stated in Seminar Kriminalisasi dan Dekriminalisasi dalam Pebaruan Hukum Pidana Indonesia, Faculty of Law UII, Yogyakarta, 15 July 1993, page 38-39.

<sup>18</sup> Ibid, page 29.

<sup>19</sup> Ibid, page 27-28.

<sup>20</sup> J.E. Sahetapy (Ed.), Hukum Pidana, Yogyakarta: Penerbit Liberty, 1996, page 6-7.

based on analogies; (iii) nothing can be penalized based on customs; (iv) no unclear delict formulation (*lex certa condition*); (v) no retroactive regulation in the penal law; (vi) no criminal offences unless stated in the criminal law; and (vii) criminal prosecution can only be carried out based on the regulation stated in the criminal law.

In criminal law doctrine, there are six types of function of legality principle. First, in essence, legality principle is designed to announce to the public about what is prohibited by the criminal law so the public can adjust their behavior.<sup>21</sup>

Second, according to classical thoughts, legality principle functions for limiting the scope of the criminal law. Meanwhile modern thoughts interpret legality principle is an instrument to achieve social protection goal.<sup>22</sup>

Third, function of the legality principle is to assure the legal position of the people towards the state (ruler). This is the traditional interpretation which has neglect the full meaning of the legality principle as stated by criminal law experts in the XVIII century.<sup>23</sup>

Fourth, legality principle related with criminal court, expects more than just protect the people from the tyranny of the government. Legality principle is expected to play a more positive role, which is a determining the levels of legal matters assessed by the criminal law which can no longer be used.<sup>24</sup>

Fifth, the main objective of the legality principle is to limit the power that can arise in criminal law and supervise and limit the implementation of the power or to place into norm the supervising function of criminal law. This supervising function is also a function of the equality principle, subsidiary principle, proportionality principle, and publicity principle.<sup>25</sup>

Sixth, legality principle gives legal certainty to the people about prohibited actions (criminal actions) along with the penalty of the actions. With the determination of prohibited actions, there is a certainty and guideline in behaving for the people.

From the six functions of legality principle, the most relevant function in criminalization context is the second function which regards the function which refer to the function to limit the scope of criminal law

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<sup>21</sup> Abdullah Aluned An-Nairn, *Dekonstruksi Syari'ah*, Yogyakarta, LkiS and Pustaka Pelajar, 1990, page 197.

<sup>22</sup> Antonie A.G. Peters, "Main Current in Criminal Law Theorie", in *Criminal Law in Action*, Gouda Quint by, Arnhem, 1986, page 33, cited from Kamariah, "Ajaran Sifat Melawan Hukurn Material Dalarn Hukum Pidana Indonesia", Professorship Inauguration Lecture, UNPAD, Bandung, March 1994, page 43.

<sup>23</sup> Roeslan Saleh citing Antonie A.G. Peter, in *Asas Hukum Pidana Dalam Perspektif*, Jakarta: Aksara Baru, 1981, page 28.

<sup>24</sup> *Ibid*, page 35.

<sup>25</sup> *Ibid*, page 14.

and the third function which refer to the to protect the legal position of the people towards the state. The Function of the legality principle to protect the legal position of the people towards the state and to protect each individual of the society from the tyranny of the government is the political dimension of legality principle.<sup>26</sup>

The existence of the criminal law must be limited because the criminal law is the fiercest chapter in law with heavy punishment including the death penalty. The criminal law is used only to protect the interest of the society that is most vital for social life. Actions which needed to be criminalized are actions that directly disturb the social order of the society.

The function to protect the legal position of the people towards the state must also be a focus in the criminal law. Criminal law must ensure the basic rights of each citizen and limitation towards the basic rights of the citizens through criminal law instruments must merely meant to guarantee the basic rights for all citizens. Function of the legality principle to protect the position of the people towards the state and to protect society members from the tyranny of the government is the legal political dimension of legality principle.<sup>27</sup>

In the practice of law, legality principle cannot play the role to protect the position of the people towards the ruler and limit the tyranny of the government in formulating and enforcing the law. Legality principle only functions as the foundation for governments to regulate the lives of the people through the creation of criminal law which often violates the rights of the people especially in the New Order era. With the increase of criminal actions, not only the functions of the legality principle are damaged but also the legal protection principle.<sup>28</sup>

Second, beside based on the legality principle, criminalization must also based on subsidiary principle. This means that the criminal law must be positioned as the *ultimum remedium* (final weapon) in crime fighting which utilizes penal instruments, not as *primum remedium* (main weapon) to overcome the problem of crimes

The implementation of subsidiary principle in criminalization and decriminalization policy force the existence of investigations on the effectiveness the use of criminal law in fighting crime and other actions that violates the rights of the society. The main problem that needs to be investigated is whether the objectives which are aimed by the use of criminal law cannot also be achieved by other methods which

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<sup>26</sup> **Ibid, page 28.**

<sup>27</sup> **Ibid, page 28.**

<sup>28</sup> **Ibid, page 61-62.**

burden less social and individual costs. This investigation demands us to know about the detrimental of the enforcement of criminal law and to ensure that the intervention of criminal law is effective.<sup>29</sup>

If the investigation finds that the use of other methods (non penal instruments) is more effective in fighting crimes, then the use of criminal law should be avoided. In the practice of law, these efforts are not only neglected but also unthought-of. The subsidiary a principle in the practice of law is not actually used as expected. Criminal law is not the ultimum remedium but the primum remedium. The determination of criminal actions has overburdened the criminal law institutions.<sup>30</sup>

The reality that occurs in the practice of law is the existence of a belief among lawmakers that criminalization with penalty would have an automatic effect towards the behavior of the society.

In the effort to eradicate gambling for instance, the government thinks that the enhancement of penalty from a light penalty to a heavier penalty will regulate gambling better.<sup>31</sup> In reality, gambling is still present. The same is with traffic crimes. From these experiences, belief that harsher punishment does not control crime emerges. Therefore, they will use the subsidiary principle.<sup>32</sup>

The urgency of using subsidiary principle in determining a criminal action is consisting by two factors. First, the use of subsidiary principle will promote the creation of a fair criminal law. Second, legal practice causes detrimental effects towards the criminal law system due to over criminalization and over penalization so criminal law will lose its effectiveness in the society. Over criminalization and over penalization add burden towards legal apparatus in the process of criminal court. The next detrimental effect is that the criminal law will be unable to function properly and therefore loses its authority.<sup>33</sup>

Third, aside from legality and subsidiary principle, there is another principle which also holds an important role which is the equality principle. Equality is simplicity and clarity. Simplicity and clarity will generate order. According to Servan and Letrossne, equality principle is not a statement from the aspiration about a more just criminal law. The equality principle is more of a desire to organize a criminal law that is clear and simple.<sup>34</sup> Meanwhile, Lacretelle argues that equality principle is not just an encouragement for criminal law to be fair but also for the right criminal punishment.<sup>35</sup>

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<sup>29</sup> Roeslan Saleh, *Op. Cit.*, page 61.

<sup>30</sup> *Ibid*, page 58.

<sup>31</sup> Aruan Sakidjo and Bambang Poernomo, *Hukum Pidana, Jakarta: Ghalia Indonesia, 1990*, page 45.

<sup>32</sup> *Ibid*, page 50.

<sup>33</sup> Roeslan Saleh, *Op. Cit.*, *Asas Hukum*, page 48.

<sup>34</sup> *Ibid*, page 36-37

<sup>35</sup> *Ibid*, page 38-39.

The principles of criminalization are normative critical principles. They are considered critical because they are stated as a measure to judge the fairness of criminal law and normative because they function to regulate the government policy in criminal law.<sup>36</sup>

### **Criminalization Criteria**

In discussing the matter of criminalization, two questions emerge: (i) what are the criteria used by lawmakers in criminalizing an action as a criminal action which is subject to a certain criminal punishment? (ii) What criteria used by lawmakers to determine the punishment towards a certain criminal action higher than the punishment of other action?<sup>37</sup>

Determination of behaviors that will be criminalized should start with a question: Is a behavior suitable to be categorized as private ethics or should it be a part of the public domain?<sup>38</sup> Behaviors that goes into private areas are not necessary to be criminalized and behaviors that can be criminalized should be ones that really violates the society interest.

According to Bassiouni, the decision to criminalize and decriminalize must be based on specific policy factors which considers many factors:<sup>39</sup>

- a. Balance between the facilities used and the objectives,
- b. Cost analysis towards the results achieved in correlation with the objectives.
- c. Assessment or appraisal of the objectives in relation with other priorities in allocating human resources, and
- d. The social effect of criminalization and decriminalization viewed from its secondary effects.

Other views had been stated by Soedarto which states that in facing criminalization, these matters should be considered:<sup>40</sup>

- a. The use of criminal law should consider the objectives of national development which is to realize a just and prosperous society in a material and spiritual abundance based on Pancasila. Therefore, criminal law is aimed to fight crimes and support this fight for the prosperity and security of the society.

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<sup>36</sup> Ibid, page 14.

<sup>37</sup> Rush Effendi, et. al., Op. Cit., page 34-35.

<sup>38</sup> Harkristuti Harkrisnowo citing Bentham in "Konsep Pidana: Suatu Gugatan Terhadap Proses Legislasi di Indonesia", Professorship Inauguration Lecture, UI, Jakarta, page 20.

<sup>39</sup> M. Cherif Bassiouni, "Substantive Criminal Law", 1978, page 82. Cited from Barda Nawawi Arief, Bunga Rampai Kebijakan Hukum Pidana, Bandung: Citra Aditya Bhakti, 1996

<sup>40</sup> Sudarto, Op. Cit, page 44-48.

- b. Actions that are being prevented or overcome by criminal law must be an undesirable action which brings about material or spiritual loss to the society.
- c. The use of criminal law should also consider the cost and benefit principle.
- d. The use of criminal law must also consider the working capacity of law enforcement institutions to avoid overcapacity.

The criteria of criminalization stated by Soedarto explained above contains the similar criteria of criminalization formulated by the Criminal Law Renewal Symposium (1976) which states a number of the following criteria:<sup>41</sup>

- a. Are the actions disliked or banned by the society due to being detrimental or causing victims?
- b. Are the costs of criminalizing (cost of creating the law, supervision, enforcement, and the burden of the victim and the perpetrator) equivalent to the results aimed?
- c. Is it going to add extra burden to the law enforcement apparatus which is not balanced or clearly impossible to handle?
- d. Are the actions hampering the objectives of the Indonesian nation so become a threat towards the whole society?

Hullsman argues that a number of absolute criteria needed to be considered in the process of criminalizing. They are:<sup>42</sup>

- a. Criminalization should not be determined merely on the basis of an urge to conduct a particular moral attitude towards a certain behavior.
- b. The main reason to determine an action as a criminal action should never be for protection or a treatment towards a particular potential criminal or for one's own interest.
- c. Criminalization should not cause something over the capability of the criminal court apparatus.
- d. Criminalization should not be used as a tyranny to overcome a particular problem.

According to Moeljatno, there are three criteria of criminalization in the renewal process of the criminal law. First, determination of an action as a prohibited action (criminal action) must be according to the feeling of law in the society. Second, is the penalty the main matter to prevent the criminal actions? Third, is the government with its instrument able to conduct the penalty if there is an offender?<sup>43</sup>

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<sup>41</sup> Barda Nawawi Arief, *Op.Cit.*, page 38-40.

<sup>42</sup> Hullsman as cited by Roeslan Saleh in *Dari Lembaran Kepustakaan Hukum Pidana*, Penerbit Sinar Grafika, Jakarta, 1988, page 87.

<sup>43</sup> Moeljatno, *Azas-Azas Hukum Pidana*, Jakarta: PT Bina Cipta, 1985, page 5.

According to Peter W. Low, the effects of conducting criminalization should be measured. There are three effects that should be measured. The first effect is the benefits of criminalization towards the society. The question is whether criminalization brings more benefit than costs towards the society. It is not easy to measure the benefits of criminalization due to the difficulties in differentiating the multistage prevention effects in a particular criminalization scheme from the effects that can be achieved through non criminal methods such as other legal regulation or other regulating mechanism. There is also the difficulty of calculating the effects of a certain behavior in criminalization. It is also difficult to measure the benefits of criminalization also due to the fact that criminalization is a variable that can be manipulated because the effect will be dependent to the definition of the behavior being prohibited.

The second measurement needed is the cost of criminalization which covers the behavior prevention aspects which is in the social norm, cost to enforce the law, effects towards individuals, effects on privacy, criminogenic effects, and cost of crimes. Prevention of socially valuable behaviors with criminal prohibition can prevent a legally acceptable activity to avoid conducting criminally prohibited activities. The magnitude of these effects varies due to the varying prohibition and the instrumental characteristics of the prohibited behaviors.

The expenditure of the costs to enforce the law is related with the budget for the various resources employed to detect and punish offenders. In a number of cases, resources used to enforce the law for a certain violations is viewed as opportunity cost, resources foregone that could have been used to enforce other criminal law.

Beside socially valuable behavior prevention aspect and the cost of enforcing, other criminalization costs are the effects of criminalization towards the individual. Not all 'sorrow' of penalty can be measured with economical scale or even psychological scale. We can describe the effects of detention, prosecution, and penalty for individual offenders. This includes the decrease of productivity due to stigmatizing of the individual and family and psychological and physical costs that occurs as an effect of prison time.

Other cost components are the effects that emerge from criminalization on the privacy of a person. Stephen and Devlin argue the dangers of criminalizing a behavior in the private area which does not inflict any losses to others. The problem is that the law enforcement requires the police to use intrusive techniques which violate privacy in investigation.

Moreover, there are criminogenic effects due to criminalization. A number of prohibitions contain criminogenic consequences which are effects of creating conditions which increases the probability of a criminal activity which would not occur if there were no prohibition. According to labeling theorists, an official

response towards a particular deviation, mainly through stigmatizing processes in criminal law, increases the probability of further deviation by other individuals who have not done it.

There are also costs that must be measured due to the insufficient enforcement. The level of law enforcement is determined based on the allocation of resources in investigating and prosecuting and the prevalence of behaviors being prohibited.

Aside from the aforementioned, other cost components that must be measured is the cost of crimes. The prohibition towards commercial activities such as gambling, sex, pornography, and drug abuse clearly decrease the supply of the goods and services but as long as there are customers, commercial black markets will emerge. How much can the prohibition decrease the unwanted activities is very dependent on the elasticity of demand which is the response of the potential consumers towards the increase of price.

Cost of crime has three social consequences. First is the high income produced by illegal trafficking of prohibited goods are untaxed. The second social consequence is the strong urge of black market players taking all necessary steps to protect their investment and decrease their risk of punishment. Corruption by law enforcement apparatus will also flourish. Apart from that, high cost of crime for drug dealing, sex, and gambling form an economic condition which enable large scale criminal organizations to grow. In the end, the quality of illegal goods and services will vary and the society will benefit from the regulation: prostitutes need not to be examined and treated for sexual transmitted diseases, unmonitored establishment of gambling facilities makes cheating possible, and drugs are not tested for impurities.<sup>44</sup>

Aside from measuring its costs and benefits, criminalization must also consider the profit and loss. According to Junker, profit-loss argument in decriminalization is a disguised libertarianism ideology and that its supporters are implicitly undermining the legitimacy and benefit of the prohibition towards the society.<sup>45</sup>

## **Conclusion**

There are a number of conclusions that can be accessed from the aforementioned discussion. First, criminalization is limited to the determination of an action as a criminal action which is subject to criminal punishment. The definition of criminalization is not limited to the determination of an action as criminal action and therefore is subject to criminal punishment, but also the escalation of criminal punishment towards the existing criminal action. Second, criminalization is a complex problem due to the different types

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<sup>44</sup> Peter W. Low, et. al., *Criminal Law: Cases and Materials*, New York: The Foundation Press,. Inc., 1986, page 1075-1080.

<sup>45</sup> *Ibid*, cited from Junker, "Criminalization and Criminogenesis", at 19 *UCLA L. Rev.* 697 (1972).

of actions that can be criminalized, different values and norms in the society, various choices of instruments regulating the social life, and social change occurred in the society.

Third, the important principles that should be considered in criminalization are legality principle, subsidiary principle, and equality principle. Finally, criteria that should be considered in criminalizing consists of: actions that are criminalized are actions which are undesirable according to the justice feeling of the society, balance between facilities and results or benefits acquired from criminalization, balance between cost and benefit, detriments of criminalization, and the ability of justice institution and law enforcement apparatus to enforce the criminalized actions.

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