

## Governing through Penal Policy: Criminal Law and State Control Mechanisms

Henny Saida Flora<sup>1</sup>✉, Pramidazzura Alifa Rifqi<sup>2</sup>

Universitas Katolik Santo Thomas<sup>1</sup>, Universitas Sebelas Maret<sup>2</sup>

e-mail: [hennysaida@yahoo.com](mailto:hennysaida@yahoo.com)<sup>1</sup>

### ABSTRAK

Contemporary criminal law increasingly functions not only as an instrument for addressing crime but also as a mechanism of state control. The phenomenon of governing through penal policy reflects a shift in the role of criminal law from ultimum remedium toward a regulatory tool used to manage social behavior and political stability. This article examines the normative ambiguity surrounding the legitimacy of penal policy as a means of governance and its implications for the rule of law and human rights protection. Employing a normative juridical approach with critical and prescriptive analysis, the study reveals that the expansion of criminalization often lacks clear normative parameters, leading to overcriminalization, erosion of civil liberties, and legal uncertainty. Such developments risk undermining the legitimacy of criminal law and transforming it into an instrument of power rather than justice. The article argues for the necessity of normative limits on penal policy through the reaffirmation of the ultimum remedium principle, proportionality, and constitutional review mechanisms to safeguard democratic legal order and human rights.

**Keywords:** criminalization, human rights, penal policy, rule of law, state control

### INTRODUCTION

In modern states governed by the rule of law, criminal law can no longer be understood merely as a technical instrument for combating crime. Developments in contemporary criminal policy indicate that criminal law increasingly functions as a strategic instrument of the state to regulate, discipline, and control social behavior. This shift has given rise to a phenomenon in critical legal literature referred to as governing through penal policy, namely the use of penal policy as a mechanism of state control that extends beyond the classical function of protecting legal interests. In this context, criminal law has transformed from an ultimum remedium into an active regulatory instrument that shapes social and political order.<sup>1</sup>

This phenomenon is clearly reflected in the growing tendency toward the expansion of criminalization across various sectors of social life. States increasingly respond to social, moral, and administrative issues through criminal sanctions, including in the fields of information technology, national security, narcotics, and public order. Penal policy is no longer directed solely at conduct that causes tangible harm, but also at behavior perceived as threatening social stability, moral order, or particular political interests. David Garland observes that in situations of declining state legitimacy, criminal

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<sup>1</sup> Alessandro Corda, "The Legitimacy of Criminal Law and the Performance Crises of Penality," *Criminal Law Forum* 36 (2025): 351–380.

law is often employed as a symbolic expression of power and control to respond to public anxiety, even though its effectiveness in preventing crime is frequently questionable.<sup>2</sup>

Within the framework of the rule of law, the use of criminal law as an instrument of state control raises serious normative concerns. Constitutionally, Indonesia defines itself as a state governed by law that upholds legal certainty, the protection of human rights, and limitations on state power. However, in the practice of criminal policy, there are no clear normative parameters to determine the legitimate boundaries of criminalization. As a result, penal policy often develops in a reactive, populist, and excessive manner, without adequate scrutiny based on the principles of proportionality, necessity, and subsidiarity. This normative ambiguity creates space for the instrumental and potentially repressive use of criminal law.<sup>3</sup>

The main legal issue that arises concerns the blurred boundary between penal policies that are legitimate within a rule of law framework and those that function primarily as instruments of power control. When criminalization is no longer grounded in the protection of clearly defined legal interests, but instead driven by the need for social and political control, criminal law risks losing its normative legitimacy. Alessandro Corda argues that the legitimacy crisis of modern criminal law stems from the expansion of penal functions without sufficient normative justification.<sup>4</sup> In such circumstances, criminal law no longer operates as a safeguard for citizens, but rather as a disciplinary instrument of the state.

This issue becomes increasingly relevant in the context of the reform of national criminal law through Law Number 1 of 2023 concerning the Criminal Code. Although the National Criminal Code reflects the spirit of decolonization and modernization of criminal law, it also contains several provisions that expand the scope of criminalization and state discretion. Certain new regulations indicate a tendency to use criminal law as a tool for regulating social behavior that could otherwise be addressed through non penal mechanisms. This development raises critical questions regarding the consistency of national penal policy with the principle of *ultimum remedium* and the protection of human rights.<sup>5</sup>

From an academic perspective, studies of national criminal law remain largely dominated by dogmatic analyses of criminal offenses, criminal responsibility, and punishment. Discussions of criminal policy are often confined to technical aspects without being linked to power relations and mechanisms of state control. Meanwhile, critical criminology and international criminal law literature have long warned of the dangers of overcriminalization and penal populism as characteristics of states that use

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<sup>2</sup> David Garland, "The Current Crisis of American Criminal Justice: A Structural Analysis," *Annual Review of Criminology* (2022).

<sup>3</sup> Zul Khairul Kadir, "Fear and Control: Rethinking Criminal Policy through the Lens of Moral Panic," *International Journal of Law Analytics* (2025)

<sup>4</sup> Corda, op. cit.

<sup>5</sup> Tomi Khoiron Nasir, Beniharmoni Harefa, and Handar Subandi Bakhtiar, "Criminal Policy in Law Number 1 of 2023 Concerning the Criminal Code," *International Journal of Social Science and Human Research* (2025).

criminal law to manage social fear and political stability.<sup>6</sup> The limited number of critical studies that situate penal policy within the framework of the rule of law and human rights reveals a significant academic gap.

This gap is evident in the scarcity of research that explicitly examines penal policy as a strategy of state control, particularly within the context of post reform Indonesian criminal law. Most existing studies continue to treat criminal law as a neutral instrument, without critically examining the political and human rights implications of the expansion of criminalization.<sup>7</sup> As shown by Cliquennois, Snacken, and van Zyl Smit, penal policies that lack clear normative constraints have the potential to erode civil liberties and reinforce control practices that are inconsistent with human rights principles.

Based on this background, this study aims to analyze the function of criminal law as an instrument of state control through penal policy and to examine the implications of normative ambiguity in criminalization for the principles of the rule of law and the protection of human rights. This research not only seeks to explain the phenomenon of governing through penal policy, but also proposes a prescriptive framework to limit the use of criminal law so that it remains within the bounds of rule of law legitimacy. In doing so, this study is expected to contribute to the development of a criminal policy that is more proportional, accountable, and oriented toward the protection of citizens' rights.

## METHOD

This research constitutes a normative juridical legal study with a critical prescriptive character. Normative juridical research is selected because the focus of the analysis is directed toward legal norms, criminal policy, and the conceptual construction of criminal law within the framework of the rule of law and human rights. This approach allows criminal law to be examined not merely as a system of positive legal rules, but also as an instrument of power with political and social implications. The critical prescriptive character is employed to assess the legitimacy of penal policy and to formulate normative recommendations aimed at limiting the use of criminal law as a mechanism of state control.<sup>8</sup>

The research approaches applied include the statute approach, conceptual approach, historical approach, and case approach. The statute approach is used to examine constitutional provisions and statutory regulations that form the basis of penal policy, particularly the Constitution of the Republic of Indonesia of 1945, Law Number 1 of 2023 on the Criminal Code, as well as sectoral laws that expand criminalization. The conceptual approach is employed to analyze key concepts such as penal policy, social control, ultimum remedium, penal populism, and overcriminalization as developed in critical criminal law and criminology literature. The historical approach is used to trace the shift in the function of criminal law from an instrument for the protection of legal interests toward a tool of regulation and state control. The case approach is used in a

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<sup>6</sup> Zsolt Boda et al., "Two Decades of Penal Populism – The Case of Hungary," *Review of Central and East European Law* (2022).

<sup>7</sup> Gaëtan Cliquennois, Sonja Snacken, and Dirk van Zyl Smit, "Human Rights, Prisons and Penal Policies," *European Journal of Criminology* 18 (2021): 3–10.

<sup>8</sup> Alessandro Corda, "The Legitimacy of Criminal Law and the Performance Crises of Penality," *Criminal Law Forum* 36 (2025): 351–380.

limited manner to examine examples of criminalization policies that normatively demonstrate excessive and problematic tendencies.<sup>9</sup>

The legal materials used in this research consist of primary, secondary, and tertiary legal materials. Primary legal materials include statutory regulations and court decisions relevant to criminal policy and the limitation of state power. Secondary legal materials comprise books, journal articles, and scholarly studies addressing criminal law, criminal policy, critical criminology, and human rights. Tertiary legal materials are used as complementary sources to clarify legal terms and concepts. The analytical technique is conducted through normative systematic and critical analysis, employing teleological and contextual interpretation to assess the conformity of penal policy with the principles of the rule of law, proportionality, and the protection of human rights.<sup>10</sup>

## RESULT AND DISCUSSIONS

### Normative Ambiguity in Penal Policy as an Instrument of State Control

Penal policy within modern criminal law systems has undergone a significant expansion of function without being accompanied by the formulation of clear normative boundaries. Normative ambiguity arises when criminal law is used not only to protect concrete legal interests, but also to regulate social, moral, and political behavior of an abstract nature. In this context, criminalization often no longer rests on the harm principle, but rather on assumptions of potential threats to public order or state stability. This condition causes criminal law to lose its protective orientation and to transform into a flexible instrument of state control.<sup>11</sup>

Normative ambiguity in penal policy is also reflected in the absence of clear parameters for assessing the legitimacy of criminalization. Sectoral statutes frequently expand criminal offenses without adequate testing against the principles of necessity and proportionality. As a result, the boundary between legitimate penal policy and repressive penal policy becomes blurred. Alessandro Corda emphasizes that the legitimacy crisis of modern criminal law is rooted in the legal system's inability to distinguish between necessary criminalization and criminalization that is symbolic or populist in nature.<sup>12</sup> In such circumstances, criminal law becomes vulnerable to being used as a rapid response to political pressure and moral panic.

From the perspective of the rule of law, this normative ambiguity has serious implications for legal certainty. Citizens are no longer able to rationally predict which behaviors will be criminalized or how criminal law will be applied. This situation contradicts the principle of legal certainty that is constitutionally guaranteed. Moreover, normative ambiguity creates broad discretionary space for law enforcement authorities,

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<sup>9</sup> David Garland, "The Current Crisis of American Criminal Justice: A Structural Analysis," *Annual Review of Criminology* (2022); Zul Khaidir Kadir, "Fear and Control: Rethinking Criminal Policy through the Lens of Moral Panic," *International Journal of Law Analytics* (2025).

<sup>10</sup> Gaëtan Cliquennois, Sonja Snacken, and Dirk van Zyl Smit, "Human Rights, Prisons and Penal Policies," *European Journal of Criminology* 18 (2021): 3–10; Corda, *op. cit*

<sup>11</sup> Alessandro Corda, "The Legitimacy of Criminal Law and the Performance Crises of Penality," *Criminal Law Forum* 36 (2025): 351–380.

<sup>12</sup> *Ibid*

thereby increasing the risk of abuse of power and inconsistent application of the law.<sup>13</sup> Consequently, penal policy that is not normatively constrained ultimately erodes the very foundations of the rule of law.

From a prescriptive standpoint, it is necessary to formulate explicit parameters within criminalization policy. These parameters must include clarity of the objectives of criminalization, identification of the legal interests to be protected, and the limitation of criminal sanctions to situations that cannot be adequately addressed through non-penal instruments. Without such limitations, criminal law will continue to function as an excessive and potentially repressive instrument of state control.

### **Criminal Law as a Mechanism of Social and Political Control by the State**

Historically, criminal law has indeed served a function of social control, yet in modern developments this function has undergone intensification and politicization. Penal policy is no longer solely directed at combating crime, but also at normalizing citizen behavior in accordance with state interests. Through criminalization, the state establishes standards of permissible and impermissible conduct, while simultaneously imposing sanctions for deviations. Within this framework, criminal law operates as an effective technology of power.<sup>14</sup>

The use of criminal law as a mechanism of social control is increasingly evident in sectoral legislation containing administrative penal provisions. Violations of administrative obligations that were previously regulatory in nature are now threatened with criminal sanctions. This approach reflects a shift from governance through administrative regulation toward governance through penal policy. David Garland describes this phenomenon as the expansion of the penal state, in which punishment is employed to manage social risk and public anxiety.<sup>15</sup>

More problematically, penal policy is often intertwined with political interests. In the context of political stability, criminal law may be used to suppress criticism, control opposition, or respond to penal populism. Zul Khaidir Kadir demonstrates that moral panic frequently serves as a justification for states to expand criminalization, despite its significant impact on civil liberties.<sup>16</sup> Under such conditions, criminal law no longer operates as a neutral instrument, but rather as a political tool for securing power.

To clarify the distinction between penal policies oriented toward legal protection and those oriented toward control, the following analytical table is presented:

**Table 1. Penal Policy as Legal Protection versus State Control Mechanism**

Aspect	Protective Penal Policy	Control-Oriented Penal Policy
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<sup>13</sup> Gaëtan Cliquennois, Sonja Snacken, and Dirk van Zyl Smit, "Human Rights, Prisons and Penal Policies," *European Journal of Criminology* 18 (2021): 3–10.

<sup>14</sup> Petro Vorobey et al., "Nature and Significance of the State's Criminal Law Policy," *Artificial Intelligence* 10 (2021): 225–231.

<sup>15</sup> David Garland, "The Current Crisis of American Criminal Justice: A Structural Analysis," *Annual Review of Criminology* (2022).

<sup>16</sup> Zul Khaidir Kadir, "Fear and Control: Rethinking Criminal Policy through the Lens of Moral Panic," *International Journal of Law Analytics* (2025).

Primary Objective	Protection of legal interests	Regulation and discipline of society
Basis of Criminalization	Concrete harm and necessity	Moral panic, political pressure
Role of Punishment	Ultimum remedium	Primum remedium
Impact on Civil Liberties	Limited and proportional	Potential erosion of rights
Compatibility with Rule of Law	High	Problematic

The table demonstrates that penal policies oriented toward control tend to disregard the principles of limitation of power and proportionality. When criminal punishment is positioned as the primary instrument of control, the risks of overcriminalization and human rights violations increase significantly.<sup>17</sup> Therefore, normative limitations on the controlling function of criminal law constitute an urgent necessity within a democratic state governed by the rule of law.

### **Implications of Governing through Penal Policy for the Rule of Law and Human Rights**

The use of criminal law as a primary instrument of state control through penal policy carries serious implications for the principles of the rule of law and the protection of human rights. Within the framework of a rule of law state, criminal law should be positioned as a last resort and applied in a limited and proportional manner. However, the practice of governing through penal policy instead promotes the normalization of punishment as a routine instrument of social regulation. This shift blurs the boundary between law enforcement and the exercise of power, such that criminal law no longer functions as a safeguard protecting citizens from arbitrariness, but rather as a medium for the expansion of state power.<sup>18</sup>

The most apparent implication is the increasing risk of overcriminalization. When various aspects of social life are addressed through penal approaches, the number of acts classified as criminal offenses continues to expand without adequate normative evaluation. Overcriminalization not only imposes excessive burdens on the criminal justice system, but also diminishes the legitimacy of criminal law itself. Markus Dubber explains that the modern penal state tends to construct a dual penal state, in which punishment is selectively used to control certain groups, while the principle of legal protection is applied unevenly.<sup>19</sup> This condition contradicts the principle of equality before the law, which constitutes a core pillar of the rule of law.

The second implication relates to the erosion of civil liberties and individual freedoms. Penal policies oriented toward control frequently sacrifice the principles of proportionality and necessity in the name of security or public order, as broadly defined by the state. In this context, criminal law becomes a means of restricting freedom of

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<sup>17</sup> Natasa Mavronicola and Mattia Pinto, "Challenging Punishment as the Justice Norm," *Leiden Journal of International Law* (2025).

<sup>18</sup> Alessandro Corda, "The Legitimacy of Criminal Law and the Performance Crises of Penality," *Criminal Law Forum* 36 (2025): 351–380.

<sup>19</sup> Markus D. Dubber, "O processo penal no estado penal dual: uma análise histórico-comparada," *Revista do Instituto de Ciências Penais* (2025).

expression, freedom of assembly, and the right to privacy. Natasa Mavronicola and Mattia Pinto emphasize that the dominance of punishment as the prevailing paradigm of justice has shifted the focus away from human rights protection toward a logic of deterrence and control.<sup>20</sup> As a result, criminal law loses its humanistic dimension and transforms into a coercive instrument.

Furthermore, governing through penal policy also affects legal certainty and the rationality of the criminal law system. Criminalization policies that react to political pressure or moral panic produce penal norms that are unstable and difficult to predict. This condition contradicts the principle of *lex certa*, which requires clarity and consistency in criminal norms. Zul Khaidir Kadir demonstrates that criminalization driven by moral panic tends to generate penal policies that are symbolic, repressive, and lacking in long term effectiveness.<sup>21</sup> Under such circumstances, criminal law loses its regulatory capacity and intensifies public distrust in the legal system.

From a prescriptive perspective, these implications necessitate firm normative constraints on the use of criminal law as a mechanism of state control. The principle of *ultimum remedium* must be reaffirmed operationally in the formulation of criminalization policies, rather than remaining merely a normative slogan. In addition, constitutional review of legislation that expands criminalization constitutes an important instrument for maintaining balance between state authority and the protection of citizens' rights. Without such corrective measures, governing through penal policy will continue to weaken the rule of law and shift criminal law from an instrument of justice into an instrument of domination.

## CONCLUSION

Penal policy in the development of modern criminal law has undergone a significant functional shift, from an instrument for protecting legal interests to a mechanism of social and political control by the state. The phenomenon of governing through penal policy demonstrates that criminal law is no longer employed in a limited manner as *ultimum remedium*, but rather as an active regulatory tool for governing citizen behavior. This shift occurs within a context of normative ambiguity that fails to provide clear boundaries of legitimacy between lawful criminalization and potentially repressive criminalization.

Normative ambiguity in criminalization policy has direct consequences for the principles of the rule of law and the protection of human rights. The expansion of criminal offenses without firm normative parameters increases the risks of overcriminalization, erosion of civil liberties, and legal uncertainty. Under such conditions, criminal law tends to lose its normative legitimacy and transform into an instrument of power that prioritizes stability and control over justice and the protection of citizens' rights.

Therefore, a reconfiguration of penal policy is required through the establishment of firm normative limitations on the function of criminal law. The reaffirmation of the

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<sup>20</sup> Natasa Mavronicola and Mattia Pinto, "Challenging Punishment as the Justice Norm in the Face of Ongoing Atrocities," *Leiden Journal of International Law* (2025).

<sup>21</sup> Zul Khaidir Kadir, "Fear and Control: Rethinking Criminal Policy through the Lens of Moral Panic," *International Journal of Law Analytics* (2025).

principle of *ultimum remedium*, the strengthening of proportionality review in criminalization, and the active role of constitutional review constitute essential steps to ensure that criminal law remains within the corridor of a democratic rule of law state and does not shift into an excessive instrument of state control.

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