



Illegality and Its Grounds for Exclusion: Limits, Scope, and Interpretive Issues

La antijuridicidad y sus causas de exclusión: límites, alcances y problemas interpretativos

Cristian José Yumbla Castro

Docente de Derecho de la Universidad Católica de Cuenca

cristian.yumbla@ucacue.edu.ec

<https://orcid.org/0009-0009-4384-9702>

ABSTRACT

To synthesize and analyze the main research, doctrinal contributions, regulations, and theoretical approaches related to unlawfulness and its grounds for exclusion in contemporary criminal law. This study is based on a review of the doctrinal literature and a structured analysis of recent constitutional and criminal case law. The study highlights the evolution of the concept of unlawfulness from a formalist perspective toward a substantive and rights-based understanding, aimed at the substantial protection of legal interests against the punitive power of the State. The classical, finalist, and functionalist approaches are systematically compared; it is emphasized that current legal doctrine and case law move beyond rigid conceptions by applying the pro-persona principle and contextual criteria in the assessment of grounds for justification (e.g., self-defense versus the fear of a perfect response). Likewise, the distortions generated by punitive populism in restricting these grounds for exclusion are identified. Illegality constitutes a dynamic and constantly evolving category influenced by the constitutionalization of criminal law. Grounds for exclusion should not be interpreted as mere secondary legal exceptions, but rather as

essential normative instruments that legitimize rationality and limit the state's right to punish.

RESUMEN

Sintetizar y analizar las principales investigaciones, aportes doctrinarios, normativas y enfoques teóricos relacionados con la antijuridicidad y sus causas de exclusión en el Derecho penal contemporáneo. Se fundamenta en una revisión de la literatura dogmática y un análisis articulado de la jurisprudencia constitucional y penal reciente. El estudio evidencia la evolución del concepto de antijuridicidad desde una perspectiva formalista hacia una comprensión material y garantista, orientada a la protección sustancial de bienes jurídicos frente al poder punitivo del Estado. Se contrastan de manera sistemática los enfoques clásico, finalista y funcionalista; se destaca que la doctrina actual y la jurisprudencia superan las concepciones rígidas mediante la aplicación del principio pro-persona y criterios contextuales en la valoración de las causas de justificación (v.g., la legítima defensa frente al miedo de una respuesta perfecta). Asimismo, se identifican las distorsiones que el populismo punitivo genera al restringir estas causas exclusorias. La antijuridicidad constituye una categoría dinámica y en constante evolución influenciada por la constitucionalización del Derecho penal. Las causas de exclusión no deben interpretarse como simples excepciones legales secundarias, sino como instrumentos normativos esenciales que legitiman la racionalidad y limitan el *ius puniendi* estatal.

Keywords / Palabras clave

Substantive illegality, grounds for exclusion, criminal due process, contemporary legal theory, constitutional case law.

Antijuridicidad material, causas de exclusión, garantismo penal, dogmática contemporánea, jurisprudencia constitucional.

Introduction

From the perspective of criminal law, it is understood in this context as a branch of the legal system whose priority— —is to regulate human

conduct that endangers legal interests, based on the corresponding consequences. Thus, we can define that within the framework presented by this project on the theory of crime, it plays a central role by allowing us to determine when a conduct can be considered criminally relevant and, therefore, subject to punishment (Ventura Granados, 2025).

As part of our discussion, we will also provide context regarding unlawfulness, which is an essential category in the theory of crime, since it will help us assess whether these types of conduct are contrary to the legal system, with the aim of understanding how the legal system functions as a whole—as criminal law already recognizes the existence of circumstances under which, when conduct fits a criminal offense, it is not considered unlawful due to the presence of grounds that exclude such unlawfulness.

The objective of this project is to develop this field, in which we will synthesize and analyze the main research, doctrinal contributions, regulations, and theoretical approaches related to unlawfulness and its grounds for exclusion in criminal law; and will therefore proceed as a review of classical and contemporary criminal doctrine, since this is how the most common legal provisions are understood; from there, concepts, commonalities, and debates will emerge throughout this project.

State of the Art on Illegality and Its Grounds for Exclusion in Criminal Law

Unlawfulness in the theory of crime: doctrinal approaches

Illegality is a central element of theories of crime, serving as a means to identify typical conduct that the legal system deems contrary to normal behavior. This involves the contradiction between how a human being behaves and how legal norms are specialized or incorporated within the legal system, extending beyond the formal definition of a criminal offense (Gil, 2018).

We can define that within the classical doctrine of authors such as Franz von Liszt, it was argued that unlawfulness is determined as an objective judgment, where conduct and law intersect; they explicitly stated that every typical action is viewed as unlawful, except in specific cases where there is justification recognized by the legal system.(Ventura Granados, 2025) This conception laid the foundation

for clearly differentiating between criminality and unlawfulness as autonomous categories within the structure of a crime.

According to contemporary doctrine, what we refer to as unlawfulness is not conceived solely as a formal opposition to what we call law, but rather is redefined as a category that requires us to assess the We will explain the concept of unlawfulness, noting that criminal theory is not static but has been undergoing a progressive evolution, in line with conceptions of criminal law, which are shaped by the legal system (Padilla Rojas, 2023). In its earliest formulations, unlawfulness was understood from a predominantly formal perspective, as it was directly linked to a violation of existing law, without a prior analysis to determine the content of that law based on conduct, nor regarding the interests it protects or produces.

4

We must also take into account the development of the positivist school, which saw the rise of approaches that have always focused on the study of the perpetrator rather than the act itself; This is taken as the concept of unlawfulness, as it moved beyond a purely theoretical framework, leading to its expansion into various fields such as criminological, social, and psychological factors, given the need to analyze unlawful conduct (Tovar, 2022).

In summary, the historical evolution of the concept of unlawfulness reflects the transition from a formalist conception toward a more substantive and rights-based understanding, in which the analysis of criminally relevant conduct is conducted in light of the purposes and principles that inform modern criminal law (Valarezo Trejo et al., 2019). This evolution is fundamental to understanding the current treatment of grounds for exclusion from unlawfulness and the ongoing doctrinal debates surrounding their scope and application.

behavior, where the key elements of legal reform are considered, which aligns with criminal law; thus, unlawfulness is presented as a dynamic element, the content of which has been the subject of constant debates and reinterpretations in the conceptualization of criminal theory (Rubio Correa & Arce Ortíz, 2021).

Historical Evolution of the Concept of Illegality in Criminal Law

Formal unlawfulness and material unlawfulness

In part of criminal doctrine, a fundamental distinction has been developed to better understand unlawfulness—namely, the difference between what is formal and what is material—specifically in the context of unlawfulness. This distinction arose in response to the need to move beyond a strictly normative conception of crime and to incorporate substantive criteria linked to the protection of legal interests.

Formal unlawfulness is established when an action is contrary to positive law—that is, when there is an objective conflict between a person’s conduct and the command or prohibition established by the legal system (Dohna-Schlodien et al., 2021). From this perspective, a typical act is considered unlawful solely because it violates a criminal law, and its unlawfulness is presumed unless there is a legally recognized justification.

Material unlawfulness is based on a purely substantive analysis of conduct, since this approach is not based on a contradiction with a specific norm, but rather on something linked to material disvalue, which makes it relevant to criminal law; this is linked to the function of protecting legal interests fulfilled by criminal law, serving as a reference point within a social and democratic state (Eduardo et al., 2021).

The Role of Illegality within the Criminal Justice System

Unlawfulness plays a fundamental role in contemporary criminal theory, as it is a evaluative standard that makes it possible to determine whether a specific behavior is legally reprehensible under criminal law (Pawlik, 2022). Contemporary legal doctrine agrees that unlawfulness functions as a value-based filter that prevents the imposition of criminal sanctions in cases where, despite the conduct meeting the elements of a crime, it is justified by the legal system itself.

According to Guamán Chacha et al. (2021), the primary function of unlawfulness is to ensure that the law is invoked only when there is an illegitimate infringement—where legal interests are at stake—so that, if such an infringement exists, it is more clearly identified, thereby preventing the excessive proliferation of the State’s punitive power. Recent criminal doctrine has also emphasized that unlawfulness fulfills a systematic function within the structure of a crime by delimiting the scope of application of criminal typification.

According to Cornejo Aguiar et al. (2019), unlawfulness cannot be viewed as a mere complement to criminal typology; this is because it is understood as a much more autonomous category, one that allows for the integration of subjective considerations based on constitutional and axiological norms that aid in assessing conduct. Authors such as Zaffaroni emphasize that unlawfulness must be interpreted in light of constitutional principles and human rights, so that only those acts that substantially contradict the legal order can be legitimately punished.

From a political-criminal perspective, unlawfulness also helps fulfill one of the functions of the criminal justice system, namely the interpretation of existing criminal offenses to facilitate appropriate solutions. According to Pokol (2023), to be properly defined, unlawfulness should be regarded as indispensable for upholding the guarantees of criminal law in societies that use the term “democratic” to describe their legal framework (Holger & Tandazo, 2021).

In this approach, unlawfulness aims to serve as one of the most historic pillars underpinning the theory of crime; this stems from its origins in traditional criminal dogma, and it exerts a significant influence on contemporary doctrine, as it is regarded as an original formulation grounded in human conduct and the legal system.

According to Busato & Montes Huapaya (2020), from the classical perspective, unlawfulness is understood as an autonomous normative judgment regarding criminal typology—that is, the factual basis that helps us systematize crime and endow criminal law with coherence and consistency. Current legal doctrine recognizes that this conceptual distinction remains useful for criminal legal analysis, insofar as it facilitates the identification of cases in which conduct that meets the elements of a crime does not warrant criminal censure because it is protected by the legal system itself.

In current criminal doctrine, several authors have pointed out that, although the classical approach has limitations due to its largely formal nature, its fundamental tenets remain relevant if reinterpreted in accordance with constitutional principles and human rights. (Cornejo Aguiar & Piva Torres, 2021a) assert, in this vein, that the presumption of the unlawfulness of typical conduct remains a valid starting point if accompanied by a substantive analysis focused on safeguarding legal interests.

In the Latin American context, the persistence of the classical approach is also evident in its reception in terms of legislation and case

law, where it continues to be used as a frame of reference for examining grounds for justification (Cornejo Aguiar & Piva Torres, 2021). The classical structure of crime remains the methodological foundation for the education and application of criminal law, despite the integration of functional and constitutional methods, according to recent research (Rodríguez Reyes, 2023).

The Finalist Approach to Unlawfulness in Contemporary Criminal Doctrine

This approach offers a different perspective on the theory of crime, as it introduced a profound transformation in the assessment of human conduct and, consequently, the evaluation of unlawfulness. Based on contemporary criminal doctrine, this approach remains important for establishing better constitutional principles and as a means of safeguarding criminal law (Cornejo Aguiar et al., 2019).

Recent legal scholarship identifies several fundamental contributions of the finalist approach to the analysis of unlawfulness:

The introduction of a more complex assessment of conduct that goes beyond mere formal analysis.

Integration of the meaning and purpose of the action into the assessment of unlawfulness.

According to (De Derecho et al., 2023), these contributions manifest in the fact that unlawfulness ceases to be a simple negative judgment of normative contradiction and instead becomes a structural assessment within the criminal justice system.

Based on contemporary criminal law doctrine, there is a continuum of final action and unlawfulness, given that the idea is expressed that not all conduct that meets the elements of a crime is necessarily unlawful; this will always be the case, so one must first analyze the justifying causes—both in terms of how the doctrine has evolved and the specific schools of thought that have emerged—resulting in a continuum developed from this perspective.

- Unlawfulness requires:
- Typical conduct.
- A conscious intent.
- A material contradiction with the legal system.

Grounds for justification:

- They are not mere exceptions
- Normative provisions that legitimize certain purposes of the action.

The author also reinforces this point, noting that the protective nature of criminal law avoids automatic assessments of unlawfulness based solely on the elements of the offense (Aráuz et al., 2024).

Table 1. *Visual comparison: classical approach vs. finalist approach*

8

Criterion	Classical approach	Finalist approach (current doctrine)
Conception of the act	Physical movement	Final and conscious conduct
Unlawfulness	Objective contradiction with the norm	Normative assessment + purpose-
Role of the subject	Secondary	Central to the assessment
Grounds for justification	Normative exceptions	Manifestations of the legal order
Current orientation	Moderate formalist	Substantive and rights-based

Source: (Cornejo Aguiar et al., 2019)

Based on their contributions, there were also perspectives that were highly critical of finalism, given that it was associated with a rigid application; the main criticisms include:

- Risk of excessive subjectivity in criminal analysis.

- Evidentiary difficulties in determining the purpose.
- The need to supplement the finalist approach with functional and constitutional criteria.

According to Benavente Chorres (2023a), the finalist approach may have certain limitations because it is not inherently aligned with principles such as legality and proportionality. This is a serious issue, as it can undermine what we call legal certainty; therefore, its application must be integrated rather than seeking to exclude these principles.

The functionalist theory of crime is a critical response to classical formalism and to certain limitations of finalism (La et al., 2025). This perspective suggests an analysis of criminal law based on its normative and social function. In contemporary legal doctrine, functionalism understands unlawfulness not only as a normative or material contradiction but also as a concept that must be interpreted in accordance with the purposes of the criminal justice system and the effective protection of legal interests (Zaffaroni et al., 2021).

The central tenets of the functionalist approach are defined by a link between unlawfulness and the relative protection of legal interests; thus, this concept—which has recently begun to emerge in legal doctrine—will always hold true: conduct is only considered unlawful when it significantly affects a legal interest that criminal law is intended to protect. This is articulated from the following perspectives:

- Not every formal violation of a criminal law entails unlawfulness.
- Actual or potential harm to the legal interest is required.
- Unlawfulness is interpreted restrictively, in accordance with the principle of minimal intervention.

Criteria from criminal policy are also incorporated, whereby the analysis of unlawfulness must consider not only the violated provision but also take into account the potential social consequences that may arise, in order to prevent criminal sanctions (Ortiz et al., 2021).

We will describe the following elements that must be integrated or characterized:

- Incorporate principles of general and special prevention.

- Assess the necessity of punishment in the specific case.

This type of approach has become standard in cases involving grounds for exclusion, where unlawfulness is not well understood, since these grounds are not viewed as mere legal exceptions but are instead used as normative instruments that help fulfill the function of the criminal justice system. According to contemporary doctrine, these grounds reflect criminal policy decisions that seek to balance the protection of legal interests with respect for fundamental rights (Cornejo Aguiar & Piva Torres, 2021).

We present the following examples, which describe why the conduct is functionally appropriate within the legal system:

10

- Self-defense is justified by the need to protect legal interests against an unlawful attack.
- A state of necessity is justified when the conduct prevents a greater harm.
- The fulfillment of duty serves the functionality of the legal order.

Table 2. *Visual Comparison: Finalism vs. Functionalism*

Criterion	Finalist Approach	Functionalist approach
Focus of the analysis	Purpose of the action	Function of criminal law
Unlawfulness	Substantive assessment plus purpose	Normative and functional assessment
Legal interest	Implicit	Central focus of the analysis
Grounds for exclusion	Justification of the purpose	Functional justification
Main risk	Subjectivization	Expansion of criminal law (if not limited)

Criminal procedural guarantees emerged as a critical theory in opposition to authoritarian models of criminal law. Its leading proponent is Luigi Ferrajoli, who argues that the *ius puniendi* must be strictly conditioned by substantive and procedural guarantees

(Cornejo Aguiar & Piva Torres, 2021d).

Key principles of criminal procedural guarantees:

- Strict legality
- Harmfulness

- Proportionality
- Culpability
- Presumption of innocence
- Minimal intervention

1.1. Relationship Between the Constitution and Unlawfulness

11 In this case, this doctrine is highlighted as the fundamental basis for analyzing unlawfulness, which must be carried out in harmony with the Constitution—a principle typically upheld in constitutional legal systems (Catalán Peralta, 2025).

Constitutional implications of the rights-based approach:

- Constitutional review of criminal offenses.
- Interpretation in accordance with human rights.

- Application of the pro-person principle.
- Constitutionality block.

Materials and Methods

To structure, substantiate, and develop this state-of-the-art review on “Illegality and Its Grounds for Exclusion: Limits, Scope, and Interpretive Problems,” a qualitative, descriptive, and analytical methodological model was designed, based on documentary and legal-dogmatic research. Since the subject of study falls within the realm of criminal theory and constitutional criminal law, the methodology does not aim to manipulate empirical variables or statistically quantify phenomena, but rather to achieve a substantive, hermeneutic, and critical understanding of current normative, doctrinal, and jurisprudential texts.

The methodological design was systematically divided into four fundamental operational dimensions: (i) the research approach and

type, (ii) the strategy for searching, selecting, and delimiting the documentary corpus (heuristics), (iii) the techniques and tools for analyzing and processing information (hermeneutics), and (iv) the specific criteria for selecting and deconstructing the criminal and constitutional case law used.

The research falls within the qualitative approach, which is well-suited to the legal sciences when the purpose is to examine the evolution of conceptual and dogmatic categories that undergo changes as the paradigms of constitutional states shift. This approach allows for an exploration of the underlying meanings of criminal theories (classical, finalist, and functionalist) and their impact on judicial interpretation.

The scope of the study is descriptive-analytical:

Descriptive, in that it provides a detailed characterization of the theoretical characteristics of formal and material unlawfulness, mapping out traditional and contemporary views in legal doctrine.

Analytical, in that it goes beyond the mere accumulation of texts and seeks to deconstruct the interpretive phenomenon, identifying the tensions between normative rigidity, the guarantees of the pro-person principle, and the punitive setbacks fostered by penal populism.

The design is non-experimental, cross-cutting, and documentary. Legal dogmatics is adopted as the core research method. Dogmatics allows us to conceive of the criminal legal system as an integrated system of norms, principles, and values, whose internal rationality must be unraveled through abstract interpretation and its subsequent comparison with the reality of high court decisions.

3.2. Strategy for Searching and Selecting the Documentary Corpus (Heuristics)

The process of collecting bibliographic materials was guided by the principles of exhaustiveness, academic relevance, thematic pertinence, and chronological currency. The search focused on high-impact scientific databases and indexed repositories, such as Scopus, Web of Science (WoS), SciELO, Dialnet, Latindex Catálogo 2.0, and Redalyc, supplemented by a review of classic and essential treatises on the theory of crime.

To conduct the searches in the search engines, specific search strings were designed using Boolean operators (AND, OR). The key terms

used (in both Spanish and English) corresponded to the central descriptors of the research:

- "Material unlawfulness" AND "grounds for exclusion" AND "criminal law"
- "Criminal due process" AND "Ferrajoli" AND "illegality"
- "Substantive illegality" AND "grounds for exclusion" AND "constitutional law"
- "Punitive populism" AND "restriction of rights" AND "self-defense"

To refine the volume of information retrieved, the following inclusion criteria were rigorously applied:

- 13 Scholarly articles published in peer-reviewed journals, book chapters, and treatises on criminal doctrine that directly address the conceptual evolution of unlawfulness.

Studies that analyze criminality and unlawfulness as autonomous categories but linked through the theories of *ratio cognoscendi* or *ratio essendi*.

Research conducted or published preferably in recent years (with an emphasis on contemporary contributions from 2019 to 2025/2026), without precluding the inclusion of historical works by foundational authors (such as Franz von Liszt or Hans Welzel) necessary to explain the paradigmatic shift in criminal law.

Academic texts that analyze the impact of the pro-persona principle and human rights on the review of conformity with international conventions in criminal proceedings.

The following documents were automatically excluded:

- Addressed unlawfulness from a purely civil or administrative perspective, falling outside the scope of criminal offense theory.
- Newspaper articles, opinions on legal blogs lacking scientific rigor, or gray literature not backed by a recognized peer-review or indexing process.
- Redundant studies that did not contribute critical, distinguishing elements with respect to the approaches already analyzed.

Since this article incorporates a structured analysis of recent criminal and constitutional judicial practice, the selection of rulings was not random but rather based on intentional and analytical sampling. Priority was given to rulings from High Courts (Constitutional Courts and Supreme Courts of Justice in the Ibero-American context), as their decisions establish binding precedents and set the standard for the substantive interpretation of the right to punish (*ius puniendi*).

Once the final body of documentation was compiled (comprising the selected legal doctrine and the collection of rulings), the process of processing and deconstructing the information began.

Organization and Data Entry Phase (Categorization): Two-way tables and electronic data entry tools were used to organize the information according to the study variables. Each unit of analysis (paragraph, doctrinal argument, or case law excerpt) was classified into the following subcategories: Formal e Unlawfulness, Material Unlawfulness, Classical Approach, Finalist Approach, Functionalist Approach, Criminal Guarantees, Punitive Populism, and Contextual Case Law Interpretation.

Theoretical and Comparative Triangulation Phase: Traditional doctrinal positions were systematically compared with the tenets of contemporary criminal doctrine. This technique made it possible to visually and conceptually contrast how the role of the subject shifts from being secondary (in the classical approach) to central (in the finalist approach), and how the legal interest becomes the guiding principle of the analysis of harmfulness from a functionalist and rights-based perspective.

Critical Synthesis and Drafting Phase: In this final stage, hermeneutics was applied to evaluate the correspondence between theoretical discourses and judicial practice. The impact of punitive populism—characterized by reactive and emotive criminal legislation—was critically analyzed, highlighting how this phenomenon exerts pressure toward the tightening of judicial criteria and fosters distrust of justifying grounds, thereby undermining legal certainty and the sphere of civil liberties.

Results

According to (Cornejo Aguiar & Piva Torres, 2021e), it is not possible to pinpoint the exact historical moment when the general theory of crime first emerged; it was not until ten years after the German Penal

Code of 1881 came into force that a genuine general theory of crime began to take shape, thanks to the work of Frank von Litz.

According to (Ochoa et al., 2022), the doctrinal debate based on the systematic placement of subjective elements gradually gave way to a new framework, which is attributable not to a single author but to the collective thinking of several authors, including Goldschmidt.

In this project, our priority is to present both positions, such as the general theory of crime, which indicates that it should not be understood as a simple logical order; rather, it involves levels that contribute to the logical-evaluative order, depending on causality, because these can be refined through filters such as behavior. The theories of **ratio cognoscendi** and **ratio essendi** do not underestimate the value of filters; their approach consists of extending or shortening these filters. Bacigalupo understands that current systems operate under a tripartite system; in contrast, proponents of the bipartite system reduce the filters, considering the assessment of typically unlawful and culpable behavior to be sufficient (Alikair et al., 2021).

Recent doctrine has linked the concept of punitive populism to restrictive interpretations of the grounds for exclusion from unlawfulness.

Characteristics of punitive populism:

- Emotional criminal justice responses
- Legislation reactive to high-profile cases
- Tightening of judicial standards

- Skepticism toward grounds for justification

From a rights-based perspective, it is evident that this phenomenon distorts the function of criminal law by prioritizing punishment over legal rationality (Zaffaroni, 2022).

Recently, constitutional case law has emerged as the sole driver in the evolution of the concept of unlawfulness, typically specifying grounds for exclusion in detail (Bien Jurídico, El Delito De Colusión & Pariona Arana, 2022). Based on a rights-based and constitutional approach to criminal law, the courts have moved beyond rigid conceptions of

traditional legal doctrine to adopt interpretations that are more substantive, contextual, and oriented toward the protection of fundamental rights.

Case law has served to reinforce the notion that unlawfulness is not reduced to a mere formal difference between an act and criminal law, but rather requires an exhaustive examination of the harm caused and the validity of the State's response (Alikair et al., 2021). In this context, various courts have indicated that the existence of a criminal offense is merely a starting point in criminal analysis; it is essential to examine whether the conduct in question truly harms the legal order as a whole. This perspective has been crucial for avoiding immediate punitive responses and for establishing a more measured and balanced criminal process.

16

From a constitutional perspective, oversight bodies have emphasized that any manifestation of illegality must be consistent with the principles and rights enshrined in the Constitution (Arroyo & Arroyo, 2022). Legal doctrine has held that a criminal charge is legitimate only when it is precise, balanced, and reasonable, which implies that certain typical acts may not be unlawful if their punishment has an excessive impact on essential rights such as human dignity, individual autonomy, or the right to a defense. Consequently, the analysis of unlawfulness has become a forum for reviewing the exercise of the right to impose sanctions.

Regarding self-defense, recent criminal rulings have taken a more practical and realistic interpretive approach (Cusi, 2022). It has been accepted that the analysis of this ground for exclusion must be conducted by examining the specific details of the case and the defendant's state of mind at the time of the events. The judges stated that a person acting in self-defense cannot be expected to react perfectly or without error, especially in moments of imminent danger (Leal, 2022). This shift in case law has helped take into account factors such as reasonable fear, the speed of the attack, and proportionality viewed in context, moving away from overly formalistic requirements that undermine the protective purpose of legitimate self-defense.

An important aspect of how courts interpret the Constitution is how they apply the pro persona principle when analyzing the grounds for not classifying an act as a crime. This principle holds that, if there are multiple ways to interpret a criminal law, the interpretation that is most favorable to the individual must be chosen. This has led judges

to favor broad interpretations of the grounds justifying such a decision (Martínez Oblitas, 2023). It also limits punitive approaches that unnecessarily expand the scope of what is considered a crime. Consequently, the grounds for excluding an act from criminal liability are now stronger as a defense against the state's power to punish.

In short, recent contributions from constitutional and criminal rulings have been crucial in redefining unlawfulness as a complex analysis that is constantly evolving and focused on the protection of the individual. The grounds for exclusion no longer appear as secondary exceptions but have been established as essential elements of the criminal justice system, necessary to ensure rationality, humanity, and legitimacy in the application of punishment (Benavente Chorres, 2023c). This progress in the rulings shows a clear shift toward a particular model.

17

Today, both in theory and in judicial decisions, the concept of illegality and the grounds for excluding it are hotly debated topics. This is especially true when it comes to fully understanding their limits and how they are applied in real life. Although almost everyone agrees that they are important for ensuring that criminal law functions properly, there are many different opinions on how far these ideas should go (Estrada Londoño, 2024). The goal is to prevent crimes from going unpunished, but also to prevent the government from using its power to punish unfairly (Bustos et al., 2024). These differences show that illegality is not a fixed concept, but rather an idea that is constantly changing and being reinterpreted.

Furthermore, the link between unlawfulness and human rights has sparked new discussions regarding the review of conformity with international standards in the field of criminal law. In particular, researchers are examining whether certain common concepts in criminal law are consistent with international criteria for the protection of fundamental rights (Joan & Zabaleta, 2020). Recent rulings have revealed conflicts between domestic criminal laws and global treaties, forcing a reevaluation of the concept of unlawfulness from a supranational perspective. This development reinforced the idea that criminal law today cannot be understood separately from international human rights law.

There is now renewed debate about the role of the judge in determining whether an act is criminally unlawful. Some believe that the judge should simply apply the laws as they are written. Others believe that judges should uphold rights and make significant

interpretations to ensure justice is served (Liseth et al., 2024). This discussion is particularly relevant in constitutional systems. In such systems, criminal judges must balance the law with important values such as human dignity and the principle of just punishment.

Conclusions

We can conclude that this state-of-the-art analysis we conducted helped us conceptualize certain definitions for our professional development, particularly regarding how to view legal doctrine, regulations, and the case law associated with each legal field. This greatly aided us in conducting a coherent analysis rather than a piecemeal one, proving very useful when establishing a methodology.

There were also certain sections where the sources consulted demonstrated to us that unlawfulness is a constantly evolving category; this means that the constitutionalization of criminal law—where human rights are subject to constant change—represents a transformation of the concerns surrounding the application of cases defined by exclusion.

Throughout the study, the significance of case law as an active source of criminal law creation was highlighted, as it allowed for a comparison between theory and judicial practice. The analysis of case law provided a deeper insight into the limitations and scope of the State's punitive power in specific cases.

References

- Acosta Alcántara, B. S. (2024). Legal grounds for reducing the statute of limitations for criminal prosecution in cases of attempted crimes. *National University of Cajamarca*. <http://repositorio.unc.edu.pe/handle/20.500.14074/7267>
- Alikair, A., Calderón, L., Héctor, A., & Rojas Rodríguez, F. (2021). *The illegitimate Functionality of Criminal Law Regarding the Liability of Legal Entities*. Pontifical Catholic University of Peru. <http://hdl.handle.net/20.500.12404/18000>

- Aráuz, R. D., Moposita, W. O., Sánchez, Y. P., & Mite, G. V. (2024). Unlawfulness in Criminal Law: Concepts, Types, and Relevance in the Legal System. *Revistalexenlace*, 1(1), 1–9. <https://doi.org/10.26807/rr.vi02.28>
- Arroyo, C. G., & Arroyo, C. G. (2022). On the Concept of a Legal Interest. Special Consideration of Supraindividual-Institutional Legal Interests. *Electronic Journal of Criminal Science and Criminology*, 24. <http://criminnet.ugr.es/recpc>
- BARRAGÁN GAVILANES. (2022). “SAPIENTIA OMNIUM POTENTIOR EST” DEPARTMENT OF GRADUATE STUDIES AND CONTINUING EDUCATION THESIS SUBMITTED FOR DEGREE.
- Benavente Chorres, H. (2023a). *The Methods and Systems of Criminological Theory*. 267. <https://elibro.net/es/lc/sibdi/titulos/232962>
- Benavente Chorres, H. (2023b). *Methods and Systems in Criminological Theory*. 267. <https://elibro.net/es/lc/sibdi/titulos/232962>
- Benavente Chorres, H. (2023c). *Methods and Systems in the Theory of Crime*. 267. <https://elibro.net/es/lc/sibdi/titulos/232962>
- Legal Interest: The Crime of Collusion, E. E., & Pariona Arana, R. (2022). The legal interest in the crime of collusion. *Giuristi: Journal of Corporate Law*, 3(6), 78–94. <https://doi.org/10.46631/giuristi.2022.v3n6.06>
- Busato, P. C., & Montes Huapaya, S. (2020). *Introduction to Criminal Law: Foundations for a Democratic Criminal Justice System*.
- Bustos, L. A. G., Falcon, L. I. O., Subia, C. P. U., <https://dialnet.unirioja.es/servlet/autor?codigo=6465829>, <https://dialnet.unirioja.es/servlet/autor?codigo=6465830> & <https://dialnet.unirioja.es/servlet/autor?codigo=6465831>. (2024). Legal Entities and Grounds for Exclusion from Criminal Liability. *Ciencia Latina: Journal Multidisciplinary*, e-ISSN 2707-2215, ISSN 2707-2207, Vol. 8, No. 3, 2024, pp. 378–390, 8(3), 378–390. https://doi.org/10.37811/cl_rcm.v8i3.11227
- Catalán Peralta, M. I. (2025). *On the Compatibility Between a Hegelian Conceptualization of Action and the Two-Level Analytical Model of Criminal Legal Imputation*. <https://repositorio.uchile.cl/handle/2250/208447>
- Chimbo, M., María, R., Santillán Molina, I., & Ii, A. L. (2021). PARAMETERS FOR COMPLIANCE WITH AN ORDER ISSUED BY A COMPETENT AUTHORITY AS A GROUND FOR EXCLUSION OF UNLAWFULNESS. *Debate Jurídico Ecuador*, 4(1), 28–41. <https://revista.uniandes.edu.ec/ojs/index.php/DJE/article/view/2488>

- Cornejo Aguiar, J. S., Agurto Gonzáles, C. Antonio, Quequejana Mamani, S. Lidia, & Choque Cuenca, Benigno. (2019a). *The Theory of Unlawfulness and the Grounds for Justification*.
- Cornejo Aguiar, J. S., Agurto Gonzáles, C. Antonio, Quequejana Mamani, S. Lidia, & Choque Cuenca, Benigno. (2019b). *Theory of Unlawfulness and Grounds for Justification*.
- Cornejo Aguiar, J. S., Agurto Gonzáles, C. Antonio, Quequejana Mamani, S. Lidia, & Choque Cuenca, Benigno. (2019c). *Theory of Unlawfulness and Grounds for Justification*.
- Cornejo Aguiar, J. S., Agurto Gonzáles, C. Antonio, Quequejana Mamani, S. Lidia, & Choque Cuenca, Benigno. (2019d). *Theory of Unlawfulness and Grounds for Justification*.
- Cornejo Aguiar, J. S., & Piva Torres, G. Egidio. (2021a). *Theory of Unlawfulness and Grounds for Justification*. 264.
- Cornejo Aguiar, J. S., & Piva Torres, G. Egidio. (2021b). *Theory of Unlawfulness and Grounds for Justification*. 264.
- Cornejo Aguiar, J. S., & Piva Torres, G. Egidio. (2021c). *Theory of Unlawfulness and Grounds for Justification*. 264.
- Cornejo Aguiar, J. S., & Piva Torres, G. Egidio. (2021d). *Theory of Unlawfulness and Grounds for Justification*. 264.
- Cornejo Aguiar, J. S., & Piva Torres, G. Egidio. (2021e). *Theory of Unlawfulness and Grounds for Justification*. 264.
- Cusi, J. (2022). *Constitutional Criminal Law, Criminal Procedure, and Due Process - José Luis Cusi Alanoca - Google Books*.
https://books.google.com.ec/books?hl=es&lr=&id=FJdAEQAAQBAJ&oi=fnd&pg=PA39&dq=2.4.%09Fundamentos+del+garantismo+penal&ots=oulsIjxOkP&sig=J9xkEf4v9P9uVuX0fFkJSnTmb2c&redir_esc=y#v=onepage&q&f=false
- De Derecho, C., Alberto, J., Ortega, A., Carlos, J., & Quizhpi, L. (2023). *Illegality: The Problem with Consent in the Comprehensive Organic Criminal Code*. <http://dspace.uazuay.edu.ec/handle/datos/12950>
- Dohna-Schlodien, Alexander, Agurto Gonzáles, C. Antonio, Quequejana Mamani, S. Lidia, Choque Cuenca, Benigno, & Fontán Balestra, Carlos. (2021). *The Structure of Criminal Theory*.
- Eduardo, J., Chavez, B., Antonio, J., & Santana, A. (2021). *THE CONCEPT OF UNLAWFULNESS IN ECUADOR'S CURRENT CRIMINAL LAW*.
- Estrada Londoño, H. D. (2024). *Partial criminal responsibility and criminal policy aimed at the criminal treatment of psychopaths from a neuroscientific perspective*.
<https://doi.org/10.60909/BDIGITAL/HANDLE.001.12025>

- Gil, A. G. (2018). *International Criminal Law: Special Consideration of the Crime of Genocide*. <https://dialnet.unirioja.es/servlet/tesis?codigo=40616&info=resumen&idioma=SPA>
- Gomes dos Santos, H., & Pizzotti Faiçal, L. (2024). Contemporary Trends in Criminal Liability. *Law Review*, 23(46), e466. <https://doi.org/10.47274/DERUM/46.6>
- Guamán Chacha, K. A., Ríos Guamán, V. M., & Yuqui Villacrés, C. S. (2021). The Theory of Crime: Philosophical Foundations. *Contemporary Dilemmas: Education, Politics, and Values*, 8(SPE3). <https://doi.org/10.46377/dilemas.v8i.2697>
- Holger, M., & Tandazo, A. (2021). The Absence of Error in Ecuador's Comprehensive Organic Criminal Code as a Justification for Criminal Conduct. *Revista Conrado*, 17(83), 70–79. <https://conrado.ucf.edu.cu/index.php/conrado/article/view/2059>
- Joan, C., & Zabaleta, F. (2020). *The criminal liability of political parties in Colombia and restorative justice in punishment*. <https://repositorio.unal.edu.co/handle/unal/79296>
- La, D. E., En, A., Contexto, E. L., Contemporáneo, J., Correa Manzano, D. E., Diaz Basurto, I. J., Elías, C., Paucar, P., Manzano, C., & Basurto, D. (2025). Challenges of Illegality in the Contemporary Legal Context. *University and Society*, 17(2), e5056–e5056. <https://rus.ucf.edu.cu/index.php/rus/article/view/5056>
- Leal, I. P. E., & <https://dialnet.unirioja.es/servlet/autor?codigo=3654909>. (2022). Historical Evolution of the Theory of Criminal Legal Interest. *Archives of Criminology, Private Security, and Criminalistics, ISSN-e 2007-2023*, No. 29, 2022, pp. 140–160, 10(29), 140–160.
- Liseth, N., Fernández, R., Patricia, S., Heredia, S., Rolando, M., Morejón, F., Luis, J., Pacheco, V., Fabricio, A., & Sandoval, E. (2024). Determining the grounds for exclusion from unlawfulness in euthanasia. *Sinergia Académica*, 7(Special Issue 7), 568–590. <https://doi.org/10.51736/0JGYKZ69>
- Martínez Oblitas, C. M. (2023). *Reward-Based Criminal Law: Effective Informing and Terrorist Repentance as a State Criminal Policy for Social Control*. <https://repositorio.unprg.edu.pe/handle/20.500.12893/11351>
- Mila, F. (2023). *Manual of Criminal Law: General Part: Dogmatic Foundations of the Theory of Crime from the Perspective of*

- Constitutional Functionalism.* 877.
<https://elibro.net/es/lc/sibdi/titulos/232935>
- Ochoa, C., Shocrón, A., Tenaglia, Y., María, A., & Marini E-Bo, V. (2022). *UniR or Editor: Criminal Law I*. www.unirioeditora.com.ar
- Ortiz, J. G. V., Masías, S. P. S., Quiñonez, R. I. V.,
<https://dialnet.unirioja.es/servlet/autor?codigo=5206106>,
<https://dialnet.unirioja.es/servlet/autor?codigo=5206107> &
<https://dialnet.unirioja.es/servlet/autor?codigo=5344631>. (2021).
 Criminal Offense Classification: From a Finalist Approach to Crime.
Polo Del Conocimiento: Scientific-Professional Journal, ISSN-e 2550-682X, Vol. 6, No. 3, 2021, pp. 1626–1637, 6(3), 1626–1637.
<https://doi.org/10.23857/pc.v6i3.2459>
- Padilla Rojas, A. I. (2023). *The Right to Equality in Age-Based Limited Liability: Jurisprudential Contradictions Between the Constitutional and Criminal Chambers of the Supreme Court*.
<http://repositorio.unprg.edu.pe/handle/20.500.12893/10964>
- Pawlik, Michael. (2022). *The Duty of Citizen Cooperation in Criminal Law and the Position of the Excluded: Conference Proceedings Series No. 64*.
- Pokol. (2023). *Studies in Criminal Law Theory by Béla Pokol*.
- Rodríguez Reyes, M. P. (2023). *The Charge of Material Unlawfulness in the Crime of Defamation When the Honor of a Public Servant and Freedom of the Press Are at Stake*.
<http://dspace.uazuay.edu.ec/handle/datos/13084>
- Rubio Correa, Marcial, & Arce Ortíz, E. Guillermo. (2021). *Essential Theory of the Legal System*.
- Tovar, A. N. (2022). *Punitive Populism: A Critique of Modern Criminal Discourse*. 6.
https://books.google.com/books/about/Populismo_punitivo.html?hl=es&id=pqIGEA AAQBAJ
- Valarezo Trejo, E. E., Valarezo Trejo, R. L., & Durán Ocampo, A. R. (2019). Some Considerations on Criminal Offense Classification in Criminal Theory. *Revista Universidad y Sociedad, 11(1), 331–338*.
http://scielo.sld.cu/scielo.php?script=sci_arttext&pid=S2218-36202019000100331&lng=es&nrm=iso&tlng=es
- Ventura Granados, F. M. (2025). *Adaptation of Traditional Categories of Crime as the Basis for the Punishability of Legal Entities*.
<http://repositorio.unprg.edu.pe/handle/20.500.12893/15962>
- Zaffaroni, E. R., Bailone, M., Romero, G. N., Schünemann, B., Lascuraín, J. A., Molina Fernández, F., Fernández, J. R. S.-P., & Demetrio-Crespo, E. (2021). *Dogmatic Debates on Contemporary Criminal Law*. 1–200.