Implementation Of The Principle Of Ultimum Remedium In Administrative Criminal Law As The Embodiment Of The Law Of The Pancasila State

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ABSTRACTION

Indonesia is a constitutional state, which means that the state and all elements and processes therein are subject to the law. The purpose of this research is to find out whether the principle of ultimum remedium is a moral principle or a legal principle. The research method used is a normative legal research approach with a conceptual approach. Based on the results of this study, the principle of ultimum remedium is a moral principle as well as a legal principle. Thus the principle of ultimum remedium must be applied consistently. Furthermore, the principle of ultimum remedium should be included in laws and regulations including in the field of Administrative Law because it gives rise to legal certainty, is easy to identify, and is easy to make and replace when it is no longer needed or no longer appropriate.

Keywords: ultimum remedium principle, moral principle, legal principle, legislation

ABSTRAKSI

Indonesia adalah negara hukum, artinya negara beserta segala unsur dan proses di dalamnya tunduk pada hukum. Tujuan dari penelitian ini adalah untuk mengetahui apakah asas ultimum remedium merupakan asas moral atau asas hukum. Metode penelitian yang digunakan adalah pendekatan penelitian hukum normatif dengan pendekatan konseptual. Berdasarkan hasil penelitian ini, asas ultimum remedium merupakan asas moral sekaligus asas hukum. Dengan demikian prinsip ultimum remedium harus diterapkan secara konsisten. Selanjutnya asas ultimum remedium harus dicantumkan dalam peraturan perundang-undangan termasuk di bidang Hukum Tata Negara karena menimbulkan kepastian hukum, mudah diidentifikasi, serta mudah dibuat dan diganti apabila sudah tidak diperlukan lagi atau tidak lagi diperlukan. sesuai.

Kata kunci: asas ultimum remedium, asas moral, asas hukum, perundang-undangan

A. Background

Article 1 paragraph (3) of the 1945 Constitution states that "Indonesia is a state based on law." This statement clearly implies that normatively constitutive law in the Republic of Indonesia has a very high and fundamental position, as well as a declaration that Indonesia is a constitutional state. The basic understanding of a rule of law state is that power grows on the law and everyone is subject to the law.[1] R. Supomo, in his book "Provisional Constitution of the Republic of Indonesia" has defined the term rule of law as follows: ... that the Republic of Indonesia was formed as a rule of law, meaning that the state will be subject to the law, legal regulations also apply to all entities. and state equipment.[2] F. Julius Stahl stated that the characteristics or elements of a rule of law in the classic sense are first, the protection of human rights. Second, there is separation or division of state power to guarantee human rights. Third, government based on regulations. Fourth, there is administrative justice.[3]

The rule of law in Indonesia's perspective is different from the type of rule of law that exists, which can be seen in the post-amendment to the 1945 Constitution. Prior to the amendment to the 1945 Constitution, the statement and affirmation of Indonesia as a rule of law state is contained in the explanation which states "Indonesia is based on law (rechtsstaat) ...,". The word "rechtsstaat" in the explanation suggests that the law in the concept of a rule of law in Indonesia adopts the concept of a rule of law in countries that adhere to the civil law tradition or Continental Europe. After the amendment to the 1945 Constitution, an explanation containing a normative statement that Indonesia is a state based on law was accommodated in the amendment to the 1945 Constitution, namely in Article 1 paragraph (3) of the 1945 Constitution, which states "Indonesia is a state based on law." The word "rechtsstaat" which originally existed, in this change is no longer there. This means that the legal state of

[1] Irfan Nur Rachman, *Politik Hukum Yudisial: Sumber Pembangunan Hukum Nasional*, Depok: Rajawali Pers, 2020, hal.125.

[2] Abdul Mukthie Fadjar, *Negara Hukum dan Perkembangan Teori Hukum: Sejarah dan Pergeseran Paradigma*, Malang: Instrans Publising, 2018, hal. 6.

[3] S.F. Marbun, *Peradilan Administrasi Negara dan Upaya Administratif di Indonesia*, Yogyakarta: Liberty, 1997, hal. 9.

Indonesia does not adopt the concept of rechtsstaat or the concept of rule of law, but rather a combination of both..[4]

According to Moh. Mahfud MD, the omission of the word "rechtsstaat" in the amendment to the 1945 Constitution, implies the existence of a prismatic concept of a rule of law, namely the incorporation of good elements from various different concepts into an integrated concept, whose implementation is adapted to demands and developments.[5] Indonesia does not adhere to the concept of "rechtsstaat" or "rule of law" but instead forms a new concept of a rule of law state, namely the Pancasila legal state, which is a crystallization of views and a philosophy of life that is loaded with the noble ethical and moral values of the Indonesian nation, as stated in the Preamble of the 1945 Constitution. and implied in the articles of the 1945 Constitution.[6] In this context, the concept of Indonesia's rule of law state is the concept of a Pancasila based state which accepts the principle of legal certainty in the rechtsstaat concept, while simultaneously accepting the principle of justice in the rule of law concept, as well as spiritual values in the concept of religious law. Written law and all procedural provisions are accepted in the Indonesian legal state in order to uphold justice. The same thing was conveyed by Bagir Manan, that the new formulation contained in the 1945 Constitution is not fixated on one ideology of a rule of law, but includes all the elements needed for the establishment of a rule of law and democracy. Thus, the content of the rule of law becomes wider, and can accommodate all the dynamics of society and the state.[7]

Related to Administrative Law, its existence in a welfare state is a means of controlling the extent of government interference in various aspects of human life. Government interference (government administrators) in various aspects of people's lives as adhered to in the concept of the welfare state, has developed in such a way as to become an understanding of interventionism which is the justification for the participation of the state in every socio-economic activity.

[4] Irfan Nur Rachman, *Op.,Cit*, hal. 32.
[5] *Ibid*, hal. 32.
[6] Rocky Marbun, *Politik Hukum Pidana dan Sistem Hukum Pidana Di Indonesia: Membangun Filsafat Pemidanaan Berbasis Paradigma (Filsafat) Hukum Pancasila*, Malang: Setara Press, 2019, hal. 171.
[7] Irfan Nur Rachman, *Op.Cit*., hal. 32.

This tendency has strong implications for the prominence of general prevention in that the state, through its supporting instruments, seeks to be involved as a form of protection for society more broadly.[8] Philipus M. Hadjon said that through administrative law, it has enabled the state in carrying out its function to protect citizens against the actions of government administrators, as well as protecting the government administrators themselves.[9]

According to Sir Ivor Jening, administrative law is law relating to government, which determines the organization, powers, and obligations or duties of government agencies.[10] A.W. Bradley and K.D. Ewing argued that Administrative Law has 3 (three) functions, namely making government tasks workable, regulating relations between public bodies, and regulating relations between public bodies and individuals or private legal entities.[11] Meanwhile, the main objective of administrative law according to H.W.R. Wade's goal is to keep government power within its boundaries, while protecting citizens against the government's abuse of power.[12]

In order to enforce Administrative Law so that it is complied with and implemented, instruments are needed that are able to encourage compliance with the provisions stipulated in Administrative Law. According to J.B.J.M ten Berge, the instrument is in the form of monitoring and imposing sanctions. Supervision is a preventive step to enforce compliance, while the application of sanctions is a repressive step to enforce compliance.[13]

As with other laws, Administrative Law also has a set of sanctions in the event of a violation of the norms or provisions in it. Sanctions are an important closing part of the law. There will be no use for the government to stipulate obligations and prohibitions for society without including a sanction in it. This sanction strengthens a legal instrument so that the law has authority. The existence of sanctions will maintain the authority of agencies or officials enforcing laws and

[8] Septa Candra, *Perumusan Ketentuan Pidana Dalam Hukum Pidana Administratif*, Jakarta: Kencana, 2021, hal. 42.

[9] D. Andhi Nirwanto, A*sas Kekhususan Sistematis Bersyarat Dalam Hukum Pidana Administrasi dan Tindak Pidana Korupsi*, Bandung: Alumni, 2015, hal. 97, hal. 99.

[10] A'an Efendi dan Freddy Poernomo, *Hukum Administrasi*, Jakarta: Sinar Grafika, 2017, hal. 4.

[11] *Ibid*, hal. 26.

12 *Ibid*, hal. 26.

[13] *Ibid*, hal. 296.

regulations. Thus, sanctions are repressive efforts to force compliance.[14] This was also stated by Philipus M. Hadjon that in general there is no point in including obligations and prohibitions for citizens in administrative laws and regulations, when the rules of conduct cannot be imposed by government administrators. One of the instruments to force the behavior of these citizens is sanctions. Therefore, sanctions are often an inherent part of certain legal norms.[15]

According to Yudhi Setiawan, et al, sanctions in Administrative Law consist of regressive sanctions, reparatory sanctions, punitive sanctions, and cumulative sanctions. Regressive sanctions (regressive sanctions) are sanctions imposed on violations of the provisions contained in the stipulation. This sanction is aimed at the original legal situation prior to the issuance of the decision. For example, withdrawing, changing, and postponing a decision (de intrekking, de wijziging, of de schorsing van een beschikking). Reparatoir sanctions are sanctions imposed on violations of administrative law norms in general. For example, government coercion (bestuursdwang) and imposition of forced money (dwangsom). Punitive sanctions are sanctions aimed at giving punishment (straffen) to someone (uitsluitend de sancties die ertoe strekken om een persoon te 'straffen). For example, the imposition of administrative fines (bestuurs boete). Cumulative sanctions are the application of sanctions jointly between administrative law and other laws. Administrative law laws and regulations often contain not only one type of sanction, but several types of sanctions which are cumulatively imposed (together). This cumulation sanction consists of internal accumulation and external cumulation.

1. Internal accumulation is the application of two or more administrative sanctions together. For example, termination of administrative services and/or revocation of licenses, and/or imposition of fines.
2. External accumulation, is the application of administrative sanctions and criminal sanctions or civil sanctions.[16]

[14] Yudhi Setiawan, dkk, *Hukum Administrasi Pemerintahan Teori dan Praktik*, Depok: Rajawali Pers, 2017, hal. 201.

[15] *Ibid*, hal. 298.

[16] Yudhi Setiawan, dkk, *Op.Cit*., hal.203.

The existence of external cumulative sanctions that apply criminal sanctions in addition to administrative sanctions indicates that there is use or utilization of criminal law in enforcing Administrative Law.

Indriyato Seno Adji said that at the current level of legislation, there is a tendency for legislation in various fields, as administrative regulations containing criminal sanctions or commonly referred to as administrative penal law. Legislation products in the field of administration which contain criminal sanctions are spread across various sectors, such as banking, taxation, mining, telecommunications, state administration, and so on.[17] This opinion is in line with what was done by Barda Nawawi Arief who identified that during the 1985-1995 period there were 29 (twenty nine) legislative products in the form of laws which contained the chapter "criminal provisions". In fact, there are at least 25 (twenty five) statutory products which contain provisions on administrative criminal acts.[18]

Administrative penal law or administrative criminal law, according to Sudarto, is called government criminal law, so it is also known as "Verwaltungsstrafrecht" and "Bestuursstrafrecht".[19] Barda Nawawi Arief, defines administrative criminal law as criminal law in the field of administrative law violations.[20] Furthermore, Barda Nawawi Arief stated that administrative criminal law, in essence, is an embodiment of the policy of using criminal law as a means to enforce or implement administrative law[21]

Talking about the purpose of criminal law according to Eddy O.S. Hiariej, it is impossible to be separated from the currents in criminal law, which in general there are only 2 (two) streams, namely the classical school and the modern school. First, the classical school, that the purpose of criminal law is to protect individual interests from the arbitrariness of the authorities. This flow is based on 3 (three) principles, namely the principle of legality, the principle of guilt and the principle of secular retaliation. The principle of legality, which states that there is no crime

[17] D. Andhi Nirwanto, *Op.Cit*., hal. 7.
[18] *Ibid*, hal. 108.
[19] Maroni, *Pengantar Hukum Pidana Administrasi*, Bandar Lampung: Aura, 2015, hal. 25.
[20] *Ibid*, hal. 25.
[21] Hariman Satria, *Op. Cit*, hal. 9.

without a law, no crime without a law, and no prosecution without a law. The principle of guilt, which states that people can only be punished for criminal acts committed intentionally or negligently. The principle of secular retaliation, which states that punishment is concretely not imposed with the intention of achieving a useful result, but is commensurate with the severity of the act committed. Second, the modern school, the purpose of criminal law is to protect society from crime. This goal adheres to the postulate le salut du people est la supreme loi, which means that the highest law is the protection of society. This flow is also called a positive flow, because it seeks the causes of crime using natural science methods with the intention of influencing the perpetrators of crimes positively as far as they can be corrected. This flow is based on fighting crime, paying attention to other sciences, and the principle of ultimum remedium. Paying attention to other sciences, namely protecting society from crime cannot rely solely on criminal law, but it is necessary to pay attention to other sciences, such as criminology, psychology and so on. Meanwhile, the principle of ultimum remedium means that criminal law is the ultimate weapon or the last means used to resolve a legal issue. Frank von Lizt stated that criminal law is a substitute for other legal domains.[22]

With regard to the principle of ultimum remedium which in the common law legal system is often referred to as "last resort" or "ultima ratio", where the application of this principle in legislation in the field of Administrative Law there are still differences of opinion, and questions that are often asked by experts criminal law is whether the ultimum remedium or ultima ratio is a moral principle or a legal principle. this question is the same as Panu Minkkinen's statement, "the nature of last resort is it merely a non-binding moral guideline affecting criminal law legislation or is it a principle has suggested even constitutional practices". Panu Minkkinen implicitly emphasizes that the status of the principle of ultimum remedium is actually unclear. It seems to be between moral principles and legal principles.[23] According to Hariman Satria, what was questioned by Panu Minkkinen is reasonable, because so far there has been confusion over the status of criminal law as ultimum remedium. On the one hand, if you pay attention to the

[22] Eddy O.S. Hiariej, *Op.Cit*., hal. 28.
[23] Hariman Satria, *Op. Cit*, hal. 36.

history of the formation of the Criminal Code, since the beginning it has been emphasized as a last resort. But on the other hand, this is not accompanied by consistency in criminal justice practices, or at least integrated into the guidelines for sentencing.[24]

B. Problem Formulation

Based on the background above, the problem is formulated as follows:

1. Is the principle of ultimum remedium a moral principle or a legal principle.
2. In order to guarantee legal certainty, does it need to include the principle of ultimum remedium in legislation, particularly administrative legislation

C. Research Methodology

This study uses a normative legal research approach with the approach method used is the conceptual approach, which is a type of approach in legal research that provides an analysis point of view of solving legal research problems seen from the aspect of the legal concepts behind it, or even can be seen of the values contained in the normalization of a rule in relation to the concepts used.[25]

D. Finding & Discussion

1. The principle of ultimum remedium is a moral principle as well as a legal principle**.**

The principle of ultimum remedium is said to be a moral principle, if the principle only provides a guideline, especially in drafting legislation, whether criminal law needs to be used or not. Thus ultimum remedium is only a moral guideline, especially in making criminal legislation so that it prioritizes other means besides criminal law in an effort to overcome, overcome, prevent problems/conflicts in society, both non-legal and legal means (which are not criminal law). . Meanwhile, the principle of ultimum remedium is said to be a legal principle, if the obligation to apply ultimum remedium is regulated in a certain law, moreover there are implications for violating the ultimum remedium, there are consequences or legal consequences. Moreover, if obligations are contained in a constitution, of course it becomes even more binding on legislators (the government and the DPR). As a result of neglecting this obligation, of course,

[24] Ibid, hal. 37.

[25] Irwansyah, *Penelitian Hukum Pilihan Metode dan Praktik Penulisan Artikel*, Cet-IV, Yogyakarta: Mirra, 2021, hal. 147.

the criminal provisions in the law can be repealed through judicial review of the law.[26]

The term moral comes from the Latin (Greek) "moralis, mos, moris" which means customs, customs, habits, ways, behavior, and behavior. It can also be interpreted as "mores" which is a picture of customs, behavior, character, character, morals, and way of life. This term in English, known as "moral".[27] According to Franz Magnis Suseno, the word moral always refers to the good and bad of humans as humans. The moral field is the field of human life in terms of its goodness as a human being. Moral norms are benchmarks for determining the rightness of human attitudes and actions in terms of the good and bad as humans and not as actors of certain and limited roles.[28] Meanwhile, according to Lorens Bagus, morals in general can be interpreted as follows:

Concerning human activities that are seen as good/bad, right/wrong, appropriate/inappropriate.In accordance with accepted norms, regarding what is considered right, wise, just, and appropriate. Having the ability to be directed by or influenced by awareness of right and wrong, and the ability to direct or influence others according to the rules of behavior that are considered right or wrong. Concerning the way a person behaves in relation to other people.[29]

Furthermore, the definition of law according to Abdul Manan, that law is a set of rules regarding human behavior that is recognized by a group of people, prepared by people who are authorized by that community, applies and binds to all members of society in a country.[30] Thus, based on the opinions of Franz Magnis Suseno and Lorens Bagus regarding the notion of morals, and Abdul Manan's opinion regarding the notion of law, there are similarities between morals and law, namely that they both regulate human behavior that is considered good or bad by society. This is in line with the view of H.M. Agus Santoso, that between law and morals there is a very close relationship, because actually the law is part of the moral guidance that humans experience in their lives. This illustration requires that humans live together in accordance with moral principles,

[26] Topo Santoso, *Hukum Pidana Suatu Pengantar*, Depok: Rajawali Pers, 2020, hal. 126.
[27] Sukarno Aburaera, dkk, *Filsafat Hukum*, Jakarta: Kencana, 2013, hal. 162.
[28] *Ibid*, h. 162.
[29] *Sukarno* Aburaera, dkk, Op. Cit., hal. 162.
[30] Abdul Manan, Dinamika Politik Hukum Di Indonesia, Jakarta: Kencana, 2018, hal. 7.

and therefore, in forming regulations, both in the form of laws and other regulations in writing or unwritten which are positive law, must be based on good morals, including also in the settlement of legal disputes, must also be based on sound morals. If in the formation of law ignores morals, it will surely obtain pseudo-justice.[31]

In Lon L. Fuller's view, a legal system is considered valid if it has moral principles. These moral principles are general laws, enacted (promulgation), known to everyone included in the system, not retroactive. Clear, not contradictory, has the possibility to be complied with, remains, and there is conformity between the promulgated rules and their implementation. The eight principles are affirmative in nature, meaning that law-making must be adjusted to these eight principles.[32]

The same thing was also conveyed by Salman Luthan that morals have a close relationship with criminal law, because morals are a source of value for the formation of criminal law. Some of the principles of criminal law that regulate crime (crimes) originate from moral principles that live in society. Immoral acts are legalized into criminal acts according to criminal law through decisions of the legislature. When an immoral act is legalized into a criminal act, it means that there is harmony between morals and criminal law.[33] Even in legal literature, especially in the Japanese legal system, law is interpreted or identified with morality, namely law is morality.[34] Based on this description, the principle of ultimum remedium is a moral principle as well as a legal principle because the two cannot be separated from one another.

2. **Inclusion of the principle of ultimum remedium in laws and regulations in the field of Administrative Law in the framework of realizing just legal certainty.**

As a moral principle as well as a legal principle, the ultimum remedium principle should be stated in laws and regulations, including laws and regulations

[31] H.M. Agus Santoso, Hukum, Moral, dan Keadilan, Cet-II, Jakarta: Kencana, 2014, hal. 95.

[32] Petrus C.K.L. Bello, Hukum dan Moralitas: Tinjauan Filsafat Hukum, Jakarta: Penerbit Erlangga, 2012, hal. 80.

[33] Salman Luthan, *Kebijakan Kriminalisasi Di Bidang Keuangan*, Yogyakarta: UII Press, 2014, hal. 46.

[34] Zainuddin Ali, *Filsafat Hukum*, Cet-IX, Jakarta: Sinar Grafika, 2019, hal. 78.

in the field of Administrative Law. This is in the framework of legal certainty so that the application of this principle no longer debates and differences because it has been stated in the legislation. The inclusion of the principle of ultimum remedium in laws and regulations is not taboo, let alone prohibited because there are several principles or legal principles that are concretely stated in legislation, for example:

a. The principle of pacta sunt servanda, that is, every agreement made by the parties is binding like a law (Article 1338 of the Civil Code).
b. The principle of legality, namely that there is no act that can be punished except based on the strength of criminal legislation that existed before the act was committed (Article 1 paragraph (1) of the Criminal Code).
c. The principle of ne bis in idem, that is, a person cannot be prosecuted more than once before a court with the same case (Article 76 of the Criminal Code).[35]

Legally normative, there is only one law and regulation in Indonesia which explicitly emphasizes the position of criminal law as ultimum remedium, namely in the General Explanation of Law Number 32 of 2009 concerning the Protection and Management of the Environment, at point 6 it reads "enforcement of environmental criminal law remains pay attention to the principle of ultimum remedium which requires the application of criminal law enforcement as a last resort after administrative law enforcement is deemed unsuccessful." Apart from that, it can be found explicitly in Article 100 paragraph (2) which reads: "Criminal acts that violate the waste, emission and nuisance quality standards can only be imposed if the administrative sanctions that have been imposed are not complied with or the violation is committed more than once.[36]

Thus, the principle of ultimum remedium should be included in laws and regulations, including in the field of Administrative Law, because according to HAS Natabaya, the advantages of laws and regulations as part of written law can give rise to legal certainty, are easy to identify, and are easy to make and replace when they are already in place. not needed or not suitable anymore[37] First,

[35] Zainal Arifin Mochtar dan Eddy O.S Hiariej, Op. Cit., hal 101.
[36] Hariman Satria, *Op.Cit.*, hal 35, 37.
[37] Mukhlis Taib, Dinamika Perundang-Undangan di Indonesia, Bandung: Refika Aditama, 2017, hal,. 18.

statutory regulations are legal rules that are easy to recognize or identify, rediscover and easy to trace. Second, As a rule of written law, the form, type and place are clear, as is the maker. Third, statutory regulations provide legal certainty that is more real because the principles are easy to identify and find again. Fourth, the structure and systematics of laws and regulations are clearer so that it is possible to be re-examined and tested, both from a formal perspective and from a material perspective. Fifth, the formation and development of laws and regulations can be planned. This factor is very important for countries that are building a new legal system that suits the needs and developments of society.

The same thing was also conveyed by Bagir Manan that the increasing role of laws and regulations occurred due to several things. First, statutory regulations are legal rules that are easy to recognize or identify, rediscover and easy to trace. As a rule of written law, the form, type, and place are clear, as is the maker. Second, statutory regulations provide legal certainty that is more real because the principles are easy to identify and find again. Third, the structure and systematics of laws and regulations are clearer so that they are possible to be re-examined and tested, both from a formal perspective and from the substance of the content. Fourth, the formation and development of laws and regulations can be planned. This factor is very important for countries that are building a new legal system that suits the needs and developments of society.

E. Conclusions and Suggestions

Based on the description above, it can be concluded as follows:

1. The principle of ultimum remedium is a moral principle as well as a legal principle because the two cannot be separated from one another, and the two complement each other. Even Lon L. Fuller stated that a legal system is considered valid if the legal system has moral principles.
2. The principle of ultimum remedium should be included in legislation, including in the field of Administrative Law, because according to HAS Natabaya, the advantages of statutory regulations as part of written law can give rise to legal certainty, are easy to identify, and are easy to make and replace when they are no longer valid. needed or no longer appropriate

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