



RESEARCH ARTICLE

The Essence Of The Principle Of Ultimum Remedium Tax Crimes In Indonesia As An Effort To Recover State Losses

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ABSTRACT

In Indonesian tax law, the principle *summum ius, summa iniuria* highlights the conflict between legal certainty and justice. Rooted in Gustav Radbruch's theory, this principle suggests that law must balance justice (*gerechtigheit*), utility (*zweckmäßigkeit*), and legal certainty (*rechtssicherheit*), which often leads to conflicting goals. Law No. 28 of 2007 on General Provisions and Procedures for Taxation (UU KUP) aims to provide stability and order in societal regulations. However, the law must remain dynamic to adapt to evolving human and societal needs. UU KUP facilitates flexibility in judicial interpretation by offering a broad framework for tax offenses, as seen in Article 8 regarding tax return obligations. This flexibility helps accommodate various legal scenarios and societal changes. The legal process in Indonesia involves four stages: legal principles (*rechtsbeginselen*), legal rules (*rechtsregels*), specific regulations (concrete *regels*), and jurisprudence (*jurisprudentie*). These stages reflect how abstract legal principles guide concrete law applications, as described in Article 4 of UU KUP. By using a broad and forward-looking approach, particularly in tax-related criminal acts, UU KUP aims to ensure the law's durability and inclusiveness. The principle of *ultimum remidium* emphasizes that criminal sanctions should be a last resort for resolving tax issues, as per Article 36 of UU KUP. Understanding these foundational principles is essential for applying tax law effectively, ensuring that legal provisions are both dynamic and just while upholding their core objectives.

INTRODUCTION

Taxes are the main source of revenue for the state, so tax law enforcement is crucial to maintain economic stability. In tax law enforcement, criminal sanctions are used to deal with serious offenses such as tax evasion. However, the application of criminal sanctions must still pay attention to individual rights and the principle of legal justice, as stipulated in Article 39 and Article 39A of Law Number 28 of 2007 concerning General Provisions and Tax Procedures (KUP Law).

Indonesia has carried out reforms in the tax system, one of which is through the concept of *Ultimum Remedium* which is reflected in Article 36 of the KUP Law. This concept emphasizes that criminal sanctions are only used as a last resort after other attempts have failed. This concept is important in tax law enforcement in Indonesia, because it maintains a balance between tax compliance and the protection of taxpayers' rights.

Tax law is included in the category of Public Law, specifically State Administrative Law or State Administrative Law. As part of administrative law, tax rules are made to achieve state goals as stated in the fourth paragraph of the Preamble to the 1945 Constitution. Article 23A of the 1945 Constitution provides a constitutional basis for tax law, which carries out two main functions: the budget function to collect revenue to finance state development and expenditure, and the

regulatory function to implement the government's economic policies, especially in an effort to realize social justice for all Indonesia people. The reform of the tax system in Indonesia began in 1983 with the enactment of Law Number 6 of 1983 concerning General Provisions and Tax Procedures (UU KUP). This law significantly changed the paradigm and taxation system from the official assessment model of the Netherlands heritage to a self-assessment system.

In its consideration, this law affirms that Indonesia is a country of law based on Pancasila and the 1945 Constitution, which respects the rights and obligations of its citizens. Therefore, taxation is seen as a manifestation of state obligations, in which citizens participate in state financing and national development. The explanation of the KUP Law notes that most of the tax laws in force at that time were colonial legacies, which basically only aimed to raise funds for the colonial government to strengthen its power in Indonesia. At that time, taxes were considered a heavy burden by the people, because the determination of the amount, type, and procedure of collection was carried out without regard to justice, the ability of the people, or their human rights. Taxes are seen as an obligation that must be complied with without paying attention to aspects of justice or respect for the rights of the people.

Criminal sanctions in taxation are applied only if other legal instruments, such as administrative or civil law, are no longer effective in recovering losses on state revenue. This is due to the fact that the application of criminal sanctions can be counterproductive to the main function of taxes as a source of state revenue. Therefore, crime in taxation is applied as the ultimate *remedium* (last step), where the main priority is the optimization of state revenue, not the criminal aspect. The implementation of criminal sanctions as an ultimate *remedium* aims to increase state revenue from the tax sector. Perpetrators of tax crimes are responsible for correcting state losses arising from their mistakes, so that in the application of legislation, state revenue takes precedence. Legal politics that position criminal sanctions in taxation as an effort to return state revenue affirms that criminal sanctions are used as the last step. Thus, taxpayers who do not fulfill their tax obligations will first be subject to administrative and civil sanctions before being subject to criminal sanctions.

The existence of criminal sanctions as the ultimate *remedium* in taxation has an economic purpose, namely to ensure that the tax law that is formed can maintain and optimize state revenue. Therefore, the formulation of criminal sanctions for fines against perpetrators of tax crimes is the main sanction (*preimum remedium*), while prison sentences are formulated as the last sanction that is only used as the ultimate weapon (*ultimum remedium*). The provision that regulates that criminal sanctions are a last resort (*ultimum remedium*) is contained in the explanation of Article 13A of Law Number 6 of 1983 concerning General Provisions and Tax Procedures (KUP Law), which has been amended by Law Number 16 of 2009. This article explains that criminal sanctions are only applied after administrative and civil sanctions are no longer effective in overcoming tax violations and returning losses to state revenue.

"The imposition of criminal sanctions is a last resort to increase taxpayer compliance. However, Taxpayers who violate the provisions as referred to in Article 38 for the first time are not subject to criminal sanctions, but are subject to administrative sanctions. Therefore, a Taxpayer who, due to his negligence, does not submit a Notification Letter or submit a Notification Letter, but the content is incorrect or incomplete, or attaches information whose content is incorrect so that it can cause losses to state revenue is not subject to criminal sanctions if the forgetfulness is first committed by the Taxpayer. In this case, the taxpayer is obliged to pay off the shortfall in payment of the amount of tax owed along with administrative sanctions in the form of an increase of 200% (two hundred percent) of the amount of underpaid tax."

Taxpayers as stipulated in Article 1 number 2 of Law Number 6 of 1983 concerning General Provisions and Taxation Procedures (KUP Law) and the Job Creation Law, are individuals or legal entities that include tax payers, withholders, and collectors, who have tax rights and obligations in accordance with applicable regulations. An entity, according to Article 1 number 3 of the KUP Law and the Job Creation Law, refers to a group of people and/or capital that form a unit, both

those who run a business and those who do not. It includes various forms of organizations such as limited liability companies, limited liability companies, state-owned enterprises, firms, partnerships, cooperatives, foundations, and various other forms of legal entities including collective investment contracts and permanent forms of business. For Corporate Taxpayers, tax rights and obligations are represented by their administrators in accordance with Article 32 paragraph (1) of the KUP Law and the Job Creation Law.

If a Corporate Taxpayer is involved in a tax crime or other criminal act, the responsibility belongs to the management or his representative personally and/or jointly for the payment of the tax payable, unless they can prove to the Director General of Taxes that they are unlikely to be burdened with such responsibility. If the Taxpayer does not take advantage of the provisions of Article 8 paragraph 3 and Article 44B of the KUP Law, the criminal violation will be processed in the general court. Enforcement of material criminal law in tax cases is carried out through an investigation process as stipulated in Article 44 of the KUP Law and the criminal procedure law in accordance with the Criminal Procedure Code.

Criminal sanctions for tax crimes are cumulative, with a minimum prison sentence of 6 months and a maximum of 6 years, as well as a fine of at least 2 times and a maximum of 4 times the amount of tax that is not or underpaid, in accordance with Article 39 of the KUP Law and the Job Creation Law. For other criminal acts, the sanction is imprisonment between 2 to 6 years and a fine between 2 times to 6 times the amount of tax in tax documents, as stipulated in Article 39A of the KUP Law and the Job Creation Law. In the provisions of Article 13 paragraph (5) and Article 15 paragraph (4) of the KUP Law, Taxpayers who have been convicted based on court decisions can still be subject to an Underpaid Tax Determination Letter plus an administrative sanction in the form of interest of 48% of the amount of tax that is not or is underpaid. However, this provision was removed in Law Number 11 of 2020 concerning Job Creation, which resulted in problems in the form of loss or reduction of the state's rights to tax revenues that should have been received.

In addition, criminal sanctions for tax crimes committed by Corporate Taxpayers can be imposed on the management or employees of the company concerned, either in the form of imprisonment or fines. The fine can be replaced (subsidized) with a prison sentence, which is a minimum of one day and a maximum of six months, if the convict is unable to pay the fine, in accordance with Article 30 of the Criminal Code. This provision has the potential to harm state revenue because of the possibility of ineffective recovery of fines through confinement.

Replacement of the fine with imprisonment can occur if the convict is unable to pay the fine imposed. This is due to the inability of the Prosecutor's Office to execute or force the payment of fines based on judicial decisions. In addition, in the Law on General Provisions and Tax Procedures (KUP Law) which has been last amended by the Job Creation Law, there are no provisions regarding the follow-up to fines or imprisonment in lieu of fines.

METHOD

The research approach provides guidance on how the research will be conducted, including the methodology chosen and the reasons for its selection. In this context, the type of research used is normative or doctrinal juridical legal research. This research aims to find the right answers by verifying the truth based on the legal prescriptions written in the books of law and the underlying doctrines. This legal research seeks to find the truth of coherence, which is to ensure whether the rule of law is in accordance with legal norms, whether legal norms in the form of orders or prohibitions are in accordance with legal principles, and whether a person's actions are in line with legal norms and legal principles, not just the rule of law.

RESULT AND DISCUSSION

The Nature of Tax Crimes in Indonesia as an Effort to Recover Losses in State Revenue According to the Ultimum Remidium Principle

Tax crimes in Indonesia play a crucial role in recovering losses on state revenue, especially through the application of the ultimum remedium principle. This principle puts forward that the application of criminal sanctions in tax cases is the last option used when other legal instruments, such as administrative sanctions or civil law, are no longer effective in recovering state losses.

According to Article 39 and Article 39A of Law Number 6 of 1983 concerning General Provisions and Tax Procedures (KUP Law) which has been amended by Law Number 16 of 2009 and integrated in the Job Creation Law, criminal sanctions can be imposed on taxpayers who commit serious violations that have a significant impact on state revenue. However, before reaching the criminal stage, administrative sanctions such as fines, interest, or tax increases are first imposed in accordance with Article 13A and Article 19 of the KUP Law. The use of criminal sanctions in taxation must be seen from a priority scale for optimizing state revenue.

Article 13A of the KUP Law explicitly explains that the application of criminal sanctions as the ultimate remedium aims to ensure that criminal actions are only used when administrative sanctions are unable to overcome the violation. In the case of Corporate Taxpayers, Article 32 paragraph (1) of the KUP Law stipulates that the company's management is personally responsible for tax crimes committed by the Agency. If the criminal act is proven, Article 39 and Article 39A stipulate that the prison sentence and the fine imposed on the management can be replaced (subsidiary) with a prison sentence if the fine is not paid, in accordance with Article 30 of the Criminal Code (KUHP). However, this has the potential to harm state revenue because the substitution of fines with confinement does not increase state revenue.

The lack of procedural laws that are specifically written (*lex scripta*), strictly regulated (*lex stricta*), and clearly explained (*lex certa*), as well as the formality in the application of tax laws, can cause conflicts of interest among law enforcement officials, especially *fiscus*. According to Law Number 30 of 2014 concerning Government Administration, a conflict of interest occurs when a government official has a personal interest that can affect the neutrality and quality of decisions or actions taken. These personal interests may only focus on completing tasks practically in order to achieve Key Performance Indicators (KPIs), which are requirements for implementing a merit system for remuneration, career development, promotion, and mutation. However, this often comes at the expense of legal certainty and the purpose of implementing criminal sanctions norms that should provide broader benefits to society. The criminal procedure law that is regulated in detail, strictly, and clearly aims to protect basic human rights from the possibility of arbitrary rulership. In this context, the *fiskus* has broad discretion in deciding whether or not criminal sanctions will be applied, and often these decisions are based on practical reasons, choosing to deal with cases that are easier to resolve than those that have greater benefits to society. This more practical approach is problematic in heterogeneous modern societies, where economic and political power is often concentrated in the upper layers of society.

In countries with liberal and capitalist economies, the rule of law tends to benefit wealthier groups more than serving the interests of society as a whole. This concentration of power makes economic crimes, including tax crimes, difficult to deal with, because although they cause great losses, the impact is not always felt directly by the community as victims of crime. With broad discretion and inconsistent application of criminal law, the main goal of tax law, which is to achieve social justice and prosperity for all Indonesians, is difficult to achieve. Tax law, as part of the legal system that binds the community, should pay attention to and serve the needs of the community, including the need for equality in legal treatment. In the context of tax law, the need that must be protected is welfare through the redistribution of prosperity and the achievement of social justice.

Laws and regulations are considered to have advantages because they can provide certainty about the values protected by law, but by incorporating certain values, the legislation is also involved in making choices that often prioritize certain groups over others sociologically. This layering and social prioritization often makes the law discriminatory, both in regulations and implementation. Law enforcement tends to be selective because the strata of society that controls

resources have more access to regulations, advantages for law enforcement agencies in handling cases that provide convenience, the influence of political power that makes law enforcement against powerful groups more difficult, and the application of regulations that are more often carried out against lower groups. Laws and regulations are considered to have advantages because they can provide certainty about the values protected by law, but by incorporating certain values, the legislation is also involved in making choices that often prioritize certain groups over others sociologically. This layering and social prioritization often makes the law discriminatory, both in regulations and implementation. Law enforcement tends to be selective because the strata of society that controls resources have more access to regulations, advantages for law enforcement agencies in handling cases that provide convenience, the influence of political power that makes law enforcement against powerful groups more difficult, and the application of regulations that are more often carried out against lower groups.

In material law, there is a principle that the more detailed and strict the legal regulations, the more difficult it is to achieve justice, because justice and legal certainty often contradict each other. This principle, known as *summum ius, summa iniuria*, is a continuation of Gustav Radbruch's thought, which emphasized that law must be able to fulfill three goals: justice (*gerechtigkeit*), utility (*zweckmäßigkeit*), and legal certainty (*rechtssicherheit*), all of which cannot be achieved simultaneously to the maximum. Lawmakers must maintain a balance between the social order and the protection of human interests by ensuring that regulations remain stable and orderly, as stipulated in Article 1 of the KUP Law (Law Number 28 of 2007 concerning General Provisions and Tax Procedures). Meanwhile, the law as a tool of protection must be able to keep up with the dynamic development of humans and society so that their interests remain protected. Laws that are drafted in a general and less restrictive manner allow judges to interpret the law more freely, so that it can cover a wide range of new events and developments.

This is related to Article 2 of the KUP Law which provides flexibility in the application of tax law in accordance with the development of community needs. However, a deep understanding of the basis of thinking underlying laws and regulations is still needed to achieve justice. Law is manifested through four stages: legal principles (*rechtsbeginselen*), legal rules (*rechtsregels*), concrete regulations (*concrete regels*), and jurisprudentie (*jurisprudentie*).

Legal principles, although abstract, provide relevant guidance as long as they are applied in concrete law, as stipulated in Article 4 of the KUP Law which emphasizes the importance of legal principles in the application of tax rules. Legal principles are considered moral tendencies in law and help solve problems that have not been regulated by regulations. As Scholten stated, legal discovery involves consideration of language, history, legal systems, social goals, and historical developments. Looser and futuristic laws, such as the KUP Law in formulating criminal acts related to the Annual Tax Return (Annual Notification Letter), are expected to be more durable and cover more legal events compared to very detailed and strict regulations, in accordance with Article 8 of the KUP Law which regulates the obligation to submit tax returns. This can encourage justice as long as the legal discovery is carried out in accordance with the principles and objectives of the law, namely collecting state revenue while still considering the principle of *ultimum remedium* in the tax criminal law as a last resort, as stipulated in Article 36 of the KUP Law.

CONCLUSSION

In the context of tax criminal law, state losses highlight the importance of balancing legal certainty and justice. The tax criminal law in Indonesia, which is regulated in Article 1 number 1 of the KUP Law, must combine legal certainty with the principle of justice. The postulate *summum ius summa iniuria* shows that strict legal certainty can sacrifice justice. The principle of *ultimum remedium*, which is stated in Article 36 paragraph (1b) of the KUP Law, emphasizes that criminal sanctions must be the last step after administrative efforts fail, aiming to reduce state losses. Broad discretion by law enforcement officers can cause uncertainty and injustice, as stipulated in

Article 8 paragraph (3) of the KUP Law. Therefore, regulations must be detailed and clear to prevent abuse of power. Tax laws must protect the welfare of the community and ensure a fair distribution of the tax burden, in accordance with Article 39 and Article 39A of the KUP Law, with the ultimate goal of achieving social justice and prosperity for all Indonesia people.

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