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Legal analysis of the application of ultimum remedium towards state officials' discretion causing state financial losses

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ABSTRACT

This study aims to analyze the application of the ultimum remedium principle to discretionary actions by state officials that result in financial losses to the state. In practice, the law enforcement of discretionary actions often gives rise to debates between protecting the freedom of administrative decision-making and enforcing criminal law within the framework of corruption eradication. This study uses a normative legal method with a statute, conceptual, and case study approach, which allows for a comprehensive analysis of the applicable legal framework and its implementation practices. The results show that the application of the ultimum remedium principle is in line with the principle of due process of law and the protection of legitimate discretion, as long as it meets the elements of compliance with procedures, is based on good faith, and is not motivated by self-enrichment or other motives. Thus, criminal law is truly applied as a means of last resort, achieving a balance between protecting public officials with integrity and effective law enforcement to realize good governance, where policy innovation and courage to make decisions are protected, without neglecting accountability and integrity in government administration.

Keywords: Ultimum Remedium, Discretion, State Financial Losses, Integrity.

1. INTRODUCTION

The Discretion is an important instrument in government administration, providing space for state officials to make decisions in certain situations for the public interest. (Yulikhsan, 2016). However, the exercise of discretion often has legal consequences when a policy or decision results in financial losses to the state. In this context, the application of criminal law is often carried out without considering the principle of ultimum remedium, namely, that criminal law is used as a last resort after other legal means have been inadequate. (Muhlizi, 2012). Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption, as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption, regulates 30 acts that are qualified as corruption, which are grouped into seven forms of criminal acts of corruption. These seven forms are unlawful acts that harm state finances: bribery, embezzlement in office, extortion, gratuities, fraudulent acts, and conflicts of interest.

Theoretically, discretion embodies the principle of responsive law, as proposed by Nonet and Selznick, which positions law as an instrument to achieve broader social goals. (Nonet & Selznick, 2019). Within this framework, discretion is not merely a rigid complement to the law but an inherent part of the legal system capable of addressing concrete challenges on the ground. However, when the legal system leans toward a purely repressive and legalistic approach, discretion becomes vulnerable, even turning into a tool for criminal prosecution against policymakers.(Ansori, 2015).

In Indonesia, the application of the ultimum remedium to the discretion of state officials remains weak. The broad formulation of the regulations, as stipulated in Articles 2 and 3 of the Corruption Eradication Law, allows law enforcement to directly criminalize actions that cause state losses without prior administrative reviews. This is evident in numerous cases, including the case of Karen Agustiawan, the then President Director of Pertamina, in her investment decision for the BMG Australia Block. The decision was made within the context of a state-owned enterprise's corporate business and was strategic in nature; however, it was criminalized as an abuse of authority. The Supreme Court ultimately acquitted Karen through decision no. 121 K/Pid.Sus/2020, considering her actions as a business judgment rule, not a criminal act of corruption. This decision emphasizes the importance of distinguishing between policy discretion and unlawful acts in the public decision-making process. Criminal proceedings are conducted parallel to or even precede administrative review mechanisms by supervisory bodies such as the Supreme Audit Agency (BPK), Financial and Development Supervisory Agency (BPKP), or Public Prosecutor's Advisory Board (APIP). This has led to overcriminalization and reduced officials' courage in making strategic decisions. Discretion is often equated with unlawful acts, even if performed in good faith. (AR et al., 2024).

This phenomenon raises fundamental questions about the limits of the legitimate use of discretion and when the application of ultimum remedium is appropriate. This issue is increasingly relevant considering that the provisions of Articles 2 and 3 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Corruption are often used to imprison state officials, even though such actions are part of the discretionary authority. Discretion is part of the design of a modern state that recognizes that the law cannot cover every situation. Therefore, a state based on the rule of law relies not only on the principle of legality but also on the principles of expediency and justice. When administrative law is not given a proportional position in resolving discretionary issues, overcriminalization occurs, namely the tendency to drag all violations into the criminal realm without considering the administrative context and the official's intentions.

2. METHODOLOGY

This study is a normative legal study that uses three main approaches. First, a statute approach is used to analyze various relevant provisions of Law Number 30 of 2014 concerning Government Administration, Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, and Law Number 1 of 2004 concerning State Treasury.

Second, a conceptual approach is utilized to examine the principle of ultimum remedium and the concept of discretion from an administrative law perspective, including the principles underlying the limitations and protections for the exercise of such authority. Third, a case approach is used to study relevant court decisions to see how the application of criminal law to the discretion of state officials is implemented in practice (Tersiana, 2018). The data sources for this research come from primary, secondary, and tertiary legal materials, which are analyzed qualitatively, with conclusions drawn using deductive methods, resulting in systematic and argumentative findings. (Asikin, 2016).

3. RESULTS AND DISCUSSION

3.1 Application of the Ultimum Remedium Principle in Law Enforcement

In the legal system, there is the principle of ultimum remedium. Ultimum remedium is one of the principles contained in Indonesian criminal law, which states that criminal law should be the last resort in law enforcement. (Yoserwan & MH, 2021). The principle of ultimum remedium is a principle of criminal law that places criminal sanctions as the last resort after other legal remedies, such as administrative or civil sanctions, are inadequate or fail to achieve the objectives of law enforcement. This principle arises from the awareness that criminal law is repressive in nature, creates a severe social stigma, and has the potential to limit individual freedom; therefore, its use must be limited proportionally (Siregar, 2023).

The application of this principle aligns with the principle of due process of law, which states that every state official who uses their discretionary authority is entitled to legal protection as long as their actions are carried out in accordance with procedures, in good faith, and without the aim of enriching themselves or others. Conversely, if the results of an administrative investigation reveal mens rea or clear malicious intent and strong evidence of involvement in the abuse of authority, only then can criminal law be applied. (Rahmawati, 2013).

The principle of ultimum remedium encompasses the obligation to prioritize noncriminal resolution mechanisms, such as administrative sanctions, civil proceedings, or mediation, before taking a case to criminal court. This principle aligns with the concept of subsidiarity, which requires proof that criminal action is the only effective and proportionate means. (Wibowo et al., 2022). In the context of government administrative law, this principle applies to every action of a state official that results in state financial losses, as long as the action is discretionary, carried out in accordance with legal procedures, and without malicious intent. (Hamzah, 2017).

The principle of ultimum remedium also contains an element of the goal of ensuring that criminal sanctions are imposed on the right person, because perpetrators of criminal acts also have human rights, including the right to justice, the right to life, and the right to self-improvement. The existence of these human rights ultimately gives rise to the principle of ultimum remedium in law enforcement. The application of ultimum remedium must be interpreted as an effort (middle way) that can benefit all parties, whether as victims, perpetrators, or for the benefit of the wider community (Sitompul & Maysarah, 2021).

In the context of administrative law and corruption, the application of this principle requires that any administrative deviation or error, including the use of discretion by state officials, be resolved first through administrative or civil mechanisms. This approach aims to avoid the excessive criminalization of public officials who act within their authority but may err in their implementation.

In practice, the application of the ultimum remedium principle requires a clear distinction between administrative error (culpa) and deliberate abuse of authority (dolus). This filter is implemented through internal inspections, audits, or administrative oversight mechanisms before a case is brought to the criminal court. (Rahmawati, 2013). Thus, law enforcement does not only focus on criminalization but also maintains a balance between human rights protection, legal certainty, and government effectiveness. (Fithri et al., 2021).

In the context of state officials' discretion that results in state financial losses, this principle ensures that criminal action is taken only when there is strong evidence of malicious intent and not merely due to procedural errors or policies that prove detrimental to the state. This aligns with the spirit of the State

Administration Law and the principles of good governance, which prioritize fostering and improving governance as the primary measure, with criminal sanctions as a last resort.

3.2 Legal Limitations on the Use of Discretion

Discretion is a decision and/or action determined and/or carried out by government officials to address concrete problems faced in the administration of government in the case of laws and regulations that provide options, do not regulate, are incomplete or unclear, and/or the existence of government stagnation. However, its use must be authorized by officials and in accordance with its purpose. According to Article 1 number 9 of Law No. 30 of 2014 concerning Government Administration, discretion is a decision and/or action determined and/or carried out by government officials to address concrete problems faced in the administration of government in the case of laws and regulations that provide options, do not regulate, are incomplete or unclear, and/or the existence of government stagnation (Siswanto, 2020). Discretion plays a crucial role in all aspects of national life. It primarily fills gaps in written regulations and relaxes rigid and outdated provisions of the law. It even adapts to current contexts that are beneficial to the public. (Ansori, 2015).

Legitimate discretion must meet the requirements stipulated in Article 24 of the State Administration Law, namely, it must be in accordance with the purpose of the discretion, not conflict with statutory regulations, and be exercised in good faith, as follows. Violating these provisions can lead to legal liability. Discretion, although an important instrument in government administration, cannot be exercised freely and without limits. Law Number 30 of 2014 concerning State Administration provides a clear legal basis for the parameters for the use of discretion. Article 22 of the law emphasizes that discretion may only be exercised to (Endang, 2018):

1. Facilitating government implementation
2. Fill legal gaps;
3. Provide legal certainty; and
4. Overcome government stagnation in certain circumstances for public interest.

The use of discretion must meet the formal and material requirements. Formal requirements include legitimate authority, an adequate legal basis, and transparent decision-making. Material requirements require that decisions taken do not conflict with statutory regulations, are based on objective reasons, and do not give rise to a conflict of interest. These legal boundaries are reinforced by the general principles of good governance (AUPB), such as the principles of accuracy, transparency, and proportionality. Violating these boundaries can transform previously legitimate discretion into an unlawful act, with consequences for administrative, civil, or criminal liability, depending on the degree of error and the resulting impact (Solechan, 2019).

In the context of state finances, legal limits on discretion become increasingly important because every decision involving the use of the budget has the potential to cause state loss. (Setiawan & Ma'ruf, 2017). Therefore, every official who uses discretion is obliged to consider the legal risks that may arise and ensure that the actions taken are legally, morally, and administratively accountable.

3.3 Application of Ultimum Remedium to State Officials' Discretion that Causes State Financial Losses

The principle of ultimum remedium positions criminal law as the last resort in law enforcement, especially when administrative and civil mechanisms have not resolved the problem effectively or are unable to do so. In the context of state officials' discretion that results in state financial losses, this principle serves as an instrument to ensure that criminal penalties are imposed only when non-criminal measures have been taken and have failed to recoup or restore the state's losses. (Yoserwan & MH, 2021).

The application of ultimum remedium is relevant because not all state financial losses due to discretion constitute criminal acts of corruption (Sitompul & Maysarah, 2021). Discretion exercised in

good faith, in accordance with procedures, and within the law, even if it results in state losses due to external factors, should be handled through administrative or civil mechanisms, not criminal ones. Criminal penalties are only appropriate when there is strong evidence of intent (dolus) or gross negligence (culpa lata), accompanied by abuse of authority. Maladministration often occurs in public service activities and the granting of permits. If the actions of Government Administrative Officials are proven to be in bad faith (such as bribes, promises, or gifts), the resolution is directed to the Corruption Eradication Commission (Tipikor). If there is no evidence of bad faith, the resolution is based on the principle of maladministration. Legal action refers to the principle of ultimum remedium, which prioritizes administrative resolution and restitution of losses before resolving the matter through criminal or corruption law. In other words, criminal/corruption resolution is the last resort if administrative resolution and restitution of losses are infeasible. State finances cannot be implemented by Government Administration Officials, in accordance with Article 20, Paragraph 6 of the UUAP.

Abuse of authority, which can also result in state financial losses, can occur in public services, licensing, and auctions of goods and services within the government agencies. This can result in comprehensive audits that disrupt services or operational activities. Similarly, if criminal activity is suspected, it can result in the confiscation of services and operational assets. The best solution is to adhere to the principle of ultimum remedium, which prioritizes administrative resolution and restitution of losses before criminal or corruption-related resolutions (Pardede, 2020). In other words, criminal/corruption resolution is a last resort if administrative resolution and restitution of state financial losses cannot be implemented by government administration officials. Types of state financial losses can include state finances, state assets (including natural resources), state assets (recorded in the state treasury), and state collection rights. Internal factors that underlie this include a suboptimal oversight system, low revenue, and the lack of a culture of morality and integrity. External factors include attempts at bribery or enticement from the public and political pressure.

The concept of saving state finances, linked to the ultimum remedium norm, leads to the conclusion that state financial losses and state financial losses are distinct but interrelated issues. State financial losses are the cause, and state financial losses are the effect. There will be no state financial losses if there are no state financial losses, but not all state financial losses result in state financial losses (Indriana, 2018). State financial losses are inevitable in any action involving state finance. While state financial losses cannot be 100% avoided, their impact must be minimized to the greatest extent possible. Efforts to minimize the impact of state financial losses include the reimbursement of state funds (Mubarak & Trisna, 2021).

The forms of recovery that can be implemented include rehabilitation, equitable compensation, and restoration of the original position and condition. In my view, the Supreme Court is the highest institution in the judicial process and has the authority to correct lower court decisions, including redressing all their impacts (Saputra, 2017). Compensation for state financial losses can be pursued through a civil lawsuit, as stipulated in Article 32 of the Corruption Eradication Law, which does not necessarily require criminal proceedings alone. Legal restoration can be achieved through rehabilitation, reinstatement to one's previous position, and compensation for material and immaterial losses, including the restitution of lost time and opportunities. In accordance with the principle of ultimum remedium, it is advisable to prioritize judicial review by the State Administrative Court (PTUN). There is a judicial review forum through the PTUN, as stipulated in Article 21 of UUAP. In examining the legal aspects of government administration, discretion, and state financial losses, a comprehensive legal approach should be adopted, including administrative, civil, criminal, and constitutional law. In addition to examining aspects of justice, legal certainty, and expediency, as outlined by Gustav Radburch's theory, which intersects with social constructionism, investigators review these aspects based on the UUAP, literature related to discretion, and expert testimony in the field of administrative law (Prasetyo, 2021). Investigators often see discretion as an unlawful act, even though the definition of discretion is an action/decision that does not conflict with the law and is not based on legal regulations and is more to fill a legal vacuum. (Yuhdi, 2013).

4. CONCLUSSION

The application of the ultimum remedium principle in law enforcement against the discretion of state officials that results in state financial losses is a strategic step to prevent the criminalization of public policies carried out in good faith. This principle emphasizes that criminal law should only be used as a last resort after administrative and civil remedies have proven ineffective or inadequate. The application of the ultimum remedium is relevant because not all state financial losses due to discretion constitute corruption. Discretion exercised in good faith, in accordance with procedures, and within the legal framework, even if it results in state losses due to external factors, should be handled through administrative or civil mechanisms, not criminal ones. Criminal penalties are only appropriate when there is strong evidence of intent (dolus) or gross negligence (culpa lata), accompanied by abuse of authority. Maladministration often occurs in public service activities and the granting of permits. If the actions of Government Administrative Officials are proven to be in bad faith (such as the use of bribes, promises, or gifts), the resolution is directed to the Corruption Eradication Commission (CEC). If there is no evidence of bad faith, the resolution is based on maladministration. With this approach, the state can maintain a balance between two primary interests: first, the protection of state officials who carry out their duties in accordance with the law, procedures, and public interest; second, firm law enforcement against acts of abuse of authority committed intentionally or with gross negligence that harm state finances. The application of ultimum remedium does not mean weakening the eradication of corruption but rather ensures that the legal process is carried out proportionally, fairly, and based on objective evidence. This principle also supports the creation of good governance, where policy innovation and courage to make decisions are protected without neglecting accountability and integrity in the administration of government.

Ethical Approval
Ethical approval was not required for this study.

Informed Consent Statement
Informed consent was not obtained for this study.

Author Contributions
Not applicable.

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Notes on Contributors

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He is also indexed in major academic platforms, reflecting his commitment to advancing legal scholarship both nationally and internationally.

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