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APPLICATION OF ADMINISTRATIVE LAW AS PRIMUM REMEDIUM IN ERADICING CRIMINAL ACTS OF CORRUPTION

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ABSTRACT

Research on administrative law as the main instrument in eradicating criminal acts of corruption, because of several interesting things, including, the sanctions of imprisonment for special offenses of office crimes in the Dutch Criminal Code since it came into force on March 3 1881 where the law was initially lighter. In the course of more than a hundred years of its use in Indonesia, especially in office crimes (Tipikor), the criminal sanctions applied have become increasingly irrational. Historically, the use of the Dutch Criminal Code began to be applied to colonial territories, with several reconditions to colonial territories which had different sociological aspects, both Suriname and the Dutch East Indies . Hoekoeman Baroe Boewat Indies-Ollanda. This research is normative legal research or what is also known as library research and study of decision documents . The type of approach used in this research is a statutory approach (statute approach) carried out by examining all court decisions . The application of State administrative law as the Primum Remedium for eradicating corruption in Indonesia should be implemented in accordance with the spirit of the UNCAC Ratification (United Nations Convention). Against Corruption, 2003) Article 53 that Non-Conviction Based (NCB) Asset Confiscation or Action to return wealth directly can be carried out without punishment.

Keywords : ***Implementation, Administration, Primum Remedium, Eradication.***

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INTRODUCTION

The idea arose to conduct research on administrative law as the main instrument in eradicating criminal acts of corruption, because of several interesting things, including, the sanctions of imprisonment for special offenses of office crimes in the Dutch Criminal Code since it came into force on March 3 1881 where the law was initially lighter. In the

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course of more than a hundred years of its use in Indonesia, especially in office crimes (Tipikor), the criminal sanctions applied have become increasingly irrational. Historically, the use of the Dutch Criminal Code began to be applied to colonial territories, with several reconditions to colonial territories which had different sociological aspects, both Suriname and the Dutch East *Indies* . Hoekoeman Baroe Boewat Indies-Ollanda.[1]

The interesting thing about the problem that will be studied in this research is that, since January 1 2015, the Netherlands has completely abolished the use of the gratification or bribery article for state administrators, namely article 362 and removed part of article 363 in Wetboek van *Strafrecht* . [2]Meanwhile, in Indonesia, which was a former colony, the sanctions in Article 418 of the Criminal Code were increased, namely to six years in prison and Article 419 of the Criminal Code to five years in prison. Unfortunately, Article 418 in the Boekoe Wetbook Hoekoeman Baroe Boewat Hindia-Ollanda or the Criminal Code for the Dutch East Indies was before the enactment of Law No. 1 1946 Concerning Criminal Law Regulations, initially during the Dutch East Indies occupation the prison sentence was only four months and two weeks with a fine of F300 three ratoes roepiah.

Regarding the non-synchronization of these articles, it is actually still a mystery that has not been solved until now and the problem regarding the non-synchronization of interpretation as mentioned above, is also found in the Criminal Procedure Code (Het Wetboek Van Strafvordering) *where* there are striking differences regarding the evidence contained therein. article 339 *Het Wetboek Van Strafvordering* [3]where the use of one of the pieces of evidence in article 184 of the Criminal Procedure Code is different from the guiding evidence, in the Dutch Criminal Procedure Code, the criminal law evidence used in the Netherlands is 1. Evidence of the judge's observations; 2. Evidence of the defendant's statement; 3. Evidence of witness statements; 4. Expert information; 5. Documentary evidence. Meanwhile, in Law no. 8 of 1981 KUHAP, the criminal law evidence used in Indonesia is [4]1. Witness statement evidence; 2. Evidence from expert testimony; 3. Documentary evidence; 4. Instructions; 5. Evidence of the defendant's statement.

Based on pre-research conducted by researchers at the Central Jakarta Special Class IA District Court, judges, when examining and deciding on a corruption case, are usually only given a bundle of case administration files by the Public Prosecutor, apart from copies of documents of what evidence the judge wants to study, as follows: a form of active judge observation, even though initially the evidence provided by Dutch legal

[1]Boedihardjo, R, *Wetbook Hoekoeman Baroe Boeat hindia-Ollanda Dalem Bahasa Melajoe*, (Kediri: Toko Soerabadja, 1920), p 1

[2]https://wetten.overheid.nl accessed 23 February 2021

[3] Pasal 339 *Het Wetboek Van Strafvordering*

[4] Kitab Undang Undang Acara Pidana

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scholars when creating the Criminal Code was used as a judge's control over investigators and public prosecutors at trial, that the judge's observation evidence was carried out actively, both with the judge's participation in making a case. can be judged objectively based on their respective authorities in the trial, so that with this reality there are no victims of deviant justice or even premature justice, so it is appropriate, the legal adage, it is better to release a thousand guilty people than to punish one innocent person, can be perfectly understood.

This has of course been adjusted by the drafters of the Criminal Code since it was first created with the spirit of article 183 of the Criminal Procedure Code, namely *" A judge may not impose a crime on a person unless, based on at least two valid pieces of evidence, he is convinced that a criminal act has actually occurred and that it is the defendant who is guilty of doing it "* [5]so that the substantial intent of article 183 of the Criminal Procedure Code with article 339 *Wetboek van Strafvordering*[6] or the Dutch Criminal Procedure Code can be in line with the spirit of article 8 in the French Declaration of Human and People's Rights of 1789, [7]namely *" La Loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée"* that no one can be punished except in accordance with the law that was established and promulgated before the offense, and is legally implemented, in Indonesia.

The use of indicative evidence as written in article 26A of the Corruption Law [8]is not included in the evidentiary system in the Dutch Criminal Code which still applies evidence from the judge's observations, so that criminal experts in the Netherlands do not focus on evidence that is not material in nature, for example the question of the connection between the confession of so and so witness A with the witness so and so B, they understand (the Dutch legal institution) that the proof of the bribery offense is very weak in the law of evidence and actually contradicts the terms in Article 6 paragraph (2) of Law No. 48 of 2009 concerning Judicial Power above , because it is Nowhere in the world does someone give a bribe or gratification using a receipt, so Article 362 in *Wetboek Van Strafrecht* was completely removed from the Dutch Criminal Code system and has never been applied since January 1 2015, because proof of bribery or gratification can be has the potential to violate human rights and due to these conditions the Netherlands shifted the focus of the area of criminal acts of corruption to the application of administrative law and social criminal sanctions.

The error in terming corruption, as an *extraordinary crime* , has now actually entered into political jargon or campaigns. Corruption Eradication Commission Chairman

[5] Pasal 183 KUHAP

[6] Pasal 339 Wetboek van Strafvordering, https://wetten.overheid.nl/ , diakses 22 April 2021

[7]*Declaration Des Droits De L Home Et Du Citoyen De 1789",* www.legifrance.gouv.fr, diakses 22 April 2021

[8] Pasal 26 UU No. 20 Tahun 2001 Tentang Pemberantasan Tindak Pidana Korupsi

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Commissioner General of Police Firli at an event at Lemhanas on 8 October 2020 stated the term corruption, that "Corruption is a crime that robs people of their rights, "corruption also robs human rights, corruption is also against humanity,"[9] of course the term crimes against humanity which is echoed by law enforcement agencies in Indonesia, should be able to be tried at the International Criminal Court which was established based on the Rome Statute of 17 July 1998, the statute which is the basis The establishment of a Criminal Court for the most serious crimes *(extraordinary crimes)* , namely genocide, crimes against humanity, war crimes and crimes of aggression, has been effective since 1 July 2002.[10]

Discussions regarding the failure of the criminal legal system or the malfunction of the criminal system, especially in eradicating criminal acts of corruption, can be an important factor in the failure of the ultimate goal of punishment or the legal system that was created failed to deter and prevent people from criminal behavior or prohibited acts. [11]According to Roeslan Saleh, the aim of the criminalization should be to answer, what do you want with the criminalization, what's the goal where according to Roeslan Saleh the purpose of punishment is always shifting, where in the 19th century the purpose of punishment was to cause pain to the convict (prison house, flogging and death penalty) and after the second world war, the purpose of punishment was resocialization, therefore the problem is how influencing the convict so that he can adapt himself to return to a better life in society.

Based on a literature study conducted by researchers, cases of criminal acts of corruption have not decreased to date, on the contrary, every year law enforcers are still handling new cases, in other words the criminal law (prison) that has been in force has turned out to be ineffective. to reduce or even prevent these criminal acts. In line with Satjipto Rahadjo's view above that when there is a conflict in/and with the law, the legal system must adapt to humans, so there must be a reform of the legal system that is able to significantly reduce, prevent and eradicate criminal acts of corruption, the researcher intends to review and see how effective is the application of State administrative law in eradicating criminal acts of corruption as a *Primum Remedium* to resolve the problem of criminal acts of corruption in Indonesia.

The application of administrative law as Primum Remedium in legal concepts is still very little regulated in the legal legislation of the Republic of Indonesia, especially in eradicating corruption or office crimes, so it is an urgent issue for researchers to conduct this research. The concept of law enforcement of the Republic of Indonesia currently places criminal law as Primum Remedium, for example in Article 104 of Law no. 7 of

[9] Ketua KPK *"Korupsi Adalah Kejahatan Luar Biasa*", www.lemhannas.go.id, diakses 20 April 2021

[10] William Driscoll, Joseph Zompetti and Suzette W. Zompetti, *The International Criminal Court: Global Politics and The Quest For Justice*, (New York : The International Debate Education Association, 2004), p. 30

[11] Roeslan Saleh, *Stelstel Pidana Indonesia*, (Jakarta :Penerbit Aksara Baru : 1959),p. 35

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2014 concerning Trade. The a quo provisions regulate the prohibition that business actors who do not use or complete Indonesian language labels on goods traded domestically as intended in Article 6 paragraph (1) will be punished with imprisonment for a maximum of 5 (five) years and/or a fine. a maximum of IDR 5,000,000,000.00 (five billion rupiah), [12]but in reality the criminal sanctions as Primum Remedium in Law No. 7 of 2014 concerning Trade are not effective. The application of criminal law principles as Ultimum Remedium is still relatively limited, for example Article 13 A of the KUP Law mentions punishment as a last resort (*Last Resort, Ultimum Remedium*) to increase compliance after all administrative efforts implemented are ineffective [13]and Law of the Republic of Indonesia Number 32 of 2009 concerning Protection And Environmental Management Article 100 paragraph (2) Criminal acts as referred to in paragraph (1) can only be imposed if the administrative sanctions that have been imposed are not complied with or the violation is committed more than once, so that the gap in the above problems is one of the important reasons for researchers to carry out This research is specifically in eradicating criminal acts of corruption.[14]

METHOD

research is normative legal research or what is also known as library research and document study of decisions of the Corruption Crime Court and study of administrative (resolution) KTUN decisions in eradicating criminal acts of corruption, for these conditions using primary data, namely court decisions and secondary data in the library.[15] The nature of this research is analytical descriptive research, namely a form of research aimed at describing existing phenomena, both natural and man-made phenomena. Analytical descriptive research is research that attempts to describe and interpret something, for example existing conditions or relationships, developing opinions, ongoing processes, consequences or effects that occur, or ongoing trends that are then analyzed and conclusions drawn on problems. researched.[16]

The type of approach used in this research is a statutory approach (*statute approach*) carried out by examining all court decisions, KTUN and regulations related to the main research issue. The legislative approach is an approach that uses legislation and regulations.[17] The analytical approach is to analyze the meaning of law, legal principles, legal rules, legal systems, and various juridical concepts related to the

[12] UU No.7 Tahun 2014 Tentang Perdagangan

[13] Undang-Undang Republik Indonesia Nomor 6 Tahun 1983 Tentang Ketentuan Umum Dan Tata Cara Perpajakan Sebagaimana Telah Beberapa Kali Diubah Terakhir Dengan Undangundang Republik Indonesia Nomor 16 Tahun 2009

[14] Undang-Undang Republik Indonesia Nomor 32 Tahun 2009 Tentang Perlindungan Dan Pengelolaan Lingkungan Hidup

[15] Ediwarman, *Monograf Metodologi Penelitian Hukum (Panduan Penelitian Tesis Dan Disertasi)*, (Medan : Program Pascasarjana Universitasmuhammadiyah Sumatera Utara, 2014),p. 94

[16]Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta : Prenada Media, 2005),p. 35

[17]Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta : Kencana, 2010),p. 93

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problems in research.[18] The case approach *is* studying the application of legal norms or rules carried out in legal practice, especially regarding cases that have been decided on cases that are the focus of research.[19]

DISCUSSION

Application Of The Principle Of Primum Remedium In State Administrative Law As An Instrument In Eradicing Criminal Acts Of Corruption

In the implementation of criminal acts of corruption to date the author still sees inequality in the application of the law (disparity) caused by differences in the views of law enforcers themselves, both the views of prosecutors, judges and lawyers in the judiciary which ultimately causes differences in the quality of decisions, so that the implementation of eradicating acts of corruption uses an approach Criminal law can create conditions of legal uncertainty and worsen legal culture in society because it will create a negative stigma among society regarding differences in decisions between one case and another.

According to Atmasasmita, (2016) regarding the use of criminal law in eradicating criminal acts of corruption, from the perspective of microeconomic analysis it is clear that social work penalties or maximum fines with conditional sentences reflect the efficiency, balance and maximization of a legal policy. The opinion expressed by Becker was specifically quoted from Posner (in Atmasasmita, 2016) [20]that microeconomic analysis of criminal law includes:

1. Balance between certainty and severity of punishment;
2. Economic comparison between fines and prison sentences;
3. Economic aspects of law enforcement and procedural law;
4. The deterrent and deterrent effect of prison sentences (including the death penalty).

One solution and input for the preparation of criminal law policies in general is three legal objectives/legal ideals: (1) legal certainty, (2) justice, and (3) efficiency.[21] In Soekanto, (1983) law enforcement as a process is essentially the exercise of discretion which involves making decisions which are strictly regulated by legal rules, but which have an element of personal judgment.[22] By quoting Roscoe Pound's opinion, Lafavre stated that essentially discretion lies between law and morals (ethics in the narrow sense).

This is different from the application of State administrative law , where when there is a violation, the system applied will not enter into the issue of disparity in decisions

[18]Jhonny Ibrahim, *Teori Dan Metode Penelitian Hukum Normatif*, Cetakan Pertama, (Malang : Bayu Media, Malang,), p. 257

[19]Ibid., p. 268

[20]Romli Atmasasmita Dan Kodrat Wibowo, *Analisis Ekonomi Mikro Tentang Hukum Pidana Indonesia.* (Jakarta : Penerbit Kencana. 2016), p. 83

[21]Ibid p.87

[22]Soerjono Soekanto, *Faktor-faktor Yang Mempengaruhi Penegakkan Hukum*, (Jakarta : Penerbit CV. Rajawali, 1983),p. 4

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but will follow a predetermined system (administration). An additional approach to the criminal case provisions of Law Number 22 of 2009 concerning Road Traffic and Transportation, for example in Article 287 paragraph (1) "Every driver who violates traffic signs shall be punished with a maximum imprisonment of 2 months or a maximum fine of IDR 500 thousand " and Article 288 paragraph (1) "Every driver who is not equipped with a Motor Vehicle Registration Certificate or Motor Vehicle Test Certificate shall be punished with imprisonment for a maximum of 2 months or a fine of a maximum of IDR 500 thousand." [23]In practice, as stated by Soerjono Soekanto, a law enforcer, like other members of the community, usually has positions and roles at the same time, so it is not impossible that conflicts of interest arise between various positions and roles, so that the public still hears about collusion in the field between officers and the public who do not comply with regulations, especially regarding the Traffic Law. Due to the condition of a lot of collusion between officers and the public in the field regarding the application of criminal sanctions and fines, National Police Chief Listyo Sigit Prabowo inaugurated the implementation of *Electronic Traffic Law Enforcement* (ETLE) or electronic ticketing Phase I on Tuesday 23 March 2021. [24]Where ETLE is an effort to implement technology to record violations in traffic electronically to support security, safety and order. According to Saputra, (2021) the aim of implementing ETLE is to minimize parties who commit extortion when taking action against traffic violations. Not only that, this implementation is to improve driving discipline .[25]

The mechanism for implementing ETLE is: [26]First, the device automatically captures traffic violations through ticket cameras that have been installed at certain points and sends evidence of the violation to the ETLE back office at the Regional Traffic Management Center (RTMC) Regional Police. Second, officers identify vehicle data using Electronic Registration & Identification (ERI). Third, the officer sends a confirmation letter to the violator's address as a request for confirmation of the violation that occurred. Fourth, violators will confirm and clarify via the website or come directly to the Regional Police Law Enforcement Sub-directorate office according to the schedule set out in the letter. If there is any objection regarding the violation, it can be submitted on this occasion. The fifth stage, after confirmation, the officer will issue a ticket using the payment method using the Briva (BRI Bank) virtual account code for each violation that has been verified for law enforcement. So that there is no longer the term peace between law enforcement officers and members of the public who are suspected of violating traffic laws. So, based on the ETLE mechanism, the punishment function in the

[23] Undang-undang Nomor 22 Tahun 2009 Tentang Lalu Lintas dan Angkutan Jalan

[24] Noverdi Puja Saputra, 2021, *Electronic Traffic Law Enforcement (ETLE) Dan Permasalahannya*, Jakarta : Jurnal Vol. XIII, No.7/I/Puslit/April/2021 Pusat Penelitian Bidang Hukum Badan Keahlian DPR RI,p. 1

[25]Ibid p. 2

[26]Ibid p. 2

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Traffic Law is updated with an Administrative Law mechanism where the application of ETLE eliminates conflicts of interest and legal economic efficiency, where people who violate can no longer conspire with law enforcers in the field, that is, there are no more criminal acts of corruption (bribery). , then there are no large state costs for trying cases of criminal traffic violations.

Corruption in Administrative Law Perspective

In the perspective of administrative rules, the word authority or authority is aligned using *"authority"* in English and *"bevoegdheid"* in Dutch. *Authority in Black'S Law Dictionary* is defined as legitimate power: *a right to commend or to act; the right and power of public officers to require obedience to their orders legally issued within the scope of their public duties.* (authority or authority means the power of rules, the right to command or act, the right or power of public officials to comply with legal rules within the scope of carrying out public obligations).[27]

From Philipus M Hadjon's view, [28]in positive law the word authority is found, including in Article 1 number 6, Article 53 paragraph two letter C of Law Number 5 of 1986 concerning State Administrative Courts. The term authority is used in the form of a noun, the word is often interchanged using the term authority, the word authority or authority is often equated with the word *"bevoegdheid"* in Dutch legal terms.

Meanwhile, if we refer to the opinion of former Chief Justice of the Supreme Court, Bagir Manan, [29]authority in legal language is not the same as power (*macht*). Power only describes the right to do or not do. In law, authority simultaneously means rights and obligations (*rechten en plichten*).

The concept of abuse of authority in the English concept is *abuse of power* , meaning the same concept as *De Pouvoir's Detournement* which in the Francis legal system is the abuse of an official's authority by deviating from the provisions of the applicable law. The prohibition against committing *Abuse of Power* or the prohibition against committing acts *of detournement de pouvoir* means a principle contained in the general principles of good government (*Algemene Beginselen Van Behorlijk Bestuur*) or *Les Principex Generaux Du Droi. Abuse of power* can occur because: first, using authority for exclusive interests or political goals; second, using authority contrary to the law which contains the basic rules for the authority granted; third, exercising authority for purposes other than those required by law with that authority.[30]

[27]Abdul Latif, *Hukum Administrasi Dalam Praktik Tindak Pidana Korupsi*, (Jakarta: Prenada Media Group, 2014), p. 6.

[28] Philipus M Hadjon, 2011, *Hukum Administrasi Dan Tindak Pidana Korupsi*, (Yogyakarta: Gadjah Mada University Press), p. 10

[29] Bagir Manan, *"Wewenang Provinsi, Kabupaten, dan Kota dalam Rangka Otonomi Daerah"*, Makalah disampaikan pada Seminar Nasional , Fakultas Hukum UNPAD, Bandung, 13 Mei 2000, p. 1-2.

[30]Philipus M Hadjon, *Op.Cit* ., p. 44.

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According to Indriyanto Seno Adji, providing an understanding of abuse of authority by citing the opinions of Jean Rivero and Waline regarding the relationship between *"Detournement De Pouvoir"* and *"Freis Ermessen",* abuse of authority in administrative regulations can be interpreted in three (3) forms, namely:[31]

1. Abuse of authority to carry out actions that are contrary to the public interest to benefit personal, group or class interests;
2. Abuse of authority in the sense that the official's actions are truly in the public interest, but deviate from the purpose for which the authority is granted by law or other regulations;
3. Abuse of authority in the sense of abusing procedures that should be used to achieve certain goals, but has used other procedures to achieve them.

In measuring whether there has been an abuse of authority, it must be proven that the official has used the authority for another purpose. The occurrence of abuse of authority is not the cause of negligence. Abuse of authority is carried out consciously, namely diverting the goals that have been given to the authority. Diversion of goals based on negative exclusive interests, whether for one's own interests or those of others. Whether there is a diversion of purpose must be proven, *a contrario* as long as there is no evidence regarding the diversion of purpose means there is no abuse of authority.[32]

Meanwhile, according to Nur Basuki Minarno, (2010) [33]in the concept of administrative law, every delegation of authority to an agency or to a state administrative official is always accompanied by the "goals and purposes" of the authority given, so that the application of the authority must be in accordance with the "goals and purposes" given. authority. Even though the use of authority is not in accordance with the "purpose and purpose" of granting that authority, it constitutes an abuse of authority *("detournement de pouvoir").*

Meanwhile, Indriyanto, citing Konijnenbelt's opinion, stated that to measure abuse of authority using the following parameters:

1. The element of abuse of authority is assessed whether there is a violation of written basic regulations or the principles of decency that exist in society and this country. The criteria and parameters are alternative.
2. The principle of propriety in implementing a policy or *Zorgvuldigheid* is applied if there are no basic regulations or the principle of propriety is established if there are basic regulations, while the basic (written) regulations in fact cannot be applied to certain conditions and circumstances that are urgent in nature.[34]

[31]Abdul Latif, Op .*Cit* ., p. 38.
[32]Philipus M Hadjon, *Op.Cit* ., p. 44.
[33]Nur Basuki Minarno, *Penyalahgunaan Wewenang dan Tindak Pidana Korupsi Dalam Pengelolaan Keuangan Daerah,* (Surabaya : Laksbang Mediatama, 2010), p. 80.
[33]*Ibid*., p. 81
[34]*Ibid* ., p. 81

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In State administrative law, the responsibilities of officials are differentiated between: office responsibilities and personal responsibilities. *Fautes personalles* are losses to third parties borne by officials whose actions have caused losses and the burden of responsibility is shown to the official as a person (*Priveperson*), while *Fautes de service* are losses to third parties borne by the agency of the official concerned and the burden of responsibility responsibility is shown to the position. Regarding State financial losses, in the dimension of State administrative law, in principle, it is oriented towards recovering these losses, and can be applied cumulatively with other sanctions, namely: administrative, criminal and civil witnesses .

Acts against the law or abuse of authority in the management of State finances do not necessarily have to be subject to punishment, the public can examine whether there is abuse of authority or acts against the law of authority committed by government officials, which is in accordance with article 21 paragraph (1) of Law No. 30 of 2014 Regarding Government Administration, namely that the Court has the authority to receive, examine and decide whether or not there is an element of abuse of Authority committed by Government Officials, which was later strengthened by the Supreme Court of the Republic of Indonesia with the issuance of MARI Regulation No. 2 of 2019 concerning Guidelines for Settlement of Disputes on Government Actions and the Authority to Adjudicate Actions Violating the Law by Government Agencies/or Officials *(onrechtmatige overheidsdaad).*

Application Of Criminal Law Principles As The Ultimum Remedium Which Must Be Implemented By Law Enforcement In Eradicing Criminal Acts Of Corruption

In Utrecht, (1965) regarding special prevention theory, the purpose of punishment is to restrain the bad intentions of the perpetrator (dader). Punishment aims to restrain violators from repeating their actions or to restrain would-be offenders from carrying out evil acts that they have planned. [35]Where the function of criminal law is as a final alternative *(last resort)* after administrative law and civil law are implemented first.

Entering the function of administrative law according to Hadjon, (1985), [36]the function of State administrative justice is that there is a harmonious relationship between the government and the people which is based on the principle of harmony. The main functions of State administrative justice are the advisory function, the referral function and the judicial function. In these three functions the judicial function is not placed in first place but in last place with the understanding that this function is the last means (Ultimum Remedium). So with the description above, administrative law can be described as having the following functions:

a. **Advisory Function**

[35]Ernst Utrecht, *Rangkaian Sari Kuliah Hukum Pidana I,* (Bandung : Penerbitan Universitas, 1965), p. 184

[36] Philipus, Hadjon. M,*Perlindungan Hukum Bagi Rakyat di Indonesia*, (Surabaya : PT. Bina Ilmu, 1985), p. 184.

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By giving this function to the Administrative Court, efforts are made to ensure that there are as few disputes as possible between the people and the government, regarding the government's actions. What is expected from the State's administrative justice is not primarily repressive action against the actions of the authorities based on the principle of freedom of action, but preventive steps to prevent this from happening. dispute. The State administrative judiciary also carries out an advisory function to the people regarding not only their rights but also their obligations.[37]

b. **Referral Function**

Peaceful resolution of administrative disputes is the most ideal in accordance with the principle of harmonious relations between the government and the people. Peaceful dispute resolution does not mean abandoning applicable legal principles and rules, but the disputing parties actively seek and ultimately realize the actual legal principles and provisions in the disputed matter, in this way there is no win-lose term but mutual understanding. and mutual awareness of the nature of applicable legal regulations.[38]

c. **Judicial Functions**

From the aspect of the nature of the case, the problem that arises concerns: whether the judiciary only enforces legal norms or also functions as a policy maker. In terms of the basic test, the problem that arises is whether the test is validity or the test of appropriateness.[39]

Application of criminal law from an administrative law perspective In the view of Atmasasmita, (2010) who quotes the opinion of HG de Bunt in his book *strafrechtelijke handhaving van miliue recht* , states that criminal law can become Primum Remidium if the victim is very large, the suspect/defendant is a recidivist, and the loss cannot be recovered (*irreparable*). .[40]

Based on Atmasasmita's view above regarding the use of criminal law, criminal law requirements/criminal sanctions should be applied as a tool to enforce a norm, namely [41]:

1) If it is really needed and other laws cannot be used (*mercenary*);
2) Causing very many victims;
3) The suspect/defendant is a recidivist;
4) The loss cannot be recovered (*irreparable*);
5) If other lighter law enforcement mechanisms are useless or are not considered.

[37]*Ibid* ., p. 188
[38]*Ibid* ., p. 189.
[39]*Ibid* ., p. 190.
[40]Romli Atmasasmita, *Globalisasi dan Kejahatan Bisnis*, Cetakan Ke-1, (Jakarta: Kencana Prenada Media Group, 2010), p. 192
[41]Titis Anindyajati, Irfan Nur Rachman, Anak Agung Dian Onita, *Konstitusionalitas Norma Sanksi Pidana sebagai Ultimum Remedium dalam Pembentukan Perundang-undangan*, Jurnal Konstitusi Vol 12, 2015, p. 7

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The characteristics of criminal law in the context of Ultimum Remedium can be interpreted as meaning that the regulation of criminal sanctions is placed or positioned as the final sanction. The application of State administrative law as a Primum Remedium in law enforcement should provide space for the wider community to make improvements, corrections and other efforts so that there is improvement in legal behavior. Of course, if punishment is applied up front then the goal *of* the law created will not be achieved. . Even in the Chinese Criminal Code which is considered strict and cruel for Indonesian society because of the application of the death penalty for corruptors, in China people who commit criminal acts of corruption are still given the opportunity to correct mistakes or compensate for losses to the State (Restorative Justice) so that they are acquitted by law as *regulated* in Criminal Law of the People's Republic of China article 392 " Anyone who gives bribes to state officials, when the circumstances are serious, shall be punished by no more than three years' fixed-term imprisonment or criminal detention. Before prosecution, if the person who provided bribes to state officials takes the initiative to confess to the crime, he or she may receive a lighter sentence or be released from punishment."[42]

The element " abuse of authority " in article 3 of Law No. 31 of 1999 concerning the Eradication of Corruption Crimes is interpreted to have a different meaning from "Abuse of Authority" as intended in article 21 paragraph (1) of Law No. 30 of 2014 concerning Government Administration. In the provisions of article 21 paragraph (1) of Law No. 30 of 2014 concerning Government Administration, it is deemed to revoke the authority that investigators have in carrying out investigations in order to find out whether there has been an abuse of authority committed by a suspect as a government official, that this should be the object of investigation. be tested first in the State Administrative Court if it is based on the principle of *Prae Sumptio iustae causa* which means that government decisions must always be considered correct and legal and immediately implemented before there is a legal decision with permanent legal force stating that the decision is invalid. Based on the principle of presumption *Rechtmatig / Prae sumptio iustae causa* that State administrative decisions (KTUN) must be considered legally valid until a court decision states otherwise.[43]

The effectiveness of the application of State administrative law as the main instrument in eradicating criminal acts of corruption is currently seen in the settlement of state losses to Bank Indonesia Liquidity Assistance amounting to Rp. 110 Trillion, where the current government policy is to issue Presidential Decree of the Republic of Indonesia Number 6 of 2021 concerning the Task Force for Handling State Claims for Bank

[42] Criminal Law of the People's Republic of China Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997

[43]Supandi, Kapita Selekta Hukum Tata Usaha Negara, (Jakarta : Penerbit Alumuni, 2016), p. 97

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Indonesia Liquidity Assistance Funds and not to use the Criminal Code [44](Tipikor) and Civil Code approaches as the main method in resolving State losses resulting from misuse. Bank Indonesia Liquidity Assistance.[45]

From the perspective of the Corruption Eradication Law, the final solution in creating order still focuses on the output of returning state losses and the resulting deterrent effect is intended to regulate social behavior, but the conditions between expectations and reality are unfortunately inversely proportional because criminal acts that are the target of law enforcement are still very large, so it is not surprising that Correctional Institutions are currently overcapacity and the burden on the state to improve this behavior is very burdensome on the budget. Correctional Institutions at the Ministry of Law and Human Rights in 2018 disbursed at least Rp. 1.3 trillion just to feed prisoners[46]

Discussion of article 3 of Law no. 20 of 2001 concerning the Eradication of Corruption, namely "Every person who, with the aim of benefiting himself or another person or a corporation, abuses the authority, opportunity or means available to him because of his position or position or the means available to him because of his position or position which can causing harm to state finances or the state economy, shall be punished with life imprisonment or imprisonment for a minimum of 1 (one) year and a maximum of 20 (twenty) years and/or a fine of at least Rp. 50,000,000 (fifty million rupiah) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah). [47]The origin of Article 3 of the Corruption Eradication Law is taken from Article 423 of the Criminal Code and the sanctions for this article are increased to up to 20 years in prison. From the point of view of the State Administration Law in its explanation, "Abuse of Authority" by state officials is not a criminal offense and is purely an administrative error. State administrative law views "Abuse of Authority" as an administrative error that must be answered with administrative sanctions as a means of evaluation to improve the performance of administrative management. This is of course contrary to the perspective of the Corruption Eradication Law which threatens perpetrators with a maximum of 20 years in prison. In the Government Administration Law, on the contrary, the nature of human error is the basis for evaluation to improve the behavior of managing State finances in the implementation of good governance *and* as an effort to prevent the practice of Corruption, Collusion and Nepotism.[48]

The Government Administration Law specifically actualizes the constitutional norms of the relationship between the state and citizens, the legal regulation of government administration in law is an important instrument of a democratic rule of law, where decisions and/or actions are determined and/or carried out by bodies and/or or government officials or other state administrators which include institutions outside the

[44]Decree of the President of the Republic of Indonesia Number 6 of 2021 concerning the Task Force for Handling State Claims for Bank Indonesia Liquidity Assistance Funds

[45] Mahfud MD, "Total Aset Hak Tagih BLBI Rp110 Triliun"www.merdeka.com.diakses 16 Desember 2021

[46] UU Nomor 20 Tahun 2001 Tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi

[47]Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan

[48]Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan

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executive, judiciary and legislature which carry out government functions which may be tested through the courts (Administrative Court). These are the ideal values of a legal state. The implementation of state power must be in favor of its citizens and not vice versa. In the event that law enforcement (Judiciary) considers that there has been a criminal act of corruption or abuse of authority committed by an organizing official, then the Judicial institutions, both the Police and Prosecutor's Offices, have issued a warrant to investigate the alleged criminal act of corruption on suspicion of "Abuse of Authority" of the TUN Official or Decision Making Officer (State losses) must then be tested at the State Administrative Court so that administrative justice should take precedence before trials for criminal acts of corruption. This is of course in accordance with the principles that apply to criminal law itself regarding Ultimum Remedium that the criminal route is the last resort, so that in order to test the determination of a suspect or issue an investigation warrant, in fact one may not use the pretrial route in general. Regarding the examination of the term "Abuse of Authority" it is stated expressly in Law Number 30 of 2014 concerning Government Administration article 21 paragraph (1) The court has the authority to accept, examine and decide whether or not there are elements of abuse of authority committed by government officials. And in paragraph (2) government bodies and/or officials can submit a request to the court to assess whether or not there is an element of abuse of authority in decisions and/or actions. [49]In this case, the actions of investigators in investigating criminal acts of corruption can become the object of administrative law disputes because of the nature of criminal law itself (Ultimum Remedium).

Regarding the application of administrative law as Primum Remedium, it is actually very clearly regulated in Law Number 1 of 2004 concerning State Treasury in Article 60 paragraph (1), namely "Every state loss must be reported by the direct superior or head of office to the minister/institution head and notified to the Financial Audit Agency no later than 7 (seven) working days after the state loss is discovered. (2) As soon as the state loss is discovered, the treasurer, non-treasurer civil servant, or other official who has clearly violated the law or neglected his obligations as intended in Article 59 paragraph (2) will immediately be asked for a statement of capability and/or acknowledgment that the loss it is his responsibility and is willing to compensate the country's losses. (3) If it is impossible to obtain a certificate of absolute responsibility or cannot guarantee the return of state losses, the minister/head of the institution concerned shall immediately issue a decision letter on the imposition of temporary compensation for losses to the person concerned."[50]

CONCLUSION

Based on the results of research conducted by the author, the application of State administrative law as *the Primum Remedium* for eradicating corruption in Indonesia should be implemented in accordance with the spirit of the UNCAC Ratification (United Nations Convention Against Corruption, 2003) Article 53 which states "Non-Conviction Based Asset Confiscation (NCB).) or Actions for direct return of wealth can be carried out without punishment". The approach to eradicating corruption without prior

[49]Pasal 21 UU Nomor 30 Tahun 2014 Tentang Administrasi Pemerintahan
[50] UU Nomor 1 Tahun 2004 Tentang Perbendaharaan Negara

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punishment is actually regulated in Law of the Republic of Indonesia Number 17 of 2003 concerning State Finances Article 34 paragraph (3) The President Gives Administrative Sanctions in Accordance with the Provisions of the Law to Civil Servants and Other Parties Who Do Not Fulfilling Their Obligations, As Determined In This Law and emphasized in Article 35 paragraph (1) Every state official and non-treasurer civil servant who violates the law or neglects their obligations, either directly or indirectly, which harms state finances is required to compensate for the losses in question, so that they learn from The case of Sjamsul Nursalim, which turned out to be able to compensate for state losses without criminal punishment, is certainly much more effective, because sanctions for perpetrators of corruption offenses using civil and administrative legal methods are very detrimental to violators, where the perpetrator's assets can be confiscated.

If there is a change in the legislation after the act is committed, then the provisions that are most beneficial to the defendant are applied (see the amendment to the Criminal Code which uses administrative law Law No. 3 of 1971 concerning the Eradication of Corruption Crimes to Law no. 31 of 1999 concerning the Eradication of Corruption Crimes and see also article 418, the penalty in WvSI is three years, whereas in WvS or the Criminal Code based on Law No. 1 of 1946 it is only six months). The criminal approach in eradicating corruption that has been going on since the colonial era until now is actually very irrelevant or more accurately can be said to be outdated, because the criminal process that is applied includes sanctions including imprisonment, imprisonment, fines, revocation of political rights and replacement money besides not having The significant effect of eliminating corruption is also felt to be inhumane, where the nature of State administrative law is much more effective and humanizes humans (*Restorative Justice*) in resolving cases.

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