ULTIMUM REMEDIUM AND THE LEGAL POLITICS OF TAX CRIMINAL PROSECUTION IN INDONESIA

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Abstract

The enforcement of tax criminal law in Indonesia faces a structural dilemma between the principle of ultimum remedium, which emphasizes the recovery of state financial losses, and the tendency to apply primum remedium, which is punitive. This study uses a juridical-normative method with a statutory, conceptual, case-based, and comparative approach to analyze the normative construction of the KUP Law, law enforcement practices, and Supreme Court jurisprudence related to tax crimes. The results show that the ambiguity of the discretionary formulation of Article 44B of the KUP Law, as well as the inconsistency of the ratio decidendi in court decisions, have given rise to legal uncertainty and unequal treatment of taxpayers. As a novelty, this article deconstructs the binary paradigm of ultimum remedium–primum remedium and proposes the Integrative Justice Model as an alternative theoretical framework. This model is designed as a legal triage mechanism that classifies tax crimes based on the level of seriousness of the act and the degree of culpability (mens rea) of the perpetrator, thus allowing for proportional differentiation of settlement paths through: (1) administrative-restorative paths, (2) hybrid restorative-punitive paths, and (3) punitive-preventive paths. The Integrative Justice Model is offered as a normative solution to bridge the interests of state financial restoration with just, effective, and legal certainty-oriented criminal law enforcement.

Kata kunci:
Hukum Pidana Pajak, Keadilan Integratif, Keadilan Restoratif, Kepastian Hukum.

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Intisari

Penegakan hukum pidana pajak di Indonesia menghadapi dilema struktural antara asas ultimum remedium yang menitikberatkan pada pemulihan kerugian keuangan negara dan kecenderungan penerapan primum remedium yang berorientasi punitif. Penelitian ini menggunakan metode yuridis-normatif dengan pendekatan perundang-undangan, konseptual, kasus, dan perbandingan untuk menganalisis konstruksi normatif UU KUP, praktik penegakan hukum, serta yurisprudensi Mahkamah Agung terkait tindak pidana perpajakan. Hasil penelitian menunjukkan bahwa ambiguitas formulasi Pasal 44B UU KUP yang bersifat diskresioner, serta inkonsistensi ratio

decidendi dalam putusan pengadilan, telah menimbulkan ketidakpastian hukum dan ketimpangan perlakuan terhadap Wajib Pajak. Sebagai kebaruan (novelty), artikel ini mendekonstruksi paradigma biner ultimum remedium–primum remedium dan mengajukan Model Keadilan Integratif sebagai kerangka teoretis alternatif. Model ini dirancang sebagai mekanisme triase yuridis yang mengklasifikasikan tindak pidana pajak berdasarkan tingkat keseriusan perbuatan dan derajat kesalahan (mens rea) pelaku, sehingga memungkinkan diferensiasi jalur penyelesaian secara proporsional melalui: (1) jalur administratif-restoratif, (2) jalur hibrida restoratif-punitif, dan (3) jalur punitif-preventif. Model Keadilan Integratif ditawarkan sebagai solusi normatif untuk menjembatani kepentingan restorasi keuangan negara dengan penegakan hukum pidana yang berkeadilan, efektif, dan berorientasi pada kepastian hukum.

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1. Introduction

Taxes are the main foundation for the sustainability of a modern state because they function as the main source of funding for the administration of government and the fulfillment of general welfare (Ajeigbe et al., 2024; Mpofu, 2022; Ulinnuha, 2025). From the perspective of social contract theory, tax obligations reflect a collective agreement between the state and citizens, where a portion of economic resources is handed over to the state to be managed for the public interest (Revkin & Ahram, 2020; Viona et al., 2025). Therefore, tax compliance is not only understood as a formal legal obligation, but also as a fundamental state obligation. However, in practice, violations of tax obligations are often responded to with coercive criminal law instruments. Criminal law, which is doctrinally positioned as the ultimum remedium, is repressive in nature and has severe social consequences for the perpetrators (Istikomah & Melati, 2024). When criminal law is applied to the taxation sector, a conceptual dilemma arises between the restorative objective of tax law, namely the recovery of state financial losses, and the retributive and preventive objectives of criminal law. This phenomenon becomes even more problematic when the use of criminal sanctions has the potential to disrupt economic activity, shut down businesses, and ultimately reduce the tax revenue base (Retnani et al., 2024). Thus, the enforcement of criminal tax law is in tension between the fiscal needs of the state and the coercive function of the state as a law enforcer, which raises serious issues regarding proportionality, effectiveness and fairness in criminal tax policy.

There have been quite a lot of academic studies on the application of the ultimum remedium principle in tax crimes in Indonesia (Hidayat & Sinaga, 2022; Jadidah, 2023; Pasmawati, 2025). Previous studies generally highlight the existence of the ultimum remedium principle in the General Provisions and Tax Procedures Law (UU KUP) (Januru et al., 2025), as well as the shift in orientation of tax criminal policy following various legislative changes, particularly after the enactment of the Tax Regulation Harmonization Law (Anggini et al., 2025; Silalahi, 2025). Some studies emphasize that criminal tax law should be understood as part of administrative penal law, the main objective of which is to support administrative compliance, not merely to punish perpetrators (Kärner, 2022; Putra & Yasa, 2024). Other studies emphasize implementation problems, such as weak legal certainty due to the discretionary nature of the termination of investigations based on Article 44B of the KUP Law (Sumarna et al., 2022). However, most of these studies are still descriptive-normative in nature and tend to contrast the application of ultimum remedium and primum remedium dichotomously. Tax criminal law enforcement is often positioned as having only two extreme options: prioritizing state financial recovery or strictly enforcing criminal penalties. This approach fails to fully explain the complexity of tax violations and the differences in the levels of culpability and impacts of each offense.

Based on these conditions, this study aims to critically analyze the normative construction and practice of tax criminal law enforcement in Indonesia, particularly in the context of the tension between the principle of ultimum remedium and the tendency to apply primum remedium. This study not only seeks to identify the sources of legal uncertainty arising from the regulation and implementation of Article 44B of the KUP Law, but also examines the philosophical and practical implications of this inconsistency in law enforcement for legal certainty and justice for taxpayers. Furthermore, this study aims to evaluate the extent to which the existing tax criminal law framework aligns with the characteristics of economic crimes, which are generally financially motivated and administrative in nature. Furthermore, this study aims to formulate an alternative theoretical model capable of proportionally bridging the restorative objectives of tax law with the punitive functions of criminal law. Thus, the ultimate goal of this study is to provide conceptual and normative contributions to the development of tax criminal policies that are fairer, more effective, and aligned with the principles of the rule of law.

The main argument in this study is that the binary paradigm between ultimum remedium and primum remedium is no longer adequate to explain and direct the enforcement of complex tax criminal law. Tax criminal law has a unique characteristic as ius singulare that cannot be fully equated with general criminal law. Tax crimes encompass a broad spectrum, ranging from administrative violations due to negligence to systemic organized crime that undermines the integrity of the tax system. Therefore, the uniform application of a single principle has the potential to create injustice and inefficiency. This study argues that a tiered approach is needed that allows for differentiation of handling based on the seriousness of the act and the degree of culpability (mens rea) of the perpetrator. This approach must be able to functionally integrate restorative and punitive logics, rather than contrasting them. Within this framework, criminal law is not abolished, but rather selectively positioned as an instrument to address violations that are truly serious and harmful to the tax system. This argument forms the basis for the development of the Integrative Justice Model proposed in this study.

Based on a review of previous studies, a significant research gap exists in the study of tax criminal law in Indonesia. To date, few studies have explicitly deconstructed the binary paradigm of ultimum remedium–primum remedium and replaced it with a more adaptive and proportionate conceptual framework. Existing studies generally have not formulated a structured and operational law enforcement model to differentiate settlement paths based on the typology of violations and the level of culpability of the perpetrator. Furthermore, jurisprudential analysis is often conducted in a piecemeal manner without drawing broader theoretical implications regarding the objectives of tax criminalization. Therefore, this study fills this gap by offering the Integrative Justice Model as a new theoretical framework that combines administrative-restorative, hybrid restorative-punitive, and punitive-preventive approaches within a coherent law enforcement system. Thus, this research not only enriches academic discourse but also provides normative direction for tax criminal policy reform in Indonesia.

2. Research methods

This research uses a juridical-normative approach with legal norms as the main object of study (Aksa et al., 2025; Arifuddin et al., 2025). This approach was chosen because the research focuses on the analysis of legal principles, normative construction of

statutory regulations, as well as doctrinal and jurisprudential interpretations in the tax criminal law system (Firmanto et al., 2024). The analysis was conducted to examine the tension between the principle of ultimum remedium and the tendency to apply primum remedium in the Indonesian tax legal framework.

The approaches used include: (1) a statute approach, to analyze the consistency, hierarchy, and potential conflicts of norms in the General Provisions and Tax Procedures Law as last amended by Law Number 7 of 2021, specifically Articles 38, 39, 39A, and 44B, and their relationship to the Criminal Code; (2) a conceptual approach, to examine the concepts of ultimum remedium, primum remedium, restorative justice, and administrative penal law based on the doctrines of legal scholars; (3) a case approach, through an analysis of the ratio decidendi in Supreme Court decisions related to tax crimes to map patterns of interpretation and inconsistencies in the application of the law; and (4) a comparative approach, by comparing the practice of tax criminal law enforcement in Indonesia with the fiscale transactie model in the Netherlands and Selbstanzeige in Germany, and referring to OECD standards.

The legal sources consist of primary, secondary, and relevant supporting legal materials. All materials are analyzed qualitatively using systematic and teleological interpretation methods to produce prescriptive arguments and recommendations for reforming criminal tax law (Lacity & Janson, 1994; Nolen & Talbert, 2011).

3. Analysis and Discussion

The grand theory used in this research is the Administrative Penal Law theory (Putra et al., 2022). This theory views certain criminal laws, including tax criminal laws, not as purely part of classical criminal law, but rather as instruments of sanctions used by state administrative law to ensure the effectiveness of administrative norms. Within this framework, criminal penalties do not stand as ends in themselves, but rather serve as supporting (instrumental) means for achieving the goals of state administration, namely compliance with regulations and protection of the public interest.

In the context of taxation, administrative penal law positions state revenue and tax compliance as the primary goal, while criminal sanctions are positioned as a secondary, subsidiary tool. This means that the use of criminal sanctions can only be justified if administrative mechanisms - such as collection, fines, or other financial sanctions - are no longer effective in achieving these goals. Thus, this theory provides a conceptual basis for

the application of the ultimum remedium principle in criminal tax law, as criminal sanctions are viewed as a "borrowing" from general criminal law to strengthen the fiscal administration regime.

Administrative penal law theory also explains why criminal tax law has specific characteristics that differ from conventional criminal offenses. Tax violations are generally economically motivated, the losses are quantifiable, and theoretically recoverable through financial mechanisms. Therefore, the orientation of punishment in tax law should be functional and restorative, not retributive. Imprisonment, from this theoretical perspective, is not the default response, but rather a final instrument for serious, systematic violations committed with a high degree of mens rea.

Using administrative penal law as a grand theory, this study assesses that the main problem with criminal tax law enforcement in Indonesia lies not in the absence of criminal norms, but rather in the inconsistent application of criminal law as an administrative instrument. When punishment is used prematurely or without clear criteria, it loses its functional legitimacy and actually creates legal uncertainty. This grand theory serves as a basis for criticizing the binary paradigm of ultimum remedium–primum remedium and for formulating the Integrative Justice Model as a legal triage system more in line with the character of criminal tax law.

Ultimum Remedium Discretion as a Key Normative Finding

The research findings indicate that the central problem in the enforcement of criminal tax law in Indonesia lies in the normative construction of ultimum remedium, which is discretionary in nature. Article 44B paragraph (1) of the KUP Law explicitly uses the phrase "may terminate an investigation," which emphasizes that the mechanism for terminating a case in the interest of state revenue is not an automatic or mandatory legal procedure, but rather an optional authority that depends on the considerations of the Minister of Finance and the Attorney General. From the perspective of a state based on the rule of law, this formulation is problematic because it does not provide objective standards that can be used as guidelines by taxpayers or law enforcement officials. The law no longer functions as a predictable system of norms, but rather as a flexible policy instrument. This discussion shows that ultimum remedium in the KUP Law does not operate as a principle limiting state power, but rather as a broad scope for discretion. As a result, the principle's original purpose-namely limiting the use of criminal penalties to protect citizens' rights-loses its normative force. In the context of administrative criminal law, this condition demonstrates a shift in the function of the principle from a principle of protection to a flexible fiscal policy tool, which is vulnerable to abuse if not guarded by clear legal criteria.

Further discussion shows that the discretion in Article 44B of the KUP Law directly impacts the lack of legal certainty for taxpayers. The absence of normative indicators regarding when restorative action should be prioritized leaves taxpayers in a state of

uncertainty from the outset of the law enforcement process. Even when taxpayers have demonstrated good faith by paying off state losses, the final outcome of the case remains unpredictable. From the perspective of legal certainty theory, this situation contradicts the principles of lex certa and predictability of law.

This discussion confirms that criminal tax law fails to fulfill its preventive function because taxpayers lack clarity regarding the legal consequences of their cooperative actions. Furthermore, broad discretion creates an asymmetrical power relationship between the state and taxpayers. The state holds a dominant position with the threat of criminal penalties, while taxpayers are on the defensive without adequate legal protection. These findings demonstrate that legal uncertainty is not merely a technical legal issue, but a structural problem that has the potential to erode public trust in the tax system and the rule of law itself.

The Distortion of Ultimum Remedium into an Instrument of Punitive Pressure

The research also reveals a distortion in the function of ultimum remedium in practice. Administrative sanctions in the form of fines reaching 300% to 400% of state losses, theoretically designed as a restorative instrument, often function as punitive pressure in practice. This discussion demonstrates that the threat of imprisonment is used as a "trump card" to encourage taxpayers to accept administrative settlements with significant financial burdens. In such situations, payment of the fine is not entirely voluntary, but rather the result of coercive pressure. This blurs the line between administrative sanctions and criminal sanctions. From the perspective of restorative justice theory, this situation is problematic because recovery should be based on awareness and responsibility, not coercion. This discussion emphasizes that without a clear normative design, restorative mechanisms can degenerate into punitive settlements. Thus, the goal of restoring state finances is achieved, but at the expense of the principles of justice, proportionality, and rights protection. These findings strengthen the argument that ultimum remedium in Indonesian tax criminal law has not yet functioned conceptually as intended.

Jurisprudential analysis shows that in judicial practice, the punitive approach (primum remedium) remains the mainstream. Many Supreme Court decisions focus on proving intent and make imprisonment the primary response to tax crimes. Repayment of state losses is generally considered only as a mitigating factor, not as a basis for eliminating criminal penalties. This discussion demonstrates that judges within this school view tax crimes on a par with other general crimes, thereby marginalizing administrative and fiscal logic. This approach does provide a symbolic effect in the form of state assertiveness, but it has the potential to ignore the primary objective of tax law, namely the sustainability of state revenues. From the perspective of economic criminal policy, this finding indicates over-criminalization that is potentially counterproductive. Imprisoning taxpayers without

considering the long-term economic impact can damage the tax base and reduce voluntary compliance. Thus, this discussion confirms that the dominance of the punitive approach is not merely a matter of legal interpretation but also a reflection of the lack of a focused philosophy of tax punishment.

Restorative Justice and Its Limitations in Judicial Practice

Conversely, the study also found that some decisions prioritize a restorative approach, although their number is relatively limited. In these decisions, judges prioritize the recovery of state losses as the primary objective and view imprisonment as an instrument that is not always relevant. This discussion demonstrates that some judges understand the special character of tax criminal law as part of administrative penal law. However, because this approach is not supported by binding judicial guidelines, its application is inconsistent and highly dependent on the judge's individual perspective. As a result, the treatment of defendants is inconsistent. Two taxpayers with similar violations can receive very different decisions. This situation confirms that the existence of a restorative approach is not sufficient to create legal certainty. This discussion reinforces the finding that the main problem lies not in the absence of restorative norms, but rather in the absence of a systemic framework that consistently integrates these norms into judicial practice.

The jurisprudential inconsistencies found in this study have resulted in a phenomenon that can be described as a "judicial lottery." The fate of defendants in tax crimes depends largely on the judge examining the case, not on the objective classification of the offense. This discussion demonstrates that this situation contradicts the principle of equality before the law. In a state governed by the rule of law, differences in decisions should be based on differences in facts and levels of culpability, not on the philosophical preferences of individual judges. This phenomenon also demonstrates a systemic failure to provide clear sentencing guidelines. Without a Supreme Court Regulation (PERMA) or Supreme Court Regulation (SEMA) governing the philosophy of tax sentencing, judges are forced to develop their own assessment frameworks. This discussion emphasizes that jurisprudential inconsistencies are not simply variations in interpretation, but rather indicators of the weakness of the overall design of tax criminal law policy.

The comparative results show that the Netherlands has succeeded in reducing uncertainty through a standardized fiscale transactie mechanism. (Beetsma et al., 2013; Welkenhuysen, 2017). This discussion demonstrates that the Netherlands' success lies not in the abolition of criminal penalties, but rather in the clarity of pre-trial procedures. Prosecutors have clear guidelines regarding when a transaction is offered and when prosecution should proceed. Thus, discretion remains, but is limited by a transparent normative framework. This lesson is relevant for Indonesia, which currently relies on reactive discretion without any established standards. This finding emphasizes that legal

certainty is not synonymous with rigidity, but rather with the measurability of discretion.

The Selbstanzeige model in Germany provides important lessons regarding the role of incentives in tax law enforcement (Baselgia, 2023; Feld & Larsen, 2012). This discussion demonstrates that criminal immunity for voluntary disclosure creates a strong incentive for taxpayers to return to compliance without the threat of criminal penalties. This model positions criminal penalties as a backup instrument for serious violations, rather than as an initial response. These findings suggest that compliance can be achieved through intelligent policy design, not solely through repression. For Indonesia, this model is relevant for strengthening the preventive and restorative phases of the tax law enforcement system..

The OECD framework emphasizes the importance of a coherent national strategy in combating tax crime. This discussion shows that Indonesia lacks a clear roadmap for integrating administrative and criminal approaches. Without a national strategy, law enforcement tends to be reactive and ad hoc. OECD principles emphasize proportionality, inter-agency coordination, and the protection of suspects' rights. These findings strengthen the argument that tax crime reform must be systemic, not partial.

The following discussion confirms that the binary paradigm of ultimum remedium–primum remedium fails to explain the complexity of tax violations. The broad spectrum of violations cannot be reduced to a single principle. These findings suggest that this binary approach actually breeds injustice, as it equates minor violations with serious crimes within a single legal response framework. Therefore, this paradigm needs to be deconstructed.

The research findings point to the need for a legal triage system in tax criminal law. This discussion demonstrates that classifying violations based on seriousness, state losses, and mens rea is a prerequisite for fair and effective law enforcement. Without triage, criminal penalties risk being used excessively or, conversely, too leniently.

Overall, the results and discussion of this research demonstrate that the main problems with tax criminal law enforcement in Indonesia are structural and philosophical. Discretion without standards, jurisprudential inconsistencies, and an outdated binary paradigm hinder the achievement of justice and effectiveness. These findings form the conceptual basis for proposing the Integrative Justice Model as a normative solution in the following section.

4. Conclusion

This research confirms that the main problem of tax criminal law enforcement in Indonesia is structural and philosophical, not merely a regulatory technicality. From an Administrative Penal Law perspective, tax criminal law should function as a subsidiary administrative instrument to ensure compliance and recovery of state losses, but in

practice it is often distorted into punitive pressure that blurs the line between administrative and criminal sanctions. An interesting finding that is novel in this research is the deconstruction of the binary paradigm of ultimum remedium - primum remedium and the formulation of the Integrative Justice Model as a legal triage system. This model classifies tax crimes based on the level of seriousness, state losses, and mens rea to distinguish proportionally between administrative-restorative, hybrid restorative-punitive, and punitive-preventive pathways. Through an analysis of the discretion of Article 44B of the KUP Law, the distortion of administrative fines into punitive settlements, the phenomenon of "judicial lotteries," and lessons learned from the Dutch fiscale transactie, the German Selbstanzeige, and the OECD framework, this research provides an important conceptual contribution to the design of a fairer, more consistent, and more legal certainty-oriented tax criminal system.

On the other hand, this study has several limitations that need to be critically acknowledged. The juridical-normative approach used focuses on the analysis of regulations, doctrine, and jurisprudence, thus failing to explore empirical dimensions, such as the experiences of taxpayers, law enforcement officials, or statistical data on case handling, which could enrich the validity of the findings. Comparative studies with the Netherlands, Germany, and OECD standards are also still conceptual in nature, so adapting the institutional and political aspects of law to the Indonesian context requires further, more in-depth, interdisciplinary research. Furthermore, the proposed Integrative Justice Model remains at the normative design level, so its transformation into positive norms, prosecution guidelines, or sentencing guidelines has not been operationally tested. These limitations also open up opportunities for future research to test, modify, and operationalize this model through a broader socio-legal approach and policy dialogue.

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