

4-30-2021

CRIMINISTRATIVE LAW: DEVELOPMENTS AND CHALLENGES IN INDONESIA

Nathalina Naibaho

Faculty of Law, Universitas Indonesia, Indonesia, nathalina.naibaho@gmail.com

Harkristuti Harkrisnowo

Faculty of Law, Universitas Indonesia, Indonesia

Suhariyono AR

Faculty of Law, Universitas Brawijaya

Andri Gunawan Wibisana

Faculty of Law, Universitas Indonesia, Indonesia

Follow this and additional works at: <https://scholarhub.ui.ac.id/ilrev>



Part of the [Administrative Law Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

Naibaho, Nathalina; Harkrisnowo, Harkristuti; AR, Suhariyono; and Wibisana, Andri Gunawan (2021) "CRIMINISTRATIVE LAW: DEVELOPMENTS AND CHALLENGES IN INDONESIA," *Indonesia Law Review*. Vol. 11 : No. 1 , Article 1.

DOI: 10.15742/ilrev.v11n1.647

Available at: <https://scholarhub.ui.ac.id/ilrev/vol11/iss1/1>

This Article is brought to you for free and open access by the Faculty of Law at UI Scholars Hub. It has been accepted for inclusion in Indonesia Law Review by an authorized editor of UI Scholars Hub.

CRIMINISTRATIVE LAW¹: DEVELOPMENT AND CHALLENGES IN INDONESIA²

Nathalina Naibaho,* Harkristuti Harkrisnowo,* Suhariyono AR,**
Andri G Wibisana*

*Faculty of Law, Universitas Indonesia, Indonesia; **Faculty of Law, Universitas Brawijaya

Article Info

Received : 27 August 2020 | Received in revised form : 10 October 2020 | Accepted : 18 November 2020

Corresponding author's e mail : nathalina.naibaho@gmail.com

Abstract

The borderlines between core criminal law and administrative law developed in such a way that it became increasingly difficult to draw a clear and a firm category while dividing line between those. The category of a measure as administrative or criminal is far from being theoretical as it preconditions the applicable legal regime and especially the level of procedural safeguards benefiting to those sanctioned. This paper is questioning the gray area belonging to something in between criminal and administrative law and discussing the rule and the role of criminal law and administrative law in action when the later comprehend punitive administrative sanctions. Several circumstances need to be considered in order to determine the appropriate sanction to fill the gap. This article also suggests the use of "una via principle" as an approach to unpack the gray area in the role of criminal and administrative law, specifically in tax law case.

Keywords: criminal law; administrative law; punitive administrative sanction; tax case; una via.

Abstrak

Irisan antara prinsip hukum pidana dan hukum administrasi berkembang sedemikian rupa sehingga menjadi sulit untuk menarik garis pemisah yang jelas dan tegas antara keduanya. Kategori suatu sanksi sebagai bentuk dari sanksi administratif atau sanksi pidana dalam aplikasinya tampak bergeser dari landasan teoritis, hal ini terjadi karena berkembangnya argumentasi dalam tatanan teori dan penegakan hukum terutama pada tingkat perlindungan prosedural yang tampak menguntungkan bagi mereka yang dijatuhi sanksi. Tulisan ini mempertanyakan dan sekaligus mendiskusikan adanya keaburan yang terdapat di antara hukum pidana dan hukum administrasi serta membahas aturan dan peran hukum pidana dan hukum administrasi dalam suatu sanksi manakala ada nuansa punitif dalam suatu sanksi administratif. Tulisan ini juga menyarankan menggunakan prinsip "una via" sebagai upaya untuk memperjelas dan mempertegas keaburan itu, utamanya dalam kasus di bidang perpajakan.

Kata kunci: hukum pidana; hukum administrasi; sanksi administratif punitif; kasus pajak; una via.

¹ The term of "criministrative law" was used by Antoine Bailleux, a Professor at Saint-Louis University, Brussels on his article discuss about sanction in EU competition law published in 2014 via Antoine Bailleux, "The Fiftieth Shade of Grey: Competition Law, Criministrative Law, and Fairly Fair Trial," in *Do Labels Still Matter? Blurring Boundaries Between Criminal and Administrative Law: The Influence Of the EU*, ed. A Weyembergh and F Galli (Brussels: Publications de l'Université Libre de Bruxelles, 2014), 137-152.

² This paper has been presented on 11 June 2019 in the 16th Asian Law Institute Conference (ASLI Conference 2019), hosted by the Faculty of Law, National University of Singapore, Singapore

I. INTRODUCTION

For years, the boundaries of repressive law evolved in such a way that it became increasingly difficult to draw a clear dividing line between core criminal law and administrative law when the latter also includes punitive sanctions. Approaching punitive administrative sanctions implies entering a gray area belonging to something in between criminal and administrative law. The classification of a measure as administrative or criminal does not belong only in the theoretical realm as it sets the precondition for the applicable legal regime and especially the level of procedural safeguards benefiting those at the receiving end of the sanction. Administrations have indeed adopted repressive measures, without granting the addressee the procedural guarantees attached to repressive measures taken under the umbrella of criminal law. On the issue of administrative law enforcement, the inclusion and imposition of criminal sanctions in administrative provisions aim to support and strengthen administrative law enforcement, because there is an opinion that criminal sanction has a deterrence effect on the perpetrator. Moreover, there is also a need to cumulate both kinds of sanctions in certain ways to justify that there is no strict distinction between those sanctions since both the administrative and criminal sanctions have punitive and reparative goals on their application and development.

The discussion will focus its concern on criminal and administrative sanctions management in several laws and its application in legal practice by making review upon the history and development of such both sanctions so that it can identify the criteria of criminal action/conduct on which criminal and/or administrative sanctions should be imposed, and the selection criteria of criminal/administrative sanction within settlement practice of various cases. This research is expected to recommend its administration and performance in the future. Furthermore, coherency in different regulations and creating integrated, comprehensive, and measurable sanctions and practical guidance for legal officers are urgently required in addressing any legal problems in economic activities.

This article focuses more on Indonesian taxation law and customs law which stipulated either administrative and/or criminal on its sanction. the research was performed using library research, and in this research, the focal point is to seek a theoretical basis that lies upon inclusion and application of criminal sanction and/or administrative sanction in various existing laws. The data used is secondary data in form of library data either in form of primary legal material or secondary one. The analyzed and studied primary legal material provisions formulating criminal sanction and/or administrative sanction within the law in tax, custom, and excise issues. Meanwhile, secondary legal material is in form of books on relevant law and reports of research results related to the discussion topic. The data obtained in this research consists of secondary data from various documents such as regulations, various writings about administrative sanction and criminal sanction and their progress in other countries, and case analysis in form of court ruling supported by interviews with several competent informants and resource persons. The countries in comparison are The Netherlands and Belgium considering these countries are the origin of the establishment and development of the discussion on *una via* principle that has been adopted by the Indonesia Supreme Court.

II. CRIMINISTRATIVE LAW: CRIMINAL LAW SANCTION IN ADMINISTRATIVE LAW

The criminal penalty, which is determined and implemented for economic transgressions by administrative acts, aims at restoring balance in socio-economic development and at securing funds for the welfare of the people. It is understood that the purpose of any governmental regulation is to ensure the welfare of the people; however, it is necessary to understand the rationale of the lawmakers/legal drafters who formulated the different types of sanctions. This study explores the theory/purpose the legislators used when formulating articles of sanction in the laws, that law enforcement officers are to adopt when imposing sanctions concerning a relevant case. The development of various theories on the criminal penalty is ultimately derived from the view of the crime and the criminals in society.

A. Intersection Between Administrative Law and Criminal Law: Theoretical Perspectives

Indonesia is not the only place where discussions on the regulation and application of criminal sanctions and administrative sanctions take place, the Netherlands is also such a place. According to Peci, in its development, there are two views on the relation of criminal sanctions with other areas of the law³⁴, The first is the autonomous school, this group believes that criminal law has the regulations, principles and functions of its own, as well as in possession of a strong characters which differentiate it from the law of other fields, particularly administrative law, in respect to sanctions. One of them is the principle of *ultimum remedium*. The second is the heteronomous school, this group believes that criminal law is not a special part of law but simply a governmental activity just like other field of legislation. Criminal law does not differ so much from other forms of law enforcement, that the criminal law character is not distinguishable from other type of any legal sanction since the administrative law and disciplinary law are also of punitive character. To that effect, Idir Peci differentiate the administrative law from the criminal law, including its goals regarding the objectives of penalty applications in the following:⁵

Development of criminal law and administrative law

Progress		Criminal Law	Administrative Law
Actors (Actors: Role holder Parties)	Previously	Presiding Judge	Administrative Officer
	Currently	Presiding Judge, Public Prosecutor Police and Police (cooperate and coordinate with each other)	Administrative Presiding Judge, General Admin Law Act (GALA), cooperate and coordinate with each other
Goal (Objective: Application of Sanction)	Previously	Retributive (backward looking – past)	Reparative, Constructive (forward looking – future)
	Currently	Prevention, protecting the public order and society	Punitive sphere in Administrative Law

³ Idir Peci, *Sounds of Silence: A Research Into the Relationship Between Administrative Supervision, Criminal Investigation and the Nemo-Tenetur Principle* (Nijmegen: Wolf Legal Publisher, 2006), 7-8.

⁴ Peci, *Sounds of Silence*, 7-8.

⁵ Peci, *Sounds of Silence*, 9-12. Peci did not specify the timeline of “previously” and “currently”.

As can be seen from the table, both the criminal law and administrative law have gone through quite a development. In terms of applying sanctions, criminal law has adopted a nuance of prevention, and administrative law has adopted a nuance of punishment. Thus, it can be said that today criminal law is similar to other bodies of law in that it has punitive sanctions, as expressed by the heteronomous school, as quoted by Peci as follows:⁶

*“Criminal law... is not a special part of the law, but simply a governmental activity... the substantive criminal law does not have its own norms and its function is ... that it guards the norm – through punitive sanctions – of other fields of law.”*⁷

Similar to Peci, Rimmelink argued the opinion that certain parts of administrative sanctions have punitive purposes which are intended to impose suffering on the offender.⁸ This development of administrative law and criminal law has certainly become an interesting discussion in terms of the relationship between administrative sanctions and criminal sanctions, which has always been debated. Regarding the above two schools, criminal law scholars Stanley Yeo and Kumaralingam Amirthalingam hold different views. Yeo agrees with the first school, where there is a clear distinction between criminal sanctions and administrative sanctions. Yeo’s view is that the difference between the two opinions lies in the justification for criminal and administrative sanctions, the type of sanctions, and differences in how a criminal case and an administrative violation case are processed. He thinks that criminal sanctions are autonomous sanctions that should stand on their own.⁹

In contrast to Yeo, Amirthalingam believes that the growing similarity between criminal sanctions and administrative sanctions may have occurred due to the discretionary authority of the law enforcement officers and administrative officials in handling factual cases in the community and various sanctions, according to prevailing regulations. On this development, Amirthalingam indicated that there is a potential for abuse of the authority held by the administrative officials and law enforcement officers, because they are given too much discretion. This is exacerbated by the weak or lack of supervision over their discretionary authority. This is ironic, as the administrative officials and law enforcement officers would be violating the same rules they are enforcing.¹⁰ As a response to this essay, Widdershoven in the Netherlands believes that in a condition where one must choose whether to use administrative sanctions such as a fine, or criminal sanctions, the following considerations must be taken: which provision will be used to process the case, including the severity of the violation. If the violation is related to traffic law or social security, then administrative sanctions will take precedence. In terms of business competition or communication with options of administrative sanctions, the administrative officials must work together with the relevant business competition or related bodies; in this case, whether it would be more appropriate to apply administrative sanctions¹¹. From this,

⁶ Peci, *Sounds of Silence*, 9-12.

⁷ Peci, *Sounds of Silence*, 7.

⁸ Jan Rimmelink, *Hukum Pidana: Komentar atas Pasal-Pasal Terpenting dari KUHP Belanda dan Padannya dalam KHUP Indonesia*; (Jakarta: PT. Gramedia Pustaka Utama, 2003), 16.

⁹ Interview was conducted on 21 March 2012 at the Faculty of Law, National University of Singapore, Singapore.

¹⁰ Interview was conducted on 27 February and 2 March 2012 at the Faculty of Law, National University of Singapore, Singapore.

¹¹ Rob Widdershoven, “Enroachment of Criminal Law in Administrative Law in Netherlands,” *Electronis Journal of Comparative Law* 6 (December 2002): 3.

we can see that when determining which process to use must take into consideration which regulation would apply and the severity of each case. Still referring to the experiences in the Netherlands, Luchtman¹² states that in handling fiscal and tax cases, the officials in charge (tax officers), police, and public prosecutors should work and coordinate together. This ensures that there will be no case in which there will be an overlap or both authorized officials or law enforcement officers do not feel that the case is under their jurisdiction or responsibility. In response to Luchtman, Schwenk questioned the power of the administrative official's authority when considering imposing a sanction, when the violation is not minor but is serious enough to warrant an administrative sanction. This question by Schwenk, according to the authors, is important because it is one of the problems that occur at the practical level.

Schwenk found three challenges regarding the application of criminal law in the field of administrative law linked to authority¹³. The first one is the authority of the Act by which the administrative officials imposing the rules, enforcing them, and eventually categorizing the deed as a part/element of a criminal act. The second issue is the authority given to the administrative bodies/officials to formulate the sanctions for the violation of the rules and regulations. The third is the authority to determine and impose sanctions on the offender. Specifically, two questions arise: What is the standard of the legislators in giving authority to the administrative officials in determining the elements of an act as criminal. The next question is, to what extent does the court provide space and/or determine whether an administrative official has the authority or not to issue a ruling and what basis will the legislators use to apply administrative sanctions? Schwenk also elaborated that even though the penalty was accepted as an administrative sanction, there is still a need for a proper/appropriate room for the use of administrative sanctions (for administrative violations) as a penalty. Schwenk questioned the power of the administrative official's authority to consider imposing a sanction when the violation is not minor but is serious enough for an administrative sanction. Therefore, the argument on this article's topic has become a perpetual discussion, not only on the regulation but also on the power of authority of the people who decide on the factual case they encounter.¹⁴

Faure and Svatikova, who have researched the type of sanctions on violations of environmental law, state that there are two kinds of sanctions that can be imposed, namely criminal sanction and administrative sanction. Usually, administrative sanctions are preferred because the process is much simpler and cheaper compared to criminal sanctions, which process must go through the criminal court and is thus considered complicated and requires quite a bit of money. The choice by law enforcement agencies to impose civil penalties or administrative sanctions in environmental law rather than criminal sanctions also takes place in the United States as well as in Australia¹⁵, as part of the prevention effort, especially against pollution. Faure and Svatikova's essays both elaborated on the scope of criminal and administrative law enforcement in terms of violation against environmental law in four jurisdictions in Western Europe, including the history and development of the enforcement of environmental law¹⁶.

¹² Interview was conducted on 8 June 2010 at the Willem Pompe Institute, Faculty of Law, University of Utrecht, Netherlands.

¹³ Edmund H Schwenk, "The Administrative Crime, Its Creation and Punishment by Administrative Agency," *Michigan Law Review* 42, no. 1 (August 1943): 79.

¹⁴ Schwenk, "The Administrative Crime," 79.

¹⁵ Anthony Ogus and Carolyn Abbot, "Sanction for Pollution: Do We Have the Right Regime?" *Journal of Environmental Law* 14, no. 3 (2002): 283, 286-288, <https://doi.org/10.1093/jel/14.3.283>.

¹⁶ Michael Faure and Katarina Svatikova, "Criminal or Administrative Law to Protect the Environmen-

They analyzed the urgency of a permanent fund allocation for the environmental management agency, to be utilized for law enforcement of single criminal sanctions or multiple sanctions, whether administrative or criminal, in processing every case.

The research on types of sanctions imposed on violations against environmental law in Western Europe found that two kinds of sanctions are being imposed: criminal and administrative sanctions. Usually, administrative sanctions are preferred because the process is much simpler and cheaper compared to criminal sanctions which process must go through the criminal court and is thus considered complicated and requires quite a bit of money. The study discovered that resolving environmental law violations by environmental agencies, through administrative procedures and sanctions, will reduce the environmental damage at a lower cost. Especially for cases that are not too serious and severe. Faure and Svatikova also discovered that administrative processes are less strict and more informal. In terms of costs, it is much more effective to complement the enforcement of criminal law with administrative law instead of only using criminal law enforcement.¹⁷ In other words, administrative sanctions are considered cheaper. Theoretically, administrative sanctions contain a weakness due to the opportunity for collusion between the government officials and the offenders. To anticipate this, a control mechanism needs to be established. What's interesting is that in practice there is no clear distinction between criminal law and administrative law. This is in line with the heteronomous school, which believes that there has been an integration between criminal law and administrative law including their sanctions.

B. Intersection Between Administrative Law and Criminal Law: Argumentation and Discussion in Practical Issues

Peci wrote about the relationship between administrative supervision, criminal investigation, and the principle of *nemo-tenetur* (the right to remain silent in Human Rights Law). The background of his thinking is that there is a distinction in Dutch law and doctrine in terms of implementing administrative supervision and criminal case investigations, especially in handling socio-economic-related cases. This happens when citizens are required to provide information to the supervisory authority even though the perpetrators of the crime have the right to remain silent during the investigation. In his research, Peci concluded that this happened because there was a sharp distinction between the supervision of administration and the investigation of criminal cases. Therefore, due to the increasing fusion between administrative and criminal cases, there is no need for a sharp distinction, especially in respecting the principle of *nemo-tenetur*. *Thus, in the discussion of this topic, other legal issues came into play, namely human rights concerning the process of resolving administrative cases that might also be resolved through criminal channels. In such situations, the perpetrator is certainly vulnerable to human rights violations both in the context of administrative and criminal law.*

Concerning case settlements where administrative officers or law enforcement officers have the choice of resolving through criminal or administrative channels, including the choice to impose administrative sanctions and/or criminal sanctions, this issue will lead us to the principle of *ne bis in idem*, which is a legal doctrine to the effect that no legal action can be instituted twice for the same cause of action, which is

tal? Evidence from Western Europe," *Journal of Environmental Law* 24, no. 2 (2012): 259-260.

¹⁷ Faure and Svatikova, "Criminal or Administrative," 259-260.

a very important principle in the discipline of law. In their paper, Garoupa and Gomez-Pomar elaborated more on the double jeopardy clause. They explained the following:

“Though there is a clear distinction in nature and procedure, both Regulatory agencies and courts frequently rely on similar instruments to sanction the same or very similar kinds of illegal behaviour.... It is generally more effective to have a penalty imposed by a Regulatory Agency rather than by the Courts... considering imprisonment sentences, legal error, and collusion between a Regulatory Agency and an offender...”

The Double Jeopardy clause will be violated if the penalties imposed by the Agency, though non-criminal by definition, qualify as “punishment” for the purposes of the scope of the *ne bis in idem* principle. The imposition of penalties by the Agency, then, would bar any criminal conviction and sanction, and vice versa. The US Supreme Court and other Constitutional Courts have been struggling with this issue and alternating between granting or denying Double Jeopardy protection in these -highly likely, in terms of occurrence- circumstances. Our analysis, we believe, sheds new light upon the meaning of Double Jeopardy in this context and points out at some factors that Courts should look at when deciding the scope of the Double Jeopardy clause with respect to -nominally, at least- non-criminal sanctions.

In many circumstances, regulatory penalties are also coupled with civil penalties. Our analysis conceptually applies with respect to the optimality of regulatory penalties and civil penalties. However, one should emphasize that a regulatory penalty’s advantage in deterrence is less evident because the burden of proof for a civil penalty is no longer reasonable doubt, but preponderance of the evidence, and mental states are less important. Yet, a civil case is usually more expensive and more time consuming than regulatory hearings.¹⁸

The issue of double jeopardy or *ne bis in idem* can be found in tax cases. For example, someone who violates a tax regulation can be punished with administrative sanctions as well as criminal sanctions, depending on the violation and how it was carried out.

The factual condition in Indonesia seems to be similar to that in the Netherlands and Belgium in terms of fiscal-related crimes, for example, tax evasion. In Belgium, since September 2012, a new provision has been promulgated as a guideline in processing tax cases (tax fraud/evasion)¹⁹, which also introduced a principle called *una via* principle/prosecution. This principle was introduced to prevent double jeopardy in tax cases and to significantly increase the amount for criminal fines on tax violations compared to the previous provision.²⁰ Initially, in Belgium, it was possible to impose double sanctions, namely tax penalties as well as criminal fine, with no regard for the *ne bis in idem* principle. However, over the years, the legislators introduced the application of *una via* principle, a principle used in processing tax cases, in particular tax evasion, which can now be solved through administrative procedures/channels, either by the tax authority or the criminal authority.²¹

¹⁸ Nuno Garoupa dan Fernando Gomez-Pomar, “Punish Once or Punish Twice: A Theory of The Use of Criminal Sanction in Addition to Regulation Penalties”, *Harvard John M. Olin For Law, Economics, and Business Discussion Paper Series* 308 (December 2000): 1-29.

¹⁹ “Belgium.” Irefeurope. Accessed March 15, 2015. <http://en.irefeurope.org/Belgium.a0940>.

²⁰ “Una Via Prosecution of Tax and Increased Criminal Fines,” Laga.be, Accessed March 9, 2015, <http://laga.be/newsroom/legal-news/una-via-prosecution-of-tax-and-increased-criminal-fines>.

²¹ “Una Via Prosecution.”

The decision to introduce this principle was made by the legislators, considering that previously in cases of tax fraud/evasion, the offender could be subjected to administrative sanction through payment of tax fines, as well as criminal sanctions in the form of criminal fines. This violates the double jeopardy principle, in which a person can not be punished twice for the same deed, even though the punishment was imposed through two different channels²². With the application of the *una via* principle in Europe, particularly in Belgium, the authors believe this principle can be considered for adoption in tax, custom, and duty cases, because all three are of similar nature, in that they are all legal matters related to state income.

C. Development and Challenges in Court Decision

The following are some cases that are relevant to the topic of research, from the fields of taxation, forestry, and customs. In the field of taxation, examples can be given of cases that have arrived at the settlement process at the Supreme Court. In the Decision of the Supreme Court of the Republic of Indonesia No. 05/C/PK/PJK/2005 in the case of underpayment of value-added tax (PPn) in violation of Act No. 18 of 2000 concerning Value Added Tax on Goods and Services and Luxury Goods Sales Tax as well as Government Regulation No. 144 of 2000 dated 22 December 2000, involving PT. Yos Raya Timber (Appellant for appeal) based in Pekanbaru, Riau versus the Director-General of Taxes of the Republic of Indonesia, the Supreme Court of Indonesia decided to reject the Appellant's petition and ruled for the punishment of PT. Yos to pay sanctions in the amount of Rp. 731,854,591 in addition to the outstanding VAT in the amount of Rp. 2,648,971,204. In this decision, the Panel of Judges did not specify the reasoning for imposing administrative sanctions.

Another tax case is one related to income tax (PPH) which involves PT. Asuransi Karyamas Sentralindo, domiciled in North Jakarta, as Appellant for appeal and the Director-General of Taxes of the Republic of Indonesia. Based on the Decision of the Supreme Court of the Republic of Indonesia No. 06/C/PK/PJK/2005, the Supreme Court has rejected the petition of the Appellant and sentenced the company to pay its obligations in the amount of Rp. 176,495,933. The sanction was imposed without giving reasons or considerations of why the Panel of Judges gave such a decision.

One important decision that can be used as an illustration, which closely related to the topic of this article is a taxation case, Decision No. 1090/B/PK/PJK/2014, a case that uses extraordinary remedies in the form of a review, examined and decided by the Indonesian Supreme Court on March 10, 2015. This is a breakthrough decision that can be an ideal example for the discussions on processes and imposition of sanctions in the realm of administrative law and criminal law related to the principle of *ne bis in idem* and *una via*. It turns out that the two principles have been applied in Indonesian courts, yet at the same time have become a challenge for the enforcement of criminal law and administrative law in Indonesia.

Taxpayer CV. Tiara Dalung Permai (Tiara Gatzu outlet) as the Appellant, represented by their Director, Hendro Teguh, based on a court decision of legal force, Denpasar District Court Decision Number 1092/Pid.B/2009/PN.Dps dated January 19, 2010, was found guilty of having committed tax crimes which resulted in the loss of state revenue. In his appeal, he claims that these losses were sufficiently compensated through the penalty imposed on Tiara Dewata Group (its parent

²² "Una Via Prosecution."

company, represented by Iskak Soegiarto Tegoeh) in a separate court case. Iskak Soegiarto Tegoeh as the Deputy Commissioner of the parent company, Tiara Dewata Group, was proven to be guilty of committing tax crimes of “jointly submitting a notification letter and/or information which contents are incorrect or incomplete, or not depositing taxes that have been deducted or collected, so as to cause losses to the state’s income.” The court, through the decision of the Denpasar District Court, Number 1144/Pid.B/2008/PN.Dps. on May 25, 2009, has sentenced the Defendant to two years in prison and imposed an administrative sanction on the Defendant as the Deputy Commissioner of Tiara Dewata Group, in the amount of three times the taxes owed, namely Rp.6,037,577,318, bringing the fine to a total of Rp.18,112,731,954. This amount of penalty imposed on the parent company, Tiara Dewata Group, was calculated based on the criminal provisions of fines as per article 39 paragraph (1) letter g of the Taxation Law, which allows fines to be imposed at a maximum of four times the amount of taxes owed. According to the Appellant’s claim, this amount of taxes owed included CV Tiara Dalung Permai’s corporate income tax of 2006 in the amount of Rp. 63,250,424.

At the appeal to the High Court, the fine was brought down to only twice the amount of taxes owed, a total of Rp.12,075,154,636, and the prison sentence was reduced to one year. This decision was made based on the consideration that Tiara Dewata Group has supported the economy in Bali and is a place of employment for local people, and with an estimated asset of Rp. 26,000,000,000, paying the aforementioned amount would likely bankrupt the company and risk the loss of 3,000 jobs. In terms of the defendant’s prison sentence, the crime was considered to have been committed in his capacity as Deputy Commissioner of the company, and he did not personally enjoy the money that was not deposited as it was used for the company’s operational interests.

What is groundbreaking and interesting to note is that in its consideration, the Indonesian Supreme Court cited the expert opinion of Philipus M Hadjon that the imposition of an administrative sanction in the form of paying tax owed in addition to a fine of 48%, after the offending taxpayer was fined 200% of the unpaid taxes, is contrary to the spirit of Act Number 28 of 2007 concerning the Third Amendment to Law Number 6 of 1983 on the General Provisions and Procedures for Taxation, as stipulated in point a of its consideration, “to provide more justice and improve services to taxpayers, providing more legal certainty”.

Furthermore, on the verdict’s consideration, the Supreme Court stated that in the Administrative Law (particularly the Tax Law), there is a principle of *una via*, according to which accumulation of sanctions for the same unlawful acts are not allowed, except based on a decision of one public authority. This principle requires one to choose between two sanctions (criminal sanctions and administrative sanctions) when different powers have the authority to impose sanctions, but the cases and perpetrators are the same. As with the case of tax fraud, a (criminal) court can impose sanctions in the form of imprisonment and fines; other than that, the tax owed by the authority in the taxation/fiscal sector may impose sanctions in the form of paying the amount of tax that is not or less paid plus a fine. According to the *una via* principle, if a criminal sanction has been imposed in the form of a prison sentence and a fine, then the tax authority may not impose an administrative sanction in the form of paying the amount of the tax that is not or less paid plus a fine. This principle has been applied in Belgium, in their Taxation Law on September 20, 2012 (promulgated on October 22, 2012), as follows:

From now on, such cumulation of tax and criminal sanctions no longer has a legal basis, although in any event the above-mentioned case law of the European Court of Human Rights treats these administrative sanctions as criminal sanctions which cannot therefore be cumulated with sanctions imposed under criminal law.²³

Further, in the judge's consideration, the Supreme Court Decision quoted Lodewijk Jakob Jan Rogier in the final conclusion of his dissertation entitled *Strafsancties, administratieve sancties en het una via beginsel* (Penal sanctions, administrative sanctions and the *una via* principle) published by Gouda Quint BV, Arnhem, 1992:

The *una via* principle deals with the choice between penal sanctions and administrative sanctions. It is an extension of the *ne bis in idem* principle... etc. In my opinion, the *una via* principle is of paramount importance. Statutory provision should be made to prevent the possible cumulation of penal and administrative sanctions. In the absence of such a rule incorporating the *una via* principle, the authority with power to impose sanctions should apply the principle directly.

The opinion from L.J.J. Rogier seems to be in line with the expert opinion of Prof. Dr. Philipus M Hadjon, SH., which in this case applies the principle of *ne bis in idem* by analogy (because this principle is usually only used in criminal law).²⁴ Experts believe that the principle of *ne bis in idem* means a case that has been decided by a court with a decision that has legal force can not be prosecuted for the second time. The taxpayer of the verdict, in this case, submits an *exceptio rei iudicatae*, based on a decision that has permanent legal force. On that basis, the Notice of Tax Assessment for underpayment in dispute is considered irrational. In terms of administrative law, irrational official actions are considered arbitrary acts and are contrary to the principle of legal certainty, and a violation of the general principles of good governance.

Moreover, the Supreme Court considered Law Number 6 of 1983 on General Provisions and Procedures for Taxation, as amended several times, the latest by Law No. 28 of 2007, which stipulates that the Respondent (Directorate General of Taxes) has the authority to determine whether a Notice of Tax Assessment should be issued in a tax case or should the case be a subject to Examination of Preliminary Evidence for a criminal offense in the taxation field. Per these provisions, a non-criminal investigation in the field of taxation still provides an option of punishing the offender to either pay taxes that are less paid plus administrative sanctions or be subject to prison sentences. If Article 44B of Law Number 6 of 1983 on General Provisions and Procedures for Taxation, as amended several times, the latest by Law No. 28 of 2007, is not used, the said tax case should transfer from Administrative Law into Criminal Law. In this respect, the Respondent no longer had the authority to issue a Notice of Tax Assessment.

The Supreme Court on the decision found that the reasons for the Appellant's petition for Appeal in the *a quo* case can be justified, and therefore granted the Appellant's request for appeal, effectively overturning the previous courts' decision, and thereby releasing the Appellant from having to pay owed corporate tax of 2006 and its fines, as the Supreme Court found that the claimed loss of state revenue has

²³ François Koning, in an article of The Act of 20 September 2012 establishes the "una via" principle in the prosecution of violations of the tax legislation and increases the criminal tax fine, spotlight December 2012, <http://www.eubelius.com>.

²⁴ The principle of *ne bis in idem* is the principle contained in criminal law; when this principle is accepted and applied in administrative law, the Judge and the Expert argue that its application is based on an analogy, namely an analogy in administrative law.

been charged and paid through the separate court decision of a taxation case against the Appellant's parent company Tiara Dewata Group, represented by its Deputy Commissioner, Iskak Soegiarto Teguh. One of the judges of the case, Justice Hary Djatmiko²⁵, in the interview session explained that he tried to make a breakthrough in the provisions of the law in which he linked tax issues, not only with one law but also subject to human rights. He said the punishment imposed on perpetrators shall avoid violation of human rights by imposing excessive sentences or double jeopardy in which there is an *una via* principle that keeps the law on the right path.

In contrast, other scholars, Christopher Hanna and Joseph Hoffman²⁶, commented that the use of criminal sanction in tax law aims to guarantee the compliance of the taxpayer, if the court proved that there is an act of manipulation or fraud from the taxpayer or tax consultant, in this specific situation of the serious tax cases, the criminal law process and sanction have to apply the framework of tax crime. Eventually, the Supreme Court's Judicial Review which led to this Decision highlighted development in the Indonesian Court, having found a breakthrough in determining which sanctions to use in resolving cases, by using the principle of *una via* in administrative law, to uphold the principle of *ne bis in idem* of criminal law, for the sake of justice, legal certainty and benefit of the law. A question raises on why in the end policymakers prefer to use the *una via* in the system. The logic is that the court cannot apply too much sanction, in this case, multiple types of sanction, according to the proportionality principle in deciding cases. Another argumentation says that, if since the beginning of the process the administrative authority and the law enforcement officers already decided on the process, they need to be responsible with the decision, there is no room for using too much power in the judiciary process under the rule of law. The authors recommend that the Supreme Court's Decision is worth noting and should be followed by law enforcement officials and administrative officials, in terms of adjudicating similar cases in the future, with good consideration in line with the development of current issues in various countries, while paying attention to the principles and rule of law in Indonesia.

III. CONCLUSION

The rule and the role of criminal law and administrative law in action, concerning punitive administrative sanctions still in the "gray area" in its development. The challenge to formulate clear argumentation, consideration, and justification on why the criminal sanction is required within the administrative act to address legal problems arising due to economic activities. The current research initiative discovered that, in such cases, there is a lack of coherency and of consistency in formulating criminal sanctions in the acts of administrative law. This deficiency of cogency results in heterogeneity in sentencing. This paper has elaborated on the problems and offered recommendations that could become guidelines for law enforcement officers and/or administrative officers/agencies/authorities on determining sanctions with respect to the administrative act, in cases related to economic activities such as customs and excise, tax, environment protection, and forestry. Some circumstances need to be considered on the regulation and enforcement of the sanctions pertaining to economic activities. They are the gravity of the act, seriousness, or nature of the infringement;

²⁵ Interview was conducted on 26 December 2018 at the office of Indonesia Supreme Court of Justice in Jakarta.

²⁶ Interviews were conducted on 7 and 8 August 2018 at University of Tokyo, in Tokyo, Japan.

the intention or fault of the offender (except for strict liability violations); the previous conduct/record of the offender (the repetition of an offense generally leads to the imposition of higher sanction); the economic situation or capacity of the offender (solvency); the estimated economic benefits derived from the infringement; the type of goods involved in the infraction; and the damage caused to natural resources because of the violation. This paper also suggested the use of "*una via principle*" as an approach to resolve the gray area in the role of criminal and administrative law, especially for tax cases.

BIBLIOGRAPHY**Books**

- Asworth, Andrew. *Principles of Criminal Law*. Oxford: Oxford University Press, 2003.
- Bailleux, Antoine "The Fiftieth Shade of gray: Competition Law, Criministrative Law, and Fairly Fair Trial." In *Do Labels Still Matter? Blurring Boundaries Between Criminal and Administrative Law: The Influence Of the EU*, edited by A Weyembergh and F Galli. Brussels: Publications de l'Université Libre de Bruxelles, 2014.
- Duff, Anthony and David Garland. *A Reader on Punishment*. Oxford: Oxford University Press, 1994.
- Hadjon, Philipus. *et. al. Pengantar Hukum Administrasi Indonesia*. Yogyakarta: Gadjah Mada University Press, 2008.
- Hardjasoemantri, Koesnadi. *Hukum Tata Lingkungan*. Surabaya: Gadjah Mada University Press, 2001.
- Hieriej, Eddy O.S. *Prinsip-Prinsip Hukum Pidana (Edisi Revisi)*. Yogyakarta: Cahaya Atma Pustaka, 2016.
- Husak, Douglas. *Overcriminalization The Limits of the Criminal Law*. Oxford: Oxford University Press, 2008.
- Remmelink, Jan. *Hukum Pidana: Komentar atas Pasal-Pasal Terpenting dari KUHP Belanda dan Padanannya dalam KHUP Indonesia*. Jakarta: PT. Gramedia Pustaka Utama, 2003.
- Ridwan HR. *Hukum Administrasi Negara*. Jakarta: Raja Grafindo Perkasa, 2007.
- Schaffmeister, D. *et. al. Kekhawatiran Masa Kini Pemikiran Mengenai Hukum Pidana Lingkungan Dalam Teori dan Praktek Translated by Tristam P. Moeliono*. Bandung: PT. Citra Aditya Bakti, 1994.
- Yaqin, Anwarul. *Legal Research and Writing*. Malaysia: Lexis Nexis Group, 2011.

Journal Article

- Faure, Michael and Katarina Svatikova, "Criminal or Administrative Law to Protect the Environmental? Evidence from Western Europe," *Journal of Environmental Law* 24, no. 2, (2012).
- Garoupa, Nuno and Fernando Gomez-Pomar. "Punish Once or Punish Twice: A Theory of The Use of Criminal Sanction in Addition to Regulation Penalties." *Harvard John M. Olin For Law, Economics, and Business Discussion Paper Series 308 (2000)*.
- Ogus, Anthony and Carolyn Abbot. "Sanction for Pollution: Do We Have the Right Regime?" *Journal of Environmental Law* 14, no. 3 (2002).
- Schwenk, Edmund H, "The Administrative Crime, Its Creation and Punishment by Administrative Agency," *Michigan Law Review*, (Vol. 42, No. 1, 1943)
- Setiadi, Wicipto, "Sanksi Administratif Sebagai Salah Satu Instrumen Penegakan Hukum dalam Peraturan Perundang-Undangan", *Jurnal Legislasi Indonesia*, (Jakarta: Direktorat Jenderal Peraturan Perundang-undangan Departemen Hukum dan HAM RI (ISSN No. 0216-1338, Vol. 6, 2009)
- Suhariyono AR, "Penentuan Sanksi Pidana Dalam Suatu Undang-Undang", *Jurnal Legislasi Indonesia*, (Jakarta: Direktorat Jenderal Peraturan Perundang-undangan Departemen Hukum dan HAM RI, ISSN No. 0216-1338, Vol. 6, 2009).

Weyembergh, Anne and Nicholas Johnceray, "Punitive Administrative Sanctions and Procedural Safeguards. *New Journal of European Criminal Law* (Vol. 7., Issue 2, 2016)

Dissertations:

Merckx, Dirk. "Sanctioning Economic Crime: An Integrated Policy." PhD diss., Vrije Universiteit Brussel (VUB), 2002.

Peci, Idir. "Sounds of Silence: A Research Into the Relationship Between Administrative Supervision, Criminal Investigation and the Nemo-Tenetur *Principle*." PhD diss., Rijksuniversiteit Groningen, 2006.

Rogier, Lodewijk. "Penal Sanctions, Administrative Sanctions and the 'Una Via' Principle." PhD diss., Erasmus University, 1992.

Online Websites

Laga.be. "Una Via Prosecution of Tax and Increased Criminal Fines." Accessed March 9, 2015. <http://laga.be/newsroom/legal-news/una-via-prosecution-of-tax-and-increased-criminal-fines>.

Peeters Law. "Una Via Principle." Accessed March 9, 2015. <http://www.peeters-law.be/documents/news-item/48-het-una-via-principle-in-fiscale-fraude-dossiers.xml>

Peeters, Leo and Anne-Marie Dossche. "The Una Via Principle Applicable In Tax Fraud." Accessed March 9, 2015. <https://www.mondaq.com/white-collar-crime-anti-corruption-fraud/211068/the-una-via-principle-applicable-in-tax-fraud-cases>

References to Indonesian Law

Indonesia, *Undang-Undang tentang Kepabeanan (Law regarding Customs)*, UU No. 17 Tahun 2006 sebagai perubahan atas UU No. 10 Tahun 1995 Tentang Kepabeanan.

Indonesia, *Undang-Undang tentang Cukai (Law regarding Excise)*, UU No. 39 Tahun 2007 sebagai perubahan atas UU No.11 Tahun 1995 Tentang Cukai.

Indonesia, *Undang-Undang tentang Ketentuan Umum dan Tata Cara Perpajakan (Law regarding General Provisions and Procedures for Taxation)*, UU No. 16 Tahun 2009 Sebagai Perubahan Terhadap UU Nomor 6 Tahun 1983 tentang Perpajakan.

References to Indonesian Case

Denpasar District Court of Republic of Indonesia, "Denpasar District Court, Number 1144/Pid.B/2008/PN.Dps. on May 25, 2009.

Supreme Court of Republic of Indonesia. "Decision No.06/C/PK/PJK/2005."

Supreme Court of Republic of Indonesia. "Decision No.1090/B/PK/PJK/2014."