

The Principle of *Ultimum in Remedium* Against Immigration Criminal Actions

Veren Sallie¹, Megawati Barthos²
verensallie.india@gmail.com¹, megawati_barthos@borobudur.ac.id

Universitas Borobudur^{1,2}

Abstract. To help the Public authority's Nawacita program and complete the elements of facilitators of local area government assistance advancement, the Directorate General of Movement gives a few migration offices that plan to draw in unfamiliar vacationers and unfamiliar financial backers to enter and put their capital in Indonesia remembering BVK and Visa for Appearance (VOA). In any case, this strategy is frequently abused by outsiders who enter and are in the Area of Indonesia to do exercises that oppose the arrangements of regulations and guidelines. Subsequently, there is a need to force sanctions on outsiders who disregard legal structures. The utilization of criminal statute is known as the "*ultimum remedium*" guideline, which suggests that the criminal regulation here has prior authorization. This intends that a principle first directed is regulatory, standard, and criminal authorizations. Punishment is set as the last cure when different approvals can't be upheld. Where in deciding a go about as a lawbreaker act and its charges are known to be the three primary standards: the rule of lawfulness; guideline of auxiliary (*ultimum remedium*), and measure of balance. However, in its execution, there were still questions from movement authorities in utilizing the policy to the burden of authorizations for migration infringement.

Keywords: *Ultimum in Remedium* Private; Immigration, Criminal Acts

1. Introduction

Based on the provisions of Article 1 Paragraph 3 of the 1945 Constitution, Indonesia is a state based on law. This implies that every step and/or action taken by the government should be based on applicable laws and regulations and must not act arbitrarily and abuse authority. In a state based on law is that the state determines what must be done or what is allowed and what is prohibited to be done by citizens is regulated laws and regulations, and what must be obeyed by everyone who is in the territory of Indonesia and enforced by agencies appointed by the state as enforcement officers law.

Policing a work made to make the law a rule for conduct in each legitimate activity, both by the legitimate subjects concerned and by policing who are authoritatively given the undertaking and authority by regulation to guarantee the working of the legitimate standards material in friendly and state life. Arrangements regarding what must be done or what is allowed and what is prohibited for everyone related to immigration, are managed in Regulation Number 6 of 2011 concerning Movement and Unofficial law Number 31 of 2013 concerning Execution Guidelines of Regulation Number 6 of 2011 concerning Migration and Guidelines Clergyman of Regulation and Basic freedoms connected with other movement. In its application, the

Directorate General of Migration is assigned as one of the policing as specified in Article 1 point 3 of Regulation Number 6 of 2011 concerning Movement, that:[1] "The Immigration function is part of the affairs of the state government in providing Immigration services, law enforcement, state security, and the facilitator of community welfare development."

Meanwhile, data on the entry of foreigners into Indonesian territory in the last decade is estimated at 2.5 million people each year and this figure is expected to continue to increase in the future. Such a large flow of migration certainly brings positive and negative aspects to the life of the nation and state. The positive aspects include modernization and encouraging the country's economic growth, while the negative aspects include increasing international crime and increasing transnational organized crime. To anticipate these negative aspects, the government establishes selective policies. In view of the planned strategy and to safeguard public interests, just outsiders who give benefits and don't imperil security and public request are a permitted in Indonesian Area.

To help Taxpayer supported initiatives and do the capability of working with local area government assistance advancement, the Directorate General of Movement gives a few migration offices pointed toward drawing in unfamiliar sightseers and unfamiliar financial backers to enter and put resources into Indonesian region, including Free Visit Visa (BVK) and Visa On Appearance (VOA). Notwithstanding, this approach is frequently abused by outsiders who enter and are an in Indonesian Area to do exercises that are in opposition to the arrangements of the regulations and guidelines, consequently important to force sanctions on outsiders disregard the arrangements of the regulations and guidelines.

Against outsiders who carry out movement infringement and different regulations and guidelines, in Regulation Number 6 of 2011 concerning Migration there are 2 (two) kinds of assents, specifically regulatory authorizations and criminal sanctions.[1] Managerial assents as migration authoritative activities which remember consideration for the counteraction or discouragement list; restriction, change, or wiping out of Stay License; denial to be in one or a few certain spots an in the Indonesian Area; the commitment to dwell in a specific spot an in the Indonesian Area; burden of costs; as well as removal from Indonesian Domain. In the mean time, criminal approvals as detainment or potentially fines are managed in Article 113 to Article 136 of Regulation Number 6 of 2011 concerning Migration.

The imposition of action sanctions (maatregel) in the immigration law is evidence that law enforcement in the immigration field uses the idea of a double-track system. The fact of the matter is the propensity to utilize two tracks (Twofold Track Framework) in the approvals framework, and that implies that criminal authorizes and activity sanctions are directed at the same time.

In the use of criminal regulation, it is known as the standard of "ultimum remedium" and that implies that the criminal regulation here is the last authorization. That is, in deciding a go about as a lawbreaker act and its assents there are three primary standards, in particular the guideline of legitimacy; the rule of subsidiarity (ultimum remedium), and the standard of correspondence. Notwithstanding, in its execution, there are still questions from migration authorities with respect to the use of this standard to the burden of authorizations for movement infringement. Based on this brief thought, the problem is how to apply the Ultimum Remedium Principle to immigration violations. And, what is used in the imposition of sanctions against perpetrators of immigration violations?

2. Research Method

As an effort to be able to answer or solve problems, the research used was carried out

through a normative juridical research approach.

3. Discussion

3.1 Law Enforcement Against Immigration Violations

In today's increasingly complex society, law enforcement and justice are required to fulfill a sense of justice in society. In this regard, the judge as a case breaker must decide not only based on the applicable law but also must be based on legal values that live in society.

Apart from this, every law and regulation is abstract and passive. This means that it is abstract. It is general in nature and passive because it does not give rise to the law if no concrete events occur. Therefore, in making decisions, judges must be based on legal interpretations that are by the sense of justice that grows, lives, and develops in society as well as other influencing factors such as cultural, social, economic, political, and other factors. Apart from that, to determine a court decision, the judge also needs to reach confidence about the position of the case that occurred based on the statements of the parties involved. The judge's conviction about the case is very important, especially in the civil law justice system which places the judge as the sole decision maker, both in terms of facts (placement of guilty or not guilty) and the law.

Law Number 6 of 2011 concerning Immigration as a form of legislation certainly cannot be separated from these provisions. In this case, the author will discuss Article 75 paragraph (1) of a quo law which has so far been considered to weaken immigration law enforcement through the judiciary (*pro justitia*).

3.2 Interpretation of Article 75 Paragraph (1) of Law Number 6 of 2011 concerning Immigration in Enforcement of Immigration Law

Translation which is essential for legitimate disclosure is the most common way of concretizing or individualizing general lawful guidelines (*das sollen*) by recalling specific substantial occasions (*das sein*). Legal interpretation is an attempt by judges to find law through the interpretation of texts in legislation from other legal sources, both written and unwritten to be applied to events or factual incorreto law.

Normative legal texts always require interpretation. Thus, the judge who has the authority to decide must make a wise decision by considering various factors both inside and outside the law. However, in interpreting, one must also know what the intentions of the drafters of the rules are.

Following the subject matter in discussing Article 75 paragraph (1) of the a quo Law which reads: [1] "Immigration Officials have the authority to carry out Immigration Administrative Actions against Foreigners who are in Indonesian Territory who carry out dangerous activities and are reasonably suspected of endangering security and public order or not respecting or disobey laws and regulations."

In that article, outsiders who don't regard or don't conform to regulations and guidelines can be dependent upon migration managerial activity as made sense of in the past section. Nonetheless, this regulation doesn't make sense of the type of not regarding or ignoring these regulations and guidelines so a discussion emerges in regards to the legitimate results of Article 75 passage (1) of the a quo regulation. As explained in the law, in addition to regulating administrative sanctions, the a quo law also regulates criminal sanctions, thus creating confusion as to whether these criminal sanctions can be included in the category of not respecting or disobeying laws and regulations.

To interpret a norm in ambiguous laws and regulations, a legal discovery method is needed, one of which is the method of interpretation. The authority of judges in making legal discoveries is also a consequence of the principle of justice where *"the court may not refuse to examine, try and decide on a case filed on the pretext that the law does not exist or is unclear but is obliged to examine and try it"*.

Based on these various methods of interpretation, historical interpretation, and grammatical interpretation methods can be explained.

Historical Interpretation

Looking at its legal history, the formation of Article 75 paragraph (1) of the law a quo which includes the phrase "disrespecting or disobeying laws and regulations" is closely related to the continuing increase in immigration violations by foreigners in Indonesian territory. The primary reason for these plans is to give an impediment impact to culprits and to keep up with security and public request. To additionally explain what is implied by the expressions of not regarding or defying the regulations and guidelines in Article 75 section (1) of the a quo regulation, another translation is required. In this case, the writer looks back at the intent of the phrase in terms of its grammatical meaning.

Grammatical Interpretation

Syntactically or linguistically, as per Article 75 passage (1) of the a quo regulation, it appears to be indistinct. Phrases that are befuddling and cause banter are the expressions of not regarding or defying regulations and guidelines. This is on the grounds that the a quo regulation doesn't plainly make sense of the type of not regarding or resisting the regulations and guidelines themselves. As a result, the competent authorities are still hesitant to include criminal offenses under the a quo law in this article.

For this reason, it is necessary to know the meaning of the word disrespect or disobey. Based on the Big Indonesian Dictionary, the word is not an adv particle to express denial, rejection, denial, etc.; then the word honor-death implies; 1 respect; 2 appreciate; uphold; 3 acknowledge and obey (rules, agreements). Based on the explanation above, the meaning of the word disrespect or disobey is clearly illustrated. Furthermore, to better understand the meaning of the phrase not respecting or disobeying laws and regulations, it is necessary to know the meaning of laws and regulations.

Observing the sources of multi-dimensional immigration violations, it is necessary to analyze from several points of view so that the settlement of immigration violations can fulfill the principles of justice, benefits, and legal certainty.

3.3 The Effectiveness of Immigration Administrative Actions and the Pro Justitia Process in Enforcement of Immigration Law

Immigration Administrative Action Process

Immigration administrative actions according to the explanation in the previous chapter are administrative actions in the field of immigration outside the judicial process. In carrying out immigration actions, to guarantee legal certainty and justice for foreigners, the decision is made in writing, which contains at least the identity of the person affected by the action, the reason for the action, and the type of action.

The implementation instructions regulate the reasons and considerations for imposing sanctions on immigration administrative measures against foreigners who commit immigration violations. One of them is considering the political, economic, social, and cultural as well as security aspects which are deemed more effective in carrying out immigration actions.

After being subject to immigration administration measures, the offender will be proposed to be included in the ban list. However, the decision regarding the length of time for the ban is left to the minister or the appointed immigration official. This will provide a significant deterrent effect for perpetrators without having to be given a prison sentence.

Pro Justitia Process

Pro justitia action is the settlement of criminal acts through the judiciary. In this implementation, the process of investigating immigration crimes is carried out according to the provisions stipulated in the Criminal Procedure Code (KUHAP). The Criminal Justice System consists of components or sub-systems, namely investigation, prosecution, court, and correctional institutions. Civil Servants (PPNS), toeyh ol' in this case PPNS Immigration is a sub-system or part or link of the Criminal Justice System. As explained in the previous chapter, the process of investigating immigration crimes is carried out by Immigration Civil Servants. In carrying out these duties, PPNS Immigration coordinates with POLRI investigators and after completing the investigation, the case files are submitted to the public prosecutor.

Based on the cases that occurred in 2018-2021, the cases that were processed stated that the settlement of cases through the courts took more than 3 months. This makes of course energy-consuming and costly. In this case, the fee is used for monitoring departures out of Indonesian territory (deportation). During the deportation process, it is accompanied by a proposal to be placed on a blacklist, such as in an immigration administrative action.

Effectiveness of Immigration Law Enforcement

Immigration law enforcement as previously described consists of administrative sanctions in the form of immigration administrative actions as stated in Article 75 paragraph (2) of the a quo law. Apart from that, in enforcing immigration law there are also provisions regarding criminal sanctions by those listed in Articles 113 to 136 of the a quo law. In connection with the two forms of enforcement of immigration law which are both regulated in the same law, the principle of *ultimum remedium* will apply. The point is that criminal law is only used if other means fail to complete it.

Such legitimate standards may not be viewed as concrete legitimate standards yet ought to be seen as broad standards or rules for appropriate regulation. The arrangement of pragmatic regulation should be situated towards these legitimate standards.

Based on this understanding, the legal principal functions as a thing that bases its existence on the formula for the formation of laws and judges (which are valid) and binds the parties. In addition, another function is the principle that functions as a regulatory and explanatory matter, for this situation, it is partitioned into general legitimate standards and exceptional lawful standards. General regulation standards are rules that connect with all fields of regulation, extraordinary lawful standards are rules that capability in a smaller field. However, legal principles are different from legal norms. These differences include: a principle is a concept, while a norm is an elaboration of that concept; Legal principles do not have sanctions, while norms have clear sanctions.

Observing the meaning and function of a principle and its relation to immigration law, enforcement of immigration law should refer to the principle of *ultimum remedium*. This is based on the existence of two sanctions in immigration law, namely in the form of administrative sanctions for immigration and criminal sanctions. With the choice of applying these sanctions, the principle of *ultimum remedium* can be applied in enforcing immigration law.

As a material for consideration in applying this principle which is considered to reduce the enforcement of immigration law through the judicial process, it needs to be seen the effectiveness of each sanction that can be applied. By knowing its effectiveness, authorized

officials can make decisions through which channels an immigration violation is resolved to achieve a law enforcement process that is fast, and inexpensive, but still upholds the principle of justice.

If you look at the aspect of travel time used, the imposition of administrative action sanctions is faster in resolving immigration violations than the imposition of criminal sanctions. Looking at the previous explanation, it can be seen that the process through the judicial route takes months. For that long time, the sentence imposed was not proportional to the results achieved. Taking a long time, draining energy and thoughts and the disproportionate results can burden immigration law enforcement officials. Moreover, the current number of officers is still insufficient to fulfill the responsibilities of enforcing immigration law, whose working Area is quite wide. Looking at the time aspect used for immigration administrative actions, it can create faster law enforcement. To strengthen the need for the application of the principle of *ultimum remedium* in enforcing immigration law, it is also necessary to look at it from other aspects, one of which is from the economic field.

In addition, when viewed from budget planning, the immigration administrative action process is prepared with a smaller budget compared to criminal sanctions. As Lilik Mulyadi composed, in the criminalization cycle it is important to take a gander at whether the expenses of criminalization are in offset with the outcomes to be accomplished, implying that the expenses of making regulations, policing, the weights borne by casualties and culprits are offset with law and order to be accomplished.

In addition, currently, the deterrent effect based on morality is not real because perpetrators as rational actors with economic value calculations tend to commit crimes or have the potential to become recidivists. When it comes to foreigners, those who have committed certain crimes that have a major impact on harming the country and disrupting public order think that the benefits they get outweigh the costs they incur. For this reason, it is necessary to consider alternative sanctions that are non-penal but still deterring not in a physical context but in a financial and social context, for example, optimal fines and expulsion from Indonesian territory.

Based on the consideration of these two aspects, in enforcing immigration law applying the principle of *ultimum remedium* in this case in the form of administrative sanctions for immigration is seen as more effective and efficient. The use of the principle of *ultimum remedium* which transforms a criminal sanction into an administrative sanction, then is fine and not a setback but a logical consequence of the choice of values adopted. Because with a heavy sentence does not mean that it will guarantee the effectiveness of the sentence, but it is hoped that the imposition of a sentence will also take into account the main ideas behind the specified criminal threat. With these reforms, it is hoped that legal certainty will be realized and the image of the government of the Republic of Indonesia in the eyes of the international community will be improved, which in turn will have a multiplier effect on the development of other sectors.

Imposing sanctions on immigration administrative actions in the form of deportation/expulsion as a form of applying the *ultimum remedium* principle, is one of the most effective ways for a country to expel foreigners who are in its territory. The procedure for expulsion is indeed very easy, because there are no interests of other countries involved, except for the interests of the person/individual being expelled. The effectiveness of taking deportation measures is greatly felt by the ranks of the immigration apparatus because, in addition to having taken an immigration action, it will usually be followed by entering the data of the foreign national who has been deported into the deterrence list. Thus, effective law enforcement steps have been taken and immediately eliminated the potential for violations of law in Indonesia.

In connection with the existence of arrangements regarding immigration administrative

sanctions and criminal sanctions, an immigration official has the authority to determine the method of action against immigration violations by what is stated in Article 75 of the a quo law. In this case, the professionalism of immigration officials plays a crucial role in carrying out what is their authority in a responsible manner.

3.4 The Authority of Immigration Officials in Determining the Method of Enforcement Against Immigration Violations

Following Article 75 of the a quo law, an immigration official has the authority to carry out immigration administrative actions or pro justitia actions. Based on existing statutory provisions, almost every immigration case can be subject to immigration action (Administrative Action), this occurs because the authority granted by law is broad and is like a rubber article. Thus the determination of whether to be subject to immigration action or to be processed through a judicial process is fully determined by immigration officials at every level of the organizational structure.

In carrying out the rules of immigration law, the role of the officer in this case the immigration official/PPNS of immigration plays an important role in determining the functioning of the rule of law. In the process of enforcing immigration law, this view is very important because it is the authority (discretion) of immigration officials to decide whether a violation case is resolved by criminal or administrative legal proceedings. For this reason, it is necessary to have strict boundaries and categorization in the process of enforcing criminal law with administrative actions, so that it is no longer dependent on the assessment of immigration officials but is based on a system of laws and regulations with due regard to the process of resolving immigration cases quickly, effectively and efficiently.

Discretion or *Freies Ermessen* is the freedom to act or make decisions for authorized public officials based on their own opinions. However, the use of this authority must be carried out responsibly, the aim is to avoid the occurrence of disgraceful, unlawful, unlawful acts, inappropriate movements, and activities that are not useful.

Concerning the enforcement of immigration law, there is a large space in making decisions on enforcement as stated in Article 75 of the a quo law which creates the impression that repressive law enforcement is highly dependent on the will of immigration officials who hold the discretion to enforce the law.

Immigration law enforcement must be professional and by the law. The professional in question is carrying out what is within his authority to fulfill the element of justice, not committing fraud which benefits the offender and officials personally. In determining the settlement of the problem of immigration violations, certain aspects must be considered. The point is to weigh and see for yourself how these problems can occur through the perpetrator's BAP. By digging up as much information as possible in the dossier, it will be able to help immigration officials know the violations that have occurred and the background of the violations. If the consequences of the perpetrator's actions do not cause major losses and threats to the public interest, immigration administration measures can be imposed which are more effective, efficient, fast, and inexpensive.

Settlement of immigration violations does not have to go through the courts because immigration administrative actions are also law enforcement. So that in carrying out their duties, immigration officials/immigration PPNS do not need to find fault to resolve violations through the courts.

Though in managing what activities ought to be made lawbreaker acts and what authorizations ought to be utilized against the violator, the main things that should be considered are generally:

- 1) The utilization of criminal regulation should focus on the objectives of public turn of events, specifically the acknowledgment of an equitable and prosperous society that is physically and profoundly uniformly dispersed in view of Pancasila, in such manner, the (utilization of) criminal regulation means to handle wrongdoing and do fetus removals against the actual countermeasures, for government assistance and local area security;
- 2) Actions that are endeavored to be forestalled or managed by criminal regulation should be undesirable, specifically activities that inflict any kind of damage (material and polite) to individuals from people in general;
- 3) The utilization of criminal regulation must likewise consider the expense and advantage rule;
- 4) The utilization of criminal regulation must likewise focus on the functioning limit or capacity of the policing, that is to say, there should no over-burden.

By considering the matters above and looking at the background of the violations committed, an immigration officer/immigration PPNS can use the authority mandated by law by the principle of justice. Apart from that, it is also necessary to increase work professionalism which is the duty of every immigration official to continue to make fair decisions in the face of globalization and the continued development of technology.

4. CLOSING

Based on the description above, the conclusion is: The application of the *Ultimum Remedium Principle* to immigration violations in enforcing immigration law as previously described consists of administrative sanctions in the form of immigration administrative actions by what is stated in Article 75 paragraph (2) of the *a quo* law. Apart from that, in enforcing immigration law there are also provisions regarding criminal sanctions following those listed in Articles 113 to 136 of the *a quo* law.

Concerning the two forms of enforcement of immigration law which are both regulated in the same law, the principle of *ultimum remedium* will apply. The point is that criminal law is only used if other means fail to complete it. immigration law, in upholding immigration law should refer to the principle of *ultimum remedium*. It is based on the existence of two sanctions in immigration law, namely in the form of administrative sanctions for immigration and criminal sanctions. With the choice of applying these sanctions, the principle of *ultimum remedium* can be applied in enforcing immigration law.

As a material for consideration in applying this principle which is considered to reduce the enforcement of immigration law through the judicial process, it is necessary to look at the effectiveness of each sanction that can be applied. By knowing its effectiveness, authorized officials can make decisions through which channels an immigration violation is resolved to achieve a law enforcement process that is fast, and inexpensive, yet still upholds the principle of justice.

Imposing sanctions on immigration administrative actions in the form of deportation/expulsion as a form of applying the *ultimum remedium* principle, is one of the most effective ways for a country to expel foreigners who are in its territory. The procedure for expulsion is indeed very easy, because there are no interests of other countries involved, except for the interests of the person/individual being expelled.

In connection with the existence of arrangements regarding immigration administrative sanctions and criminal sanctions, an immigration official has the authority to determine the

method of action against immigration violations under Article 75 of the *a quo* law. In this case, the professionalism of immigration officials plays a very important role in carrying out what is their authority in a responsible manner.

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