

Corporate Mining Offences: Assessing The Interpretation of Ultimum Remedium

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Article Info

Received: 2024-09-30

Revised: 2024-12-1

Accepted: 2024-12-20

Keywords:

Interpretation, Ultimum
Remedium, Minning
Offence

Abstract

The principle of ultimum remedium in criminal law is more accurately referred to as a moral principle for legislators (legislative ethics) so that they can think about whether or not an act needs to be criminalized, including the threat of criminal sanctions. Normatively, in Indonesian criminal law the principle of ultimum remedium is strictly regulated in Article 100 and the general explanation of point 5 of the PPLH Law. In the Minerba Law, the principle of ultimum remedium is not normative. In decision Number 46/Pid.B/LH/2021/PT Kdi, it is implied that a corporate crime occurred by the defendant PT Bososi Pratama. The panel of judges acquitted the defendant PT Bososi Pratama by interpreting the principle of ultimum remedium. This interpretation emerged because the position of criminal sanctions in the Mineral and Coal Law is still unclear, whether as ultimum remedium or primum remedium.

I. Introduction

The discourse on criminal law as a scientific discipline has been going on for centuries. It can be said that since humans have known civilization, since then criminal law has had a place in society and has become one of the most interesting studies.¹ Initially, criminal law was only in the form of customary law (customary law/living law), such as that which was born and developed in England. In its development, the existence of criminal law was then legalized through legislation produced jointly by the government and parliament, such as in the Netherlands.²

In some countries, especially those with a Civil Law character, criminal regulations are codified in a single code.³ This is influenced by the teachings of Emperor Justinianus in his book entitled *Corpus Iuris Civilis* which is divided into four books, namely *Caudex*, *Novellae*, *Instituti* and *Digesta*. As a field of science, criminal law tends to be better known for its threat of retributive or retaliatory sanctions than other fields of law. Regarding the latter, Marjono Reksodiputro emphasized that criminal law should be used carefully because its implications are not only for perpetrators of crimes but also for society and the state.⁴

In relation to that, Muladi likened criminal law to the diction "slicing one's own flesh". Because on the one hand, criminal law must be enforced because a crime has occurred that must be accounted for by the perpetrator, but on the other hand, it is susceptible to being misused by law enforcement officers so that it has the potential to violate a person's Human Rights.⁵

Seeing the characteristics of criminal law—Douglas Husak then emphasized that the use of criminal law should be limited so as not to cause criminal law inflation, a condition in which a country experiences obesity of criminal regulations so that a phenomenon of high quantity of punishments arises which is directly proportional to the massive growth of crime rates in society (too much punishment and too many crimes).⁶ Husak added that criminal law should be the last resort in dealing with violations of the law that occur in the midst of society.

¹ Michael Jefferson, 2013, *Criminal Law*, Pearson, Eidenburgh, p. 3.

² Larry J. Siegel, 2018, *Criminology: Theories, Paterns, and Typologies*, Cengage Learning, Boston, p. 16.

³ George P. Fletcher, 1998, *Basic Concept of Criminal Law*, Oxford University Press, New York, p. 3-4.

⁴ Marjono Reksodiputro, 2020, *Integrated Criminal Justice System*, PT RajaGrafindo Persada, Jakarta, p. 387.

⁵ Muladi, 2004, *Conditional Sentence Institution*, Alumni, Bandung, p. 21.

⁶ Douglas Husak, 2008, *Overcriminalization: The Limits of the Criminal Law*, Oxford University Press, New York, p. 157

This argument is in line with what Modderman once put forward when compiling the *Wetboek van Strafrecht (W.v.S)* in 1809. He said that criminal sanctions can only be used if the unlawful act can no longer be prevented by other legal means. Criminal sanctions must still be seen as *ultimum remedium*.⁷ If other legal means are still possible to be used, to overcome a violation of the law, then criminal law is not always the first. Criminal law has its own nature as *ultimum remedium*. This view is reinforced by Merkel, a German jurist who said that criminal law is subsidiary to other areas of law.⁸

In Indonesia, the principle of *ultimum remedium* was first applied by the court in the case of environmental pollution in Buyat Bay by PT Newmont Minahasa Raya. At that time, the Manado District Court acquitted the defendant PT Newmont Minahasa Raya in its decision Number 284/Pid.B/2005/PN. Mdo. In its legal considerations (*ratio decidendi*) the panel of judges emphasized that the corporate defendant was acquitted because in environmental crimes, criminal law is *ultimum remedium*.

The panel of judges then quoted the general explanation in point 7 paragraph 5 of Law No. 23 of 1997 concerning Environmental Management, which reads: as a support for administrative law, the application of criminal law provisions still takes into account the principle of subsidiary law, namely that criminal law should be used if sanctions in other legal fields, such as administrative sanctions, civil sanctions and alternative sanctions for resolving environmental disputes are considered no longer effective.

Such normative formulation is an affirmation that in environmental crimes, criminal law is positioned as a last resort or ultimate weapon. In this case, if administrative, civil, and mediation settlements are no longer effective, then criminal law settlements must be implemented. In short, normatively, the 1997 Environmental Law has placed criminal law as the *ultimum remedium*. It should be noted that in Law No. 32 of 2009 concerning Environmental Protection and Management, the principle of *ultimum remedium* is still adopted in writing in its general explanation.

Still regarding the principle of *ultimum remedium*, in Kendari, Southeast Sulawesi there is a court decision No. 46/Pid.B/LH/2021/PT Kdi. The *a quo* decision relates to a mining crime committed by PT Bososi Pratama as a corporation. In this case, the corporation is the defendant in the mining crime. The crime is that as the holder of an IUP, the defendant corporation intentionally submitted an incorrect report or submitted false information as referred to in Article 43 paragraph (1), Article 70 letter e, Article 81 paragraph

⁷ van Bemmelen, 1987, *Hukum Pidana 1: Hukum Pidana Material Bagian Umum*, Binacipta, Jakarta, p. 14.

⁸ Jan Remmelink, 2003, *Hukum Pidana: Komentar Atas Pasal-Pasal Terpenting Dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia*, PT Gramedia Pustaka Utama, Jakarta, p. 28

(1), Article 105 paragraph (4), Article 110, or Article 111 paragraph (1) of Law No. 4 of 2009 concerning Mineral and Coal Mining (Minerba Law). The defendant's actions are regulated and subject to criminal penalties in Article 159 in conjunction with Article 163 of the Minerba Law.

However, in the a quo decision, the panel of judges acquitted the defendant, based on 3 legal considerations, namely as follows: first, in Article 94 paragraph (1) of the Regulation of the Minister of Energy and Mineral Resources No. 11 of 2018 concerning Procedures for Granting Areas, Licensing, and Reporting on Mineral and Coal Mining Business Activities, it is emphasized that if the IUP holder does not fulfill the Production Work Plan and Budget (RKAB) or submits incorrect or false information, then administrative sanctions will be imposed first.

Second, that through the regulation of the Minister of Energy and Mineral Resources, it can be interpreted that administrative sanctions in the Minerba Law must be prioritized (*premium remedium*) while criminal sanctions are the last resort (*ultimum remedium*). Third, that from the legal facts obtained in court there is no information stating that the defendant has been given an administrative sanction. Fourth, it is appropriate in this case that the defendant is given an administrative sanction as stated in Article 151 paragraph (2) of the Minerba Law, in the form of a written warning first.

Based on the review above, it can be seen that the panel of judges of the Southeast Sulawesi High Court has carried out a special legal interpretation regarding the use of the *ultimum remedium* principle in mining crimes committed by corporate defendants. This principle ultimately became the basis for the acquittal of the corporate defendant because according to the panel, the defendant had never been given an administrative sanction before being given a criminal sanction. The question then is, in the Minerba Law, is there a norm that specifically emphasizes that the application of criminal sanctions in mining crimes is as *ultimum remedium*? The answer to this question will be reviewed by the author in the following section.

2. Research Method

In this study, the author uses a normative and empirical juridical approach.

- a. Normative Juridical Approach
the approach is based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this research.
- b. The empirical juridical approach
is research by going directly to the field on the object of research to collect primary data obtained directly from the object of research through observation and interviews with related respondents or sources.

3. Results and Discussion

Explicitness of Corporate Crime

If we look closely at the decision Number 46/Pid.B/LH/2021/PT Kdi, it can be said that what happened was a corporate crime. In this case, PT Bososi Pratama as the subject of the crime has committed a mining crime in North Konawe Regency. PT Bososi Pratama committed the crime through the policy of the board of directors (President Director) named Andi Uci Abdul Hakim who directed Darwis as Head of Mining Engineering at PT Bososi Pratama to prepare the RKAB and then present it to the Evaluation Team of the ESDM Service of Southeast Sulawesi Province and other related agencies.

The problem then, in the legal considerations of the panel of judges—it was revealed that the amount of nickel ore production and mining service contractors contained in the RKAB and Quarterly Reports I-III of 2019 that were presented, did not correspond to the actual facts. This, basically, is detrimental to the state, because the PNBK that should have been received by the state did not correspond to the facts reported by the defendant PT Bososi Pratama. In theory, the actions committed by PT Bososi Pratama are corporate crimes, which John Braithwaite describes as, the conduct of a corporation, or of employees acting on behalf of a corporation, which is prescribed and punishable by law.⁹In short, PT Bososi Pratama as the defendant has committed a corporate crime.

Related to that, PT Bososi Pratama committed a crime through its management who intentionally provided an incorrect or false RKAB report or statement. The purpose of this act was to benefit or for the benefit of the defendant PT Bososi Pratama. That means, there are offenses committed by corporate officials for their corporation.¹⁰ If viewed more broadly, the management has used the corporate infrastructure of PT Bososi Pratama to commit mining crimes, then what Pontel and Geis said is relevant, when agents of a corporation use the corporate infrastructure or asset to commit a crime meant to boost general profits.¹¹

The theoretical definition is concretized and expanded in scope in Article 3 of Supreme Court Regulation No. 13 of 2016 concerning Procedures for Handling Criminal Acts by Corporations (Perma 2016). In the a quo article, it is stated that criminal acts by corporations are criminal acts committed by people based on employment relationships, or based on other relationships, either individually or together, acting for and on behalf of the corporation within or outside the

⁹ John Braithwaite, 1994, *Corporate Crime in The Pharmaceutical Industry*, Routledge & Kegan Paul, London, p. 6.

¹⁰ Richard D. Hartley, 2008, *Corporate Crime*, A B C Clio, Santa Barbara-California, p. 4

¹¹ Henry N. Pontel & Gilbert Geis, *International Handbook of White Collar and Corporate Crime*, Springer, New York, p. 187

corporate environment.

In essence, it is called a criminal act by a corporation if: (1) it is committed by a person based on an employment relationship or other relationship. (2) either individually or together. (3) acting for and on behalf of the corporation. (4) inside or outside the corporate environment. In the a quo case, it is clearly illustrated that the President Director and Head of Mining Engineering acted for and on behalf of the PT Bososi Pratama corporation—done based on an employment relationship.

In that context, there is a work relationship within the scope of the corporation between the board of directors as the determinant of corporate policy and the management at the lower level. When correlated with the theory of corporate criminal liability, the actions of the management and directors are included in the identification theory. The advantage of this theory is that it is able to identify the role of management in realizing crimes within the scope of the corporation.¹²Clearly conveyed by Amanda Pinto and Martin Evans, corporations can commit crimes through management that is closely related to corporations. In short, there was a corporate crime by PT Bososi Pratama through the President Director and Head of Mining Engineering in the preparation and reporting of the RKAB which was not carried out correctly or with false information.

It should be emphasized that the Minerba Law does not provide adequate regulations regarding the criminal liability of corporations that commit mining crimes. To cover this deficiency, in its legal considerations the panel of judges used Perma 2016. In Article 13 of Perma a quo, it is stated that the management representing the corporation at the investigation level must also be present at the examination of the corporation in court. In this case, the defendant corporation PT Bososi Pratama was represented by the President Director Andi Uci Abdul Hakim, during the examination in court.

Although in decision Number 46/Pid.B/LH/2021/PT Kdi, the defendant PT Bososi Pratama was acquitted by the panel of judges on the grounds that the process violated the principle of ultimum remedium—but in decision Number 158/Pid.B/LH/2020/PN Unh, as a first-instance court, the panel of judges instead imposed a fine of IDR 3,000,000,000.00 (three billion rupiah). The emergence of the amount of the fine by the first-instance court is in line with Article 163 paragraph (1) of the Minerba Law which in essence emphasizes that the penalty that can be imposed on the legal entity is in the form of a fine with an increase of 1/3 (one third) of the maximum provisions of the fine imposed. Regardless of the acquittal of the corporate defendant but explicitly in the first-instance court, the defendant has been sentenced to a fine in accordance with the Minerba Law and the 2016 Perma.

¹² Amanda Pinto & Martin Evans, 2003, *Corporate Criminal Liability*, Sweet and Maxwell, London, p. 223.

The imposition of a first-degree fine on the defendant PT Bososi Pratama cannot be separated from the proof of the element of corporate error as stated in Article 4 paragraph (2) letter a of Perma 2016, that the judge can assess corporate error, among other things if the corporation can obtain profit or benefit from the crime or the crime is carried out for the benefit of the corporation.

At least, the proof of the defendant's corporate guilt can be seen from the benefits or advantages of the RKAB reporting that was carried out incorrectly and the act was clearly carried out for the benefit of the corporation. To be precise, although the defendant has been acquitted by the Kendari High Court, the fact that cannot be ignored is that the defendant PT Bososi Pratama has committed mining crimes for his own interests.

If the decision Number. 46/Pid.B/LH/2021/PT Kdi, is connected to the theory of the corporate criminal liability system, as explained by Muladi and Dwija Priyatno, then the corporate criminal liability model in the a quo decision adopts a system that emphasizes that the management as the creator of the corporation is responsible. The actions of the corporate management of Darwis as Head of Mining Engineering and the order from the President Director of PT Bososi Pratama to Prepare the 2019 RKAB are considered as actions of the management for the benefit of the corporation itself. It should be emphasized that in principle this system was created because it took into account the development of the character of the corporation which turned out that determining the management alone as the perpetrator was not enough, but with the corporation. In other words, the criminalization of the management does not provide a guarantee that the corporation will not repeat the prohibited act again.¹³

Context of the Ultimum Remedium Principle

In the beginning of this manuscript, the author has provided a brief description of the principle of ultimum remedium in criminal law. In order to obtain a complete explanation, the principle of ultimum remedium will be systematically described again. The argument that criminal law as ultimum remedium is often referred to as the term last resort or ultima ratio regis, which means the final goal or the last means/ultimate weapon.¹⁴

This concept is related to the argument that asserts that criminal law may be used only as a last resort. The question then is, when can the argument of last resort/ultima ratio or ultimum remedium be applied in criminal law? Answering this question, Husak stated that the principle of ultima ratio is closely related to the process of criminalization of an act. This stage plays a very important role

¹³ Hariman Satria, 2020, *Hukum Pidana Korporasi: Doktrin, Norma dan Praksis*, PT RajaGrafindo Persada, Jakarta, p. 210.

¹⁴ ¹⁴ William Wilson, 2011, *Criminal Law: Doctrin and Theory*, Pearson Longman, New York, p. 35

because it determines and provides reasons why an act is made a crime.

Theoretically, it is called a criminalization process. Husak then reminded that a theory of criminalization is needed to justify the criminal laws we should retain, as well as to provide the criteria by which we should decide whether to enact even more penal legislation. In short, a theory of criminalization is needed as a justification for criminal law in determining whether or not a criminal regulation will be enforced by the legislature. Mistakes in determining the reasons for criminalization can result in overcriminalization.

Husak's argument is supported by Jareborg by stating that: criminalization is regularly used as a first resort (sola ratio), partly because a new criminalization does not involve immediately immediate costs that have to be taken into consideration in the budget proposals of criminal justice authorities. As a result, we have to live with "criminal law inflation."¹⁵

So if criminalization only refers to the principle as a first resort (sola ratio) then the costs required and the results obtained from the implementation of criminal law (cost and benefit principle) must be considered. If this is overlooked by lawmakers, it can result in criminal law inflation.

Basically, the argument that criminal law is the last resort (ultima ratio) is related to the doctrine that criminal law is not the only appropriate means by which to pursue the proper end of protecting legitimate values and interests. In this case, criminal law is not the only appropriate way to protect legitimate values and interests. On the contrary, all legal systems must be used first, such as civil law, administration, and mediation until they fail. After that, criminal law can be used as the last protection that must be considered. As emphasized by Jareborg:

Whole arsenal of the legal order must be put to use, and criminal law is actually the last means of protection to be considered. It may only be employed where other means (e.g., private law litigation, administrative solutions, non-criminal sanctions, etc.) fail.¹⁶

It can also be said that criminal law related ideas are the subsidiarity of criminal law and the fragmentary character of criminal law. Subsidiarity of criminal law means that the validity of criminal law is limited so that it cannot immediately penetrate further into an event that is suspected of being a crime. The first thing that must be done is to let the parties (perpetrators, victims, and the community) resolve their problems first. When the problem is not resolved, state organs can intervene, but other sanctions are prioritized in the form of social assistance, victim care or other support. Criminal law is ultimately the last option in resolving problems in society.

¹⁵ Nils Jareborg, *Criminalization as Las Resort (Ultima Ratio)*, "Ohio State Journal of Criminal Law" Vol. 2, No. 2, 2005, 521-534, p. 524.

¹⁶ Nils Jareborg, *Op. Cit.*, 525.

If observed, the subsidiary nature of criminal law actually has the same meaning as the argument that criminal law is the last resort (*ultima ratio*). It should be noted that both the principle of subsidiarity and last resort are inseparable parts of the theory of criminalization in criminal law. In relation to that, criminalization should have a strong constitutional value. If not, an act should not be criminalized (*in dubio pro libertate*). As emphasized by Joreborg, *the subsidiarity principle (and the ultima ratio principle if it is taken to duplicate the subsidiarity principle) collapses into the principle of in dubio pro libertate*.¹⁷

On that basis, Joreborg mentioned 3 basic values in criminalization, namely: (1) the penal value principle, meaning that behavior that must be responded to by criminal law is only that which is truly reprehensible (blameworthiness). So the higher the reprehensible value, the stronger the reason for criminalization. (2) the utility principle is that if criminalization is carried out, the emphasis must be on its benefits. These benefits can be measured through the weight of the arguments regarding the need for criminalization, cost control and efficiency. (3) the humanity principle means that criminalization must also pay attention to the interests of the victim.

Referring to the above description, it can be said that the last resort (*ultima ratio*) principle has placed criminal law as a subsidiary of other legal fields. When other legal means are no longer effective, criminal law will shift position to *sola ratio* or the first attempt. However, Joreborg reminded that the concept of last resort is more appropriately directed at the stage of criminalization by lawmakers. That is what underlies the view that last resort is legislative ethics. So, the concept of last resort is addressed to the legislature as the lawmaker, not at the judicial level. In essence, the last resort principle must be reflected when a law is made through the hands of the legislature.

This view is supported by Husak who introduced the minimalist theory of criminalization. This theory emphasizes that the criminal law should be used only as a last resort. So, criminal law will be used as a last resort. Such a doctrine places criminal law as the last option since the criminalization stage. Even according to Husak, before determining whether or not criminalization of an act is necessary, other areas of law must first be considered. This is important because the criminalization carried out is actually unable to significantly reduce criminal statistics. Husak emphasized that criminalization carried out, it is not able to significantly reduce the criminal statistics.

Husak's minimalist criminal law doctrine is basically built on four basic components, namely:

- a) the principle of respect for human rights, b) the right not to be subjected to state punishment, c) the principle that the criminal law should not be invoked*

¹⁷ *Ibid.*

unless other techniques are inappropriate, and d) the principle that conduct should not be criminalized if the effects of doing so would be as bad as, or worse than, not doing so.

So the concept of minimalist criminal law is based on the principle of respect for Human Rights, the right not to be unreasonably punished, criminal law may only be used if other areas of law are not appropriate, and behavior may not be criminalized if the effects of criminalization are much worse than not being criminalized. Sometimes criminalization is carried out without considering the reasons and justifications so that criminalization is considered a rational choice.

So a theory of criminalization should probably include the (appropriately construed) last resort principle. Moreover, when determining the threat of punishment for acts that have been criminalized, there is a lack of moral reasons (basis for reproach) that can justify that an action is worthy of being criminalized and threatened with criminal sanctions. A further problem, said Husak, is the lack of evaluation of criminalization in a law so that on the one hand criminal law only seems to limit people's freedom, on the other hand it only adds to the burden of criminal justice officials.

An act that should only receive a reaction from the administrative or civil law field, is actually criminalized, resulting in criminal law experiencing overcriminalization. On that basis, Husak proposed that criminal law be made as minimalist as possible (minimalist theory of criminal law). In this case, criminal law will only function to deal with various crimes that indeed deserve a reaction from criminal law.

In essence, said Husak, minimalist criminal law is directed as a last resort by means of preventive interpretation, namely criminal law should not be used if non-criminal methods are able to prevent prohibited acts. It should be emphasized that the argument of last resort functions from the criminalization stage to the threat of criminal sanctions for an act. Therefore, according to Husak, the last resort is actually in the legislative realm, namely when it will be formulated as a prohibited act and given the threat of criminal sanctions. In other words, Wilson stated *punishment as a response of last resort where other mechanisms designed to promote order and stability in society have failed*.¹⁸

The explanation above has confirmed that criminal law is basically an ultimum remedium or last resort (ultima ratio) since its formulation in the legislature. Regarding this, Panu Minkinen stated that the principle of ultimum remedium is actually still unclear whether it is included as a legal or moral principle? If it is called a legal principle, it seems that it has not worked well because if it is violated, the public reaction is not the same as a violation of the principle of legality.¹⁹ On the other hand, if ultimum remedium is considered a moral principle, it will

¹⁸ William Wilson, *Op.Cit*, p. 56.

¹⁹ Topo Santoso, 2020, *Hukum Pidana Suatu Pengantar*, PT RajaGrafindo Persada, Jakarta, p. 125.

become a guideline or ethics for the legislature in drafting legislation on whether or not the use of criminal law is necessary. Topo Santoso, agrees with this argument while stating that the principle of ultimum remedium is more appropriately called a moral guideline for criminal law makers to prioritize other means besides criminal law.²⁰

Considering the explanation of Minkkinen and Santoso, it is undeniable that the principle of ultimum remedium in criminal law is more appropriate if it is directed as a moral principle for lawmakers (government and parliament) when formulating a crime in a particular law. Lawmakers must consider carefully and wisely whether criminal sanctions are still needed or not in the law being made. To be precise, understanding the principle of ultimum remedium must begin from the time the law is made or the act is criminalized at the legislative stage in parliament.

In the end, the public can understand or realize that through the principle of ultimum remedium, the existence of criminal law can only be used if other legal means are no longer effective in controlling criminal behavior in society. So that criminal law will always be the last choice or ultimate weapon. The context of the last resort must be understood from the criminalization stage to the determination of criminal sanctions by lawmakers.

Interpretation of the Ultimum Remedium Principle

The use of the ultimum remedium principle by the panel of judges in decision Number 46/Pid.B/LH/2021/PT Kdi—can be said to be a form of legal interpretation. Why is it said so? There are 3 reasons that the author will put forward, namely as follows: first, in the Minerba Law, there is not a single formulation of norms that emphasizes that criminal law is the last resort (ultimum remedium) while administrative law is the first resort (primum remedium). Second, although the Minerba Law is in the realm of administrative criminal law (administrative penal law), criminal sanctions are not *mutatis mutandis* used as subsidiaries of administrative sanctions unless expressly stated. Third, in concluding that administrative sanctions take precedence over criminal sanctions—the panel of judges of the Kendari High Court first referred to the Regulation of the Minister of Energy and Mineral Resources No. 11 of 2018 concerning Procedures for Granting Areas, Licensing, and Reporting on Mineral and Coal Mining Business Activities, not based on the Minerba Law as a higher regulation.

In criminal law, legal interpretation is not something that is prohibited because as Ronald Dworkin said, *law (including documents and statutes) as interpretation*.²¹ Maachteld Boot strengthened this view by stating that *every legal norms need*

²⁰ *Ibid*, p. 126

²¹ Aileen Kavanagh dan John Oberdiek (Ed), 2009, *Arguing About Law*, Routledge, London and New York, p. 127.

*interpretation. Even if a text seems clear on its face, the legal meaning of statutory paragraph can be different from what would follow from the natural understanding of the words.*²² Boot further stated that *a judge must choose the meaning of a different word or in other words, he must interpret.*²³ Boot clearly stated that a judge has to choose from different possible meanings of a word or in other words, he has to interpret (auslegen). This argument received support from Jan Remmelink who stated that a criminal judge could not possibly apply criminal legislation without using interpretation.

In this regard, the interpretation of the norm as ultimum remedium by the high judge in decision Number 46/Pid.B/LH/2021/PT Kdi, is based on the following legal considerations:

1. In the Regulation of the Minister of Energy and Mineral Resources of the Republic of Indonesia Number: 11 of 2018 concerning Procedures for Granting Areas, Licensing, and Reporting on Mineral and Coal Mining Business Activities, Article 94 paragraph (1) states: "Holders of IUP, IUPK, IUP Production Operations specifically for processing and/or refining, IUPJ and IUP Production Operations specifically for transportation and sales, who do not comply with as referred to in Article 61 paragraph (1) letter a or up to letter d, paragraph (2) or up to paragraph (6), Article 62, Article 63, Article 64, Article 65 letter a or up to letter k, Article 67 paragraph (1) letter a or up to letter t, Article 68 paragraph (1) or paragraph (2), Article 69 letter a or up to letter c, Article 71 letter a or up to letter j, Article 72 letter a or letter b, Article 74 letter b or up to letter d, Article 75 letter b or up to letter e, Article 77 letter a or letter b, Article 78 paragraph (1) or paragraph (2), Article 79 paragraph (3), Article 81 paragraph (1) or up to paragraph (2), Article 82 paragraph (1) or up to paragraph (7), Article 83 letter a or up to letter g, Article 84 paragraph (1) or up to paragraph (2), Article 86 paragraph (1) or up to paragraph (5), Article 87 paragraph (3), Article 89 paragraph (3), Article 90 and Article 91 are subject to administrative sanctions.
2. Article 151 paragraph (1) and Article 159 both contain Article 111 paragraph (1) of Law No. 4 of 2009 concerning Mineral and Coal Mining, but the legal sanctions are different, but with the regulation of the Minister of Energy and Mineral Resources as mentioned above, it can be interpreted that administrative sanctions in Law No. 4 of 2009 concerning Mineral and Coal Mining are prioritized premium remedium while criminal sanctions are the last resort ultimum remedium.
3. From the legal facts obtained in court, there is no information stating that the

²² Machteld Boot, 2001, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes Against Humanity, War Crimes*, Intersentia, Antwerpen-Oxford-New York, p.103.

²³ *Ibid.*

defendant has been subject to administrative sanctions, which shows that so far the defendant has carried out his obligations correctly and in accordance with the laws.

4. During that time, the defendant PT. Bososi Pratama has never committed a violation that was subject to sanctions, so it is appropriate in this case that the defendant is subject to administrative sanctions in accordance with those regulated in Article 151 paragraph (2) in the form of a written warning first.
5. If the administrative sanctions are not obeyed by the Defendant PT. Bososi Pratama, then it is reasonable if criminal sanctions must be applied.

Based on the ratio decidendi of the high panel of judges, there are several things that are worth commenting on, namely: first, in Indonesian legislation, there is only one regulation that explicitly and clearly adopts the principle of ultimum remedium, namely Law No. 32 of 2009 concerning Environmental Protection and Management (UU PPLH). Article 100 paragraph (2) of the UU PPLH reads: criminal acts as referred to in paragraph (1) may only be imposed if the administrative sanctions that have been imposed are not complied with or the violation is committed more than once.

The provision is further emphasized in the general explanation of point 6 of the PPLH Law, that the enforcement of environmental criminal law still pays attention to the principle of ultimum remedium which requires the application of criminal law enforcement as a last resort after the application of administrative law enforcement has failed. The application of the ultimum remedium principle only applies to certain formal crimes, namely criminalization of wastewater quality standards, emissions and disturbances as stated in Article 100.

However, sometimes criminal law can change from ultimum remedium to primum remedium. H.G. De Bunt in *Strafrechtelijke handhaving van milieu recht* provides 3 indicators related to this. (1) the victims are very large (massive). (2), the defendant is a recidivist. (3), the loss is irreparable.²⁴ When these three indicators are met, that is when criminal law can function as a first resort.²⁵

Second, in the Minerba Law, the principle of ultimum remedium is not mentioned in writing either in the body or the explanation of the a quo law. That is what distinguishes the Minerba Law from the PPLH Law as described above. The logical consequence is that the existence of criminal sanctions in the Minerba Law cannot be interpreted as a subsidiary or ultimum remedium of administrative sanctions as in the PPLH Law. Departing from such reasoning, there is no logical ratio that can be used as a basis for stating that in the Minerba Law criminal sanctions are ultimum remedium.

²⁴ Hariman Satria, *Loc.Cit.*, p. 223

²⁵ Hariman Satria & Topo Santoso, *Sexual-violence offenses in Indonesia: Analysis on the Criminal Policy in the Law Number 12 of 2022*, "Padjajaran Law Journal," Vol 10 No. 1, 2023, 59-79, p. 61.

Third, Article 151 of the Minerba Law basically emphasizes administrative sanctions against holders of IUP, IPR and IUPK. The types of sanctions include: a) written warning; b) temporary suspension of some or all exploration activities or production operations; and/or, c) revocation of IUP, IPR, or IUPK. However, the enforcement of these administrative sanctions does not prevent the functionalization of criminal sanctions when a corporation commits a crime in mining. In other words, the existence of administrative sanctions in Article 151 of the Minerba Law is not an affirmation that the Minerba Law has adopted the principle of ultimum remedium but only as an affirmation that the Minerba Law has the character of administrative penal law—so that administrative sanctions become more apparent than criminal sanctions.

Fourth, stating that the corporate defendant has never been subject to administrative sanctions before so that he cannot be subject to criminal sanctions if the defendant commits a Minerba crime, then the panel of judges has truly interpreted legal norms. It can be said that leading to extensive interpretation is an interpretation that goes beyond the limits of grammatical interpretation.²⁶ When an extensive interpretation is carried out by a judge, he has consciously entered into an analogy. Meanwhile, analogy is a reasoning that is contrary to the principle of legality. Moeljatno stated that one of the meanings of the principle of legality is that analogies are not accepted by judges when handling cases.²⁷ This is related to the concern that a judge could build an analogy in order to benefit the parties to the case or vice versa because there is no clear guidance. Moreover, if the legal norms are clear, then the judge should avoid interpretation so as not to cause losses to the parties to the case.

Fifth, the provisions regarding criminal sanctions and administrative sanctions in the Minerba Law are actually clear so that there is no need for interpretation by the panel of judges. When connected with the theory put forward by Maachteld Boot, that if a regulation is clear (*lex certa*) and written (*lex scripta*) then interpretation should be avoided as much as possible. If an interpretation is to be made, the word Boot must use the principle of *lex stricta*, namely that a legal regulation must be interpreted narrowly so as not to cause ambiguous meaning.

4. Conclusion

Theoretically, the principle of ultimum remedium in criminal law is a moral principle for lawmakers (legislative ethics) so that they can consider whether or not an act should be criminalized, including the threat of criminal sanctions. Normatively, the principle of ultimum remedium is expressly regulated in Article 100 and the general explanation of point 5 of the PPLH Law. At the practical level, the first court to apply the principle of ultimum remedium was the Manado District

²⁶ Sudikno Mertokusumo, 2009, *Penemuan Hukum: Sebuah Pengantar*, Liberty, Yogyakarta, p. 61.

²⁷ Moeljatno, 2008, *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, p. 25

Court in decision Number 284/Pid.B/2005/PN. Mdo, with the defendant PT Newmont Minahasa Raya. Meanwhile, in the Minerba Law, the principle of ultimum remedium is not known. In practice, in decision Number 46/Pid.B/LH/2021/PT Kdi, the panel of judges acquitted the defendant PT Bososi Pratama by interpreting the principle of ultimum remedium. This interpretation emerged because the position of criminal sanctions in the Minerba Law was still unclear, whether as ultimum remedium or primum remedium.

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