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The Reversed “Ultimum Remedium” Principle: When Criminal Law Becomes the Primary Means of Resolving Land Disputes

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ABSTRACT

In legal doctrine, criminal law is regarded as the ultimum remedium, the last resort after civil and administrative remedies have proven inadequate. However, in the practice of resolving land disputes in Indonesia, the trend is actually the opposite: criminal complaints alleging land encroachment, embezzlement, or document forgery are often used as the first step to pressure the opposing party, rather than as a last resort. This normative legal study employs legislative, conceptual, and case-based approaches to examine the underlying causes and legal implications of this reversal of the principle. The results of the study indicate that uncertainty regarding proof of ownership, unequal power dynamics, and the weak gatekeeping function of law enforcement officials are the primary causes of this phenomenon, which leads to the dysfunction of the criminal justice system and legal uncertainty. The enactment of the National Criminal Code has created an opportunity to strengthen the principle of ultimum remedium through a restorative approach, but this requires consistent implementation starting from the investigation stage.

Keywords: ultimum remedium, land disputes, criminalization, restorative justice, Criminal Code.

INTRODUCTION

In legal doctrine, criminal law is always regarded as an ultimum remedium—that is, a last resort to be used only after other legal instruments, such as civil or administrative law, have proven incapable of resolving the issue. Sudarto emphasizes that the use of criminal sanctions must be carefully considered due to their nature as an ultimum remedium; thus, criminal law should ideally only be invoked when non-criminal measures have failed to provide adequate legal protection to the public (Sudarto, 1986a). A similar view was expressed by Barda Nawawi Arief in his study on criminal law policy, which positions the use of criminal law as part of social policy that must take into account the proportionality of the social cost incurred by criminalization itself, so that criminal sanctions should not be the first instrument the state employs to address a conflict (Arief, 2011).

This principle aligns with the thinking of Herbert L. Packer in his work *The Limits of the Criminal Sanction*, which reminds us that society has a mistaken tendency to view criminalization and harsh enforcement of criminal law as a shortcut to order, whereas criminal sanctions are fundamentally socially costly instruments and should be used sparingly (Packer, 1968). Similar concerns have also emerged in contemporary criminal law discourse in the United States, where Douglas Husak introduced the term *overcriminalization* to describe the phenomenon of excessive expansion of criminal law, which ultimately leads to structural

injustice because many issues that should be resolved through civil or administrative channels are instead brought into the criminal sphere (Husak, 2008).

However, in law enforcement practice in Indonesia, particularly in land disputes, the prevailing trend runs counter to the principle of *ultimum remedium*. Land disputes essentially arise from civil matters—such as disputes over ownership, possession, property boundaries, or the validity of the legal basis for land rights—which, according to the national agrarian legal framework, should first be resolved through civil mechanisms, mediation, or administrative land procedures as stipulated in the Basic Agrarian Law and its various implementing policies. Boedi Harsono emphasizes that national land law is built on the spirit of dispute resolution that prioritizes legal certainty and justice for the parties through orderly land administration, rather than through a repressive approach (Harsono, 2008). Maria S.W. Sumardjono, in her study on land policy, specifically highlighted the importance of strengthening alternative dispute resolution (ADR) mechanisms in the land sector as the preferred course of action before disputes escalate into broader legal conflicts (Sumardjono, 2005).

Recent developments reveal an alarming shift: criminal complaints—such as those alleging land encroachment, property damage, or document forgery—are frequently used as the first step by disputing parties to pressure their opponents, rather than pursuing civil or administrative channels first.

Criminal law, which should serve as the *ultimum remedium*, is instead being used as the *premium remedium*—that is, a bargaining tool to secure a more advantageous position in civil disputes. This practice not only burdens the criminal justice system with cases that are not, in substance, pure criminal offenses, but also has the potential to be abused as a means of intimidation against the weaker party in agrarian disputes, including indigenous communities and tenant farmers.

The gap between the theoretically upheld principle of *ultimum remedium* and the practice of criminalizing land disputes—which instead positions criminal law as the primary instrument—is the fundamental issue this study aims to examine. Further analysis is needed regarding the factors causing this reversal of the principle, its implications for legal certainty and justice for the disputing parties, and how land law enforcement should be brought back into alignment with the principle of criminal law as *ultimum remedium*.

LITERATURE REVIEW

The Principle of *Ultimum Remedium*

The principle of *ultimum remedium* is one of the fundamental principles of criminal law that treats criminal sanctions as a last resort (the last resort), which may only be invoked after other legal instruments—whether civil law or administrative law—have proven inadequate to resolve a matter (Sudarto, 1986a). This principle stems from the recognition that criminal law is the harshest branch of law (*ultima ratio*) because its sanctions can infringe upon a person's liberty, property, and even dignity; therefore, its application must be limited to the absolute minimum.

Sudarto, one of Indonesia's most influential criminal law scholars, asserts that criminal law is fundamentally subsidiary to other branches of law (Sudarto, 1986b). He argues that the imposition of criminal sanctions can only be justified if non-criminal measures—such as civil lawsuits, mediation, or administrative actions—are no longer effective in protecting the legal interests at stake. Muladi and Barda Nawawi Arief expand on this line of thought by emphasizing that criminalization policy should be grounded in the principles of subsidiarity and

proportionality, rather than merely serving as a response to social pressure, short-term political interests, or the unilateral interests of one of the parties involved in a case (Muladi & Arief, 1992). In another work, Barda Nawawi Arief also asserts that criminal law policy should be an integral part of social policy aimed at achieving public welfare; thus, the disproportionate use of criminal sanctions actually contradicts the very purpose of the law itself (Arief, 2011).

In the body of international criminal law thought, the principle corresponding to *ultimum remedium* is known as the *ultima ratio* principle. Claus Roxin and Luis Greco, in their study of the general theory of German criminal law, assert that criminal law may only be invoked when the protection of legal interests (*Rechtsgüterschutz*) cannot be achieved through less repressive legal means, such as civil or administrative law (Roxin & Greco, 2020). Douglas Husak, in his widely cited work on overcriminalization, argues that the excessive use of criminal sanctions (overcriminalization) actually undermines the legitimacy of the criminal justice system by blurring the line between acts that truly warrant criminal punishment and ordinary civil matters (Husak, 2008). Herbert Packer, in his work on the limits of criminal sanctions, points out that criminal sanctions carry high social costs—both for the individuals subjected to them and for the justice system as a whole—and thus their use must be restricted to acts that genuinely and seriously threaten the public interest (Packer, 1968). Andrew Ashworth and Jeremy Horder reinforce this view through the principle of “minimalism in criminalization,” which requires the state to refrain from using criminal law when the interests at stake can be adequately protected through civil or administrative legal channels (Ashworth & Horder, 2013).

Land Disputes

Land disputes are, in essence, civil matters concerning the right of possession, ownership, boundaries, and the transfer of land rights. Boedi Harsono, in his study on the history and implementation of national agrarian law, explains that such disputes should be resolved through mechanisms for establishing land rights, land registration, or civil lawsuits in court, in accordance with the principles enshrined in the Basic Agrarian Law (Harsono, 2008). Maria S.W. Sumardjono notes that the complexity of Indonesia’s land regulations—which stems from the overlap between customary law, colonial law (*Agrarische Wet*), and post-independence national agrarian law, often creates loopholes for disputing parties to “criminalize” their opponents, rather than pursuing civil proceedings, which are actually more appropriate for the nature of such issues (Sumardjono, 2001). Adrian Sutedi adds that the lack of legal certainty in the processes of land registration and the transfer of land rights further exacerbates this practice, as the absence of a single, definitive proof of ownership makes it easier for one party to fabricate allegations of criminal acts against the other, such as accusations of land encroachment or embezzlement (Sutedi, 2007).

This phenomenon has been termed by several researchers as the “criminalization of civil disputes,” which refers to the use of criminal provisions as a bargaining tool to secure a stronger negotiating position in disputes that are, in essence, of a civil nature (Arief, 2007). Barda Nawawi Arief describes the tendency to pursue criminal avenues first before exploring civil or administrative remedies (*primum remedium*) as a form of criminal policy distortion that has the potential to lead to excessive criminalization as well as abuse of process (abuse of process) (Arief, 2010). In an international comparative context, Nils Jareborg emphasizes that violations of the *ultima ratio* principle risk turning criminal law into an instrument of private power for parties that are economically or politically stronger, rather than an instrument for protecting the public interest as it should be (Jareborg, 2005). This situation, in turn, creates legal uncertainty, burdens the criminal justice system with cases that should be resolved through other channels,

and risks being misused as a means of intimidation against those who are in a weaker economic or social position..

METHOD

This study employs the normative legal research method (normative legal research), which examines law as applicable norms or rules, using legal materials as the primary data to be systematically analyzed (Marzuki, 2016). The selection of this method is based on the characteristics of the issue at hand—namely, the deviation from the *ultimum remedium* principle in the resolution of land disputes—which is fundamentally a matter of consistency in applying criminal law principles to existing agrarian and criminal law norms, rather than an empirical issue concerning social behavior in the field.

The approaches used in this study are the statutory approach, the conceptual approach, and the case approach (Marzuki, 2017). The statutory approach is used to examine relevant provisions—whether in the Criminal Code, the Basic Agrarian Law, or other land-related legislation—to determine the extent to which the application of the *ultimum remedium* principle is accommodated within Indonesia's positive legal system. The conceptual approach is used to dissect the concepts of *ultimum remedium* and *ultima ratio* as they have developed in criminal law doctrine—both nationally and internationally—serving as the primary analytical tool in this study. The case-based approach, meanwhile, is used to examine the handling of land dispute cases that result in criminal proceedings, in order to obtain a concrete picture of how these principles are reversed in law enforcement practice.

The legal materials used in this study consist of primary, secondary, and tertiary legal sources. Primary legal sources include laws and regulations governing criminal law and land law, as well as court decisions relevant to land disputes that lead to criminal proceedings. Secondary legal materials include textbooks, academic journals, previous research findings, and doctrinal works by both national and international legal scholars discussing the *ultimum remedium* principle, criminalization policies, and agrarian law. Tertiary legal materials consist of legal dictionaries and legal encyclopedias used to clarify technical terms that arise in the discussion.

Legal materials were collected through library research, which involved searching for, gathering, and cataloging relevant legal materials from various sources—including legislation, court decisions, and academic literature—drawn from both national legal databases and international legal journals accessible via scholarly databases such as Google Scholar, HeinOnline, or SSRN.

The collected legal materials are then qualitatively analyzed using a descriptive-prescriptive method. The descriptive analysis is conducted to explain how the *ultimum remedium* principle should be applied in the resolution of land disputes according to applicable doctrine and legislation, while the prescriptive analysis is conducted to provide a normative assessment of the practice of reversing this principle and to formulate arguments regarding how the law should be applied to align with the *ultimum remedium* principle (Ibrahim, 2006).

The reasoning process in this study employs deductive logic, which starts from general premises—namely, applicable legal principles and norms—and applies them to a specific issue—the phenomenon of the criminalization of land disputes—to ultimately draw conclusions regarding the consistency or inconsistency of the principle's application in practice.

RESULTS AND DISCUSSION

Patterns and Causal Factors Behind the Reversal of the Ultimum Remedium Principle in Land Disputes

A review of legislation, legal doctrine, and law enforcement practices reveals a strong tendency to use criminal law as the first recourse (*primum remedium*) in resolving land disputes, rather than as a last resort as intended by the *ultimum remedium* principle. This phenomenon is evident in a recurring pattern where parties who feel aggrieved in disputes over land ownership, possession, or boundaries immediately file criminal complaints—typically under charges of land encroachment, embezzlement, or forgery of documents—without first pursuing or resolving the matter through civil proceedings via an ownership claim (*rechtsvordering*) in district court. Criminal complaints are often filed concurrently with or even prior to civil lawsuits, causing criminal proceedings to run in parallel and potentially influencing the bargaining positions of the parties in the unresolved civil dispute. The alleged criminal elements also frequently intersect directly with the core issue of the civil dispute—namely, determining who is the rightful owner of the land—thereby forcing investigators and prosecutors to enter the realm of proving property rights, which should fall within the jurisdiction of the civil courts.

This finding aligns with Barda Nawawi Arief’s concerns regarding deviations in criminal policy, where criminal law is used not on the basis of an urgent need to protect legal interests, but rather as a means to expedite dispute resolution or to pressure the opposing party (Arief, 2011). This situation also confirms Douglas Husak’s concerns regarding overcriminalization—that is, the expanding use of criminal sanctions in areas that could actually be resolved through less severe legal mechanisms (Husak, 2008), while reinforcing Herbert Packer’s warning that the indiscriminate use of criminal sanctions will incur social costs that are disproportionate to the benefits of legal protection gained (Packer, 1968).

Further discussion reveals that this reversal of the principle is driven by a number of intertwined factors. First, the uncertainty regarding proof of land ownership resulting from a registration system that adheres to a negative principle with positive tendencies—as explained by Boedi Harsono—opens the door for more than one party to claim rights to the same parcel of land, and this uncertainty is subsequently exploited to construct allegations of criminal offenses (Harsono, 2008). Second, the unequal power dynamics between disputing parties—as noted by Maria S.W. Sumardjono—mean that parties with greater economic capital or political access find it easier to initiate criminal proceedings, thereby transforming criminal law from an instrument for protecting the public interest into an instrument of private power (Sumardjono, 2001), in line with Nils Jareborg’s warning regarding similar risks in international comparative law (Jareborg, 2005). Third, the length of civil litigation and dissatisfaction with the effectiveness of judgment enforcement drive disputing parties to opt for the criminal route, which is psychologically perceived as providing a deterrent effect more quickly, even though the substance of the matter remains civil in nature. Fourth, the weak gatekeeping function of law enforcement officials during the preliminary and investigative stages results in land-related criminal reports often being pursued without a thorough examination of the *mens rea* element and the exclusive jurisdiction of the civil courts, a situation that contradicts the views of Claus Roxin and Luis Greco, who argue that the invocation of criminal law must be based on the real need to protect legal interests (*Rechtsgüterschutz*), not merely on the administrative formality of accepting a report (Roxin & Greco, 2020).

This finding becomes increasingly relevant in light of the enactment of Law No. 1 of 2023 on the Criminal Code (National Criminal Code), which will take effect on January 2, 2026,

following a three-year transition period after its promulgation. The new Criminal Code is explicitly designed to strengthen the principle of *ultimum remedium*—that is, the principle that criminal punishment, particularly imprisonment, should be a last resort when other sanctions are deemed inadequate—as part of a paradigm shift from a retributive approach toward a corrective and restorative approach (Arafat, 2025). This shift is reflected, among other things, in the recognition of non-custodial alternative sanctions, the strengthening of the principle of individualized sentencing, and the recontextualization of the role of correctional institutions from merely a means of “imprisonment” to a process of measured rehabilitation and social reintegration (Arafat, 2025). Nevertheless, the findings of this study indicate that this normative strengthening has not yet fully correlated with the practical handling of land disputes on the ground, as the underlying issue does not lie in the absence of norms supporting the *ultimum remedium* principle, but rather in the lack of consistency in its application from the stage of receiving reports through to the investigation.

Legal Implications and the Urgency of Strengthening the *Ultimum Remedium* Principle within the Framework of the New Criminal Code

The reversal of the *ultimum remedium* principle in the resolution of land disputes gives rise to a number of significant legal implications. The first implication is the dysfunction of the criminal justice system, in which an institution that should handle acts that truly threaten the public interest is instead burdened with cases that are, in substance, civil in nature. This situation reinforces the argument made by Andrew Ashworth and Jeremy Horder regarding the importance of the principle of minimalism in criminalization, as this undue burden diminishes the effectiveness of criminal law enforcement against crimes that truly require serious attention (Ashworth & Horder, 2013). The second implication is the creation of legal uncertainty for land rights holders, as ownership status—which should be determined through civil evidence—is instead “decided” *de facto* through criminal proceedings, including through coercive measures such as detention, thereby contradicting the principle of the presumption of legality (*vermoeden van rechtmatigheid*), which should apply to certificate holders until proven otherwise through a final and binding civil judgment, as emphasized by Adrian Sutedi (Sutedi, 2007). The third implication is a decline in public trust in the legal system, as criminal law—which is supposed to protect the public interest—is instead perceived as a tool that can be “hired” by those with significant financial resources. This concern aligns with the views of Muladi and Barda Nawawi Arief that disproportionate criminalization policies will erode the legitimacy of criminal law as part of social policy aimed at public welfare (Muladi & Arief, 1992).

In light of the implementation of the new Criminal Code, these implications can in fact be minimized if the restorative spirit embedded within it is consistently applied in the handling of land-related cases. The new Criminal Code requires law enforcement officials to no longer think solely within a retributive framework that emphasizes punishment, but rather to shift to a restorative framework that prioritizes the resolution of social conflicts and the restoration of relationships among citizens as its primary objectives (Arafat, 2025). To achieve this, clear mechanisms are needed for the police to identify cases suitable for resolution through restorative justice (penal mediation), as stipulated in Police Regulation No. 8 of 2021, as well as alignment by the Attorney General’s Office through Attorney General Regulation No. 15 of 2020 on the Discontinuation of Prosecution Based on Restorative Justice. This inter-institutional coordination is particularly crucial in the context of land disputes, because without a clear identification mechanism at the initial stage, the spirit of *ultimum remedium*—which has been normatively reinforced in the new Criminal Code—risks remaining a mere dead letter, where the norm goes

unimplemented while the practice of misusing criminal provisions to pressure opponents in land disputes continues as it did under the old Criminal Code system.

On this basis, this study argues that the momentum of the new Criminal Code's implementation should be leveraged to consistently strengthen the principle of ultimum remedium in the resolution of land disputes, through at least two key steps. First, strengthening the gatekeeping function of law enforcement officials through internal guidelines that explicitly require an assessment of whether any unresolved civil disputes exist before a land-related report is escalated to the investigative stage, in line with the principles of restorative justice already provided for within the framework of the new Criminal Code and its implementing regulations. Second, optimizing the resolution of land disputes through alternative channels, including land mediation and the strengthening of land registration institutions, so that legal certainty regarding rights can be achieved without the need to pursue criminal proceedings. These steps align with Herbert Packer's thinking regarding the need for careful restrictions on the use of criminal sanctions (Packer, 1968), and simultaneously serve as a test of the consistency in implementing the corrective-restorative paradigm—one of the core principles of the National Criminal Code reform—so that criminal law truly functions as an ultimum remedium, rather than becoming a primum remedium that actually undermines the sense of justice in the resolution of land disputes in Indonesia.

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