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Ultima Ratio as a Constitutional Principle

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Abstract

The paper argues the criminal law notion of ultima ratio is an instance of a broader constitutional law principle of proportionality. However, ultima ratio is not the only principle relevant in a constitutional assessment of criminalization. The role of ultima ratio is to impose limitations on criminalization. But constitutional doctrines also exist which call for criminalization and might even be seen as establishing a criminalization obligation. The paper examines three constitutional counterweights to ultima ratio. The first of these is discussed in the context of state constitutions. This is the cluster of the interrelated constitutional doctrines of the horizontal effect of fundamental rights and the protective duty of the state, as well as the understanding of collective security as a basic right. These doctrines are analysed in the light of the praxis of the German Constitutional Court and the Finnish Constitutional Law Committee. The two other constitutional counterweights are discussed at the level of the transnational, European constitution. These are the principles of precaution and effectiveness.

Key words

Ultima ratio; proportionality; horizontal effect; protective duty of the state; precautionary principle; principle of effectiveness

Resumen

Este artículo defiende que el concepto de ultima ratio es una instancia más amplia del principio de proporcionalidad dentro del derecho constitucional. Sin embargo, el ultima ratio no es el único principio relevante en la valoración constitucional de la criminalización. El papel del ultima ratio es imponer límites a la criminalización. Pero también existen doctrinas constitucionales que exigen la criminalización e incluso dan pie a entender que obligan a establecer una pena. El documento examina tres contrapesos constitucionales al ultima ratio. En primer lugar, se

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analiza en el contexto de las constituciones estatales. Este es el conjunto de las doctrinas constitucionales interrelacionadas entre el efecto horizontal de los derechos fundamentales y el deber de protección del Estado, así como la asunción de la seguridad colectiva como un derecho fundamental. Estas doctrinas se analizan a la luz de la praxis de la Corte Constitucional de Alemania y del Comité de Derecho Constitucional Finlandés. Los otros dos contrapesos constitucionales, los principios de precaución y eficiencia, se discuten en el ámbito de la constitución transnacional europea.

Palabras clave

Ultima ratio; proporcionalidad; efecto horizontal; deber de protección del Estado; principio de precaución; principio de efectividad

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1. Introduction

In a fairly recent article, Nils Jareborg (2005) has argued that *ultima ratio* is not a constitutional principle but rather a principle of legislative ethics. Jareborg (re)defines *ultima ratio* as a metaprinciple which summarizes reasons for criminalization, such as the penal value principle, the utility principle and the humanity principle. Only as such a metaprinciple can it – according to Jareborg – have any independent normative function.

In this paper I shall take a view different from Jareborg's. I shall stick to the traditional criminal law notion of *ultima ratio* according to which criminalization should be used only as "uttermost means in uttermost cases". But I shall treat the criminal law notion of *ultima ratio* as an instance of a broader constitutional law principle of proportionality. However, *ultima ratio* is not the only principle relevant in a constitutional assessment of criminalization. If the role of *ultima ratio* is to impose limitations on criminalization, constitutional doctrines also exist which call for criminalization and might even be seen as establishing a criminalization obligation. I shall examine three such potential constitutional counterweights to *ultima ratio*. The first of these I shall discuss in the context of state constitutions, the other two at the level of the transnational, European constitution. The three counterweighing doctrines are:

- the doctrines of the horizontal effect (*Drittwirkung*) of fundamental rights and the protective duty (*Schutzpflicht*) of the state, as well as the related understanding of collective security as a basic right
- the precautionary principle of EU law
- the principle of effectiveness (*effet utile*) in EU law.

2. Ultima Ratio as an instance of the constitutional principle of proportionality

In constitutional law, proportionality, as we may recall, is a principle elaborated especially for assessing the legitimacy of limitations on fundamental rights. Perhaps the greatest merit for articulating this principle falls to the German Constitutional Court. The Court has distinguished between four proportionality-related requirements which measures by public authorities entailing fundamental-rights limitations must meet:

- legitimacy of the aim; the measure at issue pursues a legitimate aim
- effectiveness; the measure is causally efficient as a means to achieve the legitimate aim
- necessity; the measure is necessary for achieving the legitimate aim (no less restrictive means would suffice)
- appropriateness (or proportionality in the stricter sense); the overall benefits of the measure overweigh the "costs" in terms of fundamental-rights limitation.

Although often linked to the jurisprudence of the German Constitutional Court, proportionality belongs to the global success stories of constitutional law in recent decades; it is one of the substantive doctrines which give credence to the talk of world constitutionalism or new constitutionalism, as this world-wide phenomenon has also been called. Thus, at the European level a proportionality test is implied by the limitation clauses of Articles 4-11 of the European Convention on Human Rights. Art. 8(2), for instance, reads as follows:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In Finland, in turn, the general preconditions for limitations on fundamental rights were codified in the report the Constitutional Law Committee of Parliament issued in 1993 on the reform of the Chapter on Fundamental Rights of the Constitution (Report 25/1994). The report clearly expresses the influence of the German doctrine, including the principle of proportionality as articulated by the German Constitutional Court. The general preconditions include the requirements of

1. precise provisions at the level of parliamentary statutes
2. a pressing social need
3. necessity of the measure at issue for meeting the need
4. proportionality in the sense of the benefits' outweighing the costs in terms of fundamental-right limitation
5. inviolability of the kern of the fundamental right
6. availability of legal remedies
7. harmony with Finland's international human-rights obligations (see, e.g., Alexy 1986, pp. 100-104).

It should not be difficult to see the affinity between the constitutional principle of proportionality and the criminal-law notion of *ultima ratio*. Criminal-law penalties are undoubtedly measures by public authorities which involve limitations on otherwise protected fundamental rights: prison sentences on personal liberty and fines on property. In addition, if we – in the wake of early modern moral and political philosophy – assign the idea of a general right to freedom and self-determination a constitutional status, criminalization *per se* restricts this right. So why should criminal law be a safe haven from proportionality test?

Only one further argumentative step is needed to show the pertinence of the proportionality test for assessments of criminalization and, by the same token, to elevate the criminal law principles of *ultima ratio* onto constitutional level. Often enough, the emphasis in discussing the proportionality requirement is on individual measures affecting singular, identifiable individuals. But constitutional law does not oblige only executive, administrative and judicial authorities but even the legislature. This also goes for provisions on fundamental rights as well as principles guiding the interpretation of these provisions. So, evidently, the proportionality test is relevant for legislative decisions on criminalization as well. The proportionality principle reformulates the *ultima ratio* and, arguably, makes it analytically more fine-grained. By the same token, *ultima ratio* is transformed into an expression of proportionality as a broader constitutional principle.

Systems of constitutional review differ in, for instance, the availability of *ex ante* abstract control of legislation. The argumentative step in fundamental-rights doctrine from individual measures to legislative decisions is easier and more natural to take in systems where the emphasis lies in *ex ante* control or where at least such control is a vital part of constitutional review. In the Finnish system, the main actor is the Constitutional Law Committee of Parliament, which exercises its powers of constitutional review by examining legislative bills *ex ante*. In Germany, in turn, abstract norm control by the Constitutional Court can be initiated by political actors before the entry into force of enactments adopted by Parliament. It should not come as a great surprise that in both systems criminalization has been submitted to a proportionality test and, hence, *ultima ratio* has been transformed into a constitutional principle. In Germany, the land-mark case is the notorious abortion law decision from 1975 (BVerfGE 39, 1.).

In its ruling the Court stated that "the interruption of pregnancy irrevocably destroys an existing human life" and that "abortion is an act of killing" (para. III.2a). However, what is now important is not so much the view the Court took in 1975 on abortion but rather its argument concerning the criminalization of abortion.

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Let me present a rather lengthy citation, which shows how the Court treated *ultima ratio* as an instance of the proportionality principle:

> The decisive factor is whether the totality of the measures serving the protection of the unborn life, whether they be in civil law or in public law, especially of a social-legal or of a penal nature, guarantees an actual protection corresponding to the importance of the legal value to be secured. In the extreme case, namely, if the protection required by the constitution can be achieved in no other way, the lawgiver can be obligated to employ the means of the penal law for the protection of developing life. The penal norm represents, to a certain extent, the "ultimate reason" in the armory of the legislature. According to the principle of proportionality, a principle of the just state, which prevails for the whole of the public law, including constitutional law, the legislature may make use of this means only cautiously and with restraint. However, this final means must also be employed, if an effective protection of life cannot be achieved in other ways. The worth and the importance of the legal value to be protected demand this. It is not a question of an "absolute" duty to punish but rather one of a "relative" duty to use the penal sanction, which grows out of the insight into the inadequacy of all other means. (Para. III.2b).

In Finland, the Constitutional Law Committee of Parliament expressed it general views on the constitutional dimension of criminal law in its report in 1997. The Committee stated that the most important limitations on the powers of the legislator in the field of criminal law are related to fundamental rights. These limitations derive from the premise that legislation may not prohibit activities which are expressly allowed by the Constitution. In addition, imposing a fine implies interference in property and a prison sentence in personal liberty. Criminalisations which entail limitations on individual fundamental rights, such as, say freedom of expression, must be assessed according to the same criteria as fundamental-rights limitations in general. Thus, criminalization must be required by a pressing social need and a reason which is acceptable from the fundamental-rights perspective. The requirement of proportionality, in turn, presupposes the necessity of criminalization for protecting the legal value at issue. This implies assessing whether the corresponding purpose could be accomplished through a means which does not entail as harsh an encroachment on fundamental rights as does criminalization. Finally, the report evokes the significance of proportionality for defining the severity of the penalty, too. (Report 23/1997).

As an interim conclusion, I would argue that at least for constitutional lawyers it is wholly natural to treat the criminal law notion of *ultima ratio* as an expression of a wider constitutional principle of proportionality. The principle of proportionality, conditioning limitations on fundamental rights enshrined in national constitutions and international human rights instruments, includes the requirement of necessity – which could perhaps be called *ultima ratio* in the strict sense – as one of its constituent elements or, as we could also put it, sub-principles. Is such a constitutional reading of the criminal law principle of *ultima ratio* an instance of constitutional imperialism, to allude to an accusation which in Germany has from time to time been hurled against both the Constitutional Court and academic constitutional lawyers? In Finland, too, constitutional lawyers have been criticized for an attempt to replace established doctrines of other fields of law by constitutional principles, especially those related to fundamental rights.

I have tried to defend an intermediary position in the Finnish debates on the (over)constitutionalisation of the legal order. Many of the established principles of other fields of law can be shown to be closely related to constitutional principles, and in particular to fundamental rights. But this does not mean that the latter should substitute for the former and that results of centuries of legal doctrinal work should be devalued. What constitutional law and reference to fundamental rights can add to this tradition is increased normative justification and maybe even – as in the case of *ultima ratio* – analytical precision. Moreover, fundamental rights principles can also contribute to such normative coherence of the law which is

needed even in our era of legal fragmentation, polycentricity and pluralism. (Tuori 2007, pp. 270-271).

As regards the constitutionalisation of criminal law a further point can be invoked. Criminal law, if any field of law, undeniably relates to the vertical relation between the state and the individual, that is, the classic liberal *Rechtsstaat* focus of fundamental rights, and, hence, no resort to the controversial doctrines of *Drittwirkung* or fundamental rights as general legal principles is needed for the constitutional anchoring of *ultima ratio*.

3. Counterweighing constitutional doctrines

The ruling of the German Constitutional Court and the report of the Constitutional Law Committee of the Finnish Parliament are also instructive in evoking, in addition to the requirement of proportionality, even other potential interfaces between constitution and criminalization. The report of the Finnish Constitutional Law Committee draws attention to the criminal-law principle of legality which has been expressly enshrined in the Finnish Constitution (Art. 7(1)). Furthermore, both organs of constitutional review discuss fundamental rights as a source of, not only limitations on, but also obligations of criminalization. Here they draw on the contentious doctrine of the duty of protection of the state (*Schutzpflicht*), which, together with the doctrine of *Drittwirkung*, has entailed the transformation of fundamental rights into general legal principles of constitutional status and operative throughout the legal order (see Böckenförde 1991). The implications of the doctrines of the *Drittwirkung* and the *Schutzpflicht* of the state for criminal law are easy to detect. If for example the fundamental rights on life, personal integrity and property are relevant even in the relations among private individuals and if the constitution imposes on the state the duty to protect the rights in such horizontal relations, then a criminalization obligation is constitutionally grounded. Hence, legislative decisions on criminalization seem to boil down to a balancing between the protective duty and *ultima ratio* considerations. And, in fact, such a conclusion is obvious in the above-cited abortion ruling of the German Constitutional Court.

The conclusions drawn from the *Drittwirkung* of fundamental rights and the *Schutzpflicht* of the state have been further buttressed by yet another doctrinal development; namely, the tendency to treat security in the sense of a collective good as a fundamental right.

Security possesses both an individual and a social dimension; risks and security threats, as well as combating them, can be approached from the perspective of both singular individuals and collectives. In constitutional terms, security can be treated as an *individual right* or a *collective good*. Rights must be protected, and collective goods produced through public policies. In its collective aspect, security relates to a factual state of society, brought or to be brought about through policy measures. In particular the liberal, *Rechtsstaat* tradition, with its emphasis on the restrictive constitutional function, places collective security - public order and security, as the term goes - outside the normative sphere of fundamental rights. Security is an extra-constitutional collective good, and one of the central tasks of the constitution is to discipline the power wielded by police and other security authorities which are expected to procure security. Fundamental rights are supposed to function as side-constraints to security measures and to protect individuals against the potential security threat posed by uncontrolled state power.

The doctrines of proportionality and *balancing* already signify retreat from the liberal, *Rechtsstaat* view. In recent constitutional and jurisprudential debates, much of the balancing and proportionality talk has been about liberty and security, about justifying restrictions to liberty in the name of increasing security. Here we encounter one of the security-related paradoxes of constitutional doctrine: extra-constitutional collective security interests to which individual fundamental rights were supposed to function as side-constraints make their (re-)entry into

constitutional doctrine as grounds for limiting these very rights. However, the ideas of balancing do not necessarily entail effacing the distinction between individual fundamental rights and security as a collective good. It still makes sense to discuss within the balancing paradigm for instance whether the personal freedom or physical integrity of a suspect or detainee may be restricted in order to increase the collective security of society.

However, in recent decades a tendency of blurring in a problematic manner the distinction between individual fundamental rights and such collective goods as security has made itself noticeable in, for instance, Germany and, under the impact of German constitutional culture, Finland as well. In Finland, this tendency has been linked to the (re-)interpretation of the right to security which has been explicitly confirmed in the Finnish Constitution after the model of Art. 5(1) of the ECHR. But as the example of Germany shows, the elevation of security to the rank of fundamental rights is also possible without such support in the text of the constitution, through the understanding of fundamental rights not only as subjective rights but also as general legal principles; the *Drittwirkung* of fundamental rights; and the *Schutzpflicht* of the state. If security as a collective good is converted into a fundamental right with a rank equal to that of individual liberty rights, such as the rights to personal liberty and integrity, balancing between liberty and security is re-defined as balancing between diverse fundamental rights. With the same move, the Dworkinian distinction between policies aiming at collective goods and principles focusing on individual rights, with the concomitant *prima facie* primacy of the latter, is obliterated from constitutional doctrine (Dworkin 1978).

Such an understanding of security allows for justifying, say, new police powers or new criminalizations in terms of collective security or the realization of fundamental rights in horizontal relations. If and when the powers of security authorities or the provisions of criminal law encroach on individual fundamental rights, such as rights to liberty, personal integrity, privacy and the confidentiality of correspondence, their constitutional acceptability is claimed to depend on mutual weighing of fundamental-rights principles of equal rank. What according to the liberal, *Rechtsstaat* view was to be restricted through fundamental rights – the powers of security agencies, as well as the state's penal authority - has itself been absorbed inside this system as a one of its constituent elements. *Ultima ratio* has found its counterweight in the constitutional criminalisation obligation of the legislator. Such an argument is already detectable in the abortion ruling from 1975 of the German Constitutional Court.

4. Ultima ratio in EU law

In my further discussion of constitutional counterweights to *ultima ratio*, I shall shift my focus onto EU law. The considerations pushing for criminalization which are summarized in the precautionary and effectiveness principles are relevant at the state level, too, but only within EU law have they been articulated as legal principles possessing at least potential constitutional relevance. Before turning to these two principles, let me briefly comment on *ultima ratio*'s constitutional significance for the EU's criminal-law measures. I shall argue that *ultima ratio* is a constitutional principle of EU law, too, although, at least to my knowledge, there is no authoritative ruling of the ECJ explicitly confirming this.

The principle of proportionality is one the "classic" general principles of EU (Community) law. Early on, the Court adopted the principle of proportionality in its case-law on derogations from fundamental economic freedoms, and since Lisbon, the principle has been enshrined in Art. 5 TEU as well as in the Protocol on the Application of the Principles of Subsidiarity and Proportionality. According to Art. 5(1) TEU "the use of Union competences is governed by the principles of subsidiarity and proportionality", and Art. 5(4) offers the following definition of the

principle: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

It is obvious that the main focus of the principle of proportionality as articulated in Art. 5 TEU and the Protocol on the Application of the Principles of Subsidiarity and Proportionality does not lie on disciplining fundamental-rights limitations but, rather, complementary to subsidiarity, on circumscribing the use of EU competences to the detriment of the sovereignty of the Member States. The central position of the economic constitution among the many constitutions of Europe has brought about a reversal of the cost-benefit analysis such as we know it from national systems of constitutional review or the praxis of the Strasbourg Court: in the proportionality test of the Court, fundamental-rights considerations have appeared as potential justifications for derogations from market freedoms related to economic policy standpoints. Now the "costs" are assessed in relation to policy factors and "benefits" in relation to fundamental rights, i.e., Dworkinian principles.

The gradual strengthening of fundamental rights' position in EU law may, however, weaken the dominance of the economic constitution and enhance the significance of proportionality as a yardstick for permissible limitations on fundamental rights. Arguably, the principle of proportionality is part of the common constitutional traditions of the Member States, as well as of the guarantees offered by the ECHR, and should be included in the general fundamental-rights principles evoked by Art. 6(4) TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

The development of the fundamental-rights dimension of EU law has culminated in the Lisbon Treaty, which through Art. 6(1) TEU assigned legal effect to the EU Charter on Fundamental Rights. This also entailed an explicit acknowledgement of the principle of proportionality as applied to fundamental-rights limitations. Not only does the Charter attach the interpretation of its provisions to the European Convention[1] and the common constitutional traditions of the Member State[2] but it expressly enshrines some of the central methodological premises of the Strasbourg Court. These premises, in turn, owe much to the example provided by the German Constitutional Court. Thus, according to Art. 52(1), "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms", and "subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".[3]

Moreover, the Charter also includes a particular provision on the criminal-law principles of legality and proportionality. Art. 49(1) confirms the principle of legality

[1] Art. 52(3) lays down that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention". According to the authoritative explanation attached to the Charter, "this means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR without thereby adversely affecting the autonomy of Community law and of that of the Court of Justice of the European Communities".

[2] Art. 52(4) provides that "in so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions".

[3] According to the authoritative explanation attached to the Charter, "the wording is based on the case-law of the Court of Justice: '... it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights' (judgment of 13 April 2000, Case C-292/97, paragraph 45 of the grounds)".

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in terms of the prohibition of retroactive criminalization and the sub-principle of lighter penalty. Art. 49(3), in turn, lays down that "the severity of penalties must not be disproportionate to the criminal offence". The requirement of proportionality as applied to penalties is not exactly the same as the traditional *ultima ratio* principle. However, as I have argued, even *ultima ratio* is to be considered a manifestation of the same overarching principle of proportionality, invoked in Art. 49(3) of the EU Charter.

5. European security constitution and the precautionary principle

Even if *ultima ratio* is accorded a constitutional status in EU law, its position is perhaps more contested than in the context of state constitutions or the ECHR. It is threatened by constitutional principles which are related to the specific features of the transnational, European constitution. These principles express policy-related considerations which are relevant at the state level, too, but which, at this level, lack the constitutional significance they have been accorded in the European context. The first of these potential counter-principles is the preventive or *precautionary principle*, manifesting for its part the emergence of a particular European security constitution. The other counter-principle is the principle of *effectiveness*, which has its background in the complicated relations between EU law and the national legal orders of the Member States.

Let me briefly sketch the emergence of what I have called the security constitution. Elsewhere (Tuori 2010), I have tried to defend the thesis that the transnational European constitution must examined as a differentiated process of constitutionalisation. European constitution is not a standstill phenomenon but, rather, an ever-extending chain of constitutional speech acts. It is an evolutionary and, at the same time, differentiated process: the European constitutions have not developed simultaneously nor at the same pace but, rather, successively, following a certain order. European constitutionalisation is susceptible to a periodisation where each stage receives its particular colouring from a particular constitution. Reflecting the temporal and functional primacy of economic integration, the first wave proceeded under the auspices of economic constitution; in the second phase, marked by the milestone decisions of the ECJ in the 1960s, such as *van Gend* and *Costa v. Enel*, the emphasis shifted to juridical constitution; during the third wave, with the Treaty of Maastricht (1993) as the landmark, the focus was transferred to political constitution; and finally, in our contemporary age, say, since the Treaty of Amsterdam (1998), the pacemaker role appears to have been taken over by the security constitution.

At the Treaty level – the "surface level" of EU constitutional law - we can observe an advancing constitutionalisation of the security dimension starting from the declaration of enlisted security issues as "common interests" of the Member States in Maastricht, and ending up with the "communitarisation" of the entire Area of Freedom, Security and Justice (AFSJ) and the upgrading of security objectives in Lisbon. But increased attention to security issues at Treaty level does not yet in itself corroborate the claim of a distinct European security constitution. What is also needed is a certain degree of coherence in security-related constitutional law. Such a coherence is brought about by the concept of security which informs the individual Treaty provisions and, arguably, the *Vorverständnis* of the central actors within the field of the security constitution.

Traditional constitutional doctrine has seen the state of exception and the ensuing emergency powers as the main constitutional (?) response to security concerns. But, as many observers have recently argued, the boundary separating exceptional from normal times and extraordinary measures from ordinary legislation has become increasingly blurred,[4] although by no means have arguments from

[4] This point has frequently been made by, e.g., Oren Gross (1998, 2000), and Gross, Ni Aolain (2001).

emergency and constitutional emergency powers exhausted all their relevance, either.[5] Nor does a strict demarcation correspond to the rationale of the putative European security constitution. The European security constitution seems to ignore the state of exception as a juridical institution. It is true, though, that the Solidarity Clause in Art. 222 TFEU invokes a pending emergency. However, this clause does not adhere to the Continental European constitutional tradition, with its requirement of an explicit declaration of a state of emergency and the consequent (partial) suspension of such constitutional basics as fundamental rights, rule of law and separation of powers. No emergency provision, comparable to that of Art. 15 of the ECHR or Art. 4 of the UN Covenant on Civil and Political Rights, was included in the EU Charter of Fundamental Rights, either.

The concept of security has been major the argumentative figure which has facilitated lowering down the wall separating exceptional from normal times, and emergency measures from normal legislation. Under the justification from security exigencies, normal legislation has in many countries acquired features which brings it close to the characteristic effects of a declaration of an emergency or state of exception; such as limitations on fundamental rights, the rule of law and the separation of powers, as well as increases in the powers of security authorities. The typical nation-state reaction to 9/11 and the subsequent terrorist attacks in Europe did not consist of a declaration of emergency and time-limited emergency measures but of rather far-reaching amendments to normal legislation; in the aftermath of 9/11, packages of anti-terrorist legislation were adopted in, not only the USA, but in such European countries as, e.g., the UK and Germany as well. Criminal-law measures had a prominent place in these packages.

"Security" or "national security" has become the main justification for a "permanent state of exception". EU constitutional law must be analysed in this general cultural framework where the clear-cut concept of emergency or state of exception has increasingly yielded to a diffuse, expansionist and boundary-breaking concept of security. The institution of state of exception epitomises a constitutional *ultima ratio* which allows for suspending altogether fundamental rights, with the exception of so-called absolute rights. By definition, in constitutional vocabulary derogations signify more far-reaching encroachments on the otherwise protected autonomy of individuals than mere limitations. But as a counterweight, developments in constitutional and international law, reacting to the experiences of the 20th century, have built an elaborate system of preconditions and control mechanisms around temporally and spatially limited states of exceptions. The replacement of the state of exception as a constitutional *ultima ratio* through a diffuse notion of security is far from an unproblematic tendency from the point of view of the protection of fundamental rights.

"Security" is a tricky concept, hard to pinpoint in an unambiguous definition. The most promising way to approach it is through the concept of risk - for many sociological observers a key concept in modern society - and to define "security" negatively, as connoting *fight against risks*. Emergencies are already realised risks, temporarily and territorially limited and located, with identifiable appearances and sources. "Security" may cover already realised risks, too, but the emphasis is elsewhere, in *anticipation* and *prevention*. Security calls for continuous detection and assessment of risks, security threats. Hence the inherent *expansionism* of security: ever new risks can be perceived and brought under the umbrella of "security", named as security threats and, consequently, seen as calling for security measures. Such expansionism is conspicuous in the development of the EU's security dimension, too, say, from the modest start with anti-terrorist co-operation

[5] On the continuing reliance on the emergency figure in the USA, see Levinson, Balkin (2010), where the term "policy of government through emergency" is introduced.

in the Trevi framework in the 1970s to the Internal Security Strategy for the European Union, approved by the European Council in March 2010. [6]

Since 9/11 terrorism has topped EU lists of security threats, although by no means was it a starting-point for common anti-terrorist activities within the EU. Terrorism exemplifies many of the typical features of the concept of security which lies behind EU legislation, as well as programmatic documents and practical activities. Terrorism has proved to be a phenomenon hard to capture in an unequivocal definition. Within the EU, terrorism has not found a fixed location in relation to criminality. As the EU Framework Decision on Combating Terrorism (2002/475/JHA) makes clear, terrorism has been considered a criminal offense or, rather, a series of criminal offences. But it seems not to be reducible to criminality but goes beyond it. In EU legislation and programmes, terrorism is at times assimilated with "other" serious crimes, at times dealt with as a security threat separate from crime. The EU has retained a distance from the "War on Terrorism" -rhetoric of the Bush administration, but has not taken a firm position in favour of treating terrorism as a crime, either. It is as if defining terrorism "merely" as a crime would downplay the enormity of the threat to the universalist values and principles invoked in the Recitals of the Framework Decision on Combating Terrorism.

Be it as it may, terrorism proves how conceptual diffuseness and breaking down traditional constitutional distinctions go hand in hand: war and crime, external and internal security, soldiering and policing are hard to keep separate in combating terrorism. Fight against terrorism corroborates the connection between security, prevention and anticipation, too: potential terrorists must be identified and terrorist plots unearthed before their realisation. Hence the in principle never-saturated need of registering individuals and intercepting their communication. Terrorism is a *de-localised* and *de-individualised* security threat: terrorism does not possess fixed headquarters but operates through networks for which territorial boundaries pose no obstacles. Terrorists, in turn, are seen, not so much as individual persons, but, rather, as replaceable cogs in an anonymous machine; the identity of a suicide-bomber is not important, and Al Qaeda is not in need of even Usama bin-Laden. The difference in the traditional perception of criminal offenders and terrorists is conspicuous.[7]

It is no coincidence that the emergence of the security constitution, with its emphasis on anticipation and prevention, coincides with the discussion of the preventive or precautionary use of criminal law and the relevance of criminal law for risk management. Security, defined as combatting risks, provides a justification for preventive criminal law, as terrorism-related crimes as defined in the EU Framework Decision on Combating Terrorism demonstrate. There is a clear tendency of transforming the precautionary principle, originating in EU environmental law,[8] into a general principle of EU law and even according it a constitutional status. Discussion on the application of the precautionary principle to criminal law has also started, and critical interventions have already pointed to the

[6] The strategy identifies following security threats, "main challenges for the internal security of the EU": terrorism; serious and organised crime; cybercrime; cross-border crime; violence itself, such as youth violence or hooligan violence at sports events; as well as natural and man-made disasters, such as forest fires, earthquakes, floods and storms, droughts, energy shortages and major information and communication technology breakdowns. A comprehensive concept of security entails that "internal security must be seen as encompassing a wide range of measures with both horizontal and vertical dimensions". (European Council 2010, pp. 14-15).

[7] Similar points are made by Lepsius (2004). I analyse the European security constitution in more detail in Tuori (2013).

[8] In its Communication on the precautionary principle (COM(2000) 1 final), the Commission discussed this principle in the context of "the dilemma of balancing the freedom and rights of individuals, industry and organisations with the need to reduce the risk of adverse effects to the environment, human, animal or plant health". However, the communication was versed in a risk vocabulary which is easily extendable to other fields of legislation, too. The precautionary principle is explicitly evoked in Art. 191(2) as a principle guiding the Union's policy on environment (Commission of the European Communities 2000).

dangers the precautionary principle entails with regard to such classical constitutional principles as legality and fair trial. Arguably, the precautionary principle is on its way of becoming a counter-principle to *ultima ratio*, too.

Interestingly, *ultima ratio* has played a very subdued role in debates on EU criminal law. Critical interventions are not lacking in these debates but the yardsticks for the critique have been drawn from elsewhere than the *ultima ratio* principle, namely, the principles of legality and fair trial (due process).[9] Still, as I have tried to demonstrate, *ultima ratio*, as related to the proportionality requirement concerning fundamental rights limitations, is a principle of EU law, too.

6. Criminalisation and the EU-law principle of effectiveness

The constitutional status of the precautionary principle with a general reach may still be unsure. By contrast, the principle of *effectiveness* (*effet utile*) has established credentials as a constitutional principle of EU law (previously Community law). The principle has diverse connotations and fields of application, but its central purport pertains to the relations between transnational European law and the legal systems of the Member States: "effectiveness" refers to the necessity of securing the realization of EU law in and through national legal systems. Finally, ensuring the efficacy and uniform application of economic constitutional law was seen to require the constitutional doctrine of supremacy and the assignment to (ordinary) national courts an integral role in supervising this principle and, by the same token, the economic and juridical constitution in general. Through the doctrines of direct effect and supremacy, and the supervisory function allotted to national courts, the latter were drawn in a Europe-wide mechanism of constitutional review. Arguably, the *principle of efficacy* (*effet utile*) has served as a bridge between economic and juridical constitution: steps taken in juridical constitutionalisation have been motivated and justified by the needs of the efficient realisation of the economic constitution. Indeed, *effet utile* can be characterized as a meta-level or master principle of European constitutional law.

Before Lisbon and the abolition of the pillar structure, the ECJ invoked the principle of effectiveness as a justification for criminal law measures within the Community pillar. In the much-debated Case C-176/03 *(Commission v. Council)*, the effectiveness principle is used as a constitutional principle which grounds legislative competence. According to the Court

> (a)s a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence ... However the last mentioned finding does not prevent the Community legislator, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the member states which it considers necessary in order to ensure that rules which it lays down on environmental protection are fully effective.

Art. 83(2) TFEU confirms this conclusion and renders it a more general form: "If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned." Here the Treaty confers a constitutional justification for a tendency which has made itself known at state level, too, and which threatens to whittle away at the significance of *ultima ratio*: the instrumentalization of criminal law for policy purposes or, in Jürgen Habermas' terms (Habermas 1989, p. 365), the transformation of criminal law from an institution into a medium.

[9] As a representative example, see Herlin-Karnell (2011).

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