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The Principle of "Ultima Ratio" And/Or the Principle of Proportionality

RUDOLF WENDT*

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Abstract

The ultima ratio principle is a highly topical subject. The author describes the common grounds and different perspectives of "ultima ratio" on the one hand and/or the principle of proportionality in German criminal and public law on the other hand. At the same time, the meaning of these principles in the field of criminal law and their practical application by the courts are being analyzed.

After a historical and theoretical analysis of the ultima ratio principle and the principle of proportionality, the main emphasis of this publication lies on studying whether the German Federal Constitutional Court lives up to the self-imposed expectations when applying the ultima ratio principle and/or the proportionality principle on criminal law provisions. The case-law based analysis shows that – with respect to criminal law provisions – these principles are in fact weaker than what their theoretical standing suggests. The author gives various references which reflect the application of the ultima ratio principle and/or the principle of proportionality in the German legal system.

Key words

Ultima ratio principle; principle of proportionality; proportionality of German criminal law provisions; German Federal Constitutional Court

Resumen

El principio de ultima ratio es un tema de candente actualidad. El autor describe, por un lado, los puntos en común y diferentes perspectivas del "ultima ratio" y/o el principio de proporcionalidad en el derecho penal y público alemán, por otro. Al mismo tiempo, se analizan el significado de estos principios en el ámbito del derecho penal y su aplicación práctica por los tribunales.

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* The author is Professor at Saarland University, Saarbrücken, Germany, where he holds the Chair of Constitutional and Administrative Law, Economic, Financial and Tax Law. Professor Wendt is also vice president of the Saarland Constitutional Court. He is co-author of various commentaries, mainly on German and Saarland constitutional law, and author of numerous articles. Universität des Saarlandes. 66123 Saarbrücken (Germany). r.wendt@mx.uni-saarland.de

Después de realizar un análisis histórico y teórico del principio de ultima ratio y el principio de proporcionalidad, el énfasis principal de este artículo radica en estudiar si el Tribunal Constitucional Federal Alemán está a la altura de las expectativas autoimpuestas al aplicar el principio de ultima ratio y/o el principio de proporcionalidad en las disposiciones de la legislación penal. El análisis de la jurisprudencia muestra que, con respecto a las disposiciones del derecho penal, estos principios son en realidad más débiles que lo que su posición teórica sugiere. El autor da varias referencias que reflejan la aplicación del principio de ultima ratio y/o el principio de proporcionalidad en el sistema jurídico alemán.

Palabras clave

Principio de ultima ratio; principio de proporcionalidad; proporcionalidad de las disposiciones del derecho penal alemán; Tribunal Constitucional Federal Alemán

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1. Introduction

The principle of ultima ratio has been an important basic political and legal concept – not only in our times. Its meaning is so complex and ambivalent that it has again and again been invoked in a variety of cases such as wars, political or economic and social conflicts, as well as in the natural sciences and humanities. At the same time, the principle of ultima ratio is difficult to grasp and it is often problematic to define its meaning in the respective application. From a jurist's point of view, in my case from a jurist who has been socialized by public law, terminological barriers often arise when it comes to comparisons with terms and principles of other fields of law. The different branches of law cherish their particularities or even vanities to the extent that they are often unable to agree on interdisciplinary terms. Nevertheless, in this paper I will try to act as a mediator between the different positions in criminal law and in public law. I shall examine the principle of ultima ratio, searching for the common ground as well as trying the pin-point and differences in these two fields of law. At the same time, I aim at a deeper analysis of the ultima ratio principle in order to find out whether its meaning in the field of criminal law matches its practical application by the courts.

2. Definition and historical development

In order to take a closer look at the principle of ultima ratio in a scientific way, it would, at first, be appropriate to consider the term itself.

Ultima ratio, which comes from Latin "ultimus", meaning the last one, the farest or most remote (Georges 1887, p. 765), and "ratio", reasoning (Georges 1887, p. 614), is commonly understood as the last or final resort to achieve an aim pursued. Here, it is not to be understood as the chronologically last resort but as the most interfering last resort with the farest-reaching effect.

The term probably goes back to the famous French statesman Armand-Jean du Plessis, Duke of Richelieu, later on also a Cardinal of the Catholic Church. Towards the end of the Thirty Years' War, under the reign of Louis XIV of France, Richelieu let cast "Ultima Ratio Regum" on the royal French cannon which means "the final argument of kings" (Prantl 2004, p. 31 *et seq*.). This, however, should not be understood as the last resort existing to achieve an aim pursued after having exhausted every other possibility but as the king's last word for deciding a political conflict.

At the same time, the Spanish poet Pedro Calderón de la Barca wrote in his play "In this life all is truth and all is falsehood" ["En Esta Vida Todo Es Verdad y Todo Mentira"]: "Ultima razón de reyes son la polvora y las balas", which means gunpowder and lead are the kings' last resort (Meyers Großes Konversations-Lexikon 1909, p. 884). In the German-speaking area the term appeared for the first time in Prussia. It is said that from 1742 onwards Frederick the Great's bronze-cannons bore the inscription "ultima ratio regis". So the cannonballs flew as his, the king's, last word, "ultima ratio regum" (Brockhaus' Konversations Lexikon 1908, p. 53). Nowadays, the term is still used in the political debate: For example in the context of the on-going Euro debt crisis Horst Seehofer, the leader of the German Federal state of Bavaria, stated in the course of a political meeting that an expulsion of Greece from the Eurozone had to be "ultima ratio".[1]

The original use in the military context suggests that certain means should only be used as "ultima ratio" because they are able to cause considerable damage. Therefore their use has to be carefully deliberated and can only be approved after having exhausted every other possibility.

[1] "Als Ultima Ratio muss man immer die Überlegung anstellen: Was ist, wenn dies nicht zu schaffen ist" (Augsburger Allgemeine Zeitung 2011).

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3. Application of the term in legal matters

In legal matters the idea of "ultima ratio" is a basic concept of many fields of law (Michalski, Funke 2010, § 13 marginal no. 280, Gomille 2011, marginal no. 3, Streinz, Hammerl 2008, marginal no. 297). For example, in labour law the extraordinary termination of a contract by the employer is "ultima ratio" (Berkowsky 2009, marginal no. 49, Müller-Glöge 2011, marginal no. 24); also there is the idea that in labour conflicts strikes are "ultima ratio". (Richardi 1999, marginal no. 617 *et seq*., Dieterich 2011, marginal no. 132 *et seq*.) The most popular application of the ultima ratio principle, however, can probably be found in criminal law where this theorem of modern criminal law theory is a kind of common property (Baumann 1983, p. 937) which is treated in nearly every textbook or commentary (Wohlers 2006, Jescheck 1992, marginal no. 3, Jakobs 1993, marginal no. 27, Roxin 1997, marginal no. 38.).

The basic idea of this principle, also often called subsidiarity (Baumann, Weber, Mitsch 2003, p. 29, Jakobs 1993, marginal no. 26, Hassemer 1981, p. 19) or "fragmentary character of criminal law" (Jescheck, Weigend 1996, p. 52 *et seq*.), is that criminal law – due to its severe and interfering legal consequences – should only be ultima ratio of state action. Only if other measures, for example measures based on civil, administrative or social legislation, cannot reach the aim pursued, the state may take drastic measures of criminal law in order to enforce a certain social behaviour (Baumann, Weber, Mitsch 2003, marginal no. 19).

In a number of decisions, the German Federal Constitutional Court comes to the conclusion, that criminal law is the ultima ratio to protect legal goods in those cases where the behaviour leads to grave social damages, thus ruling out the incrimination of mere nuisances.[2]

When looking at these functions, jurists immediately recognize parallels to one of the most outstanding, maybe the most outstanding principle of German public law, the so-called principle of proportionality. This principle is derived from the Rechtsstaat-Principle. The Rechtsstaat-Principle is inshrined in Article 20 paragraph 3 of the German constitution, the Basic Law, and in the fundamental rights themselves.[3] It is an expression of the citizens' personal liberty rights vis-à-vis to the state. For public authority should only be allowed to limit these liberty rights insofar as this is essential for the protection of public interests.[4] Therefore, both in legislation and application of law, the principle of proportionality as well as the principle of ultima ratio set obstacles, thus calling for a "reasonable reaction of the state".

Both, the principle of ultima ratio and the principle of proportionality, aim at proportional results that are in conformity with the Rechtsstaat-requirements. Therefore, the questions arise as to how these two principles can be distinguished and whether such a distinction would be of a conceptual nature only. Who else if not the German Federal Constitutional Court is best qualified to answer these questions? As the guardian of the constitution[5] and by illuminating and applying the principle of proportionality in practice the Federal Constitutional Court has promoted the principle's outstanding importance – though the Court itself has not

[2] BVerfGE 88, 203 (258); 96, 10 (25).
[3] According to the Federal Constitutional Court, the prohibition on excessiveness as a general rule ("übergreifende Leitregel") guiding all state action results from the Rechtsstaats-principle ("zwingend aus dem Rechtsstaatsprinzip") (BVerfGE 23, 127 [133]; 38, 348 [386]); for fundamental freedoms, however, the prohibition on excessiveness also results from the nature of these fundamental rights itself which – as an expression of every citizen's general right to freedom vis-à-vis the state – can only be restricted by state authority insofar as it is essential for the protection of public interest (BVerfGE 19, 342 [348]). In fact, it has to be assumed that, when tracing the roots of the prohibition on excessiveness, the Rechtsstaats-principle and fundamental rights mesh (Grzeszick 2012, marginal no. 107 *et seq*.).
[4] BVerfGE 19, 348 (349); 65, 44.
[5] "Hüter der Verfassung", BVerfGE 1, 184 (195).

created it. In actual fact for the Federal Constitutional Court criminal law's ultima ratio principle flows from the principle of proportionality, a principle that dominates public law including constitutional law.[6] This statement stands for the court's interest to locate the ultima ratio principle within the framework of the constitution. However, it is a matter of debate, whether the principle of ultima ratio is only a carbon copy of the principle of proportionality or whether it goes beyond the scope of this principle.

4. The principle of proportionality

The principle of proportionality (Grundsatz der Verhältnismäßigkeit)[7] is a dogmatic approach which has been developed above all, I think, in German public law. The principle of proportionality in a broader sense or rather the prohibition of excessiveness (Übermaßverbot)[8] is understood as a generic term for the rules of suitability, necessity and proportionality in the narrow sense. It is part of the fundamental guidelines for public action. Its qualities as a yardstick of constitutionality are nearly unchallenged in the German constitutional debate. The principle of proportionality, just as the prohibition of arbitrary action, belongs to the elementary components of justice (Schneider 1976, p. 393 *et seq*.).

At this point it is necessary to briefly describe the principle of proportionality as it is understood in the Federal Constitutional Court's jurisprudence. According to the Court, an examination of proportionality comprises a number of checkpoints: Legislation that restricts fundamental rights has to pursue a legitimate purpose and has to be suitable and necessary for reaching this purpose.[9] Briefly and very schematically, a piece of legislation is suitable if it supports the purpose pursued, if it is appropriate in order to achieve the intended objective (Pieroth, Schlink 2011, marginal no. 293). A piece of legislation is necessary in order to achieve the intended objective, under the premise that there are no equally suitable but less severe means of achieving the objective; i.e. if the legislator could not have chosen equally appropriate means that interfere less with the fundamental right affected.[10]

The legislator, however, should have a certain margin of discretion when assessing the suitability and the necessity of the means chosen in order to achieve certain objectives or when considering and forecasting the risk of danger to the individual or to the general public. According to the Federal Constitutional Court, this margin of discretion is only in a very limited way subject to judicial review – depending on the particular matter, the possibilities to make a sufficiently clear judgement and the legal interests at stake[11]. This leads in practice to a wide margin of discretion.

Furthermore, the judiciary and the prevailing view in legal literature agree that the principle of proportionality in the narrow sense – also called principle of reasonableness – is part of the principle of proportionality in a broader sense. Therefore, legislation cannot be proportionate if the means aiming at securing a legitimate purpose are excessive in the concrete circumstances in view of the right at stake (Pieroth, Schlink 2011, marginal no. 299).

5. Comparison of the two principles and identification of the differences

So what is the relation between the constitutional principle of proportionality and the principle of ultima ratio in criminal law?

[6] BVerfGE 39, 1 (47).
[7] This is the predominent term used by the Federal Constitutional Court, see e.g. BVerfGE 30, 292 (316); 27, 211 (219).
[8] For fundamental details see Lerche (1961) and Dechsling (1989).
[9] BVerfGE 47, 109 (117).
[10] BVerfGE 90, 145 (172).
[11] BVerfGE 90, 145 (173); 77, 170 (215) ; 88, 203 (262).

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As I have already mentioned, the Federal Constitutional Court has stated in several decisions that, due to its intrusive effect, criminal law is not the primary means of legal protection. Its application is subject to requirements of proportionality.[12] It should, however, be applied as the ultimate measure of protection where the relevant conduct is so socially damaging and unbearable for the order in the community that it must be prevented at any cost. Generally speaking the principle of proportionality should also build the constitutional standard for examining criminal legislation.[13]

However, the principle of proportionality should take on greater significance when it comes to examining criminal legislation. This is because criminal legislation is the harshest sanction to which a state can recur, a sanction which affects a citizen very intensely[14] and which is accompanied by an ethical and social condemnation with the consequence that a convicted person is infringed in his right for social worth and respect, a right that has its roots in human dignity (Article 1 paragraph 1 of the German Basic Law).[15]

It is clear from the above that the principle of ultima ratio, even if it flows from the same legal notion, has to be more poignant than the principle of proportionality, or more precisely: a harsher legal test is required for criminal legislation.

If this is really true it should be possible to find a confirmation in the Federal Constitutional Court's decisions. Comparing the Court's rulings concerning the constitutionality of criminal legislation with those concerning other legislation there should be satisfactory evidence of the greater significance of the principle of proportionality and the prohibition on excessiveness in criminal law cases. In the end, the greater significance of the principle of proportionality in criminal law cases should meet the requirements and have the same consequences that, according to the Karlsruhe judges, the application of the principle of ultima ratio in criminal law cases has. If we can demonstrate that, we can understand the principle of ultima ratio as the adaption of the general principle of proportionality in the criminal law. Correspondingly, it needs to be further investigated on the basis of the different points of examination established for the principle of proportionality whether this checklist applied to criminal legislation, would set up a more rigid legal test than in the "ordinary" case.

6. Legitimate Purpose

In order to be proportionate, legislation that restricts fundamental rights has to pursue a legitimate purpose. Furthermore, the means used by the state to pursue this legitimate purpose have to be allowed and suitable as well as necessary to fulfill that purpose (Pieroth, Schlink 2011, marginal no. 289). Applied to criminal legislation, at this point we have to reflect the legislation's punitive purposes and the legal goods. More precisely, we have to take a closer look at the purpose pursued by the criminal legislation and examine if this legislation can be used for this purpose – or rather if is it allowed to be used with regard to the ultima ratio principle.

The Federal Constitutional Court's difficulties when it comes to meeting their own targets for an intensified proportionality examination crystalises in the fact that, at this crucial point, in actual practice the Court lets suffice that the criminal legislation pursues any acceptable punitive purpose and is just as lenient with regard to the suitability and the necessity of the criminal legislation. The Court names compensation, prevention, reintegration into society, atonement and retribution for the wrong commitment as aspects of a reasonable criminal

[12] BVerfGE 88, 203 (258); 6, 389 (433); 39, 1 (47).
[13] BVerfGE 80, 137 (153); 55, 159 (165); 75, 108 (154).
[14] BVerfGE 90, 145 (172); BVerfGE 25, 269 (286).
[15] BVerfGE 96, 245 (249).

punishment.[16] Even though it appears that the Court tends to prefer a general preventive purpose of punishment[17], it stresses explicitly that it takes into account the objective attached by the government; yet, it is not going any further into the different theories of punishment. The court feels not responsible for deciding this (academic) conflict by way of the constitution.[18] This stand of the Court may be comprehensible at first sight. Indeed, the Court cannot be expected to finally decide a centuries old question about the legitimacy and the purpose of state punishment. Likewise the different theories regarding the protection of legal goods are too ambivalent, and also, taken together, of a complementary nature. The problems arising here when it comes to fulfill the requirements of the ultima ratio principle can be seen in an exemplary manner in the so called incest decision of the Federal Constitutional Court. This decision concerned the constitutionality of the provision in section 173 paragraph 2 sentence 2 of the German Criminal Code, which forbids sexual intercourse between natural siblings with imprisonment.[19] Here, the Court states that constitutional reasons do not impose stricter requirements on the purposes pursued by a criminal-law provision than on the purposes pursued by other provisions. According to the Court, no other conclusion can be drawn from the criminal theories on legally protected goods. As there is no agreement on the term legally protected goods, it was the legislator's task to determine the legal interests protected by means of criminal law[20] as well as the penal objectives and to adapt criminal-law provisions to developments in society.[21]

The Court grants extensive freedom to the legislator not only with regard to determining the individual penal objective but also with regard to the legal goods to be protected. In the decision, the Court names several legal goods to be protected and, as a consequence, several penal objectives of the provision. This provision is supposed to protect the family order from the damaging effects of incest and lead to a protection of the inferior/weaker partner in an incestuous relationship. When the Court, in the following, also names the avoidance of serious genetic diseases in children of incestuous relationships as a further objective of the provision, it seems like a back-up strategy, or rather like an aim of the provision that legitimates the other legal objectives. Here the Court overlooks, that the protected person, the sibling's future child, does not exist yet when the provision is fulfilled, meaning that the possibility of procreation is only offered by the crime committed. According to the lonely dissenter juge Hassemer, however, it is forbidden by the constitution to base at least criminal encroachments on the protection of the health of potential descendants.[22] Furthermore, it is surprising that, the Federal Constitutional Court traces the roots of the prohibition on incest back to ancient times before it actually examines the constitutionality of section 173 paragraph 2 sentence 2 of the German Criminal Code. After explaining the prohibition on incest in the Prussian Criminal Code, during the period of National Socialism and in the younger German legal history after 1945, the Court finally mentions the results of a study of the Max Planck Institute for Foreign and International Criminal Law regarding the legal position in more than twenty countries. The court takes this study as a proof that the legal positions dealing with the criminal liability of sexual intercourse between natural siblings are largely uniform when it comes to the reason for punishment.[23]

The connection between these statements and the scope of the constitutional examination itself is not clear. Should the historical development of the provision or even a comparison with similar legislation in other countries legitimate the

[16] Cf. BVerfGE 32, 98 (109); 28, 264 (278); 64, 261 (271).
[17] BVerfGE 39, 1 (57); 90, 145 (184); 120, 224 (252).
[18] BVerfGE 45, 187 (253).
[19] See also the recent judgment given by the European Court of Human Rights (ECHR) (2012) with the case note by Jung (2012).
[20] Cf. BVerfGE 45, 187 (253).
[21] BVerfGE 120, 224 (242).
[22] BVerfGE 120, 224 (258).
[23] BVerfGE 120, 224.

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provision itself? It cannot be denied that these statements give the reader the impression of an additional and/or an anticipated justification for the result of the Court's decision (Noltenius 2009, p. 15).[24] It is obvious that this approach impedes an increased proportionality examination.

Therefore, one has to conclude that due to the legislator's freedom in determining the penal objectives and the legal goods to be protected by means of criminal legislation, the legislator is provided with a kind of "kit" that permits to make use of diverse regulatory goals. As a consequence, the further examination of proportionality can be conducted on the basis of various legal objectives. In consequence, there is a high probability that the provision is proportionate in relation to the objective pursued. It is then also likely that the provision is as a whole proportionate. Thus our test case teaches us the following lesson: In theory the court maintains that the principle of proportionality in criminal matters leads to a stricter examination of the relevant piece of legislation. In his actual practice the Court does not adhere to its own standards.

7. Suitability/Necessity

One would expect that the Court, when examining the suitability and necessity of a penal provision, restricts the boundaries in order to take into account in practice its self-imposed proposition that criminal legislation is ultima ratio in the legislator's range of measures.[25] Yet the Court applies the very same test for criminal legislation that it applies for all other legislation. In addition to that the Court leaves a wide margin of discretion to the legislator and examines only, whether the means used are objectively inappropriate, objectively unsuitable or simply inept.[26] As a matter of fact, the Court states that in applying these criteria a legislative act will only in very rare and extraordinary cases be unconstitutional.[27]

Furthermore, it seems that the Federal Constitutional Court is almost fond of criminal legislation regarding it as highly effective and therefore suitable. In a fundamental decision addressing the constitutionality of the liberalization of the abortion law (Abortion I Judgment), the Court stated that the mere existence of a penal sanction had influence on the conception of values and human behavior[28], actually a reference to the theory of positive general prevention.

This observation, however, is contrary to the Court's statement that penal sanctions should only be the last resort, ultima ratio. Here, the Court states that, due to its deterrent effect, the sharp sword of criminal law should be given priority over other regulating mechanisms. And so the Court rules that, even if less sharp measures for preventing an interruption of pregnancy and therefore for the protection of the unborn life could be chosen, the dangerous interference of moral permissibility from a legal absence of sanction is too near (Engisch 1971, p. 104) not to be drawn by a large number of those subject to the law.[29]

Such an attitude towards the effectiveness of a penal provision does not only de facto imply its suitability for the protection of legal goods, but considers it as highly

[24] Hassemer, in: BVerfGE 120, 224 (257): "Neither a nebulous effective societal conviction based upon cultural history (should it really regard the fact that incest should carry criminal penalties and not only be socially condemned) nor a by the way fragmentary and often divergent criminal liability in international comparison can constitutionally justify a criminal provision." ("Weder eine nebulose kulturhistorisch begründete, wirkkräftige gesellschaftliche Überzeugung [sollte sie sich wirklich auf eine Strafwürdigkeit des Inzests beziehen und nicht bloß auf seine soziale Ächtung] noch eine im Übrigen lückenhafte und vielfach divergente Strafbarkeit im internationalen Vergleich sind imstande, eine Strafnorm verfassungsrechtlich zu legitimieren.").
[25] BVerfGE 39, 1 (47).
[26] This is the Federal Constitutional Court's so-called "negative formula" ("negative Formel"), BVerfGE 30, 250 (262); 55, 28 (29), for the definition of "suitability" used by the Federal Constitutional Court see also: BVerfGE 30, 292 (316); 33, 171 (187).
[27] BVerfGE 30, 250 (263).
[28] BVerfGE 39, 1 (57).
[29] BVerfGE 39, 1 (58).

likely to be suitable. It is therefore not at all surprising that the examination of suitability as it is applied by the Federal Constitutional Court does not represent a serious obstacle for the enactment of a penal provision (Höffner 2003, p. 88).[30]

In theory, when examining the necessity of a criminal statute, one has, according to the ultima ratio principle to look for equally suitable but less severe means. Therefore, the Court has to look for any reasonable regulatory alternative (Hirschberg 1981, p. 59)[31], even non-legislative measures.

In one of his decisions the Court addressed the question whether section 184 paragraph 1 number 7 of the German Criminal Code was in conformity with the German Constitution. One main question here was whether young people could be protected as effectively from public pornographic films by efficient admission controls to film cinemas with age verification and therefore a regulation by the means of criminal law was not necessary. The Court stated that, due to its experience with the observance of the age limit set by the competent authorities, the legislator considers age verifications as not sufficient. There was no evidence for the legislator's assessment being incorrect and under these conditions the Court could not oppose the legislator's view.[32] It seems that in the Court's view it had to be clearly proven that the less severe measure was equally effective and that the Court in the case of criminal legislation leaves this decision to the legislator.

This, however, is not in accordance with an increased proportionality examination. Exactly at this point, it was the Court's task to further examine equally effective measures that have less interfering effects on those subject to the law. The more so if, as this was the case here, these alternatives had been addressed in the course of the procedure. It appears that the Court grants a too generous concession to the legislator when it comes to evaluating and knowing the facts forming the basis of the examination of necessity. This cannot meet the requirements of an increased proportionality examination. In order to meet the requirements set by the ultima ratio principle it might be useful to limit the legislator's prerogative of evaluation when it comes to penal provisions.

8. Reasonableness / Proportionality in the narrow sense

Derived from the principle of proportionality, the judiciary and the prevailing opinion in legal literature see the proportionality in the narrow sense (Verhältnismäßigkeit im engeren Sinne)[33] as a last point of the proportionality examination of a legal provision (Pieroth, Schlink 2011, marginal no. 299). According to the Federal Constitutional Court, this third stage of the proportionality examination should counter-check suitable and necessary measures with regard to their interference potential balanced against the protection of the legal goods at stake.[34] The proportionality in the narrow sense means purpose relation orientated towards the ideals of justice (Günther 1983, p. 205). Here, it is necessary to balance the benefits of a measure against the interference with rights caused by it (Grzeszick 2012, marginal no. 117). Therefore, it is possible that a suitable and necessary measure protecting legal goods may not be applied because it interferes with fundamental rights of the person affected, under the premise that these fundamental rights largely outweigh the increase of protection of legal goods so that the measure itself appears to be disproportionate.[35]

[30] See also Lagodny (1996, p. 178) who states that the sub-rule of suitability is a wide-meshed sieve, where hardly any regulation cannot pass through.
[31] When assessing the necessity, however, the Federal Constitutional Court does not examine regulatory alternatives in all directions but limits itself to those alternatives presented by the complainant or discussed among experts ("in Fachkreisen diskutiert"). Cf. BVerfGE 77, 84 (109); 40, 196 (223).
[32] BVerfGE 47, 109 (119).
[33] At this point of examination one also often speaks of "reasonableness" ("Angemessenheit" or "Zumutbarkeit") or "proportionality" ("Proportionalität"). (Stern 1994, p. 782 *et seq*.).
[34] BVerfGE 90, 145 (185); 92, 277 (326).
[35] BVerfGE 90, 145 (185).

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When examining the proportionality in the narrow sense, the Federal Constitutional Court on occasions had to address the proportionality of the punishment in relation to the offender's guilt (schuldangemessene Strafe). Here, the Federal Constitutional Court's decision on the constitutionality of life imprisonment is of particular interest.[36] Section 211 of the German Criminal Code used to provide a totally absolute punishment, i.e. life imprisonment, for murder without giving the possibility to the court to adapt the sentence to the guilt of the offender as it is usually done according to the criteria provided in section 46 of the German Criminal Code. The referring court had argued that, according to the principle of ultima ratio, there had to be, even in the case of murder, be a margin of punishment allowing the court to tailor in a concrete case the threatened punishment in due consideration of the severity of the crime and the culpability of the offender. A judge should not be forced to impose an unreasonably severe sentence.[37] The Federal Constitutional Court agreed and stated that the absolute threat of such a severe punishment was only in accordance with the Constitution if by law, the judge had the possibility to find a sentence that was in accordance with the constitutional principle of proportionality when applying the abstract provision on a concrete case. According to the Court, however, this needed not to be realized by means of a penalty reduction system within section 211 of the German Criminal Code. The Court sees this requirement already realized in the provisions of the general part of the German Criminal Code and by means of a constitution conform interpretation of section 211, especially of the criteria constituting murder. The Court reasons that in general a judge was more lenient than the legislator and now and then tends to not apply the most severe punishment even in cases in that the legislator wanted them to be applied.[38] In the light of the principle of proportionality, however, such an approach is problematic. Firstly, the judge handing down the judgment is denied the possibility to take a proportionate and therefore reasonable sentencing decision.[39] Secondly, the Court uses considerations that do not form part of the provision in order to maintain its constitutionality.[40]

This contradicts a decision on the constitutionality of section 29 paragraph 1 numbers 1 and 3 of the German Narcotics Law (BtMG). Here, the Court stated that in many cases of purchase and possession of cannabis products in small quantities for own consumption legal goods were not jeopardized and the individual guilt was only minor.[41] As a consequence, imposing severe sanctions on experimental or occasional users could lead to unreasonable and rather detrimental results considering special preventive reasons.[42] Nevertheless, the Court does not see any conflict with the prohibition of excessiveness as the legislator met these requirements by allowing the prosecution authorities to discharge such cases according to Section 29 paragraph 5 of the German Narcotics Act. Thus in the individual case, the pettiness of the infringement and the minor guilt could be taken into account.[43] Apparently, here, the Court seems to trust judges more than in the

[36] BVerfGE 45, 187.
[37] BVerfGE 45, 187 (260).
[38] BVerfGE 45, 187 (261).
[39] In other decisions, however, the Federal Constitutional Court shows more confidence in courts and prosecution authorities when it comes to judging the gravity of the infringement and the guilt in the individual case. See e.g. BVerfGE 90, 145 (189).
[40] Here it is questionable whether an application of sections 20 and 21 of the German Criminal Code, that totally or partially exclude punishment in cases of exemption from criminal responsibility or diminished responsibility, is sufficient for reaching proportionality of the punishment threatened in section 211 of the German Criminal Code. These possibilities, as well as the penalty reduction system for attempted murder provided in section 23 paragraph 2 in conjunction with section 49 of the German Criminal Code, require certain factual constellations that are not fulfilled in every single case where section 211 applies. If these sections, however, do not apply in the individual case, they can neither establish proportionality of the threatened punishment nor, as a consequence, of the regulation itself.
[41] BVerfGE 90, 145 (187).
[42] BVerfGE 90, 145 (188).
[43] BVerfGE 90, 145 (189).

above mentioned decision. No concerns are expressed about a judge handing down too lenient a judgment. The Court has confidence in the appropriateness of the judges' actions. This procedural solution (prozessuale Lösung), though constitutionally permitted,[44] is rather questionable with regard to the ultima ratio principle. The Court apparently approves of the constitutionality of section 29 paragraph 1 numbers 1 and 3 of the German Narcotics Act presupposing that the regulation is applied in conformity with the constitution by the prosecution authorities. This allows the conclusion that the legislator may threaten a behaviour with punishment even in those cases where imposing a sanction would not be appropriate after all (Höffner 2003, p. 95). With regard to the Rechtsstaats-principle and with regard to the ultima ratio principle it would be desirable, if not necessary, to privilege certain acts and therefore limit the scope of this general penal provision or to create special sanctions for minor offences.[45] This is the only way to arrive at a sustainable decriminalization. It may be noted that also here, when examining the constitutionality in the narrow sense, no stricter criteria of examination can be derived from the Federal Constitutional Court's decisions.

9. Conclusion

Summing up, one can say that the Federal Constitutional Court's self-imposed proposition concerning the ultima ratio principle in criminal matters does not consistently find its expression in the Court's decisions. The same applies to an increased proportionality examination. Instead of examining proportionality strictly according to a logical and recognized structure, the Court frequently reasons with a conglomerate of principles, often inextricably linked with one another (Lagodny 1996, p. 72). Sometimes unsuitable criteria that seem questionable with regard to the Rechtsstaats-principle are applied.[46] This does not only make it more difficult to penetrate and understand the decisions' grounds but also hinders the realization of the ultima ratio principle in criminal law. A comparison of the ultima ratio principle and the principle of proportionality shows that, from a theoretical point of view, both principles pursue the same purpose – that is to impede excessive state action towards the citizens. In practice, the ultima ratio principle in criminal law cannot live up to its supposed greater strictness[47]. It rather seems that the ultima ratio principle is not as effective as the principle of proportionality. Obviously, the legislator regards penal provisions as highly effective for pursuing his purposes. As this view is often shared by the Federal Constitutional Court, it is not surprising that the probability of a criminal provision being regarded as not proportionate is relatively low. Even if a provision seems to be excessive at first glance, the Court's decision-making repertoire gives many possibilities, such as restrictive interpretation of loosely framed statutes, to regard the provision as proportionate in the end. Finally it can be said that, due to the multitude of potential penal objectives and due to the special impact on morality, it is typical for criminal legislation that penal provisions ingeniously evade an effective constitutional control (Lagodny 1996, p. 536).

We have to wait and see whether this deplorable situation will prevail in the future. A trend towards decriminalization, however, cannot be identified. The ultima ratio

[44] BVerfGE 50, 205 (213).
[45] So-called substantive legal solution ("materiell-rechtliche Lösung"), BVerfGE 50, 205 (213); 90, 145 (191).
[46] In his incest decision, the Federal Constitutional Court points out that the threatened punishment is finally not disproportional as many factors indicate that, due to an aversion to incest, the prohibition only affects a small number of siblings in a qualified and perceptible way (BVerfGE 120, 224 [252]). Here, however, it can be objected that such a point of view is based on utilitarian considerations only. It places the well-being of the community above the well-being of the individual. To repeat the words of Immanuel Kant (1934, p. 97): "Own benefit is not a reason for law. Benefit to many does not give them a right against an individual." ("Der eigene Nutz ist kein Grund des Rechts. Der Nutz vieler gibt ihnen kein Recht gegen einen.".
[47] BVerfGE 90, 145 (172); BVerfGE 25, 269 (286).

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principle is restricted to the admonitory function not too thoughtlessly use criminal legislation. A change towards a real and not loosely constitutional control of criminal provisions would however be desirable.

Bibliography

Augsburger Allgemeine Zeitung, 2011. Seehofer: Griechenland-Ausschluss «Ultima Ratio». *Augsburger Allgemeine Zeitung* [online], 12 Sep. Available from: http://www.augsburger-allgemeine.de/thema-des-tages/Seehofer-Griechenland-Ausschluss-Ultima-Ratio-id16688856.html [Accessed 25 January 2013].

Baumann, J., 1983. Strafrecht und Wirtschaftskriminalität. *JuristenZeitung (JZ),* 935-939.

Baumann, J., Weber, U., Mitsch, W., 2003. *Strafrecht allgemeiner Teil*. 11th ed. Bielefeld: Gieseking, § 3 III 2.

Berkowsky, W., 2009. Unwirksamkeit der Kündigung nach dem Kündigungsschutzgesetz. *In*: R. Richardi, *et al.,* eds. *Münchener Handbuch zum Arbeitsrecht*. 3rd ed. München: Beck, Vol. 1, § 110.

Brockhaus' Konversations Lexikon, 1908. 14th ed. Leipzig: Brockhaus, Vol. 16.

Dechsling, R., 1989. *Das Verhältnismäßigkeitsgebot*. München: Vahlen.

Dieterich, T., 2011. Art. 9 GG. *In*: R. Müller-Glöge, U. Preis, I. Schmidt, eds. *Erfurter Kommentar zum Arbeitsrecht*. 11th ed. München: Beck.

Engisch, K., 1971. *Auf der Suche nach der Gerechtigkeit*. München: Piper.

European Court of Human Rights (ECHR), 2012. *Case of Stübing v. Germany, (Application no. 43547/08), on 12 April 2012* [online]. Available from: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110314 [Accessed 20 January 2013].

Georges, K.E., 1887. *Lateinisch-Deutsches Wörterbuch*. 4th ed.

Gomille, C., 2011. Anwendung unmittelbaren Zwanges. *In*: M. Haußleiter, ed. *FamFG : Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit ; Kommentar*. Munchen: Beck, § 90.

Grzeszick, B., 2012. Art. 20 VII. *In*: T. Maunz, D. Dürig, R. Herzog, eds. *Grundgesetz.* München: Beck.

Günther, H.L., 1983. *Strafrechtswidrigkeit und Strafunrechtsausschluß: Studien zur Rechtswidrigkeit als Straftatmerkmal und zur Funktion der Rechtfertigungsgründe im Strafrecht*. Köln: Heymann.

Hassemer, R., 1981. *Schutzbedürftigkeit des Opfers und Strafrechtsdogmatik*. Berlin: Duncker und Humblot.

Hirschberg, L., 1981. *Der Grundsatz der Verhältnismäßigkeit*. Göttingen: Schwartz.

Höffner, D., 2003. *Zivilrechtliche Haftung und strafrechtliche Verantwortung des GmbH-Geschäftsführers bei Insolvenzverschleppung: zugleich ein Beitrag zum ultima-ratio-Prinzip*. Berlin: Duncker und Humblot.

Jakobs, G., 1993. *Strafrecht allgemeiner Teil: die Grundlagen und die Zurechnungslehre*. 2nd ed. Berlin; New York: de Gruyter.

Jescheck, H.H., 1992. Einleitung. *In*: *Leipziger Kommentar zum StGB*. Berlin: De Gruyter.

Jescheck, H.H., Weigend, T., 1996. *Lehrbuch des Strafrechts*. 5th ed. Berlin: Duncker und Humblot.

Jung, H., 2012. Das Inzestverbot oder der Europäische Gerichtshof für Menschenrechte auf den Spuren des Bundesverfassungsgerichts. Goltdammer's Archiv für Strafrecht, 10, 617-620.

Kant, I., 1934. *Reflexionen zur Moralphilosophie, Kant's gesammelte Schriften*, Band XIX, 3. Abteilung, Handschriftlicher Nachlass 6. Band, Nr. 6586, p. 97. Preußische Akademie der Wissenschaften, eds. Berlin & Leipzig: Walter de Gruyter & Co. Available from: http://www.korpora.org/kant/aa19/097.html [Accessed 15 January 2013].

Lagodny, O., 1996. *Strafrecht vor den Schranken der Grundrechte*. Tübingen: Mohr.

Lerche, P., 1961. *Übermaß und Verfassungsrecht*. Köln: Heymann.

Meyers Großes Konversations-Lexikon, 1909. 6th ed. Leipzig: Biographisches institut, Vol. 19.

Michalski, L., Funke, I., 2010. *Kommentar zum GmbH-Gesetz*. 2nd ed. München: Beck.

Müller-Glöge, R., 2011. § 626 BGB. *In*: R. Müller-Glöge, U. Preis, I. Schmidt, eds. *Erfurter Kommentar zum Arbeitsrecht*. 11th ed. München: Beck.

Noltenius, B., 2009. Grenzenloser Spielraum des Gesetzgebers im Strafrecht? *Zeitschrift für das Juristische Studium - ZJS* [online], 1/2009, p. 15-21. Available from: http://www.zjs-online.com/dat/ausgabe/2009_1.pdf [Accessed 20 January 2013].

Pieroth, B., Schlink, B., 2011. *Grundrechte, Staatsrecht II*. 27th ed. Heidelberg: C.F. Müller.

Prantl, H., 2004. Krieg als letztes Mittel. *In*: K. Ambos, J. Arnold, eds. *Der Irak-Krieg und das Völkerrecht*. Berlin: Berliner Wissenschafts-Verlag.

Richardi, R., 1999. Einführung in das kollektive Arbeitsrecht. *In*: J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. 13th ed. Berlin: Sellier de Gruyter, Zweites Buch, Recht der Schuldverhältnisse, §§ 611-615.

Roxin, C., 1997. *Strafrecht Allgemeiner Teil Band I: Grundlagen. Der Aufbau der Verbrechenslehre*. 3rd ed. Munchen: Beck, § 2.

Schneider, H., 1976. Zur Verhältnismässigkeitskontrolle insbesondere bei Gesetzen. *In*: C. Starck, ed. *Bundesverfassungsgericht und Grundgesetz: Festgabe aus Anlass d. 25jähr. Bestehens d. Bundesverfassungsgerichts*. Tübingen: Mohr, Vol. II.

Stern, K., 1994. *Das Staatsrecht der Bundesrepublik Deutschland*. München: Beck, Vol. 3, part 2.

Streinz, R., Hammerl, C., 2008. *Lebensmittelrechtshandbuch*. 28th ed. München: Beck, VII., D.

Wohlers, W., 2006. Strafrecht als ultima ratio - tragender Grundsatz eines rechtsstaatlichen Strafrechts oder Prinzip ohne eigenen Aussagegehalt. *In*: A. von Hirsch, K. Seelmann, W. Wohlers, eds. *Mediating Principles*. Baden-Baden: Nomos, 54-69.