

Ultima Ratio, is the Principle at Risk?: Editors' Introduction

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Abstract

Ultima ratio as a normative principle, or a constellation of principles, would be a hermeneutic pre-understanding or pre-interpretative concept to the effect that the definition of a certain socially relevant conduct as a crime and the consequent infliction of a penal sanction on the perpetrator of such conduct is a serious matter to be handled with caution and not to be abused. Similarly, the emergence of new definitions of "European" crimes is a matter of concern. The *risk* referred to in the rhetoric question of the Workshop "Is the ultima ratio principle at risk?" lies in the non-observance of the principle of minimal intervention, the tendency to criminalise and to bring all or any socially – even politically – undesirable actions under the criminal law, and to use the criminal definition and sanction for purposes and situations other than the strictly necessary – principle of necessity – and universally shared – principle of deep social consensus.

Key words

Ultima Ratio; European Criminal Law; minimal intervention; decriminalisation; criminalisation; criminal sanctions; proportionality of criminal sanctions; abuse of punishment

Introduction to the workshop *Ultima Ratio: Is the General Principle at Risk in our European Context?* held in the International Institute for the Sociology of Law, Oñati, Spain, 2-4 February 2012, and coordinated by Joxerramon Bengoetxea (University of the Basque Country), Heike Jung (Saarland University), Kimmo Nuotio (University of Helsinki).

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Resumen

Ultima ratio como un principio normativo, o una constelación de principios, sería un concepto heurístico, una comprensión o pre-interpretación hermenéutica, a fin de que la definición como "delito" de determinada conducta socialmente relevante, y la consecuente imposición de una sanción penal al causante de dicha conducta es un asunto serio que debe tratarse con cautela, y del que no se debiera abusar. El "riesgo" mencionado en la pregunta retórica del seminario "¿Está el principio de ultima ratio en riesgo?" se encuentra en la falta de observación del principio de intervención mínima del derecho penal, en la tendencia a criminalizar y a reconducir las acciones socialmente, incluso políticamente, indeseables bajo el derecho penal, y a abusar de la definición penal o tipificación y de la sanción penal cubriendo finalidades y situaciones diferentes de las estrictamente necesarias, principio de necesidad, y de las universalmente compartidas, principio de consenso social profundo.

Palabras clave

Ultima ratio; derecho penal europeo; intervención mínima; despenalización; penalización; sanciones penales; proporcionalidad de las sanciones penales; abuso del castigo

The International Workshop "ULTIMA RATIO, Is the General Principle at Risk in our European Context?" was held on February 2nd-4th, 2012 at the Oñati Institute (IISL International Institute for the Sociology of Law, Oñati, Basque Country, <http://www.iisj.es>). It was organised by Joxerramon Bengoetxea (University of the Basque Country), Heike Jung (Saarland University) and Kimmo Nuotio (University of Helsinki) with the financial assistance of the Spanish Ministry of Science and Innovation (MiCin)¹ and of the Centre of Excellence "Foundations of European Law and Polity" University of Helsinki, with the collaboration of the Oñati Institute (IISL) and ehuGUNE, a programme of the University of the Basque Country for the interaction between society and academy to deal with, amongst others, issues of reconciliation and transitional justice in the University. A very interesting summary of the Workshop was published by Sarah Haggenmüller, Heike Jung and Carl-Friedrich Stuckenberg (2012).

Ultima Ratio as a normative principle, or rather a constellation of related principles², would be a hermeneutic pre-understanding or pre-interpretative concept to the effect that the definition of a certain socially relevant conduct as a crime, as a felony, and the consequent infliction of a penal sanction on the perpetrator of such conduct is a serious matter to be handled with caution and not to be abused. The *risk* referred to in the rhetoric question of the Workshop "is the Ultima Ratio principle at risk?" lies in the non-observance of the principle of minimal intervention, the tendency to criminalise and to bring all or any socially – even politically -undesirable actions under the criminal law, and to use the criminal definition and sanction for purposes and situations other than the strictly necessary – principle of necessity - and universally shared – principle of deep social consensus.

The Ultima Ratio principle forms part of the "cultural heritage" of criminal law. It is supposed to work as a built-in restraint against excessive criminalisation. In actual fact, this principle has come under pressure for some time; its rank is unclear: is it a constitutional principle or just a policy consideration? Is it marking a special qualitative difference between criminal law and other branches of law as regards sanctioning of harmful behaviour? Should the principle be conceived of as expressing a special legislative ethics? Moreover, with the return of punitiveness, its "protective potential" in criminalisation processes is limited. Has Criminal Law now become the "prima" or "sola ratio" (Naucke; Hassemer) or is it more appropriate to speak of Criminal Law as a "propria ratio" (Prittwitz)?

This predicament calls for stock-taking, in particular in times of an emerging European Criminal Law. It is necessary to review, reconsider (and reaffirm?) the classical Criminal Law standards and guarantees. The workshop and the present issue of the OSLs address the Human Rights, European Law, International Law and Constitutional Law perspectives, and moves from the global to the local, to the extent that it includes some specific articles related to the principle of Ultima Ratio at risk in the Basque Country. The volume rehearses the role of Criminal Law within a system of social control and tries to answer the question of who has the last word in matters of criminalisation, the legislator or the judiciary. It also takes into account multiculturalism and plurality of religions (which raises issues of tolerance, all the way to the question of a cultural defence). Also, the Ultima Ratio principle inspires judicial decision-making, especially the interpretation of the law to be applied by the courts and features in the justificatory practices of courts.

¹ Proyecto de Investigación "la protección de los derechos fundamentales en la Unión Europea: retos y oportunidades después de la entrada en vigor del Tratado de Lisboa" referencia: der2010-19715 (subprograma juri del Ministerio de Ciencia e innovación), investigador principal: Jose Ramon Bengoetxea Caballero

² Jareborg (2005) calls Ultima Ratio a metaprinciple of legislative ethics encompassing the penal value principle, the utility principle and the humanity principle.

The subtitle of the workshop directly asks whether the principle is at risk in Europe, and the Basque language subtext³ asks whether the principle is at risk in the Basque Country where the legislative and judicial approaches to politically motivated crimes have become a real challenge to Ultima Ratio, interesting for scholars but a real nightmare for those involved.

There is therefore a legitimate concern that the principle of Ultima Ratio should not be abused in our European context and legal environment. But what would it mean for the principle to be abused and put at risk? In the European context the risk of abusing the principle can be related to the extension of new crimes to protect interests of the EU or the indirect expansion - or hidden transplant - of crimes from one jurisdiction to the other by means of apparently neutral procedural instruments like the European Arrest Warrant. However, risks also lurk in cases of impunity, when seriously harmful acts are allowed, for different reasons, to go unpunished.

Ultima Ratio is a constitutional⁴ and constitutive legal *principle* which is primarily and primordially addressed to the legislator⁵, not to the judiciary. The hypothesis of the Workshop, however, is that not just the legislator but the judiciary too, may, and should, draw certain normative interpretations or conclusions from this principle, as if the principle had indirect effects, a special *Drittwirkung*, for the custodians of the law. If Ultima Ratio is conceived as a general principle addressed to the legislator by some higher normative realm - like the Constitution or an International Human Rights instrument - or if the principle, whether we characterise it as legal or politico-moral, is reflexively self-imposed by the legislator on itself, then there will be a possibility of control as to whether the legislator is respecting this limitation, or else abusing it. Constitutional courts can perform this type of control, together with supranational Human Rights Courts. But jurists and the body politic at large can also control it. And scholars can and should be engaged in this debate, which is one of the conclusions of the Workshop. But this possibility of control requires a shared understanding as to what constitutes respect and what constitutes abuse of the principle, an issue that is closely linked to cultural and political perceptions in each jurisdiction and for which, unfortunately, few common or shared European standards are found. The Workshop, and the project on Ultima Ratio can be seen also as an attempt and a contribution in this quest for shared standards based on fundamental rights, that might allow us all to control whether legislators and judges are being respectful of the Ultima Ratio principle, which is of growing importance in the post-Lisbon Treaty context of ever greater interaction between the criminal laws of the Member States of the EU and ever more manifestations of transnational criminal law.

In a way, this workshop and this publication could be taken as the first of a series of *fora* to elaborate and stimulate a broader discourse on the issue of Ultima Ratio, a necessary building block of a Rechtsstaat-oriented criminal justice system within Europe and throughout.

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³ See the poster designed by Basque artist Jon Urizar for the Workshop, in the illustration of this issue of OSLS and at the end of this introduction.

⁴ See the contribution to this volume by Tuori (2013).

⁵ Indirectly, also to the executive, insofar as it might be tempted to define administrative sanctions in such a way as to avoid the stringent controls and guarantees usually linked to the criminal justice system, e.g. in the control and policing of immigrants.

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