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Ultima Ratio and the Judicial Application of Law

JOXERRAMON BENGOETXEA*

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Abstract

The nature of Ultima Ratio as a principle, its relationship to other principles in the criminal law is the first subject of this paper. After discarding approaches that deny any role to the ultima ratio principle like the criminal law of the enemy, the major readings of the justification of the *ius puniendi* – deontological and utilitarian – are related to the idea of a restrained resort to criminalisation and penal sanction. The role of the main protagonists in relation to punishment is next considered: transgressor, community and victim. The issues of impunity and overpunity are also considered in this part. The second part of the paper analyses the possible effects of ultima ratio, a general politico-moral principle mainly addressed to the legislator, on the application of the law by the judges. It is then turned into something closer to a general legal principle. The impact of ultima ratio on the different sub-decisions of the judicial application of the criminal law is spelt out in the decisions on qualification, evidence (inferences), interpretation and consequences in sentencing. Next, the role of ultima ratio on decisions in appeal and in cassation is analysed. The third part and conclusion deals with the main ideologies of ultima ratio and the wider issue of its role in securing a guarantee oriented criminal law in Europe.

Key words

Criminalisation; decriminalisation; de-juridification; impunity; ius puniendi; deontological and utilitarian justifications; alternatives to punishment; ultima ratio; last resort; minimal intervention; rational discourse; guarantees and rights of the defense; in dubio por reo; principle of legality; principle of proportionality

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* Ph.D. In Law, University of Edinburgh; Profesor titular of Jurisprudence, University of the Basque Country (UPV/EHU). Director of EHUgune. Coordinator for the UPV/EHU of the Oñati International Master in Sociology of Law and the Ph D Program in Sociology of Law. Member of the Academic Board of the Renato Treves International Ph D in Law and Society. UPV / EHU. Zuzenbide Fakultatea; Manuel de Lardizabal, 2; E-20018 Donostia–San Sebastián. joxerramon.bengoetxea@ehu.es

Resumen

En este artículo se aborda, en primer lugar, el carácter de ultima ratio como principio, su relación con otros principios en el derecho penal. Después de descartar los enfoques que rechazan cualquier papel del principio de ultima ratio como el derecho penal del enemigo, las lecturas principales de la justificación del ius puniendi, deontológico y utilitarista, están relacionadas con la idea de un recurso restringido a la criminalización y sanción penal. A continuación, se analiza el papel de los protagonistas principales relacionados con el castigo: transgresor, comunidad y víctima. En esta parte también se tienen en cuenta las cuestiones de impunidad y castigo excesivo. La segunda parte del trabajo analiza los posibles efectos sobre la aplicación de la ley por los jueces del principio ultima ratio, un principio político-moral general, principalmente dirigido principalmente al legislador. El impacto del ultima ratio en las diferentes sub-decisiones de la aplicación judicial del derecho penal se detalla a partir de las decisiones sobre la calificación, evidencia (inferencias), interpretación y consecuencias de las sentencias. A continuación se analiza el papel del ultima ratio en los veredictos de apelación y casación. La tercera parte y conclusión aborda las principales ideologías de ultima ratio y, de forma más amplia, del papel que juega en lograr en Europa un derecho penal orientado al garantimos.

Palabras clave

Criminalización; decriminalizacion; des-juridificación; impunidad; ius puniendi; justificaciones deontológicas y funcionales; alternativas al castigo; ultima ratio; último recurso; intervención mínima; discurso racional; garantías y derechos de defensa; in dubio por reo; principio de legalidad; principio de proporcionalidad

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This presentation aims to provide a cartography identifying the main issues involved in a judicial application and interpretation of criminal law respectful of the ultima ratio principle. The subtitle of the workshop directly asked whether the principle is at risk in Europe; and the Basque language subtext of the workshop asked whether the principle is at risk in the Basque Country, and thus explains why many examples are brought from the Basque context in relation to politically motivated crimes, an area where ultima ratio may have been neglected[1]. Indeed, the tendency to solve political disputes through criminalisation[2] would imply abusing the ultima ratio principle and putting it 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 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.

Besides locating the key themes raised by ultima ratio, some relationships between those themes will be spelt out as well. The first part of the introduction is concerned with the ultima ratio principle in the context of complex, plural societies and in the relationships between legislator and judiciary. The second part attempts to identify the different stages in the judicial application of the (criminal) law where the ultima ratio principle can be of assistance. Part Three draws some conclusions from these analyses pointing to larger models of orientation of the interpreter depending on the values considered prominent, and takes the analysis into the broader supranational context.

1. Contextualising ultima ratio in the trias politica

1. Ultima ratio as a normative principle, or rather a constellation of principles[3], 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 "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.

[1] The text that follows is based on the oral presentation or introduction to the topics discussed in Block III of the Ultima Ratio Workshop and which focused on the ultima ratio principle as it inspires judicial decision-making, especially interpretation of the law to be applied by the courts and as it features in the justificatory practices of courts. This block was organised around presentations made by Panu Minkkinen (U Helsinki), on "Ultima ratio as a moral and/or as a legal principle" and by Thomas Frøberg, (U Oslo), on "The role of the Ultima Ratio principle in the jurisprudence of the Norwegian Supreme Court". One was more theoretical, the other more descriptive, but both of them gave already a feel of the broad range of issues to explore, and which this introduction wishes to expand.

[2] For example when the Spanish Criminal Code was amended by the right-wing Government in 2003 (LO 20/2003 on the Law on Arbitration introduced a new Article 506bis in the Criminal Code) in order to criminalise and punish – with prison sentences from 3 to 5 years and up to 10 years incapacitation from public office – the calling of a referendum by an authority that did not have the power to do so; a move that was intended against the Basque president at the time. The crime was later repealed by LO 2/2005 (Socialist Government reform), but the parliamentary group UPyD has lodged a legislative proposal for its reintroduction 122/000078 – 1st October 2012 – as a possible response against the Catalan president if such consultation process is initiated.

[3] Jareborg (2005) calls ultima ratio a metaprinciple of legislative ethics encompassing the penal value principle, the utility principle and the humanity principle.

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2. My analysis starts off from the premise that ultima ratio is a constitutional[4] and constitutive legal *principle* which is primarily and primordially addressed to the legislator[5], not to the judiciary. The query, however, is that not just the legislator but the judiciary too, may – as a matter of fact - and should – from a normative perspective - draw certain normative interpretations or conclusions from this principle, as if the principle had indirect effects, a special institutional horizontal effect or *Drittwirkung*[6]*,* 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, the academic community, and the body politic at large can also control it. This can be anticipated as one of the conclusions of this paper. 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 will be found[7]. 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.

3. The nature and origin of the ultima ratio principle can be searched, perhaps in intuitive and rudimentary form, in other normative orders like political morality (pace Minkkinen[8]), enlightened natural law or international human rights law. The normative and hermeneutic understanding that the criminal law is to be handled with care is a call for precaution that reminds one of the need for proportion, right measure and self-restraint, as Aristotelian and Enlightenment *virtues*. Indeed the relationship between ultima ratio and proportionality is a constant in most analyses[9]. However, ultima ratio is conceptually and methodologically prior to proportionality. Whereas ultima ratio addresses the question whether the criminal law should be used at all to address socially harmful conduct, proportionality (Asp 2007) is concerned with the question how much criminal law should be used once it is assumed that it ought to be resorted to – necessity and appropriateness tests - in order to address such conduct.

4. But what would be the grounds for resorting or not resorting to the criminal law? Why and when would or should the criminal law and the criminal justice system be mobilised? The answer from ultima ratio positions can be: precisely because of the gravity, harmfulness, repulsion and seriousness of certain conducts the criminal law

[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, eg. in the control and policing of immigrants.
[6] This term, developed in German jurisprudence in the context of rights and principles operating in relationships between individuals and public authorities but producing effects horizontally in private relationships between individuals, is here used as a metaphor to capture the effects produced on the judiciary by a principle addressed to the legislator.
[7] To begin with, international Human Rights or approximation of criminal law instruments do not explicitly refer to the principle of ultima ratio, which makes the search for common standards very difficult.
[8] See his contribution to this volume, considering ultima ratio as politico-moral or constitutionalist principle (Minkkinen 2013).
[9] See Wendt's contribution to this volume (Wendt 2013). The European Commission Communication on approximation of criminal laws also underlines this connection between ultima ratio and proportionality, following the principles affirmed in the Stockholm program (European Commission 2011, p. 2).

must intervene as an *ultimum remedium*. The state, institutionally organised society, is under a general obligation to intervene to protect individual fundamental rights and ensure security (an obligation to protect or *Schutzpflicht*)[10]. Less harmful conduct is and ought to be addressed by less punitive means, by ratios other than the criminal. Ultima Ratio underlines the subsidiary character of criminal law, as Kimmo Nuotio reminded us in the Workshop ("Ultima Ratio as a principle of legislative policy and legislation"). *Ultima* calls for a line of thinking where other alternatives have been analysed but considered insufficient; therefore the last, ultimate, resort. The ultimate and subsidiary reason of the criminal sanction, legitimate use of state force, is the *ratio*. But *ultima ratio* responses are not uniform. We can leave aside therapeutic or treatment approaches to deviance where the harmful behaviour is dealt with as manifestation of the medical abnormality of the transgressor, to be treated as patient, and we can also leave aside the criminal law of the enemy (Jakobs 1985) to be combatted in all circumstances. In both scenarios it is not so much that *ultima ratio* becomes *prima ratio*, but rather, the ratio disappears altogether, and there is no point in asking whether it might be *prima, secunda* or *ultima*, there simply is no *ratio*. This is probably the explanation behind Heike Jung's rejection of the value of 'the enemy' as a normative category since "its symbolic and emotional overflow is disastrous for the construction of a rationally-based human rights oriented criminal justice system" (Jung 2007, p 100)[11]. The emphasis would be on the lack of any rational base; the absence of any ratio in the discourse of the enemy: destruction and militarisation are denials of reason, of rights and guarantees. They are exceptions. But what if they become the norm?[12]

5. To approach ultima ratio one assumes two preconditions, i.e. the *personal autonomy* of the transgressor, an arguable but still necessary assumption, and the normative standing of community or Society, as institutionally organised in legislatures and courts, having a duty to protect (*Schutzpflicht*), and a correlative right to punish, *ius puniendi*, and holding the legitimate monopoly of force in a weberian sense, as symbolised in the penal response. Society or community is interested in defining key values as to what are acceptable and unacceptable actions; it is interested in the maintenance of social order and in reducing conflict. On the other hand, the individual, under all kinds of influences and powers, ultimately has a choice over her actions; the individual is a responsible person. The relation implied by *ultima ratio* is thus dual: it implies a transgressor and society or a community in respect of a good worthy of special legal protection.

6. This view, although correct, seems rather reductionist: is it all a matter of a (social) contract between community and the potential transgressor? An affirmative answer would highlight the value of *legality*, *the nullum crime sine lege previa*. Indeed just like ultima ratio is closely connected with the principle of proportionality, it is also connected with the principles of legality and certainty –*lex certa* - according to which no crime exists if the legislator has not foreseen that specific *type* of crime. Combining the principles of ultima ratio – necessity, minimal intervention, social consensus on severity, importance of the protected good – with legality, autonomy of the offender and proportionality of the response we obtain the *constellation* of the classical liberal picture of the rule of law: potential transgressors and society at large know that only seriously harmful acts are legally defined –nullum crimen - and punished –nulla poena - as crimes according to their severity. Community or institutionally organised society has already made the

[10] See Tuori's (2013) contribution to this volume, especially the link between the European security constitution and the precautionary principle, which has inspired this contribution in many respects.
[11] Kimmo Nuotio (2006, p. 1016) reaches a similar conclusion: "We should not let the militarism of counter-terrorism militarise criminal justice by referring to enemy concepts".
[12] I refer, again, to the discussion on the permanent state of exception in Tuori's contribution (Tuori 2013).

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warning: whoever breaches certain specially protected legal goods will be liable to a penal response. There seems to be something missing, though.

7. In this classical scenario of rule of law and social contract between community and potential transgressor, where is the victim of the transgression, the usual beholder of the good? Can we assume that the victim will be a gravitational force pulling the response of society organised as a legislator towards ever more punitive responses or should a special role and place be subsequently found for the victim in restorative responses by the judiciary? Sometimes victims of certain types of crimes get organised as lobbies that tend to push the legislator into punitive responses that may jeopardize or pervert the ultima ratio principle. These lobbies rarely call for abolitionism and de-criminalisation, for alternatives to criminalisation or for approaches that take into account the successful re-integration of the offender[13]. But from the perspective of institutionally organised society, the body politic, the legislator and community, re-socialisation of the offender and recovering the transgressor to social life may also be a primary interest and a social goal – together with punishment and reprobation of undesirable conduct and with providing internal security. By opposing such legitimate goals some victims' lobbies play a key role in the debate on the extent – respect or abuse – of ultima ratio. Other lobbies[14] also push for greater punitiveness and for prison sentences. Yet others may push for re-socialisation of the offender[15]. Ultima ratio would therefore seek the right balance between two extreme positions: impunity where blameworthy and harmful conduct goes unpunished and *overpunity* where any undesired conduct is criminal, or excessive criminal sanctions are foreseen and passed[16].

8. The initial response to this dilemma from the standpoint of judicial application of the principle is that ultima ratio is a general principle primarily of a legislative nature and this implies that ultima ratio and criminalisation is a matter of general prevention where politically organized society defines those socially harmful acts that are considered and punishable as crimes. It will take into account, in a general manner, the interests of the potential victims and the general interests of society to keep social peace and security, an area of liberty, security and justice. Only later, at the stage of application will the special individual characteristics and factual circumstances concerning offender and victim be introduced into the deliberation. The courts will combine or conflate the general prevention of the legislator with the special prevention of the individual sentence towards the offender from a perspective of punishment –desert - and reintegration and with the special needs of the victim from the perspective of restoration or reparation. In all this process, the basic core of the dignity (Jareborg 2002, p. 121) of the offender is to be respected, or restored.[17]

9. Institutionally organized society has as much an interest in security (crime control) as it does in the liberty of the victim (retribution/restoration) and in justice (human rights respected throughout the process). But we can, again, ask who does the dispute really belong to at this stage? Who *owns* the dispute? In dyadic models it would be the victim and the offender that own their dispute and would be

[13] Some organised groups of victims of ETA terrorism, AVT for instance, systematically call for legislative interventions to ensure that ETA prisoners will not have access to regular penitentiary treatment afforded to other prisoners. This insight on the interaction between organised groups of victims and the legislator, or the mass media is not limited to the Basque case. The interaction is also with the executive and the judiciary, e.g. when AVT requests the central court of parole control to revoke its decision to grant parole on medical grounds to an ETA prisoner (J. Uribetxeberria). News on the Spanish broadcast (Radio Televisión Española 2013).

[14] Security companies, constructors, developers.

[15] Families of prisoners, religious and humanitarian NGOs, groups advocating abolitionism.

[16] For want of a better term I use 'overpunity'. Other terms are 'overcriminalisation' or 'overpunishment' (Husak 2008, Streiker 2010, Melander 2013).

[17] See, in this volume Minkkinen's (2013) discussion of the doctrine of the German Federal Constitutional Court on resocialisation and dignity, BVerfGE 35, 202 (1973).

empowered by it, but in triadic models institutionally organised society becomes the dispute resolver and the norm maker, and the dyadic parties to the conflict become somewhat disempowered, they lose control over their own dispute to the benefit of institutionally organised society (Sandholz, Stone-Sweet 2004). From the perspective of ultima ratio, the appropriation of the conflict or the dispute by institutionally organised society - through the pre-definition of the crimes by the legislator and through the fact-finding process, litigation procedure and deliberation by the courts applying the criminal law norms - means that the official public response to the dispute can control that the criminal justice system is restricted to its minimal but essential function as a manifestation of sovereignty, combining the preservation of internal security with the respect for the Human Rights of all persons within the jurisdiction, including the rights of the victim (reparation) and of the offender (rights of the defence, habeas corpus).

10. There is no right-claim to ultima ratio benefiting the offender, just as there is no right of the victim to secure punishment. Ultima ratio is better seen as a limitation on criminalisation of conducts or an obligation of restraint (Hassemer 1990, p. 316) imposed on the legislator and which can be resorted to or taken into account by the judiciary, but not a right nor a claim. Ultima ratio is a principle to be linked with the domain of legislative policy rather than the forum of rights. Indirectly it is also linked to judicial policy. This does not mean that no consequence can be derived in the interest of victims (e.g. the protection of the basic goods, *Rechtsgüter*[18]) or of offenders (e.g. the restriction of the *ius puniendi* of institutionally organised society to the most harmful and offensive breaches of those goods).

11. Once these assumptions and conditions concerning society, transgressor and victims are accepted, *ultima ratio* can be related to functional and to deontological outlooks. Functional and utilitarian approaches[19] (economic analysis, consequentialism) emphasize the aim of control, security and social order sought by the use of the criminal law, examining whether it can actually and effectively achieve that aim. This seems to call for sociological and criminological analysis together with economic analysis concerning the most efficient use of resources and punishment: dissuasion and prevention results, crime-rates, rehabilitation rates, recidivism rates, prison rates. On the other hand, deontological approaches (Duff 2001, p. 43) tend to be more normative and address the questions what is risk and how is it defined, what sorts of socially *blameworthy* acts deserve the ultimate response of the criminal law, what type of penal sanction is best suited to what offence, and what is an adequate, ethical and civilized response, assuming that it is society that reacts to blameworthy behaviour on the basis of the desert of the free-willing, autonomous offender, who incurs in a loss of *dignity* whenever he or she engages in crime by harming others. Utilitarian paradigms insist on harm and security just as deontological ones insist on justice and blameworthiness. Both ideal types will yield different responses concerning the impact of ultima ratio from the more instrumental response to the more principled response, neglecting neither abolitionism nor risk prevention.

12. The two ideal types or approaches – the utilitarian and the deontological – are rational, but involve different types of rationality: instrumental in one case, practical-imputational in the other. Because *ultima* involves an assessment of what the last resort is, both approaches ought to be concerned with the issue of alternatives: if the criminal law is not used, what other normative responses can be used? The possible answers to this question open up new alleys for analysing the mechanisms that the law has at its disposal for dealing with deviance and social

[18] See the critical contribution by Stuckenberg (2013) in this volume, based on the circular and reflexive nature of the concept of legal good, and the difficulty of finding an objective or absolute concept of the good, besides the system-relative concept of the protected good.
[19] See the classic approach in H.L.A. Hart (1959-60, 2008).

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control, with harm and blameworthiness. This takes us to the issue of 'decriminalisation' within the law: i.e. to allow other areas of the law to react first, like administrative law, civil law, tort law, tax law, or seeking prevention through social welfare policies and education… We are assuming that the law referred to here is the official state law, for in a sense the criminal law embodies the response of institutionally organised civil society to deviant, blameworthy or harmful behaviour. Institutionally organised Society pursuing the public interest or the Common Good might want to use first and foremost "non-law" i.e. non-legal tools of a preventive, educational character or even "other law", legal tools of a reactive punitive character – but not within the realm of the criminal law. Contrary to ordinary views, decriminalisation does not mean impunity. An interesting example is the debate following the judgment of the Landgericht Köln of 7 May 2012 considering circumcision as unlawful bodily harm. The German federal legislator has decided to regulate the issue under paragraph 1631 of the Federal Civil Code – requiring paternal consent and a competent performer - and not under the Criminal law (Fateh-Moghadam 2012).

13. The discourse of alternatives brings the two analyses, utilitarian and deontological, closer together. The classical position of criminal law was characterised by a defensive criminal policy where the criminal justice system protects individuals against arbitrary use and misuse of power operating only when explicitly legally protected interests and goods – *Rechtsgüter* - are infringed or threatened (Jareborg 1995). Ultima ratio here means restricting the "types" of crimes – tipification of an act as "crime" - to react to core crimes like murder, manslaughter, robbery, arson, assault, rape, etc. But the criminal justice system has evolved and transformed responding to different demands, interests and needs, not least, those constituted by lobbies as mentioned above, but also social needs not connected to individuals but to the state (public) as such, to the market, to the world of finance, to welfare and environment or to institutionally organised society. Criminal law is then seen as just another tool in the policy kit. It becomes sometimes risk-preventive, pro-active[20] or precautionary, sometimes offensive, reactive. Notions of blameworthiness change in time, and the conception of interests worth preserving and goods worth protecting through the criminal law also evolve.

14. However, the analysis of alternatives might also direct our attention away from the law towards the availability, within a given complex and plural society, of other normative systems that operate besides the law – morality, religion, ethics. Take the issues of adultery or blasphemy, even incest[21], and how they can be dealt with from normative systems spanning from the criminal law to the domains of strictly private morality. This opens altogether the debate on 'dejuridification' or deregulation, beyond decriminalisation, and on the larger discussion concerning pluralism, relative, tolerated or controlled pluralism, where state law, the most highly institutionalised normative order, allows other domains of practical reason, other normative orders to step in to regulate behaviour and to deal with conflict. In our multicultural societies, these normative alternatives are worth taking into account. In a meaningful and relevant sense resorting to law, to legal regulation as opposed to other normative domains of practical reason is already an expression of ultima ratio. Why not leave an interpersonal conflict to be dealt with in the domain of private ethics or public mores, *Sitten*, or social norms? But resorting to the criminal law is an additional exercise of ultima ratio, a double rational evaluation of last resort: ultima is the last and the ultimate justifying reason.

[20] Erling Johannes Husabø's term. See Sakari Melander (2007).
[21] See on the prohibition of incest, Heike Jung (2012).

2. Ultima Ratio as a principle also inspiring the Judicial decision-making process

15. Our discussion (points 7-11) on the role of the victims and on the question whether ultima ratio is a matter where different actors and groups, besides institutionally organised Society, might hold a stake, took us to the discussion of whether ultima ratio has to do more with the creation of general norms or with dispute resolution in particular cases. Our provisional answer was that ultima ratio concerns the elaboration of norms and requires the legislator to limit or restrain the qualification of crimes, to restrict tipification or criminalisation - the definition and number of crime-types - to particularly serious and harmful deviant blameworthy behaviour against legal goods worth protecting. However, not only legal norms but also conflict are the key ingredients of the law. Conflict obtains when norms are not followed with the result that legal goods are breached and the law reacts with the application of the foreseen sanction through the courts. The existence and likelihood that the courts will enforce the sanction against the offender is seen as a precondition to the proper functioning of the norm. However the norm works best, not when it is *enforced* by law-agents and courts, but rather when it is observed and *internalised* by the addressees (positive general prevention).

16. One can say that the norm is not working if it is regularly or often breached, but one can also say that the norm is not working if it is not being enforced whenever it is breached, because the prosecutors are not bringing suits or because the judges are not applying it. These can be situations of impunity, where a crime is made but the criminal justice system does not respond. Situations of impunity can obtain when the legislator, institutionally organised society, decides not to define as crimes certain types of action that society, the community, considers grave, harmful and blameworthy[22]. This would also be an abuse of ultima ratio: because it would imply an omission to criminalise in a situation where criminalisation would have been justified and expected. Yet this discussion is rarely neutral and objective. Take a type like terrorism. Some systems do not contemplate it as a separate type of crime and use existing types like mass murder to punish such actions. It cannot be said that there is impunity in those situations, but rather that the legislator has made a choice, after considering other alternatives, to typify or categorise certain acts in certain ways. But compare this to a situation where financial malpractice, eg, the manipulation of derivatives, leads to harmful consequences on investors and where the legal system does not criminalise such practices because it considers them to be mere "technical" failures. In the case of terrorism, the blameworthy and harmful actions are criminalised under different types, but in the case of financial malpractice the equally blameworthy and harmful actions are left unpunished. This is a new version of impunity worth exploring in the new European financial governance and harmonisation of economic crimes concerning the euro and financial stability[23].

17. But normally, impunity refers to situations where a crime is defined by the law but the criminal justice system, for different reasons, does not punish concrete instances of the type of crime. In a case like torture, for instance institutionally organised society, in its basic laws, defines torture as a crime and has an interest in punishing any case of torture as a violation of an absolute human right. Yet, often these crimes go unpunished because the criminal justice system decides not to investigate or to downplay allegations of torture as suspect of anti-state interests. In such cases, the victim of torture is then re-victimised by the system and the community, represented in the legislator, is deprived of its ius puniendi. Thus, on several occasions, Spain has been found in breach of the European Convention on Human Rights by the European Court of Human Rights for not having investigated

[22] Note that a difficult difference is made here between institutionally organised society and 'civil' society or community.
[23] See on a related point, European Commission (2004).

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allegations of torture made by persons that had been detained in relation to their presumed connections with ETA[24]. Indeed the crime – criminal type - of *pertenencia,* "belonging" to a criminal organisation (Article 517,2 of the Spanish Criminal Code) is a tricky one and there are some Basque politicians paradoxically serving sentence for belonging to an organisation on the basis of their having attempted to set up a political party that would ultimately depart from, and reject the use of violence[25]. The criminal type of membership of a terrorist organisation does not require any specific action or participation in any violent act. This is a case of abuse of the ultima ratio by the legislator, further breached by the judiciary.

18. Different from these cases of state-induced impunity are those where the criminal justice system is, at least in theory, interested in persecuting and punishing certain crimes; where it does not systematically protect impunity, but it happens to be incapable of properly dealing with them: fraud, corruption, white glove crimes. The tendency of the legislator in such cases may be to leave the sanction as it is, as pure rhetoric and symbol, to reinforce the sanction out of its own impotence or else, as in certain cases like drug consumption, to decriminalise the conduct. This shows how there is an interesting interaction between the legislator, the prosecution and the judiciary. If the judiciary considers that the legislator has overstepped and abused the ultima ratio principle by too easily and readily resorting to the criminal law in order to criminalise behaviour that could be policed through other means, the judiciary might opt for lenient interpretations, or other techniques of judicial decision-making – qualification of facts, strict requirements on evidence, mitigating consequences, to avoid incrimination. On the other hand, if there are clearly identified victims and clearly defined protected goods these strategies will not be so easy to deploy. This brings us closer to the application of the law and the weight of the ultima ratio principle for the judiciary.

19. The judicial application of the law is a complex process of decision-making that can be analysed from different perspectives. Leaving aside, for present purposes, interesting approaches from the social and political sciences, the legal reasoning focus can be carried out holistically looking at the result of the judgment, zooming out: how is the law applied to a dispute in a given situation and how the law is being developed, adjusted, adapted in such individual application – in our present case, whether the ultima ratio principle is respected by the court, is there an extension of the crime to new situations? Judicial decision-making in the criminal domain can also be seen heuristically, zooming in and analysing a series of decisions or sub-decisions made in the course of the judicial process. Ultima ratio can have an influence on each of these sub-decisions or heuristic and procedural steps of the judgment.

20. Let it be remembered at the outset that the principles of legality and of procedural justice call on the judge not to engage in extensive interpretations leading to incrimination. This principle, related to *in dubio pro reo* and the presumption of innocence, guarantees the accused against arbitrary incrimination,

[24] See the last case, Otamendi Egiguren v Spain, Judgment of 16 October 2012 (47303/08) (European Court of Human Rights, Cour Européenne des Droits de l'Homme 2012). "Invoquant l'article 3 de la Convention, le requérant se plaint en particulier de l'absence d'enquête effective au sujet des mauvais traitements qu'il allègue avoir subis au cours de sa garde à vue au secret (incomunicado). Il estime que les mauvais traitements qu'il a dénoncés atteignent le minimum de gravité nécessaire pour tomber sous le coup de l'article 3." The Court found a breach of Article 3. What is most outrageous in this and other cases is that those prisoners that made allegations of torture were considered to be slandering the state because the State could not possible engage in torture, and therefore accusations had to be false and those who made such accusations should be prosecuted. This was often the response from Spanish government officials. This adds a special type of impunity to normative impunity: cognitive impunity.

[25] Judgment 351/2012 of the Tribunal Supremo, of 7 May 2012, in case Bateragune: "there is no difficulty in considering that Otegi belongs to and is integrated in ETA which entrusted him with negotiating and bringing together all the pro-sovereignty sector in the Basque Country under the aegis of the izquierda abertzale thus following ETA's directions." This judgment was agreed with a majority of one vote (Tribunal Supremo 2012) and was delivered months after ETA had unilaterally declared a permanent ceasefire (October 2011).

and it can inspire all sub-steps of the judicial decision: from qualification to evidence to interpretation to consequences[26]. We shall briefly examine each of these heuristic moments.

21. Qualification takes places at different moments of the application reasoning process. It operates as a hermeneutic pre-understanding when the parties categorise their dispute as falling within one legal category – crime or criminal type – or another, and when the Court decides that the dispute falls within one category of the law: is this circumcision a mere accident in the performance of a religious rite or is it the infliction of unconsented bodily harm on a minor? Is this rape or sexual abuse? Is this degrading treatment? Is this a glorification of terrorism or the exercise of the freedom of expression? The principle of ultima ratio would here imply restraint and caution when categorising or qualifying certain facts. The whole process and its procedure will depend on these qualifications. Indeed whether there is inquest or enquiry and whether there is prosecution at all, often depend on these initial categorisations and labelling made by victims, police, public and/or popular prosecutors and judges, depending on the system. In situations of impunity there is an added element of covering up certain crimes by resorting to much lower qualifications – e.g. not qualifying as torture but as the legitimate use of force to control a resisting detainee.

22. Ultima ratio also influences fact-finding and decisions on evidence, especially when it comes to defining the extent and standard of the presumption of innocence and the rebuttal of the presumption. Drawing inferences concerning dolus from hearsay and spurious or circumstantial evidence, or from unlawfully obtained evidence are not strictly speaking matters of ultima ratio and yet they may be related to the extensive interpretations of crimes; eg the so-called crime of apology, glorification or excuse of terrorism. Thus, when Basque citizens are prosecuted in Spain for displaying boards in bars and taverns with photographs of prisoners serving sentence for belonging to a terrorist organisation (not for having committed specific acts) there is a dangerous accumulation of sliding incriminating decisions –inferences - departing from the ultima ratio principle imposing restraint. The result would be an abuse of logical inferences in considering that the display of the photograph of a prisoner implies solidarity with the cause and motives of those prisoners, even with their acts, and that, as a result, the victims of those prisoners are symbolically attacked, their honour violated, and that this also involves apology or incitement to terrorism. One can see how dangerous such unchecked inferences can become, and yet they have been, and still are[27], the daily bread of some victim's organisations and Spanish prosecutors in the fight against ETA's environment.

23. The most obvious impact of the ultima ratio principle as regards the application of the law is in relation to construction or interpretation of the criminal law. As was stated supra, ultima ratio is a principle directed to the legislator as a matter of policy seeking self-restraint in the definition of crimes. Its implication on the criminal judge or courts would be restrictive interpretation: not to interpret the criminal types in a way that leads to an extension of their sense and reference to cover situations that were not those strictly pre-defined by the legislator. Going back to the case previously mentioned of solidarity with prisoners, we can see that there have been several incriminations on this basis. When the judge has to stretch the extension of certain crimes or criminal types to cover situations that do not

[26] I have analysed the heuristic steps of judicial decision-making on several occasions (Bengoetxea 2007). See more generally Jerzy Wróblewski (1992).

[27] Thus AVT, the association of victims of terrorism has announced that it will bring a criminal accusation against the organisers of a peaceful and authorised demonstration in favour of "human rights, settlement, peace, Basque prisoners to the Basque Country" and which gathered over 115 000 demonstrators in the streets of Bilbao on 12 January 2013. The ground for the action is that boards with photos of ETA prisoners were displayed and this is a glorification of terrorism and an offence to the dignity of the victims.

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seem to fall within the core reference of such crimes, the juridical implication is sometimes for the legislator to amend the criminal law to conform to the principle of legality by defining a new type of crime, or by redefining the presumption of mens rea –dolus -in certain acts. But if the legislator does not amend the law or distinguish different types of crime it might be the Supreme Court that extends the type by way of interpretation[28]. Similarly, the Spanish criminal justice system has punished acts such as the organisation of welcome receptions in the Basque hometowns of prisoners released after having served their sentence or acts of homage to prisoners considering them to be crimes of glorification of terrorism, "ensalzamiento", which also contains a type of vilification or defamation of victims (Article 578 CrC[29]). Such legislative amendments have followed situations where the judiciary in decisions of fact – inferences about symbolic meanings and mens rea– qualification – as apology, glorification or excuse – and interpretation had stretched and abused the principles related to ultima ratio – in dubio pro reo, presumption of innocence, legality, restrictive interpretation, etc. But other legislative amendments follow when the judiciary calls on the legislator to show greater rigour in the definition of crimes, as is the case concerning the cited article 578 of the Spanish Criminal Code that conflates glorification with vilification.

24. Last, not least a major sub-decision in the judicial application of criminal law is the drawing of the consequences of interpretations leading to the concrete sentence. Ultima ratio does not call for leniency nor does it call for severity in sentencing. It would certainly be mistaken to conclude that ultima ratio leads to impunity. On the opposite, as a legislative policy, it calls for criminalisation and punishment of all serious crimes, and it calls on other, administrative, civil, fiscal, legal domains and other normative systems to deal with conduct that is still blameworthy but better addressed outwith the criminal law, for utilitarian or deontological reasons. When it comes to sentencing it would involve finding the right level of punishment that combines and balances, in the individual case, all relevant stakes that the legislator has considered worth pursuing when defining the crimes and the scales of punishment for each of those crimes: victims', community's and offenders' interests, rights and guarantees.

25. Likewise, ultima ratio can also inspire the control of the judicial application of the law on appeal and cassation and on human rights protection. All previous sub-decisions – qualification, the legality of evidence or the rationality of the inference from certain means of proof, interpretation of legal concepts in evidence, and interpretation of the sense and reference of certain types, and consequences in

[28] Judgment 299/2011 of the Spanish Tribunal Supremo (Criminal Section), 25 April 2011 (RJ 2011, 3486): displaying photographs of ETA prisoners in a txozna called Txori Barrote (feast bar premises) demanding that they serve sentence in prisons closer to their hometowns or demanding their amnesty amounts to a "ensalzamiento" or glorification of the unlawful conducts of such prisoners, condemned for acts of terrorism, and of the prisoners themselves. Such display is to be qualified as a crime of glorification "enaltecimiento" of terrorism and amounts to praising such acts and an plea for the perpetrators "alabanza de los actos terroristas o la apología de los verdugos". In the given case, it could not be proved that it was those accused that had actually displayed the photographs, just because they were present in the txozna. The Audiencia Nacional, in this case, more faithful to the principle of ultima ratio, had decided that displaying the photographs in itself was not to be qualified as a crime of apology or glorification unless a special mens rea was established to vilify the victims.

[29] "el enaltecimiento o la justificación por cualquier medio de expresión pública o difusión de los delitos comprendidos en los arts. 571 a 577 de este Código o de quienes hayan participado en su ejecución, *o* la realización de actos que entrañen descrédito, menosprecio o humillación de las víctimas de los delitos terroristas o de sus familiares se castigará con la pena de prisión de uno a dos años" (emphasis added). As regards the first type, the Audiencia Nacional interprets that a general abstract dolus is sufficient to establish the crime: "Así pues, por lo que a las fotos se refiere, desde el momento que el legislador no ha exigido una tendencia específica, más allá de la que es propia de un dolo genérico, bastará ser consciente de la acción que se realiza y tener voluntad de realizarla para cubrir el tipo subjetivo, elementos que concurrían en los acusados, pues sabían que las fotos, así como los demás signos que en apoyo de esas fotos que portaban, eran de individuos que se encontraban en prisión por haber participado en hechos delictivos de índole terrorista, y tenían voluntad de portarlos". The problem is the interpretation that displaying a photograph amounts to a "justification by means of any media of public expression" (Judgment A.N. 24/2012 of 30 May 2012) (Audiencia Nacional 2012).

sentencing on the basis of legal criteria – can be the subject, depending on the jurisdiction, of review. The highest courts will spell out the right degree of criminalisation and punishment that the legislator has tried to achieve, and will do so while respecting the principles of certainty, restrictive interpretation of crimes or criminal types, and procedural guarantees. In doing so, judicial application of the criminal law by the highest courts is also judicial, quasi-legislative development of the law.

26. Ultima Ratio can then be understood also as the last word in the hands of the judicial hierarchy, as the quasi-legislative authority of supreme and constitutional courts, but also supranational courts, in our case, the European Court of Human Rights. The discussion might then turn on the question whether the validity of their judgments and ultimate interpretations stems from their authority – from the fact that they are ultima and therefore by definition always institutionally right and authoritative - or from their persuasiveness and rationality – stressing the ratio rather than the ultima. Controlling the controllers on the basis of the rational justification of their decisions is probably the last resort for the juristic community and the polity at large. But the forum for that is no longer institutional, but rather the agora of public reason.

27. Judicial decision-making needs to be approached also from the perspective of the judicial process and not only of judicial reasoning. This is the other dimension of rational discourse: a rational process. And ultima ratio bears an interesting relationship to some key principles of the criminal process like:

- certainty and legality, understood as inter-systemic validity, lacunae, the restriction of analogy in interpretation when it leads to incrimination, restrictive interpretation of the criminal types, conform interpretation inspired by fundamental rights and guarantees,
- procedural fairness in establishing "guilt", respecting the presumption of innocence, standards of proof, evidentiary reasoning, narratives, narrow qualification of the facts, as we have seen supra
- proportionality especially in balancing values and principles of sentencing,
- the rights of the defence and the rights of victims and stakeholders to participate in the process are also relevant features of ultima ratio, as the discussion in Part I of this contribution has shown. Ultimately, the ultima ratio implications for procedure are that the accused has the last word, has a right to stick to the presumption of innocence and that it is for the prosecution – official, popular, private – to establish guilt and rebut that presumption beyond reasonable doubt, and the judgment must stick to the accusations made by the prosecution and not change them (accusatory principle).

28. In order to complete the trajectory of the principle of ultima ratio and its implications, beyond criminal legislative policy, and even beyond judicial application of the law, for the criminal justice system, we would need to explore the execution of the judgment and discuss the issue of serving the sentences in prison, parole, or alternatives. This clearly goes beyond the scope of this contribution, but the map would not be complete if reference to this discussion was omitted[30]. Ultima ratio is not to be confused with abolitionism, but on the other hand the attempt to restrict the criminal law and sanction to the strictly necessary will certainly have penitentiary implications. Likewise, the map of the theoretical issues and the discussion of the practical aspects of ultima ratio would be incomplete if the institution of "pardon" was omitted[31]. Executive discretionary pardon of serving

[30] See Minkkinen's (2013) contribution to this volume on the issue of prisons.
[31] See the manifest: "Contra el Indulto como Fraude en Defensa de la Independencia Judicial y de la Dignidad" (2012) signed by over 200 Spanish judges on 29 November 2012 on the occasion of the pardon granted to four catalan police (Mossos d'esquadra) who were serving prison sentences on

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prisoners can be seen as a new form of impunity and a denial of the ultima ratio principle, as a demise of reason, ratio. It deprives the legislature and the judiciary of their basic roles in securing the operation of the principle and reinstates the regum element in the ultima ratio regum principle.

3. Conclusion. Models of Ultima Ratio Regum as criminal law conceptions

29. Ultima ratio regum was inscribed on the cannons of the "Sun King". When other means failed, military force stepped in to impose a solution. In reality there was no ratio but sheer force: ultima ratio was the end of ratio. The expression was carried into the criminal law, which was thought to be the last resort to address serious crimes. Criminalisation must be kept to the strictly necessary and not abused for other purposes even if the conducts addressed are undesirable. We have also seen that the judicial application of criminal law is to be inspired by this principle of restraint. But the interpretations of the principle can follow different paths depending on whether the emphasis is placed on the ultima, on the ratio or on the regum.

- Emphasizing the **ultima**, trying everything first before one resorts to criminalisation, could lead to a minimal criminal law and perhaps even to abolitionism, but we have already noted that there is no conceptual link between ultima ratio and minimal criminal law; only with its restrictive use. Ultima ratio does plead against extensive or expansive recourse to criminalisation,

- Emphasizing the **regum** does seem to point to authoritative solutions, to the need to protect the sovereign's interests, and can be related to the raison d'état and to risk prevention and the security constitution,

- Emphasizing the **ratio** finally seems to point on the need to justify recourse to the criminal law, on the basis of utilitarian or deontological arguments, and to the application of the criminal law in accordance with such principles, where the law is accompanied by other discourses within the domains of practical reason.

30. This contribution has been very much focused on a traditional model of ultima ratio regum assuming one single, albeit plural, complex, federal and diverse, institutionally organised society and one State with its criminal law[32]. However, great difficulties and challenges to the principle now come from transnational and supranational developments very much related to globalisation and the dwindling possibilities of control on the hands of the states. Offenders, criminals, can move freely in a global space with sometimes only virtual and other times physical, but always porous, frontiers. They can also exploit differences between state jurisdictions to escape effective prosecution in one state. "Since the gradual emergence of the modern nation state in the seventeenth and eighteenth centuries and its conceptualization in the writings of Hobbes, Locke, Montesquieu, and Rousseau, providing security to citizens, controlling access to the national territory, and administering justice have all belonged to the basic justification and legitimacy for the existence of the state. The fact that since the 1990s the EU has developed a steadily increasing role in these fields means that it has entered into one of the last and most sensitive formerly exclusive domains of member-state competence – not by replacing the member states as primary providers of internal security and justice, but by emerging as an increasingly important additional provider of these essential public goods – and can be regarded as a process of major 'constitutional' importance for the EU system" (Monar 2012, p. 613). This additional character of EU law is achieved by mutual recognition of judicial decisions and by harmonization

grounds of torture. The manifest asserts: "El indulto implica afirmar la falta de necesidad de la ejecución de la pena. Sólo se justifica cuando el cumplimiento de aquélla no desempeñe finalidad preveniva, resocializadora o retributive alguna, o cuando resulte desproporcionada."

[32] There are federal systems like the USA where each federated unit has its own criminal law; there are also federations like Germany or Switzerland with a single, shared criminal law. Finally there are plurinational but not federal States like the UK with a plurality of criminal justice systems.

of state criminal laws. At first sight it would seem that ultima ratio would have a special impact at the level of harmonization since it is mostly concerned with the legislator and legislative policy: it would call for a self-restraint on the part of the European legislator to limit the pre-definition of new crimes to the strictly necessary minimum[33] or ideally, even achieve a situation where all member states pre-defined a minimum common set of crimes, and no more, allowing each jurisdiction, according to their local sensibilities and legal cultures, to define the penalties for each of these with deference to the principle of subsidiarity. Still, ultima ratio also has a role to play in relation to mutual recognition, for, if all state legislators showed respect for the principle and restraint in limiting the pre-definition of crimes – tipification - to the minimum, it would be easier for the different prosecutors and judiciaries to trust each other. In spite of experiences like the adoption of the European Arrest Warrant[34], in the absence of a shared legal culture mutual trust cannot be imposed; it has to be carefully earned. Mutual trust is a prerequisite for mutual recognition, and a shared conception of ultima ratio regum that emphasised the ratio component would indeed be a facilitating factor in securing mutual trust and towards a shared minimum legal penal culture.

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[33] The EU has adopted a range of Framework Decisions, and now Directives, providing for the common definition of the constituent elements of the most important types of serious cross-border crimes like terrorism, human trafficking, illicit drug-trafficking, paying more than just lip-service to the principle of ultima ratio. It has even provided minimum maximum penalties, over-stepping into the domain of proportionality. In the case of terrorism the effect has been to impose a transplant in the type of terrorism, which not all member states recognised as an independent type or crime.

[34] See generally the contribution to this volume by Haggenmüller (2013), who suggests that the EAW should be the ultima ratio of international penal cooperation.

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