

The Basque Issue and the Spanish Rule of Law: Report on the UPV/EHU “Ultima Ratio” Seminar

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Abstract

This paper resumes the seminar organised by the International Institute for the Sociology of Law, the University of the Basque Country and the Basque Studies Society too in San Sebastian Campus and Oñati during the 2nd and 3rd of February 2012, with the presence of certain relevant experts from academia and practitioners. The ultima ratio principle was analysed from different perspectives and, in particular, within the complex context of implementation of the Rule of Law within the Basque Country.

Key words

Ultima ratio principle; human rights; criminal law; constitutional law; EU framework

Resumen

Este artículo resume el seminario organizado por el Instituto Internacional de Sociología Jurídica, la Universidad del País Vasco y Eusko Ikaskuntza - Sociedad de Estudios Vascos en el Campus de la Universidad del País Vasco de San Sebastián y en Oñati durante el 2 y 3 de febrero del 2012, en el que se contó con la presencia de relevantes expertos de la comunidad científica y profesionales. Se analizó el principio de ultima ratio desde diferentes perspectivas, y, en particular, dentro del complejo contexto del desarrollo del estado de derecho en el País Vasco.

Palabras clave

Principio de ultima ratio; derechos humanos; derecho penal; derecho constitucional; marco de la Unión Europea

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1. Introduction to the seminar

The seminar organised by the IISL, the University of the Basque Country (ehuGune) and the Basque Studies Society, with financial support from the Spanish Ministry of Science, took part in San Sebastian Campus during the 2nd February 2012, with the presence of certain relevant experts from academia and practitioners.

As any relevant democracy, the Spanish one enjoys since 1978 those tools that define the concept of a State under the Rule of Law. The main pillars of this system are the separation of powers and the respect for Human Rights both acting as the real guarantee of individuals.

During the last years, and mainly due to the policies and regulations enacted by the Popular Party (PP) and the Socialist Party (PSOE), we have been suffering a very dangerous risk and involution within the separation of powers which is somehow very difficult to appreciate nowadays in Spain.

Thereby, we have been suffering a clear tendency to foster a sort of "single thinking" in Spain, in front of those minorities who are not well seen from the Spanish Government. That was one of the main viewpoints underlined by the report of **Mariano Ferrer** (Journalist) within a context of expansive use of criminal law including a particular path of the mass media fostering the idea of fear and security among our society.

Rafael Sainz de Rozas, Lecturer on Criminal Law at the University of the Basque Country and Criminal law expert at the Ararteko (Basque Ombudsman), analysed the current troubles to apply the "Ultima ratio" principle out of the boundaries of criminal law. He quoted the clear situation of risk for that principle nowadays. To avoid the aforementioned situation, he proposed to enforce law with rationality, security and, in any case, under the umbrella of Human Rights as a clear limit of the Rule of Law.

Juan Calparsoro, General Prosecutor of the Basque Country, focused in the current tendency to enforce criminal law towards the protection of new and complex objects, such as the environment or collective rights, inter alia. The risk of this tendency is an increasing use of prosecutors to pursue and research in any issue within a context of complex technical aspects to deal with.

Miguel Castells, practising lawyer based in San Sebastian, gave explanation of the different examples of the erosion of the "Ultima ratio" principle within an increasing use of precautionary measures to bring people into jail, the criminal policy against ETA members to send them far away from their respective local jails, the use of new criminal offences based on mere opinion and the procedural special jurisdiction of the Spanish National Court, *Audiencia Nacional*, based in Madrid in breach of the natural court stated by modern Constitutions.

At the end of the first session of the seminar, **Nekane San Miguel**, Judge based in Bilbao's Courts, gave us a whole general approach to the new types of criminal proceedings and, once again, the increasing use of those ones based only on the premises or mere risk instead of the usual objective requirements. In that sense, she underlined the expansive use of criminal law against the "Ultima ratio" principle and also in breach of constitutional civil rights and guarantees. There is, in fact, a general use within the Basque context of the police reports as a main ground to act at the criminal jurisdiction against the procedural rights of the defendant

During the second half of the workshop, **Juan Igartua**, Professor of Philosophy of Law at the University of the Basque Country, reported on the importance of this principle within the application of Law and, in particular, in terms of the value given by Judges to the different evidences that may grant a final judgment based on the "Ultima ratio" principle.

Patxi Etxeberria, Professor of Procedural Law at the University of the Basque Country, analysed a remarkable view of the judicial cooperation EU system in this regard. He focused on the importance of the EU tasks concerning "Ultima ratio" application and data protection or the precautionary measures of prison for foreigners in EU member States. Even though there is already a transfer of sovereignty towards the EU, there are still important boundaries and limits normally made by member States.

The vision coming directly from the Administrative Courts was supported by Judge **Carlos Coello** who established a whole framework of relations among Administrative Law and Criminal Law to be mutually applied by the Administrative jurisdiction Courts in Spain. All the aforementioned is drifting also towards the very expansive trend of Criminal Law to new fields traditionally regulated by Administrative Law.

Javier Saenz De Pipaon, criminal lawyer based in Madrid, and **Ignacio Muñagorri**, Professor of Criminal Law at the University of the Basque Country, agreed in the general situation of "ad hoc" criminal law within different cases concerning Basque issues in general. That is the case of the banning of the main left wing party advocating for independence of the Basque Country: Herri Batasuna and its successive heirs since 2003, right now with a new brand and Statutes against any sort of violence. This new party is called "SORTU" and has formally declared to be against any sort of violence in its Statutes. Meanwhile the Supreme Court decided to declare it banned according, once again, to the Spanish Law in force since 2003 regulating political parties. This judgment has been quashed in June 2012 by the Spanish Constitutional Court on a special protection (amparo) appeal. He quoted as well the cases of the public popular consultation proposed by the Basque Premier in 2008 and forbidden by the Constitutional Court, the actions against political conversations with ETA, the Judgment against Batasuna's leader Arnaldo Otegi or the criminal policies developed against ETA's members to be disseminated around the jails of Spanish geography. In both views there is a huge tension between Human Rights and the State violence who should require a clear step forward to protect citizens against the arbitrariness of the State.

2. "Ultima ratio" and human rights

In my view, any State has the right and the tools to defend its sovereignty under the Rule of Law and according to international law. But meanwhile, the essence of a Constitution according to modern Law are Human Rights and democratic principles. One of these is in fact the "Ultima ratio" principle.

Spain and its Constitution are obliged as well to follow these rules (article 10 of the Spanish Constitution, the 1950 European Convention on Human Rights and the 1966 International Covenant on Civil and Political Rights, inter alia), but is rather clear that the Spanish Government according to its recent policies has been acting in breach of these rules at the domestic level. There are, at least, two current examples with the Spanish Constitution and the current regulations in force to demonstrate that the separation of powers in Spain has disappeared or is about to do so.

2.1. *The banning of Batasuna*

According to the Spanish constitutional system, a political party may only be banned through a criminal judgment (articles 6, 22 and 55 of the Spanish Constitution, Spanish Criminal Code and articles 14.7, 15 and 25 on the rights of political participation, of the International Covenant on Civil and Political Rights 1966). In my view, none of those requirements have been fulfilled; "Batasuna" was banned by means of an administrative ad hoc judgment, an ad hoc court and interpreting a legal framework promoted for these purposes only. Even before the Constitutional Court giving the OK to the final appeal in 2003, its former President,

Jiménez de Parga, accepted and assumed that judgment in front of the press stating its "political" necessity.

There is, indeed, a constitutional procedure for banning political parties due to the eventual criminal behaviour of any of its members. This does not mean to defend Batasuna, but to defend the Constitution and its guarantees. In any case, the applicable case law until 2011 upholds the ban; even the European Court of Human Rights (Judgment of 30-6-2009) accepted the interpretation made by the Spanish Constitutional Court in this regard.

2.2. Closure of the Basque newspaper "Egunkaria"

A restriction on the right of public expression and information is only possible in the Spanish system through a criminal judgment or by the government declaration of state of alarm, or exception. None of those situations occurred, contrary to articles 20 and 55 of the Constitution, the criminal code and articles 9 and 19 of the International Covenant on Civil and Political Rights (1966).

We might be facing an exceptional enforcement of the Law in certain issues. I do sincerely believe that the people who live under the threat of ETA survive under exceptional circumstances; in a different sense, the Basque issue and the Basque society do live in Spain under a particular and, sometimes, exceptional regime fostered during the last years. But of course, one thing is an exceptional regime promoted by a terrorist organisation and a different one is an under-covered exceptional regime promoted by a government. They are very different things.

The precarious situation of the Spanish Rule of Law could be divided in three different branches: Human Rights¹, the separation of powers and the involution in decentralisation. Curiously, the three issues do have general examples within Spain, but also remarkable data linked with the vision of the Basque issue assumed by the two main Spanish parties.

At the same time, the Spanish parliament approved an incredible amendment in the criminal code in order to prosecute the Basque Premier due to his intention of convoking a public consultation in the Basque Country on the mentioned Proposal for public consultation (2008), once approved by the Basque Parliament².

Regarding the *ad hoc* amendment on the criminal code, the objectives and considerations were very similar. The inclusion of this criminal offence by reason of the intention of the Basque Premier for convoking a public consultation was a direct violation of articles 9 y 25 of the Spanish Constitution, and 15 and 19 of the International Covenant on Civil and Political Rights (1966).

All these situations did not foster any advance towards the resolution of the Basque conflict in both sides of the Pyrenees, while there is an important part of Basque society with serious restrictions for political participation within the Spanish level since 2003³.

¹ See for instance the Judgment of the European Court of Human Rights (ECHR) (2010) in the case of Mikel San ArgimiroIsasa (case 2507/07), Judgment of 28-9-2010. See also the recent Judgment of the ECHR (2012a) in the case of Otamendi v. Spain, Judgment of 16-10-2012. See also the ECHR (2012b) Del Río v. Spain (42750/09) Judgment, 10-7-2012.

² Afterwards, the legal approach by the Spanish Government and the Constitutional Court made impossible the Basque Parliament Act for a consultative referendum in 2008 Judgment 103/2008 of the Spanish Constitutional Court (STC 103/2008). (Tribunal Constitucional de España 2008).

³ Finally in May 2011, the new coalition Bildu took part in the provincial and local elections with left nationalist, EA and Alternatiba having great results in the whole Basque Country, becoming the second force after the PNV (Basque National Party) and even clearly winning in Gipuzkoa, in San Sebastián and in most of the town councils of Gipuzkoa. In the Basque Parliament elections (21-10-2012) the seats were as follows: PNV (27), EH Bildu (21), PSOE (15), PP (9), UPD (1).

We should underline, at this point, that the electoral list of Batasuna for the European Parliament was legal in France during 2004 elections but not in Spain. Another peculiar example for EU law.

In all this complicated context, a very relevant part of the Basque society might keep on claiming for self-determination according to the new developments of International Law and pursuant to the recognition of Basque Historical Rights or Titles made by the 1978 Spanish Constitution. Indeed, the non-compliance of Spain with their constitutional system provided is more than a legal reason to foster the path for Basque self-determination through the compliance with Basque Historical Rights.

This general blockage should be removed by the statutory decision of the Nationalist Left (SORTU) against any sort of violence and the appeal before the Constitutional Court accepted finally by the Spanish Constitutional Court in its Judgment on Sortu of June 2012. Therefore the path is open to this new political option in favour of independence of the Basque Country.

The so called Plan B for the left wing parties was based on the new coalition Bildu with great results at the 2011 elections (formed by Batasuna, EuskoAlkartasuna&Alternatiba). Fortunately Bildu was also present in November 2011 general Spanish elections with a new brand named Amaiurand with a broader base composed by: Batasuna, EA, Alternatiba&Aralar. This coalition was renamed EH Bildu for the 21-10-2012 elections to the Basque Parliament becoming the second force with 21 seats after the PNV⁴.

Within such a complex situation, could we find any role for the EU to play at a context of risk for the "Ultima ratio" principle in Spain? That might be a question for a long and also complex debate on its political role on an issue affecting two EU member States like Spain and France.

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