

The Role of the Ultima Ratio Principle in the Jurisprudence of the Norwegian Supreme Court

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Frøberg, T., 2013. The role of the ultima ratio principle in the jurisprudence of the Norwegian Supreme Court. *Oñati Socio-legal Series* [online], 3 (1), 125-134. Available from: <http://ssrn.com/abstract=2200885>



Abstract

The article examines how the ultima ratio principle can be used to analyze and criticize the argumentation of the courts in cases concerning the interpretation of criminal statutes.

Key words

Criminal law; Principle of legality; Thin ice principle; Johs. Andenæs

Resumen

Este artículo analiza la forma en la que el principio de ultima ratio se puede utilizar para analizar y criticar los argumentos de los tribunales en casos relacionados con la interpretación de la legislación penal.

Palabras clave

Derecho penal; principio de legalidad; principio de precaución; Johs. Andenæs

Article resulting from the paper presented at 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). I am grateful to the participants as well as Anders Løvlie and Synnøve Ugelvik for their comments.

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1. Introduction

In this article, I argue that the ultima ratio principle can be used to evaluate the argumentative patterns employed by the courts in criminal law adjudication. My point of departure is a shift in the Norwegian Supreme Court's approach to the interpretation of criminal statutes in the years following the Second World War. While the Court previously subscribed to what we can call a *narrow interpretation principle*, under which doubt as to the law shall benefit the accused, it now consistently holds that anyone who commits an act which borders on illegality does so at his own peril. I refer to this latter standard as the *thin ice principle*.¹ The change in the Court's interpretive approach can largely be attributed to academic criticism of its earlier practice.

I argue that the criticism of the narrow interpretation doctrine did not pay sufficient attention to the fundamental values encapsulated in the ultima ratio principle, and thus that the Supreme Court's about face was ill advised. While the analysis focuses on an aspect of substantive Norwegian criminal law, my basic argument is of a general nature. The relevance of the ultima ratio principle is not limited to the question of which acts should be criminalized. The principle should also come into play when discussing how to interpret criminal statutes.

In section 2 below, I clarify the basic concepts that are used in the following analysis. I then, in section 3, give an account of how the Norwegian Supreme Court's way of interpreting criminal statutes changed in the post-war years. In section 4, I argue that the ultima ratio principle affords good grounds for abandoning the current approach.

2. The basic concepts

2.1. 'Principle'

Given the ambiguity of the word 'principle', some preliminary clarifications are in order.² In the following analysis, the word will be used in two different senses, which are distinguishable by what is being referenced. The general ambiguity resulting from the multiple senses of the term in legal usage should therefore not taint the following analysis.

When referring to particular argumentative patterns in Norwegian criminal law, for instance in discussions of 'the principle of narrow interpretation', the word 'principle' merely denotes a general trend in the Court's reasoning. These patterns are 'principles' in the sense that they provide a broad synthesis of the Court's arguments in concrete cases. With regard to the interpretation of statutes, one can for instance speak of a principle of preferring the ordinary meaning of the statutory language.³ Occasionally I use the term 'doctrine' interchangeably with 'principle' in this sense.

When referring to the notion of ultima ratio itself, the word 'principle' points to the values that underpin, and thus rationalize, a particular argumentative pattern. Viewed in this way, a particular way of arguing can be seen as a concretization of the value; a vehicle giving it legal effect.⁴ In this sense, the principle can be put forward as a justification for arguing in a particular way. Suppose someone asks why we should prefer the ordinary meaning of the statutory language. We could reply: 'Because we should respect the intentions of the legislature, and this intention is reflected in the plain meaning of the statutory language.' Or we could

¹ The label "narrow interpretation" is borrowed from Gallant (2009, pp. 275-276). On the notion of "the thin ice principle", see section 3 below.

² For an account of the different uses of the term 'principle', see Halpin (2004, p. 6 *et seq.*)

³ On the prevalence of such a principle of statutory interpretation, see the comparative studies in MacCormick and Summers (1991).

⁴ This draws heavily on the account of legal principles given by MacCormick (2005, p. 193).

say: 'The average citizen will read the statute with its ordinary meaning in mind, and we should not undermine his or her legitimate expectations by interpreting it differently.' In the first instance, we contend that the democratic authority of parliament to regulate behavior through legislation supports our way of reading the statutory language. In the second, we appeal to the public's need for legal certainty.⁵ We are in both cases invoking value-considerations to justify a particular interpretational doctrine. My second use of the word 'principle' refers to such values.

2.2. 'Ultima ratio'

The ultima ratio principle is traditionally conceptualized as a limitation on which acts the State should criminalize. In brief, the principle states that criminal sanctions should be the 'last resort' in combating unwanted behavior.⁶ The scope of the criminal law should therefore be limited to instances where other legal remedies are assumed to be inadequate.⁷ This assertion is premised on the fact that criminal sanctions themselves must be considered 'evils' (Minkkinen 2006, pp. 523-524), and therefore should only be invoked in the last instance.

While the ultima ratio principle may seem quite commonsensical at first glance, its practical implications are far from clear. I will briefly sketch some of the problems that have been highlighted in legal literature, before clarifying my own approach.

Firstly, there's the question of the principle's status: is it a moral or a legal constraint?⁸ Secondly, and irrespective of how one replies to the first query, there's the question of whether the principle's relevance is limited to the legislature, or if it also applies to judges or prosecutors. Thirdly, one has to ascertain what should count as a *criminal* sanction (Jareborg 2005, p. 526). While imprisonment clearly is a sanction *sui generis*, the dividing line between monetary sanctions classified as 'criminal' and those classified as 'administrative' is often arbitrary.⁹ This makes a formal conception of 'criminal sanctions' unsatisfactory, which in turn gives rise to a large specter of difficult delimitations. Finally, there's the question of when the use of the criminal law really is the *last* resort, i.e. what criteria can be used in ascertaining whether the principle's requirements have been met. Naturally, the answers one gives to these questions will be intertwined.

I will primarily focus on what constraints the principle places on the adjudication of the courts. The principle may, in this context, apply both to the determination of which acts are punishable, and to the determination of the appropriate sentence. I will, however, only be discussing the former.¹⁰ Because of the difficulties with delimiting what kind of sanctions should fall within the principle's ambit, I will only discuss the application of statutory provisions where imprisonment is an available sanction.

The judiciary does not criminalize acts in the same way as the legislature.¹¹ Under Norwegian law, this follows directly from article 96 of the Constitution, which states that criminal sanctions must be based on an act of parliament. Despite this, the

⁵ Compare MacCormick (2005, p. 126) on what arguments can be put forward in favor of choosing the ordinary meaning of statutory language.

⁶ Both Husak (2005) and Jareborg (2005) use this formulation of the principle as the title of their articles.

⁷ See e.g. Nuotio (2010, p. 255), who links ultima ratio to the notion of the subsidiary character of criminal law.

⁸ As noted by Minkkinen (2006, p. 530-531), the Anglo-American approach seems to be to understand ultima ratio as a moral principle, while continental lawyers often view it as a legal principle.

⁹ The enormous amount of case law from the European Court of Human Rights (ECtHR) on what constitutes a "criminal charge" under the Convention is an apt illustration of this point.

¹⁰ On the principle's application to sentencing, see Minkkinen (2006).

¹¹ The common law tradition is something of an exception. However, English courts have in recent years repeatedly stated that they no longer have the power to create new offences or abolish old ones (Ormerod 2008, p. 19).

courts still wield considerable influence on the scope of criminal responsibility.¹² I will confine the discussion here to their role as authoritative interpreters of statutes, thereby bracketing other ways of influencing the content of the criminal law, for instance the creation of new defenses.

Like any statute, a criminal provision may be couched in vague or ambiguous terms, its grammatical structure may be unclear, etc.¹³ In such situations, the court functions as a deputy legislature, mapping the precise boundaries of the criminal law within the grey area left open by parliament. Since there's rarely a definitive or 'right' answer to such interpretive questions, the courts often enjoy considerable discretion when delimiting the boundaries of criminal liability. The choice between competing interpretations will often be value-laden,¹⁴ resembling the way in which the legislator's decision to criminalize often involves a choice between competing values.

These similarities should not be exaggerated: a judge must take heed of a myriad of institutional constraints that don't apply to the politician. A judge is, for instance, often obliged to respect the value-choices already made by the legislator. He may for example believe that it is not morally wrong to administer a lethal dose of medication to end the suffering of a terminal cancer patient, but still consider such an act to be punishable as murder under the current criminal law. But since these institutional factors often leave considerable room for recourse to values, there are at least obvious parallels between the 'legal' and 'political' determination of the content of the criminal law. It's therefore pertinent to ask whether – and, if so, how – the ultima ratio principle can play a role in the adjudicative context.

3. The transition from the narrow interpretation principle to the thin ice principle in Norwegian criminal law

Taking a broad view of the Norwegian Supreme Court's approach to statutory interpretation in difficult cases, one may say that it attempts to strike a balance between two competing principles. On the one hand, the Court tries to uphold the principle of *lex certa*, which constitutes one of the central facets of the principle of legality. This principle prescribes that the foundation of a criminal conviction must be stated with some precision in the relevant sources of law. On the other hand, the Court also holds that the criminal law's uncertainty should not benefit the accused. In other jurisdictions, this is sometimes called *the thin ice principle*, in accordance with the metaphor that those who skate on thin ice should not expect to find a sign marking the exact spot where they will fall in (Ashworth 2009, p. 63). I will use this label for the purposes of this article.

While there is no explicit statement of the *lex certa* principle in the Norwegian constitution, it is said to follow from the above-mentioned provision in article 96 (Jacobsen 2009, pp. 320 *et seq*). Under ECtHR jurisprudence, the principle is also embodied in The European Convention on Human Rights (ECHR) article 7.¹⁵

The thin ice principle states that anyone who is aware that his or her actions border on illegality, can not rely on the law's uncertainty as a defense against conviction. In Norwegian law, this notion is encapsulated in two rules. The first states that doubt as to what the law is, does not benefit the accused. The second establishes that mistakes of law on the part of the accused do not negate blame.¹⁶ While the first rule concerns which acts and omissions constitute illegal behavior, and thus

¹² See also Ashworth (2009, p. 8).

¹³ Additionally, the scope of criminal liability may, under certain conditions, be extended by analogy beyond the plain meaning of the statutory language. I won't broach this subject here.

¹⁴ On the prominent role of value judgments in the interpretation of criminal statutes in Norwegian law, see Høgberg (2000).

¹⁵ See for instance European Court of Human Rights (1996, para. 29).

¹⁶ The accused may escape punishment if he is able to show that his mistake was 'excusable', but this standard has been interpreted so strictly as to only be applicable in exceptional circumstances.

goes toward establishing the *actus reus*, the second concerns whether the accused acted with the necessary *mens rea*.¹⁷ Taken together, these rules make maneuvering along the edge of criminal responsibility a hazardous enterprise.

The interplay between the principle of *lex certa* and the thin ice principle creates an interesting dialectic. On the one hand, interpretation of criminal statutes must adhere to the ideal of *lex certa*. At the same time, anyone who oversteps the blurry lines of a criminal norm is liable for punishment, even if the interpretation of the statute was contentious enough to cause a 3 – 2 split vote in the Norwegian Supreme Court.

This dynamic is for instance apparent in obscenity cases. In a 2005 ruling, the Supreme Court emphasized the importance of *lex certa* when interpreting the pornography rule in the General Civil Penal code section 204, which vaguely defines pornography as 'offensive sexual depictions'.¹⁸ It found that a magazine which contained pictures of explicit consensual sex between adults did not fall foul of this rule. The Court added that this decision had not been difficult.¹⁹ This reasoning echoes the 1958 decision concerning a book written by Agnar Mykle. The question before the Supreme Court in that case was whether the book could be seized, which boiled down to whether its contents were obscene. In a 12 – 3 decision, the Court found that a seizure was not warranted. In the process of doing so, it also underlined that the *lex certa* principle curbed the ambit of the obscenity statute.²⁰

Both decisions seem to give credence to the standing of the *lex certa* principle in cases concerning vaguely worded statutes. However, in 1984, the Court found that the owner of a video store who had rented out a ten minute cartoon which showed Snow White engaging in some decidedly un-Disney-like activities with the seven dwarves, was 'clearly' peddling obscene materials.²¹ As to his attempt to claim a mistake of law, the Court emphasized that an effective enforcement of the obscenity statute required the availability of such a defense to be limited to 'exceptional circumstances'. Speaking for the Court, justice Aasland added that he did not see anything problematic with the notion that a person who moves near the ambit of the criminal law does so at his own peril.²²

Which implications does the interplay between these two principles have for the criminal law? A dogmatic lawyer might say that the dialectic I have tried to explicate is erroneous. What is in fact happening in these cases is that the *lex certa* principle, taken together with other arguments, affords a certain margin of security for those who are ostensibly within the scope of the wording of the statute. Outside of this protective sphere, the thin ice principle prevails. The problem with this seemingly coherent ordering of the two standards is the presupposition that the dividing line can be explicated *ex ante*, when one is in fact often only able to establish it *ex post*. This affords judges considerable freedom to choose whether to convict or acquit in any given case.²³ What we are dealing with is thus not a case of the Court carefully delimiting the field of application of two standards, but a

¹⁷ Following Fletcher (2007 p. 43 *et seq*), the Norwegian criminal law doctrine can be said to employ a quadripartite system, which draws on the bipartite system traditionally found in Anglo-American criminal law between *actus reus* and *mens rea*, but separating the first into (i) the object of the crime itself and (ii) other objective factors (e.g. self defense) and the second into (iii) the subject of the offense (excluding for instance the mentally disabled) and (iv) the subjective side of the liability (*dolus* and *culpa*). There are some rumblings in Norwegian criminal law doctrine as to whether this systematization is theoretically adequate, a question I will not pursue here.

¹⁸ Norsk Retstidende 2005 p. 1628 (section 16).

¹⁹ Norsk Retstidende 2005 p. 1628 (section 31).

²⁰ Norsk Retstidende 1958 p. 479 (p. 482).

²¹ Norsk Retstidende 1984 p. 1016 (p. 1018).

²² Norsk Retstidende 1984 p. 1016 (p. 1019).

²³ Høgberg (2007, p. 31) states that the court has repeatedly switched between these two argumentative patterns in the post-war years.

textbook example of speech acts (*parole*) generated in a language-system (*langue*) that always allows for the generation of counter-arguments.²⁴

Before the Second World War, the Court frequently emphasized that any doubt as to the content of the criminal law should benefit the accused (Høgberg 2007, pp. 22 fn. 4). The Court thus viewed doubt – whether concerning the facts of the case or the content of the applicable legal rule – as something that should count towards an acquittal. In the post-war years, however, only doubt regarding the facts are viewed in this way.

This marked change in the Court's approach can largely be attributed to the criticism put forward by Johs. Andenæs in his doctoral thesis on criminal omissions (Andenæs 1942, pp. 224 *et seq*). His success in changing the Court's opinion may certainly in part be put down to the persuasiveness of his arguments. However, it is also worth emphasizing that Andenæs, in the years following the publication of his thesis in 1942, quickly established himself as *the* central criminal law scholar in Norway, a status he would enjoy up to his death in 2003.²⁵ He cemented this position with his enormously influential book on the general part of the Norwegian criminal law, which contains a distilled version of his views on the principle of narrow interpretation (Andenæs 1956, pp 101-102).²⁶ One can only speculate, but it's plausible that Andenæs' immense stature influenced the abandonment of the earlier interpretive doctrine.

Andenæs' arguments against the traditional approach fall into two groups: Those questioning whether the doctrine can be justified at all, and those questioning whether it can be operationalized. I will concentrate on the former.²⁷ Andenæs (1942, p. 224 *et seq*) begins his discussion by distinguishing doubt regarding the law from doubt regarding the facts of the case. If a judge disregards uncertainty with regard to factual circumstances, he risks convicting the accused for an act he did not commit. Not so in the case of legal uncertainty: 'doubt' here only signifies that there is no clear rule governing the matter, typically due to an absence of case-law. Therefore, one cannot justify the narrow interpretation doctrine by pointing to the rationale underpinning the *in dubio pro reo* principle. This observation is undoubtedly correct.

Andenæs then considers whether the narrow interpretation principle can be justified on separate grounds. It may be argued, he contended, that it satisfies some conception of justice, since it may appear unfair to convict someone for an act that the legislation did not expressly prohibit. But in Andenæs' view, this argument gave considerations of justice too wide a berth: the mere existence of doubt should be ample warning, especially considering that acts bordering on illegality are often morally dubious.

Andenæs' views have subsequently been adopted by the majority of Norwegian criminal law scholars.²⁸ The Supreme Court has also explicitly rejected the doctrine of narrow interpretation. In a 1984 decision, the Court stated that the doubt in the case concerned 'the legal question of whether the proven factual circumstances should be viewed as criminal negligence. With regards to this question, there is no principle according to which doubt should benefit the accused'.²⁹ This decision has

²⁴ In this respect, this facet of the Norwegian criminal law discourse resembles Koskenniemi's structuralist account of international legal reasoning. On this, see Koskenniemi (2005, p. 8). However, unlike his basic concepts *apologism* and *utopianism*, the *lex certa* principle and the thin ice principle do not directly define each other's meaning.

²⁵ See Jacobsen (2010 p. 257), who characterizes him as having 'more or less personified the Norwegian criminal law science'.

²⁶ See also the current edition, Andenæs (2004, pp. 114-115).

²⁷ Andenæs' view is also discussed by Høgberg (2007, p. 22 *et seq*).

²⁸ See for instance the works cited by Høgberg (2007, p. 21, fn. 3).

²⁹ Norsk Retstidende 1984 p. 91 (p. 92, my translation). The original text reads: 'Tvilen gjelder [...] det rettslige spørsmål om hvorvidt det faktiske forhold som er funnet bevist, er å anse som straffbar uaktsomhet. I dette spørsmål gjelder ikke noe prinsipp om at tvilen skal komme tiltalte til gode.'

been quoted as precedent in later cases.³⁰ Note that the narrow interpretation principle still figures in the Court's argumentation, but now in negative form: there is no such principle, and therefore doubt may be resolved to the detriment of the accused. The principle's argumentative function has thus been turned on its head.

4. The critical potential of the ultima ratio principle

The question now becomes whether the ultima ratio principle furnishes a basis for criticizing Andenæs' rejection of the narrow interpretation doctrine, and therefore also the court's current interpretive approach.

It is worth noting that Andenæs reduces the values underpinning the narrow interpretation principle to the concept of foreseeability; it's this value he's referring to when speaking of 'considerations of justice'. His argument is in essence that the law already furnishes a sufficient basis for securing predictability, through the principle of legality (of which the aforementioned *lex certa* principle is one central element).

A principle stating that one should favor the most lenient interpretation can certainly aid the citizen in predicting which acts fall under the penumbra of the criminal law. However, this doctrine is superfluous next to the principle of legality only if foreseeability is the *sole* value by which it can be justified. In this respect, it is crucial to note that such an approach also consistently points towards choosing the least expansive interpretation of the criminal law. In this respect, it makes the use of criminal sanctions the *ultima ratio* also in the adjudicative context: if the arguments in favor of sanctioning an act are not sufficiently strong to remove at least qualified doubt as to whether this interpretation should prevail, an adequate justification for using such measures has not been given. What we're thus trying to limit is the use of criminal sanctions *per se*. We're not, as in the case of the principle of legality, simply trying to ascertain whether the use of such sanctions was sufficiently predicable.

This distinction should not be overstressed. Since the narrow interpretation principle establishes a method for dealing with *doubt* regarding the content of the law, it will come to bear on cases where the possibility of accurately predicting which acts are criminal is at least somewhat impaired. But this does not entail that both values delimit the ideal scope of the criminal law in the same way. One may be inclined to accept Andenæs' contention that doubt shrouding a criminal statute is an adequate warning to the prudent citizen, and still maintain that the employment of criminal sanctions, with all its damaging side-effects, has not been adequately defended in cases where there is at least qualified doubt as to what the law requires. More succinctly, the ultima ratio principle justifies the restrictive interpretation of the criminal law in cases where the standard of foreseeability flowing from the principle of legality is satisfied.

The above-mentioned considerations can also be brought to bear on the interpretational canons codified in the Rome statute of the international criminal court. Article 22 subsection two reads: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In the case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.'³¹ As I have argued above, these two sentences can be justified separately: the first by reference to the basic requirement of predictability, the second by reference to the requirement that the need for criminal sanctions be

³⁰ See for instance the majority opinion in Norsk Retstidende 2012 p. 387 (paragraph 22).

³¹ In the jurisprudence of the *ad hoc* tribunals, one sometimes encounters this interpretational maxim under the label 'in dubio pro reo', see for instance *Tadić* (IT-94-1-A), decision on appellant's motion for the extension of the time-limit and admission of additional evidence, 15 October 1998, para. 73. For the reasons discussed in section 3 above, the resolution of doubt regarding the law in favor of the accused cannot be justified in the same manner as doubt regarding the facts.

proven authoritatively. And while these justifications will often count toward the same outcome, they are conceptually distinct and need not have the same scope.

From the point of view of Norwegian law, this appeal to the ultima ratio principle is liable to spawn a host of difficult questions. If one adopted a narrow interpretation principle, it is for instance not clear how much weight it should be attributed in the face of countervailing arguments. There are also problems with operationalizing the doctrine itself: when is the interpretation so doubtful that recourse to the principle is justifiable? While such concerns are legitimate, they are concerns of a second order. That is, they arise once one has begun to consider whether a doctrine of narrow interpretation should be adopted. The foregoing argument has been limited to the question of whether such considerations are warranted at all. While the affirmative answer given did not necessitate much in the way of analytical embellishment of the ultima ratio principle itself, the process of detailing a narrow interpretation doctrine suited for criminal law adjudication certainly will. The first step, however, is realizing that this challenge deserves the attention of legal scholars. In essence, this means accepting that the ultima ratio principle has a role to play not only in the delimitation of the scope of the criminal law by the legislator, but also when the precise boundaries of criminal statutes are drawn by the courts. By limiting the constraints we're willing to impose in the latter context to those that can be justified by the value of foreseeability, the harms flowing from the use of criminal measures are given too unbridled a reign.

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