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Position for the Formulation of the Principle of *Ultimum Remedium* in the Criminal Law Codes in Various Countries

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Abstract

This article provides a comprehensive analysis of a fundamental and universal principle in criminal law: the principle of *ultimum remedium*. This principle advocates for the use of criminal sanctions as a last resort, to be employed only when all other avenues have been exhausted. The primary focus of this study is to examine how the principle of *ultimum remedium* is articulated within the criminal codes of various countries. The countries selected for this analysis—Germany, Slovenia, Croatia, the Czech Republic, Kosovo, Montenegro, and Kyrgyzstan—were chosen randomly. By scrutinizing these formulations, the study aims to delineate an ideal framework for the application of the *ultimum remedium* principle. This research utilizes a doctrinal methodology, and through this lens, the article finds that legislators in numerous countries

frequently integrate the principle of *ultimum remedium* implicitly within provisions that address basic principles and limitations of the use of criminal law, basic principles and limitations of criminal law enforcement, basic principles and limitations of criminal sanctions, and basics of criminal accountability. Nonetheless, some countries have explicitly codified the principle of *ultimum remedium* within provisions titled "The Principle of Subsidiarity of Criminal Repression." These articulated principles serve as crucial guidelines for legislators and law enforcement authorities.

KEYWORDS *Criminal Law, Criminal Code, Ultimum Remedium*

Introduction

In criminal law there is a school of modern criminal law. According to this school, criminal law is one that can be used to overcome crime. This is in line with the development of criminal law which according to the modern school, criminal law aims to protect society from crime.[1] Talking about the criminal system certainly cannot be separated from the relationship between criminal acts and the form of responsibility for these criminal acts. [2] The function of criminal law as an *ultimum remedium* means that if a case can be taken through other channels such as civil law or administrative law, that route should be taken before operationalizing criminal law.[3] The flow of modern criminal law reflects the development of thought in efforts to overcome crime using criminal means. This flow is built on various foundations, one of which is the *ultimum remedium*.[4] Criminal law with harsh sanctions is said to have a subsidiary function, meaning that if other legal functions are lacking then criminal law can be used. It is often said that criminal law is the *ultimum remedium* or final

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[1] Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2016), 31.

[2] Shafa Amalia Choirinnisa Ridwan Arifin, "Corporate Responsibility on Money Laundering Crimes on Indonesian Criminal Law Principle," *Jurnal Mercatoria* 12, no. 1 (2019): 43–53, https://doi.org/10.31289/mercatoria.v12i1.2349.

[3] Mas Putra Zenno, "Application of the Principle of Ultimum Remedium in Corruption Crimes," *Jurnal Yudisial* 10, no. 3 (2017): 257–76, https://doi.org/https://doi.org/10.29123/jy.v10i3.266.

[4] Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana*.

remedy.[5] This principle is the antithesis of the classical view which believes "*criminalism is the only way to eradicate crime*".[6] There are various experts who support the use of criminal sanctions as a last resort, including Frank von Lizt, G.E. Mulder, Merkel, Modderman, Van Kan, Sudarto, Muladi and so on.[7] Nina Pasak believes that the principle *(ultima ratio)* can sometimes be found in criminal codes. [8]

The principle of *ultimum remedium* can be said to be a fundamental and universal principle. It is said to be a fundamental principle because it is a fundamental teaching in the use of criminal sanctions as a means of overcoming crime. Meanwhile, it is called a universal principle, because it is a teaching that is widely known in criminal law. The principle of *ultimum remedium* is fundamental and universal, providing guidance that the use of criminal sanctions must be used as a last resort in resolving legal problems that occur in society. Rudolf Wendt explained well the history of the principle of *ultimum remedium* by stating:

> *To take a closer look at the principle of the ultimate ratio scientifically, it is first useful to consider the term itself. The ultimate ratio, which comes from the Latin "ultimus" which means the last, furthest or furthest and "ratio", reasoning is usually understood as the last or final effort to achieve a goal to be achieved. Here, it is not understood as the chronological last resort but rather as the most disruptive last resort with the widest impact. The term may have originated from the famous French statesman Armand-Jean du Plessis, Duke of Richelieu, who later also became a Cardinal of the Catholic Church. Towards the end of the Thirty Years' War, under the reign of Louis However, this should not be understood as the last available effort to achieve the desired goal after all existing possibilities have been exhausted, but rather as the king's last words to decide a political conflict.*[9]

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[5] Nur Ainiyah Rahmawati, "Hukum Pidana Indonesia: Ultimum Remedium Atau Primum Remedium." *Recidive: Jurnal Hukum Pidana dan Penanggulangan Kejahatan* 2, no. 1 (2013): 39-44.

[6] Muladi Muladi, Barda Nawawi Arief, *Teori-Teori dan Kebijakan Pidana* (Bandung: Alumni, 1984).

[7] Eddy O.S. Hiariej, "Prinsip-Prinsip Hukum Pidana."

[8] Nina Peršak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts* (New York: Springer New York, NY, 2017), https://doi.org/https://doi.org/10.1007/0-387-46404-2.

[9] Rudolf Wendt, "The Principle of 'Ultima Ratio' and/or the Principle of Proportionality," *Onati Socio-Legal Series* 3, no. 1 (2013): 84.

> *"At the same time, the Spanish poet Pedro Calderón de la Barca wrote in his play "In this life everything is truth and everything is falsehood" ["En Esta Vida Todo Es Verdad y Todo Mentira"]: "Ultima razón de reyes son la polvora y las ballast", which means gunpowder and lead were the king's last resort. In German-speaking areas, the term first appeared in Prussia. It is said that from 1742 onwards, Frederick the Great's bronze cannons bore the inscription "ultima ratio regis". So the cannonball flew as his last words, the king, "the highest ratio rules". Today, the term is still used in political debates: For example in the context of the ongoing Euro debt crisis, Horst Seehofer, leader of the German Federal state of Bavaria, stated in a political meeting that expulsion would be carried out. Greece from the Eurozone should be the "main ratio". Its initial use in a military context indicated that certain methods should only be used as "primary ratios" because they could cause major damage. Therefore, its use must be considered carefully and can only be approved after all other possibilities have been tried.".*[10]

The idea of "*ratio ultima*" in its development was then adopted in a legal context. Furthermore, Rudolf Wendt, referring to various expert views, stated that in legal matters, the idea of the "*ultimate ratio*" is a basic concept in many areas of law. For example, in labor law termination of a contract by an employer is the "*ultimate ratio*", there is also the idea that in labor conflict a strike is the "*ultimate ratio*". However, the most popular application of the principle of ultimate ratio can probably be found in criminal law where theorems from modern criminal law theory make it a type of "*common property which is treated in almost every textbook or commentary*".[11]

Criminal law - because of its serious and disturbing legal consequences - should only be the "ultimate ratio" of state action. Only if other measures, for example measures based on civil, administrative or social laws, cannot achieve the objective pursued, can the state take drastic measures with criminal law, to enforce certain social behavior.[12]

The principle of *ultimum remedium* needs to be considered, because like the characteristics of principles in general that "legal principles contain ethical demands, legal principles are a bridge between legal regulations and the social ideals and ethical views of society".[13] The principle of *ultimum remedium*

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[10] Wendt.

[11] Wendt.

[12] Wendt.

[13] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: PT Citra Aditya Bakti, 2014).

contains an ethical demand that criminal sanctions should be used as a last resort, if other methods outside criminal law are not successful in overcoming crime.

Criminal law, because of its serious and disturbing legal consequences, should only be the "ultimate ratio" of state action. Only if other measures, for example measures based on civil, administrative or social laws, cannot achieve the objective pursued, can the state take drastic measures with criminal law, to enforce certain social behavior.[14] The principle of *ultimum remedium* is always discussed in class, in books, journals, proceedings, even in scientific meetings called "*seminars, congresses and conferences*" or just informal discussions by criminal law thinkers. When the principle of *ultimum remedium* was conveyed, many of the listeners were confused by the ethical demands that criminal law must be the last means of overcoming crime. But unfortunately, understanding of this principle stops there, because a deeper and broader explanation of this principle is difficult to find. So far, information about these principles has been found piecemeal in small sections of writing. It is difficult to find a complete review of this principle in the complete literature.

This article tries to outline the pattern of formulating the principle of *ultimum remedium* in the German, Slovenian and Croatian Criminal Codes. This is intended so that we all get a better explanation of this principle. Beside that in this article I examine one condition a minimalist theory of criminalization might contain: the criminal law should be used only as a *last resort*. I discuss how this principle should be interpreted and the reasons we have to accept it. I conclude that a theory of criminalization should probably include the (appropriately construed) last resort principle. But this conclusion will prove disappointing to those who hope to employ this principle to bring about fundamental reform in the substantive criminal law. I argue that the last resort principle may not help to reverse the growth of the criminal law to any degree that could not be achieved more directly and less controversially by other principles that a theory of criminalization is generally thought to include. Unless we reject others parts of conventional wisdom about crime and punishment, the application of a last resort principle is unlikely to bring about sweeping changes that theorists might have anticipated.[15]

Intentionally, criminal sanction was seen as an effective solution for the problem of crimes. On the other hand, criminal sanctions also pose as an implementation of state responsibility in maintaining public security, order and

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[14] Rahardjo.

[15] Douglas Husak, "The Criminal Law as Last Resort," *Oxford Journal of Legal Studies* 24, no. 2 Summer (2004): 207–35, https://doi.org/10.1093/ojls/24.2.207.

legal protection of its citizens. In the development of Indonesian legal system, most of the laws enacted by the state have included criminal sanction in its substance. Therefore, there is a shift in the political law (legal policy) regarding the application of criminal sanctions, which intentionally pose as a last resort (*ultimum remedium*) has shifted towards first resort (*primum remedium*). The inclusion of criminal sanctions in the legislation as *primum remedium* might result on the violation of the constitutional rights of Indonesian citizens. In addition, there is an emergence of numbers in applications of judicial review on the laws regarding the criminal sanction issues.[16]

Furthermore, it turns out that the traditions of the legal system also influence its understanding. It is evident that there are differences in understanding between the Anglo-American and German approaches. This principle in Germany is more fundamental and constitutional, as explain of Panu Minkkinen, the possibility of understanding the so-called 'last resort principle', not merely as a penological maxim, but also as a legal principle proper inferred from the principle of proportionality It is suggested that while the Anglo-American approach understands the last resort principle more in terms of a moral restraint in the use of criminal legislation, the German approach is more inclined to infer the principle from the constitutional framework of the rule-of-law state.[17] This research is more urgency because Criminal law is increasingly unable to separate its application from social welfare (social welfare). This can be traced from the history of the development of criminal law, until now in the era of democratic participation and egalitarianism. This means that the principle of *ultimum remedium* needs to be interpreted in a more contemporary way with standards of democratic and egalitarian participation, this is shown relationship between criminal justice and social welfare/regulatory policy in contemporary criminal law scholarship.[18]

This study employed library research that normative or doctrinal research, specifically legal research that employed secondar data source from library materials. This research utilized a concept approach, and a comparative law approach. A conceptual approach is an approach that departs from the beliefs

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[16] Anak Agung Dian Onita Titis Anindyajati, Irfan Nur Rachman, "Konstitusionalitas Norma Sanksi Pidana Sebagai Ultimum Remedium Dalam Pembentukan Perundang-Undangan," *Jurnal Konstitusi* 12, no. 4 (2015): 872–92, https://doi.org/10.31078/jk12410.

[17] Panu Minkkinen, "If Taken in Earnest': Criminal Law Doctrine and the Last Resort," *The Howard Journal of Crime and Justice* 45, no. 5 2006 (2006): 521–35, https://doi.org/https://doi.org/10.1111/j.1468-2311.2006.00441.x.

[18] Vincent Chiao, *Criminal Law in the Age of the Administrative State*, *Oxford: Oxford University Press*, 2018.

and doctrines developing in the science of law. At the same time, the comparative law approach was adopted for investigations to gain more profound knowledge about specific legal materials. Comparative law is not a science of law but merely a method for research that works in comparison in this research the authors use many countries to compare with Indonesian law, such as Germany, Slovenia, Croatia, Ceko, Konsovo, Montenegro, and Kyrgastan.

Comparation used in this research because Tthere are a number of countries whose formulation models are compared and then analyzed. This study, therefore, also adopts a comparative approach. In comparative criminal law, there are two models of analysis. First, hierarchical or unidirectional mode of comparative analysis. This model places a domestic criminal law system facing an external criminal law system. The comparison is not balanced. The second model is called the egalitarian or multidirectional mode of comparative criminal law. This second model developed after the American revolution. In this model there is no single criminal law system that is used as a reference. The study of the article uses this second model.[19] So, sources of research data were obtained through secondary legal sources with primary legal materials covering the 1945 Constitution of the Republic of Indonesia, the Criminal Code, and other regulations. Secondary legal materials are all legal materials or publications about law, such as legal journals, papers, or other writings following the research being studied.

The Principle of *Ultimum Remedium*: Various Development

Talking about the formulation of principles in various countries, of course it will be closely related to criminal law policy, this is related to the fact that criminal law policy is part of criminal policy. G. Peter Hoefnagels, stated that Criminal Policy is the rational organization of social reaction to crime.[20]while Marc Ancel explains the rational organization of the control of crime by society.[21] Marc Ancel's view shows that criminal policy is a rational effort taken by a society to "control" or "control" the crimes that occur. And Sudarto, stated

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[19] Markus D. Dubber, "Comparative Criminal Law in Mathias Reimann & Reinhard Zimmermann, Eds," in *The Oxford Handbook of Comparative Law (2nd Edition)* (Oxford: Oxford University Press, 2019), 1296–1300.

[20] G. Peter Hoefnagels, "The Other Side of Criminology: An Inversion of the Concept of Crime," *Beginselen van Criminologie*, 1969, 57.

[21] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana Perkembangan Konsep KUHP Baru, Cetakan Ke-1* (Jakarta: Kencana Prenadamedia Grup, 2008).

that criminal politics is a rational effort by society to overcome crime.[22] These opinions are oriented that criminal law policy making is about tackling crime. Discussions on the formulation of criminal law in various countries are presented to be used as a reference by policy makers in formulating policies in a country to achieve an ideal goal.

Furthermore, it is important to first explain the position of the principle of ultimum remedium in the flow of criminal law. This is an understanding, this principle is one of the foundations in building modern criminal law. When a country uses criminal law to tackle corporate crime, the country in this case needs to determine the flow of criminal law that underlies its criminal law system. In this case, the flow of criminal law underlies the policy of formulating the principle of ultimum remedium in corporate punishment policies.

Shidarta interprets schools as models of reasoning or a framework for juridical thinking orientation. [23]Another opinion was expressed by I.S. Susanto stated that a school of thought is a perspective (frame of reference, paradigm, perspective) used by criminologists in seeing, interpreting, responding to and explaining the phenomenon of crime.[24] The next opinion states that a school of thought is intended as a perspective or way of looking at something as a way of studying something. [25]Referring to these various opinions, the flow of criminal law is a framework for the thinking orientation of criminal law experts which is used in every criminal law reasoningin order to understand every crime prevention problem. The various schools of criminal law also show the existence of models of criminal law reasoning. Because scientifically there are various schools, various models of criminal law reasoning are available that can serve as a guide.

Muladi and Barda Nawawi Arief emphasized that these schools of criminal law are not looking for a legal basis or justification for the crime, but are trying to obtain a criminal law system that is practical and useful.[26] This means that the fundamental use of a criminal law school is as a tool for criminal law experts to ideate a criminal law system that is practical and useful. After being able to understand the position of the criminal law school to base policy formulation on the principle of *ultimum remedium*, we also need to know what the position of *ultimum remedium* is in developing countries, as will be explained in this section.

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[22] Barda Nawawi Arief.

[23] Shidarta, *Hukum Penalaran Dan Penalaran Hukum: Buku I Akar Filosofi* (Yogyakarta: Genta Publishing, 2013).

[24] Shidarta.

[25] Angkasa, *Viktimologi* (Jakarta: Rajawali Press, 2020).

[26] Muladi, Barda Nawawi Arief, *Teori-Teori Dan Kebijakan Pidana.*

1. The Principle of Ultimum Remedium in Germany

An explanation of the formulation policy of the Principle of Ultimum Remedium in Germany can be found in Gabriel Hallevy's explanation when explaining the basic structure of the principle of legality (The Basic Structure of the Principle of Legality).[27] Hallevy uses "Scientific Structure of Legal Theory" as a tool to explain the principles of legality. Hallevy explains that:

> *A scientific theory has various levels of application. The levels are hierarchical, with lower levels subordinated to the higher ones. The highest level represents the essence of the theory, generalized into a supra-principle. This supra-principle is the core of the theory, and all other levels are subordinated to it. Exceptions at this level require replacing the entire theory. From the supra-principle derive the fundamental principles that break down the supra-principle into basic legal principles, which in turn guide the application of the supra-principle. From each fundamental principle derive secondary principles. It is the secondary principles that create the legal form of the concrete application of the fundamental principles. From each secondary principle derive specific legal provisions that make the secondary principles applicable to specific events.*

This theory actually explains a legal principle working in a scientific structure. This scientific structure is what makes this principle can be applied well. This structure can also explain the application of a legal principle in a tiered, layered or gradual manner. The level of application of a legal principle begins with the existence of principles known as Supra Principles, then is reduced to Basic Principles/Fundamental Principles, then continues with Secondary Principles, and ends with the existence of Specific Legal Provisions. Legal Provisions). The four have different levels, some are higher and some are lower than others. Basic/Fundamental Principles, Secondary Principles and Special Legal Provisions are positioned under Supra Principles.

Supra Principles have the highest position in the scientific structure of legal theory. This principle is the core of legal theory (principle is the core of the theory) and all other levels are subordinated to it (all other levels are subordinated to it). From these supra-principles, principles/principles are

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[27] Gabriel Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Berlin: Springer Berlin, Heidelberg, 2010), https://doi.org/https://doi.org/10.1007/978-3-642-13714-3.

obtained which break down the supra-principles into legal principles which in turn become guidelines for the application of the supra-principles. These principles are called Basic Principles. Each basic principle then derives secondary principles. These secondary principles create legal forms from the concrete application of fundamental principles. From each secondary principle, special legal provisions will be obtained which make the secondary principle apply to certain events.

Hallevy explained that the principle of free choice is a super principle in criminal law. According to the supra principle, no criminal liability can be imposed on a person unless that person has chosen to commit a criminal act. When someone is forced to commit an offense, imposing criminal liability cannot be justified. Individual autonomy of humans is the social concept behind the Supra Principles.[28] Furthermore, from the Supra Principles, fundamental principles are derived. There are 4 (four) fundamental principles, among others:[29]

a. *The principle of legality*
   The supra-principle of free choice refers to an individual's choice between permissible/permissible and prohibited actions. To enable free choice, it is necessary to accurately draw the line between "*permitted*" and "*prohibited*". The rules for establishing what is "*permitted*" and "*prohibited*" are embodied in the first basic principle of criminal law theory, the principle of legality. When a person chooses to commit a prohibited act, the act must be carried out physically to allow for the imposition of criminal liability.
b. *The principle of conduct*
   Principles of criminal law theory, the principle of conduct, objective expressions of free choice. The exercise of individual free choice requires a certain mental position in the individual's mind, including both positive and negative aspects. The positive aspect is contained in the mental element of the offense, the negative aspect in the general defense. Thus, an offense may require specific intent to impose a positive aspect of criminal liability (mental element). When the individual is incapable of committing a crime (doli incapax), due to mental illness, childhood, lack of self-control, uncontrollable drunkenness, etc., the possibility of incurring criminal liability is negated due to subjective reasons related to negative aspects.
c. *The principle of culpability*
   The rules for the formation of the mental appearance of free choice are embodied in the third basic principle of criminal law theory, the principle of

[28] Hallevy.
[29] Hallevy.

guilt, the subjective expression of free choice. Because the imposition of criminal responsibility requires free choice on the part of the individual, that free choice needs to be the individual's own and personal free choice. A person is not criminally responsible for another person's free choice. Free choice and criminal liability are realized in the same legal entity.

d. *The principle of personal liability*

The rule for the formation of personal appearance of free choice is embodied in the fourth basic principle of criminal law theory, the principle of personal responsibility.

Then Hallevy explained again that from the four basic/fundamental principles secondary principles were derived. From each of the four basic principles, four secondary principles are derived. Secondary principles form a concrete and specific template for the application of basic principles. From each of these secondary principles, specific legal provisions and specific applications of the secondary principles are derived. Special legal provisions are concrete rules for imposing criminal responsibility on individuals.

In the structure of the principle of legality by Hallevy, it can be seen that the principle of *ultimum remedium* is not within the structure of the principle of legality. However, in the process of compiling the structure of legality principles, Hallevy studied the legality principles that apply in the German criminal law system. At that time, it was discovered that in the German criminal law system, the principle of *ultimum remedium* was part of the structure of the principle of legality. Hallevy explained:

> *In Germany, the principle of legality (Gesetzlichkeitsprinzip) was codified in Article 1 of the German penal code (Strafgesetzbuch), and it is considered to be part of the constitutional concept in Germany because it has been included in the constitutional Basic Law as well. he principle of legality in Germany bans courts from creating offenses (only parliament is authorized to enact criminal norms), prohibits aggravating retroactive criminal norms, and bans analogy as a legitimate method of interpretation of the criminal norm. German criminal law embraced two additional applications of the principle of legality. First is the secondary principle of subsidiarity (Subsidiariteatsprinzip), whereby criminal law is exercised only as a last resort (ultima ratio), when all other options are not relevant in a given case. Second is the secondary principle of protection of legal rights (Rechtsgeuterschutzprinzip), whereby the criminal law can be applied legitimately only when legal rights have been infringed by the offender.*

Moral values are not considered as legal rights and cannot justify exercising the criminal law.[30]

Hallevy's findings above show an expansion of the principle of legality which includes the principle of *ultimum remedium*. Where this principle is included in the Secondary Principle category of the Principle of Legality. In other words, in the German criminal law system, there are 6 (six) secondary principles of the principle of legality which include:

1) Sources of the criminal norm;
2) Application of criminal law norms according to time (application of the Criminal Norm in time);
3) Application of criminal law norms according to place (applicability of the Criminal Norm in Place);
4) Interpretation of criminal law norms (Interpretation of the Criminal Norm);
5) Principle of subsidiarity of criminal law (principle of subsidiarity); And
6) Principle of protection of legal rights (principle of protection of legal rights).

If the principle of legality as a fundamental principle and the six secondary principles are as shown on Figure 1.

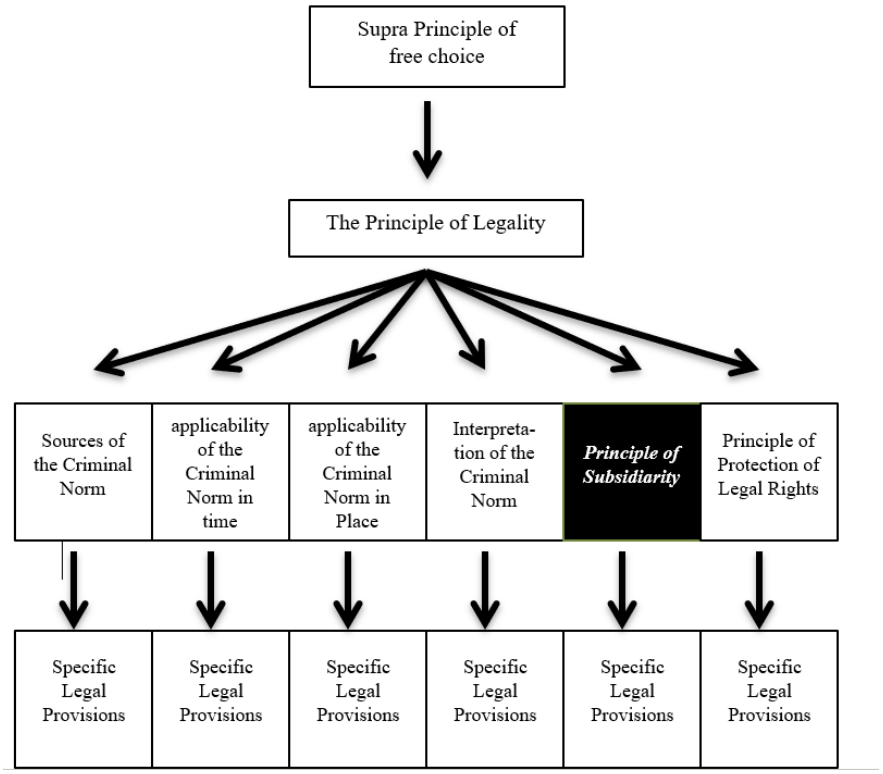

FIGURE 1. The Position of the Principle of Subsidiarity in the Basic Structure of Law in Germany, modified from Hallevy

[30] Hallevy.

In Germany too, risk society controls crime not only by means of core criminal law. The prevention and prosecution of crime are also supplemented by other legal regimes, such as civil law, administrative sanction law, preventive police law, intelligence law, money-laundering law, and even the laws of war. These alternative legal regimes can go beyond the limits of criminal law in terms of efficiency. With regard to this plethora of alternative regimes of legal control besides criminal law, this chapter will focus on one of the oldest extensions of the criminal law arsenal: the field of 'administrative sanction law', also called 'criminal administrative law' or 'administrative criminal law'. In Germany, this type of law is called *Ordnungswidrigkeiten* law and is codified in a separate code called the *Ordnungswidrigkeitengesetz* (OWiG), which can be translated as the 'law on regulatory offences'. This code defines an *Ordnungswidrigkeit*, as distinguished from a 'crime', as an illegal and reprehensible act covered by a provision, which enables the act to be sanctioned by the imposition of a *Geldbuße*. The term *Geldbuße* (administrative fine) used in this definition of *Ordnungswidrigkeit* is deliberately different from the term *Geldstrafe* (criminal fine), which is used in criminal law, in order to expressly describe a non-criminal administrative fine.[31]

The alternative crime in Germany for example applied for Russian people in Germany with the civil problematic law, use alternative dispute resolution avoid the use of criminal law. Currently, both Russian and German legislators are looking for alternative ways, besides procedural coercion or the threat of its use, to resolve conflicts in the process, which contribute to the humanization of criminal legislation, reducing the number of convicts, procedural problems. economy. One alternative in German criminal procedural law is the termination of criminal prosecution followed by the imposition of duties and regulations on the defendant. The possibility of terminating criminal prosecution on this basis is not only regulated in the Criminal Procedure Code of the Federal Republic of Germany, but also in various sectoral laws, for example the German Narcotics Law, the German Youth Court Law.[32]

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[31] Matthew Dyson and Benjamin Vogel, "The Limits of Criminal Law: Anglo-German Concepts and Principles," in *Administrative Sanction Law in Germany* (Cambridge: Cambridge University Press (CUP), 2021), 301–32.

[32] Ya. M. Ploshkina and N. P. Kirillova, "Termination of Criminal Prosecution Followed by the Imposition of Duties and Regulations on the Accused as an Alternative Way to Resolve a Criminal Law Conflict in the German Criminal Procedure," *Lex Russica* 75, no. 6 June (2022): 109–22, https://doi.org/10.17803/1729-5920.2022.187.6.109-122.

2. The Principle of Ultimum Remedium in Slovenia

Apart from Germany, another country that places the principle of *ultimum remedium* as part of the legality principle is Slovenia. Regarding this matter, Nina Persak in her book entitled "Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts" stated: [33]

> *The Art. 2 in the Slovenian Criminal Code formulates the principle in the following way: "Therefore, it shall be legitimate to lay down criminal offences and to prescribe sentences only when, and to the extent that, the protection of human life and other basic values cannot otherwise be assured." "Therefore" relates to the previous article (Art. 1) that expounds the principle of legality. In Slovenia, as already mentioned,* ***the ultima ratio principle is conceived as being derived from the legality principle****.*

Regarding the expansion of the secondary principle of the principle of legality which applies to Germany and Slovenia, it appears that Hallevy does not agree with it. This can be observed from the non-inclusion of the *ultimum remedium* principle in the secondary principle of the legality principle. Nina Persak emphasized this in this regard: [34]

> ***Unfortunately, the principle of legality is often also inappropriately extended (distorted)*** *to include the numerous other conceptions – for example, the ultima ratio principle (i.e. the assertion that the latter is derived from the legality principle), the strict construction of penal statutes, the accessibility of law, the prohibition of the use of analogy, and the prohibition against retrospectivity…*

Slovenia formulated the principle of *ultimum remedium* in the Criminal Code of the Republic of Slovenia (Slovenian Criminal Code). This principle is formulated in the General Part, Chapter I concerning Fundamental Provisions. Confirmed in Article 2 which is entitled "Grounds for and Limits of Criminal Law Repression". This article establishes the basis and limitations of the use of criminal law. In Article 2 of the Slovenian Criminal Code, it is stated:

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[33] Nina Peršak, *Criminalising Harmful Conduct: The Harm Principle, Its Limits and Continental Counterparts.*

[34] Nina Peršak.

> *It shall be legitimate to determine criminal offences and to prescribe punishments only, when and to the extent that the protection of human being and other basic values* ***cannot otherwise be assured.***

A closer look at the formulation of this article shows that, firstly, the Slovenian Criminal Code places the principle of *ultimum remedium* as a fundamental principle in criminal law. However, this principle is a derivative of the principle of legality. In Article 1 of the Slovenian Criminal Code it is stated that no penalties or other criminal sanctions shall be imposed on a person for an offense which was not determined to be a criminal offense by law before it was committed, and for which the penalty is not determined by law.[35] Second, although Article 2 of the Slovenian Criminal Code is not explicitly stated as the principle of *ultimum remedium*, if you read the content it can be understood that it contains the ethical demands of this principle. Third, the principle of *ultimum remedium* in Article 2 of the Slovenian Criminal Code is intended as a guideline for legislators and law enforcement officials. Lawmakers are asked to determine an act as a criminal offense to provide legal protection to society and its basic values. This legitimacy is supplemented by provisions, if other methods other than criminal law cannot provide a guarantee of protection. Likewise, for law enforcement officials, punishment can be carried out with the aim of providing legal protection for society and its basic values and if other methods other than criminal law do not provide guarantee.

Slovenia has witnessed a harsher criminal justice policy and legislation and that this, among other things, is reflected in a steady increase in the prison population. The escalation of punitivity has been identified primarily as a symptom of global trends, which Slovenia has not escaped or is unable to escape. On the other hand, the study showed that Slovenia, in contrast to some other countries, has not experienced any aggressive punitive populism, at least not on a wide scale. The latter has been limited to certain politicians and legal experts on 'the right', while political actors on 'the left' have been prone to action that could be described as penal populism. at the same time, the "substance" of criminal justice in Slovenia has changed in the same way too, as a stricter penal policy and legislation may have (at least temporarily) primarily symbolic implications. in Slovenia been changes for the worse, now has become infected with active penal populism and thus contributed to the escalation of punitivity.[36]

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[35] Criminal Code of the Republic of Slovenia, n.d.

[36] Benjamin Flander and Gorazd Mesko, "Punitivity and Penal Populism in Slovenia," *Revija Za Kriminalistiko in Kriminologijo* 64, no. 4 October (2013): 30–344.

3. The Principle of Ultimum Remedium in Croatia

The principle of *ultimum remedium* is formulated in Article 1 of the Criminal Code of the Official Gazette of the Republic of Croatia (Croatian Criminal Code). This article is entitled "Basis and Limitations of Criminal Law Enforcement". In this article it is stated:[37]

> *Basis and Limitation of Criminal Law Enforcement*
> *Article 1*
>
> *(1) Criminal offenses and criminal sanctions shall be prescribed only for acts violating personal liberties and human rights, as well as other rights and social values guaranteed and protected by the Constitution of the Republic of Croatia and international law in such a manner that their protection* ***could not be realized without criminal law enforcement.***
>
> *(2) The prescribing of specific criminal offenses, as well as the types and the range of criminal sanctions against their perpetrators, shall be based upon the necessity for criminal law enforcement and its proportionality with the degree and nature of the danger against personal liberties, human rights and other social values.*

Paying attention to the provisions above, it can be concluded that the principle of *ultimum remedium* is a fundamental principle in the Korean Criminal Code. This can be seen from the policy formulation which is placed in the article that begins the Croatian Criminal Code. Second, the Croatian Criminal Code does not explicitly state that Article 1 of the Croatian Criminal Code is the principle of *ultimum remedium*. However, by looking at the substance of the article, it can be understood that it contains this principle. Third, the principle of *ultimum remedium* as a principle in the formation of criminal law and enforcement of criminal law. In the formation of criminal law, the determination of an act as a criminal act and criminal sanctions are based on violations of personal freedom, human rights and other social rights and values guaranteed constitutionally and in international law.

Apart from that, the justification is also based on the need for legal protection through criminal law. In Croatia it can be seen that the direction of development of criminal law there is still in a transition period, so that it is facing problems such as the growth of organized crime. In conditions like this, it is clear that the use of criminal law instruments tends to strengthen. nowadays

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[37] "Criminal Code The Official Gazette of the Republic of Croatia" (n.d.).

Croatia, like many other countries in the region, does not seem to have a 'conventional crime problem' and does not fit the profile of a 'high crime region' when compared with the rest of Europe, but it struggles with corruption and organized crime, and it still has to deal with atrocious crimes from the recent past and the far-reaching consequences of war profiteering and criminal 'privatization'.[38]

4. The Principle of Ultimum Remedium in Czech

The principle of *ultimum remedium* is formulated in Article 12 of the Criminal Code of the Czech Republic. The following is the complete formulation of the article:

Chapter II Criminal Liability
Division 1 Fundamentals of Criminal Liability
Section 12
Principle of Legality and
Principle of Subsidiarity of Criminal Repression

(1) Only criminal law determines criminal acts and criminal sanctions that can be imposed for those acts.
(2) the criminal responsibility of the perpetrator and the criminal consequences related thereto can only be applied in socially detrimental cases where the application of responsibility according to other legal regulations is insufficient.

Referring to the policy formulation above, it shows, firstly, the principle of *ultimum remedium* is formulated explicitly using the term Subsidiarity Principle. Second, the principle of subsidiarity is part of the Fundamental Principles of Criminal Responsibility. Third, the principle of subsidiarity is seen as a continuation of the principle of legality. This is known by its formulation pattern, namely the principle of legality in Article 12 paragraph (1) and the principle of subsidiarity in Article 12 paragraph (2). Fourth, the principle of subsidiarity applies to law enforcement officers. Law enforcement officials in this case must ensure that criminal responsibility is carried out on the basis of (a) criminal acts and sanctions have been determined by criminal law (b) punishment is only carried out in cases that are socially detrimental; and (c) other legal regulations are inadequate.

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[38] R. Getoš Kalac, A.-M., & Bezić, "Criminology, Crime and Criminal Justice in Croatia," *European Journal of Criminology* 14, no. 2 (2017): 242–66, https://doi.org/https://doi.org/10.1177/1477370816648523.

Furthermore, in Czech law does not recognize corporate criminal or quasi-criminal liability; it is hard to predict whether corporate criminal or quasi-criminal liability legislation will be adopted in the foreseeable future; and, thus, questions about the concept of liability and the structure of liability principles are inapplicable.[39]

5. *The Principle of Ultimum Remedium in Kosovo*

The Criminal Code of the Republic of Kosovo (Criminal Code of the Republic of Kosovo) contains the principle of *ultimum remedium* in Article 1. The following is the complete text of the article:

> *General requirements*
> *article 1*
> *Basis and Limits of Criminal Sanctions*
> *1. Criminal offenses and criminal sanctions are foreseen only for acts that violate and violate freedoms, human rights, other rights and social values guaranteed and protected by the Constitution of the Republic of Kosovo and international law to the extent that it is impossible to protect these values without criminal sanctions.*
> *2. Criminal acts and the types of acts and the severity of criminal sanctions for perpetrators of criminal acts are based on the need for enforcement of criminal justice and proportionality of the level and nature of danger to human rights, freedoms and social values.*

Based on the provisions above, it can be seen, firstly, that the principle of *ultimum remedium* in the Criminal Code of the Republic of Kosovo is placed as a fundamental principle as can be seen from its formulation which is formulated in Article 1. Second, the principle of *ultimum remedium* is aimed at legislators in determining criminal law norms. The criteria that need to be considered in determining a criminal offense are (a) the existence of actions that violate and violate freedom of liberty; (b) violates human rights; (c) violates other rights and social values guaranteed and protected by the constitution and international law; and (d) the action may protect them without criminal sanctions. Third, the principle of *ultimum remedium* is also a guideline for law

[39] K. Jelínek, J., Beran, "Why the Czech Republic Does Not (Yet) Recognize Corporate Criminal Liability: A Description of Unsuccessful Law Reforms," *Corporate Criminal Liability. Ius Gentium: Comparative Perspectives on Law and Justice* 9, no. Dordrecht: Springer (2011): 333-354., https://doi.org/https://doi.org/10.1007/978-94-007-0674-3_13.

enforcement officials in enforcing criminal law. Things that need to be considered (a) punishment is based on the need for criminal justice enforcement; and (b) proportionality of the level and nature of the danger of the act to human rights, freedoms and social values.

Beside that rules the current internal processes that Kosovo is facing are economic and social development, which are still far from regional and European development structures, which as a result of poverty and lack of perspective, for a significant part of Kosovan society, are resulting with a high crime rate. This because high levels of unemployment and poverty, high levels of corruption in state institutions, and lack of free movement outside Kosovo contribute to creating appropriate conditions for the development of criminality in general and organized crime in particular.[40]

The act in Kosovo affected the geostrategic position of the Republic of Kosovo in the Balkans, as well as the created post-war conditions, enables various criminal groups to carry out organized crime activities. The example After 1999, due to poorly controlled borders, lack of legislation, creation of a new police, and the establishment of the justice system, many criminal groups from the field of narco-criminality took advantage of this situation by creating organized criminal networks for the purpose of trafficking narcotic substances and psychotropic substances from the country of origin, transiting through Kosovo, and continuing towards the country of destination which was in Western Europe.[41] But the Republic of Kosovo, compared to EU countries, has a lower level of criminality, while compared to countries in the region where the criminality level is higher.[42]

6. *The Principle of Ultimum Remedium in Kyrgastan*

The principle of legality in the Criminal Code of the Kyrgyz Republic is formulated in the General Part, in Article 4 which is entitled Grounds of Criminal Responsibility, as follows:

> *Article 4. Basis of Criminal Liability*
> *The basis for criminal liability is the commitment of a socially dangerous act with the nature of corpus delicti as regulated in criminal law.*

[40] Avdullah Robaj, "The Rule of Law and Criminality in the Republic of Kosovo," *Auc Iuridica* 69, no. 3 (2023): 145–55, https://doi.org/10.14712/23366478.2023.33.

[41] Avdullah Robaj.

[42] Avdullah Robaj.

Reading the formulation above, several things can be stated, first: (a) the principle of *ultimum remedium* is placed as part of the principle of criminal responsibility or the principle of error. (b) legislators establish criminal laws for socially dangerous acts; and (c) for law enforcers, punishment is only carried out for socially dangerous acts that have been determined by the legislators and the punishment takes into account the principle of corpus delicti.

In the Republic of Kazakhstan, the new Criminal Code came into force on January 1, 2018. In the Kyrgyz Republic, a new Criminal Code has been developed. It will enter into force from January 1, 2019. The developers paid increased attention to the above-mentioned problems; they also raised questions about the effectiveness of new rules on the competition of norms in the qualification of crimes and their correspondence to the global trends in the development of criminal law.[43]

7. The Principle of Ultimum Remedium in Montenegro

The principle of *ultimum remedium* is contained in Article 1 under the title "Basis and Scope of Criminal Law Compulsion" which reads:

> Protection of human values and other basic social values is the basis and scope for defining criminal acts, determining *criminal* sanctions and their enforcement to the level necessary to crack down on these violations.

This article does not explicitly mention the principle of ultimum remedium. However, the formulation of the article shows (a) the determination of an act as a criminal offense is based on the need to provide protection for human values and other basic social values. This shows the principle of proportionality in the state's steps in determining criminal acts; and (b) criminal law enforcement is carried out on the basis of the need to provide protection for human values and other basic social values.

In Montenegro there are have three systems of imposition of a sentence of imprisonment, and then the different models of sentencing scopes (closed, open

[43] T. Bapanova, "The Issue of Competing Criminal Law Norms in the Qualification of Crime," *Opcion* 34, no. 85 Januari (2018): 921–34.

and semi-open).and next in terms of the normative determination of individual sanctions in a separate part of the Criminal Code and its practical application.[44]

Paying attention to various criminal law policies in various criminal law systems, it can be seen that the principle of *ultimum remedium* is formulated in the Criminal Code or Penal Code, including Article 2 of the Criminal Code of the Republic of Slovenia (Slovenian Criminal Code), Article 1 of the Criminal Code, The Official Gazette of the Republic of Croatia (Criminal Code of Croatia), Article 12 of the Criminal Code of the Czech Republic, Article 1 of the Criminal Code of the Republic of Kosovo (Criminal Code of the Republic of Kosovo), Article 4 of the Criminal Code of the Kyrgyz Republic, Article 1 of the Criminal Code of Montenegro, and etc.

With regard to the formulation of the *ultimum remedium* principle in the Criminal Code, Nina Pasak believes that the principle (ultima ratio, pen) can sometimes be found in criminal law (eg Slovenia, Croatia), although it may be more suitable in the constitution. [45]What Nina Pasak said was different from Nils Jareborg in that the ultima ratio is not a constitutional principle but rather a principle of legislative ethics (ultima ratio is not a constitutional principle but rather a principle of legislative ethics).[46]

The existence of the *ultimum remedium* principle in a constitution is actually closely related to what Kaarlo Tuori calls the relevant principle in constitutional assessments of criminalization. In this case, Tuori also reminded that although the principle of *ultimum remedium* is the principle that is the basis for the constitutionality of criminalization, he reminded that the ultimate ratio is not the only principle used to assess the constitutionality of criminalization.[47]
Tuori also emphasized that if the role of the ultimate ratio is to limit criminalization, there are also constitutional doctrines that call for criminalization and can even be seen as requiring criminalization. I will examine three potential constitutional counterbalances to the ultimate ratio. I will discuss the first in the context of state constitutions, the other two at the transnational level, European constitutions. The three balancing doctrines are: (1) the doctrine of the horizontal effect (*Drittwirkung*) of fundamental rights and protective obligations (*Schutzpflicht*) of states, as well as the related

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[44] Darko Radulović, "Sentencing Scopes (Ranges) In The Criminal Code of Montenegro and the Sentencing Policy," *Journal of Criminology and Criminal Law* 2 (2021): 93–112, https://doi.org/https://doi.org/10.47152/rkkp.59.2.6.

[45] Criminal Code The Official Gazette of the Republic of Croatia.

[46] Kaarlo Tuori, "Ultima Ratio as a Constitutional Principle" 1 (2013): 6–20, https://opo.iisj.net/index.php/osls/article/view/191.

[47] Tuori.

understanding of collective security as a basic right; (2) the precautionary principle of EU law; and (3) the principle of effectiveness (*effet utile*) in EU law. Kaarlo Tuori intelligently explains the principle of ultima ratio in a constitution. In this case explained by him:[48]

1) The Ultima Ratio as an example of the constitutional principle of proportionality
2) In constitutional law, proportionality, as we recall, is a principle developed primarily to assess the legality of restrictions on fundamental rights. Perhaps the greatest benefit in articulating this principle fell to the German Constitutional Court. The courts have distinguished four requirements regarding proportionality that must be met by acts of public authorities that require restrictions on fundamental rights:
3) legitimacy of goals; the action in question had a legitimate purpose
4) efficiency; the action is causally efficient as a means of achieving a legitimate goal
5) need; the action is necessary to achieve a legitimate goal (restrictive means are also sufficient)
6) appropriateness (or proportionality in the narrow sense); the overall benefits of these measures outweigh the "costs" in terms of restrictions on fundamental rights.

This explanation shows that the Ultima Ratio is actually an example of a principle in the constitution, namely the principle of proportionality. In the constitution, the principle of proportionality is to assess the legitimacy of restrictions on fundamental rights. He gave an example, in Germany, there are 4 (four) proportionalities that must be fulfilled by public authorities in limiting the fundamental rights possessed by citizens, including: (1) goal legitimacy, the action in question pursues a legitimate goal; (2) efficiency, the measure is causally efficient as a means to achieve legitimate goals; (3) needs; the action is necessary to achieve a legitimate goal (no less stringent means are sufficient); and (4) appropriateness (or proportionality in a stricter sense), the overall benefits of the measure outweigh the "costs" in terms of restrictions on fundamental rights.

Apart from a constitution, it is interesting to see that The European Convention on Human Rights, in Article 8 (2) states: there shall be no interference by public authorities in the implementation of these rights except what is in accordance with the law and is necessary in a democratic society in the interests of national security and safety. the public or economic welfare of

[48] Tuori.

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

From the policy formulation, it can be found that there are 2 (two) Formulation Models of the Principle of *Ultimum Remedium*. The 2 (two) formulation models are "Explicit Model" and "Implicit Model". In the first model or explicit model, the formulation of the *ultimum remedium* principle is referred to as "clear", "firm" or "express" as a sub-heading of an article provision. This can for example be found in the Criminal Code of the Czech Republic. This principle is formulated by stating the "Principle of Subsidiarity of Criminal Repression". The advantage of this model is that it provides legal certainty that the existence of the principle of *ultimum remedium* must be used as a general principle of punishment. This has the consequence that law enforcement officials at all levels must pay attention to this principle in implementing criminal law. Even providing guidance for legislators in determining the source of criminal law requires paying attention to this principle.

In the second model, namely the implicit model. The principle of *ultimum remedium* is "implied" in the formulation of the provisions of an article in the Criminal Code. This means that the principle of *ultimum remedium* is "contained" or "concluded" in a legal norm formulation. Efforts are needed to find the existence of this principle by interpreting the formulation of the article. The adoption of this second model is marked by the existence of this principle implicit in various provisions, including in "Grounds for and Limits of Criminal Law Repression", "Basis and Limitation of Criminal Law Enforcement", "Basis and Limits of Criminal Sanctions", "Grounds of Criminal Responsibility", and "Basis and Scope of Criminal Law Compulsion".

Regardless of the explicit or implicit model adopted in the policy of formulating the *ultimum remedium* principle, the *ultimum remedium* principle is a fundamental principle because it is the basis and limitation of the use of criminal law. This principle is formulated in Book I of the General Part of the Criminal Code. The principle of *ultimum remedium* plays an important function. These functions are the *Basic Functions of Legislative Jurisdiction and the Basic Functions of Judicial Jurisdiction.*

In the first function, this principle serves as a guideline for legislators in determining acts that are categorized as criminal acts and sanctions are based on considerations "as far as human protection and other basic values cannot be guaranteed by other means"; "necessity and proportionality of the level and nature of the danger of acts against personal freedom, human rights and other social values"; "only for acts that violate and violate freedoms, human rights, rights and other social values guaranteed by the constitution and international law to the extent that it is impossible to protect these values without criminal

witnesses"; "socially dangerous acts"; "to the extent that it is necessary to protect human values and other basic social values". This first function, when referring to Nils Jareborg, is called "Independent Normative Function". Jareborg redefines the ultima ratio as a meta-principle that summarizes the reasons for criminalization, such as the principle of penal value, the principle of utility and the principle of humanity. Only such metaprinciples can – according to Jareborg – have an independent normative function.[49] In this case, simply put, legislative decisions regarding criminalization boil down to a balance between considerations of the duty of protection and the ultimate ratio.[50]

Second, as the Basic Function of Judicial Jurisdiction (Basis for Judicial Jurisdiction), this principle provides guidelines for law enforcement officials in enforcing the law. Where criminal law enforcement must consider: "protection of personal freedom, human rights, rights and other social values cannot be realized without criminal law enforcement"; "socially detrimental where the application of responsibility according to other legal regulations is insufficient"; "on the need for enforcement of criminal justice and proportionality of the level and nature of danger to human rights, freedoms and social values"; "criminal law enforcement is carried out on the basis of the need to provide protection for human values and other basic values".

In fact, the function of the *ultimum remedium* principle is in line with the contents of the *ultimum remedium* principle. Nina Pesak explains the content of the principle, more or less, following from its name. States should use criminalization tools only as a last resort, when there is no other way to address the behavior. This is often mentioned in connection with the so-called "fragmentary nature" of criminal law (i.e. it protects only a few legal goods) and the "subsidiarity" of criminal law (i.e. that the task of criminal law is only to provide additional protection for interests recognized and protected by law). Therefore, criminal law should be used only when other means have been used. Jareborg envisions a kind of four-step process to ensure principles are respected along the way. First, "there must be a basic assumption that the State should not interfere at all. Second, if intervention is necessary, then assistance, support, care, insurance and licensing arrangements must take precedence over coercive measures. Third, if coercive measures are necessary, they do not have to take the form of sanctions. And fourth, if sanctions are necessary, private law sanctions may be preferable to administrative sanctions."[51]

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[49] Tuori.

[50] Tuori.

[51] Tuori.

The discussion regarding the principle of *ultimum remedium* is related to various principles. The existence of the *Ultimum Remedium* Principle is related to the Principle of Legality, Proportionality Principle, The Harm Principle, The Principle of Necessity. One of the principles that is close to the *ultimum remedium* principle is the principle of legality. Nina Pesak Article 2 of the Slovenian Criminal Code formulates the following principle: "Therefore, it is lawful to establish criminal offenses and determine penalties only if, and to the extent that, the protection of human life and other basic values cannot be otherwise rest assured." Therefore, is related to the previous article (Article 1) which explains the principle of legality. In Slovenia, as already mentioned, the principle of ultimate ratio is understood as a derivative of the principle of legality. The prevailing Slovene theory of criminal law (and perhaps also some other Continental theories) clearly considers the principle of legality to be the "only", single most important principle, surpassing all others, including the principle of ultimate ratio. The picture may have to be reversed, or more precisely, the principle of ultimate ratio be aligned with the principle of legality. Jareborg, for example, claims that the principle of ultimate ratio must be a meta-principle, if we are to have an independent normative function – a "principle that summarizes the reasons of criminal value sufficient for criminalization", Of course some precisely.[52]

Furthermore, Pesak adds that if, today, emphasis is truly placed on the moral legitimacy of law (Bavcon), since legality itself is not enough, then the argument for "making" the principle of last resort a meta-principle must be supported. However, this principle should not be viewed as a principle of criminal law alone, but rather a broader legal principle, because when viewed from the four steps of the implementation process, it becomes quite clear that it does not only apply in the criminal field. law, but law in general. Moreover, it does not only involve legal intervention, but any kind of state intervention. Therefore, this principle is not taken into account only before criminalization (and therefore only addressed to legislators), but before any kind of state intervention, from any representative of the state. Bavcon, similarly, states that the principle speaks not only to lawmakers but also to any official or agency in the criminal justice system. "Even when an act meets all the statutory elements of some criminal offence, the authority must consider carefully, within its legally defined powers, whether the act in the case at hand turns out to be so dangerous as to require the use of criminal law powers, or whether there may be some other

[52] Tuori.

measures are used, measures such as conditional suspension of prosecution or mediation, etc."[53]

However, the principle is primarily addressed to legislators, and it is one of the characteristics it shares with the harm principle. More importantly, the description of the principle of repressive restraint (as the principle of ultimate ratio is called in Slovene legal theory) as "a group of checks on government arbitrariness", could also describe the harm principle. Because its main and most important function, which is exactly the same, is to limit the negative side of state power (arbitrariness is one of them). An additional common element between the principle of ultimate ratio and the principle of harm, is the presumption called "*in dubio pro libertate*". What is meant by freedom in this context is non-criminalization. Since a judge cannot convict someone without proof of guilt, lawmakers should not criminalize certain types of behavior without proof that criminalization is warranted, according to Hanack. *In dubio pro reo* for judges must be translated into *in dubio pro libertate* or *in dubio contra delictum for legislators*. Feinberg supported this notion in favor of freedom and formulated it as the requirement that "whenever a legislator is faced with the choice between imposing legal obligations on citizens or leaving them free, other things being equal, he should leave individuals free to make their own choices. Freedom must become the norm; coercion always requires special justification." This presumption is a "reason against criminalization", and as such, is the logical outcome of the harm principle (the 'liberty principle', as Mill called it) as well as the principle of ultimate reason. Their "job" is to make the task of criminalization more difficult. And that assumption also allocates the burden of persuasion; The burden is on those who want to criminalize, not on those who want to live free from such restrictions.[54]

Upon evaluation, one detects so many similarities between the ultimate ratio principle and the loss principle, that it is right to count the two as probably belonging to the same "family." The harm principle can actually be a kind of "sub-principle", a subcategory of the ultimate ratio principle, except that the harm principle also determines the content of criminalization, while the ultimate ratio only prioritizes non-intervention or non-criminal intervention. And herein lies the main reason why the principle of the ultimate ratio is not enough, namely that there are not enough warrants to stop "criminal law inflation" (or "overcriminalization") or to guarantee that criminal laws are passed for the right reasons, that is, for valid reasons. for criminalization. While the principle of ultimate ratio is only a "formal" principle, the harm principle is

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[53] Tuori.

[54] Tuori.

a "substantive" principle and this is also why it is better to imagine it hierarchically reversed: to make the harm principle an "auxiliary principle", as the main principle determining criminalization (to be applied for the first time, in first filter level), while the principle of ultimate ratio with its formal nature will test the material that can be criminalized thereby prima facie at the second filter level as a 'limiting principle', narrowing the behavior that can be legitimately criminalized even further.

Persak in this case sees that the principle of *ultimum remedium* is closer to "the harm principle". He even called the harm principle a "subprinciple" or "subcategory" of the principle of ultimate ratio. The following is Pesak's statement:[55] *Upon evaluation, one detects so many similarities between the principle of ultima ratio and the harm principle, to be entitled to count the two as perhaps coming from the same "family". The harm principle could be, in fact, a kind of "subprinciple", a subcategory of the ultima ratio principle*. Meaning After evaluation, one detects so many similarities between the ultimate ratio principle and the loss principle, that it is right to count the two as probably belonging to the same "family". The loss principle can actually be a kind of "subprinciple", a subcategory of the ultimate ratio principle.

The relationship between the ultimum remedium principle and various other principles can actually be clearly illustrated when using "The Principles Filter" developed by Jonathan Schonscheck. In this case, Nina Persak calls it Schonscheck's "*The Structure or Filtering Approach*".[56] The Filter Principle or Filter Approach is used as a procedure in adopting criminalization policies in order to obtain moral justification. Every criminalization carried out by legislators must go through the procedures or stages contained in the Filter Principle. Criminalization is stated to be morally unacceptable if one of the stages in the filter approach is taken into account.

The filter principle is a concrete proposal from Jonathan Schonscheck which he recommends for use when taking criminalization measures. Schonscheck considers criminalization actions to be "passive, successful and successively". In this filter there are at least 3 (three) layers as filters that must be passed in criminalizing an act. Failure to pass one of the required filters has the consequence that the criminalizing act cannot be justified. However, if all these filters are successfully fulfilled, then the state's actions in criminalizing can

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[55] Tuori.

[56] Nina Peršak, "Chapter 1 EU Criminalisation, Its Normative Justifications, and Criminological Considerations for EU Criminal Policy and Justice," in *The Future of EU Criminal Justice Policy and Practice* (Leiden: Brill, 2017), 15–36, https://doi.org/https://doi.org/10.1163/9789004367371_003.

be considered normal. In this case the policy taken by the state can be seen as "morally justified criminalization".

In the Filter Principles there are 3 (three) layers, including Principles Filter, Presumption Filter and Pragmatics Filter. Next, Nina Persak, in this case, tries to illustrate Schonscheck's Filter Principle In the criminalization process, the first filter that must be passed is the principle filter. The filter closest to the mouth of the funnel. In this filter there are Principles of State Authority that need to be considered. This principle, questions what is appropriate for the state to do. In determining things that are appropriate for the state to do, according to Schonscheck, this is done by contrasting them with Feinberg's "Liberty-Limiting Principles." According to him, Feinberg's "principles that limit freedom" are quite long and complicated. Apart from raising the issue of the moral integrity of the state, they also raised the issue of "effectiveness" and also the issue of conflict between values.

From the length and complexity of the principles put forward by Feinberg, in the end, according to Schonscheck, there is an important loss principle that needs to be considered at this stage. Harm Principle: It is always a good reason to support criminal laws that are likely to be effective in preventing (eliminating, reducing) harm to anyone other than the actor (who is prohibited from acting) and there may be no other way around it. equally effective at no greater cost to other values. Schonscheck also offers a list of Principles of State Authority that certainly correlate with Feinberg's "Principles Restricting Freedom. The list includes:[57]

> *(1) The Harm Principle: An action is an appropriate concern of the state if that action causes harm to a person other than the actor.*
> *(2) The Offense Principle: An action is an appropriate concern of the state if it offends a person other than the actor.*
> *(3) The Liberal Position: The Harm Principle and the Offense Principle, duly clarified and qualified, between them exhaust the class of good reasons for an action's being an appropriate concern of the state.*
> *(4) Legal Paternalism: An action is an appropriate concern o f the state if that action causes harm to the actor oneself.*
> *(5) Legal Moralism (narrow): An action is an appropriate concern of the state if it is inherently immoral, even though it causes neither harm nor offense to the actor or to others.*

[57] Nina Peršak.

(6) *Moralistic Legal Paternalism: An action is an appropriate concern of the state if the action causes moral harm to the actor oneself.*
(7) *Legal Moralism (broad): An action is an appropriate concern of the state if, while neither harming nor offending others, it constitutes or causes "free-floating" evils.*
(8) *Benefit to Others: An action is an appropriate concern of the state if performing the action will produce benefit for persons other than the person oneself.*
(9) *Benefit-Conferring Legal Paternalism: An action is an appropriate concern of the state if its performance will benefit that person.*
(10) *Perfectionism: An action is an appropriate concern of the state if its performance will improve (a) other people, or (b) the individual oneself.*

The existence of the principle of state authority is intended so that state decision procedures in carrying out criminalization can be morally justified. The Filter Argument is in principle an argument about individual rights, and the appropriate role of the state.

Nina Persak stated that in this first filter, legislators must determine whether the action falls within the state's moral authority and therefore must contain the main principles or principles of substantive criminalization. The harm principle (or Jareborg's 'criminal value principle') clearly lies in this filter area, allowing only wrongful and highly dangerous behavior to pass through, while other behavior (e.g. harmless behavior, the criminalization of which would be based on legal moralism) would (should) remains on the other side, not passing through this filter. At the second level, the Presumption Filter, Schonscheck stated:

> *The second Filter is the Presumptions Filter. Once the action has passed through the Principles Filter, the good legislator, the good philosopher of criminal law must ask: given that this is the sort of action with which the state is appropriately concerned, is there some technique of social control which will be successful in reducing the incidence of that action to an acceptable rate-but which is less intrusive, less coercive than a criminal statute? Alternatively: is there some action the state could take that, although not reducing the incidence of the conduct, would reduce the negative consequences of that conduct to an acceptable level?*

> *If an investigation reveals the fact that every state action-even a "public awareness" campaign-would prove ineffective (a waste of resources) or counterproductive (would instigate a higher rather than a lower incidence)-then the action does not pass through the Presumptions Filter. If, however, there are state measures which would reduce the incidence, or the deleterious consequences, then the action does pass through the Presumptions Filter. However, one cannot have shown that the state is justified in criminalizing an action without investigating whether there are ways of successfully reducing the incidence of that action without engaging the machinery of the criminal justice system: police, prosecutors, courts, and the costly strictures of procedural due process. Now I am not arguing for reducing the strictures of due process in criminal prosecutions-far from it. My claim, rather, is that we ought to be more selective as regards precisely which actions will subject citizens to the machinery of the criminal justice system. Though I shall have (much) more to say about that machinery (in the context of the third Filter), I claim this here: there are many ways of discouraging behavior, and o f reducing or eliminating the negative consequences of behavior; the good legislator, the good philosopher of the criminal law, ought to investigate very thoroughly just how those goals might be achieved in ways that allow for a freer society, ways which do not subject citizens to the indignities of arrest, the expense of defense, the consequences of incarceration, and the encumbrances of conviction-as detailed in the Introduction. The state, via education campaigns, has powerful instruments of persuasion at its disposal. So as regards particular actions, one must ask, "Might not a well-designed program of information about the deleterious consequences of this action reduce its incidence to a tolerable level-without involving police and prosecutors, courts and incarceration?" Additionally, taxation policies can be employed to alter behavior, or to indemnify' the state if citizens elect especially risky behavior. Additionally, the state might institute schemes of licensing, insurance, permits, etc. Regulation-even if the criminal law is used to enforce those regulations-might well prove effective, as well as less costly: both in terms of resources, and in terms of liberty.*

This stage is a continuation stage of the first level. Once an "act" has passed the Principle Filter, then a good legislator must ask, given that this is an "act" that the state must pay attention to, are there any social controls that

would work to reduce it? Are there any actions that can be taken by the state, even if they do not reduce the occurrence of these acts, but can reduce the negative effects of these behaviors or actions? If the results of a review of the facts show that state action, even a "public awareness" campaign, will prove to be ineffective (a waste of resources) or counterproductive, then the action does not pass the Presumption Filter. However, if there are state steps that will reduce the act, or its detrimental consequences, then the act passes the filter presumption. Nina Persak also explained that:[58] legislators should check whether other possible means, which are less coercive and intrusive than criminal law, can fulfill their task satisfactorily, namely reducing the occurrence of undesirable behavior to an acceptable level. We can add here the following limiting factors, which are essentially normative in nature: the requirement of the supremacy of law (including human rights), the principles of ultimate reason and legality, other constitutional limitations, and quite possibly also Jareborg's 'principle of humanity' (at least some parts of it). This level represents a filter that allows proposed new criminalization measures to be implemented only if no other less intrusive, less repressive, and more humane measures (and measures that are in line with constitutional rules) are available or can do their job well enough. This filter could also play host to Bentham's fourth type of circumstance in which punishment should not be imposed; that is, punishment is 'unnecessary' because the offense would be more beneficial if dealt with in other ways, for example through education. Next at the third level, Pragmatic Filter. Schonscheck elaborates:

> *the real consequences of the criminalization of these actions. The enactment and enforcement of criminal laws have causal consequences: some are direct and obvious, some may be distant (in time and space) and subtle, some may be quite surprising and very strange. Good legislators, good philosophers of criminal law do their best to anticipate these causal effects, by envisioning the web of causalities that would be created by criminal laws prohibiting such actions. And then a cost/benefit analysis has to be done; we must assess the social costs and benefits of enacting proposed laws, and assess the costs and benefits of not enacting those laws. (Regarding existing laws: social costs and benefits of such laws; causal consequences of repealing such laws, and costs and benefits of such repeal.)*

[58] Nina Peršak.

The third filter relates to the real consequences of criminalizing an act. Good legislators do their best to anticipate the causal consequences that result from criminalization. Next, carry out a cost/benefit analysis by enforcing or not enforcing the criminal law. It was stated by Nina Persak that: The third and final filter (Schonsheck's Pragmatic Filter) deals with more pragmatic issues and therefore accommodates limiting factors that are essentially pragmatic in nature, such as: financial costs of criminalization and law enforcement, social costs of criminalization, 'principles' Jareborg's utility', the 'practical feasibility of law enforcement' similar to Bentham's 'unfortunate' cases, such as the low probability of detection of effectiveness, the factor of insubordination, the suitability and consistency of the proposed offense with existing laws, and similar factors.

If and only if, after this final step, the benefits of the new criminal law still outweigh the costs, then criminalization will be given the green light. A law that 'successively and successfully' passes the Schonsheck-Peršak three-step screening procedure as described above will be legally criminalized. Some of the balancing factors mentioned above can also act as 'balancing factors', because these factors do not prevent criminalization but only eradicate it. These limiting factors would therefore act as a corrective, ensuring that even actions that harm others remain outside state prohibition if there are other important social considerations that preclude or outweigh the benefits of criminalization.

The explanation above provides an understanding that the process of implementing the *ultimum remedium* principle has started since the stage of law formation with the existence of criteria and stages of criminalization. After the criminalization process is carried out, which is marked by the ratification of a criminal provision in statutory regulations, the application of the principle of *ultimum remedium* is carried out by formulating criminal guidelines in various Criminal Codes.

Barda Nawawi Arief explained the rationale for formulating the sentencing guidelines by saying:[59]the criminal law system is a unified system with a purpose ("purposive system") and criminal law is only a tool/means to achieve the goal; "criminal purpose" is an integral part (sub-system) of the entire criminal system (criminal law system) in addition to other sub-systems, namely the "criminal act", "criminal responsibility (guilt)", and "criminal" sub-systems; the formulation of objectives and guidelines for punishment is intended as a control/directive function and at the same time provides a philosophical basis/foundation, rationality, motivation and justification for punishment;

[59] Barda Nawawi Arief, *Tujuan Dan Pedoman Pemidanaan: Perspektif Pembaharuan Hukum Pidana Dan Perbandingan Beberapa Negara* (Semarang: Pustaka Magister, 2012).

viewed functionally/operationally, the criminal system is a series of processes through the "formulation" stage (legislative policy), the "application" stage (judicial/judicial policy), and the "execution" stage (administrative/executive policy); Therefore, in order for there to be intertwining and integration between the three stages as a unified criminal system, it is necessary to formulate criminal objectives and guidelines.

Furthermore, in his book entitled Aims and Guidelines for Sentencing, Barda Nawawi Arief attempts to explain the important position of sentencing guidelines in a criminal system, as shown on Figure 2.

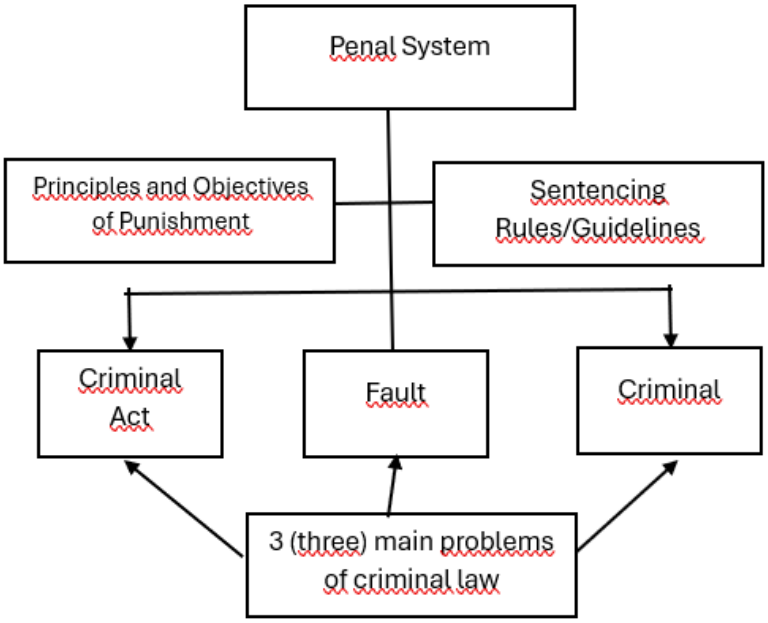

FIGURE 2. Position Chart of Sentencing Guidelines in the Penal System[60]

From the Figure 2, it can be seen that sentencing guidelines are one of the considerations in imposing criminal sanctions on legal subjects for humans and corporations. Barda Nawawi Arief highlights three key aspects of criminal law: *criminal acts,* which are defined as actions that violate legal statutes and require precise classifications for effective enforcement. He emphasizes, *criminal responsibility*, focusing on the conditions under which individuals can be held accountable for their actions, considering factors like intent and mental capacity. Lastly, he addresses, *penalties*, underscoring the importance of proportional sanctions that not only punish but also deter future offenses and promote rehabilitation, thereby ensuring a balanced and just criminal justice

[60] Barda Nawawi Arief.

system. These components are essential for addressing the complexities of law and morality in society.

Conclusion

Finally, this study concluded that in the formulation of criminal policy across various countries, the principle of *ultimum remedium* is often embedded within the Criminal Code, particularly in sections concerning "basic principles and limitations of the use of criminal law," "criminal law enforcement," "criminal sanctions," and "criminal accountability." This principle advocates for the application of criminal sanctions as a last resort, emphasizing that legal measures should only be taken when all other non-criminal alternatives have been exhausted. In some jurisdictions, this principle is articulated explicitly under provisions titled "The Principle of Subsidiarity of Criminal Repression."

This framework serves as a vital guideline for both legislators and law enforcement officials, ensuring that the use of criminal law is both judicious and proportionate. The comprehensive analysis presented in this article examines how the principle of *ultimum remedium* is expressed in the criminal codes of countries such as Germany, Slovenia, Croatia, the Czech Republic, Kosovo, Montenegro, and Kyrgyzstan. By scrutinizing these varied approaches, the study seeks to establish an ideal framework for the application of this crucial principle. Utilizing a doctrinal methodology, the research highlights that while many countries incorporate *ultimum remedium* implicitly, the explicit codification found in some jurisdictions underscores the importance of this principle in promoting a fair and effective justice system. Ultimately, these articulated guidelines not only inform legislative practices but also shape the enforcement of criminal law, reinforcing the necessity for restraint and proportionality in legal responses to wrongdoing.

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There is no greater tyranny than that which is perpetrated under the shield of the law and in the name of justice.

Charles-Louis de Secondat, baron de la Brède et de Montesquieu, *The Spirit of the Laws*

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