

## The 'Last Resort': A Moral and/or Legal Principle?

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### Abstract

The paper addresses critically the constitutional status of the so-called 'last resort' principle on three different levels: in the jurisprudence of the Federal Constitutional Court of Germany, in the criminal justice principles at a European level, and, finally, in select human rights instruments at a global level. The paper claims that the penal sanction that the 'last resort' principle allegedly delimits, i.e. imprisonment, is a highly polymorphous sanction. In addition to the deprivation of liberty, imprisonment involves elements of corporal punishment and shaming that usually go unrecognised. Correspondingly, the basic right protected by the principle is not exclusively personal freedom as is usually claimed but an equally polymorphous human dignity. The polymorphosity of both imprisonment and human dignity, both the sanction and the right it threatens, introduces a 'fuzziness' into the 'last resort' that is typical of the principles of liberal constitutionalism.

### Key words

Criminal justice; constitutionalism; imprisonment; human rights; human dignity

### Resumen

El artículo aborda críticamente la situación constitucional del principio llamado "último recurso", a partir de tres niveles diferentes: en la jurisprudencia de la Corte Constitucional Federal de Alemania, en los principios de la justicia penal en el ámbito europeo, y, por último, en determinados instrumentos de los derechos humanos a nivel mundial. En el artículo se afirma que la sanción penal que el principio de "último recurso" supuestamente delimita, por ejemplo el encarcelamiento, es una sanción que asume múltiples formas. Además de la privación de libertad, el encarcelamiento implica elementos de castigo corporal y vergüenza que suelen pasar desapercibidos. En consecuencia, el derecho

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fundamental protegido por el principio no es exclusivamente la libertad personal como se suele afirmar, sino la dignidad humana, igualmente polimorfa. Las numerosas formas que adoptan tanto el encarcelamiento como la dignidad humana, la sanción como el derecho que amenaza, introduce una "falta de claridad" en el "último recurso" que es típico de los principios del constitucionalismo liberal.

**Palabras clave**

Justicia criminal; constitucionalismo; encarcelamiento; derechos humanos; dignidad humana

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## 1. The blind spots

In the public examination of a Finnish doctoral thesis, the examining 'opponent' is usually instructed to first comment on the title of the thesis. So in that spirit I would first like to comment the title of our event: "Ultima ratio: a principle at risk in Europe?" The title is formulated as a question suggesting that the principle may, indeed, be at risk. The organisers have already admitted that the question is intended to be rhetorical, that the event is organised on the premise that the principle is at risk. But we can also ask if the title suggests that the 'last resort' principle is at risk *in toto*, or whether the *status* of the 'last resort' as a principle is at risk. Perhaps it has never had the status of a principle to begin with, so claiming that it is at risk would be hyperbole. And lastly, is it specifically at risk "in Europe"? Whose Europe is this? Are we to believe that, unlike in the rest of the world, the 'last resort' has had a significant impact "in Europe"? And how can an "international workshop" confidently talk about such a Europe without sounding patronising?

In a number of ways, the substantial element of the 'ultima ratio' or 'last resort' principle is easy enough to formulate. After the widespread abolishment of capital punishment, imprisonment is left as the most intrusive means with which a state intervenes in the life of an individual. As if the intrusiveness of the sanction was not enough in itself, its implementation seems to go even beyond the original intrusiveness implied. In a recent report on the alarmingly widespread use of torture, the Special Rapporteur noted more generally that:

... conditions of detention are appalling in the vast majority of countries and must often be qualified as cruel, inhuman or degrading. Whether convicted criminals, suspects in police custody or accused in pretrial detention, illegal migrants and asylum-seekers in detention pending deportation, patients in psychiatric hospitals or children in closed institutions, detainees are among the most vulnerable and forgotten human beings in our societies. As soon as people are locked up, whether for justified or less justified reasons, society loses interest in their fate. One of the oldest stereotypes of modern societies is that those who are in detention must have done something wrong: an attitude which totally overlooks the fact that the criminal justice systems in most countries do not function properly ... Prison conditions seem to be one of the last taboos, even in so-called "open societies" (United Nations, Human Rights Council 2010, paragraph 28).

It is against this background that I propose to review the 'last resort' principle. In particular I would like to address three possible blind spots that are present in any debate on the 'last resort'.<sup>1</sup>

Firstly, penology is not merely a descriptive account about the aims of punishment. As a fundamentally normative discourse, it provides the 'deep justification' of criminal law. The specific position of penology as a justification is based on the nature of imprisonment as the most repressive intrusion of the state into the legally protected domain of the individual. In other words, a discourse about the 'last resort' focuses immediately on the penal sanction of imprisonment, and the criminal justice system as a whole in a mediated way. After capital punishment has been abolished, imprisonment may be regarded as an extension of what Michel Foucault (2003, pp. 239-241) called the right of sovereignty, the *faire mourir* to which the individual owes her life, and an aspect of the *ultima ratio regum* that Professor Wendt (2013) has so eloquently analysed. The individual's life is, then, thoroughly 'subjected', and the discourse of this subjected life is, in Foucault's terms, through and through juridical: any penological claim concerning the 'aims' of punishment, be it retribution, prevention, safety or any other, is an attempt to juridically justify the employment of the penal sanction as state violence.

Secondly, as a principle – if, indeed, it is a principle – the 'last resort' is intended to protect some value of the subjected individual's life. If we focus on imprisonment as

<sup>1</sup> These blind spots are developed in more detail in Panu Minkkinen (2006).

the deprivation of liberty, our likely conclusion would, of course, be that the protected value is personal liberty. But imprisonment is a highly polymorphous sanction. In addition to the deprivation of liberty, imprisonment includes well-known and accepted characteristics that we generically refer to as the 'hardships of prison life'. The unavoidable harsh environment and the risk of being victimised by inter-inmate violence includes aspects that were previously associated with corporal punishments, and the difficulties of an inmate to adjust to life outside of the institution even after he has served his sentence resemble the public humiliations that were part and parcel of archaic sanctions like the pillory. In other words, delimiting the use of imprisonment as the 'last resort' is not only motivated by its intrusion into personal liberty, but also because of its known – and generally accepted – polymorphous characteristics. The combination of the deprivation of liberty, the violence of prison life in overcrowded and under-resourced institutions, the inmate's continuing problems in adjusting to life outside of the institution, all this suggests that imprisonment may very well be categorically an 'inhuman' sanction, that implementing imprisonment as a sanction in a 'humane' way may be impossible.

Thirdly and lastly, I would like to suggest that the German debate on the '*ultima ratio*' is a very specific case, and I will return to this in more detail later.

With these three potential blind spots in mind, I will discuss the nature of the 'last resort'. Is it merely a non-binding moral guideline affecting criminal law legislation as Jareborg (2005) claims, or is it a principle with, as Professor Tuori (2013) has suggested, even constitutional status? Is it, perhaps, something in between, a moral guideline that is, however, sufficiently entrenched or 'anchored' in constitutional practices to give it the status of a 'soft' principle, something that we readily acknowledge with tones of approval but, nonetheless, are reluctant to point out when and if it is breached against?

## **2. Germany: the 'last resort' as constitutionally entrenched penology**

I would like to begin with the special case of Germany where the execution of the penal sanction has been explicitly constitutionalised. This took place through a development in which general penological principles were gradually entrenched into the constitutional framework. Originally no primary legislation was required to govern the execution of imprisonment. Unlike normal citizens, prisoners and other institutionalised inmates were, following the terminology coined by Otto Mayer, under a 'special relationship of power' (*besonderes Gewaltverhältnis*) in relation to the state. According to Mayer, the special relationship will introduce more severe restrictions to the rights of an individual because it includes a "stricter dependence that is established in favour of a particular body of public administration in relation to all individuals who enter into the proposed special relationship" (Mayer 1924, p. 101).

This changed radically in 1972 when the Federal Constitutional Court ruled that prisons must be regulated by primary legislation to ensure that all restrictions to inmates' basic rights served the general purposes of the Basic Law.<sup>2</sup> This general principle was further elaborated a year later in the well-known "Lebach" case. In its *dicta* the court specified that the only constitutionally acceptable aim of imprisonment is rehabilitation, that is, the ability to retain human dignity and to exercise the constitutional rights that are required to achieve this.<sup>3</sup>

The debate with much pressure exerted by legal academics finally led to the federal Prison Act 1976 through which penology and the 'last resort' as part of it entered constitutional discourse.<sup>4</sup> The principle of *ultima ratio* has since become an

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<sup>2</sup> BVerfGE 33, 1 (1972).

<sup>3</sup> BVerfGE 35, 202 (1973).

<sup>4</sup> On the implications of this development, see Liora Lazarus (2004).

established yardstick with which the constitutionality of the penal sanction is measured.<sup>5</sup> In, for example, a recent case on youth justice, the court once again in its *dicta* called for special attention to the principle (*Grundsatz*) that a penal sanction is only to be used as a last resort.<sup>6</sup> Although the case specifically dealt with youth justice, reference was made to the well-known cannabis case<sup>7</sup> implying that the 'last resort' principle does not only apply to youth justice. The court further noted that imprisonment is to be considered an "evil" (*Übel*), and therefore all its negative effects must be minimised.

In other words, the court recognises two distinct restrictions to the use of imprisonment as a penal sanction. One follows directly from an established 'last resort' principle, and the court here merely reiterates the rationality of its own jurisprudence. But restrictions also follow from the "evil" quality of the sanction that is related to the 'last resort'. This "evilness" is hardly a legal concept, and yet it clearly has constitutional significance. So what basic right does the 'last resort' protect? I would suggest that it is at least not exclusively personal liberty as per Article 2 of the Basic Law, but human dignity as per Article 1 as well, if not even primarily. In other words, a violation of the 'last resort' principle, that is, using the 'evil' sanction of imprisonment in ways that do not support the aims of the Basic Law, is a human rights violation.

### 3. Europe: the 'last resort' as restrictive reasoning

If we broaden our perspective to the European level, we can first note that the relevant rights are also enshrined in the Charter of Fundamental Rights of the European Union, especially in Article 1 (human dignity), Article 4 (prohibition of torture and inhuman or degrading treatment or punishment), Article 6 (liberty) and Article 49 (principles of legality and proportionality of criminal offences and penalties). Although the Charter makes no reference to the 'last resort' principle, it had already earlier been mentioned in a number of Council recommendations. In, for example, recommendation R (99) 22 on prison overcrowding, the Council noted that the deprivation of liberty should be used as a last resort only when other less intrusive sanctions are "clearly inadequate" (Paragraph 1). Similarly in Rec(2006)2 concerning the implementation of the European Prison Rules, the Council reiterated that the deprivation of liberty should not be used "save as a last resort" (Preamble). The Preamble also strengthened this claim by endorsing a number of other relevant international instruments such as the United Nations Standard Minimum Rules for the Treatment of Prisoners. The Council further specified that compromises to the human rights of inmates can never be justified with reference to lack of resources (Paragraph 4) and that imprisonment must always aim towards reintegration into society (Paragraph 6). Indeed, life inside the prison should in all respects "approximate" civilian life (Paragraph 5).

The 'last resort' principle has come up in surprisingly few Strasbourg cases although a few on overcrowding or lengthy prison sentences have touched upon the human rights of inmates in relevant ways. A notable exception is the dissenting opinion of Judge Tulkens in the case *Bouchet v. France* where she stated that Convention rights guaranteed in Article 5 (liberty and security) would only allow deprivations of liberty that are strictly necessary.<sup>8</sup> Although the case specifically dealt with pre-trial detention, the principle itself, if accepted, would have allowed for broader interpretations.

<sup>5</sup> The classic study is Young-Cheol Yoon (2001).

<sup>6</sup> BVerfGE 116, 69 (2006).

<sup>7</sup> BVerfGE 90, 145 (1994).

<sup>8</sup> Application no. 33591/96, 20 March 2001: "...non seulement si, isolément, la longueur de la détention provisoire est ou non conforme à l'exigence du délai raisonnable mais aussi si, en fonction de l'ensemble des alternatives qui pouvaient être envisagées, les autorités judiciaires nationales n'ont recouru à la détention provisoire que lorsque la privation de liberté s'avérait strictement nécessaire." Academically speaking Tulkens's area of specialisation is, of course, criminal law.

Sonja Snacken (2006, pp. 158-161) has, however, depicted a hypothetical reasoning that would allow constructing the 'last resort' principle analogically from two cases concerning Articles 10 (freedom of expression) and 8 (privacy) respectively. In *Handyside v. UK* that dealt with limitations to freedom of speech as per Article 10, the Court constructed a restrictive reasoning that required the assessment of whether restrictions or penalties were necessary for the protection of morals in a democratic society before a decision could be taken.<sup>9</sup> Although the Court concluded that no Convention rights were violated in this case, Snacken argues that the restrictive reasoning of 'necessity' would imply a similar assessment conducted by governments themselves of how well restrictions to Article 5 (liberty and security) achieve their criminal policy aims. Similarly, in *Hatton v. UK*, this time with reference to the right to privacy and family life as per Article 8, the Court emphasised that the more intimate the protected right is, the narrower the national margin of appreciation will conversely be.<sup>10</sup> Snacken concludes that if the restrictive reasoning of both cases is applied to Article 5, then one can construct the foundations of a "reductionist penal policy" that would require states to actively seek out alternatives to imprisonment. But perhaps the weakness of Snacken's argument is its emphasis of liberty as the single or primary protected right.

#### 4. ICCPR: the 'last resort' protecting human dignity

If we finally take the 'last resort' principle to the global level, we can see even more clearly how the polymorphous characteristics of the sanction of imprisonment are set against a correspondingly polymorphous set of rights and values. In, for example, the International Covenant on Civil and Political Rights, the relevant articles would be Article 7 (prohibition of cruel, inhuman and degrading punishment), Article 9 (personal liberty), and especially Article 10 according to which all those that are deprived of their liberty must be treated "with humanity and with respect for the inherent dignity of the human person" (10.1). The Article further states that the essential aim of imprisonment must be the "reformation and social rehabilitation" of inmates (10.3).

The 'last resort' principle is obviously motivated by the potential of any individual sentence of imprisonment becoming an inhuman or degrading sanction. In relation to Article 7, the Human Rights Committee has, in *Vuolanne v. Finland*, stated that what constitutes the depiction "inhuman or degrading" within the meaning of Article 7 of the ICCPR depends on all the circumstances of the case, including the duration and manner of the punishment or treatment, its physical or mental effects, as well as the sex, age and state of health of the inmate. The Committee then clarified that "for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty." (United Nations, Human Rights Council 1989, Paragraph 9.2). In other words, "all the circumstances", that is, the sentence itself including its duration, its concrete effects on the individual in question, as well as the vulnerability and other circumstances of the individual, may tip a sanction over the limit making it a case of inhuman or degrading punishment. The 'last resort' principle relates to all of these in the sense that "all the circumstances" can potentially make a sanction involving incarceration inhuman or degrading.

In a general comment, the UN High Commissioner for Human Rights has stated that Articles 7 and 10.1 of the ICCPR are complimentary. Not only does Article 7 prohibit sanctions falling under the article but that:

... neither may they [PM: inmates] be subjected to *any hardship or constraint other than that resulting from the deprivation of liberty*; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant,

<sup>9</sup> *Handyside v The United Kingdom* (1976) 1 EHRR 737.

<sup>10</sup> *Hatton v The United Kingdom* (2002) 34 EHRR 1.

subject to the restrictions that are unavoidable in a closed environment. (United Nations Human Rights Committee (UNHRC) 1992, Paragraph 3 (my emphasis)).

The High Commissioner further emphasises that this "rule" is fundamental and universally applicable, and that it cannot be avoided by making reference to the lack of resources available to the state party (Paragraph 4). In relation to Article 10.3, the High Commissioner states that no penitentiary system should be "solely retributory" but should aim at the reformation and social rehabilitation of the inmate (Paragraph 10).

## 5. Polymorphous sanction and polymorphous rights

In conclusion, and pulling these scattered ideas and observations together, I would firstly like to suggest that the German interpretation of the 'last resort' principle as it can be extracted from the jurisprudence of the Federal Constitutional Court is a unique and special case. It is possibly rooted in and made possible by something that I would call, paraphrasing Mark Tushnet (2008), a strong-form legal constitutionalism emphasising the role of the judiciary in implementing principles of constitutional stature. I don't believe that other European jurisdictions, the EU framework, or transnational arrangements can quite live up to this. But even in the German tradition the 'last resort' principle has started to take on a normative quality that is not juridical even if it is applied by the judiciary. If the Federal Constitutional Court regards imprisonment as an "evil", then perhaps we could also say that imprisonment may potentially threaten the human dignity enshrined in Article 1 of the Basic Law just as much as the personal liberty of Article 2. Then it becomes a matter of taste as to whether we claim that two clear-cut basic rights are protected horizontally or that we are dealing with an "open-textured" hybrid. In the latter case the principle itself would read in the following way: a polymorphous sanction is to be used as the 'last resort' because it threatens a correspondingly polymorphous human right.

In response to whether the 'last resort' principle is moral or legal in nature, I would claim that, at least positivistically speaking, it is not properly either. I would say that it is a politico-moral principle with constitutional significance or, what I would call, a *constitutionalist principle*. With this I wish to refer to the type of political constitutionalism that is represented by the likes of Jeremy Waldron or David Dyzenhaus. According to this variant of constitutionalism, even if the legal constitution were suspended in, for example, a state of emergency, this would not lead to anomie, to complete lawlessness. Liberal constitutionalists claim that even in the most exceptional of situations, the actions of the state would continue to be regulated by an extra-legal morality. Apparently this extra-legal morality is often enough which would explain the political constitutionalists' aversion towards constitutional review conducted by the judiciary.

Professor Tuori's elegant exposition of the living European constitution illustrated how the position of a given principle can change depending on the constitutional framework it is anchored in. For example, the right to a fair and public hearing enshrined in Article 6 of the European Convention may have once stood for a much stronger expression of what lies behind *habeas corpus*, but today it may be much more about the measure of what is reasonable, the time that an individual must expect to wait before her case is reviewed by a court of law because of the acknowledged workloads of the judiciary. In other words, what has formerly been a strong right entrenched in a constitution of liberty has become a management tool in a constitution of security, a variant of the so-called floodgates argument.

In Professor Tuori's terms, the latest European constitution is, indeed, a security constitution, and it will further erode what were previously thought of as strong rights.<sup>11</sup> Tuori's antidote seems to be the strengthening of the *Rechtsstaat*, but I

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<sup>11</sup> On the security paradigm and criminal law, see Pat O'Malley (2004).



fear that such a return may be nostalgic at best, perilous at worst. For there is no return to the *Rechtsstaat*. The 'last resort' is a paradigmatic example of the fuzzy principles of such a new 'constitutionalist' framework ideally equipped to address issues of security. But unlike other principles that may have become uprooted from their constitutional entrenchment, the 'last resort' has always been fuzzy. It is a sign of the gradual 'Anglicisation' of all constitutional rationality, including its German strong-form variant. The 'last resort' is the human rights fluff that the constitutionalist culture of 'good governance' requires to justify its political apparatuses, and not much more.

In Foucaultian terms, it is part of the juridical residue that allows the biopolitical technologies to operate smoothly in governing dangerous populations.

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