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**THE ECTHR MARGIN OF APPRECIATION IN ARTICLE 8 CRIMINALISATION  
CASES THROUGH THE LENS OF CRIMINAL THEORY**

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## **INTRODUCTION**

The limits of substantive criminal law are extensively discussed within the confines of criminal legal theory, but seldom are the principles devised in criminal theory transferred into practicality. The European Court of Human Rights has dealt with many cases where it decided whether the criminalisation of certain conduct was in violation of the European Convention on Human Rights in the specific case before it, making many references to its doctrine of the “margin of appreciation” in undertaking this task. The scope of this study only covers criminalisation cases that have been seen at the European Court under the right to respect for private life enshrined in Article 8 of the Convention. Since the aim of both criminal theory and the analysis of the Court in such cases is to draw the boundary between the autonomy of the individual and the state’s legitimate area of substantive criminalisation, this study aims to determine whether the Court in determining the breadth of the margin of appreciation in these cases followed any identifiable pattern that can be explained through the principles of criminalisation which are the limits of substantive criminal law that have been conceived in criminal legal theory.

Following the perspective of liberal criminal theory, six such cases will be analysed in Chapter 3, after an explanation of the mentioned principles of criminalisation in Chapter 1, and a description of the Court’s interpretation of the Convention and the Article concerned in Chapter 2. The observations made through the analysis in Chapter 3 will be recited and further discussed in Chapter 4 before concluding that even though there are identifiable patterns of the use of principles of criminalisation in the Court’s determination of the breadth of the margin of appreciation, these patterns do not amount to a principled reasoning compatible with any specific conception of criminal legal theory.

## CHAPTER I- THE THEORY OF CRIMINALISATION

### A) The State's Power to Criminalise

The state's power to criminalise human conduct is based on no other than its sovereignty.<sup>1</sup> In the modern notion of the state, sovereignty rests in the hands of the citizens who delegate representatives to act on their behalf.<sup>2</sup> It is this delegated power that is exercised through criminal legislation,<sup>3</sup> since it is this delegated power that gives the state authority to make laws and establish institutions to enforce them.<sup>4</sup>

State sovereignty is not unlimited, constitutionalism and the rule of law serve to limit sovereignty<sup>5</sup> and protect the rights of the individual from the arbitrary use of this power.<sup>6</sup> Criminal law being a representation of the state's monopoly of the use of physical force within its territory,<sup>7</sup> many guarantees have been put into place to ensure that this force is not used arbitrarily. The principle of legality dictates that criminal law must be general, promulgated, non-retroactive and clear;<sup>8</sup> however these requirements of legality are neutral towards the substantive aims pursued through criminal law.<sup>9</sup>

Criminalisation, the act of defining certain human conduct as criminal offences and assigning to them a range of criminal law sanctions,<sup>10</sup> is undeniably a political process.<sup>11</sup> It is the criminal policy of the state that determines the substantive content of criminal law<sup>12</sup>. This

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<sup>1</sup> John Locke, *Second Treatise of Government* (first published 1690, Hackett Publishing Company 1980), 8.

<sup>2</sup> Jean Jacques Rousseau, 'On Social Contract', in Alan Ritter and Julia Conaway Bondanella *Rousseau's Political Writings* (W.W. Norton & Company 1988), 105.

<sup>3</sup> Simeneh K. Assefa, 'Sovereignty, Legitimacy, and Fundamental Rights as Limitations to the Criminalization Power of the State' (2018) 12:1 Mizan Law Review 127, 146.

<sup>4</sup> Assefa (n 3) 131. // Cesare Beccaria, 'Suçlar ve Cezalar Hakkında' (Of Crimes and Punishments), trans. by Sami Selçuk (Imge 2016), 29.

<sup>5</sup> *ibid* 128.

<sup>6</sup> Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press 2013) 3.

<sup>7</sup> Nina Persak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts* (Springer 2007) 9.

<sup>8</sup> Lautenbach (n 6) 46.

<sup>9</sup> *ibid* 47.

<sup>10</sup> Persak (n 7) 6.

<sup>11</sup> *ibid* 5.

<sup>12</sup> Zeki Hafizoğulları, *Ceza Normu: Normatif Bir Yapı Olarak Ceza Hukuku Düzeni* (2nd edn, US-A Yayıncılık 1992) 5.

power to criminalise is immense, it divides the population into criminals and non-criminals,<sup>13</sup> it shapes society as much as it is shaped by it. In order to ensure that this power is not used arbitrarily, criminalisation ought to be guided by principles that are consistent with liberal values.<sup>14</sup>

Constitutions and human rights documents define a private sphere of the individual into which the government cannot interfere.<sup>15</sup> In the national legal space, legislatures have broad power to establish what conduct will be criminalised, yet their decisions can be overturned by constitutional courts when they infringe the limits set by the constitution.<sup>16</sup> In the international space, human rights can only set boundaries to the substantive content of law as long as human rights treaties are signed and institutions are set up to determine the scope of state obligations that the rights entail.<sup>17</sup> The European Court of Human Rights that will be the focus of this study, considers the cases that come before it to see if in that specific case criminalisation of the conduct constituted a violation of a right enshrined in the European Convention on Human Rights. The quest for drawing the boundaries between the autonomy of the individual and the conduct the state may legitimately criminalise however, is not easy.<sup>18</sup>

For centuries philosophers and criminal theorists have attempted to come up with a consistent set of principles to determine the scope of human conduct that may legitimately be criminalised, yet a “grand theory” for criminalisation has not been established.<sup>19</sup> Nevertheless, some principles of legitimate criminalisation have been identified and even though there is hardly any consensus on their definition and scope, they are useful in untangling and analysing the discussions surrounding criminalisation. The rest of this Chapter will be dedicated to understanding some of the most prominent views on the principles of criminalisation.

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<sup>13</sup> Persak (n 7) 6.

<sup>14</sup> *ibid* 4.

<sup>15</sup> Lautenbach (n 6) 57. // Kai Möller, ‘From Constitutional to Human Rights: On the Moral Structure of International Human Rights’ (2014) 3 *Global Constitutionalism*, 373, 376.

<sup>16</sup> Esteban Restrepo Saldarriaga, ‘Poisoned Gifts: Old Moralities under New Clothes?’, in Alice M. Miller, Mindy Jane Roseman, *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law* (University of Pennsylvania Press 2019), 201.

<sup>17</sup> Lautenbach (n 6) 61.

<sup>18</sup> Lautenbach (n 6) 61.

<sup>19</sup> Saldarriaga (n 16) 199.

## **B) Aims of Criminal Law**

In order to start a discussion over what conduct ought to be criminalised and what conduct ought not, it is indispensable to consider the aims of criminal law. Criminal law is distinct from other bodies of law because it not only prohibits certain actions but also threatens individuals with a certain punishment in the event that the prohibited action is committed.<sup>20</sup> The enactment of the threat contained in criminal legislation is one of the most intrusive and repressive acts of state power<sup>21</sup>, therefore it must be justified in its aims. The most commonly suggested purposes for the criminal law are as follows: the deterrence of offences, the rehabilitation of offenders, the disablement of offenders from reoffending, sharpening the community's sense of right and wrong and the satisfaction of the community's sense of just retribution.<sup>22</sup> Each of these purposes are complex and none of them can be said to be wholly excluding the others<sup>23</sup>.

Instead of the ex post aims of criminal law that are the aims of punishment, this study will focus on the ex ante aims of criminal law, which are the aims of criminalisation. The criminalisation of a conduct declares that the conduct is wrongful and should not be done, and deploys a supplementary reason not to do it, threatens with punishment.<sup>24</sup> Today, these authoritative judgements of wrongfulness are made by the state on behalf of the wider community, since this valuation of the conduct stems from the state's authority and the state takes its authority from its citizens.<sup>25</sup>

Criminalisation also aims at clearly defining those acts that are prohibited by the state. The principle of legality today dictates that no person shall be punished for violating a rule that was non-existent or unclear at the time they acted<sup>26</sup>, therefore criminal legal codes draw clear

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<sup>20</sup>A.P. Simester, Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 3.

<sup>21</sup> Persak (n 7) 1.

<sup>22</sup> Henry M. Hart, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems*, 401.

<sup>23</sup> *ibid.*

<sup>24</sup> Simester, Hirsch (n 20) 6.

<sup>25</sup> Simester, Hirsch (n 20) 13.

<sup>26</sup> Peter Westen, *Two Rules of Legality in Criminal Law* (2007) 26 *Law and Philosophy* 229, 303.

lines between permissible and impermissible conduct, and the criminal justice system relies on citizens knowing these lines and governing their conduct accordingly.<sup>27</sup>

Once it is made public that a certain act has been criminalised, citizens are entitled to expect the state to see its commitment through, the state's willingness to carry out the threats is essential to the deterrent effect of criminalisation.<sup>28</sup>

### **C) Limits of Substantive Criminal Law**

The question of what a "crime" is, can be approached from a variety of theoretical perspectives that can be broadly divided into two categories: positivist theory, and non-positivist theory.<sup>29</sup> Positivist theory conceives that law is a social construct and therefore its systemic validity is sufficient for its enforcement.<sup>30</sup> Positivists argue that legal philosophy should be concerned not with speculation about the morality of law but rather with understanding the nature of law as it exists.<sup>31</sup> Non-positivists argue that since criminal sanction is the most drastic of the state's institutional tools for regulating the conduct of individuals, it should be deployed only where supported by convincing justifications.<sup>32</sup> They seek to determine the boundaries of liberty and the limits of criminalisation, and in undertaking this task they employ various concepts and principles.<sup>33</sup>

The substantive limits of criminalisation have developed differently in Continental European and Anglo-American legislations. When in Continental European legislations the concept of a "*Rechtsgut*", a "legally protected interest" has been employed in an attempt to limit the state in the range of conducts it may criminalise, in Anglo-American legislations four principles that carry the same aim have emerged. The said principles are: the harm principle, the offense principle, legal paternalism, and legal moralism.

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<sup>27</sup> John M. Darley, Paul H. Robinson, Kevin M. Carlsmith, 'The Ex Ante Function of Criminal Law' (2001) 35 *Law & Society Review* 165, 165.

<sup>28</sup> Simester, Hirsch (n 20) 10.

<sup>29</sup> Mouaid Al Qudah, 'The Moral Foundations of Criminal Liability' (2014) 2 *International Property Rights Open Access* 116, 116.

<sup>30</sup> Stanford Encyclopedia of Philosophy, *Legal Positivism*, available at: <https://plato.stanford.edu/entries/legal-positivism/#3>, accessed: 24.08.2019.

<sup>31</sup> Qudah, (n 29) 116.

<sup>32</sup> Simester, Hirsch (n 20) 19.

<sup>33</sup> Qudah, (n 29) 3.

## 1. Continental Theory of the Limits of Substantive Criminal Law

In order to discuss theoretical criminal law, it is essential to start by dissecting crime into its elements. Various dissections of crime into its elements have been made, and to this day there is no consensus on how many separate elements there must be. If the opinion that there are three elements to crime will be adopted here for the sake of argument, it can be said that crime consists of the following elements: the material element, the moral element, and the legal element. The material element relates to the external facet of the crime, it is the act, the commission or omission itself. The moral element is the culpability of the person who has committed the said act. The legal element embodies the principle of legality,<sup>34</sup> it is the necessity that the act must infringe a criminal prohibition. It is the legal element that is concerned with criminalisation. For a “crime” to occur therefore, there must be a commission or omission that has been committed by a culpable person, and this act must have infringed a criminal prohibition that had previously been put into place by the state. In the event that one of these elements is missing, there would be no crime.

Liberal non-positivist Continental criminal law theorists have come up with the theory of a “*Rechtsgut*” to limit the state in the range of conducts it can criminalise.<sup>35</sup> According to the *Rechtsgutstheorie*, there exist “legal goods”, which are the legally protected interests of individuals or other legal entities, or of certain collectives, which precede the making of the law.<sup>36</sup> Those who support this theory argue that when a crime is committed there are two “wrongs” that occur in the legal element of the crime, the first is the “formal wrong”, the fact that the law the state had put down has been breached; the second is the “material wrong”, the fact that harm has been done to the “legal good”, the legally protected interest the existence and value of which preceded the law.<sup>37</sup> For liberal non-positivist continental criminal law theorists then, for the criminalisation of a certain act to be justified there must be an

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<sup>34</sup> Albin Eser, ‘The Principle of “Harm” in the Concept of Crime: a Comparative Analysis of the Criminally protected Legal Interests’ (1966) 4:3 *Duquesne Law Review* 345, 355.

<sup>35</sup> Tatjana Hörnle, ‘Theories of Criminalization’ in Markus Dubber, Tatjana Hörnle *The Oxford Handbook of Criminal Law*, (Oxford University Press 2014) available at:

<https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199673599.001.0001/oxfordhb-9780199673599-e-30> accessed: 09.08.2019, 7.

<sup>36</sup> Persek (n 7) 106.

<sup>37</sup> Eser (n 34) 348.

identifiable “material wrong”, the infringement of a value, an interest that already existed before the legal rule was made to protect it. This theory attempted to limit the scope of justifiable criminalisation by asserting that criminal prohibitions can only be justified when made for the purpose of protecting interests worthy of such protection.<sup>38</sup>

Continental legal positivists however, have argued that the “legally protected interest” can be any interest that is of value in the eyes of the legislator for the “welfare of society”.<sup>39</sup> They have maintained that the “legal good” is what the positive law says it is, and rejected the idea that a “legal good” can have any normative value independent of the lawmaker.<sup>40</sup> This argument breaks the distinction that non-positivists have made between a “formal wrong” and a “material wrong” because if whatever the lawmaker deems as against the welfare of society and criminalises constitutes a material wrong, then the material wrong is no longer different from the formal wrong which is the breach of the legislation itself.<sup>41</sup> This argument can be, and has been deployed by lawmakers to legislate as they see fit in order to advance their own idea of the welfare of society.<sup>42</sup>

In order for “legal goods” to play a critical role in criminalisation, they have to be conceptualised as something beyond the positive criminal law.<sup>43</sup> There is no list of a classification of recognised legal goods and it is easy to fall prey to the positivist approach<sup>44</sup> that claims that the “legal good” need not precede criminalisation, it can be created and recognized with criminalisation itself. The Rechtsgut doctrine today is rather ambivalent and has not been successful in its aim to limit the range of conduct that the state may legitimately criminalise.<sup>45</sup>

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<sup>38</sup> Eser (n 34) 351.

<sup>39</sup> Zeki Hafizoğulları, Muharrem Özen, *Türk Ceza Hukuku Genel Hükümler*, (US-A Yayıncılık, 2012) 226.

<sup>40</sup> Persek (n 7) 107.

<sup>41</sup> Hafizoğulları, Özen *Türk Ceza Hukukuku* (n 39) 226.

<sup>42</sup> Eser (n 34) 349.

<sup>43</sup> Persek (n 7) 110.

<sup>44</sup> Persek (n 7) 117.

<sup>45</sup> Persek (n 7) 118.

## **2. Anglo-American Theory on the Limits of Substantive Criminal Law**

The Anglo-American tradition, as has been mentioned, generally recognises four basic principles of criminalisation. Legal moralism, the harm principle, the offense principle and legal paternalism are subject to wide dispute since there is no consensus as to which ones constitute good justification for criminalisation<sup>46</sup>, there is also much disagreement as to which criminal prohibitions can be well justified through which of the principles.

### **2.1 Harm Principle and Legal Moralism**

Any evaluation of the criteria for criminalisation in modern academia starts with John Stuart Mill's "Harm Principle". In his essay "On Liberty", published in 1859, Mill famously declares "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."<sup>47</sup> The harm principle has been used in argumentation as a limiting principle with regard to the enforcement of morality.<sup>48</sup> In 1873, Lord James Fitzjames Stephen published an attack on Mill's essay in his book titled "Liberty, Equality, Fraternity" where he argued "There are acts of wickedness so gross and outrageous that self-protection apart, they must be prevented as far as possible at every cost to the offender, and punished, if they occur, with exemplary severity".<sup>49</sup>

A century later, in 1959, Patrick Devlin gave his famous lecture "The Enforcement of Morals" where he argued that morals and religion are inextricably joined, that it is impossible to claim that moral codes of society are not based on religion;<sup>50</sup> but because the state cannot say that certain acts are criminalised because they are sinful, it must find some other way of justifying the punishments it imposes on wrongdoers.<sup>51</sup> He suggests that what makes a "society" is a community of ideas,<sup>52</sup> not only political but also moral, and argues that society should use law

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<sup>46</sup> Persek (n 7) 13.

<sup>47</sup> John Stuart Mill, *On Liberty* (first published 1859, Bootche Books 2001) 13.

<sup>48</sup> Bernard E. Harcourt, 'Collapse of the Harm Principle' (1999) 90:1 Journal of Criminal Law and Criminology 109, 115.

<sup>49</sup> *ibid* 123.

<sup>50</sup> Patrick Devlin, 'The Enforcement of Morals' (1959) available at: <http://psi329.cankaya.edu.tr/uploads/files/Devlin%2C%20The%20Enforcement%20of%20Morals%20%281959%29%281%29.pdf> accessed: 08.08.2019, 132.

<sup>51</sup> *ibid* 133.

<sup>52</sup> *ibid* 136.

to enforce its moral judgements<sup>53</sup> indeed. To ascertain the moral judgements of society, he introduces the idea of the “reasonable man” who “is not expected to reason about anything, and his judgement may be largely a matter of feeling.”<sup>54</sup> He defines immorality for the purpose of the law as “what every right-minded person is presumed to consider to be immoral”.<sup>55</sup> In the end he makes the point that any such immorality is capable of affecting society injuriously and this is what gives the law its *locus standi*<sup>56</sup>.

H.L.A. Hart has observed in his “Law, Liberty and Morality” that there is a similarity in the general tone of Stephen and Devlin.<sup>57</sup> Bernard E. Harcourt on the other hand has commented that Devlin’s arguments are different from those of Stephen because Devlin himself does not oppose Mill’s harm principle, he simply plays on the ambivalence in the notion of harm, defines public morality in terms of harm to society and opens up the door to what Harcourt calls “Conservative Liberalism”, which is the deployment of the harm principle by conservatives to justify laws that criminalise prostitution, pornography, drug use and many other acts conservatives are traditionally against.<sup>58</sup> Harcourt concludes by arguing that there is no longer an argument within the structure of the debate to resolve the competing claims of harm, since “nontrivial harm arguments are being made about practically every moral offense”.<sup>59</sup> He adds that “there is probably harm in most human activities”, and suggests that instead of broad prohibitions that affect entire categories of moral offenses, more nuanced remedies that address particular harms ought to be developed.<sup>60</sup>

Ronald Dworkin in his article “Lord Devlin and the Enforcement of Morals” argues that what is shocking and wrong with Devlin’s legal moralism is not that the community’s morality counts, but his idea of what counts as the community’s morality.<sup>61</sup> He admits that of course the legislator will apply tests to determine “the community’s morality” before legislating it, but the answer will depend upon the legislator’s own understanding of what the shared morality of

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<sup>53</sup> *ibid* 138.

<sup>54</sup> *ibid* 141.

<sup>55</sup> *ibid* 142.

<sup>56</sup> *ibid* 142.

<sup>57</sup> Harcourt (n 48)123.

<sup>58</sup> *ibid* 139.

<sup>59</sup> *ibid* 114.

<sup>60</sup> *ibid* 193.

<sup>61</sup> Ronald Dworkin, ‘Lord Devlin and the Enforcement of Morals’ (1966) 75 *Yale Law Review* 986, 1001.

society requires.<sup>62</sup> “No legislator can afford to ignore the public’s outrage”, he continues, “it will set the boundaries of what is politically feasible, and it will determine the strategies of persuasion and enforcement within these boundaries. But we must not confuse strategy with justice, nor facts of political life with principles of political morality. Lord Devlin understands these distinctions, but his arguments will appeal most, I am afraid, to those who do not.”<sup>63</sup>

Gerald Dworkin in his article “Devlin Was Right: Law and the Enforcement of Morality” declares that he sides with Hart in most issues concerning specific rights and gives as an example the fact that he does not think homosexual sex should be criminalised; but he agrees with Devlin in believing that there is no principled line following the contours of the distinction between immoral and harmful conduct such that only grounds referring to the latter may be invoked to justify criminalisation.<sup>64</sup> Bernard Harcourt criticises Gerald Dworkin’s stance, arguing that just like Devlin Dworkin seems to premise his argument on the assumption that harmless wrongdoing is not possible, and this collapses his legal moralism into the public harm thesis, making it indistinguishable from the harm principle.<sup>65</sup>

Even though the harm principle starts out with the aim to limit the state in the range of conduct that it may legitimately criminalise by requiring it be limited to conduct which causes harm to others, the vague nature of the word “harm” has resulted in different views of what it entails. While some have maintained that “harm” should be narrowly interpreted, others have claimed that any sort of harm can be included in the principle, and have brought legal moralism into the sphere of justification of the harm principle through claims of “harm to society”. This ambivalence in the meaning of “harm” has caused stagnation in the deployment of the principle with liberal aims.

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<sup>62</sup> *ibid* 1002.

<sup>63</sup> *ibid*.

<sup>64</sup> Gerald Dworkin, ‘Devlin Was Right: Law and the Enforcement of Morality’ (1999) 40:927 *William and Mary Law Review* 927, 928.

<sup>65</sup> Harcourt, (n 48) 134-304.

## 2.2. Offense principle

Joel Feinberg in the second book titled “Offense to Others” of his four-volume treatise “The Moral Limits of Criminal Law” published in 1988 suggests a new principle called the “offense principle” in order to cover those acts that do not constitute harm but may be legitimately criminalised under this new principle, so as to release the stagnation caused by the disagreement over the interpretation of the harm principle. Feinberg’s harm principle is different from Mill’s in the sense that whilst Mill’s harm principle is exclusive of any other principles, Feinberg’s can coexist with other principles.<sup>66</sup> Feinberg defines harm as a “setback to interest”, an action that makes the harmed party worse off; and moves on to add that there are varieties of conduct that can be criminalised where the justification of doing so does not refer to harm.<sup>67</sup> He contends, “there are human experiences that are harmless in themselves yet so unpleasant that we can rightly demand legal protection from them even at the cost of other persons’ liberties”.<sup>68</sup>

Using a “ride on the bus” analogy to demonstrate the legitimacy of what he calls the “offense principle”, Feinberg asks the reader to imagine themselves in a bus where they have harmless but unpleasant experiences with other passengers, ranging from a passenger wearing a shirt with an unpleasant colour scheme to other passengers eating live slugs and fish heads, to public nudity, to other passengers smashing the head of a corpse in a coffin. Admitting that offense is a “less serious thing than harm”,<sup>69</sup> he argues that acts causing offense may still be criminalised, taking the word “offense” not in the strict sense in ordinary language that is about the feelings of the affected party but as an objective wrong, saying “it is necessary that there be a wrong but not that the victim feel wronged.”<sup>70</sup> Feinberg’s conclusion is that one’s private control of his “inner property” is violated when others obtrude their own sounds, shapes and affairs upon his “territory” without his consent, forcing him to experience

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<sup>66</sup> Persek (n 7) 13.

<sup>67</sup> A.P. Simester, Andrew Von Hirsch, ‘Rethinking the Offense Principle’ in Paul H. Robinson (ed), *The Structure and Limits of Criminal Law* (Ashgate 2014) 365.

<sup>68</sup> Joel Feinberg, *The Moral Limits of Criminal Law vol. 2: Offense to Others* (Oxford University Press 1988) Chapter 7 ‘Offensive Nuisances’, available at <https://www.oxfordscholarship.com/view/10.1093/0195052153.001.0001/acprof-9780195052152>, 13.

<sup>69</sup> *ibid* 3.

<sup>70</sup> *ibid* 3.

“disgusting, enraging activities” and violating “something like a property right”.<sup>71</sup> Even though Feinberg endorses the offense principle as one of the legislative legitimizing principles, he argues that various restrictive standards to the offense principle need to be put in place,<sup>72</sup> and suggests that these standards be 1) the intensity and durability of the repugnance produced, and the extent to which repugnance could be anticipated to be the general reaction of strangers to the conduct displayed or represented, 2) the ease with which unwilling witnesses can avoid the offensive displays, 3) whether or not the witnesses have willingly assumed the risk of being offended either through curiosity or the anticipation of pleasure.<sup>73</sup>

Simester and Hirsch in their article “Rethinking the Offense Principle” remark that Feinberg’s test for which offenses can be criminalised is capable of being tilted against prohibition by requiring that the balance must be strongly in favour of criminalisation.<sup>74</sup> They agree with Feinberg on the argument that offensive states are not themselves a harm since they do not intrinsically set back the victim’s interests and well-being,<sup>75</sup> defining harm as “a loss of opportunity on the part of the victim”.<sup>76</sup> In their conclusion they stress that a successful life requires that there be conciliation between an individual’s way of life and the society in which they live, something that depends on the individual being permitted to express their own values and chosen life in a tolerant environment, and that there is need to accommodate diverse and sometimes inconsistent styles of life.<sup>77</sup>

Feinberg’s narrow definition of harm and creation of a new offense principle is a good step for the liberal minimalist approach to criminalisation in the sense that it prevents the harm principle from unduly expanding via the broadening of the notion of harm.<sup>78</sup> The offense principle is still suitable to being interpreted so widely that it may be used to justify legal

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<sup>71</sup> *ibid* 23.

<sup>72</sup> Joel Feinberg, , *The Moral Limits of the Criminal Law vol. 2: Offense to Others* (Oxford University Press 1988) Chapter 8 ‘Mediating the Offense Principle’, available at: <https://www.oxfordscholarship.com/view/10.1093/0195052153.001.0001/acprof-9780195052152> , 23.

<sup>73</sup> *ibid* 2.

<sup>74</sup> Simester, Hirsch, *Rethinking the Offense Principle*, (n 67) 368.

<sup>75</sup> *ibid* 379.

<sup>76</sup> *ibid* 377.

<sup>77</sup> *ibid* 391.

<sup>78</sup> Persek (n 7) 15.

moralism, therefore it is important that the limitations Feinberg and Simester and Hirsch offer for the offense principle are followed.

### 2.3. Legal paternalism

John Stuart Mill's "harm principle" requires that the infamous "harm" be done to "others" for state intervention to be justified. Harm that the person does to himself is no legitimate reason for state intervention since to Mill "Over himself, over his own body and mind, the individual is sovereign."<sup>79</sup> Immanuel Kant on the other hand, argues that the person who wilfully engages in or solicits self-harming behaviour will have disrespected the humanity in his own person, which would justify a state committed to the flourishing of all its citizens to have a reason to intervene in self-harming conduct.<sup>80</sup>

The restriction of the freedom and choices of individuals with the aim to protect them from themselves has been referred to as "paternalism".<sup>81</sup> Paternalism assumes that individual agents are not always able to make the judgement of what is good for them. The argument against paternalism is that there is no reason to believe legislators to be in a better position to make such judgement.<sup>82</sup> What legislators interpret as harm may be perceived by the person concerned as beneficial, a reasonable choice consistent with their interests.<sup>83</sup> Paternalistic arguments could thus be a roundabout way of promoting a conception of what is "good", at the expense of individual liberty.<sup>84</sup>

Feinberg writes that it is important to distinguish between paternalistic behaviour generally, and paternalistic rules that are coercive interferences with liberty. He offers the example of prescribing placebos to healthy but anxious patients, or withholding the truth from deathbed

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<sup>79</sup> Mill (n 47) 13.

<sup>80</sup> John Kleinig, 'The Paternalistic Principle' (2016) 10 Criminal Law and Philosophy 315, 320.

<sup>81</sup> Christophe Béal, 'Can Paternalism Be Soft? Paternalism and Criminal Justice', (2011) 4:44 *Presses de Science Po- Raisons Politiques*, 41, 42.

<sup>82</sup> *ibid* 44.

<sup>83</sup> *ibid* 45.

<sup>84</sup> *ibid* 46.

patients.<sup>85</sup> Simester and Hirsch agree that paternalistic intervention outside of the criminal law is a different matter than criminal legal paternalism and opine that it cannot be argued that it would be good to knock down paternalism altogether.<sup>86</sup>

### *i. Soft paternalism*

In order to find a way for the state to be able to intervene paternalistically without imposing its own ideas of good and bad on individuals, Feinberg conceives a “soft paternalism” that can be justified through the notion of autonomy conceived as a form of personal sovereignty.<sup>87</sup> The idea is to maximize the wellbeing of individuals while preserving their autonomy through having paternalistic legislation be justified with the consent of those who experience its interference.<sup>88</sup>

This explanation of autonomy would expect the individual to act according to a coherent set of goals of his individual choice and their right to control their affairs with personal values and beliefs will be respected.<sup>89</sup> There will be no intervention by the state when the individual acts in apparently self-destructive behaviour that is part of a fuller life-conception or plan of their own.<sup>90</sup> The writer who drinks and smokes because he is inspired through this choice of life will not be interfered with, because they are acting in accordance with their long-term goals; even the person who takes excessive risks because they believe they are unusually skilful or lucky can, unless they suffer from significant mental illness, make their decisions without interference by the state.<sup>91</sup>

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<sup>85</sup> Joel Feinberg, , *The Moral Limits of the Criminal Law vol. 3: Harm to Others* (Oxford University Press 1988) Chapter 1 ‘Legal Paternalism’, available at:

<https://www.oxfordscholarship.com/view/10.1093/0195059239.001.0001/acprof-9780195059236>, 2.

<sup>86</sup> Simester, Hirsch, *Crimes, Harms, and Wrongs* (n 20) 114.

<sup>87</sup> Béal (n 81) 10.

<sup>88</sup> Béal (n 81) 10.

<sup>89</sup> Tom L. Beauchamp ‘Autonomy and Consent’ in Franklin Miller, Allen Wertheimer, *The Ethics of Consent: Theory and Practice* (Oxford University Press 2009) available at:

<https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195335149.001.0001/acprof-9780195335149>, 7.

<sup>90</sup> Simester, Hirsch, *Crimes, Harms, and Wrongs* (n 20) 153.

<sup>91</sup> Andrew Von Hirsch, ‘Direct Paternalism: Criminalizing Self-Injurious Conduct’, (2008) 27:1 Criminal Justice Ethics 26.

In the end, this theory allows the state to intervene into the consent of individuals by way of invoking temporary restraint on them only if the individual has identifiable long-term goals and the act that will be interfered with would apparently frustrate these goals.<sup>92</sup> Gerald Dworkin asserts that intervention should only be permissible if the self-harm is potentially grave and irreversible, the person appears to be acting under unusual stress, the duration of the intervention is limited, and there will be restrictions of repeated interventions.<sup>93</sup> Andrew Hirsch rejects soft paternalism and holds that self-determination should involve disposing of one's interests as one now chooses, irrespective of the supposed longer-range preferences one has developed previously.<sup>94</sup>

It is true that state intervention may be designed to protect and improve the quality of people's lives and to promote the goods of human welfare. Indeed, many kinds of non-penal state intervention are already in place for this purpose.<sup>95</sup> When it comes to criminal paternalistic prohibitions however, the state rules out some options for individuals permanently, options which may be valuable for the individual who is often better placed than the state to make nuanced judgements about the effects of a contemplated action in the particular circumstances.<sup>96</sup> Another important point is that in a pluralistic society where multiple reasonable conceptions of what is good coexist, criminal jurisdictions should not condemn actions for the simple reason that they contradict a particular idea of what is a good conception of happiness.<sup>97</sup>

## *ii. Criminal legal paternalism*

When the state attaches a criminal sanction to one harming one's self, or one harming a consenting other, it is criminal legal paternalism at play. Historically, the victim's consent was a defense against prosecution. The maxim "volenti fit non injuria", meaning "a person is not

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<sup>92</sup> Hirsch, *Direct Paternalism* (n 91) 26.

<sup>93</sup> *ibid* 27.

<sup>94</sup> *ibid* 27.

<sup>95</sup> Simester, Hirsch, *Crimes, Harms, and Wrongs* (n 20) 148.

<sup>96</sup> *ibid*.

<sup>97</sup> Béal (n 81) 10.

wronged by that to which he consents”<sup>98</sup> was recognized in Roman law as early as the sixth century<sup>99</sup> and applied to all kinds of criminal sanction.<sup>100</sup> The monopolization of the system of punishment by the state and the king’s becoming the ultimate victim and the sole prosecutor of a criminal act was the historical reason for the rejection of the consent of the victim as a defence.<sup>101</sup> In one of the earliest English cases where this rejection occurred, the court’s opinion was that by maiming the willing victim, the defendant had deprived the king of the aid and assistance of one of his subjects.<sup>102</sup> Today the argument for not recognising the consent of the victim as a defence lies not in the benefit of the king, but in the benefit of the victim concerned.

A distinction is to be made between legislation that prohibits acts that harm one’s self and those that harm a consenting other. The first kind has been referred to as pure paternalism or direct paternalism,<sup>103</sup> whereas the second kind has been referred to as impure paternalism or indirect paternalism.<sup>104</sup> Clearly the two forms of paternalism do not have the same legal scope, and they raise different problems.<sup>105</sup>

### *Pure paternalism*

Pure paternalistic criminal laws claim to be aimed at protecting the individual from himself, but the use of penal sanction with its deprivations and censure does not promote the interests of the individual in the end.<sup>106</sup> It is inconceivable that punishment that makes the individual worse off could promote the individual’s best interest.<sup>107</sup> However, with the recent tendency to reduce criminal sanctions for pure paternalistic crimes such as drug use, it has become

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<sup>98</sup> Vera Bergelson, ‘Consent to Harm’ (2008) Rutgers School of Law-Newark Research Papers No. 023, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1162360](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162360) 101, 104.

<sup>99</sup> Vera Bergelson, ‘The Right to be Hurt - Testing the Boundaries of Consent’ (2006) *The George Washington Law Review* 9.

<sup>100</sup> Feinberg, *vol.2* Chapter 8 ‘Mediating the Offense Principle’ (n 72) 2.

<sup>101</sup> Bergelson, *Consent to Harm* (n 98) 105.

<sup>102</sup> *ibid.*

<sup>103</sup> Hirsch, ‘Direct Paternalism’ (n 91) 2.

<sup>104</sup> Béal (n 81) 43.

<sup>105</sup> *ibid.* 44.

<sup>106</sup> Hirsch, ‘Direct Paternalism’ (n 91) 28.

<sup>107</sup> Douglas Husak, ‘Paternalism and Consent’ in Franklin Miller, Allan Wertheimer *The Ethics of Consent: Theory and Practice*, Oxford Scholarship Online (Oxford University Press 2009) available at: <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195335149.001.0001/acprof-9780195335149-chapter-5>, 3.

possible to argue that modest criminal penalties may not necessarily be worse for the individual than their own self-destructive conduct.<sup>108</sup> However, it is still hard to argue that the censure function criminalisation carries which is the expression of disapproval of the perpetrator for the wrongfulness of their conduct, the public recognition of a “wrong”, is compatible with the state’s claim of protection of the individual.<sup>109</sup> If the state’s aim in criminalising self-harming behaviour is to safeguard the individual’s options for the future as is claimed, then a non-penal disincentive would be a more appropriate response.<sup>110</sup>

### *Impure Paternalism*

Impure paternalism in criminal law is when the victim and the perpetrator of a crime are different individuals, where the victim has consented to the harm that the perpetrator has caused them. The moral and legal effects of consent need to be discussed when it comes to discussing impure paternalism, along with whether one has an unlimited right to authorize another person to harm them.<sup>111</sup>

The ability to consent is a central manifestation of personhood and individual autonomy. To be able to consent, one must be an agent who has reached a certain level of maturity, this is why young persons and those with mental illnesses do not possess the capacity to consent.<sup>112</sup> In the absence of such impairment however, one’s consent is valid and at the centre of their legal life; the consent of the governed is so important that it is seen as the only source of legitimacy of state power in modern political theory.<sup>113</sup> However the rules governing individuals’ ability to consent to being harmed by others are very strict, and also morally and conceptually incoherent.<sup>114</sup>

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<sup>108</sup> Hirsch, Direct Paternalism (n 91) 28.

<sup>109</sup> *ibid* 27.

<sup>110</sup> *ibid* 29.

<sup>111</sup> Bergelson, Testing Boundaries (n 99) 4.

<sup>112</sup> John Kleinig, ‘The Nature of Consent’, in Franklin Miller, Allan Wertheimer *The Ethics of Consent: Theory and Practice*, Oxford Scholarship Online (Oxford University Press 2009) available at: <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195335149.001.0001/acprof-9780195335149-chapter-1>, 11.

<sup>113</sup> Bergelson, Testing Boundaries (n 99) 6.

<sup>114</sup> *ibid*, 6.

Consent carries an inculpatory role in criminal law, as in, consensual sex is not rape, consensual possession of others' belongings is not theft and consensual presence on other people's premises is not trespass.<sup>115</sup> But in other cases, especially in cases of bodily harm, this inculpatory role of the consent of the victim vanishes.<sup>116</sup>

There are some arguments that look to justify this loss of consent of its inculpatory role in different cases. These arguments revolve around the validity and voluntariness of consent. One of these arguments is that the victim who consented to being harmed was not rational. This argument exhibits circular reasoning: "a person who consents to X is insane because one has to be insane to consent to X", and when the victim's insanity is thus established and his consent invalidated, criminal conviction of the perpetrator automatically follows.<sup>117</sup> The second argument that is used with the same purpose is to claim that consent was not voluntary. This argument follows that under certain circumstances people may not act entirely voluntarily even when they are not subjected to formal duress or coercion; it could be that they were vulnerable because they were young, it could be that they were vulnerable due to constant pain, and this vulnerability may be exploited by others.<sup>118</sup> There may be truth in this argument, it has been claimed that cases of acute or chronic pain can impair consent, for example.<sup>119</sup> However, where the lawmaker has concerns regarding the consent of the victim in a certain scenario, it should direct the law towards a removal of the said uncertainties by demanding persuasive proof of valid consent, and not by taking away the power to consent altogether.<sup>120</sup>

As Louis Henkin has aptly put it, "Motives and purposes for legislation are notoriously elusive, ambiguous, and multifarious."<sup>121</sup> This chapter has aimed to demonstrate the complexity and intricacy of the various categories of justifications for criminal legislation. As there is no consensus among scholars on which justifications are legitimate, there is no consensus

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<sup>115</sup> *ibid* 7.

<sup>116</sup> *ibid* 7.

<sup>117</sup> *ibid* 28.

<sup>118</sup> *ibid* 30.

<sup>119</sup> Kleinig (n 112), 24.

<sup>120</sup> Bergelson, *Testing Boundaries* (n 99) 32.

<sup>121</sup> Louis Henkin, 'Morals and the Constitution: The Sin of Obscenity' (1963) 3 *Columbia Law Review* 391, 392.

among scholars on which justifications legitimately justify which criminal prohibitions. In fact there are so many inconsistencies with what is criminalised and what isn't, it is not possible to come up with a theoretically satisfactory explanation for existing criminalisation.<sup>122</sup> This impossibility lies in the fact that the explanation for the criminalisation of different actions is rooted not in logical or ethical, but historical and ideological standards.<sup>123</sup>

This complexity in the theoretical sphere transfers to practicality as a lack of a firm limitation on the state's power of criminalisation. The concern in practicality is not whether it is legitimate to legislate morality, since it is almost impossible to define and locate morality in law; but rather what the appropriate limits of criminal policy must be.<sup>124</sup> Even though we cannot devise a consistent theory of what ought to be criminalised, we can still argue what ought not be criminalised, relying on a conception of an inviolable privacy, a freedom from state interference.<sup>125</sup>

The rest of this study will be dedicated to examining how the European Court of Human Rights interprets the right to private life contained in Article 8 of the European Convention on Human Rights when deciding on the legitimacy of state interference with the right through criminalisation, and analysing how the Court has used criminal theory in its undertaking of this task.

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<sup>122</sup> Hugo Adam Bedau, "Are There Really Crimes Without Victims?" in Edwin M. Schur, Hugo Adam Bedau, *Victimless Crimes: Two Sides of a Controversy* (Spectrum Book 1974) 101.

<sup>123</sup> *ibid* 101.

<sup>124</sup> Joseph F. Winterschild, 'Victimless Crimes: The Threshold Question and Beyond' 52:5 (1997) *Notre Dame Law Review* 995, 997.

<sup>125</sup> Bedau (n 122) 102.

## CHAPTER II- INTERPRETATION OF THE CONVENTION

As Steven Malby rightly points out, bringing criminal theory and international human rights law together is no easy task because while criminal theory is a theoretical exercise that is concerned with an ideal, critical moral approach of what should and should not be criminalised, international human rights law deals with a ready text, a treaty, and whether the state failed to satisfy its obligations arising from the treaty.<sup>126</sup> The Court then cannot purely deal with the ideal dimension of the matter as it has to remain in the boundaries that the Convention confines it to. To understand the Court's case law then, it is essential to understand how the Convention is interpreted. This chapter aims at briefly describing the Court's interpretation of the Convention generally, and then its interpretation of Article 8.

### A) General Interpretation of the Convention

The Vienna Convention on The Law of Treaties asserts that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>127</sup> Drawn from the principles in the Vienna Convention, the interpretation of the European Convention has been dominated by the “purposive approach” which permits the application of meanings that are in alignment with the object and purpose of the treaty.<sup>128</sup> It should be fair to say however that the Vienna Convention has played a minor role in the interpretation of the ECHR since the Court has created its own labels for the interpretative techniques it uses, such as “living instrument”, “practical and effective rights” and “autonomous concepts”.<sup>129</sup>

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<sup>126</sup> Steven Malby, *Criminal Theory and International Human Rights Law* (Routledge 2019) 6.

<sup>127</sup> Vienna Convention on the Law of Treaties 1969, Art. 31

<sup>128</sup> European Convention on Human Rights (1950) // Bernadette Rainey, Elizabeth Wicks, Claire Ovey, *The European Convention on Human Rights* (6th edn Oxford University Press) 65.

<sup>129</sup> George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' 21:3 (2010) *The European Journal of International Law*, 513.

## 1. Object and Purpose

Textual originalism is a theory of interpretation of legal texts that ties the text to the meaning it would have had at the time that it became law.<sup>130</sup> Supporters of this view to treaty interpretation argue that treaties must be interpreted like private contracts are, where only that which the contractors at the time of the contract agreed to, binds them.<sup>131</sup> They maintain that states should have knowledge of the obligations they are undertaking when signing a treaty, and international tribunals would only be justified in substituting themselves for the convention makers if the States Parties clearly intend to delegate this power to them.<sup>132</sup> Non-originalists on the other hand, argue for “unenumerated” rights which are rights that are not expressly mentioned in the text of the law but should be “read into” it.<sup>133</sup> This was the case in *Golder v UK* where the Court read the right of access to a court into the right to fair trial contained in Article 6.<sup>134</sup> The Court in its decision referred to the Vienna Convention that hadn’t come into force yet, accepting that its provisions represented customary international law. By the guidance of the “object and purpose” found in the Preamble of the ECHR where the drafting states resolved to take the first steps for the collective enforcement of rights in furtherance of the rule of law, the Court found that one could not suppose compliance with the rule of law without the possibility of taking legal disputes to court,<sup>135</sup> and concluded that the right of access to court was “in the very terms” of Article 6.<sup>136</sup>

Since *Golder*, the Court has endorsed the idea that the Convention must be interpreted in present-day conditions rather than what the drafters intended in 1950, it has recognized rights the drafters had not clearly intended to grant and it has recognized rights the drafters had clearly intended not to grant.<sup>137</sup> The use of the Vienna Convention in *Golder* has led to the

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<sup>130</sup> Steven G. Calabresi, ‘On Originalism in Constitutional Interpretation’, available at: <https://constitutioncenter.org/interactive-constitution/white-pages/on-originalism-in-constitutional-interpretation> accessed: 03.08.2019

<sup>131</sup> Curtis J. Mahoney, ‘Treaties as Contracts: Textualism, Contract Theory and the Interpretation of Treaties’, (2007) 116 Yale Law Journal 834.

<sup>132</sup> Letsas, ‘Lessons’ (n 129) 518.

<sup>133</sup> *ibid* 515.

<sup>134</sup> David Harris and others, *Law of The European Convention on Human Rights* (3rd edn Oxford University Press 2014) 8.

<sup>135</sup> *ibid*.

<sup>136</sup> Letsas, ‘Lessons’ (n 129) 517.

<sup>137</sup> *ibid* 518.

rejection of originalism and the creation of the Court's own doctrines of interpretation such as "autonomous concepts" and "evolutive interpretation".<sup>138</sup>

## 2. Autonomous Concepts

The Court has frequently used the ordinary meaning of words in order to interpret the Convention; however in instances where the terms used in the Convention did not point at identical concepts among the Contracting Parties, the Court has resorted to adopting its own rules to determine the meanings of such terms in order to secure uniformity of treatment.<sup>139</sup>

The *Engel and Others v Netherlands* case was the beginning of the Court's case law that would be named "the theory of autonomous concepts".<sup>140</sup> In the *Engel* case the Government stated that the proceedings against the applicants were classified as "disciplinary" and reminded that Article 6 only refers to criminal charges, disciplinary proceedings were not included in the text of the article.<sup>141</sup> Even though it is well-established that disciplinary offences are distinct from criminal offences, the Court expressed the fear that some acts or omissions may be classified by the state either intentionally or innocently as disciplinary offences and therefore escape the guarantees of Article 6, and went on to create a separate concept of a "criminal charge".<sup>142</sup> "Autonomous concepts" give the Court "semantic independence", the definition in national law constitutes no more than a starting point in interpreting the autonomous meaning of a concept in the context of the Convention<sup>143</sup> since autonomous concepts should be interpreted according to the common denominator of the respective legislation of the various contracting parties.<sup>144</sup> Since *Engel*, many autonomous concepts have been identified by the Court and the former Commission.<sup>145</sup>

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<sup>138</sup> *ibid* 520.

<sup>139</sup> Rainey, Wicks, Ovey (n 128) 69.

<sup>140</sup> *ibid.* // *Engel and Others v. the Netherlands* (1976) ECtHR App No 5100/71, 5101/71, 5102/71, 5354/72, 5370/72.

<sup>141</sup> George Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECtHR' (2004) 15:2 *European Journal of International Law* 279, 281.

<sup>142</sup> *ibid* 281.

<sup>143</sup> George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 43.

<sup>144</sup> Letsas 'The Truth in Autonomous Concepts' (n 141) 283, 295.

<sup>145</sup> *ibid* 282.

After introducing the notion of a common denominator, in *Engel*, the Court noted that the very “nature of the offence” was more important than the domestic law classification. George Letsas argues that the Court set out to discover the real nature of a “criminal offence”, something constant and objective.<sup>146</sup>

### 3. Living Instrument, Evolutive Interpretation

In *Tyrer v UK*, the Court had to decide whether judicial corporal punishment of juveniles amounts to degrading punishment within the meaning Article 3 of the Convention. The State claimed that it could not be considered to be degrading because it did not outrage public opinion in the Isle of Man.<sup>147</sup> The Court rejected the idea that public opinion in the Isle of Man provided a privileged insight to the truth of the protected right and argued that “...the Convention is a living instrument which must be interpreted in present day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards of the penal policy of the Member States”.<sup>148</sup> The Court went on to argue that the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human, and that this amounted to an institutionalized assault on a person’s dignity and physical integrity, and found a violation of Article 3.<sup>149</sup>

In *Marckx v Belgium*<sup>150</sup>, the Court referred to two international conventions, the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children and the European Convention on the Legal Status of Children Born out of Wedlock as a way to demonstrate the existence of commonly accepted standards.<sup>151</sup> This marked a shift from commonly accepted standards in domestic legislations to signs of evolution and attitudes amongst modern societies.<sup>152</sup> Letsas argues that this was indication that “living instrument” means keeping

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<sup>146</sup> *ibid* 297.

<sup>147</sup> *ibid* 275.

<sup>148</sup> *Tyrer v. UK* (1978) ECtHR App No 5856/72

<sup>149</sup> *ibid*.

<sup>150</sup> *Marckx v. Belgium* (1979) ECtHR App No 6833/74

<sup>151</sup> Letsas ‘Lessons’ (n 129) 529.

<sup>152</sup> Letsas *A Theory of Interpretation* (n 143) 77.

pace with evolving European attitudes and beliefs rather than legislation found in the majority of Member States.<sup>153</sup>

In *Dudgeon v UK* that will be further analysed in the next chapter, the Court argued that the contemporary understanding of homosexuality in the Member States is not merely different but better than the time when the legislation criminalising male homosexual sex was enacted.<sup>154</sup> Letsas argues that “better” meant “towards the truth of the substantive protected right”.<sup>155</sup>

As Letsas’ analysis of the principle of evolutive interpretation reveals, the abovementioned case law suggests that the Court believes there is an objective substance of the protected right, that evolution is important only because and when it gets this value right, and also that for the evolution to constitute a standard of correctness, there need not be a concrete consensus among Member States.<sup>156</sup> However the judicial activism Letsas calls for risks being perceived as the Court illegitimately enlarging its role and exceeding its given functions of interpretation.<sup>157</sup> Therefore the Court while applying the abovementioned tools in its interpretation also uses a tool of judicial self-restraint, the margin of appreciation.

#### **4. The Margin of Appreciation<sup>158</sup>**

The margin of appreciation has been defined by scholars in many ways<sup>159</sup>, one of which is “room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations.”<sup>160</sup> The *Handyside v. UK* case was an important step in the development of the margin of appreciation doctrine, where the Court famously declared that “It is not possible to find in the domestic law of the various contracting

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<sup>153</sup> *ibid.*

<sup>154</sup> *ibid* 79. // *Dudgeon v. UK* (1981) ECtHR App No 7525/76.

<sup>155</sup> *ibid.*

<sup>156</sup> *ibid.*

<sup>157</sup> Paul Mahoney, ‘Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two sides of the same Coin’, (1990) *Human Rights Law Journal* 57, 66-8.

<sup>158</sup> This title may contain excerpts from an essay written by the same author at the University of Essex International Human Rights Law LLM Program 2018-2019.

<sup>159</sup> Oddny Mjöll Arnadóttir, ‘Rethinking the Two Margins of Appreciation’, (2016) 12 *European Constitutional Law Review* 27,28.

<sup>160</sup> Gabriel Füglistaler, ‘The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights Post 2011 Jurisprudence’ 295 (2016) *Cahier de l’IDHEAP*, 14.

states a uniform European conception of morals.” and “By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them.<sup>161</sup>”

Although there is no clear and exhaustive list of principles that determine the scope of the margin of appreciation, factors which seem to influence the Court’s choice in the matter can be distinguished in Court jurisprudence<sup>162</sup>. For example, in *Buckley v UK*, the court determined that that the scope of the margin of appreciation would not be identical in each case but would vary according to context and that the relevant factors would include the nature of the right concerned, the importance of the right for the individual and the nature of the activities concerned<sup>163</sup>. Similarly in *Dudgeon v UK* the Court explained that not only the nature of the aim of the restriction but also the nature of the activities involved would affect the scope of the margin of appreciation<sup>164</sup>, if an activity is of “intimate nature”, the margin of appreciation would be narrow. Existence or lack of consensus across contracting states is another factor that determines the width of the margin of appreciation, as demonstrated in *Evans v UK (2007)*<sup>165</sup>, the margin of appreciation is likely to be wide when there is no international or European consensus on the matter. Likewise, as demonstrated in *Marckx v Belgium (1979)*<sup>166</sup>, the fact that the member states to the Council of Europe have evolved and are continuing to evolve towards judicial recognition of a matter narrows the margin of appreciation of the state on the matter.

In the case where the margin of appreciation is narrow, the Court expects states to produce “very weighty reasons” in order to justify the interference<sup>167</sup>. In the case where the margin of

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<sup>161</sup> *Handyside v UK* (1976) ECtHR App No 5493/72 para 48.

<sup>162</sup> Chris Hilson, ‘The Margin of Appreciation, Domestic Irregularity and Domestic Court Rulings in ECtHR Environmental Jurisprudence: Global Legal Pluralism in Action’ (2013) 2 *Global Constitutionalism* 262, 265.

<sup>163</sup> *Buckley v. UK* (1996) ECtHR App No 20348/92 para 74.

<sup>164</sup> *Dudgeon* (n 154).

<sup>165</sup> *Evans v. UK* (2007) ECtHR App No 6339/05

<sup>166</sup> *Marckx v. Belgium* (n 150).

<sup>167</sup> Jan Kratochvil, ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’ 29:3 (2011) *Netherlands Quarterly Human Rights* 324, 350.

appreciation is wide however, the Court will relatively easily accept the arguments advanced by governments.<sup>168</sup>

The margin of appreciation doctrine is widely criticised in the way that it encourages non-uniform applications that by some are said to be subjectivist and relativist, and therefore inconsistent with the very idea of the universality of human rights and the rule of law<sup>169</sup>. It has been claimed that the Court should abandon the doctrine because in matters of human rights there can be no room for a margin of appreciation, no room for enabling the states to decide what is acceptable and what is not, depriving individuals of the protection to which they are entitled under the Convention<sup>170</sup>. The counterargument frequently deployed against this view is that even though there are innate and unchanging rights every person is entitled to by way of being human, differences in legal traditions, constitutional values and historical developments<sup>171</sup> need to be taken into consideration and as the Court's function is to monitor the actions of the Contracting States which hold primary responsibility for the protection of human rights, the margin of appreciation is a good mechanism through which a "tight or slack rein" is kept by the Court on State conduct.<sup>172</sup> It is also claimed that in the absence of such a doctrine as the margin of appreciation, the Court would be perceived to be imposing solutions from the outside without paying regard to the knowledge and responsibilities of the local decision-makers<sup>173</sup>, which would in turn endanger state compliance with Court decisions.

The Court's overall approach in interpreting the Convention has been summarised as an evolutive approach based on the object and purpose of the Convention restricted by awareness of its own subsidiary role as an international court.<sup>174</sup> As observed by Paul Mahoney, judicial activism represented by evolutive interpretation and judicial self-restraint

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<sup>168</sup> Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' 18 (2018) *Human Rights Law Review* 495, 498.

<sup>169</sup> Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument For its Application by The Human Rights Committee' 65 (2016) *International and Comparative Law* 38.

<sup>170</sup> Adam Wisnevski, 'On the Theory of the Margin of Appreciation Doctrine' (2012) *Polish Review of International and European Law* 63, 65.

<sup>171</sup> Gerards (n 168) 495.

<sup>172</sup> Harris and others (n 134) 17.

<sup>173</sup> *ibid.*

<sup>174</sup> Rainey, Wicks, Ovey (128) 82.

represented by the margin of appreciation mirror the very nature of the Convention as an international treaty intended to secure effective protection of human rights.<sup>175</sup>

Now that the general interpretation of the treaty has been discussed, it should be beneficial to briefly explain the interpretation of Article 8 before moving on to analysing the margin of appreciation afforded to the states in Article 8 criminalisation cases.

## **B) The Interpretation of Article 8**

*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of 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.*

Article 8 has been said to be the “least defined and most unruly of the rights enshrined in the Convention”.<sup>176</sup> None of the four interests covered in the article -private life, family life, home and correspondence- have been defined by the Convention, and they are not bound by domestic definitions either; they are autonomous concepts and their content is a matter of interpretation by the Court.<sup>177</sup> This study is interested in the scope of the “right to respect for private life” as contained in Article 8.

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<sup>175</sup> *ibid* 75.

<sup>176</sup> Harris and others (n 134) 522.

<sup>177</sup> *ibid*.

## **1. Paragraph 1, Right to Respect for Private Life**

According to the Court's case law, "private life" in Article 8 is a broad term not susceptible to exhaustive definition.<sup>178</sup> Case law has shown that it encompasses many areas of human life such as one's name, education, professional activities, and more. The areas of human life contained in the right to respect for private life that are relevant for the purposes of this study include the physical and moral integrity of the person including their sexual life,<sup>179</sup> and the right to self-determination and personal autonomy.<sup>180</sup> Once it has been established that there has been an interference with the right to private life, it will be examined whether this interference constituted a violation of the right, following the boundaries contained in paragraph 2.

## **2. Paragraph 2, Justification Clause**

Paragraph 2 of Article 8 lays down the conditions upon which the state may legitimately interfere with the enjoyment of the right defined in paragraph 1.<sup>181</sup> Justification clauses such as paragraph 2 for the limitation of human rights serve the purpose of balancing the interests of the community against the interests of the individual; and this balancing is where the political nature of the choices facing the Court are most obvious.<sup>182</sup> If the Court is convinced that the interference was in accordance with the law, it pursued one of the legitimate aims mentioned in the paragraph and the interference was necessary in a democratic society in the pursuit of the said legitimate aims, it will decide that there was no violation of Article 8.

### **2.1. Was the interference "in accordance with the law"?**

The interference of public authority with the private life of the individual must be in accordance with the law<sup>183</sup>, which means that the state must point to some specific legal rule that

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<sup>178</sup> Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (2nd edn Oxford University Press 2007) 510. // *Pretty v UK* (2002) ECtHR App No 2346/02 para 61.

<sup>179</sup> Mowbray (n 178) 487.

<sup>180</sup> *ibid* 510.

<sup>181</sup> Harris and others (n 134) 503.

<sup>182</sup> Rainey, Wicks, Ovey, (n 128) 308

<sup>183</sup> Council of Europe, *Guide on Article 8 of the ECHR* (updated 2019) available at: [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf), accessed: 19.08.2019

authorizes the interference it seeks to justify.<sup>184</sup> It is not sufficient that the said rule merely exist, it must be compatible with the rule of law, clear, foreseeable, and adequately accessible.<sup>185</sup> Since this study deals with criminalisation, cases this study is concerned with do not raise many problems with the interference being in accordance with the law, since the interference itself is the law.

## 2.2. Did the interference pursue a “legitimate aim”?

It is for the state concerned to argue that the interference pursues one or more of the legitimate aims stated in paragraph 2 of the Article.<sup>186</sup> The interferences this study is concerned with have been argued by states to legitimately pursue the protection of health, morals or the rights and freedoms of others. Applicants frequently challenge the aims that states put forward, insisting that the aim claimed to be pursued by the state is not the real reason for the interference.<sup>187</sup> If the state concerned lists more than one aim for the interference the Court is satisfied that the intervention was necessary for the protection of one of these aims, it will not consider the other aims since the absence of a violation will have already been established.<sup>188</sup>

## 2.3. Was the interference “necessary in a democratic society”?

The legality and legitimacy of the interference do not guarantee its compliance with Article 8, the interference that is in accordance with the law and pursues a legitimate aim also needs to be “necessary in a democratic society”, which is a phrase heavy with uncertainty.<sup>189</sup> It is here in the determination of necessity where the tension created by the collision between the individual and society resides.<sup>190</sup>

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<sup>184</sup> Harris and others (n 134) 506.

<sup>185</sup> *Guide on Article 8 of the ECHR* (n 183) 10.

<sup>186</sup> *ibid* 11.

<sup>187</sup> Harris and others (n 134) 510.

<sup>188</sup> *ibid*.

<sup>189</sup> *ibid*.

<sup>190</sup> Ivana Roagna, ‘Protecting the Right to Respect for Private and Family Life under the European Convention on Human Rights’, *Council of Europe Human Rights Handbooks* (2012) 44.

The Court in its case law has established that “necessary” is not synonymous with “indispensable”, but it isn’t as flexible as expressions such as “useful” “reasonable” or “desirable”,<sup>191</sup> the notion of necessity implies that the interference corresponds to a “pressing social need” and that it is “proportionate” to the legitimate aim pursued.<sup>192</sup> Only the minimum interference which secures the legitimate aim will be permitted.<sup>193</sup>

Do the interests of society as a whole override the interest of the individual in the particular case concerned?<sup>194</sup> To what extent should the Court defer to the state’s interpretation in allowing a limitation on the rights guaranteed by the Convention?<sup>195</sup> This is where the previously mentioned margin of appreciation comes into play.

It is important to explain at this stage that scholars have observed that the Court uses the term “margin of appreciation” for two different purposes. The first use is in answering the question of whether societal interests override the interest of the individual in the case concerned. When the Court does the balancing required by the justification clause in paragraph 2 and decides that the intervention was justified because the test of necessity was satisfied, it may say that the state remained in its margin of appreciation and did not violate the right. Letsas calls this first use the “substantive concept of the margin of appreciation”.<sup>196</sup> The second use of the term, which Letsas calls the “structural concept of the margin of appreciation” is present when the Court refrains from a substantive human rights review on the basis that there is no consensus among contracting states on the issue.<sup>197</sup> While the substantive concept of the margin addresses the relationship between individual freedoms and collective goals, the structural concept of the margin limits the intensity of the review of the Court in view of its status as an international tribunal, it is more about the relationship between the Court and the individual autonomy of the state.<sup>198</sup> When the lack of consensus among Member States results in a wide margin of appreciation, or when the Court defers to

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<sup>191</sup> Harris and others (n 134) 510// Handyside (n 160) para 48

<sup>192</sup> Harris and others (n 134) 510// Olsson v Sweden ECtHR (1988) App No 10465/83 para 67.

<sup>193</sup> Rainey, Wicks, Ovey (n 128) 309.

<sup>194</sup> *ibid.*

<sup>195</sup> *ibid* 325.

<sup>196</sup> George Letsas, ‘Two Concepts of the Margin of Appreciation’, 26:4 (2006) Oxford Journal of Legal Studies 705, 706.

<sup>197</sup> *ibid.*

<sup>198</sup> *ibid* 721.

the decision by the national authorities because they are better placed than the international judges to decide on politically sensitive issues in their state, it is the structural use of the term that is in use.<sup>199</sup>

Letsas argues that the substantive use of the margin of appreciation should not be referred to as the “margin of appreciation” at all, that it would be enough just to state that the right was not violated rather than say that the state remained in its margin of appreciation.<sup>200</sup>

This study will consider all instances where the Court refers to the “margin of appreciation” and use the term for both concepts when analysing how considerations that are already present in criminal theory affected the Court’s decisions. Further reference will be made to the distinction between the two separate uses in Chapter 4, Observations.

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<sup>199</sup> *ibid* 723.

<sup>200</sup> *ibid* 712.

### CHAPTER III- CASE ANALYSIS

This chapter will analyse the case law of the Court of criminalisation cases under the right to respect for private life with the aim to identify whether the Court consistently invokes recognizable principles of criminalisation as it determines the breadth of the margin of appreciation to be accorded to the state for legitimate criminalisation.

The Court states in *A.D.T. v. UK* that “It is not the Court’s role to determine whether legislation complies with the Convention in the abstract. The Court will therefore consider the compatibility of the legislation in the present case with the Convention in the light of the circumstances of the case”;<sup>201</sup> yet there have been instances where it has conducted analysis verging on the abstract consideration of the criminal law in isolation.<sup>202</sup> *A.B. and C. v. Ireland* where the Court considers broadly the proportionality of the abortion prohibitions with the right to private life, *Dudgeon v. UK* where the Court chose to see whether the criminalisation of homosexual sex was in violation of the right to private life even though the law had not been enforced on the applicant,<sup>203</sup> *Pretty v. UK* where the applicant complained against the blanket nature of the criminal law on assisted suicide are good examples of this.<sup>204</sup> These decisions provide information on the stance of the Court as to the boundaries of substantive criminalisation from a human rights perspective, and although they are only binding on the state concerned, they create precedent for future cases.<sup>205</sup>

The cases that will be analysed in this chapter have been chosen as they are representative of the Court’s stance on the boundaries of criminalisation under the right to private life enshrined in the Convention. The cases that will be analysed are *Dudgeon v. UK* on the criminalisation of private male homosexual activity between two persons, *Laskey, Jaggard and Brown v. UK* on the criminalisation of consensual assault in the form of sadomasochism, *A.D.T. v. UK* on the criminalisation of homosexual activity practised in the presence of more

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<sup>201</sup> *A.D.T. v UK* (2000) ECtHR App No 35765/97 para 36.

<sup>202</sup> Malby (n 126) 22.

<sup>203</sup> *ibid.* // *A.B. and C. v. Ireland* (2010) ECtHR App No 25579/05 // *Dudgeon* (n 154).

<sup>204</sup> Malby (n 126) 86 // *Pretty* (n 178).

<sup>205</sup> *ibid* 88.

than two persons, *Pretty v. UK* on the criminalisation of assistance to suicide, *A.B.C. v. Ireland* on the criminalisation of abortion and *Stübing v. Germany* on the criminalisation of consensual incest.<sup>206</sup> The cases will be analysed in chronological order as the Court has frequently referenced previous decisions in its discussions.

## **Dudgeon v. United Kingdom (1981)**

### *Facts*

Mr. Dudgeon, resident in Northern Ireland, 35 years of age at the time and homosexual, complained against the existence of laws criminalizing homosexual acts between consenting adult males in Northern Ireland after the Police found personal papers in his house that were descriptive of homosexual behaviour when they entered his house with a warrant to search for drugs.<sup>207</sup> He was interrogated at the Police station about his homosexuality, and his file was brought to the prosecutor who decided to discontinue the proceedings reasoning that it would not be in the public interest to continue them.<sup>208</sup>

The law in question concerning “buggery”, which came into force in 1861, made it criminal to attempt or to have “sexual intercourse per anum by a man with a man or a woman, or per anum or per vaginam by a man or a woman with an animal”.<sup>209</sup> Anyone could bring a prosecution for the offence.<sup>210</sup> The other law in question that came into force in 1885 made it criminal for any male person to commit “gross indecency” with another male either in public or private and “gross indecency” was not statutorily defined but it meant any act other than that which constitutes “buggery”, thus it would usually take the form of mutual masturbation, inter-crural or oral-genital contact.<sup>211</sup>

The 1861 and 1885 Acts had in fact been passed by the United Kingdom Parliament, and came into force in England, Wales and all Ireland (which was then an integral part of the

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<sup>206</sup> *Dudgeon* (n 154) // *Laskey, Jaggard and Brown v. UK* (1997) ECtHR App No 21627/93, 21628/93, 21974/93 // A.D.T. (n 201) // *Pretty* (n 178) // A.B. and C. (n 203) // *Stübing v. Germany* (2012) ECtHR App No 43547/08.

<sup>207</sup> *Dudgeon* (n 154) 13, 33.

<sup>208</sup> *ibid* 33.

<sup>209</sup> *ibid* 14.

<sup>210</sup> *ibid* 29.

<sup>211</sup> *ibid* 14.

United Kingdom) <sup>212</sup> . Later in England and Wales male homosexual activity was decriminalised in 1967, but the law in Northern Ireland remained the same. <sup>213</sup>

#### *Legitimate aim*

The aim pursued by the legislation was the “protection of morals”.<sup>214</sup> The Government claimed that the legislation was also aiming at protecting the “rights and freedoms of others” since they perceived homosexual sex as harmful for the young, but the Court rejected this claim and asserted that it was the moral interests of the young that were of concern to the State and this concern was already contained in the aim of the protection of morals.<sup>215</sup>

#### *Necessary in a democratic society*

The Court stated that in assessing whether the law in question remained in the bounds of what is necessary in a democratic society,<sup>216</sup> the fact that the protection of morals was at issue would render the margin of appreciation extensive; because “the requirements of morals vary from time to time and place to place”.<sup>217</sup> This practice of the Court which holds that common approaches to morality are determinative to the legitimacy of criminal law clearly resonates more with the legal moralist conceptions of criminal legal theory<sup>218</sup> than liberal minimalist ones.<sup>219</sup> However the Court did not stop there and went on to explain that not only the nature of the aim of the restriction but also the nature of the activities involved would affect the scope of the margin of appreciation;<sup>220</sup> and since the present case concerned a “most intimate aspect of private life”, particularly serious reasons would be required before interferences on the part of the public authorities could be legitimate for the purposes Article 8/2.<sup>221</sup> This reasoning that there is a core aspect of private life that cannot generally be infringed upon can be most closely associated with the notion of autonomy that is present in

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<sup>212</sup> *ibid.*

<sup>213</sup> *ibid* 5.

<sup>214</sup> *ibid* 46.

<sup>215</sup> *ibid* 47.

<sup>216</sup> *ibid* 49.

<sup>217</sup> *ibid* 52.

<sup>218</sup> Malby (n 126) 166.

<sup>219</sup> Persek (n 7) 1.

<sup>220</sup> Dudgeon (n 154) para 52.

<sup>221</sup> *ibid.*

criminal legal theory.<sup>222</sup> The Court then went on to balance the concept of personal autonomy against the interests of society represented by “the protection of morals.”<sup>223</sup>

In determining whether the restriction was proportionate to the legitimate aim pursued,<sup>224</sup> the Court started by confirming that there indeed were differences between Northern Ireland and Great Britain in relation to questions of morality, Northern Irish society being more conservative and placing more emphasis on religious factors, and added that the fact that similar measures were not considered necessary in other parts of the UK or in other Member States of the COE did not mean that they could not be considered necessary in Northern Ireland.<sup>225</sup> To the Court, the “genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society” was “certainly relevant” for the purposes of Article 8/2.<sup>226</sup> This reasoning of the Court demonstrates that the “morals” to be protected need not be based on a critical morality reasoned from specific principles, but can include any generally accepted norm in a society.<sup>227</sup>

The Court went on to explain that as compared with the era the legislation was enacted there was a “better” understanding at the time of the hearing and more tolerance towards homosexuality in Council of Europe States, and declared that it could not overlook the changes in society and legislation that had taken place with time.<sup>228</sup> This recognition of the Court of changing standards further supports the “community consensus” line of reasoning the Court follows, it is the prevailing social position that determines the extent to which criminal law restrictions can be placed on individual rights.<sup>229</sup> Indeed, the fact that in Northern Ireland itself authorities had refrained in the previous years from enforcing the laws in question and there had been no public demand for stricter enforcement of the law was essential to the decision of the Court when it determined that there was no “pressing social

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<sup>222</sup> Malby (n 126) 133.

<sup>223</sup> Malby (n 126) 117.

<sup>224</sup> Dudgeon (n 154) para 53.

<sup>225</sup> *ibid* 56

<sup>226</sup> *ibid* 57

<sup>227</sup> Malby (n 126) 122.

<sup>228</sup> Dudgeon (n 154) para 60.

<sup>229</sup> Malby (n 126) 123.

need”<sup>230</sup> for the interference in question.<sup>231</sup> This reasoning has led one commentator to argue that the decision in *Dudgeon* was not that it was unacceptable that a fundamental right was limited only because there was a sentiment of intolerance in the community, the decision was that because the sentiment of intolerance had decreased over time, and it no longer represented majoritarian view, the criminalisation of homosexual activity in private was found to be in violation of the right.<sup>232</sup>

It was also central to the Court’s decision however that there was no evidence that the lack of enforcement of the law had caused any injury to moral standards, there was no sufficient risk of harm to vulnerable sections of society requiring protection.<sup>233</sup> The use of the word “harm” here does not point to a detailed concept of harm, it is used in a general sense of negative consequences.<sup>234</sup>

The Court reasoned that arguments for retaining the law in force such as the argument that members of the public who regard homosexuality as immoral may be shocked, offended and disturbed were outweighed by the detrimental effects the very existence of the said law can have on the life of a person of homosexual orientation like the applicant.<sup>235</sup> The fact that the Court referred to “offense” separately, after having settled that the act in question was not “harmful” is indicative of its acknowledgement of “offense” as separate from “harm”,<sup>236</sup> and its rejection of Devlin’s understanding of harm that includes offense in it. As stated in Chapter 1, Feinberg argued against Devlin that the causing of universally disliked mental states was a separate and distinct legitimizing principle for criminalisation.<sup>237</sup> The Court acknowledged that offense might be caused to some members of the community, but rejected this offense as a legitimizing reason for criminalisation.<sup>238</sup>

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<sup>230</sup> *Dudgeon* (n 154) para 60.

<sup>231</sup> *ibid* 60.

<sup>232</sup> Roberto Perrone, ‘Public Morals and the ECtHR’, (2013) University of Leicester School of Law Research Paper No 14, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2382086](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2382086), 10.

<sup>233</sup> *Dudgeon* (n 154) para 60.

<sup>234</sup> Malby (n 126) 160.

<sup>235</sup> *Dudgeon* (n 154) para 60.

<sup>236</sup> Malby (n 126) 119.

<sup>237</sup> *ibid* 120.

<sup>238</sup> *ibid* 121.

## **Laskey, Jaggard and Brown v. UK (1997)**

### *Facts*

In 1987 the police came into possession of some video films made during sadomasochistic encounters involving the applicants and forty-four other men. The applicants and several other men were charged with a series of offences including assault and wounding relating to sadomasochistic activity that had been taking place for over ten years, and although the instances were very numerous, the prosecution limited the counts to a small number of exemplary charges.<sup>239</sup>

The sadomasochistic activity in question was consensual and conducted in private for no other purpose than sexual gratification and did not lead to any instances of infection, permanent injury or need for medical attention, but there were instances of “branding” and infliction of injuries which resulted in the flow of blood.<sup>240</sup>

When the applicants appealed, the decision in the House of Lords was that even though consent is a defence against prosecution for the infliction of bodily harm in the course of some “lawful activities”, this defence should not be extended to the infliction of bodily harm in the course of sadomasochistic encounters. The reasons put forward for this view ranged from “The violence of sadomasochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous.” and, “Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.”<sup>241</sup> to the argument that there were potential health risks such as the transmission of HIV or the infection of wounds, and the argument that it was a real danger that young men could be corrupted because the recording of videos suggested that secrecy may not be as strict as appellants claimed.<sup>242</sup> Dissenting opinions suggested that the matter at hand was a matter of

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<sup>239</sup> Laskey (n 206) para 8.

<sup>240</sup> *ibid* 8.

<sup>241</sup> *ibid* 20.

<sup>242</sup> *ibid* 21.

policy in an area where social and moral factors were extremely important and attitudes could change.<sup>243</sup>

### *Legitimate aim*

The legitimate aim pursued was uncontestedly the “protection of health or morals”.<sup>244</sup> The Court only considered the protection of health and when it found that the interference was justified for this purpose, did not need to consider the protection of morals.

### *Necessary in a democratic society*

The Court stated that one of the roles the State is unquestionably entitled to is to seek to regulate activities which involve the infliction of physical harm;<sup>245</sup> and that the level of harm that should be tolerated when the victim consents to it is in the first instance a matter for the State concerned to determine since what is at stake is related to public health considerations, the general deterrent effect of criminal law and the personal autonomy of the individual.<sup>246</sup> For the Court then, prevention of bodily harm was certainly a reason for which the criminal law may be used,<sup>247</sup> and it would be up to the state to determine the cases in which the consent of the victim would constitute a defence<sup>248</sup> against prosecution. In terms of criminal theory, this would mean that the Court does not oppose impure criminal paternalism which is the criminalisation of harm done to a consenting other.

Drawing on the fact that the sadomasochistic activities of the applicants involved “a significant degree of injury or wounding which could not be characterised as trifling or transient” the Court was not persuaded by the claim of the applicants that the issue at hand was an issue of private morality that was not the State’s business to regulate; and added that this in itself was sufficient to distinguish the present case from the ruling in *Dudgeon*.<sup>249</sup> The Court similarly rejected the claim of the applicants that no prosecution should have been brought against

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<sup>243</sup> *ibid* 23.

<sup>244</sup> *ibid* 35.

<sup>245</sup> *ibid* 43.

<sup>246</sup> *ibid* 44.

<sup>247</sup> Malby (n 126) 118.

<sup>248</sup> John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007), 88.

<sup>249</sup> Laskey (n 206) para 45.

them because no severe injury had been inflicted and no medical treatment had been required and stated that State authorities were entitled to have regard to not only the injury that had been caused but also the “potential harm inherent in the acts in question”<sup>250</sup>. The presence of the risk of harm to consenting others then, brought the discussion to a different plain than it was in the homosexuality case where no harm was done. The Court’s not having considered the presumably informed wishes, desires or aspirations of the individuals who participate in sadomasochistic activity as victims<sup>251</sup> is indicative of the fact that it is not soft paternalism that justified criminalisation in the eyes of the Court.

The Court found that the national authorities were entitled to consider that the prosecution and conviction of the applicants were necessary in a democratic society for the protection of health within the meaning of Article 2/8.

### **A.D.T v. UK (2000)**

#### *Facts*

The case concerned the applicant, “a practising homosexual” having been convicted of “gross indecency” on account of videotapes found by the police in the applicant’s home that contained footage of the applicant engaging in oral sex and mutual masturbation with four other adult men in his own home.<sup>252</sup>

The Sexual Offences Act of 1967 provided that homosexual acts in private between two consenting adult men were no longer an offence, but when “more than two persons take part or are present” the act would no longer be considered to be conducted in “private”; therefore the applicant’s conduct constituted the offence “gross indecency”.<sup>253</sup>

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<sup>250</sup> *ibid*, para 46.

<sup>251</sup> Christopher Nowlin, ‘The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms’, 24:1 (2002) *Human Rights Quarterly* 264, 284.

<sup>252</sup> A.D.T. (n 201) paras 8-10.

<sup>253</sup> *ibid* 12,13,16,17.

### *Private life*

The Government claimed that the case fell outside of the scope of “private life” because of the number of individuals involved and because there was a video recording of the act.<sup>254</sup> The Court referred to *Laskey*, to the fact that no question had been raised there as to whether the number of participants in the act made it so that the act would not fall in the scope of private life, and decided to only answer the claim that the existence of the videotapes made the present case fall out of the scope of private life. The Court found that the applicant had gone to lengths not to reveal his sexual orientation and would not knowingly be involved in the making of the tapes public, which made the case fall entirely within the notion of private life.

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### *Legitimate aims*

The aims of the legislation were the protection of morals and the protection of the rights and freedoms of others.<sup>256</sup> It is not clear why the “protection of the rights and freedoms of others” was taken to be one of the legitimate aims of the legislation here, where this was not the case in *Dudgeon*. In any case, the “protection of the rights and freedoms of others” being stated as an aim concerning the criminalisation of purely private conduct involving consenting adults and no public health considerations involved would be alarming from a liberal criminal theoretical perspective; nevertheless the Court does not refer to the rights and freedoms of others again, and this statement of it as a legitimate aim does not have any effect on the decision.

### *Necessary in a Democratic Society*

The Court found that in the present case the applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. The genuinely private nature of the activities resulted in the margin of appreciation being narrow as it was in *Dudgeon*.<sup>257</sup> Given the narrow margin of appreciation related to the purely private nature of the behaviour and the absence of any

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<sup>254</sup> *ibid* 21.

<sup>255</sup> *ibid* 25.

<sup>256</sup> *ibid* 30.

<sup>257</sup> *ibid* 37,38.

public health considerations, the Court decided that the reasons submitted by the Government were not sufficient to justify the legislation and the prosecution.<sup>258</sup>

## **Pretty v. UK (2002)**

### *Facts*

The Applicant suffered from motor neurone disease which is a terminal progressive disease that affects the voluntary muscles of the body, by which death usually occurs as a result of weakness of breathing muscles and no treatment can prevent the progression of the disease.<sup>259</sup> At the time of the hearing the applicant was paralysed from the neck down, had no decipherable speech and was tied to a feeding tube, her life expectancy was “measurable only in weeks and months”. She wished to be able to control how and when she died, she wanted her husband to assist her suicide because she could not commit suicide by herself.<sup>260</sup>

Suicide ceased to be a crime in England and Wales by virtue of the Suicide Act of 1961, but section 2/1 of the same act states that: “A person who aids, abets, counsels, or procures the suicide of another, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years”<sup>261</sup> Case law had established that an individual may refuse to accept life-prolonging or life-preserving treatment.<sup>262</sup>

### *Private life*

Even though no previous case had established that there was such a right to self-determination contained in Article 8, the Court considered that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees and decided that the case could be seen under the right to private life.<sup>263</sup> The Court’s reasoning was that the ability to conduct one’s own life in a manner of one’s own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally harmful nature to the

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<sup>258</sup> *ibid* 38.

<sup>259</sup> *Pretty* (n 178) para 7.

<sup>260</sup> *ibid* 8.

<sup>261</sup> *ibid* 16.

<sup>262</sup> *ibid* 17.

<sup>263</sup> *ibid* 35.

individual concerned.<sup>264</sup> Therefore the State's paternalistic interventions in the form of criminal measures aimed at protecting the consenting individual from the harm they consent to were seen by the Court as impinging on the right to private life of the applicant even when the harm concerned was of life-threatening nature.<sup>265</sup>

*Legitimate aim*

The legitimate aim was that of safeguarding life, and therefore it was the "protection of the rights of others".<sup>266</sup>

*Necessary in a democratic society*

The Court found, like it had previously in *Laskey*, that states are entitled to regulate through criminal law activities which are detrimental to the life and safety of other individuals; and added that the more serious the harm involved, the more heavily it would weigh on the side of public health considerations against the countervailing principle of personal autonomy.<sup>267</sup>

The Court stated that the law concerned was aimed at protecting "the weak and the vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end life or to assist in ending life."<sup>268</sup> Accepting that the conditions of terminally ill patients would not always be the same, the Court still held that many would be vulnerable and that it was the vulnerability of the class that provided the rationale for the law in question.<sup>269</sup> The Court stated that in spite of the arguments as to the possibility of safeguards and protective procedures, "clear risks of abuse" did exist, and it would be primarily for the States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were to be relaxed or if exceptions were to be created.<sup>270</sup> The Court did not consider that the blanket nature of the ban on assisted suicide was

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<sup>264</sup> *ibid* 62.

<sup>265</sup> *ibid* 62.

<sup>266</sup> *ibid* 69.

<sup>267</sup> *ibid* 74.

<sup>268</sup> *ibid*.

<sup>269</sup> *ibid*.

<sup>270</sup> *ibid*.

disproportionate,<sup>271</sup> and concluded that the interference was justified as “necessary in a democratic society” for the protection of the rights of others.<sup>272</sup>

The decision of the Court in *Pretty* starts as if it would be compatible with Mill’s conception that harm to a consenting other cannot legitimately be criminalised in stating that it is contained in the right to private life for the individual to make their own lifestyle choices even when these choices will be of seriously harmful or even life-threatening nature. Even though it seems as if the Court does not resort to paternalistic reasoning when it argues that terminally ill persons may not be sufficiently free of external influences to consent, this reasoning is similar to soft paternalistic grounds for criminalisation which hold that criminalisation of self-regarding harmful conduct is justified when consent is not sufficiently “voluntary”.<sup>273</sup> This reasoning is incompatible with liberal criminal theory<sup>274</sup> which would suggest that the risk of uncertainties with consent in some cases cannot be a justification for a blanket ban that takes away the power of those who truly do consent, to consent to the harm concerned.<sup>275</sup>

### **A., B. and C. v. Ireland (2010)**

#### *Facts*

The first two applicants complained under Article 8 about the prohibition of abortion for health and well-being reasons and the third applicant’s complaint concerned a positive obligation of the state regarding Article 8.<sup>276</sup> Since this study only deals with the negative obligation arising from the right to private life, the third applicant’s case will not be discussed.

The first applicant, A, had become pregnant unintentionally at a time when she was unmarried, unemployed and living in poverty. She had four young children, the youngest disabled, all of whom were in foster care due to A’s alcoholism. She had remained sober in the year before her fifth pregnancy hoping to regain custody of her children and reunify her

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<sup>271</sup> *ibid* 76.

<sup>272</sup> *ibid* 78.

<sup>273</sup> Malby (n 126) 138.

<sup>274</sup> *ibid* 155.

<sup>275</sup> Bergelson, *Testing Boundaries* (n 99) 32.

<sup>276</sup> A.B. and C. (n 203) para 3.

family.<sup>277</sup> For the same reason, when she became pregnant and decided to obtain an abortion in England she felt that she had to travel to England in secrecy without alerting social workers<sup>278</sup>. She borrowed money for the journey and operation, and on the way back from England she had health problems related to the operation but did not seek medical advice.<sup>279</sup>

The second applicant B, had become pregnant unintentionally when the emergency contraception pill she took failed.<sup>280</sup> She decided to go to England to get an abortion because she could not care for a child on her own at that time of her life.<sup>281</sup> She too had difficulty meeting the costs of travel, and on her return to Ireland she had health problems related to the procedure. She was unsure of the legality of having travelled for an abortion, so she sought follow-up care two weeks after her return in a clinic in Dublin affiliated to the English clinic she had been to.<sup>282</sup>

#### *Private life*

The Court found that the prohibition of abortion in Ireland where sought for reasons of health and well being about which A and B complained came within the scope of Article 8,<sup>283</sup> and it amounted to an interference with their right to respect for their private lives.<sup>284</sup>

#### *Legitimate aim*

The Court found that the restriction pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect, referring to its previous case law in the *Open Door* case and *Vo* where the Court had decided that it was neither desirable nor possible to answer the question of whether the unborn was a person. <sup>285</sup>

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<sup>277</sup> *ibid*14.

<sup>278</sup> *ibid* 15.

<sup>279</sup> *ibid* 16.

<sup>280</sup> *ibid* 19.

<sup>281</sup> *ibid* 19.

<sup>282</sup> *ibid* 21.

<sup>283</sup> *ibid* 214.

<sup>284</sup> *ibid* 216.

<sup>285</sup> *ibid* 222,227.

*Necessary in a democratic society*

The Court stated that there can be no doubt as to the “acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake”, which meant that a broad margin of appreciation was to be accorded the state.<sup>286</sup> However there was consensus among a substantial majority of Council of Europe states towards allowing abortion on broader grounds than accorded under Irish law.<sup>287</sup> The Court nevertheless did not decide that this consensus would narrow the broad margin of appreciation of the State, because there was no European consensus on the scientific and legal definition of the beginning of life.<sup>288</sup> It was impossible to answer the question of whether the unborn was a person to be protected for the purposes of Article 2.<sup>289</sup>

The Court added that the margin of appreciation accorded to the state was broad but not unlimited, and the Court would decide whether the interference constituted a proportionate balancing of the interests involved because a prohibition of abortion to protect unborn life could not automatically justify the interference on the basis that the expectant mother’s right to respect for private life was of a lesser stature.<sup>290</sup>

While admitting that the process of traveling abroad for abortion was psychologically and physically arduous for A and B, having regard to the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland, the Court did not consider that the prohibition in Ireland of abortion for health and well being reasons exceeded the margin of appreciation, based on the profound moral beliefs of the Irish people as to the nature of life and the protection to be accorded to the right to life of the unborn.<sup>291</sup> The Court found that the prohibition struck a fair balance between the right of A and B to respect for their private lives and the rights invoked on behalf of the unborn, and found no violation.<sup>292</sup>

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<sup>286</sup> *ibid* 223.

<sup>287</sup> *ibid* 235.

<sup>288</sup> *ibid* 237.

<sup>289</sup> *ibid* 237.

<sup>290</sup> *ibid* 238.

<sup>291</sup> *ibid* 240,241.

<sup>292</sup> *ibid* 241, 242.

As has been seen, not many tools of criminal legal theory were used in the case of *A.B. and C.* This is due to the fact that the Court defers to state authorities after having established that no European consensus exists on the legal definition of the beginning of life. It is not possible to find an equivalent of European consensus in criminal legal theory since criminal legal theory deals with national law. One comment that can be made is that the sensitivity of the subject being deployed as a reason to broaden the margin of appreciation was again supportive of legal moralism.

### **Stübing v. Germany (2012)**

#### *Facts*

The applicant, because he was placed in a foster home at the age of 3 and adopted by another family at the age of 7 after which he had no contact with his family of origin, was unaware of the existence of his biological sister with whom he re-established contact in 2000.<sup>293</sup> Following their mother's death in 2000 the relationship between the biological siblings intensified, and as from January 2001 they started engaging in consensual sexual intercourse<sup>294</sup>. The applicant and his biological sister had four children together, and following the birth of the fourth child the applicant underwent a vasectomy.<sup>295</sup> The applicant was convicted on charges of incest several times, and the fact that he reoffended was taken to be an aggravating factor along with the fact that he had unprotected sex with his biological sister even though he was aware of pregnancy risks.<sup>296</sup>

The applicant's biological sister S.K. had also been charged with the same offence but following an expert opinion that stated she had a "very timid, withdrawn and dependent personality structure" that led her to being dependent on the applicant, she was not sentenced.<sup>297</sup>

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<sup>293</sup> Stübing (n 206) paras 6,7.

<sup>294</sup> *ibid* 7.

<sup>295</sup> *ibid* 8.

<sup>296</sup> *ibid* 11.

<sup>297</sup> *ibid* 12.

The Court considered that the criminal conviction interfered with the applicant's right to private life because he was forbidden to have sexual intercourse with the mother of his four children.<sup>298</sup>

#### *Legitimate Aim*

The interference was aimed at the "protection of morals" and the "rights of others".<sup>299</sup>

#### *Necessary in a Democratic Society*

Even though the interference had been with a most intimate aspect of private life and this usually called for a narrow margin of appreciation, the Court considered that the lack of consensus among member states and the fact that the case raises sensitive moral and ethical issues would mean that the margin would have to be wider because State authorities are in a better position to give an opinion on the "exact content of the requirement of morals" in their country.<sup>300</sup> As has been previously commented on and will be further discussed in the next chapter, this widening of the margin when it comes to sensitive moral issues amounts to a legal moralist view of criminal law which is incompatible with liberal criminal theory. The Court observed that twenty-four of the forty-four member States criminalised consensual incest and decided that the broad consensus among the States on the matter and the lack of empirical support to assume that there was a general trend towards decriminalisation would mean that the State would enjoy a wide margin of appreciation in determining how to confront incestuous relationships between consenting adults.<sup>301</sup> No equivalent of the weight given to international consensus or the lack of it exists in criminal legal theory.

As Stübing is the only case examined in this study that concerns the continental criminal law system, it should be appropriate to comment on the "legally protected values" claimed by the state that justify criminalisation in national law in accordance with the Rechtsgut theory explained in Chapter 1. The State claimed that the legislation was aimed at protecting "marriage and the family" and "the weaker partner in the relationship", and preventing genetic

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<sup>298</sup> *ibid* 55.

<sup>299</sup> *ibid* 57 .

<sup>300</sup> *ibid* 59, 60.

<sup>301</sup> *ibid* 61.

damage. Again, as discussed in Chapter 1, there is much dispute as to what constitutes a “Rechtsgut” therefore it is not easy to argue that the interests stated by Germany would not constitute legal goods worth protecting.<sup>302</sup>

The Court decided that the reasoning of the Federal Constitutional Court of Germany that sexual relationships between siblings could seriously damage “family structures” and “society in its entirety” as a consequence, appeared not to be unreasonable.<sup>303</sup> This risk of serious damage to the stated interests “family structures” and “society” of contraceptively protected, privately performed and consensual incest, as Malby comments, would not amount to “harm” in the sense that Feinberg understands it.<sup>304</sup> This is therefore another example that the Court’s understanding of “harm” is not always consistent.

The Court also stated that criminal liability in the case was further justified by reference to the protection of sexual self-determination; and contended that by addressing specific situations arising from the interdependence and closeness of family relationships, the criminal code could avoid difficulties in the classification of, and defence against transgressions of sexual self-determination in that context.<sup>305</sup> This reasoning is similar to the reasoning in *Pretty* in alignment with soft paternalism that the vulnerability of the consenting “victim” made it legitimate for the state to criminalise the act altogether. This would again be incompatible with liberal criminal theory which would require that as long as “vulnerability” does not reach the threshold of the removal of the capacity to consent, it should not be given weight to.<sup>306</sup> Since the capacity to consent should be regarded on case-by-case basis, any blanket ban on soft paternalistic claims around “vulnerability” will be incompatible with liberal values.

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<sup>302</sup> Patrick Braasch, ‘Margin of Appreciation or Victimless Crime? The European Court of Human Rights on Consensual Incest Between Adult Siblings’ (2012) 55 German Yearbook of International Law, 615.

<sup>303</sup> Stübing (n 206) paras 63, 65.

<sup>304</sup> Malby (n 126) 151.

<sup>305</sup> Stübing (n 206) para 63

<sup>306</sup> Malby (n 126) 155.

The Court concluded that the applicant's criminal conviction corresponded to a pressing social need, and that the domestic courts stayed within their margin of appreciation when convicting the applicant of incest. There had been no violation of Article 8.<sup>307</sup>

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<sup>307</sup> Stübing (n 206) paras 66, 67.

## CHAPTER IV- OBSERVATIONS

Chapter 3 has analysed specific cases to see how the Court used reasoning that carries similarities to the principles of criminalisation in criminal legal theory in the determination of the breadth of the margin of appreciation. This chapter aims at identifying patterns in the similarities that have been observed, in order to establish whether the Court follows consistent criminal legal theoretical reasoning in this determination.

- I) “Harm” and the “risk of harm” widened the margin of appreciation accorded to the State as regards to criminalisation.

It has been observed during the discussion in Chapter 3 that the presence of “harm” tended to negate the narrowing down of the margin of appreciation by the “private nature” of the cases concerned. The term “margin of appreciation” is being used in its substantive sense here since there is an examination of whether the interference is permissible and the presence of harm weighs on the side of public interests rather than individual ones.<sup>308</sup>

In *Dudgeon* and *A.D.T.* the Court explicitly stated that the absence of “harm” combined with the private nature of the conduct led to the Court’s finding of a violation of Article 8. In *Dudgeon* it was that there was no evidence of the lack of enforcement having caused any “injury” to moral standards and no sufficient risk of harm to vulnerable sections of society requiring protection,<sup>309</sup> and in *A.D.T.* the Court followed the same logic and added that there were no public health considerations involved in the case. Conversely in *Laskey*, bodily harm was present, and the Court reasoned that the level of harm that should be tolerated when the “victim” consents to it was a matter for the State concerned to determine since what was at stake was related to public health considerations. This was the reason why no violation of Article 8 was found in *Laskey*.<sup>310</sup> In *Pretty* the Court mentioned harm in stating that the more serious the harm consented to, the more it would weigh on the side of public interest, against individual autonomy<sup>311</sup>.

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<sup>308</sup> Letsas, ‘Two Concepts’ (n 196) 711.

<sup>309</sup> *Dudgeon* (n 154) para 60.

<sup>310</sup> *Laskey* (n 206) para 44.

<sup>311</sup> *Pretty* (n 178) para 74.

Even though it can be observed that the presence or lack of harm affected the margin of appreciation, it is hard to make out the definition of “harm” employed by the Court. Indeed, as explained in Chapter 1, criminal legal theorists have defined and used the term “harm” in their separate ways with the purposes of the harm principle that holds that only those acts which cause harm to others should be criminalised. For Devlin “immoral” conduct is capable of “affecting society injuriously” and therefore it may legitimately be criminalised under the “harm principle”.<sup>312</sup> Harcourt argues that this definition of “harm” collapses the harm principle into legal moralism and makes it possible to pursue legal moralistic aims hiding under the guise of respect for the harm principle.<sup>313</sup> For Feinberg, harm as a legitimising principle for criminalisation should represent a setback of interests that wrong the victim in a morally indefensible manner.<sup>314</sup>

The finding of the Court in *Dudgeon* and *A.D.T.* that no harm was present is indicative of the fact that the Court’s understanding of harm in those cases was not in alignment with that of Devlin, since Devlin would argue that the offense caused to society would amount to harm. In fact in *Dudgeon* the “offense” to be caused to some members of society is explicitly mentioned and not accepted to amount to “harm”, which is closer to Feinberg’s understanding of harm and offense, the offense principle constituting a separate principle of justification for criminalisation.<sup>315</sup> The Court’s conception of harm when it finds in *Stübing* that incest is “injurious” to family structures and therefore society however, is incompatible with how Feinberg defines harm, mainly because there are no setback of interests as long as the act is consensual, private and contraceptively protected.<sup>316</sup> Malby has similarly observed that the Court generally uses the term “harm” in a relatively non-specific way, including drawing the harm principle from philosophy in its broadest sense.<sup>317</sup>

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<sup>312</sup> Devlin (n 50) 142.

<sup>313</sup> Harcourt (n 48) 139.

<sup>314</sup> Malby (n 126) 28.

<sup>315</sup> Feinberg ‘Offense to Others’ (n 68) 3.

<sup>316</sup> Malby (n 126) 151 // Joel Feinberg, *The Moral Limits of Criminal Law vol. 4 Harmless Wrongdoing* Chapter 1 Legal Moralism and Non- Grievance Evils (published 1990 online 2003), available at: <https://www.oxfordscholarship.com/view/10.1093/0195064704.001.0001/acprof-9780195064704>, 18.

<sup>317</sup> Malby (n 126) 119.

- II) The presence of “vulnerability” widened the margin of appreciation accorded to the State as regards to criminalisation.

It has been observed that in cases concerning a consenting “victim” who is in a vulnerable position due to the situation they are in, the margin of appreciation accorded to the state for criminalisation tended to be wide. The term “margin of appreciation” here is again being used in its substantive meaning because the possible vulnerability of the class of persons the victim belongs to tips the balance between individual freedoms and collective goals to the side of collective goals.<sup>318</sup>

In *Pretty* the vulnerability of terminally ill patients as a class, the fact that they may not be sufficiently free of external influences for their consent to be entirely “voluntary”, was seen by the Court as reason to widen the margin of appreciation accorded to the State.<sup>319</sup> The Court’s reasoning was that it should be left for the States to assess the risks of abuse and decide whether the blanket ban should be relaxed and exceptions should be created.<sup>320</sup> Again in *Stübing* the female partner’s “vulnerability” was the reason for the Court to find that the criminalisation of incest was not in violation of the right to private life of the applicant, because the interdependence and closeness of family relationships made it so that the “victim” would, again, not be sufficiently free of external influences for their consent to be voluntary.<sup>321</sup>

This “vulnerability” argument used by the Court has been observed to be similar to the “soft paternalism” grounds for criminalisation<sup>322</sup> where the State by the criminal legislation is saving a consenting victim from their own weak will because the victim’s consent is presumed by the state to not be “voluntary” under the present circumstances. It is soft paternalism that is present here because the State as presumed is not protecting a consenting individual from harm; the state is protecting a consenting individual whose vulnerability creates trouble with their consent, from harm. It should be noted here that this is only the case where the trouble with consent does not amount to a removal of the capacity to consent.

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<sup>318</sup> Letsas, ‘Two concepts’ (n 196) 706.

<sup>319</sup> Malby (n 126) 138.

<sup>320</sup> *Pretty* (n 178) para 74.

<sup>321</sup> *ibid* 63.

<sup>322</sup> Malby (n 126) 138.

As discussed in Chapter 1, even the “soft” version of paternalism is problematic when it comes to criminal law because the individual is often better placed to make nuanced judgements about the effects of a contemplated action in the particular circumstances and a blanket ban, as in the case with assisted suicide and incest, permanently rules out the options of those who may genuinely voluntarily consent to the “harm” in question.<sup>323</sup>

III) The widening of the margin of appreciation when the “protection of morals” is concerned, amounts to legal moralism.

As explained in Chapter 1, Devlin suggests that a society is a “community of ideas”<sup>324</sup> and therefore to preserve the very existence of society it is legitimate to use the criminal law to enforce moral judgements.<sup>325</sup> The Court recognizes that the requirements of “morals” differ in different times and different places, and states that it is specifically for this reason that the margin of appreciation accorded to states must be wider when the protection of morals is concerned.<sup>326</sup> Malby comments that this reasoning of the Court that gives the prevailing social position on the issue determinative weight on the extent to which criminal law can restrict individual rights<sup>327</sup> adds a subjective dimension to questions of criminalisation.<sup>328</sup> This resonates with legal moralist conceptions of criminal law theory.

Some conceptions of the Rechtsgut theory also recognize ethical convictions of society.<sup>329</sup> These conceptions however are those that support the circular argument which holds that the “legally protected interest” can be the “welfare of society” itself, therefore allow the legislator to legitimise criminalisation that protects the interests they see fit.<sup>330</sup>

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<sup>323</sup> Simester, Hirsch, *Crimes, Harms, and Wrongs* (n 20) 148.

<sup>324</sup> Devlin (n 50) 136.

<sup>325</sup> Devlin (n 50) 138.

<sup>326</sup> Dudgeon (n 154) para 52.

<sup>327</sup> Malby (n 125) 123.

<sup>328</sup> *ibid* 166.

<sup>329</sup> Malby (n 126) 166.

<sup>330</sup> Eser, (n 34) 349.

Letsas comments that when the Court refers to the protection of morals as a legitimate aim, it is actually referring to the moralistic preferences of the majority.<sup>331</sup> Here the preferences of the majority are being used in the substantive decision of whether societal interest overrides individual autonomy. This is an instance where it is harder to distinguish whether it is the substantive or the structural use of the doctrine of the margin of appreciation that is at play, but it can be said to be closer to the structural use since the Court is leaving the state more space in doing the balancing.

Similarly when weight is given to European consensus, such as in *A.B.C.* where the lack of European consensus on the legal and scientific beginning of life, and the “acute sensitivity of the moral and ethical issues” in Ireland amounted to the state enjoying a wide margin of appreciation; or in *Stübing* where the presence of European consensus on the criminalisation of consensual incest was given weight in the decision, it is the structural sense of the margin of appreciation that is at play.<sup>332</sup> As Malby contends, the European consensus standard risks opening the door to non-liberal moralistic preferences of the majority to authorise the use of state coercion in an unprincipled and arbitrary manner.<sup>333</sup> Reference to European consensus however cannot be explained through the tools of criminal theory since criminal theory stays in the confines of national law when commenting on legal moralism.

To conclude, although there do exist some identifiable patterns of reference to criminal legal theory in the Court’s case law, such as the reference to harm, paternalism, autonomy and offense, it cannot be said that the Court follows any principled reasoning compatible with a specific conception of criminalisation theory. This conclusion may also lead to an idea that even though it has been argued that the Court’s interpretation of the Convention has been largely liberal,<sup>334</sup> there are instances where the Court’s case law suggests otherwise. As Malby concludes, no single moral-legal theory is determinative of the reasoning of the Court.<sup>335</sup>

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<sup>331</sup> Letsas, ‘Two Concepts’ (n 196) 729.

<sup>332</sup> *A. B. and C.* (n 203) // *Stübing* (n 206)

<sup>333</sup> Malby (n 126) 112.

<sup>334</sup> *ibid.*

<sup>335</sup> *ibid.*

## **CONCLUSION**

This study has aimed at searching for a principled account of the use of the margin of appreciation in Article 8 right to life criminalisation cases through an analysis of a number of selected cases, using the principles of criminalisation in criminal legal theory. Chapter 1 explained the multiple views and principles in criminal legal theory that aim to devise a coherent limit to justifiable substantive criminal law. Chapter 2 described the general interpretation of the European Convention and the interpretation of Article 8. In Chapter 3 selected Court decisions were analysed through the lens of criminal theory and finally in Chapter 4, the observations made in Chapter 3 that amounted to a pattern affecting the margin of appreciation were recited. The conclusion has been that although there are some identifiable patterns of reference to criminal legal theory in the Court's case law, such as the reference to harm, paternalism, autonomy and offense, it cannot be said that the Court follows any principled reasoning compatible with a specific conception of criminalisation theory.

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