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Coercive Human Rights and the Forgotten History of the Council of Europe's *Report on Decriminalisation*

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What if the European Court of Human Rights (ECtHR), instead of developing a 'coercive human rights doctrine' concerning state duties to criminalise serious human rights violations, had focused on decriminalisation? The ECtHR has never developed a coherent case law on protecting human rights by removing, rather than adding, criminal regulation. This article returns to a largely forgotten moment in 1980, when the Council of Europe adopted a Report on Decriminalisation, which analysed the costs of criminal justice and made suggestions for overcoming any dysfunctions that would arise from curtailing criminalisation. Engaging with the recommendations and limitations of the reports, this article sheds light on a framework whereby the ECtHR could have approached criminalisation cases differently. Showing that today's 'coercive human rights doctrine' is not as obvious as we may believe, the article advances decriminalisation as an alternative that is not just theoretical but grounded in human rights history.

INTRODUCTION

On 16 February 2021, the European Court of Human Rights (ECtHR) decided the case of *VCL* v *United Kingdom*[1] (*VCL*). The case concerned two Vietnamese nationals who had been arrested, charged, convicted and detained for producing cannabis. Their prosecution and punishment had occurred although the national authorities knew they were minors at the moment of their arrest and likely to be victims of human trafficking (they were conclusively recognised as such after conviction). The ECtHR ruled, unanimously, that the United Kingdom had violated Article 4 and Article 6 § 1 of the European Convention on Human Rights (ECHR). In particular, the Court gave considerable attention to the adverse impact of the criminal process on victims of human trafficking. Their prosecution, the Court wrote, 'would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future'.[2] By relying on Article 4, the ECtHR placed limits on the state's penal powers and demanded that prosecution authorities present

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1 *VCL* v *United Kingdom* (2021) 73 EHRR 9.
2 *ibid* at [159].

clear reasons consistent with international law if they want to prosecute victims of trafficking. In other words, the Court used this human rights provision as a 'shield' against the negative spillovers of penalisation.[3] However, the Court also made clear that it would tolerate the deployment of criminal law against victims of trafficking in certain cases – crucially, not when the negative consequences of criminalisation are eliminated or minimised but when a specific procedure is followed. The ECtHR also reminded us that the same human rights obligations under Article 4 which limit the prosecution of victims also act as the 'sword' of the criminal law by requiring that the state prosecute and punish traffickers.[4]

The ECtHR is often called upon to consider cases that bear on questions of substantive criminal law. As shown in *VCL* v *United Kingdom*, the case law of the Court reveals both reductionist and expansionist tendencies.[5] Yet these tendencies are not equally balanced. Both in *VCL* and more generally in its wider case law, the ECtHR is very confident in calling on states to criminalise, prosecute and punish serious human rights violations, such as human trafficking, torture and rape.[6] There is now ample case law, crystallised in what Natasa Mavronicola and Laurens Lavrysen have described as 'the ECtHR's coercive human rights doctrine', requiring states to mobilise their criminal law to protect against and provide redress for human rights violations.[7] This jurisprudence is part of broader 'anti-impunity' trends that have made human rights a driving force of penality at the domestic, regional and international levels.[8] These trends are characterised by an increased emphasis on ensuring criminal accountability for serious violations of international law. They include, for example, the imposition of criminal-law obligations in international human rights instruments;[9] the recognition of these obligations by human rights bodies through

3 Christine van den Wyngaert has shown how human rights have a role in both neutralising as a 'shield' and in triggering as a 'sword' the application of criminal law, Christine van den Wyngaert, 'Human Rights between Sword and Shield' (Antwerp, December 2006); see also Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577.

4 n 1 above at [151], mentioning *Siliadin* v *France* [2006] 43 EHRR 16 at [89], [112]; *Rantsev* v *Cyprus* (2010) 51 EHRR 1 at [285].

5 Similarly, in the context of the UN Human rights Council Universal Periodic Review, see Adnan Sattar, *Criminal Punishment and Human Rights: Convenient Morality* (London: Routledge, 2019) 194.

6 Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Oxford: Hart, 2020); Mattia Pinto, 'Awakening the Leviathan through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Utrecht Journal of International and European Law* 161.

7 Natasa Mavronicola and Laurens Lavrysen, 'Coercive Human Rights: Introducing the Sharp Edge of the European Convention on Human Rights' in Lavrysen and Mavronicola, *ibid*, 1-2.

8 Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 *Human Rights Quarterly* 729; Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Review* 1069.

9 See for example Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 1984; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222, 2000; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2171 UNTS 227, 2000; International Convention for the Protection of All Persons from Enforced Disappearances, 2716 UNTS 3, 2006.

judicial interpretation;[10] the establishment of international criminal tribunals;[11] and the prosecutions of past leaders in contexts of transitional justice.[12] Conversely, when it comes to censuring the state's decision to resort to penal measures,[13] the ECtHR adopts a case-by-case approach and is very cautious and deferential to national authorities. It is true that the Court has contributed to the decriminalisation of homosexuality in Europe.[14] The ECtHR has also considered some criminal sanctions to be in breach of freedom of thought, conscience and religion or freedom of expression on account of their disproportionality.[15] However, beyond these specific cases, there is hardly any coherent case law on the protection of human rights by removing, rather than adding, criminal regulation. In other words, nothing comparable to the ECtHR's coercive human rights doctrine exists concerning states' duties to decriminalise or abstain from criminal prosecution and punishment.

This article imagines what it would entail for the ECtHR to develop robust jurisprudence on decriminalisation. Decriminalisation is a process by which certain forms of conduct are no longer treated as crimes.[16] It involves taking certain offences out of the realm of criminal law, by adopting other forms of legal and non-legal regulation. Decriminalisation is distinct from legalisation, which defines the process of making legal acts that were formerly forbidden. It is also different from depenalisation, which refers to all forms of de-escalation within the penal system (for example the removal of custodial sentences as a punitive measure while the conduct remains a crime). Decriminalisation finally differs from diversion, which concerns the withholding of criminal proceedings in cases where the criminal justice system is formally competent.[17] Re-thinking the relationship between human rights and criminal law through the lens of decriminalisation is relevant today given the growing space that penality has assumed across many regions of the world. It is widely acknowledged that we live in an 'overcriminalised' society, where penal legislation has penetrated many

10 See for example *MC* v *Bulgaria* (2005) 40 EHRR 20; *Barrios Altos* v *Peru* [2001] IACHR Series C No 75; United Nations Human Rights Committee, General Comment No 31 [80], 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add. 13 (2004).

11 Rome Statute of the International Criminal Court, A/CONF183/9, 1998; United Nations Security Council, Resolution 827 (1993) (establishing the International Criminal Tribunal for the Former Yugoslavia); United Nations Security Council, Resolution 955 (1994) (establishing the International Criminal Tribunal for Rwanda).

12 Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69.

13 The reference is here to substantive criminal law. For criminal procedure and penitentiary law, the situation is arguably different.

14 See for example *Dudgeon* v *United Kingdom* (1983) 5 EHRR 573; *Norris* v *Ireland* (1991) 13 EHRR 186; *Modinos* v *Cyprus* (1993) 16 EHRR 485.

15 See for example *Bayatyan* v *Armenia* (2012) 54 EHRR 15; *Altuğ Taner Akçam* v *Turkey* (2016) 62 EHRR 12; *Şükran Aydın and Others* v *Turkey* [2013] ECHR 62.

16 European Committee on Crime Problems (ECCP), *Report on Decriminalisation* (Strasbourg: Council of Europe, 1980) 13-14; Maggy Lee, 'Decriminalisation' in Eugene McLaughlin and John Muncie (eds), *The SAGE Dictionary of Criminology* (London: SAGE, 2001) 81-82.

17 ECCP, *ibid*; Emily Nagisa Keehn, 'Decriminalization and the UN Human Rights Bodies' Harvard Law School, HRP Research Working Paper Series No 18-002 (March 2018) 7 at https://hrp.law.harvard.edu/wp-content/uploads/2018/03/Emily-Keehn_HRP-18_002.pdf [https://perma.cc/8WZF-UDPV].

spheres of private morality and social welfare, with deleterious consequences for effective human rights protection.

Rather than directly considering which offences could become the focus of decriminalising efforts, this article returns to a largely forgotten moment in 1980, when another body within the Council of Europe, the European Committee on Crime Problems (ECCP), adopted a *Report on Decriminalisation*.[18] The Report analysed the costs of criminal justice; placed the decriminalisation of certain offences within a broader penal abolitionist perspective; and made suggestions on how to overcome the possible dysfunctions that would arise from abolishing or curtailing criminal regulation. The Report is not without limitations: from today's perspective, some of its recommendations somehow justify alternative modes of control that offer the involved person less protection against arbitrary measures than criminal law would. Nonetheless, a critical engagement with the Report may help shed light on a framework for approaching criminalisation cases differently and more coherently – a framework the ECtHR could have taken up but never did. The article, thus, explores the ideas, suggestions and limits of the Report. It also reflects on which factors contributed to the partial erasure of decriminalisation debates in present-day human rights thinking and case law. By showing that today's coercive human rights doctrine is not the unfolding of inevitable logic, the article ultimately puts forward decriminalisation as a possible (though not resolutive) alternative to present arrangements that is not just theoretical but also grounded in the history of human rights.[19]

The discussion in this article is structured as follows. First, the article analyses the ECtHR's cases on curtailing criminal regulation. It shows that the Court has demanded that states repeal criminal laws only in a small number of cases, while it has frequently accorded states a wide margin of appreciation. Second, trying to find a framework that can help the ECtHR approach criminalisation cases differently, the article engages with the *Report on Decriminalisation* and examines its findings. The following section advances some reasons why the Report has largely been neglected after its publication. In particular, it examines the role that (over)criminalisation has increasingly assumed in contemporary society. Subsequently, the article discusses the limitations of the Report, considering the general drawbacks of the approach adopted and the limits that we can now see with the benefit of hindsight. The final section considers what we can learn from the Report and its failures. It is argued that while human rights-driven decriminalisation can and should be advanced as an alternative to the ECtHR's coercive human rights doctrine, the scope for reorienting the ECtHR's case law is constrained by institutional, jurisdictional, social and cultural structures.

18 ECCP, *ibid*.

19 This approach follows Samuel Moyn's invitation to explore the 'hypothetical alternatives with which [anti-impunity] competes or which it even rules out'. See Samuel Moyn, 'Anti-Impunity as Deflection of Argument' in Karen Engle, Zinaida Miller and D.M. Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016) 88.

ECtHR CASES ON REMOVING CRIMINAL REGULATION

The ECtHR has played a significant role as human rights adjudicator in matters of criminalisation.[20] An analysis of the cases in this field reveals that the possible outcomes of a decision are threefold. In most cases, the Court adopts a permissive approach, holding that the criminal offence under scrutiny is legitimate with respect to the Convention rights.[21] When it comes to conduct that seriously harms individual liberties (for example human trafficking, torture and rape), the ECtHR imposes criminalisation obligations on states.[22] Finally, only in a small number of cases, mostly involving acts against public order and morality, the Court criticises the legislative choice on account of undue criminalisation of certain conduct.[23]

The ECtHR is hesitant in demanding that states curtail criminal regulation because its default approach towards national criminal policies seems to be one of permissibility.[24] Under the Court's case law, a criminal offence is presumed to be human rights-compliant insofar as it does not directly engage any right and freedom embodied in the ECHR.[25] As stated in the landmark case of *Engel* v *Netherlands* (*Engel*), decided in 1976, 'the Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights it protects'.[26] In *Engel*, the ECtHR established three criteria for determining the meaning of a 'criminal charge'[27] to prevent states 'from dressing up criminal proceedings as if they were civil and thereby avoiding the appropriate safeguards'.[28] Thus, in an attempt to counter problematic cases of *under*criminalisation (and the resulting denial of penal guarantees), the Court granted states great flexibility in relation to the opposite problem of *over*criminalisation.

The Court does not position itself in the role of assessing whether criminalising a certain behaviour effectively protects the common interests of all human beings or entrenches existing privileges and inequalities. This arises because the ECtHR claims to have a mandate only to assess whether penal policies affect

20 Steven Malby, *Criminal Theory and International Human Rights Law* (Abingdon: Routledge, 2019); Paulo Pinto de Albuquerque, 'The Overuse of Criminal Justice in the Case Law of the European Court of Human Rights' in Piet Hein van Kempen and Manon Jendly (eds), *Overuse in the Criminal Justice System: On Criminalization, Prosecution and Imprisonment* (Cambridge: Intersentia, 2019).

21 Malby, *ibid*, 101.

22 *ibid*, 102.

23 *ibid*, 102-103.

24 Similarly, Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008) 100. Lacey argues that bills of rights enshrined in national constitutions and international human rights conventions do not offer much constraint to what states may criminalise and how ('While the power to punish may be weakly constrained by standards such as the prohibition on cruel and unusual punishments, the power to criminalise remains all but unconstrained').

25 Malby, n 20 above, 169.

26 *Engel* v *Netherlands* (1976) 1 EHRR 647 at [81].

27 The criteria are: i) classification in domestic law; ii) nature of the offence; and iii) severity of the penalty that the person concerned risks incurring. See *ibid* at [82]-[83].

28 Andrew Ashworth and Lucia Zedner, 'Preventive Orders: A Problem of Undercriminalization?' in R.A. Duff and others (eds), *The Boundaries of the Criminal Law* (Oxford: OUP, 2010) 75.

the rights of specific individuals involved in a case. It does not consider the wider consequences of the concrete operation of criminal law on the social, economic and health interests of offenders and their communities and on society more generally. By following such an approach, the ECtHR often fails to counter overcriminalisation. Ironically, as Steven Malby has noted, a criminalisation framework based *solely* on the ECHR would in fact open 'the doors for criminalization of any number of trivial, and indeed, not-so trivial, acts without good reason'.[29] The broad permissiveness of the ECtHR towards criminal regulation is also connected to the operation of the margin of appreciation doctrine.[30] In the Court's view, in absence of a uniform European approach, domestic legislators and judicial bodies are in a better position than the Strasbourg judges to decide whether particular conduct should be criminalised.[31] Accordingly, in many decisions, the Court is prepared to defer to states' arguments that criminal law is required for societal interests in health, safety and security, for the protection of individual autonomy and human dignity, or for addressing harm, offence and community consensus.[32]

The ECtHR's broad permissiveness towards criminalisation has its roots in the late 1970s when *Engel* was decided. Interestingly, during the same period, the ECCP, another Council of Europe body, was working on a report that could have taken the ECtHR's case law in a very different direction. As we will see in the next section, the *Report on Decriminalisation* came out in 1980 and explicitly promoted decriminalisation as a penal policy centred on human rights. However, the Report's recommendations never influenced the ECtHR's case law. If we look at the instances where the Court has challenged the state's use of criminalisation, it is hard not to notice the limited number of cases and the cautious, case-by-case approach followed by the judges.

A first strand of cases on decriminalisation concerns consensual same-sex sexual relations. In *Dudgeon* v *United Kingdom*, decided in 1981, the Court held that Northern Ireland's laws criminalising homosexual acts between consenting male adults violated the guarantee of respect for private life under Article 8.[33] In the following cases of *Norris* v *Ireland* and *Modinos* v *Cyprus*, decided respectively in 1988 and 1993, the ECtHR confirmed the ruling also in the absence of any actual or likely enforcement against the complainants.[34] The Court considered that just the fact of retaining the offence of buggery in the criminal code continuously and directly affected the applicant's private life.[35] In 2000, in *ADT* v *United Kingdom*, the ECtHR censured the criminalisation of private homosexual acts between more than two consenting adults,[36] while three years later, in *SL* v *Austria*, it found discriminatory that only homosexual (and not heterosexual) acts of adult men with consenting minors over 14 were criminalised.[37]

29 Malby, n 20 above, 170.
30 *ibid*, 186.
31 See, generally, Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000).
32 Malby, n 20 above, 110-146.
33 *Dudgeon* v *United Kingdom* n 14 above.
34 *Norris* v *Ireland* n 14 above; *Modinos* v *Cyprus* n 14 above.
35 *Modinos* v *Cyprus ibid* at [24]. See also *Norris* v *Ireland ibid* at [33], [47].
36 *ADT* v *United Kingdom* (2001) 31 EHRR 33.
37 *SL* v *Austria* (2003) 37 EHRR 39.

These cases are significant as they influenced the practice of European states and the development of international human rights law beyond Strasbourg.[38] However, in view of the general European criminal policy trends with regard to homosexuality since the late 1950s,[39] calling for the decriminalisation of consensual same-sex acts has not arguably been 'particularly adventurous'.[40] It should not be overlooked, for instance, that outside the realm of consensual same-sex relations the Court has never really challenged the state's criminal regulation of sexual morality. In *Laskey* v *United Kingdom* and *KA and AD* v *Belgium*, decided respectively in 1997 and 2005, it held that the criminalisation of sadomasochism was justified by either actual or potential harm.[41] In the 2012 case of *Stübing* v *Germany*, the applicant's conviction and prison sentence for a consensual incestuous relationship with his sister were found to be justifiable intrusions into privacy, especially in order to protect family structures.[42]

Another group of decriminalisation decisions concerns Articles 9 (Freedom of thought, conscience and religion) and 10 (Freedom of expression). With regard to the first provision, since 1993 the ECtHR has censured the use of criminal sanctions against conscientious objection in the military and the attempt to persuade someone to change their religion (proselytism).[43] The compatibility of criminal measures with freedom of expression was assessed in 2008 in *Vajnai* v *Hungary*, where the Court found a violation of Article 10 because the applicant was convicted for wearing the red star (the symbol of the international workers' movement) at a demonstration.[44] Three years later, in *Altuğ Taner Akçam* v *Turkey*, the Court criticised the charge of 'denigrating the Turkish nation' because it was too broad and could open the way to arbitrary prosecutions.[45] Similarly, in the 2013 case of *Şükran Aydin* v *Turkey*, the ECtHR held that the criminalisation of the use of unofficial language (in the case, Kurdish) in political campaigns was not compatible with freedom of expression.[46] Finally, in 2002 and more recently in 2018, the Court criticised laws that, by means of criminal penalties, afford special protection to heads of state and, therefore, undermine freedom of expression.[47] All these decisions, however, do not constitute a clear stance against the criminalisation of speech and thought, as the disapproval of criminal measures is often dependent on the circumstances of each case. This

38 Ali Jernow, 'The Harm Principle Meets Morality Offenses: Human Rights, Criminal Law, and the Regulation of Sex and Gender' in in Alice M. Miller and Mindy Jane Roseman (eds), *Beyond Virtue and Vice: Rethinking Human Rights and Criminal Law* (Philadelphia, PA: University of Pennsylvania Press, 2019) 60.

39 The Wolfenden Report, which recommended the decriminalisation of male homosexuality in Great Britain, was published in 1957, see Departmental Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution* Cmnd 247 (1957).

40 Joxerramon Bengoetxea and Heike Jung, 'Towards a European Criminal Jurisprudence? The Justification of Criminal Law by the Strasbourg Court' (1991) 11 LS 239, 270.

41 *Laskey* v *United Kingdom* (1997) 24 EHRR 39; *KA and AD* v *Belgium* [2005] ECHR 110.

42 *Stübing* v *Germany* (2012) 55 EHRR 24.

43 *Kokkinakis* v *Greece* (1994) 17 EHRR 397 (proselytism); *Bayatyan* v *Armenia* n 15 above (conscientious objection).

44 *Vajnai* v *Hungary* [2008] ECHR 1910.

45 *Altuğ Taner Akçam* v *Turkey* n 15 above.

46 *Şükran Aydın and Others* v *Turkey* n 15 above.

47 *Colombani and Others* v *France* [2002] ECHR 521 (insulting a foreign head of state); *Otegi Mondragon* v *Spain* [2018] ECHR 910 (insulting the king).

point emerges clearly when we consider the ECtHR's cases on defamation. For the Court, the imposition of criminal sanctions in defamation cases is not automatically in breach of Article 10.[48] In this area, the ECtHR appears to be more deferential to state criminal policies than the Parliamentary Assembly of the Council of Europe, which has explicitly promoted the decriminalisation of defamation.[49]

In a third strand of cases, the ECtHR has challenged state decisions to criminalise certain behaviours because they affected individuals in vulnerable positions. A recent example is *VCL*, discussed in the Introduction and decided in 2021, where the Court found that the prosecution of victims of human trafficking may, in certain circumstances, be at odds with the state's duties under Article 4.[50] Another 2021 decision is *Lăcătuş* v *Switzerland*[51] (*Lăcătuş*). The case involved a 19-year-old Roma woman who was convicted eight times in Geneva for begging, and sentenced to pay fines, and subsequently imprisoned for five days for non-payment. The ECtHR observed that begging constituted a means of survival for the applicant, who was poor, illiterate and unemployed.[52] For this reason, the Court found that the criminal sanctions imposed infringed on the applicant's human dignity and impaired the very essence of her right to private and family life.[53] Both *VCL* and *Lăcătuş* decisions benefited the applicants *in casu*. They also sent a strong signal regarding the impact that criminal measures have on the underprivileged and deprived. However, both cases are also double-edged.[54] The Strasbourg judges accepted that *some forms* of criminalisation of trafficking victims or beggars can be permitted under the ECHR.[55] In this way, states were somehow offered a green light to continue prosecuting and punishing those marginalised groups – and to do so authorised by human rights law.

The three strands of cases just outlined generally resonate with the approach of other human rights bodies and organisations, most of which tend to have more freedom than the ECtHR in generating policy proposals. Processes of decriminalisation, both in general terms or in relation to specific offences (for example possession and personal use of drugs; HIV transmission, exposure and non-disclosure), have at times been advocated at the level of the United Nations (UN), in particular at some UN Congresses on Crime Prevention and Criminal Justice.[56] These decriminalisation efforts are not generally driven by

48 *Lindon* v *France* (2008) 46 EHRR 35; See also Pinto de Albuquerque, n 20 above, 69-70.
49 Council of Europe, Parliamentary Assembly, Resolution 1577 (2007), 'Towards decriminalisation of defamation'.
50 *VCL* v *United Kingdom* n 1 above at [159].
51 *Lăcătuş* v *Switzerland* [2021] ECHR 37.
52 *ibid* at [107].
53 *ibid* at [115].
54 Sarah Ganty, 'The Double-Edged ECtHR Lăcătuş Judgment on Criminalisation of Begging: Da Mihi Elimo Sinam Propter Amorem Dei' (2021) 3 *European Convention on Human Rights Law Review* 393 (discussing *Lăcătuş*).
55 *ibid*, 402.
56 See for example United Nations, 'Eight UN Congress on the Prevention of Crime and the Treatment of Offenders' A/CONF.144/28/Rev.1 (1990) 4, adopted later as United National General Assembly, Resolution 45/107, 'International co-operation for crime prevention and criminal justice in the context of development' (14 December 1990) Annex, para 15.

a concern with overcriminalisation in society but rather by the awareness that criminalisation is ineffective and even counterproductive in preventing certain specific behaviours.[57] UN human rights bodies, on the other hand, have recommended that states repeal laws that punish individuals on account of their sexual orientation,[58] that criminalise proselytism,[59] that restrict freedom of expression through criminal penalties,[60] or that penalise trafficking victims[61] and people living in poverty.[62] Similarly to the ECtHR's case law, the jurisprudence of UN human rights bodies on decriminalisation does not appear always to be straightforward and coherent.[63] Nonetheless, on account of their wider room for manoeuvre on questions of criminalisation, there are instances where UN human rights bodies have gone further than the Strasbourg judges, by recommending the decriminalisation of some acts that, according to the ECtHR, can instead be criminalised.[64] An example is defamation, whose criminalisation is generally opposed by UN human rights bodies.[65] Another significant difference is with respect to abortion. In the 2016 case of *Mellet* v *Ireland*, the UN Human Rights Committee held that Ireland's criminalisation of abortion in nearly all circumstances amounted to cruel, inhuman or degrading treatment.[66] Conversely, in *A, B and C* v *Ireland*, decided six years earlier, the ECtHR found that the same provision did not in itself violate any Convention rights.[67] In addition, UN human rights bodies have recommended the decriminalisation of a number of offences whose compatibility with the ECHR has not yet been considered.[68] These include sex work,[69] vagrancy, adultery, apostasy, occupation of land and personal use and possession of drugs.[70]

The decriminalisation of certain offences has also occasionally been put forward in the campaigns of human rights NGOs. For instance, Human Rights Watch has argued that laws criminalising drug use and possession are inconsistent with human rights (for example respect for human autonomy, the right

57 *ibid*.
58 *Rosanna Flamer-Caldera* v *Sri Lanka* [2022] CEDAW/C/81/D/134/2018; *Toonen* v *Australia* [1994] CCPR/C/50/D/488/1992.
59 See for example United Nation Human Rights Committee, 'Concluding Observations Adopted by the Human Rights Committee at Its 105th Session, 9-27 July 2012: Armenia' CCPR/C/ARM/CO/2 (2012).
60 United Nation Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Tajikistan' CCPR/CO/84/TJK (2005) para 22.
61 Joy Ngozi Ezeilo, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo' A/HRC/20/18 (2012) paras 23-34.
62 Magdalena Sepúlveda Carmona, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' A/66/265 (2011).
63 Keehn, n 17 above, 50-51.
64 Malby, n 20 above, 106.
65 See for example United Nation Human Rights Committee, 'Concluding Observations on the Third Periodic Report of Paraguay, Adopted by the Committee at Its 107th Session (11-28 March 2013)' CCPR/C/PRY/CO/3 (2013) para 25.
66 *Mellet* v *Ireland* [2013] CCPR/C/116/D/2324/2013 at [7.6].
67 *A, B and C* v *Ireland* (2011) 53 EHRR 13 at [241].
68 Malby, n 20 above, 107; Keehn, n 17 above.
69 In April 2021, the ECtHR has accepted to consider a case concerning the criminalisation of the purchase of sexual services in France. The case has yet to be decided. See *MA and Others* v *France (communicated case)* [2021] ECHR App No 63664/19.
70 Keehn, n 17 above.

to privacy and the right to health) and has explicitly promoted their abrogation.[71] In 2016, Amnesty International released a policy calling on governments around the world to decriminalise consensual sex work.[72] Nevertheless, decriminalisation is far from being a central advocacy strategy for major human rights organisations.[73] Both Amnesty International and Human Rights Watch are much more likely to call on states to protect human rights by passing, rather than repealing, criminal laws.[74] When they do advocate for decriminalisation, they tend to focus on laws which directly affect personal and sexual autonomy or political freedoms.[75] There is much less attention to how criminalisation as such disproportionately affects disadvantaged groups and may consequently impede the full realisation of human rights.

THE REPORT ON DECRIMINALISATION

Decriminalisation has only a marginal position in today's human rights thinking and case law. It also finds little space in contemporary criminal law theory.[76] Conversely, the criminalisation and punishment of abusive practices by state and non-state actors have become the preferred and often unquestioned methods for attempting to end human rights violations.[77] However commonsensical our present-day arrangements may appear to many,[78] they are not obvious if assessed from a historical perspective that is still very close to us in time. At least within the Council of Europe, until a few decades ago it was not a foregone conclusion that the emphasis would be on criminalisation, rather than decriminalisation. There was a moment, in the 1970s, when it seemed that the trend was towards limiting the role of criminal law to the benefit of individual rights and freedoms. In the context of the Council of Europe, Europe's leading human rights

71 Human Rights Watch and ACLU, 'Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States' (2016) at https://www.aclu.org/report/every-25-seconds-human-toll-criminalizing-drug-use-united-states [https://perma.cc/CD3K-HDEN].

72 Amnesty International, 'Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers' (2016) at https://www.amnesty.org/en/documents/pol30/4062/2016/en/ [https://perma.cc/47WC-JACB].

73 An exception is in the context of the right to health. Organisations working in this area have identified criminal law as a barrier to health services and have put decriminalisation at the centre of their advocacy. See Aziza Ahmed, 'Women's Rights, Human Rights and the Criminal Law or, Feminist Debates and Responses to [De]Criminalization and Sexual and Reproductive Health' (2018) 112 *Proceedings of the ASIL Annual Meeting* 87; Michele R. Decker and Others, 'Human Rights Violations against Sex Workers: Burden and Effect on HIV' (2015) 385 *Lancet* 186.

74 Sattar, n 5 above, 200.

75 *ibid*, 200 and 234.

76 But see for example Darryl K. Brown, 'Democracy and Decriminalization' (2007) 86 *Texas Law Review* 223. On the counterpart concept of criminalisation, see for example R.A. Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford: OUP, 2014); Nicola Lacey, 'Criminalisation: Conceptual and Empirical Issues' (2009) 72 MLR 936; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: OUP, 2009).

77 Karen Engle, Zinaida Miller and D.M. Davis, 'Introduction' in Engle, Miller and Davis, n 19 above, 1.

78 According to Engle, Miller and Davis, *ibid*, 'it has become almost unquestionable common sense that criminal punishment is a legal, political, and pragmatic imperative for addressing human rights violations'.

organisation, the climax of this policy of 'less criminal law' was reached with the publication of the ECCP's *Report on Decriminalisation* in 1980.[79] This Report is in many ways an extraordinary publication. It is the only international document ever published that gives ample guidance to policy and decision-makers on how to curtail criminal regulation in general rather than with respect to specific offences.[80] To our contemporary eyes, the Report may appear quite radical. It attacks the normal operation of the penal system as unable to meet its stated purposes and explicitly shows how the abolition of a large amount of criminal law would be socially beneficial. The findings of the Report have also remained entirely unfulfilled. After its publication, the Report was soon all but forgotten and became, in the words of one of its contributors, one of 'Europe's most hidden treasures'.[81] Other Council of Europe documents rarely mention it. Those that do mention it do not fully engage with its observations.[82] The ECtHR has mentioned it only once, in a concurring opinion of Judge Tulkens.[83] Even beyond the field of human rights, there are, remarkably, no references to the Report in today's renewed proposals, demands and writings on abolishing (or defunding) the police and the prison, in the United States (US) and outside.[84]

The history of the *Report on Decriminalisation* starts in 1958 when the Council of Europe's Committee of Ministers set up the ECCP to oversee and coordinate intergovernmental activities in the field of crime prevention and crime control.[85] In the following years, the ECCP developed a comprehensive strategy aimed at harmonising national laws concerning criminal law and procedure, penitentiary law and related matters.[86] Until the early 1980s, the action of this committee was based on what David Garland has termed 'penal-welfarism',

79 Robert Roth and Françoise Tulkens, 'Introduction' (2011) 9 *Journal of International Criminal Justice* 571, 571; ECCP, n 16 above.

80 However, the commitment to decriminalisation in general terms has been promoted elsewhere at the international level, in particular at UN Congresses on Crime Prevention and Criminal Justice. See for example United Nations, n 56 above.

81 Vitaliano Esposito in *William Ambrogio Colombelli* [2020] *Giudice per i Rimedi Straordinari (San Marino)* 19/19 *Registro unico* 726/2013 *Proc. Pen*. 20 (translation by the author).

82 ECCP, *Final Activity Report, The Simplification of Criminal Justice*, PC-R-PS(87)1 15 (Strasbourg: Council of Europe, 1980) 20; Francis Bailleau and Garioud Garioud, 'Social Strategies Aimed at Avoiding the Production of Criminal Behaviour' in *New social strategies and the criminal justice system* (Strasbourg: Council of Europe, 1994) 12; Council of Europe, *The Management of Criminal Justice* (Strasbourg: Council of Europe, 1996) 9-10; Secretariat of the Directorate General of Human Rights and Legal Affairs, *Minimum Corpus of the Council of Europe Standards*, RL-BU(2008)2 21 (Strasbourg: Council of Europe, 2008).

83 Not by chance, Tulkens is the ECtHR's judge that has questioned the coercive human rights doctrine the most. See Concurring Opinion of Judge Tulkens in *MC* v *Bulgaria* n 10 above at [2] ('the observations set out in the Report on Decriminalisation by the European Committee on Crime Problems clearly show that the effectiveness of general deterrence based on the criminal law depends on various factors and that such an approach "is not the only way of preventing undesirable behaviour"').

84 For a discussion juxtaposing American prison and police abolitionism with European and Latin American penal abolitionism, see Máximo Langer, 'Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then' (2020) 134 *Harvard Law Review Forum* 42 (however, the article does not mention the Report).

85 'Council of Europe – European Committee on Crime Problems' at https://www.coe.int/en/web/cdpc/home [https://perma.cc/LN3V-RPNF].

86 Vitaliano Esposito, 'Pour l'Histoire Du Comité Européen Pour Les Problèmes Criminels' (1999) *Cahiers de Défense sociale* 67.

that is, a combination of 'the liberal legalism of due process and proportionate punishment with a correctionalist commitment to rehabilitation, welfare and criminological expertise'.[87] Within its wider programme of criminal reform and modernisation, in 1970 the ECCP decided to establish a subcommittee to study the reasons for, and the consequences of, removing certain categories of conduct from the penal sphere altogether.[88] The Subcommittee on Decriminalisation began its work in 1972. Its terms of reference required it 'to undertake a comparative study of the trends and criteria applied in decriminalisation', notably by listing 'recent examples' and analysing the 'reasons for them in their legal and social context'.[89] After 14 meetings where legislators, administrators, legal scholars and criminologists were consulted and interviewed, in 1979 the Subcommittee drafted a report which was adopted by the ECCP.[90]

The chairperson of the Subcommittee was Louk Hulsman. A Dutch professor of penal law and criminology, Hulsman was also one of the most influential penal abolitionists worldwide.[91] Before representing the Netherlands in the ECCP, he had been one of the architects of the Dutch 'policy of tolerance' towards soft drugs and the driving force behind the establishment of the Dutch league of penal reform.[92] His work for the Dutch government may seem out of step with his abolitionist conviction, but he always maintained that his goal was to make a repressive system a little less repressive.[93] The *Report on Decriminalisation* is primarily the result of Hulsman's efforts towards a gradual abolition of criminal regulation. His belief that crimes have no ontological reality but differ from non-criminalised social problems only due to their labelling as such, underpins the whole Report.[94] The Subcommittee had other significant members. Berl Kutchinsky, from Denmark, was internationally famous for purporting to demonstrate that the liberalisation of pornography does not lead to an increase in sexual violence but a reduction in the incidence of certain sexual offences.[95] The Swiss member, Jacques Bernheim, was one of the main experts on medical ethics in prison and would later sit on the European Committee for the Prevention of Torture (CPT).[96] Another future member of the

87 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: OUP, 2001) 27.

88 ECCP, *Final Activity Report Concerning the Report on Decriminalisation (Activity 22.13.1)* CM(80)51 (Strasbourg: Council of Europe, 1987) 2.

89 ECCP, n 16 above, 10.

90 ECCP, n 88 above, 4.

91 Andrea Beckmann, 'Louk Hulsman: An Obituary' (2009) 76 *Criminal Justice Matters* 52.

92 René van Swaaningen, 'Louck Hulsman (1923-2009)' in Keith Hayward, Shadd Maruna and Jayne Mooney (eds), *Fifty Key Thinkers in Criminology* (London: Routledge, 2010) 140.

93 *ibid*, 141.

94 See for example Louk H.C. Hulsman, 'Critical Criminology and the Concept of Crime' (1986) 10 *Contemporary Crises* 63.

95 Berl Kutschinsky, *Studies on Pornography and Sex Crimes in Denmark. A Report to the US Presidential Commission on Obscenity and Pornography* (Copenhagen: Nyt fra Samfundsvidenskaberne, 1970). The potential link between pornography consumption and sexual violence has been the subject of dozens of studies over multiple decades, but there is still no consensus about whether the link is real. See, generally, Christopher J. Ferguson and Richard D. Hartley, 'Pornography and Sexual Aggression: Can Meta-Analysis Find a Link?' (2022) 23 *Trauma, Violence, & Abuse* 278.

96 Christine Bicknell, Malcolm D. Evans and Rod Morgan, *Preventing Torture in Europe* (Strasbourg: Council of Europe, 2018) 39.

CPT was Vitaliano Esposito, who would also represent the Italian government in several international organisations devoted to human rights protection and act as an ad hoc ECtHR judge.[97] After her experience on the Subcommittee, Christine Chanet, who represented France, became a member of the UN Human Rights Committee, the UN Committee against Torture and was in charge of reviewing French criminal policy following the delivery of ECtHR's judgments.[98] Other experts who worked in the areas of human rights after their work on decriminalisation were Roland Miklau, from Austria,[99] and Régis De Gouttes, from France.[100] Finally, the Subcommittee was assisted by several experts and specialists, including Denis Chapman, a British radical theoretician;[101] and Herman Bianchi, a Dutch criminologist and, like Hulsman, a committed penal abolitionist.[102]

The 260-page Report is divided into two parts. A general part gives a detailed analysis of different forms of decriminalisation. This part discusses the costs of the penal system and the reasons in favour of its withdrawal with respect to certain conduct. It also exposes possible alternatives to criminalisation while responding to arguments against decriminalisation. It finally illustrates how decriminalisation can be promoted in the legislative process. This discussion is followed by a special part on property offences (cheque, credit card and credit sale offences, petty fraud, shoplifting and theft from manufacturing firms by employees), which provides an illustration of the decriminalisation models presented in the general part. The Report does not make recommendations on concrete decriminalisation measures. Instead, it outlines a variety of schemes which may serve as a basis for law reforms in the Council of Europe's states.

The Report distinguishes between *de jure* and *de facto* decriminalisation. *De jure* decriminalisation is done by an act of legislation or through interpretation by the judiciary and involves taking certain offences out of the realm of criminal law.[103] *De facto* decriminalisation is the phenomenon by which an offence remains in the criminal code but is no longer enforced.[104] In turn, *de jure* decriminalisation (the focus of the Report) is divided into three categories: (i) 'type A decriminalisation', which 'aims at a *full and social recognition* of the decriminalised behaviour' (for example decriminalisation of homosexuality);

97 'Vitaliano Esposito – DCP: Diritto Penale Contemporaneo' at https://archiviodpc.dirittopenaleuomo.org/autori/335-vitaliano-esposito [https://perma.cc/T5XR-5A6E]. Esposito has also published in the area of decriminalisation. See Vitaliano Esposito, 'La Filosofia Della Depenalizzazione e Quella Della Decriminalizzazione' (1979) *Rassegna Penitenziaria e Criminologica* 209.

98 'Human Rights Committee – Members: Christine Chanet (France)' at https://www2.ohchr.org/english/bodies/hrc/membersCVs/chanet.htm [https://perma.cc/JQ96-7YHD].

99 'Prof. Dr. Roland Miklau' at https://volksanwaltschaft.gv.at/downloads/bfdv7/Lebenslauf%20Roland%20Miklau%20EN.pdf.

100 'De Gouttes Régis' at https://www.ohchr.org/Documents/HRBodies/CERD/Elections21/RegisdeGouttes.pdf [https://perma.cc/J2P6-BMSD].

101 David Webb, 'A Forgotten Radical: Dannis Chapman and the New Criminology in Britain' (1981) 21 BJC 148.

102 Herman Bianchi, 'Abolition: Assensus and Sanctuary' in Herman Bianchi and René van Swaaningen (eds), *Abolition: Towards a non-repressive approach to crime* (Amsterdam: Free University Press, 1986).

103 ECCP, n 16 above, 13-14.

104 *ibid*, 14.

(ii) 'type B decriminalisation', whereby 'a different appraisal of the role of the state or the growth of human rights' implies state neutrality with regard to certain forms of behaviour (eg pornography); and (iii) 'type C decriminalisation', where the behaviour in question is still considered undesirable but the state prefers to abstain from using the penal system to deal with it, by choosing either to do nothing or to apply non-penal means of control.[105]

According to the authors of the Report, the rationale underlying a policy of decriminalisation is the realisation that the penal system does not generally meet its stated purposes, including reducing and preventing crime and protecting human rights.[106] Not only are these goals hardly achieved but the very effort to make the system work has enormous economic and social costs.[107] The Report notes how the penal system involves the imposition of *intentional* suffering on the offender but often also *unintentional* suffering on the family and other components of the offender's environment.[108] The centrality of suffering in the operation of criminal justice somehow creates 'a moral paradox': '[W]ell-being in society, restriction of the use and threat of coercion, the safeguard of freedom and the promotion of human dignity are pursued by the recourse to activities which imply coercion, deprivation of liberty and impairment of dignity.'[109]

The suffering stemming from the penal system is also distributed unequally and, in practice, it is borne disproportionately by 'the weaker members of society'.[110] Moreover, it is stated that 'focusing on the criminal act and the guilt of the author tends to divert' attention from 'the need to improve social conditions'.[111] In this context, a gradual process of decriminalisation is seen as a means to 'permit a better approach to problems at present within the competence of the criminal justice system' and to help solve social problems 'created by' or 'inherent in the criminal justice system'.[112]

The authors of the Report distinguish four possible non-penal alternatives to address what they call 'problematic situations'.[113] A first option is to change 'the symbolic environment of criminalised events', that is, to encourage a re-evaluation of the undesirability of certain behaviours or an increase in their tolerance.[114] A second alternative is called 'techno-prevention'.[115] This approach entails changing 'the physical environment by technical means', reducing, in turn, the frequency of problematic situations.[116] A new car-locking system, for example, would diminish the theft of cars so equipped. Thirdly, the Report suggests changes in the way social life is organised. Increasing the provision of

105 *ibid*, 15.
106 *ibid*, 22.
107 Relatedly, it is stated that 'the very inefficiency of the penal system … is a precondition for its existence: if all punishable acts were in fact reported, cleared up, prosecuted, etc, the system would immediately break down', *ibid*, 97.
108 *ibid*, 26.
109 *ibid*, 26-27.
110 *ibid*, 27.
111 *ibid*, 25.
112 *ibid*, 149-150.
113 *ibid*, 176.
114 *ibid*, 154.
115 *ibid*, 159.
116 *ibid*, 159-160.

housing, education, health and social services is seen as one of the best ways to attack the root causes of undesirable events.[117] Finally, an alternative is to replace social control through the penal system with other forms of social control. The Report argues that the regulation of certain behaviours can be left to 'intermediate institutions', notably 'small, legally controlled, informal organisations that build up values, reconcile differences between people, and mediate in order to settle conflict'.[118] Examples are the family, the neighbourhood or the local community. Where the management of conflict and the control of undesirable behaviour in this framework is not satisfactory, the Report suggests a resort to medico-social services or 'arbitration possibilities at grass root level'.[119] Legal remedies of compensatory or conciliatory nature are presented as a last resort.[120] According to the Report's authors, '[o]ne of the important tasks of "official" social control would be to contain and limit the "negative" aspects of non-legal social control, preventing it from becoming aggressive and, if it becomes so, providing remedies'.[121]

A part of the Report is also devoted to responding to possible objections to decriminalisation. One such argument is that decriminalisation would deprive the offender of the legal guarantees inherent in the penal system.[122] While the Report acknowledges that certain forms of decriminalisation may impair the offender's human rights, it also argues that due process rights can and should be taken over by other legal systems without substantial difficulty.[123] To the objection that decriminalisation would foster a return to private vengeance, the authors of the Report respond that the data at present does not show a correlation between the proliferation of self-defence and decriminalisation policy.[124] In any case, to address people's feelings of insecurity, the withdrawal of penal control can be accompanied by social interventions by the state or by other organisations and the dissemination of appropriate information.[125] Finally, the Report addresses the argument concerning the deterrent effect of criminal law.[126] Here, the authors show that the criminal justice system is not a very efficient means of preventing undesirable behaviour[127] and that non-punitive mechanisms of social control can in fact be more effective and have fewer detrimental side effects.[128]

Finally, the Report formulates suggestions on how to implement concrete projects of decriminalisation at the national level. In the authors' view, it is important that these projects are prepared in advance, so that they are ready for immediate implementation when the political climate is propitious, and that

117 *ibid*, 34.
118 *ibid*.
119 *ibid*, 181.
120 The Report also discusses the opportunity of introducing some aspects of the penal system (the police phase and legal aid schemes) in the civil system, *ibid*, 52-53.
121 *ibid*, 181.
122 *ibid*, 63.
123 *ibid*, 64 65.
124 *ibid*, 67-68.
125 *ibid*, 172.
126 *ibid*, 75-93.
127 *ibid*, 78.
128 *ibid*, 87.

they are placed within a clear and consistent criminal policy.[129] Not only should criminal justice institutions (police, judiciary, penal institutions) be involved in the discussion about new tasks and prospects at an early stage; but the legislators should also consider setting up a multidisciplinary task force to examine and promote alternatives to a criminal justice approach.[130] Other suggestions include giving special attention to 'the victims of the problematic situations now defined as "crime"'; employing 'comparative studies' showing the wide differences in the extent of criminalisation in comparable countries; and making projects of 'further criminalisation' difficult to implement by subjecting them to procedural controls.[131]

Overall, the *Report on Decriminalisation* exposes a 'technocratic' and 'rationalistic' critical analysis of criminal law as constituting just one option among others for controlling undesirable situations.[132] This analysis recognises that penal control should be a last resort and explicitly highlights how decriminalisation would benefit human rights protection. Although the Report appears at times as a conglomerate of different opinions and insights, Hulsman's ideas, as already noted, constitute to a large extent its theoretical framework. First, the Report presents itself as anti-ideological. Its proposals regarding decriminalisation neither imply radical political reforms nor structural analyses of criminalisation. Rather, the authors merely highlight the overwhelming counter-productivity of the penal system in relation to its stated purposes and show how decriminalisation would in fact make the management of conflict and the control of undesirable behaviour more effective.[133] In other words, the main concern is improving the economy of social control rather than questioning why (and for the benefit of whom) such social control exists in the first place. Second, the Report often adopts a 'libertarian' approach,[134] which builds upon the ideas of 'small is beautiful' and 'self-reliance' in the field of economics.[135] When the authors consider strategies for reducing the existing application of the penal system, they place emphasis on decentralisation, the role of 'intermediate institutions' and face-to-face conflict resolution. Underlying these proposals we see Hulsman's argument that society does not merely consist of the formal institutions of the state, on the one hand, and of individuals, on the other.[136] According to the Dutch scholar, the building stones of society are in fact neighbourhoods, professional groups, circles of friends, social movements, recreational clubs and work settings, which fulfil many functions of social control in a better fashion than state institutions.[137] While the centralised penal system is accused

129 *ibid*, 147.
130 *ibid*, 183.
131 *ibid*.
132 Gerlinda Smaus, 'Modelli Di Società Nel Movimento Abolizionista' (1985) 3 *Dei Delitti e Delle Pene* 569, 570.
133 *ibid*, 582-583.
134 Hulsman, n 94 above, 69.
135 Smaus, n 132 above, 570; Rolf S. De Folter, 'On the Methodological Foundation of the Abolitionist Approach to the Criminal Justice System. A Comparison of the Ideas of Hulsman, Mathiesen and Foucault' (1986) 10 *Contemporary Crises* 39, 43.
136 Hulsman, n 94 above, 68-69.
137 *ibid*.

of 'stealing the conflict' of those directly involved,[138] decriminalisation would open spaces for types of conflict regulation that are more closely related to the direct experience of those concerned.[139]

WHY WAS THE REPORT FORGOTTEN?

While the *Report on Decriminalisation* seems radical in some respects, its theoretical framework is hardly subversive.[140] The Report does not question the foundations of our society or the official purposes and functions of criminal law. Liberal democracies could adopt all its recommendations without their ideological structures being challenged. Ultimately, what the Report suggests is not far from a 'liberal' and 'humanitarian' approach to criminalisation based on the principles of subsidiarity and minimal criminalisation (*ultima ratio*).[141] However, if this is true, why was the Report instantly forgotten? Why has it never properly been considered by the ECtHR, despite its ample case law on matters of criminalisation? Probably, the answer is not in the Report itself or in the limits of its observations. Rather, we should look at the transformations of the social and political context between the 1970s and 1980s, when the Report was published.

The Report was the result of a criminal policy oriented towards social welfare. However, in the mid-1970s, support for 'penal welfarism' began to wane under growing disenchantment with its premises and practices.[142] In the US, the correctionalist commitment to rehabilitation was attacked and rejected in favour of an explicit retributive approach to punishment.[143] In Europe, the penal climate dramatically changed in the 1980s and repressive and expansionist orientations prevailed.[144] The preoccupation with reducing criminal law and its costs, which had been predominant in many European states, was substituted by moves for heightened penal control and large-scale imprisonment.[145] The increased tendency to 'govern through crime'[146] led the interest away from containing criminal regulation and towards a broader criminalisation of behaviours. Since the 1980s, legislatures have produced new criminal offences, for

138 Nils Christie, 'Conflict as Property' (1977) 17 BJC 1.
139 De Folter, n 135 above, 43.
140 Smaus, n 132 above, 579.
141 ECCP, n 16 above, 9.
142 See for example Garland, n 87 above, 53-73.
143 See for example Andrew Von Hirsch, *Doing Justice: The Choice of Punishments – Report of the Committee for the Study of Incarceration* (New York, NY: Hill and Wang, 1976) (endorsing a 'just desert' retributivism in place of the utilitarian approach to punishment that was dominant at the time); Francis A. Allen, *The Decline of the Rehabilitative Ideal* (New Haven, CT: Yale University Press, 1981) (offering a sociological account of the decline of rehabilitation).
144 Heike Jung, 'Criminal Justice: A European Perspective' (1993) CLR 237, 238-239.
145 Sonja Snacken, 'Resisting Punitiveness in Europe?' (2010) 14 *Theoretical Criminology* 273. On the turn to punitiveness, see for example Garland, n 87 above; John Pratt, *The New Punitiveness: Trends, Theories, Perspectives* (Cullompton: Willan Publishing, 2005); Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: OUP, 2007); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham, NC: Duke University Press, 2009).
146 Simon, *ibid*.

example, to address terrorist threats,[147] and have expanded the scope of some existing crimes, such as in the case of drug or sexual offences.[148] Police and prosecution authorities have intensified the enforcement of 'poverty' crimes, including drug possession, petty theft, begging, vagrancy or squatting in residential buildings.[149] As Loïc Wacquant has convincingly argued, particularly in the most acutely 'neo-liberal' countries, the state has increasingly relied 'on the police and penal institutions to contain the disorders produced by mass unemployment, the imposition of precarious wage work and the shrinking of social protection'.[150] More recently, the state criminal-law machinery has also been deployed for countering immigration, with the detention, prosecution and sentencing to imprisonment of irregular migrants.[151]

Several explanations have been advanced for the shift from 'penal welfarism' to overcriminalisation. Garland has reconnected this phenomenon to broader socio-economic and cultural transformations that occurred in Western industrialised nations between the 1970s and 1980s.[152] Wacquant has highlighted the role played by the global spread of neo-liberal policies, which transformed the welfare state into a penal one.[153] Other authors have shown how this 'punitive turn' was influenced by the interaction between public opinion, political choices and the media.[154] The early 1980s saw a growing sensibility about revenge by crime victims,[155] renewed attention towards 'popular' demands of punishment,[156] diffusion of images of insecurity by the media[157] and political initiatives promoting 'law and order' thinking.[158] A new form of 'penal optimism' took shape,[159] summed up by the assertion that 'prison works'.[160] This

147 Bernadette McSherry, Alan Norrie and Simon Bronitt, 'Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Oxford: Hart, 2008).

148 Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in McSherry, Norrie and Bronitt (eds), *ibid*; Leslie Sebba, '"Victim-Driven" Criminalisation Some Recent Trends in the Expansion of the Criminal Law' in McSherry, Norrie and Bronitt (eds), *ibid*.

149 See, generally, Wacquant, n 145 above.

150 Loïc Wacquant, 'The Penalisation of Poverty and the Rise of Neo-Liberalism' (2001) 9 *European Journal on Criminal Policy and Research* 401, 404.

151 This trend has been called 'crimmigration'. See Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 *American University Law Review* 367.

152 Garland, n 87 above.

153 Wacquant, n 145 above.

154 Sonja Snacken, 'Punishment, Legitimate Policies and Values: Penal Moderation, Dignity and Human Rights' (2015) 17 *Punishment & Society* 397, 401-402.

155 Ivo Aertsen, 'Punitivity from a Victim's Perspective' in Sonja Snacken and Els Dumortier (eds), *Resisting punitiveness in Europe: Welfare, Human rights, and Democracy* (Abingdon: Routledge, 2012).

156 John Pratt, *Penal Populism* (London: Routledge, 2007); Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in Christopher M.V. Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (Oxford: Clarendon, 1995).

157 Simon, n 145 above.

158 Robert Reiner, *Law and Order: An Honest Citizen's Guide to Crime and Control* (Cambridge: Polity, 2007).

159 Cheryl Marie Webster and Anthony N. Doob, 'Penal Optimism: Understanding American Mass Imprisonment from a Canadian Perspective' in Kevin R. Reitz (ed), *American Exceptionalism in Crime and Punishment* (Oxford: OUP, 2017).

160 The phrase was coined by former British Home Secretary Michael Howard in a speech at the British Conservative Party conference on 6 October 1993. See Colin Brown,

punitive fervour attracted not only 'law and order' politicians, but also many liberal and progressive movements (victim advocates, feminist activists and ecological groups), which started viewing the penal system as a tool of social reform and a source of protection for vulnerable individuals.[161]

The Report had the potential to influence European states' reductionist penal policies. At the time of its drafting, it was not implausible that the ECtHR, another body within the Council of Europe, would take it as a guideline in adjudicating criminalisation cases. After all, the Report deals with issues of human rights and many of its authors would continue their careers in human rights institutions. However, both European states and the ECtHR took a completely different path – one towards criminalisation rather than decriminalisation. An indication that the Report was destined to be forgotten (not for its content but for the changed socio-political context) lies in the lack of interest by the Council of Europe in supporting the Subcommittee on Decriminalisation in its final stages of work. The item of decriminalisation was discontinued in the late 1970s, while the Report was still being drafted, and from 1979 the members of the Subcommittee had to pay their meeting expenses from their own pockets.[162] When the Report was eventually completed, the Council of Europe authorised its publication and 'took note', but did nothing more to encourage states to implement its observations.[163] A survey on the decriminalisation of sexual offences, which was supposed to supplement the special part of the Report, was left unfinished and eventually abandoned.[164]

DISCUSSING THE REPORT

The *Report on Decriminalisation* provides a convincing critique of (over)criminalisation and offers some helpful recommendations. However, it does not provide a perfect blueprint for tackling contemporary forms of overcriminalisation. In particular, the theoretical framework underpinning the Report leaves it open to several criticisms. A first limitation relates to the fact that the Report deals with the stated purposes and manifest dysfunctions of the penal system but completely overlooks its latent functions.[165] On the one hand, the authors question the operation of criminal law insofar as it fails to adhere to its objectives and as it develops in such an expansive manner that can no longer be justified. On the other hand, they only identify the individual, rather than the structural, costs of criminal law. The authors note that the penal system is a source of harm for the convicted person and their family,

'Howard Seeks to Placate "Angry Majority": Home Secretary Tells Party' *The Independent* 7 October 1993 at http://www.independent.co.uk/news/uk/howard-seeks-to-placate-angry-majority-home-secretary-tells-party-that-balance-in-criminal-justice-1509088.html [https://perma.cc/VWF4-PQYZ].

161 Pinto, n 8 above, 732-737.

162 Council of Europe, Committee of Ministers, Conclusions 80/317, 'Conclusions of the 317th Meeting of the Ministers' (1980) 91.

163 *ibid*.

164 ECCP, n 16 above, 12.

165 Smaus, n 132 above, 580.

but they fail to notice that the production of such harm plays a function in the maintenance of economic, racial and ideological structures.[166] Both the economic and racial dimensions of penality are completely absent from the Report. The authors mention that criminal law predominantly affects 'the weaker members of society',[167] but they do not disclose that these 'members' generally belong to racial minorities or poorer social classes. In this regard, the Report radically differs from contemporary campaigns for the radical overhaul or abolition of the penal system, which, especially in the US, have depicted criminalisation and punishment as instruments for the preservation of a racial capitalist regime.[168] The Report also highlights the need to give space to non-penal mechanisms of social control, but it says nothing about how these mechanisms should be structured to avoid preserving the social hierarchies promoted by the penal system. As Gerlinda Smaus has observed, the Report ultimately offers a '*laissez-faire* ideology' that intends to 'preserve the rich's privileges and the vagrant's shelter under the bridge'.[169]

Moreover, the Report focuses only on the social control effects of penality and seems to ignore its symbolic and emotional functions. However, as Garland has noted, 'modern punishment is a cultural as well as a strategic affair; … it is a realm for the expression of social value and emotion as well as a process for asserting control'.[170] An analysis of the place of criminalisation in our society only in terms of its *utility* – as the one conducted in the Report – inevitably fails to consider why, despite its questionable instrumental value, criminal law is so ubiquitous in our society. Emotions often lie at the heart of penality.[171] The urge to criminalise and punish does not only depend on the need to control undesirable behaviours, but also on people's desire for public affirmation of norms.[172] Although penality emanates from state power, a much wider population is involved in its operation, by supplying the context of social support and valorisation within which state-led criminalisation originates.[173] If penality is (also) a realm for the expression of social values and public acknowledgement of claims, a successful strategy of decriminalisation should indicate how this symbolic, but crucial function can be fulfilled without criminal law. However, the Report is completely silent on this point. In this way, it misses the main reason why non-penal alternatives generally struggle to gain political support: they may be better methods of social control, but they do not substitute penality in expressing and evoking social values and sentiments.

There are further criticisms that can be levelled against the Report with the benefit of hindsight. Its trust in the self-regulating mechanisms at the grass root

166 *ibid*, 575.
167 ECCP, n 16 above, 27.
168 See for example Angela Y. Davis, *Are Prisons Obsolete?* (New York, NY: Seven Stories Press, 2003); Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis and Opposition in Globalizing* (Oakland, CA: University of California Press, 2007); Ruth Wilson Gilmore, *Change Everything: Racial Capitalism and the Case for Abolition* (Chicago, IL: Haymarket Books, 2023).
169 Smaus, n 132 above, 581 (translation by the author).
170 David Garland, 'Frameworks of Inquiry in the Sociology of Punishment' (1990) 41 BJS 1, 4.
171 Émile Durkheim, *The Division of Labor in Society* (1893) (New York, NY: Macmillan, George Simpson tr, 1933).
172 *ibid*.
173 Garland, n 170 above, 8.

level and in people's capacity to manage conflict rationally seems naïve and unrealistic.[174] In today's increasingly globalised and mobile society, most conflicts and problems cannot be mediated at the level of face-to-face interactions but require higher authorities and some form of coercion for the enforcement of the proposed solutions. Other proposals of the Report are not merely unconvincing but problematic. Techno-prevention, replacement of penal control with therapeutic control[175] and promotion of conflict regulation at the level of the family or in the workplace may perhaps be understandable in the progressive spirit of the 1970s. However, in today's so-called 'culture of control' one might see these forms of social control as potentially more dangerous than the state's criminalisation.[176] Not by chance, conservative policymakers and groups sometimes use decriminalisation as an attractive label to reduce the costs of the criminal justice system, cut down its caseload and transfer petty offences to alternative modes of control that use new technologies to foster prevention and compliance.[177] From a Foucauldian perspective,[178] the Report may be criticised as it sticks to a traditional juridical and repressive conception of power.[179] In so doing, it fails to consider how people's lives, even outside the penal sphere, are affected and controlled by mechanisms of discipline and normalisation.[180] The risk is that the Report's projects of decriminalisation may, on the one hand, reduce the repressive criminal policy of the state but, on the other, replace it with 'even more subtle forms of social control on the micro level of social inter-action'.[181] From a radical feminist perspective,[182] the Report perpetuates a dichotomy between the public and private realms that is not only inaccurate but also oppressive. Arguing for a return to interpersonal conflict resolution overlooks how much violence and domination, especially against women, occurs within the private sphere, be it the family or the workplace. Withdrawal of criminalisation in favour of autonomous management of conflict may serve to

174 van Swaaningen, n 92 above, 145.

175 On the risks of replacing criminal measures with public health's mandatory measures in relation to domestic violence, see Michal Buchhandler-Raphael, 'Overmedicalization of Domestic Violence in the Noncarceral State' (2022) 94 *Temple Law Review* 589, 594 ('Mental health institutions impose social control strategies that are similarly coercive to policing. These strategies include mandatory treatment programs, electronic surveillance, behavioral observation, and reporting requirements').

176 van Swaaningen, n 92 above, 143.

177 Lee, n 16 above, 82. See also the conservative US 'Right on Crime' initiative aimed at 'reducing crime, restoring victims, reforming offenders, and lowering taxpayer cost' at https://rightoncrime.com/ [https://perma.cc/HT54-8Q8J].

178 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1975) (Harmondsworth: Penguin, Alan Sheridan tr, 1991).

179 De Folter, n 135 above, 59.

180 Foucault, n 178 above.

181 De Folter, n 135 above, 59. Similarly, the European penal policy on non-custodial sanctions, promoted in the late 1980s and early 1990s and aimed at penal reductionism, appears to have given rise to 'community sanctions and measures, which restrict liberty to an extent that in some cases can parallel or even exceed the pains of imprisonment'. See Dirk van Zyl Smit, Sonja Snacken and David Hayes, '"One Cannot Legislate Kindness": Ambiguities in European Legal Instruments on Non-Custodial Sanctions' (2015) 17 *Punishment & Society* 3, 19.

182 Carole Pateman, *The Sexual Contract* (Cambridge: Polity, 1988).

uphold 'everyday' (women's) oppression by rendering power relations within the private realm as 'natural' and immune from political regulation.[183]

DECRIMINALISATION AND THE FUTURE OF HUMAN RIGHTS

Human rights law is today infused with duties to mobilise criminalisation. However, the existence of the *Report on Decriminalisation* is a confirmation that the contemporary relationship between human rights and criminal law could have been completely otherwise than what it is. As soon as we realise that the ECtHR's coercive human rights doctrine is not as obvious as we may believe, in Michel Foucault's words, 'transformation becomes at the same time very urgent, very difficult, and entirely possible'.[184] Not only can we *imagine* the ECtHR's coercive human rights doctrine reoriented towards decriminalisation, but we can *advocate* this reorientation and show how it would in fact be consistent with human rights values and history.

A reorientation of human rights towards decriminalisation is particularly important in today's 'overcriminalised' society. What is concerning is not merely that we have too many criminal laws or that some of them are disproportionate or arbitrarily enforced. It is rather that the functioning of the criminal justice system appears as in itself highly discriminatory.[185] It is selective in relation to the provision of state security, which is largely accorded to the socially advantaged groups in society; and it is biased in the processes of criminalisation and imprisonment, which mostly affect racial minorities and poorer social classes.[186] The accelerating pace of discriminatory criminalisation and exclusionary punishment raises important concerns in light of the values at the basis of human rights, chiefly human dignity and equality.[187] Those who are generally caught in the wide net of criminalisation are the very marginalised groups human rights law is mandated to protect. In a context of police brutality, harsh prison conditions and mass incarceration across many regions of the world, any act of criminal regulation has the potential to enhance physical violence against the most vulnerable. When criminalisation does not lead to over-enforcement or a prison term, defining a social problem as a crime may lead to *some* people

183 Noëlle McAfee and Katie B. Howard, 'Feminist Political Philosophy' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2018) at https://plato.stanford.edu/archives/win2018/entries/feminism-political/ [https://perma.cc/BW7D-9RKR].

184 Michel Foucault, 'So Is It Important to Think?' in James D. Faubion (ed), *Essential Works of Foucault 1945-1984, Vol. 3: Power* (New York, NY: New Press, 2000) 457.

185 For a discussion on the unequal distribution of penality, corroborated by ethnographic research in France and the US, see Didier Fassin, *The Will to Punish* (Oxford: OUP, 2018) 91-119.

186 Alessandro Baratta, 'Principi Del Diritto Penale Minimo. Per Una Teoria Dei Diritti Umani Come Oggetti e Limiti Della Legge Penale' (1985) 3 *Dei Delitti e Delle Pene* 442, 445; Widney Brown, 'Reflection of a Human Rights Activist' in Miller and Roseman (eds), n 38 above, 75; Fassin, n 185 above; Wacquant, n 145 above.

187 Bianchi, n 102 above, 115.

being considered potentially deviant as a result of their social circumstances or background.[188]

In this context, the *Report on Decriminalisation*, despite its limitations, offers a practicable framework to understand and assess the costs of criminalisation for human rights and to overcome the possible dysfunctions that might arise with the withdrawal of criminal regulation. When the ECtHR is called to consider the compatibility of national criminal law with the Convention rights, it could engage in more thorough scrutiny of the consequences of criminalisation for effective human rights protection. Instead of maintaining a position of general permissibility regarding state criminal policies[189] and following a case-by-case approach,[190] it could regard criminalisation as *prima facie* affecting the enjoyment of human rights. It is true that the ECtHR is a judicial body and has no mandate to formulate policy proposals. However, the Strasbourg judges can be less deferential to national authorities and more critical of expansive criminal legislation, even if they are confined to adjudicating on justiciable questions. The Court has been quite willing to enquire into and review national criminal justice systems when states have failed to criminalise, prosecute or punish certain human rights violations.[191] Nothing prevents the Court from being equally proactive when it is not the lack of penality but its presence that raises concerns for human rights. In turn, this new approach might have positive implications at the national level. The ECtHR's occasional decisions on decriminalisation, exposed in the first part of the article, are to date generally implemented by domestic authorities.[192] If the Court managed to preserve this cooperation and compliance even with a more robust jurisprudence on decriminalisation, it would become an important motor for penal moderation in Europe. In addition, the *Report on Decriminalisation* may offer insights on a broader interpretation of Article 13 (Right to an effective remedy), by showing that in cases of serious human rights violations (for example arbitrary killing, torture, human trafficking and rape) remedies for victims can be 'effective' even without the use of penal measures. In fact, with regard to serious abuses, the ECtHR has so far stated that

188 Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification* (Cambridge: Polity, 1985).

189 *Engel* n 26 above at [81].

190 See for example *Lindon* v *France* n 48 above (on defamation); *A, B and C* v *Ireland* n 67 above (on abortion).

191 Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-criminal Jurisdiction of the Human Rights Courts' (2013) 107 AJIL 1. On the obligation to criminalise see for example *Osman* v *United Kingdom* (2000) 29 EHRR 245 (intentional taking of life); *MC* v *Bulgaria* n 10 above (rape); *Beganović* v *Croatia* [2009] ECHR 992 (assault); *Stubbings and Others* v *United Kingdom* (1997) 23 EHRR 213 (sexual offences against children); *Siliadin* v *France* n 4 above (slavery and servitude); *Rantsev* v *Cyprus* n 4 above (human trafficking); *Opuz* v *Turkey* (2010) 50 EHRR 28 (domestic violence); *Söderman* v *Sweden* (2014) 58 EHRR 36 (filming for voyeurism); *KU* v *Finland* (2009) 48 EHRR 52 (malicious misrepresentation involving child welfare).

192 For instance, after the decision in *Lăcătuș* n 51 above, the Swiss authorities immediately suspended the criminal ban on begging. See Corina Heri, 'Beg Your Pardon!: Criminalisation of Poverty and the Human Right to Beg in Lăcătuș v. Switzerland' 10 February 2021 *Strasbourg Observers* at https://strasbourgobservers.com/2021/02/10/beg-your-pardon-criminalisation-of-poverty-and-the-human-right-to-beg-in-lacatus-v-switzerland/ [https://perma.cc/784K-B9X4].

Article 13 not only requires compensation but also a *criminal* investigation 'capable of leading to the identification and punishment of those responsible'.[193] Conversely, the Report shows that the idea that criminal law best serves the purpose of providing an effective remedy is questionable. Based on the principle of subsidiarity, it demonstrates that criminal law is not only insufficient but, in several circumstances, also unnecessary for offering redress to victims.[194]

If reductionist penal policies are to be successfully developed for the benefit of human rights, the *Report on Decriminalisation* cannot simply be taken as a blueprint, but some of its limitations need to be addressed. First, more attention should be given to the latent functions of penality and, in particular, how it perpetuates social and moral hierarchies along racial and socio-economic lines. In other words, human rights-driven projects of decriminalisation need to consider, and offer solutions to, both the individual and structural costs of criminalisation. Second, decriminalisation will have success in halting punitive trends only if it is understood in broader terms than just withdrawing the state's monopoly of crime control. Ironically, the Report's central suggestion that more space be given to non-state-led social control mechanisms appears to have been fulfilled with the expansion of a private security industry in many countries.[195] Yet the effects have been the opposite of what the Report's authors intended: the amount of punitive control has drastically increased, not diminished. Human rights-driven decriminalisation should avoid the same mistake of becoming an attractive label for the criminal justice system to reduce its caseload and to transfer petty offences to private, but less protective, modes of control.[196] Third, the success of human rights-driven decriminalisation requires a direct engagement with the passions that crime and punishment provoke in the public.[197] To this end, Loader distinguishes between two ways of pursuing reductionist penal policies: 'moderation-by-stealth' and 'moderation-as-politics'.[198] The Report is an example of moderation-by-stealth: it avoids thorny questions over punishment and does little to change public discourse and sentiment about penality. Moderation-by-stealth offers a route to short-term reform but leaves unaddressed the conditions that generate demands for penal severity.[199] In contrast, human rights-driven projects of decriminalisation should pursue moderation-as-politics, which seeks to understand and challenge prevailing understandings of the meanings and place of penality in our society.[200] This approach 'carries a wider ambition and promise – one which seeks to find ways of anchoring

193 See for example *Al Nashiri* v *Romania* (2019) 68 EHRR 3 at [706]; *Abu Zubaydah* v *Lithuania* [2018] ECHR 446 at [673].

194 ECCP, n 16 above, 69 ('decriminalisation does not mean taking no interest in the fate of victims, but rather dealing differently with their situation, preferably by replacing the penal system … by a different method of taking responsibility for victims'). See also Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Oxford: Hart, 2021) 157.

195 Garland, n 87 above.

196 Lee, n 16 above, 82.

197 Similarly, Snacken, n 154 above, 406.

198 Ian Loader, 'For Penal Moderation: Notes towards a Public Philosophy of Punishment' (2010) 14 *Theoretical Criminology* 349, 361.

199 *ibid*, 362.

200 *ibid*, 363.

moderation in public institutions and culture, rather than treating moderate penality as an always precarious and fragile accomplishment of elites'.[201]

Showing that a reorientation of human rights law (or, more specifically, the jurisprudence of the ECtHR) towards decriminalisation is possible and advisable is not to say that it is straightforward. The ECtHR's coercive human rights doctrine is the result of political and cultural choices that were by no means inevitable but neither were they purely fortuitous. The normative scope for reversing these choices will always be conditioned by institutional and jurisdictional structures, social forces and cultural values.[202] As Susan Marks has observed, '[w]hile current arrangements can indeed be changed, change unfolds within a context that includes systematic constraints and pressures'.[203] The ECtHR, in particular, operates within a structured field of forces, the logic of which has led its case law in certain directions that cannot easily be reversed. As a judicial body, the ECtHR's room for manoeuvre on questions of (de)criminalisation is limited and even more restricted than the Council of Europe at large. Structural constraints also appear clearly if we consider the centrality of the margin of appreciation doctrine in the Court's judgments. In a political climate where the Court is constantly negotiating its legitimacy against populist challenges or accusations of democratic deficit, the Strasbourg judges have a tendency to restrain their power of review taking into account the presence or absence of a common European approach.[204] Reliance on this doctrine in (de)criminalisation cases will probably prevent the Court from challenging many criminal provisions that are problematic for human rights. Indeed, given the expansive criminalisation trends in Europe, most searches for a convergence or a consensus among member states are likely to be concluded in favour of criminalisation of some kind. As a consequence, even if ECtHR judges recognise the need for decriminalisation and they have the mandate to intervene, they may find themselves constrained by the Court's precedents or the political interests at stake to decide otherwise.

CONCLUSION

In the *Report on Decriminalisation*, the authors acknowledge that the decision to curtail criminal regulation 'is to a large extent a political issue to be debated in the context of different national systems'.[205] Yet they also note that, at the level of the Council of Europe, there is 'one common denominator directly relevant to this issue: the European Convention on Human Rights'.[206] On this basis, they hope that the 'extension of human rights on the international or

201 *ibid*.
202 David Garland, 'Beyond the Culture of Control' (2004) 7 *Critical Review of International Social and Political Philosophy* 160, 181.
203 Susan Marks, 'False Contingency' (2009) 62 CLP 1, 2.
204 Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015).
205 ECCP, n 16 above, 145.
206 *ibid*.

constitutional planes may have a direct bearing on decriminalisation'.[207] Until now their hopes have mostly remained unfulfilled. Rather than moderating state penal policies, the more human rights have permeated conceptions of justice around the globe, the greater has been the dissemination of penal responses.[208] To date, the ECtHR has dared to reprimand states for their undue criminalisation choices only in a small number of cases, mostly involving acts against public order and morality. The deference to national authorities with regard to decriminalisation is remarkable if confronted with the judicial activism of the Court in cases involving the other side of the coin, namely criminalisation. Here, the Strasbourg judges have not had reservations in imposing growing duties to mobilise criminal law towards protection and redress of human rights violations.

This article has argued that this direction taken by the ECtHR, and more broadly by human rights law and activism, is not inevitable and can be reversed. The Council of Europe's *Report on Decriminalisation* is not only evidence of a past where the arrangements were quite different; if it is brought back to light, it may also become an important resource for resisting criminalisation trends and shaping non-penal human rights futures. The Report shows us that, if we care about human rights, we should be wary of calls for more criminalisation and punishment, given that the operation of the penal system implies coercion, deprivation of liberty and impairment of dignity. It also suggests that a gradual process of decriminalisation may enable a better approach to problems that are currently dealt with through criminal justice mechanisms, thereby ensuring more effective human rights protection. Looking back at the Report today is an invitation to re-imagine the relationship between human rights and criminal law under a new and, hopefully, less coercive perspective. To this end, it is also important to learn from the Report's limitations and pay attention to the institutional, social and cultural structures that have so far prevented it from becoming an influential reference for penal moderation.

207 *ibid*.
208 Pinto, n 8 above, 761.