HUMAN RIGHTS LAW AS SOCIAL CONTROL

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Abstract

Criminologists have long used the concept of social control to consider the ways in which societies respond to individuals or groups regarded as deviant or problematic. Although it is generally recognized that law and its enforcement is a cornerstone of social control, there is very little research on how human rights law might fulfil a social control function. Through an examination of a purposive sample of cases adjudicated by the European Court of Human Rights, we show how human rights law can facilitate forms of upward, inward and downward social control in contemporary societies. Our overall conclusion is that human rights law enables, produces and shapes contemporary practices of social control, often with significant and far-reaching consequences.

Keywords

Social control; human rights law; European Court of Human Rights; European Convention on Human Rights; Council of Europe.

Introduction

In this article we examine the relationship between human rights law and social control in a way that may appear counter-intuitive. Rather than considering human rights law as a means by which individuals resist the regulation of their conduct – which is how human rights law is often understood – we examine how human rights law can produce new and intensify existing forms of social control. Our aim is to demonstrate that human rights law - which codifies 'abstract values' and endorses 'social practices to realize those values' (Donnelly, 2013: 11) – plays a significant role in shaping the control of individual or group behaviours designated as deviant or problematic in contemporary societies (Cohen, 1985).

We begin by providing an overview of the concept of social control and explaining why human rights law, like other forms of law, can be considered to have a social control function. We then outline our methodology and describe the empirical data that we use throughout the article. We go on, through an analysis of the empirical data, to show three key ways in which human rights law fulfils a social control function. First, we demonstrate how individuals can use human rights law as a mechanism to achieve upward social control resulting in the regulation of state agents. Secondly, we illustrate how individuals can utilize human rights law to achieve forms of inward social control resulting in some individuals becoming subject to regulation by state agents. Thirdly, we show how unsuccessful attempts by individuals to use human rights law can result in an endorsement and legitimization of forms of downward social control favoured by state agents. In conclusion, we argue that human rights law provides an important arena in which the definition of and response to deviant behaviours is determined and, consequently, makes a significant contribution to shaping patterns of social control in contemporary societies.

Social control, law, and human rights

Social control is a concept that has been used by criminologists and other social scientists since the late nineteenth century. The concept of social control originated in explanations of how 'that ascendency over the aims and acts of the individual which is exercised on behalf of the group' is achieved (Ross, 1896: 519). The concept of social control has been used widely (for a discussion see Lowman et al., 1987) and, as a result, developed diverse and multiple meanings (for a discussion of the history of social control, both as a concept and as a practice, see: Melossi, 1990; Melossi, 2013). For example, within sociology, from the 1980s onwards, the consensus has been that there are three basic types of social control: informal, legal, and medical (Chriss, 2007). However, criminologists and other social scientists have conceptualized social control very differently. Cohen, for example, understood social control as 'the organized ways in which society responds to behaviour and people it regards as deviant, problematic, worrying, threatening, troublesome or undesirable in some way or another' (1985: 1). By contrast, Foucault (1988) and Mead (1934) considered, albeit in different ways, how social control is achieved through self-surveillance or self-control (for a discussion, see: Deflem, 2015).

Although the concept of social control has been conceptualized in very different ways, it is generally recognized that a key way in which social control is produced and sustained in contemporary societies is through law and legal practices (Innes, 2003). For instance, social control can be achieved by legislatures through the making of statute law, or by practitioners, such as police officers or social workers, who implement and enforce law (Cohen, 1985: 3). Through law, contemporary societies pursue a variety of social control objectives, such as crime prevention, public safety, and the rehabilitation of individual offenders. More generally, law facilitates social control by providing a

mechanism by which 'people hold each other to standards, explicitly or implicitly, consciously or not' and a means by which individuals become classified as 'those who are respectable and those who are not' (Black, 1976: 105).

When criminologists and other scholars have considered the relationship between law and social control they have tended to focus on the criminal law (for example, Pound, 1942; Black, 1984), although other forms of law have sometimes been examined (for example Smart, 1989; Roach Anleu, 1998). Previous considerations of the relationship between law and social control have, in essence, been concerned with how law shapes 'the normative life of a state and its citizens' (Black, 1976: 2) and functions 'to guide behaviour via a system of *sanctions*' (Chriss, 2007: 38). Different 'styles of law' have been recognized to be connected to different 'style[s] of social control found more widely in social life' (Black, 1976: 4). Despite this, however, virtually no consideration has been given to whether human rights law functions as a mechanism for implementing, developing or sustaining social control in contemporary societies.

Even Cohen, a sociologist who conducted extensive research on both social control and human rights, seldom considered how human rights law may be deployed as a mechanism of social control (Cohen, 1985, 1993, 2001; see also Downes et al., 2007). Some scholars have critically analysed the ways in which human rights and human rights law interact with criminal justice systems and criminal justice practices (see, for example: Amatrudo and Blake, 2014; Weber, Fishwick and Marmo, 2014) and thereby provided an implicit consideration of how human rights law interacts with forms of social control. In a rare explicit consideration of the relationship between human rights and social control, Innes notes that human rights can provide a form of 'meta control' over the legal systems of countries (Innes, 2003: 43). There has, however, been no

systematic consideration of how human rights law might function to regulate the conduct of individuals or groups.

Consequently, the idea that human rights law can fulfil a social control function is alien to most contemporary debates about human rights. In lay discourse, human rights are usually discussed, either positively or negatively, as a mechanism for enabling individuals to exercise greater agency in their everyday lives and, therefore, as a means to resist forms of social control. Similarly, in scholarly or expert discourse, human rights are frequently considered as a framework through which individuals maximize their sovereignty (see, for example, Madsen at al., 2013; Baxi, 2002). In essence, human rights law is commonly understood as the means to achieve respect for 'human freedom' (*C.R. v the United Kingdom*, 1995: para. 42) rather than a means to achieve social control. Although social control practices are often considered in terms of how they negatively impact upon human rights – for instance, in respect of impairing or violating rights (see, for example, International Council on Human Rights Policy, 2010; Blower et al., 2012) – the potential for human rights to instigate or sustain forms of social control over individuals is almost never discussed.

The absence of a consideration of the relationship between social control and human rights law is striking given that human rights law, like other forms of law, codifies particular values – giving, what Durkheim described as, the 'stability and precision' of law to particular forms of social morality (1893 [1933]: 65) – and allows these values to be translated, through judicial decision making and mechanisms of enforcement, into outcomes aimed at reshaping the conduct and practices of individuals and groups. In this sense, human rights law provides a mechanism to compel individuals to behave in particular ways and, therefore, functions in a similar way to other legal means by which 'the individual finds himself [sic] in the presence of a force which dominates him and to

which he must bow' (Durkheim, 1895 [1982]: 143). Human rights law can therefore shape perceptions of deviance in contemporary societies, encourage obedience among a general population in respect of defined parameters of acceptable behaviour, and result in sanctions against those whose behaviour does not conform to or comply with such parameters (for a general discussion of these aspects of social control, see Chriss, 2007: 33). As we will show below, human rights law is a key aspect of the 'control patterns' of contemporary societies and a mechanism for creating 'both change and stability' in their social orders (Cohen, 1985: 4).

Methodology and sample: the European Court of Human Rights

In order to explore the relationship between human rights law and social control we examine the work of one of the most important human rights organizations in the world, the European Court of Human Rights (hereinafter 'the Court'). The Court is an international court that was established by the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms – more commonly referred to as the European Convention on Human Rights (hereinafter 'the Convention') – that entered into force in 1953. First acting as a part-time institution in collaboration with the former European Commission of Human Rights, the Court has sat as a full-time and permanent court since 1998 examining complaints brought against nation states about alleged violations of rights and freedoms guaranteed by the Convention. As a result of the expansion of the Council of Europe to include 47 European states, the Court's caseload has significantly expanded and, in the last year for which statistics are available, it disposed of 85,951 applications judicially (European Court of Human Rights, 2017).

The extensive case law of the Court provides one aspect of the empirical data used throughout this article. We draw upon a purposive sample of six of the Court's judgments to provide an in-depth analysis of three key ways in which Convention jurisprudence is implicated in aspects of social control. The six judgments were chosen on the basis that they are representative of three key aspects of the Court's case law: two of the judgments (*Angelova and Iliev v Bulgaria* (2007) and *S. and Marper v the United Kingdom* (2008)) represent cases in which a state has been found to have violated the Convention and readily complies with requirements set down by the Court; two of the judgments (*Moldovan and Others v Romania (no. 2)* (2005) and *Alekseyev v Russia* (2010)) represent cases in which a state has been found to have violated the Convention but resists or delays complying with requirements set down by the Court; and two of the judgments (*Valašinas v Lithuania* (2001) and *Ramirez Sanchez v France* (2005, 2006)) represent cases in which a state has been found not to have violated the Convention and therefore does not need to comply with any requirements. The six judgments were also chosen to represent two types of applications that commonly come before the Court: applications that allege that state officials have perpetrated a violation of rights guaranteed by the Convention (therefore failing to meet negative obligations under the Convention), and applications that allege that state officials have failed to provide adequate safeguards against a violation of rights guaranteed by the Convention (therefore failing to meet positive obligations under the Convention). We also draw upon other case law selectively to illustrate our arguments.

Whilst an analysis of case law has methodological and epistemological limitations – it does not, for instance, permit access to any of the 'back stage' work that underpins its production – it allows an understanding of the wide range of processes and practices that make up a juridical field (Bourdieu, 1987). Furthermore, although Court judgments can be seen as highly stylized and reified representations, they are usually the only

means by which judges make publically available their reasoning. An analysis of case law is therefore a key means by which it is possible to observe how the administration of human rights law is implicated in contemporary patterns of social control.

A second aspect of the empirical data used throughout this article are documents which relate to the execution of the Court's judgments by the Committee of Ministers of the Council of Europe. Judgments of the Court are ultimately declaratory commands similar to other forms of legal judgments: they are authoritative statements that seek to compel states, and the individuals in them, towards particular forms of action and behaviour. This aspect of the Court is what makes it a popular destination for applicants. Whilst the Court forms just one element of the more general juridification of contemporary European societies (Habermas, 1989), applicants know that a favourable judgment in the Court can have widespread effects throughout Europe and beyond. A judgment by the Court can reshape social control practices throughout 47 states and influence the lives of up to 800 million people within them. However, the capacity of the Court's jurisprudence to act as a form of governmental social control (Black, 1976: 2) depends upon the effectiveness of its execution. Unless one accepts command theories of law (for example, Olivecrona, 1971) it is important to recognize that the existence of the Court's jurisprudence does not in itself 'do' anything. Human rights law, like all 'paper law', requires a machinery of enforcement in order to translate it into action and the Committee of Ministers functions as the Court's machinery of enforcement.

The Committee of Ministers supervises compliance by states with the requirements of the Court's judgments. The Court is often regarded as 'weak' because the Committee of Ministers has no direct power to compel states to comply with judgments, save for the possibility of suspending a member state's right of representation and terminate its membership of the Council of Europe (Statute of the Council of Europe, 1949: Article

8). Nevertheless, it is generally accepted that compliance with judgments is high (Bates, 2010) although variable across states (von Staden, 2012). Compliance with judgments can often be slow and piecemeal, resulting in lengthy negotiations with states over the changes they are prepared to implement. Two cases that we discuss below, *Moldovan and Others v Romania (no. 2)* (2005) and *Alekseyev v Russia* (2010), are good examples of the weaknesses prevalent at the enforcement stage. In the first case, the Romanian authorities finally complied with the Court's judgment ten years after it was handed down, and in the second case Russian authorities have still not complied with the judgment eight years after it was finalized.

We trace the life of the judgments in our sample through the execution stage (where this was required) in order to show the process by which judgments become translated into social control practices. Through an analysis of the case work of the Committee of Ministers we show how states respond to judgments by implementing individual and general measures and, in doing so, how these measures have an impact 'on the ground' in respect of social control. Although the effectiveness of the Court and international law generally should not be overplayed – existing research shows, for example, that human rights law has variable influence on the working practices of criminal justice professionals (Costigan and Thomas, 2005; Donald et al., 2009; Bullock and Johnson, 2012) – our analysis shows how the work of the Committee of Ministers can influence those 'street-level bureaucrats' (Lipsky, 1980) charged with social control functions. Therefore, as we show below, the successful execution of a judgment by the Court can have profound implications for social control practices in contemporary European states.

Human rights law and social control in action

In this section we examine the relationship between human rights law and social control in respect of the Court's jurisprudence. We draw upon a purposive sample of six judgments of the Court in order to consider three key ways in which the Court's jurisprudence contributes to patterns of social control throughout the member states of the Council of Europe. First, we consider how the Court's jurisprudence can instigate forms of social control over agents or officials within member states. Second, we explore how the Court's jurisprudence can give rise to the regulation of private individuals within member states. Finally, we show how the Court's jurisprudence can legitimize forms of social control pursued by member states.

The social control of state agents

In this section we consider two cases, *Moldovan and Others v Romania (no.2)* (2005) and *S. and Marper v the United Kingdom* (2008), which concerned complaints made by individuals in Romania and the United Kingdom about the conduct of state agents who were charged with carrying out law enforcement activities. In both cases, the Court upheld the complaints and, in doing so, required the Romanian and United Kingdom governments to introduce new forms of regulation in respect of the behaviour of state agents. The respective governments responded in very different ways to the Court's judgments: as we noted above, in *Moldovan and Others* the Romanian national authorities took 10 years to comply with the Court's judgment, whereas in *S. and Marper* the United Kingdom national authorities complied in a relatively short amount of time. Although the compliance of national authorities with the Court's judgments can, as we show below, produce far reaching consequences for the regulation of state officials, these cases show that the effectiveness of human rights law is significantly

affected by the manner in which national authorities respond during the execution process.

In *Moldovan and Others* a group of Roma individuals complained to the Court about the unlawful destruction of their homes by police officers and the very poor conditions in which they were subsequently forced to live. The complainants further submitted that they were victims of discrimination, on account of their ethnicity, by judicial bodies and officials. They complained to the Court that the actions against them had caused them 'considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement' (2005: para. 110). In upholding the complaints, the Court considered that Romanian state agents had fallen short of protecting the Roma individuals' human rights. Notably, the Court held that the way in which the complainants' grievances were dealt with by the national authorities was discriminatory and amounted to a form of degrading treatment prohibited by the Convention. As a consequence of the judgment, the Romanian national authorities were required to implement general measures designed to ensure that no further violation of this kind would happen in the future.

To comply with the Court's judgment, the Romanian national authorities can be seen to have instigated new forms of regulation over the conduct of state officials in respect of their treatment of Roma people. This regulation originated in the commitment of the Romanian national authorities to eradicate racial discrimination within the judicial and policing systems, and to remove stereotypes, prejudices and discriminatory practices against the Roma community in public institutions. Through negotiations with the Committee of Ministers, the Romanian national authorities proactively identified appropriate practices to prevent and fight discrimination against Roma people by stage agents. These measures included thematic training seminars for magistrates, public

officials and other civil servants. The overall aim of the Romanian national authorities was to prevent future human rights violations by stimulating the inclusion of Roma people in the economic, social, educational, cultural and political life of the local community.

The Romanian national authorities were required to evidence their claim that they had implemented general measures that satisfied the judgment of the Court. In this respect, they provided evidence that general measures had contributed to changing police practices and cited, as an example of this, an incident involving three citizens of Roma origin and another Romanian citizen which the police had responded to in a manner designed to ensure that the local population did not react in an adverse way towards the Roma community and, consequently, that the Roma community were protected from possible attacks motivated by hatred. The Committee of Ministers was satisfied that the Romanian national authorities had, amongst other things, undertaken measures to ensure 'the prevention against discrimination of this [Roma] community by the local authorities' and, on this basis, decided to close the examination of the case (Resolution 39, Adopted by the Committee of Ministers on 10 March 2016). The outcome of the case can therefore be seen to have resulted in the introduction of 'soft' social controls aimed at reshaping the beliefs of state agents, with the ambition of regulating their conduct (Innes, 2003: 7).

In *S. and Marper*, two individuals complained about the retention of their DNA samples/profiles and fingerprints by the police after they were charged with, but not subsequently convicted of, recordable criminal offences. At the relevant time, the police were lawfully entitled to retain fingerprints, cellular samples and DNA profiles obtained from those charged with a recordable offence and, in practice, operated a blanket policy of retaining and using such data (see William and Johnson, 2008). The individuals in *S.*

and Marper argued that this practice was in violation of their right to respect for their private lives because the data in question 'were crucially linked to their individual identity and concerned a type of personal information that they were entitled to keep within their control' (2008: para. 60). In asking the Court to recognize that the police had violated this aspect of their human rights, the individuals in *S. and Marper* were essentially looking to the Court to compel the United Kingdom government to strengthen the limitations on the capacity of the police to retain and use DNA samples/profiles and fingerprints taken from those charged with an offence but subsequently found not guilty.

The Court held in *S. and Marper* that the indiscriminate and blanket retention of DNA samples/profiles and fingerprints constituted a disproportionate and unnecessary interference with the right to respect for private life. In reaching this conclusion, the Court stated that the United Kingdom national authorities had failed to strike a fair balance between competing public and private interests in respect of a number of issues relating to the prevention and detection of crime. The Court was critical of English law that: allowed the retention and use of DNA samples/profiles and fingerprints regardless of the nature or gravity of the offence of which the individual was originally suspected or the age of the suspected offender; enabled the police to retain such material for an indefinite amount of time, even if the suspect was then deemed innocent; and provided very limited possibilities for an acquitted individual to have such materials destroyed or stop them being used. The Court explicitly stated that 'it will be for the respondent State to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private life' (2008: para. 134).

In order to comply with the judgment in *S. and Marper*, the United Kingdom government revised, by way of primary legislation, the legal framework governing the retention and use of DNA samples/profiles and fingerprints by the police. Initially, the Crime and Security Act 2010 made a number of changes that included placing a limit on the amount of time that the police could retain DNA profiles and fingerprints taken from persons not subsequently convicted, and made special provisions for minors. However, the Committee of Ministers considered these reforms to be insufficient and requested that the national authorities make further changes to ensure, for example, that the circumstances under which the police could retain data from unconvicted persons adequately take into account the gravity of any offence for which individuals had originally been suspected. As a consequence, the Protection of Freedoms Act 2012 introduced a new legal regime that imposed stricter limitations on the circumstances under which the police may retain DNA profiles and fingerprints taken from unconvicted individuals depending on the gravity of the offence and the age of the suspected offender. Moreover, the government created an independent Commissioner for the Retention and Use of Biometric Material to keep under review the retention and use by the police of DNA samples/profiles and fingerprints. The Committee of Ministers regarded these changes to satisfy the requirements of the Court's judgment. In essence, therefore, the Court's judgment can be seen to have instigated 'hard' control of the police designed to regulate their operational conduct.

Both *Moldovan and Others* and *S. and Marper* demonstrate the ways in which human rights law can be used to effectively control the activities of state officials. In both cases, individuals utilized human rights law to create soft and hard controls over the action of state agents. Whilst it is generally recognized that 'the criminal law […] regulates the conduct of state officials charged with processing citizens who are suspected, accused, or found guilty of crime' (Skolnick, 1993: 18), *S. and Marper*

shows how human rights law can be used to challenge the criminal law in order to reshape the social control of state agents. Both cases demonstrate the capacity of human rights law to facilitate upward social control (Black, 1984). In this sense, human rights law can enable a form of 'social control that a dependent party applies to a dominant party' and, as *Moldovan and Others* illustrates, a form of social control that 'responds to *downward deviance* committed by dominants against dependents' (Horwitz, 1990: 15). Although it has been argued that '[u]pward social control is relatively rare in the legal system' (Mullis, 1995: 142), both cases show that when individuals successfully complain in the Court about the conduct of state agents the outcome is that national authorities may be required to adopt measures to prevent such conduct occurring in the future. For this reason, the Court, and human rights law generally, provides a powerful legal resource for those individuals wishing to control the behaviour of those 'above' them.

This does not mean that a successful application to the Court always achieves upward social control in the form of a reduction or curtailment of social control activities by state officials. In some cases, a successful application may provide a state with a basis on which to mandate the social control activity complained of. For example, in *Malone v the United Kingdom* (1984) a complaint about interception of postal and telephone communications and the 'metering' of a telephone by or on behalf of the police was upheld by the Court on the basis of the 'obscurity and uncertainty as to the state of the law' which 'does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities' (para. 79). To comply with the Court's judgment, the UK Government enacted the Interception of Communications Act 1985 (subsequently the Regulation of Investigatory Powers Act 2000, and the Investigatory Powers Act 2016) to permit the Secretary of State to issue a warrant allowing interception of communications by post or a telecommunication system. This

action by the state, which was deemed satisfactory the Committee of Ministers (1986), therefore provided legal clarification of the social control activity complained of rather than preventing the activity occurring. In circumstances such as these, where a successful judgment does not remove the downward social control complained of, a further case would need to be taken to the Court to complain about the substance of the control activity.

The social control of private individuals

In this section we consider two cases, *Angelova and Iliev v Bulgaria* (2007) and *Alekseyev v Russia* (2010), which concerned complaints about the failure of national authorities in Bulgaria and Russia to regulate the conduct of private individuals. In both cases, the Court upheld the complaints and, in doing so, required the Bulgarian and Russian governments to enhance or introduce new forms of regulation within their populations. The respective governments responded in very different ways to the Court: in *Angelova and Iliev* the Bulgarian authorities positively complied with the Court's judgment whereas, as we noted above, in *Alekseyev* the Russian authorities continue to fail to implement the general measures necessary to comply with the Court's judgment. These cases therefore illustrate that the extent to which human rights law can function as an effective mechanism of social control strongly relies upon the voluntary compliance of national authorities.

In *Angelova and Iliev*, two Bulgarian individuals of Roma origin, who were respectively the mother and brother of a man who was killed by a group of teenagers, complained that Bulgarian authorities had failed to investigate and prosecute the racial discrimination aspect of the attack. In arguing before the Court that national authorities had consistently failed to address 'systematic patterns of violence and discrimination

against their [Roma] community' by private individuals (2007: para. 107), the complainants were essentially asking the Court to compel the Bulgarian authorities to amend domestic criminal legislation to make 'specific provisions incriminating the offences of murder or serious bodily injury, or indeed any other felony, as separate criminal offences where the latter were racially motivated' and include 'explicit penalty-enhancing provisions relating to racially motivated offences' (2007: para. 77). In upholding the complaint, the Court considered that the national authorities had failed to make a distinction between racially motivated and other offences and that this was irreconcilable with the Convention. As a consequence, the Court required that the national authorities identify and implement appropriate measures to address offences committed by individuals or groups of individuals motivated by racial or ethnic hatred. The Court did not, however, explicitly require national authorities to introduce new criminal legislation, noting that 'other means may also be employed to attain the desired result of punishing perpetrators who have racist motives' (2007: para. 104).

In order to comply with the Court's judgment, the Bulgarian national authorities revised, by way of primary legislation, the law relating to offences motivated by hatred and introduced enhanced penalties for murder and bodily harm committed with racist or xenophobic motives. In so doing, the national authorities can be seen to have introduced a new regime of hard social control aimed at enhancing the investigation and prosecution of those engaging in racially motivated conduct. In order to show that this new regime satisfied the Court's judgment, the Bulgarian authorities provided evidence of nearly 150 investigations of racially motivated offences that had been undertaken within five years of its introduction. The Committee of Ministers was satisfied that the Bulgarian government had adopted appropriate measures to 'secure proper investigation of possible racist motives of offences having resulted into death or injury' and, on these grounds, decided to close the examination of the case (Resolution 383, Adopted by the

Committee of Ministers on 22 November 2017). As such, the Court's judgment can be seen to have directly resulted in a tightening of social control of particular forms of conduct engaged in by private individuals.

In *Alekseyev*, a Russian gay man complained to the Court about the repeated refusals by public officials in Moscow to allow a gay pride event to take place. In defence of these refusals, the Russian government argued, amongst other things, that restricting the public assembly of gay and lesbian people was necessary because of a number of threats made by religious groups. For example, the head Muslim authority of Nizhniy Novgorod had stated that 'as a matter of necessity, homosexuals must be stoned to death' (2010: para. 62) and, in light of this and other threats, the Russian government argued that it had been appropriate to refuse permission for public assemblies on safety grounds and for the protection of public order. In upholding the complaint, the Court stated that the response of the national authorities amounted to a violation of the Convention because individuals have the right to hold a public demonstration even if it 'may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote' and that individuals 'must be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents' (2010: para. 73). Where the threat of physical violence is present, the Court stated that the national authorities should have dealt with it 'through the prosecution of those responsible' (2010: para. 76). Consequently, the Court's judgment effectively called for the social control of individuals seeking to incite hatred towards gay men and lesbians.

In response to the Court's judgment, the Russian government argued that domestic legislation and judicial practice were consistent with the standard of human rights protection required by the Convention and, therefore, that no general measures were needed to prevent a similar violation occurring in the future. Although the government

acknowledged that a number of requests to hold a gay pride march had continued to be rejected they contended that this was the result of procedural problems. Several Russian and international non-governmental organisations contested this account and submitted detailed reports – which have not been officially challenged by the Russian government – showing that Russian authorities have refused more than 100 applications for gay pride events on the grounds of general 'security threats' (Communication 790 from NGOs, Considered by the Committee of Ministers on 26 September 2012). These reports also allege that extremist groups have become more active in coordinating the targeted harassment of gay, lesbian and transgender individuals who take part in public events. For example, it has been reported that public assemblies of LGBT individuals are increasingly disrupted by groups who engage in verbal and physical abuse and that police largely fail to prevent or address these incidents (Communication 228 from NGOs, Considered by the Committee of Ministers on 6 March 2014; Communication from 253 a NGO, Considered by the Committee of Ministers on 9 December 2016). The Committee of Ministers has repeatedly urged the Russian government to adopt measures to ensure that all citizens can effectively enjoy the right of public assembly without discrimination on the grounds of sexual orientation. However, to date, the Committee of Ministers has not been satisfied with the government's response and the Court has since gone on to find that Russia has further violated the Convention because of the existence of so-called 'homosexual propaganda' laws (see Johnson, 2015) that prohibit public statements concerning the identity, rights and social status of sexual minorities (*Bayev and Others v Russia*, 2017: para. 84).

The common feature of *Angelova and Iliev* and *Alekseyev* is that the complainants in both cases sought to use the Court as a mechanism for instigating new forms of social control of private individuals. Insofar as both cases were successful in the Court, all of the complainants can be seen to have utilized human rights law to authorize new forms

of inward social control (Horwitz, 1990) through which the 'marginal' in a society regulate the conduct of the 'integrated' (Horwitz, 1990: 14). In practice, however, these cases demonstrate that such control will only come into existence if governments voluntarily comply with the Court's judgments. *Angelova and Iliev* shows the effectiveness of the Convention system for achieving the better regulation of the conduct of individuals (anti-Roma individuals) that are motivated by hatred of other individuals (Roma people) in contemporary Bulgaria. By contrast, *Alekseyev* demonstrates the failure of the Convention system for achieving the regulation of the conduct of individuals (anti-gay individuals) that are motivated by hatred of other individuals (gay people) in contemporary Russia. The key to the success or failure of the Convention system in these cases – which is the key to making the Convention system an effective mechanism of social control more generally – is the willingness of a respondent government to positively comply with a judgment of the Court by, in circumstances like these, instigating control of individuals. When a respondent government does positively comply with a judgment of the Court, the Convention system can act as an important mechanism for reshaping mechanisms of social control that regulate how private individuals can behave towards each other in contemporary societies.

Legitimizing social control

In the previous sections we have demonstrated how the Convention system can be used to challenge and facilitate changes to patterns of social control in contemporary European societies. Such changes obviously unsettle previously established modes of social control favoured by state and other actors. However, there is a way in which the Convention system can act as a mechanism for legitimizing those forms of control that are preferred by the state. This happens when, as a result of a complaint to the Court, a

respondent government successfully defends an impugned aspect of social control. In this section we consider two cases, *Valašinas v Lithuania* (2001) and *Ramirez Sanchez v France* (2005, 2006), which demonstrate how the Court can come to mandate forms of social control chosen by the state. Both cases concern, amongst other things, complaints about placing convicted individuals who are detained in prison in solitary confinement. In both cases the Court rejected the complaints and therefore did not require the Lithuanian or French government to implement any general measures to comply with the Convention (in both cases the Court did find violations of the Convention in respect of other matters complained of, which we do not discuss).

In *Valašinas*, a Lithuanian individual complained about being subjected to a period – described by the Court as 'short'– of 15 days of solitary confinement whilst detained in prison (*Valašinas*, 2001: para. 112). In *Ramirez Sanchez*, a Venezuelan individual complained about being subjected to prolonged periods of solitary confinement, which on one occasion had lasted for eight years and two months, whilst detained in prison in France. In arguing before the Court that their solitary confinement amounted to 'inhuman and degrading treatment' in violation of the Convention (*Valašinas*, 2001: para. 3; *Ramirez Sanchez*, 2005: para. 66), both complainants can be seen to have shared the ambition of using the Court as a means to compel the Lithuanian and French governments to limit the capacity of prison authorities to confine prisoners in isolation. Both cases can be understood to frame the conduct of state officials as forms of 'downward deviance' that require greater social control (Horwitz, 1990: 15). Had the Court upheld these complaints it would have facilitated upward social control, like in the cases that we described above, of the prison authorities by the individual complainants.

In rejecting the complaints in *Valašinas* and *Ramirez Sanchez* the Court held that the conditions of the individuals' detention did not attain the minimum level of severity amounting to treatment contrary to the Convention (*Valašinas*, 2001: para. 112; *Ramirez Sanchez,* 2006: para. 150). In reaching this conclusion, the Court stated that the practice of placing prisoners in solitary confinement could not be considered as a violation of human rights *per se* (*Ramirez Sanchez*, 2005: para. 110). The Court acknowledged that prisoners must not be subjected to distress of 'an intensity exceeding the unavoidable level of suffering inherent in detention' (*Valašinas*, 2001: para. 102; *Ramirez Sanchez*, 2006: para. 119), that 'complete sensory isolation, coupled with total social isolation' cannot be justified by 'the requirements of security or any other reason' (*Ramirez Sanchez,* 2005: para. 100), and that solitary confinement 'cannot be imposed on a prisoner indefinitely' (*Ramirez Sanchez,* 2006: para. 145). However, the Court did not consider that the complaints advanced in *Valašinas* and *Ramirez Sanchez* were contrary to these principles.

In rejecting the applicants' complaints, the Court can be seen to implicitly legitimize forms of downward social control used by states. This is because the Court's judgments effectively endorse the states' chosen ways of dealing with the behaviour of individuals regarded to be criminal or deviant. The judgments mandate the use of solitary confinement by national authorities in the circumstances complained of and, moreover, offer considerable scope for national authorities to use solitary confinement in a range of other circumstances. For example, in *Ramirez Sanchez*, the Court held that holding a person convicted of terrorist attacks in solitary confinement for prolonged periods of time was justified 'having regard to all […] considerations' (2006: para. 150), which included recognizing that '[i]n the modern world, States face very real difficulties in protecting their populations from terrorist violence' (2006: para. 116). In this respect, the Court explicitly stated that it is 'understandable' that national authorities, in certain

circumstances, combine detention with 'extraordinary security measures' (*Ramirez Sanchez,* 2006: para. 125). This therefore establishes wide parameters in which national authorities may legitimately use extensive periods of solitary confinement to address particular problems in 'the modern world' without falling foul of the Convention. More generally, the judgments give the imprimatur of the Court to particular social control practices and enable those state agents engaging in such practices to claim that they are, and have been officially recognized as being, respectful of fundamental human rights.

Conclusions

In this article we have examined the relationship between human rights law and social control. In doing so, we have critically considered how human rights law, like other forms of law, can fulfil social control functions. Through an analysis of a purposive sample of judgments of the European Court of Human Rights, and the execution of some of these judgments by the Committee of Ministers of the Council of Europe, we have evaluated the ways in which human rights law can sustain or reshape aspects and practises of social control in contemporary societies.

As we have shown, human rights law provides an arena in which competing parties can contest what should be regarded as deviant and, therefore, what requires social control. In taking complaints to the Court, individuals often seek to use human rights law as a means to 'label' particular forms of individual or group conduct as deviant and instigate social control of it. By contrast, in defending themselves against complaints in the Court, national governments seek to establish that their social control practices are compatible with human rights law and therefore acceptable. In its adjudication of these competing perspectives, the Court issues judgments that, as we have shown, can form

the basis for types of social control that 'harmonizes clashing activities by checking some and stimulating others' (Ross, 1896: 519).

We have discussed three key ways in which human rights law is implicated in contemporary forms of social control. First, we have shown how, as a result of successfully complaining in the Court about the conduct of state agents, individuals are able to use human rights law as a means for achieving upward social control of those state agents. Secondly, we have demonstrated that, as a result of successfully complaining in the Court about the failure of national authorities to regulate the conduct of private individuals, complainants are able to use human rights law as a means of achieving inward social control. Thirdly, we have shown how, when the Court rejects a complaint about an aspect of social control, human rights law can endorse a state's chosen strategy for responding to behaviours it regards as problematic and, consequently, legitimize downward social control.

Because human rights law provides a powerful resource to challenge and reshape existing patterns of social control in contemporary societies, the Court is an attractive venue for individual litigants. Despite the limitations that are inherent in the system for ensuring the enforcement of the Court's judgments, individual complainants know that the Court provides a means of compelling national authorities to change or implement new forms of social control. However, when individual complaints fail in the Court, existing social control practices in states are given significant legitimacy. Given that the vast majority of complaints to the Court are unsuccessful – in 2017, for example, approximately 82% of applications judicially disposed of by the Court were declared inadmissible or struck out (European Court of Human Rights, 2017) – human rights law can be seen to play an important role in maintaining the *status quo* of many aspects of social control in contemporary societies. This aspect of human rights law, which is

rarely explicitly acknowledged, provides state actors with a powerful rhetorical resource by which to defend the actions they take against individuals or groups.

In focusing on one international court we have attempted to reveal a relationship between human rights law and social control that can be further investigated in respect of other jurisdictions. Human rights law is administered by several courts operating at a supranational level around the world – for example, the African Court on Human and Peoples' Rights, and the Inter-American Court of Human Rights – as well as by courts within nation states. Each international and national system for administering human rights law has different mechanisms for adjudicating complaints and ensuring the execution of judgments. Further studies of these systems will reveal the ways in which they are implicated in the patterns of social control found in contemporary societies and, specifically, the extent to which human rights law enables, produces and sustains the regulation of individuals.

List of judgments of the European Court of Human Rights

Alekseyev v Russia (2010), applications nos 4916/07, 25924/08, 14599/09, judgment of 21 October.

Angelova and Iliev v Bulgaria (2007), application no 55523/00, judgment of 26 July.

Bayev and Others v Russia (2017), applications nos 67667/09, 44092/12, 56717/12, judgment of 20 June.

C.R. v the United Kingdom (1995), application no 20190/92, Series A no. 335-C, judgment of 22 November.

Malone v the United Kingdom (1986), application no 8691/79, Series A no 82, judgment of 2 August.

Moldovan and Others v Romania (no.2) (2005), applications nos 41138/98, 64320/01, ECHR 2005-VII (extracts).

Ramirez Sanchez v France (2005), application no 59450/00, judgment of 27 January.

Ramirez Sanchez v France [GC] (2006), application no 59450/00, ECHR 2006-IX.

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against Russian Federation (Considered by the Committee of Ministers on 9 December 2016 at the 1273rd Meeting of the Ministers' Deputies).

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