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CRIMINALISATION AS A LAST RESORT: A NATIONAL PRINCIPLE UNDER THE PRESSURE OF EUROPEANISATION?

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ABSTRACT

In the Netherlands, as well as in several other European countries, the last resort principle has long been considered to be a fundamental guideline in determining the scope of substantive criminal law. In the context of criminalisation of conduct, it requires the national legislator to take the path of criminalisation only as a last resort, and to consider alternatives to criminal law measures. Today, the criminalisation of conduct is no longer automatically the outcome of national law-making, but is increasingly imposed by the international and European legislator. This raises the question whether or not national principles on criminalisation are in harmony with the criminalising of conduct at the transnational level. This paper focuses on the influence of EU criminal law and Strasbourg case law.

Keywords: criminalisation; European criminal law; last resort principle; substantive criminal law; *ultima ratio*

1. INTRODUCTION

It is common knowledge that as time goes by, people may start to think very differently about the desirability and acceptability of behaviour. This could, for instance, be well illustrated by an historical overview of indecency legislation, or legislation on the freedom of speech. Apart from technological developments which may prompt the legislator to criminalise conduct (e.g. 'cybercrime'), the spirit of times may have substantial influence on the scope of criminal conduct. However, the sky is not the limit; several rules and obligations operate to restrict the legislative powers of the (inter)national legislator.[1] The last resort principle could play an additional role

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1 For instance, on the basis of international law and national constitutional law, homosexual relationships between adults could not at all be labelled as a criminal offence.

because it demands that the national legislator take the path of criminalisation only when all else fails, and also that it considers alternatives to criminal law measures.[2]

In the Netherlands, as well as in several other European countries,[3] the last resort principle[4] has long been considered a fundamental guideline used to determine the scope of substantive criminal law. A reserved approach towards turning to the criminal law is considered to be not only desirable from the perspective of limited governmental powers and the interfering character of criminalised conduct, but also from the perspective of enforcement possibilities.

The gradual expansion of criminalised behaviour in the Netherlands over the past decades however, raises the question whether or not the last resort principle is structurally observed by the Dutch legislator. This question is even more pressing, given that nowadays the criminalisation of conduct is no longer automatically the outcome of national law-making, but is increasingly created at the transnational level. Not only has the influence of EU law on national substantive criminal law become noticeable, but also the obligations that result from the substantive provisions of the ECHR have affected national substantive criminal law.

This paper discusses the relationship between criminalisation of conduct at these various levels of legislation. What are the *rationales* for criminalising conduct at the EU and ECHR level and do they comply with the national principle of last resort? This paper starts from the Dutch level in particular and therefore opens with an overview of the last resort principle in substantive criminal law in the Netherlands (2). It subsequently describes the influence of EU and ECHR provisions respectively on Dutch criminal law, and pays attention to the question of how this influence relates to the classical notion of 'criminalisation as a last resort' (3). This paper finally provides some concluding remarks and questions for debate (4).

2. THE LAST RESORT PRINCIPLE IN DUTCH CRIMINAL LAW

The last resort principle requires the authorities to exercise reserve when turning to the criminal law, not only where it comes to legislation, but also in respect of criminal procedure, where the principle particularly states that a criminal trial and the imposition of punishment should be avoided if possible. As such, for the public prosecutor, the last

2 I stick to this interpretation of the last resort principle, because it is commonly interpreted so in the Netherlands. An overview of other interpretations of the last resort principle is provided in D. Husak, 'The Criminal Law as Last Resort', *Oxford Journal of Legal Studies* 24(2), 2004, p. 207–235. Husak explicitly criticises the interpretation used in this paper, in particular on p. 220.

3 For instance in the United Kingdom, where the last resort principle is a component of the minimalist approach, A. Ashworth, *Principles of Criminal Law*, Oxford University Press 2009, p. 31–33.

4 In Dutch literature, it is usually referred to as the principle of *ultimum remedium*. Sometimes, it is also known as the subsidiarity principle.

resort principle is part of the question whether in an individual case criminal prosecution is opportune or not; for the criminal judge, the last resort principle plays a role in the sphere of punishment – sanctions should not be more severe than necessary and custodial sanctions are to be handed down only when there is no alternative

This paper, however, focuses solely on the principle of last resort in the legislative sphere, the application of which goes back to the introduction of the 1886 Dutch Criminal Code which was accompanied by debating criminalisation criteria: what kinds of conduct should be criminalised? What makes specific conduct blameworthy? At the time it appeared that – as formulated by the then Minister of Justice – criminalising behaviour should remain a last resort: the path of criminalisation should only be followed if other responses (to be found in other areas of law – e.g. civil law or administrative law – or in non-legal solutions) were regarded as inadequate alternatives.[5]

The historic significance of the last resort principle closely relates to the interfering character of criminal measures and the traditionally ruling views on the functions and aims of criminal legislation and criminal justice. Although in these views criminal legislation was considered necessary in order to establish a well-ordered society (instrumental approach), regulation was equally deemed necessary to protect the individual against arbitrary governmental action, disproportionate sanctions, legal uncertainty, and inequality of justice (protective approach).[6] Both approaches have alternately been emphasized, but have long been considered two sides of the same coin, even as early as the 1886 Dutch Criminal Code. It explains why in Dutch criminal law theory, the idea of 'criminalisation as a last resort' has long been considered a fundamental notion; without this notion, substantive criminal law would be more likely to encompass behaviour that is not sufficiently unjust, or behaviour that could easily be responded to otherwise – at least without the interfering consequences of criminalisation. After all, the more conduct that constitutes a criminal offence (allowing the state authorities to interfere), the more individual freedom is cut back. In addition, not only is a reserved approach towards calling on the criminal law considered to be desirable from the perspective of limited governmental powers and the interfering character of criminalised conduct, but is desirable also from the perspective of enforcement possibilities.

From the perspective of 'criminalisation as a last resort', it might sound surprising that the volume of substantive criminal law in the Netherlands has significantly been expanded over the past few decades.[7] Some recent examples of newly criminalised

5 J. Remmelink, *Mr. D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse Strafrecht*, Deventer: Gouda Quint 1996, p. 35.

6 In particular: R. Foqué and A.C. 't Hart, *Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie*, Arnhem: Gouda Quint; Antwerpen: Kluwer 1990.

7 As to the Dutch context, see e.g.: C. Kelk, *Strafrecht binnen menselijke proporties*, Den Haag: Boom Juridische Uitgevers 2008, pp. 20–22; J.C.J. Boutellier, 'Uitdijend strafrecht', in: J.H. Crijns, P.P.J. van der Meij & G.K. Schoep (red.), *De taak van de strafrechtswetenschap*, Den Haag: Boom Juridische Uitgevers 2005, pp. 109–116.

behaviour concern the prohibition of squatting buildings and houses[8] and the prohibition of having sex with animals.[9] Furthermore, the former Dutch government has *inter alia* proposed to criminalise inciting a bank run,[10] illegal residence,[11] and the wearing of a burka or other face covering veils in public places.[12] Besides these new crimes, the scope of criminal behaviour has significantly been expanded as a result of other legislative changes. For example, acts of preparing serious criminal offences have been penalised, prohibited child pornography has been extended to virtual child pornography, and the minimum age for prostitution has increased. In this development, the Netherlands is not quite alone though. Both in other European countries and overseas, the scope of substantive criminal law has been noticeably enlarged as well.[13]

The result of these legislative changes is obvious: because the substance of the Dutch Criminal Code and ancillary codes has substantially been enlarged, people are more likely to commit an offence compared to several decades ago, simply because more conduct is classified as a crime. How does this relate to the classical notion of 'criminalisation as a last resort'?

It is generally assumed that the last resort principle is not structurally observed by the Dutch legislator.[14] This assumption is often explained in the light of societal developments. Over the past decades, Dutch society is considered to have developed into a security state ('veiligheidsstaat') with high hopes for the preventive effects of criminal law and in which aspects of law enforcement, safety and public security (instrumental aspects) have undivided and primary attention.[15] In such a society, a reserved approach towards using the criminal law does not fit. Widespread disapproval of these developments amongst criminal theorists indicates a gap between theory and

8 Law of 24 July, 2010, published in the Dutch Law Gazette, *Staatsblad* 2010, 320.

9 Law of 4 March, 2010, published in the Dutch Law Gazette, *Staatsblad* 2010, 111.

10 Www.rijksoverheid.nl/nieuws/2010/12/23/oproep-tot-bank-run-strafbaar.html (last accessed 1 October 2012).

11 'Vrijheid en verantwoordelijkheid', Coalition Agreement VVD-CDA, 30 September 2010, p. 21, available at: www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/09/30/regeerakkoord-vvd-cda.html (last accessed on 3 January, 2012). A few years ago, illegal residence was debated as well, but it has been decided not to criminalise illegal residence, *Kamerstukken II* 2004/05, 29 537, nr. 23.

12 *Kamerstukken* 2011/12, 33 165, nr. 1 (available in Dutch only).

13 With regard to the United States of America and Great Britain, see Husak (including references) in: D. Husak, 'The Criminal Law as Last Resort', *Oxford Journal of Legal Studies* 24(2), 2004, p. 208–209. P. Smith deals with the criminalisation of acts preparing criminal offences in the United Kingdom, Germany and Switzerland in 'Over de grenzen van het strafrecht. Een beschouwing over de strafbaarstelling van voorbereidingshandelingen in rechtsvergelijkend perspectief', *Ars Aequi* 2011, p. 827–834.

14 Recently J. Crijns, 'Strafrecht als ultimum remedium. Levend leidmotief of archaïsch desideratum?', *Ars Aequi* 2012, p. 11–18.

15 E.g.: H. Boutellier, *De veiligheidsutopie. Hedendaags onbehagen en verlangen rond misdaad en straf*, Den Haag: Boom Juridische Uitgevers 2005; Y. Buruma, 'Strafrechtelijk regeringsbeleid in de veiligheidsstaat', in: K. Boonen (ed.), *De weging van 't Hart: idealen, waarden en taken van het*

practice. Whereas these criminal law theorists still consider the idea of 'criminalisation as a last resort' to be a fundamental principle that should guide the legislator, the growing body of substantive criminal law suggests that the last resort principle does not function as such in practice.[16]

3. EUROPEANISATION OF SUBSTANTIVE CRIMINAL LAW

Irrespective of whether the assumption that – under the influence of societal developments – the last resort principle is no longer adhered to by the Dutch legislator is true or false, the reality of today is that the criminalisation of conduct is no longer automatically the outcome of national law-making, but is increasingly imposed by international and European obligations. If only because of this, the question arises to what extent the national principle of 'criminalisation as a last resort' can be upheld.

Before dealing with this question, it helps to outline how the europeanisation of criminal law affects the scope of criminalised behaviour at the national level. Most noticeable in this regard is the influence of legislation adopted in the framework of the European Union (3.1). In the framework of the Council of Europe, the positive obligations inferred from the European Convention on Human Rights and Fundamental Freedoms, affect the scope of national substantive criminal law as well (3.2).

3.1. CRIMINALISATION OF CONDUCT WITHIN THE FRAMEWORK OF THE EUROPEAN UNION

The entry into force of the Lisbon Treaty[17] gave the European Union new competences to adopt legislation in the field of substantive criminal law. The current legal basis for

strafrecht, Deventer: Kluwer 2002. Also M.A.H. van der Woude, *Wetgeving in een veiligheidscultuur. Totstandkoming van antiterrorismewetgeving in Nederland bezien vanuit maatschappelijke en (rechts)politieke context* (diss. Leiden), Den Haag: Boom Juridische Uitgevers 2010.

16 In 2002, more than 30 scholars (criminal lawyers and criminologists) expressed their concerns about the unfolded intentions of the then Dutch government with regard to criminal justice: some of these intentions would be likely to violate fundamental values and principles of criminal justice in a democratic society, including the last resort principle. In reaction to *inter alia* this open letter, the then Dutch Minister of Justice Donner made a stand against the – in his eyes – tendency of legal scholars to stick to fundamental values and principles that were developed decades ago (in Dutch): '*Ik moet inderdaad constateren dat juristen niet altijd bereid zijn een aantal grondslagen ter discussie te stellen en eventueel te herijken. In plaats van zich af te vragen: waarom deden we het ook alweer, waar was het goed voor en is het nog goed, krijg je alleen maar een tegenreactie te horen*', *Nederlands Juristenblad* 2002–37, pp. 1838–1845.

17 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (Lisbon Treaty), *OJ* 9 May 2008, C115/1.

criminalising conduct is laid down in Article 83 of the Treaty on the Functioning of the European Union (TFEU). This provision enables the European Parliament and the Council to establish minimum rules concerning the definition of offences and sanctions, either in areas that have already been subject to harmonisation measures (because the effective implementation of these measures would need common definitions of offences and common sanctions, Article 83(2) TFEU), or in areas of 'particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis' (Article 83(1) TFEU). With regard to the latter, Article 83(1) TFEU itself lists the following areas of crime: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. This list is not exhaustive though, but may be extended by the Council 'on the basis of developments in crime'. Minimum rules on the definition of offences and sanctions that are adopted on the basis of Article 83 TFEU require the Member States to criminalise such offences or to criminalise related or inchoate offences (acts preparing the offences at stake).

In the pre-Lisbon era, it was hotly debated whether a competence existed for the EU legislator to adopt legislation in the field of substantive criminal law.[18] Despite the absence of a specific and clear provision, a large number of legislative measures prohibiting and criminalising certain types of conduct was still adopted over the past few decades. The criminal offences that have been created mainly concern financial crimes, such as money laundering and EU fraud which must be understood against the background of the principal aim of the European Union: the establishment of an internal market. Besides these financial crimes, several crimes have been created that relate to an EU policy area, such as racism and xenophobia and drugs – or that aim at the protection of vulnerable groups of people, such as children who need to be protected against sexual abuse and human trafficking.[19]

Apart from the crimes that obviously relate to the very aim of the European Union, it is hard to identify a clear and coherent criminal policy behind this set of 'eurocrimes'. In their entirety, the preambles to the various directives and framework decisions do not display a coherent whole as to the question 'why criminalisation?' Most preambles give no trace that the question 'why criminalisation' has been asked at all, let alone give an account of having examined alternatives to criminalisation. Klip raises a very fundamental question when he states: 'Whilst the protection of some forms of conduct

18 The Commission and the Council battled before the Court of Justice of the European Union, in Cases C-176/03 and C-440/05. In both cases, the Court identified a criminal law competence for the Community (then First Pillar framework) and therefore annulled former Third Pillar framework decisions. The issue has extensively been described and reflected on in a 2006 Report from the House of Lords, European Union Committee, entitled: *The Criminal Law Competence of the European Community*, 28 July 2006.

19 See the overview in A. Klip, *European Criminal Law. An Integrative Approach*, Cambridge/Antwerp/Portland: Intersentia 2012, p. 211–220. See also the overview given in S. Peers, *EU Justice and Home Affairs Law*, Oxford University Press 2011, p. 780 *et seq.*

may find its explanation in the link to a policy area, this cannot be said of others. In addition, there are numerous policy areas that have not led to any criminalisation of conduct. This raises the question how the choices are made'.[20]

Now that it is crystal clear, since the entry into force of the Lisbon Treaty, that the EU legislator *does* have the power to criminalise certain forms of conduct, the question *how* this power will (and should) be used has become more relevant than ever. After all, a convincing reason to criminalise undesirable conduct is not automatically given by the mere fact that Article 83 TFEU provides a legal basis. It is in actual practice that the pros and cons of criminalisation have to be considered, thereby being guided by a coherent whole of abstract principles and concrete criteria.

It is fascinating to observe that the realisation of the Lisbon Treaty has prompted EU politicians and academics to renew the debate on the scope of legislative powers in the field of substantive criminal law. Both within the EU institutions as well as amongst a group of legal scholars, it is felt that the European Union needs guiding principles and criminalisation criteria. Of utmost relevance for this paper is that the last resort principle explicitly recurs time and time again. It started by the end of 2009, when the Council concluded on model provisions that should guide its future deliberations in criminal law.[21] The main reason to design such model provisions was found in the increased competence to enact common definitions of criminal offences and sanctions and the likelihood of ending up with 'incoherent and inconsistent criminal law provisions in EU legislation'. The Council concluded that future deliberations should start with assessing the need for criminal law provisions, based on the rule that '[c]riminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used as a last resort'. So-called impact assessments have to be made to ascertain the expected added value or effectiveness of criminal provisions compared to other measures, of the seriousness and frequency of the harmful conduct, and of the possible impact on existing criminal law provisions in EU legislation as well as in national legal systems.

Shortly after the adoption of these Council conclusions, 14 criminal law scholars from 10 EU Member States launched a 'Manifesto on European Criminal Policy' in which they urged the European legislator to develop a long-term view on criminal law based on a number of fundamental principles.[22] One of these fundamental principles

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20 A. Klip, *European Criminal Law. An Integrative Approach*, Cambridge/Antwerp/Portland: Intersentia 2012, p. 219.

21 Council Conclusions on model provisions, guiding the Council's criminal law deliberations, Brussels, 30 November 2009.

22 'A Manifesto on European Criminal Policy' (European Criminal Policy Initiative), *Zeitschrift für Internationale Strafrechtsdogmatik* 2009–12, p. 707–716; 'The Manifesto in European Criminal Policy in 2011', *European Criminal Law Review* 2011, p. 86–103. See also in this regard: M. Kaiafa-Gbandi, 'The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law', *European Criminal Law Review* 1 (2011), pp. 7–34 and P. Asp, 'The Importance of the Principles of Subsidiarity and Coherence in the Development of EU Criminal Law', *European Criminal Law Review* 1 (2011), p. 44–55.

is the 'ultima ratio Principle'. As stated in the Manifesto, applying this principle means that 'the European legislator may only demand that an act be criminalised if it is necessary in order to protect a fundamental interest and if all other measures have proved insufficient to safeguard that interest.'[23]

Subsequently both the European Commission and the European Parliament have given their opinions on guiding principles of EU criminal law. In its 2011 framework for the further development of an EU Criminal Policy in the Lisbon era, the European Commission states: 'Criminal investigations and sanctions may have a significant impact on citizens' rights and include a stigmatising effect. Therefore, criminal law must always remain a measure of last resort'.[24] The Commission also advocates the use of impact assessments prior to any legislative proposal which should include an assessment of the difficulties which could arise with regard to implementation into national law, for instance relating to legal enforcement or the execution of sanctions.

The European Parliament launched its 'Report on an EU approach on criminal law' this year.[25] It appears that the European Parliament also favours a reserved approach towards calling on the criminal law, in particular because it states that in the future 'the necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence making it clear that […] there are no other, less intrusive measures available for addressing such conduct'.

We will have to wait and see whether and how the intentions unfolded in the abovementioned documents are followed in practice, especially because it seems that different arguments underlie the Council's and Commission's pleas for a last resort principle in the context of criminalising conduct at the EU level. Whereas the Council focuses on the need for coherency and consistency in order to facilitate implementation in national criminal law – without giving any further account of *why* precisely criminalisation should remain the ultimate remedy – the Commission explicitly refers to the interfering character of criminal law, thereby connecting the 'ultima ratio' principle to the principles of necessity and proportionality.

3.2. CRIMINALISATION OF CONDUCT IN ORDER TO PROTECT HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The primary impetus for the European Convention of Human Rights and Fundamental Freedoms (ECHR) in 1950 was to protect individuals against the unlimited and excessive use of power by states. The codification of people's fundamental rights and freedoms is therefore addressed to states and involves their obligation to respect the

23 'The Manifesto in European Criminal Policy in 2011', *European Criminal Law Review* 2011, p. 88.

24 European Commission Communication, 'Towards a EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', Brussels, 20 September 2011, COM(2011) 573 final, para. 2.2.1.

25 European Parliament, 'Report on an EU approach on criminal law' (Committee on Civil Liberties, Justice and home Affairs), 24 April 2012.

rights and freedoms it entails. In most cases, the ECHR requires states to refrain from interference in the exercise of these rights and freedoms (negative obligations). As to some other rights and freedoms, however, the text of the ECHR itself requires states to take action (positive obligations). Article 2(1), for instance, states that 'Everyone's right to life shall be protected by law'.

The 1968 *Belgian Linguistic Case* was the first case in which the European Court of Human Rights (ECtHR), in the absence of a literal reference to a duty to take action, nonetheless recognised that positive obligations were inherent in the text of the Convention, *in casu* Article 14 ECHR.[26] From that time on, such positive obligations have increasingly been inferred, nowadays commonly based on standard-setting provisions in combination with Article 1 ECHR or the 'rule of law'.[27] Besides, such positive obligations are gradually interpreted as not only applying in the relationships between the states and the individuals, but also in the private relationships between individuals, provided that the state can be held responsible for violations of the ECHR.[28] In this way, the ECtHR has been able to strengthen over time the possibilities for individuals to effectively enjoy the rights and freedom secured by the Convention.

The tendency to infer positive obligations from the text of the ECHR has affected the scope of national substantive criminal law. After all, under the positive obligations that follow from ECtHR case-law, the national legislator may be obliged to criminalise behaviour. In the framework of this paper, only a few examples can be given.

3.2.1. Right to life (Article 2 ECHR)

In order to protect the right to life (Article 2 ECHR) sufficiently, the ECtHR held in *Osman vs. United Kingdom* that States have to adopt 'effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'.[29] This obligation not only concerns the intentional taking of life, but under certain circumstances has to cover the *unintentional* infringement of the right to life as well: 'The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life. […] For the Court, and having regard to the nature of the

26 ECtHR 23 July 1968, *Belgian Linguistic Case,* Appl. No. 1474/62.

27 See J.F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights* (Human rights handbooks, No. 7), Belgium: Council of Europe 2007, p. 8–9.

28 J.F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights* (Human rights handbooks, No. 7), Belgium: Council of Europe 2007, p. 14–15.

29 ECtHR (Grand Chamber) 28 October 1998, *Osman vs. United Kingdom*, Appl. No. 23452/94, para. 115.

right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge'.[30] The 2004 case of *Öneryildiz vs. Turkey* illustrates what kind of situations the ECtHR was referring to: In 1993, 39 people died as a result of a methane explosion at a municipal refuse dump near Istanbul. The Court held that '[w]here it is established that the negligence attributable to State officials or bodies on that account goes beyond an error of judgment or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity […] the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2'.[31] Although the precise scope of negligence has not been made clear, it appears that according to the ECtHR the duty to secure the right to life extends beyond the criminalisation of the intentional taking of life only. To date, the obligation to enact criminal law provisions in order protect the right to life enshrined in Article 2 ECHR has been confirmed several times and is considered to be established case-law.[32]

3.2.2. Right to private life (Article 8 ECHR)

According to the Court, Article 8 ECHR (right to respect for private life and family life) may also require the criminalisation of conduct. Probably most well-known in this respect is the case of *X and Y vs. the Netherlands*.[33] This case relates to the right to private life, a concept that covers a person's physical and moral integrity, including his or her sexual life.[34] As appears from the Court's decision in this case, the right to respect for private life does involve positive obligations for contracting states to adopt criminal law provisions that practically and effectively protect people's right to private life. Applied to the facts of the case in hand, this means that the criminal character of forced sexual intercourse should not depend on whether a complaint has been filed or not, since such a requirement would exclude mentally handicapped persons from protection.[35] According to the Court, an obligation to use the criminal law also exists

30 ECtHR (Grand Chamber) 28 October 1998, *Osman vs. United Kingdom*, Appl. No. 23452/94, para. 116. ECtHR (Grand Chamber) 30 November 2004, *Öneryildiz vs. Turkey*, Appl. No. 48939/99, para. 94.

31 ECtHR (Grand Chamber) 30 November 2004, *Öneryildiz vs. Turkey*, Appl. No. 48939/99, para. 93.

32 *Inter alia* ECtHR (Grand Chamber) 24 October 2002, *Mastrometto v. Italy*, Appl. No. 37703/97, para. 67; ECtHR 20 December 2007, *Nikolova & Velichkova vs. Bulgaria*, Appl. No. 7888/03, para. 57; ECtHR 10 January 2012, *Cesnulevicius vs. Lithuania*, Appl. No. 13462/06, para. 82.

33 ECtHR 26 March 1985, *X and Y vs. the Netherlands,* Appl. No. 8978/80.

34 J.F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights* (Human rights handbooks, No. 7), Belgium: Council of Europe 2007, p. 37.

35 ECtHR 26 March 1985, *X and Y vs. The Netherlands,* Appl. No. 8978/80, para. 27, 30.

to protect children against approaches by paedophiles on the internet. In *K.U. vs. Finland*, a minor of 12 years old was the subject of an advertisement of a sexual nature on an internet dating site. Finnish law at that time did not provide for the means to identify the person who placed the advertisement; then applicable legislation protected the privacy of the publisher in order to guarantee the freedom of (anonymous) expression. The Courts found that there was a violation of Article 8 ECHR: The gravity of the act at stake requires efficient criminal law provisions.[36] It is up to the national legislator to provide a legal framework that in practice enables national authorities to find a balance between the various claims that compete for protection in this context: on the one hand the obligation to secure respect for everybody's private life and freedom of expression, and on the other hand the obligation to secure the rights and freedoms of other persons, in this case children, and the legitimate imperative to prevent disorder or crime.[37]

3.2.3. Right to private life and prohibition of torture or inhuman or degrading treatment or punishment (Article 8 ECHR in conjunction with Article 3 ECHR)

From Article 8 ECHR *in conjunction with* Article 3 ECHR (prohibition of torture or inhuman or degrading treatment or punishment), the Court inferred broader obligations to criminalise sexual offences. According to the Court, both articles require contracting states to enact criminal legislation punishing all forms of rape, ill-treatment and sexual abuse, either committed by state authorities or by citizens, and irrespective of whether the victim was a minor, mentally handicapped, or actively resisted physically: 'In any event, […] effective protection against rape and sexual abuse requires measures of a criminal-law nature'.[38]

3.2.4. Human rights approach vs. last resort approach

These are just a few of many cases in which the ECtHR obliges states to criminalise conduct in order to guarantee the effective protection of human rights and fundamental freedoms. I can imagine that the examples I gave will not be regarded as earth quaking; I suppose the decisions I mentioned are not even regarded as problematic at all. Who would contest the fact that murder and manslaughter has to be criminalised in the national legal order of the contracting states?

I would nonetheless like to bring up for discussion whether and to what extent the Court's human rights approach to the criminalisation of conduct conflicts the classical

36 ECtHR 2 December 2008, *K.U. v. Finland*, Appl. No. 2872/02, para. 43, 45.

37 ECtHR 2 December 2008, *K.U. v. Finland*, Appl. No. 2872/02, para. 43, 49.

38 ECtHR 4 December 2003, *M.C. v. Bulgaria*, Appl. No. 39272/98, para. 186, confirmed several times, for instance in ECtHR 24 July 2012, *D.J. v. Croatia*, Appl. No. 42418/10, para. 150, 153.

notion of criminalisation as a last resort which traditionally is adhered to in the Netherlands. The relationship between positive obligations to use the criminal law on the one hand and the last resort principle on the other hand has been questioned before. In his 2008 inaugural lecture, Van Kempen shows that the Strasbourg Court has inferred from the ECHR a high number of positive obligations that compel the contracting states to use the criminal law, varying from obligations to criminalise conduct, to obligations to start criminal inquiries and gather evidence, to obligations to impose adequate sanctions.[39] Van Kempen points out that this development demonstrates a fundamental change of paradigm in the Court's approach: While human rights and fundamental freedoms used to aim at monitoring and limiting the powers of the state over citizens within its jurisdiction, it is in the name of the same rights and freedoms that nowadays the state is increasingly legitimized and even obliged to use its powers, for instance by being forced to follow the path of criminalisation.[40]

Needless to say, this approach is likely to be at odds with the notion that to prevent and combat unjust and unwanted behaviour the criminal law should only be invoked if other responses are regarded as inadequate alternatives. Traditionally, part of the *rationale* to support a reserved approach towards calling on the criminal law is that by means of criminalising conduct, individual freedom is cut back. Even more, by means of criminalising conduct, fundamental freedoms can be violated. For instance, making defamation a criminal offence, limits the fundamental freedom of expression. The phenomenon of various interests and rights competing with each other is nothing new in the context of the ECHR; even the rights laid down in the Convention itself may conflict (for instance, the freedom of expression might infringe another person's private life). That a conflict exists between criminalisation in the name of human rights and fundamental freedoms on the one hand, and criminalisation as an ultimate remedy on the other, does not as such imply that criminalisation can never be the proper path to follow. After all, adherence to the last resort principle does not completely close this road but rather enjoins the authorities to choose this road only if alternative routes appear to be inadequate.

As a result, the key issue here is not the very fact that the human rights approach may conflict with the approach to criminalise conduct only as a last resort. The key problem is that the Strasbourg Court seems not to consider itself to be bound by the principle of last resort. After all, its primary task is to ensure that the rights and guarantees set out in the ECHR are respected by the contracting states. As a result,

39 This inaugural lecture is only available in Dutch: P.H.P.H.M.C. van Kempen, *Repressie door mensenrechten. Over positieve verplichtingen tot aanwending van strafrecht ter bescherming van mensenrechten* (inaugural lecture Nijmegen), Wolf Legal Publishers 2008, p. 25–56, also available at: http://dare.ubn.kun.nl/bitstream/2066/74249/1/74249.pdf (last accessed on 1 October 2012).

40 P.H.P.H.M.C. van Kempen, *Repressie door mensenrechten. Over positieve verplichtingen tot aanwending van strafrecht ter bescherming van mensenrechten* (inaugural lecture Nijmegen), Wolf Legal Publishers 2008, p. 80.

case-law of the ECtHR does not show a clear or consistent approach towards the question if and under what circumstances the protection of human rights and fundamental freedoms justifies the criminalisation of conduct at the national level. This does not alter the fact that the Court does recognize now and then that criminal law is not the path to be followed automatically. In the *X and Y vs. the Netherlands* case, for instance, the Court emphasized that in principle it is up to the state to determine in which way it wants to ensure respect for private life (Article 8 ECHR) and that '[r]ecourse to the criminal law is not necessarily the only answer',[41] although in this particular case it held that the protection by means of civil law was insufficient and that effective deterrence against the kind of wrongdoing the applicant suffered (rape of a mentally ill person) did require criminal law provisions.[42] Moreover, in a recent case concerning the right to private life ex Article 8 ECHR, the ECtHR also stated that 'recourse to criminal law is not necessarily the only answer', although 'grave acts where fundamental values and essential aspects of private life are at stake' do require criminal law provisions, while in case of 'lesser grave acts', civil law measures may suffice.[43]

It remains, however, unclear under which precise circumstances the ECtHR finds that non-criminal law measures are not sufficient. This must be considered problematic from the viewpoint that criminalisation of conduct should remain a measure of last resort, with the consequence that the choice of criminalisation requires extensive justification and should be transparent in ECtHR judgments, which should examine not only the question of whether the law allows criminalisation, but also the question whether resort to the criminal law is desirable in the first place.[44]

One could argue that there is no problematic relationship at all between the protection of human rights by means of criminal law provisions on the one hand and the national last resort principle on the other hand, because the essence of 'criminalisation as a last resort' is indirectly observed in the very fact that the ECHR concerns fundamental rights, the protection of which intrinsically justifies the use of criminal law provisions. Would this be a possible way to 'modernise' the classical notion of 'criminalisation as a last resort' and to adapt it to today's reality in which criminal law provisions are created at various levels? I would say it is not. After all, applying the last resort principle in practice requires that pros and cons are weighed time and time again. As mentioned in the previous paragraph: the very fact that the law allows for the criminalisation of conduct does not automatically mean this route should be followed.

41 ECtHR 26 March 1985, *X and Y v. the Netherlands,* Appl. No. 8978/80, para. 26.

42 ECtHR 26 March 1985, *X and Y v. the Netherlands,* Appl. No. 8978/80, para. 27.

43 ECtHR 21 June 2012, *E.S. v. Sweden*, Appl. No. 5786/08, para. 58.

44 See also P.H.P.H.M.C. van Kempen, *Repressie door mensenrechten. Over positieve verplichtingen tot aanwending van strafrecht ter bescherming van mensenrechten* (inaugural lecture Nijmegen), Wolf Legal Publishers 2008, p. 66.

4. CRIMINALISATION AS A LAST RESORT IN A MULTI-LEVEL LEGAL ORDER: CONCLUDING REMARKS

As any other European (nation) state, in this day and age, the Netherlands faces a pretty complex situation where it comes to the issue of criminalisation. At the pure national level, legislative developments over the past decades indicate that the principle of last resort is no longer observed with regard to the criminalisation of behaviour. At the same time, however, the last resort principle attracts revived attention at the level of the European Union, now that the Council, the Commission and the Parliament have explicitly recognised the need for guiding principles, which include the principle of last resort. Meanwhile in the context of the ECHR, it appears that instead of using the criminal law as the ultimate remedy, it regards the effective protection of human rights and fundamental freedoms as increasingly obliging the contracting states to enact criminal law provisions.

The question arises to what extent the national legislator has the opportunity to coherently and consistently apply national principles of substantive criminal law, such as the last resort principle, especially in relation to Strasbourg case law. As to this point, a confirmatory answer to the question asked in this paper's heading might seem the only right answer. This would, however, ignore that it is broadly doubted whether the Dutch legislator observes the last resort principle in the context of criminalisation; legislative developments over the last decades indicate otherwise.

As a result, a different question arises in the relationship with EU criminal law. The renewed attention for criminalisation as a last resort in the EU context might encourage the Dutch legislator to rethink its approach towards this classical notion. In doing that, it should not avoid facing the fundamental question *why* criminalisation should be a last resort or whether another, modernised, approach is necessary in order to determine the volume of national substantive criminal law.

It is true that the differences in *rationales* for using the criminal law do not cause huge conflicts in today's legislative practice. At this very moment, the conflicts are predominantly dogmatic and abstract. This, however, does not affect the need to give renewed thought to some fundamental issues, in order to be prepared for the future, supposing that the developments at the respective levels will persist. Although it goes beyond the scope of this paper to deal with these issues in depth right here, I hope to have successfully demonstrated the need to deal with them. Until then, no unambiguous answer can be given to the question asked in the heading.