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Preparatory Offences: a Challenge to Criminal Law Boundaries, Democracy and Human Rights Principles

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Introduction

It is true that one of the principal objectives of law is 'the care of security'[1]. And the most powerful weapon in this war to protect security, one might first think, is the criminal law[2]. We should therefore desire our criminal law to be as strong as possible to match the threats caused by harmful conduct in order to ensure our safety.[3] However, even though we might gain better personal security against criminal conduct through stronger criminal law, we also simultaneously risk undermining the other side of the coin of security which is political security against State interference i.e. liberty[4]. Therefore, too strong criminal law is as dangerous as weak criminal law. In this sense, criminal law is a double-edged sword.[5] To strike a balance, criminal law must respect the liberty of both potential victims and the potentially accused; if either side has been unjustifiably favoured, the citizenry will be at risk of either being unnecessarily victimized or unfairly criminalized. None the less, in the thirst for security especially when facing serious harm, the State tends to ignore the balance and opts to extend the boundaries of criminal law in an unprincipled manner. Many types of preventive criminal laws have been increasingly used in order to pre-empt prohibited harm[6]

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[1] Jeremy Bentham and John Bowring, *The works of Jeremy Bentham* (W. Tait 1843) 307.

[2] Wayne R LaFave, *Criminal Law* (West Group 2000) 3.

[3] Herbert Wechsler, 'The Challenge of a Model Penal Code' (May 1952) 65 Harv L Rev 1097, 1089.

[4] Lucia Zedner, *Security* (Routledge 2009) 28.

[5] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014) 109.

[6] Ibid, 96. See also Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 Current Legal Problems 174.

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even when the opportunity for it to be caused has yet to arise[7]. Preparatory offences are one of those preventive crimes.

To achieve the aim of harm prevention which is one of the fundamental functions of criminal law[8], preparatory offences are enacted to empower the state to intervene in an earlier stage of a continuing chain of criminal conduct in order to prevent harm from being successfully done. However, the offences have some inevitable downsides which need very close attention. Firstly, unlike traditional inchoate offences sharing the same preventive aim, preparatory offences allow the state to punish objectively innocuous acts purely done with an ulterior intent, such as buying a computer (to commit an act of terrorism) or having breakfast (before murdering someone)[9]. Preparatory offences, additionally, leave no room for repentance[10], the private sphere where all citizens should have been able to enjoy. Thirdly, as soon as the preparatory offences come into effect, a state has a plausible excuse to intervene into citizens' mental space[11], to prematurely prevent criminal action, despite innocuous preparation, from being committed. Last but not least, the pre-inchoate offences could render us politically dependent on the state. Taking these four serious concerns into account, it is sensible to consider that the preparatory offences tend to undermine the fundamental values we hold dear rather than protect them. The values focused on here are those of liberalism, democracy and human rights, especially autonomy and civil liberty.

The first Part will outline the current status of the preparatory offences in the English legal system. Even though the first thing we consider when contemplating preparatory offences are terrorist preparation offences[12] and the threat they represent as a ground to criminalise such acts, this part will show us that there are other preparatory offences which

[7] Peter Ramsay, 'Democratic Limits to Preventive Criminal Law' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the limits of the criminal law* (Oxford University Press 2013) 214.

[8] Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in Anthony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 280-282.

[9] AP Simester, 'Prophylactic Crimes' in GR Sullivan and Ian Dennis (eds.), *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart 2012) 63.

[10] R. A. Duff, *Criminal Attempts* (OUP 1996) 386-389.

[11] Peter Ramsay, 'Preparation Offences, Security Interests, Political Freedom' in R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (eds), *The Structures of the Criminal Law* (OUP 2011), 219.

[12] Terrorism Act 2006, s 5

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do not concern emergency or national security. The relationship between security and preparatory offences as the source of the first three problems mentioned in the previous paragraph will be discussed in the Part 2. After that I will point out that, as far as subjective security or the fear of victimisation is concerned, the classical moral philosophy can no longer work properly as a criminal constraint. This is because both the harm principle: along with the fair imputation argument and the wrongfulness principle are compatible with the preparatory offences, even though there are many illiberal aspects emanating from the offences.

In Part 3, I will consider Ramsay's argument of democratic limits as the possible constraint of criminal law. Political independence might be an eventual result of preparatory offences. However, even though this argument is convincing, a further discussion about the real concept of democracy and the scope of civil liberty might be required. The last Part will deal with the human rights principle enshrined in the European Convention on Human Rights. It will criticise and examine the relationship between preparatory offences and both positive and negative obligations. It will show that even though the state has no positive obligation to criminalise preparatory offences, to penalise such acts does not violate any state's negative obligations to refrain from infringing Convention rights without justification. Yet there are some valid concerns about the violation of human rights. The point this paper tries to make is that the enactment of preparatory offences could possibly eliminate liberalism, democracy and human rights, but there are currently no constraints that could restrain them.

1. Preparatory Offences in English Criminal Law

There is currently no general offence of criminal preparation; even though a proposal for legislation was made in 2007 by the Law Commission[13], it was later abandoned in the following two years[14]. The main reasons were that there was insufficient support from relevant organisations and the current scope of the criminal attempt was thought to be satisfactory and wide enough. The proposed preparation offence is not our concern here since it does not extend the boundaries of criminal law. The criminal preparation, according to the proposal, must proceed 'beyond the stage of mere preparation…it would not

[13] Law Commission, *Conspiracy and Attempts* (Law Com No 183, 2007) part 16.
[14] Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) paras 8.67-8.70.

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encompass earlier preparatory acts'[15]. The extension, if any, had been made modest[16] intentionally; because, first of all, it will be too difficult to prove the actor' criminal intentions which will ordinarily be possible only if the actor has actually moved close to the commission of a crime[17]. The other reason is to respect the free and democratic society and to protect civil liberties such as the right to privacy and freedom of conduct[18]. Some public interest could possibly be protected by criminalising preparation acts at an earlier stage; however, none of them is more important than democracy and civil liberty[19].

The thoughts underpinning the proposal are truly convincing; nevertheless, they are not always the case. The prosecution and criminalisation of acts in a preliminary stage which are earlier than mere preparatory acts are not unknown to the English criminal law. We might be familiar with section 5 of the Terrorism Act 2006 which imposes the preparation of terrorist acts. The word 'preparation' tell us clearly that we will be liable for terrorist offences even if we act in a preparatory stage. This is also the case for the 'preparatory offences' in section 61-63 of the Sexual Offences Act 2003. However, there are more offences which impose liability in mere preparatory stages, even if their names do not include the terms 'preparation' or 'preparatory'. 'Going equipped' for burglary or theft under the Theft Act 1968[20], 'making articles' for use in frauds under the Fraud Act 2006[21] and 'taking steps' with a view to the fraudulent evasion of value added tax under Value Added Tax Act 1994[22] are some examples of offences criminalising merely preparatory acts. Unlike the offences of terrorist preparation, these preparatory offences are imposed as ordinary crimes and are not enacted on an emergency basis. There is no independent reviewer to scrutinise the necessity and the effect of the enforcement of such offences. These offences are imposed as ordinary crimes, despite sharing the same remoteness and other illiberal problems which will be discussed in the Part 2.

2. Preparatory Offences and Liberalism

[15] Law Com No 318 (n 14), para 8.18
[16] Jonathan Rogers, 'The Codification of Attempts and the Case for "Preparation"' (2008) 12 Crim. L.R. 941-942.
[17] Law Com No 183(n 13), paras 15.10, 16.20
[18] Ibid, 15.11.
[19] Ibid.
[20] s 25.
[21] s 7.
[22] s 72 (1).

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Before exploring the problem of liberalism caused by preparatory offences, it is necessary to understand the relationship between criminal law and security. Both international and domestic law protect the rights to security and regard them as one of the prime interests. In the realm of international law it is unclear whether it protects only physical security or also includes psychological security[23]. However, it has been made clear that contemporary English criminal law protects both types of security[24]. Physical security against so-called first-order harms, such as death, injury and loss of property, are protected by orthodox offences such as murder, assault and criminal damage. The criminal law has also been expanded to protect second-order harms including the harms of subjective insecurity[25]. Preparatory offences are part of this expansion scheme. By accepting that a threat of first-order harms could violate our interests[26], a state has two possible grounds to penalise preparatory acts. The first is to deter the preparer from carrying out the act and finally causing the remote first-order harms, and the second is based on the second-order harm of feeling insecure which has already been caused[27]. It seems there is no problem prohibiting both types of harm to citizens as by doing so an individual's security should be improved. However, using criminal law to prevent the second-order harm of subjective security alters illiberal offences to satisfy liberal requirements and thus they become liberal. This Part will indicate why the preparatory offences which severely limit our liberty countenance the traditional liberal principles, namely the harm principle and the wrongful principle.

2.1 Preparatory Offences, the Harm Principle and the Fair Imputation Argument

The harm principle has been the cornerstone of criminal law's restraints. First proposed by Mill[28] and then markedly modified by Feinberg[29], it suggests that the state can

[23] The more discussion about the relation between the international human rights law and preparatory offences will be revisited in the Part 4.
[24] Peter Ramsay, *Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012), 64-66.
[25] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 11) 208.
[26] Hyman Gross, *A Theory of Criminal Justice* (OUP 1979) 125.
[27] Ramsay 'Preparation Offences, Security Interests, Political Freedom' (n 11) 206-209.
[28] "...the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others…" John Stuart Mill, *On Liberty* (Longman, Roberts & Green, 1869; Bartleby.com, 1999) <www.bartleby.com/130/> accessed 20 August 2014, ch 1, para 9.
[29] "*The Harm Principle*: It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than

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rightly penalise an act only when that act causes harm or creates a risk of harm to others; and there is no better alternative that has an equal effectiveness in protecting their interests. According to the first part, since preparatory acts cause second-order harms and create risks of first-order harms to others, the criminalisation of preparatory acts satisfies this first requirement of 'harm to other'. Nevertheless, using the 'harm to other' criterion as a criminal law's constraint is no longer very useful. This is because the extent of harm has currently expanded to include the second-order harms and the remote risk of those harms[30]. Therefore this requirement might effectively deter the state to use moralism or paternalism as a single ground for criminalising; as Ashworth argues, 'it is more appropriate as a justification than as a restraining principle'[31]. Being very broad, harms by themselves could not constrain criminal law.

Turning to the balancing part, even though an act could cause or create a risk of a prohibited harm, it is not always legitimate to criminalise that act. It is integral, in justifying criminal offences[32], to evaluate the gravity and the likelihood of the eventual harm against the value of the act and the degree of interference with the actor's and other citizens' rights and security[33]. The rights and security of all parties, namely the actor, the victim and the public, must be brought into account. If the harm is trivial or unlikely to occur, then the state should not penalise. However, if it is non-trivial or to some extent possible, what principles must the state then take into account in this balancing process? The answer to this question and to the questions of whose rights, and which rights, are more important are not provided by the Standard Harms Analysis. They are left to political debate and principles[34]. Moreover, the analysis might work well with the traditional offences that have a clear and immediate causal relationship between the prohibited conduct and harm. It however has problems with the remote-harm offences, including preparatory offences. The offence of terrorist

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the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values." Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (OUP 1984), 26.

[30] A.P. Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: on the Principles of Criminalisation* (Hart 2011) ch 3.

[31] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (n 5) 104.

[32] Ibid,103.

[33] Andrew von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in A.P. Simester and A.T.H. Smith (eds), *Harm and Culpability* (OUP 1996) 261 and Ramsay 'Preparation Offences, Security Interests, Political Freedom' (n 11) 214.

[34] Peter Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 7) 219.

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preparation[35]might be referred to as a good example since it consists of both first-order harms: massive death and injuries of innocents, and second-order harms: the fear of those heinous harms are clearly severe and likely. As Ramsay notes, this offence has been enacted without much public debate[36]. Considering this fact and the offence's maximum sentence of life imprisonment, it does confirm that when the threat of harm is not trivial and likely to happen, it is not hard for the state to surrender individuals' rights to prevent the threat. It has not been explained by Parliament why the actor should be held accountable for the eventual harms which are still remote[37]. This reveals the fact that even if the balancing process has been taken; it has not been done so seriously. It is then proposed that the balancing approach of Standard Harm Analysis is not sufficient and should be supplemented by 'Fair Imputation'[38].

Von Hirsch further argues that the other reason why the conventional analysis is not enough when dealing with the remote harms is because the criminal punishment does not only make a deterrent effect but public condemnation has been placed upon the convict as well. Therefore, he should be held accountable for the harm only on the basis of fairness. Otherwise, the state unfairly lies to the public about the actor's blameworthiness. Normally, it is clear and fair to hold the murderer accountable for the death he causes; however, it is not as clear when we have to answer why the preparer must be imputed for the 'remote' risk of harm to another. Then in order to fairly punish the preparer, a justified explanation from the state is needed. This argument is called 'Fair Imputation'. Even though von Hirsch's argument is seemingly convincing and should be applied. Even though too at first glance the connections between the preparatory acts and the harms risked or caused seem distant as there are several contingencies between them, we should ask first whether preparation acts are actually remote.

Generally, the remoteness problems, according to Simester, have three aspects, namely the nexus requirement, the proper step to justifiably criminalise and lastly the imputation argument[39]. The first requirement argues that even though one has formed a criminal intent in his mind, it does not mean that every act committed by him while having such intention could be prosecuted. The prohibited act could be either wrongful act, such as

[35] Terrorism Act 2006, s 5
[36] Ramsay 'Preparation Offences, Security Interests, Political Freedom' (n 11) 204.
[37] Von Hirsch (n 33) 265-266.
[38] Von Hirsch (n 33) 260.
[39] Simester (n 9) 68-69.

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shooting a person, or neutral act connected to the wrongful intention, such as walking down the street to the victim's house[40]. Therefore, if one having a murderous intention walks down the street to have dinner, which is entirely unrelated to the intention, he should not be convicted for that. Then, preparatory offences, despite punishing objectively innocuous acts, will satisfy this requirement as long as it requires an ulterior intent to commit a crime.

The next problem of remoteness is what the proper step for the state to punish an act 'in the process of committing a substantive offence'[41] is. Should it be the overt act, unequivocal act, final act, more than preparatory act, substantial step or something else? Balance must be given to both sides. A victim's security could be violated by others if the state has to wait until the too-late stage; however, an actor's security could also be violated by the state if it could intervene in the too-early stage, which should still be his private world. It should be private because the actor, despite having a criminal mind, is a rational moral agent capable of deliberation and self-control[42] then he should be given some opportunities or places to change his mind. And, if he still could change his mind in that place, even after having made it up once, the state should leave that place to repent free from interference. The state can definitely coerce or persuade the actor to act in accordance with the law. The state nevertheless should not interfere until the risk of protected interests is too high and it is unlikely to be prevented. Otherwise, our dignity and autonomy will be disrespected, treated as objects and enemy, as opposed to being treated as subjects and citizens[43]. However, even though preparatory offences clearly abolish that place to repent (the *locus poenitentiae*[44]); the valid question here is whether it is too distant to the prevented harms. If the prevented harms are the eventual first-order harms, the prohibition of preparation acts is too remote[45]. However, if the subjective insecurity is the ground for prohibition, there is no problem of distance. This is because the offences are used as distinct substantive offences to protect the distinct second-order harms of insecurity which are immediately caused when the preparation

[40] Ibid, 68 and Ashworth and Zedner, *Preventive Justice* (n 5) p.108.
[41] Ashworth and Zedner, *Preventive Justice* (n 5)110-111.
[42] Simester and von Hirsch (n 30) 79.
[43] Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 (6) Colum. L. Rev. 1727 and Ramsay, *Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (n 24) 191-192.
[44] R. A. Duff, *Criminal Attempts* (n 10) 386.
[45] Von Hirsch (n 33) 260.

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acts are committed. In this sense, preparatory offences are not prophylactic offences: which is contrary to Von Hirsch and Simester's argument[46], and therefore, are not too remote.

The last problem is the fairness of imputation. Von Hirsch and Simester argue that it is unfair to predict the future act of the actor, and then punish him based on the predicted conduct[47]. This argument again is based on the autonomous moral agency[48]. It is objectionable in principle[49] to penalise one only since he is more likely to choose further harmful acts[50]. Instead of mere prediction, they propose that some form of normative involvement in the eventual harmful conduct is needed[51]. Also, Ashworth proposes that the necessity to 'defend up the field' in some particular offences such as terrorist offences might be a justifiable reason to hold the actor liable for future crimes[52]. These arguments would be valid, if we were discussing the first-order harms as the ground of criminalisation; however, again when the second-order harms are taken into account, there is no need of predicted future acts. As Ramsay suggests 'the harm may fairly be imputed to someone who knowingly defies the law's demand that its subject not contribute to the harm of subjective insecurity that is caused by terrorist preparations'[53].

If that is true, we should ask how much we have to refrain from making other citizens feel insecure. Whereas, we have the duty not to make the world more dangerous including the obligations to cooperate to avoid prohibited harms, we also accept that almost all acts cause or create a risk of harm or negative impact to others[54], especially when including feeling as a protected interest. Then we shall have a small collection of acceptable acts that we can choose to perform which are not good for being autonomous moral agents. The point then is what the extent of an acceptable dangerous act is. To answer this question, we might have to return the Standard Harm Analysis after proving that there is no remote connection between the preparatory acts and the second-order harms. However, the answer will not be static and subject to political debate again.

[46] Simester and von Hirsch (n 30) 79
[47] Ibid, 80-81.
[48] R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007), 165 and R. A. Duff, 'Criminalising Endangerment' in Stuart Green and R.A. Duff (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OPU 2008) 64.
[49] Ashworth and Zedner, *Preventive Justice* (n 5)112.
[50] Simester and von Hirsch (n 30) 81.
[51] Ibid.
[52] Ashworth and Zedner, *Preventive Justice* (n 5)112.
[53] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 11) 218.
[54] Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 7) 219.

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Therefore, as far as the second-order harms are concerned, preparation offences could not be constrained by the conventional harm principle because preparation acts cause harm to others and no balancing has been practically taken. It also could not be restrained by the added Fair Imputation argument as the second-order harms compromise the remote connection between the preparation and prohibited harms. In the next part we will discuss the wrongful principle

2.2 Preparatory Offences and the Wrongful Principle

It is claimed that the state should not condemn or coerce an individual especially with the criminal penalty, unless he culpably commits a wrongful act[55]. Otherwise, the state immorally lies to other citizens about the convict's wrongfulness and subsequently the state would lose its moral authority to guide citizens' behaviour. Apart from being harmful, therefore, a criminalised act must also be wrongful. Thus, even though preparatory acts are harmful: at least in terms of subjective security, it must be asked whether those acts are wrongful.

One might simply argue that the preparatory acts are wrongful because the state declares so[56]; however, this is not always true. If violating the law always amounts to wrongful conduct, then there is nothing the principle of wrongfulness can offer as a constraint on the criminal law. The flaw in that argument is the order of the consideration. It first must be wrong to do the act before the criminalisation can be countenanced and not vice versa. Simester and von Hirsch explain that there are two sources of wrongfulness, *mala in se*: wrong in its own right, and *mala prohibita*: an act being not inherently wrongful but proscribed by law. With a good reason, the state can set a new standard of norm and give citizens a fair opportunity to act according to the announced new norm[57]. However, if neither the act is inherently wrongful nor the state has a good reason to proscribe it, it is against the wrongfulness principle to criminalise the act. Therefore, if the preparatory acts are either inherently wrongful or prohibited with a good reason, they satisfy the wrongfulness principle.

From a subjectivist point of view, it could be said that the preparation acts are inherently wrongful since the actors have committed themselves to the wrong of eventual crimes. Because of the ulterior intents, preparers are 'sufficiently culpable to be held

[55] Michael Moore, *Placing Blame: A Theory of Criminal Law*, (OUP 1997) 35 and see also Simester and von Hirsch (n 30) ch 2.
[56] John Gardner, *Offences and Defences*, (OUP 2007) 239. Gardner does not argue about preparatory offences in particular, rather he proposes the idea about criminal law in general.
[57] Ashworth and Zedner, *Preventive Justice* (n 5)114.

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criminally liable'[58]. Then an intention to commit substantive crimes must be the internal element of preparatory offences. As we might see, the current preparatory offences such as terrorist preparation or preparation to commit sexual acts all require intention as their *mens rea*; therefore, they seem to countenance the wrongful principle in this aspect. However, Simester convincingly opines that there are three kinds of actions: namely, inherently innocent, inherently wrongful and morally ambiguous[59]. The first type is an everyday activity such as connecting to the internet, walking down the street or eating cereal. They are unlike a morally ambiguous act such as carrying a crowbar which could be innocent or wrongful subjected to the actor's intention[60]. The everyday activity is inherently innocent and would not be harmful despite done with a bad intention; thus it should not be criminalised[61]. Then since the preparatory acts are objectively innocuous and not in themselves dangerous: because they have just shadowy existence and the actor retains control over the outcome[62], they should not be criminalised even if they are done with criminal intents.

However, the last sentence is true only when we look at the offence as mala in se, but not as mala prohibita. As the latter, it is not difficult for the state to provide a good reason to impose its citizens an obligation to cooperate and not make harms of subjective insecurity[63]. One of the possible reasons is to protect citizens' 'real autonomy'[64]. Therefore, the preparatory offences satisfy the wrongfulness principle and then could not be constrained by it.

2.3 The Second-Order Harms of Subjective Insecurity and the Project of Liberalism

We have seen previously those liberal legal theories: both the harm principle and the wrongful principle, countenance preparatory offences[65] as a result of holding the subjective insecurity as the protected interest. This happens even though the offences cause fundamental negative effects. The detriments are obvious that our private space is eliminated or at best

[58] Ashworth and Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law', (n 8) 285.
[59] Simester (n 2) 73.
[60] Ibid, 75.
[61] Ibid, 74.
[62] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 11) 211.
[63] Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 7) 221.
[64] The term 'real autonomy' will be discussed in the next section.
[65] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 11) 225.

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narrowed into only our 'purely mental space'[66] and even that space would be subjected to official surveillance[67]. Therefore, it is reasonably claimed that the criminalisation of mere preparation could undermine the project of liberal law rather than protect it[68]. This Part will first discuss why those drawbacks negatively affect liberalism. Then it will examine whether the protection of second-order harms of subjective make the criminal law liberal or illiberal.

In respect of the drawbacks to liberalism, firstly, since autonomy is the foundation of liberalism, the criminal law must give one 'a moral chance to remain innocent' and must not punish him before an offence has been committed[69]. Otherwise that it tantamount to treating the person 'merely as an object'[70] and thus is illiberal. The actor could normatively be prosecuted once he commits any act with the ulterior intent, even though he might eventually change his mind to not commit the crime. The prosecutor in this case is not required to prove any objective connection between the potentially eventual first-order harms and the preparatory acts. Despite not formally, these offences abandon the substantive of presumption of innocence. It is more problematic, as mentioned above, when bearing in mind that preparatory acts normally are objectively innocuous acts, therefore, what the Crown has to do is only to prove the criminal intention. This is very close to an illiberalism thought crime. Controversially, the acts of traditional inchoate offences are objectively connected to the eventual first-order harms. Apart from the ulterior intention to commit crimes, the prosecutor is still required to prove the concrete and proximity connection between the acts and harms. However such a connection could also be found between the preparation acts and the second-order harms of subjective insecurity as the harms have already been occurred by the acts. Then the connection between the acts and harms is concrete. Therefore, even though it seems illiberalism when punishing the preparation offences on the ground of remote first-order harms, liberalism still countenances the offences when second-order harms are used as the ground of criminalising.

Secondly, as previously mentioned when discussing the problems of remoteness, the mere preparation liability provides no place for the actor to repent and assumes that the preparer will not change his criminal mind. This strongly undermines the autonomy principle.

[66] Ibid, 219.
[67] Ibid.
[68] Ibid, 217.
[69] Christopher New, 'Time and Punishment' (1992) 52 (1) Analysis 35-40 and for further critique see Saul Smilansky, 'The Time to Punish' (1994) 54 (1) Analysis 50
[70] Smilansky (n 62), 50-51

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As moral agents, we should be left to decide our own choices since we are capable of rationally thinking and altering wrong decisions unless those decisions harm others. Then when preparatory offences treat us otherwise, they seem to be illiberal criminal offences. However, again, this is not true when second-order harms are the ground of criminalisation. The preparatory acts already cause fear and put other citizens in the climate of subjective insecurity. The place to repent might be provided but narrowed to only our mental space[71]. When we let our harmful intention manifest in the outside world, we immediately cause harm to others and the punishment could be said to be well-deserved. According to this, the state actually treats us as autonomous moral agents and then the preparatory offences are dear to liberalism.

Lastly and more problematically, although the harms of subjective insecurity compromise the illiberal aspect of preparatory offences, it is worth noting that to prevent such harms; the state must operate close surveillance on and interfere with our private sphere[72]. Ramsay further argues that this leads to 'the slippery slope to eliminating the private sphere entirely'[73]. By this he means it is likely that our mental sphere is also subject to public surveillance as it is the place where our thought to commit the subjective insecurity harm is formed. These assumptions should caution legislators of the illiberal aspect of preparation offences. Then what principle could constrain the criminal law from being illiberalism, when the conventional moral philosophy of liberalism itself cannot do that? In the next two Parts, democratic limits and human rights principle will be discussed to find out whether they are potential criminal law's constraints.

Before discussing that answer, it is important to look briefly into the relationship between the subjective security and liberalism; as from the previous analysis, this type of security is the source of problems. Brudner argues that there are three different concepts for being a free person: namely, formal agency, real autonomy and communal belonging[74]. 'Formal agency' is a capacity to choose differently than he did[75]; in other words, one is a free person if he is not forced to choose one end by others. There is no problem with the formal agency concept if an individual makes his choice because of a basic instinct, custom or others' opinions e.g. it needs not to be completely self-determined and it does not matter

[71] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 11) 218.
[72] Ibid, 219.
[73] Ibid, 220.
[74] Alan Brudner, *Punishment and Freedom* (OUP 2009) 5
[75] Ibid,

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'why' he makes the chosen end as long as he is not coerced to do so. In marked contrast, to be a free person in the concept of 'real autonomy' requires a capacity to actually make the self-determined choice[76]. Therefore, the chosen end must be generated from the agent's own purposiveness. The law must protect the agents from any external circumstances or factors that might have an impact on his decision making regardless of whether those circumstances are willingly caused by a human or not. The last concept of being a free man is the communal belonging[77]. We are free people to the extent that it meets the moral expectations of our political community.

The problem lies in the second concept. The real autonomy concept argues that only the formal capacity to choose is not sufficient to protect individual autonomy. Then each citizen must have the cooperative obligation to avoid interfering with others' capacity to make self-determined choices. By failing to reassure our fellow citizens that we would not harm them, which makes them fear or feel insecure, we simply fail to perform such obligation and then are liable to be punished. In other words, as Ramsay suggests 'we are assuming that their (real) autonomy is vulnerable to that security'[78]. Under the preparatory-offence regime, then, not only are the actors' moral agency and private space being undermined, but the victims are also so vulnerable that they need state protection in every part of life: even in the process of making decisions, where the protections offered by the traditional offences are not sufficient. The preparatory offences are therefore based on incompetence and failure, in terms of protecting liberalism and autonomy, of ordinary criminal law. In this sense, the preparatory offences offer a better protection of liberalism because they prohibit the harms of insecurity which are a part of autonomy. We then are ensured that the offences countenance liberalism and autonomy, despite causing many detrimental effects to them.

Here the question is which side of the effect is more significant. Is it better to leave real autonomy vulnerable to some degree in order to preserve our private space and moral agency, or it is the opposite? There is no answer available from liberalism, as it is subject to political debates; therefore, we will need to look from other perspectives.

3. Preparatory Offences and the Democratic Limits

[76] Ibid, 6-7
[77] Ibid, 5
[78] Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 7) 222.

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At first glance, as the offences are legislated by the majority of MPs through the parliamentary process, they seem to have no conflict with the democratic principle. However, Ramsay proposes that preparatory offences, as part of the wider pre-inchoate offences, are not consistent with a democratic philosophy[79]. In his view, apart from the free and fair election, democracy must consist of 'a state in which all the citizens collectively rule themselves by determining the laws that they will obey and the policies that they will collectively pursue'[80]. To achieve this, we must be politically independent from the state, which should be our representative[81] not the opposite. As state's subjects, as opposed to objects, we should have the rights to choose our preferences of social life not only at the time of vote but also at any time[82]. This value however is severely encroached upon by preparatory offences[83]. We could not exercise the right of self-determination if the state has the coercive powers to observe and control our private space where our thoughts and expressions are initially formed. And if the state could control our thoughts and expressions then we are no longer politically independent[84]. Consequently, it would be the people who are representing the state rather than the state representing the people[85].

Furthermore, in order to be politically independent, our civil liberty, especially free speech and association and other fundamental human rights needed for exercising those liberties such as the right to life, must be protected by the criminal law[86]. And to prevent the criminal law from turning into a rights violator itself, the safeguards proscribed by criminal procedure are needed[87]. The presumption of innocence and state's burden of proof lies in the heart of those safeguards requiring the state and citizenry to trust the moral agency of other citizens[88]. Therefore, according to these safeguards, part of the reason why the state and other citizens have to wait until it is proved that we have committed a criminally prohibited wrongful harm is because they 'trust' our moral agency. However, as the preparatory offences give the state the surveillance-in-our-private-space powers and no place to repent, it

[79] Ibid, 214-215.
[80] Ibid, 224
[81] Ibid.
[82] Ibid, 225.
[83] Ibid.
[84] Ashworth and Zedner, *Preventive Justice* (n 5)107.
[85] Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 7) 225.
[86] Ibid, 226.
[87] Ibid, 227
[88] Ibid, 228-229.

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reveals that we are no longer trusted. Logically speaking, this means the presumption of innocence and the state's burden of proof no longer substantively exists to protect our civil liberty which is the shelter of our political independence. To put it simply, we have been made politically dependent upon the state by preparatory offences.

Moreover, with such powers the state does not have to wait until the actor enacts something dangerously, but can punish him by identifying that he is a dangerous person. This becomes problematical when the term 'dangerous persons' is subject to the state's subjective discretion. We are then required to trust the government on what we should think and do; otherwise we could be punished. No more civil liberty to think and express. Therefore, preparatory offences replace a broad-minded and tolerant society: which is necessary for democracy, with a distrustful and independent one. Without self-determination, it is hard to call our society a democratic one, even though the laws controlling society have been passed by the consent of the majority.

I then argue here that even though one's decision might be influenced by others' acts, it is the price to pay for living in a democratic society as an independent subject living free from the state. To be really autonomous and protected by criminal law from any outside influence, we have to let the law extend significantly to cover the area of subjective security. But by doing so we will end up finding out that our rights to make decisions has been compromised entirely at the same time. To live under that law is not to live in a democratic society. Looking at the democratic philosophy in this way might help us to minimise criminal law to the extent that it is used only for protecting civil liberty, anything beyond that must be dealt with in an exceptional manner[89].

However, further discussion about this democratic limit is needed because the political interpretation of the extent of civil liberty is dynamic and subject to a large margin of appreciation. As the argument is vulnerable to the claim of national security, it might be able to limit some kinds of preparatory offences, but not the offences designated to protect national security in an emergency situation such as a terrorist preparation offence.

4. Preparatory Offences and Human Rights Principle

As a 'state' censuring institution, the criminal law's realm is limited by human rights obligations. There are two perspectives here. Firstly, it is true that the under-inclusive criminal law cannot protect individuals' human rights and thus could violate its positive

[89] Ibid, 232.

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obligations. However, at the same time, if the criminal law is over-inclusive, it would infringe its negative obligations by interfering with individuals' human rights itself. There are international human rights obligations binding the UK, but this Part will only deal with those imposed by the European Convention on Human Rights (ECHR). This Part will first consider whether there are any positive obligations on states requiring the criminal law's protection of subjective insecurity. Then it will go on to scrutinise whether or not the preparatory offences violate negative obligations. Finally, it will discuss if there are any human rights principles capable of limiting preparatory offences.

4.1 Preparatory Offences and Positive Obligations

To begin with, normally the Convention imposes negative obligations on member states to refrain from intentional and unlawful violation of human rights; however, almost all provisions now recognise positive obligations[90] requiring states to 'take appropriate steps to safeguard'[91] persons' human rights within their jurisdiction from the acts of others, albeit private persons. This obligation is based on the implication of Article 1 that the states 'shall secure everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention'[92]. The *LCB* case[93] in 1986 was the first UK case that the Strasbourg Court recognised such obligations, although the *X and Y* case[94] is the first of its kind.

There are three types of positive obligations[95] supplementing the protections of each convention right. The first type of obligation following the judgment in *Osman v UK*[96], then called the Osman obligation[97] is to take 'preventive operational measures' to protect an individual's rights when the official knows or ought to know that such rights are at risk by private acts. The second one is to secure the rights by 'putting in place effective criminal-law provisions to deter the commission of offences…, backed up by law-enforcement machinery

[90] Robin C.A. White and Clare Ovey, *Jacobs, White, & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010) 100.
[91] *LCB v United Kingdom* 1998-III, 27 EHRR 212, (App.23413/94) para 36.
[92] European Convention on Human Rights, Art 1.
[93] LCB (n 84).
[94] *X and Y v The Netherlands*A 91 (1985) 8 EHRR 235.
[95] Andrew Ashworth, *Positive Obligations on Criminal Law* (Hart 2013) 198.
[96] 1998-VIII, 29 EHRR 245, (App.23452/94).
[97] D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, (2nd edn, OUP 2009) 44-45.

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for the prevention, suppression and punishment of breaches of such provisions'[98]. This one also follows the Osman case. Whereas, the first two duties are preventive ones taken place before the right violations, the last obligation is to put in place as an independent, thorough, effective and official investigation after the protected being violated. This obligation was initially proposed in *McCann v UK*[99], and recapitulated by the Grand Chamber in the *Ramsahai* case[100].

While the third obligation hardly relates to preparatory offences; the criminalisation of the offences might be because the second obligation requires that the state put in place effective criminal provisions to secure the right to subjective security; and thus the constant and close surveillance on our private life might emanate from the first type of obligation. The latter claim might be more valid when considering the trend that the Osman obligation has expanded in principle from protecting a particular person on a case by case basis to protecting the public as a whole from 'dangerous' individuals[101].

We will deal with these two possibilities together by finding out whether the right to subjective security is a Convention right. We will first look into the text of the Convention. Bearing in mind that it is not the physical security we are discussing here: despite obviously being the kind of security protected by many Articles. This is because we have discussed and have already seen that it is not legitimate in terms of liberalism to criminalise preparatory offences to protect physical security. Nor is it national security, although it is exactly this type of security which in times of emergency will eventually trump any values upheld by human rights[102]. The reason is we are not only discussing terrorist preparations or offences concerning national security; it is the general concept of mere preparation offences that we are focusing on. It is the feeling of insecurity that we are sceptical about. Looking into the

[98] *Osman* (n 96) para 115 and *Mahmut Kaya v Turkey* ECHR 2000-III, (App.22535/93) para 85.

[99] A 324 (1995), 21 EHRR 97

[100] *Ramsahai and others v The Netherlands* (2008) (Grand Chamber), 46 EHRR 983, (App.52391/99) para.323-325.

[101] *Mastromatteo v Italy* 2002-VIII (Grand Chamber) (App. 37703/97). According to this judgment, the state has a duty of care to the public to anticipate any risks occurring from the release of prisoners.

[102] Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 (2) J. POL.PHIL. 191 and International Commission of Jurists (ICJ) and International Commission of Jurists (ICJ), *Addressing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, (February 2009) 17 <http://www.refworld.org/docid/499e76822.html> accessed 20 August 2014.

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convention's text, even though the title of Article 5 is clearly named 'right to liberty and security' and its first sentence states that 'everyone has the right to liberty and security', in the rest of the Article, there is no further sentence or word concerning security. The European Court also clearly indicated that the Article mainly focuses on the deprivation of liberty[103]. And even though there are a few cases relating the right to security, such as the *Guzzardi* case[104] which is about the disappearance of prisoners, it was physical security rather than psychological security that is protected and it is just to uphold the right to liberty. Moreover, even if when we look further into International Bill of Rights consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economics, Social and Cultural Rights, we might find the 'freedom from fear' being proclaimed to be one of our highest aspirations; but there is no further provision to protect this freedom in particular.

Turning back to the Convention, even if there are no explicit texts concerning psychological security, mental suffering may constitute torture or ill-treatment, subject to the degree of severity, prohibited by Article 3[105]. The Strasbourg Court also explicitly stated that the convention 'requires states to take measures designed to ensure that individuals…are not subjected to ill-treatment, including ill-treatment administered by private individuals'[106]. The question is whether the psychological or subjective insecurity caused by private individuals amounts to ill-treatment or not. In the *Tanli* case[107], the European Court affirmed that ill-treatment 'must attain a minimum level of severity', in order to be inhuman treatment. For example, the use of psychological interrogation techniques: 'such as holding detainees in a room where there was a continuous loud and hissing noise'[108], or destroying an individual's

[103]*Bozano v France* A 111 (1987) 9 EHRR 297

[104]*Guzzardi v Italy* A 39 (1981) 3 EHRR 333, (App.7367/76)

[105] Even though there are no case that the Court found that merely mental suffering amounted to torture, there are a number of case that mental suffering constituted inhuman treatment; see Harris, O'Boyle, Bates and Buckley (n 97) 75.

For torture cases see; *Ireland v United Kingdom* A 25 (1978) (Grand Chamber) 2 EHRR 25 (It was held as torture before the Grand Chamber shifted to inhuman treatment.), *Tyrer v United Kingdom* A 26 (1978) 2 EHRR 1, (App.5856/72) and *Soering v United Kingdom* A 161 (1989), 11 EHRR 439, (App.14038/88)

For inhuman treatment see; *Kudla v Poland* (2000) 35 EHRR 198

[106]*Moldovan and others v Romania* (2007) 44 EHRR 302, (Apps. 41138/98 and 64320/01) para 98.

[107]*Tanli v Turkey* 2001-III, 38 EHRR 31

[108]*Ireland* (n 105).

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home and property in a contemptuous manner in their presence[109] were held as inhuman treatment contrary to Article 3 since they caused mental suffering. When comparing those cases, to cause fear of being victimised by committing a preparation act: which is still remote from first-order harms, should not constitute inhuman treatment by itself. Therefore, subject insecurity is not under the protection of Article 3.

Before concluding, it is worth noting here that the requirement of any international organisation, however important or respectful, is not a positive obligation: in the sense we are discussing, for the state to impose a law. Moreover, even if the state legislate an offence in accordance with such a requirement, it is not an excuse for the state to violate human rights without a further legitimate justification. I argue this point because some may think that the enactment of terrorist preparation offences is always justified as it is required by the UN Security Council. The UNSC Resolution 1373 demands that

> "all states shall…ensure that any person who participates in the…preparation …of terrorist acts…is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts…"[110]

In *Al-Jedda* case, the case concerned a British citizen of Iraqi descent who was detained without charge for 3 years in Iraq. It had been argued that the detention was legitimate because it was done following the requirement of the UNSC Resolution 1546. Lord Bingham along with the majority of judges decided that

> "…there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must

[109] *Selcuk and Asker v Turkey* (1998) 26 EHRR 477, (Apps. 23184/94 and 23185/94)
[110] UNSC Resolution 1373 (2001), 28 September 2001, 2 (e).

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> ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention."[111]

However, the Strasbourg Court disagreed with the House of Lords and affirmed that any UNSC Resolution must be interpreted in the most harmonious manner with the Convention to avoid any conflict of Convention obligations[112]. Additionally, any agreement between states may not overrule the Convention obligations[113]. This may not eliminate entirely the justification of the UNSC Resolution 1373 in requiring the criminalisation of terrorist preparation offences; nonetheless, it should caution that the human rights principle must be maintained even when conflicting with a UN's requirement.

Our fear of victimisation does not need to be prevented by international law. In other words, there is no positive obligation for the right to subjective security thus it is not compulsory for the state to put in place a criminal offence or any preventive measure to protect that security. However, this does not in any way mean that the state, lacking of such obligation, cannot criminalise an offence. The power of legislation and criminalisation is for, and only for, the state to use through Parliament. The European Court and a domestic court can only monitor and make a judgement of a violation[114] or declaration of incompatibility[115] respectively, if they find that the offences interfere with convention rights without legitimate justification. We are going to consider this point in the next Part.

4.2 Preparatory Offences and Negative Obligations

Now we realise that the state has no positive obligation to protect the subjective security, but it still enforces preparatory offences to protect such values by undermining our civil liberty. Then we should ask whether these offences interfere with our civil liberty with a reasonable justification. We will first discuss the rights to free thought and expression which are allowed to be qualified. Then we will consider whether the preparatory offences undermine the absolute freedom from inhuman treatment or punishment.

Freedom of thought and expression, fundamentally essential for liberalism and democracy, are the rights traded for subjective security, as noted in Part 3. There is no need

[111] *Al-Jedda v Secretary of State for Defence* (2007) UKHL 58, para 39.
[112] *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, [2011] ECHR 1092, 30 BHRC 637, para 102.
[113] Ibid, para 108.
[114] White and Ovey (n 90) 42.
[115] Human Rights Act 1998, s 6.

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to be punished, unless the offences impose a chilling effect on us to think or express, in which case we could say that our rights are being interfered with[116]. However, according to the second paragraph of the ECHR Articles 9 and 10, there are four conditions required to be satisfied in order to limit the protected rights. Firstly the interference must be in accordance with law. Since the preparatory offences are enacted by Parliament and their contents are accessible and foreseeable, they satisfy the first requirement. Secondly, the least effective requirement is that the interference must be done to pursue one of the vast legitimate aims provided by each article. The prevention-of-crime aim listed in Article 10 is a legitimate reason for criminalisation. And even if such aim is not listed in Article 9, the protection of public order stated in the Article means quite the same thing[117]. The second condition thus countenances the offences.

Lastly and most importantly, the interference must be necessary in a democratic society. Here we might argue, as in Part 3, that the offences undermine the real democratic value, independence and self-preference. However, the phrase 'necessary in a democratic society' is actually about the test of proportionality between the pressing social need and the legitimate aim[118]. We again go back to political debate and balancing. In order to satisfy this condition, the state must explain first how the interference could contribute to the legitimate aim where undoubtedly the preparatory offences could increase the effectiveness of crime prevention. Then the state must show that the aim pursued is more important than the rights qualified. Lastly, it needs to state why other less severe measures are not selected. The two latter requirements are not easy for states to answer; however, in the case of Articles 9 and 10, an immense margin of appreciation has been granted by the Strasbourg Court to states[119]. Preparatory offences thus could justifiably interfere with freedoms of thought and expression.

Turning to Article 3, more medical analysis or empirical research is needed to convincingly argue that to let our private space be under constant and close surveillance amounts to ill-treatment. However, it is not unreasonable to suggest that the punishment of preparatory offences might violate Article 3 as inhuman punishment[120]. The Strasbourg

[116] *Steur v the Netherlands* (2004) 39 EHRR 706, (App. 39657/98)

[117] White and Ovey (n 90) 315.

[118] *Silver and others v United Kingdom*A 61 (1983) 5 EHRR 347, (Apps. 55947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, and 7136/75) para 97.

[119] Harris, O'Boyle, Bates and Buckley (n 97) 349-350, 437.

[120] As the punishment issue is beyond the scope of this paper, I intend to offer just a glancing overview of this problem. For more extensive discussion please see D. van Z. Smit and A.

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Court's general proposition about sentencing is to leave it as a domestic matter[121]. Nonetheless, if the length of the imprisonment term is obviously disproportional, the Court might review the sentence and the disproportional sentence could amount to inhuman punishment contrary to Article 3. In *Weeks* case, the 17-year-old applicant, described by domestic courts as a very dangerous young man[122], was sentenced to an 'indeterminate' life sentence, the gravest sentence known to English law, as a result of committing an armed robbery of 35 pence which he did not even take away[123]. Considering the age of the applicant along with the statistics showing that only 17 of the 54,580 persons convicted for robbery were sentenced to life imprisonment, the Court could have severely scrutinised the compatibility of the sentence with Article 3[124]. However, 'because of the very special circumstance of the case'[125], being sentenced to life imprisonment, the applicant might be released much sooner than being imposed to some definite term of imprisonment[126]. Without this exceptional explanation, the sentence will 'exceed any reasonable relationship of proportionality'[127] and violate the right to be free from ill-treatment. Therefore, even though the sentence might sound terrible; it was not an inhuman punishment contrary to Article 3. Considering the judgment in the *Weeks* case along with the power to pass a sentence of life imprisonment for terrorist preparation and a 10-year imprisonment for sexual offence preparations, it should raise doubts about the proportionality of the offences leading to the possibility of the infringement of Article 3.

Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67 (4) MLR, 541.

See also Dennis J. Baker, *The Right not to Be Criminalized: Demacrating Criminal Law's Authority* (Ashgate 2012) 9. Baker has proposed that there is a basic human right called the right not to be criminalised which is formed by rights concerning deprivation of liberty and fair punishment as set out in the ECHR Articles 3, 5 and 8. To impose a disproportionate punishment is to violate such right.

[121] Harris, O'Boyle, Bates and Buckley (n 97) 91.

[122] *Weeks v United Kingdom* A 114 (1987), 10 EHRR 293, para 14, 46

[123] *Weeks* (n 115) para 11-12; additionally he was found guilty of assaulting a police officer and being in the unlawful possession of a firearm, which he received 2 and 3 year-imprisonment sentences respectively.

[124] *Weeks* (n 115), para 14, 47-48

[125] Harris, O'Boyle, Bates and Buckley (n 97) 91

[126] Lord Justice Salmon expressed this view in the Court of Appeal's judgment.

[127] Weeks (n 115) see especially the partly dissenting opinion of Judges Thor Vilhjalmsson, Lagergren, Sir Vincent Evans and Gersing and the dissenting opinion of Judge de Meyer.

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As a terrorist preparation offence has the same penalty as that for completed terrorism, we have two additional problems with which to contend. Firstly, if the preparer is to be punished by the same penalty like completing the substantive crime, so the penalty of the completed offences can no longer deter him from carrying out the final act. This is because whether or not he completes it, he would be punished with the same penalty. Secondly, it is possible that in this case that even though he eventually completes the terrorist act, the prosecutor might opt to prosecute him as a terrorist preparer instead. Since this allows the prosecutor to prove the 'less demanding' *actus reus* of the preparatory offence but it still suffices to secure the same life-imprisonment sentence. Then here it is not only about the drawbacks when the substantive offences are not committed, the preparatory offences could also cause problems even when the substantive offences are completed. My argument is that the preparation offences would eliminate reliability of the criminal law's status as the public censuring institution because it allows the criminal justice system to lie to the public about the real stigma of the convicted: in this case from being a terrorist to being just a terrorist preparer.

5. Conclusion

It should be clear by now that preparatory offences cause severely adverse results to liberalism: by not respecting us as autonomous agents, and to democracy: by rendering us to be dependent on the state. However, even though our fundamental human rights or so-called civil liberty are interfered with, there is no violation found except for the possibility of disproportional penalty. Another point to mention, even though the illiberal aspects have been caused by preparatory offences, the traditional moral principles will countenance the offences as long as we decide to regard the right to subjective security as important and necessary to protect. A reconsideration or supplement of liberal theories as a constraint of criminal offences preventing the second-order harm of subjective security is in need. Democratic limits might be acceptable but a clear consensus of the scope of the political self-determination and representative democracy must be provided before the proposal could work properly. Otherwise, it would end up like other restraints where the exception, especially that of national security or the state of emergency, takes the normal role.

One might consider my concerns shared with other academics of losing our autonomy, independence and civil liberty as just a theoretical problem. There is no real case or empirical evidence showing that, by imposing preparatory offences, the state will take our

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mental space under surveillance or practically eliminate the place to repent; or by so doing we will be political dependent. That opinion is valid; however these concerns should not be taken lightly as this article has proved that, despite normatively, the preparation offences could undermine all the values that they were created to protect in the first place. At some point, we might have to ask which values between on the one hand, autonomy and political independence: and on the other, the right to subjective security are more important?

I recommend that a further study on preparatory offences and other types of offences protecting the right to subjective security be conducted. This worrying trend is not limited only to the theory of criminalisation but also that of punishment. I reasonably believe as mentioned in 4.3 that the disproportional penalty: where the penalties provided for the preparations to commit terrorist or sexual acts are likely to fall could violate human rights without real justification. My critique is part of a work to find a proper balance between criminal law and rights in a dynamic society holding stable core values.

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