

Obligations of Criminalization and the ‘Reservation to the Law’ in Continental Countries, with a Specific Focus on Italy

Las obligaciones de criminalización y la reserva de ley en los países continentales, con especial atención a Italia

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<https://doi.org/10.14201/rspc.31451>

Artículo original sin previa publicación

Fecha de recepción: 15/10/2023

Fecha de aceptación: 22/01/2024

Abstract

In the Italian legal system, the principle of 'reservation to the law' seems to have been in crisis for quite some time now. One of the most significant factors contributing to this crisis is undoubtedly the changing system of legal sources. Both the European and conventional perspectives have introduced obligations concerning criminalization. Consequently, the legislator is bound, in the choice of the goods to be protected through criminal sanctions, to the guidelines coming from either Europe or Strasbourg. In reality, at least in Italy, the situation is less chaotic than it may seem if one acknowledges the stabilizing role played by the Constitutional Court and, above all, the decisive indications already present in the Constitution. The impression, in fact, is that it is precisely through the Constitution that a new dimension of the "principle of legality" can be redefined, utilizing the principles set forth in criminal matters in a critical and selective manner. The main aspects will focus on the *quomodo* (how) of criminalization and a broader view of criminal law, encompassing procedural and penitentiary aspects, which find ample confirmation, especially in the jurisprudence of the Strasbourg Court.

Keywords: Obligations of Criminalisation; Reservation to the law; European Criminal Law; Harmonization of law; European Convention on Human Rights; Treaty on the Functioning of the European Union; System of sources of law.

Resumen

La reserva de ley en Italia parece estar en crisis desde hace mucho tiempo. Uno de los elementos más significativos de esta crisis es sin duda el cambiante sistema de fuentes. Tanto desde la perspectiva europea como desde la convencional, surgen obligaciones de criminalización. Por lo tanto, el legislador estaría vinculado, en la elección de los bienes a proteger a través de sanciones penales, a las indicaciones que provienen ya sea de Europa o de Estrasburgo. En realidad, al menos en Italia, la situación es menos caótica de lo que podría parecer, si se reconoce el papel de cierre desempeñado por el Tribunal Constitucional y, sobre todo, las indicaciones decisivas ya presentes en la Constitución. La impresión, de hecho, es que a través de la Constitución es posible reelaborar una nueva dimensión de la 'reserva de ley', utilizando de manera crítico-selectiva los principios establecidos en materia penal. Los aspectos principales se centrarán en el 'cómo' de la tipificación y en una visión más amplia de la norma penal, que incluya también aspectos procesales y penitenciarios, encontrando amplia confirmación, sobre todo, en la jurisprudencia del Tribunal de Estrasburgo.

Palabras clave: Obligaciones de criminalización; Reserva de ley; Derecho penal europeo; Armonización legislativa; Convenio Europeo de Derechos Humanos; Tratado de Funcionamiento de la Unión Europea; Sistema de fuentes.

Summary: 1. The 'reservation to the law' during the 'physiological' crisis. 2. The constitutional incrimination obligations. 2.1. The constitutional paradigm of the criminal offence: the critical-selective function of general principles governing criminal matters. 2.2. Article 13(4) of the Constitution as the only constitutional incrimination obligation: the judgments of the European Court of Human Rights for violation of Article 3 ECHR in respect of persons subject to restrictions of liberty. 2.3. The 'new' crime of constitutional value: Article 613-bis of the Criminal Code. 3. The *para*-constitutional obligations of incrimination: Article 83 TFEU. 4. The *sub*-constitutional obligations: indications from the European Court of Human Rights

1. THE 'RESERVATION TO THE LAW' DURING THE 'PHYSIOLOGICAL' CRISIS

In continental legal systems, the principle of 'reservation to the law' is understood as a corollary of the principle of legality. The 'reservation to the law' implies that through laws passed only by the Parliament (and, in the Italian legal system, acts equivalent to laws) can new offenses be introduced. The idea is that Parliament serves as a safeguard, being the representative body of the popular will. Parliamentary laws (and acts equivalent to laws) can be subject to review by the Constitutional Court and potential abrogative *referendum*. The principle of 'reservation to the law', as many argue, has been in a state of 'crisis' for some time, with identified causes stemming from both 'endogenous' (internal) and 'exogenous' (external) factors¹. Among the endogenous factors, the crisis in Parliament and representation is commonly cited, along with a simultaneous erosion of the protective essence of reservation to the law. On the exogenous side, the crisis of the legal sources system² takes center stage, expanded by European and international treaties. The endogenous factors, often seen as pathological and, according to some, "abstractly correctable"³, are typically related to the instrument through which the reservation to the law is applied, namely, legislation. The crisis of the reservation to the law primarily arises from a significant legislative crisis. In practice, Parliament has relinquished its central role, often passing opaque

1. This is a well-established distinction in the Italian penal literature: *ex multis*, MASSARO, Antonella. *Determinatezza della norma penale e calcolabilità giuridica*. Napoli: Editoriale scientifica, 2020b, p. 103; GRANDI, Ciro. *Riserva di legge e legalità penale europea*. Milano: Giuffrè, 2010, p. 24; CUPELLI, Cristiano. Il problema della legalità penale segnali in controtendenza sulla crisi della riserva di legge. *Giurisprudenza Costituzionale*. 2015, 1, p. 181; NAPOLEONI, Valerio. Il sindacato di legittimità costituzionale *in malam partem*. In Manes, Vittorio and Napoleoni, Valerio. *La legge penale illegittima. Metodo, itinerari e limiti della questione di costituzionalità in materia penale*. Torino: Giappichelli, 2019, p. 517; MANTOVANI, Ferrando. Erosione del principio della riserva di legge, interrogativi e rimedi. *Criminalia*. Pisa: Edizioni ETS, 2017, pp. 126-131, who, with reference to the 'conditioning factors' of the crisis of the reservation of law, uses, instead of the traditional distinction between exogenous and endogenous causes, a broader classification: (i) indirect causes; (ii) direct causes, the latter further decomposable into (a) endogenous causes and (b) national, supranational and international exogenous causes.

2. On the crisis of the State extending to the sources, PINO, Giorgio. La gerarchia delle fonti del diritto. Costruzione, decostruzione, ricostruzioni. *Ars interpretandi*. 2011, 1, p. 19 ff.

3. NAPOLEONI, Valerio. *Il sindacato di legittimità...*, cit., 519; FIANDACA, Giovanni. Crisi della riserva di legge. *Criminalia*. Pisa: Edizioni ETS, 2017, p. 86; GROSSO, Carlo Federico. Il fascino discreto della conservazione (considerazioni in margine all'asserita crisi del principio di riserva di legge in materia penale). *Criminalia*. Pisa: Edizioni ETS, 2011, pp. 127-128; DI GIOVINE, Ombretta. Il principio di legalità tra diritto nazionale e diritto convenzionale. In Bertolino, Marta; Eusebi, Luciano and Forti, Gabrio (Eds.). *Studi in onore di Mario Romano*, vol. IV. Napoli: Jovene, 2011, pp. 2250-2251.

laws or delegating the authority to issue crucial regulatory acts to the Government. Through an in-depth analysis of exogenous factors, which are beyond correction, we can uncover a different aspect of the reservation to the law. It may not be entirely 'new', but it remains somewhat underrecognized and unexplored. The 'new' system of legal sources, as a direct consequence, leads to a reduced prominence of ordinary law within the Italian legal system. Ordinary law faces non-application when in conflict with a European Union legal provision⁴ and to a declaration of unconstitutionality in cases where a compliant interpretation in line with the European Convention on Human Rights (ECHR) norm (i.e., the ECHR provisions as interpreted by the European Court of Human Rights) is not feasible⁵. As a result, the system of legal sources can no longer be depicted using the pyramid model but should be seen as a network⁶. Nevertheless, the Constitution remains the foundation, identifying both the 'transfer of part of state sovereignty' and the so-called counterbalances that remain excluded from any balancing with European law (and which the Constitutional Court has identified in the principles protecting fundamental rights). Even in the context of the ECHR, the Constitution specifies the constitutional-level norm through which the ECHR is positioned as a *sub*-constitutional source. Any conflict, therefore, results in a declaration of constitutional illegitimacy. In this context, the hierarchy of norms remains robust⁷, with the

4. For an in-depth study, MASSARO, Antonella. *Appunti di diritto penale europeo*. Torino: Giappichelli, 2020a, p. 44 ff.

5. These are the conclusions of the Constitutional Court with the celebrated (first) 'twin judgments' (Constitutional Court, 22 October 2007, no. 348 and Constitutional Court, 22 October 2007, no. 349), which were later mitigated. The first judgment identifies the 'mobile reference' provided for in Article 117(1) of the Constitution as the legal basis for giving the ECHR sub-constitutional status. Through this mechanism, the ECHR integrates the parameter of constitutional legitimacy: any conflict with a domestic norm will lead to the declaration of the constitutional illegitimacy of the norm under order. It is not the recourse to the scheme of the so-called 'interposed norm' that is surprising in the Court's reasoning, but the clarification of the content of the reference: it is not the Edu Convention that is incorporated into Italian law, but the interpretation offered by the ECtHR. Corte Cost., 22 October 2007, no. 348 § 4.6 of the *Considerato in diritto*.

6. The reference is to OST, François. Dalla piramide alla rete: un nuovo modello per la scienza giuridica? In Vogliotti, Massimo (Ed.). *Saggi sulla globalizzazione giuridica e il pluralismo normativo*. Torino: Giappichelli, 2013, pp. 29-48. ZACCARIA, Giuseppe. Trasformazione e riarticolazione delle fonti del diritto, oggi. *Ragion Pratica*. 2004, 1, p. 116, who suggests that the archipelago serves as the most apt metaphor to represent the new system of sources. For a summary of the literature on the point MASSARO, Antonella. *Determinatezza...*, cit., p. 5, footnote 25; PINO, Giorgio. *La gerarchia delle fonti...*, cit., p. 21, footnote 6.

7. A normative hierarchy refers to the relationship between at least two norms, where one norm holds a higher position (super-ordinate) than the other, making the latter subordinate to the former. Normative hierarchies are typically categorized into structural, material, and axiological hierarchies. On the matter, PINO, Giorgio. *Interpretazione e 'crisi' delle fonti*. Modena: Mucchi Editore, 2014, § 2.1; GUASTINI, Riccardo. *Le fonti del diritto. Fondamenti teorici*. Milano: Giuffrè, 2010, pp. 241-254, who also uses a fourth category: that of logical or linguistic hierarchies.

Constitution maintaining its supremacy. The Constitutional Court retains a central role⁸ in the system and decides the level of binding interpretation from the European Court of Human Rights⁹.

The 'new system of legal sources' also has an impact on criminal law, with overlapping supranational and international influences.

The most interesting aspect is that relating to the 'freedom' of the state legislature in its choice of incrimination, which puts the principle of the reservation to the law to the test, but highlights its absolute topicality, from a formal and substantive point of view.

When focusing solely on European and Convention-based criminal law, the 'greater resistance' given to these systems imposes additional constraints on the legislator. Article 83 of the Treaty on the Functioning of the European Union (TFEU) introduces a Criminal Law competence for the European Union, establishing actual obligations of criminalization for Member States. Furthermore, there are additional demands for criminalization originating from the European Court of Human Rights to provide greater protection for rights recognized in the Convention. In Italy, these systems are integrated through a constitutional foundation. Therefore, these obligations of criminalization are constitutional protection obligations¹⁰.

8. MASSARO, Antonella. *Determinatezza...*, cit., p. 46.

9. It is, in fact, from the so-called second twins (Corte Cost., 11 November 2009, no. 311 and Corte Cost., 30 November 2009, no. 319) that the apparently mandatory conclusions reached by the previous constitutional jurisprudence were mitigated, until reaching a 'partially limited' degree of binding force with judgment no. 49/2015, according to which the ordinary court is obliged to comply with the indications coming from the Strasbourg Court only when they are the expression of 'established law' (Corte Cost., 14 January 2015, no. 49, § 7 of the *Considerato in diritto*). V. Constitutional Court, 30 November 2009, no. 319, §8 of the *Considerato in diritto*. *Amplius*, MASSARO, Antonella. *Appunti...*, cit., pp. 10-14, to which we refer also with reference to the analysis of the Constitutional Court's decision No. 49/2015.

10. On the matter, *ex multis*, VERVAELE John A. E. Harmonization of the Criminal Law Enforcement of Community Policy: Ignori nulla cupido? In Bassiouni, Cherif M.; Militello, Vincenzo and Stazer Helmut (Eds.). *European cooperation in penal matters: issues and perspectives*. Cedam, 2008, pp. 31-60; NIETO MARTÍN, Adán. La armonización del Derecho Penal ante el Tratado de Lisboa y el programa de Estocolmo. European Criminal Policy Initiative y el Manifiesto sobre Política Criminal Europea. *Revista Penal*, 27, pp. 78-82; VIGANÒ, Francesco. L'arbitrio del non punire. Sugli obblighi di tutela penale dei diritti fondamentali. In Bertolino, Marta; Eusebi, Luciano and Forti, Gabrio (Eds.). *Studi in onore di Mario Romano*, vol. IV. Napoli: Jovene, 2011a, pp. 2645-2704; VIGANÒ, Francesco. Obblighi convenzionali di tutela penale? In Manes, Vittorio and Zagrebelsky, Vladimiro (Eds.). *La Convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*. Milano: Giuffrè, 2011b, pp. 243-298; PAONESSA, Caterina. *Gli obblighi di tutela penale. La discrezionalità legislativa nel quadro dei vincoli costituzionali e comunitari*. Pisa: ETS, 2009; SICURELLA, Rosaria. La tutela "mediata" degli interessi della costruzione europea: l'armonizzazione dei sistemi penali nazionali tra diritto comunitario e diritto dell'Unione europea". In Grasso, Giovanni and Sicurella, Rosaria (Eds.). *Lezioni di diritto penale europeo*.

In summary, the reservation to the law appears to be in a crisis that may seem uncorrectable due to the ‘new system of legal sources’. Nevertheless, the Constitution and its oversight body, the Constitutional Court, continue to hold a prominent role. The expansion of legal sources leads to the emergence of new obligations for criminal protection. These include *para*-constitutional obligations stemming from Article 83 TFEU, which still encounter control limits, and *sub*-constitutional obligations derived from the ECHR provision through Article 117, first paragraph of the Constitution¹¹.

This leads us to examine the so-called constitutional incrimination obligations, which are a crucial step in understanding the new protection obligations.

2. THE CONSTITUTIONAL INCRIMINATION OBLIGATIONS

The reflection on the constitutional obligations of incrimination in Italy has had a very short course, and it has been considered that in Italy there is only one constitutional obligation of criminal protection: that contained in Article 13, fourth paragraph of the Italian Constitution¹² (“All physical and moral violence against persons subjected to restrictions of liberty shall be punished”).

The origins of this narrative can be traced to the discussion generated, on the one hand, by a judgment of the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany) on the interruption of pregnancy¹³, and, on the other hand, by the thoughts of Franco Bricola on the “legal asset of constitutional relevance”.

Milano: Giuffrè, 2007, pp. 245-394; SICURELLA, Rosaria, “Prove tecniche” per una metodologia dell’esercizio delle nuove competenze concorrenti dell’Unione europea in materia penale”. In Grasso, Giovanni; Picotti, Lorenzo and Sicurella, Rosaria. *L’evoluzione del diritto penale nei settori d’interesse europeo alla luce del Trattato di Lisbona*. Milano: Giuffrè, 2011, pp. 3-66; MASSARO, Antonella. *Appunti...*, cit., p. 69; GRANDI, Ciro. *Riserva di legge e legalità penale europea*, cit., p. 119.; BERNARDI, Alessandro. *La competenza penale accessoria dell’Unione Europea: problemi e prospettive*. Testo, aggiornato e corredato di note, della relazione svolta il 9 maggio 2009 nell’Università Statale di Milano in occasione del Convegno di studi Diritto penale e fonti sovranazionali: i termini di una relazione problematica. *Diritto penale contemporaneo*. 2012, 1, pp. 43-78.

11. Constitutional Court, 22 October 2007, no. 348, § 4.7. On the exact scope of the degree of bindingness of the ECHR norm, *supra*, footnote 14.

12. MARINUCCI, Giorgio and DOLCINI, Emilio. *Corso di diritto penale. Le norme penali: fonti e limiti di applicabilità. Il reato: nozione, struttura e sistematica*. 3rd ed. Milano: Giuffrè, 2001, p. 496 ff. to which reference is also made for further bibliographical indications.

13. BVerfG, 25 febbraio 1975 - 1 BvF 1/74, 1 BvF 2/74, 1 BvF 3/74, 1 BvF 4/74, 1 BvF 5/74, 1 BvF 6/74, in BVerfGE 39, 1 - *Schwangerschaftsabbruch I*. This concerns the ruling through which the Federal Constitutional Court (BVerfG) declared the illegitimacy of § 218a StGB, modeled according to the so-called term solution, as it contradicts Articles 2 § 2 and 1 GG (respectively: the right to life and human dignity).

Franco Bricola¹⁴, since the 1970s, identifies the Constitution not only as a *limit of* criminal law, but also as its foundation with respect to the identification of the legal assets to be protected through criminal sanction¹⁵. The idea is to strengthen criminal law as an *extrema ratio*. The legislator, in its choice of incrimination, would be bound to the constitutional ‘table of values’: since the criminal sanction pertains to the personal freedom of the individual, which is a constitutional right, for it to be applied, it is necessary that another ‘value’ protected by the constitution be violated¹⁶. The criminal sanction, it is added, can also be applied with reference to injuries to legal assets that are closely linked by a relationship of ‘necessary presupposition’ to constitutional values. In other words, an injury to them necessarily entails endangering the value to which they are bound¹⁷ (for example: the environment in relation to the constitutional value of health).

This step makes it possible to broaden the constitutional ‘table of values’, but it contradicts the premises of the discourse, because it does not allow the immediate isolation of the good that can be protected through criminal sanction. It could therefore lead to pan-penalisation¹⁸.

14. BRICOLA, Franco. *Teoria generale del reato*. In *Novissimo digesto italiano*. Padova: Utet, XIX, 1973, pp. 7-93; BRICOLA, Franco. *Tecniche di tutela penale e tecniche alternative di tutela*. In Bricola, Franco. *Scritti di diritto penale*, vol. I, t. II. Milano: Giuffrè, 1997, pp. 1476-1555; BRICOLA, Franco. *Legalità e crisi: l’art. 25, commi 2 e 3 della costituzione rivisitato alla fine degli anni 70. Questione criminale*. 1980, pp. 179-275; BRICOLA, Franco, 1981. *Sub art. 25, 2° e 3° comma*. In Branca, Giuseppe (Ed.). *Commentario alla Costituzione. Rapporti civili: art. 24-26*. Bologna: Zanichelli, 1981, pp. 227-316.

15. For an effective reconstruction, in an evolutionary key, of Bricola’s thought, DONINI, Massimo. *Ragioni e limiti della fondazione del diritto penale sulla Carta costituzionale. L’insegnamento dell’esperienza italiana. Il foro italiano*. 2001, 2, cc. 29-46.

16. This perspective argues that a criminal penalty should only be imposed when a violation involves a value that holds constitutional significance, even if it’s of an equivalent magnitude to the value (like personal freedom) being sacrificed. In simpler terms, for a criminal offense to be considered, there must be a substantial breach of a constitutionally important value.

It’s worth noting that in this framework, the constraint functions in a one-way manner. In other words, not every breach of a constitutional value necessitates a criminal sanction, but every time a criminal penalty is applied, it should be due to a ‘significant’ violation of a constitutional value.

17. BRICOLA, Franco. *Teoria generale...*, cit., p. 16. The author gives as an example of the relationship of ‘necessary presupposition’ the safety of traffic in relation to the life or safety of citizens. In *contrast*, for all, MARINUCCI, Giorgio and DOLCINI, Emilio, *Corso...*, cit., p. 498.

18. MUSCO, Enzo. *Bene giuridico e tutela dell’onore*. Milan: Giuffrè, 1974, p. 123. The author argues that the ‘significance’ of the constitutional value alone is not sufficient to provide a concrete, positive criterion for distinguishing what is deserving of punishment from what is not. This is because it fails to clearly delineate the boundaries of the legal interest.; also PAONESSA, Caterina. *Gli obblighi...*, cit., p. 43; MARINUCCI, Giorgio and DOLCINI, Emilio, *Corso...*, cit., p. 499, to which reference is made for further bibliographical indications.

This idea seemed not to respect the separation of powers¹⁹: the legislative power would not be free, but rather bound, in its criminalization choices, to the ‘table of values’ already present in the Constitution. The Constitutional Court, on the other hand, would be given the task of supervising (and punishing) the legislature’s discretion.

The main role carved out for the Constitutional Court largely marked the end of the discussion on the role of the Constitution as the ‘foundation’ of criminal law.

It must be emphasised that the idea of constitutional ‘obligations’ for criminal protection rested on a fundamental misunderstanding. The Constitutional Court, in fact, had no ‘power’ to push the legislature to incriminate certain conduct. This was enough to empty the ‘obligation’ of incrimination of cogency. The subject is that of so-called legislative omissions, whose *discrimen* with respect to omissions is based on the presence or absence of an obligation²⁰. The omission is such because it relates to an *obligation to do*; the lacuna is a ‘gap’ to which no obligation corresponds. If, however, it is not possible to ‘justify’ the absence of protection, then it is not correct to speak of ‘obligations to incriminate’. And this is the reason why in the European and international sphere things have turned out differently.

2.1. *The constitutional paradigm of the criminal offence: the critical-selective function of general principles governing criminal matters*

The concept of the Constitution serving as a foundation, rather than solely a limitation, for criminal law has not garnered widespread support. Nonetheless, it is posited that the constitutional paradigm can be employed to delineate the distinctive characteristics of a criminal offense.

Substantively, an offense is defined as a *modality of harm*²¹. In comparison to other transgressions, such as those within the realm of civil or administrative law, the offense

19. Clearly, this criticism arises from a thorough recognition of the separation of powers as a foundational paradigm within the Constitution. It essentially takes for granted what should be proven. In fact, it doesn’t seem unreasonable to suggest that it’s the system of checks and balances, rather than the separation of powers, that appears to be the inspiration behind the Constitutional Charter. On this matter, MORTATI. *Appunti per uno studio sui rimedi giurisdizionali contro comportamenti omissivi del legislatore. Foro italiano*. 1973, 9, p. 158. The author believes that the model adopted by the Italian Constitution is that of checks and balances, which necessitates mutual control among the supreme constitutional organs. One of the most typical expressions of this model is found in the judicial review of laws.

20. MORTATI, Costantino. *Appunti per uno studio...*, cit., p. 153, esp. footnote 4.

21. This is the well-known theory of GALLO, Marcello. *L’elemento oggettivo del reato. Appunti di diritto penale*. Torino: Edizioni CLUT, 1963, pp. 8-9, which remained almost unchanged until GALLO, Marcello. *Diritto penale italiano*. 3rd ed. Torino: Giappichelli, 2021, pp. 201-203, taken up, among others, also by BRICOLA, Franco. *Teoria generale...*, cit., pp. 13-14; DONINI, Massimo. *Principi costituzionali e sistema penale. Modello e programma. IUS17@unibo.it*. 2009, no. 2, p. 424. On the exact meaning to be attributed to the expression ‘injury mode offence’, TRAPANI, Mario. *Il reato e le sue conseguenze*. In *Punibilità, pena, punizione in un sistema criminale integrale e integrato*. Roma: Roma TrE-Press, 2022, pp. 279-282, footnote 550, spec. p. 281.

exhibits a high degree of connotation. Its primary aim is to provide an abstract and as comprehensive as possible elucidation of the modes of aggression that tinge and differentiate the offense. Every element of the factual scenario has the capacity to be refracted and calibrated through the prism of criminal law. It is in the stage of formulating the legal case that the precise identification and selection of the elements that constitute the offense become pivotal. The objective element, the subjective element (*mens rea*), the manifestations of the offense, and the personal attributes of the perpetrator serve as a framework for assessing the offense in relation to the interest safeguarded by the incriminating provision – which, fundamentally, comprises the summation of each of these elements²².

Assuming the legislature as the ‘privileged’ recipient of the Constitution, all the principles set forth in criminal matters take on the nature of actual obligations in the formulation of legal cases. These are now considered ‘justiciable’ obligations, meaning they can lead to the invalidation of any laws that fail to comply, through a declaration of constitutional illegitimacy. Thus, principles such as determinacy²³, personalization of criminal liability, offensiveness, and proportionality emerge as the foundational pillars of the criminal law system. In accordance with these principles, the legislator enjoys a degree of freedom in pursuing their own criminal policy objectives, according to a scheme that is polarised more on the *quomodo* of incrimination than on the *an* of criminal protection: it is, moreover, only from the elements of the offence (*post-normative* plan) that it is possible to reconstruct the protected interest.

At the core is the legislator’s pen, and the cases subject to criminalization are, or should be, nothing more than the designs crafted within the boundaries of the Constitution.

22. GALLO, M. *Diritto penale italiano*, cit., p. 209. In the same sense, TRAPANI, Mario. *Il reato...*, op. cit., p. 281, in note; TRAPANI, Mario, 2021. “Elementi negativi a contenuto negativo?” Contributo ad una analisi strutturale del “fatto di reato”. *Archivio penale*. 2021, 2, p. 10, footnote 18.

23. It is considered preferable to refer only to determinateness and not also to taxability for two reasons. First of all, the principle of determinacy, understood in a broad sense, i.e. including also the principle of precision, stands as a logical presupposition of the consequent principle of taxability: a precise, determinate, intelligible law restricts, upstream, the fields of possible ‘creative interpretation’. Determinacy, then, has the legislator as its addressee, whereas the principle of taxability seems to identify the judge as its ‘privileged’, if not exclusive, addressee. On precision as a principle in itself MARINUCCI, Giorgio; DOLCINI, Emilio and GATTA, Gian Luigi. *Manuale di diritto penale. Parte generale*. 12th ed. Milano: Giuffrè, 2023, pp. 79-89. A broad interpretation of determinateness, as including the principle of precision and taxability, is given by MASSARO, Antonella. *Determinatezza...*, cit., pp. 342-346, who offers a ‘complex’ dimension of this principle, articulated along three lines: (i) *syntax*, which mainly concerns precision in formulation; (ii) *semantics*, relating to verifiability; (iii) *pragmatics*, referring to taxativity.

Two implications arise from this: (i) the obligations of criminalization may, in principle, provide guidelines for protecting a particular class of goods, but it is the *quomodo* of criminalization that determines the fulfillment or non-fulfillment of the obligation, taking into account the leeway inherent in the exercise of legislative power; (ii) above all else, the legislature is bound by the constitutional ‘paradigm’ of the criminal offense.

There has been talk of principles dictated in criminal law. It is considered that many features, usually attributed to *substantive criminal law* alone, must also extend to *procedural criminal law* and the rules on the *prison system*.

The trial, which may be considered a deviation from civil law, is an integral part of criminal law. The criminal rule does not exist separately from the trial, and it is only through the trial, following the procedures outlined in the Code of Criminal Procedure, that the violation of the substantive legal principle can be established and its consequences applied. Subsequently, these consequences are applied in line with the rules of the prison system. In other words, this concept refers to the so-called ‘real criminal norm’²⁴. The actual criminal norm consists of substantive components as well as procedural and enforcement elements. Kelsen’s hypothetical judgement, which can be expressed as ‘if A, then B’, is expanded to include intermediate hypothetical propositions. These propositions define both the methods used to establish ‘A’ and the procedures to implement ‘B’.

2.2. Article 13(4) of the Constitution as the only constitutional incrimination obligation: the judgments of the European Court of Human Rights for violation of Article 3 ECHR in respect of persons subject to restrictions of liberty

The discussion regarding constitutional obligations of protection has led to the recognition of only one explicit obligation of criminal protection, as stipulated in Article 13(4) of the Constitution. This article specifies that ‘all physical and moral violence against persons subjected to restrictions of freedom shall be punished’.

Under this provision, Article 608 of the Criminal Code, which pertains to the abuse of authority against arrested or detained persons, acquired a ‘constitutional’ value. This offense imposes a maximum penalty of up to thirty months of imprisonment on public officials who subject detained or convicted individuals to unauthorized hardship measures. Notably, the penalties associated with the offense outlined in Article 608 of the Criminal Code are relatively lenient, and they may not be sufficient to address the incrimination obligation stated in Article 13, fourth paragraph, of the Constitution, which

24. GALLO, Marcello. *Diritto penale...*, cit., pp. 14-16; GALLO, Marcello. *Le fonti rivisitate. Appunti di diritto penale*. Torino: Giappichelli, 2017, pp. 24-35. It adopts the scheme of the real criminal norm as a methodological premise of its work TRAPANI, M. *Il reato e le sue conseguenze*, cit., *passim*.

demands protection against torture. However, there is a widely held belief that any law seeking to repeal or decriminalize this offense would be deemed unlawful and subject to a declaration of constitutional illegitimacy²⁵.

The issue of the constitutional obligation prescribed in Article 13(4) of the Constitution has gained renewed significance following convictions in Strasbourg for violating the prohibition of torture²⁶. These judgments seem to confirm the impression that the *quomodo* of incrimination is the basis on which the fulfilment of the obligation of criminal protection is assessed.

It is necessary to analyze the cases dealt with by the European Court of Human Rights (henceforth ECtHR) in which acts of torture were committed against persons subjected to restrictions of liberty. These are the cases in which the ECtHR confronted the Italian constitutional obligation to incriminate.

There are three judgments on this subject. Two of them concern acts of torture carried out during the G8 *summit* in Genoa, specifically the events that occurred at the Bolzaneto prison. The other judgment pertains to episodes of ill-treatment suffered by two detainees in the Asti prison²⁷.

The judgments in the cases of *Azzolina and Others v. Italy* and *Blair and Others v. Italy*, whose elements are nearly identical, resulted from the appeals of 59 individuals. During the G8 *summit* in Genoa, these individuals were held in the Bolzaneto barracks, which was used as a 'temporary prison' for the occasion. While in the barracks, they endured systematic harassment and humiliation at the hands of law enforcement officers²⁸.

25. MARINUCCI, Giorgio and DOLCINI, Emilio. *Corso...*, cit., p. 506.

26. Convictions for failure to comply with the positive obligation of protection arising from Article 3 ECHR are particularly well known with regard to the events relating to the G8 in Genoa: Corte Edu, IV sez., judgment of 7 April 2015, *Cestaro v. Italy*, Application No. 6884/11; Corte Edu, I sez., judgment of 22 June 2017, *Bartesaghi Gallo and Others v. Italy*, Application Nos. 12131/13 and 43390/13.

27. These are three judgments on which the First Chamber of the ECtHR ruled on the same day: Corte Edu, I sez., 26 October 2017, *Azzolina and Others v. Italy*, Rec. nos. 28923/09 and 67599/10; Corte Edu, I sez., *Blair and Others v. Italy*, 26 October 2017, Application Nos. 1442/14, 21319/14 and 21911/14; ECtHR, I sez., *Cirino and Renne v. Italy*, 26 October 2017, Application Nos. 2539/13 and 4705/13. For a comment, F. Cancellaro, *A Bolzaneto and Asti was torture: three new sentences imposed by the Strasbourg Court on Italy for violation of Article 3 ECHR*, in *Dir. pen. cont.*, 16 November 2017.

28. ECtHR, Sec. I, 26 October 2017, *Azzolina and Others v. Italy*, cited above, § 128; ECtHR, Sec. I, *Blair and Others v. Italy*, 26 October 2017, cited above, § 97. A series of severe physical and verbal assaults were established by the Strasbourg Court. The people stopped, for example, were forbidden to raise their heads and look at the officers present; forced to maintain harassing positions for hours and to walk, with their heads down, through the 'tunnel of officers', who, in the meantime, were hitting and insulting them, some of them, those from the Diaz-Pertini school, were branded with a cross on their faces.

The victims allege a violation of Article 3 of the European Convention on Human Rights (ECHR) from both a substantive and procedural standpoint. Not only did the acts perpetrated against them constitute ‘torture’, but the investigation was also ineffective. In the case of the Bolzaneto events, forty-five individuals faced investigation and were brought to trial, including deputy magistrates, members of the police force, and prison administration doctors. However, Italy did not have a specific crime of ‘torture’ in its legal framework. Consequently, various lesser offenses were levied, such as abuse of power against arrested or detained persons (Article 608 of the Criminal Code), grievous bodily harm, outrage, violence, threats, aiding and abetting, abuse of office, and aggravated forgery under Article 476, second paragraph, of the Criminal Code. The decisions imposed were already limited due to the statute of limitations and were not particularly severe. Furthermore, some perpetrators received pardons or suspended sentences.

The ECtHR upholds the findings of the judges of merit: severe physical and psychological assaults were carried out against the applicants within the barracks, to such an extent that Article 3 of the ECHR was violated. Consequently, actual acts of torture were committed in the Bolzaneto barracks. The reference to Article 3 of the ECHR necessitates a more comprehensive assessment by the Court. This entails the examination of whether Article 3 of the ECHR was violated from both a ‘substantive’ and ‘procedural’ perspective²⁹.

To ascertain that Article 3 of the ECHR has been upheld, it is not sufficient merely to meet its substantive obligations. It is also imperative to conduct ‘effective’ investigations. This means that the process, including the investigation phase, must be capable, in the abstract, of “leading to the identification and, where appropriate, punishment of the perpetrators and ascertainment of the truth”³⁰. *In the abstract*, in the sense that the procedural obligation is an obligation of means and not of result³¹.

29. On which § 4.

30. ECtHR, Sec. I, 26 October 2017, *Azzolina and Others v. Italy*, cited above, § 147; ECtHR, Sec. I, *Blair and Others v. Italy*, 26 October 2017, cited above, § 116. Repeating a guideline that can be said to be widely established in Strasbourg jurisprudence, the Court continues: “S’il n’en allait pas ainsi, nonobstant son importance fondamentale, l’interdiction légale générale de la torture et des peines et traitements inhumains ou dégradants serait inefficace en pratique, et il serait possible dans certains cas à des agents de l’État de piétiner, en jouissant d’une impunité virtuelle, les droits des personnes soumises à leur contrôle”.

31. This is a frequent expression in the judgments of the ECtHR dealing with the assessment of the procedural *standard*, not only with reference to Art. 3 ECHR, but also to Articles 2 and 8 ECHR. On the side of Article 2 ECHR, ECtHR, Grand Chamber, 15 June 2021, *Kurt v. Austria*, Rec. no. 62903/15§ 159: “The duty to take preventive operational measures under Article 2 is an *obligation of means, not of result*” [italics ours]. With reference to Article 8, ECtHR, 1st Sect, 27 May 2021, *J.L v. Italy*, Rec. no. 5671/16, §118: “Elle rappelle en outre que l’obligation positive qui incombe à l’État en vertu de l’article 8 de protéger l’intégrité physique de l’individu appelle, dans des cas aussi graves que le viol, des dispositions pénales efficaces et peut s’étendre par conséquent aux questions touchant à l’effectivité de l’enquête pénale menée aux fins de la mise en œuvre de ces dispositions (M.N. v. Bulgarie, no 3832/06, § 40, 27 November 2012). Pour ce qui est de l’obligation de mener une enquête effective, la Cour rappelle qu’il s’agit là d’une obligation de moyens et non de résultat”.

In the current case, the Court upholds the complaints raised by the applicants, finding a violation of Article 3 of the ECHR from both substantive and procedural perspectives. The substantive violation encompasses two distinct aspects. Firstly, the committed acts meet the *criteria* for defining torture (constituting a breach of the negative substantive obligation)³². Secondly, the ECtHR emphasize the absence of an adequate legal framework to penalize such behavior (an infringement of the positive substantive obligation)³³. In essence, there is no criminal offense that incriminates acts of torture.

The issue of the procedural obligation is noteworthy. Despite the complexities arising from the lack of police cooperation, the investigations reveal no inadequacies. Furthermore, there are no delays at either the procedural or trial stages. However, the ‘deficiencies’ identified at the substantive level also extend to the procedural level³⁴. In the absence of a specific criminal offense addressing the severity of the act, which is reflected in the penalty (and, consequently, in the statute of limitations), any investigation is afflicted by an inherent and irreparable flaw.

The judgment concerning the ill-treatment of prisoners at the Asti prison in the case of *Cirino and Renne v. Italy* closely parallels the decisions discussed earlier.

Two inmates are placed in solitary confinement. Led to their respective cells by several prison officers, they are subjected to both physical and verbal abuse. Subsequently, they are undressed and left without heating or bedding. Over an indeterminate period, numerous violent incidents occur, persisting throughout the day and night.

Following these events, two prison police officers were subject to investigation and subsequently tried for the offense of ill-treatment against family members or cohabitants (under Article 572 of the criminal code) and personal injuries (under Article 582 of the criminal code). The trial judge in the initial instance classified

32. As a first approximation, a substantive negative obligation can be defined as that which binds the state to a ‘do-nothing’: more precisely, not to commit acts detrimental to the right recognised in the Convention. *Amplius*, VIGANÒ, Francesco. *Obblighi convenzionali di tutela penale?*, cit., pp. 247-251 and *infra* § 4.

33. The substantive positive obligation relates to a *duty on the part of the signatory State*, which must provide an adequate legal framework (*legislative and regulatory framework of protection*) to protect individuals from conduct detrimental to the right recognised in the ECHR. *Amplius*, VIGANÒ, Francesco, *loc. cit.*, and *infra* § 4.

34. Corte Edu, Sec. I, 26 October 2017, *Azzolina and Others v. Italy*, cited above, §§ 158-159; Corte Edu, Sec. I, *Blair and Others v. Italy*, 26 October 2017, cited above, §§ 127-128. The two judgments are perfectly overlapping on this point: “Contrary to its conclusion in other cases, the Court considers that, in the present case, the length of the domestic proceedings and the dismissal of the case on the ground that most of the offences were time-barred are not attributable to delay or negligence on the part of the public prosecutor’s office or the domestic courts, but to *structural shortcomings in the Italian legal system* [...]. *In the Court’s view, the root of the problem lies in the fact that none of the existing criminal offences appears capable of covering the whole range of issues raised by an act of torture to which an individual may fall victim*” [italics ours; unofficial translation].

the contested facts as ‘torture’, referencing the UN Convention, even though it had not been integrated into domestic law. In a reading that was later criticized by the Court of Cassation³⁵, the Court reclassifies the act as “abuse of authority against arrested or detained persons” (under Article 608 of the criminal code). However, the offense was time-barred, and consequently, a non-prosecution order was issued.

The public prosecutor appealed the verdict with an immediate cassation appeal. The Court of Cassation determined that the relevant offense to be considered is that of ill-treatment against family members or cohabitants. However, the appeal was nevertheless deemed inadmissible due to a lack of interest, as the ill-treatment offense had also expired due to the statute of limitations.

The trial before the European Court of Human Rights confirmed the dual violation of Article 3 of the ECHR, both on a substantive and procedural level. There were no claims of delays on the part of the investigators or the trial judges; in fact, they acted diligently. However, due to the absence of a specific crime of torture, the Court “had to resort to other existing offenses, namely the provisions of the Criminal Code related to the abuse of authority against detainees and causing bodily harm”³⁶. Nevertheless, the Court found that these offenses were “incapable of addressing the full range of issues arising from the acts of torture experienced by the applicants”³⁷.

These judgments are particularly intriguing for two closely interrelated aspects: (i) Article 608 of the Criminal Code is proven to be inadequate and thus non-compliant with both ‘sub-constitutional’ and pure ‘constitutional’ obligations; (ii) the effectiveness of protection cannot be separated from proper coordination between the provisions categorized as ‘substantive’ and those designated as ‘procedural.’ In essence, the concept of the real criminal norm emerges strengthened both in its content and to some extent in its regulation.

The offense of constitutional significance, namely Article 608 of the Criminal Code, is insufficient to ensure the level of protection mandated by Article 13(4) of the Constitution. Nevertheless, it appears that the intervention of the European Court of Human Rights was not necessary to come to this realization, even in terms of procedural implications³⁸.

35. Cass., sez. VI pen., 27 July 2012, no. 30780, point 2.1 of the *Consideration in law*.

36. ECtHR, Sec. I, *Cirino and Renne v. Italy*, 26 October 2017, cited above, § 109.

37. *Ibid.*

38. See, in this regard, the views expressed a year before the well-known *affaire Cestaro v. Italy* by PUGIOTTO, Andrea. *Repressione penale della tortura e Costituzione: anatomia di un reato che non c'è. Diritto penale contemporaneo*. 2014, 2, p. 129 ff. On the matter, *amplius* TALINI, Silvia. *La privazione della libertà personale*. In *Metamorfosi normative, apporti giurisprudenziali, applicazioni amministrative*. Napoli: Editoriale scientifica, 2018, pp. 233-237.

2.3. The 'new' crime of constitutional value: Article 613-bis of the Criminal Code

Article 613-bis of the Criminal Code represents the 'new' crime of constitutional value, introduced as a response to the 'justiciability' of the legislative omission in Strasbourg. The European Court of Human Rights effectively compelled the legislature to address this omission.

Article 613-bis outlines the following provisions:

1. Anyone who, through the use of violence, serious threats, or cruel actions, inflicts acute physical pain or demonstrable psychological trauma upon a person who is deprived of personal liberty, entrusted to their custody, authority, supervision, care, or assistance, or who is in a condition of diminished defense, shall be subject to imprisonment ranging from four to ten years if the act involves multiple actions or results in inhuman and degrading treatment affecting the individual's dignity.
2. If the actions described in the first paragraph are committed by a public official or an individual responsible for a public service, through an abuse of their authority or a violation of the duties inherent in their role or service, the penalty will range from five to twelve years of imprisonment.
3. However, the previous paragraph does not apply when suffering results solely from the execution of lawful measures that deprive or limit rights.
4. In cases where personal injury arises as a consequence of the actions described in the first paragraph, the penalties indicated in the preceding paragraphs will be increased. For serious personal injury, the penalties will be increased by one-third, and in cases of very serious personal injury, the penalties will be increased by half.
5. If the acts referred to in the first paragraph result in death as an unintended consequence, the penalty shall be thirty years' imprisonment. If the offender voluntarily causes death, the penalty is life imprisonment.

The Italian legislator, in framing the concept of torture, follows a contradictory path. It heavily relies on the definition provided by the Convention Against Torture (CAT) but simultaneously diverges from it in crucial aspects. Additionally, it incorporates the content of Article 3 of the ECHR by identifying 'inhuman or degrading treatment' as an alternative form of conduct³⁹. The outcome is, in essence, a patchwork.

The redundancy of attributes within Article 613-bis of the Criminal Code suggests that at the national level, an effort was made to emulate the same pathos embraced by the international legislator when describing 'severe pain or suffering, physical or

39. MAUGERI, Anna Maria. Delitti contro la libertà morale. Art. 613- bis Tortura. In Pulitanò, Domenico (Ed.). *Diritto penale. Parte speciale*. Torino: Giappichelli, I, 3rd ed., 2019, pp. 265-268.

mental'. However, the grandiose language isn't characteristic of the criminal legislator, as it remains to some extent overshadowed by the *extrema ratio* associated with the imposition of criminal sanctions. Not all acts of violence lead to punishment, but only those that have reached a certain level of severity.

Transplanting 'concepts' developed within a specific legal and cultural context can risk creating misunderstandings when executed without the linguistic and systematic adaptation of the receiving country. It might have been more appropriate, perhaps, to independently reconstruct the formulation found in the The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), taking into account the usual protective techniques employed by the national penal code.

This issue is broadened when viewed from the perspective of comparative law, necessitating contemplation of the methods by which certain legal models (or segments thereof) circulate and disseminate. This concept, often referred to as 'cross-fertilization', should ideally result in the enhancement of individual protection within the European legal system. To achieve this goal, one must consider both the 'peculiarities' of the system being influenced and the system that is causing the influence⁴⁰. Article 613-*bis* of the Criminal Code runs the risk of being unconvincing. The UNCAT is not directly applicable to individuals and is not subject to the constraints of formulation and interpretation that characterize criminal law. Even when the UNCAT is subject to interpretation by the European Court of Human Rights, the broad interpretation is allowed primarily because it is applied not within the realm of criminal law but at the level of state party responsibility. This falls outside the punitive framework in the strictest sense⁴¹.

40. *Amplius*, LOBBA, Paolo. Obblighi internazionali e nuovi confini della nozione di tortura. www.dirittopenalecontemporaneo.it, 16 April 2019, p. 10. On *cross-fertilization*, GENEUSS, Julia. Obstacles to Cross-fertilisation: The International Criminal Tribunals' "Unique Context" and the Flexibility of the European Court of Human Rights' Case Law. *Nordic Journal of International Law*. 2015, 84, p. 404 ff., esp. p. 406: "A direct 'cut and paste' transmission (or transplant) of legal norms or concepts between different legal systems is rarely possible. Rather, the legal norm or concept must be translated from the language of the original legal system into the language of the receiving one. *Inherent to any translation is the risk of misinterpretation of the original understanding of meaning*", quoting WALKER, Neil. Postnational Constitutionalism and the Problem of Translation, in *European Constitutionalism beyond the State*. In Weiler, Joseph and Wind, Marlene (Ed.). Cambridge: Cambridge University Press, 2003, p. 37, goes on to conclude: "[t]hus, for a successful translation, a *'detailed hermeneutic understanding both of the context in which it was originally embedded and of the new context for which it is destined'* is necessary" [italics ours].

41. Emphasises this aspect MACULAN, Elena. Judicial Definition of Torture as a Paradigm of Cross-fertilisation: Combining Harmonisation and Expansion. *Nordic Journal of International Law*. 2015, 84, p. 474.

The key issue here is the absence of specific intent and the classification of torture as a common (rather than a distinct) offense⁴², with the identification of a particular aggravating factor in cases where the offense is committed by a public official or someone responsible for a public service.

From the first perspective, specific intent would primarily serve to define the boundaries of typicality. The ‘characterized’ intent, which must underlie the action, would delineate the scope of applicability of the specific case concerning those forms of conduct that are particularly injurious to personal dignity. A proper appreciation of the purpose pursued by the (qualified) actor would have made the somewhat challenging provision inserted in the third paragraph of Article 613-*bis* of the Criminal Code⁴³, which pertains to cases where suffering results from the execution of lawful measures ‘depriving or limiting rights’, unnecessary. Suffering caused by the execution of lawful measures could never coincide with the disvalue associated with the element of specific intent.

Regarding the structure of the general offense, it was the judiciary that redefined the legal nature of the second paragraph. Contrary to the legislature’s preference for an aggravating circumstance framework, the courts adopted an interpretation more consistent with international sources⁴⁴. It was believed that not specifying the necessary qualification for committing the offense as a distinct category would have been inconsistent with international obligations.

The outcome is less than ideal. The CAT Committee has previously expressed concerns about the wording of the offense⁴⁵. The European Court of Human Rights has not yet dealt with the new crime of torture.

42. The convergence in doctrine is almost absolute, among the many: MASSARO, Antonella, *Appunti...*, cit., p. 171; RUOTOLO, Marco. Brevi riflessioni su una recente proposta per l’introduzione delitto di tortura nell’ordinamento italiano. In Nico, Anna Maria (Ed.). *Studi in onore di Francesco Gabriele*. Bari: Cacucci, 2016, pp. 895-896; TALINI, Silvia. *La privazione...*, cit., p. 246 ff.; RISICATO, Lucia. L’ambigua consistenza della tortura tra militarizzazione del diritto penale e crimini contro l’umanità. *Criminalia*. Pisa: ETS. 2018, pp. 365-368; LOBBA, Paolo. *Obblighi...*, cit., p. 10; MAUGERI, Anna Maria. *Delitti contro la libertà morale...*, cit., pp. 270-271.

43. Although this is a ground for non-punishment that takes up almost verbatim what is contained in the last part of Article 1(1) of the UN Convention, it does not in fact appear to be necessary within our legal system for the reasons expressed. On this point, MAUGERI, Anna Maria. *Delitti contro la libertà morale...*, cit., pp. 273-274; RISICATO, Lucia. *L’ambigua consistenza...*, cit., p. 367.

44. Ordinary Court of Siena, Criminal section, 7 May 2021, no. 58, spec. point 4.1. In the jurisprudence of legitimacy, Cass., penal sec. III, 25 May 2021, no. 32380, point 3.2. *Contra* Cass., sec. V pen., 8 July 2019, no. 47079.

45. CAT Committee, *Concluding observations on the combined fifth and sixth periodic reports of Italy*, 18 December 2017, CAT/C/ITA/5-6 (‘Report of the CAT Committee on Italy 2017’). The negative judgement is mainly based on: (i) superfluous elements in the formulation of the case; (ii) lack of specific intent; (iii) lack of clear identification of the agents; (iv) a statute-barred offence (and not imprescriptible, as envisaged by the UN Convention).

3. THE PARA-CONSTITUTIONAL OBLIGATIONS OF INCRIMINATION: ARTICLE 83 TFEU AND THE EUROPEAN SANCTIONS IN CASE OF NON-COMPLIANCE WITH THE OBLIGATIONS OF CRIMINALIZATION

The Lisbon Treaty, in Article 83 TFEU, confers upon the European Union an ‘indirect’ competence in criminal law⁴⁶. EU criminalization obligations impose restrictions on the choices of the state legislator regarding criminalization. These obligations are affirmative in nature, necessitating action on the part of the Member State, which involves the enactment of criminal offenses. Non-compliance with this obligation is subject to sanctions: the offending state may face legal action for infringement⁴⁷. In addition to the political implications, the mechanism outlined in Article 260(3) TFEU⁴⁸ is highly dissuasive.

The failure of a Member State to transpose a directive could result in the use of ‘coercive measures’ designed to encourage the Member State to voluntarily comply. The process of implementing the European directive is regarded as an imperative obligation to take action: the task of enacting transposition laws belongs exclusively to Parliament. The infringement procedure involves the imposition of daily fines (for

46. *Amplius*, SOTIS, Carlo. Il Trattato di Lisbona e le competenze penali dell’Unione europea. *Cassazione penale*. 2010, 3, p. 1147, for whom, following the Lisbon Treaty the European Union becomes definitively competent to carry out the judgment of the necessity of punishment, but not to exercise punitive power. For an effective reconstruction of the ‘antecedent’ cases to the formulation of Article 83 TFEU, to be found in the famous judgments of the Court of Justice concerning the ‘Greek corn case’ (CJ, 21 September 1989, C-68/88) and environmental offences (CJ, 13 September 2005, C-176/03), for all, MASSARO, Antonella. *Appunti...*, cit., pp. 72-82.

47. SIRACUSA, Licia. Il transito del diritto penale di fonte europea dalla “vecchia” alla “nuova” Unione post-Lisbon. Considerazioni a partire dalla nuova direttiva in materia di inquinamento cagionato da navi. *Rivista trimestrale di diritto penale dell’economia*. 2010, 4, p. 808; PAONESSA, Caterina. *Gli obblighi di tutela penale*, cit., pp. 259-260. On the infringement procedure, for all, DRAETTA, Ugo; BESTAGNO, Francesco and SANTINI, Andrea, 2022. *Elementi di diritto dell’Unione europea. Parte istituzionale, Ordinamento e struttura dell’Unione europea*. 7th ed., Milano: Giuffrè, 2022, p. 292 ff.

48. “When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment”.

each day of non-compliance with the obligation) and/or a lump sum penalty. The fines are determined based on the severity and duration of the infringement, with an additional flexible factor aimed at ensuring the deterrent effectiveness of the penalty⁴⁹.

If the key to the significant success of incrimination obligations in the supranational sphere lies in the effective enforcement of breaches by the legislator, upon closer examination, the revolutionary impact of these obligations appears to be somewhat limited.

3.1. *The Article 83 TFEU*

Article 83 TFEU is composed of three paragraphs. In the first paragraph, it identifies a criminal jurisdiction based on subject matter (*rationae materiae*). In the second paragraph, it establishes a criminal jurisdiction described as ancillary (additional to the framework set out in the first paragraph). In the third paragraph, it introduces the so-called emergency brake, which can suspend any ongoing legislative procedure⁵⁰.

The first paragraph, in more detail, provides, in the first line, that “The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the 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”. The second introductory sentence lists the ‘nine spheres’ (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) and outlines the procedure for introducing additional spheres.

The key points of Article 83, paragraph 1, first introductory sentence, TFEU can be summarized as follows: (i) the use of directives, adopted through the co-decision procedure (ordinary procedure), to address the democratic deficit in identifying offenses; (ii) the establishment of minimum criminal standards for both the legal provisions and penalties; (iii) when necessary, the creation of a common strategy to address areas of crime with a transnational character discernible at the ‘substantive’ level or for the purpose of effective cooperation.

49. See the data reported by the Department for European Policies at www.politicheeu-ropee.gov.it, whereby, based on the above-mentioned indices, the minimum daily penalty payment for Italy is EUR 8,505.11.

50. On this matter, GRASSO, Giovanni. La “competenza penale” dell’Unione europea nel quadro del Trattato di Lisbona. In *L’evoluzione del diritto penale nei settori d’interesse europeo*, cit., p. 701.

The use of directives as the primary instruments for the European legislature's criminalization choices prevents, at least formally, the circumvention of the guarantee function associated with the reservation of law. It is only through Parliament that the directive's contents are crystallized and acquire significance in the national legal system, which is why the term 'indirect competence' is used⁵¹. Regardless of the level of detail in the directive, it binds the legislator in terms of the desired objective while allowing some flexibility in choosing the means to achieve it.

The definition is of *minimum rules concerning the definition of criminal offences and sanctions*. Both the general part and the 'traditional' procedural and penal aspects remain intact. This means that the fundamental choices made by the national legislator regarding criminal law discipline would remain intact and cannot be altered. The primary goal is to align and provide a unified punitive response to very serious issues. Harmonization, regardless of the level of detail in the laws to be implemented, is targeted primarily at the special part of criminal law.

The general part retains its significance and continues to be at the core of the national legislator's decisions. The implementation entrusted to Parliament necessitates an evaluation process that would incorporate the introduction of these 'minimum standards' into the national criminal system. This includes rules derived from the general principles of the Penal Code, the Code of Criminal Procedure, and the Penitentiary Order. For instance, it involves considerations related to alternatives to detention or measures that define the concrete terms and extent of detention that can be recognized at the European level.

The prerequisite for minimum criminal standards, then, is that 'serious' crime spheres, the transnational dimension of which can be deduced from *the nature or impact of such offences*, and from the special need to combat them on a common basis, are taken into account.

Criteria for determining competences in European criminal legislation are often vague⁵² and tend to emphasise the need to develop a shared response to protection. The nature and extent of offences often do not provide sufficiently clear indications to identify with certainty the spheres of indirect competence of the European legislator in advance.

However, it is more effective to define these criteria based on the nine previously identified 'crime areas'. These areas help establish both the cross-border dimension of the crime and the requirement for a 'common response.' They particularly relate to crimes involving:

51. SOTIS, Carlo. *Il Trattato di Lisbona...*, cit., p. 1151.

52. GRASSO, Giovanni. La "competenza penale"... , cit., p. 697.

1. Infliction of serious harm to human dignity (such as trafficking in human beings and sexual exploitation of women and children).
2. A structural dimension that transcends national borders (including terrorism, illicit drug trafficking, illicit arms trafficking, money laundering, computer crime, and organized crime).
3. Damage to the financial interests of the European Union (in cases of corruption and counterfeiting of means of payment).

It appears that any expansion of this catalog should be interpreted restrictively⁵³ and must exhibit characteristics of ‘seriousness’ comparable to the criminal areas already identified.

As both the pre-established ‘crime areas’ and potential future areas encompass offenses of significant gravity necessitating a criminal response, the process of harmonization would primarily revolve around how these crimes are regulated⁵⁴. Nevertheless, individual parliaments retain the option to maintain or establish more stringent protective standards⁵⁵.

Harmonization, in short, would entail the establishment of minimum rules, detailed as regards the basic elements of the offence but more flexible as regards penalties. The imposition of penalties would be defined by existing national laws, taking into account the specific characteristics of each legal system.

53. BVerfG, 2 BvE 2/08 § 362: “[e]ntsprechend begrenzend ist die allgemeine Ermächtigung zur Festlegung von Straftaten und Strafen nach Art. 83 Abs. 1 AEUV auszulegen [...] Die demokratische Selbstbestimmung ist allerdings in einer besonders empfindlichen Weise berührt, wenn eine Rechtsgemeinschaft gehindert wird, über die Strafbarkeit von Verhaltensweisen und gar die Verhängung von Freiheitsstrafen nach Maßgabe eigener Wertvorstellungen zu entscheiden. Das gilt umso mehr, je enger diese Wertvorstellungen mit historischen Erfahrungen, Glaubenstraditionen und anderen für das Selbstgefühl der Menschen und ihrer Gemeinschaft wesentlichen Faktoren verknüpft sind”. This is the judgment with which the Bundesverfassungsgericht ruled on the process of European integration following the Treaty of Lisbon (judgment of 30 June 2009 - 2 BvR 1010/2008, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 5/08 and 2 BvR 182/09, which can be consulted on the website www.bundesverfassungsgericht.de and whose Italian translation, by Prof. Jörg Luther, is available at www.cortecostituzionale.it). For an effective summary with commentary, BÖSE, Martin. *La sentenza della Corte costituzionale tedesca sul Trattato di Lisbona e il suo significato per la europeizzazione del diritto penale. Criminalia*. Pisa: ETS, 2009, pp. 267-301.

54. Stresses this aspect, among others, MASSARO, Antonella. *Appunti...*, cit., p. 77.

55. Especially in directives issued for the protection of inviolable human rights, the so-called ‘non-regression clause’ is usually present, whereby the provisions introduced may neither reduce nor limit or derogate from the highest level of protection guaranteed by the law of the individual member state. Lastly, see Article 49 of the Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence (COM/2022/105), under discussion in the European Parliament.

The role of parliament in cases of indirect competence serves a dual purpose, encompassing both mandatory and discretionary functions. In the first scenario, parliament plays a critical role in translating ‘minimum rules’ into specific instances and deciding penalties within the confines set by the European legislator. In the second scenario, parliament can further influence the legal framework for new offenses, such as by deciding on the application of judicial probation or alternative sanctions.

The second paragraph of Article 83 TFEU also provides for an *ancillary* competence⁵⁶. This would be, more specifically, the introduction of minimum rules concerning criminal offences and sanctions “If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures”.

This paragraph adds a layer of complexity to the preceding one. Here, EU criminal competence hinges on the effective implementation of EU policies that have previously undergone harmonization. In essence, introducing criminal sanctions can be perceived as the final step in a harmonization process, which, without this tool, might prove inadequate in realizing the Union’s objectives.

This perspective introduces a higher level of complexity, as the primary concern of criminal jurisdiction shifts from the ‘seriousness’ of offenses related to a transnational sphere to the effectiveness of specific EU policies. Within this context, punishment assumes a different role, functioning not only as an instrument for safeguarding particular legal interests but also as a means to enforce and enhance the effectiveness of EU policies⁵⁷. However, it has been noted that the selective function carried out by the legal interest, while not usually elevated to the level of a universal concept and remaining external to the (criminal) policy of the European Union, is to some extent replaced by the principle of offensiveness and the resulting proportionality⁵⁸.

However, it is important to note that despite this apparent shift in the traditional role of punishment, the principles of offensiveness and proportionality remain paramount. Punishment is reserved for situations where alternative sanctions are inadequate, preventing an overreliance on criminal law at the expense of other measures. In other words, punishment is employed only when other sanctions are ineffective, thereby mitigating the risk of unwarranted over-criminalization.

56. BERNARDI, Alessandro. La competenza penale accessoria, cit., p. 46, who identifies the *accessory* nature of the competence *under* Art. 83, § 2 TFEU for a twofold reason: (i) this competence, first of all, would be ‘not expressive of the ‘hard core’ of European criminal policy’ derivable from Art. 83, § 1 TFEU; (ii) the provisions enacted on this legal basis would *complete* a framework already subject to European harmonisation through extra-criminal measures.

57. SOTIS, Carlo. I principi di necessità e proporzionalità della pena nel diritto dell’Unione europea dopo Lisbona. *Diritto penale contemporaneo – rivista trimestrale*. 2012, 1, p. 120. *Contra* A BERNARDI, Alessandro. La competenza penale accessoria, cit., pp. 51-58.

58. BERNARDI, Alessandro. La competenza penale accessoria, cit., pp. 51-55.

It appears that European influence primarily pertains to offenses in the ‘special part’, raising questions about the ‘mandatory’ and ‘optional’ roles of national parliaments in implementing directives. The central issue still revolves around the ‘*quomodo*’ of incrimination, with the essential elements of the offense still grounded in the general principles of the criminal code, such as the regulation of error, intent, and guilt. However, it’s worth noting that the third paragraph of Article 83 TFEU introduces an ‘emergency brake’ to be used if the directive significantly impacts fundamental aspects of national criminal law. Simultaneously, there’s an ‘acceleration’ clause that can be activated if at least nine Member States opt for enhanced cooperation based on the directive, even if it was initially suspended. These mechanisms are designed to safeguard the national criminal justice system’s core principles⁵⁹.

4. THE SUB-CONSTITUTIONAL OBLIGATIONS: INDICATIONS FROM THE EUROPEAN COURT OF HUMAN RIGHTS

The most innovative aspect of the ‘new’ constitutional obligations of criminal protection stems from the standards established by the European Court of Human Rights (ECtHR). These obligations are primarily developed through the court’s interpretations.

The ECHR is unique as an international treaty for three main reasons:

1. The Convention’s focus is on fundamental rights.
2. It establishes a dedicated court, the ECtHR, with the authority to determine and condemn violations of the rights outlined in the ECHR.
3. It designates a political body, the Committee of Ministers, responsible for overseeing the enforcement of judgments issued by the ECtHR⁶⁰.

In this context, a judgment from the European Court of Human Rights (ECtHR) can trigger the adoption of measures by the State party to redress the violated right, which may involve remedies for both individuals and the broader public⁶¹. If the State party refuses to comply with the ECtHR’s judgment, the Committee of Ministers can, under

59. For all, MANACORDA, Stefano. Diritto penale europeo. www.treccani.it, Diritto on line. 2014.

60. ZAGREBELSKY, Vladimiro. La convenzione europea dei diritti dell’uomo e il principio di legalità nella materia penale. In *La Convenzione europea dei diritti dell’uomo nell’ordinamento penale italiano*, cit., pp. 69-70, which highlights, among the other new features of the ECHR, the failure to provide for the principle of reciprocity (according to which a State is obliged to comply with what is laid down in the Treaty, provided that the other contracting States do not themselves violate the provisions contained therein).

61. For a reconstruction of the discipline and rulings of the ECHR on Article 46 ECHR, see *Guide on Article 46 of the European Convention on Human Rights. Binding force and execution of judgments*, at www.echr.coe.int, updated 31 August 2022.

Article 46, initiate proceedings before the Court to establish the violation. This exceptional procedure, used for the first time in the case of *Ilgar Mammadov v. Azerbaijan*⁶² and not frequently employed, appears to primarily address political responsibility rather than providing mechanisms to compel the state to comply. The focus on enforcing obligations by states through a system of ‘dual’ justiciability underscores the increasing importance of ‘conventional protection obligations’.

Moreover, the novelty features concern both the diversification of the obligations, capable of giving shape to a true ‘taxonomy’ depending on the *species* under consideration, and the source, which can only be deduced indirectly through the interpretation of European judges. In fact, the European Convention on Human Rights does not contain explicit obligations to incriminate⁶³.

The journey toward recognizing obligations of criminal law protection commenced in 1985 with the landmark judgment *X. and Y. v. Netherlands*. In this case, the European Court of Human Rights found a violation of Article 8 of the ECHR⁶⁴. This case was remarkable in various ways, as it revolved around sexual intercourse with a disabled 16-year-old, where the perpetrator went unpunished due to both ‘substantive’ and ‘procedural’ reasons⁶⁵.

The ECtHR, drawing on the traditional differentiation between negative and positive obligations, determined that the Dutch criminal justice system was inadequate in delivering effective protection for individuals’ private lives, particularly in situations where this right was significantly violated. What renders this judgment noteworthy is its primary focus on the protection provided through criminal law. In such cases, generic forms of protection, like those offered by civil or administrative law, are considered insufficient. Instead, the main instrument for ensuring effective rights protection, both punitively and in terms of general prevention, is the criminal sanction⁶⁶.

62. ECtHR, Grand Chamber, Judgment of 29 May 2019, *Proceedings under Article 46 § 4 In the case of Ilgar Mammadov v. Azerbaijan*, Rec. no. 15172/13, on which POLI, Ludovica. *Equilibri istituzionali alla prova nella prima procedura d’infrazione di fronte alla Corte europea dei diritti umani. Diritti umani e diritto internazionale*. 2020, 3, p. 761 ff.

63. Emphasises this aspect, VIGANÒ, Francesco. *L’arbitrio del non punire*, cit., p. 2653.

64. ECtHR, 26 March 1985, *X and Y v. The Netherlands*, Application No. 8978/80, on which VIGANÒ, Francesco. *L’arbitrio del non punire*, cit., pp. 2664-2666.

65. Article 248-ter of the Dutch Criminal Code, in fact, required as a condition for prosecution a complaint by the victim, who, however, in the case at hand, was incapacitated due to her illness.

66. ECtHR, 26 March 1985, *X and Y v. Netherlands*, cited above, § 27: “[t]he Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.

Moreover, as was pointed out by the Commission, this is in fact an area in which the Netherlands has generally opted for a system of protection based on the criminal law. The only gap, so far as the Commission and the Court have been made aware, is as regards persons in the situation of Miss Y; in such cases, this system meets a procedural obstacle which the Netherlands legislature had apparently not foreseen”.

In this judgment, although in its early stages, several crucial conceptual distinctions emerge that will prove fundamental in assessing the compliance of national criminal systems with the international obligations set forth in the ECHR. These distinctions include those between positive and negative obligations and between ‘substantive’ and ‘procedural’ obligations.

The ECHR, particularly as interpreted by the Strasbourg Court, prioritizes effectiveness: ensuring the effective guarantee of established rights and, in turn, the protection of both the threatened and imposed sanctions. The legal foundation for these obligations is articulated in Article 1 of the ECHR, which is titled ‘Obligation to respect Human Rights’: “The High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. Unlike the Italian or Spanish versions, where it is written that states ‘riconoscono’ or ‘reconocen’ human rights, the English version, with the verb ‘to secure’, emphasises the active role of the State. This implies a ‘duty to protect’ the human rights in question. It underscores the instrumental role of the state in implementing the fundamental human rights established in the Convention⁶⁷.

In the judgments of the ECtHR, the distinction between substantive and procedural obligations plays a central role in evaluating the fulfillment of the ‘duty to protect’. This distinction doesn’t exactly align with the traditional separation between substantive and procedural law. According to the Strasbourg Court’s interpretation, substantive law encompasses more than what is exclusively covered in the Criminal Code.

The division between substantive and procedural obligations appears to be related to the static and dynamic dimensions of a right, which are the right in the abstract and its practical application, respectively. The static dimension involves recognizing the right and the state’s duty to protect it. It assesses the level of protection provided by the legislature in theory. In contrast, the dynamic dimension deals with the actual implementation of the rules in cases where, despite the abstract protection of the right, a real violation has occurred. In these cases, the focus is on whether the state conducts effective investigations to identify the responsible parties for the violation and imposes a punishment appropriate to the severity of the act. In essence, both substantive and procedural obligations imply a ‘duty to punish’. The former is assessed in the abstract and based on general cases, while the latter is evaluated in concrete terms, considering the specifics of the case.

67. ECtHR, 28 July 1998, *Ergi v. Turkey*, application no. 66/1997/850/1057, § 78, in which the Court links the positive content of Article 2 ECHR to the general duty deriving from Article 1 ECHR: “[f]urthermore, under Article 2 of the Convention, read in conjunction with Article 1, the State may be required to take certain measures in order to ‘secure’ an effective enjoyment of the right to life”. On these issues, it is obligatory to refer to VIGANÒ, Francesco. *L’arbitrio del non punire*, cit., p. 2653, who considers that the ECHR does not so much impose obligations of criminalization, but of *effective punishment*: the ECHR, that is, does not limit itself to ascertaining the presence of a criminal sanction in the event of a violation of the right recognised in the Convention, but extends its review to the *effective application* of the penalty and to the assessment of the latter, which should be *sufficiently severe* ‘to represent an effective deterrent’.

Substantive obligations can be categorized into negative and positive obligations. A ‘negative obligation’ entails a duty to abstain from criminalizing or imposing unwarranted interference in the legitimate exercise of a recognized right. In simpler terms, it means that the state must refrain from unduly restricting or suppressing people’s rights. Conversely, a ‘positive obligation’ implies a duty to proactively take measures to protect and uphold rights that could be under threat⁶⁸.

Under the negative obligation, states are bound by a prohibition (*non facere*). In this context, states are prohibited from excessively criminalizing or interfering with the rights protected by the Convention. For instance, the obligation to respect an individual’s private life, as outlined in Article 8 of the ECHR, means that states must refrain from violating the private life of individuals.

Positive obligations entail that states must take active measures to safeguard the rights established in the Convention. These obligations impose an affirmative duty on the state to establish a legal framework that ensures the protection of these rights from unwarranted harm. In cases involving particularly significant rights, such as those covered by Articles 2 and 3 of the ECHR, states may be obligated to implement preventive measures when there are reasonable grounds to believe that these rights may be at risk⁶⁹.

In summary, conventional obligations can be divided into different categories according to the nature of the duty imposed on states:

- substantive obligations: these pertain to the static dimension of law and are divided into:
 - a. positive obligations: the legislator is required to protect, through positive action, the right recognized in the Convention. Hence the obligation to provide: (i) an adequate *legal framework* to act as a deterrent *and, in some cases*, (ii) preventive measures to safeguard the right in the event of danger of injury;
 - b. negative obligations: the legislator is required to abstain from incriminating and interfering in the proper exercise of the right recognized in the Convention;
- procedural obligations: these pertain to the dynamic dimension of law and require that the sanctions envisaged in the abstract are applied in practice. This means conducting effective investigations, prosecuting those who have violated rights and imposing penalties appropriate to the gravity of the violations.

68. For a more detailed discussion, VIGANÒ, Francesco. *Obblighi convenzionali di tutela penale?*, cit., p. 248. In this text, the author emphasises that the directions that have emerged in German doctrine and jurisprudential practice have in these respects influenced the ECtHR. In Germany, the content of human rights seems to operate in two different directions: the first, which is embodied in the negative obligation, so-called *Abwehreecht*, requires the State not to violate itself the right it recognises; the second, with a positive content, so-called *Schutzpflicht*, requires instead the implementation of mechanisms aimed at sanctioning, and thus protecting, the same right from arbitrary violations committed by third parties.

69. *Amplius*, VIGANÒ, Francesco. *Obblighi convenzionali di tutela penale?*, cit., pp. 248-250.

This ‘maximum articulation’ of protection does not belong to all the rights recognized in the Edu Convention, but only to those considered particularly *important* - such as Articles 2, 3, 4.

The degree of importance is left to the interpretation of the Strasbourg Court. In these cases, we witness the creation of an *axiological hierarchy*⁷⁰, in the sense that, although among norms of equal rank, some of them are to some extent superordinate to the others⁷¹. The subject of the axiological hierarchy is interesting in that it makes it possible to dispel the idea that the ECHR norms are ‘combating’ not “excessive punishability, but [all]impunity”⁷². What comes into consideration, more precisely, is the dialectic between ‘victim’ and ‘offender’ in the system of protection outlined by the Convention. It is true that the ECHR rules place themselves in a more pronounced ‘victim-centred’ perspective than can be derived from some national systems. However, this does not seem to imply a shift from the rights of *the accused/convicted person* to those of the *victim* of the violation⁷³.

To better understand this dynamic, we must begin by identifying who the ‘parties’ involved are and then ascertain whether and to what extent rights exist that are axiologically superordinate to others.

The victim, within the meaning of Article 34 ECHR, is the person who directly or indirectly suffers a violation at the hands of the State party⁷⁴. The dialectic between ‘victim’ and ‘perpetrator’ within the ECHR system is limited to the relationship between the individual and the State. The accused or suspect in domestic proceedings can approach the ECtHR when they have experienced a violation of their rights, making them a victim due to actions taken by the State. The role of the ‘victim’ extends beyond the scope of domestic proceedings and includes individuals who, despite being under

70. The axiological hierarchy represents a *species* of the normative hierarchy (*supra*, footnote 7), such that, given two norms *even* of equal rank, one is held to prevail over the other on the basis of a choice of value (adherence to the principles or values that inspire the legal system). On the matter, *amplius* PINO, Giorgio. *Interpretazione e ‘crisi’ delle fonti*, cit., §§ 2.1.3 and 3.1.5.

71. Particularly icastic in this regard is the distinction between *supreme constitutional principles* and *common constitutional principles*. The example is from PINO, Giorgio. *Interpretazione e ‘crisi’ delle fonti*, cit., § 3a.1.5.

72. VIGANÒ, Francesco. *L’arbitrio del non punire*, cit., p. 2647.

73. Thus, VIGANÒ, Francesco. *L’arbitrio del non punire*, cit., p. 2654.

74. The notion of ‘victim’ has been subject to evolutionary interpretation by the ECtHR. See, most recently, ECtHR, 5th section, judgment of 31 August 2023, *M. A. et autres v. la France*, 63664/19, concerning the admissibility, under Art. 34 ECHR, of an appeal lodged by some so-called *sex workers*, with reference to the introduction, in France, of an offence of exploitation of prostitution (Art. 611-1 code pénal, under the heading “Du recours à la prostitution”). The applicants complained of the violation of Articles 2, 3, 8 ECHR, although they were not mentioned in the new case. The ECtHR confirmed their *status* as victims, considering that the new offence produces direct effects on them (the appeal highlighted how legislation of this kind encourages clandestinity and isolation, creating greater risks in terms of safety and health).

investigation or accused in legal proceedings, have suffered a violation of their rights by the State. In proceedings before the ECtHR, these individuals are the only ones who can be considered the 'accused'. The cases concerning, for example, the violation of Articles 6 (right to a fair trial), 7 (*Nulla poena sine lege*) or 4, Prot. 7 (Right not to be tried or punished twice) ECHR are sufficiently representative of this dynamic.

When establishing a hierarchy among victims based on the significance of the violated rights, it appears that the rights of suspects or accused individuals in domestic criminal proceedings hold the highest position. Article 7 of the ECHR, as systematically interpreted by the ECtHR, becomes the central pillar of the rule of law. Furthermore, Article 15 of the ECHR specifies that Articles 2 (with the exception of deaths caused by lawful acts of war), 3, 4 § 1, and 7 of the ECHR are non-derogable even in times of war⁷⁵.

However, the rights of suspects and accused individuals gain particular prominence when it comes to remedies and their reconciliation with other rights.

Article 7 of the ECHR first and foremost imposes an absolute prohibition on an extensive interpretation *in malam partem*⁷⁶, even when such interpretation might serve as a means to prosecute conduct that would otherwise remain unpunished.

To illustrate this concept, consider a case like *Myumyun v. Bulgaria*, which revolved around the violation of Article 3 of the ECHR. In this instance, the applicant raised objections against the interpretation carried out by the domestic courts, contending that they could and should have viewed the actions perpetrated against him as constituting violations of other criminal offenses (e.g., Articles 282 § 1 or 287 of the Bulgarian Criminal Code), which would have been better suited for his protection.

75. Some Additional Protocols to the ECHR also identify cases of 'non-derogable' rights, which, again, concern the suspect/defendant (of domestic proceedings). V. Additional Protocols Nos. 6 (concerning the abolition of the death penalty), 7 (limiting the greater 'non-derogation' to the *bis in idem* prohibition set out in Art. 4) and 13 (concerning the abolition of the death penalty in all circumstances).

76. On this point, ECJ, Grand Chamber, 17 May 2010, *Kononov v. Latvia*, Rec. no. 36376/04, §185: "[t]he guarantee enshrined in Article 7, an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, so as to provide effective safeguards against arbitrary prosecution, conviction and punishment. Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision - and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice - what acts and omissions will make him criminally liable" [italics ours]. In a similar vein, among others, ECtHR, 4th Sect., judgment of 3 November 2017, *Myumyun v. Bulgaria*, cited above, § 76; ECtHR, Grand Chamber, 21 October 2013, *Del Rio Prada v. Spain*, Rec. no. 42750/09, § 78.

But the rights of the suspect/accused emerge with great force especially when it comes to remedies and/or balancing with other rights.

The ECtHR, while acknowledging Bulgaria's breach of its substantive obligations, emphasized that the national authorities could not fulfill their positive obligations under Article 3 of the ECHR by violating Article 7 of the ECHR, which establishes the prohibition of an extensive interpretation in criminal matters⁷⁷.

From the framework of Article 46 of the ECHR, the rights of the suspect/defendant operate as a *limit* and as a *foundation*. For a long time now, the European Court of Human Rights, in order to ensure the full effectiveness of judgments, in addition to just satisfaction *under* Article 41 ECHR, has been used to identify individual and/or general remedies, with the aim of putting an end to the alleged violation and/or to remedy its effects⁷⁸. In this context, the rights of the suspect/defendant operate as a *limitation with respect to the* identification of measures *under* Article 46 ECHR: according to Articles 7 and 4 Prot. 7 of the ECHR, it is in any case prevented from reopening proceedings concerning a statute-barred offence or against the same suspect/defendant⁷⁹. Victims' rights in domestic and Strasbourg proceedings may never result in the violation of the rights of the suspect or accused, even if the latter have not yet received justice. At the same time, the violation of the rights of the suspected or accused person operates as a *ground*. According to Article 46 of the ECHR, the violation of the rights of the suspect/defendant may lead to the reopening of domestic proceedings resulting in the immediate release of the accused or, in

77. ECtHR, 4th sect., judgment of 3 November 2017, *Myumyun v. Bulgaria*, cit., § 76 “[i]t should be noted in this connection that the national authorities cannot be expected to discharge their positive obligations under Article 3 of the Convention by acting in breach of the requirements of its Article 7, one of which is that the criminal law must not be construed extensively to an accused's detriment”.

78. On the matter, *amplius*, CALAFIORE, G. Obligation to execute judgments of the European Court of Human Rights versus criminal judgments: the discrimen between procedural and substantive violations. *Studies on European Integration*, 2018, 3, p. 715 ff.

79. ECtHR, II sez, sent. 4 April 2019, *Bayram Taşdemir and others v. Turkey*, Rec. no. 52538/09, §14: “[t]he Court accepts that there may be situations where it is *de jure* or *de facto* impossible to reopen criminal investigations into the incidents giving rise to the applications being examined by the Court. Such situations may arise, for example, in cases in which the alleged perpetrators were acquitted and cannot be put on trial for the same offence, or in cases in which the criminal proceedings became time-barred on account of the statute of limitations set out in the national legislation. Indeed, a reopening of criminal proceedings that were terminated on account of the expiry of the statute of limitations may raise issues concerning legal certainty and may thus have a bearing on a defendant's rights under Article 7 of the Convention. In a similar vein, putting the same defendant on trial for an offence for which he or she has already been finally acquitted or convicted may raise issues concerning that defendant's right not to be tried or punished twice within the meaning of Article 4 of Protocol No. 7 to the Convention”.

some cases, even the convicted person, or to the immediate closure of proceedings instituted in violation of *ne bis in idem*⁸⁰.

The ‘victim-centered’ perspective adopted by the ECtHR not only seems to preserve the fundamental pillars of criminal law but reinforces them. In this context, the obligations to punish are externally constrained by the rights of the suspect/defendant, which dictate limits to the legislator on how to meet the protection requirements set forth by the ECtHR.

The notion that ‘overcriminalization’ inevitably results from the ECHR, as interpreted by the Strasbourg judges, needs to be reevaluated. The emphasis shifts to how the obligations of criminalization are implemented at the national level, with Parliament as the author, in compliance with the principle of legal reservation. In essence, the question concerns the *quomodo* of protection, now extended to the ‘procedural’ aspects. This approach is the key to ensuring ‘real’ and effective protection of rights. The rights of the suspect/defendant in domestic proceedings are codified in national constitutions as fundamental principles guiding the legislator in the process of criminalization. The “duty to punish in certain ways” can also be seen as the “right not to be punished in the absence of those same ways”.

The indications from Strasbourg also offer an opportunity to explore the actual scope of criminal law within a broader dimension that encompasses the so-called procedural aspects. This relates to the tangible elements of criminal law, the formulation of legal cases, and the definition of offenses, ultimately contributing to enhanced protection. All these aspects are directed at the legislator in accordance with constitutional principles, presenting themselves as an effective and fragmentary dimension of the obligations of criminal protection.

5. CONCLUSIONS

The idea, following this brief overview, is that the obligations related to criminalization appear less chaotic when one acknowledges the authority of the national legislator over the manner (*quomodo*) of criminalization. In other words, it suggests that a distinct aspect of criminalization arises from the “constitutional paradigm in criminal matters”, entrusted to the legislator and functioning as a focal point in fulfilling the obligations

80. ECtHR, II sec, judgment of 4 March 2014, *Grande Stevens and Others v. Italy*, Rec. nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, §§ 233-237, spec. §237: “[i]n these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 4 of Protocol No. 7, the Court considers that the respondent State must ensure that the new set of criminal proceedings brought against the applicants in violation of that provision and which, according to the most recent information received, are still pending, are closed as rapidly as possible and without adverse consequences for the applicants’.

of criminal protection. The reservation to the law, viewed not only formally but also substantively, would remain unaffected by the obligations arising from the European or Conventional system.

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